Human rights law at the hands of the powerful: an interdisciplinary legal analysis of the regional human rights system of the League of Arab States

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Declaration

I, Ahmed Fahmy, hereby declare that this thesis is my own work and that it has not been prepared or published for the award of any other degree or diploma at any university or equivalent institution, either in its entirety or excerpts thereof.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation, and linguistic expression is acknowledged. I further declare that I have acknowledged the work of others to the best of my knowledge and judgement by providing detailed references of said work.

Any views expressed in this thesis are those of the author and do not necessarily reflect the views of Lancaster University or any other institution.

Abstract

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The regional human rights system of the *League of Arab States* (LAS) remains one of the least investigated in international human rights law. Using mixed research methodologies (doctrinal and interdisciplinary socio-legal research), this study assesses the added value of the 2004 *Arab Charter on Human Rights* to the effective legal protection of human rights in the Arab world. Embedded at the intersection of domestic, regional and international law, this thesis examines the interpretation and application of human rights law around three comparative dimensions. The first dimension is state-centric and provides a comparison of the pluralistic legal systems in Arab states, a comparison of human rights codification in Arab constitutions and statutory laws, as well as a comparison of the positions of Arab states towards international and regional human rights instruments. The second dimension focuses on the doctrinal comparison of the provisions of the Arab Charter with provisions of the other regional human rights treaties in Europe, the Americas and Africa and selected international human rights instruments. The third dimension compares the scope and quality of concluding observations and recommendations made by the *Arab Human Rights Committee*, the treaty body of the Arab Charter, with selected international human rights treaty body reports. The comparatively large number of reservations submitted by Arab states to the human rights treaties they have ratified, the structural deficiencies of the LAS human rights system, the incompatibility of many provisions in the Arab Charter with international human rights standards, and the weak competences of the Arab Committee lead to the conclusion that Arab states have consistently been using their membership in international/regional human rights systems to fend off unwanted interferences in their national sovereignty. The contribution the Arab human rights system has brought to the legal protection of human rights in Arab states is therefore rather limited.

Dedication & Acknowledgments

I thank God, the Most Gracious and Most Merciful, for giving me the strength and endurance to bring my PhD journey to a successful end.

I dedicate this academic achievement to my dear parents who taught me that investing time and effort in education and knowledge acquisition always pays off; to my beloved daughter Sophia, my precious source of happiness, inspiration and pride; to the killed, wounded, orphaned and traumatised children of Gaza; and to all innocent children and souls across the world whose dignity and human rights are abused in an increasingly heartless world. I am not sure my work will ever have a tangible impact on protecting their rights, but I often thought about them while working on my thesis.

My PhD adventure started in October 2020 just a few months after Sophia was born. In March 2021 we left Egypt to start a new chapter in Germany. In these four and a half years my family and I have survived multiple COVID-19 infections and vaccinations, learned how to cope with some persistent Long COVID symptoms, and gained valuable (and often stressful) experiences of how to balance full-time professional commitments with childcare obligations and academic responsibilities. The fact that my PhD journey has made a safe landing despite these turbulences is first and foremost the result of the tremendous support and motivational pushes I have been receiving from my supervisors and my family.

I consider myself a very blessed person to have been supervised by Prof. Sigrun Skogly and Dr. Laura Hughes-Gerber. I would never have made it to the end without their vast knowledge and constant academic guidance, constructive critique, persistent encouragement and their highly pleasant and decent style of human interaction. They were always reachable for advice and feedback, generous with their time, supportive of new ideas and proactive in arranging my participation in various training courses and capacity development measures to enhance my capabilities as a researcher and my career prospects. I could always count on their understanding of my professional and family related circumstances (Prof. Skogly: “We all have a life to master”) which took a lot of pressure off my shoulders. I will remain grateful and indebted to Prof. Skogly and Dr. Hughes-Gerber for all their support and will always look back at our academic

collaboration with the most positive memories. I would also like to direct a special thank-you to all colleagues at Lancaster Law School for the academic advice and administrative support they have provided in the different appraisal stages of the PhD programme.

I feel sincerely grateful to my mother and my late father for the unconditional love, endless support and for the sacrifices they have made to ensure that their children receive a high-quality education. I owe this accomplishment to my mother, the embodiment of kindheartedness, my backbone in life and my moral and emotional compass, who has always been supporting me with her pure soul, her wisdom, her continuous encouragement and the positive energy she spreads out. Despite struggling with some health challenges during the past few years, she has been perpetually assisting me and my family in mastering our daily commitments which allowed us to steadily advance on our academic journeys.

My dear wife deserves special praise for all the support and care she has been providing to the best of her ability since 2020. I will remember the numerous long nights we spent working on our PhDs after bringing Sophia to bed and the stressful moments we overcame together. I also feel thankful to my brother for always being available with help and advice despite the physical distance.

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List of Abbreviations and Acronyms

ACHR	Arab Charter on Human Rights / Arab Charter	BBC	British Broadcast Corporation
ACtHR	Arab Court of Human Rights	CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
AFTE	Association for Freedom of Thought and Expression, Egypt	CCPR	United Nations Human Rights Committee (treaty body)
AHRC	Arab Human Rights Committee / Arab Committee	CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
ALSA	Arab Labor Standards Agreement	CESCR	Committee on Economic, Social and Cultural Rights
AmCHR	American Convention on Human Rights / American Convention	CIA	Central Intelligence Agency (of the United States of America)
AOHR	Arab Organization for Human Rights	CIHRS	Cairo Institute for Human Rights Studies
ASEAN	Association of Southeast Asian Nations	CoE	Council of Europe
ATFD	Tunisian Association of Democratic Women, Association tunisienne des femmes démocrates	CORs	Concluding Observations and Recommendations
AU	African Union	CRC	United Nations Convention on the Rights of the Child
AWO	Arab Women Organization	CRC	Committee on the Rights of the Child
BADEA	Arab Bank for Economic Development in Africa	CRPD	Convention / Committee on the Rights of Persons with Disabilities

CSOs	civil society organisations	GIS	General Intelligence Service (of Egypt)
DAC	Development Assistance Committee (of OECD)	GNA	Government of National Accord (Libya)
ECHR	European Convention on Human Rights / European Convention	HRC	Human Rights Council (of the United Nations)
ECJ	European Court of Justice	IACHR	Inter-American Commission on Human Rights
ECtHR	European Court of Human Rights	IACtHR	Inter-American Court of Human Rights
EIPR	Egyptian Initiative for Personal Rights	ICC	International Criminal Court
EU	European Union	ICCPR	International Covenant on Civil and Political Rights
EUA	Economic Unity Agreement (of the Arab League)	ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
FAO	Food and Agriculture Organization	ICESCR	International Covenant on Economic, Social and Cultural Rights
FIDH	International Federation for Human Rights	ICJ	International Court of Justice
FIS	Islamic Salvation Front, Front islamique du salut (Algeria)	ICPPED	Convention for the Protection of All Persons from Enforced Disappearance
GANHRI	Global Alliance of National Human Rights Institutions	ICWM	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
GCC	Gulf Cooperation Council	ILO	International Labour Organization

IMF	International Monetary Fund	OMADHD	Human Rights Observatory (Mauritania), Observatoire mauritanien des droits de l'homme et de la démocratie
LAS	League of Arab States / Arab League	OP	Optional Protocol (of a human rights treaty)
LLM	Master of Laws	PAHRC	Permanent Arab Human Rights Commission
MENA	Middle East and North Africa region	PhD	Doctor of Philosophy
MERCOSUR	Southern Common Market	RUDs	reservations, understandings and/or declarations
NCHR	National Council for Human Rights (Egypt)	SADC	Southern African Development Community
NGOs	non-governmental organisations	SCC	Supreme Constitutional Court (of Egypt)
NHRIs	national human rights institutions	SII	Siracusa International Institute for Criminal Justice and Human Rights
OAS	Organization of American States	SIPRI	Stockholm International Peace Research Institute
OAU	Organisation of African Unity	TRT	Turkish Radio and Television Corporation
ODA	Official Development Assistance	TWAIL	Third World Approaches to International Law
OECD	Organisation for Economic Co-operation and Development	UAE	United Arab Emirates
OHCHR	Office of the High Commissioner for Human Rights	UAJ	Union of Arab Jurists

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDP	United Nations Development Programme
UN ESCWA	United Nations Economic and Social Commission for West Asia
UNHCR	UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UPR	Universal Periodic Review (of the UN Human Rights Council)
US	United States (of America)
VAT	value-added tax
VCLT	Vienna Convention on the Law of Treaties

Chapter 1: Introduction and methodology

On 5 September 2017, *Human Rights Watch* released a widely disseminated and discussed 63-page report in which it denounced the widespread and systematic practice of torture of political detainees by Egyptian security forces.[1] About a month later, Egyptian President Abdel Fattah El-Sisi denied these allegations at a joint press conference held with French President Emmanuel Macron on 24 October 2017 saying:

> "(…) In Egypt we attach a lot of importance to human rights. Here in Paris you must realise this. But we are in a very unstable region and this instability has almost destroyed and has transformed our region into an area of violence and terrorism which threatens the security of the whole world (…) I am responsible for 100 million Egyptian citizens in the very unstable conditions we have today (…) We will not torture anybody. We must be cautious and aware of the news that is being broadcast by some organisations (…) Some organisations are enemies of Egypt (…) Come to Egypt, come and see what is going on, come and talk to Egyptian citizens (…) We must not reduce the question of human rights purely to political rights. Why don't you talk about the right of each individual in Egypt to have access to education, to have access to healthcare, which we do not have yet. Why don't you talk about the right to employment, the right to a job, which we still have not achieved fully. Why don't you talk about the right to a quality housing in Egypt (…) Human rights is a difficult issue, but you must put it into its context. We are a country which lives in a region which has great specificities."[2]

What is remarkable about El-Sisi's statements at that conference is not only the distortion of the truth about torture and other human rights offences in Egypt, but also his outright discredit of human rights organisations for their critical coverage of the problematic human rights situation in the most populous country of the Arab world. His disregard for the indivisibility of human rights appears as an attempt to trade off Egypt's poor civil

[1] See Human Rights Watch (05.09.2017), '"We Do Unreasonable Things Here" – Torture and National Security in al-Sisi's Egypt', accessed 23.06.2024.
[2] France 24 English Youtube Channel (24.10.2017), 'REPLAY - Watch Emmanuel Macron's and Egypt's president Abdel Fatah al-Sisi's joint conference', segment starting 22:00 to 25:25, English version provided by simultaneous interpreter, accessed 23.06.2024.

and political rights record against its equally weak performance in protecting socio-economic rights.[3] However, El-Sisi is undoubtedly right in his observation that many Arab states, including Egypt, have been experiencing serious political instabilities and major socio-economic and developmental threats since the outbreak of the *Arab Spring* uprisings in the early 2010s.[4] Foreign interventions, long-standing protests and armed rebellions have turned into full-fledged civil or proxy wars in Iraq, Syria, Libya, Yemen and recently in Sudan.[5] Widespread corruption and economic injustices resulted in anti-government protests that toppled ruling elites in Tunisia and Egypt and eventually created new repressive regimes.[6] A financial crisis and a dysfunctional sectarian political system have led Lebanon to the brink of collapse and the absolute monarchies in Saudi Arabia, the United Arab Emirates and Bahrain continue ruling over their societies with uncompromising authoritarianism.[7]

The contemporary problems in the Arab world unquestionably have direct impacts on the enjoyment of human rights in the region.[8] Armed conflicts have denied millions of displaced persons, refugees and migrants their basic rights to security, food, water,

[3] Grimm and Roll describe El-Sisi's human rights narrative as a selective strategy of "cherry-picking" through which socio-economic challenges are "instrumentalised to offset the country's obvious violation of the physical integrity of the population, its negligence of identity-based human rights, or its failure to protect minorities." (Grimm, J. & Roll, S. (2023), 'Human Rights Dialogue with Arab States - Argumentation patterns of authoritarian regimes as a challenge for a values-based foreign policy', *SWP Comment No. 41*, published 19.07.2023, p. 3.

[4] For more information about the impact of the *Arab Spring* uprisings on Arab states, see Bowen, J. (2021), 'Arab Spring: How the uprisings still echo, 10 years on', *British Broadcast Corporation (BBC)*, published 12.02.2021.

[5] More insights into the political situations in Iraq, Syria, Libya and Yemen can be found in Cordesman, A. H. (2019), ''Peace' in Afghanistan, Iraq, Syria, Libya, and Yemen', *Center for Strategic and International Studies*, published 05.08.2019. More details about the current civil war in Sudan can be obtained from the Center for Preventive Action (2024), 'Civil War in Sudan', *Council on Foreign Relations*, published 19.04.2024. This thesis was submitted just a few weeks after the collapse of Bashar Al-Assad's totalitarian/tyrannic regime in Syria and the capture of the capital Damascus by opposition forces on 8 December 2024 (see Aljazeera (10.12.2024), 'How al-Assad's regime fell: Key moments in the fall of Syria's 'tyrant'', accessed 15.12.2024). As a new constitution for the post-Assad era has not been drafted before submission of this thesis, references to Syrian legal documents (constitutions, legislation, etc.) and international legal obligations mainly relate to the reign of the Al-Assad clan in Syria (1971-2024).

[6] See Allinson, J. (2022), 'Political Revolutions and Counter-Revolutions: Tunisia and Egypt', in: 'The Age of Counter-Revolution: States and Revolutions in the Middle East', *Cambridge University Press*, pp. 103-142.

[7] See Blair, E. (2022), 'Explainer: Lebanon's financial crisis and how it happened', *Reuters*, published 23.01.2022, as well as Abouzzohour, Y. (2021), 'Heavy lies the crown: The survival of Arab monarchies, 10 years after the Arab Spring', *The Brookings Institution*, published 08.03.2021.

[8] A comprehensive overview about the multiple geopolitical and human rights challenges in today's Arab world can be found in Bali, A. Ü. (2023), 'Human Rights and Geopolitics in the Middle East, North Africa, and Afghanistan', in Sabatini, C. (editor), 'Reclaiming Human Rights in a Changing World Order', *Brookings Institution Press, Chatham House*, pp. 313-315

healthcare, education and an adequate standard of living.[9] People demanding political reforms or expressing their dissatisfaction with exploding costs of living and economic stagnation are silenced by security forces, and dissidents and critics are detained, tortured and unfairly prosecuted by authorities.[10] Discrimination remains widespread across the region on the grounds of race, gender, religion, nationality, legal status and economic class, as determined by *Amnesty International* in its most recent regional overview about the human rights situation in the Middle East and North Africa.[11] The magnitude of challenges the Arab world is facing today has undeniably elevated the issue of human rights to the forefront of public awareness. Today, the protection and promotion of human rights by Arab governments, legislators and civil societies matters more than ever before.

On a personal level, the idea behind my Doctor of Philosophy (PhD) project at Lancaster University was born back in 2019. While drafting my Master of Laws (LLM) dissertation titled 'Statelessness and the Legality of Citizenship Deprivation in International Human Rights Law: An Analysis of Case Studies from the United Kingdom and Egypt', I had an insightful discussion with my supervisor, Prof. Sigun Skogly, about the impact of clawback clauses on the effectiveness of international and regional human rights treaties.[12] This was my first encounter with the concept of clawback clauses in human rights law which is well established in academic research, especially in the context of the African human rights system.[13] At that time however, I came across no academic contribution substantially engaging with the topic of clawback clauses in the Arab human rights context. It was that interesting academic discussion from 2019 and further research carried out on clawback clauses that eventually resulted in my personal discovery of the existence of the *Arab Charter on Human Rights* (ACHR, 2004) within the *League of*

[9] Amnesty International (2024), 'The State of the World's Human Rights', published April 2024, p. 59. The complete regional overview on the situation of human rights in the Middle East and North Africa can be found on pp. 59-68. See also UN Human Rights Office of the High Commissioner (2024), 'Human rights situation in the MENA region', OHCHR Regional Office of the Middle East and North Africa, accessed 08.09.2024.
[10] Ibid.
[11] Ibid.
[12] For more information about the right to nationality in human rights law, see Owen, D. (2018) 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights', *Netherlands International Law Review*, Vol. 65, pp. 299-317.
[13] Clawback clauses/provisions enshrined in human rights treaties permit State parties to routinely and systematically breach their treaty obligations and "restrict the exercise and enjoyment of basic human rights to the maximum extent allowed by domestic law" (Hansungule, M. (2004), 'Towards a more effective African system on human rights: "Entebbe Proposals"', paper presented at a conference organized by the *British Institute of International and Comparative Law*, 10-11 May 2004, Entebbe, Uganda, p. 3 and p. 9). An in-depth discussion of clawback clauses and their impact on the effectiveness of human rights treaties can be found in subchapter 5.3.6.

Arab States (LAS). Although I was born and raised in an Arab state (Egypt) and despite my academic background in Middle Eastern Studies, it took me by surprise to find out that the Arab world already had its own human rights treaty embedded in a complex fabric of interwoven human rights institutions operating under the umbrella of the Arab League. This surprising experience eventually paved the way to embark on a learning journey to find out more about human rights protection on regional level in the Arab world.

My discovery of the Arab human rights system coincided with a relatively limited coverage of the LAS human rights regime in academic literature. A search on Google Scholar on 31 May 2024 for academic literature using the English names of selected human rights treaties/documents achieved the following results: *Arab Charter on Human Rights* (152,000 results), *European Convention on Human Rights* (3.19 million results), *American Convention on Human Rights* (3.5 million results), *African Charter on Human and Peoples' Rights* (443,000 results), *Universal Declaration of Human Rights* (2.35 million results), *International Covenant on Civil and Political Rights* (663,000 results), *Convention on the Rights of the Child* (3.79 million results) and *Convention on the Rights of Persons with Disabilities* (252,000 results).[14] A similar search in the online library of Lancaster University ("OneSearch") on 2 June 2024 using the same keywords resulted in the following outcomes: *Arab Charter on Human Rights* (383 results), *European Convention on Human Rights* (20,277 results), *American Convention on Human Rights* (6,115 results), *African Charter on Human and Peoples' Rights* (1,305 results), *Universal Declaration of Human Rights* (8,616 results), *International Covenant on Civil and Political Rights* (3,564 results), *Convention on the Rights of the Child* (14,307 results) and *Convention on the Rights of Persons with Disabilities* (4,956 results).[15]

Although online searching techniques/algorithms bring along their very own limitations in terms of the accuracy and quality of the achieved results (hit counts), they nevertheless are worth considering for comparative purposes.[16] In this case, it is evident that the Arab

[14] Google Scholar (31.05.2024). The results of the searches appear automatically after typing the different keywords (treaties/documents) on *https://scholar.google.com/*.
[15] Lancaster University Online Library (02.06.2024). The "OneSearch" tool is accessible through *https://portal.lancaster.ac.uk/portal/my-area/library*. Results appear automatically after typing the different search terms.
[16] For more information about the suitability, accuracy and limitations of web search engines for research purposes, see Uyar, A. (2009), 'Investigation of the accuracy of search engine hit counts', *Journal of Information Science*, Vol. 35(4), pp. 469–480 as well as Martínez-Sanahuja, L. & Sánchez, D. (2016),

Charter is rather placed on the periphery of the academic human rights debate, at least in the English-speaking world. An in-depth review of literature I have been collecting on the topic since November 2020 seems to validate the above quantitative findings. Of all secondary data -produced in English or Arabic- I managed to access online or purchase from local bookstores in Egypt, at most a dozen academics or human rights specialists (most of them nationals of Arab states) have conducted pertinent research relating to the *Arab Charter on Human Rights*, including Allam (2005, 2014), Almakky (2015), Al-Shaikh (2008), Fuzay' (2018), Hammami (2013), Hunaiti (2020), Mattar (2013), Rishmawi (2005, 2010, 2015), Sadri (2019), van Hüllen (2015) and Zerrougui (2008).[17]

Since only a comparatively limited number of academics have so far carried out in-depth research with regard to the Arab human rights system, and since most of the primary data about the topic is only published in Arabic on the web portal of the *League of Arab States*, this PhD aims to narrow the gap about the Arab human rights system in Western academic literature by introducing new perspectives to the subject that were either completely missing from or not sufficiently discussed in existing scholarly works. Chapter 4, for example, provides an extensive overview of multilateral treaties codifying human rights within the umbrella of the Arab League.[18] Many of these treaties are only accessible in Arabic on the LAS website and have been analysed by a few human rights researchers including Allam and Rishmawi.[19] Chapter 5 offers a comprehensive and expanded analysis of the *Arab Charter on Human Rights*, the key regional human rights instrument for the Arab world, in comparison with the other regional human rights systems in Europe, the Americas and Africa.[20] This analysis encompasses, among others, a detailed discussion of the impact of clawback clauses on the effectiveness of human rights treaties.[21] Another novel perspective is addressed in Chapter 6 which provides a systematic comparison of Concluding Observations and Recommendations issued by the

'Evaluating the suitability of Web search engines as proxies for knowledge discovery from the Web', *Procedia Computer Science*, Vol. 96, pp. 169-178.

[17] The academic works associated with the authors mentioned in the text will be referenced in detail in subsequent chapters. Each academic contribution is also listed in the bibliography section.

[18] See discussion in subchapter 4.6.

[19] See Allam, W. (2005), 'The Arab Charter on Human Rights: a study on the role of the Charter in promoting human rights in the League of Arab States' [in Arabic], *Dar Al-Nil Publishers,* pp. 14-70 as well as Rishmawi, M. (2015), 'The League of Arab States Human Rights Standards and Mechanisms. Towards Further Civil Society Engagement: A Manual for Practitioners', *Open Society Foundations* & *Cairo Institute for Human Rights Studies*, pp. 98-101. Many of the treaties that fall under the umbrella of the Arab League are referenced in subchapter 4.6. and are also included in the bibliography.

[20] See discussion in subchapters 5.2.2., 5.3. and 5.4.

[21] See discussion in subchapter 5.3.6.

Arab Human Rights Committee, the treaty body of the Arab Charter, with similar reports of selected international human rights treaty bodies.[22] It capitalises on the work of Hunaiti, the only researcher I know of who compared the quality of selected Arab Committee reports with those of other regional and international human rights treaty bodies.[23] To complement existing data about the topic, this thesis further draws upon qualitative semi-structured interviews allowing thus for the integration of valuable opinions from Arab human rights officials and independent human rights advocates which have not yet been adequately reflected in primary and secondary literature.[24] The strongest contribution this thesis makes to the academic community arguably lies, however, in providing an updated and comprehensive analysis of the Arab Charter in comparison to the codification of human rights in Arab states (domestic perspective) and in comparison to the practice of Arab states towards selected multilateral human rights treaties (international perspective).

1.1. Central research question and structure of thesis

Embedded at the intersection of international and domestic human rights law, this dissertation complements academic initiatives engaged in the study of regional human rights regimes which constitute an "in between semi-autonomous layer of law between global human rights law and constitutional law."[25] Weston et al. generally view the regionalisation of human rights favourably as regional alliances based on common interests and created by states with high cultural, political and juridical commonalities are more likely to "secure the cooperative transformation of universal proclamations of human rights into more-or-less concrete realities".[26] For Cali et al. the "very rationale for regional regimes (in addition to, or alongside the UN system and constitutional systems) lies in their ability to articulate and institutionalise human rights in ways that are more responsive to and legitimate in a certain region and its particular cultural, legal, and political contexts."[27] But do these positive assertions, which were primarily made in

[22] See discussion in Chapter 6.
[23] See Hunaiti, H. (2020), 'The Arab Human Rights Committee: A Promising Mechanism in an Emerging Human Rights System', *European Master's Programme in Human Rights and Democratisation, University of Strasbourg*, pp. 55-62.
[24] More insights into the qualitative interviews conducted in the course of this PhD project shall follow in subchapter 1.2.
[25] Cali, B., Madsen, M. R. & Viljoen, F. (2018), 'Comparative Regional Human Rights Regimes: Defining a Research Agenda', *International Journal of Constitutional Law*, Vol. 16(1), January 2018, p. 131.
[26] Weston, B. H., Lukes, R. A. & Hnatt, K. M. (1987), 'Regional human rights regimes: comparisons and appraisal', *Vanderbilt Journal of Transnational Law*, Vol. 20(4), p. 589.
[27] Cali, B., Madsen, M. R. & Viljoen, F. (2018), n25, p. 130.

assessment of the European, Inter-American and African human rights systems, apply equally to the Arab regional human rights regime?[28] And what benefit has the *Arab Charter on Human Rights* brought specifically to the effective legal protection and promotion of human rights in the Arab world?

The main focus of this thesis lies on assessing the distinctive role of the Arab Charter in a multi-level system of human rights protection. The central/overarching research question this study attempts to answer thus reads: *To which extent does the Arab Charter -as the centrepiece of the human rights system of the Arab League- complement or contradict national human rights law in Arab states, existing international human rights instruments and legal obligations of Arab states thereunder (state practice)?*

The analytical examination of this question stretches across five thematic chapters (Chapters 2-6). Each chapter discusses specific perspectives that are linked to the overarching research question which examines the Arab Charter in comparison with the domestic protection of human rights in Arab states and the international protection of human rights as rooted in UN and regional human rights treaties and as reflected in the attitudes of Arab governments towards these instruments.

Chapter 2 discusses the context and factors that shaped the understanding and application of human rights in Arab states. The objective of this interdisciplinary framework is to better understand the environment in which human rights law has evolved and in which certain perceptions of human rights have prevailed over others in the Arab world. This chapter outlines how factors such as colonialism, authoritarianism, ethnic and religious pluralism/sectarianism, socio-economic disparities and the role of Islam as a normative system have affected the political and legal regimes and the formation of human rights law in modern-day Arab states. Special attention is dedicated to the examination of the different human rights approaches within Islamic law and to the interplay of *Shari'a* law, secular law and customary law in today's pluralistic Arab legal systems.

Chapter 3 engages with the actual codification of human rights. The first part of the chapter illustrates how human rights are codified in contemporary Arab constitutions and presents case studies reflecting how human rights legislation (statutory law) has developed in recent years in selected Arab states. The role of national human rights

[28] See ibid., pp. 128-131.

institutions (NHRIs) and civil society organisations will also be touched upon. The second part of the chapter is dedicated to assessing the behaviour/attitude of Arab states towards international human rights law. A historical analysis examines how Arab states have influenced and/or reacted to the most significant international human rights endeavours that have taken place on the global stage since the adoption of the *Universal Declaration of Human Rights* (UDHR) in 1948. This analysis feeds into an evaluation of how Arab states have positioned themselves in the global debate revolving around the universality versus cultural relativity of human rights. Chapter 3 is concluded by an updated overview of the key international and African human rights treaties ratified by Arab states and an analysis of the reservations, understandings or declarations Arab states have entered thereto.

Chapter 4 focuses entirely on the *League of Arab States*, the Arab world's principal intergovernmental political organisation, and its integrated (in-house) human rights system. First, a brief overview about the history and mandate of the Arab League is provided, combined with a presentation of the *Pact of the League of Arab States*, the founding treaty upon which the political system of the Arab League is based. This is followed by an analysis of the governance and decision-making system within the Arab League which has developed throughout the past decades into a complex regional organisation with interlinked organs and processes. The second part of the chapter outlines the history of human rights promotion within the Arab League and provides an institutional assessment of the LAS organs involved in the human rights domain, such as the *Permanent Arab Human Rights Commission* (PAHRC), the *Arab Court of Human Rights* (ACtHR) and the *Arab Parliament*. The last part of Chapter 3 brings together a variety of lesser-known LAS multilateral conventions in which human rights are codified in a scattered manner.

Chapter 5 constitutes the centrepiece of this thesis. It provides a detailed analysis of the *Arab Charter on Human Rights* in comparison with other regional and international human rights instruments. The main objective of this chapter is to analyse whether and to what extent the Arab Charter meets international human rights standards. Chapter 5 starts with an evaluation of the political dynamics in the Arab world and within the Arab League that led up to the adoption of the Arab Charter in 2004 and reveals the opposing perceptions of Arab public officials vis-à-vis human rights specialists and civil society organsiations with regard to the formulation of certain human rights provisions therein.

The human rights and fundamental freedoms included in the Arab Charter are then listed and compared to the human rights catalogues covered in the other regional treaties and some selected international conventions. This is followed by a critical assessment of the positive and problematic provisions contained in the Arab Charter which is a decisive factor for determining whether the Arab Charter complies with international human rights standards or not. A special emphasis is given to Art. 43 of the Arab Charter which appears to have created an ambiguous interface at which national, regional and international human rights obligations collide. Chapter 5 finally sheds light on some initiatives and measures that are necessary to reform the Arab Charter and the wider human rights regime within the Arab League.

Chapter 6 compares selected Concluding Observations and Recommendations (CORs) made by the Arab Committee in response to state party reports submitted to it with similar CORs made by international human rights committees to Arab governments in a similar period of time. It aims to discuss the question of whether the Arab Committee is more critical or more lenient than its international counterparts in addressing human rights challenges prevailing in Arab state parties. The purpose behind this textual comparison is essentially to assess how effectively the Arab Committee has managed to monitor the adherence of Arab states to their legal obligations arising from the Arab Charter.

The results of the discussion in the thematic chapters feeds into the conclusion (Chapter 7) which attempts to provide a final appraisal in relation to the central research question and some recommendations for enhancing the compliance of Arab states with their regional and international human rights obligations.

1.2. Legal research methodologies and methods

1.2.1. Legal research methodologies

This study is embedded in the overall domain of international human rights law. Researchers usually find themselves exposed to a variety of methodologies that approach international legal phenomena from different perspectives and through which different scholarly results can be achieved.[29] Hervey et al., for example, have identified a plurality

[29] Research methodology in law can be generally defined as a systematic scientific procedure (or a set of procedures) that allows scholars to critical reflect about specific legal phenomena and find appropriate answers to their research questions (see Hervey, T. et al. (2011), 'Research Methodologies in EU and International Law', *Bloomsbury Publishing*, pp. 7-9.

of methodologies in international law, including doctrinal approaches (legal positivism, Natural Law), modern approaches (liberalism, cosmopolitanism, constitutionalism, 'New Governance', and idealism), critical methodologies (Marxism, feminism, queer theory, postcolonial theory, critical theory) as well as interdisciplinary approaches that address cross-cutting intersections between law and other social sciences such as political science, sociology, history, economics, literature or geography.[30] As international human rights law is implemented across different jurisdictions and legal systems, it is worth distinguishing comparative law as a separate research methodology in international law.[31]

Convinced that no single methodology can provide a universal explanation for all the interrelated human rights issues discussed in this thesis, I chose to apply mixed/pluralistic legal research methodologies: a) *doctrinal approach* ("black-letter", positivism); b) *interdisciplinary/socio-legal methodology* ("law in context"); and c) *comparative methodology* examining the interaction of human rights law on national, regional and international levels. The collective application of these methodologies provides an analytical framework for addressing the central research question and the interdependent human rights topics discussed across the five thematic chapters of this study.

The doctrinal positivistic legal approach is characterised by the interpretation of authoritative legal texts and is therefore often labelled colloquially as 'black-letter law' or 'law in books'.[32] The focus in doctrinal legal scholarship is "(…) heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside the law."[33] As a hermeneutic discipline of reasoning, the black-letter methodology has evolved into a formalistic rule-based technique through which facts,

[30] Ibid., pp. 10-15. See also Chynoweth, P. (2008), 'Legal Research' in Knight, A. & Ruddock, L. (editors), 'Advanced Research Methods in the Built Environment', *John Wily & Sons, Incorporated*, pp. 28-38.
[31] McCrudden, C. (2015), 'Why do national court judges refer to human rights treaties? A comparative international law analysis of CEDAW', *American Journal of International Law*, Vol. 109(3), p. 534.
[32] Chynoweth, P. (2008), n30, p. 29. See also Halpérin, J.-L. (2011), 'Law in Books and Law in Action: The Problem of Legal Change', *Maine Law Review,* Vol. 64(1), pp. 47-52.
[33] McConville, M. & Chui, W. H. (2007), 'Introduction and Overview', in: McConville, M. & Chui, W. H. (editors), 'Research Methods in Law', *Edinburgh University Press*, p. 1. See also Dobinson, I. & Johns, Fr. (2007), 'Qualitative Legal Research', in: McConville, M. & Chui, W. H. (editors), 'Research Methods in Law', *Edinburgh University Press*, pp. 18-19.

values and legal principles are systematically synthesised.[34] The researcher's principal aim in this process "is to describe a body of law and how it applies. In doing so, the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment. In this regard, the research can be seen as normative or purely theoretical."[35]

The black-letter approach is applied throughout this study first and foremost in Chapter 5 in which the provisions of the *Arab Charter on Human Rights* are analysed. Chapter 3 outlines the codification of human rights in Arab constitutions and Arab statutory laws (legislation) and evaluates, among others, the reservations lodged by Arab states in selected international human rights instruments.[36] Chapter 4 further examines the *Pact of the League of Arab States* and engages with several other (human rights) treaties and legal documents adopted by the Arab League.

Unlike the 'law in books' approach which focuses on the interpretation of the law itself, interdisciplinary or socio-legal research looks mainly at the broader context in which law operates.[37] Interdisciplinary sociological research in law is therefore often referred to as 'law in context', 'law in action', 'living law', or 'law in/and society'.[38] As a constructivist explanatory discipline, socio-legal research stimulates awareness about law as a social phenomenon which can be perceived and applied differently by individuals and groups with distinct ideologies and political interests in a specific social context.[39] It does not accept law as a ready-made product but rather invites researchers to critically investigate the "operation of law in society", to examine the interdependent "relationship between

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[34] Van Hoecke, M. (2013), 'Legal Doctrine: Which Method(s) for what Kind of Discipline?', in Van Hoecke, M. (editor), 'Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?', *Bloomsbury Publishing Plc*, p. 4. See also Bhat, P. I. (2019), 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles', in Bhat, P. I. (2019), 'Idea and Methods of Legal Research', *Oxford University Press*, pp. 143-152.
[35] Dobinson, I. & Johns, F. (2007), n33, p. 19.
[36] See subchapters 3.1. and 3.3.
[37] McConville, M. & Chui, W. H. (2007), n33, p. 1, as well as Chynoweth, P. (2008), n30, p. 31.
[38] See Snyder, F. (2024), 'Establishing Law in Context', *Verfassungsblog: On Matters Constitutional*, published 20.03.2024, accessed 27.07.2024, Macaulay, S. (2016), 'New Legal Realism: Elegant Models and the Messy Law in Action', in Mertz, E., Macaulay, S. & Mitchell, T. W. (editors), 'The New Legal Realism: Translating Law-and-Society for Today's Legal Practice', *Cambridge University Press*, p. 29, as well as Mather, L. (2013), 'Law and Society', in Goodin, R. (editor), 'The Oxford Handbook of Political Science' (2011), *Oxford Academic*, published 05.09.2013, accessed 27.07.2024, p. 289. A comprehensive introduction into the sociology of law as a methodology in legal scholarship can be found in Deflem, M. (2008), 'Sociology of Law: Visions of a Scholarly Tradition', *Cambridge University Press*, pp. 1-4.
[39] Van Hoecke, M. (2013), n34, p.8. See also Nelken, D. (2009), 'Introduction', in Nelken, D. 'Beyond Law in Context: Developing a Sociological Understanding of Law', *Taylor & Francis Group*, 2009, pp. xi-xix.

law and gender, social class, ethnicity, religion and other social relations of power", and to "decipher the workings of legal, social and cultural processes."[40] The interdisciplinary methodology thus promotes cross-cutting research and encourages scholars to find answers to their legal questions by exploring other disciplines such as sociology, philosophy and ethics, political science, international relations, economics, history, cultural studies or behavioural science.[41] Understanding human rights as both a moral and a legal concept, the interdisciplinary approach appears to complement the doctrinal approach in the realm of human rights law well:

> "While doctrinal research plays an important role in understanding the legal framework through which human rights are protected, it provides a narrow and particular lens through which to engage with a subject that has roots in philosophy, religion and ethics; the articulation of which is intimately wrapped up with historical and political forces; and the meaningful application of which has such crucial significance for individuals and groups seeking justice, challenging structural inequality, and striving for a language through which to articulate their claims for dignity."[42]

The main purpose of applying different interdisciplinary techniques in this study (mainly borrowed from history, Islamic philosophy/theology and law, political science,[43] and postcolonialism[44]) is to understand why human rights law is codified as it is in

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[40] McConville, M. & Chui, W. H. (2007), n33, pp. 5-6.
[41] Ibid., p. 5.
[42] Gonzalez-Salzberg, D. A. & Hodson, L. (2019), 'Introduction: human rights research beyond the doctrinal approach', in Gonzalez-Salzberg, D. A. & Hodson, L. (editors), 'Research Methods for International Human Rights Law: Beyond the Traditional Paradigm', *Taylor & Francis Group*, 2019, p. 2.
[43] As an academic discipline closely related to social studies, political science is concerned with the systematic empirical study of governance and politics. It involves the analysis of "all the societal, cultural, and psychological factors that mutually influence the operation of government" and investigates "the nature of states, the functions performed by governments, voter behaviour, political parties, political culture, political economy, and public opinion, among other topics." Related subfields include comparative politics, political philosophy, political theory, international relations and public policy and administration (Roskin, M. G. (2024), 'political science', *Britannica*, last updated 27.06.2024, accessed 27.07.2024).
[44] Postcolonialism, or postcolonial theory, is a global intellectual/academic discipline and movement focusing on the critical and interdisciplinary investigation of the cultural, economic and political legacy of colonialism and Western imperialism/exploitation of colonised peoples and nations. Postcolonial researchers study the social and political power relationships between coloniser and colonised and examine the effects of colonial rule across a wide range of academic disciplines such as history, anthropology, political science, sociology, cultural studies, literature, arts, philosophy, economics, human geography or feminism (see Ivison, D. (2024), 'postcolonialism', in *Britannica*, last updated 04.07.2024, accessed 27.07.2024, as well as Raja, M. (2019), 'What is Postcolonial Studies?', *Postcolonial Space*, published 02.04.2019, accessed 27.07.2024). An insightful overview on postcolonial Third World approaches in international law can be found in Haskell, J. D. (2014), 'TRAIL-ing TWAIL: Arguments and Blind Spots

contemporary Arab states and to analyse the reasons and motivations behind the attitudes of Arab states towards international human rights law. Chapter 2, for example, provides a general non-legal context analysis of the main historic, political, socio-economic and cultural/religious characteristics of Arab states and societies, presents the fundamentals of Islamic legal thought, jurisprudence and human rights approaches and discusses how the pluralistic political and legal systems in present-day Arab states were created.[45] Chapter 3 outlines, among others, the problematic relationship between Arab regimes and non-governmental human rights organsiations and discusses possible causes for the political mistrust between them.[46] The same chapter assesses the positions of Arab governments towards international human rights law since 1948 and explains -using elements from postcolonialism and international relations[47]- why Arab states first endorsed universal human rights conceptions in the 1950s and why many of them embraced skeptical or culturally relativist positions later on after gaining independence from European colonial powers.[48] Chapter 4 provides an institutional analysis portraying the governance system and the key human rights players within the Arab League and examines the interplay between them.[49]

The design of this study is essentially comparative in nature as it examines the interpretation and application of human rights law on three different yet interconnected legal spheres (national/domestic/constitutional law, law created by regional treaties, and international/global law). According to McConville and Chui, international comparative legal research "crosses traditional categories of law, integrating public and private international law with domestic law, [regional law] and the comparative method. It aims to facilitate our understanding of the operation of international law and legal systems and its impact on the formulation of public policy in an era of global interdependence."[50]

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in Third World Approaches to International Law," *Canadian Journal of Law and Jurisprudence*, Vol. 27(2), pp. 383-414

[45] See subchapters 2.1., 2.2. and 2.3.

[46] See subchapter 3.1.

[47] The academic field of international relations engages with the study of "the relations of states with each other and with international organizations and certain subnational entities (e.g., bureaucracies, political parties, and interest groups). It is related to a number of other academic disciplines, including political science, geography, history, economics, law, sociology, psychology, and philosophy" (McClelland, C. A. & Pfaltzgraff, R. (2024), 'international relations', in *Britannica*, last updated 24.07.2024, accessed 27.07.2024).

[48] See subchapter 3.2.

[49] See subchapters 4.3. and 4.5.

[50] McConville, M. & Chui, W. H. (2007), n33, p. 7.

The comparative analysis in this study revolves around three dimensions. The first dimension relates to the comparison of human rights treaties. The main focus here lies on the doctrinal comparison of the provisions of the *Arab Charter on Human Rights* with provisions of the other regional human rights treaties in Europe, the Americas and Africa and selected international human rights instruments such as the ICCPR, ICESCR, CAT and CRC (Chapter 5).[51] The second dimension is state-centric and provides a comparison of the pluralistic legal systems in Arab states (Chapter 2), a comparison of human rights codification in Arab constitutions and selected statutory law, as well as a comparison of the positions of Arab states towards selected international human rights instruments and the Arab Charter (Chapters 3 and 5).[52] The third dimension aims at assessing the effectiveness of the Arab Charter by comparing the Concluding Observations and Recommendations made by the Arab Committee with selected international treaty body reports (Chapter 6).[53] The interplay between these comparative dimensions is best mirrored in the analysis of Art. 43 of the Arab Charter which constitutes an interface in which the different layers of human rights law (national, regional, international) come together or possibly clash with each other (Chapter 5). A comparative examination of judicial decisions of Arab domestic courts, in which principles of international human rights law were applied, further unveils whether Arab statutory human rights law and international human rights law can coexist and complement each other or whether there are areas of inevitable tension between them.[54]

1.2.2. Research methods

This study applies mixed research methods which integrate qualitative (constructivist/interpretivist) and quantitative (positivist) epistemological discourses.[55] Johnson et al. define mixed research methods as:

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[51] See subchapters 5.2., 5.3. and 5.4.
[52] See subchapters 2.4., 3.1., 3.2., 3.3. and 5.1.
[53] See subchapters 6.2.-6.7.
[54] See subchapter 5.5. According to Benvenisti and Harel, "the coexistence of constitutional and international law norms is inevitably a source of conflict." However, they reject any hierarchy between them (domestic law is not superior to international law and vice versa) and embrace the concept of "discordant parity" instead according to which the tension between constitutionalism and internationalism is a desirable feature and "useful for emphasizing the primacy of human rights and for bolstering freedom." (Benvenisti, E. & Harel, A. (2017), 'Embracing the tension between national and international human rights law: The case for discordant parity', *International Journal of Constitutional Law*, Vol. 15(1), pp. 1, 56 and 58-59).
[55] Timans, R., Wouters, P. & Heilbron, J. (2019), 'Mixed methods research: what it is and what it could be', *Theory and Society*, Vol. (48), pp. 208-209. See also Langbroek, P. et al. (2017), 'Methodology of Legal Research: Challenges and Opportunities', *Utrecht Law Review*, Vol. 13(3), pp. 6-7.

> "(…) the type of research in which a researcher or team of researchers combines elements of qualitative and quantitative research approaches (e.g., use of qualitative and quantitative viewpoints, data collection, analysis, inference techniques) for the broad purposes of breadth and depth of understanding and corroboration."[56]

Qualitative research methods deployed in this thesis include desk-based methods and empirical methods in the form of semi-structured interviews. Desk-based methods encompass the collection and analysis of primary sources, such as international/regional (human rights) treaties, national constitutions and statutes, court decisions and reports of international/regional human rights treaty bodies (e.g. the *Arab Human Rights Committee*, the *Human Rights Committee* or the *Committee on the Rights of the Child*), as well as secondary sources, such as academic books, journals, studies, encyclopaedias, newspaper articles, websites, blogs, and publications of the UN and non-governmental human rights organisations.[57]

To validate the findings gained from desk-based research (primary and secondary data analysis), qualitative semi-structured interviews are integrated into the methodical design of this study. The use of semi-structured interviews brings two advantages. Since they are based on a predetermined list of questions/topics prepared by the researcher/interviewer, semi-structured interviews provide an adequate standardisation which allows for a meaningful comparability of responses collected from different interviewees on the same topic.[58] At the same time, semi-structured interviews offer the necessary flexibility for researchers to raise other relevant questions, to explore new topics or inquire more deeply about specific answers from the interviewees as the conversation unfolds.[59]

Interview invitations were sent to a total of 15 respondents in this doctoral project. Ten of them are independent human rights experts (academics or non-academic human rights defenders/advocates) with proven knowledge and track record in the Arab human rights system, and the remaining five invitees are former or current members of the *Arab*

[56] Johnson, R. B., Onwuegbuzie, A. J. & Turner, L. A. (2007), *Journal of Mixed Methods Research*, Vol. 1(2), published 02.04.2007, p. 122.
[57] A comprehensive overview about the different types of sources in legal research can be found in Blechner, A. J. (2023), 'Legal Research Strategy', *Harvard Law School Library*, last updated 21.09.2023, accessed 19.07.2024.
[58] Edwards, R. & Holland, J. (2013), 'What is qualitative interviewing?', *Bloomsbury Academic*, p. 29.
[59] Sybing, R. (2024), 'Mastering Semi-Structured Interviews', *Atlas.ti,* accessed 16.07.2024.

Human Rights Committee. A gender balanced sample was created (seven potential interviewees are women, eight are men) and a fair representation of the main Arab geographies was ensured by inviting experts/officials from 11 out of 22 Arab states (Sudan, Egypt, Palestine, Algeria, Syria, Lebanon, Bahrain, Tunisia, Saudi Arabia, Jordan, and the United Arab Emirates). The e-mail addresses of all interviewees were collected from the websites of the institutions they are affiliated to, from their publicly available social media accounts (mainly LinkedIn) or from some well-connected friends and professional acquaintances engaged in Arab human rights sectors.

Empirical interviews bear potential personal risks for both the researcher and the respondents and must therefore pass a strict ethical examination by the concerned academic institution.[60] I submitted my complete ethics application, including a detailed ethics application form, a risk assessment, a participant information sheet and a consent form, to the Faculty of Arts and Social Sciences and Management School Research Ethics Committee (FASS-LUMS REC) at Lancaster University in August 2021. The approval of my ethics application was granted by FASS-LUMS REC in December 2021 which paved the way for sending out the invitations to all potential interviewees in February 2022. Interviewees were approached by e-mail in Arabic and English. Each correspondence included the participant information sheet and the consent form, together with a request to have an electronic copy of the latter signed and returned to me. Despite sending out a reminder about the invitation to all interviewees in March 2022, only three invitees responded and signalled their willingness to participate in an interview: Mr. Asaad Younis, member of the *Arab Human Rights Committee* (2009-2015) from Palestine, Dr. Hafidha Chekir, human rights academic and defender from Tunisia, and Mr. Asem Rababaa, member of the *Arab Human Rights Committee* (2011-2015). The latter has not responded ever since to follow-up e-mails from my side. Eventually, only two interviews were conducted via Microsoft Teams: the first with Mr. Younis on 16 June 2022, and the second with Dr. Chekir on 27 January 2023. Prior to the interviews, I had shared with both experts a list of questions that would guide our conversations.

In the beginning of each interview, I welcomed the participants, provided a short introduction about myself and my PhD project and asked them for permission to video

[60] A thorough overview about ethical considerations in qualitative empirical research can be found in UK Statistics Authority (2022), 'Ethical considerations associated with Qualitative Research methods', published 25.05.2022, last updated 21.10.2022.

record the interviews in accordance with the consent form shared with them earlier. Both experts agreed verbally to video recording. The translation of the interviews from Arabic into English was finalised within a week after each conversation and was sent to the interviewees by e-mail for approval. Dr. Chekir authorised using her interview statements in an e-mail to me on 5 September 2024, and on 27 September 2024 Mr. Younis approved quoting him in my thesis.

The aforementioned qualitative methods are complemented by quantitative instruments applied to substantiate the findings from doctrinal desk-based research, especially in Chapters 3 and 5. For example, the statistical analysis of Arab ratifications of international human rights treaties in Tables 5 and 6, and the overview of reservations, understandings and declarations entered by Arab states and selected non-Arab states in nine key international human rights treaties (Table 7), aim towards providing additional comparative and measurable impetus to better understand the positions of Arab states towards international human rights law. To mention another example, Table 14 (Chapter 5) lists the provisions in the Arab Charter and five other regional/international human rights treaties that contain clawback clauses. Knowing where and how frequently clawback clauses are codified in legal texts contributes to forming a better comparative judgment about the nature of clawback clauses and their possible impact on the effectiveness of human rights treaties. Quantitative tools, irrespective of their degree of complexity, thus provide valuable descriptive and explanatory validity to the study, especially in combination with the other qualitative methods used.[61]

1.3. Reflections on research limitations

Like any other academic work, this study too has its own constraints. Ross and Bibler Zaidi define study limitations as "weaknesses within a research design that may influence outcomes and conclusions of the research. Researchers have an obligation to the academic community to present complete and honest limitations of a presented study."[62] Transparently addressing these limitations, explaining their implications and identifying

[61] More insights into the purposes of quantitative research designs can be found in Chui, W. H. (2007), 'Quantitative Legal Research', in: McConville, M. & Chui, W. H. (editors), 'Research Methods in Law', *Edinburgh University Press*, pp. 50-51.
[62] Ross, P. T. & Bibler Zaidi, N. L. (2019), 'Limited by our limitations', *Perspectives on Medical Education*, Vol. 8, p. 261.

measures for mitigating possible effects can provide useful insights to the audience and future researchers about the validity and generalisability of the study results.[63]

The first limitation concerns my own role as a researcher in this study. The main question raised here is whether researchers can create academic knowledge by objectively analysing a specific topic (the Arab human rights system) irrespective of personal values, beliefs, experiences and emotions, or whether the produced knowledge is rather influenced by subjective feelings and maybe bias.[64] Ratner holds that epistemic objectivity and impartiality cannot be fully applied in qualitative research since:

> "Qualitative methodology recognizes that the subjectivity of the researcher is intimately involved in scientific research. Subjectivity guides everything from the choice of topic that one studies, to formulating hypotheses, to selecting methodologies, and interpreting data. In qualitative methodology, the researcher is encouraged to reflect on the values and objectives he brings to his research and how these affect the research project."[65]

Bhat concurs with Ratner and points out that knowledge creation in social sciences cannot be entirely objective, unlike in natural sciences:

> "No doubt, the researcher should stand above personal factors, mundane influences, and communitarian prejudices. But in the field of social science, knowledge is not—nor can it be—impersonal, unlike in the pure sciences, where objectivity is a laboratory-made product. In social sciences, knowledge of facts has strong elements of subjective realization of the inquirer. The skill of the knower is largely guided by his passions too. The conscious or unconscious political philosophy, economic ideology, and social attitude of the researcher intrude into his thought process and deflect his decision. A plethora of ideologies such as capitalism, communism, and socialism, democracy and

[63] Ibid. See also Theofanidis, D. & Fountouki, A. (2018), 'Limitations and delimitations in the research process', *Perioperative Nursing*, Vol. 7(3), p. 156.
[64] See Leiter, B. (2009), 'Introduction), in Leiter, B. (editor), 'Objectivity in Law and Morals', *Cambridge Studies in Philosophy and Law, Cambridge University Press*, p. 1.
[65] Ratner, C. (2002), 'Subjectivity and Objectivity in Qualitative Methodology', *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research,* Vol. 3(3), Art. 16, p. 1.

totalitarianism, cultural assimilation and pluralism, propose different ideas and actions to inquirers."[66]

Bhat then lists multiple factors that -in his view- can impair the objectivity of researchers:

"Some factors that distort objectivity and neutrality are religion-based preferences; racial prejudice; linguistic chauvinism; regional consideration; gender bias; love towards one's own community, nation or class; displeasure against an adversary or an unfriendly nation or relation; regionalism or localism; caste affinities; and anger against past exploitations and present denials. These are strong feelings that push the inquirer to uphold some propositions or denigrate the other."[67]

Without doubt, my subjective understanding and perception of human rights was formed over the years by different normative convictions that seem to have consciously or unconsciously cemented how I generally view and approach human rights issues on personal, professional and academic levels. First, I reject totalitarianism and authoritarianism in all facets and consider them breeding grounds for human rights violations. Second, I oppose neocolonialism and foreign interventions by force, especially those considered unlawful in international law or those publicly proclaimed by hegemonial powers to 'bring democracy' to the world. Third, I endorse the principle of equality among peoples and cultures and reject the idea that certain civilisations are superior to others. My perception of human rights reflected in this thesis cannot, therefore, be completely neutral. It is biased because the normative lens through which I view human rights was shaped by my very own biography.

Being biased against authoritarianism, for example, bears the risk of being overly critical of the human rights situation in autocratic Arab states to the extent of possibly overlooking positive developments (legislation, policies). I tried to mitigate this risk and minimise subjective factors as much as possible by consciously integrating different opinions and positions into my analysis across all chapters in a balanced manner. In Chapter 3, for example, I present good practices of legislative progress made in Arab states in the different fields of human rights in addition to highlighting statutory human

[66] Bhat, P. I. (2019), 'Objectivity, Value Neutrality, Originality, and Ethics in Legal Research', *Oxford University Press*, p. 58.
[67] Ibid., p. 61.

rights challenges prevalent in some Arab countries.[68] Chapter 5 discusses commendable aspects of the *Arab Charter on Human Rights* although the Charter has received rather negative reviews by academics and human rights defenders.[69] Chapters 3 and 5 discuss the vital role civil society organisations and human rights defenders play in the protection and promotion of human rights in the Arab world and acknowledge the many positive initiatives that are taking place at grassroot levels in Arab states. The comparative analysis of the Arab Charter with other international and regional human rights treaties on the basis of specific and partially measurable indicators (Chapters 5 and 6) further contributes to the delivery of balanced findings to the reader.

It is important to me to clarify that my critical analysis of the Arab human rights system should not in any way be interpreted as an attack against Arab people, their culture(s) or Islam, the religion most Arabs adhere to.[70] However, to fully understand how human rights law is practiced today in the Arab world, it is indispensable to constructively discuss how Islam as a legal system and how secular law brought by European colonisers to many parts of the Arab world have influenced the formation of human rights law in modern-day Arab states. For that reason, Chapter 2 outlines some fundamentals of *Shari'a* law and presents different human rights approaches that are historically rooted in Islamic law. I leave it to the reader to decide which Islamic human rights trajectories (traditionalist/positivist vs. reformist/modernist interpretations) are likely to be (in)compatible with a universal or a culturally relativist perception of human rights. I must state here that I have not found for myself yet a final satisfactory positioning with regard to the normative debate around the universality versus cultural relativity of human rights. On the one hand, the entire concept of human rights would be meaningless if it did not involve basic human rights and freedoms that are unconditionally valid for all individuals just by virtue of being human beings. On the other side, one cannot simply ignore centuries-old cultural and religious traditions which have developed into legal norms and principles that many people, in the Arab/Islamic world or elsewhere, view as binding and accept to embrace. I might disagree morally with, for example, puritan criminal punishments that are still prevalent in some states, but I would always opt for peaceful, reconciliatory and inclusive methods for addressing and reforming those. I will

[68] See discussion in subchapter 3.1.
[69] See discussion in subchapter 5.4.1.
[70] A detailed discussion around the main characteristics of Arab states and societies is provided in subchapter 2.1.

touch upon this important normative discussion several times, for example in Chapter 2 which compares the different human rights approaches within the Islamic legal tradition with universal perceptions of human rights, and Chapter 3 which outlines the historic positions and attitudes of Arab states towards international human rights law.[71] However, I will not delve into too much details in this far-reaching academic debate as it would go beyond the scope of this thesis.[72]

The next limitation addressed here relates to the selection and analysis of case studies and the generalisability of study results. Despite sharing similar linguistic and religious characteristics, each of the 22 Arab states is unique in terms of demographics (population size), political and legal system, history, economic situation, and social fabric (this is discussed in more detail in Chapter 2). It is therefore challenging to reach conclusions that represent all Arab states equally. I tried to mitigate this comparative limitation by treating all Arab states equally in some of the quantitative exercises included in Chapter 3 (e.g. Tables 6 and 7). Where it was not possible to cover all Arab states, I tried to have Arab states belonging to one of the four main geographical regions of the Arab world (North Africa, East Africa, the Levant and the Arabian/Persian Gulf region) fairly represented in the various case studies, examples and comparative analyses in Chapters 2, 3 and 6. The comparative analysis of selected treaty body reports in Chapter 6 (Table 16), for instance, covers Iraq (broadly representing the Levant), Sudan (East Africa), Algeria (North Africa) and Qatar (Arabian/Persian Gulf state). Less populous Arab states like Djibouti, the Comoros and Bahrain are also adequately represented, especially in Chapters 2 and 3.[73] If Egypt comes across as overrepresented in this study, it is because I am more familiar with the Egyptian context as compared, for example, to Djibouti, the Comoros or Mauritania, and/or because I found more relevant secondary data on Egypt for a particular topic of discussion.

Generally speaking, and although my research methodology is comparative in nature, I would like to reiterate that the primary geographic focus of this study is on the Arab

[71] See subchapters 2.2.2. and 3.2.
[72] Excellent and comprehensive analyses addressing the academic debate around the universality versus cultural relativity/particularity of human rights can be found, for example, in Donnelly, J. (2013), 'Universal Human Rights in Theory and Practice', *Cornell University Press*, 3rd edition, pp. 93-120, Dahre, U. J. (2017), 'Searching for middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights', *International Journal of Human Rights*, Vol. 21(5), pp. 611-628, and Mullender, R. (2003), 'Human Rights: Universalism and Cultural Relativism', *Critical Review of International Social and Political Philosophy*, Vol. 6(3), pp. 70-103.
[73] See discussions in subchapters 2.3., 2.4., 3.1 or 3.2., for example.

world, not on other regions. The results reached in this thesis are therefore mainly valid for Arab states. However, I have integrated selected non-Arab states into some of the quantitative analyses in Chapter 3 (for example in Table 5 covering the ratification of the 18 core international human rights treaties and in Table 7 examining the distribution of reservations, understandings and declarations in nine selected international human rights instruments) in order to demonstrate whether and to which extent some of the legal phenomena examined in this study also apply to non-Arab states. Nevertheless, a detailed analysis of the human rights positions of non-Arab states goes beyond the scope of this project.

Another limitation concerns the small sample size of qualitative interviews conducted. Of course it would have been better to conduct more than two interviews and receive additional first-hand insights from persons who know the Arab human rights system well. Nevertheless, the valuable inputs received from both interviewees filled some of the gaps in existing secondary data and fit well into my analysis in different sections, especially with respect to the examination of the institutional human rights set-up within the Arab League (Chapter 4) and when discussing the political preferences of Arab states in adopting, complying with and reforming the Arab Charter (Chapter 5).

Last but not least, I have been facing some technical limitations in accessing data on the website of the Arab League since relocating to Germany in March 2021.[74] It seems the LAS web portal has not been accessible in Germany for some years for technical reasons unknown to me. Nevertheless, I managed to gain direct access to the materials I needed from the LAS portal through the internet archive (Wayback Machine), while on holidays to Egypt (April 2023, April 2024) and on short visits to the UK (October 2021, July 2023, February 2024).[75]

Finally, I would like to clarify some research specificities and terminologies that might be useful to be aware of. First, in this thesis an Arab state is defined in political terms according to its membership in the Arab League and not along ethnic/demographic lines.[76] Second, British English is used throughout the document except for terms

[74] I have not been able to access the official website of the Arab League *(www.lasportal.org)* from Germany since March 2021.
[75] The internet archive Wayback Machine *(https://web.archive.org/)* allows access to websites that are no longer accessible or existing.
[76] The existence of large-sized non-Arab minorities in Arab states is acknowledged and further discussed in subchapter 2.1.

originally spelt in another English spelling, for example in American English. Third, where no authoritative English translation of an Arabic primary or secondary source was found, I translated the text from Arabic into English myself to the best of my knowledge and marked this as such in the footnotes. This applies, for example, to the interviews conducted in Arabic and to the Concluding Observations and Recommendations of the *Arab Human Rights Committee* (Chapter 6) which are only available in Arabic. Finally, numbers from one to nine are written in words in the main text, except for dates, numbers in treaty provisions/articles as well as numbers in tables and chapters/subchapters.

Chapter 2: Arab human rights trajectories and pluralistic legal systems

This chapter discusses the key similarities and differences of Arab societies and political systems and analyses the historic and cultural contexts in which human rights trajectories have evolved in the Arab world. A special focus is dedicated to the examination of the different human rights perceptions that emerged from within the Islamic legal tradition and to the interplay between *Shari'*a law, secular law and customary law in today's pluralistic Arab legal systems.

2.1. A framework analysis: common features of Arab societies and political systems

To better understand the human rights conceptions prevailing in the Arab world, it is important to consider the plurality of legal systems, historic experiences, socio-economic developments and deeply rooted cultural traditions that characterise the 22 Arab states as we know them today. This requires a move beyond a positivist description of how human rights are codified in Arab states (see Chapter 3) towards an interdisciplinary and context-sensitive approach that considers the diversity of political actors and interest groups, as well as the multiple geostrategic, socio-economic, and cultural/religious factors that have been impacting the understanding and formation of human rights law in the Arab world.

One of the key historic legacies modern Arab states have in common is that most of them were colonised by European powers until the 20th century. The now sovereign states of Mauritania, Morocco, Algeria, Tunisia, Syria, Lebanon, Djibouti, and the Comoros were all occupied by France until they gained definitive independence between 1946 (Syria and Lebanon) and 1977 (Djibouti). Jordan, Sudan and the Gulf monarchies of Kuwait, Bahrain, Qatar, and the UAE achieved their independence from British colonialism between 1946 and 1971. Libya's occupation by Italy ended in 1943 and it became a sovereign state in 1951 after eight years of control by the Allies (France and Great Britain). The Somali republic was formed in 1960 following the unification of former Italian Somaliland and the State of Somaliland (British Somaliland). Out of the 22 Arab states, only five states (Egypt, Iraq, Yemen, Oman, and Saudi Arabia) had already enjoyed full independence or at least partial political autonomy from foreign occupation

in the first half of the 20th century.[77] Decades of European colonialism have left their mark on the domestic administrative and legal systems in place in many of the Arab states today and the artificial demarcation carried out by France and Britain after the fall of the Ottoman Empire has exacerbated sectarian tensions in multi-ethnic Arab states such as Iraq, Lebanon and Syria in their process of decolonisation and state-building. [78] It should not come as a surprise therefore that the colonial legacy Arab states inherited in the 20th century has significantly influenced the development of human rights law in these countries.

Another characteristic of Arab states is that most of them have been governed by authoritarian regimes since their independence. These autocratic regimes are generally distinguished by limited political pluralism, the concentration of power in elites (clientelism) backed by pervasive bureaucracies, military, police and intelligence ("mukhabarat") institutions, fierce control (co-optation) of the legislative and judicial branches of government and the media by the executive, the application of varying degrees of repression/coercion to dominate the public order and to silence oppositional voices, weak guarantees for free and fair elections as well as restricted individual liberties, especially with regard to the freedoms of expression, speech, assembly, association and participation in public life.[79]

Among all Arab states only present-day Tunisia may cautiously serve as an exception for an Arab state that succeeded (or is still in the process of succeeding) in its transformation into a functioning democracy despite the political deadlocks caused by the frequent clashes between secular and Islamist parties in the aftermath of the 2011 Arab Spring which ended 55 years of dictatorship in the country.[80] The absolutist Arab monarchies of

[77] For a comprehensive overview of modern Arab nation states, see Cleveland, W. L. & Bunton, M. (2012), 'A History of the Modern Middle East', *Westview Press*, pp. 159-61 and pp. 179-220 and for a shorter overview Tell, T. (2014), 'State formation and underdevelopment in the Arab world', *The Lancet*, Vol. 383 (9915), pp. 480-481.
[78] Stewart, D. J. (2012), 'The Middle East Today: Political, Geographical and Cultural Perspectives', *Taylor & Francis Group*, p. 150. A very good brief analysis concerning the history and the impact of colonialism on Middle Eastern states is provided by Gilley, B. (2021), 'The Case for Colonialism in the Middle East', *Hoover University – Stanford University*.
[79] Ayubi, N. (1996), 'Over-stating the Arab State politics and society in the Middle East', pp. 449-450 as well as Hamzawy, A. (2017), 'Authoritarian rule in the Arab world: fear of change', *Qantara* (26.07.2017).
[80] Ottaway, D. (2021), 'Grim prospects for democracy promotion in the Arab world', *Wilson Center* (19.02.2021). Many commentators are observing a continuous regression of Tunisia into an open authoritarian regime under the presidency of Kais Saied who was first elected in October 2019 (see Le Monde (2024), 'Tunisia's alarming regression under Kais Saied', published 29.05.2024).

Saudi Arabia, Bahrain, Qatar, the United Arab Emirates (UAE) and Oman can be categorised as "purely authoritarian regimes" while the Arab presidential republics of Syria, Egypt, Yemen, Algeria, Libya, Mauritania and Sudan were ruled by long-lasting autocratic regimes throughout most of the past few decades.[81] Kuwait, Morocco and Jordan are often portrayed as hybrid or mixed regimes in the sense that they managed to develop some features of democratic practice (e.g. an established multi-party system, an active civil society or relatively independent judiciaries and media) without achieving a complete transfer of power from the still omnipotently ruling monarchs/clans. Iraq (in the post-Saddam Hussein era after the 2003 US invasion) and Lebanon (after the end of the 1990 civil war) have gone through similar democratic experiences, but their impacts remain limited due to the dysfunctional institutions, sectarian conflicts, and staggering economic instabilities these two countries have been facing.[82]

The authoritarian character of Arab regimes and their inability or unwillingness to secure their power through the formulation and maintenance of representative, peaceful and sustainable social contracts with the citizenry and political interest groups have contributed to weakening the domestic legitimacy of the ruling elites.[83] This resulted in a noticeable proliferation of ideological conflicts and even long-time civil wars carried out between the militarised autocratic regimes in power and oppositional forces (whether Islamist groups or liberal parties). The oppression of the Muslim Brotherhood in Egypt (during the reign of Presidents Abdel Nasser from 1954 to 1970, Mubarak from 1981 to 2011 and currently El-Sisi), the Algerian Civil War (1991-2002) fought between the military-backed Algerian government and supporters of the Islamic Salvation Front (FIS), the violent suppression of the Islamist uprising in Syria by the secular Ba'ath Party-controlled regime of Hafez Al-Assad between 1976 and 1982, the longstanding oppression of liberal parties and moderate Islamists during the militarised puritan rule of

[81] Miller, L. E., Martini, J., Larrabee, F. S., Rabasa, A., Pezard, S., Taylor, J. E., & Mengistu, T. (2012), 'The Arab World on the Eve of Change', in 'Democratization in the Arab World: Prospects and Lessons from Around the Globe', *RAND Corporation*, p. 40

[82] See Rutherford, B.K. (2013), 'Hybrid regimes and Arab democracy", in Rutherford, B.K, 'Egypt after Mubarak: Liberalism, Islam, and Democracy in the Arab World', *Princeton University Press,* pp. 14-24. An excellent interdisciplinary analysis of the causes and roots of authoritarianism in the Arab world can be found in Lawson, F.H. (2007), 'Intraregime dynamics, uncertainty, and the persistence of authoritarianism in the contemporary Arab world', in: Schlumberger, O. (ed.), 'Debating Arab authoritarianism: Dynamics and Durability in Nondemocratic Regimes', pp. 109-127 as well as in Harb, I. K. (2022), 'The Democracy Deficit in the Arab World', *Arab Center Washington DC* (14 January 2022).

[83] See Loewe, M., Trautner, B. & Zintl, T. (2019), 'The Social Contract: An Analytical Tool for Countries in the Middle East and North Africa (MENA) and Beyond', *German Development Institute,* Briefing Paper 17/2019, pp. 3-4.

the Sudanese dictators Jaafar Nimeiry (1969-1985) and Omar A-Bashir (1989–2019), the exclusive nationalist one-party-system maintained in Tunisia under Habib Bourguiba (1957-1987) and his successor Zine El-Abidine Ben Ali (1987-2011) and the traditional hostility towards liberals in Saudi Arabia are symptomatic of the disproportionately widespread ideological instabilities and conflicts that have been dominating the Arab world over the past seven decades.[84]

A comprehensive analysis of Arab human rights experiences must also consider the mosaic of ethnic, religious, and tribal identities that exist on sub-state levels throughout the Arab world. There are ethnic minorities in most Arab states, most notably the Kurds spread between Iraq, Syria and Lebanon, the Berbers living across all North African states ranging from Mauritania in the West to Egypt in the East, the Nubians in Egypt, the Nuba and the Fur in Sudan or the Malagasy in the Comoros.[85] Religious plurality is as evident as ethnic diversity: while Sunni Muslims make up the majority of the populations in Arab states, Shi'a Muslims form the majority in Iraq, Lebanon and Bahrain and Ibadi Muslims the majority in Oman, with significant religious minorities existing in many Arab societies such as Twelver Shi'a in Saudi Arabia, Zaydi Shi'a in Yemen, Shi'a Alawites forming the ruling elite in Syria, Christians in Egypt, Lebanon, Sudan and Palestine, Yezidis in Iraq or the Druze in Lebanon.[86] The diversity of powerful local chiefs and families forming alliances among themselves through kinship further reflects the societal tribal pluralism dominating Arab Gulf monarchies.[87] The contemporary history of Arab states shows, however, that this diversity was more a curse than a blessing since much of the civil violence in the region was caused by deeply rooted ethnic and/or religious differences in fragile political contexts, such as the Lebanese Civil War (1975-1990), the Halabja chemical massacre committed by Iraqi forces against Kurdish rebels and civilians in 1988 or the Second Sudanese Civil War (1983-2005)

[84] For a more in-depth analysis of the impact of persistent authoritarianism on the stability of Arab regimes, see Ghalioun, B. (2004), 'The Persistence of Arab Authoritarianism', *Journal of Democracy*, Vol. 15(4), pp. 126-129 as well as Bellin, E. (2004), 'The Robustness of Authoritarianism in the Middle East. Exceptionalism in Comparative Perspective', *Comparative Politics*, Vol. 36(2), pp. 147-151.
[85] This expanded list is based, among others, on Hinnebusch, R. (2003), 'The International Politics of the Middle East', *Manchester University Press*, p. 55.
[86] Ibid., pp. 55-56.
[87] See Lu, L. & Thies, C. G. (2012), 'War, Rivalry, and State Building in the Middle East', *Political Research Quarterly*, Vol. 66(2), p. 241.

fought between the Sunni-Arab dominated central government and the mostly Christian independence movement seeking religious and political autonomy for southern Sudan.[88]

The economic and developmental disparities in the Arab world constitute another dimension worth highlighting to better understand the positions of Arab states especially regarding the protection of social and economic rights. On the one side there are the rich Gulf monarchies (Bahrain, Oman, Qatar, Kuwait, the UAE, and Saudi Arabia), and to a certain degree Libya before the outbreak of the Libyan Revolution of 2011, enjoying high per-capita income due to revenues from exporting fossil oil and natural gas.[89] These states are classified as "rentier states" in the sense that they "used their income to act as general providers for their people, rather than encourage self-reliance or growth led by the private sector. Thus, citizens became dependent on rulers for jobs, services, and favours. As governments did not need to levy taxes on their citizens to raise national income, their authoritarianism was even more difficult to challenge."[90] The dependency on petrodollars makes those economies particularly vulnerable in times of low global prices of hydrocarbons and increases the risk of social protest as experienced in Oman in 2021 after the first-time introduction of a value-added tax (VAT) to mitigate the effects of low oil prices and reduced revenues.[91]

On the other hand, there are the much more populous middle-income Arab economies (such as Egypt, Tunisia, Iraq, Jordan, Syria, or Morocco) and the low-income states (e.g. Sudan, Yemen, Djibouti, and Somalia), characterised by comparably sparse oil and gas reserves, the limited manufacturing and exporting potential of private sectors, a concentration of economic activity in informal productive sectors with weak tax generation and the dependence on foreign direct investments, remittances and loans from the oil-producing Gulf monarchies and other international borrowers, mainly the *World Bank* and the *International Monetary Fund* (IMF). These economic challenges are exacerbated by high population growth rates, high unemployment rates, especially among the youth, poor governance and widespread corruption, and the deterioration of

[88] Ibid., p. 243 as well as Hägerdal, N. (2019), 'Ethnic Cleansing and the Politics of restraint: Violence and Coexistence in the Lebanese Civil War', *Journal of Conflict Resolution*, Vol. 63(1), pp. 65-67.
[89] Salehi-Isfahani, D. (2013), 'Rethinking Human Development in the Middle East and North Africa: The Missing Dimensions', *Journal of Human Development and Capabilities*, Vol. 14(3) p. 343
[90] Cammack P., Dunne M., Hamzawy A., Lynch M., Muasher M., Sayigh Y. & Yahya M. (2017), 'Arab Fractures: Citizens, States, and Social Contracts', *Carnegie Endowment for International Peace*, pp. 40-41.
[91] Aljazeera News (25.05.2021), 'Protests in Oman over economy, jobs continue for third day'.

public healthcare, social support and education services which makes these governments more susceptible to protests demanding social justice.[92]

The most common denominator in the Arab world, however, is that all Arab states are Muslim majority countries (Sunni and Shi'a populations counted equally). The percentage of the Muslim population in Arab states ranges from 60-70% in Lebanon, Qatar, and Bahrain, 70-85% in Kuwait, the UAE, and Oman, to more than 99% in Mauritania, Morocco, Somalia, the Comoros, Iraq, and Tunisia.[93] Islam as a cultural and normative system influences the beliefs, traditions and daily activities of hundreds of millions of Arab Muslims. Many Arab states have declared Islam as their state religion and the principles of Islamic law (*Shari'a* law) are incorporated in most Arab constitutions and thus significantly affect the formulation of positive law.[94] Islam and *Shari'a* law are also ubiquitously reflected in most Arab-Islamic human rights treaties and declarations, most notably in the 1990 *Cairo Declaration on Human Rights in Islam* and the 2004 *Arab Charter on Human Rights* as will be discussed in detail in later chapters.

In this context it is important to differentiate between Islam and Islamism. Unlike Islam as a global faith/religion, Islamism is a relatively modern term describing "religionized politics".[95] For Tibi the "religionization of politics means the promotion of a political order that is believed to emanate from the will of Allah and is not based on popular sovereignty. Islam itself does not do this. As a faith, cult, and ethical framework, it implies certain political values but does not presuppose a particular order of government. Islamism grows out of a specific interpretation of Islam, but it is not Islam: it is a political ideology that is distinct from the teaching of the religion of Islam."[96] Islamist parties and thinkers consider Islam to be both, a religion and a state order (political ideology).[97]

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[92] O'Driscoll D., Bourhrous A., Maddah M. & Fazil S. (2020), 'Protest and State-Society Relations in the Middle East and North Africa', *Stockholm International Peace Research Institute (SIPRI)*, pp. 42-45.
[93] World Population Review (12.06.2022), 'Muslim Majority Countries 2022'
[94] See Lombardi, C.B. (2013), 'Constitutional Provisions Making Sharia "A" Or "The" chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter', *American University International Law Review*, Vol. 28(3), p. 734.
[95] Tibi, B. (2012), 'Islamism and Islam', *Yale University Press*, p. 1.
[96] *Ibid.*
[97] Ibid., p. 31.

The following subchapter (2.2.) briefly presents some fundamentals of Islamic law which are important for understanding the different human rights trajectories that emerged from within the Islamic legal and theological tradition.

2.2. Human rights in Islamic law

2.2.1. Fundamentals of Islamic jurisprudence

According to an estimate from 2022, there are around two billion Muslims worldwide, making Islam the second largest world religion after Christianity.[98] Just as with other religions, Islam is lived and practised in many ways by its adherents. The two largest denominations/branches of Islamic belief are Sunni Islam (followed by around 75-90% of Muslims) and Shi'a Islam (followed by about 10-13% of Muslims).[99] Each of the two major denominations is further divided into several schools of theology such as Ash'arism, Maturidism, Sufism or Wahhabism within Sunni Islam or Twelver Shi'ism, Ibadism, Zaydism or Ismailism within Shi'a Islam. There are some relatively new Islamic movements/sects that differ in their core beliefs from traditional branches of Islam, for example, the Ahmadiyya which are mainly widespread in India and Pakistan or the Nation of Islam in the United States.[100]

Despite the fundamental theological differences between them, Islamic traditions are united in their ambition to observe the principles and practices of *Shari'a* which can be broadly interpreted as the "entirety of all religious and legal norms."[101] Islamic law (or *Shari'a* law) generally distinguishes between religious commandments (acts of worship) that define the relationship between humans and God *('ibadat),* issues of morality *(akhlaq)* and legal norms that govern the interpersonal relationships between humans *(mu'amalat).*[102] Examples of religious duties encompass the 'five pillars of Islam', namely the declaration of faith *(shahada)*, the five daily prayers *(salah),* the regular

[98] World Population Review (18.08.2022), 'Muslim Population by Country 2022'.
[99] Ibid.
[100] See Morewedge, P. (2009), 'Theology', *The Oxford Encyclopedia of the Islamic World*, *Oxford University Press.*
[101] Rohe, M. (2014), 'Islamic Law in Past and Present', *BRILL*, p. 10. The term *Shari'a* can be translated literally as 'God's path' and usually refers to God's divine law as contrasted with the Islamic scholarly interpretations, *fiqh* (see ibid., pp. 10-14). For the sake of synchronisation, the terms Islamic law and *Shari'a* law will be used interchangeably in this research.
[102] Ibid., pp. 14-15. A short distinction between *'ibadat* and *mu'amalat* can also be found in Youssif, O. (2018), 'Beyond Shari'a: Between Religious and Interpersonal Legal Duties' [in Arabic], *Aljazeera* (26.07.2018). An insightful introduction to ethics/morality in Islam *(akhlaq)* is provided in Campo, J. E. (2016), 'Ethics and morality in Islam', in Campo, J. E. (ed.), 'Encyclopedia of world religions: Encyclopedia of Islam' (2nd edition), accessed 18.08.2022.

giving of alms (charity) to the needy *(zakat),* the fasting in Ramadan *(sawm)* and the pilgrimage to Mecca *(hajj)* for those who can afford it.[103] Commendable Islamic morals (good deeds) do not differ much from those advocated by other religions and include honesty, fidelity, mercifulness towards humans (the elderly, children, people in need, etc.) and animals, humility, politeness, patience or paying respect to neighbors.[104] Interpersonal matters include marriage and divorce, inheritance, contract law, commercial transactions, the relationship between Muslims and non-Muslims and criminal law.[105]

The human understanding of *Shari'a* by theologians, legal scholars and judges has resulted in the formation of concrete legal rules *(ahkam;* plural of *hukm)* that guide Muslims in their actions towards God and other humans in their community. Islamic jurisprudence *(fiqh)* as the knowledge of legal rulings and as a scholarly discipline is thus concerned with how divine *Shari'a* foundations are transformed by the competent authorities into law. Islamic rulings emerge when the qualified jurists deploy their knowledge and exert independent mental reasoning *(ijtihad)* while interpreting Islamic sources of law *(masadir ash-shari'a)* based on established jurisprudential methodologies/theories *(usul al-fiqh).*[106]

The provisions of the *Qur'an* and the statements, traditions and actions of Prophet Muhammad *(Sunnah)* are the uncontested primary sources of law used by Sunni scholars to derive their legal rulings. These are complemented by secondary sources of law, namely the consensus of legal scholars on a specific subject *(ijma')* and conclusion/deduction by analogy *(qiyas)* in case of insufficient evidence from the *Qur'an*, the *Sunnah* and/or unclear scholarly consensus.[107] Drugs, for example, are neither explicitly mentioned in the *Qu'ran* nor in the *Sunnah* but the consumption of drugs was prohibited by contemporary Muslim jurists applying *qiyas* on the basis that their impact on human health is as destructive as alcohol.[108]

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[103] Gianotti, T. J. (2016), 'Pillars of Islam', in Martin, R. C. (ed.), 'Encyclopedia of Islam and the Muslim world', accessed 18.08.2022.
[104] See Campo, J. E. (2016), n102.
[105] Laher, S. (2022), 'Mu'amalat'*, Oxford Encyclopedia of the Islamic World: Digital Collection, Oxford University Press*, accessed 18.08.2022.
[106] Rabb, I. (2009), 'Fiqh', *The Oxford Encyclopedia of the Islamic World, Oxford University Press*.
[107] See Souaiaia, A. (2004), 'On the sources of Islamic law and practices', *Journal of Law and Religion*, Vol. 20(1), pp. 123-126.
[108] Alittihad (25.07.2014), 'The legal ruling on drug consumption applied by qiyas in analogy to the prohibition of alcohol' [in Arabic].

The complex human process of interpreting *Shari'a* sources and applying jurisprudential methodologies (hermeneutics) has inevitably resulted in the proliferation of legal opinions *(fatwa),* often on the very same matter. Generally, legal rulings in Islam can be clustered into five broad categories known as the 'five rulings' *(al-ahkam al-khamsa)*. Accordingly, human actions are obligatory/mandatory *(fard* or *wajib*) such as the necessity to observe the five daily prayers; recommended (*mandub* or *mustahhab*) such as collecting donations for the needy; permitted (*mubah*) which includes most neutral daily human actions provided that they do not contradict Islamic morals (working, travelling, doing business, etc.); despised/discommended (*makruh*) which are formally permitted actions of reprehensible character (e.g. divorce or praying with one's mouth full) or forbidden/prohibited *(haram)* actions such as murder, usury, alcohol production/consumption and adultery.[109]

The plurality of interpretations and legal rulings is best manifested in the legal heritage left by the four main orthodox schools of Sunni jurisprudence *(madhahib)* formed in the 8th and 9th century*:* the *Hanafi* school (based on the legal views of scholar Abu Hanifa An-Nu'man and his disciples), the *Maliki* school (relying on studies by jurist Imam Malik ibn Anas and his followers), the *Shafi'i* school (founded by Arab scholar Muhammad ibn Idris Al-Shafi'i and carried forward by his students) and the *Hanbali* school (named after the Iraqi jurist Imam Ahmad ibn Hanbal).[110]

Whereas the four schools consented *(ijma')* in their legal opinions to the most essential mandatory practices (e.g. the necessity to fast in Ramadan and to pray five times a day) and categorically prohibited human actions (such as murder or unlawful sexual practices), legal rulings can differ substantially in many other matters examined by these ancient jurists (significant differences in *ahkam* even occur within each Islamic school of law). *Hanafis*, for example, have prohibited the consumption of seafood except for fish, while some *Malikis* have permitted eating crocodiles.[111] Some *Shafi'is* have declared men shaving their beards as discommended/reprehensible *(makruh)* whereas it

[109] See Vikør, K. (2014), 'Sharīʿah', *The Oxford Encyclopedia of Islam and Politics*, *Oxford University Press*. Examples of reprehensible *(makruh)* actions can be found in Al-Qaradawi, Y. (13.06.2017), 'Reprehensible Actions' [in Arabic].
[110] *Ibid.* Orthodox schools of jurisprudence in Shi'a Islam include the *Ja'fari* school (named after the sixth Shi'a Imam Ja'far Al-Sadiq) as well as the *Isma'ili* and *Zaydi* schools (see Sachedina, A. (2009), 'Law: Shīʿī Schools of Law', *The Oxford Encyclopedia of the Islamic World, Oxford University Press*.
[111] See Islamqa (26.05.2002), 'Are there types of seafood which are prohibited to eat?' [in Arabic], fatwa number 1919.

is prohibited in the three other schools if there is no necessity to do so (medical or social reasons).[112] Among the four schools only *Hanafi* law allows women to conclude a marriage contract without a male guardian *(wali)*. The three other schools consider a marriage contract without a male custodian (usually the father, brother, or another first-degree relative) to be void.[113] Although the usually verbal and temporary 'pleasure marriage' contract *(nikah al-mut'ah)* is permitted under certain conditions in *Twelver Shi'a* jurisprudence (and mainly practiced in modern-day Iran), it is prohibited by consensus in the four Sunni schools of law.[114]

These are some examples of how varying interpretations of *Shari'a* sources can lead to completely different legal outcomes/rulings. Nevertheless, these differences should be regarded as an advantage to the 'average Muslim' who is allowed to choose the opinion that best suits his/her private situation. The legal doctrine of *takhayyur/talfiq* (scholastic/eclectic selection and piecing together) further allows Muslims to choose the rulings of their preference from among the different schools of jurisprudence without having to adhere to one particular school.[115] On an institutional level, this legal pluralism gives Muslim states the flexibility to select the legal rulings that correspond best to local customs and traditions and that are accepted by their societies, especially when considering that Islam does not encompass a central/superior religious authority that dictates a single theological or legal direction global worshippers must follow.[116]

The legal knowledge produced by the four early jurists of Islam and their students is until today influencing the teaching and practice of Islamic law in major Sunni educational institutions like the Al-Azhar University in Egypt, the University of Ez-Zitouna in Tunisia or the University of Al-Qarawiyyeen in Morocco and provides a reference canon for religious authorities (foundations of *fatwa*) in Muslim/Arab states. The collection of opinions and rulings left by traditional scholars has also had a considerable impact on the codification of modern civil codes (covering family, inheritance, contract and property

[112] Islamqa (09.07.2014), 'Which scholars allowed the shaving of beards?' [in Arabic], fatwa number 219947.
[113] See Dar Al-Ifta Al-Missriyyah (retrieved 12.07.2022), 'Can a woman get married without her (wali) guardian's approval?'
[114] Badran, S. & Turnbull, B. (2019), 'Contemporary temporary marriage: A blog-analysis of first-hand experiences', *Journal of International Women's Studies*, Vol. 20(2), p. 242.
[115] Kamali, M. H. (2007), 'Shari'ah and Civil Law: Towards a Methodology for Harmonization', *Islamic Law and Society*, Vol. 14(3), p. 406.
[116] See Hallaq, W. (2009), 'An Introduction to Islamic Law', *Cambridge: Cambridge University Press*, p. 27.

law) and to a lesser extent penal codes in Arab and Muslim-majority states.[117] Whereas *Hanafi* law is now widespread in countries like Afghanistan, Pakistan, Bangladesh, Egypt, Jordan, Syria or Turkey, the *Shafi'i* school can be found mainly in Indonesia, Malaysia, Ethiopia, Somalia, India or the Philippines. The *Maliki madhab* spreads across the Maghreb region (Mauritania, Morocco, Algeria and Tunisia), Libya, in West Africa, Sudan, the UAE, Kuwait or Bahrain, while the *Hanbali school* (and its puritan version *Wahhabism*) is the predominant branch of Islamic jurisprudence in Saudi Arabia and Qatar.[118] Some Muslim/Arab states like Egypt and Tunisia have in the past introduced legislative reforms of their Islamic laws (mainly family codes) by invoking the doctrine of *takhayyur/talfiq*.[119] This has resulted in loosening the common attachment to a particular school of jurisprudence and granted judges a higher degree of adaptability in basing their verdicts on a more diversified set of rulings derived from amongst the four traditionalist schools.[120]

A far-reaching debate in Islamic law concerns the question as to whether *ijtihad* (legal reasoning) is an exclusive right attributed to the early jurists of Islam or whether modern Muslim jurists can deduce their own rulings from Islamic sources of law independently from the outcomes achieved by the ancient scholars and their students. The majority of orthodox scholars advocate that the 'gate of *ijtihad* was closed' as all essential theological and legal issues associated with the Islamic faith and practice were discussed and terminally settled by the ancient scholars by the end of the 9th century.[121] In their opinion, there is little room for innovating Islamic *fiqh* and contemporary legal opinions have to be reproduced/imitated *(taqlid)* in conformity with the heritage left by the ancient jurists.[122] This traditionalist view is fundamentally opposed by 19th and 20th century Islamic modernists like Jamaluddin Al-Afghani, Muhammad Abduh, Muhammad Iqbal,

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[117] See Dupret, B., Bouhya, A., Lindbekk, M. & Yakin, A. (2019), 'Filling Gaps in Legislation: The Use of Fiqh by Contemporary Courts in Morocco, Egypt and Indonesia', *Islamic Law and Society*, Brill Academic Publishers, Vol. 26(4), pp. 405-412.
[118] University of North Carolina at Chapel Hill (retrieved 13.07.2022), 'Islamic Jurisprudence & Law – Distribution of the four schools of Islamic jurisprudence', *ReOrienting the Veil Programme, Center for European Studies.* See also Robinson, K. (2021), 'Understanding Sharia: The Intersection of Islam and the Law', *Council on Foreign Relations*.
[119] Kamali, M. H. (2007), n115, p. 408.
[120] Ibrahim, A. F. (2022), 'Talfiq/Takhayyur', *Oxford Encyclopedia of the Islamic World: Digital Collection, Oxford University Press*, accessed 18.08.2022.
[121] Hallaq, W. (1984), 'Was the Gate of Ijtihad closed?', *International Journal of Middle East Studies,* Vol. 16(1), p. 3.
[122] See Weiss, B. G. (2009), 'Taqlid', *The Oxford Encyclopedia of the Islamic World, Oxford University Press*, accessed 19.08.2022.

Sayyid Ahmad Khan, Fazlur Rahman and Nasr Hamid Abu Zayd, as well as contemporary academics like Wael Hallaq and Abdullahi An-Na'im who argue that the "gate of ijtihad" was never closed (and would/should never be ceased) since *Shari'a* does not attribute a monopolistic right of interpreting divine law to a specific generation of jurists.[123] Islamic reformists endorse the right of modern jurists to carry out their own *ijtihad* by directly interpreting the *Qur'an* and the *Sunnah* without restrictions and by applying new legal methodologies that complement their own understanding of divine law. In their view, this would lead to the creation of new legal opinions that better address the social realities and challenges Muslims are facing in modern times.[124]

In conclusion, Islamic law (*Shari'a* law) as an umbrella term implies many different meanings depending on how Islamic sources of law are interpreted and which philosophy and legal approaches Muslim jurists apply in their reasoning. This plurality is best reflected in the diversity of legal rulings Muslims are confronted with in their daily practice. Some legal rulings might appear too strict or puritan, some others as progressive. Some jurisprudential outcomes were incorporated into positive Islamic law in Muslim-majority states, some others were left out. Discussions around *Shari'a* law (or human rights law in Islam) should always therefore consider that Islamic law is not a monolithic domain.

2.2.2. Islamic human rights approaches

According to the traditionalist Islamic scholarly consensus, *Shar'ia* law regulates the entirety of Muslim affairs and as such, it naturally determines the fundamentals of human rights too. Shah (2006) observes that "in Islam the origin of duties and rights is divine and not a human artefact. In the Islamic scheme of human rights, duties are stressed more than rights."[125] This is supported by Khadduri who maintains that "human rights in Islam are the privilege of Allah (God), because authority ultimately belongs to Him."[126] Anwar argues that the understanding of human rights in Islam is derived from divine sources. He defines a human right *(haqq al-insan)* in the Islamic legal and theological sense as "a

[123] See Hunter, S. T. (2008), 'Reformist Voices of Islam: Mediating Islam and Modernity', *Routledge Taylor & Francis Group*, pp. 14-16.
[124] Makhlouf, A. G. (2020), 'Evolution of Islamic Law in the 20th Century: The Conception of Collective Ijtihad in the Debate Between Muslim Scholars', *Oxford Journal of Law and Religion*, Vol. 9(1), p. 157.
[125] Shah, N. (2006), 'Women, the Koran and International Human Rights Law: The Experience of Pakistan', *BRILL*, p. 6.
[126] Khadduri, M. (1946), 'Human Rights in Islam', *Annals of the American Academy of Political and Social Science*, Vol. 243, p. 78.

proven obligation or an established claim of any person or group of persons (…) upon any person or group of persons in complete conformity with the express or implied dictates of Shari'ah."[127]

It is true that human rights principles like freedom, dignity, justice, brotherhood, the right to life and personal safety, equality before the law without distinction based on sex, colour, race or class, respect to a person's honour and family, freedom from arbitrary arrest and the right to be presumed innocent until proven guilty all play a central role in the Islamic understanding of human rights like they do in other cultures/religions.[128] Senturk argues that "all universal cultures, be they religious or secular, ancient or modern, commonly agree on the inviolability of all human beings. Yet they do so in their own terms (…)."[129] However, the enjoyment of inalienable human rights is not absolute, at least not in the orthodox Islamic conception. Human rights remain framed by an individual's duty to observe *Shari'a* law and are conditioned by how an individual behaves towards the other members in his/her community. For example, the guarantee to life for an offender committing premediated murder "vanishes the moment he infringes the right to life of another [individual]."[130] Because in Islamic law "justice is mostly about the rights of the other human beings"[131], the family of the victim in this example has the right to ask for compensation, to forgive the perpetrator or to demand the death penalty as one of the punishments *(hudud)* possible under traditional Islamic criminal law.[132]

The theocentric perspective of human rights in Islamic law differs without doubt from the anthropocentric/secular worldview which recognises the individual liberty, equality and dignity of each human being as the sole source of universal human rights. Cox highlights that:

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[127] Anwar, S. M. (2013), 'Normative Structure of Human Rights in Islam', *Policy Perspectives*, Vol. 10(1), pp. 89-90.
[128] Khan, I. (1999), 'Islamic Human Rights: Islamic Law and International Human Rights Standards', *Appeal: Review of Current Law and Law Reform*, Vol. 5, p. 78. See also Khadduri, M. (1946), n47, pp. 77-78.
[129] Senturk, R. (2005), 'Sociology of Rights: I Am Therefore I Have Rights: Human Rights in Islam between Universalistic and Communalistic Perspectives', *Muslim World Journal of Human Rights*, Vol. 2(1), p. 2.
[130] Anwar, S. M. (2013), n127, p. 93.
[131] Johnston, D. L. (2015), 'Islam and Human Rights: A Growing Rapprochement?', *The American Journal of Economics and Sociology*, Vol. 74(1), p. 126.
[132] Ibid.

> "[w]hereas the [Western-led model] seeks to assert the importance of the individual's entitlements against both the law and the state (and does so to protect the interests of the individual), the [traditionalist human rights perspective in Islam] seeks to generate a society in which the law (and thus God who gave the law) is respected and the collective—that is to say the Islamic community—is enhanced (and the individual is cherished as a member of the collective and a child of God). What is key for the traditionalist Muslim is that the law should be obeyed rather than challenged."[133]

It becomes obvious that both human rights philosophies, the religion-based model versus the liberal/secular one, constitute "two competing 'faith claims' – that is, they are ideologies believed by their supporters to represent universal truth but whose truth is as unprovable as their falsity (…)."[134] This sharp ideological contrast has been impacting the discussion around the universality or cultural relativity of international human rights until the present day as:

> "[e]ach philosophy bases itself on particular assumptions which can work to limit or enable one another. For example, the Western philosophical and political notion of free will is inherently limited by the Islamic presupposition that all human acts are subject to God's will. The Shari'a prescribes a finite freedom that is much narrower in its scope than the European-based, secular notion of free will. This example epitomizes the tension between human rights in Islam as they exist in relation to obligations toward God, fellow humans and nature, and the human rights adopted by international human rights institutions which are devoid of any religious coercion."[135]

The juxtaposition of both human rights ideologies as mutually exclusive antagonisms overlooks however the diverse Islamic legal heritage as well as the plurality of Muslim societies and political systems in which human rights law is formed and practiced. From a socio-anthropological perspective, the dichotomous contraposition of both human rights models also fails to recognise that normative systems can influence each other on local, regional and international levels over time in many possible ways, especially in the

[133] Cox, N. (2013), 'The Clash of Unprovable Universalisms – International Human Rights and Islamic Law', *Oxford Journal of Law and Religion*, Vol. 2(2), p. 319.
[134] Ibid., p. 323.
[135] Khan, I. (1999), n128, p. 78.

age of globalisation and international migration resulting in a stronger exchange of ideas across borders, cultures and peoples.[136] This view is supported by Chase who promotes the necessity of moving "beyond a simplistic opposition between Islam and human rights or an equally misleading conflation (based on similar assumptions) that sees Islam as inherently supportive of human rights (…) Islam is neither responsible for rights violations nor the core basis for advancing rights."[137] Although Chase is right in his observation that Islam as a religious faith is neither responsible for the amelioration nor the deterioration of human rights, "the nature of Islamic law means that it is open to a variety of different interpretations—and some of these interpretations will render Islamic law far more compatible with international human rights law than others."[138]

This takes us one step back to the debate concerning how Muslim scholars look at the sources of *Shari'a* law (most importantly the *Qur'an* and the *Sunnah*) and which methodologies of legal reasoning they apply when dealing with human rights issues. While a narrow textual/positivist interpretation of these sources is likely to lead to the adoption of an orthodox/conservative/puritan human rights worldview that is incompatible with international human rights law on several fronts, a contextual interpretation of *Shari'a* focusing on the broader moral philosophy/spirit of Islamic law rather than on the literal meaning of *Qur'anic* texts and prophetic records is more likely to result in a reformist human rights perception that conforms with international human rights standards.[139]

The differences between orthodox and reformist positions within the Islamic human rights tradition are best reflected in the discussion around women's rights, family and inheritance law, apostasy and freedom of religion, rights of non-Muslim minorities and *Shari'a* punishments *(hudud).* These domains are considered "general areas of tension between [international] human rights standards and Islamic law."[140] Given the limited

[136] For more insights on the relationship between globalised flows of people, information, technology and norms on the development of human rights across cultures, see Donnelly, J. (2002), 'Human Rights, Globalizing Flows, and State Power', in Brysk, A. (ed.), 'Globalization and Human Rights', *University of California Press*, pp. 184-189.
[137] Chase, A. (2008), 'The Tail and the Dog: Constructing Islam and Human Rights in Political Context', in Chase, A. & Hamzawy, A. (eds.), 'Human Rights in the Arab World: Independent Voices', *University of Pennsylvania Press*, p. 21.
[138] Cox, N. (2013), n133, p. 317.
[139] See Johnston, D. L. (2015), n131, pp. 128-133.
[140] Shah, N. (2006), n125, p. 1. See also Twinning, W. (2009), 'Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai & Upendra Baxi', *Cambridge: Cambridge University Press*, p. 95, as well as Arzt, D. (1990), 'The Application of International Human Rights Law in Islamic States', *Human Rights Quarterly*, Vol. 12(2), pp. 207-209.

scope of this chapter, only women's rights and the *hudud* shall be discussed in more detail hereinafter.

The conservative view of women in Islam is derived from the concept of *qawama* (guardianship and authority) according to which men are responsible for protecting and ensuring the financial security of women who are perceived as the weaker gender in society.[141] This principle is well-established in the four Sunni schools of jurisprudence and has resulted in Muslim women being subjected to inequalities in orthodox Islamic law:

> "Further examples that fuel the tension include Islamic restrictions on family law and inheritance matters. In this area, women lack the capacity to initiate a marriage contract or to obtain a unilateral divorce and their legal right to inherit property entitles them to only one half the share that a man is entitled to. In addition, a woman's testimony in a court of law must be corroborated by male testimony to the same effect and women are legally disqualified from holding general political or judicial office, because that would require them to exercise authority over men."[142]

Regarding the issue of a woman's testimony, for example, most traditionalist exegetes throughout Islamic history have endorsed the opinion that a woman's testimony as a witness in court carries less weight compared to a man's as women were considered to be more emotional, more forgetful and hence "more prone to error" than men.[143] They justify their position by adopting a verbatim interpretation of a verse *(ayah)* in the *Qur'an* which states that:

> "O believers! When you contract a loan for a fixed period of time, commit it to writing. Let the scribe maintain justice between the parties (…) Call upon two of your men to witness. If two men cannot be found, then one man and two

[141] The idea of *qawama* is mainly based on *surah* (chapter) 4, *ayah* (verse) 34 of the *Qur'an* which states: "Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them first, if they persist, do not share their beds, but if they still persist, then discipline them gently (....)" (see Quran.com, English translation, *surah* 4, *ayah* 34).
[142] Khan, I. (1999), n128, p. 79.
[143] Fadel, M. (1997), 'Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought', *International Journal of Middle East Studies*, Vol. 29(2), p. 187

women of your choice will witness—so if one of the women forgets the other may remind her (…)."[144]

The first Muslim reformist exegete to refuse this perception was Muhammad 'Abduh in the 19th and early 20th century who argued that both men and women have the same capacity to remember and forget and should therefore be treated equally in their testimony in court.[145] Other Muslim modernists have followed 'Abduh's lead claiming that this verse was not meant to be universally applicable as it was exclusively addressed to earliest Muslim communities in which men and women had different economic roles in society (in the sense of women being more forgetful about commercial transactions which used to be a male-dominated domain while being superior to men in remembering household and family matters).[146]

Provisions from the *Qur'an* and the *Sunnah* have also inspired the evolution and application of the *hudud* punishments under classical Islamic criminal law. *Hudud* penalties cover the following offences among others: murder *(qatl)* punished by the death sentence; burglary *(sariqa)* punished by amputation of the right hand; fornication *(zina)* punished by whipping of one hundred lashes for an unmarried perpetrator and stoning to death for a married offender (male or female); drinking alcohol punished by forty to eighty lashes; or apostasy *(ridda)* punished by the death penalty if the defendant persists in his/her 'disloyalty' to Islam.[147] It is true that orthodox Muslim jurists have made it harder to perform these punishments by applying high standards of evidence (e.g. requiring four witnesses to attest to adultery), yet these harsh *hudud* penalties are still inflicted -albeit exceptionally- for example in Saudi Arabia.[148] Codified Islamic penal law was also introduced in Libya (1972–1974), Pakistan (1979), Iran (1979), Sudan (1983), and northern Nigeria (2000).[149]

Contemporary Muslim reformists like Abdullahi An-Na'im, Khaled Abou El Fadl and Amina Wadud challenge these traditionalist perceptions without denying the existence of contentious provisions in the *Qur'an* and the *Sunnah*. They all champion an interpretive approach to *Shari'a* law which re-evaluates sacred texts within the social

[144] Quran.com, English translation, *surah* 2, *ayah* 282.
[145] Fadel, M. (1997), n143, p. 187.
[146] *Ibid.*
[147] See Twinning, W. (2009), n140, p. 86.
[148] Peters, R. (2009), 'Hudud', *The Oxford Encyclopedia of the Islamic World*, *Oxford University Press*. See also Twinning, W. (2009), n140, p. 87.
[149] *Ibid*.

context in which they were revealed and which highlights the universal normative value (ethos) behind Islamic provisions. An-Na'im believes that:

> "the only effective approach to achieve sufficient reform of Sharia in relation to universal human rights is to cite sources in the Quran and Sunna which are inconsistent with universal human rights and explain them in historical context while citing those sources which are supportive of human rights as the basis of legally applicable principles and rules of Islamic law today."[150]

Abou El Fadl addresses the enduring hermeneutic debate between Islamic positivists and reformists on the question as to whether the sanctity of human life in Islam should override any textual interpretation regarding human rights by stating that:

> "(…) there exists the concept of sanctity of human life (…) and the resulting conception of the rights of people. The remaining question is what happens if these conceptions clash with the positive law as deduced from the text – as read and interpreted from the text. Do the rights take priority over the text, or does the text take priority over the rights?"[151]

He illustrates this debate in reference to the *Shari'a* punishment for apostasy vis-à-vis what he sees as a morally superior right to intellect:

> "For example, people have a right to intellect. If the text says that an apostate should be killed, however, this clashes with the philosophical awareness that people have a right to their intellect, which seems to mean that people have a right not to believe. So which one wins? Does the right win or does the text win?"[152]

Abou El Fadl therefore criticises Islamic positivists for lacking:

> "a clear understanding of the normative moral commitment that Islam makes. For example, a large number of people think that the law that a woman inherits

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[150] An-Na'im, A. (1996), 'Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law', *Syracuse: Syracuse University Press*, p. 227.
[151] Abou El Fadl, K. (2005), 'A Distinctly Islamic View of Human Rights: Does it Exist and is it Compatible with the Universal Declaration of Human Rights?', in Hunter, S. T. & Malik, H. (eds.), 'Islam and Human Rights: Advancing a U.S.-Muslim Dialogue', *Centre for Strategic and International Studies*, pp. 36-37.
[152] Ibid., p. 37. The *Mu'tazilah* were a prominent theological school within Islam known for championing reason and justice above scripture and other sources of religious knowledge (see El Omari, R. (2009), 'Mu'tazilah', *The Oxford Encyclopedia of the Islamic World*, *Oxford University Press*).

> half of what a man inherits in many situations is the normative commitment itself. They believe that that is the moral commitment and that therefore one must protect that law regardless of the circumstances. I am saying, "No, that is the positive law; that is not a moral commitment." And herein lies the difference. We must distinguish between what in the text is a moral commitment – to establish justice, for instance, or to establish mercy – and what in the text is a positive law."[153]

Wadud, a prominent Muslim feminist lamenting the domination of *Qur'anic* exegesis by early male scholars and jurists, has endorsed a similar position.[154] For her, *Qur'anic* verses must be re-interpreted restrictively in in their proper historic context (7th century) and exegeted holistically in terms of identifying the universal moral value, the *Weltanschauung* (worldview), of the entire *Qur'an*[155]*:*

> "I believe the Qur'an adapts to the context of the modern woman as smoothly as it adapted to the original Muslim community fourteen centuries ago. This adaptation can be demonstrated if the text is interpreted with her in mind, thus indicating the universality of the text. Any interpretations which narrowly apply the Qur'anic guidelines only to literal mimics of the original community do an injustice to the text. No community will ever be exactly like another. Therefore, no community can be a duplicate of that original community. The Qur'an never states this as the goal. Rather, the goal has been to emulate certain key principles of human development: justice, equity, harmony, moral responsibility, spiritual awareness, and development. Where these general characteristics exist, whether in the first Muslim community or in present and future communities, the goal of the Qur'an for society has been reached."[156]

Whether one gives credit to the wide spectrum of conservative human rights opinions rooted in the four orthodox Islamic schools of law (which are still influencing law-making in Muslim majority states today) or to modernist/moralistic human rights interpretations that have been evolving from within the Islamic legal tradition since the late 19th century (and which are often defamed by the Islamic orthodoxy as heresy or

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[153] Ibid., p. 40.
[154] Wadud, A. (1999), 'Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective', *Oxford University Press*, p. 2.
[155] Ibid., p. 62.
[156] Ibid., p. 95.

instruments of Western neo-colonialism),[157] this sheer diversity leads to the conclusion that "it is virtually impossible to define a single distinctive and coherent human rights regime [in Islam]."[158] Correspondingly, the argument that Islamic human rights law is per se concordant or opposed to Western-led international human rights standards is inaccurate. While certain textual interpretations of contentious human rights issues (women's and minority rights, family and inheritance law or the application of the *hudud*) can very well be in conflict with international human rights law, a holistic approach highlighting the universal values of equality and justice in Islam is consistent with most international human rights norms.[159] In other words, if "Islam is what Muslims make of it"[160], then by the same token, Islamic human rights law, which is a product of human reflection, is what Muslim exegetes, jurists and policymakers make of it in specific historic, geographic and social contexts.

Since there is no monolithic theological conception of human rights in Islam, experts in Islamic human rights law reinforce the necessity to analyse human rights trends occurring in the Muslim world from a contextual and sociological perspective which views human rights law as a product of many different factors[161]:

> "In fact, various levels of acceptance or compliance with human rights norms are more likely to be associated with the political, economic, social, and/or cultural conditions of present Islamic societies than with Islam as such. Consequently, whatever the role of Islam may be, it cannot be understood in isolation from other factors that influence the way Muslims interpret and attempt to comply with their own tradition."[162]

Chase argues that "social, political, and economic circumstances can override even norms embedded in Islamic justifications"[163] and illustrates that:

> "Muslim family law [for example] has fluctuated widely depending on historic context, region, country, locality, custom, and political and social pressures (…)

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[157] See Abou El Fadl, K. (2005), n151, p. 39. See also Khan, I. (1999), n128, p. 77 and p. 82 as well as Alhargan, R. A. (2012), 'Islamic Law and International Human Rights Norms', *Muslim World Journal of Human Rights*, Vol. 9(1), pp. 8-9.
[158] Khan, I. (1999), n128, p. 79.
[159] See Twinning, W. (2009), n140, p. 95.
[160] Attributed to Fuad Zakariya, as cited in Chase, A. (2008), n137, p. 25.
[161] See n80-83.
[162] Twinning, W. (2009), n140, p. 95.
[163] Chase, A. (2008), n137, p. 30.

> In other words, for all the invocation of shari'a, the determining factors have little to do on either side with religious arguments and everything to do with historical context (…) political, economic, and social context is the primary variable."[164]

Abou El Fadl calls for the need to assess the human rights behaviour of Muslim states and societies rather than discussing to what extent certain human rights views are 'Islamic' or not:

> "In short, what is taking place is very much part of nationalistic politics, which in many ways is thoroughly secular and is often determined by factors of realpolitik and national interests rather than by an interest in defining what is "real Islam". Therefore, in trying to identify principles and traditions that can be characterized as distinctly Islamic, it is important to account for the political factors and power-related concerns that affect the behavior of Muslim countries."[165]

The debate around the right of Saudi women to drive offers a practical example of how changing social, political and power-related dynamics can override the most orthodox Wahhabi understanding and application of women's rights. Until 2017/2018, Saudi traffic authorities refused to issue driving licences to women although there was no monarchical decree explicitly banning women from driving. This discrimination was based on a historically inherited consensus adopted by the highly influential *Council of Senior Scholars* and controlled by the *Committee for the Promotion of Virtue and the Prevention of Vice*, the religious authority tasked with upholding community morals.[166] Several legal opinions *(fatwas)* were issued by the *Council of Senior Scholars* and by many powerful Islamic scholars refusing to grant women such a right to the effect that this discrimination became customary practice in Saudi Arabia.[167] This radically changed in 2017 when King Salman ordered an overturning of the driving ban. On 26 September 2017 the Saudi Minister of Interior instructed traffic authorities to start issuing driving licences to Saudi women "in compliance with religious duties" and quoted the consent

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[164] Ibid.
[165] Abou El Fadl, K. (2005), n151, p. 29.
[166] See France24 (23.05.2011), 'The Saudi woman who took to the driver's seat' as well as Burke, J. (17.06.2011), 'Saudi Arabia women test driving', *The Guardian*.
[167] See for example a religious sermon by Saudi preacher *Muhammad Ibn Saleh Al-Uthaymeen* (updated 22.06.2004), 'General recommendations for believers' [in Arabic], *Al-Istikama Foundation*, in which he warns from "lethal evil and deadly poison" that can be brought to society by empowering women to drive.

of the *Council of Senior Scholars* for this decision as being permissible under *Shari'a* law. The first driving license for a Saudi woman was subsequently issued on 4 June 2018.[168] Changing domestic and international social realties, the pressure exerted by the civil *Women to Drive Movement* for reforms and most importantly the political will and aspiration for change led by Saudi crown prince and de-facto leader Mohammed bin Salman have apparently prevailed in this case over the conservative mindset of the powerful religious establishment.

2.3. Shari'a vs. democracy: a bird's-eye view on Arab constitutional law

Determining if and to what extent *Shari'a* law is still applied in Arab legal systems today requires an assessment of how Islamic law is codified in both Arab constitutions and statutory laws. An examination of the contemporary constitutions (or interim/transitional constitutional declarations currently in force) of the 22 Arab states reveals that Islam is recognised as the official religion of the state in 20 Arab countries.[169] Mauritania's Constitution of 1991, for example, provides in Art. 5 that "Islam is the religion of the people and of the State."[170] Similarly, Art. 97 of the 2018 Constitution of the Comoros declares that "Islam is the State religion."[171] Almost identical formulations can be found in most other Arab constitutions.[172] Somalia's Constitution of 2012 goes a radical step further by declaring in Art. 2 that "Islam is the religion of the State" and that "[n]o religion other than Islam can be propagated in the country."[173] By contrast, Morocco's 2011 Constitution advocates in Art. 3 for a liberal wording which respects the freedom of religion of non-Muslims by stating that "Islam is the religion of the State, which guarantees to all the free exercise of beliefs."[174] The present-day constitutions of Syria

[168] Saudi Press Agency (26.09.2017), 'Monarchical order issued for the application of the traffic law and its by-law including the issuance of driving licenses for men and women equally' [in Arabic]. See also *Alarabiya* (04.06.2018), 'Watch: issuance of the first driving license for a Saudi woman'.
[169] This comparative assessment of currently effective Arab constitutional documents was carried out by the author in September 2022. The analysis is based on constitutional texts made available by the *Comparative Constitutions Project* (short *Constitute Project)*, a respectful academic online service located at the University of Texas at Austin and the University of Chicago and specialised in the collection and authoritative English translation of constitutions from around the world. Given the limited scope of this subchapter, this comparison could not be extended to encompass all former Arab constitutional texts.
[170] Mauritania's Constitution of 1991 with Amendments through 2012, Art. 5.
[171] Comoros' Constitution of 2018, Art. 97.
[172] See for example Jordan's Constitution of 1952 with Amendments through 2016 (Art. 2), Djibouti's Constitution of 1992 with Amendments through 2010 (Art. 1) or Tunisia's Constitution of 2014 (Art. 1). Even Tunisia's first constitution of 1959 (as amended in 2008), enacted during the reign of the secular regime of President Habib Bourguiba, contained such a clause in Art. 1.
[173] Somalia's Constitution of 2012, Art. 2.
[174] Morocco's Constitution of 2011, Art. 3.

and multi-religious Lebanon are the only two Arab supreme legal documents not containing a clause with respect to an official religion of the state.[175] Syria's 2012 Constitution, for example, includes in Art. 3 a unique phrase stipulating that "[t]he religion of the President of the Republic is Islam; Islamic jurisprudence shall be a major source of legislation; The State shall respect all religions, and ensure the freedom to perform all the rituals that do not prejudice public order; The personal status of religious communities shall be protected and respected."[176]

The proliferation of confessional clauses in Arab constitutions does not necessarily mean, however, that all states concerned are theocratic in nature in the sense of being directly administered by a priestly/clerical order or by a religious authority that exclusively applies divine law.[177] The official religious establishments in most present-day Arab states are in fact controlled by secular authoritarian regimes.[178] These confessional constitutional clauses could rather be interpreted as formal/cosmetic acts of recognition of a religion (Islam) the majority of Arab populations adhere to.[179] Therefore, what is more decisive in this discussion is not the constitutional status of Islam as the official

[175] See Lebanon's Constitution of 1926 with Amendments through 2004, the Syrian Arab Republic's Constitution of 2012, as well as the Syrian Arab Republic's Draft Constitution of 2017.
[176] Syrian Arab Republic's Constitution of 2012, Art. 3.
[177] See definition of a theocratic state in Bhargava, R. (2013), 'Multiple Secularisms and Multiple Secular States', in Berg-Sorensen, A. (ed.) 'Contesting Secularism: Comparative Perspectives', *Taylor & Francis Group*, p. 21.
[178] Brown, N. J. (2017), 'Official Islam in the Arab World: The Contest for Religious Authority', *Carnegie Endowment for International Peace*, published 11.05.2017. The term 'secularism' has a broad range of meanings in different languages and is shaped by various ideological and cultural interpretations. Sajo defines secularism generically as "a social, political, and legal arrangement that does not follow considerations based on the transcendental or the sacred." (Sajo, A. (2008), 'Preliminaries to a Concept of Constitutional Secularism', *International Journal of Constitutional Law*, Vol. 6(3), p. 607). Bhargava provides a nuanced definition that puts secularism in opposition to religious hegemony: "The goal of secularism, defined most generally, is to ensure that the social and political order is free from institutionalized religious domination so that there is religious freedom, freedom to exit from religion, inter-religious equality and equality between believers and non-believers (…) Secularism is not intrinsically opposed to religion and may even be seen as advocating critical respect towards it." (Bhargava, R. (2013), n180, p. 20).
[179] In Egypt, for example, the clause "Islam is the religion of the state and Arabic is its official language" was already enshrined in Art. 149 of the country's first modern constitution of 1923. Back then Egypt was still struggling to end British colonial rule and Egyptian national parties agreed to this clause in an attempt to solidify Egypt's Arab/Islamic identity (Farid, S. (2013), 'Tracking Egypt's Islamic identity in the constitution', *Alarabiya News*). The public discussion around that clause and around the role of *Shari'a* law in national legislation resurfaced under the presidency of Anwar Al-Sadat (1970-1981) who cherished an image of a pious Muslim in a time in which Egypt witnessed an Islamic revival in the aftermath of the defeat to Israel in the 1967 war. Sadat used these Islamic credentials to appeal to the growing Islamist movements and to break with the socialist legacy of his predecessor Gamal Abdul-Nasser (Ahmed, D. I. & Ginsburg, T. (2014), 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions', *Virginia Journal of International Law*, Vol. 54(3), pp. 673-674).

religion of the state but rather the specific influence *Shari'a* law has on national legislation in Arab states.

At present, 14 Arab constitutional documents (out of 22) contain differently worded "Islamic supremacy clauses"[180] that declare *Shari'a* (or *Shari'a* principles) as source of legislation.[181] While Islamic law is codified as 'a' principal/main source of legislation in five Arab constitutions (Kuwait, Bahrain, Palestine, Syria and the UAE),[182] it is enshrined as 'the' basis or 'the' main/principal source of legislation in the constitutions of Oman, Qatar, Egypt and Libya.[183] Art. 3 of the Constitution of Yemen provides that *Shari'a* law is the source of all legislation.[184] Similar provisions making *Shari'a* the only source of law-making are spread across the 1992 Constitution of Saudi Arabia ("Basic Law of Government").[185] The constitutions of Somalia, Yemen and Iraq went further by enacting so called "repugnancy clauses"[186] according to which it is prohibited to pass national legislation which is not compliant with Islamic law.[187] The 2018 Constitution of the Comoros follows a different pattern and avoids referring to *Shari'a* law explicitly as 'a', or 'the', source of legislation. It instead highlights "the Sunni principles and rules of obedience and the Chafi'i rites that govern belief and social life"[188] and is thus the only contemporary Arab constitution that mentions a traditional Islamic school of

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[180] Ibid., p. 615. An insightful contribution concerning the variation in wording of the "sharia-as-source-of-legislation" provisions can be found in Lombardi, C. B. (2013), 'Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?', *American University International Law Review*, Vol. 28(3), p. 734.

[181] See n182 to n186.

[182] Kuwait's Constitution of 1962, reinstated in 1992 (Art. 2); Bahrain's Constitution of 2002 with Amendments through 2017 (Art. 2); Palestine's Constitution of 2003 with Amendments through 2005 (Art. 4); United Arab Emirates' Constitution of 1971 with Amendments through 2009 (Art. 7).

[183] Oman's Constitution of 1996 with Amendments through 2011 (Art. 2); Qatar's Constitution of 2003 (Art. 1); Egypt's Constitution of 2014 with Amendments through 2019 (Art. 2); Libya's Constitution of 2011 with Amendments through 2012 (Art. 1).

[184] Yemen's Constitution of 1991 with Amendments through 2015 (Art. 3).

[185] See Saudi Arabia's Constitution of 1992 with Amendments through 2013 "Basic Law of Government", Art. 1, 8, 17, 23, 26, 46, 48, 55, 57 and 67.

[186] Ahmed, D. I. & Ginsburg, T. (2014), n179, p. 621 and p. 629.

[187] Somalia's Constitution of 2012 (Art. 2(3)) provides that "[n]o law which is not compliant with the general principles of Shari'ah can be enacted." Iraq's Constitution of 2005, which was written in a time of civil war and US occupation, contains two consecutive "repugnancy clauses" in Art. 2 (First), namely that "[n]o law may be enacted that contradicts the established provisions of Islam" and that "[n]o law may be enacted that contradicts the principles of democracy." This reflects the intention of the drafters to "integrate Islamic values into the country's political life while retaining the separation of powers, checks and balances, and human-rights guarantees that are the hallmark of secular and democratic constitutions around the world." (Feldman, N. & Martinez, R. (2006), 'Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy', *Fordham Law Review*, Vol. 75(2), p. 884). Art. 135 of Yemen's Draft Constitution of 2015 states that "[a]ll rights and freedoms are guaranteed as long as they do not conflict with the conclusive provisions of the Islamic Sharia (…)."

[188] Comoros' Constitution of 2018, Art. 97.

jurisprudence by name. The currently effective constitutional documents of the remaining eight Arab states (Tunisia, Algeria, Mauritania, Morocco, Djibouti, Sudan, Lebanon and Jordan) do not contain similar supremacy clauses.[189]

The fact that eight Arab states do not explicitly codify *Shari'a* law as source of legislation in their constitutions and that five Arab states view Islamic law as only 'a' principal source of law suggests that there are other sources of law or normative influences shaping the legal order in these states. It is indeed noticeable to discover that the principles of democracy, pluralism and civil participation are -in various ways- recognised and prominently placed in most current Arab constitutions (except for the constitutions of Saudi Arabia, the UAE and Oman).[190] Morocco's Constitution, for example, provides that "Morocco is a constitutional, democratic, parliamentary and social Monarchy" and that the "constitutional regime of the Kingdom is founded on the separation, the balance and the collaboration of the powers, as well as on participative democracy of [the] citizen, and the principles of good governance and of the correlation between the responsibility for and the rendering of accounts."[191] Bahrain's Constitution states that the "system of government in the Kingdom of Bahrain is democratic, sovereignty being in the hands of the people, the source of all powers."[192] A positivist commitment to democracy is enshrined even in the ultraconservative Constitution of Somalia stipulating that "Somalia is a federal, sovereign, and democratic republic founded on inclusive representation of the people and a multiparty system and social justice."[193]

The abundance of references to democracy in Arab constitutions however hides the reality of prevailing authoritarianism across the Arab world.[194] Defining the much-debated term 'democracy' around the core liberal principles of equality before the law, political pluralism, separation of powers, free and fair elections and the protection of basic human rights and civil liberties, it is striking that 18 Arab states are classified as

[189] The constitutions of the concerned Arab states can be accessed on the online platform of the *Comparative Constitutions Project* (see n169).
[190] See for example Qatar's Constitution of 2003 (Art. 1), Mauritania's Constitution of 1991 with Amendments through 2012 (Art. 1) and Djibouti's Constitution of 1992 with Amendments through 2010 (Art. 1).
[191] Morocco's Constitution of 2011, Art. 1.
[192] Bahrain's Constitution of 2002 with Amendments through 2017, Art. 1d.
[193] Somalia's Constitution of 2012, Art. 1(1).
[194] Freedom House (2022), 'Freedom in the World 2022: The Global Expansion of Authoritarian Rule', p. 25.

authoritarian regimes by the 2021 *Democracy Index*.[195] No Arab state is currently listed as a "full democracy" and only Tunisia, Morocco and Mauritania are categorised as "hybrid regimes" combining democratic features (e.g. holding regular elections or formally maintaining a multi-party system) with autocratic ones (for example in the form of repression towards the opposition or journalists).[196] These constitutional clauses are therefore mostly decorative lip service dedicated to democracy by Arab regimes because they were continuously pressurised by Western powers (mainly the United States and the European Union) to open up and "because there is no risk or cost in expressing support for it."[197]

Besides the rather superficial constitutional commitment to democracy by the aforementioned states, some Arab states (Algeria, Libya, Egypt, Sudan, Syria and Iraq) enshrined clauses of adherence to socialism and/or (secular) Arab nationalism in older versions of their constitutions.[198] This phenomenon was attributed to the attempt to break with the legacy of Western colonialism and was shaped by the ideological exportation of Arab socialism/nationalism/secularism from Egypt under the presidency of Gamal Abdul-Nasser to neighbouring Arab countries in the 1950s and 1960s.[199] Explicit references to Arab socialism/nationalism have in the meantime disappeared from contemporary Arab constitutions.[200]

With this in mind, what do all these constitutional principles mean for the ideological/normative orientation of Arab national laws? Is it true that, as Van Engeland suggests, "a constitution which considers Islamic law as 'the' source of law [cannot]

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[195] Economist Intelligence Unit (2022), 'Democracy Index 2021: The China challenge', pp. 14-16. More information about the definition of democracy used, the methodology and the scoring/measurement system applied in the *Democracy Index* can be found on pp. 65-79.
[196] *Ibid.,* pp. 14-16. A definition of "hybrid regimes" is included on p. 68.
[197] Braizat, F. (2010), 'The Meanings of Democracy: What Arabs Think', *Journal of Democracy, National Endowment for Democracy and The Johns Hopkins University Press*, Vol. 21(4), p. 132. A good commentary on the effect of Western interventionism for the alleged promotion of democracy in the Middle East can be found in Fisk, R. (08.03.2010), 'Once again a nation walks through fire to give the West its 'democracy'", *The Independent*.
[198] References to socialism can be found for example in the Preamble, Art. 10, 22 and 62 of the Constitution of Algeria of 1962, Art. 6 (Socialism) of the Constitution of Libya of 1969, as well as the Preamble and Art. 1, 8, 13, 21 and 23 of the Constitution of Syria of 1973.
[199] An insightful contribution discussing the history of Arab socialism in the second half of the 20th century is provided by Kadri, A. (2016), 'The Unmaking of Arab Socialism', *Anthem Press*, pp. 29-76.
[200] A textual examination of the current constitutions of Egypt, Sudan, Algeria, Syria, Iraq and Libya has discovered no references to socialism as an ideology impacting the political systems of these states.

leave room for any other source of law"?[201] When multiple sources of law exist, what is the relationship between those? Do they stand in hierarchy or in conflict to each other? And does the fact that *Shari'a* law is not explicitly recognised as a source of law in the current constitutions of nine Arab states mean that Islamic law is not observed at all in these countries?

Providing satisfactory answers to these questions requires a move beyond constitutional law and an evaluation of how the major legal realms/influences (Islamic law, secular law inherited from Western colonialism and customary law) have been shaping Arab domestic/statutory law[202] in the 19th and 20th centuries until the present day. Discussing the nature of Arab domestic laws is particularly important to better understand the impact of provisions within the Arab Charter (most notably Art. 43) which explicitly refer to Arab national laws and which will be presented in more detail in Chapter 5.[203] The subsequent subchapter (2.4.) therefore sheds light on the "last bastions"[204] of positive *Shari'a* law and defines the areas in which codified secular law and customary law predominate in contemporary Arab legal systems.

2.4. A mosaic of Shari'a, secular and customary laws: features of Arab legal systems

Just as Western legal systems cannot be assumed to be the same, Arab law "is not a unity, nor has it ever been."[205] Nevertheless, Arab legal systems can still be compared in their plurality and their mosaic-style composition. Hill argues that "what is found in the contemporary [Arab world], with occasional exceptions, are legal systems which combine codes and judicial institutions of European origin, national statutory legislation, principles of the Shari 'a (constituting a kind of "common law"), and decisions of various courts."[206] This legal pluralism is mainly attributable to two major historic influences

[201] Van Engeland, A. (2014), 'The Balance between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism through the Prism of Legal Pluralism', *Cambridge Journal of International and Comparative Law*, Vol. 3(4), p. 1325.
[202] Statutory law (statute law) can be defined as codified/written law enacted by a competent legislative authority on national or sub-national levels (Van Horn, C. (27.7.2017), 'Statutory Law', *The Encyclopedia of Law*).
[203] See subchapter 5.5. titled "Art. 43 of the Arab Charter: interface of tension between national, regional and international human rights law?"
[204] Dupret, B., Bouhya, A., Lindbekk, M. & Yakin, A. (2019), n117, p. 8.
[205] Hill, E. (1978), 'Comparative and Historical Study of Modern Middle Eastern Law', *The American Journal of Comparative Law*, Vol. 26(2), p. 284.
[206] Ibid., pp. 279-280 (see also p. 286). See also Sandkühler, H. J. (Menschenrechte in der arabischen Welt. Einleitung in den Themenschwerpunkt', *MenschenRechtsMagazin,* Heft 1 / 2012, p. 7.

that shaped the evolution of Arab national law as we know it today: a) the codification of *Shar'ia* law and reforms of the judicial system in the Ottoman Empire in the mid-19th century and; b) the far-reaching adoption of European civil, commercial and penal/criminal codes and hierarchical courts by most Arab states in the 20th century.[207]

During the period of 1839-1876, the Ottoman Empire, which had ruled over vast Arab lands (including present-day Jordan, Palestine, Iraq, Syria, Lebanon, Iraq, Egypt and parts of Libya) until its dissolution in 1922, instituted a series of major reforms. The so-called *Tanzimat* aimed at transforming the bureaucracy and judicial apparatus of the empire into a modern nation state similar to then industrially and commercially advanced European powers like France, Prussia, Austria and Switzerland.[208] New codes on penal and commercial law and procedures were adopted and were almost completely based on French secular law.[209] A three-tiered hierarchical court system (the so-called *Nizamiye* courts), largely modeled on Napoleonic judicial structures, was introduced in the 1870s to adjudicate on civil, commercial and criminal disputes.[210] *Shari'a* courts, composed of judges trained in classical Islamic law, continued to function alongside the newly established *Nizamiye* courts but their jurisdiction was restricted to personal status matters (family law) and pious endowments.[211]

Another major element of the *Tanzimat* reforms concerns the adoption of the *Mejelle (*or *Mecelle)* in 1869, the first-ever attempt of any Islamic state to codify *Shari'a* law into a modern civil code.[212] The *Mejelle* was derived from traditional *Hanafi* jurisprudence

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[207] See Kourides, P. N. (1970), 'The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts', *Columbia Journal of Transnational Law*, Vol. 9(2), p. 385 and Kamali, M. H. (2007), n115, p. 403. Codification refers to the act of consolidating all laws/statutes into a formal legal code (Codification (2007), in Collin, P. H. (ed.), 'Dictionary of law', 5th ed., A&C Black). It provides a "formal account of the law" and implies the establishment of legal norms as positive law (see Anver, M. E. (2016), 'Codification and Islamic Law: The Ideology behind a Tragic Narrative', *Middle East Law and Governance*, Vol. 8(2-3), p. 289).

[208] See Kourides, P. N. (1970), n207, p 385 and Razai, S. (2019), 'Law and Legal Systems in the Arab Middle East: Beyond Binary Terms of Traditionalism and Modernity', *The Institute of Law and Justice in Arab Countries (IEDJA).*

[209] Liebesny, H. J. (1983), 'Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival', *Middle East Journal*, Vol. 37(2), p. 203.

[210] Razai, S. (2019), n208. See also Rubin, A. (2012), 'Civil Disputes between the State and Individuals in the Ottoman Nizamiye Courts', *Islamic Law and Society,* Vol. 19(3), p. 261.

[211] Rubin, A. (2012), n210, p. 258 as well as Razai, S. (2019), n208.

[212] Findley, C. V. (2009), 'Mecelle', *The Oxford Encyclopedia of the Islamic World, Oxford University Press*. In a civil law legal system, the term 'civil code' refers to the codification of private law which covers relationships between individuals relating to property, family, inheritance and obligations. It is distinguished from public law which governs the relationships between natural persons and the government, as well as between state institutions/administrations (see Argüelles, L. M. (2015), 'Mixed Jurisdictions: The Roads Ahead', in Palmer, V. V., & Mattar, M. Y. (eds.), 'Mixed legal systems: East and West', *Taylor & Francis Group,* p. 37).

which had been the predominant Islamic school of law throughout the centuries-long rule of the Ottomans.[213] It covered contracts, torts and some principles of civil procedure but omitted other legal domains (such as family and inheritance law) which were already included in other European civil codes at that time.[214] Now treated as uniform state law *(qanun)* and applied by the secular *Nizamiye* courts and the *Shari'a* courts alike, the *Mejelle* diminished the role of orthodox *Hanafi* jurists and theologians who used to issue judicial verdicts *(fatwas)* based on the jurisprudential knowledge they inherited from their predecessors.[215] In this respect, the *Mejelle* transformed parts of *Shari'a* law from an uncodified common-law-like system into French-inspired, codified private law with fixed provisions to be adhered to by judges.[216] Although the *Mejelle* was replaced by the Swiss Civil Code in Turkey in 1926, it survived much longer in several Arab states which had belonged to the Ottoman Empire. It was not substituted by new civil codes until 1932 in Lebanon, 1949 in Syria, 1953 in Iraq and 1977 in Jordan.[217]

The influence of secular European law on Arab legal systems increased even more with the direct colonisation of Arab lands. The Maghreb states (Tunisia, Algeria, Morocco and Mauritania), Djibouti and the Comoros fell under French colonial rule in the period between 1830 to the early-20th century until they all became independent in the second half of the 20th century.[218] Great Britain occupied Egypt in 1882.[219] After World War I, Palestine, Iraq (except for the region of Mosul) and Jordan came under British control while Lebanon and Syria were administered by France.[220] Colonial rule has left its marks

[213] *Ibid*. See also Razai, S. (2019), n208.
[214] *Ibid.* See also Liebesny, H. J. (1983), n209, p. 203.
[215] See Liebesny, H. J. (1983), n209, p. 215, as well as Razai, S. (2019), n208.
[216] Common law (also known as Anglo-American law) is a body of law based on custom, general principles and judicial decisions (case law). It is rooted in English law and can be found in a pure or hybrid form in the other UK legal systems (Wales, Northern Ireland, Scotland), Canada, the United States and in most member states of the Commonwealth (Kiralfy, A. R., Lewis, A. D. E. and Glendon, M. A. (2022), 'Common Law', *Encyclopedia Britannica*, last updated 31.08.2022). By contrast, jurisdiction in civil law systems (also known as Romano-Germanic law) is based on statutes or codified law rather than case precedent. The most prominent codifications of modern civil law were the Napoleonic Code (influencing legal systems in Spain, Italy, the Netherlands and many countries in South America) and the German Civil Code prevailing in Austria, Switzerland and Scandinavian countries (Glendon, M. A., Rheinstein, M. and Carozzo, P. (2019), 'Civil Law', *Encyclopedia Britannica*, last updated 20.09.2022. See also Kamali, M. H. (2007), n115, p. 394).
[217] Findley, C. V. (2009), n212.
[218] Trumbull, G. R. (2013), 'Africa: French colonies', in Mason, P. L. (ed.), 'Encyclopedia of race and racism', 2nd edition, Gale.
[219] Mulligan, W. (2020), 'Decisions for Empire: Revisiting the 1882 Occupation of Egypt', *The English Historical Review*, Vol. 135(572), p. 95.
[220] De Souza Martins, A. (2016), 'Imperiale Aufteilung im Nahen Osten: Das Sykes-Picot-Abkommen von 1916', *WeltTrends – Das außenpolitische Journal*, 24. Jahrgang, April 2016, p. 50.

on Arab legal systems up to the present day but its impact varied from one country to the other:

> "The introduction of foreign law into the Middle East occurred at different times and under varying circumstances. "Reception" of foreign law has meant everything from a colonial power's imposition of its laws upon its colony to the voluntary adoption of a foreign civil code. Some countries adopted the laws of others in form, but not in substance; other countries, like Egypt, have received their law from one foreign power [France] while being occupied by another [Great Britain]."[221]

By the time they gained their independence, most Arab states had integrated secular European commercial and penal codes into their legal systems and applied them in specialised courts and tribunals.[222] Traditional *Shari'a* courts were either completely abolished (e.g. in Tunisia and Egypt) or their scope of adjudication was restricted to the domain of personal status law.[223] The Egyptian Civil Code (1949) further served as a prototype for the adoption of hybrid civil codes in Syria (1949), Iraq (1951), Libya (1953), Jordan (1976) and the UAE (1985), all combining codified *Shari'a* law and French law.[224] The heritage colonial powers left behind has ultimately created mixed Arab legal systems in which the application of *Shari'a* law is practically narrowed to the field of family law which colonial powers did not dare to radically secularise "due to fear of popular resistance": [225]

> "The colonial powers (…) reshaped the legal system in these countries and managed to enforce laws of Western origin in all legal fields apart from family law. A type of hybrid legal system emerged then, when Islamic law was confined to family matters, while other areas were assigned to nationally

[221] Hill, E. (1978), n205, p. 286.
[222] See Kamali, M. H. (2007), n115, pp. 403, 410 and 419.
[223] Kourides, P. N. (1970), n207, p. 434. See also Liebesny, H. J. (1983), n209, p. 204, as well as Dupret, B., Bouhya, A., Lindbekk, M. & Yakin, A. (2019), n117, p. 6.
[224] Kourides, P. N. (1970), n207, p. 419 as well as Serag, M. A. (2015), 'Integration of Islamic Law in the Fabric of Legal Thought in Egypt', in Palmer, V. V., & Mattar, M. Y. (eds.), 'Mixed legal systems: East and West', *Taylor & Francis Group*, p. 204. The successful "blend of Islamic jurisprudence and Western laws" (Serag, M. A. (2015), p. 207) enshrined in modern civil codes in these states can be attributed largely to the work of Abdul-Razzak Al-Sanhuri, the eminent architect of these codes who was educated in both *Shari'a* and French law (see also Liebesny, H. J. (1983), n209, p. 204 and Hill, E. (1978), n205, p. 302).
[225] Kamali, M. H. (2007), n115, p. 419.

codified laws taken from Western legal sources and were applied by different court systems."[226]

This hybridity is still well-reflected in the legal systems of many present-day Arab states including Egypt, Bahrain, Jordan and Morocco. In Egypt, personal status matters (such as marriage, divorce, inheritance, child custody, alimony and adoption) are based on *Shari'a* law (mainly in the *Hanafi* tradition) and are dealt with by specialised Family Courts, while commercial, administrative and penal rules are derived entirely from secular Napoleonic law.[227] The Family Courts also have jurisdiction over personal status matters related to non-Muslim minorities (the largest of which are Orthodox/Coptic Christians) in accordance with their own ecclesiastical laws and religious traditions.[228]

The legal system in the Kingdom of Bahrain is based on civil law and *Shari'a* law and largely follows the Egyptian model.[229] Civil Courts have jurisdiction over civil, commercial, criminal and administrative affairs as well as personal status matters for non-Muslims, while *Shari'a* Courts -which are divided into *Sunni* and *Shi'a* sections- settle personal status and family disputes related to the Muslim majority population.[230] Similarly, Civil Courts in Jordan deal with civil and criminal disputes, whereas religious courts (Islamic or Christian) have jurisdiction over personal status issues such as marriage, divorce, child custody, or inheritance based on *Shari'a/Hanafi* law or Christian

[226] Serag, M. A. (2015), n224, p. 203.
[227] Abdel Wahab, M. S. E. (2019), 'An Overview of the Egyptian Legal System and Legal Research', *Global Law & Justice, Hauser Global Law School Program*, New York University School of Law, sections on the Egyptian legal system and the court system. See also Welchman, L. (2007), 'Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy', *Amsterdam University Press*, p. 45. While mainly based on *Hanafi* law, Egyptian personal status law allows judges to 'borrow' provisions from other classical Islamic schools of jurisprudence through the techniques of *talfiq* and *takhayyur* (pragmatic eclecticism). This reformist approach is best reflected in the so-called *Khul' Law (Law No. 1 of 2000)* which allows a judge to grant a wife a no-fault divorce without her husband's consent in exchange for returning her dowry. In this case, "[t]he legislator who had to make a choice between (…) conflicting juristic views opted for the view of the Malikis (…), allowing the judge, failing reconciliation [between the wife and her husband], to divorce her against the husband's will." (Ibrahim, A. F. (2015), 'Pragmatism in Islamic Law: A Social and Intellectual History', *Syracuse University Press*, p. 211).
[228] Law No. 10 of 2004 on the Formation of Family Courts [in Arabic], published by the Official Gazette of the Government of Egypt on 18.03.2004, Art. 3 and Egyptian Personal Status Law No. 1 of 2000 [in Arabic], published by the Official Gazette of the Government of Egypt on 29.01.2000, Art. 3.
[229] Al Doseri, A. & Jawahery, E. (2018), 'The Constitutional Law and the Legal system of the Kingdom of Bahrain', *Global Law & Justice, Hauser Global Law School Program*, New York University School of Law, section "Organization of the Judiciary".
[230] *Ibid.*

legal traditions.[231] Various secular courts exist with specialised jurisdiction such as a military court, an income tax court and land settlement courts.[232] In Morocco's unified legal system which is predominantly based on the French legal model, the *Moudawana*, the country's personal status code reformed in 2004, remains the last bastion of *Shari'a* law.[233] Although rooted in classical *Maliki* jurisprudence, the 2004 *Moudawana* introduced several major reforms and was hailed by Moroccan -and many Arab and international- civil society organisations as a:

> "landmark in the history of Moroccan women's struggle for equality (…) it upholds the principle of equality between men and women through the introduction of the joint and equal responsibility within the family, equality in terms of rights and obligations within the household, and suppression of guardianship of a male member of the family. Other provisions for equality between men and women include equal minimum age of marriage for men and women, the principle of divorce by mutual consent under judicial supervision. Furthermore, dissolution of marriage via divorce becomes prerogative of both husband and wife under the judicial supervision of a judge, thereby ending a husband's right to unilateral repudiation of his wife. Equality between the sexes is now extended to allow the grandchildren on the daughter's side to inherit from their grandparents just like the grandchildren on the son's side [and] polygamy is now subject to stringent legal conditions: a prospective wife can stipulate that [the marriage contract] is conditional on the pledge of the husband-to-be not to take a second wife (…) [and] the wife reserves the right to ask for divorce if she does not accept the polygamous situation (…)."[234]

The primacy of *Shari'a* law over secular European-influenced statutory law can be observed only in a few contemporary Arab states like Mauritania and Saudi Arabia. In

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[231] Isaias, B. C., Jennings, F. and Sakijha, T. (2020), 'Overview of the Hashemite Kingdom of Jordan Legal System and Research', *Global Law & Justice, Hauser Global Law School Program*, New York University School of Law, sections 8. and 9.2., as well as Welchman, L. (2007), n227, p. 45.
[232] Ibid., section 9.3.
[233] Buskens, L. (2010), 'Sharia and national law in Morocco', in Otto, J. M. (ed.), 'A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present', *Leiden University Press*, p. 89.
[234] Harrak, F. (2009), 'The History and Significance of the New Moroccan Family Code', *The Roberta Buffet Center for International and Comparative Studies*, *Northwestern University*, p. 7. The *Moudawana* regulates family affairs of Morocco's Muslim population. Family affairs concerning the Jewish minority are governed by the provisions of the Hebraic Moroccan Family Law (see Moroccan Family Code (Moudawana) of 5 February 2004, authoritative English translation by *Global Rights*, Art. 2).

these countries, the dominance of *Shari'a* law goes beyond personal status matters and captures other legal domains, especially criminal/penal codes. Although the legal system in Mauritania is formally a mix of French civil law and *Shari'a* law, several legal codes were substantially reformed throughout the past decades to make them more *Shari'a*-compliant:

> "This is the case for example of the Penal Code which contains Sharia crimes such [as] heresy, apostasy, atheism, refusal to pray, adultery and alcoholism as well as punishments such as lapidation, amputation and flagellation. Equally, the 2001 Personal Status Code reflects Sharia norms and its Article 311 states that for difficulties of interpretation as well as in cases where the Code is silent, reference should be made to Sharia. The Criminal Procedure Code (Article 363) and the Penal Code provide for the application of the Sharia rules of evidence. The Code of Contract and Obligations exclude business transactions prohibited by Sharia such as usury."[235]

In Saudi Arabia, *Shari'a* law is the foundation of the entire legal system. According to Art. 46 of the Saudi Constitution, "(…) judges bow to no authority other than that of Islamic Shari'ah."[236] Art. 48 adds: "Courts shall apply the provisions of Islamic Shari'ah to cases brought before them, according to the teachings of the Holy Qur'an and the Prophet's Sunnah as well as other regulations issued by the Head of State in strict conformity with the Holy Qur'an and the Prophet's Sunnah."[237] As *Shari'a* in Saudi Arabia is still largely uncodified in statutes or codes, "the traditionally trained judges and scholars, therefore, resort to Hanbali *fiqh*-books in particular in their administration of justice."[238] In this case, verdicts of the Saudi *Shari'a* Courts are directly derived from orthodox Islamic *fiqh* (jurisprudence) in a common-law-like fashion:

> "In the judiciary, a single judge deals with each court case. He is empowered to exercise his personal Islamic understanding and interpretation without recourse to previous decisions relating to similar cases (…) Since there is no valid system of precedent in application, the outcome of possibly identical cases may vary

[235] Serge, Z. N. & Pillay, K. (2017), 'Law and Legal System in Mauritania', *Global Law & Justice, Hauser Global Law School Program*, New York University School of Law, section 3.1.1.
[236] Saudi Arabia's Constitution of 1992 with Amendments through 2013, Art. 46.
[237] Ibid., Art. 48.
[238] Van Eijk, E. (2010), 'Sharia and national law in Saudi Arabia', in Otto, J. M. (ed.), 'A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present', *Leiden University Press*, p. 157.

> drastically depending on the inclinations of the judge in question; a case dealing with an identical issue is dealt with very differently by a judge in Jeddah than by a judge in Qaseem or in Riyadh."[239]

Legal domains governed by secular law remain the exception in Saudi Arabia. The *Regulation on Criminal Procedure* (2001)*,* Saudi Arabia's first-ever criminal procedure law, has for example borrowed provisions for the protection of the rights of the accused from modern Egyptian and French law.[240] Some commercial affairs such as intellectual property, securities and limited liability companies are influenced by Western law and are administered by non-religious special committees and courts.[241] Otherwise, "[Islamic fiqh] continues to govern the bulk of cases, covering personal status, civil contract, tort, property, agency, and nearly all crimes (…)."[242]

Besides *Shari'a* law and secular statutory law, some contemporary Arab societies have inherited mainly unwritten/uncodified customary legal practices that are applied especially in rural/peripheral areas up to the present day. Customary law is still prevalent for example among Bedouins and other tribal communities in Upper Egypt, Libya, Jordan, Syria, Iraq, Somalia, Kuwait, Bahrain and Yemen.[243] It is based on social norms, rituals and traditions (customs) that were passed down by older generations and that are accepted by the concerned tribal clans as binding law.[244] Stewart argues that many of these customs "reflect a profound gap between the values of ordinary people and those that are embodied in the state's laws."[245] Some customary practices are not only penalised according to the criminal and family laws applicable in Arab states, but they are also considered to be "generally incompatible with Islamic law."[246] This applies, for example, to honor killings carried out by an immediate relative (usually a father or a brother) of a woman believed to have brought shame to her family (for example by committing adultery or premarital sex), to self-administered blood feuds (family revenge

[239] Yamani, M. (2008), 'Polygamy and Law in Contemporary Saudi Arabia', *Garnet Publishing (UK)*, pp. 139-140.
[240] Van Eijk, E. (2010), n238, p. 166
[241] Ibid., p. 167.
[242] Vogel, F. E. (2000), 'Islamic law and legal system: Studies of Saudi Arabia', BRILL, p. 175.
[243] See Stewart, F. H. (1987), 'Tribal Law in the Arab World: A Review of the Literature', *International Journal of Middle East Studies*, Vol. 19(4), pp. 474-484.
[244] Custom (2001), in Palmisano, J. M. (ed.), 'World of sociology', Gale.
[245] Stewart, F. H. (2006), 'Introduction: Theme Issue: Customary Law in North Africa and the Arab East', *Islamic Law and Society*, Vol. 13(1), p. 3.
[246] *Ibid*.

killings) or to disallowing women their inheritance of agricultural lands and property.[247] State authorities are countering these practices by, for example, formalising extrajudicial customary agreements (the peaceful settlement of blood feuds in Upper Egypt is usually attended by local government representatives and police officials),[248] by launching awareness-raising campaigns and offering legal support to victims (e.g. disinherited women)[249] or by reforming penal codes, removing lenient penalties and applying stricter punishments for perpetrators of honor killings in Jordan.[250]

2.5. Concluding remarks

The outlined plurality of Arab legal systems and the empirical fact that *Shari'a* law at present is codified only in personal status affairs in most contemporary Arab states provides additional impetus for the discussion around Islam and human rights. The wholesale portrayal of Islamic law as fundamentally opposed to universal human rights not only fails to acknowledge the diversity of orthodox and reformist positions within the Islamic legal tradition, but it also ignores the current empirical reality that *Shari'a* is not as omnipresent in regulating Arab national law as it used to be until the early 19th century. This should not be understood as an attempt to shield Islamic law from criticism. It is rather an invitation to consider that *Shari'a* law cannot be praised or blamed for more than it actually regulates. In other words, *Shari'a* law cannot serve as a single variable for explaining, for example, why the right to a fair trial, the right to vote or the freedom of assembly/association are in decline in many parts of the Arab world,[251] or why several Arab states lag behind in the protection of the rights to health, education, science and to an adequate standard of living,[252] because *Shari'a* law is largely irrelevant when it comes

[247] For more insights into honor killings in Jordan, see Begum, R. (2017), 'How to End 'Honor Killings' in Jordan', *Human Rights Watch*, published 03.04.2017. A fatal incident of revenge killing between two Upper Egyptian families is covered for further information in Egypt Independent (03.06.2021), '17 killed and wounded in Upper Egypt revenge massacre', accessed 26.09.2022. With respect to the widespread disinheritance of women in Upper Egypt, Khodary (2018) illustrates that some "[l]ocal communities believe that if a woman obtained her inheritance, it will fall back into the hands of her husband, who is still perceived as an outsider to his wife's original family" (Khodary, Y. (2018), 'What Difference Can It Make? Assessing the impact of gender equality and empowerment in matters of inheritance in Egypt', *The Journal of the Middle East and Africa*, Vol. 9(2), p. 174).
[248] See Lotfi, K. (2017), 'A customary mediation session between the Al-Akharisa and Al-Ayyadi families in the presence of the governor of Ismailia' [in Arabic], *Al-Ahram*, 01.10.2017.
[249] See Khodary, Y. (2018), n247, pp. 184-190.
[250] Begum, R. (2017), n247.
[251] For more insights into the decline of democratic values and fundamental freedoms in the Arab world, see ElBaradei, M. (2022), 'The meaning of good governance in the Arab world', *Aljazeera* (09.01.2022).
[252] An excellent overview of the main challenges Arab states currently face with respect to human development and achieving the Sustainable Development Goals can be found in Arab Human

to regulating these and other human rights areas. Even in human rights fields in which *Shari'a* law is still influential (primarily family law and women's rights, but also minority rights, freedom of religion and the implementation of some criminal penalties) one needs to examine which classical school(s) of Islamic jurisprudence was/were adopted in which form, how the codification of Islamic law was carried out, and which political and socio-economic circumstances impacted the law-making process. Only then can an objective and fair comparison of *Shari'a law* and international human rights law take place.

Development Report (2022), 'Expanding Opportunities for an Inclusive and Resilient Recovery in the Post-Covid Era', *United Nations Development Programme*, pp. 26-44.

Chapter 3: Human rights law in Arab states: domestic and international perspectives

This Chapter engages with the actual/positivist codification of human rights by Arab states on national/domestic and international levels.

3.1. Domestic perspectives: human rights law in Arab states

Despite the political upheavals and economic instabilities the Arab world has gone through during the past decades, at least the "official discourse in the Arab states claims to be committed to human rights."[253] All Arab constitutions (or interim/transitional constitutional declarations currently in force) contain provisions that -in different ways- address the respect for human rights and the protection of individual freedoms.[254] Some Arab states have enshrined their adherence to specific international and/or regional human rights declarations and treaties in the Preamble of their contemporary constitutions. Egypt's, Morocco's, and Lebanon's constitutional Preambles, for example, explicitly mention their commitment to the UDHR.[255] Both the Preambles of Djibouti and the Comoros proclaim respect for the UDHR and the *African Charter on Human and Peoples' Rights* (Banjul Charter). [256] Algeria's constitutional Preamble expresses complete commitment to human rights as outlined in the UDHR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR), the Banjul Charter and the *Arab Charter on Human Rights*.[257]

Additionally, the vast majority of contemporary Arab constitutions contain entire chapters/sections dedicated to the protection of fundamental human (citizens') rights and liberties, such as Chapter 14 titled "The Bill of Rights and Freedoms" (Art. 42-67) of Sudan's Constitution of 2019,[258] Chapter 2 titled "Fundamental Rights and the Duties of

[253] Abdellatif, A. M. (2004), 'Human Rights in the Arab Mediterranean Countries: Intellectual Discourse, Socio-Economic Background and Legal Instruments', *Mediterranean Politics*, Vol. 9(3), p. 327.
[254] *Ibid.*
[255] Egypt's Constitution of 2014 with Amendments through 2019, Preamble, Morocco's Constitution of 2011, Preamble as well as Lebanon's Constitution of 1926 with Amendments through 2004, Preamble.
[256] Djibouti's Constitution of 1992 with Amendments through 2010, Preamble and Comoros' Constitution of 2018, Preamble.
[257] Algeria's Constitution of 2020, Preamble.
[258] Sudan's Constitution of 2019, Chapter 14.

the Citizen" (Art. 10-42) of Somalia's Constitution of 2012,[259] and Section 2 ("Rights and Freedoms, Art. 14-46) of Iraq's Constitution of 2005. [260] By contrast, the Constitutions of Lebanon and Saudi Arabia are less exhaustive in their human rights codification. The focus in Lebanon's Constitution lies mainly on the protection of basic civil and political rights such as the prohibition of punishment without law (Art. 8), the freedoms of religion (Art. 9), opinion, expression, assembly, association, and the press (all in Art. 13), the inviolability of dwelling (Art. 14) or the right to ownership (Art. 15). Economic, social, cultural and solidarity rights are marginally codified therein.[261] The Constitution of Saudi Arabia goes in the opposite direction in the sense that it largely omits explicit reference to the protection of civil and political rights while favouring the promotion of economic, social, cultural and environmental rights as reflected for example in the rights to ownership, capital and labour (Art. 17), social security support offered especially to the elderly and persons with disability (Art. 27) , the provision of job opportunities (Art. 28) and public education (Art. 30), the promotion of arts, sciences and culture (Art. 29) as well as public health and medical care to every citizen (Art. 31) and the protection of the environment and prevention of pollution (Art. 32).[262]

A compilation of selected human rights and freedoms is further provided hereunder in Table 1 (for civil and political rights), Table 2 (for economic, social, and cultural rights) and Table 3 (for collective and environmental rights) for a total of 10 contemporary Arab constitutions.[263] This collection is not exhaustive. It serves as a contribution to better compare how the different categories of human rights are codified on a constitutional level in Arab states. The selected countries were chosen to (as much as possible) represent the heterogeneity of the Arab world in terms of geography, population size and governance systems. Arab states located in the Maghreb and North Africa (Algeria, Tunisia, Egypt) are represented, as are countries located in East Africa (Sudan, Somalia, the Comoros), the Levant (Jordan, Iraq) and the Persian/Arabian Gulf (Saudi Arabia, Qatar). Populous states like Egypt, Algeria, Sudan, Iraq, and Saudi Arabia are included as are countries with comparatively smaller populations (Qatar, the Comoros), and Arab

[259] Somalia's Constitution of 2012, Chapter 2.
[260] Iraq's Constitution of 2005, Section 2.
[261] Lebanon's Constitution of 1926 with Amendments through 2004, Chapter Two: The Lebanese, their Rights, and their Obligations.
[262] Saudi Arabia's Constitution of 1992 with Amendments through 2013, Part 5: Rights and Duties.
[263] This compilation was carried out by the author in November 2022. The collection is based on currently effective constitutional documents made available by the *Comparative Constitutions Project* (see n169).

republics (Algeria, Tunisia, Egypt, Sudan) are covered, as are monarchies like Saudi Arabia, Qatar, and Jordan.

It should be noted at this point that not all human rights are explicitly codified/worded as such in Arab constitutional texts. Oman's Constitution, for example, does not explicitly address the human right to vote but de facto recognises it in Art. 58 by outlining the direct, independent and secret voting system for the *Majlis Al Shura* (Consultative Assembly), the democratically elected legislative body in the country.[264] Similarly, although Art. 15 of the Constitution of the Comoros codifies the "right to access justice and a defense (…) as well as the right to obtain court decisions in a reasonable time period", it fails to mention the right to a fair trial by name and omits several minimum guarantees associated with the right to a fair trial (and enshrined in Art. 14 of the ICCPR) such as the right to be heard by a competent, independent and impartial tribunal, the right to a public hearing, the presumption of innocence until the accused is proven guilty or the right to have a sentence reviewed by a higher tribunal.[265] The marginal or partial codification of a certain human right is marked in the below tables.

[264] See Oman's Constitution of 1996 with Amendments through 2011, Art. 58bis 9 to Art. 58bis 17.
[265] Comoros' Constitution of 2018, Art. 15 as well as International Covenant on Civil and Political Rights, Art. 14.

TABLE 1

SELECTED CIVIL AND POLITICAL RIGHTS INCLUDED IN 10 ARAB CONSTITUTIONS

	equality / non-discrimination	right to life	prohibition of torture / slavery / inhuman treatment	freedom of opinion / expression	freedom of religion / belief	right to vote	right to a fair trial
Algeria	Art. 35 & 37	Art. 38	Art. 39 & 69	Art. 51, 52 & 54	Art. 51	Art. 56	Art. 41
Tunisia	Art. 21	Art. 22	Art. 23	Art. 31	Art. 6	Art. 54	Art. 108 & 110
Egypt	Art. 9, 11 & 53	Art. 99	Art. 52 & 55	Art. 65	Art. 64	Art. 87	Art. 96
Sudan	Art. 4 & 8	Art. 44	Art. 47 & 51	Art. 57	Art. 56		Art. 52
Somalia	Art. 11	Art. 13	Art. 14 & 15	Art. 18	Art. 17	implicit reference in Art. 42	Art. 34 & 35
Comoros	Art. 2		Art. 20	Art. 21			partially in Art. 15
Jordan	Art. 6		Art. 8	Art. 15	Art. 14	Art. 67 & 71	partially in Art. 101
Iraq	Art. 14	Art. 15	Art. 37	Art. 38	Art. 41 & 43	Art. 20	Art. 19
Saudi Arabia	partially in Art. 8						
Qatar	Art. 35		Art. 36	Art. 47 (of opinion only)	Art. 50	partially and implicitly in Art. 75	Art. 39

TABLE 2

SELECTED ECONOMIC, SOCIAL AND CULTURAL RIGHTS INCLUDED IN 10 ARAB CONSTITUTIONS

	right to social security	right to work	right to an adequate living standard	right to education	right to culture / science	right to housing	right to health
Algeria	Art. 69	Art. 69	Art. 69, 77 & 144	Art. 68	Art. 79 & 80	Art. 66	Art. 65
Tunisia	partially in Art. 65	Art. 40	Art. 21	Art. 39 & 47	Art. 33 & 42		Art. 38
Egypt	Art. 17	Art. 12-15	Art. 8, 17 & 27	Art. 19	Art. 48, 66 & 67	Art. 78	Art. 18
Sudan	marginally in Art. 8	partially in Art. 49 & 64		Art. 62	Art. 66 (culture)	marginally in Art. 8	Art. 65
Somalia	Art. 27	Art. 24		Art. 30	Art. 31 (culture)		Art. 27
Comoros	Art. 89	Art. 37 & 38		Art. 29	Art. 29		Art. 42
Jordan	marginally in Art. 111	Art. 23		Art. 20	Art. 15		
Iraq	Art. 30	Art. 22	Art. 22, 28 & 30	Art. 34	Art. 34 & 35	Art. 30	Art. 30 & 31
Saudi Arabia	Art. 27 (“ support” by the state)	Art. 17 & 28		Art. 30	Art. 29		Art. 31
Qatar	Art. 28 & 30 (social justice)	marginally in Art. 28 & 30	marginally in Art. 28	Art. 49	Art. 24		Art. 23

TABLE 3

SELECTED COLLECTIVE AND ENVIRONMENTAL RIGHTS INCLUDED IN 10 ARAB CONSTITUTIONS

	right to self-determination	right (or commitment to) sustainable development	right to a healthy environment
Algeria	Art. 32	Art. 79, 221 & 227	Art. 67
Tunisia		Art. 12 & 129	Art. 45
Egypt		Art. 41, 46 & 79	Art. 43-46
Sudan		Art. 8 & 68	Art. 8
Somalia		marginally in Art. 52 & 99	Art. 25
Comoros		Art. 51, 102 & 105	Art. 43
Jordan			
Iraq		marginally in Art. 114 & 121	Art. 33 & 114
Saudi Arabia		Art. 7, 15 & 22	Art 32
Qatar	Art. 7	Art. 33	Art. 32

The textual assessment of Arab constitutions leads to a number of empirical and analytical findings worth highlighting. First, the wording of the human rights codified in Arab constitutions is not consistently directed at protecting the rights of all individuals/persons living in Arab territories. The formulation of several Arab human rights articles indicates that the rights of citizens are those meant to be protected in the first place rather than the rights of non-citizens including refugees, asylum seekers, migrant workers, or expats. Art. 9 of Palestine's Constitution, for example, provides that "Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability."[266] A similar phrase can be found in Oman's Constitution (Art. 17).[267] Art. 10 of Mauritania's Constitution lists several fundamental civil and political rights/freedoms than can only be enjoyed by citizens such as the freedom of opinion and of thought, the freedom of expression, the freedom of assembly, the freedom of association or the freedom of intellectual, artistic, and scientific creation.[268] Art. 49 of Qatar's Constitution restricts the enjoyment of the right to education to citizens.[269] In some cases, like in Art. 26 of the Constitution of the UAE, citizens are addressed in the first part of the clause ("Personal liberty is guaranteed to all citizens."[270]) while all individuals enjoy protection from torture as reflected in the last part of the same article ("A person may not be subjected to torture or to degrading treatment").[271] Given that only 10% of the total population of the UAE are citizens (amounting to one million persons out of 10 million inhabitants in 2021), the exclusive focus on citizens' rights in some provisions (as in Art. 19 concerning the right to healthcare or in Art. 29 with regards to the freedom of movement and residence) means that about nine million people are not covered by constitutional protection hereof.[272] Although I did not encounter reliable academic sources discussing the reasons for the prevailing negligence of constitutional rights for non-citizens in Arab states (most documents I came across reveal the various discriminations non-citizens are regularly exposed to),[273] the sheer

[266] Palestine's Constitution of 2003 with Amendments through 2005, Art. 9.
[267] Oman's Constitution of 1996 with Amendments through 2011, Art. 17.
[268] Mauritania's Constitution of 1991 with Amendments through 2012, Art. 10.
[269] Qatar's Constitution of 2003, Art. 49.
[270] United Arab Emirates' Constitution of 1971 with Amendments through 2009, Art. 26.
[271] *Ibid.*
[272] Ibid., Art. 19 & 29 as well as UAE Information Services (2021), 'Population and demographic mix', updated 16.08.2022, accessed 25.12.2022.
[273] See for example Amnesty International (2019), 'Qatar: Reality check: The state of migrant workers' rights with four years to go until the Qatar 2022 World Cup', published 05.02.2019.

size of migrant populations living and working in countries like the UAE, Kuwait, Oman, and Qatar, and the financial burden that would be associated with satisfying their social and economic rights (such as free basic education, adequate housing, affordable healthcare, labour rights, etc.), may explain why Gulf Arab governments have committed themselves to constitutionally protect these rather 'costly' rights only for their citizens.[274]

Another common thread reflected in all Arab constitutions is the abundance of limitation clauses in human rights related provisions. These clauses are phrased in different forms with the effect of limiting the enjoyment of a certain right or group of rights "in accordance with the provisions of the law" (Art. 26, UAE's Constitution), "in conformity with the law and within the limits of public order and morals" (Art. 40, Kuwait's Constitution), "as regulated by the law" (Art. 74, Egypt's Constitution), "within the limits of the law" (Art. 15, 16 & 23, Jordan's Constitution), "except in the cases specified by the law" (Art. 14, Djibouti's Constitution), "in accordance with the customs observed in the country" (Art. 22, Bahrain's Constitution), "according to the law and the requirements to protect the public order and public morals" (Art. 50, Qatar's Constitution), "within the limits provided by the Sharia and the Law" or "in accordance with Islamic Shari'a" (Art. 7 & 26 respectively, Saudi Constitution) and so forth.[275] It must be mentioned at this point, however, that Arab constitutions generally refrain from restricting non-derogable human rights such as the prohibition of torture, cruel and inhumane treatment. The Constitutions of Egypt (Art. 52) and Tunisia (Art. 23) take a step further by explicitly pointing out that the crime of torture cannot be subjected to any limitation.[276] Saudi Arabia's 1992 Constitution remains an exception in this discussion as it is the only Arab constitution not containing a provision on the prohibition of torture, cruel, degrading, and inhumane treatment.

The prevalence of limitation clauses in Arab constitutional human rights provisions is by no means a phenomenon exclusively associated with Arab states. Ahmed and Bulmer (2017)

[274] The *Arab Charter on Human Rights* too limits the enjoyment of some rights to citizens, such as the right to work, the right to social security and the right to free education. Further details about the compatibility of these provisions, or the lack thereof, with international human rights standards is discussed in subchapter 5.3.1.
[275] Check the quoted articles in Arab constitutions as translated by the *Comparative Constitutions Project* (see n169).
[276] Egypt's Constitution of 2014 with Amendments through 2019, Art. 52 as well as Tunisia's Constitution of 2014, Art. 23.

observe that international treaties/declarations and almost all national constitutions, case law and legislation contain at least one human rights related limitation clause.[277] Art. 29(2) of the UDHR, for example, states that "[in] the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[278] Similar restriction clauses are included in Art. 12(3), Art. 19(3), Art. 21 and Art. 22(2) of the ICCPR or in Art. 8(2), Art. 9(2), Art 10(2) and Art. 11(2) of the *European Convention on Human Rights* (ECHR), just to name one regional human rights treaty.[279] It should not be overlooked however that international human rights treaties and the constitutions of democratic states tie the limitation of human rights to the fulfillment of specific criteria. A restriction of a human right must be prescribed by law, justifiable, necessary, proportional, non-arbitrary and non-discriminatory and it must be geared towards achieving a higher public good:

> "Most rights are subject to limitations that are necessary and reasonable in a democratic society for the realization of certain common goods such as social justice, public order and effective government or for the protection of the rights of others. For example, freedom of expression may be limited to prevent people from shouting 'Fire!' in a crowded public place or by a prohibition against inciting violence against a specific individual or group. Likewise, freedom of movement is quite properly limited by traffic rules, by rules relating to lawful detention and imprisonment and by immigration rules. These rules may permit the state to infringe on individual freedom, but they may be justified if they do so only for legitimate purposes and to an acceptable (i.e. necessary, reasonable, proportional) extent."[280]

[277] Ahmed, D. & Bulmer, E. (2017), 'Limitation Clauses', *International Institute for Democracy and Electoral Assistance*, p. 7 and p. 11.
[278] Universal Declaration of Human Rights (UDHR), Art. 29(2).
[279] International Covenant on Civil and Political Rights as well as European Convention on Human Rights, Council of Europe, quoted articles.
[280] Ahmed, D. & Bulmer, E. (2017), n277, p. 4.

The challenge here is therefore "to design a constitutional provision that enables rights to be prudently limited to the extent necessary to protect the public good and the rights of others without undermining essential human rights or the civil liberties that provide the foundation for a free society."[281] Only the contemporary constitutions of Bahrain (Art. 31), Egypt (Art. 92), Tunisia (Art. 49), Somalia (Art. 38), Iraq (Art. 46) and Qatar (Art. 146) address this balancing act by outlining -to varying degrees- the criteria a rights-specific limitation clause must satisfy.[282] In the opinion of the author, these criteria are particularly well-crafted in Art. 49 of Tunisia's Constitution:

> "The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations."[283]

Undoubtedly, the absence of such criteria (necessity, proportionality etc.) from most Arab constitutions augments the likelihood of abusing the application of limitation clauses. It may support the argumentation of authoritarian regimes that limiting human rights is generally permissible as long as it is made possible by the constitution and prescribed by national law. However, even where limitation clauses are constitutionally protected by specific criteria, the risk of abuse remains high in authoritarian states, especially when the legislative and judicial branches of government are controlled by securitised executive elites:

> "Authoritarian constitutions typically allow the legislature to determine the limitations on rights, with few restrictions on the discretion of the legislature to determine the extent of those limits. In other words, constitutional rights exist only to the extent that legislatures (which themselves are often politically weak and

[281] *Ibid.*
[282] See the quoted articles in Arab constitutions as translated by the *Comparative Constitutions Project* (see n169).
[283] Tunisia's Constitution of 2014, Art. 49.

> under the domination of powerful executives) allow them to. In practice, such constitutions have not provided for the effective protection of human rights, as the legal limitations on rights have rendered the proclaimed rights quite meaningless."[284]

The following example from Egypt illustrates this dilemma well. Although Art. 92 of the 2014 Constitution states that "[n]o law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation"[285], *Law No. 107 of 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations* violates the 'essence' of the freedom of assembly protected in Art. 73 of the Constitution in multiple ways.[286] Art. 10 of that Law grants security authorities absolute power in banning any protest or public gathering on the vague ground of "serious information or evidence that there will be a threat to peace and security", without the necessity of providing a justification for the decision.[287] Art. 11 further gives security officials the right "to disperse non-peaceful demonstrations without defining the limits of peacefulness, leaving this to the discretion of security forces. The same article renders a crime committed by one participant in a demonstration sufficient to disperse the assembly." [288] This amounts to collective punishment and violates the legal principle that penalties are personal (as enshrined in Art. 95 of the Constitution).[289] Just a few days after passing that Law, the *UN High Commissioner for Human Rights* described it as flawed and demanded the Egyptian government amend or repeal it:

> "Of particular concern are the provisions on the use of force by law enforcement officials and the excessive sanctions, including massive fines as well as prison sentences, that can be imposed on those found to be in breach of this law (…) There is a real risk that the lives of peaceful protestors will be put at risk because of the

[284] Ahmed, D. & Bulmer, E. (2017), n277, p. 13.
[285] Egypt's Constitution of 2014 with Amendments through 2019, Art. 92.
[286] Law No. 107 of 2013 was issued on 24 November 2013 by interim President Adly Mansour using his temporary legislative powers (see Human Rights Watch (2013), 'Egypt: Deeply Restrictive New Assembly Law', published 26.11.2013).
[287] *Ibid.*
[288] Association for Freedom of Thought and Expression (AFTE), Egyptian Initiative for Personal Rights (EIPR) & Cairo Institute for Human Rights Studies (CIHRS) (2014), 'The Right to Freedom of Assembly in Egypt', 20th session of the UPR (October-November 2014)- The UPR of Egypt, submitted on 15.03.2014, p. 4.
[289] *Ibid.* as well as Egypt's Constitution of 2014 with Amendments through 2019, Art. 95.

violent behaviour of a few, or because the law may too easily be interpreted by local security authorities in a way that permits them to use excessive force in inappropriate circumstances."[290]

Due to the above-mentioned flaws, Art. 10 of *Law No. 107 of 2013* was rendered unconstitutional by the *Egyptian Supreme Constitutional Court* on 3 December 2016.[291] As a result, it was replaced in a legislative amendment passed by the Egyptian Parliament in March 2017. The amendment now obliges the Minister of the Interior to apply for a judicial order first before forbidding a protest, postponing it or changing its location if it threatens public security and peace.[292] The other problematic provisions of *Law No. 107*, mainly Art. 11 (on the right of security forces to use force to disperse a protest they believe is not peaceful), as well as Art. 19 and Art. 7 (setting a prison sentence between two to five years for violating the Law on vague grounds such as "impeding the interests of citizens" or "blocking traffic"), were not affected by this amendment and remain effective today.[293] Ever since the Law was passed, thousands of Egyptians have been arrested and detained, and hundreds have received prison terms following their participation in protests.[294]

This leads us to the question of how to assess the problematic provisions of *Law No. 107 of 2013* in light of Art. 92 of the Egyptian Constitution stipulating that no law shall infringe upon the essence of individual freedoms. A government proponent is likely to argue that the Law does not violate the 'essence' of the right to assembly because it allows protests to take place as long as the public order (security, peace, rights of others, etc.) is not endangered. An independent lawyer or human rights defender would probably have a completely opposite perspective, arguing that the 'essence' of the right to peaceful assembly is inherently violated when security forces are given the tools to arrest and detain peaceful protesters on vague/arbitrary grounds and use indiscriminate force against them. Eventually,

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[290] UN News (2013), 'New anti-demonstration law in Egypt must be amended, urges UN rights chief', published 26.11.2013.
[291] Almasry Alyoum (2017), 'The Parliament agrees to amend the protest law and assigns the right to ban protests to the judge of temporary issues' [in Arabic], published 27.03.2017.
[292] *Ibid.*
[293] See Human Rights Watch (2013), n202.
[294] See Hamzawy, A. (2016), 'Egypt's Anti Protest Law: Legalising Authoritarianism', *Carnegie Endowment for International Peace*, published 24.11.2016, in addition to Associated Press (2019), 'Egypt rights group: Nearly 2,000 detained since protests', published 27.09.2019, as well as Ahram Online (2013), '24 activists detained for defying Egypt protest law', published 27.11.2013.

what the author intends to demonstrate with this case study is that even when a constitutional limitation clause is bound to protect the 'essence' of a human right subject to restrictions (as provided by Art. 92 of Egypt's Constitution), this vaguely phrased protection can be easily hollowed out on the level of national statutory law, especially in legal systems in which the legislature and the judiciary are not independent or strong enough to counterbalance problematic laws drafted and enforced by a dominating executive branch of government.[295] As Abdellatif points out, "due to the absence of the separation of powers, which often renders the judiciary at the mercy of the executive branch and the rather vague provisions of the constitutions, interpretation of [national] law has, in most cases, not been in favour of citizens' rights [in Arab states]."[296]

As a detailed analysis of national human rights laws in the 22 Arab countries would go beyond the scope of this research project, I have opted for introducing several case studies of how Arab human rights legislation has developed over the past few years in four selected Arab states, namely Algeria (representing the Maghreb region), Sudan before the outbreak of the civil war in 2023 (representing East Africa), Jordan (representing the Levant) and Kuwait (representing the Arab/Persian Gulf region). The aim is to provide examples of good practices in relation to legislative progress made in different human rights fields and to highlight some statutory human rights challenges/weaknesses the selected Arab states are still facing.

Starting with Jordan, on 3 August 2017 the Jordanian Parliament voted to abolish Art. 308 of the *Penal Code* which allowed a rapist to avoid prosecution by marrying his victim for a

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[295] See El-Sadany, M. (2017), 'Human Rights in the Constitution: A Survey of the Arab Uprisings', *Arab Center Washington DC*, published 24.05.2017. The 2016 and 2020 parliamentary elections in Egypt were won by a pro-Sisi electoral alliance ('For the Love of Egypt') then party ('Nation's Future Party') believed to be formed and controlled by the *Egyptian General Intelligence Service, GIS* (see Bahgat, H. (2016), 'Anatomy of an election', *Mada Masr*, published 14.03.2016, as well as Dawoud, K. (2015), 'The President's Men: A Rundown of the For the Love of Egypt Coalition', *Atlantic Council*, published 09.09.2015.) In 2019, the Egyptian Parliament approved several constitutional amendments that cemented the subordination of the judiciary to the President who was granted even broader unchecked supervisory powers. Under the amended Art. 185 of the Constitution, the President now has the authority to appoint all of the heads of the judicial bodies and even presides over the *Supreme Council for Judicial Bodies*. The President also has the authority to appoint the *Prosecutor General* (amended Art. 189) as well as the head of the *Supreme Constitutional Court* from the five oldest deputy heads of the Court (amended Art. 193) (Egypt's Constitution of 2014 with Amendments through 2019, Art.185, 189 & 193. See also Human Rights Watch (2019), 'Egypt: Constitutional Amendments Entrench Repression', published 20.04.2019).

[296] Abdellatif, A. M. (2004), n253, p. 330.

minimum period of five years.[297] A few months earlier, Art. 98 and Art. 99 of the same *Penal Code* were reformed, resulting in increased sentences for perpetrators of so-called 'honour crimes'.[298] Both reforms were hailed as historic victories for the women's movement in Jordan and were selected by the *UN Human Rights Council* as examples of good legislative practices on country level.[299] In contrast, national and international human rights groups have identified some Jordanian laws that need be reformed for a stronger protection of basic rights. Art. 9 of Jordan's *Nationality Law*, for example, does not allow Jordanian women married to non-Jordanians to pass on their nationality to their children.[300] Additionally, local governors and officials are still resorting to provisions of the *1954 Crime Prevention Law* to detain individuals by administrative order for up to one year without adequate judicial review.[301]

Kuwait, for its part, has adopted several legislative reforms related to different human rights in the past few years. In 2013, the *Prevention of Trafficking in Persons and Smuggling of Migrants Law No. 91* was adopted, with the effect of criminalising all forms of human trafficking.[302] Art. 3 of that Law prescribes a hefty penalty for the perpetrators of human trafficking and Art. 12 includes medical and psychological measures in support of victims.[303] Moreover, in 2015 the Kuwaiti National Assembly passed *Law No. 68,* granting migrant domestic workers several labour rights such as the prohibition of employment without a contract (Art. 18), payment in accordance with the applicable minimum wage (Art. 19), forbidding the employment of minors below the age of 21 (Art. 21), the rights to a weekly day off, paid annual leave, a 12-hour working day with rest (Art. 22) and an end-of-service compensation of one month salary for each year of work (Art. 23).[304] Despite containing some positive features, *Law No. 68* was criticised for failing to include monitoring and

[297] UN Women (2017), 'Jordanian Parliament abolishes law that allowed rapists to avoid prosecution by marrying their victims', published 04.08.2017.
[298] *Ibid.*
[299] See Office of the UN High Commissioner for Human Rights (OHCHR), 'Examples of Good Practices at Country Level – Reported in 3rd Cycle UPR 2017-2020', accessed 12.07.2022, p. 22.
[300] Human Rights Watch World Report (2020), 'Jordan – Events of 2019', accessed 12.07.2022.
[301] *Ibid.*
[302] UN Human Rights Council (2015), 'Report of the Working Group on the Universal Periodic Report – Kuwait', 29th session, agenda item 6, UPR, UN General Assembly document A/HRC/29/17, 13.04.2015.
[303] *Ibid.*
[304] Kuwait Law No. 68 of 2015 Concerning Domestic Workers [in Arabic], as published by UN ESCWA on 14.07.2017.

enforcement measures (such as regular governmental inspections of working conditions in households) and for omitting sanctions against employers who confiscate the passports of domestic workers or fail to provide decent lodging, food or healthcare for them.[305] Human rights groups are therefore demanding the abolition of the decades-long *kafala* (sponsorship) system which fosters the vulnerability of migrant workers by granting Kuwaiti employers almost total control over migrant workers' immigration status and employment.[306] Another demand for legal reform concerns Art. 153 of the *Kuwaiti Penal Code* stipulating that a man who finds his wife, daughter, mother or daughter committing adultery and kills them is sentenced to three years in prison or to a relatively small fine.[307]

Despite witnessing a prolonged phase of political instability and violence towards civilians since the 2019 Sudanese Revolution and the October-November 2021 coup d'état, the government of Sudan has embraced a series of legislative reforms/amendments aiming at promoting human rights and fundamental freedoms in line with the *2019 Draft Constitutional Declaration*. This includes, among others, the criminalisation and punishment of female genital mutilation practices (Art. 141a of the *Criminal Code*), the decriminalisation of apostasy and the criminalisation of violations against the religion and beliefs of others (Art. 126, *Criminal Code*), introducing a more severe penalty for torture committed by a person invested with public authority (Art. 115(2) *Criminal Code*), abolishing corporal punishments that were codified under the *Criminal Code*, repealing Art. 12 of the *Passports and Migration Act* requiring the written consent of a male guardian before a child could leave the country accompanied only by its mother and increasing the penalty for the trafficking of women and children under the *2014 Anti-Human Trafficking Act*.[308] Remaining statutory deficits include, for example, the far-reaching powers of the *Sudanese General Intelligence Service* (GIS) in arresting and detaining individuals without adequate judicial oversight and amendments made to the *2007 Cybercrimes Act* resulting in an

[305] Human Rights Watch World Report (2019), 'Kuwait – Events of 2018', accessed 12.07.2022.
[306] An excellent analysis of the historic roots, functioning and human rights implications of the *kafala* system in Kuwait and other (Gulf) Arab states can be found in Robinson, K. (2022), 'What is the Kafala System?', *Council on Foreign Relations*, last updated 18.11.2022.
[307] Kuwait Penal Code Nr. 16 of 1960 [in Arabic], accessed 08.12.2022.
[308] UN Human Rights Council (2021), 'National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Sudan', Working Group on the Universal Periodic Review, 39th session, 1-12 November 2021, UN General Assembly document A/HRC/WG.6/39/SDN/1, 27.08.2021, paragraph 24b, p. 8.

increase in penalties for vaguely worded offences such as 'spreading false news' or publishing 'indecent materials'.[309]

Algeria, too, has reformed its national human rights legislation in many domains over the past few years. The *2020 Act on Preventing and Combating Discrimination and Hate Speech* criminalises all forms of expression propagating, inciting, encouraging, or justifying discrimination and has resulted in creating the *National Observatory for Monitoring Acts of Discrimination and Hate Speech* under the auspices of the Office of the President.[310] The *2018 Health Act* provides for healthcare services in prisons and obliges healthcare professionals to report violence against women to national authorities.[311] The *2015 Child Protection Act* was further commended by national and international human rights stakeholders as it provides adequate social and judicial protection for vulnerable children through effective protection mechanisms such as the *National Body for the Protection and Advancement of Children* receiving reports of violations of children's rights which are then handled by the relevant authorities.[312] Domestic laws in need of reform include, among others, Art. 326 of the *Algerian Penal Code* which allows a person who abducts a minor to avoid prosecution if he marries his victim, as well as provisions of the *Family Code* granting men the right to unilateral divorce without explanation while obliging women to apply to court for a divorce on specified grounds.[313] Other recommendations voiced by international human rights bodies concern, for example, the necessary review of repressive legislation, primarily *Law. No. 12-06* on associations and *Law No. 91-19* on public meetings and demonstrations, and the need to amend national legislation concerning the right to inclusive education for children with disabilities.[314]

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[309] Human Rights Watch World Report (2021), 'Sudan – Events of 2020', accessed 10.12.2022
[310] UN Human Rights Council (2022), 'National report submitted in accordance with Human Rights Council resolutions 5/1 and 16/21 – Algeria', Working Group on the Universal Periodic Review, 41st session 7-18 November 2022, UN General Assembly document A/HRC/WG.6/41/DZA/1, 02.09.2022, paragraphs 12b (pp. 2-3) and 143 (p.13).
[311] Ibid., paragraphs 67 (p. 8) and 121 (p. 11).
[312] Ibid., paragraphs 124 (p. 11) and 141 (pp. 12-13).
[313] Human Rights Watch World Report (2022), 'Algeria – Events of 2021', accessed 11.12.2022.
[314] UN Human Rights Council (2022), 'Algeria - Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights', Working Group on the Universal Periodic Review, 41st session 7–18 November 2022, UN General Assembly document A/HRC/WG.6/41/DZA/2, 17.08.2022, paragraphs 33 (p. 4) and 57 (p. 7).

Like many other countries in the world, most Arab states have by now established national human rights institutions (NHRIs) with a constitutional and/or legislative mandate to protect and promote human rights and individual freedoms. These NHRIs are state-funded and are tasked with monitoring and reporting the human rights conditions in their countries, assisting their states in meeting their international/regional human rights obligations, providing consultation towards implementing human rights standards at the national level, receiving and responding to human rights complaints, investigating human rights violations, supporting victims seeking justice and redress and engaging with international/regional human rights systems.[315] Currently 12 Arab NHRIs (from Algeria, Egypt, Jordan, Mauritania, Morocco, Tunisia, Libya, Jordan, Iraq, Qatar, Palestine, and Oman) are members of the *Global Alliance of National Human Rights Institutions* (GANHRI) which was established in 1993 in Tunis as the *International Coordinating Committee.*[316] As one of the largest human rights networks globally, *GANHRI* represents more than 110 NHRIs and aims towards influencing the outcomes of international human rights mechanisms by supporting and linking its members (the NHRIs) with other international human rights stakeholders such as the *UN Human Rights Office*, specialised UN agencies, regional human rights organisations, NGOs and academia.[317]

One of the key tasks of *GANHRI* is the regular peer reviewing and accreditation of NHRIs in compliance with the *Paris Principles* which were adopted by the *UN General Assembly* in 1993 and which specify internationally agreed minimum standards that NHRIs must satisfy to be considered credible.[318] The *Paris Principles* require "NHRIs to be independent in law, membership, operations, policy and control of resources (…) [and] that NHRIs have a broad mandate, pluralism in membership, broad functions, adequate powers [and] resources, cooperative methods, and engage with international bodies."[319] NHRIs receiving the accreditation status 'A' are considered fully compliant with the *Paris*

[315] Global Alliance of National Human Rights Institutions (GANHRI) website (2022), 'National Human Rights Institutions' sub-section, accessed 15.12.2022. For a comprehensive overview of the roles of NHRIs, see Office of the UN High Commissioner for Human Rights (2010), 'National Human Rights Institutions: History, Principles, Roles and Responsibilities', Professional Training Series No. 4, pp. 21-28.
[316] Ibid., 'History' and 'Membership' sub-sections.
[317] Ibid., 'Mission and Identity' sub-section.
[318] Ibid., 'Accreditation' sub-section. For more information about the *Paris Principles*, see Office of the UN High Commissioner for Human Rights (2010), n231, pp. 31-43.
[319] *Ibid.*

Principles and are granted full *GANHRI* membership and voting rights as well as independent participation rights at the *UN Human Rights Council*, its subsidiary bodies and some *UN General Assembly* mechanisms.[320] NHRIs partially complying with the *Paris Principles* obtain the status 'B' and are allowed to participate in *GANHRI* meetings without voting rights or the authority to hold governance positions.[321] Table 4 provides an overview of current NHRIs in some selected Arab states, their date of establishment and, where applicable, the latest accreditation rank obtained by *GANHRI*.[322]

[320] *Ibid.*

[321] *Ibid.*

[322] The data presented in Table 4 is based on GANHRI (2024), 'Chart of the Status of National Institutions as of 20 November 2024', accessed 28.11.2024, as well as on additional resources collected by the author concerning NHRIs that are not members of *GANHRI*, such as the NHRIs of Djibouti, the Comoros and Lebanon (see, for example, Law of 27.06.2006 concerning the National Commission for Human Rights and Freedoms in the Comoros [in French], *Droit Afrique*, accessed 16.12.2022, or Law No. 62 of 27.10.2016 concerning the establishment of the National Human Rights Commission in Lebanon [in Arabic], *Lebanese University*, accessed 16.12.2022).

TABLE 4

OVERVIEW OF SELECTED ARAB NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

	NHRI	Date of Establishment	Member in GANHRI?	GANHRI Accreditation Status (as of 20.11.2024)
Algeria	The National Human Rights Council of Algeria	1992 (as National Observatory for Human Rights)	Yes	B
Bahrain	National Institution for Human Rights	2009	Yes	B
Comoros	National Commission for Human Rights and Freedoms	2006	No	N/A
Djibouti	National Commission for Human Rights	2008	No	N/A
Egypt	National Council for Human Rights	2003	Yes	A
Iraq	High Commission for Human Rights	2008	Yes	A
Jordan	National Centre for Human Rights	2006	Yes	A
Kuwait	National Diwan (Bureau) for Human Rights	2015	No	N/A
Lebanon	National Human Rights Commission	2016	No	N/A
Libya	National Council for Civil Liberties and Human Rights	2011	Yes	B

It should be noted here that the *Paris Principles* are also discussed critically in academic literature, especially in relation to the independence and effectiveness of NHRIs. Murray finds that:

> "The test of effectiveness of a NHRI has so far been to consider its compliance with the Paris Principles. While these provide a useful starting point for consideration, they do not deal with the nuances of how a NHRI operates in practice. There is a need for a deeper discussion on the underlying concepts such as the relationship with government and the meaning of independence. In this context it is important to look beyond the Paris Principles, which focus more on the factors relating to their establishment, less on how they operate once they are established and barely on how they relate with other stakeholders in society (…) It is also important to acknowledge that there are tensions between the various criteria outlined above. More obviously, independence from government is difficult to achieve when NHRIs, by their very nature, require some commitment by government to their establishment and functioning."[323]

The discussion around the independence and effectiveness of NHRIs is well-reflected in the case of the Egyptian *National Council for Human Rights (NCHR)* which was established by *Law No. 94 of 2003* as an independent body affiliated to the Senate, the upper house of the Egyptian parliament.[324] In practice, the NCHR is regularly criticised for lacking effective independence and for failing to address serious human rights violations the Egyptian government is involved in. This is evident, among others, in a report submitted by *Alkarama*, a Geneva-based human rights NGO focusing on the Arab world, to *GANHRI's Sub-Committee on Accreditation* (SCA) ahead of the last accreditation of NCHR in May 2018:

> "Ahead of the review, Alkarama submitted a report to the SCA highlighting a number of key concerns, showing a serious lack of compliance of the NCHR with the Paris Principles, recommending that the NCHR be downgraded to status B. Among these concerns are the NCHR's lack of independence from the executive,

[323] Murray, R. (2007), 'National Human Rights Institutions – Criteria and Factors for Assessing Their Effectiveness', *Netherlands Quarterly of Human Rights*, Vol. 25(2), pp. 219-220.
[324] Egypt's Law No. 94 of 2003 concerning the establishment of the National Council for Human Rights [in Arabic], Art. 1.

parliamentary, and legislative branches of government, as well as its lack of financial independence. Ever since its creation, serious concerns have been raised with regards to the independence of some of its members. A prime example is the NCHR's response to a 2017 Human Rights Watch report on the widespread practice of torture against political prisoners. Mohamed Fayek, the head of the NCHR, supported the state position by stating that "there is no torture in Egyptian prisons". This is all the more alarming since the United Nations Committee against Torture considers that torture is still "habitual, widespread and deliberate" in Egypt. Furthermore, the NCHR's mandate remains restricted. Cooperation between the NCHR and international human rights mechanisms must be "in coordination with the Ministry of Foreign Affairs", which puts the NCHR's work with the UN human rights mechanisms and in matters of international human rights law under the direct control and supervision of the executive. In addition, the NHRC is not authorised to carry out unannounced visits to places of detention, nor is it given full powers to act on complaints submitted by victims of human rights abuses and their families. For example, the many complaints filed by families of victims of enforced disappearance – a practice which appears to be systematic and widespread in the country – have all remained unanswered by the NCHR."[325]

The fabric of the Arab human rights movement is not only made up of governmental stakeholders, but above all of numerous non-governmental organisations (NGOs) and independent human rights defenders and lawyers advocating for human rights at the forefront of the 22 Arab states. Historically, the first specialised human rights NGOs emerged in the 1970s in those Arab countries enjoying a relative degree of political diversity and openness, most notably Tunisia, Morocco, and Egypt.[326] Both the increased ratification of international human rights instruments by Arab states (which went along with more international funding made available for NGOs) and the adoption of varying degrees of political reforms embraced by some Arab governments (mainly due to socio-economic

[325] Alkarama (2018), 'Amid crackdown on peaceful dissent, Egypt's National Council for Human Rights announces having received highest grade in protecting and promoting human rights', published 01.06.2018, accessed 16.12.2022.
[326] An-Na'im, A. (2001), 'Human Rights in the Arab World: A Regional Perspective', *Human Rights Quarterly*, Vol. 23(3), p. 716.

pressures from below) have contributed to the growth in the number of human rights NGOs from the late 1970s/early1980s onwards.[327] However, "the rise in the number of NGOs, as encouraging as it may seem, is not, by itself, an indicator of the vitality of the civil society in the Arab world (nor anywhere else)."[328] It neither reflects the extent of freedoms human rights NGOs enjoy in their daily work nor the quality and effectiveness of their contribution:

> "Generally speaking, and regardless of minor variations between them, it is clear that Arab states tend to be extremely reticent, often strongly suspicious, about any activity that even remotely pertains to the human rights field. The profound ambivalence of Arab states to the protection of human rights is clearly reflected in the aggressively hostile position of these governments towards human rights NGOs […] through tactics ranging from total prohibition of their activities, harassment of activists, to cooption and undermining of these organizations from within."[329]

Reasons behind the phenomenon of Arab hostility/skepticism towards independent human rights NGOs are multifold and differ from one country to the other. Civil society organisations (CSOs), especially those engaged in the field of civil and political rights and receiving funds from abroad, are often suspected by Arab authoritarian elites as 'Western agents' of regime change.[330] The weak culture of civic engagement in the Arab world, the limited capability of local NGOs to finance their activities through domestic fundraising and the extreme politicisation of the Arab human rights movement have further exacerbated the mistrust between Arab governments and civil societies:

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[327] Ibid., pp. 708-709 as well as pp. 716-718. See also Sadiki, L. (2000), 'Popular Uprisings and Arab Democratization', *International Journal of Middle East Studies,* Vol. 32(1), pp. 71-72.
[328] Abdellatif, A. M. (2004), n253, p. 340.
[329] An-Na'im, A. (2001), n326, pp. 710-711. Examples of repressive actions against human rights groups include the latest arbitrary detention wave of Libyan human rights defenders and civil society actors by the *Internal Security Agency* under the pretext of protecting "Libya and Islamic value" and the dissolution of the *Tanweer Movement*, a local civil society group active in the fields of gender equality, social and cultural rights (see UN Human Rights Office of the High Commissioner (2022), 'Deepening crackdown on civil society', Press Briefing Notes, 25.03.2022), and massive ongoing repressions, prosecution and intimidations carried out by Saudi authorities against human rights defenders and independent human rights organizations such as the *Saudi Civil and Political Rights Association* (see Amnesty International (2017), 'Saudi Arabia steps up ruthless crackdown against human rights activists', Press Release, 10.01.2017).
[330] Megally, H. (2008), 'Human Rights in the Arab World: Reflecting on the Challenges Facing Human Rights Activism', in Chase, A. & Hamzawy, A. (eds.), 'Human Rights in the Arab World: Independent Voices', *University of Pennsylvania Press*, pp. 109-110.

> "Human rights organizations in the Arab world are under attack from all sides, while at the same time their discourse has been seized upon and used opportunistically by political parties, religious groups, and governments (…) Islamist groups are resorting to human rights concepts and terminology in seeking to defend and protect their supporters in detention (…). Yet these very Islamists appear to pose the biggest threat to the spread of human rights values and the growth of an activist rights movement in the region. Secular political opponents are raising the banner of human rights and the principles enshrined in the Universal Declaration of Human Rights. Yet they have undermined those very principles by using the human rights discourse as a tool for political gain in an environment where outright political opposition has not been tolerated. It is politics by proxy. Governments have also learned to pay lip service to human rights principles by constantly referring to such values in their public manifestations and by establishing human rights commissions, advisors, ministers, or departments in ministries." [331]

The outbreak of long-lasting civil wars, sectarian tensions, and the resurgence of authoritarianism in several Arab countries (such as Syria, Libya, Iraq, Egypt, Bahrain, or Yemen) have contributed to further worsening the situation of human rights NGOs across the Arab world in the aftermath of the 2011 *Arab Spring*.[332] Security and legal harassment of local Arab NGOs can range from rejecting their registration by authorities, monitoring and restricting their operations by security forces, defaming their image in media campaigns and accusing their members of treason, obstructing the receipt of foreign funding without governmental approval, investigating and sentencing their staff to prison or heavy fines or shutting them down altogether.[333]

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[331] Ibid., p. 108. The weaknesses of the Arab human rights movement are also discussed in An-Na'im, A. (2001), n326, pp. 726-729. An insightful analysis addressing the international funding of human rights groups in Egypt can be found in Pratt, N. (2008), 'Human Rights NGOs and the "Foreign Funding Debate" in Egypt', in Chase, A. & Hamzawy, A. (eds.), 'Human Rights in the Arab World: Independent Voices', *University of Pennsylvania Press*, pp. 114-126.

[332] Abdelaziz, M. (2017), 'The Hard Reality of Civil Society in the Arab World', *Fikra Forum, Washington Institute for Near East Policy*, published 11.12.2017.

[333] *Ibid.* For more information about the restrictions imposed on civil society groups by Egypt's controversial *Law Governing the Pursuit of Civil Work No. 149 of 2019* (better known as *NGO Law*), see Human Rights Watch (2019), 'Egypt: New NGO Law Renews Draconian Restrictions', published 14.07.2019. In the same year, the former Presidential Council of the Libyan *Government of National Accord* (GNA) passed its

3.2. International perspectives: history of Arab attitudes towards international human rights law

Another key element to understand the positions of Arab states towards human rights is their behaviour on the international stage. This subchapter provides a brief historical analysis of how Arab states have influenced and reacted to the most significant international human rights endeavours that have been taking place since the adoption of the UDHR in 1948. This historical review aims to highlight key trends and commonalties with respect to Arab perceptions of international human rights law, yet it cannot reflect the entire spectrum of Arab positions given the large number of Arab states examined in this thesis and the extensive volume of international human rights instruments (conventions, declarations, global conferences, programmes, etc.) that occurred over the course of the past seven decades.

The relationship of the Arab world to the international human rights movement started positively in the late 1940s and during the 1950s. In 1948, the then-independent (or quasi-independent) Arab countries, Egypt, Iraq, Lebanon, and Syria, joined 44 other founding members of the United Nations in adopting the UDHR. Saudi Arabia was the only Arab country abstaining from the vote in the *UN General Assembly* alongside seven other states, including the Soviet Union, Yugoslavia, Poland, and South Africa.[334] The Arab world was even represented in the *Drafting Committee* of the UDHR by Charles Malik, then Lebanese delegate to the United Nations, refuting therewith "the claim of supporters of 'cultural relativism' that the concept of human rights is western in nature (…)."[335] The Declaration was generally hailed as a major achievement for humankind and its universal character was publicly endorsed by the UN delegates from Arab and Muslim-majority states.[336] The only substantial objections made by Arab states to the provisions of the Declaration concerned Art. 16 (on equal rights of women and men in marriage) and Art. 18 (addressing the right to

Presidential Decree No. 286 which includes "burdensome registration requirements and stringent regulations on funding" and several vaguely worded prohibitions such as implementing activities violating public order and morality, any activity not preauthorized or communicating with "political parties and entities" inside Libya (Human Rights Watch (2021), 'Libya: Draconian Decree Would Restrict Civic Groups', published 04.06.2021).

[334] Arzt, D. (1990), n140, p. 216.

[335] Abdellatif, A. M. (2004), n253, p. 333.

[336] See Arzt, D. (1990), n140, p. 215 as well as Johnston, D. L. (2015), n131, p. 120.

freedom of thought, conscious and religion which includes the right to change one's religion).[337] Saudi Arabia, Egypt, Syria and Iraq, among other Muslim-majority countries, repudiated Art. 16 of the UDHR primarily on the basis of the established consensus in classical Islamic law that a Muslim woman may not marry a non-Muslim man and in light of prevailing laws at that time making it more difficult for Arab-Muslim women to obtain a judicial divorce without the consent of their husbands.[338] The objection to Art. 18 was championed by Saudi Arabia, Iraq and Syria mainly on the basis of existing interpretations in *Shari'a* law prohibiting a Muslim to renounce his/her faith.[339] Eventually however, no Arab (or Muslim-majority) country voted against Art. 16 or Art. 18 in their final forms and only Saudi Arabia abstained.[340]

The positive contribution of Arab states in the early stages of the international human rights system continued in the 1950s, yet it was overshadowed by the struggle of many 'Third World' nations for independence from European colonial rule in times in which the Cold War had already created its own global tensions:

> "Human rights were one of the only topics on which the Third World diplomats could express an independent opinion, with little fear of Western or Soviet pressure. It was an opportunity that many embraced. Western states were content to cede leadership in the human rights program in exchange for solidarity in Cold War security matters elsewhere in the UN, which were accorded much greater priority."[341]

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[337] Johnston, D. L. (2015), n131, p. 119.
[338] *Ibid.* For more insights on the nearly universal prohibition of marriage of Muslim women to non-Muslim men in traditional *Shari'a* law, see Leeman, A. B. (2009), 'Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions', *Indiana Law Journal*, Vol. 84(2), pp. 756-758. An excellent overview on the evolution of Arab divorce laws and the legislative expansion of the grounds on which a Muslim wife could seek a judicial divorce from her husband (with or without his consent) can be found in Welchman, L. (2007), n227, pp. 107-132.
[339] Arzt, D. (1990), n140, p. 216. Whereas apostasy/conversion from Islam (irtidad) is generally viewed as a major sin (kabira*)* in *Shari'a* law, Muslim theologians have disagreed on the applicability of capital punishments for apostates. Apostasy remains socially despised in almost all Muslim-majority states but it can be punished with the death penalty in exceptional cases only in a few countries like Saudi Arabia, Yemen, and Mauritania (Schirrmacher, C. (2019), 'Leaving Islam', in Enstedt, D., Larsson, G. & Mantsinen, T. (eds.), 'Handbook of Leaving Religion', Leiden, The Netherlands: Brill, p. 84).
[340] Johnston, D. L. (2015), n131, pp. 119-120.
[341] Burke, R. (2010), 'Decolonisation and the Evolution of International Human Rights', *University of Pennsylvania Press*, p. 7.

Throughout the 1950s, Arab, Asian, and African delegates used the United Nations as a forum to promote the right to self-determination as well as the principles of national sovereignty and non-interference "with almost fanatical intensity."[342] The struggle for establishing self-determination as a collective human right served as an instrument for accelerating the end of colonialism and for achieving individual rights and civil liberties for those living under colonial rule.[343] This stood in sharp contrast to colonial cultural relativism embraced at that time by some Western powers (including Great Britain, France, Belgium and the Netherlands) resisting "any attempt to extend human rights to their colonies" and perceiving universal concepts of human rights as an "anticolonial threat."[344]

Arab diplomats participating in the human rights sessions of the *UN General Assembly Third Committee* (also known as the *Social, Humanitarian and Cultural Committee*) were at the forefront of the heated debate around human rights, self-determination and anticolonialism.[345] Among them were Bedia Afnan, Iraq's strong supporter of women's rights and major contributor to the formulation of Art. 3 of ICCPR and ICESCR on gender equality, who viewed self-determination as the core of all human rights, and Jamil Baroody, Saudi Arabia's long-serving representative to the United Nations (1946-1979) and one of the most influential figures in the history of the international human rights movement, for whom self-determination had to be achieved first before other human rights could be realised.[346] The impact these and other delegates from developing countries had on the international human rights project is well-reflected in the adoption of the right of self-determination in Art. 1 of ICCPR and ICESCR and in the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*.[347] The right to self-determination was also endorsed as the "pre-requisite of the full enjoyment of all fundamental Human Rights" in the joint Final Communiqué of the 1955 *Bandung Conference*, the first large-scale summit

[342] Ibid., p. 35.
[343] See Ishay, M. (2008), 'The History of Human Rights: From Ancient Times to the Globalization Era', *University of California Press*, pp. 191-198.
[344] Burke, R. (2010), n341, p. 114.
[345] Ibid., pp. 39-50.
[346] Ibid., p. 41, p. 43 and p. 118.
[347] See International Covenant on Civil and Political Rights (Art. 1), International Covenant on Economic, Social and Cultural Rights (Art. 1) and Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV), adopted 14 December 1960.

of African and Asian nations (including nine Arab states) and a landmark event in the long history of decolonisation.[348]

In the 1960s and 1970s, many developing countries (including several newly independent ones) had already transformed into authoritarian/absolutist regimes which regularly violated human rights to secure their power against domestic opposition or dissent.[349] The Arab world seamlessly joined this trend. Authoritarian regimes like Gamal Abdel Nasser's in Egypt, Houari Boumédienne's military regime in Algeria, Jaafar Nimeiry's socialist and Islamist one-party rule in Sudan, Hafez Al-Assad's secular pan-Arabist regime in Syria, Moktar Ould Daddah's dictatorship in Mauritania or King Faisal's absolutist rule in Saudi Arabia dominated the political landscape at that time.[350] The right to self-determination and the doctrine of non-intervention were now used as tools to shield these authoritarian regimes from international criticism concerning their human rights records and to denounce the international human rights project (especially civil and political rights) as a manifestation of Western neocolonialism/imperialism.[351] In other words:

> "Just as their colonial predecessors had, these [postcolonial] dictators abused the term culture to evade human rights scrutiny. They claimed to speak for their people, as the paternalistic arbiters of what was and was not consistent with the national culture, but without ever testing their legitimacy at the ballot box. Through their use of a notionally anti-imperialist doctrine, these postcolonial dictatorships had begun to resemble the colonial administrators that they professed to hate." [352]

The discreditation of human rights reached a regrettable level when the idea to create the post of *High Commissioner for Human Rights* was proposed and controversially debated within the *UN General Assembly* in the late 1960s and early 1970s. It was first and foremost the Soviet Union and the Arab coalition within the *General Assembly* which led the opposition to the establishment of the *High Commissioner*, mainly because he/she was to be directly appointed by the *UN Secretary-General* (not by the *General Assembly* member

[348] Final Communiqué of the Asian-African Conference of Bandung (24 April 1955), section C1, p. 4.
[349] Burke, R. (2010), n341, p. 58. See also p. 129, p. 132 and p. 134.
[350] A comprehensive analysis of the postcolonial political systems of the Arab world, whether nationalist republics or conservative kin-ordered monarchies, can be found in Ayubi, N. (1996), n79, pp. 196-255.
[351] See Burke, R. (2010), n341, p. 132 and pp. 136-137.
[352] Ibid., p. 144.

states themselves) and equipped with the powers to flag and examine human rights violations anywhere in the world.[353] UN delegates from Egypt, Sudan, Saudi Arabia, Syria, Yemen and other Arab states campaigned tirelessly to convince other African and Asian states to reject the *High Commissioner* under the pretext that their national sovereignty would be endangered.[354] Sudan's delegate to the *Third Committee* El Sheikh, for example, declared in one of the *Third Committee* meetings in 1969 that the *High Commissioner* "would make no positive contribution to the promotion of human rights and fundamental freedoms and could not in any way be justified" and emphasised his country's rejection of "any form of supervision."[355] In a 1970 session of the *Third Committee,* Syria's representative El-Fattal added that "[t]he fact that none of the imperialist, neo-colonialist and racist Powers had ratified the most important humanitarian conventions was an indication that those same Powers which strongly supported the creation of the post would exert pressure to turn it into a tool for intervention in the internal affairs of the anti-imperialist States."[356]

The decade-long *High Commissioner* controversy gave birth to a new normative trend within the UN human rights arena which Burke identifies as "radical cultural relativism."[357] Starting in the late 1960s and led by several developing countries, the universality of human rights was openly questioned and attacked as a Western concept that did not suit other cultures and civilisations.[358] At the centre of this debate was the Saudi delegate Jamil Baroody, "the chief theologian of radical cultural relativism", who used the *Third Committee* as a global platform to win the Afro-Asian bloc in the UN *General Assembly* for his rejection of the universality of human rights.[359] In 1973, he presented himself as the unofficial human

[353] Ibid., p. 131.
[354] Ibid., pp. 134-136.
[355] General Assembly, 24th session, official records, 3rd Committee, 1730th meeting, held on Tuesday, 9 December 1969, Agenda Item 53 (Creation of the post of United Nations High Commissioner for Human Rights continued), paragraphs 21-22, pp. 475-476.
[356] General Assembly, 25th session, official records, 3rd Committee, 1812th meeting, held on Monday, 7 December 1970, Agenda Item 46 (Creation of the post of United Nations High Commissioner for Human Rights), paragraph 6, p. 432.
[357] See Burke, R. (2010), n341, pp. 130-136.
[358] See Eckel, J. (2014), 'The Rebirth of Politics from the Spirit of Morality: Explaining the Human Rights Revolution of the 1970s', in Eckel, J. & Moyn, S. (eds.), 'The Breakthrough: Human Rights in the 1970s', *University of Pennsylvania Pres*s, pp. 239-240. See also Burke R. (2010), n341, pp. 137-141.
[359] Burke R. (2010), n341, p. 132.

rights speaker of the Arab world and attacked Western states accusing them of disrespecting the cultural and ideological particularities of other regions in the world:

> "As for the States of western Europe (…), they already had a regional body, namely, the Council of Europe, and instead of concerning themselves with what might be happening in Asia, Africa or Latin America, they would do better to devote themselves to the problems of their own region (…). The Arab countries (…) could never allow themselves to be lectured to by anyone who was not familiar with Islamic law; those countries had their own traditions, customs and ideologies and their own economic and social systems."[360]

During the 1980s and 1990s, cultural relativism remained the official human rights ideology advocated by most developing countries, Arab states included.[361] In these two decades, the global relativist discourse was marked by two major strategies adopted by the 'Third World': a belligerent affirmation of economic, social and cultural rights at the expense of civil and political rights, and a distinct orientation towards championing regional declarations that reflected relativist human rights positions.[362]

Accelerated by the struggle of 'Third World' ('Global South') countries for alleviating poverty and reducing global economic inequalities and dependencies from the more advanced states of the 'Global North', the right to development emerged as a centrepiece in the relativist human rights discourse adopted by developing countries in the last quarter of the 20th century.[363] Economic prosperity and socio-economic rights were now prioritised by

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[360] General Assembly, 28th session, 3rd Committee, 2047th meeting, Monday, 3 December 1973, paragraph 74, p. 416. Another symptom of Arab dissociation with the international human rights system concerns the first efforts of Arab states to establish their own regional human rights system under the umbrella of the *League of Arab States* in the late 1960s. The *Arab Commission of Human Rights* was founded by the *Council* of the *League* in 1968, with the aim of strengthening the human rights cooperation between Arab states in accordance with their own shared norms and heritage and as a platform for protecting Arab populations living in territories occupied by Israel in the 1967 war (see O'Sullivan, D. (1998), 'The history of human rights across the regions: Universalism vs cultural relativism', *The International Journal of Human Rights*, Vol. 2(3), pp. 32-33). A detailed analysis of the Arab human rights system can be found in Chapters 4 and 5.

[361] Burke R. (2010), n341, p. 114 as well as Hollinger, D. (2003), 'Cultural Relativism', in Porter, T. & Ross, D. (eds.), 'The Cambridge History of Science', *Cambridge: Cambridge University Press*, p. 708.

[362] See Koshy, S. (1999), 'From Cold War to Trade War: Neocolonialism and Human Rights', *Social Text*, No. 58 (Spring), pp. 8-11 and p. 24.

[363] Ibid., p. 8

the majority of UN member states over the enjoyment of civil and political rights.[364] The wording of Art. 1 of the *Declaration on the Right to Development*, which was adopted in 1986 by a large majority of votes in the *UN General Assembly*, suggests that the fulfilment of the right to development is a prerequisite for the realisation of all other human rights and freedoms:

> "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[365]

Although the *Declaration* is not a legally binding international human rights instrument, it well reflects the developmental type of cultural relativism prevailing within the United Nations at that time. While it was celebrated as a major victory by the 133 states who voted in favour of its adoption (including the entire Arab bloc in the UN), the 23 Western states abstaining from the vote or rejecting the *Declaration* highlighted its non-binding character and ensured that the right to development should "never be interpreted as a greater priority than political and civil rights, that it was totally non-binding, and that it carried no resource-transfer obligations." [366] Mr. Korhonen, who represented Finland in the *UN General Assembly*, explained for example why his government, alongside the governments of Denmark, Sweden, and Iceland, has abstained from voting in favour of the *Declaration on the Right to Development*:

> "The question of safeguarding the integrity of the human person against oppression and abuse of power by State authorities should be our main concern. We are worried that by elevating the right to development to a human right, the protection of the human person against oppression by State authorities may be jeopardized (…) We also regret the tendency to stress the rights of States rather than the human rights of

[364] Ibid., p. 8. See also Donnelly, J. (1981), 'Recent Trends in UN Human Rights Activity: Description and Polemic', *International Organization*, Vol. 35(4), p. 635.
[365] Declaration on the Right to Development, General Assembly resolution 41/128, adopted 04.12.1986, Art. 1. The right to development is also enshrined in Art. 22 of the 1981 *African Charter on Human and Peoples' Rights* which came into force in 1986.
[366] Uvin, P. (2007), 'From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development', *Development in Practice*, Vol. 17(4/5), p. 598. See also Koshy, S. (1999), n362, p. 8.

the individual, and economic and social rights more than civil and political rights."[367]

The zenith of global cultural relativism was reached in the early 1990s in the lead-up to the *1993 World Conference on Human Rights* in Vienna.[368] Four declarations/communiqués were endorsed by regional groups with the aim of defining their positions on the universality of human rights: the *Cairo Declaration on Human Rights in Islam* (adopted by member states of the *Organisation of Islamic Cooperation*, including all Arab states, on 5 August 1990)[369], the *Tunis Declaration* (adopted by African states, including all Arab-African countries, on 6 November 1992)[370], the *San José Declaration* (adopted by Latin American and Caribbean states, on 22 January 1993)[371], and the *Bangkok Declaration* (adopted by Asian states, including the Arab states of Bahrain, Iraq, Kuwait, Oman, Syria and the UAE, on 2 April 1993).[372] Although the *Tunis, San José* and *Bangkok Declarations* highlighted the commitment to the universality and indivisibility of human rights, the UN Charter and the International Bill of Rights, they unambiguously summed up the major attitudes developing countries have been campaigning for throughout the past decades: preservation of national sovereignty, non-interference in internal affairs, respect for national/regional cultures and ideologies, and a greater focus on economic, social and cultural rights, particularly the right to development.[373]

The *Tunis Declaration*, for example, recognises that the "universality of human rights is beyond question" but appears to relativise this commitment on the implementation level by providing that "no ready-made model can be prescribed at the universal level" for the observance and promotion of human rights "since the historical and cultural realities of each

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[367] General Assembly document A/41/PV. 97 (11.12.1986), 'Provisional Verbatim Record of the 97th Meeting Held at Headquarters, New York, on Thursday, 4 December 1986', p.77.
[368] Burke R. (2010), n341, p. 141.
[369] Cairo Declaration on Human Rights in Islam, 19th Islamic Conference of Foreign Ministers in Tehran, Organisation of Islamic Cooperation, 31 July to 5 August 1990.
[370] Final Declaration of the Regional Meeting for Africa of the World Conference on Human Rights ("Tunis Declaration"), Tunis, 2-6 November 1992.
[371] Final Declaration of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights ("San José Declaration"), San Jose, Costa Rica, 18-22 January 1993.
[372] Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights ("Bangkok Declaration"), Bangkok, 29 March-2 April 1993, pp. 3-7.
[373] See Koshy, S. (1999), n362, pp. 10-14. See also Pollis, A. (1996), 'Cultural Relativism Revisited: Through a State Prism', *Human Rights Quarterly*, Vol. 18(2), p. 331.

nation and the traditions, standards and values of each people cannot be disregarded."[374] Similarly, the *Bangkok Declaration* recognises that universal human rights must be considered "bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[375] It also reaffirms the right to development as a universal human right and acknowledges that the "main obstacles to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor."[376]

Containing a total of 14 references to *Shari'a* law across 25 articles, the *Cairo Declaration on Human Rights in Islam* constitutes an extreme form of cultural relativism.[377] Although it is not a legally binding document in international law, the *Cairo Declaration* deserves attention as it serves "as a general guidance for Member States in the field of human rights" and as it is explicitly mentioned in the Preamble of the 2004 *Arab Charter on Human Rights* which shall be analysed in more detail in Chapter 5.[378] The *Cairo Declaration* fails to mention the *Charter of the United Nations* or any of the core international human rights documents/treaties (UDHR, ICCPR, ICESCR, the *UN Convention Against Torture* (CAT), etc.) by a single word and instead subjects all the rights and freedoms stipulated therein to the *Shari'a* (Art. 24) which is the only source of reference for the explanation or clarification of any of the articles of the Declaration (Art. 25).[379] Other provisions in the *Cairo Declaration* considered to be incompatible with international human rights standards include, for example, the restriction of the freedom from bodily harm if a *Shari'a* prescribed reason exists (Art. 2d), the unequal rights status of women (Art. 6a stipulates merely that women are equal to men in human dignity), limiting the enjoyment of the right to free

[374] Tunis Declaration 1992, n370, paragraphs 2 and 5 (pp. 1-2).
[375] Bangkok Declaration, n372, paragraph 8 (p. 5).
[376] Ibid., paragraph 18 (p. 6). The influence of Arab-Asian states in the drafting of the *Bangkok Declaration* is among others expressed in paragraph 16 which affirms the support for the right of the Palestinian people to self-determination and independence and demands an immediate end to "the grave violations of human rights in the Palestinian, Syrian Golan and other occupied Arab territories including Jerusalem."
[377] Cairo Declaration on Human Rights in Islam, n369, Preamble, Art. 2 (right to life), Art. 7 (children's rights), Art. 12 (freedom of movement, right to asylum), Art. 16 (right to scientific, literary, and artistic production), Art. 19 (no crime or punishment except provided for in the *Shari'a*), Art. 22 (freedom of expression), Art. 23 (right to assume public office) as well as Art. 24 and Art. 25.
[378] Ibid., introductory paragraph, as well as League of Arab States, Arab Charter on Human Rights (15 September 1994), Preamble. See also Schlager, B. (2015), 'The Cairo Declaration on Human Rights and the Arab Charter on Human Rights in Comparison' [in German], *University of Vienna*, pp. 26-27.
[379] Ibid., Art. 24 and 25.

movement to men (Art. 12), and the restriction of the freedom of expression if it contradicts the principles of *Shari'a* (Art. 22).[380] As it omits further defining what *Shari'a* law is (Islamic law is after all a product of human interpretation by Muslim jurists and theologians as discussed earlier in subchapter 2.2.1.), the *Cairo Declaration* essentially opens the door for states applying ultraconservative interpretations of *Shari'a* to justify capital punishment, apostasy laws, discriminatory legislation against women/minorities and the implementation of other puritan Islamic practices as being perfectly in line with the provisions of the Declaration.[381]

It comes as no surprise therefore that the aforementioned regional Declarations, three of which were adopted just a few months before the *World Conference on Human Rights* was held in Vienna on 14-25 June 1993, have cast their shadow over the *Vienna Declaration and Programme of Action* which was adopted by consensus at the end of the Conference. Although Western states celebrated the *Vienna Declaration* as a victory for the universality of human rights, a careful examination of the document reveals that profound concessions were made by the West to advocates of cultural relativism:

> "Most of the rights to which the participating states committed themselves, with a few exceptions, are general principles open to varying interpretations. Of utmost significance to the Western advocates of the universality of the liberal doctrine of individual human rights is the fact that in order to achieve unanimity, the Declaration omits any reference to the [ICCPR] per se and to the rights of the individual *qua* individual (…) By contrast, the Declaration specifically reaffirms the [ICESCR], and makes repeated references to the problem of poverty and to the need for economic development (…) The text of the Declaration repeatedly urges states to take the necessary actions and to adopt the appropriate measures to further the implementation of rights. However, implementation is by states, thereby excluding the authority of regional or international organs. The primacy of sovereignty remains unchallenged (...) Nor are there any provisions delegating any

[380] Ibid., Art. 2d, 6a, 12 and 22.
[381] See Dhouib, S. (2012), 'Die kritische Diskussion der Menschenrechte. Stimmen aus dem arabisch-islamischen Kulturraum', *MenschenRechtsMagazin*, Heft 1 / 2012, pp. 47-48. A comprehensive analysis of the *Cairo Declaration* can be found in Schlager, B. (2015), n378, pp. 13-28.

power of enforcement to a supranational organ. By placing the onus on individual states, albeit emphasizing cooperation particularly at the regional level, states retain the freedom to interpret provisions of the Declaration as they see fit."[382]

The three regional Declarations adopted with Arab participation (Cairo, Tunis, Bangkok) and the *Vienna Declaration* have set the framework for the conduct of Arab states towards international human rights mechanisms from the second half of the 1990s onwards. By ratifying some of the core international human rights covenants such as the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), the *United Nations Convention on the Rights of the Child* (CRC) and the CAT at a visibly higher rate during the 1990s and 2000s, Arab states could at least demonstrate their formal commitment to the universality of human rights in order to "avoid embarrassment" and "preserve their prestige" vis-à-vis Western states and the international human rights community.[383] At the same time, Arab states continued to enter reservations into the human rights conventions they have ratified. By lodging contentious *Shari'a*-based reservations to international human rights treaties like the CEDAW and CRC (see subchapter 3.3.), Arab nationalistic/authoritarian regimes attempted to regain credibility by presenting themselves to their mostly conservative populations as guardians of Islamic law and heritage.[384] This had a practical legitimising effect for some Arab governments which were at that time challenged domestically by a growing societal influence from Islamist opposition movements, for example the *Muslim Brotherhood* in Egypt, the *National Islamic Front* in Sudan, the *Renaissance Party "Ennahda"* in Tunisia, the *Islamic Action Front* in Jordan, or the *Justice and Development Party* in Morocco.[385] This form of state-sponsored cultural

[382] Pollis, A. (1996), n373, pp. 330-332.
[383] Chekir, H. (2023), online interview with researcher on 27.01.2023, English transcript documented by the researcher, p. 4. See also UNDP (2009), 'Arab Human Development Report 2009: Challenges to Human Security in Arab Countries', *United Nations Development Programme, Regional Bureau for Arab States*, p. 59.
[384] See Johnston, D. L. (2015), n131, pp. 121-122. See also Ibrahim, S. E. (1993), 'Crises, Elites, and Democratization in the Arab World', *Middle East Journal*, Vol. 47(2), pp. 294-296, as well as Hovsepian, N. (1995), 'Competing Identities in the Arab World', *Journal of International Affairs*, Vol. 49(1), pp. 22-24. A more in-depth discussion of reservations entered by Arab states in selected international human rights treaties can be found in subchapter 3.3.
[385] An insightful analysis of the relationship between Arab nationalistic/authoritarian regimes and Islamist movements before and during the 1990s can be found in Esposito, J. (2000), 'Contemporary Islam: Reformation or Revolution', in Esposito, J. (ed.), 'The Oxford History of Islam', *Oxford University Press*, pp. 668-674.

relativism was decisively rejected by secular Arab human rights organisations and defenders who have been consistently championing universal human rights since the 1960s until now. Their convictions reached a large-scale international audience in April 1999 when the *Casablanca Declaration of the Arab Human Rights Movement* was adopted by more than 100 independent Arab human rights organsiations at the *First International Conference of the Arab Human Rights Movement*:

> "(…) the Conference declared that the only source of reference in this respect is international human rights law and the United Nations instruments and declarations. The Conference also emphasized the universality of human rights (…) The Conference examined the international setting and conditions affecting the status of human rights specifically in the Arab world and affirmed the following: (…) Rejecting the manipulation by some Arab governments of patriotic sentiments and the principle of sovereignty so as to avoid complying with international human rights standards. Rejecting any attempt to use civilizational or religious specificity to contest the universality of human rights. Commendable specificity is that which entrenches the dignity and equality of citizens, enriches their culture and promotes their participation in the administration of public affairs."[386]

The ambivalent human rights *realpolitik* of Arab governments remained more or less in effect throughout the 2010s, yet it was overshadowed by the popular uprisings of the so-called *Arab Spring* which shook several Arab states in 2010/2011 (among others Tunisia, Egypt, Syria, Libya, Bahrain, Yemen, Iraq and Sudan) and which - to varying degrees - resulted in the collapse of ruling regimes, the outbreak of civil wars, the resurgence of repressive structures and the prevalence of extreme human rights violations.[387] Affected Arab governments re-imposed emergency laws domestically and justified the crackdown on human rights with the necessity to restore peace, fight terrorism and prevent the collapse of the state order, yet when they submitted their international reports they made sure to use

[386] The Casablanca Declaration of the Arab Human Rights Movement (1999), *Netherlands Quarterly of Human Rights,* Vol. 17(3). See also International Federation for Human Rights (1999), 'The declaration of Casablanca: Arab human rights NGOs take up the new challenges', published 13.06.1999.
[387] Robinson, K. & Merrow, W. (2020), 'The Arab Spring at Ten Years: What's the Legacy of the Uprisings?', *Council on Foreign Relations*, published 03.12.2020.

human rights mechanisms as platforms to defend their actions.[388] This discourse is well reflected - albeit in an extreme form - in the national report submitted by Syria to the 2nd Cycle of the *Universal Periodic Review* (UPR) in 2016. Accused of gross war crimes and violations of international humanitarian and human rights law (the list of accusations covers torture, arbitrary detention, forced disappearances, the deliberate targeting of civilians and the indiscriminate bombing of residential areas and medical facilities), the Syrian delegation to the *UN Human Rights Council* denied all charges and responded by putting the full blame on the insurgents/terrorists it was fighting:

> "The Syrian Arab Republic reaffirms its constant observance of the provisions of the Charter and the principles of international law and international human rights instruments on the basis of its firm conviction that peace and security may be strengthened at the national and international levels by respecting and protecting human rights and fundamental freedoms. Nor should States pursue aggressive policies towards certain countries and intervene in their affairs (…) [Syria] abides by its duty to protect its citizens at the same time as it continues to combat terrorism, a right guaranteed to it by international law and the Charter of the United Nations under the heading of self-defence and the defence of its people and territory from terrorist aggression."[389]

On a more positive note, and as the last two decades (2000-2020) saw a substantial proliferation of bi- and multilateral development programmes, Arab states continued their active engagement in promoting economic, social and cultural rights as well as the right to development in the different international fora. The *Millennium Development Goals* (adopted in 2000 by all UN member states) and the subsequent *Sustainable Development Goals* (setting the development targets to be achieved by states from 2016 until 2030)

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[388] For more information about emergency laws enacted by Tunisia, Bahrain, Yemen, and other Arab states at the height of the Arab Spring, see Erakat, N. (2011), 'Emergency Laws, the Arab Spring, and the Struggle Against Human Rights', *Jadaliyya*, published on 05.07.2011. Interestingly, as of August 2024, only three Arab states (Iraq, Kuwait and Qatar) have no overdue reporting obligations for the UN treaty bodies they are members of (UN Treaty Body Database (2024), List of States parties without overdue reports, accessed 28.08.2024).

[389] Human Rights Council, Working Group on the Universal Periodic Review, 26th session, 31 October – 11 November 2016, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Syrian Arab Republic, UN document A/HRC/WG.6/26/SYR/1, paragraphs 1 and 4 (p. 3).

were/are embraced by all Arab governments and have accelerated the transfer of enormous amounts of development assistance to Arab states, especially to those listed by the *Organisation for Economic Co-operation and Development* (OECD) as least developed countries (Djibouti, Mauritania, Comoros, Somalia, Sudan and Yemen), lower middle income countries (Egypt, Jordan, Morocco, Syria and Tunisia) and upper middle income countries (Algeria, Iraq and Libya).[390]

In conclusion, the brief historical overview provided with respect to the international human rights attitudes of Arab states has mainly revealed that human rights were consistently utilized as instruments through which political interests could be achieved or defended.[391] Modern human rights were first used by Arab states to accelerate decolonisation and achieve self-determination (1940s-1950s), then the universality of human rights was discarded in favour of cultural relativism to shield authoritarian regimes from foreign interventionism (1960s-1970s), and finally the promotion of socio-economic rights and the right to development were given priority to divert attention from widespread violations of civil and political rights prevailing in most Arab states (1980s-today). Although the participation of Arab states in international human rights mechanisms has steadily increased over time (most recently Sudan ratified the CAT, and the *Convention for the Protection of All Persons from Enforced Disappearance*, ICPPED, in 2021), Arab governments made sure that their international human rights obligations did not contradict their domestic and international political preferences.[392] Entering substantial reservations to international human rights treaties was one of the central lawful strategies through which Arab governments sought to preserve what they see as national interests. This shall be further examined in the subsequent subchapter 3.3.

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[390] See OECD (2020), 'Development Assistance Committee (DAC) List of ODA Recipients effective for reporting on 2020 flows'. In the decade between 2010 and 2019 four Arab states (Syria, Jordan, Iraq, and Yemen) were among the top 10 recipients of Official Development Assistance (ODA) in the world (Ilasco, I. (2021), 'The TOP-10 ODA recipients in 2019', *DevelopmentAid*, published on 15.07.2021).

[391] Contrary to the normative/moralist approach which views human rights as "fundamental moral rights people enjoy solely by virtue of their humanity", the political approach regards human rights as "a political-legal construct that emerged under particular circumstances" and that, therefore, should be interpreted in light of the role human rights "are meant to play in contemporary international politics." (Valentini, L. (2012), 'In What Sense are Human Rights Political? A Preliminary Exploration', *Political Studies*, Vol. 60, pp. 180-181).

[392] A good analysis of Sudan's human rights reforms and its openness towards international human rights mechanisms in the time between 2019 and 2021 can be found in Amnesty International (2021), 'Sudan 2021', accessed 04.02.2023.

This is not to suggest, however, that the entire Arab engagement in the genesis of the international human rights was only guided by the self-interest of the ruling elites. Human rights diplomats like Bedia Afnan (Iraq), Charles Malik (Lebanon) and Cherif Bassiouni (Egypt) have without a doubt enriched the international human rights movement in the different stages of its evolution and have supported its normative advancement significantly.[393] Independent Arab human rights organisations (such as *Al-Haq* in Palestine, the *Al-Nadeem Center for the Rehabilitation of Victim of Violence and Torture* in Egypt, the *Tunisian Association of Democratic Women* ATFD, or the Mauritanian *Human Rights Observatory* OMADHD) are also playing an essential role by regularly participating in UN Charter based mechanisms and treaty monitoring bodies and by submitting alternative/shadow reports that better reflect the actual human rights situation on the ground in Arab states.[394]

3.3. Arab ratification overview of the principal international and African human rights treaties

In the previous subchapter, I illustrated how Arab states have generally positioned themselves towards international human rights throughout the past seven decades. The purpose of this subchapter is to complement the findings from the geo-political and historical discussion by analysing Arab state practice as mirrored in their ratification of (or accession/succession to) the core international human rights treaties and the reservations, understandings, and declarations they have entered thereto. These are in my opinion two useful indicators that adequately reflect the attitudes of Arab states regarding international human rights law. A short analysis of Arab engagement in the African human rights system shall bring this subchapter to an end.

According to Art. 14 (1) and Art. 16 of the *Vienna Convention on the Law of Treaties* (VCLT, 1969), the consent of a state to be bound by a treaty is expressed by ratification,

[393] For a brief overview on Cherif Bassiouni's contributions to international human rights law, see O'Donnell, M. (2017), 'DePaul's M. Cherif Bassiouni, global 'champion of justice', dead at 79', *Chicago Sun Times*, published 27.09.2017.

[394] See for example the Submission from the Lebanese Transparency Association to the UN Committee on Economic, Social and Cultural Rights (23 August 2016) containing detailed remarks in relation to the State Party Report of Lebanon to the Committee (E/C.12/LBN/2), or the Alternative Report (February 2018) submitted by the Algerian *Fédération Algérienne des Personnes Handicapées* to the *Committee on the Rights of Persons with Disabilities* (CRPD).

acceptance, approval, or accession.[395] As most Arab states follow the dualist tradition in international law, the ratification of an international treaty is finalised upon approval on the national level (usually by the competent legislature) and upon enactment of the treaty into binding domestic law.[396] Egypt's Constitution, for example, provides in Art. 151 that "[t]he President of the Republic represents the state in foreign relations and concludes treaties and ratifies them after the approval of the House of Representatives. They shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution."[397] A similar clause is included in Art. 70 of Kuwait's Constitution stating that "[t]he Amir shall conclude treaties by Decree and shall communicate them immediately, accompanied by relevant details, to the National Assembly. After ratification (…) and publication in the Official Gazette the treaty shall have force of law."[398] Art. 20 of Tunisia's Constitution provides that "[i]nternational agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution."[399] Apart from the discussion around the technicalities of how international human rights obligations are enforced on the domestic level, one of the fundamental questions asked by scholars of international law and political science is "why a government would sacrifice some of its sovereignty by submitting itself to a set of externally imposed legal constraints."[400] And does the act of international treaty ratification and the possible loss/transfer of sovereignty associated with it not contradict the consistent Arab pursuit of self-determination and non-interference in their internal affairs outlined in the preceding subchapter?

According to rational choice (neorealist) theorists like Goldsmith and Posner, international law serves as one of the tools through which states, the principal actors on the international stage, can "maximize their interests given their perception of the interests of other states and

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[395] Vienna Convention on the Law of Treaties (1969), UN Treaty Series, Vol. 1155.
[396] See Arzt, D. (1990), n140, pp. 220-221. In pure monist legal systems, international law is automatically incorporated into domestic law. National laws that contradict international obligations must be amended and brought in line with international law (Denza, E. (2018), 'The Relationship between International and National Law', in Evans, M. (ed.), 'International Law (5th edition)', *Oxford University Press*, p. 388).
[397] Egypt's Constitution of 2014 with Amendments through 2019, Art. 151.
[398] Kuwait's Constitution of 1962, reinstated in 1992, Art. 70.
[399] Tunisia's Constitution of 2014, Art. 20.
[400] Hill, D. W. (2016), 'Avoiding Obligation: Reservations to Human Rights Treaties', *The Journal of Conflict Resolution*, Vol. 60(6), p. 1130. See also Cassel, D. (2001), 'A Framework of Norms: International Human-Rights Law and Sovereignty', *Harvard International Review*, Winter 2001, Vol. 22(4), pp. 60-63.

the distribution of state power."[401] In this regard, states decide to commit to the provisions of international (human rights) treaties either because they expect certain political and economic gains from ratification or because they are keen on avoiding possible damages/losses in relation to other states. Since the international human rights regime is relatively weak in terms of monitoring, compliance, and enforcement (as compared for example with international regimes of trade or finance), states are inclined to ratify human rights treaties because they do not fear serious consequences in case of non-compliance:

> "(…) international human rights treaties do not exert any independent effect on the behavior of countries. If governments respect human rights, they do so because it coincides with their interests. The coincidence of interest can be a result of domestic political pressure (as is the case in liberal democracies), the consequence of cooperation (as might be the case when two states have each other's ethnic groups residing in their territories as minorities), or the consequence of external coercion (…) countries never respect human rights simply because they feel obliged to comply with international law (…) authoritarian states typically ignore human rights norms codified in international treaties, unless they are coerced or find it otherwise in their interest to respect human rights, which is rarely the case. The low cost of noncompliance means that they can easily ratify such treaties."[402]

Contrary to this perspective, liberal/constructivist theorists like Neumayer reject the view that only state interests shape the international system in general and international human rights regimes specifically. Instead, they emphasise that norms, moral principles, fairness, and altruism significantly influence the modus operandi of the international human rights system and the manoeuvring of states therein.[403] This approach gives more weight to domestic non-governmental organisations, human rights defenders, courts, protest movements as well as transnational human rights advocacy networks which can change how

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[401] Goldsmith, J. & Posner, E. A. (2021), 'The limits of international law fifteen years later', *Chicago Journal of International Law*, Vol. 22(1), p. 114.
[402] Neumayer, E. (2007), 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties', *The Journal of Legal Studies*, Vol. 36(2), *The University of Chicago Press*, pp. 400-401 (in reference to Goldsmith, J. and Posner, E. A. (2005), 'The Limits of International Law', New York: Oxford University Press).
[403] Ibid., p. 401. See also Neumayer, E. (2005), 'Do International Human Rights Treaties Improve Respect for Human Rights?', *Journal of Conflict Resolution*, Vol. 49(6), pp. 929-931.

states view international law, namely as a chance and not necessarily as a threat to their interests.[404] By persuading and by praising those states that accept to be bound by international norms, the international human rights community - so the argument goes - can create an environment in which "countries are more likely to regard treaties as legitimate and are therefore more likely to support and comply with treaties that have been negotiated in a process that even less powerful countries regard as fair."[405]

Scholars of international law are equally divided in their assessment of states restricting their commitment to human rights treaties by placing reservations, understandings or declarations upon ratification and the consequences these can have on the effectiveness of international human rights instruments.[406] The VCLT defines a reservation as a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[407] By contrast, understandings can be defined as "interpretive statements that clarify or elaborate on a treaty's terms without altering the treaty's text or legal effect" and declarations can be defined as statements that reflect a state's opinion or position on issues related to a particular treaty.[408] Although understandings and declarations usually do not "purport to exclude or modify the legal effects of a treaty", the wording of a declaration can possibly constitute a reservation.[409] Art. 19 of the VCLT allows states to formulate a reservation unless it is prohibited by the treaty or unless it is "incompatible with the object and purpose of the treaty."[410] The VCLT makes

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[404] See Koh, H. H. (1999), 'How is International Human Rights Law Enforced', *Indiana Law Journal*, Vol. 74(4), pp. 1409-1411, as well as Helfer, L. R., & Slaughter, A. (1997). 'Toward Theory of Effective Supranational Adjudication', *Yale Law Journal*, Vol. 107(2), p. 333.
[405] Neumayer, E. (2007), n402, p. 402. See also Hill, D. W. (2016), n400, p. 1130.
[406] Ibid., p. 398.
[407] Vienna Convention on the Law of Treaties (1969), n395, Art. 2(1)(d).
[408] Congressional Research Service (2022), 'Reservations, Understandings, Declarations, and Other Conditions to Treaties', IN FOCUS, published 07.09.2022, accessed 05.10.2024.
[409] See Treaty Handbook (2013), Treaty Section of the UN Office of Legal Affairs, pp. 16-18.
[410] Vienna Convention on the Law of Treaties (1969), n395, Art. 19(a) and 19(c). In General Comment No. 24 (1994), the *Human Rights Committee* has claimed for itself the right to determine whether a reservation is compatible with the object and purpose of the ICCPR or not (although the ICCPR itself does not contain a provision concerning the object and purpose test). It established a precedential rule that the "normal consequence of an unacceptable reservation is not that [ICCPR] will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that [ICCPR] will be operative for the reserving party without benefit of the reservation." It also provided that a reservation offending peremptory norms would not be compatible with the object and purpose of the ICCPR (Human Rights Committee *(*1994),

it possible for other treaty parties to object a reservation (Art. 20 (4)(b)), in which case the provisions affected by the reservation would not enter into force between the objecting and the reserving states.[411] A reservation is considered accepted by treaty parties if they do not officially object to a state's reservation within a year of notification.[412]

According to Neumayer, scholars of international law "are deeply divided in their views of the role RUDs play, their legitimacy, and their consequences for the international human rights regime."[413] He distinguishes two competing positions on reservations, understandings and declarations:

> "From one perspective, RUDs are a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity across nations (…) From the competing second account, however, RUDs are regarded with great concern, if not hostility. This is because of the supposed character of human rights as universally applicable, which is seen as being undermined if countries can opt out of their obligations."[414]

Assessing state behaviour, Hill summarises the attractiveness of reservations, understandings and declarations for states as follows:

> "[RUDs are] attractive to governments who wish to avoid being perceived as deviant but wish to also avoid the domestic legal consequences of full ratification (…) The prevalence of RUDs in human rights law indicates that while states are keen to publicly embrace human rights norms, they also view unconditional ratification as potentially costly. The possibility of entering RUDs means that

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'General Comment No. 24', UN document CCPR/C/21/Rev.1/Add.6, 11 November 1994, paragraphs 18 and 8).

[411] Vienna Convention on the Law of Treaties (1969), n395, Art. 20(4)(b).

[412] Ibid., Art. 20(5). A good analysis of the validity and effect of objections to reservations can be found in Mullins, L. (2020), 'The Ramifications of Reservations to Human Rights Treaties', *Groningen Journal of International Law,* Vol. 8(1): Open Issue, pp. 152-153.

[413] Neumayer, E. (2007), n402, p. 398.

[414] Ibid. See also Zvobgo, K., Sandholtz, W. & Mulesky, S. (2020), 'Reserving Rights: Explaining Human Rights Treaty Reservations', *International Studies Quarterly*, Vol. 64, p. 787.

governments can have it both ways, expressing general support for the notion of human rights while being non-committal from a formal, legal standpoint."[415]

Hill's findings very much pertain to the general attitude of Arab states towards international human rights instruments. On the one hand, the ratification records of international human rights treaties reveal that Arab states (among other Muslim-majority countries) are not fundamentally averse to international human rights law.[416] On the other hand, by placing reservations in international human rights treaties, Arab states ensured that the domestic legal effects of treaty ratification could be kept under control.[417] Hereafter, I would like to substantiate this conclusion by discussing some empirical data collected in relation to Arab ratification of international human rights treaties and reservations, understandings and declarations placed therein.

Table 5 presents the status of ratification/accession to the 18 existing international human rights treaties by the 22 Arab states and by 22 randomly selected non-Arab states that represent the different geographical regions (Africa, the Americas, Asia, Australia, and Europe).[418] The main finding of Table 5 is that Arab states have on average ratified 10 international human rights treaties which is not significantly less than the average of 12 treaties ratified by the 22 selected non-Arab states. Interestingly, the Arab states with the least number of ratifications (the Comoros and the UAE with six) have still ratified more international human rights treaties than the United States (five).[419] Tunisia and Morocco

[415] Hill, D. W. (2016), n400, p. 1130. Zvobgo, Sandholtz and Mulesky further clarify that a "state may reserve on a particular obligation if it believes it will be unable to comply later. Under this logic, it is better to avoid or dilute an obligation than to accept it and subsequently violate it." (Zvobgo, K., Sandholtz, W. & Mulesky, S. (2020), n414, p. 788). Since "a reservation does not provide the basis for rights litigation in domestic courts that a violation can", they argue that "the costs of reserving are lower on average than the costs of violation." (Ibid., p. 789).

[416] See Baderin, M. A. (2001), 'A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict of Congruence', *Human Rights Law Review*, Vol. 1(2), p. 269.

[417] Ibid., pp. 270-271.

[418] The data presented in Table 5 are based on the OHCHR Status of Ratification Interactive Dashboard (as of October 2024) and on the UN Treaty Body Database (as of October 2024). The 18 treaties examined include the ICCPR, ICESCR, ICERD, CAT, CEDAW, CRC, ICPPED, ICWM, CRPD and nine Optional Protocols.

[419] Only Bhutan (four) has ratified less international human rights treaties than the United States (OHCHR Interactive Dashboard, n332).

(with 15 ratifications each) come closest to reaching the ratification rate of Brazil, Germany, Mexico, Lithuania, Peru and Turkey (with 16 ratifications each).[420]

TABLE 5: RATIFICATION OF OR ACCESSTION TO THE 18 INTERNATIONAL HUMAN RIGHTS TREATIES BY ARAB STATES & OTHER SELECTED COUNTRIES

Country	International Human Rights Treaties (out of 18)	Country	International Human Rights Treaties (out of 18)
Algeria	11	Morocco	15
Bahrain	9	Oman	9
Comoros	6	Palestine	11
Djibouti	12	Qatar	9
Egypt	10	Saudi Arabia	8
Iraq	10	Somalia	7
Jordan	9	Sudan	10
Kuwait	9	Syria	11
Lebanon	8	Tunisia	15
Libya	12	UAE	6
Mauritania	12	Yemen	10
Average total Arab states: 10 (9.95)			
Australia	14	Lithuania	16
Botswana	9	Mexico	16
Brazil	16	Myanmar	6
Canada	13	Nigeria	14
China	8	Norway	14
Ethiopia	9	Peru	16
Germany	16	Russia	11
India	8	South Africa	14
Indonesia	10	Turkey	16
Japan	10	United Kingdom	13
Kenya	8	USA	5
Average total selected countries: 12 (11.9)			

[420] Argentina, Bolivia, and Ecuador are the only states worldwide that have ratified all 18 international human rights instruments (nine treaties and nine Optional Protocols).

Table 6 complements the findings of Table 5 and provides the dates of ratification of the nine principal international human rights treaties (excluding the Optional Protocols) by Arab states.[421] Only Mauritania and Morocco have ratified all nine instruments, followed by Algeria, Egypt, Iraq, Libya, Syria, and Tunisia with eight ratifications each. The Comoros, Saudi Arabia, and the UAE come last with five ratifications each. Strikingly, three international human rights treaties were ratified by all 22 Arab states (the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the CAT and the CRC) while two others received almost universal acceptance by Arab states (the *Convention on the Rights of Persons with Disabilities* (CRPD) with 21 ratifications and the CEDAW with 20 ratifications)).

The ICESCR (19 ratifications) and the ICCPR (18 ratifications) are endorsed by a high number of Arab states. The Comoros, Saudi Arabia and the UAE are the only three Arab states that have not yet ratified the ICCPR or the ICESCR (Oman ratified the ICESCR but not the ICCPR). Although the Saudi government expressed its desire to ratify the ICCPR in 1998, it has not yet done so due to the difficulty in bringing some ICCPR provisions in line with *Shari'a* law.[422] This mainly concerns ICCPR Art. 2(1) prohibiting discrimination on the basis of sex or religion, the equality of men and women in enjoying all civil and political rights (Art. 3), the freedom of religion including the freedom to change one's religion (Art. 18) and the right to marry (Art. 23) which includes the right of Muslim women to marry non-Muslim men.[423] Al-Hargan therefore concludes that:

> "(…) the Government of Saudi Arabia is placed in an impossible situation, by which it cannot ratify and honour the ICCPR without violating the Shari'ah, which is still to date central to both the Saudi Arabian constitution and the Saudis' way of life, or to modify its obligations under the ICCPR without violating the object and the purpose of the Covenant, i.e. a stalemate situation. In facing this inescapable reality, Saudi Arabia will either have to go back to its original stance based upon

[421] As in Table 5, data presented in Table 6 is based on the OHCHR Status of Ratification Interactive Dashboard (as of October 2024) and on the UN Treaty Body Database (as of October 2024). An excellent but older overview of Arab ratifications can be found in Rishmawi, M. (2015), n19, pp. 102-105.
[422] Al-Hargan, A. A. (2005), 'Saudi Arabia and the International Covenant on Civil and Political Rights1966: A Stalemate Situation', *The International Journal of Human Rights*, Vol. 9(4), p. 492.
[423] Ibid., pp. 493-494.

> the argument of the relativity of the values protected by the ICCPR, and international human rights law in general, or make radical modifications to its constitutional and legal systems in order to comply with the spirit and standards of the ICCPR."[424]

There is hardly any literature discussing why the Comoros and the UAE have not ratified the ICCPR/ICESCR yet. The incompatibility of specific ICCPR provisions with *Shari'a* law might -similar to Saudi Arabia - serve as a valid argument. Another explanation (especially pertaining to the UAE and Saudi Arabia) could relate to the unwillingness of absolutist rulers to lose authority over their societies by promoting the freedoms of expression, assembly, and association, as well as the rights of minorities and labour rights, including the right to form and join trade unions. This view may be supported by the fact that political parties and trade unions are non-existent in both countries.[425] It appears that those states declining to ratify the ICCPR and/or ICESCR preferred this scenario over entering reservations that could later turn out to be incompatible with the object and purpose of both treaties.

Another result of Table 6 concerns the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICMW) and the ICPPED which received the fewest ratifications by Arab states (six ratifications each out of 22 Arab states). It is noticeable that none of the wealthy Gulf monarchies which host millions of migrant workers have ratified the ICMW so far. Some of these countries have come under the radar of global media and human rights organisations for enabling widespread abuses of vulnerable African, South and Southeast Asian migrants.[426] In Oman, for example, the *kafala* (sponsorship) system facilitates the exploitation of migrant workers by allowing employers to confiscate their passports, by prohibiting them from receiving fair payment or changing their jobs without their employer's consent.[427] The situation with the *kafala* system

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[424] Ibid., p. 502.
[425] See Freedom House (2021), 'Freedom in the World 2021 – United Arab Emirates', accessed 25.02.203, as well as Freedom House (2021), 'Freedom in the World 2021 – Saudi Arabia', accessed 25.02.2023. The fact that Art. 116 of the *Omani Penal Code* de facto bans the foundation of and engagement in political parties and associations may be one of the reasons why Oman has not ratified ICCPR yet too (Omani Penal Law Promulgated by Royal Decree 7/2018, Art. 116, p. 28).
[426] See Robinson, K. (2022), n306, as well as Sherman, B. (2022), 'Changing the Tide for the Gulf's Migrant Workers', *Wilson Center*, published 06.06.2022.
[427] Human Rights Watch World Report (2021), 'Oman – Events of 2020', accessed 25.02.2023.

in Kuwait is similar. The legal status of migrant workers is tied to their Kuwaiti employers which "hinders any efforts for redress and exposes migrant workers to serious abuses like wage theft and indebtedness from exorbitant illegal recruitment fees."[428] Nevertheless, the majority of states (low-, middle- and high-income countries) is yet to ratify the ICMW too which reflects a general reticence towards the convention amongst the international community, Arab states included.[429]

The equally weak ratification of the ICPPED by Arab states is particularly remarkable if one compares it with the CRPD which was adopted about the same time in 2006, but which has received almost universal acceptance by Arab states (21 ratifications) ever since. A reasonable yet speculative explanation for this gap could possibly be related to a widespread perception according to which the rights of persons with disability (similar to the rights of children) are viewed as less critical and less politicised compared to the precarious topic of enforced disappearances which is/was a problematic phenomenon in many authoritarian Arab states like Egypt, Syria under Bashar Al-Assad, the UAE, Saudi Arabia, Bahrain, and Sudan.[430] In Egypt, more than 2,700 persons were forcibly disappeared between 2015 and 2020, many of them protesters, political activists, regime critics or human rights defenders.[431] The situation was even more dramatic in Al-Assad's Syria where some 82,000 are believed to have forcibly disappeared from the outbreak of the civil war in 2011 until 2024.[432] This is not necessarily a conducive environment for ratifying the ICPPED. It is worth acknowledging here, however, that the CRPD has a generally much higher global

[428] Human Rights Watch (2024), 'Submission to the Universal Periodic Review of Kuwait - 49th Session of the UN Universal Periodic Review', published 11.10.2024.
[429] As of October 2024, the ICMW has been ratified by 58 states out of the 193 member states of the United Nations, including the US, Canada, Australia, Germany, Ireland, Sweden, Norway, New Zealand, China, India, Russia, Ethiopia, Kenya, Brazil or South Africa. (OHCHR Status of Ratification Interactive Dashboard, ICMW, as of October 2024).
[430] For the UAE, see Human Rights Watch (2016), 'UAE: Torture and Forced Disappearances', published 27.01.2016. For Saudi Arabia, see MENA Rights Group (2020), 'Saudi Arabia: UN Group denounces continued and widespread use of enforced disappearances', published on 07.10.2020. For Bahrain, see Bahrain Center for Human Rights (2016), 'Enforced Disappearance: A Persistent Violation in Bahrain', posted on 30.08.2016. For Sudan, see African Centre for Justice and Peace Studies (2019), 'Sudan: End enforced disappearances and account for hundreds of political dissidents disappeared since December 2018', published 19.06.2019.
[431] Middle East Monitor (2020), 'Egypt: 2,723 enforced disappearances in 5 years', published 07.09.2020. See also Amnesty International (2016), 'Egypt: Hundreds disappeared and tortured amid wave of brutal repression', published 13.07.2016.
[432] Middle East Monitor (2018), 'Rights group: 82,000 disappeared, 14,000 dead at the hands of Syria regime', published 28.08.2018.

ratification tally than ICPPED. As of October 2024, CRPD had 186 state parties compared to 75 state parties to the ICPPED.[433] As with the ICMW, the comparatively weak ratification of the ICPPED is therefore not an Arab-states-only phenomenon.

[433] OHCHR Status of Ratification Interactive Dashboard, CRPD & ICPPED. Non-Arab states that have not ratified the ICCPED so far include the USA, Canada, the UK, Hungary, Nicaragua, Turkey, Ethiopia, DR Congo, China, Myanmar, Australia, Russia, Iran, Malaysia and Belarus (Ibid., ICPPED).

TABLE 6

NINE CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS RATIFIED OR ACCEDED TO BY ARAB STATES

	ICERD 1965	ICCPR 1966	ICESCR 1966	CEDAW 1979	CAT 1984	CRC 1989	ICMW 1990	ICPPED 2006	CRPD 2006
Algeria	1972	1989	1989	1996	1989	1993	2015		2009
Bahrain	1990	2006	2007	2002	1998	1992			2011
Comoros	2004			1994	2017	1993			2016
Djibouti	2011	2002	2002	1998	2002	1990			2012
Egypt	1967	1982	1982	1981	1986	1990	1993		2008
Iraq	1970	1971	1971	1986	2011	1994		2010	2013
Jordan	1974	1975	1975	1992	1991	1991			2008
Kuwait	1968	1996	1996	1994	1996	1991			2013
Lebanon	1971	1972	1972	1997	2000	1991			
Libya	1968	1970	1970	1989	1989	1993	2004		2018
Mauritania	1988	2004	2004	2001	2004	1991	2007	2012	2012

TABLE 6 (CONTINUED)

NINE CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS RATIFIED OR ACCEDED TO BY ARAB STATES

	ICERD 1965	ICCPR 1966	ICESCR 1966	CEDAW 1979	CAT 1984	CRC 1989	ICMW 1990	ICPPED 2006	CRPD 2006
Morocco	1970	1979	1979	1993	1993	1993	1993	2013	2009
Oman	2003		2020	2006	2020	1996		2020	2009
Palestine	2014	2014	2014	2014	2014	2014			2014
Qatar	1976	2018	2018	2009	2000	1995			2008
Saudi Arabia	1997			2000	1997	1996			2008
Somalia	1975	1990	1990		1990	2015			2019
Sudan	1977	1986	1986		2021	1990		2021	2009
Syria	1969	1969	1969	2003	2004	1993	2005		2009
Tunisia	1967	1969	1969	1985	1988	1992		2011	2008
UAE	1974			2004	2012	1997			2010
Yemen	1972	1987	1987	1984	1991	1991			2009

Table 7 provides a quantitative overview of reservations, understandings and declarations the 22 Arab and 11 randomly selected non-Arab states (representing different geographical regions) have entered to the nine principal international human rights treaties (excluding Optional Protocols). All reservations, understandings or declarations were counted manually by the author based on the data made available by the *UN Treaty Collection* (*Chapter IV: Status of Human Rights Treaties)* which lists reservations, declarations or understandings/statements made by member states at the time of treaty ratification/accession.[434] Cells left empty in Table 7 indicate that treaties were not ratified by the concerned states.

Table 7 also covers those reservations, understandings or declarations which received multiple objections by other states arguing that they are incompatible with the object and purpose of the concerned treaty. For example, several Arab states (such as Iraq, Libya, Syria, and Yemen) have entered reservations or declarations to the ICESCR (and other human rights treaties) stating that their acceptance of the Convention "shall in no way signify recognition of Israel or serve as grounds for the establishment of relations of any sort with Israel."[435] These reservations were naturally objected to by Israel.[436] Similarly, Somalia's reservation to the CRC which provides that the government of Somalia "does not consider itself bound by Articles 14, 20, 21 (…) and any other provisions of the Convention contrary to the General Principles of Islamic Sharia" received a significant number of objections, among others from Austria, Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Ireland, Latvia, Norway, Portugal, Romania and Switzerland, on the grounds of being incompatible with the object and purpose of the CRC.[437] Regardless of the discussion around whether these reservations or declarations are in fact contradicting the object and purpose of the concerned treaties or not, it is still worth capturing them in order to better understand the

[434] UN Treaty Collection (2023), Multilateral Treaties Deposited with Secretary-General, Chapter IV: Status of Human Rights Treaties, as of 26.02.2023. A very useful -yet not the most updated- compilation of reservations, understandings and declarations entered by Arab states in international human rights treaties can also be found in Chase, A. & Ballard, K. M. (2008), 'Appendix 2. Treaty Ratifications, Notable Reservations, Understandings, and Declarations', in Chase, A. & Hamzawy, A. (eds.), 'Human Rights in the Arab World: Independent Voices', *University of Pennsylvania Press*, pp. 237-282.
[435] Ibid., Treaty No. 3 (ICESCR), section "Declarations and Reservations" (Iraq, Libya, Syria, Yemen).
[436] Ibid., Section "Objections" (Israel).
[437] Ibid., Treaty No. 11 (CRC), section "Declarations and Reservations" (Somalia) and section "Objections" (by states mentioned above in the text; Objections to Somalia's reservation).

political context in which they were made and to better comprehend how Arab states comparatively position themselves towards international human rights law.

Reservations lodged by states in relation to specific treaty articles or provisions (these actually constitute the majority of reservations) are covered in Table 7, just as reservations of a general nature (general exemption clauses) which reflect a state's reservation towards a treaty as a whole. Saudi Arabia, for example, has entered two reservations to the ICERD, one of general character (receiving many objections, including from Austria, Finland, Germany, the Netherlands, Norway, Spain, and Sweden) and the other one in relation to Art. 22. The general one reads: "[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic *Shariah*."[438] The specific reservation reads: "The Kingdom of Saudi Arabia shall not be bound by the provisions of article (22) of this Convention, since it considers that any dispute should be referred to the International Court of Justice only with the approval of the States Parties to the dispute."[439]

As Table 7 excludes reservations that were later withdrawn by the concerned states, I would like to highlight two good practices of Arab states that withdrew their reservations and thereby demonstrated a stronger commitment to international human rights law. In April 2014, the government of Tunisia notified the *UN Secretary-General* of its decision to lift all its reservations to the CEDAW (with regard to Art. 9, 15, 16 and 29).[440] As these reservations had allowed the Tunisian government to opt out of certain treaty provisions, most notably those provisions concerning the equality of women within the family, the withdrawal was celebrated as an important step towards full gender equality, including women's ability to pass on their nationality to their children, and granting equal rights for both spouses in matters of divorce, child custody, and ownership of property.[441] A similar positive achievement was reached when Oman decided in 2014 to withdraw its reservations to Art.

[438] UN Treaty Collection (2023), n434, Treaty No. 2 (ICERD), section "Declarations and Reservations" (Saudi Arabia) and "Objections".
[439] Ibid. A good overview of similar general reservations made by Arab states in international human rights treaties (e.g. by Djibouti, Qatar, Mauritania, and Saudi Arabia to the CRC or by Mauritania and Saudi Arabia to the CEDAW) can be found in Neumayer, E. (2007), n402, p. 407.
[440] Human Rights Watch (2014), 'Tunisia: Landmark Action on Women's Rights – First in Region to Lift Key Restrictions on International Treaty', published 30.04.2014.
[441] Ibid.

7, 9, 21 and 30 of the CRC. [442] The lifting of the Sultanate's reservation to Art. 30 CRC, for example, has meant that children belonging to religious minorities can now freely profess their own religion without fearing discrimination.

Although Table 7 was prepared manually to the best of my knowledge, unintended human errors cannot be excluded given the abundance of states and treaties examined and the magnitude of reservations, understandings and declarations submitted and later withdrawn (or partially withdrawn) by states. A detailed analysis of the key findings of the data collected can be found below Table 7.

[442] UN Treaty Collection (2023), n434, Treaty No. 11 (CRC), section "Declarations and Reservations" (Oman) and Footnote 50.

TABLE 7

LIST OF RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS MADE BY ARAB STATES IN NINE CORE INTERNATIONAL HUMAN RIGHTS TREATIES

	ICERD 1965	ICCPR 1966	ICESCR 1966	CEDAW 1979	CAT 1984	CRC 1989	ICMW 1990	ICPPED 2006	CRPD 2006
Algeria	0	2	4	4	0	4	1		0
Bahrain	1	3	1	5	1	0			0
Comoros	0			0	0	0			0
Djibouti	0	0	0	0	0	0			0
Egypt	1	1	1	3	0	0	2		1
Iraq	2	0	2	3	0	1		0	0
Jordan	0	0	0	4	0	3			0
Kuwait	2	3	4	3	2	2			5
Lebanon	1	0	0	3	0	0			
Libya	2	1	1	2	0	0	0		1
Mauritania	0	2	0	2	2	1	0	0	0

TABLE 7 (CONTINUED)

LIST OF RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS MADE BY ARAB STATES IN NINE CORE INTERNATIONAL HUMAN RIGHTS TREATIES

	ICERD 1965	ICCPR 1966	ICESCR 1966	CEDAW 1979	CAT 1984	CRC 1989	ICMW 1990	ICPPED 2006	CRPD 2006
Morocco	1	0	0	3	1	0	1	1	0
Oman	0		1	4	2	1		2	0
Palestine	0	0	0	0	0	0			0
Qatar	0	7	0	9	2	2			0
Saudi Arabia	2			2	2	1			0
Somalia	0	0	0		0	4			0
Sudan	0	0	0		1	0		1	0
Syria	2	0	2	7	2	1	1		0
Tunisia	0	0	0	1	0	1		0	0
UAE	2			5	3	4			0
Yemen	3	0	1	1	0	0			0

TABLE 7 (CONTINUED)

LIST OF RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS MADE BY OTHER SELCTED STATES IN NINE CORE INTERNATIONAL HUMAN RIGHTS TREATIES

	ICERD 1965	ICCPR 1966	ICESCR 1966	CEDAW 1979	CAT 1984	CRC 1989	ICMW 1990	ICPPED 2006	CRPD 2006
Argentina	0	1	0	1	0	4	1	0	0
Chile	0	0	0	1	1	0	2	0	0
DR Congo	0	0	0	0	0	0			0
France	3	8	3	4	1	3		0	2
Ghana	0	0	0	0	1	0	0		0
Honduras	0	0	0	0	0	0	0	0	0
Iran	0	0	0			1			1
New Zealand	0	4	1	2	1	3			0
Senegal	0	0	0	0	0	0	0	0	0
Spain	0	0	0	1	0	2		0	0
Vietnam	2	0	1	1	2	0			0

Kuwait (21) and Qatar (20) are leading the Arab world in terms of overall reservation quantities, followed by Algeria and Syria (with 15 reservations each). Remarkably, the Comoros, Djibouti and Palestine have not placed any reservations or declarations to those human rights treaties they have ratified. The CEDAW (containing 61 Arab reservations, understandings or declarations) is leading the ranking, well ahead of the CRC (27), ICERD and ICCPR (19 each), CAT (18) and ICESCR (17).

All 22 Arab states have together entered 175 reservations, understandings or declarations to the nine selected international human rights treaties which amounts to a total average of about eight reservations/state. In comparison, the 11 non-Arab countries have together submitted 58 reservations, understandings or declarations which corresponds to a total average of about five reservations/state. The higher Arab total average compared to the sample of randomly selected non-Arab states is mainly attributable to the abundance of reservations or declarations (88) Arab states have entered to the CEDAW and CRC which amount to almost exactly 50% of all Arab reservations, understandings and declarations counted (interestingly, both treaties received universal or almost universal ratification by Arab states; compare Table 6).[443]

Hereinafter, it is necessary to provide a short analysis per treaty of what the reservations, understandings and declarations entered by Arab states are about. Starting with the ICERD, it is noticeable that Arab states have predominantly lodged two types of reservations: a) reservations in which Arab states (e.g. Bahrain, Egypt, Iraq, Kuwait, Libya, Lebanon, Morocco, Yemen) express that they do not consider themselves to be bound by Art. 22 of the Convention concerning the settlement of disputes by the *International Court of Justice* (ICJ) at the request of any of the dispute parties, and b) reservations in which they (e.g. Iraq,

[443] I have not encountered a recent comprehensive study which quantitatively and qualitatively assesses the existence, quality and impact of reservations, understandings or declarations in all major human rights treaties for all state parties of the United Nations. Such a voluminous exercise clearly goes beyond the scope of this PhD, but would be highly beneficial to the academic human rights community. I therefore encourage future researchers to follow the lead of Neumayer (2007, n402, see Appendix, Table A1, pp. 421-425) and produce an updated overview and analysis of reservations, understandings and declarations spread across the nine or 18 core international human rights treaties for all states.

Kuwait, Libya, Syria, the UAE) signal that their acceptance of the Convention shall not amount to recognition of Israel.[444]

Arab reservations and declarations to the ICCPR are comparatively more diverse in substance. Bahrain and Mauritania have submitted reservations/declarations in which they interpret Art. 3 (equality of men and women), Art. 18 (freedom of thought, conscience, and religion) and Art. 23(4) (equality of spouses in marriage) "as not affecting in any way the prescriptions of the Islamic Shariah."[445] Qatar stands out by having lodged seven reservations/declarations to the ICCPR. In one of those, the government of Qatar expresses that it shall interpret the term 'punishment' in Art. 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment) "in accordance with the applicable legislation of Qatar and the Islamic Sharia."[446] This reservation is problematic as it relativises the status of the freedom from torture and ill-treatment as a peremptory norm and makes the absolute prohibition of torture dependent on how 'punishment' is codified in domestic legislation and interpreted in *Shari'a* law (severe bodily punishments like flogging, amputation or stoning can very well be in line with some ultraconservative interpretations of *Shari'a* law as demonstrated in subchapter 2.2.2.).[447] In another reservation, the government of Qatar clarifies that it shall interpret Art. 27 (freedom of religion of minorities) in a manner that "professing and practicing one's own religion require that they do not violate the rules of public order and public morals (…)."[448] Since 'public order' and 'public morals' are rather stretchy terms, this reservation could possibly serve to justify the introduction of discriminatory laws that prevent non-Muslims from freely practising their religion.

Noteworthy reservations submitted to the ICESCR include Kuwait's and Oman's reservations to Art. 8(1) concerning the right to form and join trade unions and the right to strike. Whereas Kuwait's reservation bluntly provides that the government of Kuwait "reserves the right not to apply the provisions of article 8, paragraph 1 (d)" on the right to

[444] UN Treaty Collection (2023), n434, Treaty No. 2 (ICERD), section "Declarations and Reservations" (states mentioned in the text).
[445] UN Treaty Collection (2023), n434, Treaty No. 4 (ICCPR), section "Declarations and Reservations" (Bahrain and Mauritania).
[446] Ibid., Treaty No. 4 (ICCPR), section "Declarations and Reservations" (Qatar).
[447] See Baderin, M. A. (2001), n416, p. 288.
[448] UN Treaty Collection (2023), n434, Treaty No. 4 (ICCPR), section "Declarations and Reservations" (Qatar).

strike, Oman signals in its reservation that the enjoyment of the right to form trade unions and the right to strike shall not apply to public employees.[449]

Reservations lodged by Oman, Kuwait, Mauritania, Syria, Saudi Arabia and the UAE to the CAT have in common that they reject the competence of the *Committee against Torture* as set out in Art. 20 of the Convention.[450] These reservations effectively hinder the Committee from visiting the territories of the concerned states to collect information about and investigate possible practices of torture.[451] A similar reservation was entered by Oman to Art. 33 of ICPPED and it received several objections by Western states contending the incompatibility of the reservation with the object and purpose of the Convention.[452]

Algeria's and Morocco's reservations to the ICMW express that both countries do not consider themselves to be bound to Art. 92(1) concerning the dispute settlement mechanism of the Convention and reinforce that "any such dispute may be submitted to arbitration only with the agreement of all the parties to the conflict."[453]

Most of the reservations/declarations placed by Arab states to the CRC revolve around the compatibility of treaty provisions with *Shari'a* law. Mauritania, Saudi Arabia, Somalia, and Syria have entered general (all-inclusive) reservations to any CRC article or provision contradicting the principles of *Shari'a* law and values of Islam.[454] Reservations/declarations rejecting specific provisions of the CRC on the grounds of conflicting with *Shari'a* law mainly relate to Art. 14 (concerning right of the child to freedom of religion which entails the right to change its religion) and Art. 21 (regulating the right to adoption).[455] In all Arab states, except for Tunisia, the legal institution of adoption (in Arabic: *tabbanni*) is prohibited.[456] Muslim legal scholars generally view that "creating a new legal and permanent

[449] Ibid., Treaty No. 3 (ICESCR), section "Declarations and Reservations" (Kuwait and Oman).
[450] UN Treaty Collection (2023), n434, Treaty No. 9 (CAT), states mentioned above in the text.
[451] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 20.
[452] UN Treaty Collection (2023), n347, Treaty No. 16 (ICPPED), section "Declarations and Reservations" (Oman), and section "Objections".
[453] Ibid., Treaty No. 13 (ICMW), section "Declarations and Reservations" (Algeria and Morocco).
[454] Ibid., Treaty No. 11 (CRC), section "Declarations and Reservations" (states mentioned in the text).
[455] Art. 14 of the CRC received reservations from Algeria, Iraq, Jordan, Morocco, Oman, Somalia, Syria and the UAE, while Art. 21 received reservations from Kuwait, Somalia, and the UAE (Ibid.).
[456] Büchler, A. & Kayasseh, E. S. (2018), 'Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates', *Electronic Journal of Islamic and Middle Eastern Law*, Vol. 6, p. 37.

parent-child relationship by terminating existing legal bonds through adoption is not permissible in Islam."[457] However, all jurisprudential schools of Islamic law encourage the informal fostering (Arabic*: kafalah*) of neglected children without depriving them of their original legal family identity (if known).[458]

Out of those Arab states who have ratified the CEDAW (Sudan and Somalia have not yet done so), only Djibouti, the Comoros and Palestine have not entered any reservations, understandings or declarations thereto.[459] The majority of these reservations relate to *Shari'a* law or to the incompatibility of CEDAW provisions with existing national legislation (which itself is heavily influenced by classical Islamic law in family and personal status matters in almost all Arab states, as identified in subchapter 2.4.).[460] Oman, Qatar and Saudi Arabia are the only three Arab states that have submitted general (all-inclusive) reservations in which they express their rejection to be bound by any CEDAW terms contradicting the norms of Islamic law.[461] Three articles have (either in full or part) received the most *Shari'a*-based reservations/declarations by Arab states in the CEDAW:

a) Art. 2, especially provisions (2a), (2f) and (2g) obliging state parties to embody the principle of equality of men and women in their national constitutions and legislation, to modify or abolish discriminatory laws against women and to repeal discriminatory penal provisions against women;

b) Art 9(2) committing state parties to grant women equal rights to men with respect to the nationality of their children; and

c) Art. 16(1), especially provisions 16(1) a, c, d, f and g, obliging state parties to eliminate discrimination against women in all matters relating to marriage and family relations and to ensure equality of men and women as related to: the same right to enter into marriage, the same rights during marriage and at its dissolution, the same rights as parents in matters

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[457] *Ibid.*
[458] Ibid., pp. 37-40.
[459] See UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Declarations and Reservations".
[460] Amnesty International (2004), 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: Weakening the protection of women from violence in the Middle East and North Africa region', p. 2.
[461] UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Declarations and Reservations" (Oman, Qatar, Saudi Arabia).

relating to their children, the same rights with regards to guardianship, wardship, trusteeship, and adoption of children, as well as the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.[462]

As they did with other international human rights treaties, all Arab states that have ratified the CEDAW (except for Jordan, Libya, Mauritania and Tunisia) rejected Art. 29(1) of the Convention which provides that a dispute can be referred to arbitration or to *the International Court of Justice* by any of the parties to the dispute.[463] Baderin explains the magnitude of reservations placed by Arab states (and Muslim states generally) as follows:

> "The approach of the CEDAW is a highly revolutionary one. It aims at 'a change in the traditional role of men as well as the role of women in society and in family and at achieving full equality between men and women'. Muslim States would obviously embrace such objective with some caution. Many Muslim States apply Islamic family law principles as part of State law codified as Personal Status or Family Codes. In many Muslim States the application of the Islamic personal status or family laws is the only remnant of Islamic law by which the governments seek to justify their Islamic legitimacy (…) No impetuous change to the family institution can occur in Muslim States without serious debates about its Islamic legality. Governments of Muslim States would thus be cautious about any infringement of Islamic family principles, which can in turn undermine their own Islamic credibility from within. Thus the practice of Muslim States under human rights treaties reveals a general approach of defining the scope of gender equality and family rights within the framework of protection afforded to the institution of the family by Islamic principles."[464]

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[462] Reservations to Art. 2 were entered for example by Algeria, Egypt, Iraq, Kuwait, Morocco, Qatar, Syria, and the UAE. Reservations to Art 9(2) were enshrined among others by Jordan, Bahrain, Kuwait, Lebanon, Oman, Qatar, Syria, and the UAE. Reservations to Art. 16 were entered by almost all Arab states except for Tunisia, Yemen, Saudi Arabia (which submitted a general Shari'a-based reservation though) and Morocco (UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Declarations and Reservations", as well as Convention on the Elimination of All Forms of Discrimination against Women (1979), Art. 2, 9(2) and 16(1)). A very comprehensive tabular overview of Arab reservations to CEDAW, though not the most updated, can be found in Amnesty International (2004), n460, pp. 6-9.

[463] UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Declarations and Reservations".

[464] Baderin, M. A. (2001), n416, p. 272.

As reservations contrary to the object and purpose of the CEDAW are not permitted under Art. 28(2) of the Convention, one must ask the question whether the abundant *Shari'a*-based reservations, the general ones and those to Art. 2, Art. 9(2) or Art. 16(1) of the CEDAW can be considered compatible with the object and purpose of the Convention or not.[465] Not only have those Arab reservations to the CEDAW received many objections by other states, the CEDAW Committee has asserted in its *General Comment No. 28* (2010) and in *General Comment No. 29* (2013), that Art. 2 and Art. 16 of the CEDAW are considered to be core provisions of the Convention (as they relate to fundamental aspects of gender equality and non-discrimination) and that it therefore considers reservations to those articles to be "incompatible with the object and purpose of the Convention and thus impermissible under article 28, paragraph 2." The CEDAW Committee has also repeatedly called upon state parties to review these reservations. with the goal of withdrawing them.[466]

Nevertheless, there are also success stories to report with regard to Arab states deciding to withdraw their reservations to the CEDAW. In 2008, Egypt withdrew its reservation to Art. 9(2) and had a few years earlier amended its Nationality Law to allow Egyptian women married to foreigners to pass on Egyptian citizenship to their children.[467] This allowed up to one million individuals, among those hundreds of thousands of children of Palestinian fathers and Egyptian mothers, to become Egyptian citizens.[468] On 16 May 2005, the *Kuwaiti National Assembly* passed a bill granting Kuwaiti women the right to vote.[469] Consequently, in December of the same year, the Government of Kuwait withdrew its reservation to Art.

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[465] Convention on the Elimination of All Forms of Discrimination against Women (1979), Art. 28(2).

[466] See Report of the Committee on the Elimination of Discrimination against Women (1998), 18th and 19th session, General Assembly Official Records, 53rd session, Supplement No. 38 (A/53/38/Rev.1), pp. 47-49, as well as General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (2010), UN Document CEDAW/C/GC/28, 16.12.2010, paragraphs 41-42 (p. 10), and General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (2013), UN Document CEDAW/C/GC/29, 26.02.2013, paragraphs 3 (p. 1) and 54 (p. 10). Objections to Arab reservations to CEDAW can be found in UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Objections". An excellent discussion of *Shari'a*-based reservations made by North African and Middle Eastern states in CEDAW can be found in Monforte, T. (2017), 'Broad Strokes and Bright Lines: A Reconsideration of Shari'a Based Reservations', *Columbia Journal of Gender and Law*, Vol. 35(1), pp. 1-69.

[467] UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Declarations and Reservations" (Egypt, Footnote 21), as well as Al-Ahram Weekly (2004), 'Citizens at last', Issue No. 697, published 1-7 July 2004.

[468] Ibid.

[469] Regan Wills, E. (2013), 'Democratic Paradoxes: Women's Rights and Democratization in Kuwait', *Middle East Journal*, Vol. 67(2), p. 174.

7(a) CEDAW which referred to the old *Kuwaiti Electoral Act*, "under which the right to be eligible for election and to vote [was] restricted to males".[470]

All in all, the above analysis of reservations, understandings and declarations reveals that areas of contention between international human rights law and Arab state practice mostly relate to gender equality, family affairs (the CEDAW and ICCPR), some aspects of children's rights (the CRC), the freedoms of religion and expression (the ICCPR), and criminal punishments (the CAT).[471] These are all human rights fields in which *Shari'a* law – to varying intensity – still steers the course of national legislation in most Arab states (see discussion in subchapter 2.4.).

Leaving the international stage and moving to the regional level, Table 8 provides an overview of the six African human rights instruments the 10 Arab states located in Africa have ratified or acceded to: the *African Charter on Human and Peoples' Rights* ("Banjul Charter", 1981), the *Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights* (1998), the *African Charter on the Rights and Welfare of the Child* (1990), the *Protocol of the African Charter on the Rights of Women in Africa* ("Maputo Protocol", 2003)*, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969), and the *African Charter on Democracy, Elections and Governance* (2007). Cells left blank indicate that the states concerned have not ratified or acceded to the treaties examined.[472]

[470] UN Treaty Collection (2023), n434, Treaty No. 8 (CEDAW), section "Declarations and Reservations" (Kuwait, Footnote 32).
[471] See Baderin, M. A. (2001), n416, p. 271.
[472] Data included in Table 8 is based on the Status Lists provided by the *Organisation of African Unity* (OAU), later *African Union* (AU) Depository of Treaties, Conventions, Protocols & Charters (see Bibliography entry under OAU/AU Treaties, Conventions, Protocols & Charters, as of October 2024).

TABLE 8

SIX AFRICAN HUMAN RIGHTS INSTRUMENTS RATIFIED OR ACCEDED TO BY ARAB STATES

	Banjul Charter	Protocol to the Banjul Charter (African Court)	African Charter, Rights & Welfare of the Child	Maputo Protocol	OAU Convention Refugee Problems in Africa	African Charter on Democracy, Elections and Governance
Algeria	1987	2003	2003	2016	1974	2016
Comoros	1986	2003	2004	2004	2004	2016
Djibouti	1991		2011	2005		2012
Egypt	1984		2001		1980	
Libya	1986	2003	2000	2004	1981	
Mauritania	1986	2005	2005	2005	1972	2008
Morocco						
Somalia	1985					
Sudan	1986		2005		1972	2013
Tunisia	1983	2007		2018	1989	

A simple statistical analysis of Table 8 reveals that the six examined African human rights instruments have received a total of 39 ratifications by the 10 Arab-African states (out of 60 possible ratifications). This is an overall ratification rate of 65%. The same 10 Arab-African states account for a total of 110 ratifications made to the 18 international human rights treaties examined in Table 5 (out of 180 possible ratifications). This amounts to a ratification rate of 61%. It appears that the human rights ratification practice of these 10 states is quantitatively quite similar on both regional (African) and international levels. A comprehensive qualitative analysis of Arab behaviour in the African human rights system would require a much deeper historical and political contextual assessment and a careful textual evaluation of the different African human rights charters which, unfortunately, surpasses the scope of this research project. Such an analysis could possibly provide insightful explanations for why Egypt, for example, has ratified the CEDAW but refrained from ratifying the *Protocol of the African Charter on the Rights of Women in Africa* ("Maputo Protocol") until today.

So far, only Algeria and the Comoros have ratified all of the six African human rights instruments, followed by Libya with five ratifications. Morocco is the only member state of the *African Union* which has neither ratified the Banjul Charter nor any of the other African human rights instruments, followed by Somalia with only one ratification. The case of Morocco is particularly surprising given the fact that Morocco has topped the ranking of Arab states with most ratifications to the 18 international human rights treaties (see Table 5). This phenomenon is rooted in Morocco's decision to withdraw from the *Organisation of African Unity* (OAU, later African Union) in 1984 when several member states supported the admission (recognition) of the *Sahrawi Arab Democratic Republic* as an OAU member.[473] The government of Morocco and the *Polisario Front*, the nationalist liberation movement that proclaimed the *Sahrawi Arab Democratic Republic*, are still in a longstanding political and legal dispute over the affiliation of the Western Sahara territory.[474] Morocco rejoined the *African Union* in 2017 though and has since ratified several multilateral treaties under the umbrella of the *African Union* (e.g. the *African Charter on*

[473] Gaffey, C. (2017), 'Why Has Morocco Rejoined the African Union After 33 Years', *Newsweek*, published 02.02.2017.
[474] Ibid.

Road Safety, the *Agreement on the Establishment of the African Continental Free Trade Area*, the *Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament*, the *African Union Convention on Preventing and Combating Corruption* or *the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*).[475] In my personal opinion, it is only a matter of time until Morocco ratifies the Banjul Charter and the other African human rights instruments. Assuming that Morocco ratifies all six instruments in the (near) future, this shall increase the overall ratification rate of African human rights instruments by Arab-African states from 65% to 75%.

It is noteworthy to mention that out of the five Arab-African countries that accepted the jurisdiction of the *African Court,* only Tunisia has deposited a Declaration accepting the competence of the Court to receive cases from NGOs and individuals in accordance with Art. 5(3) of the *Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights* which states: "The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol."[476] The reality that nine out of 10 Arab-African states have either refrained from ratifying the Protocol or declined to deposit a Declaration in accordance with Art. 5(3) and Art. 34(6) underlines once more the cautious attitude of Arab states when it comes to human rights mechanisms that enable direct complaints by NGOs or individuals which they perceive as potentially undermining their national sovereignty and control.

Out of the six African human rights instruments examined, only two Charters have, to my knowledge, received reservations from Arab states, namely the Banjul Charter (three reservations by Egypt) and the *African Charter on the Rights and Welfare of the Child* (four

[475] Ministry of Foreign Affairs of the Kingdom of Morocco (2022), 'AU: Morocco Ratifies Several Treaties Enshrining Royal Vision of Joint African Action', published on 18.04.2022.
[476] Declarations Entered by Member States to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, accessed 11.03.2023. Art. 34(6) of the Protocol stipulates that "at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State which has not made such a declaration."

reservations by Egypt, three by Sudan and one by Mauritania).[477] Table 9 provides an overview of treaty provisions affected by these reservations which mainly relate to the freedom of conscience and religion (of adults and children), non-discrimination of women, and the protection of specific children's' rights, such as the right to privacy, adoption, the prohibition of child marriage, legislation on a minimum age of marriage or the education of pregnant children. The content of these reservations resembles to a certain extent those Arab reservations entered to the CRC, CEDAW and ICCPR.

TABLE 9

RESERVATIONS BY ARAB STATES IN AFRICAN HUMAN RIGHTS INSTRUMENTS

Reserving State	Treaty	Affected Provisions
Egypt	Banjul Charter[478]	Application of Art. 8 (freedom of conscience and religion) and Art. 18(3) (elimination of discrimination against women) should be in light of the *Shari'a* law. Art. 9(1) on the right to receive information: obtaining information must be authorized by Egyptian laws and regulations.
	African Charter, Rights & Welfare of the Child[479]	Not bound by: Art. 24: Adoption Art. 30 (a-e): Children of imprisoned mothers Art. 40: Communications by individuals and NGOs Art. 45: Investigations by Committee
Sudan	African Charter, Rights & Welfare of the Child	Not bound by: Art. 10: Arbitrary or unlawful interference with a child's privacy, family, home, or correspondence Art. 11(6): Education of children who become pregnant before completing their education Art. 21(2): Child marriage and betrothal of girls and boys: legislation specifying the minimum age of marriage to be 18 years
Mauritania	African Charter, Rights & Welfare of the Child	Not bound by: Art. 9: Freedom of conscience and religion

[477] I could not find reservations made to the four other African treaties from the original Charter documents accessed from the website of the African Union (see n472). It cannot be excluded that reservations exist to these human rights instruments too.
[478] African Charter on Human and Peoples' Rights (1981), concluded at Nairobi on 27 June 1981, UN Treaty Series No. 26363, section "Reservations and Declaration", p. 291.
[479] African Charter on the Rights and Welfare of the Child (1990), African Union, July 1990.

The empirical fact that a considerable number of Arab reservations/declarations made to international and African human rights treaties relate to *Shari'a*-inspired laws still prevailing in many Arab states (most notably concerning women's rights, some children's rights, freedom of religion, and criminal punishments) brings us back to the fundamental question discussed in subchapter 2.2.2., namely whether secular human rights law and *Shari'a*-based legal norms are cursed to co-exist as mutually exclusive dichotomies or whether there are prospects for rapprochement. Baderin advocates for an open and honest debate which allows both sides, proponents of the universality of human rights and champions of conservative (Islamic) human rights conceptions, to reach a compromise on some of the contentious areas identified:

> "To further enhance the developing congruence between Islamic law and international human rights law in Muslim States, Muslim States need to depart from inflexible and hardline approaches to the interpretations of the *Sharî'ah* and continue to explore through *Ijtihâd* (legal reasoning) (…) more unstinting application of Islamic law and to ensure further guarantee of the human rights of individuals within their application of Islamic law. It has never been the objective of the *Sharî'ah* to make life difficult and unbearable for human beings. [On the other hand], the international human rights treaty bodies also need to demonstrate necessary appreciation of Islamic cultural-legal sensibilities in their consideration of human rights practice in Muslim States."[480]

One of the practical means through which such a rapprochement could possibly be achieved is that international human rights treaty bodies further advance the *margin of appreciation/discretion* doctrine applied by the *European Court of Human Rights*, for example in the case of *Otto-Preminger-Institut v. Austria* (1994).[481] This doctrine offers

[480] Baderin, M. A. (2001), n416, pp. 302-303.
[481] Ibid., p. 303. In *Otto-Preminger-Institut v. Austria* (1994), the ECHR found no violation of Art. 10 (freedom of expression) of the *European Convention on Human Rights* by Austrian courts who had seized and forfeited a provocative film that ridiculed God, Jesus Christ and Virgin Mary. The ECHR held that "there was a pressing social need for the preservation of religious peace; it had been necessary to protect public order against the film and the Innsbruck courts had not overstepped their margin of appreciation in this regard (…) Although the forfeiture made it permanently impossible to show the film anywhere in Austria, the Court considers that the means employed were not disproportionate to the legitimate aim pursued and that therefore the national authorities did not exceed their margin of appreciation in this respect" (Otto-Preminger-Institut v. Austria (23 August 1994), Council of Europe: European Court of Human Rights, paras 52 and 57).

courts the possibility to strike a balance between adherence to universal human rights while respecting moral/legal values and cultural norms that are deeply rooted in different societies:

> " (…) a margin of discretion is recognized to states, but within the respect of their international obligations, and with due observation of the conditions of necessity and proportionality of the measures curtailing any freedom for legitimate aims."[482]

Considered by supporters as a necessary, justifiable, and inclusive solution for bridging the cultural-legal differences between relativist (Islamic) and universal interpretations of human rights, the *margin of appreciation/discretion* doctrine is also viewed critically out of fear it could "encourage states to evade inconvenient legal obligations and render such obligations meaningless."[483] It remains to be seen how the *margin of appreciation*, which is not explicitly mentioned in any of the international human rights instruments, can contribute to narrowing the gap between human rights universalism and *Shari'a*-based cultural relativism in the future without undermining the merits of international human rights law. This is certainly a niche topic in the study of international human rights law which deserves more academic focus in the years to come.

The normative discussion of human rights conceptions dominant in the Arab world and the assessment of Arab human rights state practice on domestic and international levels lead to Chapter 4 in which the human rights system of the *League of Arab States* is further examined.

[482] Ghantous, M. (2018), 'Freedom of Expression and the "Margin of Appreciation" or "Margin of Discretion" Doctrine', *Revue Quebecoise de Droit International*, Vol. 31(1), p. 239 (see also p. 225).
[483] Shany, Y. (2006), 'Toward a General Margin of Appreciation Doctrine in International Law', *The European Journal of International Law*, Vol. 16(5), p. 913.

Chapter 4: The League of Arab States and its integrated human rights system

4.1. The Arab League: history, mandate and key facts

The historical roots of the formation of a regional organisation that represents the interests of Arab societies can be traced back to the 1940s. During this period, most Arab states were still under British or French occupation.[484] The only two fully independent Arab states at that time were the Kingdom of Saudi Arabia (founded in 1932) and the Kingdom of Yemen or North Yemen (existing from 1918 until 1962), the predecessor state of what is now the Republic of Yemen.[485] The global context of the Second World War and the desire of Arab states for full independence have increased the pressure on the British and French governments to make concessions to the cause of Arab self-determination and unity to secure the support of Arab states against the Axis powers.[486] This British rapprochement towards the Arabs coincided with an ever-strengthening geopolitical conviction among Arab elites, especially Iraqi and Egyptian politicians, that independence alone will not guarantee the survival of Arab states in the global post-war order. In 1943 Nuri Al-Sai'd, Iraq's Prime Minister at that time, highlighted the interlinkage between the independence of Arab states and their unity and proposed a union of Syria, Lebanon, Palestine and Transjordan into Greater Syria and its union with Iraq in an Arab League which can later be joined by other Arab states.[487] He also envisaged the creation of a permanent Arab League Council in which each member state is equally represented and which was to be responsible for the coordination of defence, foreign affairs, currency, communication and custom affairs, as well as the protection of minority rights, whether the Jewish minority in Palestine or Christian Maronites in Lebanon for example.[488]

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[484] See overview of the legacy of colonialism in the Arab world in subchapter 2.1.
[485] See Orkaby A. (2019), 'Yemen: A Civil War Centuries in the Making', *ORIGINS – Current Events in Historical Perspectives*, The Ohio State University and Miami University, Vol 12(8).
[486] See Fitzsimons, M. A. (1951), 'Britain and the Middle East, 1944-1950', *The Review of Politics*, Vol. 13(1), January 1951, pp. 23-25.
[487] Podeh E. (1998), 'The emergence of the Arab state system reconsidered', *Diplomacy & Statecraft*, Vol. 9(3), p. 71.
[488] Porath Y. (1984), 'Nuri al-Sa'id's Arab Unity Programme', *Middle Eastern Studies*, Vol. 20(4), p. 90.

Al-Sa'id's plans were endorsed by Emir Abdullah of Transjordan and Egyptian Prime Minister Mustafa Al-Nahhas, the two other driving forces behind the Arab unity movement. A series of multilateral meetings was led by Al-Nahhas in 1943 and 1944 with the objective of working out a programme for the envisaged Arab union.[489] These efforts culminated in Al-Nahhas inviting Arab leaders for a conference held in Alexandria on 25 September 1944. Arab delegations participating in the *Alexandria Conference* included Egypt, Iraq, Lebanon and Transjordan with observers from Saudi Arabia, Yemen, Libya, Morocco and Palestine.[490]

The most essential issue discussed by delegations attending the *Alexandria Conference* was the form and governance structure of a future Arab union. According to Macdonald, "three forms of political organization were debated: (1) a unitary state with central political authority, (2) a federated state with a central parliament and executive committee with full political power over federal issues, and (3) a loose confederation with emphasis on coordination and cooperation."[491] The first two types of governance were dismissed and Arab delegates opted for establishing a loosely controlled regional organisation.[492] The Conference ended with the adoption of the *Alexandria Protocol* on 7 October 1944. It was signed by the Egyptian, Syrian, Iraqi, Lebanese and Transjordanian delegations.[493]

The *Alexandria Protocol* was the first institutional milestone that paved the way for the creation of a permanent regional organisation for the Arab world. The *Protocol* anticipates that "[a] League will be formed of the independent Arab States which consent to join the League. It will have a council which will be known as the "Council of the League of Arab States" in which all participating states will be represented on an equal footing."[494] It also emphasises that:

> "[t]he object of the League will be to control the execution of the agreements which the above states will conclude; to hold periodic meetings which will strengthen the

[489] Hourani, C.A. (1947), 'The Arab League in Perspective', *Middle East Journal,* Vol. 1(2), pp. 129-130.
[490] Macdonald, R. W. (1965), 'The League of Arab States: A Study in Dynamics of Regional Organization', *Princeton University Press*, p. 37
[491] Ibid.
[492] See Wichhart, S. (2019), 'The Formation of the Arab League and the United Nations, 1944-45', Journal of Contemporary History, Vol. 54(2), p. 336.
[493] The Alexandria Protocol (1944), signed on 07.10.1944, published by *The Avalon Project, Yale Law School*.
[494] Ibid., Section 1

relations between those states; to coordinate their political plans so as to ensure their cooperation and protect their independence and sovereignty against every aggression by suitable means; and to supervise in a general way the affairs and interests of the Arab countries."[495]

The *Protocol* calls on member states to accept the decisions of the Council as binding, obliges them to settle their conflicts peacefully and to refer any disputes between them to the Council for solution.[496] By forming a Preparatory Committee mandated to prepare a draft of the statutes of the Council of the League of Arab States, the *Protocol* laid the foundation for the creation of the *Pact of the League of Arab States*, also known as the *Charter/Covenant of the League of the Arab* States, concluded on 22 March 1945, just three months before the *Charter of the United Nations* came into force.[497] This makes the *Arab League* the oldest still-operational regional organisation in the world compared to other prominent regional organisations/alliances which were established later, such as the *Organization of American States* (founded in 1948), the *Council of Europe* (1949), the *European Economic Community* (1957) and later the *European Union* (1993), the *Association of Southeast Asian Nations* (ASEAN, 1967), the *Southern Common Market* (MERCOSUR, 1991), the *Southern African Development Community* (SADC, 1992) or the *African Union* (2001).

As the founding treaty of the Arab League, the *Pact* constitutes the central legal document upon which the entire political system of the Arab League is based. The *Pact* was concluded by the five signatories of the *Alexandria Protocol*, namely Syria, Iraq, Egypt, Transjordan and Lebanon, in addition to Saudi Arabia and Yemen.[498] All seven Arab states ratified the *Pact* in 1945-46.[499] Interestingly, five founding members of the *League of Arab States* (Egypt, Iraq, Syria, Lebanon and Saudi Arabia) also adopted the *Charter of the United Nations* on 26 June 1945 which underlines their striving towards gaining full independence

[495] Ibid.
[496] Ibid.
[497] See Wichhart S. (2019), n492, p. 340.
[498] Pact of the League of Arab States (1945), The Avalon Project – Documents in Law, History and Diplomacy, *Lillian Goldman Law Library, Yale Law School*
[499] Ibid.

and recognition in the global post-war era.[500] Today, the *Pact* has been ratified by all 22 member states of the Arab League.[501]

The *Pact* consists of a preamble, twenty articles and three annexes: the first designates an Arab delegate from Palestine to join the League's Council until Palestine has gained full independence, the second one addresses the cooperation with Arab countries that are not members of the Council of the League, and the third one focuses on the appointment of the Secretary-General of the League.

Art. 1 invites future independent Arab states to join the League and Art. 2 outlines the core purpose of the League, namely "to draw closer the relations between member States and co-ordinate their political activities with the aim of realizing a close collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries."[502] Art. 2 also lists several areas of cooperation between member states including economic and financial matters (trade, customs, currency, agriculture and industry), communications (roads, aviation, navigation, posts), cultural issues, nationality matters, passports, visas, execution of judgments and extradition, as well as social welfare and health matters.[503] Surprisingly, no explicit reference is made to a close cooperation in defence matters or the development of a common defence or foreign policy strategy for League members. Art. 5, however, prohibits the use of force between member states and invites disputing parties to apply to the Council for the mediation and settlement of disputes and to accept the Council's decision as effective. In case of aggression against a

[500] See list of signatories in the Charter of the United Nations and the Statute of the International Court of Justice (1945), pp. 31-54.
[501] League of Arab States, list of current Arab League members [in Arabic], accessed 04.08.2021. Although still formally affiliated to LAS, Syria's membership in the Arab League has been suspended since November 2011 by a majority vote of League members due to Bashar Al-Assad's brutal crackdown on civil protests (see Batty D. and Shenker J. (2011), 'Syria suspended from Arab League', *The Guardian*). With regards to Libya, the Arab League, similarly to the UN Security Council, has recognised the *Government of National Accord* as the legitimate executive authority despite some LAS members (Egypt, Saudi Arabia and the UAE) supporting General Khalifa Haftar who effectively controls vast areas in the east of the country (TRT World (12 June 2020), 'Arab League shifts stance on Libya and recognizes Libya's GNA'). Concerning Yemen, the Arab League recognised the government of President Abdrabbo Mansour Hadi who was ousted by the Houthi rebels in 2015 (Abu-Husain S. (2016), 'Arab League Ministerial Meeting Supports Yemen's Legitimate Government', *Asharq Al-Awsat*).
[502] Pact of the League of Arab States (22 March 1945), n498, Art. 2
[503] *Ibid.*

member state, the Council "shall determine the necessary measures to repel this aggression" and its "decision shall be taken unanimously" (Art. 6).[504]

Art. 8 of the *Pact* calls on member states to respect and recognise the form of government in the other states of the League and to not take any actions to change the way other states are governed. By inviting Arab League members to establish "among themselves closer collaboration and stronger bonds than those provided for in the present Pact" and to "conclude among themselves whatever agreements they wish for this purpose", Art. 9 has accelerated the fragmentation of the Arab League by allowing its member states to form their own particularistic coalitions and pursue divergent interests that may not necessarily conform with the preferences of other League parties.[505] This fragmentation of coalitions and the proliferation of organisations within the umbrella of the Arab League have resulted in what Brandes describes as a "competence jumble" ("Kompetenzwirrwarr") due to the multitude of parallel bi- and multilateral agreements between Arab states.[506] Art. 10-20 of the *Pact* regulate further technicalities of the League's operation, for example concerning the mandate of the General Secretariat, procedures for approving the annual budget of the Arab League or regulations for states wishing to withdraw from the organisation.[507]

[504] Ibid., Art. 6.
[505] Ibid., Art. 9.
[506] Brandes J.D. (1995), 'Die Arabische Liga – ein sicherheitspolitischer Partner des Westens?', *Die Friedens-Warte*, Vol. 70(3), p. 308. The lax regulation provided in Art. 9 of the Pact resulted in multiple alliances between Arab states such as the temporary union between Syria and Egypt into the *United Arab Republic* (1958-1961), the short-lived *Hashemite Arab Federation* between Iraq and Jordan that lasted for a few months only in 1958, the creation of the *Unified Political Command* between Egypt and Iraq in 1964, the formation of the intergovernmental *Gulf Cooperation Council* consisting of Saudi Arabia, Qatar, Kuwait, Bahrain, the UAE and Oman in 1981 or the establishment of the now inactive *Arab Maghreb Union* including Libya, Tunisia, Algeria, Morocco and Mauritania (Ibid., pp. 308-309. See also Zoubir Y. H. (2012), 'Tipping the Balance Towards Intra-Maghreb Unity in Light of the Arab Spring', *The International Spectator*, Vol. 47(3), p. 83).
[507] For example, Cairo was chosen to host the permanent seat of the League (Art. 10) and the *Council of the League* shall meet twice a year with participation of Arab heads of state and government (Art. 11). The mandate of the General Secretariat and the appointment of the Secretary-General of the League are outlined in Art. 12 and procedures for approving the annual budget of the League are determined in Art. 13. Provisions for states wishing to withdraw from the League are formulated as follows in Art. 18: "The Council of the League may consider any State that is not fulfilling the obligations resulting from this Pact as excluded from the League, by a decision taken by a unanimous vote of all the States except the State referred to." (Pact of the League of Arab States (22 March 1945), n498, quoted articles).

4.2. The Arab League: has the desire of Arab unity/integration been achieved?

Rivalries between Arab states and their exclusive focus on securing their sovereignty have resulted in a League construct that mirrors "little more than the lowest common denominator of the desires of its member states."[508] Although sharing the overarching idea of a pan-Arab identity, growing divisions into political/ideological camps in the 1950s-1980s (the leftist secular regimes in Egypt, Syria and Iraq on the one side vs. the absolute Gulf monarchies tied to the West on the other) have left their marks on the Arab League, which was gradually transformed into an organisation that "failed to achieve anything more than ad hoc collaboration between its members, and the bulk of its resolutions and decisions have gone unimplemented. The deep fissures and rivalries among Arab states (...) insured that the League would fail to develop a strong institutional framework."[509] This view is shared by Mohamedou who argues that the League had consequently exhibited "four main dynamics that would come to diminish [the] initial impetus: sterile regional infighting; bureaucratic inefficiency; side-lining of civil society domestic debates; and a gradual flight from the discourse of universalism to relativism."[510]

The inability of the League to act as a strong player that contributes to securing long-lasting peace and prosperity for its member states is best visible in the magnitude of sub-regional disputes the Arab League witnessed – yet failed to adequately resolve - in challenging international contexts. From the 1948 Arab-Israeli War to the mid-1970s, Arab states were aligned on politically and economically boycotting Israel. This position was reinforced in the League Summit in Sudan in September 1967 which passed the "Three Nos" *Khartoum Declaration* - no to peace with Israel, no recognition of Israel, and no negotiations with Israel.[511] This rare consensus within the Arab League was interrupted when Egypt signed a peace agreement with Israel in 1979. Egypt's membership in the League was suspended and

[508] Seabury P. (1949), 'The League of Arab States: Debacle of a Regional Arrangement', *International Organization*, Vol. 3(4), p. 636
[509] Maddy-Weitzman, B. (2013), 'The Arab League and the Arab Uprisings', in Davis, J. (2013), 'The Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy', *Taylor & Francis Group*, pp. 179-180
[510] Mohamedou M.-M. O. (2016), 'Arab agency and the UN project: the League of Arab States between universality and regionalism', *Third World Quarterly*, Vol. 37(7), p. 1221
[511] Zieve T. (2012), 'This Week in History: The Arab League's Three No's', in *The Jerusalem Post* (26 August 2012).

the organisation‘s headquarters was moved from Cairo to Tunis until 1990.[512] Ever since, the League’s policy towards Israel has lost its focus. The Palestinian Authority and Jordan recognised Israel in 1992 and 1994 respectively, Qatar and Mauritania established diplomatic/trade relations with Israel in 1996 and 1999, the UAE and Bahrain fully recognised Israel as a sovereign state in 2020 and normalisation agreements were signed by Morocco and Sudan in the same year, while states like Kuwait, Iraq, Yemen and Algeria have maintained their firm boycott and non-recognition of Israel up until today.[513] Labelled a ”toothless organization”, the Arab League had no significant impact in preventing Israel’s invasion of Lebanon in 1982, its occupation of Palestinian lands or its multiple wars/atrocities on Gaza in 2008/2009, 2014, 2021 and 2023/2024 (ongoing).[514]

Other prominent conflicts that demonstrate the League’s limited capacity to act as a successful arbiter include the Morocco-Algeria conflict over Western Sahara (1970 – present), the North Yemen Civil War from 1962 to 1968 (with Egypt and Saudi Arabia supporting opposing Yemeni forces) or the four-day border war between Egypt and Libya in 1977. The Arab League also failed to prevent Iraq’s invasion and annexation of Kuwait in 1990, itself a sovereign member of the League, which resulted in Egypt and Saudi Arabia joining the US-led *Operation Desert Storm* (First Gulf War) to liberate Kuwait in 1991, while Yemen, Jordan, Tunisia and Algeria have opposed the ground offensive.[515] Around a decade later, although all Arab League states (except for Kuwait) issued a resolution condemning the invasion of Iraq in 2003, they had little leverage to stop the aggression of the United States and its allies against a sovereign Arab state and member of the League.[516]

The incapacity of the Arab League and the disunity of its member states became even more apparent in the aftermath of the political upheavals/revolutions of the ‘Arab Spring’ starting

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[512] Cowell A. (1990), ’Arab League Headquarters to Return to Cairo’, in *The New York Times* (12 March 1990)
[513] See Mohamedou M.-M. O. (2016), n510, p. 1224. See also The Abraham Accords, US Department of State (declaration and trilateral agreements between Israel and the UAE, Bahrain, Morocco and Sudan brokered by the Trump administration in 2020).
[514] Maddy-Weitzman B. (2013), n509, p. 179. In the request for the indication of provisional measures in *South Africa v. Israel*, *the International Court of Justice* (ICJ) concluded that “at least some of the rights claimed by South Africa and for which it is seeking protection are plausible”, including “the right of the Palestinians in Gaza to be protected from acts of genocide” (International Court of Justice (26.01.2024), ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Indication of Provisional Measures, Order’, issued 26 January 2024, para 54).
[515] Berger C. (1991), ’Egyptians at Forefront of Offensive’, *The Christian Science Monitor* (25 February 1991).
[516] BBC (25 March 2003), ’Arab states line up behind Iraq’.

in 2010/2011. Led by Saudi Arabia and Qatar, the Arab League asked the UN Security Council in March 2011 to impose a no-fly zone over Libya following Mu'ammar Al-Qaddafi's violent crackdown on civil protests.[517] Although the Syrian, Algerian and reportedly also the Sudanese and Mauritanian foreign ministers expressed their refusal to invite a foreign intervention on the territory of a sovereign Arab state, the anti-Qaddafi policy of the League reflected the growing influence of the six members of the *Gulf Cooperation Council* (GCC) which held significant weight within the League and which instrumentalised the organisation to serve their own strategic interests.[518] Whereas the League, by way of a further example, imposed sanctions against the Iran-backed regime of Bashar Al-Assad in Syria and endorsed the Saudi and UAE-led military intervention against the Houthi rebels in Yemen (who were/are also supported by Iran), it remained silent in condemning the military intervention of Saudi Arabia, Kuwait and the UAE suppressing the predominantly Shi'ite anti-government uprising in Bahrain, itself a GCC Arab state.[519]

But is the League's lack of success in finding common ground for all its member states in strategic geopolitical matters the only characteristic in this organisation's 75-years old history? Is the very existence of the League of Arab States pointless and are Arabs destined to "agree to disagree" as a famous Arabic slogan says? Or has the League demonstrated its value addition to its members in other less politicised/publicised fronts such as education, agriculture, human rights, natural resources management, public administration, health, social and economic development, infrastructure or tourism to name a few?

A reduction of the League's performance solely to its political legacy would not do justice to successes achieved in other areas of Arab cooperation over the past decades. Seabury argues that it:

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[517] See BBC (12 March 2011), 'Arab League backs Libya no-fly zone'. The no-fly zone over Libya was decided by UN Security Council Resolution 1973, which was supported by Lebanon, a member state of the LAS (see UN News Center, SC/10200, 17 March 2011).
[518] See Maddy-Weitzman B. (2013), n509, pp. 183-184.
[519] Ibid., pp. 181-182 as well as pp. 186-187. See also Egypt Today (1 November 2011), 'Iran urges Arab League to show reaction to Yemen, Bahrain's developments' as well Masters J. & Sergie M. A. (2012), 'The Arab League', *Council on Foreign Relations*. For a more in-depth analysis of the role of the Arab League in regional conflicts resulting from the political upheavals of the 'Arab Spring', see Wajner D. F. & Kacowicz A. M. (2018), 'The quest for regional legitimation: Analyzing the Arab League's legitimizing role in the Arab Spring', *Regional and Federal Studies*, Vol. 28(4), pp. 491-492.

> "would not be possible (…) to pass judgment upon the successes or failures of the Arab League without a consideration of its other activities, particularly in the fields of economic and social policy. The marked successes (…) have been achieved despite some notable failures in the political arena. Economic, cultural and social projects undertaken by the League of Arab States have been numerous and ambitious. Congresses have been held under League auspices to discuss such matters as archaeology, cultural relations and educational exchanges, the progressive unification of Arab legal codes: valuable preliminary work whose constructive results are not always immediate. Economic, Transportation and Communications, and Finance Committees of the League have drafted far-reaching plans for the closer integration of the Arab economies. Draft agreements for the extradition of criminals, for the creation of an Arab Postal Union [and] for common privileges of citizenship (…) have been approved by the Council of the League and referred to member states for implementation."[520]

The creation of multiple specialised committees and agencies has further strengthened the cooperation between Arab states within the umbrella of the Arab League.

4.3. The LAS governance and decision-making system

The *League of Arab States* has developed over the past decades into a complex organisation that hosts a multitude of permanent organs, subsidiary institutions, advisory committees and organisations under its umbrella. The *Arab League Pact* has established three principal organs of the Arab League, namely the *Council*, the *Standing Committees* and the permanent *General Secretariat*.[521] 15 *Specialised Ministerial Councils* are complementing the mandate of the Council, each in its subject area.[522]

In addition to these main branches, the original seven founding members of the Arab League concluded the supplemental *Treaty of Joint Defence and Economic Cooperation of the League of Arab States* in 1950 which has now been acceded to by the majority of the Arab

[520] Seabury P. (1949), n508, pp. 639-640.
[521] LAS Portal, 'History of the Arab League' [in Arabic], accessed 18.09.2021.
[522] LAS Portal, 'Specialized Ministerial Councils' [in Arabic], accessed 01.09.2024.

League member states except for Oman, Mauritania, Djibouti and the Comoros.[523] The 1950 Treaty has created three additional organs affiliated to the Arab League: *the Permanent Military Commission* composed of representatives of the General Staff of the armies of the Contracting States (Art. 5), the *Joint Defence Council* operating under the supervision of the Arab League Council and consisting of the Foreign and Defence Ministers of treaty members (Art. 6) and the *Economic Council*, now known as the *Economic and Social Council*, mandated to strengthen the process of economic and financial integration between Arab states (Art. 8).[524]

Although not formally part of the Arab League, Arab states have founded an extensive number of specialised organisations, centres and unions among themselves since the 1950s which are now loosely integrated into the wider scope of the Arab League. The most important ones will be briefly presented in this chapter alongside the formal organs mentioned above.

4.3.1. The Council of the Arab League

The *Arab League Council* is the centrepiece and principal policy-making organ of the Arab League. The Council is composed of the representatives of each Arab League member state. The primary functions of the Council are as follows:

1) overseeing the execution of agreements concluded between member states of the Arab League;[525]

2) determining the means by which the Arab League is to cooperate with the United Nations and other international organisations;[526]

3) guaranteeing peace and security and organising economic and social relations among member states;[527]

[523] Ratification status of the *Treaty of Joint Defence and Economic Cooperation of the League of Arab States* [in Arabic], approved by the Council of the Arab League on 13 April 1950, p. 1.
[524] Treaty of Joint Defence and Economic Cooperation of the League of Arab States, 17 June 1950.
[525] Pact of the League of Arab States (22 March 1945), n498, Art. 3.
[526] *Ibid.*
[527] *Ibid.*

4) settling disputes between Arab states and mediating conflicts between members and non-members;[528]

5) appointing the Secretary-General;[529]

6) assuming overall responsibility for the approval of the annual budget of the League and the internal organisation of the General Secretariat and the Standing Committees.[530]

7) excluding member states not fulfilling their obligations from the *Pact* from the Arab League by unanimous vote;[531]

The Council performs as a plenary body and convenes twice a year in regular sessions. In situations of emergency and whenever the need arises, extraordinary Council sessions may also occur at the request of at least two member states. Council sessions with the highest possible representation of member states on the level of heads of state and government are commonly referred to as *Summits* (e.g. 1965 Casablanca Summit, 1967 Khartoum Summit, 1990 Emergency Summit in Cairo or the 2019 Emergency Summit in Mecca).[532] Council sessions are more frequently held on the level of Arab foreign ministers, often in preparation for a Summit, or on subject-matter ministerial levels. As of September 2024, there are 15 *Ministerial Councils* regularly convening to decide on Arab cooperation affairs related to housing and reconstruction, social development, transportation, tourism, environment, media, interior affairs, power, youth and sports, water management, justice, health, communication and information, the weather service, as well as population and development.[533]

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[528] Ibid., Art. 5.
[529] Ibid., Art. 12.
[530] Ibid., Art. 16.
[531] Ibid., Ar. 18. A detailed list of the main functions and competences of the *Council of the Arab League* can be found in Arab League, 'Internal Governance System of the Arab League Council', Art. 3, pp. 1-2.
[532] Almakky R. G. (2015), 'The League of Arab States and the protection of human rights: a legal analysis', Brunel University London, p. 124. A list of all Council Summits to date, including all Arab League Summits with the European Union, the African Union and South American states, can be accessed through *LAS Portal,* 'Arab League Summits' [in Arabic]. A good English compilation of Arab Summits from 1964 to 2000 can be found at The Washington Institute for Near East Policy (19 October 2000), 'Arab League Summit Conferences, 1964-2000'.
[533] LAS Portal, 'Specialized Ministerial Councils' [in Arabic], n43.

According to Art. 3 of the *Arab League Pact*, each state party has one vote within the Council, irrespective of the number of representatives its sends to Council meetings.[534] Council decisions -no matter on which level of representation - reached by unanimous vote shall be binding on all member states of the Arab League. Decisions reached by a majority vote shall only bind those states that accept them.[535] Although Art. 7 of the *Arab League Pact* provides for an execution of Council decisions by each member state, the political system of the Arab League - unlike Chapter VII of the UN Charter which authorises the UN Security Council to take enforcement action - does not have an effective enforcement or sanctioning regime that guarantees the implementation of Council decisions.

4.3.2. Standing/Permanent Committees

Art. 4 of the *Arab League Pact* provides for the formation of special committees mandated to strengthen the cooperation between member states and to draft agreements on technical cooperation for consideration by the Council.[536] Each Committee consists of one representative per member state and the head of each committee is appointed by the Council.[537] Committee decisions are passed by majority vote and each committee has the right to form sub-committees or to invite experts from member states to provide consultation on technical matters.[538]

Art. 2 of the *Arab League Pact* calls for the creation of committees on economic and financial affairs, communications/transportation, cultural matters, social welfare, health, as well as on legal matters related to nationality, visas, passports and the execution of judgments.[539] *Standing Committees* for political affairs and information were created in later stages to support the Council.[540] Prominent example of agreements brokered by a *Standing Committee* include the *Treaty of Joint Defence and Economic Cooperation of the League of*

[534] Pact of the League of Arab States (22 March 1945), n498, Art. 3.
[535] Ibid., Art. 7.
[536] Ibid., Art. 4. See also Macdonald R. W. (1965), n490, p. 46.
[537] LAS Portal, 'History of the Arab League' [in Arabic], n521.
[538] Ibid.
[539] Pact of the League of Arab States (22 March 1945), n498, Art. 2.
[540] Macdonald R. W. (1965), n490, pp. 46 & 48.

Arab States already mentioned, the 1952 *Arab Extradition Treaty* or the 1956 *Casablanca Protocol for the Treatment of Palestinians in Arab States*.[541]

4.3.3. General Secretariat

The *General Secretariat*, as outlined in Art. 12 of the *Pact*, is "composed of a Secretary-General, Assistant Secretaries and an adequate number of officials."[542] Its *Secretary-General* is appointed by the Council for a five-year term and its *Assistant Secretaries* and principal officials are appointed by the *Secretary-General* and approved by the Council.[543] As the central bureaucracy of the League, the *General Secretariat* serves as an administrative hub in which the day-to-day activities of all League organs flow together.[544]

The *Secretary-General* prepares the annual budget of the League, submits it to the Council for approval (as per Art. 14 of the *Pact*) and provides operational support to other League organs through several specialised units, such as the office of the *Secretary-General* and the departments for Arab national security, international political affairs, Palestine and occupied Arab lands, the *Arab Fund for Technical Assistance in Africa*, legal affairs, economic affairs, social matters, information and communication, election affairs, administration and finance, financial auditing, technical support, sustainable development, information technology, as well as documentation and translation.[545]

4.3.4. Affiliated institutions and mechanisms

In addition to the three primary organs of the Arab League created by the *Pact* and the institutions established by virtue of the complementary 1950 Treaty, the broader system of the Arab League encompasses a wide spectrum of specialised organizations, associations and agencies that are not explicitly enrooted in the *Arab League Pact*. The proliferation of these organisations can be attributed to Art. 9 of the *Pact* which invites Arab League parties "that are desirous of establishing among themselves closer collaboration and stronger bonds

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[541] LAS Portal, 'History of the Arab League' [in Arabic], n521.
[542] Pact of the League of Arab States (22 March 1945), n498, Art. 12.
[543] Pact of the League of Arab States (22 March 1945), n498, Art. 12.
[544] Anzari A. (1961), 'Die rechtliche Natur der Arabischen Liga', *Nordic Journal of International Law*, Vol. 31, p. 85. See also Chen W. & Zhao J. (2009), 'The Arab League's decision-making system and Arab integration', *Journal of Middle Eastern and Islamic Studies (in Asia)*, Vol. 3(2), p. 61.
[545] See LAS Portal, 'Departments of the General Secretariat' [in Arabic] and LAS Portal, 'Office of the General-Secretary' [in Arabic].

than those provided for in the present Pact [to] conclude among themselves whatever agreements they wish for this purpose."[546]

Each organisation affiliated to the Arab League was established by an intergovernmental agreement between several Arab states and has an independent governance structure, its own voting regulations, budget, and staffing rules. The 2021 *Directory of Specialised Arab Organisations* lists several institutions which are now embedded into the umbrella of the Arab League, such as the *Arab Civil Aviation Organization*, the *Arab Women Organization* or the *Arab Center for Earthquake and Natural Disaster Prevention.*[547]

The Arab League also hosts several finance and investment institutions such as the *Arab Fund for Economic and Social Development* (based in Kuwait City and established on 16 May 1968 by Resolution No. 345 of the *Economic Council*),[548] the *Arab Bank for Economic Development in Africa* (created in 1973 by the 6th Arab Summit Conference in Algiers; based in Khartoum),[549] the *Arab Investment & Export Credit Guarantee Corporation* (based in Kuwait and established in 1974 under a multilateral agreement signed by 21 Arab League states),[550] the *Arab Authority for Agricultural Investment & Development* (established in 1976 by 12 Arab countries and located in Dubai, UAE),[551] and the *Arab Monetary Fund* (created in 1976 and also based in Dubai) which aims to promote the development of Arab financial markets and trade.[552]

Furthermore, the political system of the Arab League includes two specialised judicial bodies, namely the *LAS Administrative Court* and the *Arab Investment Court*. As an arbitrary organ, the *Administrative Court* is responsible for settling labour disputes related to the staff

[546] Pact of the League of Arab States (22 March 1945), n498, Art. 9.
[547] LAS Directory of Specialized Arab Organizations [in Arabic], June 2021, pp. 3-4. Other Specialised Arab Organisations include *the Arab Industrial Development, Standardization and Mining Organization, the Arab Atomic Energy Agency, the Council of Arab Economic Unity, the Organization of Arab Petroleum Exporting Countries, the Arab Administrative Development Organization, Arab States Broadcasting Union, the Arab League Educational, Cultural and Scientific Organization, the Arab Center for the Studies of Arid Zones and Dry Lands, the Arab Academy for Science, Technology and Maritime Transport, the Arab Labor Organization, the Arab Organization for Agricultural Development, Arab Satellite Communications Organization,* and *the Arab Information and Communication Technology Organization*.
[548] Arab Fund for Economic and Social Development, Constituting Agreement, 16 May 1968 [in Arabic].
[549] Arab Bank for Economic Development in Africa (BADEA), Brief History.
[550] Arab Investment & Export Credit Guarantee Corporation, Corporate Governance.
[551] Arab Authority for Agricultural Investment & Development, 'Get to know us'.
[552] Arab Monetary Fund, 'Objectives and Means'.

of the Arab League and all its affiliated institutions (employment contracts, social and health services etc.).[553] The *Arab Investment Court* aims to secure the rights of individual investors operating across the member states of the Arab League and adjudicates on disputes arising from the 1980 *Unified Agreement for the Investment of Arab Capital in the Arab States* and from the *Agreement to Facilitate and Develop Trade among Arab States* adopted by the *Economic Council* in 1978.[554]

Other important LAS bodies such as the *Arab Parliament* and all organs associated with the human rights regime within the Arab League will be presented and examined in more detail in subsequent subchapters.

4.3.5. The LAS political system: key bottlenecks and reform needs

Analysts like MacDonald acknowledge that the Arab League "has made significant progress with its regional economic, social, and cultural programs" and that it has evolved over the decades into a "diversified regional apparatus which reaches out to influence most aspects of contemporary life."[555] However, the constant growth of the Arab League hides the fact that it has remained "a loose but permanently constituted confederation of independent states (…) to which each member state has transferred only a limited amount of its sovereignty in the interests of realizing stated common goals and objectives."[556] This is especially evident in the very fabric of the *Arab League Pact* which grants state parties exclusive decision-making powers by virtue of their membership in the "almighty" League Council at the expense of all other League organs which rather have consultative or executive functions. Chen & Zhao argue, therefore, that the Arab League can only then act as an effective regional organisation if member states are willing to cede some of their sovereign powers within the Council to integrative institutions that can better represent the common interests of Arab states and societies.[557]

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[553] See Statutes of the LAS Administrative Court [in Arabic], Art. 2,3, 5 & 17.
[554] Statutes of the Arab Investment Court [in Arabic], Art. 23.
[555] Macdonald R. W. (1965), n490, p. 284.
[556] Ibid., p. 282.
[557] See Chen W. & Zhao J. (2009), n544, pp. 61, 64 & 66. The European Union is often categorised as a political system *sui generis* for combining intergovernmental and supranational decision-making methods. Whereas the *European Council* - comprising the heads of states of all EU member states - defines the strategic directions of the organisation and appoints the *European Commission*, the primary executive and legislation proposing body

Proposals for a federal union between Arab states under the umbrella of the Arab League and for the establishment of a popular representative body within the League were already formulated by Syria and Iraq in the 1950s but failed to materialise due to the resistance of other Arab states that favoured an intergovernmental regional organisation in which their sovereignty is preserved.[558] However, external international pressure in the wake of the Arab Spring accelerated the adoption of several reform initiatives by the Arab League. The *Statute of the Arab Parliament* was adopted by Council Resolution No. 559 at the 23rd Arab Summit held in Baghdad on 29 March 2012.[559] The first session of the *Arab Parliament* took place in December of the same year, which also saw the election of its president and his four vices, the formation of a general secretariat supporting the Parliament and the establishment of its four permanent sub-committees, including one on legislative, legal and human rights affairs.[560] According to Art. 5 of the *Arab Parliament Statute*, the *Arab Parliament* is mandated "to discuss and make recommendations" on issues referred to it by the Council, by the League's Secretary-General or by the directors of specialised Arab organisations.[561] These recommendations are not binding, neither for the Council nor for any other institution related to the Arab League. The role of the *Arab Parliament* is hence reduced to another purely consultative body without any real enforceable legislative leverage. Like other regional assemblies such as the *Parliamentary Assembly of the Council of Europe* or the *Plenary* of the *Pan-African Parliament*, members of the *Arab Parliament* are not directly elected by Arab citizens (which would make them accountable only to them) but are rather appointed by their national parliaments. This dependency inhibits the members of the *Arab Parliament* from freely and critically expressing opinions that are possibly opposed to the "official line" predetermined by the political elites in member states.[562]

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of the EU, these two organisations share legislative powers with the *European Parliament* which is directly elected by EU citizens every five years and which holds control over the EU budget, possesses the mandate to approve the appointment of the EU Commission and can censure the latter with a two-thirds majority. An in-depth account on the political and legal system of the EU can be found in European Parliament (2018), 'The EU legal system and decision-making procedures', Fact Sheets on the European Union.

[558] See Macdonald R. W. (1965), n490, p. 301.

[559] LAS Council Resolution No. 559, 29.03.2012 [in Arabic], pp. 52-61.

[560] Arab Parliament (web domain), 'Creation and formation' [in Arabic].

[561] LAS Council Resolution No. 559, n559, Art. 5 (pp. 57-58).

[562] One of the main reasons for the public distrust in the Arab world towards parliamentarians is the widespread belief that they lack democratic legitimacy for being closely associated with authoritative executive powers

Another structural weakness in the League's governance system concerns the decision-making mechanism of the Council. According to Art. 5 of the *Arab League Pact*, Council decisions reached by unanimous vote shall be binding on all member states, in contrast to decisions reached by a majority vote that shall only bind member states that accept them.[563] In practice, however, "unanimous decisions lack the coercive character of majority decisions and require considerably more give and take by member states."[564] According to Aznari, a negative vote or abstention from voting by a few member states can obstruct the capacity of the entire Council in issuing binding resolutions for all.[565] Unanimous voting also makes it practically impossible to exclude any member state not fulfilling its legal obligations arising from the *Arab League Pact* since all member states (except for the state concerned) have to agree to the expulsion according to Art. 18 of the *Pact*. An ally refusing the expulsion of the concerned state would suffice to block the decision-making power of the Council.[566]

Even when unanimous decisions are reached, the Council does not have enforcement power to implement those decisions. Art. 7 of the Pact stipulates that "the decisions of the Council shall be executed in each State in accordance with the fundamental structure of that State."[567] The burden of implementing the decisions of the Council is hence placed at the discretion of each member state. The *Arab League Pact* does not mention any legal, political or economic sanctions for states refusing to abide by the decisions of the Council, except for a possible expulsion which requires a unanimous vote. This has resulted in the Council adopting softly worded resolutions which Macdonald analyses as follows:

> "Under the best of conditions, the decisions of the Arab League Council are in the form of resolutions which "recommend," "request," and "urge" member states to take joint action. This is a logical outcome of the fact that the League is by design

controlled by security and intelligence elites (see Berton B. & Gaub F. (2015), 'Arab parliaments: better than their reputation?', *European Union Institute for Security Studies*). See Europe's Human Rights Watchdog (2022), 'The Parliamentary Assembly of the Council of Europe' as well as African Union (2022), 'The Pan-African Parliament' for more information on the parliamentary assemblies in the European and African regional orders.

[563] Pact of the League of Arab States (22 March 1945), n498, Art. 7.

[564] Macdonald R. W. (1965), n490, p. 58.

[565] See Aznari, A. (1961), 'Die rechtliche Natur der Arabischen Liga', *Nordic Journal of International Law*, Vol. 31, pp. 81-83.

[566] Ibid, pp. 90-91.

[567] Pact of the League of Arab States (22 March 1945), n498, Art. 7.

> an agency of coordination which lacks the coercive powers of government. In the final analysis, therefore, the League Council is a policymaking body and not a legislative organ. Directive decisions are applied only to the internal organs of the League: the Secretariat and the operating agencies of the organization."[568]

Conclusively, the governance system of the Arab League can be strengthened by adopting several reform measures that may include the following:

a) a transfer of legislative, supervisory and budget control powers from the member states (represented in the omnipresent Council) to supranational institutions such as a reformed *Arab Parliament* that can break the decision-making monopoly of the Council;

b) a shift from unanimous voting to Council decisions reached by binding majority;

c) an amendment of the *Arab League Pact* introducing a clear-cut enforcement and sanctions mechanism that ensures that Council decisions are put into action by member states and

d) an independent court, similar to the *European Court of Justice*, that settles disputes between member states, whose rulings are accepted as binding by all parties of the Arab League and which can act against states failing to fulfil their obligations arising from Council resolutions.

4.4. History of human rights within LAS: the road to the 2004 Arab Charter on Human Rights

Unlike the *Charter of the United Nations* which in Art. 1(3) explicitly highlights the promotion and "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as one of the main purposes of the UN, the *Pact of the Arab League* does not contain any explicit reference to the protection of human rights. According to Fuzay', the concept of human rights was not at the top of the agenda of the drafters of the *Pact* in times when Arab states were more concerned with achieving

[568] Macdonald R. W. (1965), n490, pp. 70-71.

statehood, gaining full independence from their occupiers and debating opportunities of regional integration or even unification among themselves.[569]

According to An-Na'im, "indications of serious and systematic concern with the protection of human rights in the Arab world, whether at the governmental, intergovernmental or civil society level, can be traced to the 1970s (…)."[570] A few years earlier, the adoption of the ICESCR and the ICCPR by the UN General Assembly on 16 December 1966 had signalised that human rights are a matter of international significance. Early signatories of both the ICCPR and ICESCR among the Arab states include Algeria (10 December 1968), Egypt (4 August 1967), Iraq (18 February 1969), Jordan (30 June 1972) and Tunisia (30 April 1968). Libya (15 May 1970) and Iraq (15 January 1971) even ratified both conventions before they came into force in 1976.[571]

After 20 years of inactivity in the domain of human rights protection, intensified efforts in the *UN General Assembly*, ultimately resulting in the adoption of the ICCPR and ICESCR, did not leave the Arab League unaffected. On 20 December 1965, the *UN General Assembly* adopted Resolution 2081, designating the year 1968 as the *International Year of Human Rights* in celebration of the twentieth anniversary of the UDHR. The Resolution reaffirmed that the year 1968 should be devoted to intensified national and international efforts and to an international review of achievements in the field of human rights. It paved the way for the organisation of the first *UN International Conference on Human Rights* held in Teheran (Iran) from 22 April to 13 May 1968, invited member states to undertake common studies with the aim of achieving a more effective protection of human rights on regional level, and recommended state parties and regional intergovernmental organisations to implement a set of measures and activities throughout 1968 towards a greater recognition of fundamental freedoms and individual human rights everywhere, such as a review of national legislation against the standards of the UDHR.[572] The Arab League celebrated the *International Year*

[569] Fuzay', M. G. (2018), 'Reflection on the legal human rights system in the League of Arab States' [in Arabic], LAS Portal, p. 5.
[570] An-Na'im, A. (2001), n326, p. 708.
[571] ICCPR, list of signatories and status of ratification, accession or succession as of 18 September 2024, as well as ICESCR, list of signatories and status of ratification, accession or succession as of 18 September 2024.
[572] UN General Assembly Resolution 2081. International Year for Human Rights. 1404th plenary meeting, 20 December 1965, paragraphs 1, 2, 7, 12 and annex.

of Human Rights in 1968 with two milestone decisions: first, the establishment of the *Permanent Arab Human Rights Commission* (PAHRC), mandated to lead the League's human rights portfolio, on 3 September 1968 by Resolution 2443 of the *Arab League Council*, and second the organisation of the first Arab human rights conference by the League's Secretariat in Beirut from 2-10 December in the same year.[573]

In addition to urging Arab states to implement the UDHR, the Beirut Conference demanded a stronger Arab cooperation in the protection of human rights at regional and international levels and recommended the creation of national human rights committees to operate in close contact with the League's *Permanent Arab Commission for Human Rights*.[574] The international momentum in favour of promoting human rights and the positive reception by the Arab League have paved the way to significant human rights reforms in Arab states throughout the 1970s and 1980s. National human rights organisations were created in Iraq, Egypt, Libya and Sudan but remained fiercely controlled by the executive branches of government and reflected the nationalist and socialist human rights understanding of the then ruling elites. Other Arab states designated a special human rights office within the Ministry of Justice (Algeria), established an "Advisory Council for Human Rights" (Morocco) or appointed a national advisor for human rights (Oman).[575] Countries like Tunisia, Egypt, Morocco and Jordan have granted independent human rights groups a greater freedom to operate since the 1980s, yet most non-governmental human rights organisations in these and almost all other Arab countries have remained exposed to constant waves of "intimidation, subjugation and cooptation" of differing intensity ever since.[576]

One of the earliest attempts to produce a binding human rights document for all states in the Arab League took place in 1970 when the PAHRC - upon the suggestion of the *Iraqi Human Rights Organisation*- recommended the drafting of an Arab declaration of human rights by an appointed expert committee. The final draft of the *Declaration on the Rights of the Citizen*

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[573] League of Arab States, 'Snapshots from the History of the Permanent Arab Human Rights Commission – 50 Years of Achievements' [in Arabic], LAS Portal, p. 3.
[574] Al-Shaikh, I. A. B. (2008), 'The Arab Charter on Human Rights: A Study on its Background, Content and Impact on Arab National Security and Political Systems in the Arab World' [in Arabic], *Dar Al-Nahda Al-Arabiya*, p. 55.
[575] An-Na'im, A. (2001), n326, pp. 711-12.
[576] Crystal, J. (1994), 'The Human Rights Movement in the Arab World', *Human Rights Quarterly*, Vol. 16(3), p. 435.

of Arab States and Countries, consisting of a preamble and 31 articles, was presented to Arab governments in 1971 but was accepted by only nine Arab states and hence never reached the League Council for adoption.[577] Although that Declaration committed to fully respect the UDHR and borrowed an extensive number of individual freedoms and human rights from other international conventions (such as the right to life, equality without distinction of any kind, the prohibition of torture and any other forms of cruel or inhumane treatment, the freedoms of association and religion or the rights to self-determination, to work, to free education, to privacy and to a decent standard of living), it failed to establish any legal obligation or enforcement instruments on Arab League members and allowed states to derogate from any of the rights enlisted (even from the right to life) in cases of public emergency (Art. 31).[578]

The next step towards the preparation of a regional human rights treaty for the Arab world was taken in a seminar organised by the *Union of Arab Jurists* in 1979 in Baghdad/Iraq.[579] The seminar called for the revitalisation of the PAHRC and presented a draft Arab treaty for human rights. This implicit criticism addressing the inactivity of the PAHRC from 1971 to 1979 resulted in the Arab League mandating a taskforce of experts to draft the League's own Arab charter for human rights. This draft consisted of 42 articles and a preamble containing a commitment to the UDHR, as well as to the ICCPR and ICESCR, but it kept open the possibility of derogating from fundamental human rights on public emergency grounds as included in Art. 31 of the 1971 draft declaration. Additionally, Art. 27 of this new draft allowed states to derogate from their legal human rights obligations on even more grounds as related to maintaining public order and public security or preserving the national economic system, public health and morals, and also failed to commit states to submit periodical reports in review of their human rights performance.[580] Although that draft was

[577] An-Na'im, A. (2001), n326, p. 713.
[578] Zaza, L. (2017), 'Human rights protection in the Arab system in comparison with the European system' [in Arabic], *JIL Scientific Research Center*, published 22 November 2017.
[579] The *Union of Arab Jurists* (UAJ) is a non-governmental organisation established on 15 January 1975. It is based in Amman/Jordan and gained consultative status at the United Nations on 13 May 1977. The UAJ consists of 16 human rights organisations representing 16 Arab states (Union of Arab Jurists website, accessed 20.10.2021).
[580] Zaza, L. (2017), n578.

referred by the Arab League Council to the member states on 31 March 1983, it did not survive and was forgotten by the Arab League for several years.

Another noteworthy regional development was the draft *Charter on Human and People's Rights in the Arab World* adopted by 64 prominent human rights experts and advocates from 12 Arab states convening from 5-12 December 1986 at the *Siracusa International Institute for Criminal Justice and Human Rights (SII)* in Syracuse, Italy. The draft produced was based on a thorough analysis of all UN human rights conventions that had already come into force by that time, in addition to the *European Convention on Human Rights*, the *American Convention on Human Rights*, the *African Charter on Human and Peoples' Rights (Banjul Charter)* and the draft *Declaration on Human Rights in Islam* which was back then still in the making and which was later adopted by the *Organization of Islamic Conference* and known as the *Cairo Declaration of Human Rights in Islam* (1990). The "Syracuse Draft" was translated into English and French and was immediately endorsed by the *Union of Arab Jurists* which shared copies of the Charter to all Arab heads of state and government and to the Secretary-General of the Arab League.[581] According to An-Na'im, the "draft was fully consistent with, and even expanded on, established human rights standards (…) [u]nfortunately, though not surprisingly, that draft was never seriously considered by the Arab League or any national government."[582]

The notion of an Arab human rights charter was reinvigorated when the PAHRC presented an amended draft charter to the League Council in 1993. Although that draft was dismissed by several Arab states (Bahrain, Kuwait, Oman, Saudi Arabia, Sudan, the UAE and Yemen) on the grounds that "their legal systems based on Shari'a law already provide for the rights

[581] Ibid. The *Syracuse Draft* made torture a criminal offence (Art. 3), included an extensive number of rights such as the freedom from arbitrary arrest and detention (Art. 4), the right to a fair trial (Art. 5), equality before the law (Art. 11), the rights to social solidarity (Art. 22), an adequate standard of living (Art. 22), to free basic and higher education (Art. 31), the right to nationality for all citizens (Art. 36) and freedom of association (Art. 37), imposed restrictions on the right to governments to declare a state of emergency and prohibited derogation from the rights to life, personal security, nationality and from the freedoms of religion or belief in Art. 42. The Draft also provided for the establishment of a human rights committee made up of human rights experts tasked to monitor state performance and to look into individual complaints (Art. 50-54) and also involved the creation of a specialised Arab court for human rights mandated to adjudicate on interstate conflicts arising from the charter and to decide on individual complaints it receives from the committee (Art. 55-61). All provisions of the *Syracuse Draft* can be found in the bibliography at Draft Charter on Human and Peoples Rights in the Arab World [in Arabic], adopted by a group of Arab human rights experts and intellectuals in Syracuse Italy on 5-12 December 1986, *Human Rights Library, University of Minnesota*.

[582] An-Na'im, A. (2001), n326, pp. 713-714.

enshrined in the draft"[583], the *Arab Charter on Human Rights* was adopted by Resolution 5437 of the *Council of the Arab League* on 15 September 1994.[584] The preamble of the 1994 Charter refers to the "everlasting principles established by the Islamic Shari'a and the other divine religions", rejects racism and Zionism as ideologies that violate human rights and endanger world peace, and reaffirms the principles of the UN Charter, the UDHR, the provisions of the ICCPR and ICESCR and the *Cairo Declaration on Human Rights in Islam* (1990). Many of the provisions in the Cairo Declaration are widely regarded as being incompatible with international human rights law as presented earlier in subchapter 3.2.[585]

In terms of positive achievements, the 1994 Charter contained several human rights that were missing in the legislation of most Arab states at that time, such as the prohibition of the death sentence for political offences (Art. 11), the prohibition of imprisonment for those unable to repay a debt or another civil obligation (Art. 14) and a guaranteed freedom of thought, conscience and opinion for everyone (Art. 24).[586]

These accomplishments should not hide the fact, however, that the 1994 Charter manifests many substantial deficiencies when compared to the international human rights protection standards provided in the ICCPR and ICESCR. Many provisions in the 1994 Charter only protect citizens, without reference to persons not holding citizenship of a LAS member state. This pertains, for example, to the right to political asylum (Art. 23), the right to nationality (Art. 24), the right to private ownership (Art. 25), freedom of assembly and association (Art. 28), the right to work (Art. 30) or the right to education (Art. 34).[587] The Charter's provision concerning lawful trial in Art. 7 falls short of the standards for fair trial covered by Art. 14 of ICCPR, such as equality before the court, the entitlement to a public hearing by an independent and impartial tribunal established by law or the right to have a conviction reviewed by a higher tribunal.[588] Furthermore, although Art. 3 of the 1994 Charter prohibits

[583] Zaza, L. (2017), n578. For more insights on the exact reasons for each of the 7 states' objection to the draft, see Al-Shaikh, I. A. B. (2008), n574, pp.63-64.
[584] League of Arab States, Arab Charter on Human Rights (15 September 1994).
[585] See discussion in subchapter 3.2. (n365-367), as well as Mayer, A. E. (1994), 'Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?', *Michigan Journal of International Law*, Vol. 15(2), pp. 327-329.
[586] LAS Arab Charter on Human Rights (1994), n584, Art. 11, 14 and 24.
[587] Ibid., Art. 23, 24, 25, 28, 30 and 34.
[588] ICCPR, Art. 14.

the derogation from the basic human rights and freedoms contained therein, this safeguard is practically eliminated by Art. 4 which allows state parties to take national measures and impose limitations on these rights and freedoms in times of public emergencies and when deemed necessary for the protection of national and economic security, public order, public health, morals or the rights of others.[589]

Another obvious deficiency of the 1994 Charter is the creation of a weak monitoring mechanism in the form of an Expert Human Rights Committee that can only receive and study the reports submitted to it by member states.[590] There is "no system of individual or state petitions to this Committee for significant violations" and the Charter failed to offer a platform for civil society organisations and independent experts to monitor the compliance of member states with the provisions enshrined therein.[591] After all, the 1994 Charter was not ratified by a single member state of the Arab League and fell into oblivion until the early 2000s when international pressure on Arab states resurfaced in the aftermath of the 9/11 terrorist attacks. The political dynamics outside and within the Arab League that led to the adoption of the 2004 *Arab Charter on Human Rights* will be discussed in more detail in Chapter 5 of this study.

Even though the Arab League failed to adopt a collectively binding human rights charter throughout the 1970s to 1990s, the League's human rights efforts on less politicised/ideologised fronts, particularly in the fields of children, labour and family rights, were substantially more fruitful in the same period. Although the 1983 *Charter on the Rights of the Arab Child*, for example, was ratified by only seven Arab states (Syria, Iraq, Jordan, Libya, Yemen, Palestine and Egypt), it was an important milestone for the later universal ratification of the 1989 *Convention on the Rights of the Child* by Arab states.[592]

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[589] LAS Arab Charter on Human Rights (1994), n584, Art. 3 and 4.
[590] Ibid., Art. 41.
[591] Sadri, A. (2019), 'The Arab human rights system: achievements and challenges', *The International Journal of Human Rights*, Vol. 23(7), p. 1170.
[592] Charter on the Rights of the Arab Child [in Arabic], adopted by the League Council of Arab Ministers for Social Affairs on 4 December 1983. See also van Hüllen, V. (2015), 'Just leave us alone: The Arab League and Human Rights', in Börzel, T. and van Hüllen, V., 'Governance Transfer by Regional Organizations: Patching Together a Global Script', *Palgrave Macmillan*, pp. 144-145.

4.5. LAS human rights institutions: mandate, achievements and critique

This subchapter provides an overview of the responsibilities and the modus operandi of the permanent human rights institutions within the system of the Arab League. This includes the *Permanent Arab Human Rights Commission*, the League's human rights administration, the *Arab Parliament* (with a focus on the *Committee for Legislative, Legal and Human Rights Affairs* therein) and the *Arab Court of Human Rights* which has not yet come into being by the time this study was completed. The *Arab Human Rights Committee* established by virtue of the 2004 *Arab Charter on Human Rights* is excluded from this overview as it will be examined more comprehensively in Chapters 5 and 6 of this study.

4.5.1. The Permanent Arab Human Rights Commission (PAHRC)

Since its creation on 3 September 1968 by Resolution Nr. 2443 of the *Arab League Council*, the PAHRC has been acting as the League's specialised human rights organ. The PAHRC is an intergovernmental body composed of governmental representatives from each LAS member state. On 13 September 2015, the LAS Council issued Resolution Nr. 7970 which adopted the revised *PAHRC Bylaws (PAHRC Statute)* listing the functions and mandates of the PAHRC as follows:

1) provide on-request advisory opinions on human rights issues to LAS member states;

2) propose the harmonisation of Arab human rights treaties with international human rights standards and member states' human rights obligations;

3) propose draft Arab human rights treaties in line with international human rights standards and member states' commitments;

4) harmonise inter-state human rights agreements on request from the concerned states;

5) conduct research on human rights matters;

6) examine and provide recommendations on human rights requests received from the LAS Council, the General Secretariat or from member states;

7) collaborate with other LAS committees engaged in human rights matters;

8) cooperate with Arab League missions abroad on human rights issues;

9) develop a regional and international vision on human rights for the Arab world;

10) strengthen the cooperation with governmental authorities in LAS member states for raising awareness on human rights;

11) when requested by member states, offer technical assistance to LAS parties in their implementation of decisions and recommendations resulting from their regional and international human rights obligations.[593]

The PAHRC convenes in two regular sessions per year. Exceptional sessions may also take place on request from the *Arab League Council*, the League's *Secretary-General* or when demanded by one state party and supported by two other member states.[594] Similar to the decision-making system in the LAS Council, each member state has one vote in the PAHRC. Recommendations issued by the Permanent Commission are passed by unanimity, and when not possible by majority vote.[595] Quite interestingly, Art. 4(7) of the *PAHRC Statute* allows the LAS *Secretary-General* to invite specialised organisations affiliated to the Arab League to participate as observers in the meetings of the PAHRC when human rights issues that fall under their responsibility are discussed.[596] This is a positive procedure that aims to harmonise the codification of human rights spread across many conventions that fall under the umbrella of the Arab League. This notion will be presented in more detail in subchapter 4.6.

Another praiseworthy instrument provided in the *PAHRC Statute* (Art. 9) is the granting of observer status to Arab non-governmental organisations and national human rights institutions which can be interpreted as an attempt to signal stronger commitment to public transparency. These organisations are permitted to attend the sessions of the PAHRC "according to the guidelines and criteria that apply, by invitation of the [LAS] General-Secretary, yet the [PAHRC] may - in its own right - decide to limit the participation in its meetings to state representatives."[597] Nevertheless, interested civil society organisations

[593] Bylaws of the Arab Permanent Commission of Human Rights [in Arabic; translation by the author], 13 September 2015, Art. 3.
[594] Ibid., Art. 4(1-2).
[595] Ibid., Art. 7.
[596] Ibid., Art. 4(7).
[597] Ibid., Art. 9 [translation of the author].

must in practice receive approval from their governments in order to be admitted as observers. A critical attitude of the admitted observers towards their own states cannot be therefore expected.[598]

Undeniably, the PAHRC has been placed at the forefront of human rights developments within the LAS since 1968 and was a driving force behind the adoption of key milestones within the human rights system of the Arab League. Besides drafting the *2004 Arab Charter on Human Rights*, the undisputedly most significant output of the Permanent Commission, the PAHRC was also engaged in preparing several other important human rights documents such as the *2019 Arab Strategy on Human Rights*, the *2009-2014 Arab Strategy on Human Rights Education*, the *2010 Educational Manual on Human Rights*, the *2019 Arab Declaration on the Right and Responsibility of Civil Society Organizations to Promote and Protect Human Rights and Basic Freedoms* or the *Arab Declaration on Development, Indebtedness and Human Rights*.[599] The PAHRC has also been involved in reviewing and providing consultation on existing inter-state Arab human rights affairs and succeeded in institutionalising the *Arab Human Rights Day* to be celebrated on 16 March every year, the day on which the 2004 *Arab Charter on Human Rights* came into force.[600]

A balanced overall assessment of the PAHRC is provided by Judge Muhammad Fuzay', human rights expert from Bahrain and former member of the *Arab Human Rights Committee* (2013 – 2021) and its president (2017 – 2019) who admits in an Arab League publication that:

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[598] As of 2020, 19 Arab organisations enjoy observer status at the PAHRC. 6 of them are government-affiliated national human rights organisations representing Saudi Arabia, Oman, Sudan, Qatar, Lebanon and Morocco. It is unlikely that those organisations will adopt human rights positions that contradict the official policy line of their governments. The remaining 13 observers are non-governmental human rights organisations (from Jordan, Iraq, Egypt, Palestine, Morocco, Sudan, Yemen and Tunisia), of which only four institutions, namely the *Arab Institute for Human Rights* from Tunisia and the three Palestinian observers (the *Jerusalem Legal Aid and Human Rights Center*, the *Human Rights and Democracy Media Center "SHAMS"* and the *Treatment & Rehabilitation Center for Victims of Torture*) can be assessed as independent, active and impactful human rights associations in the personal assessment of the author (see full list of observer organisations in League of Arab States (2020), 'List of agencies and organisations with observers status with the PAHRC, updated as of 01.07.2020' [in Arabic], pp. 1-2).

[599] League of Arab States, 'Snapshots from the History of the Permanent Arab Human Rights Commission – 50 Years of Achievements" [in Arabic], LAS Portal, pp. 33-34.

[600] Ibid., p. 41.

> "the Permanent Arab Commission for Human Rights is an inter-governmental committee that reflects the policies, opinions and human rights directions of Arab League state members. When evaluating the important role of this Commission, it can be observed that the political interests of the state members have overshadowed some of the topics referred to the Commission and restrained it at times from exercising its role."[601]

The unfavourable legal status of the PAHRC as an intergovernmental organ has resulted in a lack of power to independently pursue a human rights promotive agenda on its own away from the preferences of member states. This assessment is shared by van Hüllen who argues that "the Arab League's member states ultimately shaped the design of regional provisions according to their preferences, as reflected in the Arab League's comparatively weak human rights regime, suggesting an interest in symbolic action rather than effective institutions."[602] It therefore appears that structural reforms of the PAHRC, how it is composed and how it operates, especially vis-à-vis the LAS Council, are indispensable:

> "One of the fundamental reforms to be envisaged for eliminating the relation of subordination of the [PAHRC] to the Council of the League is the election of independent members and the granting of genuine decision-making power to the [PAHRC] in place of its current power simply to make recommendations to the Council of the League, which exercises decision-making authority. To that end, the experiences of the African Commission of Human and Peoples' Rights and the Inter-American Commission on Human Rights are instructive. A redefining of the functions of the Permanent Arab Commission on Human Rights should be envisaged."[603]

4.5.2. LAS human rights administration

The idea behind having an administrative organ that manages the day-to-day human rights activities within the Arab League originated in 1969 when the LAS Council decided to create

[601] Fuzay', M. G. (2018), n569, p. 10 [translation from Arabic by the author].
[602] van Hüllen, V. (2015), n592, pp. 151-152.
[603] International Commission of Jurists (2003), 'The process of "modernizing" the Arab Charter on Human Rights: a disquieting regression', position paper published on 20.12.2003, p. 2.

a human rights unit within the Political Department of the *General Secretariat*. This unit was then turned into a special administration for human rights in 1993, was moved to the Department for Legal Affairs and is now subordinated to the Department of Social Affairs within the *General Secretariat*.[604]

Today, the LAS human rights administration - which has its own staff and budget - acts as a Technical Secretariat for the *Permanent Arab Commission for Human Rights*. In this role, the human rights administration is responsible for a diverse array of tasks, such as presenting the recommendations of the PAHRC to the LAS Council and to the member states, preparing the agendas, logistics and summary reports of all PAHRC regular and exceptional sessions, and monitoring the developments in the human rights field on regional and international levels and briefing the PAHRC hereon. The LAS human rights administration is also tasked to conduct human rights missions and studies on request from the PAHRC, and to coordinate PAHRC's cooperation with the *Arab Human Rights Committee* and the *Committee for Legislative and Legal Affairs and Human Rights of the Arab Parliament* through the organisation of joint capacity building and training workshops in an attempt to streamline the different human rights activities within the Arab League.[605] Additionally, the human rights administration cooperates closely with the United Nations *Office of the High Commissioner for Human Rights* (OHCHR) and maintains regular exchange with specialised UN bodies and regional human rights mechanisms, especially with the African and European ones. It also acts as an entry point for civil society organisations that wish to obtain observer status with the PAHRC.[606]

4.5.3. The Arab Parliament

The *Statute of the Arab Parliament* adopted by the LAS Council in 2012 mentions the aspiration of Arab states to promote democracy and protect human rights very broadly in the preamble and again in Art. 5(1).[607] The Parliament is also mandated to review and endorse draft Arab legislation and agreements before they are adopted by the LAS Council, to

[604] League of Arab States, 'Snapshots from the History of the Permanent Arab Human Rights Commission – 50 Years of Achievements', pp. 12-13
[605] Ibid., p. 13 as well as Bylaws of the Arab Permanent Commission of Human Rights, n110, Art. 11 and Fuzay', M. G. (2018), n569, p. 10
[606] Rishmawi, M. (2015), n19, p. 29.
[607] LAS Council Resolution No. 559, n559, Art. 5(1), pp. 57-58.

streamline existing legislation in member states, to exchange legislative experiences between Arab national parliaments and to foster cooperation with regional and international parliamentary organisations.[608]

The responsibility of the *Arab Parliament* to unify Arab human rights legislations does not necessarily mean that it can effectively ensure that Arab constitutions and laws are consistent with international law but at least it gives the *Arab Parliament* some leverage to keep the debate around human rights alive within the Arab League. Although Art. 5 of the *Statute* gives the *Arab Parliament* a mandate to review international human rights agreements in the making within the Arab League, the power to adopt those agreements in the form of resolutions/decisions remains with the LAS Council. The decisions of the *Arab Parliament* are therefore not binding but rather recommendations that need to be approved by the LAS Council on Ministerial or Summit level.[609]

The responsibilities, rules and procedures of the *Arab Parliament* are further outlined in the *Bylaws of the Arab Parliament* amended on 10 April 2021. Art. 6 of the *Bylaws* obligates the *Arab Parliament* to prepare and submit periodical reports on issues of Arab cooperation, including the promotion and protection of human rights.[610] The *Arab Parliament* has so far published some few pertinent reports with relevance to human rights such as the *Arab Status Report 2019* (which includes an entire section on the status of human rights in the Arab world), *the Annual Report on the Violations Committed by the Occupying Power (Israel) in the Occupied Palestinian Territories in 2019*, the *Arab Human Rights Decade 2020-2030* published in June 2020, and the *2023 Human Rights Status Report*.[611]

Another important provision is enshrined in Art. 7 of the *Bylaws of the Arab Parliament* acknowledging the right of members of the Parliament to question the presidents of Ministerial Councils, the Secretary-General of the League and directors of LAS affiliated organisations on matters that fall under the responsibility of the Parliament, human rights issues included. This is an established function especially in democracies allowing

[608] Ibid., Art. 5(5), 5(7), 5(8) and 5(9).
[609] Rishmawi, M. (2013), 'The League of Arab States in the Wake of the "Arab Spring"', *Cairo Institute for Human Rights Studies*, p. 60.
[610] Bylaws of the Arab Parliament [in Arabic], amended on 10 April 2021, Art. 6.
[611] The four listed reports can be found in Arabic on the preliminary website of the Arab Parliament at <http://ar-pr.org/PublicationsAndpublications.aspx>, last accessed 18.09.2024.

parliaments to monitor the performance of the executive branch of government. This positive feature is, however, restricted by Art. 7(5) which limits the supervisory power of the members of the *Arab Parliament* to proposing questions "that neither interfere in the domestic affairs of member states nor touch upon their independence or sovereignty."[612] It appears that LAS member states have successfully fended off any possible form of criticism directed at their domestic (human rights) policies. Considering that the members of the *Arab Parliament* are appointed by their national parliaments/regimes, it is anyhow unlikely to expect any serious criticism from them towards their respective member states.

The day-to-day human rights activities of the *Arab Parliament* are carried out by its *Committee for Legislative and Legal Affairs and Human Rights*. According to Art. 31 of the *Bylaws*, the responsibilities of this Committee include, inter alia, studying all legal and legislative matters and Arab treaties on request from the Parliament, drafting proposals on streamlining Arab legislation (with respect to human rights among others), organising the hearing sessions of the Parliament with affiliated Arab specialised organisations on human rights issues and preparing the responses of the Parliament on international human rights reports and observations concerning any LAS member state.[613] Despite the extensive functions bestowed on it, there is not much information available about this Committee and its achievements in terms of protecting and advocating for human rights under the umbrella of the *Arab Parliament*. The same pertains to the *Arab Human Rights Observatory* which was formally established in 2021 as a specialised human rights watch within the *Arab Parliament* but whose mandate - especially vis-à-vis the aforementioned Committee - remains unclear.[614]

4.5.4. The Arab Court of Human Rights

Amid the political upheavals of the "Arab Spring" that shook several Arab states in 2011, the King of Bahrain, who was himself at that time under heavy fire for cracking down on the anti-government protests led by the Shia-dominant opposition, surprisingly called for the establishment of an Arab court of human rights on 23 November 2011. He referred to the

[612] Bylaws of the Arab Parliament, n610, Art. 7(5).
[613] Ibid., Art. 31.
[614] Alweeam (19 January 2021), 'The Arab Parliament agrees to establish the Arab Human Rights Observatory' [in Arabic].

need of the Arab world to have a respected and specialised human rights judicial body that follows the example of the European and Inter-American Courts of Human Rights and that complements the 2004 *Arab Charter on Human Rights*. On 15 January 2012, the Kingdom of Bahrain formally submitted a proposal to the LAS *Council of Ministers of Foreign Affairs* requesting the creation of the *Arab Court of Human Rights (ACtHR)* and inviting all LAS members states to a Summit conference.[615]

The invitation of the King of Bahrain resulted in the *Secretary-General* of the Arab League forming a committee of independent Arab legal experts (including Arab human rights specialists from the OHCHR) to prepare a study on the establishment of the Court. This study was presented to the LAS member states in a special Summit that took place in Manama (Bahrain) on 25-26 February 2013.[616] This study illustrated the need for an independent Arab court of human rights that counterbalances the weaknesses in the 2004 *Arab Charter on Human Rights*, most notably the lack of an individual complaints mechanism.[617] It also proposed a Court that adjudicates in lawsuits filed by Arab member states, individual victims, the *Arab Human Rights Committee*, national human rights institutions in member states and civil society organisations on the basis of the following sources of law: the 2004 *Arab Charter on Human Rights*, international and regional human rights treaties ratified by Arab states, general principles of international law as well as Islamic jurisprudence and court decisions as supplementary sources. The study also foresaw an Arab court equipped to issue advisory opinions on any legal issues related to the *Arab Charter on Human Rights*.[618]

On 26 March 2013, the Summit of the Arab League in Doha (Qatar) approved the establishment of the ACtHR by LAS Council Resolution No. 573 and assigned a high-level committee of legal experts from Arab member states to develop the draft Statute of the Court.[619] The *Statute of the Arab Court of Human Rights* was approved by LAS Council Resolution No. 7790 on 7 September 2014 and Arab League member states were invited in

[615] Al-Shaikh, I. A. B. (2018), 'The Arab Court of Human Rights and Judicial Protection of Human Rights in the Arab Region' [in Arabic], pp. 150-151.
[616] Ibid., pp. 154-155.
[617] Ibid., p. 156.
[618] Ibid., p. 158.
[619] Ibid., p. 165. See also Rishmawi, M. (2013), n609, p. 58.

the same month to sign the *Statute* at the *General Secretariat* of the League in Cairo.[620] Civil society organisations were excluded throughout the whole process of developing the Statute.[621] The ideas and recommendations presented in the comparably progressive study from February 2013 were largely disregarded.

The *Statute* refers to the ACtHR as an independent Arab judicial organ within the framework of the *League of Arab States* (Art. 2) seated in Manama, Bahrain (Art. 3). An *Assembly of State Parties* with far-reaching competences plays a key role in the fabric of the ACtHR with each state party appointing one representative to the *Assembly*. This *Assembly* lays down the Bylaw determining its competencies, including the election of Court judges, the adoption of the Court's annual report, the preparation of the Court's budget and approval of the Court's mechanism for the execution of verdicts (Art. 4). The Court is composed of seven judges who are nationals of member states (Art. 5). Each state party can nominate two of its nationals as candidates. The *Assembly* then elects the Court judges from amongst all candidates in a secret ballot (Art. 6). Candidates must possess the necessary qualifications required for appointment in the highest judicial or legal positions in their countries. Experience in the field of human rights is preferred (Art. 7). Each judge is elected for a four-year term and may be re-elected for a second non-renewable term (Art. 8). The Court elects among its members a President and a Vice-President for a two-year term which can be extended for a second tenure (Art. 11).[622]

Furthermore, the *Statute* stipulates that judges shall exercise their duties with impartiality and independence and that a judge may not hear a case that he/she was previously engaged in as an agent, attorney or advisor for any of the parties or as a member of a national or international court, and that in case of doubt the Court shall have the authority to take a decision in that respect (Art. 15).[623] The Court shall have jurisdiction over all suits and conflicts resulting from the implementation and interpretation of the *Arab Charter on Human Rights* or any other Arab human rights convention the conflicting states are parties

[620] Ibid., 197.
[621] Magliveras K. & Naldi G. (2016), 'The Arab Court of Human Rights: A Study of Impotence', *Quebec Journal of International Law*, Vol 29(2), p. 157.
[622] Statute of the Arab Court of Human Rights [in Arabic] by the League of Arab States and as a non-official translation into English by the International Commission of Jurists (2015) – Annex 1, pp. 35-43].
[623] Ibid., Art. 15.

of (Art. 16).[624] The jurisdiction of the Court is complementary to national judiciary and does not replace it. The ACtHR may decide to not admit a case if local remedies in the defendant state were not exhausted by a final judgement according to applicable national judicial order or when the case was previously filed before another regional human rights court (Art. 18).[625] With respect to the right to access the Court, Art. 19 of the *Statute* provides that "the State Party whose citizens claims to be a victim of a human rights violation has the right to access the Court provided that both the claimant and the defendant State are parties to this Statute" and that "State Parties can accept (…) that one or more human rights NGOs accredited in that State whose citizen claims to be a victim of a human rights violation has access to the Court."[626]

The Court may also issue an opinion on any legal matter related to the *Arab Charter on Human Rights* or to any other Arab convention on human rights on request from the LAS Council or any organisation affiliated to the Arab League (Art. 21) and is authorised to cooperate with the disputing parties to reach an amicable settlement of the case (Art. 22).[627] Court judgements are enforceable immediately against state parties as if they were rulings rendered by national judiciary (Art. 26).[628] The *Statute* shall enter into force after ratification by seven member states (Art. 33).[629] Among the 22 member states of the Arab League, so far only Saudi Arabia has ratified the *Statute* on 7 June 2016 which means that it has not yet entered into force.[630]

Although LAS-affiliated human rights stakeholders have been hailing the Court as a major milestone towards modernising the Arab human rights system,[631] the adoption of the *Statute* has harvested universal criticism from independent Arab and international human rights defenders and civil society organisations. Magliveras and Naldi, for example, consider the

[624] Statute of the Arab Court of Human Rights, Art. 16.
[625] Ibid., Art. 18.
[626] Ibid., Art. 19.
[627] Ibid., Art. 21 & 22.
[628] Ibid., Art. 26.
[629] Ibid., Art. 33.
[630] Asharq Alawsat (27 June 2016), 'Saudi Arabia is the first country to ratify the Statute of the Arab Court of Human Rights' [in Arabic].
[631] See for example Alwatan News (11.04.2021), 'President of the Arab Parliament: His Excellency the King [of Bahrain] paid continuous attention to enhance the Arab human rights system' [in Arabic]; translation by the author.

Statute as "flawed because it confers limited powers on the ACtHR" and because it lacks several important jurisdictional and procedural human rights guarantees."[632] Maybe the most striking deficit of the *Statue* is that the competence of the ACtHR is limited to interstate cases only with no provision for a right of direct individual petition as it exists already in different manifestations in the European, African and Inter-American human rights systems.[633] Art. 19 of the *Statute* restricts access to the Court only to state parties who may permit registered/pre-approved NGOs to present cases on behalf of individuals.[634] The effectiveness of the ACtHR in protecting individual rights is thus severely hampered, especially because in practice states tend to refrain from instituting proceedings against each other out of concern that complaints could "embitter the relationship between States involved" or backfire on the complainant state.[635]

With respect to the jurisdiction of the ACtHR, Art. 16 of the *Statute* provides for the Court's interpretation of the *Arab Charter on Human Rights* and any other Arab human rights treaties without specifying which treaties are meant.[636] This is particularly complicated given that human rights are codified in multiple conventions and spread across several loosely connected legal documents that fall under the wider umbrella of the *League of Arab States* (see Chapter 4.6). It remains unclear if and to what extent the Court will have jurisdiction over, for example, the *Arab Convention on Suppression of Terror* or the *Arab Labor*

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[632] Magliveras K. & Naldi G. (2016), n621, pp. 147 and 151.
[633] See discussion around individual complaints procedures in regional and international human rights treaties in subchapter 5.3.3.
[634] Statute of the Arab Court of Human Rights, n622, Art. 19.
[635] See Reilly, R. & Trout, H. (2022), 'Inter-state Complaints in International Human Rights Law', *British Institute of International and Comparative Law*, published 27.04.2022, pp. 4 and 21, as well as Magliveras K. & Naldi G. (2016), n621, pp. 151, 156-157 & 161. See also Rishmawi, M. (2013), n609, p. 57. According to Art. 34 of the *European Convention on Human Rights*, "the [European Court of Human Rights] may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto, The High Contracting Parties undertake not to hinder in any way the effective exercise of this right." Art. 44 of the *American Convention on Human Rights* provides that "any person or group of persons, or any nongovernmental entity legally recognized in one or more States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." The *Inter-American Commission on Human Rights* (IACHR) can then file a case to the Inter-American Court of Human Rights on behalf of individuals according to Art. 61 of the American Convention. In the African system, Art. 5(3) of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* allows NGOs with observer status before the Commission and individuals to institute cases directly at the African Court where State parties have made a declaration accepting such provision.
[636] Statute of the Arab Court of Human Rights, n622, Art. 16.

Convention to name a few. The *Statute* also missed the opportunity to clearly state that the Court's jurisdiction must be guided by Arab states' existing obligations under international human rights law. The *International Commission of Jurists* has therefore proposed an alteration of Art. 16 of the *Statute* in a way that empowers the Court to "take full account of international human rights law, including the obligations of any State that is party to the case before it, in its interpretation of the provisions of the Arab Charter or other Arab human rights treaties so as to prevent inconsistency or conflict in the application of those provisions with any other international legal obligations of States parties." [637]

The strict necessity to exhaust domestic remedies before a case can be examined by the ACtHR (as provided in Art. 18(1) of the *Statute*) was also criticised as too restrictive and possibly inhibiting victims of human rights violations from accessing the Court. The *International Commission of Jurists* has flagged the necessity to allow for an exception to the exhaustion rule especially when domestic remedies are unreasonably prolonged.[638] Such exceptions to the exhaustion of domestic remedies are already enshrined in some international and regional human rights instruments, such as Art. 5(2b) of the *Optional Protocol to the ICCPR*, Art. 3(1) of the *Optional Protocol to the ICESCR*, as well as Art. 50 and Art. 56(5) of the *African Charter on Human and Peoples' Rights*.[639]

Furthermore, Art. 17 of the *Statute* provides for the principle of temporal jurisdiction *(ratione temporis)* based on which the ACtHR may only investigate facts committed after the entry into force of the *Statute*.[640] This is particularly problematic in cases of continuing violations in which human rights offences have started before the entry into force of the *Statute*. [641] In principle, human rights instruments are binding from the date of their ratification by a state party ('critical date'). [642] However, the concept of 'continuing

[637] International Commission of Jurists (2015), 'The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court', p. 22. See also Rishmawi, M. (2013), n609, p. 57.
[638] Ibid., pp. 22-23.
[639] For example, Art. 5(2b) of the *Optional Protocol of the ICCPR* constitutes that: "The Committee shall not consider any communication from an individual unless it has ascertained that: The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged." Similarly phrased provisions are included in Art. 50 of the *African Charter on Human and Peoples' Rights* and Art. 3(1) of the *Optional Protocol to the ICESCR*.
[640] Statute of the Arab Court of Human Rights, n622, Art. 17.
[641] Magliveras K. & Naldi G. (2016), n621, p. 165.
[642] Baranowska, G. (2023), 'How long does the past endure? 'Continuing violations' and the 'very distant past' before the UN Human Rights Committee', *Netherlands Quarterly of Human Rights*, Vol. 41(2), p. 98.

violations' -which allows human rights regimes to deal with violations whose effects continue to exist after the 'critical date'- has been steadily developing throughout the past decades and is considered an established practice in international human rights law.[643] According to Baranowska, the *Human Rights Committee*, for example, has applied the concept of 'continuing violations' in at least 54 cases by 2022, out of which 12 concern enforced disappearances.[644] Similarly in *Loizidou v Turkey* (1996), the *European Court of Human Rights* ruled that Turkey had committed a continuing violation of the rights of a Greek Cypriot refugee who had been forced out of her property during Turkey's invasion of Northern Cyprus in 1974.[645] The Government of Turkey claimed that the ECtHR is incompetent *ratione temporis* as the alleged violation had occurred before Turkey accepted the jurisdiction of the ECtHR pursuant to Art. 46 of the *European Convention on Human Rights* on 22 January 1990.[646]

Further valuable remarks and recommendations concerning the *Statute* of the ACtHR, for example concerning the necessity to introduce provisional measures towards a stronger protection of victims, are summarised by the *International Commission of Jurists* as follows:

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

[643] *Ibid.,* as well as Magliveras K. & Naldi G. (2016), n621, p. 165.
[644] *Ibid.*
[645] See Loizidou v. Turkey (1996), 40/1993/435/514, *Council of Europe: European Court of Human Rights*, 28 November 1996.
[646] Loizidou v. Turkey (1995), 40/1993/435/514, *Council of Europe: European Court of Human Rights*, 23 February 1995, paras 27, 99-105.

rights defenders and peaceful protestors in violation of their rights to freedom of assembly and expression."[647]

Assessing the role of the ACtHR from a structuralist perspective within the wider skeleton of the LAS human rights system brings along further challenges. Although the *Statute* of the Court mentions the 2004 *Arab Charter on Human Rights* as a source of its jurisdiction, it omits mentioning the *Arab Human Rights Committee*, the monitoring body established by the 2004 Arab Charter. This will inevitably result in having two important Arab human rights bodies, the Court and the *Arab Human Rights Committee*, operating in parallel universes with little interaction between them albeit embedded within the same regional human rights system.[648] Should the *Statute* come into force someday, it remains to be seen how both organs can complement each other meaningfully in the future.[649]

4.6. The codification of human rights across LAS treaties (other than the 2004 Charter)

The Arab League has developed since 1945 into a complex organisation in which the cooperation between Arab member states is governed by numerous treaties and institutions. The proliferation of legal texts and stakeholders constitutes a key feature of the LAS human rights system in which fundamental individual and/or collective rights and freedoms are codified across different LAS conventions in a scattered unbundled manner. On this account, the adoption of the *Arab Charter on Human Rights* in 2004 can be viewed as a laudable attempt of Arab states to bring fundamental human rights under one single umbrella. However, the mere existence of the 2004 Charter does not nullify other effective Arab treaties in which human rights are codified.

Allam differentiates between two types of LAS conventions that address the issue of human rights:

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[647] International Commission of Jurists (2015), n148, p. 6. A concise list of concerns and recommendations on the Statute of the ACtHR can also be found in Human Rights Watch (6 June 2014), 'The proposed Arab Court of Human Rights: An empty mechanism without key changes to its draft Statute' [in Arabic].
[648] See Magliveras K. & Naldi G. (2016), n621, pp. 156-158.
[649] Additional reflections about possible structural reforms of the LAS human rights system can be found in subchapter 5.6.

a) Arab treaties that implicitly touch upon certain human rights but that were originally adopted to regulate other dimensions of Arab cooperation and

b) Arab treaties with an exclusive focus on human rights.

Whereas most Arab treaties that are mentioned hereinafter belong to the first type, only the *Charter of the Rights of the Arab Child* (1983) and the *Arab Convention on the Status of Refugees in Arab Countries* (1994, has not come into force so far) can be attributed to the latter.[650] Arab states have also issued various declarations and guiding laws that address specific human rights issues but that can only be considered as non-binding soft law instruments.[651]

One of the first conventions to be adopted by the Arab League was the *Cultural Convention* which was adopted by the LAS Council on 27 November 1945 and which came into force on 2 March 1957. This convention aims to strengthen the cultural bonds between Arab member states and calls on state parties to establish national legislation to protect the literary, scientific and artistic heritage in the Arab world. This convention was effectively replaced with the adoption of the *Covenant on Arab Cultural Unity* which entered into force on 5 September 1964 and which was ratified by most LAS member states (except for Lebanon and the Comoros).[652] The Covenant calls on state parties to intensify their cooperation in the fields of education, culture and science (Art. 2) and encourages them to optimise their educational systems and curricula on school and university levels (Art. 4 & 5), to combat illiteracy and to make primary education mandatory (Art. 6). It also highlights the importance of adequate capacity building for teachers (Art. 13 & 14) and the necessity to protect the Arabic language (Art. 15) and advocates for the exchange of Arab experiences in the domains of cinema, theatre, music, folk art, journalism and media (Art. 20).[653] The text of the convention does not explicitly refer to any cultural human rights, neither does it

[650] Allam, W. (2005), n19, p. 14. Allam (2005) has provided an excellent compilation of all Arab conventions in which human rights are codified with a ratification overview for each agreement and a critical analysis of the content (see pp. 14-70). A shorter overview of inter-Arab conventions and treaties related to human rights can also be found in Rishmawi, M. (2015), n19, pp. 98-101.
[651] A good analysis on soft law as a source of international human rights law can be found in Olivier M. (2002), 'The relevance of 'soft law' as a source of international human rights', *The Comparative and International Law Journal of Southern Africa*, Vol. 35(3).
[652] Allam, W. (2005), n19, pp. 22-24.
[653] Covenant on Arab Cultural Unity [in Arabic].

include a mechanism that monitors the objectives mentioned therein or provide for sanctions for non-committing state parties. The implementation of the provisions is therefore completely dependent on the political will of member states.

Several economic and social rights, especially labour rights, are codified across multiple Arab conventions. The 1965 *Arab Labor Convention,* ratified by all Arab states except for the Comoros, Djibouti and Oman, encourages member states to "work together towards reaching similar levels of labour and social insurance legislations" (Art. 4), to implement a strategy for vocational training (Art. 7) and to carry out joint studies to put minimum wages in place (Art. 8).[654] The Labor Convention reads like a socialist manifesto but does not mention the right to work and falls short of meeting the international protection standards provided by Art. 6-9 of the ICESCR on the right to work, rights at work, and to social security. A much more advanced protection of workers' rights is provided in the 114-articles-long 1966 *Arab Labor Standards Agreement* (ALSA) which was only ratified by eight Arab states. The ALSA recognises the right to "productive work" to ensure a decent standard of living (Art. 4) and lists key labour standards that Arab states need to consider in their national laws, such as vocational training for workers, the regulation of working hours, employment contract, holidays, healthcare and occupational safety, social insurance, labour unions and dispute resolution (Art. 6). These standards are then specified in more detail from Art. 11 onwards. The ALSA also obligates member states to include the freedom to work and the prohibition of forced labour in their national legislation (Art. 7) based on the principle of non-discrimination (Art. 8). It also provides for an employment quota for skilled workers with disabilities (Art. 19), for an unrestricted right to form labour unions (Art. 76) and for the right to strike as regulated by national law (Art. 93). Finally, a monitoring mechanism is created by Art. 107 and Art. 108 of the Agreement by which member states are obliged to submit annual periodical reports to the *Council of Arab Labor Ministers* and then to the LAS Council.[655] Strictly speaking, the *Arab Labor Convention* and ALSA are just two out of 19 conventions regulating labour rights within the umbrella of the Arab

[654] The Arab Labor Convention and the Constitution of the Arab Labor Organization [in Arabic], translation by the author].
[655] Arab Labor Standards Agreement, 1966 [in Arabic, translation by the author].

League and the *Arab Labor Organization*.[656] This once again reflects the magnitude of proliferation and fragmentation of human rights codification within the same regional system. An in-depth analysis of all these Arab labour conventions would go beyond the scope of this project.

Several economic freedoms are also codified in the LAS *Economic Unity Agreement* (EUA) which came into force in 1964 and which is now ratified by 10 Arab states after the withdrawal of Kuwait and the UAE. Art. 1 of the treaty refers to the fundamental freedoms of a common Arab market: free movement of persons and capital, free exchange of goods and products, freedom of residence, work and economic activity, freedom of transportation and transit and the right to property. The formulation resembles the four fundamental freedoms (free movement of goods, persons, services and capital) enshrined in the *Treaty of Rome* which established the *European Economic Community* in 1957.[657] The EUA created a permanent *Arab Economic Unity Council* (Art. 3-9) mandated to implement all provisions of the EUA towards a stronger commercial and monetary integration of Arab economies.[658]

The 1971 *Convention on Arab Social Work* further expands on the socio-economic rights codified in older conventions. Some of the rights implicitly codified therein include the collective human rights to development and self-determination (preamble), equality between women and men (principle 3), freedom of expression (principle 6) and the right to social development for everyone without discrimination (principle 10). Interestingly, the Convention explicitly mentions democracy as a prerequisite for successful social cooperation (principle 9). This is the only reference to democracy that the author could find in all of the Arab human rights conventions examined. Even the 2004 Arab Charter avoids using the term in its preamble.[659]

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[656] Other Arab labour conventions encompass, for example, the 1967 *Arab Treaty on Manpower Mobility*, the 1981 *Arab Agreement on Work Environment*, the 1983 *Arab Agreement on Social Services for Workers*, the 1983 *Arab Agreement on the Determination and Protection of Wages* or the *1996 Arab Agreement on Labor of Minors*. A comprehensive list including all Arab labour conventions can be found on the website of the *Arab Labor Organization* in the bibliography.

[657] See Bertelsmann Stiftung & Jacques Delors Institute (2017), 'The four principles in the EU: Are they Inseparable?', EUROPA briefing.

[658] Economic Unity Agreement Between the States of the Arab League [in Arabic].

[659] Convention on Arab Social Work [in Arabic], translation by the author], pp. 1-2.

The *Convention on Arab Social Work* further formulates several human rights objectives Arab states should work towards achieving. This includes the provision of a "minimal standard of living for every citizen that satisfies the basic life needs" (objective 3), securing adequate housing especially for citizens with low income (objective 4), provision of healthcare for every citizen (objective 5), free education for all citizens and combating of illiteracy (objective 6), social protection for seniors (objective 7) and children (objective 9), as well as the advancement of rural and urban development (objective 15). It is noticeable that many of these socio-economic rights/objectives are exclusively reserved for citizens of state parties.[660] This stands in stark contrast to international human rights instruments which generally guarantee human rights for everyone within the jurisdiction of the state, not just citizens.[661] Only a very few rights codified in international human rights treaties are meant to be enjoyed only by citizens such as the right to vote and to be elected.[662]

The right to nationality is codified in two Arab conventions, namely the 1952 *Agreement on the Nationality of Arabs Residing in Non-Origin States* and the 1954 *Nationality Agreement*. The former was ratified by only four Arab states (Saudi Arabia, Egypt, Jordan and Iraq) and regulates a special constellation of stateless persons residing in Arab territories they are not originating from, such as Palestinian refugees who left their villages to travel to Jordan and Egypt after the 1948 Arab-Israeli War. Art. 1 of that treaty provides that these persons should have the nationality of their country of origin and that their residency rights in the hosting state should not be affected.[663] The (Arab) *Nationality Agreement* has not yet entered into force as it has only been ratified by Jordan and Egypt. It recognises the right to nationality for everyone and provides that Arab women who marry citizens from other Arab states shall automatically receive the nationality of their husbands (Art. 2) under the condition that it would not render them stateless. In case of divorce or in case the husband is himself stateless,

[660] This applies to objectives 2-8 of the Convention on Arab Social Work, n651, p. 3
[661] For example, the ICESCR (1966) recognizes the right of everyone to an adequate standard of living and to education in Art. 11 and Art. 13 respectively,
[662] ICCPR (1966), Art. 25b. The 2004 *Arab Charter on Human Rights* also deprives non-citizens from enjoying basic human rights in some of its provisions. This topic is discussed in more detail in subchapter 5.3.1.
[663] Agreement on the Nationality of Arabs Residing in Non-Origin States [in Arabic], translation of the title by the author.

Arab women would be allowed to regain/retain their original nationality (Art. 3).[664] The automatic acquisition of the husband's Arab nationality upon marriage as provided by Art. 2 of the (Arab) *Nationality Agreement* clashes with Art. 9(1) of the CEDAW stating that:

> "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[665]

On 4-6 December 1983 the *Council of Arab Ministers of Social Affairs* adopted the *Convention on the Rights of the Arab Child* ratified so far by only seven Arab states. The Convention lists numerous rights of the child such as the right to family care, stability and development, the right to social protection, to healthcare, adequate housing, sufficient and balanced nutrition, the right from birth to a name and a nationality and the right to free early and primary education. State parties are encouraged to undertake legislative, administrative and financial measures to ensure the protection of the Arab child on the different fronts and are obliged to submit periodical repots to the LAS *General Secretariat* on national measures applied in adherence to the provisions of the Convention.[666] Although the Convention shines as one of the few Arab human rights treaties in which fundamental rights are explicitly identified, it neglects the rights of children of non-Arab expats living and working in Arab countries.

As an intergovernmental organisation affiliated to the Arab League, the *Arab Women Organization* (AWO) is mandated to empower women and to foster the cooperation among Arab states with regards to enhancing the economic, social, cultural, developmental, health and educational status of women in Arab societies. These objectives are enshrined in Art. 5 of the *AWO Founding Treaty* which has to date been ratified by 13 Arab states. The text of the treaty does not mention women's rights at all and is dominated by vaguely formulated

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[664] As outlined in Allam, W. (2005), n19, pp. 42-44 [translation by the author]. The right to nationality and the prohibition of statelessness are enshrined in several international human rights instruments such as the ICCPR (Art. 24), the CRC (Art. 7) and the CEDAW (Art. 9) as well as in the 1954 *Convention Relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness.*

[665] CEDAW (1979), Art. 9(1).

[666] Convention on the Rights of the Arab Child [in Arabic, translation by the author].

quasi-legal objectives and instruments in favour of promoting "women affairs" or improving/advancing the "status of women".[667] Another Arab covenant worth briefly mentioning is the *Arab Convention on regulating Status of Refugees in Arab Countries* which was signed by Egypt only and which has not received a single ratification since it was adopted by Arab Council Decision No. 5389 in March 1994. The Convention thus never came into force and does not create an added value for the eight Arab states (Algeria, Djibouti, Egypt, Morocco, Somalia, Sudan, Tunisia and Yemen) who have already ratified (or acceded to) the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol* which are far more comprehensive in their protection of refugees.[668]

Access to justice is codified as a basic human right in different forms in the *Riyadh Arab Agreement for Judicial Cooperation* which came into force on 30 October 1985. The Agreement was ratified by 16 Arab states and provides Arab citizens the "right to litigation before legal bodies to demand and defend their rights" (Art. 3), the right to obtain legal assistance (Art. 4), the prohibition of extradition for crimes of political nature (Art. 41a) and immunity of penal action for witnesses or experts (Art. 22) but falls short of fulfilling the rights spectrum enshrined in Art. 14-16 of the ICCPR including the right to due process, the right to a fair and impartial trial, the presumption of innocence, the prohibition of double jeopardy and the right to a speedy process.[669]

The 1998 *Arab Convention for the Suppression of Terrorism* (ratified by 16 Arab states) is another interesting legal document worth shedding light on. The Preamble reflects the desire of Arab member states to "promote mutual cooperation in the suppression of terrorist offences, which pose a threat to the security and stability of the Arab national" while staying committed to "the Charter of the United Nations and all other international conventions and instruments to which the Contracting States to this Convention are parties" and provides that "all cases of struggle, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law,

[667] Founding Treaty of the Arab Women Organization [in Arabic, translation by the author], Art. 5-6.
[668] Arab Convention on regulating Status of Refugees in Arab Countries (1994), as well as States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. See also Allam, W. (2005), n19, pp. 49-53.
[669] Riyadh Arab Agreement for Judicial Cooperation (1983).

shall not be regarded as [a terrorist] offence" (Art. 2a).[670] The Convention lists security and judicial measures to be considered by state parties in their efforts to prevent and combat terrorism (e.g. exchange of information and expertise about terrorist groups, extradition of offenders, judicial cooperation, seizure of assets) but fails to acknowledge numerous fundamental human rights and judicial guarantees that states should ensure while fighting terrorism, such as the presumption of innocence, the right to a fair trial and speedy process, the prohibition of torture or inhuman and degrading treatment or punishment (of detained suspects and those standing trial) and permitting judicial control of detention places and compensation for suspects proven innocent.[671]

In addition to the outlined conventions, references to human rights can be found in several declarations and soft law instruments issued by Arab League institutions, especially the *Arab Parliament*.[672] All in all, the following general conclusions can be drawn from the scattered codification of human rights across numerous conventions and instruments under the framework of the *League of Arab States*:

a) Most conventions/agreements examined do not include clear, explicit and specific references to human rights. In some texts the wording "human right" is missing. This phenomenon appears to be a common theme and undermines the legal obligations arising from these conventions on Arab state parties;

b) The majority of the conventions analysed are characterised by weak ratification. Some of the treaties did not even come into force yet, although they were signed by Arab states and adopted by the LAS Council many years ago;

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[670] Arab Convention for the Suppression of Terrorism (April 1998).
[671] See also Allam, W. (2005), n19, pp. 68-69.
[672] The *Arab Parliament* has launched numerous non-binding human rights related legislative proposals to LAS member states, such as the *Guiding Legislation for the Achievement of Food Security in the Arab World, the Guiding Legislation regarding the Death Penalty and Guarantees of its Implementation in Arab States, the Guiding Legislations on the Promotion of Reading and Combating Illiteracy in the Arab World and the Guiding Legislations on the Organization of Non-Regular Labor and on Social Safety Nets in the Arab World,* as well as multiple thematic strategic *Papers on Arab Youth, Water Security, Educational Development, Environmental Protection and Women Rights.* All these documents are published in Arabic and can be accessed on the temporary website of the *Arab Parliament* at <http://ar-pr.org/PublicationsAndpublications.aspx> and <http://ar-pr.org/AgreementsAnddocuments.aspx>. An in-depth analysis of these texts goes beyond the scope of this project.

c) All agreements outlined above lack a strong monitoring and sanctioning regime that ensures that the provisions therein are respected and put into action by member states;

d) Most legal texts focus on the rights of Arab citizens and not on fundamental human rights for everyone which would include non-citizens;

e) Many basic rights (especially of political and civil nature) are either missing from the outlined conventions or are very weakly protected (such as the freedom of religion, freedom of speech, freedom of assembly, freedom of association, minority rights, freedom from torture, right to a fair trial, women rights, etc.);

f) None of the conventions assessed includes an individual complaints mechanism;

g) It remains unresolved which legal provision prevails in case of a clash of laws within the Arab human rights system. What would happen when, for example, a provision in the *Convention on the Rights of the Arab Child* clashes with a provision in the 2004 *Arab Charter on Human Rights*? Which convention would prevail?[673]

4.7. Concluding remarks

Undoubtedly, the *League of Arab States* has created a distinct fabric of institutions and treaties that coordinate and regulate the human rights domain on regional level across the 22 Arab state parties. It is important to keep in mind though that the Arab League remains a centralised inter-state organisation in which most of the power is vested with delegates representing their administrations in the intergovernmental *Council of the Arab League* and the *Permanent Arab Human Rights Commission*. The human rights competences transferred to the *Arab Parliament*, for example, are limited and rather advisory in nature and the *Arab Court of Human Rights* is fitted with weak competences and has not yet come into force until the present day. Human rights have been vaguely codified in a scattered and inconsistent manner across numerous multilateral treaties under the umbrella of the Arab League until the revised *Arab Charter on Human Rights* was signed in 2004 and adopted in 2008.

[673] A good short critique/conclusion of the analysed Arab conventions can also be found in Allam, W. (2005), n19, p. 70

Chapter 5: The 2004 Arab Charter on Human Rights

Chapter 5 examines the last -and arguably most important- piece in the Arab human rights puzzle, the *Arab Charter on Human Rights* (ACHR) and its treaty body, the *Arab Human Rights Committee.* It assesses the key provisions of the Charter in comparison with selected regional and international human rights instruments and provides some impetus for how the Charter and the entire Arab human rights system could be reformed.

5.1. The making of the revised Arab Charter: a brief history and ratification overview

As mentioned in Chapter 4, the 1994 *Arab Charter on Human Rights* was widely criticised for failing to meet international human rights protection standards.[674] It was not ratified by a single Arab state and fell into complete oblivion within the Arab League throughout the second half of the 1990s.[675] Then in January 2001, the PAHRC recommended a modernisation of the 1994 Charter to the *Council of the League of Arab States*.[676] About two months later, the LAS Council adopted Resolution No. 6089 on 12 March 2001 inviting Arab member states to negotiate the drafting of a new Arab human rights charter.[677]

In the aftermath of the 11 September 2001 attacks and the Global War on Terrorism declared by the US and its allies, the George W. Bush administration advocated for the democratisation of the Middle East and put considerable pressure on authoritarian Arab regimes to embrace political liberalisation, good governance and the rule of law and to combat religious extremism and terrorism.[678] Behind the scenes, however, the US

[674] See subchapter 4.4., n587-591.
[675] Ibid.
[676] Rishmawi, M. (2010), 'The Arab Charter on Human Rights and the League of Arab States: An Update', *Human Rights Law Review*, Vol. 10(1), p. 170. See also Younis, A. N. (2017), 'Historical stages in the evolution of the Arab Charter on Human Rights' [in Arabic], *Arab Human Rights Committee*, Cairo, 2017, p. 25.
[677] Allam, W. (2014), 'The Arab Charter on Human Rights: Main Features', *Arab Law Quarterly*, Vol. 28(1), p. 42. See also Sahraoui, H. H. (2004), 'Modernising the Arab Charter on Human Rights', *Yearbook of the International Commission of Jurists 2004*, pp. 339-340. A complete chronological overview on the modernisation process of the *Arab Charter on Human Rights* can be found in Younis, A. N. (2017), n676, pp. 24-30.
[678] van Hüllen, V. (2015), n592, pp. 136-137. See also Amirah-Fernández, H. & Menéndez, I. (2009), 'Reform in Comparative Perspective: US and EU Strategies of Democracy Promotion in the MENA Region after 9/11',

administration continued to favour its own geopolitical interests by maintaining strong ties with Arab dictatorships it considered trustworthy regional partners.[679] The momentum for democracy and human rights promotion lost its initial impetus, with the toleration of oppressive practices carried out by Arab regimes towards oppositionists (mainly those belonging to Islamist parties) under the pretext of the 'war on terror' and later with the unlawful US-led invasion of Iraq in 2003.[680] The American neoconservative vision to forcefully bring about democracy, freedom and human rights to the Arab world was further delegitimised when reports were published that several Arab governments, including Egypt, Jordan, Morocco and Saudi Arabia, have received 'war on terror' detainees from the US, interrogated them and possibly subjected them to torture and other forms of ill-treatment as part of the secret "extraordinary renditions" programme operated by the *Central Intelligence Agency* (CIA).[681]

Yet although the post-9/11 events had actually contributed to worsening the overall human rights situation in many parts of the Arab world (at least where civil and political rights were concerned), the conjunction of international pressure and domestic demands by Arab human rights organisations and opposition parties had a positive impact on accelerating the revision process of the 1994 *Arab Charter on Human Rights* within the *League of Arab States*:

> "The events of 11 September 2011 in particular dramatically changed the international environment for authoritarian regimes in the region. In addition, social tensions increased in many countries, undermining the legitimacy of incumbent rulers (…) Had the creation of the PACHR been sufficient to fend off interferences through the UN system in the 1960s, the Arab League and its member states now had to signal more credibly their commitment to being 'good' members of the international community. Provisions for promoting and protecting human rights by

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Journal of Contemporary European Studies, Vol. 17(3), p. 326 and pp. 329-331, as well as Latif, M. I. & Abbas, H. (2011), 'US Democracy Promotion and Popular Revolutions in the Middle East: Challenges and Opportunities', *Pakistan Horizon*, Vol. 64(3), *Pakistan Institute of International Affair*s, p. 29-30.

[679] Mednicoff, D. (2002), 'Human Rights and the Rule of Law in Arab Politics', *Middle East Policy*, Vol. IX(4), summary of papers presented by the Middle East Working Group concerning 'The Impact of 9/11 on the Middle East', December 2002, p. 88.

[680] Ibid. See also Amirah-Fernández, H. & Menéndez, I. (2009), n678, p. 326.

[681] Amnesty International (2006), '"Rendition" and secret detention: A global system of human rights violations. Questions and Answers', published on 01.01.2016.

> the Arab League in line with the global script for governance transfer by regional organizations thus became an attractive option for authoritarian rulers for boosting the image of their countries as modern and well-governed regimes."[682]

In 2002 and 2003, the *LAS Council* adopted several Resolutions instructing the PAHRC to revise and modernise the Charter.[683] Amr Moussa, then *Secretary-General* of the Arab League, clarified that the term 'modernisation' is to be interpreted "as the process to bring Charter provisions into compliance with international standards for human rights."[684] In October 2003, the PAHRC produced its first updated/revised draft of the Charter which was predominantly influenced by the 1994 Arab Charter. It therefore received widespread condemnation from Arab and international human rights NGOs for being largely inconsistent with international human rights standards.[685] The *International Commission of Jurists*, for example, criticised the draft for revealing "patent normative as well as institutional inadequacies" and formulated an extensive list of recommendations for improving the amended draft, such as:

a) the introduction of an effective monitoring mechanism to the text;

b) the necessity to have stronger participation of NGOs in the process of modernising the Arab Charter;

c) the need to reinforce the principles of the universality, indivisibility and complementarity of human rights, as well as the supremacy of the *International Bill of Rights* over the *Cairo Declaration on Human Rights in Islam*;

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[682] van Hüllen V. (2015), n592, pp. 135-136. See also Zerrougui, L. (2008), 'The Arab Charter on Human Rights', lecture delivered at the Human Rights Centre at the University of Essex, 4-6 July 2008, p. 8, as well as Allam, W. (2014), n677, p. 43.

[683] Rishmawi, M. (2005), 'The Revised Arab Charter on Human Rights: A Step Forward', *Human Rights Law Review*, Vol. 5(2), p. 362. The LAS Council Resolutions passed are as follows: Resolution No. 6184 of 10.03.2002, Resolution No. 6243 of 05.09.2002 and Resolution No. 6302 of 24.03.2003. See LAS Council (2003), 'LAS Council Decisions on Ministerial Level, Normal Round Nr. 120, Cairo 09.09.2003' [in Arabic], Topic No. 38, p. 121.

[684] Agir ensemble pour les droits de l'homme & the International Organization for the Development of Freedom of Education (2004), 'Effective Functioning of Human Rights Mechanisms: National Institutions and Regional Arrangements', report submitted by NGOs to the Commission on Human Rights on 26.02.2004, UN document E/CN.4/2004/NGO/64, paragraph 4.

[685] Rishmawi, M. (2005), n683, p. 363 as well as Allam, W. (2014), n677, p. 43. The complete first amended version of the 1994 Arab Charter produced by the PAHRC in October 2003 can be found in Al-Shaikh, I. A. B. (2008), n574, pp. 185-194.

d) the necessity to integrate a provision affirming the primacy of obligations arising from the Charter over obligations of domestic law and

e) the establishment of a comprehensive list of non-derogable rights including the right to life, the prohibition of torture and slavery, the recognition of everyone as a person before the law and the right to a fair trial.[686]

Under pressure from NGOs, the Arab League reached an agreement with the OHCHR to allow an independent *Committee of Experts* to prepare a second draft.[687] That Committee was established earlier in 2002 within the framework of a cooperation memorandum (technical assistance programme) signed by the OHCHR and the Arab League and consisted of five Arab experts (two women, three men) selected from among members of the UN human rights treaty bodies and special procedures: Ibrahim El-Cheddi (Saudi Arabia), Ghalia Ben Hamed Al Thani (Qatar) Ahmed Taoufik Khalil (Egypt), Hatem Kotrane (Tunisia), and Leila Zerrougui (Algeria) who headed the Committee.[688] Prior to convening in Cairo at the headquarters of the Arab League from 21-26 December 2003, the team of experts had already received several substantive submissions and observations from international and Arab human rights organisations such as the *Cairo Institute for Human Rights Studies, the Arab Lawyer's Union, Amnesty International,* and the *International Commission of Jurists* through the OHCHR.[689] According to Zerrougui, the involvement of civil society organisations in the drafting process was in itself a major success for the region and "enabled the team of experts to produce a solid draft in line with international human rights standards."[690] That new 'independent' draft Charter was eventually supported by more than 40 Arab NGOs which called for its adoption without amendment.[691] Professor

[686] International Commission of Jurists (2003), 'The process of "modernizing" the Arab Charter on Human Rights: a disquieting regression', position paper published on 20.12.2003, pp. 2-5.
[687] Rishmawi, M. (2005), n683, p. 363 as well as Allam, W. (2014), n677, p. 43. This was also mentioned by Mr. Asaad Younis, former member of the Arab Human Rights Committee (2009-2015) from Palestine, in my interview with him on 16.06.2022.
[688] Zerrougui, L. (2008), n682, p. 9. See also Al-Shaikh, I. A. B. (2008), n574, p. 77, as well as Rishmawi, M. (2015), n19, p. 68.
[689] Ibid., p. 9. See also Al-Shaikh, I. A. B. (2008), n574, p. 78. The insightful and critical contribution of the Cairo Institute for Human Rights Studies (CIHRS) in the redrafting of the Arab Charter can be found in CIHRS (2003), 'Which Arab Charter on Human Rights', published on its website on 23.12.2003.
[690] Ibid. See also Allam, W. (2014), n677, p. 43 as well as Rishmawi, M. (2010), n676, p. 170.
[691] Ibid. The complete revised draft as submitted by the *Committee of Experts* can be found in Arabic in Younis, A. N. (2017), n676, pp. 89-106.

Zerrougui provides an insightful first-hand account on the human rights philosophy of the Committee members and the approach they adopted while preparing the new draft:

> "In our work we were guided by two self-imposed principles. Firstly, given the political context in the region, the modernization process must have at its heart non-derogable rights as set out in international instruments but also as later specified by the UN Human Rights Committee's General Comment No. 29 regarding the suspension of some civil and political rights during states of emergency. In other words, we were guided by the need to set out all non-derogable rights in the Charter but also to further limit the opportunities for states to use exceptional measures. Secondly, the text we would propose should not merely be the lowest common denominator among member states. The Charter would be a treaty open to ratification by sovereign member states, which would remain free to ratify it or not. Concretely, we were not seeking to achieve consensus at the expense of substantive human rights issues."[692]

Professor Zerrougui also addressed the Committee's take on the *Cairo Declaration on Human Rights in Islam* and the reference to Zionism as a form of racism which had remained in the Preamble of the draft produced by the PAHRC in October 2003 and which was rooted in the 1994 version of the Arab Charter:

> "From the outset, I would like to highlight that the experts took a deliberate decision [neither] to address in the text itself the reference in the preamble to the Cairo Declaration on Human Rights in Islam [nor] to Zionism as racism, which is not consistent with international human rights standards (…). We discussed these issues extensively and decided to put them aside, as they would have dragged us into unsolvable polemics over sensitive issues for the League and its member states. Nevertheless we felt that it was our duty to draw the attention of the Secretary General of the League of Arab States and [the PAHRC] to the inconsistencies of the preamble (…)."[693]

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[692] Ibid., p. 10.
[693] Ibid., p. 11. See also the Preamble of the 1994 Arab Charter which can be found in League of Arab States (1994), Arab Charter on Human Rights, 15 September 1994.

Both revised versions of the 1994 Charter, the one produced by the PAHRC in October 2003 and the one drafted by the *Committee of Experts*, were presented in an extraordinary session of the PAHRC which took place in Cairo on 4-14 January 2004.[694] Professor Zerrougui recalls the behind-the-scenes political dynamics of that significant session as follows:

> "When invited to present our draft to the [PAHRC], we had assumed we would attend the whole session and eventually engage in a dialogue with delegates and further explain our proposals. We then realised that some delegates were opposed to our participation and expected us to leave the room after the opening session. It is worth pointing out, however, that from the beginning of the session the delegations of Algeria, Bahrain, Iraq, Morocco, Palestine, and Tunisia clearly manifested their support for the draft produced by the team of experts and insisted on devoting the session to its examination (…) After much debate, the [PAHRC] considered that the proposal by the team of experts was more comprehensive than its own draft and decided to devote the session to its examination, article by article."[695]

The PAHRC finalised the revision process and on 14 January 2004 submitted its final draft to the *LAS Permanent Commission on Legal Affairs* for examination.[696] The final draft included substantial changes made by the members of the PAHRC to the draft presented by the *Committee of Experts,* rendering the final version in conflict with some international protection standards:

> "The suggestions formulated by the team of experts had not all been taken into consideration; the [PHARC] had, at times, deviated from the text suggested and from international standards. Some significant improvements to the 1994 text had been introduced, but the adopted Charter still retained some ambiguous provisions and failed to meet the expectations of civil society."[697]

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[694] Younis, A. N. (2017), n676, p. 29 as well as Al-Shaikh, I. A. B. (2008), n574, p. 78 and p. 97.
[695] Zerrougui, L. (2008), n682, p. 10.
[696] Allam, W. (2014), n677, p. 43 as well as Al-Shaikh, I. A. B. (2008), n574, p. 97.
[697] Zerrougui, L. (2008), n682, p. 11. See also Rishmawi, M. (2015), n19, pp. 68-69.

It is worth mentioning here that the members of the PAHRC who decided on the final revised draft of the Arab Charter were primarily public nominees representing the interests of their governments:

> "It is important to note that not all members of the [PAHRC] were human rights experts; several were diplomats who negotiated rather than formulated the rules. Thus, at this stage, special attention was paid to minimizing States' obligations towards their citizens and inhabitants. Therefore, many references were made to domestic law and the word 'person' was replaced by 'national' in several articles."[698]

The LAS *Permanent Commission on Legal Affairs* made a few minor modifications in the legal phrasing and submitted the final PAHRC draft to the LAS Council (on ministerial levels) which adopted the said draft on 4 March 2004.[699] Then on 23 May 2004, the revised *Arab Charter on Human Rights* (ACHR) as we know it today was adopted unanimously by Resolution No. 270 of the LAS Council on the level of Arab heads of state and government convening at the *Arab Summit* held in Tunisia.[700]

On 15 January 2008, the UAE became the seventh state to ratify the ACHR.[701] As a result, the Charter came into effect on 15 March 2008 in accordance with Art. 49(2) of the Charter which stipulates that it shall enter into force two months after its ratification by seven Arab states.[702] As of September 2024, the Arab Charter has been ratified by 18 Arab state parties without any of them entering reservations.[703] The only Arab states which have not yet

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[698] Allam, W. (2014), n677, p. 43. For a more detailed analysis of the structural weaknesses of the PAHRC and reform suggestions voiced by civil society organisations, see subchapter 4.5.1 titled "The Permanent Arab Human Rights Commission (PAHRC)".
[699] Al-Shaikh, I. A. B. (2008), n574, p. 98.
[700] Resolution No. 270 (2004), adopted by the LAS Council on 23.05.2004 at the Arab Summit in Tunisia [in Arabic], published on the portal of the League of Arab States, pp. 38-55.
[701] Allam, W. (2014), n677, p. 44 (footnote 17).
[702] Ibid. See also LAS Portal (2024), 'Dates of Signature and Ratification of the Revised Arab Charter on Human Rights' [in Arabic], accessed 01.09.2024. Art. 49(2) of the ACHR can be found in League of Arab States (2004), 'The Arab Charter on Human Rights' [in Arabic] which is the official/original Arabic text of the Charter. An unofficial but authoritative English translation of the Arabic version can be found in Arab Charter on Human Rights (2004), UN Office of the High Commissioner for Human Rights & League of Arab States, Symbol [ST/HR/]CHR/NONE/2004/40/Rev.1. For the sake of clarity, all subsequent references to articles and provisions of the ACHR shall relate to the English text.
[703] LAS Portal (2024), n702. On 18 January 2004, Iraq had sent a memorandum to the *LAS General Secretariat* and the PAHRC containing a list of eight reservations (or rather comments) to the final draft produced by the PAHRC on 14 January 2004. However, the government of Iraq did not repeat these 'reservations' when

ratified the Arab Charter are Djibouti, Morocco, Somalia, and Tunisia. The below Table 10 contains the dates of signature and ratification for each member state in the *League of Arab States*.[704]

TABLE 10

ARAB CHARTER ON HUMAN RIGHTS: DATES OF SIGNATURE & RATIFICATION

Country	Date of Signature	Date of Deposit of Ratification Instrument	Country	Date of Signature	Date of Deposit of Ratification Instrument
Jordan	28.10.2004	28.10.2004	Oman	Accession	09.04.2023
UAE	18.09.2006	15.01.2008	Palestine	15.07.2004	28.11.2007
Bahrain	05.07.2005	18.06.2006	Qatar	24.01.2008	11.01.2009
Tunisia	15.06.2004		Comoros	Accession	19.01.2023
Algeria	02.08.2004	11.06.2006	Kuwait	18.09.2006	05.09.2013
Djibouti			Lebanon	25.09.2006	08.05.2011
Saudi Arabia	01.08.2004	15.04.2009	Libya	14.02.2005	07.08.2006
Sudan	21.07.2005	21.05.2013	Egypt	05.09.2004	24.02.2019
Syria	17.08.2006	06.02.2007	Morocco	27.12.2004	
Somalia			Mauritania	Accession	18.02.2019
Iraq	Accession	04.04.2013	Yemen	12.10.2004	12.11.2008

Since coming into force, the ACHR has been receiving rather negative international reactions. On 30 January 2008, the then *UN High Commissioner for Human Rights* issued a statement in which she pointed out that the Charter does not conform with international human rights standards and that her office "does not endorse these inconsistencies."[705] She added that throughout the redrafting process her office had shared concerns about the incompatibility of some provisions with international norms and standards:

Resolution No. 270 was adopted at the Arab Summit on 23 May 2004 in Tunisia (Allam, W. (2014), n677, pp. 44-45).

[704] The data in Table 10 is entirely based on the LAS Portal (2024), n702.

[705] UN News (2008), 'Arab rights charter deviates from international standards, says UN official', published 30.01.2008.

> "These concerns included the approach to [the] death penalty for children and the rights of women and non-citizens. Moreover, to the extent that it equates Zionism with racism, we reiterated that the Arab Charter is not in conformity with General Assembly Resolution 46/86, which rejects that Zionism is a form of racism and racial discrimination."[706]

International and domestic pressure to reform the ACHR resurfaced again amidst the civil uprisings of the Arab Spring. In March 2012, then *Secretary-General* of the Arab League Nabil Elaraby (2011-2016), a distinguished diplomat and jurist, former member of the UN *International Law Commission* (1994-2001) and Judge at *the International Court of Justice* (2001-2006), recognised that the ACHR "fell short of international human rights standards, and that revising it had become a pressing requirement that could not be overlooked."[707] A further revision of the *Arab Charter on Human Rights* has not been undertaken ever since.

The subsequent subchapter discusses the composition of the ACHR and outlines the categories of human rights codified therein in comparison to other international and regional human rights instruments.

5.2. Structure of the Arab Charter and overview of human rights codified therein

5.2.1. The Preamble and Art. 1

The 2004 ACHR consists of a Preamble and 53 articles.[708] The Preamble deserves a closer examination, not only because it 'sets the stage' for the entire Charter but also because it reflects well some key questions discussed earlier in this thesis.

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[706] Ibid. UN General Assembly Resolution 3379, adopted on 10 November 1975, determined that Zionism is a form of racism and racial discrimination. It was revoked by UN General Assembly Resolution 46/86, adopted on 16 December 1991 (Lewis, P. (1991), 'U.N. Repeals Its '75 Resolution Equating Zionism With Racism', *The New York Times,* 17 December 1991). Both resolutions are not considered to be binding in international law. A good historical and sociological discussion of whether Zionsim is a racist ideology can be found in Salaita, S. (2006), 'Anti-Arab Racism in the USA: Where It Comes From and What It Means For Politics Today', *Pluto Press*, pp. 137-145. An informative analysis of the historical roots of Zionism can be found in Pappé, I. (2021), 'The Many Faces of European Colonialism: The Templers, the Basel Mission and the Zionist Movement', in Pappé, I. (ed.), 'Israel and South Africa: The Many Faces of Apartheid', *Zed Book*, London, pp. 43-72. It is worth mentioning that the *African Charter on Human and Peoples' Rights* contains an anti-Zionism clause too in its Preamble stating that: "(…) undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism (…)".

[707] Rishmawi, M. (2015), n19, p. 70. A short biography of Nabil Elaraby can be found in Institute for Palestine Studies (2013), 'Biography – Nabil Elaraby', accessed 21.05.2023.

[708] Arab Charter on Human Rights (2004).

The Preamble starts with a reference to the "faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of the creation and in the fact that the Arab homeland is the cradle of religions and civilizations (…)."[709] This makes the Arab Charter the only regional human rights treaty that mentions a divine source (God) in its Preamble.[710] The Preamble also addresses the "furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions."[711] This provision is rooted in traditional Islamic thought and jurisprudence which views Judaism and Christianity as the only two divinely-revealed monotheistic religions which are historically and theologically related to Islam.[712] Humanist principles endorsed by other non-divinely-revealed religions like Buddhism are disregarded. Such an explicit prioritisation of a particular religion (or religions) is missing in the three other regional human rights treaties. The Preambles of the ECHR, the *American Convention on Human Rights* (AmCHR) and the *African Charter on Human and Peoples' Rights* (Banjul Charter) are confined to addressing general humanist principles (e.g. freedom, equality, justice) and historical traditions and values (Banjul Charter) that govern each treaty without connecting those to a specific religion or faith.[713]

The Preamble of the Arab Charter embraces the right of nations to self-determination which has been strongly advocated by modern Arab states since their independence.[714] It also expresses the "protection of universal and interrelated human rights" which constitutes a considerable improvement compared to the 1994 version of the Charter which failed to recognise the universality of human rights.[715] Unlike the ECHR and the American

[709] Ibid., Preamble.
[710] See European Convention on Human Rights (Introduction/Preamble), American Convention on Human Rights (Preamble), as well as African Charter on Human and Peoples' Rights (Preamble).
[711] Arab Charter on Human Rights (2004), Preamble.
[712] Scott, R. M. (2021), 'The "Divinely-Revealed Religions"', in Scott, R. M. 'Recasting Islamic Law: Religion and the Nation State in Egyptian Constitution Making', *Cornell University Press*, pp. 117-118 and pp. 126-127.
[713] See European Convention on Human Rights (Introduction/Preamble), American Convention on Human Rights (Preamble), as well as African Charter on Human and Peoples' Rights (Preamble). For example, humanist principles mentioned in the Preamble of the African Charter include freedom, equality, justice, and dignity. Cultural particularities contained in the African Charter are reflected, among others, in the consideration of the virtues of African historical traditions and values of African civilization, as well as in the struggle to achieve the total liberation of Africa and the elimination of colonialism and all forms of discrimination (Preamble).
[714] Arab Charter on Human Rights (2004), Preamble. See also discussion in subchapter 3.2.
[715] Ibid.

Convention, neither the Arab Charter nor the Banjul Charter contain a reference to democracy in their Preambles.[716] This is not surprising considering the spread of authoritarianism and the weak democratic legacy across the Arab world.[717]

In its final paragraph, the Preamble of the Arab Charter "[rejects] all forms of racism and Zionism" and "[reaffirms] the principles of the Charter of the United Nations, the [UDHR] and the provisions of the [ICCPR] and the [ICESCR], and having regard to the Cairo Declaration on Human Rights in Islam."[718] The wording of this passage is almost identical with the Preamble of the 1994 Arab Charter, however the 2004 Arab Charter appears to use a 'softer' reference to the Cairo Declaration by using the supplement "having regard to" which is missing from the 1994 version.[719] Apart from the semantic discussion around whether the formulation "having regard" carries a softer legal obligation than "reaffirming", it appears that the 2004 Arab Charter has eventually inherited the normative tension that (can) exist between two different human rights models: the secular/'Western' model of human rights enshrined in the *International Bill of Human Rights* and the *Shari'a*-based model mirrored in the *Cairo Declaration on Human Rights in Islam*. This view is shared by Allam who considers the reference to the Cairo Declaration a "weak point in the Arab Charter" given that the Cairo Declaration "is not binding and its provisions are vague and drafted in rhetorical way rather than definite rules."[720] Interestingly, the Arab Charter is the only regional instrument containing an explicit reaffirmation of the provisions of the ICCPR and ICESCR. By comparison, the other regional human rights conventions give due regard to the UDHR in their Preambles, but only the American Convention generally considers humanist principles "reaffirmed and refined in other international instruments."[721] The endorsement of both the ICCPR and ICESCR in the Preamble of the Arab Charter is insofar

[716] The ECHR states that fundamental freedoms are best maintained "by an effective political democracy". The American Convention links the consolidation of personal liberty and social justice to the existence of a "framework of democratic institutions".
[717] See discussion in subchapter 2.1.
[718] Arab Charter on Human Rights (2004), Preamble.
[719] The Preamble of the 1994 Arab Charter reads as follows: "Reaffirming the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam" (see League of Arab States (1994)).
[720] Allam, W. (2014), n677, pp. 47-48 (footnote 31).
[721] European Convention on Human Rights (Introduction/Preamble), American Convention on Human Rights (Preamble) and African Charter on Human and Peoples' Rights (Preamble).

paradox given the fact that the two conventions have not yet been universally ratified by Arab states (see Table 6 and discussion in subchapter 3.3).

Art. 1 of the Arab Charter reflects the acceptance of state parties "that all human rights are universal, indivisible, interdependent and interrelated."[722] Obviously, the Arab Charter has embraced the same wording with regard to the universality, indivisibility, interdependence and interrelation of human rights contained in the *Vienna Declaration and Programme of Action* adopted by consensus at the 1993 *World Conference on Human Rights*.[723] It could be claimed that this provision is a signal that Arab states have loosened their firm adherence to cultural relativism. However, I will argue in a later stage of this chapter that cultural relativism is in fact omnipresent in the 2004 Arab Charter, yet in a disguised fashion.

5.2.2. The human rights catalogue of the Arab Charter (Art. 2 – Art. 42)

The Arab Charter covers an extensive catalogue of human rights spread from Art. 2 to Art. 42. Freedoms and rights codified in the Charter can be grouped into six main categories.

The first category identifies *individual rights,* including the right to life (Art. 5, 6 and 7), the right not to be subjected to torture, inhuman or degrading treatment (Art. 8), the right to be free from slavery, forced labour and human trafficking (Art. 10) and the right to liberty and security of the person (Art. 14). The second category outlines rights to obtain justice (*judicial rights*), such as equality before the law (Art. 11, 12), the right to a fair trial (Art. 13) and the right to due process (Art. 15, 16, 17, 19).[724]

The third category covers *civil and political rights* including, among others, the rights to stand for election, to form and join associations and the freedom of association and peaceful assembly (Art. 24), rights of minorities (Art. 25), freedom of movement (Art. 26, 27), the right to political asylum (Art. 28), the right to nationality (Art. 29), freedom of thought, conscience, and religion (Art. 30), the right to private property (Art. 31) and the right to information and freedom of opinion and expression (Art. 32). The fourth group contains *economic, social, and cultural rights,* such as the right to work (Art. 34), the right to form

[722] Arab Charter on Human Rights (2004), Art. 1(4).
[723] Vienna Declaration and Programme of Action (1993), part I, paragraph 5.
[724] Arab Charter on Human Rights (2004), selected articles.

trade unions (Art. 35), the right to social security (Art. 36), the right to education (Art. 41) or the right to take part in cultural life (Art. 42).[725]

In addition to these four categories, two further categories of human rights codified in the Arab Charter can be identified.[726] A fifth category concerns *collective rights,* such as the right of peoples to self-determination and to control over their national wealth and resources (Art. 2), the right to development (Art. 37) and the right to a healthy environment (Art. 38).[727] A sixth category covers specific *group rights* receiving special consideration in the Arab Charter such as women (Art. 3, 33, 34), children (Art. 10, 17, 29, 33, 34,43), youth (Art. 33), the elderly (Art. 33), and persons with disabilities (Art. 40).[728]

Table 11 provides a breakdown of all human rights codified in the Arab Charter and presents it in comparison with the rights and freedoms included in selected human rights treaties, namely the ECHR (and its Protocols), the AmCHR, the *African Charter on Human and Peoples' Rights,* as well as the ICCPR and ICESCR. The rights included in the Arab Charter were manually added into the first column to the left in Table 11 in their chronological order. Human rights and individual freedoms not covered in the Arab Charter (such as the absolute abolition of the death penalty) are listed in the same column towards the end of the table. The wording of most rights included in the first column to the left is based on how these rights are named in the Arab Charter. Provisions/articles codifying rights in the other treaties were then inserted to correspond to the rights listed in the first column. I added short remarks in brackets in some cells where I found that a provision in the other examined treaties deviated from the corresponding right in the Arab Charter in terms of wording or substance.[729]

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[725] Ibid.

[726] The typology of four human rights categories contained in the Arab Charter was introduced by Al-Midani, M. A. (2006), 'Introduction', in Al-Midani, M. A. and Cabanettes M. (2006), 'Arab Charter on Human Rights 2004', *Boston University International Law Journal*, Vol. 24(2), pp. 148-149. Al-Midani's typology was adopted in further academic contributions about the Arab Charter such as Almakky, R. G. (2015), n532, p. 179, Schlager, B. (2015), n378, p. 16 and Hunaiti, H. (2020), n23, p. 33.

[727] Arab Charter on Human Rights (2004), articles mentioned in text.

[728] *Ibid.*

[729] Table 11 was prepared to the best of my knowledge, yet the occurrence of unintended human errors cannot be excluded given the extensive number of provisions contained in the six selected human rights treaties. The inspiration to prepare Table 11 was derived from an annex prepared by Schlager, B. (2015), n378, pp. 37-41. The existence of similar tabular human rights overviews produced earlier by other researchers cannot be excluded.

The rationale behind Table 11 is to provide a comparative overview of whether and where human rights are codified in the selected documents without claiming to assess the quality of the codification. A qualitative assessment of the compliance of the Arab Charter with international human rights standards will follow later in this chapter. By the same token, the number of rights contained in a charter should certainly not signal that this charter is stronger in its protection of human rights than the others. This approach ignores the quality of human rights provisions and neglects the complexity of the regional and international human rights systems which accommodate human rights treaty bodies and multiple protection layers (courts, committees, individual complaint mechanisms etc.). It also disregards the fact that human rights are codified across many more conventions (the CEDAW, CAT, ICERD, CRC, and the *European Social Charter* just to name a few) than those selected in Table 11.

TABLE 11

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
right to self-determination	Preamble & Art. 2			Art. 20	Art. 1	Art. 1
peoples' right to control over natural wealth and resources	Preamble & Art. 2			Art. 21	Art. 1	Art. 1
peoples' right to national sovereignty and territorial integrity	Art. 2			Art. 20		
elimination of racism	Preamble & Art. 2			Preamble (incl. colonialism)		
elimination of Zionism	Preamble & Art. 2			Preamble		
elimination of foreign occupation and domination	Art. 2			Art. 20, 21		
non-discrimination (race, color, sex, etc.)	Art. 3	Art. 14 + Prot. No. 12 (Art. 1)	Art. 1	Preamble, Art. 2, 19	Art. 2	Art. 2
equality between men and women	Art. 3, positive discrimination of women	Art. 14		Art. 18, 19	Art. 3	Art. 3
right to life	Art. 5	Art. 2	Art. 4	Art. 4	Art. 6	

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
prohibition of torture, cruel, degrading, and inhuman treatment	Art. 8	Art. 3	Art. 5	Art. 5	Art. 7	
prohibition of medical and scientific experimentation without free consent	Art. 9				Art. 7	
prohibition of slavery and human trafficking	Art. 10	Art. 4 (slavery, forced labor)	Art. 6 (incl. compulsory labor)	Art. 5	Art. 8 (incl. forced labour)	
equality before the law, judicial protection	Art. 11	Prot. No. 12	Art. 24	Art. 3	Art. 14, 26	
equality before courts and tribunals	Art. 12	Art. 6	Art. 25	Art. 7 (impartiality of tribunals)	Art. 14	
right to effective legal remedy	Art. 12, 23	Art. 13	Art. 10		Art. 2	
right to a fair trial	Art. 13	Art. 6	Art. 8		Art. 14	
right to liberty and security of person	Art. 14	Art. 5	Art. 7	Art. 6	Art. 9	
prohibition of arbitrary arrest and detention	Art. 14	Art. 5	Art. 7	Art. 6	Art. 9	

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
no crime/penalty without law	Art. 15	Art. 7		Art. 7	Art. 15 (implicitly)	
presumption of innocence until proven guilty	Art. 16	Art. 6	Art. 8	Art. 7	Art. 14	
right to due process	Art. 16	Art. 6	Art. 7, 8	Art. 7	Art. 14	
special legal proceedings for children and minors	Art. 17		Art. 5 (separation from adults), Art. 19		Art. 10, 14	
no imprisonment for those indebted	Art. 18	Prot. No. 4, Art. 1	Art. 7		Art. 11 (failure to fulfill obligations)	
no double trial for the same offence	Art. 19	Prot. No. 7, Art. 4	Art. 8		Art. 14	
rights of persons deprived of their liberty	Art. 20	Prot. No. 7 Art. 2, 3	Art. 7 (detention)		Art. 9, 10	
right to non-interference in privacy, family, home	Art. 21	Art. 8	Art. 11		Art. 17	
right to recognition as a person before the law	Art. 22	Prot. No. 12	Art. 3		Art. 16	

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
right to a name			Art. 18		Art. 24 (children)	
right to political activity and to take part in public affairs	Art. 24	Art. 16 (polit. activity of aliens)	Art. 23	Art. 13	Art. 25	
right to elect and stand for election, right to public office	Art. 24	Prot. No. 1, Art. 3	Art. 23	Art. 13	Art. 25	
freedom of association and peaceful assembly	Art. 24	Art. 11	Art. 15, 16	Art. 10, 11	Art. 21, 22	
right to culture for minorities	Art. 25				Art. 27	
freedom of movement and residence	Art. 26, 27	Prot. No. 4, Art. 2	Art. 22	Art. 12	Art. 12	
prohibition of exile and expulsion	Art. 27	Prot. No. 4, Art. 3, 4	Art. 22	Art. 12	Art. 13 (partially)	
right to seek political asylum	Art. 28		Art. 22	Art. 12		
prohibition of extraditing political refugees	Art. 28					

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
right to nationality	Art. 29		Art. 20		Art. 24 (children)	
prohibition of deprivation of nationality	Art. 29		Art. 20			
freedom of thought, conscience, and religion	Art. 30	Art. 9	Art. 12	Art. 8	Art. 18	
right to private property	Art. 31	Prot. No. 1, Art. 1	Art. 21	Art. 14		
right to information	Art. 32	Art. 10	Art. 13	Art. 9	Art. 19	
freedom of opinion and expression	Art. 32	Art. 10	Art. 13	Art. 9	Art. 19	
right to marriage, protection of the family, equality in marriage	Art. 33	Art. 12	Art. 17	Art. 18 (protection of family)	Art. 23	
right to pursue a sporting activity	Art. 33					
right to work without discrimination, fair and decent working conditions	Art. 34	Art. 4 (partially)		Art. 15		Art. 6, 7

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
right to form and join trade unions	Art. 35	Art. 11			Art. 22	Art. 8
right to strike	Art. 35					Art. 8
right to social security	Art. 36					Art. 9
right to development	Art. 37		Art. 26 (progressive development)	Preamble, Art. 22		
right to an adequate standard of living	Art. 38					Art. 11
right to a healthy environment	Art. 38			Art. 24		
right to physical and mental health	Art. 39			Art. 16		Art. 12
right to free basic healthcare services	Art. 39			Art. 16 (partially)		
rights of persons with disabilities	Art. 40			Art. 18 (partially)		

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
right to education	Art. 41	Prot. No. 1, Art. 2		Art. 17		Art. 13
right to take part in cultural life and scientific progress	Art. 42		partly in Art. 16, 26	Art. 17 (only cultural life)		Art. 15
freedom of scientific research and creative activity	Art. 42					Art. 15
abolition of the death penalty		Prot. No. 6, Art. 1 & Prot. No. 13, Art. 1	Art. 4 (partially)		Art. 6 (partially)	
abolition of capital punishment			Art. 4		Art. 6	
freedom from ex post facto laws	Art. 19	Art. 7	Art. 9	Art. 7	Art. 15	
right to reply (protection of honor and reputation)			Art. 14			
elimination of every discrimination against women				Art. 18		
right of dispossessed people to compensation				Art. 21		

TABLE 11 (CONTINUED)

THE CODIFICATION OF HUMAN RIGHTS IN SELECTED REGIONAL/INTERNATIONAL INSTRUMENTS

	Arab Charter	European Convention	American Convention	African Charter	ICCPR	ICESCR
peoples' right to peace and security				Art. 23		
prohibition of propaganda for war					Art. 20	
prohibition of advocacy of national, racial, and religious hatred					Art. 20	
freedom from hunger	Art. 38 (adequate food)					Art. 11
right to adequate food (adequate standard of living)	Art. 38		Art. 12 (Protocol of San Salvador)	no explicit reference		Art. 11
right to housing (adequate standard of living)	Art. 38			no explicit reference		Art. 11
right to clothing (adequate standard of living)	Art. 38					Art. 11

Comparing the human rights catalogues presented in Table 11 reveals that the Arab Charter contains almost the entire list of rights and freedoms covered in the other conventions. Virtually all individual freedoms, civil and political rights codified in the ICCPR are reflected in the Arab Charter, with a few exceptions such as the prohibition of propaganda for war and the prohibition of the advocacy of national, racial, and religious hatred. The Arab Charter even contains some civil and political rights missing from the ICCPR such as the explicit rejection of racism, the right to seek political asylum, the prohibition of extraditing political refugees, the prohibition of the deprivation of nationality or the right to private property. It must be noted, however, that these rights are codified in other international human rights treaties and declarations. For example, the rejection of and struggle to eliminate racism is well-anchored in the ICERD which has been ratified by all Arab states (see Table 6, subchapter 3.3.). The right to private property is embedded in Art. 17 of the UDHR and the right to asylum is both provided for in Art. 14 of the UDHR, as well as in the 1951 *Convention Relating to the Status of Refugees* (Art. 33).[730] Similarly, the Arab Charter contains practically all of the rights codified in the ICESCR. It codifies more socio-economic rights compared with the Banjul Charter and the AmCHR, especially with respect to rights associated with the right to an adequate standard of living (the right to food, the right to housing and the right to clothing).

It is not surprising to find the rights included in the ICCPR and ICESCR reflected to a large extent in the Arab Charter knowing that both international covenants have received a high number of ratifications by Arab states (see Table 6), albeit with substantial reservations. The Arab Charter hosts an even broader human rights catalogue compared to the ICCPR and ICESCR with respect to collective and group rights such as the right of peoples to national sovereignty and territorial integrity, the right to development, the right to a healthy environment, and the rights of persons with disabilities. This is comprehensible given that the ICCPR and ICESCR predated the historic evolution of most collective/solidarity and group rights by several years.[731] It appears that the Arab Charter has inherited these rights

[730] UDHR, Art. 14 and Convention Relating to the Status of Refugees (1951), Art. 33.
[731] The right to development, for example, was first recognised in Art. 22 of the Banjul Charter. The African Charter was also the first human rights treaty to include a peoples' right to a "general satisfactory environment favourable to their development" (Art. 24). This right evolved later into the right "to live in a healthy

from the Banjul Charter which pioneered the codification of solidarity rights.[732] Such an influence is not surprising knowing that nine Arab-African states had already ratified the *African Charter on Human and Peoples' Rights* (see Table 8) by the time the Arab Charter was amended (2002/2003) and adopted by Arab governments in 2004.[733] The only collective right included in the Banjul Charter but missing from the Arab Charter is the right of peoples to peace and security.

Other human rights and freedoms missing from the Arab Charter include, for example, the unconditional abolition of the death penalty in all circumstances (only enshrined in Protocol No. 10 and Protocol No. 13 of the ECHR), the abolition of capital punishment (included in the ICCPR and the AmCHR), the right of dispossessed people to compensation (reflected in the Banjul Charter), the right to a name and the right to reply in protection of one's honour or reputation (both contained in the American Convention).[734] What is often overlooked is that the right to pursue a sporting activity can only be found in the Arab Charter (Art. 33).[735]

Judging the selected treaties just by the scope of their human rights catalogues, the drafters of the Arab Charter have all in all succeeded in covering nearly all of the human rights and fundamental freedoms contained in the other selected regional and international conventions. However, what is more important than the sheer number of human rights included in a treaty is an assessment of the quality of their codification. This requires a deeper analysis of the provisions of the Arab Charter, a closer examination of how these are worded and how they relate to each other, in addition to a thorough analysis of mechanisms the Arab Charter provides to guarantee the effective protection and enforcement of rights codified therein. This shall follow starting in subchapter 5.3.

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environment" as established in an additional protocol to the *American Convention on Human Rights* (*Protocol of San Salvador*, 1988) and into the "right to a healthy environment" in the 2004 Arab Charter (Knox, J. H. (2020), 'Constructing the Human Right to a Healthy Environment', *Annual Review of Law and Social Science*, Vol. 16, p. 82).

[732] See Hollenbach, D. (1998), 'Solidarity, Development, and Human Rights: The African Challenge', *The Journal of Religious Ethics*, Vol. 26(2), pp. 308-310.

[733] See Hunaiti, H. (2020), n23, p. 20.

[734] See exact articles in Table 11.

[735] An interesting contribution about sport as a human right can be found in Centre for Sport and Human Rights & Deutscher Bundestag (2017), 'Sport and Human Rights: The connection between Sport and Human Rights', *Deutscher Bundestag, Ausschuss für Menschenrechte und humanitäre Hilfe*, accessed 30.06.2023.

5.2.3. The Arab Human Rights Committee and other provisions (Art. 43 – Art. 53)

Art. 43 of the Arab Charter stipulates that "[n]othing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities."[736] This is a particularly important provision in the Arab Charter because it combines two different sources/layers of law (domestic law vs. international human rights law) that can possibly be in conflict with each other.[737] This issue shall be analysed in more detail at a later stage of this chapter.

Art. 44 of the Arab Charter obligates state parties to "adopt (…) whatever legislative or non-legislative measures that may be necessary to give effect to the rights" outlined in the Charter.[738] Art. 45 – 48 discuss the composition, mandate and competences/functions of the *Arab Human Rights Committee*, the treaty body tasked with monitoring the implementation of the Arab Charter.[739] Art. 45 provides that the Committee shall consist of seven members elected by secret ballot by the state parties for a four year-term. They should be experienced in the field of human rights, shall be fully independent and impartial and shall serve in the Committee in their personal capacity.[740] Members of the Committee enjoy the immunities necessary for carrying out their functions.[741]

Art. 48 obliges each state party to submit an initial report to the Committee within one year of the date on which the Charter entered into force and a periodic report every three years

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[736] Arab Charter on Human Rights (2004), Art. 43.
[737] Benvenisti and Harel observe that human rights "are secured by at least two different legal sources: constitutional law and international law. The coexistence of constitutional and international law norms is inevitably a source of conflict: When there is a conflict between the scope of a right under a constitutional provision and an international law provision, which (if any) provision should have the upper hand? Who is (or should be) the final arbiter as to what rights we have? (…) we argue in favor of "discordant parity hypothesis" that embraces competition between constitutional and international norms. It is the persistent tension and conflict between the two systems of norms, each of which claims superiority, that is necessary for recognizing and ensuring individual freedom." (Benvenisti, E. & Harel, A. (2017), 'Embracing the tension between national and international human rights law: The case for discordant parity', *International Journal of Constitutional Law*, Vol. 15(1), p. 37).
[738] Arab Charter on Human Rights (2004), Art. 44.
[739] Ibid., Art. 43-48.
[740] Ibid., Art. 45.
[741] Ibid., Art. 47.

thereafter.[742] The role of the Committee is centred around receiving and discussing the reports submitted to it by the state parties, commenting thereon and submitting a public annual report with its observations and recommendations to the *Council of the Arab League*.[743] In June 2014, the Arab Committee developed complementary guidelines outlining the reporting and review procedures state parties should take into account when submitting and having their reports reviewed by the Arab Committee in accordance with their obligations arising from Art. 48 of the Arab Charter.[744] According to these guidelines, the review of the submitted state report shall be conducted in a public "constructive dialogue" in presence of the concerned state representatives who are given the opportunity to respond to the questions of the Arab Committee concerning the human rights issues in their country.[745] NHRIs and NGOs accredited in the concerned state or registered with the Arab League, the *Organisation of Islamic Cooperation* or with the *United Nations* are allowed to attend the plenary session as observers; the Arab Committee may also admit further non-governmental organisations to observe a particular review session.[746] Arab Committee members possessing the nationality of the Arab state under review are not allowed to intervene in any stage of the review process.[747] The Secretariat of the Arab Committee may invite NHRIs, NGOs accredited in the concerned state and specialised agencies of the Arab League and the *United Nations* to submit written contributions (shadow reports) to the Committee up to two weeks before the public review session.[748] The guidelines also provide for the appointment of a rapporteur from amongst the Arab Committee members for each state report under review.[749] The main role of the rapporteur is to represent the Arab Committee vis-à-vis the concerned state, to request if necessary additional information from the state under review after the "constructive dialogue", to draft

[742] Ibid., Art. 48(2).
[743] Ibid., Art. 48(2-6). A comprehensive overview on the Arab Committee, its institutional structure, mandate, powers, and its experience in reviewing state reports can be found in Hunaiti, H. (2020), n23, pp. 38-62.
[744] Arab Human Rights Committee (2014), 'Guidelines for State Party Reporting to the Arab Committee of Human Rights' [in Arabic], accessed 20.10.2024, pp. 1-5.
[745] Ibid., paragraph a5, p. 2.
[746] Ibid., paragraph a7, p. 2.
[747] Ibid., paragraph a8, p. 2.
[748] Ibid., paragraph b1d, p. 3.
[749] Ibid., paragraph c1, p. 4.

the Concluding Observations and Recommendations, and to follow up on their implementation.[750]

Art. 49 – 53 of the Arab Charter outline technicalities concerning the ratification, accession, entry into force, and amendments to the Arab Charter and cover procedures for submitting reservations to and withdrawing from the Charter.[751] Art. 53 deserves a special mention here as it provides that "any State party, when signing this Charter, depositing the instruments of ratification or acceding hereto, may make a reservation to any article of the Charter, provided that such a reservation does not conflict with the aims and fundamental purposes of the Charter."[752]

Finally, and in accordance with its Rules of Procedures (Bylaws) adopted in November 2014, the Committee additionally gave itself the competence to interpret the provisions of the Arab Charter.[753] This power is not explicitly mentioned in the Charter though.

5.3. General critique and overarching observations

This subchapter discusses some overarching features of the Arab Charter in comparison to the ICCPR, ICESCR and regional human rights instruments. A detailed qualitative analysis of single provisions in the Arab Charter and the extent of their compatibility with international human rights standards shall follow in subchapter 5.4.

5.3.1. Human rights or citizens' rights?

Whereas the Arab Charter seeks to protect the rights of all persons ('everyone') in most of its articles, it deprives non-citizens from enjoying basic human rights in several provisions. Art. 24 grants only citizens the rights to pursue a political activity, to stand for election or choose one's representatives, to gain access to public office, as well as the rights to freedom of association and assembly.[754] Art. 34(1) limits the right to work to citizens and Art. 36 obliges state parties to ensure the right of every citizen to social security, including social

[750] Ibid., paragraphs c2-4, p. 4.
[751] Ibid., Art. 49-53.
[752] Ibid., Art. 53(1).
[753] Rishmawi, M. (2015), n19, p. 41 as well as Hunaiti, H. (2020), n23, p. 42
[754] Arab Charter on Human Rights (2004), Art. 24.

insurance.[755] Art. 41(2) grants free education at primary and basic levels to citizens only, excluding thereby non-nationals.[756]

These discriminatory provisions against non-citizens (foreigners, refugees, expatriates, stateless persons) are inconsistent with the Arab Charter's very own Art. 3(1) which stipulates that "[e]ach State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein."[757] They also largely fail to comply with the universal protection guaranteed in other international human rights treaties. The only provision limited to citizens in the ICCPR concerns the rights to take part in public affairs, to vote, to be elected and to have access to public service (Art. 25).[758] All other civil and political rights codified in the ICCPR are granted to everyone within the jurisdiction of state parties, including the right to peaceful assembly (Art. 21) and the freedom of association (Art. 22).[759] Human rights included in the ICESCR are also formulated to protect every person without discrimination, including the right to work (Art. 6), the right of everyone to the enjoyment of just and favourable conditions of work (Art. 7), the right of everyone to education (Art. 13(1)) and the right to free compulsory primary education to all (Art. 13(2a)).[760] The latter is also recognised for every child in Art. 28 CRC.[761] The *European Convention on Human Rights* and its Protocols do not contain citizen-centric provisions. The AmCHR limits one single right to citizens, namely the right to participate in government (Art. 23) which resembles Art. 25 ICCPR in terms of wording.[762] A similar limitation of the right to participate in government to citizens only is enshrined in the Banjul Charter (Art. 13).[763]

The more frequent occurrence of citizen-centric human rights provisions in the Arab Charter (when juxtaposed to other international and regional human rights treaties) correlates with

[755] Ibid., Art. 34(1) & Art. 36.
[756] Ibid., Art. 42(1). A good overview of citizen-centric provisions in the Arab Charter can be found in Allam, W. (2014), n677, p. 61, Hammami, F. (2013), 'The Arab Charter on Human Rights: The task still unfinished', *Irish Centre for Human Rights, National University of Ireland Galway*, pp. 49-50, as well as Rishmawi, M. (2005), n683, pp. 373-374.
[757] Ibid., Art. 3(1). See also Allam, W. (2014), n677, p. 61.
[758] ICCPR (1966), Art. 25.
[759] Ibid., Art. 21 & Art. 22.
[760] ICESCR (1966), Art. 6, Art. 7, Art. 13(1), Art. 13(2a).
[761] CRC (1989), Art. 28.
[762] American Convention on Human Rights (1969), Art. 23.
[763] African Charter on Human and Peoples' Rights (1981), Art. 13.

the abundance of citizen-centric provisions in Arab constitutional/domestic human rights laws (see discussion in Chapter 3, subchapter 3.1.). The Arab Charter, with its four discriminatory articles against non-citizens, might even be viewed as an accomplishment when placed in comparison with the magnitude of citizen-specific provisions contained in the Constitutions of Mauritania or the UAE, for example. The former limits the following rights to citizens: equality before the law (Art. 1), right to elections (Art. 3), freedoms of movement, opinion, thought, expression, assembly, association, and intellectual, artistic and scientific creation (all in Art. 10), accession to public functions (Art. 12) and equality in taxation (Art. 20).[764] The Constitution of the UAE restricts the enjoyment of several rights and freedoms to its nationals only, such as equality, social justice, safety, security and equal opportunities (Art. 14), medical care (Art. 19), provision of work and qualification for jobs (Art. 20), personal liberty (Art. 26), freedom of movement and residence (Art. 29), the right to hold public office (Art. 35) and the freedom from deportation and exile (Art. 37).[765]

The discrimination against non-citizens who are excluded from enjoying the rights to work, social security and to free basic education of their children under the Arab Charter becomes even more alarming when considering that the majority of Arab states has not ratified or acceded to global conventions concerned with the protection of refugees and stateless persons. Out of the 22 Arab states, 13 states have not ratified the *1951 Convention relating to the Status of Refugees*, 18 have not accepted the *1954 Convention relating to the Status of Stateless Persons* and 20 Arab states have refrained from ratifying the *1964 Convention on the Reduction of Statelessness.*[766] 11 Arab states (Bahrain, Iraq, Syria, Saudi Arabia, Kuwait, Qatar, Oman, the UAE, Lebanon, Jordan and the Comoros) have ratified none of the three aforementioned conventions.[767] Additionally, the *1994 Arab Convention on the Status of Refugees in Arab Countries* has not yet entered into force and is considered to provide a narrower protection of refugees than the 1951 Refugee Convention.[768] It has not established a treaty body, a significant weakness it shares with the 1951 Refugee

[764] Mauritania's Constitution of 1991 with Amendments through 2012, quoted articles.
[765] United Arab Emirates' Constitution of 1971 with Amendments through 2009, quoted articles.
[766] See ratification tables of the Convention relating to the Status of Refugees (signed 28.07.1951, effective 22.04.1954), the Convention relating to the Status of Stateless Persons (signed 28.09.1954, effective 06.06.1960) and the Convention on the Reduction of Statelessness (signed 30.08.1961, effective 13.12.1975).
[767] Ibid.
[768] Rishmawi, M. (2015), n19, p. 83.

Convention, and omits provisions relating to several refugee rights including the rights to health and education.[769] Taking into account that a state like the UAE has not yet ratified either the ICCPR and ICESCR or any of the three refugee and anti-statelessness conventions, it is justifiable to ask how a refugee or stateless person based in the UAE can claim his/her right to work or to social security when the enjoyment of these rights is effectively blocked on domestic, regional/Arab and international levels due to the proliferation of citizen-centric provisions or lack of ratification of the relevant legal instruments.

5.3.2. Reservations by state parties

According to Art. 53(1) of the Arab Charter, "[a]ny State party, when signing this Charter, depositing the instruments of ratification or acceding hereto, may make a reservation to any article of the Charter, provided that such reservation does not conflict with the aim and fundamental purpose of the Charter."[770] Although none of the state parties to the Arab Charter have submitted a reservation at the time of ratification or accession (only Djibouti, Morocco, Somalia and Tunisia have not ratified the Arab Charter yet), it is still noteworthy to discuss the way the reservation clause in Art. 53(1) is formulated and to compare it to other international treaties.

What is unusual in the wording of Art. 53(1) is the emphasis that a reservation is permitted "to any article of the Charter." This means, at least theoretically, that reservations can be made even to articles codifying non-derogable rights, such as the right to life, the right to non-discrimination, freedom from slavery and servitude and the prohibition of torture and inhuman or degrading treatment or punishment. It is true that Art. 53(1) restricts the making of indiscriminate reservations that are in conflict "with the aims and fundamental purposes of the Charter", yet the wording of the quoted phrase differs compared to similar provisions in the VCLT and in other international and regional human rights conventions.[771] According to Art. 19 VCLT, a reservation is prohibited if it is incompatible with the "object and purpose" of a treaty.[772] The same wording ("object and purpose") is also used in Art. 28(2)

[769] Ibid. See also Deutsche Gesellschaft für Internationale Zusammenarbeit (2017), 'The Arab Human Rights System', published on the website of the *Institut für Menschenrechte (German Institute for Human Rights),* p. 3.
[770] Arab Charter on Human Rights (2004), Art. 53(1).
[771] See Allam, W. (2014), n677, pp. 59-61.
[772] Vienna Convention on the Law of Treaties (1969), Art. 19.

CEDAW and Art. 51(2) CRC.[773] It appears that the broader formulations "aims" and "fundamental purposes" were used in the plural form suggesting that the Arab Charter is meant to achieve more than just the protection of human rights. It seems that these formulations were carefully used by the drafters of the Charter to provide Arab governments with more flexibility for legal manoeuvre as opposed to the narrower wording ("object and purpose") stipulated in the VCLT, CEDAW and CRC.[774] In this respect it should be noted that around half of the Arab states (Bahrain, the Comoros, Djibouti, Iraq, Jordan, Lebanon, Mauritania, Somalia, the UAE, and Yemen) have not yet ratified the VCLT.[775] However, many provisions of the VCLT are generally recognised to reflect customary international law and are therefore considered to be binding upon non-ratifying states.[776]

5.3.3. Individual complaints procedure and other treaty monitoring mechanisms

Unlike other international and regional treaty bodies, the *Arab Human Rights Committee* (Arab Committee) does not have the authority to receive individual, collective, or inter-state complaints/petitions regarding human rights violations committed by state parties.[777] Art. 48 of the Arab Charter limits the function of the Arab Committee to receiving periodic reports by state parties and issuing observations and non-binding recommendations thereon.[778] According to Rishmawi, the "lack of a complaints mechanism as established in each of the other regional systems is a major constraint on guaranteeing effective access to justice for

[773] The Convention on the Elimination of All Forms of Discrimination against Women (1979), Art. 28(2), as well as the Convention on the Rights of the Child (1989), Art. 51(2). The American Convention on Human Rights refers in Art. 25 to the VCLT stating that "[t]his Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties."
[774] See also Almakky, R. G. (2015), n532, pp. 186-187.
[775] Vienna Convention on the Law of Treaties, ratification status as of 04.08.2023, UN Treaty Series vol. 1155, accessed 04.08.2023.
[776] Aust (2013) affirms that "when law of treaties questions arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the [VCLT], the rules set forth in the [VCLT] are invariably relied upon, even when states are not parties to it." (Aust, A. (2013), 'Vienna Convention on the Law of Treaties 1969', in: 'Modern Treaty Law and Practice', *Cambridge: Cambridge University Press*, p. 10). Although India, for example, is a non-party to the VCLT, the *Supreme Court of India* recognised in Ram Jethmalani v. Union of India (2011) that the VCLT codifies several principles of customary international law (Nagaraj, S. (2015), 'Guest Post: Indian Court Embraces The Vienna Convention on Law of Treaties', *OpinioJuris*, published 02.04.2015). See also Zemanek, K. (2009), 'Vienna Convention on the Law of Treaties', *United Nations Audiovisual Library of International L*aw, pp. 2-3.
[777] Sadri, A. (2019), n591, p. 1171, as well as Rishmawi, M. (2015), n19, p. 39 & p. 70, Allam, W. (2014), n677, p. 62, Hammami, F. (2013), n756, p. 58, Rishmawi, M. (2010), n676, p. 174 and Hunaiti, H. (2020), n23, p. 44.
[778] Arab Charter on Human Rights (2004), Art. 48.

victims, especially as most Arab countries have yet to sign up to the UN complaints systems (…)."[779]

This fundamental weakness is exacerbated by several factors on Arab and international levels. First, the PAHRC, the central intergovernmental human rights body within the *League of Arab States*, neither has the mandate to receive individual complaints or conduct country investigations by request of NGOs/CSOs, nor does it have special procedures through which alleged individual human rights violations can be checked and dealt with.[780] Second, assuming that the *Statute of the Arab Court of Human Rights* does enter into force one day, the Statute does not allow individuals to access the Court directly.[781] Art. 19 of the Statute merely gives member states, at their discretion, the option to permit registered/pre-approved NGOs to present cases on behalf of individuals.[782] It is unlikely that an Arab government would allow an individual petition to the Court against another Arab member state as practice has shown that (authoritarian) states rarely employ human rights complaints procedures against each other (because they would expect countermeasures which in turn could jeopardise their strategic interests).[783] Third, the lack of individual complaints procedures on regional levels in the Arab world corresponds with a weak acceptance of international complaints mechanisms by Arab states.[784] Table 12 reveals that most Arab states have not ratified individual complaints procedures established by the Optional Protocols to the ICCPR, CEDAW, CRPD, ICESCR and CRC.[785] Almost half of the Arab countries (Egypt, Sudan, the Comoros, Lebanon, Jordan, Kuwait, Qatar, the UAE, Bahrain, and Oman) have ratified none of the listed Optional Protocols establishing individual complaints procedures. It should also be noted that the extent of Arab ratification of each of the selected Optional Protocols included in Table 12 is distinctly lower than the average ratification rate by the 193 member states of the United Nations. This phenomenon may be

[779] Rishmawi, M. (2005), n683, p. 365.
[780] Sadri, A. (2019), n591, p. 1170 and Rishmawi, M. (2015), n19, p. 39.
[781] See discussion in subchapter 4.5.4.
[782] Statute of the Arab Court of Human Rights [in Arabic], Art. 19. See also Rishmawi, M. (2015), n19, p. 57.
[783] Rishmawi, M. (2015), n19, p. 57. See also Sadri, A. (2019), n591, p. 1174.
[784] Rishmawi, M. (2015), n19, p. 39.
[785] Data was collected from United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter IV: Human Rights, selected treaties, accessed 24.09.2024. An insightful overview on individual complaints procedures established by international human rights treaties can be found in UN Human Rights Office of the High Commissioner (2013), 'Individual Complaint Procedures under the United Nations Human Rights Treaties', Fact Sheet No. 7 / Rev. 2, pp. 13-24.

a result of the historic reluctance of Arab governments to transfer competences to international human rights regimes that could possibly confine their national sovereignty and/or denounce their domestic human rights practices.[786]

TABLE 12

ARAB RATIFICATION OF INTERNATIONAL OPTIONAL PROTOCOLS ESTABLISHING INDIVIDUAL COMPLAINTS PROCEDURES

Optional Protocol	Ratification / Accession / Succession
First Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1), 1966	Total number of state parties: 116 states (60% of the 193 UN member states) Arab state parties: six Arab states: Algeria, Djibouti, Libya, Morocco, Somalia, Tunisia (27% of the LAS member states)
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP), 1999	Total number of state parties: 115 states (59.5% of the 193 UN member states) Arab state parties: three Arab states: Libya, Morocco, Tunisia (13.6% of the 22 member states of the LAS member states)
Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD-OP), 2006	Total number of state parties: 106 states (55% of the 193 UN member states) Arab state parties: eight Arab states: Djibouti, Mauritania, Palestine, Saudi Arabia, Sudan, Syria, Tunisia, Yemen (36.3% of the LAS member states)
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (CESCR-OP), 2008	Total number of state parties: 29 states (15% of the 193 UN member states) Arab state parties: None
Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC-OP-IC), 2011	Total number of state parties: 52 states (27% of the 193 UN member states) Arab state party: two Arab states: Tunisia, Palestine (9.1% of the 22 member states of the LAS member states)

[786] See discussion in subchapter 3.2., as well as van Hüllen V. (2015), n592, pp. 142-152.

Additionally, most Arab states have been rejecting/ignoring the individual complaints procedures established under the CAT, ICERD, ICPPED and ICMW. So far, only four Arab states (Algeria, Morocco, Qatar and Tunisia), representing around 18% of the member states of the Arab League, have made a declaration accepting the individual complaints procedure under Art. 22 CAT, as opposed to 77 declarations entered worldwide, accounting for about 40% of all UN member states.[787] Only Algeria, Morocco and Palestine (around 14% of all LAS member states) have accepted the individual complaints procedure under Art. 14 ICERD, compared to 59 states globally amounting to about 31% of all UN state members.[788] No evidence could be found about any Arab state accepting the individual complaints procedures under Art. 31 ICPPED or Art. 77 ICMW.[789] The lack of an individual complaints mechanism within the Arab League and the weak acceptance of international complaints procedures by Arab countries make it very difficult for victims of human rights violations in many Arab states to address a petition and access justice when domestic remedies are exhausted.[790]

Each of the other regional human rights systems -the European, Inter-American and the African- provides an individual complaints procedure that could give the Arab League fresh impetus for reforming. The ECHR (Art. 34) has a compulsory individual complaints mechanism for all state parties, and permits individuals, non-governmental organisations and groups of individuals claiming to be victims of human rights violations committed by a contracting state to lodge applications before the *European Court of Human Rights* (ECtHR) after exhausting all domestic remedies and passing certain admissibility criteria outlined in Art. 35.[791] Since its establishment in 1959 until 2023, the ECtHR has dealt with more than one million applications and has issued more than 26,000 binding judgments.[792] In 2023, the Court received 34,650 applications and delivered 1,014 judgments, of which a majority

[787] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter IV: Human Rights, CAT, accessed 01.01.2024.
[788] Ibid., ICERD (1965).
[789] Ibid., ICMW (1990). No data could be found for the ICPPED.
[790] Rishmawi, M. (2015), n19, p. 39 as well as Rishmawi, M. (2005), n683, p. 365.
[791] European Convention on Human Rights *(*1950), Art. 34. & Art. 35. Under Art. 33 of the *European Convention on Human Rights* states may also submit applications against each other ("inter-state case"). This possibility was rarely used by contracting states though. As of 18.07.2023, there have been only about 30 inter-state applications since the ECHR entered into force in 1953 (see European Court of Human Rights (2023), 'Q&A on Inter-State Cases', Press Unit, published on 18.07.2023).
[792] European Court of Human rights (2024), 'European Court of Human Rights Annual Report of 2023', p. 82.

concerned violations related to the right to liberty and security, inhuman or degrading treatment, the right to a fair trial, the right to an effective remedy and the right to respect for private and family life.[793] Despite long proceedings due to the high numbers of cases the Court receives every year, the delayed implementation of judgments by contracting states, and the refusal of some member states to execute its verdicts, the ECtHR has proven to be a guardian of human rights protection for millions of people and could serve as a "source of inspiration for a future Arab Court of Human Rights."[794]

At the Inter-American level, Art. 44 of the AmCHR permits "any person or groups of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization" to lodge petitions with the *Inter-American Commission on Human Rights* (IACHR) containing complaints of violations of the AmCHR by a state party.[795] Art. 41 of the AmCHR equips the IACHR with additional monitoring competences such as the power to make recommendations to member states for the adoption of progressive human rights measures, the right to request member states to supply it with information on measures adopted, responding to inquiries from member states and providing advisory services on human rights issues, and taking action on petitions and other communications submitted to it.[796] The IACHR is also mandated to publish annual, country and thematic reports on the human rights situation in member states, to conduct on-site visits to and investigations in member countries and report on the situation on the ground, to receive and examine inter-state communications pursuant to Art. 45(1) of the AmCHR and to request member states to adopt precautionary measures "in order to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case."[797]

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[793] Ibid., p. 110. See also European Court of Human rights (2024), 'Statistics by year 2023 – Violations by Article and by State 2023', p. 2 (total results).
[794] Sadri, A. (2019), n591, p. 1174 as well as in International Federation for Human Rights (2013), 'The Arab League and Human Rights: Challenges Ahead', Regional Seminar held in Cairo on 16-17 February 2013, p. 21. For more information about the structural challenges the ECtHR is facing, see also Helfer, L. R. (2014-2015), 'The successes and challenges for the European Court, seen from the outside," *American Journal of International Law Unbound*, Vol. 108, p. 77, as well as Hervey, G. (2017), 'Europe's human rights court struggles to lay down the law', *Politico*, published 20.09.2017.
[795] American Convention on Human Rights (1969), Art. 44.
[796] Ibid., Art. 41.
[797] Organization of American States (2023), Inter-American Commission on Human Rights (About the IACHR), 'Mandate and Functions' section, accessed 07.08.2023.

Additionally, the *Organization of American States* (OAS) established the *Inter-American Court of Human Rights* (IACtHR) in 1979 to complement the work of the Inter-American Commission in protecting and promoting human rights in the Americas.[798] The IACtHR assumes two principal functions under the AmCHR: an adjudicatory function and an advisory function.[799] The Court hears and adjudicates on cases referred to it by the Inter-American Commission or by member states that have accepted its jurisdiction (Art. 61 & 62).[800] Contrary to the ECHR, individuals and NGOs are not allowed to take case directly to the IACtHR. The jurisdiction of the Inter-American Court also comprises cases relating to the interpretation and application of the provisions of the AmCHR submitted to it (Art. 62).[801] Under Art. 63(2) of the AmCHR, the Inter-American Court can order the adoption of provisional measures to prevent irreparable harm to persons in cases of extreme gravity and urgency.[802] Finally, under Art. 64 of the AmCHR, the Court issues advisory opinions to member states on matters regarding the interpretation of the AmCHR (or of other treaties concerning the protection of human rights in the Americas), as well as regarding the compatibility of domestic laws with the aforementioned treaties.[803]

Like any international or regional regime, the Inter-American human rights system has been facing its very own obstacles. Out of the 34 current members of the *Organization of American States*, nine states (Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines and the United States) have not ratified the *American Convention on Human Rights* yet.[804] The same nine states, in addition to Cuba, Dominica, Grenada and Jamaica, have not recognised the contentious jurisdiction of the *Inter-American Court of Human Rights* as of September 2024.[805] Additionally, Goldman identifies the high numbers of annual petitions, the shortage of staff lawyers able to handle

[798] Statute of the Inter-American Court of Human Rights (1979), adopted by the General Assembly of the OAS, 9th Regular Session, Resolution No. 448.
[799] Ibid., Art. 2 (Jurisdiction).
[800] American Convention on Human Rights (1969), Art. 61 & Art. 62(1).
[801] Ibid., Art. 62(3).
[802] Ibid., Art. 63(2).
[803] Ibid., Art. 64(1) & Art. 64(2).
[804] Organization of American States (2024), 'Member States', accessed 25.09.2024, as well as Organization of American States (2024), 'Multilateral Treaties – American Convention on Human Rights – Signatories and Ratifications', accessed 25.09.2024.
[805] Inter-American Court of Human Rights (2024), 'About I/A Court H.R. – What is the I/A Court H.R.? - Which States have accepted the Contentious Jurisdiction of the Court?', accessed 25.09.2024.

the increased number of complaints, limited financial resources for covering non-salary items like *in loco* visits, investigations and publication of special reports, the failure of most state parties to fully comply with orders of the Commission and judgments of the Court and the tendency of some member states not to make the rights contained in the Convention operative under domestic law as further key challenges facing the Inter-American human rights system.[806] Nevertheless, the Inter-American system provides many profound human rights protection procedures that can benefit the Arab human rights regime. Unfortunately, other than the competence to receive state reports and comment on them, the *Arab Human Rights Committee* lacks nearly all competences and powers the Inter-American Commission and Court are equipped with under the American Convention.

The African human rights system is hosting a similar dichotomous structure composed of a quasi-judicial supervision body (Commission) and a specialised human rights Court.[807] The Banjul Charter lists the functions of the *African Commission on Human and People's Rights* (often referred to as the Banjul Commission) as follows:

1) collecting documents, disseminating information, and making recommendations to governments on African human rights issues;[808]

2) formulating legal human rights principles and rules upon which member states can base their legislation;[809]

3) cooperating with other African and international institutions in human rights matters;[810]

4) interpreting all provisions of the Banjul Charter at the request of a state party or an institution of the *Organisation of African Unity* (later *African Union*);[811]

5) conducting investigations;[812]

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[806] Goldman, R. K. (2009), 'The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights', *Human Rights Quarterly*, Vol. 31(4), pp. 882-884.
[807] African Court on Human and Peoples' Rights (2023), 'Basic Information – The African Court in Brief', accessed 08.08.2023.
[808] African Charter on Human and Peoples' Rights (1981), Art. 45(1a).
[809] Ibid., Art. 45(1b).
[810] Ibid., Art. 45(1c).
[811] Ibid., Art. 45(3).
[812] Ibid., Art. 46.

6) receiving, processing and reporting on inter-state communications after ensuring that all local remedies were exhausted;[813]

7) considering communications other than those submitted by state parties (i.e. by individuals, groups or NGOs) by a simple majority of Commission members if certain criteria are fulfilled (communications must be brought to the knowledge of the state party concerned);[814] and

8) undertaking in-depth studies and factual reports of the received communications by request from the *Assembly of Heads of State and Government*, the supreme policy- and decision-making body of the *African Union*.[815]

The Commission's final decisions on the processed complaints are called 'recommendations':

> "The recommendations are made after consideration of the facts submitted by the author, his or her complaint, the State party's observations (if any) and the issues and proceedings before the Commission. These proceedings usually contain the decision on admissibility, an interpretation of the provisions of the Charter invoked by the author, an answer to the question whether the facts as presented disclose a violation of the Charter, and if a violation is found, the required action to be taken by the State party to remedy the violation. The mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the States concerned."[816]

The *African Court on Human and Peoples' Rights* (the African Court), which became operational in July 2006, complements the mandate of the African Commission by issuing legally binding judgments.[817] The African Court was established by virtue of Art. 1 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an*

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[813] Ibid., Art. 47 – Art. 53.
[814] Ibid., Art. 55 – Art. 57.
[815] Ibid., Art. 58(2).
[816] African Commission on Human and Peoples' Rights (1987), "Information Sheet No. 3: Communication Procedures', accessed 08.08.2023.
[817] Ssenyonjo, M. (2018), 'Responding to human rights violations in Africa: assessing the role of the African Commission and Court on Human and Peoples' Rights (1987-2018)', *International Human Rights Law Review*, Vol. 7(1), p. 4.

African Court on Human and Peoples' Rights (the Protocol) which was adopted in June 1998 in Burkina Faso and which came into force in January 2004 after receiving more than 15 ratifications by African states.[818] Out of the 10 Arab-African states, only Algeria, the Comoros, Libya, Mauritania and Tunisia have ratified the Protocol (see Table 8, subchapter 3.3.).[819]

The African Court has jurisdiction over "all cases and disputes submitted to it concerning the interpretation and application" of the Banjul Charter, the Protocol of the Court and "any other relevant human rights instrument ratified by the States concerned."[820] The Court also possesses the competence to provide advisory opinions on any legal matter relating to the Banjul Charter (or any other relevant human rights instrument) at the request of a member state or any of the organs of the *African Union*, provided that the topic of the opinion is not related to a matter being examined by the Commission.[821] Art. 5(1) of the Protocol permits the Commission, state parties and African inter-governmental organisations to submit cases to the Court.[822] Art. 5(3) allows NGOs with observer status before the Commission and individuals to institute proceedings before the Court in accordance with Art. 34(6) of the Protocol.[823] Pursuant to the latter, the Court shall receive petitions under Art. 5(3) only when the involving state party has made a declaration accepting this competence of the Court.[824] Only Tunisia has made such a declaration from amongst the 10 Arab-African states.[825] The verdicts of the African Court are final and are not subject to appeal.[826]

Despite their broad competences, both the African Commission and the African Court suffer from several structural and normative weaknesses. Hansungule criticises the Banjul

[818] African Court on Human and Peoples' Rights (2023), n807.
[819] List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2023), African Union, status as of 14.02.2023.
[820] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), Art. 3(1).
[821] Ibid., Art. 4(1).
[822] Ibid., Art. 5(1).
[823] Ibid., Art. 5(3).
[824] Ibid., Art. 34(6).
[825] List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2023), n819.
[826] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), Art. 28(2).

Charter's lacking enforcement power, its state centricity and the restrictions it imposes on individuals seeking recourse to the Commission and observes that:

> "The provisions made for petition by non-state actors, especially individuals, are to say the least, grossly inadequate. Such a petition will be entertained only if it secures a simple majority of the eleven-man Commission (…) The Commission was envisaged almost exclusively as a body to *promote* human rights. It cannot award damages, restitution or reparations. It is not empowered to condemn an offending State; it can only make recommendations to the parties. It was, and still is, vested with very few powers. Consequently, blatant disregard of the Commission's recommendations, orders, and pronouncements by Member States has become the norm in Africa."[827]

A serious obstacle to the *African Court of Human Rights* is the restricted access for individuals and NGOs imposed by the Protocol. Unlike the ECHR which permits anyone to file a petition before the ECtHR, Art. 34(6) of the Protocol of the African Court makes the placement of a declaration by the concerned state party a precondition for the Court to hear cases from individuals.[828] It is no surprise that only eight states (out of 55 member states in the *African Union*) have entered such a declaration under Art. 34(6) so far, as compared to 34 African states that have ratified the Protocol.[829]

Notwithstanding the aforementioned weaknesses/obstacles in the European, Inter-American and African human rights regimes, it is unfortunate that "the Arab League failed to replicate many of the positive procedures provided by these systems."[830] The *Arab Human Rights Committee* therefore remains arguably the weakest regional human rights treaty body existing today. It possesses no jurisdiction to enact binding decisions on state parties, to conduct investigations or to issue advisory opinions, and is not mandated to provide effective redress for victims of human rights violations.[831] The obligation enshrined in Art. 44 of the

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[827] Hansungule, M. (2004), n13, pp. 7-8.
[828] Ibid., p. 8.
[829] African Court on Human and Peoples' Rights (2023), n807. For further insights into the European, Inter-American and African human rights systems, see Huneeus, A. & Madsen, M. R. (2018), 'Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems', *International Journal of Constitutional Law*, Vol. 16(1), pp. 140-151.
[830] Almakky, R. G. (2015), n532, pp. 193-194.
[831] Ibid., p. 199.

Arab Charter on state parties to "adopt (…) whatever legislative or non-legislative measures that may be necessary to give effect to the rights" is not supported by a binding enforcement regime that prompts member states to fulfil this obligation.[832] As non-complying states have no legal consequences to fear, the weak enforcement mechanism makes the observance of the Arab Charter almost completely dependent on the political will of Arab governments.[833]

5.3.4. Engagement with NGOs

NGOs and CSOs play a crucial role in the promotion and protection of human rights throughout the world. They offer direct assistance to victims of human rights violations, advocate for changes in national, regional and international human rights law, disseminate knowledge of and raise awareness about human rights among societies and states.[834] The international community recognised the importance of NGOs in the *Vienna Declaration and Programme of Action* adopted by the 1993 *World Conference on Human Rights* which appreciates the contributions of NGOs to increasing public awareness of human rights, emphasises the importance of dialogue and cooperation between governments and NGOs and reinforces the significance of NGOs carrying out their human rights activities freely and without interference.[835]

Olz identifies three forms of NGO functions under international/regional human rights law:

a) the involvement of NGOs in monitoring compliance with human rights treaties;

b) maintaining mutually beneficial relations with inter-governmental human rights organisations by providing expertise and obtaining observer status; and

c) "soft" control of international human rights norms.[836]

Under the first function, NGOs may support states in their obligation to submit periodic reports and alternative/shadow reports that could help treaty bodies in their review of state

[832] See Arab Charter on Human Rights (2004), Art. 44.
[833] Hammami, F. (2013), n756, p. 59.
[834] Council of Europe (2023), 'Human Rights Activism and the Role of NGOs', accessed 09.08.2023.
[835] Vienna Declaration and Programme of Action (1993), n723, part I, paragraph 38.
[836] Olz, M. A. (1997), 'Non-governmental organizations in regional human rights systems', *Columbia Human Rights Law Review*, Vol. 28(2), pp. 326-331.

reports.[837] The *Committee on the Rights of the Child*, for example, has "systematically and strongly encouraged NGOs to submit reports, documentation or other information in order to provide it with a comprehensive picture and expertise as to how [the CRC] is being implemented in a particular country."[838] The involvement of NGOs is made possible through a progressive interpretation of Art. 45(a) CRC which allows the *Committee on the Rights of the Child* to invite specialised agencies, the *United Nations Children's Fund* (UNICEF) and "other competent bodies" to provide consultation and expert advice on the implementation of the CRC.[839] Other forms of NGO participation in monitoring the compliance of human rights norms relate to their intervention in filing complaints on behalf of victims of human rights violations, providing legal assistance to individual claimants, or supporting the investigations and on-site visits of monitoring bodies.[840] The European, Inter-American and African human rights systems have created different modalities - some more successful than others - through which NGOs can carry out treaty monitoring functions, including the filing of petitions and/or providing legal assistance to individuals (see discussion in subchapter 5.3.3.).[841] Under the Inter-American human rights system for example, NGOs "can call or participate in public hearings within the Commission, provide information for the preparation of country visits or thematic and country reports, file amicus curiae briefs, and (…) engage in strategic litigation."[842]

Another form of cooperation between intergovernmental human rights organisations and NGOs is the granting of observer status or consultative status to the latter. Intergovernmental organisations can benefit from the expertise of NGOs, and in return, NGOs are "granted the right to receive official documents, to be invited to meetings (…), to participate in hearings,

[837] Ibid., pp. 326-327. A list of African NGOs granted observer status and permitted to submit shadow reports under the African Commission can be found at African Commission of Human and Peoples' Rights (2023), 'Non-governmental organizations', accessed 09.08.2023.
[838] Committee on the Rights of the Child (1999), 'Guidelines for the Participation of Partners (NGOs and Individual Experts) in the Pre-Sessional Working Group of the Committee on the Rights of the Child', Report on the 22nd session, CRC/C/90, 07.12.1999, Annex VIII, p. 111.
[839] Convention on the Rights of the Child (1989), Art. 45a.
[840] Olz, M. A. (1997), n836, pp. 327-328.
[841] See Olz, M. A. (1997), n836, pp. 334-349 (European human rights system), pp. 352-359 (Inter-American human rights system) and pp. 360-369 (African human rights system).
[842] Soley, X. (2019), 'The crucial role of human rights NGOs in the Inter-American system', Symposium on the American Convention on Human Rights and its New Interlocutors, *Cambridge University Press*, November 2019, p. 357.

and to make written submissions or oral presentations."[843] The *Council of Europe* (CoE), for example, introduced a consultative status for NGOs in 1952.[844] In recognition of their significance, the CoE granted NGOs in 2016 the opportunity to acquire participatory status which offers NGOs additional modalities for lobbying and advocacy, like the possibility to address memoranda to the Secretary General of the CoE or accessing the agenda and public documents of the CoE Parliamentary Assembly.[845] Since 1988, the *African Union*, through the *African Commission on Human and Peoples' Rights*, has been granting observer status to NGOs which comes along with an obligation for admitted NGOs to submit a report about their activities every two years.[846] Other intergovernmental organisations with relevance to the field of human rights that have granted NGOs access include the OAS, UNICEF, the *Food and Agriculture Organization* (FAO), *the UN Educational, Scientific and Cultural Organization* (UNESCO), and the *UN High Commissioner for Refugees* (UNHCR).[847]

Finally, and according to Olz's classification, NGOs can exert influence on decision-makers by using informal mechanisms permitted under international human rights law that serve their objectives. This includes the organisation of public awareness campaigns, fact-finding missions, subject-matter conferences/seminars to disclose human rights violations and remind states of their obligations, the production and dissemination of human rights publications or the training and capacity building of human rights defenders.[848] A good example of a supranational experts' seminar is the Regional Seminar titled "The Arab League and Human Rights: Challenges Ahead" which was organised by the *International Federation for Human Rights* (FIDH) in cooperation with the *Arab Organization for Human Rights* (AOHR), the *Cairo Institute for Human Rights Studies* (CIHRS) and the *Egyptian Initiative on Personal Rights* (EIPR) in February 2013 in Cairo.[849] The seminar was attended by more than 50 human rights defenders from all Arab states, UN specialists, as well as

[843] Olz, M. A. (1997), n836, p. 328. See also Reinalda, B. (2013), 'Consultative and observer status of NGOs in intergovernmental organizations', *Routledge Handbook of International Organization*, published 28.05.2013, p. 191.
[844] Council of Europe (2023), 'Participatory status with the Council of Europe', accessed 10.08.2023.
[845] Resolution (2016)3, 'Participatory status for international non-governmental organisations with the Council of Europe', Council of Europe, adopted by the Committee of Ministers on 6 July 2016 at the 1262nd meeting of the Ministers' Deputies, Appendix to Resolution (Modalities of participation).
[846] African Commission of Human and Peoples' Rights (2023), n150.
[847] Reinalda, B. (2013), n843, p. 192.
[848] Olz, M. A. (1997), n836, pp. 329-330.
[849] International Federation for Human Rights (2013), n794, p. 4

human rights experts from the African Commission, the African Court on Human and Peoples' Rights, the Inter-American Commission and the European Court of Human Rights.[850] An exemplary capacity building programme was introduced by the Geneva based human rights NGO *Committee for Justice* which launched its Human Rights Defenders Training Platform in 2022 to enhance the skills of human rights defenders working on monitoring and documenting human rights violations around the world.[851]

The Arab Charter does not mention any involvement of NGOs in the monitoring of its implementation. However, shortly after its establishment, the *Arab Human Rights Committee* expressed its willingness to engage with NGOs/CSOs.[852] In October 2009, the newly elected members of the Committee met with representatives of *Amnesty International*, FIDH, AOHR and CIHRS to discuss means of cooperation.[853] Ever since, the *Arab Human Rights Committee* has initiated various measures aimed at enhancing its engagement with NGOs/CSOs. First, in its recommendations and observations on the submitted state reports, the Committee has regularly emphasised the importance of engaging human rights NGOs in the report drafting process and highlighted the necessity of granting freedom of action to independent civil society organisations.[854] In its Final Observations and Recommendations on the first periodic report of Qatar (2017), for example, the Committee suggested disseminating its findings to all judicial, legislative, administrative, and non-governmental entities and advised the Government of Qatar to consult NGOs in its preparation of its upcoming report.[855] Lebanon's first report (2015) submitted to the Committee was criticised for not revealing the contributions of NGOs in the preparation of the report.[856] In its observations on the first periodic report submitted by Bahrain in 2019, the Committee

[850] Ibid., pp. 4-5.
[851] Committee for Justice (2022), 'Human Rights Defenders Training Program', published 17.08.2022.
[852] Rishmawi, M. (2010), n676, p. 174 and Hunaiti, H. (2020), n23, p. 69.
[853] International Federation for Human Rights (2009), 'Human Rights organizations and Arab Human Rights Committee engage in constructive dialogue', Press Release published 21.10.2009.
[854] Hunaiti, H. (2020), n23, p. 69.
[855] Arab Human Rights Committee (2017), 'Final Observations and Recommendations of the Arab Human Rights Committee – First Periodic Report of Qatar' [in Arabic], 13th session, Mai 2017, paragraphs 132 & 136.
[856] Arab Human Rights Committee (2015), 'Observations and Recommendations of the Arab Human Rights Committee – First Report of Lebanon' [in Arabic], 7th session, April 2015, paragraph 6.

commends the swift passing of a new NGO law which guarantees the freedom of association.[857]

Second, the aforementioned complementary guidelines developed by the Arab Committee in June 2014 were also aimed at achieving a stronger structural involvement of NGOs in the reporting and review process. These guidelines allow Committee members to conduct country visits and meet up with NGOs to gather information about the human rights situation in the member states concerned.[858] NGOs are also invited to submit written contributions (shadow reports) to the Committee before the date of the public review session of the submitted state report.[859] The number of shadow reports submitted by NGOs to the Arab Committee has increased steadily over time. In the first review session for Jordan in March 2012, only one shadow report was submitted by the *Amman Center for Human Rights Studies*, whereas in the 2016 periodic review of Jordan 11 shadow reports were submitted by Jordanian human rights organisations.[860] No shadow reports were submitted by Emirati NGOs to the initial state report of the UAE reviewed by the Committee in December 2013 compared to five shadow reports submitted in the 2019 review session.[861] Additionally, accredited NGOs are allowed to observe the public plenary sessions in which the submitted state reports are discussed by the Arab Committee and the government representatives concerned but are not permitted to actively engage in these fora.[862] They are allowed, however, to submit written observations to the Arab Committee about the dialogue sessions they have attended within one week from the date of the public review sessions.[863] This is quite similar to the participation opportunities provided to NGOs by the *Human Rights*

[857] Arab Human Rights Committee (2019), 'Final Observations and Recommendations of the Arab Human Rights Committee – First Periodic Report of Bahrain' [in Arabic], 15th session, January 2019, paragraphs 49 & 118.
[858] Arab Human Rights Committee (2014), 'Guidelines for State Party Reporting to the Arab Committee of Human Rights' [in Arabic], accessed 20.10.2024, paragraphs a7, a9 & b3.
[859] Ibid., paragraph b1d.
[860] Hunaiti, H. (2020), n23, p. 71. Unfortunately, the original shadow report in Arabic submitted by the Jordanian NGO to the Arab Committee in 2012 could not be accessed on the online portal of the *League of Arab States* (www.lasportal.org) at the time of drafting this section. The author has been facing challenges in accessing the LAS portal since moving to Germany in March 2021 but still managed to find some primary resources through *Wayback Machine*.
[861] Ibid., p. 71.
[862] Arab Human Rights Committee (2014), n858, paragraph a7, as well as Arab Human Rights Committee (2024), 'Participation Guide for NHRIs, NGOs and Other Concerned Stakeholders' [in Arabic], accessed 20.10.2024, p. 2.
[863] Arab Human Rights Committee (2024), n862, p. 2.

Committee, the *Committee on Economic, Social and Cultural Rights* and other UN treaty bodies.[864]

Despite all these positive efforts made by the Arab Committee to involve CSOs in the state reporting and review process, there is still much that needs to be done within the framework of the *League of Arab States* to improve the participation and impact of independent human rights organisations. The *Arab Human Rights Committee* must ensure that NGOs are consistently involved in the reporting process with respect to all state parties and must further develop its guidelines to guarantee that NGOs are protected from reprisals when cooperating with the Committee.[865] Most importantly however, Arab governments must be willing to reform the structures of the Arab League in a way that ensures a meaningful and effective partnership and dialogue with independent NGOs.[866] In concrete terms, this means that the PAHRC must reform the NGO engagement system it has put in place in 2006, according to which CSOs can be granted observer status and attend the sessions of the PAHRC only when they have obtained clearance from the Ministries of Foreign Affairs in their home countries (see discussion in subchapter 4.5.1.).[867] In several cases Arab governments instructed the PAHRC to revoke the observer status of NGOs for allegedly violating domestic laws regulating the work of NGOs.[868] However, all these necessary reforms will certainly not bear fruit when NGOs and human rights defenders continue to be suppressed on a regular basis in most parts of the Arab world.[869] A reform of the Arab Charter in terms of allowing NGOs to file petitions on behalf of individuals is desirable but seems unrealistic at the moment, especially given the complete absence of an individual complaints procedure under the Arab Charter.

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[864] Under the UN Human Rights Committee and the CESCR, registered/accredited NGOs are allowed to attend the public dialogues/examinations as observers without taking the floor and are also permitted to engage with the Committees in formal or informal briefings in advance of the dialogues (see Centre for Political and Civil Rights (2024), 'Frequently Asked Questions regarding NGO participation in the UN Human Rights Committee's sessions', accessed 20.10.2024, pp. 1-3, as well as website of the UN Human Rights Office of the High Commissioner (2024), 'Guidelines for civil society, NGOs and NHRIs – Committee on Economic, Social and Cultural Rights', accessed 20.10.2024).
[865] Hunaiti, H. (2020), n23, p. 72.
[866] Ibid., pp. 68-69.
[867] Ibid., p. 66.
[868] Ibid. p. 66
[869] A good overview of obstacles and reprisals NGOs/CSOs face in many parts of the Arab world can be found in Abdelaziz, M. (2017), 'The Hard Reality of Civil Society in the Arab World', *FIKRA FORUM, Washington Institute of Near East Policy*, published 11.12.2017.

5.3.5. Expanded list of non-derogable rights

Like other international and regional human rights treaties, the Arab Charter includes a derogation clause in Art. 4 which is almost identical in terms of wording to the derogation clause in Art. 4 of the ICCPR.[870] The derogation clause enshrined in Art. 4(1) of the Arab Charter reads as follows:

> "In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin."[871]

In Art. 4(2), the Arab Charter prohibits derogation from 15 articles and further provides that "the judicial guarantees required for the protection of the aforementioned rights may not be suspended" which means that state parties may not adopt national legislation that is incompatible with the rights addressed in these articles of the Charter.[872] The table below (Table 13) lists all articles/rights that cannot be derogated from under the Arab Charter and presents these in exemplary comparison with similar derogation clauses in the ICCPR and the ECHR and its Protocols.[873] The African Charter does not contain a derogation provision.[874]

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[870] See the International Covenant on Civil and Political Rights (1966), Art. 4, European Convention on Human Rights (1950), Art. 15 as well as the American Convention on Human Rights (1969), Art. 27.
[871] Arab Charter on Human Rights (2004), Art. 4(1).
[872] Ibid. Art. 4(2).
[873] The data in Table 13 was collected manually by the author by reviewing each of the three assessed treaties (the ACHR, ICCPR and ECHR). The following study was additionally used for inserting the non-derogable rights under the regional human rights system of the Council of Europe: European Court of Human Rights (2022), 'Guide on Art. 15 of the European Convention on Human Rights: Derogation in time of emergency', updated on 31.08.2022, p. 13. For the sake of completeness, it is worth mentioning that the *American Convention on Human Rights* prohibits the derogation from eleven rights codified in Art. 3, 4, 5, 6, 9, 12, 17, 18, 19, 20 and 23 (see American Convention on Human Rights (1969), Art. 27(2)).
[874] A critical discussion about the absence of a derogation clause from the African Charter can be found in Sermet, L. (2007), 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion', *African Human Rights Law Journal*, Vol. 7, pp. 142-161.

TABLE 13 NON-DEROGABLE RIGHTS UNDER THE ACHR, ICCPR AND THE ECHR		
Arab Charter (ACHR) as per Art. 4(2)	ICCPR as per Art. 4(2)	European Convention (ECHR) as per Art. 15(2)
Art. 5 right to life	Art. 6 right to life; prohibition of genocide; prohibition of the death penalty for persons under 18 years and pregnant women	Art. 2 right to life Art. 2, Protocol No. 13 complete abolition of the death penalty
Art. 8 prohibition of torture and cruel, degrading, and inhuman treatment	Art. 7 prohibition of torture or cruel, inhuman or degrading treatment or punishment, as well as medical or scientific experimentation without a person's free will	Art. 3 prohibition of torture and other forms of ill-treatment
Art. 9 prohibition of medical or scientific experimentation without a person's free will		
Art. 10 prohibition of slavery, servitude, human trafficking, forced labour, and any form of exploitation	Art. 8(1) & 8(2) prohibition of slavery and servitude	Art. 4(1) prohibition of slavery and servitude
Art. 13 right to a fair trial		
Art. 14(6) access to petition and to a competent court in case of deprivation of liberty by arrest or detention		
Art. 15 no crime or penalty without law	Art. 15 no guilt for an act which did not constitute a criminal offence under national or international law at the time when it was committed; no punishment harsher than prescribed by law	Art. 7 no punishment without law
Art. 18 no imprisonment for inability to pay a debt arising from a contractual obligation	Art. 11 no imprisonment for inability to fulfill contractual obligation	

TABLE 13 (CONTINUED) NON-DEROGABLE RIGHTS UNDER THE ACHR, ICCPR AND THE ECHR		
Arab Charter (ACHR) as per Art. 4(2)	ICCPR as per Art. 4(2)	European Convention (ECHR) as per Art. 15(2)
Art. 19 prohibition of double trial for the same offence; right to challenge legality of proceedings; right to compensation for innocence		Art. 4(3), Protocol No. 7 right not to be tried or punished twice
Art. 20 rights of persons deprived of their liberty		
Art. 22 recognition as a person before the law	Art. 16 recognition as a person before the law	
Art. 27 prohibition of arbitrary and unlawful expulsion		
Art. 28 right to political asylum		
Art. 29 right to nationality; prohibition of arbitrary deprivation of nationality		
Art. 30 freedom of thought, conscience, and religion	Art. 18 freedom of thought, conscience, and religion	

Table 13 reveals that the vast majority of non-derogable rights codified in the ICCPR and the European Convention are also covered by the Arab Charter, with a few exceptions such as the prohibition of genocide in ICCPR Art. 6. The Arab Charter even contains non-derogable rights which have not attained this status in the ICCPR or the European Convention, such as the right to a fair trial, the right to petition and to a competent court in case of deprivation of liberty by arrest or detention, the right to political asylum, and the prohibition of unlawful or arbitrary expulsion.[875] This positive fact is acknowledged by

[875] See Arab Charter on Human Rights (2004), Art. 13, Art. 14(6), Art. 27 and Art. 28.

Naskou-Perraki who points out that the list of non-derogable rights included in the Arab Charter is "the longest one among the international instruments on the protection of human rights."[876]

5.3.6. Clawback clauses

One of the most significant weaknesses of the Arab Charter, however, is the abundance of limitation clauses, also called clawback clauses, in many of its provisions, thereby compromising the effective realisation of several human rights. Clawback clauses permit state parties to minimise/breach their treaty obligations for different reasons, most notably in cases where human rights provisions conflict with existing domestic laws.[877] These clauses therefore constrain the binding effect of the Charter by allowing state parties, under normal circumstances and at their unilateral discretion, to suspend several human rights provisions by reference to restrictive national laws (Allam calls this phenomenon the "paramountcy of domestic law").[878] According to Mapuva, derogation clauses are different from clawback clauses in the sense that derogation clauses permit temporal suspension of treaty obligations for certain rights in specific situations (emergencies), whereas clawback clauses may result in a permanent abandonment of human rights treaty provisions on the basis of being incompatible with domestic law.[879]

On a more theoretical level, one can understand the rationale behind restricting certain rights in specific situations. Restricting the right to liberty of a criminal by imprisoning him/her is justified as a necessary act to protect society from the wrongdoings of that person. Placing limitations on the right to freedom of expression can also be comprehended if it serves the objective of preventing hate speech against religious or ethnic minorities. In other words, clawback clauses can be justified if they are necessary, required to fulfil the rights and freedoms of others, proportional, non-discriminatory, if they serve a higher public end and

[876] Naskou-Perraki, P. (2009), 'The Arab Charter on Human Rights: A new start for the protection of human rights in the Arab world', *Revue Hellénique de Droit International*, Vo. 62(1), p. 133.
[877] Mapuva, L. (2016),'Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights', *International Affairs and Global Strategy*, Vol.51, pp. 1-2, as well as Singh, S. (2009), 'The impact of clawback clauses on human and peoples' rights in Africa', *African Security Studies*, Vol. 18(4), pp. 100-101.
[878] Ibid., as well as Allam, W. (2014), n677, p. 462.
[879] Ibid., pp. 1-2

when they are embedded in a democratic system of governance.[880] However, they can also be instrumentalised by authoritarian regimes that misuse clawback clauses to sustain their power by suppressing opposing voices and denying individuals some of their basic rights, such as the freedoms of expression, assembly, association or religion.[881]

The occurrence of clawback clauses is not an exclusive phenomenon associated with the Arab Charter. They appear in different forms in many international and regional human rights treaties.[882] Common manifestations include the suspension of rights "within the law", "except for reasons and conditions previously laid down by law", "subject to law and order", "provided that he abides by the law", "in accordance with the provisions of the law", "subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others"[883] (all in the *African Charter on Human and Peoples' Rights*); "restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others", "only pursuant to a decision reached in accordance with law"[884] (AmCHR); "no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others"[885] (the ICCPR, ICESCR, CRC); or "unless otherwise stipulated in the laws", "except on such grounds and in such circumstances as are determined by law", "except as provided for by law", "subject only to such limitations as are prescribed by law" and "within the limits laid down by the laws in force*"* (ACHR).[886]

[880] See detailed discussion in subchapter 3.1. around conditions established under international human rights law for the restriction of limitation clauses. See also Mattar, M. Y. (2013), 'Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards', *Harvard Human Rights Journal*, Vol. 26, pp. 115-116.
[881] See Bielefeldt, H. (2020), 'Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom', *Religion and Human Rights*, Vol. 15, pp. 7-8 and p. 18.
[882] Ibid., p. 122.
[883] African Charter on Human and Peoples' Rights (1981), Art. 6, 8, 9, 10, 11 & 13.
[884] American Convention on Human Rights (1969), Art. 22.
[885] See the ICCPR (1966), Art. 2, ICESCR (1966), Art. 8 and CRC (1989), Art. 15.
[886] Arab Charter on Human Rights (2004), Art. 7, 14, 30 & 35.

Table 14 presents a compilation of clawback clauses contained in the Arab Charter, African Charter, American Convention, European Convention, as well as the ICCPR and CRC. Each column includes the total number of clawback clauses identified in each treaty and the provisions/human rights affected. The data in Table 14 was collected manually by searching for clawback clauses in the selected treaties regardless of the exact wording of each clawback clause. At this point it is worth mentioning that it is not always easy to detect a clawback clause because not every reference to domestic law is per se a restrictive clawback clause. This requires a careful examination of the wording and interpretation of each provision. Art. 9 of the Arab Charter, for example, represents a common reference to domestic law that is not counted as a clawback clause in Table 14 as it does not categorically subject the prohibition of unlawful medical and scientific experimentation to domestic laws:

> "No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party."[887]

[887] Arab Charter on Human Rights (2004), Art. 9.

TABLE 14

CLAWBACK CLAUSES IN SELECTED HUMAN RIGHTS TREATIES

Arab Charter	African Charter	American Convention	European Convention	ICCPR	CRC
12 clawback clauses in total	7 clawback clauses in total	5 clawback clauses in total	4 clawback clauses in total	5 clawback clauses in total	4 clawback clauses in total
Art. 7(1) death sentence for persons under 18 years					
Art. 14(2) deprivation of liberty	Art. 6 right to liberty and security of the person	Art. 7(2) right to personal liberty			
Art. 24(7) multiple rights affected, e.g. freedom of association, assembly, right to public office	Art. 10, 11 & 13 freedom of association, freedom of assembly, right to participate in government	Art. 15 & Art. 16(2) right to assembly and association	Art. 11(2) freedom of assembly and association, including the right to form/join trade unions	Art. 21 right of peaceful assembly	Art. 15 freedom of association and peaceful assembly
Art. 26(2) expulsion of foreigners	Art. 12, Art. 14 freedoms of movement and residence, right to property	Art. 22(3) freedoms of movement and residence	Art. 8(2) right to respect for private and family life	Art. 12 freedoms of movement and residence	Art. 10(2) freedom of movement
Art. 30(1) freedom of thought, conscience, and religion	Art. 8 freedoms of conscience, profession, and religion		Art. 9(2) freedom of thought, conscience, and religion		

TABLE 14 (CONTINUED)

CLAWBACK CLAUSES IN SELECTED HUMAN RIGHTS TREATIES

Arab Charter	African Charter	American Convention	European Convention	ICCPR	CRC
Art. 30(2) freedom to manifest one's religion or beliefs		Art. 12(3) freedom to manifest one's religion or beliefs		Art. 18(3) freedom to manifest one's religion or beliefs	Art. 14(3) freedom to manifest one's religion or beliefs
Art. 32(2) multiple rights, e.g. freedom of opinion and expression, right to information			Art. 10(2) freedom of expression, opinion, and information	Art. 19(3) freedom of opinion	Art. 13(2) freedom of expression
Art. 33(1) rights and duties in marriage				Art. 22 right to freedom of association, to form and join trade unions	
Art. 35(2) freedom to form and join trade unions					
Art. 35(3) right to strike					
Art. 29(3) right of a child to acquire the nationality of his/her mother					
Art. 43 overarching clawback clause					

Table 14 reveals that the Arab Charter contains by far the highest number of clawback clauses (12), followed by the African Charter (7), the American Convention and the ICCPR (5 each), the European Convention and the CRC (4 each).[888] The ICESCR contains one single clawback clause in Art. 8(1), restricting the right to form and join trade unions.[889] Clawback clauses included in the other treaties are reflected in one way or another in the Arab Charter, such as limitations on the freedoms of association and assembly, the freedoms of movement, thought, conscience, expression, and religion and restrictions on the right to form and join trade unions.[890] The Arab Charter has expanded on these limitations by subjecting further rights to clawback clauses that cannot be found in any of the other human rights treaties, namely limitations relating to the prohibition of the death penalty for persons under 18 years (juveniles), the right to strike, equality between men and women in marriage, the right of a child to acquire the nationality of his/her mother, and the insertion of a particularly precarious 'wholesale' clawback clause in Art. 43 of the Charter that shall be further examined at a later stage in this chapter.[891]

Most of the clawback clauses included in Table 14 relate to individual civil and political rights, with the exception of the labour/economic rights to strike and to form and join trade unions. This exact group of rights is usually already restricted on constitutional levels in many Arab states as discussed in Chapter 3 (subchapter 3.1). Jordan's Constitution, for example, subjects the free exercise of religions (Art. 14), the freedom of opinion (Art. 15(1)), the freedom of assembly (Art. 16(1)) and the freedom of trade unions (Art. 23(2)) to domestic limitations.[892] Similarly, Djibouti's Constitution contains limitation clauses relating to the freedom of thought, conscience, and religion (Art. 11), the freedom of movement (Art. 14), and the freedoms of expression, opinion, constituting associations and

[888] For more information about the phenomenon of clawback clauses in the *African Charter on Human and Peoples' Rights* and their legal effects, see Mapuva, L. (2016), n877, as well as Singh, S. (2009), n877, pp. 100-101. An excellent overall assessment of the African human rights system is further provided in Murray, R. (2019), 'The African Charter on Human and Peoples' Rights: A Commentary', *Oxford University Press*, pp. 1-15.
[889] ICESCR (1966), Art. 8(1).
[890] For example, clawback clauses restricting the freedom of association or the freedom of assembly can be found in all human rights treaties examined in Table 16, including the Arab Charter. The freedom to manifest one's religion or beliefs is restricted by a clawback clause in the Arab Charter, the American Convention, the CRC and the ICCPR, but not in the African Charter or the European Convention.
[891] See Arab Charter on Human Rights (2004), Art. 7(1), Art. 29(3), Art. 33(1), Art. 35(3) and Art. 43.
[892] Jordan's Constitution of 1952 with Amendments through 2016, articles quoted in the text.

trade unions (Art. 15).[893] Furthermore, several clawback clauses in the Arab Charter are problematic "where they weaken the protection of the individual rights by qualifying it with a more restrictive domestic law."[894] For example, Art. 29(2) of the Arab Charter establishes the possibility of denying a child the right to acquire the mother's nationality when state parties decide so "as they deem appropriate, in accordance with their domestic laws on nationality (…)."[895] By this logic, several Arab countries discriminate against women in their national legislation as they prohibit them from passing on their nationality to their children when the fathers are known (Lebanon, Bahrain) or only permit persons acquiring their mother's nationality when they fulfil certain requirements upon reaching the age of maturity, such as having a clean criminal record, being proficient in Arabic and making the state (Saudi Arabia) their permanent residence.[896] Other examples of restrictive/problematic national laws compatible with the clawback clauses of the Arab Charter include Mauritania's 1964 *Law of Associations* which requires civil society organisations to obtain formal approval to operate legally and which gives the Ministry of Interior wide-reaching powers to reject such permission on vague grounds such as "anti-national propaganda" or "unwelcome influence on the minds of the people", or Qatar's 2020 amendment of its penal code which further restricts the freedom of expression by imposing criminal penalties of up to five years for spreading "rumours" or "false news" without precisely defining these terms.[897]

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[893] Djibouti's Constitution of 1992 with Amendments through 2010, articles quoted in the text.
[894] Mattar, M. Y. (2013), n880, p. 110.
[895] Arab Charter on Human Rights (2004), Art. 29(2).
[896] Mattar, M. Y. (2013), n880, pp. 110-111. Art. 1 of Decree Law No. 15 on Lebanese Nationality, 19.01.1925 (amended by Law of 11.01.1960) specifies that the following persons are considered to be Lebanese: " - Every person born of a Lebanese father. - Every person born in the Greater Lebanon territory and did not acquire a foreign nationality, upon birth, by affiliation. - Every person born in the Greater Lebanon territory of unknown parents or parents of unknown nationality." Art. 4 of Bahrain's Nationality Act (1963) states that: "Anyone shall be regarded a Bahraini national, if: (A) [He/she] was born in Bahrain after the effective date of this act and his father was a Bahraini at the time of birth. (B) (…) (C) [He/she was] born in Bahrain or abroad, after the effective date of this Act, and his mother, at the time of birth was a Bahraini national provided that father was unknown, without nationality or fatherhood was not substantiated." Art. 8 of the Saudi Arabian Nationality System (1374 H) provides that: "Individuals born inside the Kingdom from [a] Non-Saudi father and Saudi mother may be granted Saudi Citizenship by the decision of the Minister of Interior in case of the following conditions: a) Having a permanent Resident Permit (Iqama) when he reaches the legal age. b) Having good behavior, and never sentenced to criminal judgment or imprisonment for more than six months. c) Being fluent in Arabic. d) Applying for the citizenship after one year of reaching the legal age."
[897] Human Rights Watch (2021), 'Mauritania – Events of 2020', accessed 19.08.2023, as well as Human Rights Watch (2020), 'Qatar: 5-Year Prison Sentence Set for 'Fake News'', published 22.01.2020.

Interestingly, the drafters of the Arab (and African) Charters refrained from subjecting any of the collective/peoples' rights, such as the right to self-determination, the right to development, the right to an adequate standard of living or the right to a healthy environment to restriction through a clawback clause.[898] These rights are typically spared from limitation in Arab constitutions (see for example how the right to self-determination is formulated in Art. 32 of Algeria's Constitution, or the right to a healthy, sound, and balanced environment in Art. 46 of Egypt's Constitution).[899] This reflects the more positive 'standing' of these collective rights in Arab states which have been among the most vocal in advancing these rights on the international stage in their fight against colonialism and their quest for economic growth and development (see discussion in subchapter 3.2.).

An assessment of the wording of the clawback clauses in the Arab Charter further reveals that four clawback clauses are formulated in an open-ended manner. This concerns the clawback clauses in Art. 7(1) on the imposition of the death penalty for juveniles, Art. 14(2) on the deprivation of liberty, Art. 30(1) on the freedoms of thought, conscience and religion, and Art. 35(3) on the right to strike.[900] These provisions invite the invocation of clawback clauses without restriction which in turn increases the likelihood of abuse by states:

> "Governments, in particular authoritarian governments, frequently twist these clauses into general permissions to impose limitations to human rights. In extreme cases, human rights provisions thus end up as empty promises, since governments claim broad leeway in defining and redefining their scope and limitations, as they see fit."[901]

On the contrary, clawback restrictions in the ICCPR can only be invoked when justified as necessary in a democratic society and/or essential for the protection of national security, public order (ordre public), public health or morals or the rights, freedoms, and reputation

[898] See Arab Charter on Human Rights (2004), Art. 2, Art. 37 and Art. 38.
[899] See Algeria's Constitution of 2020, Art. 32, and Egypt's Constitution of 2014 with Amendments through 2019, Art. 46.
[900] See Arab Charter on Human Rights (2004), articles mentioned in the text. Art 30(1), for example, states that '[e]veryone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law."
[901] Bielefeldt, H. (2020), n881, p. 18.

of others.[902] Art. 5(2) ICCPR further provides that there "shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."[903] These ICCPR provisions illustrate that clawback clauses are meant to be the exception not the norm, and that they are generally considered as permissible under international human rights law if applied in specific situations and in a reasonable and balanced fashion that prevents potential misuse by states. In other words:

> "(…) the main function of limitation clauses is not to allow certain limitations, but to set up criteria by which *to limit the scope of permissible limitations*. To highlight this purpose, German jurisprudence has coined the artificial cluster word "*Schranken-Schranken*", which in literal translation means "limits to limits" (…) Their goal is to preserve the substance of human rights provision in complicated situations, when a human rights-based interest collides, or seems to collide, with important public goods or with the rights and freedoms of others. By insisting on the fulfilment of a number of criteria, limitation clauses prevent the easy invocation of the (alleged) need to impose limitations—or this is the guiding idea. Rather than becoming entry points for selling out the substance of human rights, limitation clauses play a critical role in defending the status and the scope of those rights."[904]

Limitations on clawback clauses are similarly prevalent in the European and American Conventions on Human Rights. Like the ICCPR, both regional conventions contain a general limitation provision on the invocation of clawback clauses. While Art. 18 of the ECHR provides that the "restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed",[905] Art. 30 of the AmCHR determines that restrictions which "may be placed on

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[902] See International Covenant on Civil and Political Rights (1966), Art. 11(3), Art. 12, Art. 18(3), Art. 19(3), Art. 21, and Art. 22.
[903] Ibid. Art. 5(2).
[904] Bielefeldt, H. (2020), n881, p. 4. Bielefeldt provides a highly interesting theoretical discussion and case study related to the limitation of clawback clauses as related to the freedom of religion and belief (ibid., pp. 4-19).
[905] European Convention on Human Rights (1950), Art. 18.

the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."[906] 'Schranken-Schranken' are also tied to single clawback clauses contained in both conventions, such the restriction of the clawback clause in Art. 11 ECHR on the freedom of assembly and association stipulating that "[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."[907] A similar qualified limitation is included in the clawback clause in Art. 12(3) of the AmCHR which provides that the "freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."[908] Out of the seven clawback clauses enshrined in the Banjul Charter, only the two clawback provisions in Art. 11 concerning the freedom of assembly and Art. 12(3) on the right to leave any country are subjected to further limitations "in the interest of national security, the safety, health, ethics and rights and freedoms of others"[909] or for "the protection of national security, law and order, public health or morality."[910] The Arab Charter also contains limitations on clawback clauses in five provisions, namely Art. 24(7), Art. 26(2), Art. 30(2), Art. 32(2) and Art. 35(2).[911] Table 15 provides a summary of clawback clauses subjected to further qualified limitations in selected international/regional human rights treaties.

[906] American Convention on Human Rights (1969), Art. 30.
[907] European Convention on Human Rights (1950), Art. 11.
[908] American Convention on Human Rights (1969), Art. 12(3).
[909] African Charter on Human and Peoples' Rights (1981), Art. 11.
[910] Ibid., Art. 12(3).
[911] Arab Charter on Human Rights (2004), articles quoted in the text.

TABLE 15

LIMITATIONS ON CLAWBACK CLAUSES IN SELECTED HUMAN RIGHTS TREATIES

ICCPR
Total number of clawback clauses: 5
Open-ended clawback clauses: 0
Clawback clauses subjected to qualified limitation: All (5)
General limitation provision on clawback clauses: Art. 5(2)
ICESCR
Total number of clawback clauses: 1
Open-ended clawback clauses: 0
Clawback clauses subjected to qualified limitation: 1
General limitation provision on clawback clauses: Art. 5(2)
CRC
Total number of clawback clauses: 4
Open-ended clawback clauses: 0
Clawback clauses subjected to qualified limitation: All (4)
General limitation provision on clawback clauses: n/a
Arab Charter on Human Rights
Total number of clawback clauses: 12
Distinctly open-ended clawback clauses: 4 (Art. 7(1), 14(2), 30(1) & 35(3))
Clawback clauses subjected to qualified limitation: 5
General limitation provision on clawback clauses: n/a
African Charter on Human and Peoples' Rights
Total number of clawback clauses: 7
Open-ended clawback clauses: 4 (Art. 6, 8, 10 & 13)
Clawback clauses subjected to qualified limitation: 3
General limitation provision on clawback clauses: n/a
European Convention on Human Rights
Total number of clawback clauses: 4
Open-ended clawback clauses: 0
Clawback clauses subjected to qualified limitation: All (4)
General limitation provision on clawback clauses: Art. 18
American Convention on Human Rights
Total number of clawback clauses: 5
Open-ended clawback clauses: 1 (Art. 7(2) on the deprivation of liberty)
Clawback clauses subjected to qualified limitation: 4
General limitation provision on clawback clauses: Art. 30

5.4. Compatibility with international human rights standards

5.4.1. Positive provisions

Whereas many provisions of the Arab Charter are largely compatible with international human rights law, some important rights and freedoms (primarily civil and political ones) are either missing from the Charter or are inconsistent with international human rights standards.[912] Scholars specialised in the Arab human rights system agree however that the 2004 Arab Charter constitutes a significant progress compared to the 1994 version of the Charter which was at extreme variance with recognised international human rights norms.[913]

One of the positive provisions of the Arab Charter is its affirmation of the principles of equality and non-discrimination in Art. 3(1) which provides that all individuals subject to the jurisdiction of the Charter shall enjoy "the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability."[914] This provision is consistent with the equality and non-discrimination provisions included in the UDHR (Art. 2), ICCPR (Art. 3, 4 & 26) and the ICESCR (Art. 2(2) & Art. 3) and constitutes an improvement compared to the 1994 Arab Charter which had omitted the prohibition of discrimination on the basis of physical and mental disability in its Art. 2.[915]

Another positive affirmation is the Arab Charter's noticeable protection of the rights of persons with disabilities emphasised in four articles (Art. 3(1), Art. 33(2), Art. 34(1), Art. 40).[916] Art. 40 obliges state parties to ensure a decent life for the disabled, to improve their independence and active engagement in society and provide them with free social services, material support, health and educational services and suitable job opportunities.[917] Allam considers this extent of protection as "unprecedented in other regional human rights

[912] Rishmawi, M. (2005), n683, p. 369.
[913] Ibid. See also Hammami, F. (2013), n756, pp. 45-47.
[914] Arab Charter on Human Rights (2004), Art. 3(1).
[915] UDHR (1948), Art. 2; ICCPR (1966), Art. 3, 4, 26; ICESCR (1966), Art. 2(2), 3; and League of Arab States (1994), Arab Charter on Human Rights, n693, Art. 2.
[916] Arab Charter on Human Rights (2004), articles mentioned in text. Art. 33(2) refers to the principle of non-discrimination against persons with disabilities within the framework of the right to protection of the family and Art. 34(1) addresses non-discrimination as related to the right to work.
[917] Ibid., Art. 40(1) – 40(5).

conventions" and Amnesty International welcomed these provisions in favour of enhancing the rights of persons with disabilities as a "very positive step."[918]

Furthermore, Art. 10 of the Arab Charter is considered to be in conformity with Art. 8 ICCPR as it prohibits all forms of slavery, servitude, human trafficking, forced labour and other forms of exploitation.[919] The 1994 Charter had only prohibited forced labour and did not criminalise slavery, servitude and human trafficking.[920] Art. 33(2) of the Arab Charter is praiseworthy too as it prohibits all forms of intrafamilial violence against women and children and calls upon states to "ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development."[921] This provision is of particular importance for Middle Eastern and Northern African societies in which more than one in three partnered women reported experiencing physical and/or sexual intimate partner violence prior to the COVID-19 pandemic.[922]

The Arab Charter also made progress in relation to judicial rights and guarantees, such as the equality of all persons before courts and tribunals, the independence of the judiciary, and the right to seek a legal remedy before courts of all levels (Art. 12).[923] Art. 13 recognises the right to a fair trial before a "competent, independent and impartial court" and Art. 16 lists several minimum guarantees of a fair trial including the right to be informed promptly, the right to have adequately prepared for one's defence, the right to be tried in one's own presence before an ordinary court, the right to the free assistance of a lawyer and an interpreter, the right not to be compelled to confess guilt and the right to file an appeal if convicted of a crime.[924] This catalogue of minimum guarantees is generally consistent with Art. 14 ICCPR, with the exception of the right to be tried without undue delay which is missing from the Arab Charter.[925] Art. 18 of the Arab Charter prohibiting imprisonment for

[918] Allam, W. (2014), n677, p. 48 and Amnesty International (2004), 'Middle East and North Africa: Re-drafting the Arab Charter on Human Rights: Building for a better future', published 11.03.2004, p. 3.
[919] Arab Charter on Human Rights (2004), Art. 10 and ICCPR (1966), Art. 8.
[920] League of Arab States (1994), Arab Charter on Human Rights, n693, Art. 31.
[921] Arab Charter on Human Rights (2004), Art. 33(2).
[922] UN Sustainable Development Group (2021), 'Deep Wounds: In the Arab Region, survivors of gender-based violence wonder where to turn', published 06.12.2021.
[923] Arab Charter on Human Rights (2004), Art. 12.
[924] Ibid., Art. 13 & Art. 16.
[925] See ICCPR (1966), Art. 14.

the inability to pay a civil debt can also be considered in compliance with Art. 11 ICCPR.[926] The prohibition of double jeopardy *(non bi in idem)* is stipulated in a similar manner in Art. 19 of the Arab Charter, Art. 14(7) ICCPR and Art. 8(4) of the American Convention.[927]

Additionally, Art. 8(2) of the Arab Charter bestows on state parties the obligation to guarantee redress for victims of torture and the right to rehabilitation and compensation.[928] The wording is quite similar to Art. 14 CAT but excludes the obligation to compensate the dependants of a victim of torture in the event of death.[929] On another positive note, Art. 14 of the Arab Charter on the prohibition of arbitrary arrest or detention can be considered to be in accord with Art. 9 ICCPR in terms of scope and wording. Both treaties cover similar procedural and judicial guarantees necessary to be in place to ensure lawful arrest or detention (the requirement to promptly inform those deprived of their liberty of the reasons of their arrest; trial within a reasonable time; right to petition a competent court on the lawfulness of the arrest; entitlement to compensation in cases of arbitrary or unlawful arrest; exceptional/limited permission of pre-trial detention).[930] Art. 24 of the Arab Charter on the rights to political activity, participation in public life, accessing public office and free and impartial elections is similar to Art. 25 ICCPR in terms of scope but these rights are restricted by a clawback clause in Art. 24(7) of the Arab Charter.[931] The wording of Art. 21 of the Arab Charter, concerning the prohibition of arbitrary or unlawful interference in a person's privacy, family, home or correspondence, is equivalent to Art. 12 of the UDHR, Art. 17 ICCPR and Art. 11 of the AmCHR.[932] The phrasing of Art. 25 of the Arab Charter concerning the rights of minorities "to enjoy their own culture, to use their own language

[926] Arab Charter on Human Rights (2004), Art. 18 and ICCPR (1966), Art. 11.
[927] Arab Charter on Human Rights (2004), Art. 19; ICCPR (1966), Art. 14(7): American Convention on Human Rights (1969), Art. 8(4).
[928] Arab Charter on Human Rights (2004), Art. 8(2).
[929] CAT (1984), Art. 14(1).
[930] Arab Charter on Human Rights (2004), Art. 14 and ICCPR (1966), Art. 9.
[931] Ibid., Art. 24(1-4) & Art. 24(7) as well as ICCPR (1966), Art. 25. The clawback clause in Art. 24(7) of the Arab Charter provides that "[n]o restrictions may be placed on the exercise of these rights other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others."
[932] Ibid., Art. 17; UDHR (1948), Art. 12; ICCPR (1969), Art. 17; and American Convention on Human Rights (1969), Art. 11.

and to practise their own religion" generally resembles Art. 27 ICCPR in terms of substance.[933]

The Arab Charter also codifies several economic and social rights that were missing from the 1994 version such as the right to an adequate standard of living, including food, clothing, services and the right to a healthy environment (Art. 38).[934] This provision is generally consistent with Art. 11(1) ICESCR on the right to an adequate standard of living, yet it is noticeable that the Arab Charter does not provide for an individual right to be free from hunger as enshrined in Art. 11(2) ICESCR.[935] The right to a healthy environment formulated in the Arab Charter resembles - in terms of substance - the corresponding provision in Art. 24 of the African Charter codifying the right to a "general satisfactory environment" favourable to the development of peoples.[936] Finally, Art. 37 of the Arab Charter contains a progressive provision on the right to development, including the obligation of states to establish policies guaranteeing this right, their duty to eradicate poverty and the right of every citizen to participate in and benefit from the realisation of development.[937]

5.4.2. Problematic provisions and missing rights

5.4.2.1. Right to life / death sentence

Art. 6 of the Arab Charter allows for the imposition of the death penalty "only for the most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgement rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence."[938] The wording of this provision is very similar to Art. 6(2) ICCPR, though the latter includes the addition that the

[933] Arab Charter on Human Rights (2004), Art. 25 as well as ICCPR (1966), Art. 27.
[934] Arab Charter on Human Rights (2004), Art. 38.
[935] ICESCR (1966), Art. 11(1) & Art. 11(2).
[936] African Charter on Human and Peoples' Rights (1981), Art. 24. In *SERAC v Nigeria*, for example, the African Commission found that the Federal Republic of Nigeria had violated Art. 16 (right to health) and Art. 24 (right to satisfactory environment) and ascertained that "[t]hese rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual." (African Commission on Human and Peoples' Rights (judgment of 27 Oct 2001), Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria (Communication No. 155/96), p. 5).
[937] Arab Charter on Human Rights (2004), Art. 37. More information about positive affirmations included in the Arab Charter can be found in Rishmawi, M. (2005), n683, pp. 369-370, Hammami, F. (2013), n756, pp. 45-47, Allam, W. (2014), n677, pp. 48-50 and Mattar, M. Y. (2013), n880, pp. 98-101.
[938] Arab Charter on Human Rights (2004), Art. 6.

imposition of the death penalty should not be "contrary to the provisions of [the ICCPR] and to the Convention on the Prevention and Punishment of the Crime of Genocide."[939] In its General Comment No. 36, the *Human Rights Committee* states that:

> "The term "the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty (…) Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy, establishing political opposition groups or offending a head of State. States parties that retain the death penalty for such offences commit a violation of their obligations under article 6 (…)."[940]

In General Comment No. 6, the *Human Rights Committee* further provides that procedural guarantees must be observed in the application of Art. 6(2) ICCPR, "including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal."[941] It remains unclear to what extent the *Arab Human Rights Committee* has embraced both standards of the *Human Rights Committee* (definition of "most serious crimes" and judicial guarantees) in its interpretation of the Arab Charter and whether it has done so in a consistent manner. Although the Arab Committee has regularly called on Arab states (e.g. Saudi Arabia and the UAE) to define what they consider to be the "most serious crimes" for which the imposition of the death penalty is permitted,[942] no evidence could be found by the author that the Arab

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[939] ICCPR (1966), Art. 6(2).
[940] UN Human Rights Committee (2018), 'General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life', CCPR/C/GC/36, 30.10.2018, paragraphs 35 & 36 (p. 9).
[941] UN Human Rights Committee (1982), 'CCPR General Comment No. 6: Article 6 (Right to Life)', 30.04.1982, paragraph 7.
[942] See Arab Human Rights Committee (2016), 'Final Observations and Recommendations of the Committee – First Report of Saudi Arabia' [in Arabic], 10th session of the Arab Committee, 28.05.-02.06.2016, paragraph 25 (p. 6) as well as Arab Human Rights Committee (2019), 'Final Observations and Recommendations of the Committee – First Periodic Report of the UAE' [in Arabic], 13.-16.10.2023, paragraph 24 (p. 9).

Committee generally considers the death penalty for specific acts not resulting in death (such as adultery, homosexuality, or apostasy) to be in violation of Art. 6 of the Arab Charter or that it shares the standards of the *Human Rights Committee* reflected in General Comment No. 36 and General Comment No. 6.[943]

Another significant setback concerns Art. 7(1) of the Arab Charter which prohibits the imposition of the death penalty on "persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime."[944] This is in stark contrast to Art. 6(5) ICCPR and Art. 37(a) CRC which contain an absolute prohibition of the death penalty for children/juveniles below the age of 18, without limitation by domestic law.[945] As no Arab state has submitted any reservations to Art. 6(5) ICCPR or Art. 37(a) CRC, Rishmawi suspects that Art. 7(1) of the Arab Charter reflects the reality in a minority of Arab states, namely Saudi Arabia and Yemen, which - at least at the time the Arab Charter was drafted - were among the few remaining countries to execute minors.[946] It was only in 2020 that Saudi Arabia enacted a Royal Order prohibiting judges from imposing the death penalty on persons below the age of 15 at the time of committing the offence, except for crimes that fall under the country's counter-terror law.[947] Furthermore, the already weakly codified prohibition of the death sentence for minors enshrined in Art. 7(1) of the Arab Charter can be derogated from in emergency situations as this provision is not included in the list of non-derogable rights protected in Art. 4(2) of the Charter.[948]

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[943] Saudi Arabia remains one of the few countries applying the death penalty and carrying out executions for crimes not directly resulting in death like drug smuggling (see Amnesty International (2023), 'Saudi Arabia: Imminent execution of seven young men would violate kingdom's promise to abolish death penalty for juveniles', published 15.06.2023). In its observations to the first report of Saudi Arabia in 2016 and to the first periodic report of the UAE in 2019, the Arab Committee advised both governments to review their national legislation with the aim of "prohibiting the death penalty except for most serious crimes" yet without defining what it generally considers to be "most serious crimes" and with no reference to the definition included in General Comment No. 36 of the Human Rights Committee (see UN Human Rights Committee (2018), n935).
[944] Arab Charter on Human Rights (2004), Art. 7(1).
[945] ICCPR (1966), Art. 6(5) and CRC (1989), Art. 37(a).
[946] Rishmawi, M. (2005), n683, p. 372.
[947] Amnesty International (2023), n943, as well as Amnesty International (2020), 'Saudi Arabia: Death penalty reform for minors falls short, and total abolition must now follow', published 27.04.2020.
[948] Arab Charter on Human Rights (2004), Art. 7(1) & Art. 4(2). See also Amnesty International (2004), n918, p. 6.

5.4.2.2. Torture, cruel, inhuman or degrading treatment or punishment

Art. 8(1) of the Arab Charter prohibits "physical or psychological torture" and "cruel, degrading, humiliating or inhuman treatment", but not punishment.[949] This stands in clear contradiction to Art. 7 ICCPR, Art. 3 of the *European Convention on Human Rights*, Art. 5 of the Banjul Charter, and Art. 5(2) of the *American Convention on Human Rights* which all prohibit torture and inhuman and degrading treatment or punishment, as well as Art. 16(1) of the CAT which obliges state parties to prevent acts of cruel, inhuman or degrading treatment or punishment.[950]

The omission of cruel or inhuman punishment from the Arab Charter is consistent with the fact that a few Arab states like Mauritania and Saudi Arabia still have severe *Shari'a*-based corporal penalties (*hudud*) in their national laws.[951] It should be noted here, however, that all Arab states have ratified the CAT and that no Arab state, except for Qatar, has entered a reservation/declaration contesting the validity of Art. 1 of the CAT on the definition of torture or Art. 16.[952] In this respect, the textual omission of the prohibition of acts of cruel or degrading punishment from the Arab Charter can be considered mitigated by the fortunate circumstance that Arab states are already bound by much stronger provisions under the CAT. In the case of Saudi Arabia, for example, the *Committee Against Torture* made clear that:

> "The State party should immediately put an end to the practices of flogging/lashing, amputation of limbs and any other form of corporal punishment. In addition, the

[949] Ibid., Art. 8(1).
[950] ICCPR (1966), Art. 7, European Convention on Human Rights (1950), Art. 3, African Charter on Human and Peoples' Rights (1981), Art. 5, American Convention on Human Rights (1969), Art. 5(2) as well as CAT (1984), Art. 16(1).
[951] See Art. 306 to Art. 318 (offences against the morals of Islam) in Mauritania's Penal Code (1983) which includes *Shari'a* crimes such as heresy, apostasy, atheism, and adultery, as well as corporal punishments like lapidation, amputation and flagellation. Although rarely practiced today, Saudi courts have in the past sentenced people to flogging for extramarital sex or for drinking alcohol and have ordered the amputation of limbs for robbery (Human Rights Watch (2022), 'Saudi Arabia: Forthcoming Penal Code Should Protect Rights', published 29.04.2022).
[952] See Table 6 as well as discussion around Table 7 in subchapter 3.3. of this thesis. Qatar's remaining reservation to the CAT reads: "Any interpretation of Articles 1 and 16 of the Convention that is incompatible with the precepts of Islamic law and Islamic religion." (UN Secretary-General Depositary Notification (2012), 'Qatar: Withdrawal and Partial Withdrawal of Reservations Made Upon Accession', Reference: C.N.758.2012.TREATIES-IV.9). From a positivist perspective, the state of Qatar could claim that any corporal punishments stipulated in its domestic laws are technically consistent with its international obligations by virtue of that reservation and also in line with its regional obligations under the Arab Charter as the latter omits reference to inhuman and degrading punishment.

State party should amend its legislation in order to abolish all such forms of corporal punishment as they amount to torture and cruel, inhuman or degrading treatment or punishment, in violation of the Convention."[953]

The *Committee Against Torture* also addressed Qatar's ambiguous reservations to the CAT and declared that:

"The Committee is concerned that there is no clear provision in the State party's legislation to ensure that the prohibition of torture is absolute and non-derogable. It also regrets that the State party continues to maintain a vaguely defined reservation of imprecise scope to articles 1 and 16 of the Convention (…) The State party should: (a) Legally abolish corporal punishment as a sentence for crime; (b) Enact legislation to explicitly and clearly prohibit corporal punishment of children in all settings."[954]

5.4.2.3. Fair trial guarantees and the right to an effective legal remedy

Whereas Amnesty International considers Art. 11 – 20 of the Arab Charter relating to equality before the law, arrest, detention and trial to be "largely consistent with international law", it views some aspects of these provisions as problematic.[955] Art. 13(2) of the Arab Charter on the right to a fair trial provides that trials "shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights."[956] This wording is too vague and appears to put the decision of excluding the public from trials at the discretion of the judiciary which – as outlined in Chapter 2 – is usually not fully independent and often controlled by the executive branch of government (security authorities) in many Arab states.[957] The wording differs from the more specific formulation enshrined in Art. 14(1) ICCPR which states that the "press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre

[953] Committee Against Torture (2016), 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding Observation of the Committee Against Torture, Saudi Arabia', 57th session, 18 April – 13 May 2016, paragraph 11.
[954] Committee Against Torture (2018), 'Concluding observations on the third periodic report of Qatar', CAT/C/QAT/3, published 04.06.2018, paragraphs 7 and 32.
[955] Amnesty International (2004), n918, p. 16.
[956] Arab Charter on Human Rights (2004), Art. 13(2).
[957] See discussion in subchapter 2.1. titled "A framework analysis: common features of Arab societies and political systems".

public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances (…)."[958]

Furthermore, Art. 16(7) of the Arab Charter stipulates that a convicted person has the right "to file an appeal in accordance with the law before a higher tribunal"[959], yet it is unclear if this provision entails the right to appeal both conviction and sentence before a higher tribunal as recognised by Art. 14(5) ICCPR.[960]

Art. 23 of the Arab Charter on the right to an effective legal remedy is a copy of the corresponding provision in Art. 2(3a) ICCPR. Both articles stipulate that state parties shall undertake to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[961] However, Art. 23 of the Arab Charter fails to codify essential elements of the right to an effective legal remedy reflected in Art. 2(3b-c) ICCPR, namely "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities (…), and to develop the possibilities of judicial remedy" and "to ensure that the competent authorities shall enforce such remedies when granted."[962]

5.4.2.4. Prohibition of secret detention and propaganda for war

An important personal liberty guarantee missing from the Arab Charter concerns the right to be held in a known and recognised place of detention and the prohibition of secret detention and enforced disappearance as reflected in Art. 1-7 of the ICPPED.[963]

Similarly, the Arab Charter does not contain a provision prohibiting propaganda for war and any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (…)" as stipulated in Art. 20 ICCPR.[964] In its General

[958] ICCPR (1966), Art. 14(1).
[959] Arab Charter on Human Rights (2004), Art. 16(7).
[960] ICCPR (1966), Art. 14(5). See also Amnesty International (2004), n918, p. 16 and Rishmawi, M. (2005), n683, p. 374.
[961] Arab Charter on Human Rights (2004), Art. 23 and ICCPR (1966), Art. 2(3a).
[962] ICCPR (1966), Art. 2(3b & 3c). See also Amnesty International (2004), n918, pp. 4-5.
[963] International Convention for the Protection of All Persons from Enforced Disappearance (2006), Art. 1-7.
[964] ICCPR (1966), Art. 20.

Comment No. 11, the *Human Rights Committee* stated that the prohibition of propaganda for war and the advocacy of national, racial or religious hatred are "fully compatible with the right of freedom of expression (…)" and that these acts resulting in aggression constitute a "breach of the peace contrary to the Charter of the United Nations (…)."[965] The *Human Rights Committee* clarified however that Art. 20(1) ICCPR does "not prohibit advocacy of the sovereign right of defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations" and calls on state parties to "refrain from any such propaganda or advocacy."[966]

5.4.2.5. Freedom of conscience, thought and religion

Art. 30(1) of the Arab Charter permits the imposition of restrictions on the freedom of thought, conscience and religion when provided for by law.[967] This clawback clause stands in obvious contradiction with Art. 4(2) of the Arab Charter which prohibits the derogation from Art. 30 (among other articles of the Arab Charter) in exceptional situations of emergency.[968] The corresponding provision in Art. 18(1) ICCPR concerning the freedom of thought, conscience and religion does not contain such a restriction and cannot be derogated from in times of public emergency as stated in Art. 4(2) ICCPR.[969]

Furthermore, Art. 30 of the Arab Charter omits two fundamental aspects on the freedom of religion included in Art. 18 ICCPR, namely: a) "This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching"[970] and b) "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."[971] The *Human Rights Committee* interprets these two provisions in its General Comment No. 22 (1993) as follows:

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[965] UN Human Rights Committee (1983), 'General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)', 19th session, 29.07.1983, paragraph 2. See also Amnesty International (2004), n918, pp. 17-18.
[966] *Ibid.*
[967] Arab Charter on Human Rights (2004), Art. 30(1).
[968] Ibid., Art. 4(2).
[969] ICCPR (1966), Art. 18(1) & Art. 4(2).
[970] Ibid., Art. 18(1).
[971] Ibid., Art. 18(2).

> "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally (…) The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert."[972]

The severely curtailed version of the freedom of religion adopted in Art. 30(1) of the Arab Charter makes sense in light of persisting apostasy laws and prevalent restrictions imposed on religious minorities in practicing their worship services in some parts of the Arab world. Apostasy from Islam *(ridda/irtidad)* is considered a criminal offence in some Arab states and can be punished with the death penalty in Saudi Arabia, Mauritania, and Yemen.[973] In Saudi Arabia, for example, the government still does not "tolerate public worship by adherents of religions other than Islam and systematically discriminates against Muslim religious minorities, notably Twelver Shia and Ismailis, including in public education, the justice system, religious freedom, and employment."[974]

5.4.2.6. Children's rights

Generally speaking, the Arab Charter gives due attention to the rights of the child in a total of nine provisions which are largely compatible with international human rights standards: Art. 10(2) prohibiting the exploitation of children in armed conflict; Art. 17 on the right to special legal guarantees for minor offenders; Art. 29(2) on the right of the child to acquire

[972] UN Human Rights Committee (1993), 'General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)', 30.07.1993, CCPR/C/21/Rev.1/Add.4, paragraphs 3 and 5.
[973] Schirrmacher, C. (2019), 'Leaving Islam', in Enstedt, D., Larsson, G. & Mantsinen, T. (eds.), 'Handbook of Leaving Religion', Leiden, The Netherlands: Brill, pp. 84-85. Art. 1 of Qatar's Law No. 11 of 2004 Issuing the Penal Code considers apostasy a *Shari'a* crime.
[974] Human Rights Watch World Report (2022), 'Saudi Arabia – Events of 2021', accessed 23.09.2023.

his/her mother's nationality; Art. 30(3) concerning the religious and moral education of children; Art. 33(2-3) on the protection of children within the family and the obligation of states to take all necessary steps to ensure the well-being of the child; Art. 34(2-3) relating to the rights of children in the workplace and their protection from economic exploitation and harmful child labour (these provisions have inherited the wording in Art. 32 CRC); and finally Art. 43 providing that nothing in the Arab Charter shall be interpreted to impair the rights of the child (among other vulnerable groups) as protected in domestic law or international/regional human rights instruments.[975] The fact that all Arab states have ratified the CRC (see Table 6 in subchapter 3.3.) provides additional evidence for the general interest and willingness of Arab states to advance children's rights.

However, some of the provisions in the Arab Charter are incompatible with international children's rights standards, and there are several important rights of the child which are missing from the Arab Charter.[976] The imposition of the death penalty on child offenders below the age of 18 (as provided by Art. 7(1) of the Arab Charter) was already thematised above (see subchapter 5.4.2.1. on the right to life). Additionally, Art. 41(2) of the Arab Charter guarantees free basic and primary education only to citizens unlike Art. 28(1a) CRC and Art. 13(2a) ICESCR which recognise the right to free and compulsory primary education for everyone.[977]

Whereas Art. 10(2) of the Arab Charter prohibits the exploitation of children in armed conflict, it falls short of the special protection standard enshrined in Art. 1 and Art. 2 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* which prohibit the direct participation of combatants under the age of 18 in hostilities and the compulsory recruitment of persons below 18 years into the armed forces.[978] All Arab states have ratified the aforementioned Optional Protocol except

[975] Arab Charter on Human Rights (2004), provisions quoted in the text.
[976] See Amnesty International (2004), n918, pp. 14-16 and Rishmawi, M. (2005), n683, pp. 370-371.
[977] Arab Charter on Human Rights (2004), Art. 41(2), ICESCR (1966), Art. 13(2a) and CRC (1989), Art. 28(1a).
[978] Arab Charter on Human Rights (2004), Art. 10(2) as well as Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), General Assembly resolution A/RES/54/263, adopted 25.05.2000, Art. 1 & Art. 2.

for Mauritania, Lebanon, Somalia, the Comoros and the UAE.[979] The sad phenomenon of recruiting child soldiers has resurfaced lately in Sudan's 2023 civil war in which children are involved in combat actions and systematically exploited by both parties of the conflict, the *Sudanese Armed Forces* and the paramilitary *Rapid Support Forces*.[980]

Although Art. 17 of the Arab Charter contains commendable special legal guarantees for minors during arrest, investigation and trial, *Amnesty International* proposed the amendment of Art. 17 to include further fundamental rights and legal guarantees for minors enshrined in other international instruments, namely:

a) the prohibition of torture, cruel, inhuman, or degrading treatment or punishment and the prohibition of capital punishment or life imprisonment for offences committed by children below the age of 18 (as stated in Art. 37(a) CRC);

b) the guarantee of respect for the child's privacy in all stages of legal proceedings (Art. 40(2b) CRC);

c) the guarantee that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest period of time (as in Art. 37(b) CRC);

d) the provision of care, guidance, counselling, probation, foster care and vocational education programmes and other alternatives to institutional care ensuring that children "are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence" (as provided for in Art. 40(4) CRC) and

e) the guarantee that imprisoned children are separated from adults and be accorded treatment appropriate to their age and legal status (Art. 10(3) ICCPR and Art. 37(c) CRC).[981]

5.4.3. Women's rights and the concept of positive discrimination

The codification of women's rights in the Arab Charter deserves a special examination as it is one of the areas of human rights in which the tension between *Shari'a* law (which is still

[979] Ratification Overview to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), accessed 24.09.2023.
[980] Bociaga, R. (2023), 'Sudan conflict poses threat of long-term societal harm as recruitment of child soldiers surges', *Arab News*, published 01.09.2023.
[981] Arab Charter on Human Rights (2004), Art. 17 as well as Amnesty International (2004), n913, pp. 15-16 as well as the CRC (1989), provisions quoted in the text and ICCPR (1966), Art. 10(3).

widely codified in contemporary Arab constitutions, family law and some criminal law matters) and international human rights standards is most evident.[982] It appears that the drafters of the Arab Charter have attempted to pay due respect to the reality of *Shari'a* law's dominance in family law matters in most Arab states while - at least formally - embracing international women's rights standards. The aspiration to accommodate both worldviews runs like a common thread throughout the Arab Charter and is best reflected in Art. 43 which states that nothing in the Arab Charter shall "be construed or interpreted as impairing the right and freedoms by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women (…)."[983]

As in other international and regional human rights instruments, Art. 3(1) of the Arab Charter provides for the principle of non-discrimination in the enjoyment of rights and freedoms without distinction on the grounds of sex.[984] Similar non-discrimination clauses aiming at protecting women's rights are found in Art. 2(1) of the ICCPR, Art. 2(2) of the ICESCR, Art. 14 and Protocol No. 12 (Art. 1) of the ECHR, Art. 1(1) of the AmCHR, Art. 2 and Art. 18(3) of the Banjul Charter, and in a more pronounced form in Art. 1 of the CEDAW as well as in Art. 1 and Art. 4 of the 2011 *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* ("Istanbul Convention").[985] The Arab Charter substantiates its non-discrimination clause by obliging state parties "to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter."[986]

In addition, the Arab Charter provides for the principle of gender equality with regard to the rights to employment, job protection and equal remuneration for equal work (Art. 34(4)), the right to compulsory and free primary education (Art. 41(2)) and calls on state parties to take

[982] See Hammami, F. (2013), n756, p. 51 and Mattar, M. Y. (2013), n880, pp. 101-109.
[983] Arab Charter on Human Rights (2004), Art. 43.
[984] Arab Charter on Human Rights (2004), Art. 3(1).
[985] ICCPR (1966), Art. 2(1); ICESCR (1966), Art. 2(2); European Convention on Human Rights (1950), Art. 14 and Protocol No. 12 (Art. 1); American Convention on Human Rights (1969), Art. 1(1); African Charter on Human and Peoples' Rights (1981), Art. 2 and Art. 18(3); CEDAW (1979), Art. 1, as well as Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011), Art. 1 and Art. 4.
[986] Arab Charter on Human Rights (2004), Art. 3(3).

appropriate measures "to ensure partnership between men and women with a view of achieving national development goals."[987] The Arab Charter also covers several other explicit forms of protection for women, such as the prohibition of all forms of intrafamilial violence or abuse against women and guaranteeing "the necessary protection and care for mothers" (Art. 33(2)), the protection of women in the place of work (Art. 34(2)) as well as the prohibition of the death penalty "on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery" (Art. 7(2)).[988] *Amnesty International* has criticised, however, that Art. 33(2) of the Arab Charter does not encompass all forms of violence against women in the community and by state officials.[989] It also signalled its concern that Art. 33(1) of the Arab Charter which states that "laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution" falls short of the equality guarantee enshrined in Art. 23(4) ICCPR which obliges state parties to "*ensure equality of rights* and responsibilities of spouses as to marriage, during marriage and at its dissolution" (emphasis added).[990]

Mattar observes that the provisions contained in the Arab Charter in favour of women's rights reflect "the concern of its drafters that women in Arab countries face disadvantages that their counterparts in other regions of the world do not experience to the same extent", particularly discrimination and vulnerabilities Arab women are exposed to in the areas of political participation, employment, education, access to justice and widespread domestic and societal violence.[991] According to Mattar, the drafters of the Arab Charter attempted to address these disadvantages by integrating the principle of positive discrimination into Art. 3(3) of the Arab Charter which states that:

> "Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women

[987] Ibid., Art. 34(4), Art. 41(2) and Art. 41(3).
[988] Ibid. Art. 33(2), Art. 34(2) and Art. 7(2).
[989] Amnesty International (2004), n918, p. 12.
[990] Ibid., pp. 12-13, Arab Charter on Human Rights (2004), Art. 33(1) as well as ICCPR (1966), Art. 23(4).
[991] Mattar, M. Y. (2013), n880, p. 102. Mattar compiled a large volume of Concluding Comments by the Committee on the Elimination of Discrimination against Women addressing the common disadvantages and challenges women are facing in the Arab world (see footnotes 73-77, pp. 102-105).

by the Islamic Shariah, other divine laws and by applicable laws and legal instruments."[992]

Legal scholars have adopted different positions concerning the interpretation of the positive discrimination clause in Art. 3(3) of the Arab Charter. Some argue that preferential actions in favour of women are urgently needed in societies in which women's rights are severely restricted and contend that special measures promoting equal rights are already well-established in Art. 4(1) of the CEDAW which provides that:

"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."[993]

In its General Recommendation No. 25 on Art. 4(1) of the CEDAW, the *UN Committee on the Elimination of Discrimination Against Women* further invites state parties to:

"(…) include, in their constitutions or in their national legislation, provisions that allow for the adoption of temporary special measures. The Committee reminds States parties that legislation, such as comprehensive anti-discrimination acts, equal opportunities acts or executive orders on women's equality, can give guidance on the type of temporary special measures that should be applied to achieve a stated goal, or goals, in given areas. Such guidance can also be contained in specific legislation on employment or education. Relevant legislation on non-discrimination and temporary special measures should cover governmental actors as well as private organizations or enterprises."[994]

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[992] Arab Charter on Human Rights (2004), Art. 3(3). See also Mattar, M. Y. (2013), n880, p. 106.
[993] CEDAW (1979), Art. 4(1). See also Mattar, M. Y. (2013), n880, pp. 106-107, as well as Rishmawi, M. (2005), n683, p. 375.
[994] UN Committee on the Elimination of Discrimination Against Women (2004), 'General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures', paragraph 31.

On regional levels, the *European Court of Justice* (ECJ) has in several decisions recognised the lawfulness of special measures in favour of women's rights. In its judgment in the case of *Kalanke v. Freie Hansestadt Bremen*, for example, the ECJ has permitted "national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men", subject to the condition that men and women are equally qualified for a position or promotion.[995] The ECJ acknowledged that such measures in favour of women, "although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life."[996]

On national levels, special legal measures in favour of women's rights are not uncommon either and have contributed to improving gender justice and reducing disadvantages for women in many Arab states. For example, the *UN Women Regional Office for the Arab States* has revealed that 10 Arab states (Egypt, Iraq, Jordan, Palestine, Morocco, Saudi Arabia, Somalia, Sudan, Tunisia and the UAE) have adopted quotas for women in national parliaments to promote greater representation of Arab women in politics.[997]

Critics of Art. 3(3) of the Arab Charter are not per se questioning the normative value of positive discrimination in favour of women but rather lament that Art. 3(3) attributes the principle of positive discrimination exclusively to how it is established in the Islamic *Shari'a* and applicable national laws:

> "Whilst welcoming the reference to positive discrimination in favour of women, which is badly needed within Arab societies, subjecting it to such qualifications as Shari'ah or national legislation could seriously undermine attempts at equality."[998]

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[995] Kalanke v. Bremen, Judgement of the European Court of Justice, 17 October 1995, Case C-450/93, paragraph 19 (see also paragraphs 16 and 24). Mattar, M. Y. (2013), n880, lists several other ECJ judgments in which the principle of positive discrimination in favour of women was applied (see footnote 86, p. 107).
[996] Ibid., paragraph 18.
[997] UN Women Arab States (2023), 'New UN country reports on Gender Justice and the Law: Progress on women's legal capacity, more reform needed for protection against domestic violence and participation in politics, as challenges continue on sexual and reproductive health and rights', published 12.02.2023.
[998] Rishmawi, M. (2005), n683, p. 375. See similar observations by Hammami, F. (2013), n756, p. 52 as well as Almakky, R. G. (2015), n532, p. 184.

As outlined earlier in subchapter 2.3., personal status and family codes in most Arab states are still largely based on *Shari'a* law. By linking the principle of positive discrimination to *Shari'a* and national laws, Art. 3(3) of the Arab Charter fails to effectively address existing tensions between *Shari'a* law (or rather between traditional interpretations in Islamic jurisprudence that still prevail in many Arab States) and international human rights standards in areas of women's rights such as polygyny, the prohibition of marriage to non-Muslim men, restrictions for women concerning their right to obtain a unilateral divorce in court, obedience to husbands, child custody or the existence of some scenarios in which women inherit half the amount in comparison to male coheirs.[999] Whereas the positive discrimination principle may induce desirable effects for women's rights in '*Shari'a*-neutral' areas such as education or employment, it is less likely to contribute to gender equality in family law areas like marriage, divorce, child custody or inheritance which are regulated by *Shari'a* in most domestic Arab legal codes.

Generally, it can be observed that the restrictive positive discrimination clause in Art. 3(3) of the Arab Charter is essentially consistent with the positioning of Arab states in regard to the CEDAW. Whereas the CEDAW is widely ratified by Arab states, many of the abundant reservations/declarations made by Arab states thereto address the necessity of treaty provisions being compatible with the Islamic *Shari'a* and domestic laws.[1000] Oman, Qatar and Saudi Arabia have even submitted general (all-encompassing) reservations/declarations in which they declare their rejection to be bound by any CEDAW provision in conflict with Islamic law.[1001]

5.5. Art. 43 of the Arab Charter: interface of tension between national, regional and international human rights law?

Art. 43 of the Arab Charter reflects some of the key issues discussed so far. It reads:

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[999] Khan, I. (1999), 'Islamic Human Rights: Islamic Law and International Human Rights Standards', *Appeal: Review of Current Law and Law Reform*, Vol. 5, p. 79. See also Hammami, F. (2013), n756, p. 52, Mattar, M. Y. (2013), n880, p. 105 and Hunaiti, H. (2020), n23, pp. 36-37.
[1000] See Table 7 and discussion in subchapter 3.3.
[1001] Ibid. See UN Treaty Collection (2023), n347, Treaty No. 8 (CEDAW), section "Declarations and Reservations" (Oman, Qatar, Saudi Arabia).

> "Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities."[1002]

On the one hand, Art. 43 reiterates the supremacy of domestic law which has always been considered sacred by Arab governments (see discussion in subchapter 3.2.), yet on the other hand, it puts national human rights law on an equal footing with the obligation to respect the international human rights instruments Arab states have adopted or ratified. As the Preamble of the Arab Charter reaffirms the principles of the UN Charter, the UDHR, the ICCPR and ICESCR, Mattar goes as far as to argue that the Arab Charter generally establishes a supremacy of international human rights law over domestic and regional law and that "in practice, this means all rights embodied in the Charter should be read in light of broadly-related rights guaranteed by international law."[1003] However and as demonstrated earlier, national family codes (and some criminal laws) are still largely based on *Shari'a* law in several Arab countries and some aspects of these laws (e.g. corporal punishment or the prohibition of women's marriage to non-Muslim men) are generally known to be inconsistent with international human rights standards claiming universality.[1004] What is unique about Art. 43 is that its drafters have brought both major human rights approaches (cultural specificity vs. universalism) together into one single paragraph without attempting to resolve obvious tensions between them since "including a reference to national legislation in Article 43 leads to, at the very least, confusion, and, at worst, an undermining of international obligations since many national laws in most Arab States are at serious variance with international law."[1005]

The ambiguous reference to both national and international human rights law in Art. 43 has unleashed many questions and challenges that remain unsettled: Which legal standards enjoy priority for Arab state parties, those reflected in national laws, those bestowed on Arab states

[1002] Arab Charter on Human Rights (2004), Art. 43.
[1003] Mattar, M. Y. (2013), n880, p. 126 (see also p. 125).
[1004] See discussion in subchapters 2.4. and 3.1.
[1005] Rishmawi, M. (2005), n683, p. 370.

by virtue of their ratification of international instruments or the provisions of the regional Arab Charter which embraces both aforementioned sources? Which standards shall prevail in the inevitable case of conflict? Can the Arab Charter serve as an intermediary platform through which the human rights obligations of Arab states are incorporated into domestic constitutions and legislation in accordance with international human rights standards? Or is this an unrealistic assumption given that several provisions of the Arab Charter are themselves in obvious contradiction with international protection standards as discussed earlier in this chapter?

There are no definite answers to these questions. Mattar, who produced significant research on Art. 43 of the Arab Charter and its implications, argues that "if national law provides for greater protection of rights and freedoms than provided in the [Arab] Charter, these national rights and freedoms should be observed and respected. However (…) if the national protections are weak, international human rights standards should direct the interpretation of any conflict of laws."[1006] Yet Mattar also acknowledges that in reality national legislation in many Arab countries falls short of satisfying both international human rights standards and protection levels established by the Arab Charter, for example in areas related to violence against women, abuse and exploitation of domestic workers or restrictions against civil society organisations.[1007] He therefore proposes that:

> "These problematic national laws, and others like them, should be reviewed and modified to ensure compliance with the international standards reflected in the Arab Charter. To this end, a legislative review process should be undertaken with reference to regional standards set by the League of Arab States, including, importantly, the Arab Charter. That review process should also consider domestic laws in light of several other conventions related to human rights and fundamental freedoms that have been adopted by the League. These include the Arab Convention on Freedom of Association, the Arab Declaration on the Rights of the Child, and the Arab Convention on the Employment of Women."[1008]

[1006] Mattar, M. Y. (2013), n880, pp. 109-110.
[1007] Ibid., pp. 118-120.
[1008] Ibid., pp. 120-121.

Another important vehicle for ensuring the effective enforcement of regional or international human rights standards on national levels is the ability and willingness of domestic courts to refer to the Arab Charter and international human rights instruments in their jurisprudence. There is sufficient empirical evidence, especially from Egypt, but also from other Arab states such as Iraq, Lebanon, or Palestine, in which courts utilised the principles of international human rights law in their decisions to interpret, reinforce or even repeal domestic laws.[1009] In Case No. 23/16, the *Egyptian Supreme Constitutional Court* (SCC) declared in March 1995 that Art. 73(6) of the *Law of the State Council* (Law No. 47 of 1972), which prohibited candidates for the *State Council* (the highest judicial body settling administrative disputes in Egypt) from being married to a foreigner, was in violation of the constitutional rights to marriage and family life.[1010] In its reasoning for the decision the SCC referred to several international human rights provisions including Art. 16 of the UDHR and Art. 23(2) ICCPR concerning the right to marry and to form a family, Art. 5(iv) ICERD codifying the right to marriage and choice of spouse, and Art. 16(b) CEDAW on the same right of men and women to freely choose a spouse and to enter into marriage by free and full consent.[1011] The Court even referred to Art. 8 of the ECHR concerning the right to respect for private and family life although Egypt is not a member of the European regional human rights system.[1012] In an earlier landmark case from 1986 (Case No. 4190), the *Egyptian State Security Court* repealed Art. 124 of the *Egyptian Penal Code* (Law No. 58 of 1937, reformed in 1952) which at that time prohibited employees from striking.[1013] The Court referred to the right to strike codified in Art. 8(d) ICESCR and decided that Egypt's ratification of the ICESCR by the *People's Assembly* (Parliament) in 1982 meant that its international legal obligation was incorporated into binding domestic law. Art. 124 was consequently repealed on the grounds of violating national law.[1014]

[1009] See Mattar, M. Y. (2013), n880, pp. 130-138.
[1010] Supreme Constitutional Court of Egypt (1995), Case No. 23/16, 18.03.1995 [in Arabic], *University of Minnesota Human Rights Library*. See also Mattar, M. Y. (2013), n880, p. 131.
[1011] Ibid.
[1012] Ibid.
[1013] State Security Court of Egypt (1986), Case No. 4190 [in Arabic]. See also Mattar, M. Y. (2013), n880, p. 137.
[1014] Ibid.

In another case from Iraq, a man attempted to prohibit his wife from traveling abroad with their children without his permission after a marriage quarrel between them. A *Court of First Instance* ruled in June 2011 that the husband has no right to stop his wife from travelling as this would violate her freedom of movement as stipulated in Art. 42(1) of Iraq's Constitution of 2005 and Art. 13(2) of the UDHR.[1015] The Court also referred to Art. 16(1c) CEDAW concerning the equality between women and women during marriage.[1016] There are also numerous court decisions from Lebanon in which juvenile court judges referred to CRC provisions, including the principle of the best interest of the child (Art. 3) or the protection of the child from all forms of violence, abuse, neglect, maltreatment or exploitation (Art. 19).[1017] However, there is insufficient empirical evidence whether and to which extent Arab courts have also referred to the Arab Charter in their decisions.[1018] Such a detailed assessment of Arab case law would go beyond the scope of this project but might give a new impetus for future research endeavours.

On the contrary, where international human rights instruments clash with the Islamic *Shari'a* -which is a source of legislation in 12 out of 22 Arab states (see discussion in subchapter 2.3.)- national courts have consistently held that *Shari'a* law takes precedence over international human rights law.[1019] This is exemplified in two landmark court judgments from Egypt addressing the freedom of religion. On 16 December 2006, the *Supreme Administrative Court* decided that persons adhering to the Bahá'í Faith are not permitted to have their religion documented in any official papers issued by the state (identification cards, birth certificates, military exemption certificates, etc.) as the formal recognition of the Bahá'í

[1015] Court of First Instance in Al-Sha'b District in Iraq (2011), verdict announced 27.06.2011 [in Arabic]. See also Mattar, M. Y. (2013), n880, p. 133.
[1016] Ibid.
[1017] See compilation of case law from Lebanon in Mattar, M. Y. (2013), n880, pp. 134-136 (including footnotes 271-281).
[1018] Mattar provides two examples of Arab court decisions mentioning regional human rights conventions. In one case concerning environmental protection of the Nile River, Egypt's *Supreme Constitutional Court* referred to Art. 26 (progressive development) of the *American Convention on Human Rights* (Mattar, M. Y. (2013), n880, p. 136, footnote 282). In another case, a plaintiff complaining about the inconsistent application of the minimum wage in Egypt referred to economic and labour rights protected in the Arab Charter. The responsible court did not take the plaintiff's reference to the Arab Charter into account in its final verdict. (Ibid., p. 137, footnote 283, as well as Court of Administrative Justice of Egypt (2010), Judgment of 30.03.2010 concerning the minimum wage [in Arabic]).
[1019] Mattar, M. Y. (2013), n880, p. 140.

Faith would conflict with *Shari'a* law and disrespect the public order in Egypt.[1020] The Court justified its verdict by clarifying that *Shari'a* law only recognises the religions of Islam, Christianity and Judaism and highlighted that Muslim jurists have reached a jurisprudential consensus that the Bahá'í Faith is not be treated as a divine religion. The Court argued that its judgment did not violate Art. 18 of the UDHR concerning the right to manifest one's religion as this right - in the opinion of the Court - is to be applied unrestrictedly only to the three divine religions of Islam, Christianity, and Judaism.[1021]

In another important judicial case, an Egyptian citizen had converted from Islam to Christianity in 1973 and sought to have his new Christian name and religious belief identified in his national identification card.[1022] In 2009, the *Court of Administrative Judice* dismissed his complaint and held that the right to freedom of religion is guaranteed by the Constitution of Egypt but that this right must be interpreted in light of the constitutional reality that Islam is the religion of the state and that the principles of the Islamic *Shari'a* are the main source of legislation.[1023] The Court acknowledged that conversion to another religion falls within the scope of freedom of religion but underlined that a change of religious status would create legal repercussions in sensitive areas of family law (marriage, divorce, inheritance) which are regulated in Egypt by *Shari'a* law for Muslims and ecclesiastical law for Orthodox/Copic Christians.[1024] The judgment confirmed Egypt's general obligation to respect the provisions of the ICCPR ratified in 1982, yet it referred to the clawback clause enshrined in Art. 18(3) ICCPR which subjects the freedom to manifest one's religion or beliefs to limitations that are prescribed by national law and that are necessary to protect public order, morals or the rights of others.[1025] The Court highlighted the general reservation submitted by Egypt to the ICCPR according to which the Covenant would be ratified

[1020] Supreme Administrative Court of Egypt (2006), Appeal of Cases No. 16834/52 and 18971/52, judgment announced 16.12.2006 [in Arabic]. See also Mattar, M. Y. (2013), n880, p. 139.
[1021] Ibid.
[1022] BBC Arabic (2009), 'Egyptian judiciary refused to modify identity of a Muslim who converted to Christianity' [in Arabic], published 14.06.2009.
[1023] Court of Administrative Justice of Egypt (2009), summary of court decision concerning the change of religious status in national identification card [in Arabic], published 24.05.2023. See also Mattar, M. Y. (2013), n880, pp. 139-140.
[1024] Ibid.
[1025] Ibid. See also ICCPR (1966), Art. 18(3).

provided that it does not conflict with the provisions of the Islamic *Shari'a*.[1026] Eventually, the Court decided that Art. 18(3) ICCPR did not apply to Egyptian Muslims wishing to convert to Christianity (or another religion) as this contradicts both Art. 2 of Egypt's Constitution establishing that the principles of the *Shari'a* are the main source of legislation and classical Islamic jurisprudence prohibiting Muslims from converting to another religion (apostasy).[1027]

The presented case law has shown that Arab courts have consistently incorporated and applied international human rights law in their decisions but only as long as there was no obvious conflict with existing domestic laws and to the extent permitted by *Shari'a* law. While human rights less regulated by *Shari'a* law, for example the right to strike or the freedom of movement, make it more likely for national courts to refer to international/regional human rights instruments ratified by Arab state parties, domestic courts are (and will be) reluctant to do the same in sensitive human rights areas governed by *Shari'a* law, most notably concerning the freedom of religion and some women's rights related to marriage, divorce and inheritance. The dichotomy in Art. 43 (international law vs. domestic law) confirms the willingness of Arab states to embrace international human rights law as long as it does not clash with its national rules and as long it respects the reservations made by Arab governments under international instruments. In other words, the Arab Charter (and particularly Art. 43) "reflects largely the degree of acceptance of international human rights law and standards by certain Arab States, as demonstrated (…) by their reservations to UN human rights treaties."[1028]

5.6. Reforming the regional human rights system around the Arab Charter

As much as it constitutes a considerable step forward in promoting human rights on regional levels in the Arab world, the analysis in this chapter has shown that the Arab Charter, the centrepiece of the human rights system within the Arab League, is falling short of meeting

[1026] Ibid. See also Egypt's general reservation to the ICCPR in Centre for Civil and Political Rights (2017), 'Reservations and declarations made by State parties of the International Covenant on Civil and Political Rights as of 31 March 2017', accessed 29.10.2023.
[1027] Ibid., as well as Mattar, M. Y. (2013), n880, p. 140 (including footnote 296).
[1028] Rishmawi, M. (2010), n676, p. 172. See also Sadri, A. (2019), n591, p. 1172.

international human rights protection standards.[1029] The death penalty is retained for minors, cruel and inhuman punishment and the secret detention of individuals are not expressly prohibited, some rights are limited to citizens, many basic freedoms are restricted by abundant clawback clauses, and the monitoring body of the Arab Charter, the *Arab Human Rights Committee*, is neither equipped with the mandate to receive and process individual complaints nor to investigate human rights breaches.[1030]

To mitigate these and other deficiencies, the Arab Charter provides possibilities for legal reform, amendments and the addition of protocols.[1031] Art. 50 of the Arab Charter establishes that:

> "Any State party may submit written proposals, though the Secretary-General, for the amendment of the present Charter. After these amendments have been circulated among the States members, the Secretary-General shall invite the States parties to consider the proposed amendments before submitting them to the Council of the League for adoption."[1032]

Art. 51 provides that the "amendments shall take effect, with regard to the States parties that have approved them, once they have been approved by two thirds of the States parties."[1033] A similar provision is enshrined in Art. 52 of the Arab Charter stating that "[a]ny State party may propose additional optional protocols to the present Charter and they shall be adopted in accordance with the procedures used for the adoption of amendments to the Charter."[1034]

It is worth mentioning here that other regional human rights systems have endeavoured to reform their mechanisms by revisiting the scope and quality of human rights provisions included in the texts of their treaties and/or by strengthening the monitoring and enforcement capabilities of their treaty bodies.[1035] The European human rights system, for example, has initiated several Protocols which expanded on the rights and freedoms protected by the

[1029] See Rishmawi, M. (2005), n683, p. 376, Allam, W. (2014), n677, p. 63 and Zerrougui, L. (2008), n682, p. 14.
[1030] See discussion in subchapters 5.3. and 5.4.
[1031] Hammami, F. (2013), n756, p. 63.
[1032] Arab Charter on Human Rights (2004), Art. 50.
[1033] Ibid., Art. 51.
[1034] Ibid., Art. 52.
[1035] Hammami, F. (2013), n756, pp. 63-64.

ECHR (such as Protocol No. 1 which codifies the rights to property, education and free elections or Protocol No. 4 covering the prohibition of imprisonment for debt, the freedom of movement and the prohibition of expulsion of nationals) or which reformed the institutional and procedural fabric of the system (as reflected, for example, in Protocol No. 11 which established a single *European Court of Human Rights* replacing the original Commission and Court of Human Rights, and which introduced the automatic right to individual petition).[1036] The African Union has followed a somehow similar path, with member states adopting three additional Protocols to the *African Charter on Human and Peoples' Rights*, namely the *Protocol on the Establishment of an African Court on Human and Peoples' Rights* (adopted in 1998), the *Protocol on the Rights of Women in Africa* (adopted in 2003) and the *Protocol on the Rights of Persons with Disabilities in Africa* (adopted in 2018, yet to enter into force).[1037]

Whereas an amendment to the Arab Charter is possible from a technical/legal perspective, reforming the Arab Charter and the wider human rights system within the LAS depends fundamentally on the willingness of Arab states to bring about a real and profound change in their human rights policies.[1038] Unfortunately, a good opportunity for substantially reforming the LAS human rights system on the highest decision-making level was missed in the few years during and after the 'Arab Spring' (2011-2015):

> "After the revolutions that overtook the Arab region, a space opened for the League to reconceptualize its position as a regional organization that is taking a more proactive approach to human rights (…) The Arab Spring coincided with the appointment of Nabil Al-Arabi in July 2011 as Secretary General, who played a role in pushing forward a League-wide reform process, requesting that an expert committee, headed by Mr Lakhdar Brahimi, make proposals on its reform. A report

[1036] See European Convention on Human Rights (1950), Protocol No. 1 of 1952 (pp. 33-35) and Protocol No. 4 of 1963 (pp. 36-29) as well as Council of Europe, 'Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby', European Treaty Series No. 155, signed 11.05.1994, entry into force 01.11.1998, Art. 19 and Art. 34.
[1037] See African Union (2023), overview of human rights treaties and protocols, accessed 20.11.2023.
[1038] Hammami, F. (2013), n756, p. 64.

was subsequently produced, but was dealt with confidentially and continues to be unavailable."[1039]

Among the reforms suggested at that time was the restructuring of the LAS institutional framework and the comprehensive amendment of the LAS Charter/Pact, the constituting document of the Arab League.[1040] The proposed new LAS Charter included the addition of the protection of human rights to the Preamble as one of the founding principles of the Arab League but this draft was not approved by at least two-thirds of the LAS member states and was consequently disregarded by state leaders convening at the Arab Summit in Sharm El-Sheikh (Egypt) on 28-29 March 2015.[1041]

The analysis in Chapters 4 and 5 has shown that the human rights system within the Arab League has developed into a multilayered network of loosely integrated institutions, most notably the intergovernmental PAHRC, the Arab Parliament, the *Arab Court of Human Rights* (ACtHR) and the *Arab Committee on Human Rights*.[1042] As it assumes the responsibility for amending and harmonising all existing human rights treaties within the Arab League and for proposing new ones, the PAHRC plays a leading role in the process of reforming the LAS human rights system.[1043] The PAHRC is advised to create a new policy vision identifying what the LAS human rights system should look in the future, how the different executive human rights organs can effectively interact with each other and which competences they should have. If the Statute of the ACtHR is to come into force in the near future, the PAHRC shall establish clear regulations and procedures of how the Court and the Arab Committee can complement each other and how important functions can be divided up meaningfully between them. Otherwise, both organs will continue "to exist in a vacuum with no formal relationship" between them.[1044]

If Arab states parties represented in the PAHRC prefer a bicameral human rights model that resembles the institutional framework in the African and Inter-American human rights

[1039] Rishmawi, M. (2015), n19, p. 14.
[1040] Ibid., p. 15.
[1041] Ibid. See also League of Arab States (2015), Decision No. 621 at the 26th Arab Summit in Sharm El-Sheikh on 28-29 March 2015 [in Arabic].
[1042] See discussion in subchapter 4.5.
[1043] See competences of the PAHRC listed in subchapter 4.5.1.
[1044] Magliveras K. & Naldi G. (2016), n621, p. 156.

systems (composed of the *African Commission on Human and Peoples' Rights* and the *African Court on Human and Peoples' Rights* and the *Inter-American Commission on Human Rights* and the *Inter-American Court of Human Rights* respectively) then the PAHRC must find adequate answers and solutions to many still open questions: Which organ should have the power to interpret the provisions of the ACHR in the future, the Arab Committee (in accordance with its own bylaws), the Arab Court (as per Art. 16 and Art. 21 of its Statute) or shall both organs share this competence? If the LAS human rights system is to have an individual complaints procedure in the future, how shall it function? Would the PAHRC consider reforming the Statute of the Arab Court to allow individuals to directly access the Arab Court, similar to the practice of the *European Court of Human Rights*? Would the Arab Committee be permitted to file applications on behalf of individuals before the Arab Court, as is already possible under the African and Inter-American mechanisms? Would the Arab Court be equipped with the power to issue interim/provisional measures? Which organ would have the competence to order inquiries and instate investigations when there is evidence of human rights breaches by Arab state parties? Could independent special procedures (country or thematic special rapporteurs) be established and integrated under the auspices of the PAHRC (similar to the *UN Human Rights Council*) or rather under the Arab Committee? Which guarantees could be put in place to ensure a minimum degree of enforcement of future Arab Court and/or Arab Committee decisions/recommendations by LAS member states? How can the independence and impartiality of the Arab Court and its judges be guaranteed? Is a stronger cooperation between the Arab Committee and the Arab Parliament envisaged concerning the unification of human rights legislation in Arab states? And how can civil society organisations be transparently and unrestrictedly integrated to enhance the protection mandate and monitoring capacity across all LAS human rights bodies?[1045]

Apparently, Arab states and LAS human rights policymakers have not yet found definite answers to many of these questions. To the knowledge of the author, a major reformation of the LAS human rights institutions has not been adopted by the PAHRC and the *Council of*

[1045] Necessary reforms of the LAS human rights bodies are addressed among others in Sadri, A. (2019), n591, pp. 1174-1176, Rishmawi, M. (2015), n19, p. 29, Fuzay', M. G. (2018), n569, pp. 34-35, as well as in International Federation for Human Rights (2013), n794, pp. 35-40.

the Arab League yet. As the Statute of the Arab Court has not yet entered into force, it seems that the Arab Committee will remain the principal human rights mechanism of the Arab League, at least for some years to come. The PAHRC is advised to decide if it wishes to transfer some of the competences addressed above to the Arab Committee (e.g. an individual complaints mechanism, special procedures, inquiries or on-site investigations) by activating Art. 50-52 of the Arab Charter, at least until the Arab Court becomes operational. In the view of Younis:

> "The entire human rights system within the Arab League needs to be reformed completely; it requires a radical change (revolution). New mechanisms need to be added to the Charter, such an individual complaints mechanism, special thematic rapporteurs, an investigation mechanism, and a strong Court (…) If the Court was linked to the Arab Charter on Human Rights and if it had a complaints and investigation mechanism it would have had a tremendous impact on the entire Arab human rights system and it would have provided a positive image for the ruling Arab regimes vis-à-vis their own societies and the international community."[1046]

Further recommendations for improving the work of the Arab Committee include the need to review state reports in public and to permit NGOs to consistently submit alternative/shadow reports to the Committee and disseminate the concluding observations of the Committee widely through their media channels and social networks.[1047] Several independent Arab human rights organisations advise amending the Arab Charter to the effect of formally equipping the Arab Committee with the competence of interpreting the provisions of the Charter and are offering to support the Committee in modernising its internal methods of work and in strengthening its engagement with local, regional and international CSOs.[1048] Muhammed Fuzay' (Bahrain), former member of the Arab Committee and its president from 2017 to 2019, highlights the need to provide sufficient financial resources for the activities of the Arab Committee and advocates for a separate annual budget the Committee can use to fund its regional and international affairs in a less

[1046] Younis, A. N. (2022), online interview with researcher on 16.06.2022, English transcript documented by the researcher, p. 6 and p. 8.
[1047] International Federation for Human Rights (2013), n794, pp. 38-39.
[1048] Ibid., p. 39.

bureaucratic manner.[1049] Most importantly however, Arab human rights specialists agree that many provisions of the 2004 ACHR need to be reviewed, amended and brought into line with international standards in accordance with the draft prepared by the independent *Committee of Experts* and presented to the PAHRC in January 2004.[1050]

Having mentioned this, how likely is it that profound human rights reforms will take place in a region experiencing authoritarianism, fragile statehood and abundant societal conflicts? Are ruling elites willing to create a genuine and independent human rights system which holds them accountable and which they cannot fully control? If the answer is 'no', then which requirements need to be fulfilled for an effective regional human rights system to exist someday in the Arab world? Fadel argues that:

> "(…) In the absence of democratic accountability, autocratic regimes will only respect human and political rights to the extent necessary to secure actual or perceived benefits from other parties, such as other States in the international system, and to a lesser extent, international civil society, rather than out of a deontic commitment to those rights being valuable in themselves, whether for their individual citizens or for the political future of their respective States (…) Accordingly, democratic governance is the prerequisite for social and moral transformation, not the opposite. So while a regional Arab human rights mechanism could be helpful in establishing an effective system of human rights enforcement in the Arab world, it can do so only after the Arab world has first democratised."[1051]

As the attempt to impose democracy by external forces is unlikely to be accepted by Arab societies and will rather deepen the instability in many Arab states, it is important that democracy, the respect for human rights and the rule of law are products of a gradual, inclusive, and peaceful process involving all possible societal forces (ruling elites and opposition groups, representatives of sectarian groups, liberals and conservatives, women

[1049] Fuzay', M. G. (2018), n569, p. 35. See also Arab Human Rights Committee (2020), '12th Periodic Report of the Arab Human Rights Committee' [in Arabic], accessed 24.12.2023, p. 22.
[1050] International Federation for Human Rights (2013), n794, p. 37.
[1051] Fadel, M. (2014), 'Is there a future for an Arab human rights mechanism? Not without democracy', *Netherlands Quarterly of Human Rights*, Vol. 32/1, pp. 6-7.

and men, the young and the elderly, etc.).[1052] It remains to be seen which direction the political systems in the Arab world will move in and which effects a democratisation or further autocratisation of Arab states will have on the operation and reformation of the human rights system of the Arab League.[1053]

[1052] The consequences of the US-led invasion of Iraq in 2003 and the attempt to impose Western-style democracy are well-reflected in Hamourtziadou, L. (2021), 'From invasion to failed state: Iraq's democratic disillusionment', *openDemocracy*, published 23.07.2021.

[1053] A very insightful analysis of regime transformation/transition, either towards democracy or towards more autocratic forms of governance, can be found in Cassani, A. & Tomini, L. (2020), 'Reversing regimes and concepts: from democratization to autocratization', *European Political Science*, Vol. 19, pp. 272-287.

Chapter 6: Comparative analysis of Concluding Observations and Recommendations

6.1. Objectives and analytical scope

Both human rights experts I interviewed for this research project are aligned in their critical assessment of the broader Arab human rights system and the Arab Charter in particular. Dr. Hafidha Chekir, Tunisian human rights academic and advocate, rejected the idea that the Arab human rights regime has brought a considerable added value to the protection of human rights in the region "because the Arab system has not produced strong human rights documents" and because "the Arab Charter falls short of meeting the human rights standards provided in both international instruments and Tunisian law."[1054] While Mr. Asaad Younis, former member of the *Arab Human Rights Committee* from Palestine, has repeatedly directed his criticism at Arab governments for their unwillingness/inability to provide adequate support to the human rights bodies within the Arab League, he judged the engagement and potential of the Arab Committee favourably:

> "(…) To be honest with you, we the members of the Committee were always very serious in our reviews of the submitted state reports and never did a favour to any Arab state. We were tackling sensitive human rights issues, accepted no limits to be imposed on us, and our questions to state representatives were never framed politically. Our sources of information were shadow reports submitted to us by NGOs, the observations from other relevant international human rights bodies, as well as local media reports from each Arab state. We developed a complete file for each country that has submitted a periodical report and - frankly speaking - all governments were very cooperative."[1055]

Despite the textual weaknesses of the Arab Charter and the limitations of the Arab Committee discussed in Chapter 5, Younis' aforementioned findings suggest that it is worth engaging with concluding observations and recommendations (CORs) of the Arab

[1054] Chekir, H. (2023), online interview with researcher on 27.01.2023, English transcript documented by the researcher, p. 5 and p. 3.
[1055] Younis, A. N. (2022), n1046, p. 4 and p. 7.

Committee in order to assess the actual value the Committee has possibly brought to the Arab Charter as the central human rights mechanism for the Arab world.

By comparing selected CORs made by the Arab Committee to state party reports submitted to it with CORs made by international human rights committees in a similar time period, Chapter 6 aims to discuss the following questions: To what extent are CORs made by the Arab Committee similar to or different from CORs made by selected international human rights treaty bodies in term of scope and substance? Is the Arab Committee more critical or more lenient than its international counterparts in addressing human rights challenges in its CORs? Has the Arab Committee suggested legislative amendments or policy improvements that were missing in the CORs of international treaty bodies? And, generally speaking, is it is reasonable to argue that the Arab Committee has managed to balance some of the weaknesses of the Arab Charter through its engagement in reviewing and commenting on state party reports in accordance with Art. 48 of the Arab Charter?

To answer these questions, I will compare four CORs made by the Arab Committee (for state party reports submitted by Iraq, Sudan, Algeria, and Qatar) with four CORs made by selected international human rights committees in response to the state reports submitted by the same Arab states in a similar time period. The eight treaty body reports (CORs) subject to analysis in this chapter are summarised in Table 16 as follows:

TABLE 16

COMPARATIVE ANALYSIS OF SELECTED TREATY BODY CONCLUDING OBSERVATIONS AND RECOMMENDATIONS (CORs)

Iraq	CORs of the Arab Committee: December 2014	Concluding observations of the *Human Rights Committee* (CCPR): December 2015
Sudan	CORs of the Arab Committee: November 2015	Concluding observations of the *Committee on Economic, Social and Cultural Rights* (CESCR): October 2015
Algeria	CORs of the Arab Committee: October 2012	Concluding observations of the *Committee on the Elimination of Discrimination against Women* (CEDAW Committee): March 2012
Qatar	CORs of the Arab Committee: May 2017	Concluding observations of the *Committee on the Rights of the Child* (CRC): June 2017

The four states chosen for the comparative analysis were selected to represent the four geographical regions with Arab presence equally: Iraq representing the Levant, Sudan representing East Africa, Algeria representing the Maghreb region and North Africa, and Qatar representing the Gulf region. International treaty bodies were selected to reflect the reporting process for a broad spectrum of human rights: the CCPR covering civil and political rights, the CESCR addressing economic, social, and cultural rights, the CEDAW Committee monitoring state compliance with regard to the protection of women's rights, and the CRC reviewing state progress and challenges concerning the protection of children's rights. Since the CORs of the Arab Committee encompass all categories of human rights, the comparison will naturally focus on the type of human rights targeted by the international treaty body. In the assessment for Qatar, for example, only the children rights specific observations and recommendations made by the Arab Committee will be compared to the concluding observations of the CRC.

Despite the limitation of the sample encompassing only four Arab states out of 22 member states of the Arab League, I am confident that the outcome of this qualitative assessment will be insightful for drawing conclusions regarding the efficacy of the Arab Committee in protecting human rights. The overall results of this comparative analysis will be validated

against existing secondary literature using a similar approach.[1056] However, before embarking on the assessment of the CORs included in Table 16, the history of compliance by Arab states with their reporting obligations towards the Arab Committee and towards the four selected international human rights treaties will be outlined first. This is in my view a relevant indicator that reflects whether Arab states are principally respecting their obligations arising from the human rights treaties they have ratified or not.[1057]

6.2. Arab compliance with human rights reporting obligations

Art. 48(2) of the Arab Charter states that "[e]ach State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter."[1058] At the end of 2023, four state parties (out of 18 that had ratified the Arab Charter by that time) had not yet submitted their initial reports to the Arab Committee, namely Palestine, Libya, Yemen and Syria.[1059] Five Arab state parties (Lebanon, Sudan, Algeria, the UAE, and Bahrain) failed to submit their first or their second periodic reports to the Arab Committee.[1060] This equates to 50% of Arab state parties (9/18 states) which have refrained from submitting their initial reports or one of their periodic reports to the Arab Committee by the end of 2023. Only five Arab states (28%), namely Jordan, Iraq, Qatar, Kuwait, and Mauritania, have fulfilled all of their reporting obligations towards the Arab Committee by 2023.[1061] Therefore, the Arab Committee has been repeatedly reminding the concerned Arab governments to submit their overdue reports and has addressed the issue to the inter-governmental PAHRC within the Arab League.[1062]

Now how does the reporting practice under the Arab Charter compare with the reporting obligations of Arab states under selected international human rights treaties? Table 17

[1056] See Hunaiti, H. (2020), n23, pp. 44-62.
[1057] An assessment of the compliance of all 22 Arab states with their reporting obligations towards all international human rights treaties goes beyond the scope of this thesis, yet it is an exercise I recommend future researchers interested in the topic to undertake in order to have a further understanding of Arab acceptance or rejection of international human rights treaty bodies.
[1058] Arab Charter on Human Rights (2004), Art. 48(2).
[1059] Arab Human Rights Committee (2023), '15th Annual Report for 2023 of the Arab Human Rights Committee in accordance with Art. 48 of the Arab Charter on Human Rights' [in Arabic], portal of the League of Arab States, accessed 11.04.2024, p. 10 as well as Annex 2 (pp. 35-36) and Annex 3 (p. 37).
[1060] Ibid., Annex 4 (pp. 38-42).
[1061] *Ibid.*
[1062] Ibid., p. 11.

provides an overview of state reports submitted by the same four Arab countries selected in Table 16 to four international treaty bodies: Iraq's reports submitted to the CCPR, Sudan's reports submitted to the CESCR, Algeria's reports submitted to the CEDAW-Committee and Qatar's reports submitted to the CRC. The reporting status for each Arab state and treaty body was collected manually by the author from the *UN Human Rights Treaty Bodies Database*.[1063]

[1063] UN Human Rights Treaty Bodies Database (2024), reporting status for Iraq (CCPR), Sudan (CESCR), Algeria (CEDAW) and Qatar (CRC), all accessed on 12.02.2024. The state reporting periodicity differs from one treaty regime to the other depending on how reporting obligations are regulated in the concerned treaties and in complementary documents (general comments, internal regulations of the treaty body, etc.). A good overview of the reporting periodicity per human rights treaty can be found in UN Human Rights Office of the High Commissioner (2020), 'Reporting compliance by State parties to the human rights treaty bodies', last updated 15.05.2020, p. 2. Under the CEDAW and CAT, for example, periodic reports are due every 4 years after the submission of the initial report, every 5 years under the ICESCR and every 2 years under the ICERD (ibid.).

TABLE 17

COMPLIANCE OF SELECTED ARAB STATES WITH THEIR REPORTING OBLIGATIONS UNDER SELECTED INTERNATIONAL HUMAN RIGHTS TREATIES

Iraq's reporting obligations towards the CCPR Date of ratification, accession or succession: 25.01.1971		
Reporting cycle	Submission due date	State party report submission date
I	22.03.1976	05.06.1979
II	04.04.1985	21.04.1986
III	15.06.1991	05.06.1991
IV	04.04.1995	05.02.1996
V	04.04.2000	11.10.2013
VI	06.11.2018	05.08.2019
Sudan's reporting obligations towards the CESCR Date of ratification, accession or succession: 18.03.1986		
Reporting cycle	Submission due date	State party report submission date
I	30.06.1990	08.05.1998
II	30.06.2003[1064]	27.07.2012
III	31.10.2020	not submitted as of 31.08.2024 when last checked
Algeria's reporting obligations towards the CEDAW Date of ratification, accession or succession: 22.05.1996		
Reporting cycle	Submission due date	State party report submission date
I	21.06.1997	01.09.1998
II	21.06.2001	29.01.2003
III-IV	21.06.2009	25.06.2009
V-VII	01.02.2016	not submitted as of 31.08.2024 when last checked
Qatar's reporting obligations towards the CRC Date of ratification, accession or succession: 03.04.1995		
Reporting cycle	Submission due date	State party report submission date
I	02.05.1997	29.10.1999
II	02.05.2002	10.01.2008
III-IV	02.05.2013	10.02.2014

[1064] In the second CESCR reporting cycle for Sudan, the state party's report was due on 30 June 2003 but was submitted by the government of Sudan around nine years later on 27 July 2012. The CORs of the CESCR thereon were published more than three years later on 26 October 2015 (see UN Human Rights Treaty Bodies Database (2024), n1058, section on Sudan, CESCR, reporting cycle II).

The exemplary reporting status presented in Table 17 shows that the four selected Arab states have submitted most of their initial and periodic reports to the chosen international human rights treaty bodies. It is noticeable though that many of the state party reports were submitted with delay. Sudan, for example, submitted its initial report to the CESCR eight years after the due date, and its second report with a nine-year delay. Against the backdrop of the ongoing civil war in the country, it is unlikely that Sudan will submit its third periodic report to the CESCR (set for 2020) anytime soon. Similarly, Iraq needed 13 years to submit its fifth periodic report to the CCPR, yet this delay is understandable giving that Iraq was facing an unlawful invasion by the US and some of its allies in 2003 followed by a long-term civil war and political instability until 2011/2012.[1065] Noteworthy is also Qatar's almost 6-year delay in submitting its second periodic report to the CRC (due in 2002), and Algeria's failure to yet submit its combined fifth and sixth periodic reports to the CEDAW-Committee (submission was originally due in 2016).

Overdue state party reporting is, however, by no means a phenomenon exclusively associated with Arab states. The *UN Secretariat* points out that:

> "As at 31 December 2017, 36 of the 197 States parties were fully compliant with their reporting obligations under the relevant international human rights treaties and protocols. That was equivalent to 18 per cent of States parties (…) As at 31 December 2017, 161 of 197 States parties (82 per cent) were overdue in submitting initial or periodic reports. The number of overdue reports per State party ranged from one to nine (…)."[1066]

The above statistics of the *UN Secretariat* reveal that overdue state reporting to international human rights treaty bodies is the norm, not the exception. If the international overdue state reporting rate of 82% (until 2017) is to be compared with the respective overdue reporting rate towards the Arab Committee until 2023 (50%), then one can reach the factual conclusion

[1065] For more information about the 2003 invasion of Iraq and its repercussions, see Chulov, M. (2023), 'A bloody delusion: how Iraq war led to catastrophic aftermath in Middle East', *The Guardian*, published 17.03.2023.
[1066] UN International Human Rights Instruments (2018), 'Compliance by States parties with their reporting obligations to international human rights treaty bodies', 30th meeting of Chairs of the human rights treaty bodies, UN document HRI/MC/2018/2, 23.03.2018, paragraphs 6 and 7.

that the Arab regional human rights system has in relative terms achieved stronger levels of state party compliance with their reporting obligations.

Interestingly, some of the Arab states linked with overdue reporting under the Arab Charter (Libya, Palestine, and Syria) were also among those countries with the highest number of overdue reports under international human rights mechanisms.[1067] This might be due to the historically inherited skepticism of some Arab states towards international human rights law (see discussion in subchapter 3.2.) or to ongoing civil wars and persistent political conflicts which have possibly precluded these Arab states from providing adequate security measures and sufficient financial and organisational resources required for the preparation and timely submission of their state party reports to international human rights treaty bodies and the Arab Committee.[1068]

6.3. Iraq

The first comparative analysis focuses on civil and political rights and is centred on the CORs produced by the Arab Committee in December 2014 in reference to the initial state party report submitted by Iraq,[1069] and the CORs of the *Human Rights Committee* (CCPR) released in December 2015 in response to the fifth periodic report of Iraq.[1070]

The CORs of the Arab Committee are eight pages long (67 paragraphs) and are divided into three main parts: an introductory section (paragraphs 1-16), a list of observations covering different types of human rights, including civil, political, economic, social and cultural rights, as well as women's and children's rights (paragraphs 17-41) and a list of recommendations (paragraphs 42-67) corresponding to the observations made.[1071] The

[1067] Ibid. Table 3 (paragraph 7).
[1068] The author did not come across academic analyses linking the political, economic, and social situations in Libya, Syria, and Palestine with the overdue reporting behaviour of these states towards the Arab Committee and international human rights treaty bodies. However, a fragile political context and weak socio-economic conditions appear to be plausible causes for a government's inability to commit to its international or regional obligations. The relationship between these factors and a state's degree of compliance with its human rights reporting obligations constitutes a field of research that deserves more attention by human rights scholars in the future.
[1069] Arab Human Rights Committee (2014), 'Concluding observations and recommendations of the Arab Human Rights Committee, Republic of Iraq', 6th session, 20-25 December 2014 [in Arabic].
[1070] Human Rights Committee (2015), 'Concluding observations on the fifth periodic report of Iraq', 3 December 2015, UN document CCPR/C/IRQ/CO/5.
[1071] Arab Human Rights Committee (2014), n1069, paragraphs mentioned in text.

introductory part contains general information with regard to Iraq's reporting obligations towards the Arab Committee (paragraphs 1-5) and acknowledgments of positive developments made by Iraq in the protection of civil and political rights (paragraphs 6-16), including praise for including the rights of minorities in the Iraqi constitution (paragraph 6), the enactment of Law No. 20 of 2009 concerning the compensation of victims of armed conflict and terrorist operations (paragraph 7), guaranteeing the right of children to obtain nationality from their Iraqi mother in accordance with Nationality Law No. 26 of 2006 (paragraph 9), welcoming Iraq's ratification of the CAT in July 2011 and the CRPD in March 2013 (paragraph 10) and its withdrawal of its reservation to Art. 9(1) and Art. 9(2) of the CEDAW concerning the equality of women and men in acquiring, changing or retaining their nationality and granting women equal rights with respect to the nationality of their children (paragraph 11).[1072]

The recommendations section mainly addresses the following civil and political rights that are previously highlighted in the observations part of the text: the necessity of amending national laws to limit the death sentence to the most serious crimes and to include the right of those sentenced to death to seek pardon or commutation of the sentence (paragraph 42), revising the provisions of Art. 287 of the *Iraqi Code of Criminal Procedure No. 23 of 1971* to ensure the postponement of the death penalty for pregnant and nursing women until the child has reached the age of two (paragraph 43), the recommendation to ensure the absolute prohibition of and non-derogation of the crimes of torture and cruel, inhumane and degrading treatment in Iraq's national laws and to introduce more severe penalties for perpetrators (paragraphs 44-45), the need to introduce a law guaranteeing adequate compensation for victims of arbitrary and unlawful arrest and detention (paragraph 46), as well as a law prohibiting imprisonment on the ground of an inability to fulfil a contractual obligation (paragraph 48), the necessity to review all laws discriminating against women in penal and family matters (paragraph 49), the necessity to enact a law that guarantees the freedom of access to information (paragraph 50) and legislation that prohibits and combats domestic violence and protects its victims (paragraph 51), the recommendation to review the *Iraqi Anti-Terrorism Law No. 13 of 2005* ensuring that all guarantees of the right to a fair trial are

[1072] Ibid., see paragraphs mentioned in text. Iraq's notification to the UN Secretary-General concerning the withdrawal of its reservation to Art. 9 of the CEDAW can be found in CEDAW (1979), end note 75.

met (paragraph 52) and the need to introduce further legal and institutional reforms ensuring the full supervision of prisons and detention centres by the Ministry of Justice and the judiciary (paragraph 53).[1073]

The CORs of the CCPR are nine pages long (47 paragraphs). Positive legislative and institutional measures taken by the government of Iraq to protect civil and political rights are highlighted in paragraphs 3-4, including the adoption of the *Trafficking in Persons Act No. 28 of 2012*, the *Protection of Journalists Act No. 21 of 2011*, and *the High Commission for Human Rights Act No. 53 of 2008*, as well as welcoming the accession of Iraq to the CRPD, the CAT, the ICPPED and to the Optional Protocols to the CRC on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict.[1074] While the accession of Iraq to the ICPPED and to the Optional Protocols of the CRC is missing from the list of positive developments included in the Arab Committee report, the CORs of the CCPR omit some of the positive aspects mentioned in the Arab Committee report, such as the withdrawal of Iraq's reservations to the CEDAW, the protection of the rights of minorities in the 2005 Constitution of Iraq and amendments made to the Nationality Law.[1075] It appears that both treaty body reports complement each other well in terms of emphasising some positive steps made by the government of Iraq in the advancement of civil and political rights.

The largest part of the CCPR report (paragraphs 5-44) consists of principal matters of concern and recommendations addressed to the government of Iraq.[1076] Concerns and recommendations are paired and grouped around the following headings in relation to civil and political rights: domestic applicability of the Covenant, the mandate of the national human rights institution of Iraq, counter-terrorism measures, non-discrimination and the equal protection of rights, harmful practices discriminating against women and girls, past human rights violations in the context of armed conflict, internally displaced persons, asylum seekers and refugees, violence against women, the death penalty, the prohibition of torture and ill-treatment, human trafficking and forced labour, the right to liberty and security,

[1073] Ibid., paragraphs mentioned in text.
[1074] Human Rights Committee (2015), n1070, paragraphs 3 and 4.
[1075] See Arab Human Rights Committee (2014), n1069, paragraphs 11, 6 and 9.
[1076] See Human Rights Committee (2015), n1070, paragraphs 5-44 (pp. 2-9).

independence of the judiciary and fair trial, freedom of religion, freedom of expression, reports of excessive use of force and the rights of minorities.[1077] Each of these themes contains a paragraph in which concerns are outlined by the CCPR and one or more paragraphs with corresponding recommendations directed at the government of Iraq. In paragraph 33, for example, the CCPR expresses its concern "at allegations that, despite existing legal safeguards, security forces carry out arrests without judicial warrants, that many persons have been detained for prolonged periods without being brought before a judge (…) and that a large number of persons have been held in pretrial detention for periods exceeding those prescribed in domestic law (…)."[1078] In the corresponding recommendation (paragraph 34), the CCPR points to the necessity of adopting "the measures necessary to guarantee that anyone arrested or detained enjoys in practice from the outset of the deprivation of liberty all fundamental legal safeguards enshrined in article 9 of the [ICCPR]."[1079]

In terms of scope, almost all areas of concern covered in the CORs of the Arab Committee are also included in the CORs provided by the CCPR, such as the death penalty, torture and ill-treatment, arbitrary arrest and detention, discrimination against women, domestic violence, and the right to a fair trial. The only topics included in the Arab Committee report but missing from the CORs of the CCPR concern the recommendations to legislate on the prohibition of imprisonment for the inability to fulfil a contractual obligation and the freedom of access to information.[1080] In contrast, the CCPR report covers several areas of concern and recommendations that are missing from or that are only marginally addressed by the Arab Committee report, such as the situation of internally displaced persons, asylum seekers and refugees, human trafficking and forced labour, the independence of the judiciary, the freedoms of religion and expression and the rights of minorities.[1081]

[1077] Ibid.
[1078] Ibid., paragraph 33.
[1079] Ibid., paragraph 34.
[1080] Arab Human Rights Committee (2014), n1069, paragraphs 48 and 50.
[1081] See Human Rights Committee (2015), n1070, paragraphs 21-22 (internally displaced persons), paragraphs 23-24 (asylum seekers and refugees), paragraphs 31-32 (human trafficking and forced labour), paragraphs 35-36 (independence of the judiciary), paragraphs 37-40 (freedoms of religion and expression) and paragraphs 43-44 (rights of minorities).

In terms of the quality of the CORs pronounced in each report, many observations and recommendations made in the CCPR appear to be more tangible and actionable compared to the Arab Committee report. This can be illustrated by reference to two examples. First, whereas the Arab Committee report addresses the topic of violence against women indirectly in its recommendation to legislate an anti-domestic violence law in Iraq (paragraph 51), the CCPR report dedicates a separate section to the topic and lists concrete recommendations to combat all forms of violence against women, such as the necessity to "facilitate the reporting of cases of violence against women and ensure that all such cases are promptly and thoroughly investigated", calling on Iraq to "swiftly amend its legislation to guarantee adequate protection of women against violence, including by repealing the Criminal Code provisions establishing "honourable motives" as a mitigating circumstance for murder and allowing for the exoneration of rapists who marry their victims, and by ensuring that all forms of violence against women, such as domestic violence and marital rape, are criminalized with appropriate penalties in all its territories" (paragraph 26).[1082] Second, the Arab Committee report contains one mere recommendation for Iraq to enact a law that guarantees the compensation of victims of arbitrary or unlawful arrest and detention (paragraph 46).[1083] On the contrary, the CCPR lists several concrete legal safeguards the government of Iraq must consider in the event of deprivation of liberty, including the need to promptly bring anyone arrested or detained on a criminal charge before a judge and to try him/her within a reasonable timeframe, to release detainees who have been discharged by courts without delay and to ensure that no one is held in secret detention (paragraph 34).[1084]

All in all, the examined CORs of the CCPR are generally more exhaustive in terms of scope and quality of observations and recommendations compared to the CORs of the Arab Committee. Although some recommendations, for example concerning the limitation of the death penalty or the prohibition of torture and ill-treatment, are similar in terms of substance in both treaty body reports, the author could not find objective evidence confirming that the

[1082] Arab Human Rights Committee (2014), n1069, paragraph 51, as well as Human Rights Committee (2015), n1070, paragraph 26.
[1083] Arab Human Rights Committee (2014), n1069, paragraph 46.
[1084] Human Rights Committee (2015), n1070, paragraph 34.

recommendations of the Arab Committee are significantly stronger in promoting and protecting civil and political rights compared to those of the CCPR.

6.4. Sudan

The second comparison addresses economic, social and cultural rights in Sudan as reflected in two treaty body reports, the CORs made by the Arab Committee in November 2015 in relation to the state party report submitted by Sudan,[1085] and the CORs published by the CESCR about two weeks earlier in October 2015 with regard to the second periodic report of Sudan.[1086]

The CORs of the Arab Committee extend over 10 pages and contain a preamble (introduction), a list of 20 substantial observations and a list of corresponding recommendations. [1087] In the introductory part, the Arab Committee expresses its appreciation to the government of Sudan for submitting its first report under the Arab Charter and for receiving a delegation of Arab Committee members visiting Sudan in August 2015 to better examine the human rights situation on the ground in exchange with ministerial representatives and other national human right stakeholders.[1088] The Arab Committee also acknowledges Sudan's resumed engagement with international human rights mechanisms including the CESCR and the UPR of the *UN Human Rights Council*.[1089]

In what appears as an attempt to contextualise/frame the report, the human rights specific observations and recommendations sections are preceded by three general observations formulated by the Arab Committee. The Committee acknowledges the long-standing challenges Sudan has been facing during the *Second Sudanese Civil War* (1983-2005) "resulting in a loss of a large part of its resources after the secession of South Sudan" and recognises the impacts of the "unilateral economic sanctions enforced upon Sudan over the years."[1090] The Committee then calls on the Arab League and its member states to provide

[1085] Arab Human Rights Committee (2015), 'Concluding observations and recommendations of the Arab Human Rights Committee, Sudan', 8th session, 7-12 November 2015 [in Arabic].
[1086] Committee on Economic, Social and Cultural Rights (2015), 'Concluding observations on the second periodic report of the Sudan', 27 October 2015, UN document E/C.12/SDN/CO/2.
[1087] Arab Human Rights Committee (2015), n1080, introduction (pp. 1-2), observations (pp. 2-6) and recommendations (pp. 6-10).
[1088] Ibid., p. 1.
[1089] *Ibid.*
[1090] Ibid., p. 2 [translation from Arabic into English by the author].

Sudan with the financial and technical support needed to mitigate the negative effects the "enforced unilateral measures" (referring to the sanctions) have caused to the enjoyment of human rights, especially economic and social rights and the right to development, in the country.[1091] Noteworthy is also the observation of the Arab Committee that the state party report submitted by Sudan focused overly on demonstrating the constitutional and legal human rights framework while lacking indicators and statistical data concerning the actual enjoyment of human rights codified in the Arab Charter by the people of Sudan.[1092]

The report of the Arab Committee comprises six pairs of observations/recommendations addressing the following economic and social rights:

1) reforming the national social protection system to enable all working groups to benefit from social protection services;[1093]

2) amending the Sudanese *Law on the Organisation of Vocational Unions of 2004* to explicitly guarantee the freedom to form vocational/professional unions in accordance with Art. 35(1) of the Arab Charter;[1094]

3) adopting "favourable policies in support of financially vulnerable social groups" (without specifying what these policies should entail) in response to weak economic growth and increased inflation contributing to rising poverty rates, especially in regions affected by armed conflict;[1095]

4) enabling citizens' easy access to free primary healthcare services in all regions irrespective of their economic situation and allocating the specialised human, infrastructure and financial resources required for the operation of these medical centres;[1096]

5) combating the inequality across regions with regard to access to education, healthcare services, clean and safe drinking water, food, sanitation and electricity services, and exerting

[1091] Ibid.
[1092] Ibid., paragraph 1 (p. 3).
[1093] Ibid., observation no. 15 (p. 5) and recommendation no. 14 (p. 9).
[1094] Ibid., observation no. 16 (p. 5) and recommendation no. 15 (p. 9).
[1095] Ibid., observation no. 17 (p. 6) and recommendation no. 16 (p. 9).
[1096] Ibid., observation no. 18 (p. 6) and recommendation no. 17 (p. 9).

more efforts in controlling infectious diseases, providing preventive medical services and combating "harmful traditional practices" to reduce the domestic mortality rate;[1097] and

6) adopting policies aimed at improving the enrolment rate of girls in primary education.[1098]

The CORs of the CESCR follow a structure/pattern similar to that of the CCPR and other international human rights treaty bodies. The document is 10 pages long (62 paragraphs) and consists of four parts: an introduction (paragraphs 1-2), positive aspects (paragraphs 3-4), principal subjects of concern (observations) and their corresponding recommendations accounting for the largest share of the report (paragraphs 5-56) and other recommendations (paragraphs 57-62).[1099] Economic, social and cultural rights are clustered into several categories, such as the management of natural resources (paragraphs 15-16), effects of austerity measures (paragraphs 17-18), regional disparities and inequality between women and men in the enjoyment of social, economic and cultural rights (paragraphs 21-22), access of internally displaced persons to basic services (paragraphs 23-24), unemployment (paragraphs 31-32), trade union rights (paragraphs 35-36), social security (paragraphs 37-38), female genital mutilation (paragraphs 41-42), effects of widespread poverty (paragraphs 43-44), access to affordable housing (paragraphs 45-46), forced evictions (paragraphs 47-48), food insecurity (paragraphs 49-50), access to healthcare services (paragraphs 51-52), access to education (paragraphs 53-54) and the right to take part in cultural life (paragraphs 55-56).[1100]

One of the noteworthy positive aspects mentioned in the CESCR report is the ratification of the *International Labour Organization* (ILO) *Convention Concerning Minimum Age for Admission to Employment* (No. 138 adopted in 1973) as well as the ILO *Worst Forms of Child Labour Convention* (No. 82 adopted in 1999) by the government of Sudan in 2003.[1101] Towards the end of the report, the CESCR encourages Sudan to ratify the Optional Protocol to the ICESCR and to "strengthen its collaboration on issues relating to economic, social and

[1097] Ibid., observation no. 19 (p. 6) and recommendation no. 18 (p. 9).
[1098] Ibid., observation no. 20 (p. 6) and recommendation no. 19 (p. 9).
[1099] Committee on Economic, Social and Cultural Rights (2015), n1086, paragraphs mentioned in text.
[1100] Ibid. paragraphs mentioned in text.
[1101] Ibid., paragraph 3c (p. 1).

cultural rights with the Office of the United Nations High Commissioner for Human Rights, specialized agencies and the relevant United Nations programmes."[1102]

A comparison of the human rights catalogues/issues addressed in both reports reveals that the CORs of the CESCR are much more exhaustive in terms of scope. Several economic, social, and cultural rights are entirely missing from the CORs of the Arab Committee (or superficially addressed at best), such as existing inequalities between women and men in the enjoyment of these rights, the weak access to basic services for internally displaced persons, asylum seekers and refugees, sustainable management of natural resources, access to affordable housing, forced evictions, food insecurity or the right to take part in cultural life.[1103]

Another disparity can be noticed with regard to the strength of the observations and recommendations expressed in both reports. The CORs of the CESCR appear more thorough and tangible compared to the equivalent provisions in the Arab Committee report. This is well exemplified by reference to the CORs concerning regional disparities in Sudan. Whereas the Arab Committee recommends the government of Sudan combat the inequality across regions with regard to access to basic services, it does not suggest concrete measures to reach this goal.[1104] The CESCR, by contrast, specifies the Sudanese regions which are particularly disadvantaged, namely Darfur and Kordofan, and proposes some measures to counteract the extreme poverty in these regions, including the integration of "accountability mechanisms at the federal and state levels into the design and implementation of programmes and policies aimed at the realization of economic, social and cultural rights" and the allocation of "adequate budgetary resources to close regional disparities."[1105] It also requests that the government of Sudan provides in the next periodic report "statistical data showing the progress achieved with regard to allocation of federal and state resources to sectors such as health, education and social security and the realization of related rights."[1106]

[1102] Ibid., paragraphs 57 and 59 (p. 10).
[1103] See Arab Human Rights Committee (2015), n1085.
[1104] Ibid., recommendation no. 18 (p. 9).
[1105] Committee on Economic, Social and Cultural Rights (2015), n1086, paragraph 22 (p. 5).
[1106] *Ibid.*

Given that the CESCR report was published just about two weeks ahead of the CORs of the Arab Committee, the author expected to find more issues of concern covered in the Arab Committee report, especially considering that the Arab Committee used to "make reference to international standards in its work", for example through regular exchanges with international human rights treaty bodies, including the CESCR.[1107] In summary, the CORs of the Arab Committee fall short of meeting the standards embraced by the CESCR in its CORs both in terms of scope and quality/depth of the observations and recommendations made.

6.5. Algeria

This section compares a pair of treaty body observations and recommendations with a focus on women's rights: the CORs made by the Arab Committee in October 2012 to the initial state party report submitted by Algeria,[1108] and the CORs adopted by the CEDAW Committee in March 2012 relating to Algeria's combined third and fourth periodic reports.[1109]

The CORs of the Arab Committee are only five pages long.[1110] The document consists of an introduction, general observations, 15 observations addressing the content of the initial report submitted by Algeria, and 17 recommendations targeting different types of human rights, predominantly civil and political rights.[1111] Many rights codified in the Arab Charter are either missing or are only superficially addressed by the Arab Committee, for example the freedoms of religion, thought and conscience, the freedoms of association, peaceful assembly, opinion and expression, the right to political asylum, the right to form trade unions, the right to social security or the right to an adequate standard of living.[1112] Some

[1107] Rishmawi, M. (2015), n19, p. 31. Mr. Asaad Younis (Palestine) explained in my interview with him that he "was the focal person of the Arab Human Rights Committee for the cooperation between the Arab League and all international human rights treaty bodies. We used to exchange information, experiences, observations, and ideas for the promotion of the Arab human rights system." (Younis, A. N. (2022), n1046, p. 7).
[1108] Arab Human Rights Committee (2012), 'Concluding observations and recommendations of the Arab Human Rights Committee, People's Democratic Republic of Algeria', 2nd session, 13-18 March 2012 [in Arabic].
[1109] Committee on the Elimination of Discrimination against Women (2012), 'Concluding observations of the Committee on the Elimination of Discrimination against Women – Algeria', 23 March 2012, UN document CEDAW/C/DZA/CO/3-4.
[1110] Arab Human Rights Committee (2012), n1108.
[1111] Ibid. 9 out of 17 recommendations relate to civil and political rights (ibid., pp. 4-5).
[1112] *Ibid.*

recommendations are vaguely phrased, such as the recommendation made to the government of Algeria to "increase its efforts aiming at fostering the integration of persons with a disability and their effective participation in society",[1113] or the recommendation to "intensify educational and pedagogical programmes in the different stages of education with the aim of encouraging fraternity and tolerance and promoting the culture of human rights and the rule of law."[1114] Women's rights are marginally addressed too. Only three observations are indirectly or directly related to women's rights: a remark providing that the Algerian Penal Law does not clearly indicate the necessary protection of victims of human trafficking, an observation concerning the prevailing violence against women and children and the ineffectiveness of national policies and regulations with respect to the monitoring and reporting of cases of domestic violence against women, and praise directed to the government of Algeria for efforts exerted in the field of free healthcare services and for its success in reducing the mortality rates of children and mothers.[1115] The report includes just two meagre recommendations addressing women's rights, namely the recommendation to step up awareness efforts to combat domestic violence and to provide sufficient shelter, as well as medical, psychological and social rehabilitation services for female victims of domestic violence.[1116]

The CORs of the CEDAW Committee extend across 14 pages (59 paragraphs) and cover a plurality of positive aspects, areas of concern and recommendations related to women's rights in Algeria, ranging from discriminatory laws (paragraphs 19-20), women's access to justice and facilitating the submission of complaints by female victims of discrimination (paragraphs 21-22), eliminating deep-rooted discriminatory stereotypes against women (paragraphs 27-28), combating all kinds of violence against women (paragraphs 29-30), trafficking and sexual exploitation (paragraphs 31-32), women's participation in political and public life (paragraphs 33-34), the enrolment of girls and women in school and higher education (paragraphs 35-36), advancing employment and health services for women (paragraphs 37-41), protecting women and girl refugees and asylum seekers (paragraphs 44-45) and abolishing existing discriminatory practices in Algeria's Family Code (paragraphs

[1113] Ibid., recommendation no. 15, p. 5 (translation from Arabic into English by the author).
[1114] Ibid., recommendation no. 16, p. 5 (English translation by the author).
[1115] Ibid., observations no. 3 (p. 2), 10 (p. 3) and 12 (p. 4).
[1116] Ibid., recommendations no. 11 and 12 (p. 5).

46-47).[1117] The recommendations provided by the CEDAW Committee to the government of Algeria are tangible and linked to the concerns addressed in each area. In paragraph 30b, for example, the CEDAW Committee urges the government of Algeria to "stipulate in the Criminal Code the definition of rape including marital rape and other sex crimes, to be defined as sexual offences committed in the absence of one's consent."[1118] In another part, the Committee recommends that Algeria takes "urgent measures to reduce the high drop-out rate for girls at the intermediate and secondary levels of education" and to "establish indicators to measure the impact of the (…) national literacy strategy and include information thereon in the next periodic report to the Committee."[1119]

Considering that the CORs of the Arab Committee were released in October 2012 around seven months after the publication of the corresponding CORs adopted by the CEDAW Committee in March 2012, the author expected the Arab Committee to have built upon at least some of the findings and recommendations made earlier by the CEDAW Committee. This was apparently not the case. The Arab Committee has left most issues concerning women's rights in Algeria unnoted and its CORs fall remarkably short of the reporting and quality standards fulfilled by the CORs of the CEDAW Committee.

6.6. Qatar

The fourth and last segment of this comparative assessment encompasses two reports: the CORs made by the Arab Committee in its 13th session on 13-18 May 2017 in relation to the first periodic report submitted by Qatar,[1120] and the CORs adopted by the *Committee on the Rights of the Child* in June 2017 after considering the combined third and fourth periodic reports of Qatar.[1121]

The CORs of the Arab Committee are 19 pages long (136 paragraphs).[1122] Children's rights are addressed in a total of six observations and corresponding recommendations therein: the

[1117] Committee on the Elimination of Discrimination against Women (2012), n1109, paragraphs quoted in text.
[1118] Ibid., paragraph 30b (p. 7).
[1119] Ibid., paragraphs 36a and 36b (p. 9).
[1120] Arab Human Rights Committee (2017), 'Concluding observations and recommendations of the Arab Human Rights Committee, first periodic report of Qatar', 13th session, 13-18 May 2017 [in Arabic].
[1121] Committee on the Rights of the Child (2017), 'Concluding observations on the combined third and fourth periodic reports of Qatar', 22 June 2017, UN document CRC/C/QAT/CO/3-4.
[1122] See Arab Human Rights Committee (2017), n1120.

recommendation to pass a comprehensive child protection law and elevate the minimum age of criminal responsibility to 12 years (paragraphs 67-68), the need to grant children born to a Qatari mother married to a non-Qatari man equal rights compared to children born to a Qatari man married to a foreign mother (paragraphs 83-84), the need to grant children born to a Qatari mother married to a foreigner the equal right to private property (paragraphs 95-96), the recommendation to step up efforts in raising awareness of domestic violence and empowering victims of domestic violence in accessing support and care services (paragraphs 107-108), the recommendation to amend the minimum age of marriage, especially for girls (paragraphs 109-110), and finally the recommendation to strengthen efforts in promoting the right to education for migrant children with a disability, including the establishment of public schools for children with learning difficulties (paragraphs 128-129).[1123] These CORs generally appear to be much more tangible and concrete/implementable compared to the observations and recommendations made by the Arab Committee in response to Algeria in 2012.

The CORs made by the *Committee on the Rights of the Child* extend across 11 pages and 45 paragraphs.[1124] The report is much more comprehensive in terms of identifying a wide array of areas in which a stronger protection of children's rights should be considered by the state of Qatar, including issues relating to non-discrimination, the best interest of the child, respect for the views of the child, the right to nationality, violence against children (corporal punishment, abuse and neglect, gender-based violence, harmful practices), children deprived of a family environment, children in prison with their mothers, children with disabilities, adolescent health, education, refugee children, economic exploitation including child labour, administration of juvenile justice, as well as child victims and child witnesses of crimes.[1125]

Some of the children's rights areas addressed in the report include a note by the CRC recognising the progress made by Qatar in that particular area. In paragraph 3, for example, the CRC "welcomes the progress achieved by the State party in some areas (…), in particular Act No. 15 of 2011 on combating trafficking in persons. It further welcomes the establishment of a unit for the rights of women, children and persons with disabilities in the

[1123] Arab Human Rights Committee (2017), n1120, paragraphs mentioned in text.
[1124] See Committee on the Rights of the Child (2017), n1121.
[1125] Ibid., see section III. C-G sections III A -G (paragraphs 13-39).

National Human Rights Committee."[1126] In the section related to non-discrimination, the CRC further "recognizes that the State party has initiated steps to expand education for girls, improve their safety and protect them against violence (…)."[1127] However, in most of the human rights areas covered in the report, the CRC expresses its serious concern with respect to persisting human rights challenges in Qatar. In paragraph 11, for example, the CRC indicates that it "remains seriously concerned that the minimum age for marriage is set at 18 years for boys and 16 years for girls."[1128] In paragraph 21, the Committee expresses its deep concern "that corporal punishment is lawful and widely used in the home, alternative care settings, day care, schools and as a penal sentence."[1129] The recommendations made by the CRC to the government of Qatar correspond to the specific concerns expressed by the CRC and are commonly phrased in a decisive and resolute manner. For example, the Committee "urges" the state of Qatar "to review its legislation on nationality in order to ensure that nationality can be transmitted to children through both the maternal and paternal line without distinction, in particular for those children who would otherwise be stateless" (paragraph 20), to prohibit child corporal punishment in all settings without any exception (paragraph 22a), to "adopt specific legislation to criminalize all forms of violence against women and girls (…) with no exceptions and within a clear time frame" (paragraph 24a), to "take effective measures to eliminate child marriage" (paragraph 25) and to "refrain from holding children and families with children in immigration detention facilities in line with the principles of the best interests of the child and of family unity" (paragraph 34a).[1130]

Although some areas of concern appear in both CORs (e.g. equal rights for children of Qatari women married to foreigners, violence against children, and the rights of children with disability), the CORs of the CRC are both more comprehensive in terms of covering a wider range of children's rights, and more decisive and specific in terms of how recommendations are phrased.

[1126] Ibid., paragraph 3.
[1127] Ibid., paragraph 13.
[1128] Ibid., paragraph 11.
[1129] Ibid., paragraph 21.
[1130] Ibid., paragraphs quoted in text.

6.7. Summary of findings

There is no doubt that the selected Arab Committee reports contain meaningful observations and recommendations concerning the human rights situations in the four Arab states examined (Iraq, Sudan, Algeria, and Qatar). This assessment is generally shared by Hunaiti who has conducted a similar qualitative analysis of other Arab Committee reports with a focus on some human rights issues that are particularly sensitive in the Arab world, such as freedom from torture, women's rights, civic rights, and freedom of expression.[1131] Hunaiti points out that:

> " (…) the Committee has showed [sic] over the years a serious commitment towards reviewing States reports. It addresses serious human rights issues in the region and provided strong recommendations and follow-up steps (…) Additionally, unlike other Arab human rights mechanisms, the Committee demonstrated a certain level of independence in reviewing States' reports, which must be further enhanced by the LAS."[1132]

Nevertheless, when comparing the selected Arab Committee reports with the reviews issued by the corresponding international treaty bodies (the CCPR, CESCR, CEDAW, and CRC) for the same states, it must be noted that the CORs of the Arab Committee clearly and consistently fall short of meeting the standards adopted in the selected CORs of the international mechanisms, both in terms of scope (quantity of human rights issues addressed) and quality/depth of observations and recommendations. This discrepancy is most apparent in the textual analysis of Algeria's and Sudan's CORs and less so for Iraq and Qatar. In none of the four case studies analysed is the Arab Committee more tangible or more actionable in its CORs than the corresponding international treaty body reviews. This outcome is at least partially shared by Hunaiti who points out in her analysis that "(…) unlike the United Nations treaty bodies, the [Arab] Committee is still reluctant to confer pressing issues or specific violations of a widespread or systematic manner in the state under review."[1133]

[1131] See Hunaiti, H. (2020), n23, pp. 55-62.
[1132] Ibid., p. 53 and p. 62.
[1133] Hunaiti, H. (2020), n23, p. 53.

But what are possible causes for the relative textual limitation of the Arab Committee reviews compared to their international counterparts? Are Arab Committee members maybe more cautious when it comes to voicing criticism vis-à-vis Arab state parties? Were/are Arab Committee members maybe subjected to direct or indirect pressure from Arab governments forcing them to adhere to certain constraints in their observations and recommendations because otherwise the Committee's annual financial budget could be in jeopardy? In my interview with him, Mr. Asaad Younis, who co-authored the Arab Committee reports for Iraq and Algeria, seemed to embrace this assumption:

> "Especially during the tenure of Amr Moussa as Secretary-General of the Arab League [2001-2011] there was a strong interest and support for the Committee and a lavish budget. We were free to do our job and to meet international experts. The situation changed after the Arab Spring in 2011. Some Arab governments started putting constraints on the Committee even though they continued respecting their obligations towards other international committees and towards the African Commission. I do not know why this happened (…) In these [past] times we used to be in regular contact with other regional and international human rights bodies."[1134]

There could be a plausible connection between political pressure and the reduction of funds on the one hand and the inability of the Arab Committee to adequately carry out its mandate in reviewing state party reports on the other hand. It cannot be ruled out that the turmoil of the Arab Spring and financial shortages have in one way or the other impacted the quality of the work of the Arab Committee in terms of narrowing opportunities for conducting on-site visits to state parties or exchanging experiences and lessons learnt with international human rights bodies. The need to provide a separate and sufficient annual budget the Arab Committee can use to finance its regional and international exchanges was after all a demand voiced by Judge Fuzay' (Bahrain) who headed the Arab Committee between 2017 and 2019.[1135]

[1134] Younis, A. N. (2022), n1046, p. 5.
[1135] Fuzay', M. G. (2018), n569, p. 35 (see discussion in subchapter 5.6.).

Another possible cause for the comparatively limited scope and quality of some Arab Committee reports could be related to the limited experience and expertise of some of its members. In his paper about the human rights system within the Arab League Judge Fuzay' urges state parties to the Arab Charter to:

> "(…) pay attention to the nomination of valuable candidates to the Arab Committee who can further promote its role, and to ensure that nominees are known for their competence and are fully aware of their roles within the Committee, as Committee members unqualified in the [field of human rights] will negatively impact the work of the Committee and its responsibilities. Throughout my journey in the Arab Committee I have witnessed some persons gaining membership in the Committee without being qualified and aware of their role and without knowing how to perform their duties properly."[1136]

Finally, and apart from the speculation around possible causes for the limitation of the examined Arab Committee reports, Judge Fuzay' rightly recommends focusing on the bigger picture and embracing a more lenient perspective which allows the Arab Committee to gradually unfold its potential in improving the human rights situation in Arab states:

> "These recommendations [of the Arab Committee], despite only being recommendations, play a major role in protecting and promoting human rights. They are disseminated widely, are not secret, and civil society organisations play an important role in monitoring the implementation of these recommendations by states. Arab parliaments play a role too [in this monitoring process] through the control and legislative instruments they possess (…) Hence, the recommendations of the Arab Committee will inevitably bear fruit gradually when respected by all concerned stakeholders. We should not forget that states submitting reports to the Committee do that on a voluntary basis without being forced, which reflects the good will for the promotion of human rights. We must build on that and encourage states to continue [their efforts] (…) Matters develop gradually."[1137]

[1136] Fuzay', M. G. (2018), n569, p. 35 (translation from Arabic into English by the author). See also p. 21.
[1137] Ibid., p. 29 (translation from Arabic into English by the author).

Chapter 7: Conclusion

In today's globalised world marked by interdependence, growing competition and high uncertainty, no state can afford surviving on its own without some kind of cooperation with the other members of the international community. All internationally recognised sovereign states are by now members in the United Nations, the world's largest intergovernmental organisation, not to mention their membership in hundreds of other international and regional institutions, unions, agencies, alliances, banks and courts that regulate numerous domains of global interest, such as peace and security, human rights, education, science, health, food and agriculture, environment, culture, telecommunications, trade, finance and other fields of interstate affairs.[1138]

The proliferation of intergovernmental organisations is a reality created, advanced and cherished by states. According to rationalist and liberal theories in international relations, transnational systems offer states multiple possibilities to pursue their selfish interests and achieve mutual benefits in a collaborative and non-violent way.[1139] By centralising collective activities for the benefit of their members, international organisations act as public service providers for state parties and enable them to reach their goals more efficiently and more cost-effectively by pooling human, technical, information and financial resources under one common platform.[1140] These advantages provide tangible incentives for states to integrate in intergovernmental organisations, especially in regional bodies in which states with

[1138] United Nations (2024), 'Member States', accessed 31.12.2024. An unofficial non-exhaustive compilation of intergovernmental organisations can be found in Northwestern University (2024), 'List of IGOs', accessed 31.12.2024.

[1139] Liberal theories in international politics generally frame the relationship of states around the domestic and transnational social/institutional contexts they are embedded in. According to Moravcsik, "[s]ocietal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments." (Moravscik, A. (1997), 'Taking preferences seriously: liberal theory of international politics', *International Organization*, Vol. 51(4), p. 513). See also Panke, D. (2019), 'Regional cooperation through the lenses of states: Why do states nurture regional integration?', *The Review of International Organizations* (2020), Vo. 15, pp. 476, 485 and 494.

[1140] See Abbott, K. W. & Snidal, D. (1998), 'Why States Act through Formal International Organizations', *The Journal of Conflict Resolution*, Vol. 42(1), pp. 4-6 and pp. 13-14, as well as Zouapet, A. K. (2024), 'States and Regional International Organizations', *International Organizations Law Review*, Vol. 21, pp. 150-151.

geographic proximity and with similar historic, demographic and cultural/normative characteristics are brought together.[1141]

Yet as much as states associate their membership in international organisations with political and economic gains, they are from a realist perspective equally interested in ensuring that their national autonomy is preserved while operating within these international or regional forums. States are generally cautious when it comes to transferring too many governance competences to international organisations out of concern this could possibly curtail their own sovereignty and decision-making powers or narrow their scope of action.[1142] Governments are therefore keen on clearly defining the political and legal limits of their membership and activity within international and regional systems and on shielding themselves from any unwanted interference in their domestic affairs. In other words:

> "[d]espite the importance of their powers, competences and their place in the international legal order today, [international/regional organisations] are still dependent on the states that created them and transferred competences to them. [Any] increase in the power of the organization requires the explicit or implicit surrender of competences by the Member States. So much so that the freedom of states remains intact and that they retain an autonomous political existence."[1143]

Whether specialised on human rights or other fields, the strength or effectiveness of any international/regional regime hence depends to a substantial extent on the competences state parties are willing to bestow on it. The dimension of powers governments accept to transfer not only affects the institutional and legal fabric which regulates how member states collaborate with each other within organisations, but also defines the scale of bindingness of collective decisions reached by organisations for its members. States that are rather concerned with protecting their sovereignty are more likely to favour membership in weakly committal and loosely integrative intergovernmental organisations (like the OECD, ASEAN or the *Shanghai Cooperation Organisation*) which they perceive as less interfering in their

[1141] See Weston, B. H., Lukes, R. A. & Hnatt, K. M. (1987), n26, pp. 589-590, as well as Cali, B., Madsen, M. R. & Viljoen, F. (2018), n25, p. 130.
[1142] See Zouapet, A. K. (2024), n1140, p. 153, as well as Panke, D. (2019), n1139, p. 495.
[1143] Zouapet, A. K. (2024), n1140, p. 166.

domestic affairs.[1144] On the contrary, other governments may rather prefer pursuing their interests under the umbrella of a highly integrative organisation (such as the *European Union*) in which key powers are distributed amongst member states and supranational organs.[1145]

The analysis of the human rights practice of Arab states carried out in this thesis reveals that most Arab governments have not been fundamentally opposed to participation in international/regional organisations generally and human rights regimes specifically. Internationally, five Arab states (Egypt, Iraq, Syria, Lebanon and Saudi Arabia) were among the very first ones to adopt the *Charter of the United Nations* and to join the UN in late 1945.[1146] Today, all Arab states are members in multiple UN specialised agencies, intergovernmental organisations and human rights systems. Arab states have on average ratified 10 out of the 18 existing international human rights instruments, with the ICERD, CAT, CRC, CRPD, CEDAW, ICCPR and the ICESCR either receiving universal or very high acceptance rates by the 22 Arab states.[1147] Regionally, Arab states were among the first ones to form a regional intergovernmental organisation towards the end of World War II when they established the *League of Arab States* on 22 March 1945. All 22 Arab states are now members of the Arab League which has developed into a complex organisation that administers an extensive network of organs, specialised agencies and affiliated institutions.[1148] Most Arab states (18/22) have by now ratified the *Arab Charter on Human Rights*, the centrepiece of the regional human rights system within the Arab League, and nine out of 10 Arab states located in Africa have ratified the *African Charter on Human and Peoples' Rights*.[1149]

[1144] The OECD, the ASEAN and the *Shanghai Cooperation Organisation (SCO)* can be classified as purely intergovernmental organisations. The supreme decision-making bodies in these institutions (OCED Council, ASEAN Summit, SCO Councils) are composed of governmental officials at the different levels (heads of state, ministers, top executives, etc.) with other organs (Secretariats) carrying out the daily bureaucratic and coordinating operations (see OECD (2024), 'Organisational structure', accessed 31.12.2024; ASEAN (2024), 'The ASEAN Charter', accessed 31.12.2024, Chapter IV; and Shanghai Cooperation Organisation (2017), 'General information', published 09.01.2017, accessed 31.12.2024).

[1145] European Union – EUR-Lex (2024), 'Division of competences within the European Union', accessed 31.12.2024.

[1146] See n500.

[1147] See findings presented in subchapter 3.3. (Table 5 and Table 6).

[1148] See discussion in subchapters 4.1. and 4.3.

[1149] See figures presented in subchapter 5.1. (Table 10) for the *Arab Charter on Human Rights* and subchapter 3.3. (Table 8) for the *African Charter on Human and Peoples' Rights*.

Nevertheless, the reasonable formal affiliation of Arab states to intergovernmental regimes on international and regional levels has never been absolute. Arab governments embracing international human rights systems have made sure that (potential) interferences of these systems -and of other member states within these systems- in their domestic political and legal affairs and in their relationship with their mostly conservative societies could be kept under firm control. The assessment in subchapter 3.2. has shown that Arab states have consistently utilised their membership in international human rights forums as a means through which geopolitical and domestic interests could be realised.[1150] In the 1940s and 1950s, the then independent (or quasi-independent) Arab states endorsed and actively shaped the international human rights agenda in its early stages to accelerate the self-determination and liberation of Arab nations from Western colonial rule.[1151] In later decades (from the late 1960s onwards), the universality of human rights was openly challenged and attacked by Arab diplomats and officials accusing Western powers of foreign interventionism in their domestic affairs.[1152] Socio-economic rights and group rights (e.g. the right to development or the right to a healthy environment) were given priority to divert attention from widespread violations of civil and political rights prevailing in most authoritarian Arab states.[1153] One of the historic peaks of Arab endorsement of cultural relativism was reached when member states of the *Organisation of Islamic Cooperation*, including all Arab states, adopted the *Cairo Declaration on Human Rights in Islam* in 1990.[1154] The Cairo Declaration constitutes an extreme form of cultural relativism as it subjects all the rights and freedoms codified therein to the Islamic *Shari'a* (without clearly defining which Islamic theological or jurisprudential conceptions are meant). It is therefore widely considered to be largely incompatible with international human rights law.[1155]

Another key strategy that has been applied regularly by Arab governments to fend off possible restrictions to their national sovereignty is the submission of a comparatively large

[1150] See discussion in subchapter 3.2.
[1151] *Ibid.*
[1152] *Ibid.*
[1153] *Ibid.*
[1154] *Ibid.*
[1155] *Ibid.* See also discussion in subchapter 2.2. around human rights approaches existing under Islamic law and to which extent universal human rights conceptions and *Shari'a*-based human rights interpretations clash or complement each other.

number of reservations/declarations to the international human rights treaties they have ratified, especially to the CEDAW, CRC, ICCPR, CAT and the ICESCR.[1156] A noticeable portion of these reservations concerns the refusal to be bound by treaty clauses which provide for dispute settlement by the *International Court of Justice* (for example Art. 22 of the ICERD), the rejection of the competence of human rights treaty bodies (e.g. the *Committee against Torture*), and numerous reservations (especially to the CEDAW, the CRC and the ICCPR) in which Arab states express their objection to abide by treaty provisions believed to be incompatible with domestic laws and/or that contradict the Islamic *Shari'a*.[1157] The analysis in subchapter 3.3. has revealed that most reservations entered by Arab states in international human rights treaties relate to civil and political rights such as gender equality, women's rights (marriage, divorce, inheritance, etc.), some aspects of children's rights, the freedom of religion, the freedom of expression and criminal punishments.[1158] These are the core fields of human rights that are still predominantly regulated by *Shari'a* law in most contemporary Arab states.[1159]

Similarly, although Arab domestic courts have regularly referred to provisions of human rights treaties and incorporated international human rights principles in their verdicts, they could only do so to the extent permitted by national law which is still largely based on codified *Shari'a* law in the domains of family law (personal status law) in most Arab states and criminal law in some parts of the Arab world.[1160] In other words, whenever a clash is believed to exist between international human rights obligations of universal nature and Arab statutory laws regulated by *Shari'a* law in sensitive human rights fields concerning, for example, the freedoms of religion and expression, full legal equality between women and men, and the application of severe criminal punishments/*hudud*, Arab courts have consistently championed *Shari'a* law over international human rights law.[1161] This practice allowed Arab states to -at least formally- comply with both, their own national laws and their

[1156] See analysis of Table 7 discussed in subchapter 3.3.
[1157] *Ibid*, for example n444, n450, and n460.
[1158] *Ibid.*
[1159] See findings in subchapter 2.4.
[1160] See Arab court decisions discussed in subchapter 5.5.
[1161] *Ibid.*

international obligations by virtue of the numerous reservations they have meticulously entered into international human rights treaties.[1162]

The endeavor to defy control from regional regimes while maintaining membership therein is also reflected in the behaviour of Arab states within the African human rights system. Out of the nine Arab state parties to the *African Charter on Human and Peoples' Rights*, only five Arab states have ratified the Protocol to the Banjul Charter concerning the *African Court on Human and Peoples' Rights*, and only one (Tunisia) of these five states has made a declaration accepting the jurisdiction of the Court to receive petitions from individuals and NGOs. [1163] This, again, underlines the cautious attitude of Arab states when it comes to human rights mechanisms which directly empower individuals or civil society stakeholders and which can potentially undermine the national sovereignty of Arab ruling regimes.

The pursuit of national sovereignty and non-interference is also evident in the behaviour of Arab states within their very own regional human rights system.[1164] This is best reflected in the weak powers the human rights organs of the Arab League are equipped with by the *Council of the Arab League*, the superior intergovernmental decision-making body within the LAS.[1165] One of the key human rights organs within the Arab League, the *Permanent Arab Human Rights Commission (PAHRC)*, is composed of representatives of member states and hence lacks the competence to promote an independent human rights agenda within the Arab League.[1166] The human rights functions bestowed by the *Council of the Arab League* on the *Arab Parliament* are similarly limited and rather advisory in nature, and the *Arab Court of Human Rights* remains dysfunctional as its *Statute* has not yet come into force. Even in the unlikely event that the currently existent *Statute* receives a minimum of seven ratifications by Arab League member states to become effective, the weakly designed *Arab Court of Human Rights* is not expected to seriously improve the protection of human rights in the Arab world as it is neither authorised to directly receive and process individual

[1162] See analysis of Table 7 discussed in subchapter 3.3.
[1163] See subchapter 3.3. (n476).
[1164] See, for example, Börzel, T. A., van Hüllen, V. & Lohaus, M. (2013), 'Governance Transfer by Regional Organizations: Following a Global Script?', *SFB-Governance Working Paper Series,* No. 42 (January 2013), pp. 9, 22 and 29.
[1165] See discussion in subchapter 4.3.
[1166] See subchapters 4.5.1. and 4.7.

complaints nor competent to prescribe interim or provisional measures where an applicant faces an imminent risk of serious harm.[1167] In other words:

> "Despite the exchange of ideas in various fora at the different levels, the Arab League's member states ultimately shaped the design of regional provisions according to their preferences, as reflected in the Arab League's comparatively weak human rights regime, suggesting an interest in symbolic action rather than effective institutions. Governance transfer by the Arab League has been designed to deflect or mitigate the 'normative power' of the global human rights regime and not reinforce its impact on domestic change."[1168]

The ambiguous behaviour towards and within international and regional human rights regimes has undeniably served the political interests of Arab ruling elites. On the one side, Arab governments -most of which have been governed by authoritarian regimes since gaining independence from Western colonial powers- could signal to their international counterparts that they are part of the global community of states and that they are generally/formally accepting international human rights norms. On the other side, Arab governments have managed to soften the obligations arising from their membership in these international and regional human rights systems by exhausting all political and legal possibilities, for example in the form of placing strategic reservations to key provisions in international human rights treaties, by creating weak intergovernmental regional institutions within the Arab League which they could easily control, or by promoting culturally relativist declarations and initiatives. By instrumentalising human rights rules and structures to their own benefit, Arab states have eventually succeeded in shielding themselves from any unwanted interference in their domestic affairs.

It is precisely this ambivalent attitude and practice of Arab states towards international and regional human rights law in which the analysis of the *Arab Charter on Human Rights* is embedded. It essentially provides the framework for answering the central research question of this study, namely to what extent the Arab Charter has complemented or contradicted

[1167] See subchapter 4.5.4.
[1168] van Hüllen, V. (2015), n592, pp. 151-152.

national human rights law in Arab states, existing international human rights instruments and legal obligations of Arab states thereunder.[1169]

On one side of the medal, the 2004 *Arab Charter on Human Rights* may give the impression of a regional human rights treaty that appears to be in line with international human rights law. The Preamble of the Charter refers to the "protection of universal and interrelated human rights" and reaffirms "the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (…)"[1170] Art. 43 of the Charter reasserts the commitment to international human rights law by providing that nothing in the Charter may be interpreted as compromising the rights and freedoms "set forth in the international and regional human rights instruments" adopted or ratified by Arab state parties to the Charter.[1171] Almost all human rights and individual freedoms codified in the ICCPR and the ICESCR are also covered in the Arab Charter. The Arab Charter has even expanded its catalogue of human rights to encompass several collective/group rights such as the right to development, the right to a healthy environment, and rights of persons with disabilities.[1172] Several provisions in the Arab Charter resemble similar provisions in other international human rights treaties and are therefore considered to be compatible with international human rights law.[1173] The affirmation of the principles of equality and non-discrimination in Art. 3(1) of the Arab Charter, for example, is consistent with the related provisions in the UDHR, the ICCPR and the ICESCR in terms of scope and wording.[1174] Art. 10 of the Arab Charter which prohibits all forms of slavery, servitude, human trafficking, forced labour and other forms of exploitation, is also considered to be compliant with Art. 8 of the ICCPR.[1175] Another positive provision codified in the Arab Charter concerns Art. 38 relating to the right to an adequate standard of living which resembles Art. 11(1) of the ICESCR.[1176] And finally, the

[1169] See central research question in subchapter 1.1.
[1170] Arab Charter on Human Rights (2004), Preamble.
[1171] Ibid., Art. 43.
[1172] See discussion in subchapter 5.2.2. including Table 11.
[1173] See subchapter 5.4.1.
[1174] Arab Charter on Human Rights (2004), Art. 3(1), as well as UDHR (1948), Art. 2, ICCPR (1996), Art. 3, Art. 4 and Art. 26 and ICESCR (1966), Art. 2(2) and Art. 3.
[1175] Arab Charter on Human Rights (2004), Art. 10 and ICCPR (1966), Art. 8.
[1176] Arab Charter on Human Rights (2004), Art. 38 and ICESCR (1966), Art. 11(1).

Arab Charter contains a longer list of non-derogable rights compared to the ICCPR and the *European Convention on Human Rights* as discussed in subchapter 5.3.5.[1177]

The other side of the medal tells a differentiated story. A careful textual analysis of the Arab Charter in comparison with other international and regional human rights instruments reveals that the Charter is full of relativist clauses that impair the positive elements mentioned above and infringe upon the overall legal effectiveness of the Arab Charter. Although the Preamble of the Charter reaffirms international human rights law, it softens this universalist commitment by "having regard to the Cairo Declaration on Human Rights in Islam" which, as discussed earlier, is considered to be largely irreconcilable with international human rights law.[1178] The same clash is visible in Art. 43 of the Arab Charter which -beside referring to the international and regional human rights instruments adopted or ratified by Arab states- also mentions that nothing in the Charter "may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties (…)"[1179] This wholesale clawback clause is particularly problematic in light of the abundant open-ended limitation clauses included in Arab constitutions that already tie the enjoyment of human rights and individual freedoms to the limits provided by domestic law and/or *Shari'a* law.[1180] The ambiguous wording and reference to both domestic and international human rights law in one go has logically proven ineffective in bridging the gap between international human rights law claiming universality and domestic constitutional/statutory law based on the Islamic *Shari'a* in some sensitive human rights fields (e.g. family law, women's rights or the freedom of religion) in many Arab states.[1181]

Other substantial weaknesses of the Arab Charter in comparison to other international and regional human rights instruments include an above-average number of citizen-centric provisions. Discriminatory provisions depriving non-citizens from enjoying their basic human rights concern four provisions in the Arab Charter (e.g. Art. 34(1) which limits the

[1177] See discussion around Table 13 in subchapter 5.3.5.
[1178] Arab Charter on Human Rights (2004), Preamble. See also assessment of the Cairo Declaration on Human Rights in subchapter 3.2.
[1179] Ibid., Art. 43.
[1180] See analysis in subchapter 3.1.
[1181] Areas of contention between international human rights law and Islamic law enshrined in national Arab constitutional and statutory law is discussed in subchapters 2.4. and 5.5.

rights to work to citizens and Art. 36 restricting the right to social security) and correlate with the abundance of citizen-centric provisions in Arab constitutional human rights laws.[1182]

The Arab Charter also stands out negatively by containing an abundance of clawback clauses according to which state parties are permitted to neglect their treaty obligations where human rights provisions of the Arab Charter clash with national laws.[1183] The comparative assessment carried out in Table 14 (subchapter 5.3.6.) has shown that the Arab Charter contains the by far highest number of clawback clauses (12) of any of the selected international or regional human rights treaties (African Charter, American Convention, European Convention, ICCPR and CRC). All clawback clauses contained in the other treaties examined are more or less reflected in the Arab Charter, such as subjecting the freedoms of association, assembly, thought, conscience, expression and religion to restrictions permitted by national law.[1184] The Arab Charter has even expanded on these limitations by subjecting further rights to clawback clauses that cannot be found in any of the other human rights instruments, such as limitations relating to the prohibition of the death penalty for persons under 18 years (juveniles), the right to strike, or the right of a child to acquire the nationality of his/her mother.[1185]

Furthermore, some Arab Charter provisions appear to clearly contradict universal human rights standards. Art. 7(1), for example, de facto permits the imposition of the death penalty on persons under 18 years of age in case the death penalty is stipulated in national law at the time of the commission of the crime.[1186] Art. 8(1) prohibits cruel, degrading, humiliating and inhuman treatment, but not cruel punishment.[1187] This stands in contrast to Art. 7 ICCPR, Art. 3 of the *European Convention on Human Rights*, Art. 5 of the *African Charter*

[1182] Arab Charter on Human Rights (2004), Art. 34(1) and Art. 36. See subchapter 5.3.1. for further citizen-centric clauses in the Arab Charter and subchapter 3.1. for citizen-centric provisions in Arab constitutional human rights laws.
[1183] The legal term 'clawback clause' is defined in n13. A comprehensive analysis of the clawback clauses included in the Arab Charter can be found in subchapter 5.3.6.
[1184] See discussion around Table 14 and Table 15 in subchapter 5.3.6.
[1185] *Ibid.*
[1186] Arab Charter on Human Rights (2004), Art. 7(1).
[1187] Ibid., Art. 8(1).

on Human and Peoples' Rights, and Art. 5(2) of the *American Convention on Human Rights* which all prohibit torture and inhuman and degrading treatment or punishment.[1188]

Finally, the *Arab Human Rights Committee*, the only treaty body of the 2004 *Arab Charter on Human Rights*, possesses only a single mandate, namely to receive periodic reports from state parties, commenting thereon and submitting its observations and recommendations to the *Council of the Arab League*.[1189] The Arab Charter does not grant the Arab Committee further protection and monitoring powers, such as the authority to receive interstate or individual communications, thematic or country-specific special procedures, or the ability to conduct on-site visits and investigations in member states.[1190] The comparative analysis of Arab Committee concluding observations and recommendations with those issued by selected international treaty bodies (the CCPR, CESCR, CEDAW and the CRC) for four Arab states has revealed that the reports of the Arab Committee consistently fall short of meeting the standards adopted by the corresponding international mechanisms in terms of scope (quantity of human rights issues and challenges addressed) and critical depth/quality of the observations and recommendations. All this together suggests that the *Arab Human Rights Committee* is certainly to be ranked among the weakest existing international or regional human rights treaty bodies.

The scale of textual and structural weaknesses presented above strongly indicates that the Arab Charter was not created to bring about a fundamental norm-based change to how Arab states interpret and apply their human rights obligations on national, regional and international levels. Subchapter 5.1. discussing the making of the revised Arab Charter has presented some evidence revealing that the Arab Charter was meant to be as weak as it is now. The progressive draft Arab Charter developed in 2002-2024 by the *Committee of Experts* (composed of experienced and independent Arab human rights experts selected from among members of UN human rights treaty bodies and special procedures) and supported by many Arab NGOs was substantially modified by the PAHRC rendering the final modified

[1188] ICCPR (1966), Art. 7, European Convention on Human Rights (1950), Art. 3, African Charter on Human and Peoples' Rights (1981), Art. 5, as well as American Convention on Human Rights (1969), Art. 5(2).
[1189] See subchapter 5.2.3. and Chapter 6. More problematic provisions of the Arab Charter that seem to clash with international human rights standards can be found in subchapter 5.4.2.
[1190] See subchapter 5.2.3 and subchapter 5.3.3.

version that we know today in conflict with several international human rights standards.[1191] The fact that the Arab Charter has remained unchanged since 2004 despite continuous pressure for reform from domestic and international civil society organisations reflects the unwillingness of Arab ruling elites to change the status quo. The observance of the Arab Charter fits in well after all into the decades-long double-tracked human rights policy Arab governments have been pursuing in the form of committing to international and regional human rights instruments formally while ensuring that possible interferences are kept under firm domestic control (by using the tactic of reservations to human rights treaties internationally and by creating a "toothless" Arab Charter/Arab Committee and an ineffective LAS human rights system regionally).[1192] The Arab Charter thus mirrors to a considerable degree the domestic human rights practice of Arab states and accepts international human rights law only to the extent permitted by national legislation. From this perspective, the Arab Charter has certainly not brought a significant added value to the legal protection of human rights in the Arab world. The widespread wisdom that regional human rights treaties or regimes established by like-minded states with geographical and cultural propinquity are per se more likely to assert pressure on its members to investigate and redress violations and "more likely to be effective in applying diplomatic, economic, and other sanctions in defence of human rights" [1193] might be true for the European human rights regime for example, but it must definitely be negated for the Arab Charter and the broader LAS human rights system.

Back in 2004, the modernisation and adoption of the Arab Charter has undoubtedly revived the entire LAS human rights system from a phase of deep stagnation. Despite its obvious deficiencies, it unleashed a gleam of hope that Arab governments were at least aware of the human rights challenges prevailing in the Arab world and ready to address those collectively in and through their own regional human rights system. The 2004 Arab Charter should not be considered the end of the process though. Much has changed over the course of the past

[1191] See analysis in subchapters 5.1.
[1192] See findings reached in subchapter 3.2. (history of Arab attitudes towards international human rights law), subchapter 3.3. (Arab ratification of key international human rights treaties and reservations entered therein), subchapters 5.3., 5.4. and 5.5. (critical assessment of the Arab Charter) and subchapters 4.4.-4.7. (critical analysis of the LAS human rights system).
[1193] Weston, B. H., Lukes, R. A. & Hnatt, K. M. (1987), n26, p. 590.

20 years in the Arab world: several political regimes were toppled, many civil wars have erupted, and the human rights expectations of Arab peoples towards their governments are dynamically evolving. Changing realities cannot be approached adequately with rigid political and legal structures and with a mindset from the past. It is to be hoped that Arab ruling elites have understood the signs of the times and have realised that reforms are inevitable on all levels of legal human rights protection.

On international level, Arab states are advised to examine whether the reservations they have entered into human rights treaties are compatible with the object and purpose of these treaties and consider withdrawing those reservations (as some Arab states have done before) if proven incompatible with international human rights protection standards.[1194] Such a process should go hand in hand with domestic initiatives engaged in reforming and advancing (not replacing!) *Shari'a* law in Arab states. The analysis in subchapter 2.2. has shown that Islamic theology/jurisprudence is not necessarily rigid by design and that it can indeed be brought completely in line with, or at least closer to, universal human rights standards when approached from a reformist and context-sensitive perspective of legal reasoning ("ijtihad").[1195] Another instrument for potentially conciliating international and national *Shari'a*-based human rights law in contentious areas such as family law, women's rights, or the freedom of religion concerns the application of the *margin of appreciation doctrine* which offers human rights courts some range of discretion in balancing between committing to universal human rights values enshrined in international treaties while observing culturally specific laws domestically.[1196] International and regional human rights courts and treaty bodies should continue to pay attention to the legal, epistemic and normative reasoning upon which national human rights law is based and attempt finding common ground between the two levels of protection whenever possible. By the same token, Arab legislators and judges are advised to open up to the *margin of appreciation doctrine* and examine all legal and jurisprudential possibilities through which domestic *Shari'a* law can be interpreted broadly enough to comply with universal/international human rights standards. The practical application of the *margin of appreciation doctrine* surely deserves

[1194] See cases studies (withdrawal of reservations to specific provisions in international human rights treaties by Tunisia and Oman) presented in subchapter 3.3.
[1195] See discussion in subchapters 2.2. and 2.5.
[1196] See discussion towards the end of subchapter 3.3.

much more attention by legal researchers and human rights practitioners in the future as it harbours the potential of bridging seemingly unbridgeable differences in human rights worldviews.

On regional level, the LAS human rights system will not be in a position to effectively contribute to the aspired legal protection of human rights in the Arab world without undergoing substantial reforms. The *Arab Charter on Human Rights* should be amended again and its problematic provisions should be redrafted to satisfy international human rights standards.[1197] The competences of the *Arab Committee on Human Rights* must be revisited and expanded to match those of other regional human rights treaty bodies.[1198] A reformed Arab Committee should at least have the power to receive and process individual complaints and investigate systematic human rights violations independently.[1199] A fundamental revamping of the *Statute of the Arab Court of Human Rights* must take into account the experience made by human rights tribunals in other regions of the world.[1200] If a modernised *Statute* establishing a strong and independent Arab human rights court is to come into force in the future, Arab human rights officials have to decide how the Arab Committee, the Arab Court and the Arab Parliament can complement each other meaningfully and transparently in terms of division of competences.[1201] These organs are doomed to fail though if the governance system within the *League of Arab States* remains controlled by purely intergovernmental bodies (the *Council of the Arab League* and the *Permanent Human Rights Commission*) with exclusive monopoly-like decision-making powers.[1202] Without the political will and the political courage to bring about a real governance transfer from intergovernmental structures to supranational organs with effective independent powers, the LAS human rights system will continue to be perceived as a marginal ineffective regime.

Aside from the apparent reform necessity, what the Arab world needs today more than anything is, however, a complete paradigm shift in how human rights are viewed and addressed. This can only be achieved when Arab ruling elites are ready to meet their civil

[1197] See discussion in subchapter 5.4.2. and recommendations in subchapter 5.6.
[1198] See discussion in subchapters 5.2.3., 5.3.3. and 5.6.
[1199] See subchapter 5.3.3. and 5.6.
[1200] See subchapters 4.5.4. and 5.6.
[1201] See subchapter 5.6.
[1202] See findings presented in subchapters 4.3.1., 4.3.5., 4.5.1. and 4.7.

societies on an equal democratic footing and when they are willing to embrace the respect for human rights as the most essential duty they have towards their peoples. Such a major shift in governance mindset does not only carry potential for improved state-society relations and enhanced civic participation and representation domestically, but it could also prompt governments to better serve their societies in the regional and international human rights organisations they belong to. As governments with democratic legitimation are more "used to operate under constraints placed upon them by their domestic constituencies and domestic veto players", [1203] they might -at least in theory- be more receptive to the idea of ceding/delegating powers in regional/international systems and promoting substantial reforms that ameliorate the overall legal protection of human rights for their populations.

The LAS human rights system must and will inevitably change, hopefully to the better, in accordance with a famous Arabic proverb expressing that "nothing ever is permanent". It is to be wished that those in power in Arab states have understood the changes of times we are witnessing.

[1203] Panke, D. (2019), n1139, p. 495.

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