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Mirage in the Desert

Regional Judicialization in the Arab World

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Our shouting is louder than our actions,
Our swords are taller than us, this is our tragedy.
In short, we wear the cape of civilization,
but our souls live in the stone age.

Nizar Qabbani, Syrian poet (1923–1998)[1]

1 INTRODUCTION

Over the past 20 years, the increasing creation and use of international judicial bodies, also referred to as 'international judicialization', has attracted much scholarly attention.[2] Unsurprisingly, literature on international judicialization tends to focus on a few well-known success stories. Failures are rarely discussed.[3] This chapter is a case study in the pathology of international judicialization, so to speak. It tells the little-known story of five failed attempts by Arab states to establish regional adjudicative bodies.

The focus is the 'Arab world', a large and geostrategically critical area populated by more than 360 million people and quickly growing demographically. Here the term 'Arab world' is not used in an ethnographic sense, to indicate countries

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[1] Nizar Qabbani, *Footnotes to the Book of the Setback*, Index on Censorship, Dec. 1981, p. 71.

[2] See, e.g., Romano, C., Alter, K. and Shany, Y. (eds.), *The Oxford University Press Handbook of International Adjudication* (Oxford: Oxford University Press, 2014); Alter, K., *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014).

[3] See, e.g., Romano, C., 'The Shadow Zones of International Judicialization', in Romano et al. (eds.), *Oxford University Press Handbook of International Adjudication*, pp. 90–110; Romano, C., 'Trial and Error in International Judicialization', in Romano et al. (eds.), *Oxford University Press Handbook of International Adjudication*, pp. 111–134; Alter, K. and Helfer, L., *Supranational Legal Transplants: The Law and Politics of the Andean Tribunal of Justice* (Oxford: Oxford University Press, 2017).

inhabited mostly by Arabs.[4] It indicates instead the 22 states that are currently members of the League of Arab States (also known as 'Arab League' or just the 'League').[5] A focus on states, as opposed to peoples, best suits the purposes of this research because it is the creation and utilization of international adjudicative bodies by states that will be discussed.

Although better than alternative concepts like the 'Islamic world' or 'the Middle East', both of which are too broad to allow for meaningful observations for the purpose of this study, the 'Arab world' concept is far from perfect. First, even a cursory look at the map reveals that the entire Arab world is not included in the Arab League. For instance, the Sahrawi Arab Democratic Republic, the entity that controls part of Western Sahara, is not a member. Niger, Chad and Mali, whose northern regions are inhabited, in the majority, by Arab populations, are not included in the Arab world either. Second, even the concept of 'Arab world' could be too broad and requires a more granular categorization to enable a meaningful discussion of Arab states towards regional judicialization.[6]

Methodological difficulties notwithstanding, this chapter will first tell the story of six regional courts that Arab states tried to establish since World War II. They are: the Arab Court of Justice; the Arab Investment Court; the Arab Court of Human Rights; the Islamic Court of Justice; the Judicial Body of the Organization of Arab Petroleum Exporting Countries; and the Court of Justice of the Arab Maghreb Union. Each of these adjudicative bodies was conceived within the framework of a specific regional organization. The Arab Court of Justice, Arab Investment Court and Arab Court of Human Rights are creatures of the Arab League. The Islamic Court of Justice is a project of the Organization of Islamic Cooperation. The Court of Justice of the Arab Maghreb Union is an organ of the Arab Maghreb Union, and

[4] The term 'Arab world' is usually rejected by those living in the region who do not consider themselves Arabs, as it implies the entire region is Arab in its identity, population and origin, whereas the original homeland of the Arabs is the Arabian Peninsula. These include non-Semitic people such as the Berbers and Kurds, as well as indigenous Semitic minorities such as the Ashkenazim, Sephardim, Mizrahim, Chaldeans, Assyrians and Syriacs, as they pre-date Arabs in places such as Iraq, Palestine and Syria. Moreover, Coptic Egyptians and other Egyptian minorities also define themselves as Egyptian and not Arab.

[5] Egypt, Syria, Lebanon, Iraq, Transjordan (now Jordan), Saudi Arabia and Yemen (members since 1945); Libya (1953); Sudan (1956); Tunisia and Morocco (1958); Kuwait (1961); Algeria (1962); Bahrain, Oman, Qatar and the United Arab Emirates (1971); Mauritania (1973); Somalia (1974); the Palestine Liberation Organization (1976); Djibouti (1977); and the Comoros (1993).

[6] For instance, one could break down the Arab world into four clusters of states with political and historical affinities: the Levant (Palestine, Lebanon, Jordan, Syria and Iraq); the Arab Peninsula (Kuwait, Saudi Arabia, United Arab Emirates (UAE), Bahrain, Qatar, Oman and Yemen); East Africa (Sudan, Djibouti, Somalia, and the Comoros); and North Africa (Morocco, Mauritania, Algeria, Libya, Tunisia and Egypt). Perhaps one could add a fifth. Egypt could be a category on its own because of its size and hegemonic role in the region, and because Egypt's identification with the Arab world tends to ebb and flow.

the Judicial Body of the Organization of Arab Petroleum Exporting Countries (OAPEC) is an organ of that organization.

None of these bodies is a successful instance of regional judicialization. In short, the Arab Court of Justice and the Islamic Court of Justice never managed to become reality. Although the Statute of the Arab Court of Human Rights was adopted, it remains to be seen whether it will ever enter into force. The Judicial Body of the OAPEC and the Arab Investment Court exist only on paper. The former has been inactive for more than 20 years and is probably now defunct, while the latter has been used in recent years, but is rarely resorted to. Finally, the Court of Justice of the Arab Maghreb Union never received a single case and should be considered for all practical purposes defunct.

~~Then we will discuss~~ some of the factors that seem to have pushed Arab states to try to create regional courts and tribunals and some of the reasons why these bodies have failed to come into being or ~~been~~ effective.

2 ARAB STATES AND REGIONAL JUDICIALIZATION: A STORY OF SIX COURTS AND TRIBUNALS

A *The Arab Court of Justice*

Since it was created in 1945, the main goal of the League of Arab States has been to maintain peace between Arab states, to draw closer relations between them, to safeguard their independence and sovereignty, and to 'consider in a general way' the affairs and interests of the Arab countries.[7] In the early days, the issues that dominated the League's agenda were freeing ~~those~~ Arab countries still under colonial rule and preventing the Jews in Palestine from creating a Jewish state. Since decolonization in the region and the establishment of Israel, the League's main goal has been to create a unified front against Israel and to support the cause of the Palestinians, and to provide a forum to mediate disputes between Arab states. For much of the Arab League's history, pan-Arabism, the vision of a unified Arab state stretching from the Atlantic to the Indian Ocean, has loomed large as the ultimate implicit goal of the organization.

The main and, to this date, sole dispute settlement organ of the League is the Council, a plenary organ comprised of the members' heads of state. The Pact of the Arab League gives the Council power to mediate or arbitrate disputes between members. However, the Council has never arbitrated or mediated a dispute between Arab states, despite dozens of hot and cold conflicts arising between them since inception.

[7] Pact of the League of Arab States, 22 March 1945, United Nations Treaty Series, Vol. 40 (No. 195), p. 247, art. 2.

More relevant to this chapter is that, besides giving the Council dispute settlement powers, the Pact provides for the possibility to create a judicial body to bindingly settle disputes between member states: the Arab Court of Justice.[8] Over the years, there have been several attempts to reform the League, but with no result, mostly due to divisions, if not actual fighting, between members. The creation of the Arab Court of Justice has been, at times, part of the reform agenda and various draft statutes have been prepared over the years, the last of which being the one presented by the Secretary-General of the League to the Council in 1996.[9]

The various drafts mooted over the years do not diverge much. In essence, they have all sketched a clone of the International Court of Justice: a court open only to states, to settle disputes between them and issue advisory opinions to the League Council, and whose jurisdiction would be established by special agreement between the disputants, by compromissory clauses in treaties, or by optional declarations. The only significant difference from the ICJ would have been the inclusion of Sharia among applicable law.[10]

In the end, the Arab Court of Justice failed to become a reality because of a fundamental disagreement between states that favored compulsory jurisdiction (mostly the small ones, like Lebanon), and those that opposed it (mostly the large and influential ones, like Saudi Arabia), and because Arab states started using the International Court of Justice, an adjudicative body that could do all the Arab Court of Justice could have done and better.

B *The Arab Investment Court*

Facilitation of investment flows between Arab countries has also been on the Arab League agenda since its inception. Over the years, Arab states have concluded a series of bilateral and multilateral agreements aimed at encouraging intra-Arab investment flows. One of these is the Unified Agreement for the Investment of Arab Capital in the Arab States, concluded on 27 November 1980 at the Eleventh Arab Summit Conference in Amman, Jordan,[11] and ratified to date by all member states of the League except the Comoros.[12]

[8] Ibid., art. 19.

[9] The text of the 1996 Draft Statute of the Arab Court of Justice, in Arabic and English, can be found in Ahmed Thani, A. F., *The Projected Arab Court of Justice: A Study to Its Draft Statute and Rules, with Specific Reference to the International Court of Justice and Principles of Islamic Sharia* (PhD thesis, University of Glasgow, 1999), p. 335.

[10] Ibid., Draft Statute of the Arab Court of Justice, art. 23(1)(b).

[11] Unified Agreement for the Investment of Arab Capital in the Arab States, concluded on 27 November 1980 at the Eleventh Arab Summit Conference in Amman, Jordan. Official text in Arabic available at: www.lasportal.org. English text available UNCTAD, *International Investment Instruments: A Compendium*, Volume II, Regional Instruments, p. 211.

[12] www.lasportal.org/ar/legalnetwork/Pages/agreements_details.aspx?RID=25.

Until the day the Arab Court of Justice is created and becomes operational, the settlement of disputes arising under the Unified Agreement is entrusted to the Arab Investment Court (AIC). The AIC has rather broad personal jurisdiction. Besides state-to-state investment disputes, it has jurisdiction over investor–state disputes (as long as the investor is Arab) and disputes between ~~two~~ public entities of two states party.[13] Its subject-matter jurisdiction is limited to disputes under the Unified Agreement. It has compulsory jurisdiction, as it does not require consent of both parties for proceedings to take place.[14] Finally, recourse to the Court is allowed only when the parties have failed to submit the dispute to conciliation or arbitration, if the conciliator failed to settle the dispute, or if the arbitrator(s) failed to render an award within the specific period.[15]

The AIC had a very slow start. Even though the Unified Agreement entered into force in 1981, the Court's statute was adopted only on 22 February 1985, and its rules of procedure a year later. The Court was officially formed on 4 September 1991, in Cairo, where it has its seat, and its first judges took their oath on 21 January 1992, more than ten years after the Unified Agreement entered into force. Then the AIC remained dormant for another decade.[16] The first case reached it only in 2003, when a Saudi investor filed a case against Tunisia. Since then, the Court has had a paltry docket. It seems that in total it has only issued nine decisions on five disputes. All were brought by individuals or corporations whose investments had been prejudiced by actions of governmental entities (and in one case by the Arab League itself). In all decisions but the latest one, in 2010, the applicants have seen their case rejected. In the latest case, *Horizon Touristic Corporation* v. *Egypt*, the Court did not find in favor of the applicant, but rather passed the ball by issuing an order to create a three-member expert panel to investigate the claims of the plaintiff to determine the damages to the plaintiff and any lost profits if found and to discuss with the parties.

The doors of the Arab Investment Court remain open, albeit it is a dormant institution. Unless the Court gains a reputation of fairness and independence from the League and the governments of its members, and greatly improves the quality of its vague and poorly drafted decisions, it is hard to see how any Arab investor might want to continue using it. This is obviously not a forum favorable to Arab investors who want to challenge Arab governments' actions. They have several better alternatives, with much more established reputations and less hostile to investors, such as the International Chamber of Commerce, or the International Centre for the

[13] Unified Agreement for the Investment of Arab Capital in the Arab States, art. 29.
[14] Ibid., art. 27.
[15] Ibid.
[16] It is reported that when the first case was filed with the Arab Investment Court, the Arab League Secretariat was taken by surprise as it was unaware of the existence of the court. Ben Hamida, W., 'The First Arab Investment Court Decision' (2006) 7 *Journal of World Investment & Trade* 699, at 720.

Settlement of Investment Disputes, or can arbitrate under the many bilateral investment treaties that exist between Arab League members.

C *Arab Court of Human Rights*

The third and most recent regional court conceived within the Arab League is the Arab Court of Human Rights. The need for a regional human rights regime that could accommodate the unique values and principles of Islam has been felt at least as early as the birth of international human rights in 1948. In ~~1999~~, the League adopted the Arab Charter of Human Rights,[17] a treaty declaring essentially the same rights as those embodied in the other international and regional human rights instruments, but with several deficiencies, particularly on women's rights, and lacking any effective human rights enforcement mechanism. All it provided for was an Expert Committee, comprised of seven independent members, to receive periodic reports from states parties. Unlike the human rights regimes of the United Nations, Europe, the Americas and Africa, there was no mechanism for individuals or state parties to petition the Committee for violations of the Charter.

The 1994 Arab Charter never received any ratification and never entered into force. Arab states felt very little pressure, internally and externally, to ratify it. However, following the passage of the Arab Charter, the increasing criticism of its deficiencies by experts, NGOs, academics and others, in and outside the region, put pressure on Arab governments at least to amend the Charter. This led to the adoption on 23 May 2004 at the Arab Summit in Tunisia of the Revised Arab Charter of Human Rights.[18] Although the Revised Charter greatly improved on the 1994 document, it still lacked an effective enforcement mechanism. Be that as it may, this time the 2004 Revised Arab Charter did achieve ratification and entered into force.[19]

The widespread unrest that has rocked the Arab world from December 2010 through 2012, called the 'Arab Spring', induced Arab governments to consider the creation of an Arab Court of Human Rights with jurisdiction over the 2004 Arab Charter as a concession to internal pressure from their populations as well as international pressure. The Statute of the Arab Court of Human Rights was adopted by the Arab League Council at the ministerial level on 7 September 2014.[20] It has

[17] Arab Charter on Human Rights, adopted by the League of Arab States on 15 September 1994 (1997) 18 *Human Rights Law Journal* 151.

[18] Revised Arab Charter on Human Rights, adopted by the League of Arab States on 22 May 2004 and entered into force 15 March 2008 (2005) 12 *International Human Rights Reports* 893.

[19] To date it has been ratified by 13 of the 22 members of the League: Jordan, the United Arab Emirates, Bahrain, Algeria, Saudi Arabia, Sudan, Syria, Palestine, Qatar, Kuwait, Lebanon, Libya and Yemen.

[20] Arab League Council Resolution No. 7790, Regular Session (142) of 7 September 2014. Arabic text available at: www.lasportal.org/. Unofficial English translation available at: https://acihl.org/texts.htm?article_id=44.

few notable features and a fatal flaw. It will be composed of seven independent judges, even though guarantees for their actual independence are weak. It will be headquartered in Manama, Bahrain. The subject-matter jurisdiction is the revised Charter as well as any other 'Arab human rights treaty'.[21] Like all human rights bodies, recourse to the Arab Court is contingent upon exhaustion of domestic remedies. However, and this is the main flaw, its access is severely limited. Cases can be brought before the Court only by states parties 'whose citizen claims to be a victim of a human rights violation . . . provided that both the applicant State and the respondent State are party to the Court Statute, or they have accepted the jurisdiction of the Court', or 'by one or more NGOs that are accredited and working in the field of human rights in the State whose subject claims to be a victim of a human rights violation' and the state in question has accepted this possibility by a specific declaration.[22]

The drafting of the Statute was an extremely opaque process that excluded civil society. The very limited access to the Court, coupled with the absence of any mechanism to enforce its decisions, and the choice of Bahrain as the seat of the Court, a country that used an iron fist to put down the Arab Spring protests in February 2011, makes all observers skeptical about the possibility it will ever enter into force.[23] The Statute is supposed to enter into force after ratification by seven member states of the Arab League. So far, only Saudi Arabia has ratified it.[24] The fact that the ultra-conservative kingdom, a country hardly known for its enthusiasm for international human rights standards and bodies, has ratified ~~it~~ adds to the skepticism, making many believe the Arab Court of Human Rights will go down in history as simple posturing to appease demands for accountability in the wake of the Arab Spring. Besides, now that the ~~Arab Spring~~ has given way to an ~~Arab Winter~~, prospects are even dimmer.

D *The Organization of the Islamic Conference and the International Islamic Court of Justice*

The need for a dedicated international adjudicative body, one that not only takes Sharia into full account, but gives it preeminence over international law, has inspired another project: the International Islamic Court of Justice (IICJ).

[21] ACHR Statute, art. 16.1

[22] Ibid., art. 19.

[23] International Bar Association, 'Bassiouni: New Arab Court for Human Rights is Fake "Potemkin Tribunal"', 1 October 2014, www.ibanet.org/Article/Detail.aspx?ArticleUid=c64f9646-15a5-4624-8c07-bae9d9ac42df; Joe Stork (Human Rights Watch), 'New Arab Human Rights Court is Doomed from the Start', 26 November 2014, www.hrw.org/news/2014/11/26/new-arab-human-rights-court-doomed-start; Rishmawi, M., *The League of Arab States Human Rights Standards and Mechanisms* (New York: Open Society Foundations, 2015), p. 57.

[24] Decision of the Council of Ministers of 6 June 2016 and Royal Decree of 7 June 2016, www.spa.gov.sa/viewstory.php?lang=en&newsid=1514142.

The Organization of the Islamic Conference (called, since 28 June 2011, the Organization of the Islamic Cooperation) has 57 members, stretching from Suriname in the west, to Indonesia in the east.[25] The OIC was created in 1969 to preserve social and economic values; promote solidarity; maintain international peace and security; increase cooperation in social, economic, cultural, scientific and political areas; and advance education, particularly in the fields of science and technology, of all member states of the Islamic Ummah, the global community of Islamic people.[26] Thus, the OIC is unique in the sense that it is neither a universal nor a regional organization, but rather an international organization of a religious nature.

The large number of participants, their extreme diversity, and also the inherent divisions in the Islamic world between the various schools and branches, of which the Sunni/Shia divide is the main and most notorious one, has made deep cooperation of the kind achieved by other regional organizations a mirage. Much like the Arab League, the OIC is mostly a tool for the leaderships of member states to profess their Islamic identity and values to the Ummah, without compromising sovereignty. Indeed, all OIC decisions are taken by consensus.[27] Although the OIC Charter adds that 'if consensus cannot be obtained, decision shall be taken by a two-third majority of members present and voting unless otherwise stipulated in this Charter',[28] it is easy to see why only the blandest proposals are likely to be put up for a vote at the periodic meetings of the Heads of State and Ministers of Foreign Affairs of member states.

Although the OIC has broad and lofty goals, it lacks any powers, and cooperation amongst members is strictly voluntary. For instance, although the OIC Charter requires 'Member States, parties to any dispute the continuance of which may be detrimental to the interests of the Islamic Ummah or may endanger the maintenance of international peace and security, [to] seek a solution by good offices, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means', activation of these means is subject to agreement between the parties to the dispute.[29]

This hands-off attitude toward dispute settlement between Islamic states changed at the beginning of the 1980s when war broke out between Iraq and Iran.[30] The Third Islamic Summit Conference, held in Taif, Saudi Arabia, in 1981, proposed the establishment of an International Islamic Court of Justice, the principal judicial organ of the OIC, with the responsibility to bindingly and peacefully

[26] Charter of the Organization of the Islamic Conference, adopted in Dakar, Senegal, on 14 March 2008 and entered into force on 2 April 2017, United Nations Treaty Series, Vol. 194 (No. 13039), art. 2. Note that, while the great majority of OIC members have mostly Muslim populations, not all do. For instance, only about 20 percent of the population of Suriname is Muslim.

[27] Ibid., art. 33.

[28] Ibid.

[29] Ibid., art. 27.

[30] Lombardini, M., 'The International Islamic Court of Justice: Towards an International Islamic Legal System?' (2001) 14 *Leiden Journal of International Law* 665, at 671.

settle disputes arising among member states.[31] The Statute of the Court was adopted on 29 January 1987.[32] The International Islamic Court of Justice¸ which was to be located in Kuwait City,[33] has a lot in common with the Arab Court of Justice (ACJ). As the ACJ, it is essentially a clone of the ICJ (i.e. an adjudicative body with contentious and advisory jurisdiction whose aim is to settle disputes between states, having optional and not compulsory jurisdiction).[34] As in the case of the Arab Court of Justice, the statute includes Sharia as applicable law. However, unlike the ACJ, Sharia is not just one of the bodies of law the Court can apply, but the main body of law. Article 1 of the Court's Statute compels the IICJ to apply the Sharia, and Article 27 of the Statute gives preeminence to Sharia over any other body of law, relegating international law to a mere subsidiary role.[35]

The Statute of the IICJ has not yet entered into force, and it is doubtful whether the Court will ever become a reality. To date only eight states have ratified the Statute,[36] while it takes 38 ratifications for entry into force.[37] As in the case of the Arab Court of Justice, divisions and rivalries between members, and the existence of a valid alternative in the International Court of Justice, give states little incentive to create and, as a consequence, pay for a new international adjudicative body.

E *The Tribunal of the Arab Maghreb Union*

By the beginning of the 1980s, some Arab leaders had come to the realization that they could hardly compete with other regions of the globe for foreign investments, financial assistance and Western technology. Furthermore, the regional instability, outmoded domestic political economies, and lack of cooperation became clear barriers to pursuing these objectives. As the Arab League had proved incapable of

[31] Islamic Summit Conference Resolution No. 11/3-P.

[32] Statute of the International Islamic Court of Justice (Islamic Summit Conference Resolution No. 13/5-P), available at: ww1.oic-oci.org/english/convenion/1987/statute_of_the_international_islamic_court_of_justice_en.pdf, art. 14.

[33] Ibid., art. 2.

[34] Ibid., art. 26. Consent to the Court's jurisdiction must be given through an optional explicit declaration. Ratification of the Statute does not suffice.

[35] '(a) The Islamic Sharia is the fundamental law of the International Islamic Court of Justice; (b) The Court can refer to international law, bilateral or multilateral international conventions, international customary law, general principles of law or to the judgments pronounced by international tribunals.' Ibid., art. 27.

[36] Kuwait, Saudi Arabia, Jordan, Bahrain, Libya, Qatar, Egypt, Maldives, Pakistan, Sudan, Somalia, Djibouti, Comoros, Chad, Mauritania, The Gambia, Niger and Palestine. Secretary General on Legal Affairs, 'Report Submitted to the 40th Session of the Council of Foreign Ministers at Conakry, Republic of Guinea, OIC/CFM-40/2013/LEG/SG-REP (9–11 December 2013), p. 17, www.oic-oci.org/subweb/cfm/40/fm/en/docs/rep/cfm_40_som_rep_leg_v2-1_en.pdf#page=17.

[37] Statute of the International Islamic Court of Justice, art. 49. It affirms that the Court will be set up upon achieving a sufficient number of ratifications necessary to amend the Charter of the Organization of the Islamic Conference Charter, which means a two-thirds majority of member states according to Article 11 of the Charter of the Organization of the Islamic Conference.

facilitating intra-Arab trade and stabilizing the macro-political and economic context, a series of sub-regional Arab organizations began to emerge.

In February 1989, Libya, Tunisia, Algeria, Morocco and Mauritania launched the Arab Maghreb Union, a political and economic integration organization bringing together these five North African states of the Maghreb region.[38] Among the broad considerations influencing the decision to create the Arab Maghreb Union were economic difficulties experienced by states in the region; the end of the Cold War; the need to respond to the creation of the Arab Cooperation Council by North Yemen, Iraq, Jordan and Egypt; and the expansion of the European Community to Spain and Portugal in 1986.[39] However, the most important motivating factor of all in the creation of the AMU was the belief that the Union might provide the means for a resolution of a major dispute pitting Morocco, Algeria and Mauritania against one another over the South West Sahara.[40]

The agreement, signed in Marrakech on 17 February 1989, established a Secretariat and laid down plans for a Maghreb parliament, bank, university and, crucially, the 'Arab Maghreb Union Tribunal',[41] to be based in Nouakchott, Mauritania.[42] Like the European Court of Justice and the many clones it inspired across the world, the AMU Tribunal would have had compulsory jurisdiction to decide disputes over the AMU Treaty, over agreements between member states concluded within the framework of the AMU, over executive decisions of the AMU organs, as well as disputes between AMU member states, and/or between the AMU Council of Head of State.[43] Notably missing amongst applicable laws, and in stark contrast to all other Arab international judicial bodies, was Sharia law.[44] That can be explained by the fact that traditionally Maghreb leaders have been less pious than their counterparts to the east.

The Tribunal was never established because the AMU never really took off. Instead of meeting regularly, the Presidential Council, the decision-making body of the Union, met infrequently from the outset, largely because of a lack of matters

[38] Willis, W., *Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab Spring* (New York: Columbia University Press, 2012), pp. 282–284.

[39] Ibid., p. 283.

[40] Ibid., p. 284.

[41] It is referred to in literature in many ways. In Arabic it is called الأمانة العامة لاتحاد المغرب العربي (Al-amanah Al-'Ammah Le-Ittihad Al-Maghrib Al-'Arabi). In French it is called 'Instance Judiciaire de l'Union du Maghreb Arabe', but has also been called 'Cour Maghrèbine de Justice'. E.g. Bouony, L., 'La Cour Maghrèbine de Justice' (1993) 26 *Revue Belge de Droit International* 356. In English it has been called 'AMU Tribunal' and 'Maghreb Court of Justice'.

[42] Treaty creating the Arab Maghreb Union, adopted on 17 February 1989 and entered into force on 1 July 1989, United Nations Treaty Series, Vol. 1546 (No. 26844).

[43] Ibid., art. 13.

[44] Applicable laws are the AMU Treaty; agreements between member states concluded within the framework of the AMU; and executive decisions of the AMU organs. Subsidiary sources are general principles common to the legislative regimes of member states and general principles of international law that are compatible with the Treaty. AMU Tribunal Statute, art. 26, www.moqatel.com/openshare/Wthaek/Molhak/MalahekMag/AMalahekMagrab26_2-1.htm_cvt.htm. See also Bouony, 'La Cour Maghrèbine de Justice', pp. 366–367.

to discuss. The last full AMU meeting took place in 1994 in Tunisia. Thereafter, some member states began failing to attend. Morocco ceased to participate, starting in 1995 in protest at what it saw as Algeria's continuing support of the separatist movement in Western Sahara. The following year, Colonel Gaddafi refused to take on the rotating presidency of the Union in protest at the lack of support from the other four members in helping Libya stand up to the international sanctions that had been imposed on it since 1992 in the aftermath of the Lockerbie bombing.[45] A few years later, in 1999, Mauritania's decision to become only the third Arab state to recognize Israel also created tension with Arab nationalist sensitivities in Algeria and Libya.[46] In 2011, the Arab Spring led to the ousting of the long-lasting dictator Ben Ali in Tunisia, to be replaced by a democratic government, and the ousting of Colonel Gaddafi in Libya, leading to an ongoing civil war.

Although the Arab Maghreb Union still formally exists,[47] it is not likely to play any meaningful role in the region for the time being. There are many reasons why the AMU failed to reach its objectives, but by far the most important obstacle has been the persistence of the Western Sahara conflict, which has divided the AMU members.[48]

F *The Judicial Body of the Organization of Arab Petroleum Exporting Countries*

The Organization of Arab Petroleum Exporting Countries (OAPEC) is an intergovernmental organization, headquartered in Kuwait, coordinating energy policies between ten oil-producing Arab nations.[49] It was created in 1968 by three then politically conservative oil-producing states – Saudi Arabia, Libya and Kuwait – as an exclusive club that would insulate oil supplies from both street pressures and external political pressure. The initial strategy was to exclude more radical and less oil-rich member states, namely Egypt and Algeria, which in the name of pan-Arabism wanted to pool their oil as a weapon of the people of Arab nations against Israel and the West. It was also an alternative, more easily controllable, to the more prominent and larger Organization of Petroleum Exporting Countries (OPEC).

In 1978, OAPEC member states created the Judicial Body of the OAPEC.[50] The Judicial Body's personal jurisdiction is quite large. It encompasses OAPEC member states, organs of the OAPEC, OAPEC affiliates (i.e. intergovernmental Arab

[45] Willis, *Politics and Power in the Maghreb*, p. 285.
[46] Ibid.
[47] The website of the AMU is www.maghrebarabe.org and is kept up to date.
[48] Willis, *Politics and Power in the Maghreb*, p. 285.
[49] In Arabic: للبترول المصدرة العربية الأقطار لمنظمة القضائية الهيئة (Al-Hay'ah al-Ga-dha-'Yyah Le-mona-ddha-mat al-ag-Tar al-'Arabiya al-Mo-sad-De-rah Le-al-Pet-rool), http://oapecorg.org. Saudi Arabia (1968), Algeria (1970), Bahrain (1970), Egypt (1973), United Arab Emirates (1970), Iraq (1972), Kuwait (1968), Libya (1968), Qatar (1970), Syria (1972).
[50] Protocol establishing the Judicial Tribunal of the OAPEC, concluded in Kuwait on 9 May 1978 and entered into force on 20 April 1980, Qatar Official Journal, Issue No. 7 (5 September

companies created to carry out projects related to petroleum, such as the Arab Petrol Transportation Company), and private persons. It has both compulsory and optional jurisdiction.[51]

Unlike many other international judicial bodies, the Protocol draws a distinction between principal and subsidiary sources of law to be applied by the judges when exercising compulsory jurisdiction. Principal sources are: the OAPEC Agreement and the other conventions that have been entered into by the parties to the procedure; international custom; and general principles common to the legislatures of the member states.[52] Subsidiary sources are the jurisprudence and doctrine in the public law of member states.[53] Moreover, the Protocol specifies that judges will rely on international and Islamic law to decide cases.[54] However, when exercising consensual jurisdiction, judges are free to apply the law that best suits the case.[55]

The Judicial Body started operating in 1980 in Kuwait City.[56] However, despite a potentially large and compulsory jurisdiction, it has rarely been utilized.[57] It has just two cases to its record. The first judgment was rendered in Kuwait in 1989 in a dispute between Iraq and Syria. The Judicial Body declined to adjudicate the dispute because of its political character. A judgment in the second case, between Algeria and the Arab Maritime Petroleum Transport Company, an OAPEC affiliate, was issued in Cairo, in 1994. Since then, the Judicial Body has fallen into disuse. Vacancies on its bench have been unfilled for years.

Although there is very little information on the OAPEC, one can only speculate that the reason for its abandonment has been, as in the case of the Arab Investment Court, distrust towards the independence of its judges – especially when adjudicating disputes where the respondent is an Arab government – and the availability of alternative fora.

3 ASSESSMENT: FACTORS FAVORING AND DISFAVORING REGIONAL JUDICIALIZATION AMONG ARAB STATES

What are the broader considerations that led Arab states over the years to create, or try to create, these six regional courts? And why have all attempts failed? As was said, failures in international judicialization are rarely discussed, and those of Arab states

1978), p. 273, available at www.almeezan.qa/AgreementsPage.aspx?id=970&language=en (English); www.almeezan.qa/AgreementsPage.aspx?id=970&language=ar (Arabic).

[51] Protocol establishing the Judicial Tribunal of the OAPEC, art. 24.

[52] Ibid., art. 26.1–4.

[53] Ibid., art. 26.5.

[54] Ibid., art. 26.

[55] Ibid., art. 26.

[56] Ibid., art. 3.

[57] Ben Salah, T., 'Note sur le Protocol relatif a la creation d'un organe judiciare au sein de l'OPAEP' (1980) 26 *Annuaire Français de Droit International* 293.

are probably the least discussed of all. Until the day more thorough and deep research is available, one can only advance some tentative hypotheses.

A *Factors Favoring Regional Judicialization in the Arab World*

The first factor favoring the creation of regional courts in and for the Arab world is a perceived need for 'Arabism' and 'Arab dispute settlement'. Relative underrepresentation of Arab states on the benches of global adjudicative bodies, coupled with a sense of uniqueness of Arab states that sets them apart from the rest of the world but also brings them intimately together, seems to have provoked Arab states to feel the need to create dedicated Arab regional dispute settlement bodies. That is one of the rationales behind the idea to create the Arab Court of Justice.

Pan-Arabism, the vision of a unified Arab world bringing together all Arab people, from the Atlantic Ocean to the Arabian Sea, has played an important role in the politics of the region, from the dissolution of the Ottoman Empire to the defeat in the 1967 Six Day War. However, pan-Arabism has always been more a popular pipedream than an actual political project embraced by Arab leaders. Egypt, and in particular President Gamal Al Nasser, used it in the 1950s and 1960s to extend its influence, leading to a brief union with Syria in the United Arab Republic. It was never bought by the other Arab leaders, however, due to the fear of seeing their own power diminished or even being absorbed into a larger Arab state. At most, Arab leaders paid lip service to pan-Arabism to appease the public. Pan-Arabism continued to exist as a wishful goal among the masses through the late 1980s, but by the end of the Cold War it began to be eclipsed by both nationalist and Islamist ideologies. The dimming prospects of pan-Arabism have put in question the need to create pan-Arab international judicial institutions, particularly given the existence of viable global alternatives.

A second factor pushing states to consider creating Arab, or Islamic, adjudicative bodies is the desire to include Islamic law (Sharia) amongst laws to be applied by international judges. This is one of the distinctive features of regional adjudicative bodies in the Arab world, with some considerable variations. While the project of the International Islamic Court of Justice gives preeminence to Sharia over other sources of law, Sharia is just one of the several sources of law the Arab Court of Justice can resort to, and there is no mention of Sharia law in the Statute of the AMU Tribunal.

The inclusion of Sharia in the applicable laws of an international adjudicative body called upon to decide disputes between Muslims – be they governments or individuals – is not only an act of respect to God, and thus an expression of piety, but a necessity dictated by the need to maintain logical consistency of the whole legal system. Indeed, Sharia is a complete legal system governing any matter pertaining to the life of every Muslim. Sharia not only provides religious teachings, but it also regulates all the activities of believers. It encompasses many fields ranging from economy and the

organization of family, to policy and international law. Sharia has a universal character. It encompasses everything. Thus, first, there is no distinction between religious law and secular law. Law's legitimacy, the legitimacy of any law, derives from God. If laws differ from God's words and will they are illegitimate. Thus, it should be no surprise that Sharia is the main source of law in the majority of Arab states.

Sharia also governs relations of Islamic nations (or at least of those that embrace it) with one another and with non-Islamic nations. The classical conception of 'external' relations in Islam is called Siyar.[58] It means 'state practice' and regulates the relations between Islamic states and non-Islamic states. It also regulates relations between non-Muslim communities within the borders of Islamic states. In other words, the adjective 'external' is used in the sense of the faith and not just of the territory. The relations among Islamic countries are not external because all Islamic countries share the same faith. Thus, they do not fall under the rules of Siyar but are regulated by the rules of the Islamic community, or Ummah. In this sense, relations between Islamic nations, and Arab nations in particular, are not governed by international law, but rather by Islamic law, that is to say Sharia.

These considerations go a long way toward explaining why including Sharia amongst applicable laws of international adjudicative bodies is not just an act of piety and profession of faith, but it is legally necessary lest the tribunal's findings would lack legitimacy.

However, as much as pan-Arabism has been paid lip service and used only to buttress Arab regimes' legitimacy, the same could be said about reference to Sharia. By referring to Sharia as applicable law in projects of some of the regional adjudicative bodies, Arab leaders professed their Islamic faith to the masses and tried to look holier-than-thou to their peers. The need to look Islamic to their populations has increased with the rise of Islamist movements that threaten the established order internally and externally, from the Muslim Brotherhood to Al Qaeda. By looking more Islamic than their neighbors, Arab leaders can woo the masses away from their rivals.

In practice, incorporation of Sharia law amongst applicable laws is unlikely to lead to any different result than if it had not been referenced. Indeed, at the end of the day Sharia law and international law differ only marginally – mostly on issues pertaining to individual rights, and certainly not on commercial matters or relations between states – and even those discrepancies can be reconciled by flexible interpretation of either or both bodies of law. In sum, there has never been a genuine need for a unique, dedicated, adjudicative forum that could apply Sharia law. Existing global adjudicative fora could be, and indeed have been, the fora of choice for many Arab disputes.

The third factor pushing Arab states to create regional courts seems to be mimicry. Several of the Arab regional adjudicative projects have been inspired by a desire to

[58] Al Ghunaimi, M. T., *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968).

emulate successful judicialization in other regions and on a global scale. A constant in the many drafts of the statute of the Arab Court of Justice has been the desire to create a regional clone of the International Court of Justice, with very little difference from that tried-and-tested template but for the inclusion of Sharia amongst applicable law. The same can be said about the project of the Islamic Court of Justice.

The AMU was launched as a response to the European Communities' expansion to the Iberian Peninsula and as an attempt to emulate their economic success.[59] As the European Court of Justice (ECJ) was considered a key ingredient of the successful European Communities formula, the Maghreb leaders decided that the new union would be equipped with a judicial body along the lines of the ECJ.

Likewise, there is little doubt that the conception and design of the Arab Court of Human Rights is inspired by those of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights. Without these precedents, no one would have ever thought of creating an Arab Court of Human Rights. Lastly, both the Judicial Body of the Organization of Arab Petroleum Exporting Countries and the Arab Investment Court follow the templates of investment-state arbitral mechanisms, from ICSID to those contained in numerous bilateral investment treaties.

However, mimicry is hardly a recipe for success. All human institutions –including the judicial ones – are the fruits of their larger political, historical and economic context. Similarities in design can lead to rather different results in different contexts. The mixed success that the many clones of the ECJ have experienced in Africa, Latin America, and even in Europe itself show that successful judicialization is one of the ingredients of successful regional integration, but it is hardly the main ingredient or the spark that leads to economic integration and growth. Per se, international adjudicative bodies can hardly bring about peace and stability. On the contrary, they need peace and stability to be effective.

If the presence of near neighbors submitting to robust regional or global judicial oversight puts pressure on states to embrace international judicialization, then their lack in and near the Arab world (with the main exception of the European courts) has eased pressure on Arab states as a whole and individually to submit to international judicial oversight.[60]

B *Factors Disfavoring Regional Judicialization in the Arab World*

Countering these factors pushing Arab states towards regional judicialization, there are a number of other factors pushing in the opposite direction. I am loath to include among these 'cultural preferences', such as a tendency to disfavor layered judicial remedies, the absence of hierarchy in religious – and, consequently,

[59] Willis, *Politics and Power in the Maghreb*, p. 283.
[60] Alter, *The New Terrain of International Law*, p. 98.

legal – authority, and hesitation to admit into the adjudicative process sources of law other than Sharia.[61] While there is a certain truth to them, there is little evidence that any of these considerations has nipped in the bud projects of regional judicialization or deterred Arab states from embracing global judicialization.

I surmise that some more precise and pragmatic considerations have conspired to stymie international judicialization in the Arab world, but they are far from intuitive. Indeed, several considerations would place the Arab world high on most predictors of regional institutionalization and judicialization. To begin with, the Arab League was the first regional organization established in the aftermath of World War II. It preceded by several years both European institutions such as the Council of Europe and the European Communities, and the Organization of American States. Second, its members share a common language, identity and culture to a degree equaled only by areas in Latin America, and definitely nothing like the fragmented puzzle of languages, identities and cultures of Europe. Third, although nowadays the League has 22 members, there is little evidence that the number of states is a hindrance to cooperation. Fourth, they share a common foe, Israel, and a continuing suspicion of the West. Fifth, they have long been accustomed to trading with one other.

Despite all of these factors that should have knit them together, Arab states have been, and continue to be, deeply divided. First, for much of the Arab League's history, there has been rivalry over leadership between the two largest members: Egypt and Iraq. Egypt's expulsion from the Arab League from 1979 to 1991, as a sanction for making peace with Israel, effectively crippled the organization. Iraq's aggression toward an Arab state (Kuwait) in 1990 and the ensuing ten years of isolation further exacerbated divisions within the League. The League was severely tested by the US-led attack on Saddam Hussein's Iraq in 2003, with some backing the war, some opposing it, and others standing on the sidelines.

Then there has been hostility between traditional monarchies – such as Saudi Arabia, Jordan and Morocco – and new republics, or 'revolutionary' states such as Egypt under Gamal Abdel Nasser, Baathist Syria and Iraq, and Libya under Muammar Gaddafi. Although, in theory, almost all of the Arab states were nonaligned during the Cold War, in practice the nationalist republics, with the notable exception of Lebanon, were allied with the Soviet Union – even as most of them ruthlessly suppressed the Communist parties within their own countries – and the conservative monarchies generally allied with the United States, leading some to talk about an Arab Cold War of sorts.[62]

[61] Shapiro, M., *Courts: A Comparative and Political Analysis* (Chicago, IL: University of Chicago Press, 1981), pp. 194–222.

[62] Kerr, M., *The Arab Cold War: Gamal 'Abd al-Nasir and His Rivals, 1958–1970* (Oxford: Oxford University Press, 3rd ed., 1971). For a list of conflicts between Arab states and internal upheaval from the fall of the Ottoman Empire to date, see http://en.wikipedia.org/wiki/List_of_modern_conflicts_in_the_Middle_East.

At the outset of the Arab Spring, in early 2011, the League showed a greater sense of purpose. It backed UN action against Muammar Gaddafi's forces in Libya. It also suspended Syria over its repression of nationwide protests. But the ongoing wars in Syria, Yemen and Libya, involving several Arab states, besides regional and global powers, and the boycott of Qatar, mean that for the time being Arab states remain, as a whole, deeply divided.

Be that as it may, tension between neighbors and frequent internal uprisings and conflicts are not necessarily a killer of regional cooperation and judicialization. They might restrict cooperation and render adjudicative bodies ineffective, but they do not necessarily prevent attempts to institutionalize and judicialize altogether. Both Latin America and Africa suffer from the same woes, but have judicialized more successfully than the Arab world.

The League's overall lack of effectiveness is often blamed on influence by external actors and the Cold War. However, there is little evidence that external actors of Cold War politics played much if any role in the original design of the Arab League and its ongoing paralysis. The Cold War may have accentuated divisions in the Arab world – particularly between the young revolutionary republics, which looked east, and the old established monarchies, which looked west – but it did not determine them. Nor were external actors (the United States, European Union, Russia, Japan and China) to blame for the disappointing results of efforts to reform the League since the early 1990s. If anything, they provided support for these initiatives.

Sometimes Egypt is blamed for sabotaging the League. Egypt, arguably the regional hegemon, is and has probably been the most influential player in the Arab League since its inception. Except for the period from 1979 to 1991 when Egypt was expelled from the League over the Camp David Agreements with Israel, the League has been headquartered in Cairo (apart from 1979–1991 when it was headquartered in Tunis), and all Secretary-Generals of the League have been Egyptians (again, except for 1979–1991). Like every regional hegemon, Egypt defined cooperation in ways that reflected its own interests. Of course, when it felt the League's action was contrary to its political interests, Egypt acted to thwart the action of the League and to hamper its organs. However, the presence of a strong regional hegemon or two is not necessarily a killer of regional cooperation, as the Organization of American States and the European integrationist projects can attest. Moreover, Egypt is, amongst Arab states, the one that seems to favor international judicialization the most, a factor that should have translated into the creation of effective adjudicative institutions.

A more plausible explanation is the one put forward by Michael Barnett and Etel Solingen.[63] Their hypothesis is that the Arab League was never meant to coordinate

[63] Barnett, M. and Solingen, E., 'Designed to Fail or Failure of Design? The Origins and Legacy of the Arab League', in Acharya, A. and Johnston, A. I. (eds.), *Crafting Cooperation: Regional*

its members' policies and integrate them, as other regional projects did, but it was instead designed to enhance its members' sovereignty, externally vis-à-vis non-Arab states and internally vis-à-vis each other. The politics of pan-Arabism and shared identity led Arab states to embrace the rhetoric of Arab unity in order to legitimize their regimes, internally and externally, but at the same time to fear proactive Arab unity that would threaten their sovereignty. The root cause of shallow regional cooperation is thus the weak legitimacy of regional regimes. The result is a series of make-believe institutions, including projects of regional adjudicative bodies, that could keep the dream of pan-Arabism alive, but that ultimately lack any capacity to turn pan-Arabism into a reality.[64]

Another important consideration is that in most Arab states power is concentrated in the hands of ruling families or parties dominated by narrow clans. While most Arab states have parliaments, nearly all are the rubber-stamping kind. Over the period from 1960 to 2000, the region had the fewest regime changes of any region outside the Organisation for Economic Co-operation and Development (OECD). Until the Arab Spring, its two leading industrial economies, Tunisia and Egypt, looked well on their way to becoming dynastic states.

A distinctive feature of Arab states is the personal and personalized conception of political power, a tendency to identify the state with the head of state.[65] At the top sits a male leader – a patriarch or a soldier who had seized power at some point through a coup – who embodies the state. This is a significant hindrance to the acceptance of binding adjudication by third parties. Because of the personalization of the state, inter-Arab disagreement is perceived as a conflict between two specific persons, not between two governments or states. A case filed against a state is a case filed against the leader of that state. Any judicial settlement compromises the prestige of the leaders concerned. In the case of disputes between Arab states, one is the winner, the other is the loser, and the loser's honor and prestige is compromised. In the case of adjudication of disputes between individuals and states, be they investment or human rights disputes, the judgment is read as a censure of the leader himself. In this context, instead of helping to de-escalate the dispute – to bureaucratize, rationalize and to dispose of it – adjudication shines the spotlight on the leader and his deficiencies. This also explains why, of all different types of contemporary adjudication, international criminal justice seems to be the one that has the most difficulty getting established in this region.

In this context, and from the point of view of leaders, political means of dispute settlement are much more desirable alternatives. In the case of interstate disputes, political settlement, as opposed to adjudication, avoids polarization in terms of

International Institutions in Comparative Perspective (Cambridge: Cambridge University Press, 2007), pp. 180–220.

[64] Ibid., p. 183.

[65] Maged, A., 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice' (2008) 8 *International Criminal Law Review* 477, at 502.

winners and losers. It allows both heads of state in the dispute to be seen shaking hands, allowing both to be perceived as winners. In the case of disputes between individuals and states, reliance on political means denies individuals the chance to level the playing field through a third-party adjudicator.

Judicialization can hardly take root in a region where political rights and civil liberties – and, as a consequence, the rule of law – are not firmly accepted and entrenched domestically. In these matters, Arab states fare considerably worse on average than most states. Freedom House, a nongovernmental organization that has been collecting data since 1972 on the degree of democratic freedoms experienced around the world, has been consistently placing most Arab states at the bottom. According to the 2018 Freedom in the World Annual Report, of 195 states surveyed, 45 percent were declared 'free' (88), 30 percent 'partly free' (59) and 25 percent 'not free' (48). The only Arab state in the 'free' group was Tunisia. Fifteen out of 22 were 'not free', five were 'partly free' and one was not surveyed in 2018 (Palestine), but had never been ranked 'free' anyway. Four Arab states featured amongst the ten 'worst of the worst' on the list: Somalia, Sudan, Syria and Saudi Arabia.[66]

Granted, autocratic and illiberal states do create international adjudicative bodies and even accept their jurisdiction, as the case of Libya under Gaddafi clearly illustrates, but that is as far as they go. Rendering them effective, that is to say giving them the power to compel compliance with their judgments, is not an option.[67] Indeed, as Anne-Marie Slaughter and Laurence Helfer noted, the existence of domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate the pursuit of their interests independently from other government institutions, is a strongly favorable precondition for effective supranational adjudication.[68] Lack of domestic government institutions committed to the rule of law is therefore a cause of poor judicialization. All Arab states, with the exception of the post-Arab Spring Tunisia, fare poorly in that regard both in absolute and relative terms. When measuring 'Rule of Law: independent judges and prosecutors, due process, crime and disorder, and legal equality', in 2018 Freedom House scored five Arab states 0 on a scale from 0 to 16 (Iraq, Libya Sudan, Somalia and Syria).[69] The two highest scoring states were Tunisia (9) and the Comoros (8).[70]

[66] *Freedom in the World 2018, Methodology*, Freedom House, https://freedomhouse.org/report/methodology-freedom-world-2018.

[67] Slaughter and Helfer define 'effective supranational adjudication' as the ability of the adjudicating body to compel compliance with its judgments by convincing domestic government institutions to use their power on the adjudicating body's behalf. Helfer, L. and Slaughter, A.-M., 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, at 387.

[68] Ibid., pp. 333–334.

[69] *Freedom in the World 2018, Methodology*, https://freedomhouse.org/report/methodology-freedom-world-2018.

[70] Ibid.

Finally, low levels of international judicialization in the Arab world can also be explained by several economic ills affecting the region. These include limited integration into the world economy and of economies within the region; inability to attract significant foreign direct investment; bloated public sectors that employ a huge percentage of the workforce; sclerotic political and economic policies; and political and economic models based on extraction of rents.

Intraregional trade between Arab states has always been minimal. As their economies tend to produce mostly the same goods, instead of complementary goods, incentive for trade has been reduced.[71] Import-substitution policies prevailing until the end of the 1980s have further depressed trade with states both outside and within the region. Even at the sub-regional level, where one would expect local trade conditions to be more favorable, performance has been modest. In 1989, the year of the AMU's creation, total trade between the five member states was just 3 percent of their total trade volumes, compared to 40 percent between the founding members of the European Community at the time of its creation in 1957.[72] In November 2013, the World Bank revealed that trade between Arab states had risen by just 1 percent over the past 20 years. This was in stark contrast to trade among European nations, which had risen by 60 percent over the same period.[73]

Even to this day, the typical Arab state employs more than 50 percent of its workforce and accounts for three-quarters of industrial production. Despite intermittent efforts in Lebanon, Jordan, Tunisia and Morocco to develop more market-friendly economies, inward-looking regimes have long remained the region's paradigm. Vastly protectionist economies, pivoting on the public sector, characterize both the republics and the monarchies of the region. Despite a rhetoric that has been calling for economic integration – a rhetoric very similar to the one that propounded pan-Arabism – the prevailing paradigm remains one of import-substitution models. That precludes effective economic integration and, since economic integration is the terrain most favorable for projects of regional judicialization, it forestalled the creation of regional courts.[74]

With the exception of the state-controlled oil and gas sectors, the Arab world as a whole has received less foreign direct investment than most areas of the world. Whereas a number of emerging economies successfully seized the opportunities

[71] Fisher, S., 'Prospects of Regional Integration in the Middle-East', in De Melo, J. and Pangariya, A. (eds.), *New Dimensions in Regional Integration* (Cambridge: Cambridge University Press, 1995), p. 440.

[72] Willis, *Politics and Power in the Maghreb*, p. 287.

[73] Middle East Monitor, 'World Bank: Trade between Arab States Has Risen Just 1% Over Past 20 Years' (13 November 2013), www.middleeastmonitor.com/20140203-world-bank-trade-between-arab-states-has-risen-by-just-1-in-the-past-20-years/.

[74] Romano, C., Alter, K. and Shany, Y., 'Mapping International Courts and Tribunals, the Issues and Players', in Romano et al. (eds.), *Oxford University Press Handbook of International Adjudication*, pp. 3–26.

offered by the 1990s' boom in trade, that wave of investment mostly bypassed the Arab countries.

The vicious circle of underinvestment and shallow integration into the world economy that has been at the heart of the economic underperformance of most Arab countries over the last several decades is not exclusively an economic phenomenon. To a significant extent it is determined by the types of political systems that have held sway across the Arab world so far.

Arab regimes tend to be 'rent-based', meaning that the government keeps itself in power by controlling an abundant source of income and channeling the proceeds to groups that support it. In oil- and gas-rich countries, that source of income lies in revenue from the export of hydrocarbons. In less resource-rich countries, rents can take the form of 'political rents' which certain states receive from foreign donors due to their particular strategic and political roles in the region – the best example being the Egyptian government's reliance on assistance from the United States.

In 'rent-based' economies the government is not incentivized to redirect resources into productive investment or to foster the conditions for economic growth. It is compelled instead to buy the loyalty of critical constituencies. The most conspicuous manifestations of this dynamic lie in very large state sectors, nepotistic networks surrounding the centers of power, and, in many cases, oversized armies that have their fingers in many pies in the broader economy. A regime sustained by rents has little incentive to genuinely liberalize, as liberalization invariably undermines its ability to collect rents.

Even in the United Arab Emirates, a showcase for reform and liberalization in the region, a majority of actual citizens (themselves a small minority of the total population) are employed by the state. In countries less well run than the United Arab Emirates, this leaves foreign investors with the unappealing prospect of having to contend with the obstructive bureaucracy and entrenched, politically influential interests that come with such state-dominated economies, reducing incentives for investing in a region that has a high risk of instability due to inter-Arab and internal conflicts.

In sum, state-controlled, rent-based economies and low integration with the global economy have conspired to suppress the emergence of a strong and independent private entrepreneurial class throughout much of the Arab world, thus also reducing the call from the public for independent and binding supranational fora where they could bring disputes arising out of their business, trade and investment activities.

Should politics and, as a consequence, economic paradigms change in the Arab world, the fortunes of international judicialization in the region might do so as well. Starting with the end of the Cold War and Iraq's invasion of Kuwait, the whole Arab world has entered a turbulent phase of its history that has not yet ended. The Arab Spring, which began in 2011 and swept away many of the historical leaders in the region, is just its latest chapter. It is anyone's guess whether the region will see a

period of turmoil and repression, and then come back with a vengeance within a generation to radically transform those societies, like the revolutions that shook Europe in 1848. Until then, international judicialization in the Arab world remains a mirage.

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