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**International Constitutional Court: Rise and Fall of an International Debate**

**Tribunal Constitucional Internacional: Ascensão e Queda de um Debate Internacional**

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# International Constitutional Court: Rise and Fall of an International Debate\*

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### Abstract

The development of an International Constitutional Court (ICoC) is an idea which received a special focus among several legal scholars worldwide. The general idea of this proposal is to create a new international public authority (IPA) with judicial powers in order to: (i) hinder local successful electoral frauds or coups d'état, and (ii) reinforce the global protection of Democracy and Human Rights. After a qualitative research based on primary sources (interviews and surveys) and secondary sources (literature review), this article examined the different ICoC proposals. We argue that the current discussion concerning the legality of this new IPA does not address legitimacy issues and, for this reason, the debate on the legal framework of an ICoC should also consider proper accountability mechanisms for international issues.

**Keywords:** International Constitutional Court. International Public Authority. legality and legitimacy. Horizontal accountability. Global Public Goods.

### Resumo

O desenvolvimento de um Tribunal Constitucional Internacional (TCI) é uma ideia que recebeu atenção especial entre vários estudiosos do direito em todo o mundo. O objetivo geral desta proposta é criar uma nova autoridade pública internacional (API) com poderes judiciais para: (i) impedir fraudes eleitorais locais e golpes de Estado nacionais, e (ii) reforçar a proteção global da Democracia e dos Direitos Humanos. Após uma pesquisa qualitativa baseada em fontes primárias (entrevistas e questionários) e em fontes secundárias (revisão de literatura), este artigo examinou as diferentes propostas do ICoC. Argumentamos que a atual discussão sobre a legalidade desta nova API não trata ainda de questões relacionadas à legitimidade dessa instituição e que, por essa razão, o debate sobre o arranjo institucional de um

TCI também deve levar em consideração a adoção de mecanismos de accountability adequados para questões internacionais.

**Palavras-chave** : Tribunal Constitucional Internacional. Autoridade Pública Internacional. legalidade e legitimidade. accountability horizontal. Bens Públicos Globais.

## 1 Introduction

There is a current discussion in international legal scholarship concerning the proposal for the creation of an International Constitutional Court (ICoC). Roughly speaking, the project concerning this new international institution frames this idea as an independent and permanent international legal mechanism of judicial nature within the United Nations (UN) and possessing advisory and contentious competences on constitutional changes and electoral procedures. The main goals of this new institution would be (i) to contain electoral frauds and unconstitutional changes, (ii) to discourage democratic ruptures, (iii) to reduce the chances of a successful spread of totalitarianism worldwide, and (iv) to avoid human rights violations in domestic arena derived from unconstitutional changes<sup>1</sup>.

This new international organization would represent a new tool set from international legal order to deal with national self-determination of processes.

Indeed, traditional international law has nothing to say about the adoption of democracy, totalitarianism, monarchy or republic, among others (U.N.G.A. Res. 25/2625)<sup>2</sup>. In this sense, even though the UN elected

democracy as common driver for developmental goals within its Millennium Declaration (U.N.G.A. Res. 55/2), and on its Sustainable Development Goals (U.N.G.A. Res. 70/1), this political regime still does not appear as a mandatory international obligation among all its member-States.

However, one cannot ignore a recent trend in international organizations in adopting democratic clauses to deal with the membership (acceptance, maintenance or suspension) of new and old member-States. African Union's Charte Africaine de la Démocratie, des Élections et de la Gouvernance (2007), Mercosur's Ushuaia Protocol, the Statute of the Council of Europe and the Interamerican Democratic Charter of the Organization of American States are just some examples of this new trend in international law<sup>3</sup>.

However, the ICoC proposal aims to present a step forward this trend. International legal arena would not only establish a legal benchmark for International Organizations to let them evaluate if a State can or cannot be suspended due to a failure to comply with an international democratic clause. According to the original proposal, this new international institution would be responsible for judging States political processes as legal or illegal and for sanctioning them in case of non-compliance to international standards.

Thus, by means of a qualitative research based on primary and secondary sources, this text discusses the proposal of ICoC and problematizes it. The idea is to understand the uniqueness of the ICoC proposal, in order to enhance alternative solutions to the international

Orders: Framing the Debate according to the Post-Modern Condition of International Law. *German Law Journal, Frankfurt*, v. 19, n. 1, p. 1-20, 2018.

<sup>3</sup> ARRIGHI, Jean-Michel. The "Democracy Clause" in the Americas. In: D'ARGENT, Pierre; BONAFÉ, Béatrice; COMBACAU, Jean; VERHOEVEN, Joe. *Les Limites Du Droit International: Essais en L'honneur de Joe Verhoeven = The Limits of International Law: Essays in Honour of Joe Verhoeven*. Bruxelles: Bruylant, 2015. CAMINOS, Hugo. The role of the Organization of American States in the Promotion and Protection of Democratic Governance. In: COLLECTED Courses of the Hague Academy of International Law. Brill Nijhoff ed. 1998. p. 118-120. GIANNATTASIO, Arthur. A Legalidade e a Legitimidade da Autoridade Pública Internacional da OEA nos Casos Brasil e Venezuela: Do Soft Power a um Direito Político Internacional. In: GOMES, Eduardo; XAVIER, Fernando; SQUEFF, Tatiana (org.). *Golpes de Estado na América Latina e Cláusula Democrática*. Curitiba: Instituto Memória, 2016b. SMITH, Peter H.; SELLS, Cameron J. *Democracy in Latin America*. Oxford: University Press, 2005.

<sup>1</sup> MARZOUKI, Mohamed. *Statement before the 67th General Assembly of the United Nations*. Washington: United Nations, 2012. Available at: <http://gadebate.un.org/node/453>. Access on: 1 Jul. 2016. MARZOUKI, Mohamed. *Statement before the 68th General Assembly of the United Nations*. Washington: United Nations, 2013. Available at: <http://gadebate.un.org/68/tunisia>. Access on: 1 Jul. 2016. MARZOUKI, Mohamed. *Statement before the 69th General Assembly of the United Nations*. Washington: United Nations, 2014. Available at: [http://downloads.unmultimedia.org/wss/ga69/en/69\\_TN\\_en.mp3](http://downloads.unmultimedia.org/wss/ga69/en/69_TN_en.mp3). Access on: 1 Jul. 2016.

<sup>2</sup> GIANNATTASIO, Arthur. Direito Internacional Público Contemporâneo e Tribunal Constitucional Internacional: A Radicalização da Política e a Transcendentalização da Origem dos Estatutos Jurídico-Políticos Nacionais. In: OLIVEIRA, Paulo (ed.). *Temas avançados de Direito Internacional e Direitos Humanos*. Salvador: Faculdade Baiana de Direito, Juspodivm, 2016a. GIANNATTASIO, Arthur. The Interaction between International and Domestic Legal

control of national decisions concerning democracy<sup>4</sup>. After all, this new international organization must also be controlled, due to the risk that its original institutional design presents to national self-determination processes.

Therefore, this text is divided into 3 (three) parts. The first one will present the materials and methods used to the elaboration of this text (2.): a qualitative research based on primary and secondary sources (2.1), which were understood within the theoretical framework provided by the concept of International Public Authority (IPA) (2.2). The second one organizes the results gathered and systematizes them according to seven common criteria (3). The third one discusses the proposals and reveals the limits of legitimacy in the institutional design of the proposal (4.).

## 2 Materials and methods

### 2.1 Qualitative Research based on Primary and Secondary Sources

The text derives from a qualitative research based on primary and secondary sources. The primary sources were semi-structured interviews - face-to-face or remote (via electronic audiovisual media) - and surveys. The interviews were conducted with academics who wrote about the issue and who presented ICoC proposals within the network built around Mohamed MARZOUKI (“Marzouki Group”). Twenty-eight scholars were invited to participate in the survey via e-mail, but only thirteen answered. Six of them did not feel comfortable to take part in the research - either via interviews, or through questionnaires. Thus, three interviews were conducted, and four electronic surveys were sent and filled.

The secondary sources consisted of scientific articles on the subject, which were collected after a cross-reference within a bibliographic review. All the texts published by this group were collected and analyzed, in order to be systematized, side-by-side with the informa-

tion gathered via the primary sources.

After collection and examination of all the information, we compared the different ICoC proposals which were found. Thus, we were able to identify three structural elements, which were more or less addressed by all proposals, namely: (i) legitimacy issues (3.1), which are related to political and social justifications for the creation of an ICoC, (ii) legality issues (3.2), which are related to the constitute regulation of the ICoC (normative basis, functions and institutional design, election of judges), and (iii) enforcement issues (3.3), which are directed related to the relationship between the ICoC and State sovereignty.

It is important to highlight that the criteria which informs the idea of the exercise of an IPA were gathered also after a close contact with specialized literature. In this sense, not only scientific articles, books and book chapters concerning the idea of IPA were read and systematized (bibliographic review), but also interviews with authors who write or wrote on the topic were conducted. Both sources were then used to present the theoretical framework below (2.2).

### 2.2 International Public Authorities: Legality and Legitimacy Issues while Enforcing the International Protection of Global Public Goods

The first initiative in presenting the concept of global public goods (GPG) are related to the consolidation of a global order (globalization) in 1960s<sup>5</sup>. By transposing the idea of national public goods (PG) to a global perspective<sup>6</sup>, the concept of GPG held the argument that, if nation-states are national public authorities concerned with the production and the protection of public goods within their borders, international society should also be structured to produce goods in the interest of the whole world population<sup>7</sup>.

<sup>4</sup> GIANNATTASIO, Arthur. *Direito Internacional Público Contemporâneo e Tribunal Constitucional Internacional: A Radicalização da Política e a Transcendentalização da Origem dos Estatutos Jurídico-Políticos Nacionais*. In: OLIVEIRA, Paulo (ed.). *Temas avançados de Direito Internacional e Direitos Humanos*. Salvador: Faculdade Baiana de Direito, Juspodivm, 2016a.

<sup>5</sup> KAUL, Inge; GUNBERG, Isabelle; STERN, Marc A. *Global Public Goods: International Cooperation in the 21st Century*. New York; Oxford: Oxford University Press, 1999. BOURGUINAT, Henri. *Quand les ‘Biens Publics’ Deviennent ‘Globaux’*. *Repères et Tendances*, sociétal, Paris, n. 39, 2003. FREUD, Claude. *Les Biens Publics Mondiaux*. *Global Public Goods. Éditions de l'ÉHESS*, v. 50, cahier 198/200, 50 ans, p. 1067-1077, 2010.

<sup>6</sup> GABAS, Jean-Jacques; HUGON, Philippe. *Les Biens Publics Mondiaux et la Coopération Internationale*. *L'Économie Politique*, n. 12, p. 19-31, 2001.

<sup>7</sup> CAFAGGI, Fabrizio; CARON, David D. *Global Public Goods amidst a Plurality of Legal Orders: A Symposium*. *The European Journal of International Law*, Oxford, v. 23, n. 3, p. 643-649, 2012.

In the absence of a regular international entity imbued with a public authority (world government), the exercise of a public authority related to the production of GPGs should be assumed by international actors<sup>8</sup>. Thus, the production of development, human rights and security, among other GPGs, should be done then within an international perspective, by means of the exercise of an international public authority (IPA).

Post-World War II period is characterized by an increase of complexity of international arena. Post-national entities – with and without legal personality - were created to promote cooperation among States, in order to enable a joint discussion between national public authorities on common interest issues, such as security, environment, migration, among others<sup>9</sup>. However, although their institutional roles were explicitly assigned in constitutive documents, legal scholarship identified that their Powers have progressively grown in such a way that nowadays they can influence the exercise of individual and collective freedoms within national borders<sup>10</sup>.

The exercise of a public authority is usually assigned

to an international entity through treaties<sup>11</sup>, as those documents are concerned with a clear legal statement of internal bodies and their respective powers. However, beyond these legality issues, such documents care also in disclosing the mechanisms of enforcement and the justifications in the exercise of these Powers.

Thus, the exercise of an IPA presupposes: (i) a clear attribution of the mandate (legality), which shall be observed by national entities due to (ii) the possibility to resort to soft and hard power mechanisms (enforcement)<sup>12</sup>, and (iii) a clear recognition that both the legality and the enforcement mechanisms are sufficiently justified or justifiable by the official mission (goals) of the international institution (legitimacy)<sup>13</sup>.

The relationship between GPG and the exercise of an IPA is easily associated to an economic perspective or to an economic strategy: promoting economic development worldwide, spreading free trade of goods, services, capital and intellectual property, and using of economic tools to strengthen environment protection or to increase the acceptance of immigrants within nation States, among others<sup>14</sup>.

However, national political issues – such as definition of democracy within national constitutions - are not immediately associated to the range of powers within international public authority<sup>15</sup>. This happens

KINDLERBERGER, Charles P. International Public Goods without International Government. *The American Economic Review*, v. 76, n. 1, p. 1-13, mar. 1986.

<sup>8</sup> RAJAGOPAL, Balakrishnan. Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination. *William & Mary Law Review*, v. 49, issue 4, article 10, p. 1347-1376, 2008. SHAFFER, Gregory. International Law and Global Public Goods in a Legal Pluralist World. *The European Journal of International Law*, v. 23, n. 3, p. 669-693, 2012. BOIDIN, Bruno; HIEZ, David; ROSSEAU, Sandrine. Biens Communs, Biens Publics Mondiaux et Propriété: Introduction au Dossier. *Développement Durable et Territoires, Économie, Géographie, Politique, Droit, Sociologie*, dossier 10, 2008. BOURGUINAT, Henri. Quand les 'Biens Publics' Deviennent 'Globaux'. *Repères et Tendances*, sociétal, Paris, n. 39, p. 47-50, 2003. COGOLATI, Samuel; HAMID, Linda; VANSTAPPEN, Nils. *Global public goods and democracy: what role for international law?* KU Leuven Working Paper. n. 159, May 2015. Available at: [https://ghum.kuleuven.be/ggs/publications/working\\_papers/2015/159cogolatihamidvanstappen](https://ghum.kuleuven.be/ggs/publications/working_papers/2015/159cogolatihamidvanstappen). Access on: May 07<sup>th</sup>, 2017. GABAS, Jean-Jacques; HUGON, Philippe. Les Biens Publics Mondiaux et la Coopération Internationale. *L'Économie Politique*, n. 12, p. 19-31, 2001. KAUL, Inge; GUNBERG, Isabelle; STERN, Marc A. *Global Public Goods: International Cooperation in the 21st Century*. New York; Oxford: Oxford University Press, 1999. MARING, Matthias. *Globale Öffentliche Güter in Interdisziplinären Perspektiven*. Karlsruhe: KIT Scientific Publishing, 2012.

<sup>9</sup> FRIEDMANN, Wolfgang. *The Changing Structure of International Law*. New York: Columbia, 1964. SALCEDO, Juan Antonio Carrilo. *El Derecho Internacional en un Mundo en Cambio*. Madrid: Tecnos, 1985.

<sup>10</sup> BOGDANDY, Armin von; WOLFRUM, Rüdiger; BERNSTOFF, Jochen von; DANN, Philipp; GOLDMANN, Matthias (ed.). *The Exercise of Public Authority by International Institutions*. Heidelberg: Springer, 2010.

Interview VII, 2017.

Interview IX, 2017.

<sup>11</sup> Interview V, 2017.

Interview VII, 2017.

<sup>12</sup> LAÏDI, Zaki. *La Norme sans la Force: L'énigme de la puissance européenne*. Paris: SciencesPo, 2008. BOGDANDY, Armin von; GOLDMANN, Matthias; VENZKE, Ingo. From Public International to International Public Law: Translating World Public Opinion into International Public Authority. *European Journal of International Law*, v. 28, n. 1, p. 115-145, 2017. GUZMAN, Andrew T. *How International Law Works*. Oxford: Oxford University Press, 2008.

<sup>13</sup> Interview VI, 2017.

Interview VIII, 2017.

Interview X, 2017.

<sup>14</sup> GABAS, Jean-Jacques; HUGON, Philippe. Les Biens Publics Mondiaux et la Coopération Internationale. *L'Économie Politique*, n. 12, p. 19-31, 2001. COGOLATI, Samuel; HAMID, Linda; VANSTAPPEN, Nils. *Global public goods and democracy: what role for international law?* KU Leuven Working Paper. n. 159, May 2015. Available at: [https://ghum.kuleuven.be/ggs/publications/working\\_papers/2015/159cogolatihamidvanstappen](https://ghum.kuleuven.be/ggs/publications/working_papers/2015/159cogolatihamidvanstappen). Access on: 7 May. 2017.

<sup>15</sup> RAJAGOPAL, Balakrishnan. Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination. *William & Mary Law Review*, v. 49, issue 4, article 10, p. 1347-1376, 2008. SHAFFER, Gregory. International Law and Global Public Goods in a Legal Pluralist World. *The European Journal of International Law*, v. 23, n. 3, p. 669-693, 2012.

because democracy is usually associated with values<sup>16</sup>, which are differently defined - both in diachronic and spatial perspectives - within each national self-determination process<sup>17</sup>. Thus, if both national and international orders do not share objective criteria and standards on democracy and national democratic regimes<sup>18</sup>, the legal framework to assign an effectively legitimate IPA on a political GPG to an international institution should be treated with more rigorous attention.

One should not ignore that ICoC proposals deal with a discussion concerning the international protection of a political GPG. For this reason, it is important to address this discussion within a political perspective of international law<sup>19</sup>, in which not only the legal mandate and the legal enforcement of this GPG are internationally ensured, but also legitimately established. After all, no matter the importance of the goal in promoting democracy and democratic regimes worldwide in nation-States, the international control of national constitutions should not disregard the core legitimate criteria of a political life: preventing anyone from having the last word (horizontal relations)<sup>20</sup>.

<sup>16</sup> PERELMAN, Chaïm. *Lógica Jurídica*. São Paulo: Martins Editora, 2000. VIEHWEG, Theodor. *Tópica e Jurisprudência*. Porto Alegre: Sérgio Antonio Fabris Editor, 2008. p. 158-160.

<sup>17</sup> ONUMA, Yasuaki. *Direito Internacional em Perspectiva Transcivilizacional*. Belo Horizonte: Arres, 2016. WALKER, Neil. Taking Constitutionalism beyond the State. *Political Studies*, v. 56, n. 3, p. 519-543, 2008.

<sup>18</sup> GIANNATTASIO, Arthur. A juridificação de conflitos políticos no direito internacional público contemporâneo: uma leitura política da paz pelo direito de Hans Kelsen a partir do pensamento político de Claude Lefort. *Revista de Direito Internacional*, v. 12, p. 57-76, 2016c.

GIANNATTASIO, Arthur. La verità effettuale y la paz en el derecho de la integración europea: un análisis político del diseño jurídico-institucional de la Comunidad Europea del Carbón y del Acero (CECA). In: ACOSTA ALVARADO, Paola; DELPIANO LIRA, Cristián (ed.). *América Latina y el Orden Mundial Contemporáneo*. Bogotá: Universidad Externado de Colombia/Sociedade Latinoamericana de Derecho Internacional, 2017. p. 205-238.

<sup>19</sup> GIANNATTASIO, Arthur. Direito Internacional Público Contemporâneo e Tribunal Constitucional Internacional: A Radicalização da Política e a Transcendentalização da Origem dos Estatutos Jurídico-Políticos Nacionais. In: OLIVEIRA, Paulo (ed.). *Temas avançados de Direito Internacional e Direitos Humanos*. Salvador: Faculdade Baiana de Direito, Juspodivm, 2016a.

<sup>20</sup> WOLFF, Francis. *Aristóteles e a Política*. São Paulo: Discurso, 1999. CARDOSO, Sérgio. Que República? Notas sobre a Tradição do Governo Misto. In: BIGNOTTO, Newton (org.). *Pensar a República*. Belo Horizonte: UFMG, 2002. CARDOSO, Sérgio. Por que República? Notas sobre o Ideário Democrático e Republicano. In: CARDOSO, Sérgio (org.). *Retorno ao Republicanismo*. Belo Horizonte: UFMG, 2004.

Thus, if ICoC proposals are directed to create a new international institution entitled to exercise an IPA which might affect directly domestic self-determination processes, it is important to understand if such proposals are concerned with the maintenance of the horizontal relations within States while ICoC exercises its judicial roles (advisory and contentious competences)<sup>21</sup>.

The legal framework of the ICoC proposals will be then examined regarding, not only (i) the legal mandate or (ii) the enforcement mechanisms which each proposal presents, but mainly taking into account (iii) the way each proposal grounds the political legitimacy of such institution in the exercise of its IPA. The idea is then to strengthen the legitimacy of an ICoC proposal by pushing it far-beyond the simple broad goal of protecting democracy in national constitutions – a political GPG.

In this sense, we agree with the argument that political legitimacy lies not only on abstract and undefined legitimate ends (politics as goal), but also on a concrete institutional design in which foreseeable means seek to ensure a legitimate outcome (politics as a procedure)<sup>22</sup>. In other words, the legitimate exercise of an IPA must not only seek democracy, but also operate (decision-making procedure, enforcement of decisions) according to accountability mechanisms (vertical-horizontal and social-political)<sup>23</sup>.

Vertical accountability is a concept which indicates the control of the legitimacy of public authorities

<sup>21</sup> BOGDANDY, Armin von.; VENZKE, Ingo. *International Judicial Lawmaking*. Heidelberg: Springer, 2012.

<sup>22</sup> CARDOSO, Sérgio. Que República? Notas sobre a Tradição do Governo Misto. In: BIGNOTTO, Newton (org.). *Pensar a República*. Belo Horizonte: UFMG, 2002. CARDOSO, Sérgio. Por que República? Notas sobre o Ideário Democrático e Republicano. In: CARDOSO, Sérgio (org.). *Retorno ao Republicanismo*. Belo Horizonte: UFMG, 2004.

<sup>23</sup> O'DONNELL, Guillermo. Accountability Horizontal e Novas Poliaquias. *Revista Lua Nova*, São Paulo, n. 44, p. 27-54, 1998. O'DONNELL, Guillermo. Accountability horizontal: la institucionalización legal de la desconfianza política. *Revista Española de Ciencia Política*. n. 11, p. 11-31, oct. 2004. For a broader distinction between horizontal and vertical accountability mechanisms. See DURAN, Camila. *A moldura jurídica da política monetária: um estudo de caso*. Tese (Doutorado) - Faculdade de Direito da Universidade de São Paulo, São Paulo, 2012, for the distinction between political and social accountability. Although we are aware that the concepts do not coincide equally in both authors, we understand that they conceptually complement each other in the assessment of the legitimacy in the exercise of a public authority. Thus, our analysis combines the four concepts to understand the ICoC proposals.

mainly by two mechanisms: (i) election of representatives and (ii) freedom of association and transparency. In the first one, voters are empowered by the possibility to vote against or in favor of candidates, in order to present a political sign of punishment or reward of those who stand for election. In the second one, individuals, media and members of civil society should be able to access information and to present claims before public authorities concerning their actions<sup>24</sup>.

Horizontal accountability refers to the legal assignment of checks and balances opportunities to different public agencies, in order to let each of them to supervise and block the action of the other. The success of these mechanisms' rests on the effective capability and willingness of each public agency to perform these actions. In other words, it is not enough to explicitly provide such powers in legal documents: the institutional framework must assign a regular and stable source of different degrees of opportunities for autonomous and deeply intertwined possibilities of action between each public agency. To put it simple: it must provide a complex and deep interweaving of rights and duties of participation and blockage one to the other (checks and balances).<sup>25</sup>

Social accountability is related to the disclosure of information from a public authority to a specific forum for public evaluation. The idea of this mechanism is to enable the public authority to present a report on its actions and to justify them in front of a specialized audience (NGOs, universities, among others) or other interest groups (media, enterprises, among others)<sup>26</sup>. Such area should be legally framed in advance, in order to allow a regular and foreseeable procedure in accordance with the action of the public authority might or not be approved by the forum. In this sense, in case of disapproval, this regular provision of this arena would at least enable reputational sanctions of the authority.

Finally, there is also the political accountability<sup>27</sup>, which operates as a complement of social accountabili-

ty mechanisms. After the disclosure of information within a forum, specialized and interest groups might be allowed to interfere in the political agenda by means of a regular legal procedure. Political accountability is thus related to the relationship between civil society and public authority institutions, in which citizens are entitled to take part in decision-making processes.

## 3 Main Structural Debates on ICoC Proposals

### 3.1 Legitimacy Issues: Goals as Justifications

Authors present different concrete justifications for the creation of the ICoC, but the majority of them argue that this new institution should be created to ensure a global respect of human rights, social rights, fundamental constitutional rights and duties, democracy, rule of law and respect for differences<sup>28</sup>. The idea would be to give an institutional opportunity to put in practice principles of a world constitutionalism<sup>29</sup>.

<sup>24</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 08-09, may/aug. 2016. GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 35-36, may/aug. 2016. QUEIROZ, Cristina M. M. A proposta de constituição de um Tribunal Constitucional Internacional: questões dogmáticas e institucionais. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 52, 2016. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 37, sep/dec. 2016. SILVEIRA, Alessandra. International Constitutional Court e integração (constitucional) europeia. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc – Feusp. IJI – Universidade do Porto, p. 74, 2016. CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 35-36, 2016. TAVARES, André Ramos. The role of an International Constitutional Court vis-à-vis the Inter-American Court of Human Rights and its democratic principles. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 81, 2016.

<sup>29</sup> CARDUCCI, Michele. Ter sfide per una proposta rivoluzionaria: la Corte Costituzionale Internazionale. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 18, 2016. DORES, António Pedro. A defesa da democracia e dos direitos humanos pelo TCI apenas será possível numa

<sup>24</sup> O'DONNELL, Guillermo. Accountability Horizontal e Novas Poliaquias. *Revista Lua Nova*, São Paulo, n. 44, p. 27-54, 1998.

<sup>25</sup> O'DONNELL, Guillermo. Accountability Horizontal e Novas Poliaquias. *Revista Lua Nova*, São Paulo, n. 44, p. 40-43, 1998.

<sup>26</sup> DURAN, Camila. *A moldura jurídica da política monetária: um estudo de caso*. Tese (Doutorado) - Faculdade de Direito da Universidade de São Paulo, São Paulo, 2012. p. 84.

<sup>27</sup> DURAN, Camila. *A moldura jurídica da política monetária: um estudo de caso*. Tese (Doutorado) - Faculdade de Direito da Universidade de São Paulo, São Paulo, 2012. p. 98-102.

Indeed, for these authors, the ICoC would be created to fill an institutional gap in international legal order. If some international judicial institutions were already created to protect GPGs worldwide (Human Rights and regional protection mechanisms, prohibition of genocide and International Criminal Courts, among others), another judicial body should be created to protect also democracy, as no international authority possesses, until now, a legal and legitimate mandate to protect such GPG as a guardian of a so-called international constitutional order<sup>30 31</sup>.

According to this perspective, there are already international bodies - such as the UN Human Rights Council and the Human Rights Committee - which lack judicial powers. Thus, the ICoC would be necessary to play the role of an international supervising institution for the defense of democracy within national countries<sup>32</sup>. Thus, beyond the general goals related to the protection of GPGs, it is possible to divide the arguments concerning the “international protection of democracy worldwide” in three axes:

(i) create institutional conditions of a global refusal of dictatorships and authoritarian regimes, in order to hinder the rise of new political regimes<sup>33</sup> and to persuade current democratic countries not to give up to its democratic institutional design<sup>34</sup>;

(ii) establish an institutional alternative to supervise (a) electoral frauds, (b) breaches of democratic freedoms and (c) disrespect of national constitutions by national public authorities, as national supervision procedures (executive, legislative and judiciary powers, as well as media) are no longer reliable<sup>35</sup>; and

(iii) create an international institution concerned with the enforcement of current international legal framework related to the protection of democracy, human rights and other freedoms<sup>36</sup>.

## 3.2 Legal Issues

### 3.2.1 ICoC's Normative Basis: Legal Foundations and Grounding Decisions

The proposals discuss the normative basis of the IPA of the ICoC in two senses: (i) which legal instrument should be used to create this new international

conjuntura favorável a humanização de sociedades discriminatórias. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 19, may/aug. 2016.

<sup>30</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 09, may/aug. 2016.

<sup>31</sup> DALLARI JÚNIOR, Hélcio de Abreu. Tribunal Constitucional Internacional já! *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 02-03, may/aug. 2016.

<sup>32</sup> MENEZES, Quênia de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 679-680, jul. 2017. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 210, 214-215, 2016. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 39-44, sep/dec. 2016.

<sup>33</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto p. 35-36, 2016. DALLARI JÚNIOR, Hélcio de Abreu. Tribunal Constitucional Internacional já! *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 02-03, may/aug. 2016.

<sup>34</sup> OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal

Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 43, may/aug. 2016.

<sup>35</sup> OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 39-44, may/aug. 2016. AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado, *apud*, REIS, Cristiane de Souza. A importância do Tribunal Constitucional Internacional para a garantia dos direitos humanos dos movimentos sociais. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 52, 2016. BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 08-09, may/aug. 2016. DALLARI JÚNIOR, Hélcio de Abreu. Tribunal Constitucional Internacional já! *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 02-03, may/aug. 2016. TAVARES, André Ramos. The role of an International Constitutional Court vis-à-vis the Inter-American Court of Humans Rights and it's democratic principles. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 77-78, 2016. WALLTERSTEIN, *apud*, REIS, Cristiane de Souza. A importância do Tribunal Constitucional Internacional para a garantia dos direitos humanos dos movimentos sociais. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 52, sep/dec. 2016.

<sup>36</sup> OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 39-44, may/aug. 2016. DORES, António Pedro. A defesa da democracia e dos direitos humanos pelo TCI apenas será possível numa conjuntura favorável a humanização de sociedades discriminatórias. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 20, may/aug. 2016. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 214-215, 2016.

institution and establish its competences (advisory and contentious)? and (ii) on which legal basis should this new international institution ground its legal opinions and judicial decisions?

The first question is addressed within the same perspective: an international treaty should be created in order to establish a clear legal mandate for the exercise of the IPA by the ICoC. The idea is that this constitutive document should stipulate clearly its principles, foundations and objectives by means of a modern and understandable language<sup>37</sup>. It is under dispute whether the UN would be the main actor in institutionalizing the ICoC<sup>38</sup>.

Be as it may, the authors agree that the political basis of this constitutive treaty would be constructed within a post-national perspective. After all, the premise for the creation of the ICoC would be the “(...) existence of an ‘international community’ personified, bearer of universal common values and of own and autonomous institutions of the politics of the States. *Res Publica*, in short”<sup>39</sup>.

In this sense, considering that maybe not all States would be State-parties to this treaty and that States probably present reservations to the treaty<sup>40</sup>, according to the proposals, the mere ratification by the States should not be regarded as enough: there should be a kind of broader global constituent power. Thus, for these authors, less relevance should be given to States and its political interests and international mechanisms should invite civil society to this international order - such as the example provided by the European Convention on Recognition of the Legal Personality of Non-Governmental International Organizations<sup>41</sup>.

As for the second question, the answer is a little more complex. There is not an agreement between the authors, as they are not able to find a common point of view concerning the legal framework in accordance with ICoC should exercise its IPA: (i) a mixture of national and international legal standards, (ii) purely international legal standards (international constitution), such as (a) international treaties, (b) international principles, or even (c) an international common law, all of them with a prevalence over the domestic legal systems<sup>42</sup>. Yet it is important to highlight that there is no consensus on the necessity of an international constitution as the legal basis for the IPA of the ICoC<sup>43</sup>.

Indeed, some authors argue that the national self-determination processes should be evaluated according to the countries’ own constitutional norms and to the international legal standards to which they are bound. ICoC would then apply a set of guidelines and standards that would be a parameter for resolving these national political conflicts by means of encompassing local and international legal standards<sup>44</sup>.

However other authors understand that there is an international legal framework which should be used as a higher standard to evaluate national self-determination processes: a so-called material international constitution<sup>45</sup>. This informal international constitution would be based on different kinds of international legal standards concerned with core values for mankind - such as human rights, universal ethical values, democracy and the fight against corruption and transnational crimes<sup>46</sup>.

<sup>37</sup> DALLARI JÚNIOR, Hélcio de Abreu. Tribunal Constitucional Internacional já! *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 03, may/aug. 2016.

<sup>38</sup> DORES, António Pedro. A defesa da democracia e dos direitos humanos pelo TCI apenas será possível numa conjuntura favorável a humanização de sociedades discriminatórias. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 23, may/aug. 2016.

<sup>39</sup> QUEIROZ, Cristina M. M. A proposta de constituição de um Tribunal Constitucional Internacional: questões dogmáticas e institucionais. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 53-54, 2016.

<sup>40</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 10, may/aug. 2016.

<sup>41</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-

Feusp, IJI – Universidade do Porto, p. 38-39, 2016. QUEIROZ, Cristina M. M. A proposta de constituição de um Tribunal Constitucional Internacional: questões dogmáticas e institucionais. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 53-54, 2016.

<sup>42</sup> OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d’Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 31-32, sep/dec. 2016.

<sup>43</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 686, jul. 2017.

<sup>44</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 09, 2016

<sup>45</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 36, 2016.

<sup>46</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional

On one hand, for some authors, the international material constitution already exists and is composed by the following documents: (i) the UN Charter, (ii) the Universal Declaration of Human Rights (1948), (iii) the International Covenants on (a) Civil and Political Rights (1966) and (b) Economic, Social and Cultural Rights (1966), (iv) the Charter of the Organization of American States (1948), (v) the European Convention on Human Rights (1950), (vi) the Harare Commonwealth Declaration (1991), (vii) the Constitutive Act of the African Union (2000) and (viii) the Treaties of the European Union (2007)<sup>47</sup>. Another author argues that simply the Universal Declaration of Human Rights (UDHR) of 1948 would be a normative reference<sup>48</sup>. Be as it may, according to this perspective, those documents would authorize implicitly the creation of an ICoC.

On the other hand, other authors argue that the material international constitution derives from international legal principles related to democracy, civil liberties, presumption of innocence, equal treatment, equality, prudence, efficiency - which are commonly shared by some international documents. According to this perspective, especially in developing countries, freedom of association and freedom of expression should be explicitly emphasized within this *corpus*. In addition, in order to comply with the objective of defending democratic elections, a special concern should be taken in all countries regarding the protection of (racial, gender, sexual) minorities, not only for voters, but also for candidates<sup>49</sup>.

Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 683, jul. 2017. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 217, 2016. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 31-32, sep/dec. 2016.

<sup>47</sup> PAGLIARINI, Alexandre Coutinho. O Tribunal Constitucional Internacional para o *Mundus Novus*. *Direito Público*, Porto Alegre, v. 13, p. 17, 2017.

<sup>48</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 29, may/aug. 2016.

<sup>49</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 38, 2016. DALLARI JÚNIOR, Hélcio de Abreu. Tribunal Constitucional Internacional já! *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 02, may/aug. 2016. GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*,

A third perspective on the idea of material international constitution is related to the argument that this legal standard should be constructed via an international common law. Such international constitution would not be formally declared by states or other international actors, but created case by case by ICoC itself, after an explicit and broad legal clause within its own constitutive treaty<sup>50</sup>.

In this sense, some authors state that it is unnecessary to create a written and exhaustive document called International Constitution, since it would be enough a set of guidelines and standards to operate as applicable parameters<sup>51</sup>. The drafting of a world constitution is discarded due to practical difficulties in operating an international constituent power and to the possibility of fostering the rise of totalitarian ideals<sup>52</sup>.

### 3.2.2 ICoC's Institutional Design: Reforming the UN Charter

According to Marzouki's original proposal, the ICoC would be created similarly to the International Criminal Court (ICC), as a logical complement to its institutional mission. The ICoC should be created then as an extension of the UN mechanisms for the protection of human rights<sup>53</sup>. The ICoC would thus be created by the

São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 31-32, may/aug. 2016. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 31-32, sep/dec. 2016. TAVARES, André Ramos. The role of an International Constitutional Court vis-à-vis the Inter-American Court of Human Rights and its democratic principles. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 80, 2016.

<sup>50</sup> CARDUCCI, Michele. Ter sfide per una proposta rivoluzionaria: la Corte Costituzionale Internazionale. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 17, 2016. OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 41-44, may/aug. 2016.

<sup>51</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 09, 2016

<sup>52</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 35, 2016.

<sup>53</sup> NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p.

UN and other international tribunals, but at the same time would be competent to act independently<sup>54</sup>.

According to this perspective, UN Charter should be reformed to operate as an effective international constituent power structured in accordance with a parliamentary political regime. First of all, a bicameral World Congress should be created and should be composed by (i) an Upper House (or Confederate Senate), in which each Member State would elect a senator via popular vote, and (ii) a World Democratic Parliament, in which each Member State would elect representatives according to their demographic density. The representatives elected to the bicameral World Congress would have the prerogative to elect the UN Office of Government and a Prime Minister<sup>55</sup>.

ICoC would be then a third international court within UN's new Charter: (i) ICJ would continue to be responsible for judging States, (ii) ICC would still be competent for judging individuals responsible for committing core crimes, and (iii) ICoC would have advisory and contentious competences concerning the protection of democracy worldwide<sup>56</sup>.

212-215, 2016.

<sup>54</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 686, jul. 2017.

<sup>55</sup> PAGLIARINI, Alexandre Coutinho. O Tribunal Constitucional Internacional para o *Mundus Novus*. *Direito Público*, Porto Alegre, v. 13, p. 18-19, 2017.

<sup>56</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 09-10, 2016.

CARDUCCI, Michele. Ter sfide per una proposta rivoluzionaria: la Corte Costituzionale Internazionale. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 17-18, 2016. CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 38, 2016. AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado, *apud*, REIS, Cristiane de Souza. A importância do Tribunal Constitucional Internacional para a garantia dos direitos humanos dos movimentos sociais. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 52, sep/dec. 2016. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016. MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 686, jul. 2017.

Besides mediation<sup>57</sup>, arbitration or conciliation<sup>58</sup> powers, there is a consensus among authors to grant to the ICoC an IPA via advisory and contentious powers concerning the protection of Human Rights and democracy. However, there is no consensus on the range of such powers. Legal scholarship is roughly divided according to two main trends: (i) a mere abstract role, that is, an international power created only to tackle national norms and decisions (international judicial review), or (ii) a concrete role, that is, an international power which is not only exercised to deal with national norms and decisions (international judicial review), but also to judge individuals and national institutions (international responsibility).

In this sense, some authors<sup>59</sup> argue that the ICoC should possess mandatory interpretation powers to evaluate and review national norms and decisions from national judges. ICoC would then play an abstract role, as it would behave as an international judicial body directed to review national norms and decisions from any national judge - including the Supreme Court - based on the idea of international constitution<sup>60</sup>.

<sup>57</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 38-39, 2016.

<sup>58</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 10, may/aug. 2016.

<sup>59</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 10, may/aug. 2016. PAGLIARINI, Alexandre Coutinho. O Tribunal Constitucional Internacional para o *Mundus Novus*. *Direito Público*, Porto Alegre, v. 13, p. 19, 2017. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016. OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 43, may/aug. 2016. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 31-32, sep/dec. 2016.

<sup>60</sup> BANDEIRA, Gonçalo S. de Melo. Tribunal Constitucional Internacional – auto de ciência. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 10, may/aug. 2016. GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 32-33, may/aug. 2016. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016. PAGLIARINI, Alexandre Coutinho. O Tribunal Con-

The judicial control of the ICoC would be abstract, as it would not focus on facts, people or States: rather, its role would be to ensure worldwide a global uniformity of national rules and decisions in accordance with the idea of international constitution<sup>61</sup>. And, in case of violation of democratic principles or fraud in elections, ICoC should be entitled with powers to invalidate them by means of a final decision<sup>62</sup>.

Another branch of this abstract role would be the advisory function - one of the greatest innovations of ICoC<sup>63</sup>. The idea is to entitle ICoC to formulate opinions on amendments of national constitutions and of national electoral legislation - an activity that cannot be exercised by the national constitutional courts<sup>64</sup>. Such advisory competence would be exercised in order to promote cohesion, coherence and integration between national decisions and ICoC decisions<sup>65</sup>.

Some authors add to this abstract role of the ICoC a concrete one: this new international Court should also be entitled with powers to judge both individuals and States worldwide<sup>66</sup>. In this sense, ICoC would then fill

the gaps of the two other courts (ICC and ICJ), as it would be allowed to exercise its judicial powers towards non-member countries of ICJ and towards nationals of non-member countries of the ICC when judging rupture of democracy and Human Rights violation<sup>67</sup>.

Finally, there is a consensus among authors that the access to ICoC should be the most democratic as possible. In other words, the broadest range of entities should be entitled to submit a demand to the ICoC: States, international organizations, representatives of civil society<sup>68</sup>, NGOs, political parties, international associations, trade unions and individuals<sup>69</sup>.

### 3.2.3 The Election of Judges to the ICoC

Although not all the authors present a clear proposal on the election procedure of judges to the ICoC, some criteria - such as moral integrity, experience<sup>70</sup>, legal knowledge<sup>71</sup> and extensive interdisciplinary knowledge to be attentive to local particularities of each location<sup>72</sup> - are usually emphasized among the authors. The main objective is to ensure independence<sup>73</sup> and impartiality<sup>74</sup>

stitucional Internacional para o *Mundus Novus*. *Direito Público*, Porto Alegre, v. 13, p. 19, 2017.

<sup>61</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 09, 2016. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 31-32, 43, sep/dec. 2016.

<sup>62</sup> NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016.

<sup>63</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades - Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 38, 2016.

<sup>64</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades - Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 38-39, 2016. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016.

<sup>65</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 09, 2016. MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 686, jul. 2017. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016.

<sup>66</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional

Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 682, jul. 2017.

<sup>67</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 695, jul. 2017.

<sup>68</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades - Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 38-39, 2016.

<sup>69</sup> NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016.

<sup>70</sup> NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 216-217, 2016. CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades - Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 40, 2016.

<sup>71</sup> OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autònoma de Barcelona, n. 38, p. 31, 43, sep/dec. 2016.

<sup>72</sup> DALLARI JÚNIOR, Hélcio de Abreu. Tribunal Constitucional Internacional já! *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, n. 41, p. 03, may/aug. 2016.

<sup>73</sup> QUEIROZ, Cristina M. M. A proposta de constituição de um Tribunal Constitucional Internacional: questões dogmáticas e institucionais. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 52, 2016.

<sup>74</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos hu-

among judges while deciding a case – and, for this reason, professional prerogatives, incompatibilities and impediments of judges is essential for ICoC to exercise its IPA as neutral and impartially as possible<sup>75</sup>.

The representativeness of the States is a common concern within legal scholarship – as heterogeneity is regarded as an indispensable condition for the effectiveness<sup>76</sup>, the neutrality and the independence of the ICoC<sup>77</sup>. Thus, these authors argue that judges should be elected also based on an equitable representation of various legal systems<sup>78</sup>. In essence, the idea is to ensure that countries from the five continents must be represented – but with a special concern with the representativeness of developing and emerging countries<sup>79</sup>. The idea is to establish a legal framework of a new IPA which might not strengthen the submission of peripheral countries to the central ones<sup>80</sup>.

There are two broad proposals concerning the election procedure of judges to the ICoC. The judges should be chosen by the UN General Assembly, (i) either based on a list previously presented by an electoral college composed by law experts, judges of the ICJ and of the ICC and members of the UN Human Rights

Committee<sup>81</sup>, (ii) or based on a list prepared by a committee – composed by ICJ and ICC judges and members from the International Law Commission, which would select candidates nominated previously by each UN member state<sup>82</sup>.

### 3.3 Enforcement Issues: The relationship between ICoC and State sovereignty

The debate concerning the effectiveness of ICoC decisions is related to the limits which its enforcement mechanisms might encounter when facing the sovereignty of States – the usual excuse for the noncompliance with international commitments.

The authors agree with the idea that the concept of sovereignty is no longer the same as before and must be re-structured according to the globalized world<sup>83</sup>. According to this perspective, this concept should be regarded as playing an important role in the formulation of global constitutionalism: there would be no abolition of internal constitutional, but a wider goal of institutionalizing a global constitution defended by an international organization – ICoC<sup>84</sup>. In other words, ICoC would not overlap the national constitutions; rather, it would work on them, based on international constitu-

manos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 686, jul. 2017.

<sup>75</sup> OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autônoma de Barcelona, n. 38, p. 31, 43, sep/dec. 2016.

<sup>76</sup> GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 32-33, may/aug. 2016.

<sup>77</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 686, jul. 2017. OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autônoma de Barcelona, n. 38, p. 31, sep/dec. 2016.

<sup>78</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 40, 2016.

<sup>79</sup> GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 32-33, may/aug. 2016.

<sup>80</sup> GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 36, may/aug. 2016.

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<sup>81</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 40, 2016.

<sup>82</sup> NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 215, 2016.

<sup>83</sup> CUNHA, Paulo Ferreira da. Dos soberanismos às interconstitucionalidades – Por uma Corte Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, p. 26, 31-32, 2016. GRILLO, Marcelo Gomes Franco. O Tribunal Constitucional Internacional e a modernidade jurídica: um passo adiante e alguns passos atrás. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 30, 34, may/aug. 2016.

OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI – Universidade do Porto, n. 41, p. 41, may/aug. 2016. PAGLIARINI, Alexandre Coutinho. O Tribunal Constitucional Internacional para o *Mundus Novus*. *Direito Público*, Porto Alegre, v. 13, p. 16-17, 2017.

RANGEL, *apud*, SILVEIRA, Alessandra. International Constitutional Court e integração (constitucional) europeia. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc – Feusp. IJI – Universidade do Porto, p. 72, 2016.

<sup>84</sup> OLIVEIRA, Frederico Batista de. Tribunal Constitucional Internacional: uma proposta hermenêutica. *Revista Internacional d'Humanitats*, CEMOrOc-Feusp, Universidade Autônoma de Barcelona, n. 38, p. 29, 41, sep/dec. 2016.

tional principles, precisely to affirm and refine national constitutions<sup>85</sup>.

In this sense, these authors argue that sovereignty will not be violated through the actions of ICoC. After all, if the UN Charter represents the development of international law towards a global constitutionalism, ICoC would not interfere with State sovereignty - rather, it would ensure respect for a freely ratified international commitment<sup>86</sup>. This common constitutional jurisdiction would be then an international tool to reinforce States willingness towards a truly global life. The consequence would be, not the breakdown of State sovereignty, but the increase of an international public sense.

In any case, there is a consensus among authors concerning the impossibility of a direct action by the ICoC against States. Many authors emphasize the need to exhaust the available internal judicial appeals<sup>87</sup> before resorting to the ICoC<sup>88</sup>. In this sense, ICoC would function as an *ultima ratio* tool endowed with supranational competence<sup>89</sup>. It is also argued that the ICoC will only have jurisdiction when the State is not able to solve the issue by itself<sup>90</sup>.

However, it should be emphasized that one author states that ICoC should have its own enforcement mechanisms via hard power resources. According to this ar-

gument, the only tool which would ensure effectiveness to its decisions would be the direct use of force by the ICoC. For this reason, this author argues that the reform of the UN Charter should create also an independent and exclusive military body to the UN, which could be used by ICoC - especially against totalitarian regimes<sup>91</sup>. Still, many authors do not agree with this idea<sup>92</sup>.

## 4 Discussion

Although the scholars of the ICoC state that the proposal was presented to the International Law Commission, the empirical research revealed that the document does not exist and is not even being discussed in this body. There is a difficulty of effective access to the exact terms of the debate, since there is no condition to promote an effective open discussion in the public sphere - an interesting contradiction for a project that seeks to promote democracy across the globe. At the same time, there are several numbers of ICoC proposals - and authors do not appear to be in consensus.

Apart from these first conclusions, after the results presented above, it is possible to perceive that few ICoC proposals are concerned with its legitimacy according to the four dimensions of accountability mechanisms (horizontal, vertical, political and social). Although some proposals develop arguments for transparency mechanisms and representativeness criteria for the election of judges, those proposals do not fit entirely the whole conditions to ensure a broader legitimacy of an IPA: after all, not only a final and precise ICoC proposal does not exist, but also none of the ones above examined address the complexities of accountability mechanisms.

## 5 Conclusion

Former Tunisian President Mohamed MARZOUKI proposed in 2012, 2013 and 2014 to the General As-

<sup>85</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 08-09, 2016.

<sup>86</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 682-684, jul. 2017.

<sup>87</sup> OLIVEIRA, Maria Lucia de Paula. A ideia de um Tribunal Constitucional Internacional: da utopia à realidade. *Notandum*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, n. 41, p. 41, may/aug. 2016. NASRAWIN, Laith K. An International Constitutional Court: future roles & challenges. *Digest of Middle East Studies*, v. 25, n. 2, p. 221-222, 2016.

<sup>88</sup> TAVARES, André Ramos. The role of an International Constitutional Court vis-à-vis the Inter-American Court of Human Rights and its democratic principles. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 79, 2016.

<sup>89</sup> AQUINO, Sérgio Ricardo Fernandes; RIBEIRO, Talvanni Machado. Fundamentos para a viabilidade do Tribunal Constitucional Internacional. *International Studies on Law and Education*, São Paulo/Porto, CEMOrOc-Feusp, IJI - Universidade do Porto, p. 09, 2016.

<sup>90</sup> MENEZES, Quênída de Rezende. Um Tribunal Constitucional Internacional para garantir os direitos democráticos e os direitos humanos. *Revista Direito GV*, São Paulo, v. 13, n. 2, p. 691, jul. 2017.

<sup>91</sup> Interview XII, 2017

<sup>92</sup> Interview XIII, 2017

CHEMILLIER-GENDREAU, Monique. Le Projet de Cour Constitutionnelle: Un Espoir de Garantie Internationale pour les Mouvements Sociaux Porteurs de Démocratie. In: SAHIL, Fatiha; EL OUAZZANI, Abdelmalek; PETERS, Anne (dir.). *Droit et Mouvements Sociaux: Quelles Interactions? Le Cas des Revoltes dans le Monde Arabe*. Toulouse: Université Toulouse Capitole, 2014. p. 9-17.

sembly of the UN the creation of ICoC. The draft of its Statute - not effectively presented to the International Law Commission of the UN - would theoretically provide for its competence to judge whether national constitutions are in conformity with democratic and human rights.

The creation of an ICoC is a discourse that follows a public paradigm of International Law - International Public Law. And in this perspective, international entities - such as International Courts - are constituted by international law as International Public Authorities (IPAs). This means that they are established as authorities with a mission to globally protect sensitive public goods for international relations - and, for this, they have impact on the dimensions of individual and collective freedoms.

From a theoretical and empirical qualitative research based on the contemporary discussions about the ICoC (primary and secondary sources), it was possible to evaluate the proposals originally formulated by the Marzouki Group and to criticize its limits. It was possible to perceive that they do not address effectively legitimacy issues while they try to formulate a legal structure to the mandate of this IPA.

Thus, although the idea of an ICoC is interesting, we argue that the current proposal is incomplete, as it lacks democratic participation in its public discussion before the ILC and in its institutional design. Despite a legitimate purpose (preservation of Human Rights and Democracy) the creation of an ICoC does not seem to follow procedures that meet the criteria of democratic legitimacy.

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