The Edward J. Bloustein Jurisprudence Lecture

DOES THE WORLD NEED AN INTERNATIONAL CONSTITUTIONAL COURT?

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Today democracy is declining around the world, and so is faith in domestic institutions. Many strategies have been suggested to fight back against the tide of authoritarianism, but the idea of creating an International Constitutional Court has yet to catch fire among defenders of democracy. In this lecture—delivered as the Edward J. Bloustein Jurisprudence Lecture at Rutgers University on May 18, 2022—I explore the origins of the proposal for an International Constitutional Court, I discuss the structure and powers of this proposed tribunal, and I evaluate how to design an International Constitutional Court for success. I conclude that the Court, if ever it is created, should be limited to issuing only advisory rulings. To be sure, creating this International Constitutional Court is a Hail Mary Play. But it may be needed now more than ever.

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INTRODUCTION—A COURT FOR THE WORLD

Today democracy is declining around the world, and so is faith in domestic institutions.[1] Defending democracy against its destruction requires a mix of proven strategies and innovative solutions to combat the forces of authoritarianism gaining strength in every region of the world. One idea has yet to catch fire among defenders of democracy: a constitutional court for the world. Creating an International Constitutional Court is admittedly a Hail Mary Play, but we should not wait until the end is near to start thinking imaginatively about what such a court would need to be successful. Who would the judges be? How would they be chosen? Who could file a suit? What powers would the Court have? And would the Court have jurisdiction over all countries?

The odds of creating an International Constitutional Court seem both long and short. They seem long because it is virtually inconceivable that the countries of the world could ever reach agreement on whether—much less on how—to create such a court. Yet the odds simultaneously seem short because there already exists an intricate web of global and regional supranational laws paired with adjudicatory bodies that offer a blueprint for how a global court could function.

In this lecture, I invite us all to consider whether it is feasible and desirable to create an International Constitutional Court. I explore the origins of the proposal for an International Constitutional Court, I discuss the structure and powers of this proposed tribunal, and I evaluate how to design an International Constitutional Court for success. I conclude that

[1] *See* Yascha Mounk & Roberto Stefan Foa, *This Is How Democracy Dies*, THE ATLANTIC (Jan. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/01/confidence-democracy-lowest-point-record/605686.

the Court, if ever it is created, should limit itself to issuing only advisory rulings designed to apply public pressure on political actors rather than binding judgments that the Court would lack the power to enforce.

I. THE MODERN ORIGINS OF THE INTERNATIONAL CONSTITUTIONAL COURT

The seeds for an International Constitutional Court were planted in a French newspaper in 1999.[2] In his provocative essay for *Libération*, Mohamed Moncef Marzouki rang the alarm on what he saw around the world: authoritarian states attacking democracy, subverting the rule of law, violating human rights, holding rigged elections to give themselves a veneer of legitimacy, and reforming the constitution to consolidate their power and to harm their opponents.[3]

A. The Project and its Purposes

Marzouki had taken the baton from George Liet-Veaux. At the height of the Second World War, Liet-Veaux exposed how political actors were exploiting formal institutions to achieve non-democratic ends.[4] For Liet-Veaux, this amounted to

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[2] Moncef Marzouki, *Une structure judiciaire supranationale et indépendante pourrait agir en cas de scrutins truqués et rappeler les États au respect des libertés : Une Cour mondiale de la démocratie*, LIBÉRATION (Nov. 8, 1999), https://www.liberation.fr/tribune/1999/11/08/une-structure-judiciaire-supranationale-et-independante-pourrait-agir-en-cas-de-scrutins-truques-et-_290047.

[3] *Id*.

[4] *See* Georges Liet-Veaux, *La "fraude à la constitution": Essai d'une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France*, 59 REVUE DU DROIT ET DE SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 116 (1943).

"fraude à la constitution," a nefarious intent to defy democratic values under the guise of strict and legalistic adherence to purportedly democratic procedures.[5] Half a century later, Marzouki reminded us all that constitutional fraud was still evident all around the world.[6] For him, here was the urgent problem facing the international community: how can we defend democracy from crafty political actors who manipulate their own legal rules while proclaiming a commitment to constitutionalism, democracy, and the rule of law?

In his essay, Marzouki sketched in broad strokes his idea for a court to protect democracy.[7] He suggested the International Court of Justice and the International Criminal Court as models for this new court, and proposed that the court should have one all-important objective in the near-term: to rule on the legality of elections around the world.[8] In the longer term, the role of this new court—which Marzouki labelled as an "International Constitutional Court"—would be to eradicate dictatorships and to guard democracy from defeat.[9] But Marzouki wisely wondered aloud about what body of law this new court would enforce. In other words, what jurisdictional authority would this International Constitutional Court exercise? He had an answer.

The new International Constitutional Court would be the guardian of the three major texts of higher law in global

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[5] *Id.*
[6] Marzouki, *supra* note 2.
[7] *See generally id.*
[8] Marzouki did not suggest any regional supranational courts as models for the International Constitutional Court, though he certainly could have. I return to this idea in a subsequent section of this lecture.
[9] Marzouki, *supra* note 2.

governance: (1) the Universal Declaration of Human Rights;[10] (2) the International Covenant on Civil and Political Rights;[11] and (3) the International Covenant on Economic, Social and Cultural Rights.[12] Marzouki saw in these three higher laws a robust commitment to universal values, foundational moral principles, and specific directives for state actors that would together set a standard for all states to follow.[13] The role of the new International Constitutional Court would be to defend these values, principles, and directives.

B. Global Trends in Democracy

Two major trends have emerged in the years since Marzouki published his pivotal essay on the pressing need for an International Constitutional Court. First, Marzouki was proven right: the problem of constitutional fraud has only worsened. Democracy has declined every year since 2006, plunging the world into a long democratic recession.[14] This trend shows no sign of reversal; on the contrary, the global decline in democracy has only grown steeper and faster.[15] Today, only 6.4 percent of the world lives in a full

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[10] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).
[11] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
[12] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[13] Marzouki, *supra* note 2.
[14] *See* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE (Elisha Aaron et al. eds., 2021).
[15] *New Report: The Global Decline in Democracy has Accelerated*, FREEDOM HOUSE (Mar. 3, 2021), https://freedomhouse.org/article/new-report-global-decline-democracy-has-accelerated.

democracy.[16] Dictatorships are far more populous than democracies: dictatorships now govern 70 percent of the world, pulling us back to the lowest levels of democratic governance since 1989, before the fall of the Berlin Wall.[17] Sadly for the world, the verdict is undeniable: democracy is losing all over the globe.[18]

The second trend is a direct response to the first. Scholars and political actors have turned their attention to diagnosing the problem of constitutional fraud and brainstorming ways to rescue democracy. This second trend is a direct response to the first. The phenomenon of "abusive constitutionalism" is the direct descendant of "fraude à la constitution," as it warns us that "the core problem, then, is that it is fairly easy to construct a regime that looks democratic but in actuality is not fully democratic."[19] Solutions to the problem are hard to find because it is possible for authoritarians lawfully and constitutionally to "use of the mechanisms of constitutional change in order to make a state significantly less democratic than it was before."[20] These constitutional changes sometimes slice so deeply into the heart of the constitution that we cannot call them mere constitutional amendments; we must call them "constitutional dismemberments," because they do violence to one or more of a constitution's essential features, for instance

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[16] *See* ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2021: THE CHINA CHALLENGE 4 (2022).
[17] VANESSA A. BOESE ET AL., AUTOCRATIZATION CHANGING NATURE? DEMOCRACY REPORT 2022 6 (Vanessa A. Boese & Staffan I. Lindburg eds., 2022).
[18] *See* German Lopez, *Democracy is Losing*, VOX (Nov. 19, 2021), https://www.vox.com/the-weeds/22791528/biden-democracy-freedom-house-build-back-better.
[19] David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 200 (2013).
[20] *Id*. at 195.

its fundamental rights, its basic structure, or a core feature of its identity.[21] The puzzle, then, is how to spot and stop "autocratic legalism" before it is too late.[22]

We now have academic resources at our disposal to identify threats to constitutionalism, to defeat authoritarianism, and to build safeguards for democracy.[23] In addition, the Biden Administration's new Summit for Democracy and its associated initiatives send strong signals to autocrats that democratic leaders around the world are joining forces to take deliberate steps "toward global democratic renewal."[24] However, among the many strategies for fighting authoritarianism, the idea of an International Constitutional Court has yet to gain support from defenders of democracy.

II. DESIGNING AN INTERNATIONAL CONSTITUTIONAL COURT

From the day Marzouki published his powerful essay on establishing an International Constitutional Court, he never relented on his idea for a new global tribunal. He was a devoted democrat, a committed constitutionalist, and a champion of

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[21] *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 84 (2019).

[22] *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

[23] *See*, *e.g.*, ANNE APPLEBAUM, TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM (2020); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019); MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY (2021).

[24] Press Release, The White House, Summit for Democracy Summary of Proceedings (Dec. 23, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/summit-for-democracy-summary-of-proceedings.

human rights.[25] But there was little he could do to put into motion the creation of the Court. After all, he was an essayist, trained as a physician, with no official executive role in government.[26]

Things changed twelve years later in 2011 when Marzouki became President of Tunisia.[27] Soon after he was sworn into office, he convened and chaired an *Ad Hoc Committee for the Establishment of an International Constitutional Court*.[28] Over a decade after Marzouki had first suggested this tribunal, he finally found a larger platform to bring his idea closer toward reality.

A. The Architecture of the Court

His Committee issued an impressive report explaining why and how to create the Court.[29] It is worth reviewing the more technical aspects of the Committee's vision for an International

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[25] For examples of Marzouki's advocacy and scholarship in human rights, *see* Moncef Marzouki, *Mondialisation, santé et droits de l'homme au Sud et au Nord*, 15 SANTÉ PUBLIQUE 283 (2003); Moncef Marzouki, *Le non-engagement scientifique pour le respect des droits fondamentaux de la personne*, 13 SANTÉ PUBLIQUE 3 (2001); Moncef Marzouki, *Thoughts from the Human Rights Perspective*, 21 CHILD ABUSE & NEGLECT: INT'L J. 117 (1997).

[26] For a short biography of Marzouki around the time he became president, *see* David Kenner, *Meet the New President of Tunisia*, FOREIGN POL'Y (Nov. 16, 2011), https://foreignpolicy.com/2011/11/16/meet-the-new-president-of-tunisia.

[27] Zied M'hirsi, *Tunisia Swears in New President*, CNN (Dec. 13, 2011), https://www.cnn.com/2011/12/13/world/meast/tunisia-president/index.html.

[28] Laith K. Naswarin, *An International Constitutional Court: Future Roles and Challenges*, 25 DIG. OF MIDDLE E. STUD. 210, 211 (2016).

[29] AD HOC COMMITTEE FOR THE ESTABLISHMENT OF AN INTERNATIONAL CONSTITUTIONAL COURT, PROJECT OF THE ESTABLISHMENT OF AN INTERNATIONAL CONSTITUTIONAL COURT (2013).

Constitutional Court, including its composition, function, jurisdiction, and authority. Some of us may be underwhelmed by these details, while others will see great promise in its broad strokes. Most, I suspect, are likely to fall somewhere in between, which is where I find myself.

The Court would have 21 judges elected by the General Assembly of the United Nations ("UN").[30] The Assembly would select these 21 judges from a closed list of 42 candidates chosen by a college of judges that would include representatives from the International Court of Justice and the International Criminal Court.[31] Those 42 candidates would be drawn from a list of roughly 200 nominees, one from each of the member states in the UN.[32]

The Court would moreover have two principal functions: giving advice and resolving disputes. In its advice-giving function, the Court would issue advisory opinions at the request of governments, political parties, professional groups, non-governmental organizations, and multinational organizations at the international, regional, or sub-regional level.[33] The Court would be authorized to give advice on texts or draft texts related to democracy and rights.[34] If the Court determined that a given petitioner has standing, the Court would issue a declaration on whether the text is consistent with democracy and rights.[35] If the Court wished, it could suggest revisions to the text in order to bring the text into conformity

[30] *Id*. at 18.
[31] *Id*.
[32] *Id*.
[33] *Id*. at 19.
[34] *Id*.
[35] *Id*.

with its standards.[36] The Court would have six months to issue its opinion.[37]

In its dispute-resolution function, the Court would rule on what the report defined as "serious violations of democratic principles and democratic conditions for elections."[38] The Court could hear complaints from political parties, professional groups, non-governmental organizations accredited by the state as part of an electoral process, and multinational organizations at the international, regional, or sub-regional level.[39] The Court could be petitioned only after the complaint had been evaluated through all available domestic avenues.[40] When a complaint was lodged with the Court, the Court could attempt to mediate the dispute.[41] Failing that, the Court would issue a judgment on whether the acts or facts respect democracy and rights.[42] The judgment would be intended to bind the state implicated in the dispute, meaning that the state would have to implement the ruling of the Court.[43]

In exercising both of these functions—advice-giving and dispute-resolution—the Court would be guided by what the report described as "the principles and rules relating to democracy and universal and regional civil liberties."[44] But what exactly would democracy demand, and which civil liberties would the Court protect? The jurisdiction of the Court is to extend broadly around the world to require the Court to

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[36] *Id*.
[37] *Id.*
[38] *Id*.
[39] *Id*.
[40] *Id*. at 20.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.

enforce relevant rules in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Treaty on European Union, the European Convention on Human Rights, the Charter of the Organization of American States, the American Convention on Human Rights, the Inter-American Democratic Charter, the Constitutive Act of the African Union, as well as the Harare Principles.[45]

This is a vast portfolio for any Court.

B. A Constitution for the World

According to the Committee, the impetus for an International Constitutional Court was two-fold.[46] First, states should be held accountable for how well or poorly they fulfill their obligation to respect "principles and rules relating to democracy, to the rule of law and to periodic, competitive and genuine elections."[47] The second impetus derives from the first: much of the world nonetheless lives in regimes that violate this obligation.[48] Authoritarian states are of course the main culprits, the ones that most blatantly breach the basics of democracy.[49] But the Committee sent a warning also to democratic states. Many of them routinely fall short of the expectations we have for democracy.[50]

Neither of those two points is controversial: states have an obligation to respect democracy, but many do not fulfill that obligation. But what *is* controversial is the long-term objective

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[45] *Id*.
[46] *Id*. at 4.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 5.

the Committee has for the Court. To its credit, the Committee did not conceal that objective. The Committee stated directly and without qualification that its goal in creating this court is to internationalize constitutional law.[51] In other words, to create and to enforce a constitution for the entire world—a world constitution. Here is how the Committee explained its mission:

> Emphasis should be laid upon the internationalization of Constitutional Law, in other words upon the principles of constitutional domestic laws common to nearly all the nations. … They are norms relative to the fundamental rights and freedoms of the citizens, to the democratic basics of political power and to the organisation of the political and jurisdictional power. An international constitutionality definitely exists.[52]

The role of the Court, then, would be to identify what qualifies as international constitutional law and to enforce it in relation to the claims brought to the Court.

It is an understatement to call the Committee's proposal provocative. But it was also profoundly fascinating, largely for the questions it raised for scholars and political actors. Can there ever be a world constitution, along with an associated world court to enforce it?

III. THREE PROBLEMS: AUTHORITY, ENFORCEMENT, COORDINATION

An International Constitutional Court would confront several problems on the path to success. The first is a problem

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[51] *Id.*
[52] *Id.*

of authority that stems from its connection to the UN.

The Committee proposed to make the International Constitutional Court an organ of the UN. It would be created by the UN, its members would be chosen by the UN General Assembly, and it would apply texts of higher law anchored in the authority of the UN.

When the UN was created, there were high aspirations for it.[53] But these aspirations have so far exceeded its achievements, and there are increasing signs of disenchantment with this body.[54] The failures of the UN are well-known, and each is a real catastrophe. Rwanda, the oil for food program in Iraq, civil wars in South Sudan, Syria and Yemen, the Rohingya Crisis, Kashmir, Haiti. It is a long list. The most recent failure is Russia's attack on Ukraine—an attack that the UN is powerless to stop because Russia's permanent seat on the Security Council gives it veto power over anything the UN does.[55] All of this paints a portrait of tragedy and undermines the authority of the UN as a body that can help manage global governance. Nonetheless, I continue to believe that the UN holds hope for bringing peace, stability, and prosperity to all

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[53] *See*, *e.g.*, Ian Clark, *The Idealists' Challenge: The United Nations, Peace and Security*, 90 INT'L AFFS. 1 (2014); Mark Mazower, *The Strange Triumph of Human Rights*, 47 HIST. J. 379 (2004); Stephen C. Schlesinger, *The United Nations: The First Decade*, 81 POL. SCI. Q. 1 (1966).

[54] *See, e.g.*, DORE GOLD, TOWER OF BABBLE: HOW THE UNITED NATIONS HAS FUELED GLOBAL CHAOS (2004); DELUSIONS OF GRANDEUR: THE UNITED NATIONS AND GLOBAL INTERVENTION (Ted Galen Carpenter ed., 1997); Chris McGreal, *70 Years and Half a Trillion Dollars Later: What has the UN Achieved?*, THE GUARDIAN (Sept. 7, 2015), https://www.theguardian.com/world/2015/sep/07/what-has-the-un-achieved-united-nations.

[55] *See* Ashley Semler, *Why Isn't the UN Doing More to Stop What's Happening in Ukraine*, CNN (Apr. 15, 2022), https://www.cnn.com/2022/04/15/politics/united-nations-ukraine-russia/index.html.

parts of the world. But I may be in the minority. And that is why the idea of an International Constitutional Court housed within the UN confronts a problem of authority.

This problem of authority is significant. Yet an even bigger challenge confronting the aspiration of an International Constitutional Court may be the problem of enforcement. When the International Constitutional Court speaks, will the wrongdoer listen?

Imagine a democracy-promoting party files a claim in the International Constitutional Court arguing that a recent election in an autocratic state was undemocratic. Imagine further that the Court hears the case, and concludes that the authoritarian government engaged in clear and flagrant violations of standards of electoral fairness and integrity. Then what happens? Probably nothing. The election result is unlikely to be reversed. Nor will a new election be called. The country will continue to operate under an authoritarian state that rigs elections.

A. Will Authoritarian States Comply?

But sometimes the authoritarian state might comply, if only in a limited way. That is what happened in Burkina Faso, an authoritarian state in western Africa.[56] The story begins in October 1987, when Blaise Compaoré seized power in a coup d'état that removed President Thomas Sankara from office.[57] A few years later in 1991, Compaoré was elected president,

[56] Abdoulie Sawo, *The Chronology of Military Coup d'états and Regimes in Burkina Faso: 1980-2015*, 48 TURKISH Y.B. INT'L RELS. 1, 11 (2017).
[57] *Id*.

then again in 1998, and again in 2005 and 2010.[58] Along the way, Compaoré changed the rules of presidential eligibility to allow himself to keep running and winning.[59] He tried again in 2014 to extend his eligibility to run for a fifth consecutive term.[60] But that amendment attempt provoked riots, protests, and anger across the land. Ultimately, Compaoré resigned from the presidency.[61]

A caretaker government was installed to help manage the transition through the upcoming election.[62] During that transition, political parties worked together to create a National Council of Transition that would have legislative authority to keep the country running.[63] The Council chose to make dramatic changes to electoral eligibility for the upcoming elections.[64] It declared in a new electoral law that several categories of persons would be ineligible to run in the next election.[65] One of those categories consisted of all those who had been supportive of the former regime's efforts to violate the rules of democracy, specifically "all persons who had supported anti-constitutional change, in violation of the principle of democratic change, notably in violation of the

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[58] John Mukum Mbaku, *Burkina Faso Protests Extending Presidential Term Limits*, BROOKINGS: AFRICA IN FOCUS (Oct. 30, 2014), https://www.brookings.edu/blog/africa-in-focus/2014/10/30/burkina-faso-protests-extending-presidential-term-limits.

[59] *Id*.

[60] *Id*.

[61] Sawo, *supra* note 56, at 13.

[62] *Id*.

[63] Congrès pour la Démocratie et le Progrès (CDP) and Burkina Faso, No. ECW/CCJ/APP/19/15, Decision, ¶ 4, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (July 13, 2015), http://www.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_16_15.pdf.

[64] *Id*.

[65] *Id*.

principle of the limitation of the number of terms of political presidential power."[66]

Some of the prospective candidates who had hoped to run in the next election brought a claim to the ECOWAS Community Court of Justice along with several individual citizens.[67] ECOWAS, which stands for the "Economic Community of West African States," has its own regional supranational court.[68] Its mandate is to ensure that member states observe the law and principles they have agreed to respect.[69] The Court has jurisdiction similar in kind to what is envisioned for the International Constitutional Court.[70] The petitioners argued that this new electoral law denied them the right to participate in elections.[71] They cited the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and People's Rights, the African Charter on Democracy, Elections and Governance, as well as the ECOWAS Protocol on Democracy and Good Governance.[72]

The Court agreed with the petitioners and issued a ruling requiring Burkina Faso to allow the prospective candidates to run.[73] The Court ruled that "there is no doubt that the exclusion

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[66] *Id.*
[67] *Id.* ¶¶ 1-2.
[68] The Court is officially titled the Court of Justice of the Economic Community of West African States, known as the Community Court of Justice. For more information, *see* the Court's website at COMMUNITY COURT OF JUSTICE, http://www.courtecowas.org (last visited June 3, 2023).
[69] *Mandate and Jurisdiction*, CMTY. CT. OF JUST., http://www.courtecowas.org/mandate-and-jurisdiction-2 (last visited June 3, 2023).
[70] *Id.*
[71] Congrès pour la Démocratie et le Progrès (CDP) and Burkina Faso, *supra* note 63, ¶ 8.
[72] *Id.*
[73] *Id.* ¶¶ 14-15.

of the political parties and citizens from the forthcoming electoral race is discriminatory and hardly justifiable in law."[74] The Court added that "forbidding any organisation or person from presenting its candidature for elections, on the grounds of being politically close to an ousted regime, whereas the person concerned has not committed any particular offence, is tantamount, in the view of the Court, somewhat, to an offence for holding an opinion, which is obviously unacceptable."[75]

Shortly after the ruling, the acting president of Burkina Faso announced that the country would comply with the ruling.[76] But then the matter went to the Constitutional Council of Burkina Faso—the highest court in the country—and the Council went over the head of the international court: the Council disqualified election candidates on the basis of the electoral law that the ECOWAS Court had earlier declared invalid.[77] But the Constitutional Council did allow some of the previously disqualified candidates to run.[78] In the end, the domestic court simultaneously enforced the international court's ruling in one part while defying it substantially in another.[79]

This illustration from Burkina Faso suggests an alternative to a single, supreme International Constitutional Court. If what we care most about is compliance and enforcement, perhaps

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[74] *Id*. ¶ 28.
[75] *Id*.
[76] *Situation Nationale : Les Grandes Décisions De Michel Kafando*, CONSULAT DU BURKINA EN ESPAGNE, http://www.consulat-burkinaespagne.org/51712_fr/Situation-nationale-:-Les-grandes-d%C3%A9cisions-de-Michel-Kafando (last visited June 3, 2023).
[77] *Burkina Dismisses Election Candidates Linked to Ex-President*, NEWS24 (Aug. 30, 2015), https://www.news24.com/News24/Burkina-dismisses-election-candidates-linked-to-ex-president-20150829-2.
[78] *Id*.
[79] *Id*.

Regional Constitutional Courts might work better. The interdependence and commonalities among countries within the same region might make it more likely that a regional court of their peers could persuade a given country to comply with a ruling issued by a court rooted in the region. These countries might respond better to a homegrown local tribunal constituted of local persons than to a foreign body, located somewhere "out there" and staffed by persons not from "here." This design could transform an institution that risked being perceived as a "foreign" court into a more familiar and recognizable body. A regional constitutional court along these lines could balance the need for a distanced, arm's length evaluation of a claim of wrongdoing within a given country, while not relying on a court far, far away, unfamiliar with the local realities of the country and its people.

This idea of Regional Constitutional Courts might alleviate the problem of enforcement. Still, we might worry that Regional Constitutional Courts would fail to fulfill the single-most important objective of the proposal for an International Constitutional Court, which is to build and enforce one "World Constitution."

It is therefore worth asking: would having Regional Constitutional Courts really undermine that goal of having one World Constitution?

Perhaps not. There can be a single World Constitution, with several interpreters of that constitution, located in different parts of the world, each drawing from its own local and regional traditions and histories to implement universal principles and values. One regional constitutional court might interpret the right to free expression differently from how another interprets it. But both courts would be upholding the same right, just with local variations. This would not be unlike

the doctrine of the margin of appreciation in the European Union.[80] For better or worse, the multiplicity of interpretations of the single World Constitution might give rise to a paradox: formally, there would be one authoritative constitution of the world, but functionally, there would be more than one valid interpretation of the World Constitution.

There is also a practical reason why a system of Regional Constitutional Courts might work better than one single International Constitutional Court: there already exist tribunals around the world that operate as Constitutional Courts within their region. Current illustrations include the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights, for example. Their purposes are much the same as the ones envisioned for the International Constitutional Court.[81] Why not just improve upon this existing architecture instead of building something that could in the end be duplicative?

The existence of regional courts currently operating around the world opens the door to a different problem. Not a problem

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[80] The margin of appreciation doctrine, developed by the European Court of Human Rights, authorizes judges to exercise discretion when balancing individual rights in the European Convention of Human Rights with national laws, procedures, and interests. For a description and critique of the margin of appreciation, *see* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999).

[81] For instance, scholars have suggested that the Inter-American Court of Human Rights operates as a constitutional court. *See*, *e.g.*, Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L. J. 45, 45 (2015); Yota Negishi, *Relative Authorities: Constitutional Reasonable Resistances Against Inter-American Court's Doctrines*, 21 IURIS DICTIO 49, 50 (2018); René Urueña, *Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context*, 35 WIS. INT'L L. J. 398, 398-99 (2018).

of enforcement nor of authority, but rather a problem of coordination: How should national, regional, and international courts exercise their powers when their jurisdiction overlaps? The challenge might be especially pronounced for the Member States of the European Union. They have their own constitution, and they are subject to the jurisdiction of their own supranational courts, and now they would also have the overhang of an International Constitutional Court.

The problem of coordination would be considerably easier to overcome in countries where there is no supranational regional court operating at the moment. For instance, in the Caribbean, a majority of eligible countries have yet to accede to the appellate jurisdiction of the Caribbean Court of Justice, keeping them beyond the appellate power of this supranational regional court.[82]

Still, these are three major problems standing in the way of an International Constitutional Court: the problem of authority, the problem of enforcement, and the problem of coordination. Not to mention the problem of political will, which does not exist today to create such a court.

B. One Path Forward: Advisory Rulings

Recall that the Ad Hoc Committee suggested two functions for the Court.[83] One is to resolve disputes. That is principally what we have been discussing so far. Could an International Constitutional Court ever resolve disputes in a way that would be treated as binding, seen as legitimate, and received as valid?

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[82] *See* Stephen Vasciannie, *The Appellate Jurisdiction of the Caribbean Court of Justice*, *in* THE OXFORD HANDBOOK OF CARIBBEAN CONSTITUTIONS (Richard Albert et al. eds., 2020).
[83] *See supra* §§ II.A-B.

I doubt this is a plausible path forward for the Court, due largely to the problems I have identified: the problems of authority, enforcement, and coordination.

But the second function could be the right path forward for the Court, if indeed the Court is ever created: its advice-giving function. The Court could hear claims of wrongdoing in rights-protection, elections, or as relates more broadly to democracy. But rather than issuing an order that is unlikely to be followed, the Court would instead issue an advisory ruling outlining its understanding of the facts, along with what the Court believes democracy requires according to the expectations set out in the three fundamental texts in global governance: (1) the Universal Declaration of Human Rights; (2) the International Covenant on Civil and Political Rights: and (3) the International Covenant on Economic, Social and Cultural Rights. The jurisdiction of the Court would not change. But it would be limited to issuing advisory rulings only.[84]

One might think that this would make the Court toothless and ineffectual. Maybe, but not necessarily. Because sometimes advisory judgments can have a catalytic effect in constitutional politics.[85] They can send a strong signal of wrongdoing around which the opposition can mobilize support, about which media can write and report, and which laypersons can read for themselves to see how the conduct of incumbents in their country measures up to standards for democracy.[86]

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[84] For a discussion of advisory rulings in the context of international human rights, *see* Jorge Contesse, *The Rule of Advice in International Human Rights Law*, 115 AM. J. INT'L L. 367 (2021).

[85] For instance, it is well-understood that the *Patriation Reference* in Canada is what catalyzed the modernization of Canada's Constitution. *See* Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Can.).

[86] An illustrative example of the catalytic effect of an international court judgment involves the United Kingdom's recent reversal of policy on the

There is a formula for successful advisory rulings. The strongest advisory rulings share three properties: unanimity, specificity, and practicality. The Court should aspire to these three properties, though none would be mandatory.

First, as with ordinary judgments, it is always better if advisory rulings are unanimous. A unanimous judgment resonates more powerfully in the jurisdiction where the claim has arisen. If the Court splits 11 to 10 on whether a set of facts runs afoul of democratic standards, that will be considerably less impactful than the Court's 21 judges speaking in one voice, by a decisive margin of 21 to 0. Unanimity is a key factor in the usefulness and impact of an advisory ruling.

Second, it matters also how well the advisory ruling reflects the specificities of the history, practices, and political dynamics of the local jurisdiction.[87] The more familiar, the better—and the more likely the ruling is to be seen as relevant in that jurisdiction. Local specificities matter, and the Court's ruling, to be effective, should reflect its awareness of those local specificities.

Third, advisory rulings ought to be attentive to the practical realities—legal, political, and social—that make it difficult to fix problems in the infrastructure of democracy. Presumably if the Court issues an advisory ruling that confirms a violation of a democratic standard, the Court will state that finding and explain how and where the wrongdoer has fallen short. This is

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Chagos Islands. *See* Patrick Wintour, *UK Agrees to Negotiate with Mauritius over Handover of Chagos Islands*, THE GUARDIAN (Nov. 4, 2022), https://www.theguardian.com/world/2022/nov/03/uk-agrees-to-negotiate-with-mauritius-over-handover-of-chagos-islands.

[87] The "receptor approach" offers constructive strategies for reconciling global values with local norms. *See* Tom Zwart, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, 34 HUM. RTS. Q. 546 (2012).

an essential part of any advisory ruling the Court would issue. But the Court should also offer a roadmap for reform. How can the wrongdoer go from failing to meet the standard to satisfying that standard? How to get from here to there: from democracy-infringing to democracy-enhancing? Advisory rulings can be most effective if they make an effort to answer these questions.

Limiting an International Constitutional Court only to an advisory function would not neutralize all problems that currently undermine the call to create the Court. The problem of authority remains. But the problems of enforcement and coordination would become less pronounced in the context of advisory rulings. That might be the Court's best chance for success.

CONCLUSION—FIVE PRINCIPLES FOR AN INTERNATIONAL CONSTITUTIONAL COURT

An International Constitutional Court is a provocative idea at a time when democracy is under attack around the world. It might also be a useful shield in the fight to protect democracy.

For now, though, as we discuss this idea of a new supranational court to defend democracy, here are five guiding principles for building this International Constitutional Court.

1. Internationality: The Court must be housed in an international organization whose member states are all the countries of the world.
2. Inclusivity: This must include democracies, autocracies, and others in between. Even if autocracies are unlikely to abide by Court rulings, they must be invited to accede to the Court's jurisdiction.

3. Representativeness: The judges of the Court must represent the rich diversity of the peoples of the world, from regions to legal traditions to systems of government and beyond.
4. Independence: The Court must both be independent and be seen as independent. The selection of judges matters here: how they are selected, how long their terms last, and how and whether they may be removed before the end of their term.
5. Advice: The function of the Court must be to give non-binding advice through advisory rulings, not to issue binding rules that are likely to be both unenforceable and disregarded.

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Those are the five principles that should guide the creation of any International Constitutional Court. The idea must be refined much more granularly than how it is currently defined in the report issued ten years ago. It is certainly worth the effort, both because it is crucial to brainstorm how to defend democracy and also because it is a way to bring allies of democracy together in a productive way to build something new. Perhaps in the process we will conclude that it is an idea just not worth pursuing. Maybe we will find an even better idea. That would be a victory. A victory for democracy in your country, and mine, and around the world. But the idea of an International Constitutional Court should not be rejected without more thinking about how and whether it would work. I will continue to think about it, and I hope you will, too.