RÉPUBLIQUE TUNISIENNE
PRÉSIDENCE DE LA RÉPUBLIQUE

COMITÉ AD HOC POUR LA CRÉATION D'UNE
COUR CONSTITUTIONNELLE INTERNATIONALE

المحكمة الدستورية الدولية
INTERNATIONAL
CONSTITUTIONAL COURT

**PROJECT FOR THE ESTABLISHMENT OF**

# THE INTERNATIONAL CONSTITUTIONAL COURT

**Documents of the ICCo Ad hoc Committee**

**Tunis 2014**

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## INTRODUCTORY NOTE

Right now, the International Constitutional Court is not established yet. It is just a project that may come true within a number of years. This idea is being promoted by an *Ad hoc* committee**,** established in Tunisia in January 2012. This Committee is chaired by Dr. Moncef Marzouki, the President of the Republic of Tunisia.

## GENESIS

In 1999, Dr. Moncef Marzouki, a Tunisian dissident and human rights militant, published an article in the French newspaper "*Libération*" whose key ideas were reproduced in his book "*The Arab Pain*" (further published in 2004). In that article, he explained that the evil of dictatorship must be treated by enhancing mechanisms that promote the Rule of Law, by reducing the margin of arbitrariness in governance through the implementation of an international court mechanism.

In 2006, Professor Ben Achour Yadh developed this proposal in the conclusion of the course he gave at the International Academy of Constitutional Law (IACL).

In 2011, an Expert Committee composed of the following personalities was set up:

- Professor Yadh Ben Achour (Tunisia);
- Professor Monique Chemillier Gendreau (France);
- Mr. Ghazi Gherairi (Tunisia).

- Professor Ferhat Horchani (Tunisia);

- Professor Maurice Kamto (Cameroon);

- Professor Slim Laghmani (Tunisia);

- Professor Ahmed Mahiou (Algeria);

- Professor Christian Tomuschat (Germany);

This committee had elaborated the key texts contained in this document. The idea of a Constitutional Court then took shape.

It was decided thereafter to create an *Ad hoc* Committee chaired by the President of the Tunisian Republic and whose mission is to support the idea of establishing an International Constitutional Court. This Committee consists of:

- A Legal Commission composed of the members of the Expert Committee. Other members joined it later;

- A commission on logistics;

Other scholars of international and constitutional law throughout the world have joined the *ad hoc* committee. Their number is constantly increasing.

Mr. Ahmed Ouerfelli, Legal Adviser to the President of the Republic of Tunisia was appointed as Coordinator of the Committee while the Diplomatic Adviser to the President of the Republic of Tunisia, is responsible for the diplomatic flap.

The Committee's goal is to disseminate the idea and to ensure support for it from the Member States of the UN. Besides, it is also a project for a better future not only for Tunisia, for its Arabic, Islamic, Mediterranean and African environment, but also for all mankind.

The Committee's objective is also to immediately gather a symbolic group of 100 professors of Constitutional Law and International Law from all corners of the world, in addition to a group composed of major international figures in the field of politics, thoughts, art and sports, as well as a group of students.

Thanks to the efforts made, the initiative has gained the support of the African countries at the XXth summit of the African Union. Tunisia will continue working to obtain the support of other groups, starting with the Arab and Islamic countries in order to ensure a positive position towards the Draft Resolution which will be submitted to the 68th UN General Assembly.

# THE PROJECT

## GENERAL PRESENTATION OF THE PROJECT FOR THE ESTABLISHMENT OF AN INTERNATIONAL CONSTITUTIONAL COURT

Since the inception of the United Nations, the movement towards democracy has continued to develop and proliferate throughout the world. It has become one of the fundamental vectors of globalization. The Tunisian Revolution is an important step towards the creation of this "global democracy." It is a reminder of the inevitability of the democratic humanism and its superiority over all political doctrines based on the enslavement of man or the negation of his natural or political rights.

The creation of an International Constitutional Court is one of the key ideas of this democratic revolution. Tunisia had launched the idea of this Court since 1999. This proposal, issued during the rule of the dictatorship, was taken up after the Revolution by the President of the Republic aiming at diffusing it and enshrining it worldwide.

The idea of setting up an International Constitutional Court stemmed from two important reasons:

-The first is that democratic legitimacy is now a positive law principle, well-established and enshrined in numerous international instruments, whether universally or regionally. Now, Principles and rules relating to democracy, to the rule of law and to periodic, competitive and genuine elections count among

the obligations of all the States. The latter must fulfill them in good faith and give them full effect in their domestic legislation.

- The second reason is that many peoples are still living under dictatorships which are sometimes bloody, or under authoritarian regimes which, at the very least, have little respect for human rights and democracy guarantees. Even in regimes regarded as democratic, it is not unusual to see governments engage in breaches of their commitments in this regard. Some countries' disregard and infringement of their democratic commitments often result in serious political and social upheavals and particularly lead to violence.

In this regard, 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. Today, a specific normativity, consisting of general principals of the International Law or of conventional international norms which are materially constitutional, does exist. They are norms relative to the fundamental rights and freedoms of the citizens, to the democratic basics of political power and to the organization of the political and jurisdictional power. An international constitutionality definitely exists.

Accordingly, the legal reasons for the creation of an ICC would be mainly:

- A guarantee of the principle of democratic legitimacy. This principle has its foundation in international law. It is translated by the practice of the electoral assistance which can go so far as to grant the certification of the election results.

- A compliment to the architecture of the international institution entrusted to exercise control over the respect for Human Rights.

The United Nations proclaim, among their goals, the respect for Human Rights and fundamental freedoms. They were so preoccupied with it that after half a century of their existence,

they came to develop a considerable corpus of protective texts that bind all the States which have accepted to abide by them. The protection of human rights goes hand in hand with the development of democracy. The Universal Declaration of Human Rights in Article 21 stipulates:

- *(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
- *(2) Everyone has the right of equal access to public service in his country.*
- *(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures*".

The content of this provision was enshrined in Article 25 of the International Covenant on Civil and Political Rights.

Concerned about the application of these texts, the United Nations set up mechanisms and institutions such as the Council of Human Rights or the United Nations Committee on Human Rights. At the regional level, Human Rights Courts and Commissions have also been or are in the process established.

However, these organizations and mechanisms do not always have the power to impose measures of a judicial nature against States that do not abide with their commitments. This results in a situation of impunity and lack of democracy that the International Constitutional Court project intends to remedy. This project is, therefore, a logical extension of the United Nations action in this field.

Therefore, the establishment of an International Constitutional Court can give effect to international commitments concerning democracy, thus avoiding the resort to violence and saving people from unnecessary suffering.

The Court would apply the principles and rules relative to democracy and to universal and regional public freedoms and would be responsible for evaluation and jurisdiction:

In term of its evaluation function, the Court gives its opinions and advisory opinions on draft texts and its opinions on texts submitted to it and which are relevant to democracy and public freedoms. It can be requested for an opinion or an advisory opinion by governments, by plenary bodies of universal, regional or sub-regional international organizations, by NGOs, by political parties, national associations and professional organizations.

In terms of its jurisdictional function, the Court rules on the serious violations of the democratic principles and the democratic conditions of the elections subject to the exhaustion of domestic remedies. Actions can be brought before the Court by individuals with support petition, by political parties, national associations and professional organizations, by plenary bodies of universal, regional or sub-regional international organizations, by NGOs accredited by the State in the context of an electoral process. The Court issues decisions of conformity or non-conformity with the act or the facts charged of infringing principles and rules relating to democracy and public freedoms. The State concerned shall give effect to the decisions of the Court. The latter can also launch a preliminary mediation stage.

The Court would be composed of 21 judges elected by the General Assembly of the United Nations on a list of persons nominated by a Board composed of the judges of the International Court of Justice, those of the International Criminal Court, and the members of the International law Commission.

Ultimately, the project is likely to reduce the gap between the promises and the ambitions of the law on one side and the inertia of the concrete mechanisms used for the realization of these promises on the other. It realizes and directly implements the principle of good faith which is at the root of the States' international obligations.

Thus, this Court is primarily a referral and advisory organism that serves the States. It could help them to better organize their political regimes by providing them with advisory opinions, opinions and recommendations of a legal nature. Moreover, it would be a real court, with, in particular, the authority of *res judicata* with respect to decisions of a jurisdictional nature. It would be called upon to examine the constitutional actions and decisions of the State, especially in large matters of public freedoms on one side and the national political elections on the other. It would be entitled to examine petitions submitted to it by citizens in litigations relating to any matter affecting their Constitutional interests as such, as well as by political parties and associations. This Court thus contributes to better eradicate tyranny and to establish and institutionalize democracy in the world.

## CHAPTER I

## THE INTERNATIONAL CONSTITUTIONAL NORMATIVITY

Since the end of World War II and along with the logic of state sovereignty which hitherto dominated the entirety of international law and gave it coherence, a second logic has developed; it is that of the Peoples' Rights and the Human Rights. It is usually believed that these rights can only be asserted against States Sovereignty.

Until the mid-eighties, Human Rights and Peoples' Rights have been able to contend with the rights of States in only two fields: the right to self-determination of peoples and the aspiration to equality between human beings, which brought about a right to decolonization and condemnation of racial discrimination. This fact is explained by the state of international society which made it possible to condemn colonization and regimes of racial discrimination. The condemnation of colonization was made

possible, first, because the peoples made of their right to freedom a reality, then because colonization as a form of domination was historically outdated and finally, because the two superpowers had no interest in maintaining it; in fact the contrary was true. The condemnation of regimes for racial discrimination was also possible because it was the subject of almost unanimous agreement of States.[2]

Human Rights and Peoples' Rights did not, however, develop their full potential. The assertion of Human Rights and Peoples' Right to self-determination carries with it the possibility of a right to democracy through the assertion of the right of peoples to choose their rulers and the right to participate in public affairs.

The standards as such are not new, what is new is the dialectic which has tied them to state sovereignty in recent years. These rights could hitherto grow only in the shadow of the States sovereignty and the principle of nonintervention. These rights were recognized by International Law, but could be guaranteed only by domestic law. We are now witnessing an attempt to globalize the guarantee of these rights.

It is within this legal and political context that it becomes possible, or at least thinkable to launch the idea of a Constitutional Court responsible for guaranteeing or, where appropriate, sanctioning violations of international constitutional normativity relative to democracy, to human rights and to the Rule of law.

We mean by **international constitutional normativity,** the international norms materially constitutional. In domestic law, the standards contained in the constitution are referred to as being constitutional. It goes without saying that there is no international constitution and that in this formal sense, there is no international constitutional normativity. However, constitutional normativity in domestic law also refers to norms which are materially constitutional. These are norms related to rights and freedoms of the citizens and to the basis of political power and those related to

the organization of political and judicial power. In this second sense, there is undoubtedly an international constitutionality and we will limit the following analysis to conventional standards or *soft law* with a universal scope.

1. **Concerning the rights and freedoms**, there is no need to recall here the human rights norms contained in mandatory instruments whether the universal general conventions, the conventions protecting specific rights or the conventions protecting specific categories.

2**. Concerning the basis of power**, we must first quote Article 21 of the Universal Declaration of Human Rights which reads:

*"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives*

2. *Everyone has the right of equal access to public service in his country.*

3. *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

We must also state:

- Article 1, common to the two International Covenants on Human Rights, which reads:

*"All peoples have the right to self-determination. By virtue of that right they freely "determine their political status and freely pursue their economic, social and cultural development."*

- Article 25 of the International Covenant on Civil and Political Rights which provides in its first paragraph:

*"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country".*

- Article 2 (1), to which Article 25 stated above refers to, provides that:

*"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property ,birth or other status"*

- Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination stipulates:

*"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*

*... (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service".*

- Moreover, Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

> *"States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:*
>
> *(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;*
>
> *(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;*
>
> *(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country".*

Furthermore, we must particularly state the African Charter on Democracy, Elections and Governance adopted in Addis Ababa in 2007 and signed by Tunisia during the XXth Summit of the African Union held on January the 27th 2013 and which mainly refers to the preamble and to Article 4 of the African Union Constitutive Act.

These mandatory rules mean that the International Law recognizes the right to democracy and to periodic and genuine elections. With regard to these two issues, the normative production of the General Assembly of the United Nations as well as that of the various international conferences asserted and strengthened the conventional standards mentioned above.

- **On the very concept of democracy.** Democracy, as a concept standing for a mode of political organization based on values generally shared by most Nations, has known a remarkable breakthrough in terms of international law since the nineties. The collapse of the communist regimes in East Europe and the aspiration of the populations there are undoubtedly parts of

it. Multiple international *soft laws* instruments echo those political mutations which had drastic effects on the international order. We must mention in this regard the *Final Act* of the *Vienna World Conference on Human Rights* in June 1993, the *Millennium Declaration* adopted by General Assembly resolution 55/2 dated September 8th, 2000, the General Assembly resolution 60/1 of October 24th, 2005 adopting the *Outcome of the 2005 World Summit and the international Conferences* of new or Restored Democracies and the series of resolutions titled AG / UN, "*Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies."*

- **On the concept of rule of law.** The concept of the rule of law emerged on the international scene at the same time as democracy. We must quote once again the *Outcome of the 2005 World Summit* as well as two series of resolutions at the UN General Assembly, the first one entitled *Enhancing the Rule of Law* and the second entitled *the Rule of law on) national and international scale.*

- **Concerning the principle of periodic and genuine elections**. We must note that two series of resolutions have been concomitantly adopted for years; they are entitled respectively: *" Strengthening the effectiveness of the principle of periodic and genuine elections"* and " *Respect for the principles of national sovereignty and of non-interference in internal affairs of states as far as their electoral processes are concerned*" .The two series of resolutions neutralize each other, but we note that since 2007, the General Assembly has confined itself to the first series of resolutions, which clearly enhances the effectiveness of the principle of periodic and genuine elections.

- **The emergence of the principle of democratic legitimacy**. This principle has progressively been formed, on the one hand through the electoral assistance and the international control

over the elections that move towards guaranteeing free, honest and transparent elections, and on the other hand, through the condemnation of the anti-constitutional takeover of power as amply illustrated by the stance of General Assembly and the Security Council on *coups d'Etat* against governments elected democratically. No doubt, the mandatory instruments of regional organizations are more explicit at this level, but the rejection of such *coups d'Etat* could be noted even universally, which made the UN Secretary General Kofi Annan declare: "*the view that coups d'Etat led by military juntas against democratically elected governments are unacceptable, has become the norm.*" In this regard, the General Assembly resolutions (following the *coups d'Etat* in Haïti and Burundi) and the Security Council resolutions (following the *coup d'Etat* in Sierra Lione) are particularly illustrative.

## CHAPTER II.

## COURT SANCTIONS

The specificity of the legal rule, compared to other scientific, moral or social norms, lies in its main characteristic which is its mandatory nature. Yet, in order to be binding, the legal rule should be accompanied by a sanction that a legal jurisdiction has power to enforce against those who infringe it.

*Lex constitutionis* principles, certainly asserted themselves as legal-value principles, but they remain crippled as long as the International Constitutional Court with power to sanction *lato sensu* is not implemented. Its role would be to record any non-conformity of a text, of a draft text or a practice with the principles identified as principles of the international constitutional law.

Thus, Article 2 of the *International Covenant on Civil and Political Rights in* its second and third paragraphs provides:

*"*2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

*3. Each State Party to the present Covenant must commit itself:*

*(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

*(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

*(c) To ensure that the competent authorities shall enforce such remedies when granted.*

No legal sanctions against the infringement of international constitutional normativity have been enforced so far.

Sanctions do exist at regional level, but they have a political feature (suspension or exclusion from the organization) and they are limited to coups. Under the provisions of articles 2 and 7 of the European Union treaty, the EU makes an exception since on the one hand it expands the sanctions so far as to cover the sanctions against the violation of the democratic principles in general and, on the other hand, it inserts in the association agreements it signed with third countries some democratic clauses the violation of which may result in the suspension of the agreement.

On an international scale, only one quasi-jurisdictional control exists. It's the one made by the Human Rights Conventions when they provided for the establishment of a mechanism to

protect and promote Human Rights. Only four of these committees (the Committee of Human Rights, the Committee on the Elimination of Racial Discrimination, the Committee against Torture and the Committee on the Elimination of Discrimination against Women) have the jurisdiction, under certain conditions, to receive petitions from individuals who claim that the rights enshrined in the treaties have been violated by a State party.

This is where establishing an international constitutional court will face a challenge, since it will be ahead of most advanced integration experiences.

Without tackling here the constitution of the court itself , its composition, its referral, its jurisdiction and its rules of evidence and procedure etc, the simplest and the most realistic, for not saying the least utopian idea we can advance, would be to recognize for the future Court the right to engage the State liability for the violation of the international constitutional normativity (liability for wrongful acts) and to require it to nullify the illegal act and / or indemnify for the damage caused by this act. It is obviously irrelevant that the Court nullifies those acts by itself and it seems actually utopian to envisage criminal penalties in the present circumstances.

In its advisory opinion on the matter of the exchange of the Greek and Turkish populations, the P.C.I.J. considered as an "*evident principle*" the fact that "The High Contracting Parties undertake to introduce in their respective laws such modifications as may be necessary with a view to ensuring the execution of the present Convention." (*Ser.B, N°10, p.20*)

In its decision in the case of certain German interests in Polish Upper Silesia, the P.C.I.J pointed that it is certainly not called upon to interpret the Polish law as such; but nothing could oppose its pronouncement on the question of whether Poland, if the aforementioned law be enforced, is acting in conformity with

its obligations towards Germany, imposed on her by Geneva Convention.

In the Arbitral Award of 10-08-1937, Germany v. Lithuania, the Court considered that in pursuance of International Law principles, a State must meet its international obligations *bona fide.* And in pursuance of the very principle, Lithuania must quash the decision rendered by one of its bodies if this decision does not comply with the dispositions of an International Convention (*Reports of International Arbitral Awards, Vol. III, p. 1751*).

In its decision relative to the application of the 1902 Convention governing the custody of infants, the ICJ is in presence of a measure taken in pursuance with the Swedish Law of 06-06-1924 on Infancy and Youth Protection. It must view this measure according to what the Swedish law intends to impose, compare it with the Guardianship that 1902 Convention regulated, and determine whether the application and the maintenance of the afore-mentioned measure against an infant whose guardianship is within the scope of the Convention comprises the infringement of such a convention *(Reports of judgments, advisory opinions and orders of the ICJ*. *1958, p. 65*).

## CHAPTER III

## COMPOSITION, MISSIONS AND APPLICABLE LAW

Once the idea of setting up an International Constitutional Court approved with regard to its principles, time will be convenient for the technical demarcation of its outlines, especially those concerning its composition, its missions and the corpus of rules it will need to implement.

### I. COMPOSITION OF THE COURT

The ICC would be composed of 21 judges appointed by the following procedure:

-Each UN member State nominates a candidate;

-A College composed of judges of the ICJ, the ICC and members of the IFA selects 42 candidates based on their integrity, competence and experience taking into account a fair representation of the main legal systems;

The 21 members of the Court are elected by the General Assembly of the United Nations on the list of persons nominated by the College.

## II. MISSIONS OF THE COURT

The Court is entrusted with an evaluation function and a contentious function.

### A. Evaluation function

1. The Court issues advisory opinions on draft texts and opinions on the texts submitted to it that are related to democracy and civil liberties. The views and opinions should be reasoned.

2. The Court may receive a request for an opinion or a request for an advisory opinion by:

– Governments;

– Plenary bodies of universal international organizations, regional and sub-regional organizations;

– NGOs with an official status, as advisory or other capacity to the above mentioned international organizations;

– Political parties, national associations and professional organizations.

3. The Court shall rule on the admissibility of requests for opinion and view (standing to act, interest to act and seriousness of the request).

4. The Court shall issue its opinion or view within six months from the decision on admissibility of the application. The

proceedings before the Court shall be in writing. The Court may decide to appeal for witnesses or open an investigation.

The opinions and advisory opinions consist of a declaration of conformity or non-conformity of all or part of the text or the draft with the principles and rules relating to democracy and civil liberties. The Court has power to make proposals for reform of the text or the draft text submitted.

### B. Contentious function

1. The Court rules on serious violations to democratic principles and democratic conditions for elections subject to the exhaustion of domestic recourses. These serious violations may consist in serious facts and / or legal acts.

2. The Court may receive applications from:

– Individuals with petitioner support;

– Political parties, national associations and professional organizations.

– Plenary bodies of universal international organizations, regional and sub-regional organizations;

– NGOs accredited by the State as part of an electoral process.

3. The Court may open a preliminary phase of mediation.

4. The Court renders decisions of conformity or non-conformity of the acts or facts concerned with the principles and rules relating to democracy and civil liberties. The State concerned shall give effect to the decisions of the Court.

## III. APPLICABLE LAW

The Court applies the principles and rules relating to democracy and universal and regional civil liberties, including the relevant provisions of 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 and the "Harare Principles" which were agreed at the Meeting of Heads of Government of Commonwealth countries on 20th October 1991.