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INTERNATIONAL LEGAL THEORY

In/on applied legal research: Pragmatic limits to the impact of peripheral international legal scholarship via policy papers

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Abstract

This article examines the limits that academics from peripheral countries might encounter while trying to influence the decision-making process inside an international organization. Although there are different mechanisms whereby academia might influence non-academic debates, we highlight here the use of policy papers, in order to examine and discuss the non-textual barriers which might be faced by those academics. After an analysis of primary sources this article presents some pragmatic limits in the use of policy papers and discusses the consequences of this condition for the legitimation of international organizations. As such, relevant international organizations still seem to be unresponsive to some initiatives in particular: closed to the spontaneous participation of academia; and not willing to call for contributions from academic communities. This is particularly relevant for contributions from peripheral academia and other non-state actors, who lack the capability to disturb the traditional ideational power exercised by core (Western) countries and by state-centric ideology in current international law.

Keywords: applied legal research; International Constitutional Court; international public authority; peripheral international legal scholarship; policy papers

1. Introduction

This article contributes to the debate concerning the limits to the influence of legal scholarship in international organizations via policy papers.[1] While texts usually focus on textual strategies for academics to prepare a policy paper,[2] we emphasize here some non-textual barriers which

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[1]*Amicus curiae* briefs, legal advice, scholar opinions, taking part in non-expert environments (media and newspapers), policy papers, among others, are just a few examples of mechanisms through which academia might produce non-academic impact. See London School of Economics Public Policy Group, *Maximizing the Impacts of Your Research: A Handbook for Social Scientists* (2011), at 190–1. A policy paper is 'a problem-oriented and value-driven communication tool' which aims to provide a 'comprehensive and persuasive argument justifying the policy recommendations presented in the paper', or even, 'to act as a decision-making tool and a call to action for the target audience'. See E. Young and L. Quinn, *Writing Effective Public Policy Papers: A Guide for Policy Advisers* (2002), at 18.

[2]See Young and Quinn, ibid.; A. Pennock, 'The Case for Using Policy Writing in Undergraduate Political Science Courses', (2011) 44 *PS: Political Science and Politics* 141; B. Trueb, 'Teaching Students to Write for "Real Life": Policy Paper Writing in the Classroom', (2013) 46 *PS: Political Science and Politics* 137.

academia might encounter while trying to influence the decision-making process of international organizations.

The idea is to warn academics who seek non-academic impact that they might face more complex – and more frustrating – limits that surpass the simple preparation of their texts. More important than providing suggestions on how to write better or convincing policy papers, we understand that academics should pay proper attention to unseen – yet hard – constraints on effective influence of academic research in international non-academic environments.

This issue was raised during the development of a policy paper within an empirical collective research project developed at a Brazilian academic institution in 2017–2018. Broadly speaking, the project had two main objectives:[3] (i) academic impact, that is, to contribute with ongoing academic discussions concerning the proposal of a new international court – the International Constitutional Court (ICoC); and (ii) non-academic impact, that is, to present a policy paper proposing an alternative institutional design for the ICoC.

The leader of the research project had previous professional experience in presenting policy papers to the Brazilian Federal Government. In those opportunities, he was a member of different collective research initiatives engaged by academic institutions: under the co-ordination of senior researchers, the team proposed (i) an alternative institutional design for the protection of Human Rights Defenders in Brazil (2007–2009), (ii) legal solutions to enable an effective and timely access to justice in Brazilian Courts to deal with repetitive legal claims (2010), and (iii) legal studies to improve gender equality by regulating femicide as a new crime in Brazilian law (2014). These experiences had in common the fact of being ordered by the Brazilian Government to each academic institution, after approval within specific public bidding procedures.

Based on his earlier educational and professional backgrounds, the leader co-ordinated a collective research project in 2017–2018 – this time, with two differences: the policy paper (i) was not previously ordered, and (ii) would be presented to the international organization responsible for the discussion of the ICoC's Statute.[4] As we discuss below, although seemingly harmless, these two aspects can be regarded as the source of many non-textual barriers for international legal scholarship developed within peripheral countries – even though not in purpose.

We are aware that our single experience cannot be regarded as a universal description of the everyday relationship between academia and international organizations. Indeed, while not all international organizations accept direct contributions from scientific researchers via policy papers, some of them give such possibilities – with restrictions – to academia. Still, such limited participation derives from explicit legal provisions designed for previously acknowledged entities – not for spontaneous proposals.[5]

In order to explore these ideas, this article is divided into three parts: Section 2 presents the material and the methods used to develop this text – a qualitative approach of primary sources – and describes some of the non-textual barriers concretely faced by the research team when submiting a policy paper to the international organization. Section 3 argues that welcoming the participation of academics from peripheral countries in international organizations' decision-making processes is important to strengthen the legitimacy of these institutions. Section 4 discusses the non-textual barriers faced by the research team and, from a critical perspective, builds upon them to suggest additional contributions to the debate concerning the international character of international law.

[3]The project will be better explained in Section 2, but only to the extent it serves the purposes of this article.

[4]In order to ensure anonymity to the people who were contacted or interviewed, we do not disclose here any information (name, regulation, reports) concerning the international organization.

[5]We will mention some international organizations in Section 3 as examples of this argument.

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2. Methods and materials: Qualitative approach to primary sources

This article is based on a qualitative approach to the following primary sources: oral interventions (interviews), field notes (participant observation), and written documents (document analysis). They were used during efforts to find a draft proposal of the ICoC – a document which was allegedly presented in 2014 to an international organization.[6]

During his speech at the United Nations General Assembly (UNGA) in 2012, former Tunisian President Mohamed Marzouki presented the idea of an ICoC. According to his discourse, this new institution was crucial for the international environment, as it would fill the mandate gap of the International Criminal Court (ICC). Mr. Marzouki argued that, while the ICC had competence to try individuals for the commitment of international core crimes, an ICoC would be necessary to decide a common related issue: the legality and legitimacy of national constitutions after elections or coup d'états.

Mr. Marzouki gave similar speeches at the UNGA in 2013 and in 2014. In those, he always stressed that this new international institution would be necessary precisely to hinder the rise, consolidation, and spread of dictatorships around the world. According to his arguments, the ICoC would indicate countries which were more prone to abandon democracy via fraudulent elections or coups d'états – that is, the same countries in which individuals would probably commit international core crimes (tried by the ICC) to achieve and to sustain their political agendas. In his last speech, Mr. Marzouki emphasized that legal scholars from different countries[7] have supported the idea since 2012 and after two years of academic discussions and events, a draft proposal was presented to an international organization in 2014.

Considering the potential impact of this new institution on the international legal environment, as well as for domestic legal traditions and political relations, an empirical and applied research project tried to contribute to this debate from an alternative standpoint.[8] The idea was to present to the organization a policy paper with a new institutional proposal for the ICoC.

In order to develop a coherent and consistent complimentary proposal, we needed to first learn how legal academia could take part in those debates (is it possible to send policy papers to the international organization, and, if yes, how to send them?)[9] and second, have access to the final version of the original proposal (what is the content of the proposed statute?).[10] Thus, we looked for:

[6]See M. Marzouki, *Statement before the 67th General Assembly of the United Nations*, 27 September 2012, available at gadebate.un.org/node/453; M. Marzouki, *Statement before the 68th General Assembly of the United Nations*, 26 September 2013, available at gadebate.un.org/68/tunisia; M. Marzouki, *Statement before the 69th General Assembly of the United Nations*, 2014, available at downloads.unmultimedia.org/wss/ga69/en/69_TN_en.mp3.

[7]From Brazil, Canada, France, Germany, Italy, Morocco, Portugal, among others. The debate concerning the convenience of an ICoC and its institutional design is not the object of this article. For more information on the original proposal see, e.g., G. Bandeira, 'Tribunal Constitucional Internacional – Auto de Ciência', (2016) *Notandum* 41; P. Cunha, 'La Cour Constitutionnelle Internationale (ICCo) – Une Idée qui fait son Chemin', (2015) *Notandum* 21; A. Grachem, 'Plaidoyer pour une Idée Tunisienne: l'Institution d'une Cour Constitutionnelle Internationale', (2016) 24 *International Studies on Law and Education* 43. For a critical appraisal of such discussion see also A. Giannattasio et al., 'International Constitutional Court: Rise and Fall of an International Debate', (2019) 16 *Revista de Direito Internacional* 130.

[8]The main goal of the project was to sustain the idea that ICoC should base its legitimacy not on abstract legal goals (protection of Human Rights and Democracy), but on legal means (accountability mechanisms). The majority of ICoC proposals focus on the development of 'efficient means' – even the use of military power.

[9]After all, if the draft proposal on the ICoC was originally presented by academic experts to the international organization, we presupposed that there should be an equal possibility to take part in this debate. That is the reason why the research team looked for the the regulation of the institution.

[10]There are articles written by some scholars of this expert group in which general ideas for the ICoC are sketched – such as Cunha, *supra* note 7; M. Chemillier-Gendreau, 'Le Projet de Cour Constitutionnelle, Un Espoir de Garantie Internationale pour les Mouvements Sociaux Porteurs de Démocratie', in F. Sahli, A. El Ouazzanni and A. Peters (eds.), *Droit et Mouvements Sociaux: Quelles Interactions? Le Cas des Revoltes dans le Monde Arabe* (2017), 9.

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1. the regulation on academic participation within the international organization via written papers;
2. the draft proposal on the annual reports of the organization after 2014; and
3. contacted directly by email the international organization for more information on both issues.

These sources were sought because of two main issues: (i) to think on possible alternative institutional designs for the ICoC, it was crucial to understand the original proposal, and (ii) to manage regular participation in formal discussions concerning the ICoC within the international organization to which the proposal was presented. The effort directed to deal with these two concrete problems revealed some initial pragmatic constraints concerning the proposal of a policy paper spontaneously prepared by academics.

Indeed, in January and February of 2017 the group looked for the draft in annual reports of the activities undertaken by the international organization. Even though such a document is prepared precisely to disclose information on the subjects which are currently under discussion, no annual report from 2012–2016 presented a single word on the ICoC, on its proposal or on its statute.[11]

Considering the absence of open information directly provided by the international organization, after the two first months of the research the group also tried to reach the draft of the statute via different sources. Based on the idea that academia is strengthened by open dissemination of research outcomes and collaborative rational discussion of such products, contact was made with scholars who were personally responsible for drafting the proposed statute.

Only four of these scholars answered the messages – one in March 2017, the others in April and May 2017. One of them agreed to give information through a phone call (in April 2017), two of them to be interviewed (August 2017 and October 2017) and one stated that s/he could not speak to the matter because 'the project is confidential' (May 2017).

Two of them promised to send the draft to us. 'After all', according to their perception, 'the proposal [was] being deeply discussed at the [international organization]' and would be 'sooner or later approved'. Thus, both agreed that an open dialogue with other scholars would foster the debate and the proposal. However, they did not send the document until July of 2017 and have not answered any subsequent messages.

Considering the barriers to collecting information from the international organization and from the academics involved, the idea was to seek a different path. Thus, the group resorted to convenience and snowball sampling:

1. diplomats whose mission is or was to take part in negotiations within the international organization; and
2. civil servants who are or were responsible for working at the international organization.

In May and June of 2017, diplomats and civil servants were contacted. Although the sample was restricted (two diplomats and one civil servant), they were properly interviewed. Their contributions can be summarized as follows:

A. ICoC statute:

A1. international irrelevance of the subject: the proposal seems to be more an academic issue than an actual and concrete concern of the international organization itself.

[11]The major discussed topics were (i) protection of persons in the event of disasters; (ii) immunity of state officials from foreign criminal jurisdiction; (iii) provisional application of treaties; (iv) formation and evidence of customary international law; (v) the obligation to extradite or prosecute; (vi) the Most-Favoured-Nation clause; (vii) protection of the environment in relation to armed conflicts; and (viii) protection of the atmosphere. This condition did not change before the first version of this article was prepared (July 2017).

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In other words, it appears that the subject has not been discussed in recent years at the international organization – which is actually concerned with other pressing matters, such as environmental issues, the most-favoured nation clause, application of treaties, criminal law, and also a discussion about the 'expulsion of aliens'.[12]

A2 confidentiality: even if there is effectively a proposed draft, it remains still confidential even to those who would need to discuss it at the international organization, because 'no national diplomatic mission has been in touch or even discussed such a project at [the international organization]'; and

B. academic participation at the international organization:

B1. intergovernmental bodies: there is no possibility for academia and other non-state actors to contribute directly to the debates inside the international organization because no other actor than states have a right to direct participation in the discussions;

B2. non-state actors and advocacy/lobbying: non-state actors usually follow alternative steps to influence the international organization. Either:

B2(a). indirectly: via national advocacy, the non-state actor can persuade a national diplomatic mission at the international organization to bring forward the idea and the policy paper —— the sole requirement is to present a proposal which meets the foreign policy of the allied diplomatic mission;[13] or

B2(b). informally: via international lobbying, the non-state actor directly persuades members of the international organization (staff and government representatives) to attend to non-official meetings outside the institution in the same city which it is located. Suggestions range from:

B2(b)(i). inviting to parallel academic events during the annual sessions; and

B2(b)(2). inviting to informal dinners or coffee breaks funded by the non-state actor itself or by an interested third party; and

B3. elite international environment: access to the international organization is formally and informally restricted. For this reason, both the staff of the international organization and government representatives are usually open and eager to talk only with 'top rank scholars' – that is, those affiliated to academic institutions (i) whose academic quality is internationally recognized as undisputed, and (ii) located in core countries. In this sense, contact would be facilitated either by closer personal relations to those individuals, or by an 'institutional email or an official letter' in which the sender 'makes believe s/he is the most important person in the world—almost a brief mini-curriculum of the most relevant achievements or institutional affiliations in her/his career'.

Thus, although we were unable to find the draft of the ICoC statute, it was possible to identify some pragmatic limits in presenting a policy paper from non-state actors to the international organization. Those barriers will be explored in Section 4. Before that, we will indicate the reasons why the regular presence of academia in international organizations is important for current development of international law and of international institutions.

[12]The testimonials given by the respondents have just confirmed our original statement by the review of the Annual Reports from 2012 to 2016.

[13]What seems to be the case of the draft proposal allegedly presented by the legal scholars in 2014.

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3. Academics and the quest for the legitimacy of international organizations

Although some authors do not completely agree with this idea,[14] it is almost undisputed that international legal order underwent deep structural changes during the twentieth century.[15] New international legal normativity[16] and new international institutions were developed within this emerging post-national context – such as international organizations, trans-governmental actors (Basel Committee, BRICS or the G20, among others), and transnational actors (corporations, media or NGOs, academia, among others).[17]

According to an international public law perspective,[18] the impact of different non-state actors in the everyday international legal order raises several issues concerning the possibilities of submitting them to a rule of international law.[19] If one pays attention to recent literature concerning, specifically, the agency of international organizations, it is a common perception that they possess more influence on local everyday life of states and individuals than originally imagined and expected.[20]

Indeed, imbued with public authority by international legal order, international organizations are legally allowed to use their[21] non-coercive instruments (hard and soft powers)[22] to enlarge or reduce individual freedoms (human rights) and collective freedoms (democracy).[23] For this reason, the legitimacy of international organizations has been severely questioned in recent years – both in academic and non-academic fields.[24]

[14]See e.g., D. Koller, '. . . and New York and The Hague and Tokyo and Geneva and Nuremberg and . . . : The Geographies of International Law', (2012) 23 *European Journal of International Law* 97; T. Weiss, *What is Wrong with the United Nations and How to Fix It* (2012); T. Weiss, T. Carayannis and R. Jolly, 'The "Third" United Nations', (2009) 15 *Global Governance: A Review of Multilateralism and International Organizations* 123. Some authors also criticize this idea of an obvious positive progression of international legal institutions, such as T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).

[15]See P. Casella, *Fundamentos do Direito Internacional Pós-Moderno* (2008); W. Friedmann, *The Changing Structure of International Law* (1964); F. Quadros, *Direito das Comunidades Europeias* (1984); J. Salcedo, *El Derecho Internacional en un Mundo en Cambio* (1985); J. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547. Weiler even uses the metaphor of geology to present an image of overlapping layers of international legal relations.

[16]See M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', (2008) 9 *German Law Journal* 1865.

[17]See J. Braithwaite and P. Drahos, *Global Business Regulation* (2000); A. Cardia and A. Giannattasio, 'O Estado de Direito Internacional na Condição Pós-Moderna: A Força Normativa dos Princípios de Ruggie sob a Perspectiva de uma Radicalização Institucional', in M. Benacchio (ed.), *A Sustentabilidade da Relação entre Empresas Transnacionais e Direitos Humanos* (2016), 127; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); J. Habermas, *A Constelação Pós-Nacional* (2001); A.-M. Slaughter, *A New World Order* (2004); G. Teubner, *Global Law without a State* (1997).

[18]A. Bogdandy, M. Goldmann and I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', (2016) *MPIL Research Paper Series* 1.

[19]See, e.g., Casella, *supra* note 15; Clapham, *supra* note 17; Friedmann, *supra* note 15; Habermas, *supra* note 17; Salcedo, *supra* note 15; Slaughter, *supra* note 17; Weiler, *supra* note 15. See also Cardia and Giannattasio, *supra* note 17.

[20]See L. Eslava, *Local Space, Global Life – The Everyday Operation of International Law and Development* (2015); J. Faria, *Direito e Conjuntura* (2008).

[21]See, e.g., A. Bogdandy and I. Venzke, 'In Whose Name? An Investigation of International Court's Public Authority and Its Democratic Justification', (2012) 23 *European Journal of International Law*; Bogdandy, Goldmann and Venzke, *supra* note 18.

[22]See, e.g., Cardia and Giannattasio, *supra* note 17; Z. Laïdi, *La Norme sans la Force* (2008).

[23]See, e.g., A. Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', (2008) 9 *German Law Journal* 1375.

[24]Specifically concerning the exercise of criminal jurisdiction in international law by international criminal courts, we could mention as examples the following non-academic references: J. Bavier, 'Gambia announces withdrawal from International Criminal Court', *Reuters*, 26 October 2016, available at www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0; International Criminal Court (ICC), 'President of the Assembly regrets withdrawal of any State Party from the Rome Statute and reaffirms the Court's fight against impunity', *ICC*, 22 October 2016, available at www.icc-cpi.int/Pages/item.aspx?name=pr1248; International Criminal Court (ICC), 'Forthcoming Official Meetings', *Assembly of State Parties Journal*, 15 November 2016, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ASP15-Journal.15nov16.2100.ENG.pdf;

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A public law perspective argues that every legal authorization for potentially affecting individual and collective freedoms must be justified. There is here a simple analogy: if the public life of millions of people is potentially affected by administrative decisions taken by international organizations, it is necessary to develop alternative methods to enhance the legitimacy of their decision-making processes.[25]

In other words, international legality must be counterbalanced by international legitimation inputs – as the legal binding derived from traditional state consent via national parliaments might not seem enough. Thus, scholars from distinct legal traditions argue nowadays that there should be alternative institutional designs to enhance the legitimacy of those institutions: via (i) the establishment of performance indicators concerning efficiency and cost-effectiveness issues,[26] (ii) a closer interaction with national institutions and political agendas,[27] (iii) a more transparent, unbiased, fair and reliable decision-making process,[28] or even (iv) the introduction of demands from non-state actors in decision-making procedures.[29]

The last proposal is the focus of this text, as it is related to the non-textual barriers encountered during the research experience described above. After all, the research team was able to perceive

Ministry of Foreign Affairs of the Russian Federation (MFA), *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, 25 June 2016, available at www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698.

Examples from the academic environment on the issue should also be mentioned here: S. Anoushirvani, 'The Future of the International Criminal Court: The Long Road to Legitimacy begins with the Trial of Thomas Lubanga Dyilo', (2010) 22 *Peace International Law Review* 213; A. Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, (2012) 25 *Leiden Journal of International Law* 491; M. Gibert, 'La Cour Pénale Internationale et l'Afrique, ou l'instrumentalisation punitive de la justice internationale?', (2015) 97 *Revue Internationale et Stratégique* 111; M. Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?', (2012) 23 *European Journal of International Law* 43; S. Koller, 'La Cour Pénale Internationale: ses Ambitions, ses Faiblesses, nos Espérances', (2003) 398 *Études* 33; F. Mégret, 'Cour Pénale Internationale et Néocolonialisme: au-delà des Évidences', (2014) 45 *Études Internationales* 27; V. Peskin and M. Boduszynski, 'The Rise and Fall of the ICC in Libya and the Politics of International Surrogate Enforcership', (2016) 10 *International Journal of Transitional Justice* 272; J.-B. Vilmer, 'Introduction: Union Africaine versus Cour Pénale Internationale: Répondre aux Objections et Sortir de la Crise', (2014) 45 *Études Internationales* 5. Such discussion goes beyond the criticism of international criminal institutions: it touches even the basis of international law – see, e.g., A. Anghie, M. Koskenniemi and A. Orford, *Imperialismo y Derecho Internacional* (2017); M. Hardt and A. Negri, *Empire* (2000).

For this reason, authors are developing analytical frameworks to assess and improve the legitimacy of international institutions; see, for instance, A. Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (2010); A. Giannattasio, '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 E. Gomes, F. Xavier and T. Squeff (eds.), *Golpe de Estado na América Latina e Cláusula Democrática* (2016), 124; M. Goldmann, *Internationale öffentliche Gewalt – Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (2015); J. Habermas, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft', in W. Brugger, U. Neumann and S. Kirste (eds.), *Rechtsphilosophie* (2008), 360.

[25]A. Bogdandy and I. Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', in A. Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking* (2012), 475; A. Bogdandy and M. Goldmann, 'Die Ausübung internationaler öffentlicher Gewalt durch Politik bewertung', (2009) 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 51.

[26]See, e.g., M. Varaki, 'Effectiveness Considerations between Legitimacy and Prosecutorial Discretion', (2014) 108 *Proceedings of the Annual Meeting, American Society of International Law*, at 309–10; A. Murdoch, 'UK statement to ICC Assembly of States Parties 17th session', *Foreign & Commonwealth Office Speech*, 5 December 2018.

[27]S. Dothan, 'How International Courts Enhance their Legitimacy', (2013) 14 *Theoretical Inquires in Law* 455.

[28]See, e.g., A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013); Bogdandy and Venzke, *supra* note 25, N. Grossman, 'Legitimacy and International Adjudicative Bodies', (2009) 41 *George Washington International Law Review* 107; J. Habermas, 'O Projeto Kantiano e o Ocidente Dividido', in J. Habermas, *O Ocidente Dividido* (2006) 115.

[29]See M. Badin, 'Breves considerações sobre os mecanismos de participação para ONGs na OMC', (2006) 4 *Sur* 103; M. Badin, 'Mudanças nos paradigmas de participação direta de atores não-estatais na OMC e sua influência na formulação da política comercial pelo Estado e sociedade brasileiros', (2007) 3 *Revista DireitoGV* 77; M. Badin, 'É possível pensar em sociedade civil no Mercosul?', (2007) 9 *Cena Internacional* 37; Y. Onuma, *Direito Internacional em Perspectiva Transcivilizacional* (2016); B. Rajagopal, *International Law from Below* (2003).

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that the introduction of non-state actors in decision-making procedures of international organizations does not mean necessarily a radicalization of democracy.[30]

Indeed, even in international organizations in which participation of non-state actors is allowed, no voting rights are effectively granted to them.[31] Just to mention some examples:

1. WTO enables the direct contact of NGOs with the Secretariat, the attendance of NGOs to ministerial conferences and some dispute settlement proceedings, but only to hear or to present written statements before those meetings (Article V.2 of the Marrakesh Agreement and Decision WT/L/162. On this example, an aspect must be stressed: this provision is directed to a specific non-state actor – NGOs, which does not necessarily mean or reach academia;
2. A similar provision is provided for the participation of non-state actors at EcoSoc's meetings: participation is allowed either orally, or via written papers, but the former is restricted to time constraints and the latter to word and page limits (items 30, 31 and 32 EcoSoc Resolution 1996/31) and is not exclusively directed to academia;
3. Two international organizations are known for their provisions specifically directed for the participation of academics in their meetings: the Antarctica Treaty System (ATS) – the Scientific Committee on Antarctic Research (SCAR), among others – and the Arctic Council (AC) – International Arctic Social Sciences Association (IASSA), among others. However, they are allowed to participate under the *status* of observers, that is: (i) only if authorized by state actors (rule 32 ATCM RoP, Articles 36, 39 and 40 AC RoP) and if they are not suspended by state's decision (Articles 37, 39 and 40 AC RoP), (ii) orally, only when authorized, with constraints (rules 33 and 43 ATCM RoP), and (iii) via written statements, with word, page and language limits (rules 35 and 45 ATCM RoP, Articles 37 and 38 AC RoP).

Of course, those institutional designs are just some examples. Still, they are samples of one general condition of international organizations: they are not properly concerned with the introduction of open participation in their decision-making processes. Even if they do allow the presence of non-state actors, such participation is limited by several constraints, such as: (i) not possessing voting rights, (ii) time-limited oral participation, (iii) word-limited written participation, (iv) accepting only previously acknowledged non-state actors, and (v) being allowed to speak or to present papers only by invitation during those meetings, among others. That is the reason why authors have already described alternative strategies of non-state actors to influence international organizations: indirectly, either by mobilizing public opinion (organizing protests, awareness-raising campaigns) or via mobilization inside other more transparent international organization (cross-institutional influence).[32]

For the purposes of this article, it is important to pay attention to the institutional design of international organizations. Indeed, the degrees of participation (and even non-participation) of non-state actors in international organizations are defined by the legal framework established to regulate workflow and the processes of the international organizations. The focus on the institutional design of the international organization enables us thus to understand not only the formal

[30]Something odd to expect especially from international institutions who claim democratic governance from national governments. This was already perceived by B. Simma, 'Foreword', in Bogdandy and Venzke *supra* note 25. See also B. Schöndorf-Haubold, 'The Administration of Information in International Administrative Law – The Example of Interpol', in Bogdandy et al., *supra* note 24.

[31]The main idea of this argument is that political participation can be exercised by other means than elections. Political accountability of public authorities would have a broader reach of alternative actions. See I. Young, 'Representação Política, Identidade e Minorias', (2006) 67 *Lua Nova* 139.

[32]A. Orsini, 'The role of non-state actors in the Nagoya Protocol negotiations', in S. Oberthür and K. Rosendal (eds.), *Global Governance of Genetic Resources* (2013), 64

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conditions for the participation of non-state actors, but mainly how academia is able (or not) to influence its agenda and its future legal regulations.

We argue that, even though not on purpose, the manner whereby those institutions handle the presence of academia in their decision-making processes unexpectedly favours something subtle: not simply the influence of some states and of some non-state actors, but mainly the influence of certain academic traditions on the development of international law.

Indeed, international law can be regarded as the result of a progressive global expansion of the legal tradition originated within core (Western) countries during the history of their own international relations.[33] If early twentieth century international law has changed within the conditions of this same tradition[34] – with the conscious concurrence of peripheral legal scholars who sought to be recognized as sharing the same legal standards of Western civilization,[35] the condition does not seem to have changed in the early twenty-first century.

This happens due to the fact that core countries are not only the source of inspiration for international legal standards, agenda, subjects, and discussions: they are also the source of the academic cognitive conditions to shape international reality. After all, academics of this intellectual field – especially from peripheral countries – are always required to have undergone experience within academic institutions located in those countries[36] and academics whose prestige is not duly recognized by one of them (universities, publishers, journals, societies, events, and so on) usually have few opportunities to be effectively heard and acknowledged by international legal scholarship.[37]

That is why, for instance, legal scholars from Brazil looking for recognition and dialogue within this intellectual field usually look for opportunities to 'internationalize' their academic and non-academic experiences – that is, to be acquainted with contemporary debates in international law developed in core countries. The usual mechanism to do this is via international mobility – almost to the same countries, institutions, and legal traditions. By doing this, they bring to Brazil subjects, concepts, and debates developed in core countries and neglect international issues related to their local agenda.[38] As scholars originating from this same peripheral epistemic community, the authors of this article and the other members of the research group are no exception to this dynamic.

Be as it may, if the legitimacy of international organizations is nowadays at stake, we stress here that this condition derives not only from institutional constraints on the participation of non-state actors in their decision-making processes. We argue that the lack of legitimacy can also be associated with the persistence of an ideational power exercised by the legal tradition of core (Western) countries[39] – the outcome of an unconscious process which denies openness and transparency to alternative legal traditions and proposals originating from peripheral academia.

We are not saying, of course, that there is a legal provision which explicitly denies academics from peripheral countries the opportunity influence non-academic debates within international

[33]For a broader approach of this argument see, e.g., Onuma, *supra* note 29; A. Roberts, *Is International Law International?* (2017). In a different perspective see, e.g., A. Anghie, 'Imperialism and International Legal Theory', in A. Orford, F. Hoffman and M. Clark (eds.), *The Oxford Handbook of The Theory of International Law* (2016), 156. These are, of course, some recent contributions to the matter, but other authors have already developed this idea: see, e.g., C. Alexandrowicz, *The Law of Nations in Global History* (2017); M. Bedjaoui, *Towards a New International Economic Order* (1979), at 50.

[34]See M. Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?', (2004) 17 *Leiden Journal of International Law* 229; S. Pahuja, 'The Postcoloniality of International Law', (2005) 46 *Harvard International Law Journal* 459.

[35]See A. Lorca, *Mestizo International Law* (2014); L. Obregón, 'Completing Civilization: Creole Consciousness and International Law in Nineteenth-century Latin America', in A. Orford (ed.), *International Law and its Others* (2006), 247.

[36]See Roberts, *supra* note 33.

[37]See Onuma, *supra* note 29.

[38]See M. Badin, G. Morosini and I. Oliveira, 'Direito Internacional Econômico no Brasil - Quem somos e o que fazemos? Evidências empíricas de 1994 a 2014', (2016) 13 *Revista de Direito Internacional* 27; A. Giannattasio, 'Editorial - What does it mean to apply history in international law studies?', (2018) 15 *Revista de Direito Internacional* 8, at 8–9.

[39]Onuma, *supra* note 29.

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organizations and explicitly favours the presence of academics originated from core countries. The restriction is informal, subtle, and probably unconscious: even if no academic (whether or not from peripheral countries) is institutionally allowed to participate directly in decision-making processes of international organizations, the possibility to promote indirect influence outside them (via informal lobbying, protests, among others) is particularly diminished for peripheral academics.

Indeed, economic, geographical, and political constraints are some reasons that hinder effective participation of academics from peripheral countries in those places. One should not ignore, in this sense, that the headquarters of those entities are usually located in cities of core countries – a condition which demands proper support (logistical, budgetary, social networking, among others) to informally reach the staff or government representatives working at an international organization.

It is possible to identify, thus, a practical selectivity of academics who are able to influence such discussions: those who are not able to surpass those barriers are excluded from this 'international public sphere'[40] – even when such a sphere is created indirectly and outside the international organization. This condition reaches a relevant epistemic issue, as it might reinforce the continuity of certain legal traditions which are already able to directly and indirectly influence the cognitive basis and the agenda of international law discourse.[41]

We understand that, even though not on purpose, this selectivity of non-state actors can be evaluated as a by-product of the above indicated traditional disregard of peripheral legal cultures in international legal scholarship. The burden and the possibility of participation must thus be shared via institutional reforms in those organizations to promote regular mechanisms for a broad inclusion of academia – with a special regard for academics from peripheral countries.

Finally, we would like to stress that this idea does not derive from a simple and abstract demand for 'enhancing democratic governance in international organizations'. Rather, from an epistemological perspective, we argue that to tackle the exclusivity of some non-state actors to access directly and indirectly international organizations means dealing with the exclusivity of specific legal scholarships in shaping international law: That this is important, not simply to voice peripheral academics, but even more to enhance the legitimacy of international organizations and their agency in international order.

In other words, we understand that the institutional inclusion of peripheral academia in international organizations could be a mechanism able to eliminate different non-textual barriers to accessing their decision-making processes. This would first, weaken the preference for certain legal cultures in international legal order and second, strengthen the legitimacy of their international authority.

4. Non-textual barriers for policy papers: A pragmatic overview of distinct academic disputes

When producing a policy paper, authors should be concerned with syntactic and semantic concerns for a brief, concise, and logically structured paper for policy makers. However, such documents might encounter external issues which may also constrain a broader impact on non-academic discussions via non-textual barriers. This situation unravels several pragmatic

[40]See also Rajagopal, *supra* note 29; Onuma, *supra* note 29.

[41]This condition was already perceived by the Final Communiqué of the Bandung Conference (held in Indonesia, in 1955), as it stated 'fuller use should be made of the existing international organisations', as this would secure the proper representativeness in international law in terms of equitable geographical distribution. This idea is continuously reiterated by the Asian-African Legal Consultative Organization (AALCO) – an international organization which inherits the so-called spirit of Bandung of reshaping the legal basis of international law. See for instance that AALCO is regarded as an important institution for 'enabl[ing] Asian-African States [to] develop … enlightened international legal policies and positions', in order to 'shap[e] a just and equitable world order' (2009, Putrajaya Declaration) and 'ensur[ing] that the Asian-African voices are heard in the United Nations and other international fora' (2016, New Delhi Declaration).

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limits in the use of policy papers: even though properly written, they might encounter unexpected practical constraints – and the aforementioned experience before the international organization revealed some restrictions in this sense.

First, although there is extensive academic debate on the ICoC, sources indicate that the issue is not even regarded as relevant in the discussion developed inside the international organization – a status which is very far from the one expected/advocated by the supporters of the ICoC.

More than that, this situation raises the suspicion that maybe no ICoC statute proposal was presented at all to the international organization. If no one discusses it at this entity and if no one is able to reach the document – either through alleged confidentiality or reluctance to disclose the draft, it seems to be more a utopic academic discussion than a concrete proposal to deal with real problems in international legal order.

In this sense, if academics try to contribute to the discussion about a new international institution via a policy paper, one of the first concerns should be verifying whether the original proposal really exists and, if yes, trying to have immediate access to the original proposal. Otherwise, instead of simply trying to develop concrete suggestions to improve the original proposal, a valuable amount of relevant time, energy, and funding for the research will be lost – either in trying to discover a document which might not even exist, or in the attempt to access it.[42]

Secondly, even if the draft exists, other pragmatic limits must be taken into account. Our policy paper on the ICoC statute was written spontaneously, that is, it was a suggestion born within a genuine academic concern to contribute to the rule of international law based in democracy and human rights and to the exercise of international public authority by this new entity.

Be as it may, considering that the policy paper was not written on demand, one could argue this would be a plausible justification for the constraints which were found. In other words, perhaps not being directly invited to participate means not being welcome at all – be it inside the international organization or among other legal scholars. This condition is of particular relevance and can be compared to previous experiences faced by one of the authors of this article.

Indeed, while producing policy papers for the Brazilian Federal Government in the past, the research teams of each previous experience have found no constraints in accessing this non-academic sphere. While some of the proposals were not fully adopted by the Brazilian Federal Government, the dialogue with institutional organs was always open and facilitated. By the same token, it seems that when international organizations accept the presence of academia – as the examples of the ATS and the AC above indicate, those academics are already known and welcomed by the founding treaty or by additional regulation of the international regulation.

Another interesting non-textual barrier faced by the research team was the 'epistemic blockade'. As described above, as a newcomer in the discussion concerning the institutional design of the ICoC, the research team found some difficulties in being effectively integrated in the debate to present its contributions to other legal scholars. A similar experience was faced in previous experiences: at least in two opportunities with the Brazilian Federal Government, a few established (academic and non-academic) non-state actors were originally reluctant to provide information for a newcomer group of academics to produce a policy paper. However, while in this last experience the epistemic blockade was lifted some months later, this practice continued with the research team which tried to influence debates inside the international organization. One possible justification is the difference of origins of each experience: in the past, the research team was working closely with the governmental authorities and by their demand and, in the most recent research, the influence sought was a spontaneous one.

Thirdly, it is possible to perceive several legitimation issues in the exercise of a public authority by the international organization in which ICoC's Statute was being allegedly discussed. Indeed, the potential outcome from the negotiation would be the establishment a new international court:

[42]Be as it may, based on an extensive literature review on the ICoC and international constitutionalism, we presented in another paper a general criticism on the existing and publicly available academic proposals on the ICoC.

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the ICoC. This new institution would have a great impact on several individual (human rights) and collective (democracy) freedoms – especially those related to self-determination issues.

If one takes seriously the argument that international organizations should meet legitimation standards in their decision-making process to have their authority properly recognized, not only the future judgements of this international court have to fulfil the usual legitimation criteria – such as fair and unbiased judgements, taken by impartial judges, transparency in decisions, due process of law, among others. More important than that: the whole procedure concerning the debate on the institutional design of the ICoC itself must meet broader legitimacy patterns – a condition which was not fulfilled by the international organization in which the discussions about ICoC's statute is allegedly being developed. Indeed:

1. the international organization does not accept the direct participation of academics in any degree (in person, oral or written);
2. the control of the possible outcome – the establishment of an ICoC – remains at the state level and ignores alternative perspectives from non-state actors (e.g. academics);
3. the decision-making process is unknown by the public;
4. not all information from this institution is properly disclosed; and
5. non-state actors are able to influence this institution only via national and international advocacy/lobbying – but this depends on several factors (funding, schedule, displacement possibilities, among others) which are not equally distributed among all interested non-state actors.

Thus, fourthly, the absence of a permanent and regular institutional procedure might reduce the formal or informal influence of academia in this non-academic institution via policy papers. After all, not all academics hold the same material and immaterial conditions to go to the headquarters located in core countries – either to influence government representatives, or to contact the staff of the international organization to attend informal meetings.

This conclusion leads to a fifth remark from the aforementioned experience – a remark which touches now, not the low legitimacy of the international organization, but the shutting down of international legal scholarship itself and its consequences to the development of international law.

Even though not on purpose, it seems that the current institutional design of the international organization fosters a selectivity which excludes peripheral international legal scholarship from influencing the decisions taken inside this organ.[43] Considering the absence of institutionalized rights for a potential and clear way to welcome spontaneous contributions prepared by academia, only those academics – from 'top rank universities' – who hold the 'proper' material and immaterial conditions to construct informal and indirect paths are able to influence the international organization.

In other words, there is an unexpected closure which reiterates the exclusivity of some legal cultures to the detriment of others. Thus, potential contributions to a new international legal framework are ignored,[44] as the international organization remains indirectly open to informal inputs originated within the usual dominant international legal culture and does not look for institutional alternatives to absorb academic proposals originated outside institutions from core countries.[45]

In this sense – and although we recognize that the following statement needs further investigation to be confirmed, bearing in mind the non-truly international character of international law – it seems that the development of institutional mechanisms to regularly welcome contributions from peripheral legal scholarship might unconsciously endanger the ideational power exercised by core countries over forthcoming changes to the international legal repertoire.[46]

[43]This condition is perceived in several international organizations: see, e.g., Rajagopal, *supra* note 29.
[44]Ibid.
[45]Onuma, *supra* note 29.
[46]Ibid.

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This leads thus to the sixth and final remark regarding the aforementioned experience: the institutional design of the international organization fosters a more subtle second selectivity, that is, the reinforcement of the ideational power exercised by a state-centric perspective in defining the future of international law.

Indeed, in the case of the indirect influence of academia through the persuasion of government representatives, academics have to convince a state actor to bring forward a policy paper at the international organization. By doing this, the academic proposal should meet and please the current foreign policy of the allied state. In other words, in order to have a scarce chance of informally influencing the international organization, academic contributions cannot be effectively independent, as it depends on the goodwill and receptivity of a state.

Thus, the absence of clear and direct ways for academia to participate in the discussion indicates an institutional design which unconsciously works against the loss of the state-centric pillars of international legal institutions. To put it simply: legal scholarships created without a certain degree of 'state seal' might endanger states' ideational power over forthcoming changes to international legal repertoire.

For this reason, we conjecture the following provisional conclusion. It is due to its capability to disturb traditional domination structures of ideational power exercised by core (Western) countries and by state-centric ideology – and not due to the spontaneity of the proposal – that international legal scholarship from peripheral countries might face non-textual barriers to directly and indirectly influence decision-making processes inside the international organization. This requires, of course, further investigation in future studies.

5. Conclusion

Although there are different mechanisms whereby academia might seek to influence non-academic debates, we highlighted the role of policy papers as one of them. While academic papers are usually written to register, build, and spread contributions within a field of knowledge, policy papers are written to provide concrete solutions to problems.

After an analysis of primary sources (interviews, participant observation and document analysis) this text argued that the non-academic environment of a specific international organization seems to be still unresponsive to some initiatives. Indeed, closed to the spontaneous participation of academia and not willing to call for contributions from academic communities, the international organization does not seem to be concerned with developing an open and clearer mechanism to enhance the formal influence of academia via policy papers.

Taking into account the current legitimation crisis faced by international organizations, we understand also that their legitimacy could be raised by innovative institutional designs directed to reduce or eliminate entry barriers for academic institution-written policy papers. This is especially important for the contributions prepared by academics originated from peripheral countries, as international legal scholarship is usually developed within core (Western) countries.

Indeed, there are material and immaterial conditions which do not allow peripheral legal scholarship to surpass non-textual barriers – a condition which reduces their capability to influence the discussions developed inside international organizations. We argued that this condition might reiterate the traditional cultural domination in international legal scholarship via the ideational power exercised by core (Western) countries and by a state-centric perspective.

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