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The Protection of Humanitarian Legal Goods by National Judges

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Abstract

National judges are increasingly exposed to deciding on issues regulated by the international legal system, given its expansion and specialization. However, this is just one of the many ways in which national judges interact with international law: they have the potential not only to receive and take into account international law, but also to shape and contribute to its modification, acting alone or in conjunction with other judicial authorities, and considering or ignoring the interests of several actors. The attitude of judges towards international norms, in the reception and modification dimensions, depends on a variety of factors worth exploring in detail. Such exploration allows us to ascertain how and when judges are more prone to protecting legal goods enshrined by international norms. The fact that national judges are empowered by a domestic legal system to act, while generating tensions and paradoxes when norms created in different levels of governance clash, does not detract from the possibility for them to defend interests and values, i.e., legal goods, belonging to other legal systems, even those generated in a global space of interaction where interests and values shared by different legal systems are shaped, including the protection of human dignity.

1 Introduction

There has been an increased interest in the role played by globalization and the ease of access to information on national judicial activity in the formation, application, and

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modification of international law.[1] This phenomenon, however, is not just a product of new dynamics; the position of national judges has always been unique. They are central state actors who, given the powers entrusted to them, have the power to interact with international law.

Nonetheless, in recent years a substantial change has taken place: the role of domestic judges has broadened as they increasingly make decisions with a greater knowledge – or the possibility thereof – of international law and with a greater likelihood of deciding on issues regulated by the international legal system. This system, given its specialization, now includes norms that overlap with those found in domestic legal systems. Furthermore, domestic judges interact with other actors in a transnational landscape, consciously or spontaneously generating links and networks,[2] and have more opportunities to exert legal influence[3] even beyond the territorial borders of their states. This extension of legal reach, coupled with substantive and subject-matter competences, explains why nowadays domestic judges can make decisions that affect legal goods with global relevance.

In this article, we aim to examine the possibilities of interaction between national judges and international law in today's global context, in which the links between legal systems and actors are greater and subsumed in an interdependent nexus. Furthermore, we seek to analyse how judges can operate as protectors of global legal goods, acting as agents who can coordinate and harmonize the internal activity of states with international law and incorporate the goals shared by legal systems of different levels of governance.

We consider that the multiple factors influencing the attitude of judges regarding international law, together with the possibilities and limits found in municipal legal systems, enable judges to employ several legal strategies that can turn judicial fora into stages where legal aspirations of the global community related to human dignity are protected. Concerning this, the increasing contacts among legal systems in connection with the content of legal goods protecting human dignity[4] can function as cohesive elements that guide the judicial activity and harmonize it across diverse jurisdictions.

Due to the presence of the previous dynamics, there may be moments in which national judges consider that the international regulation is contrary to essential

[1] See Institut de Droit International, Resolution on the Activities of National Judges and the International Relations of their State, Session of Milan, 1993; Reports of the International Law Association Committee on 'International Law in Municipal Courts'; B. Conforti and F. Francioni, *Enforcing International Human Rights in Domestic Courts* (1997); T.M. Franck and G.H. Fox (eds), *International Law Decisions in National Courts* (1996); Francioni, 'International Law as a Common Language for National Courts', 36 *Texas Int'l LJ* (2001) 587; Koh, 'How Is International Human Rights Law Enforced?', 74 *Indiana LJ* (1997) 1397; Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59; among others.

[2] See, for instance, A.M. Slaughter, *A New World Order* (2005).

[3] See Benvenisti and Downs, *supra* note 1.

[4] See, among others, Preamble along with Arts 1, 22, and 23 of the Universal Declaration of Human Rights; C. Villán-Durán, *Curso de Derecho Internacional de los Derechos Humanos* (2006), at 63, 92.

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interests – not necessarily selfish in nature – of the political communities on behalf of which they act, or even of humankind. Therefore, these judges may oppose that regulation or seek to exert influence on the international legal plane in order to attempt to shape what they perceive to be a desirable international legal system *de lege ferenda*. This illustrates that judges may not only act as defenders of purely domestic interests or interests of the international legal system, i.e., an *extraneous* legal system, because it is possible for them to exercise their functions inspired by what they perceive as legal interests that are or ought to be shared by their legal system(s) with others in a global space of legal interaction.

In this regard, it is interesting to note how the President of the European Court of Human Rights has implicitly acknowledged that, beyond formal boundaries, there are rights and legal goals the effectiveness of which depends on the proper discharge of duties and the cooperation of state and non-state entities across levels of governance and legal systems.[5] In doing so, he is perhaps implicitly acknowledging the common or shared presence of legal goods in those levels and in the actions of multiple entities.

In relation to this, the normative content shared by the global community may vary in scope and be narrow or broad; for instance, concerning freedom of expression, one may think that the prohibition of previous censorship is exclusively in the Inter-American system, placing that additional guarantee outside the scope of a meta-regional legal space of interaction. Yet a minimum and shared content of freedom of expression that is narrower than that of the Inter-American system may exist in a legal space in which international and national laws interact for the purpose of protecting interests of the global community.[6]

That a legal space of interaction may exist has been put forward by supporters of the notion of a Global Administrative Law,[7] yet the dynamics that such a space entails are not necessarily limited to legal administrative phenomena. In our opinion, a small yet relevant space of this kind encompasses the legal realities and practices[8] protecting *global legal goods*, the protection of which, as mentioned above, can be carried out or promoted by national judges.

For the sake of clarity, it is convenient to provide a brief description of what we understand as global legal goods. We consider that, in their objective dimension, global legal goods are those interests, goals, and values protected in common by norms of different legal systems and by actors who interact and shape their content, being applicable in all those systems by those actors, guiding their actions. From a subjective point of view, global legal goods constitute those interests, values, and goals that should be protected in a global space of legal interaction.[9]

[5] See Carrillo, 'Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods', *Global Legal Goods Working Paper* No. 2/2011, Universidad Autonoma de Madrid, at 35, available at: http://ssrn.com/abstract=1753036.

[6] *Ibid.*, at 10.

[7] See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', *IILJ Working Paper* No. 2004/1, New York University, at 12–18.

[8] See *infra* note 88.

[9] See Carrillo, *supra* note 5, at 10–11.

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When those global legal goods protect human dignity, they constitute, in turn, *humanitarian* global legal goods. The importance of human dignity is both legal and meta-legal: formally, human rights law is *founded* upon that concept, which can be regarded as the recognition of the *inner worth* of every human being.

Since the content of legal goods protected in the global space is but a minimum, two complementary dynamics follow: the shared global interests should serve to harmonize the protection in all interacting normative systems; and participants, allowing for plurality in regulations outside the scope of the lowest common denominator, permit either an improvement of the guarantees or the development of different norms that are not contrary to this content. This echoes the idea that constitutionalism and pluralism are not necessarily opposed to each other.[10]

In defence of global legal goods, it can be said that in the globalized landscape contacts and approaches among normative systems and actors take place, and they can occur in order to protect common interests that cannot otherwise be protected unless that synergy is present. This is due to the threat that actors capable of damaging those legal goods elude the control of a single normative system, depriving the protections present therein of their effectiveness by taking advantage of gaps, formal boundaries, or limitations of states and international authorities that act in isolation. This ignores the vulnerability of legal goods against entities that elude somewhat outdated strict separations between legal systems. Moreover, there are voices in economic and social sciences maintaining that globalization cannot be properly managed unless the several actors cooperate in the provision of goods the provision of which or lack thereof may benefit or affect populations across countries and even future generations.[11]

That being said, this article has the following structure: after exploring the international legal approach to national judicial activity, we will analyse whether judges can operate as protectors of international law, leading us to examine the reasons and factors that may exert an influence on the adoption of a proactive attitude in that regard. Following this, we will examine whether national legal systems can accommodate such behaviour, and how domestic judges can contribute to the transformation of the international legal system. Finally, we will briefly analyse the notion of global legal goods as core interests and aspirations protected globally in order to determine whether national judges can cooperate in their achievement and protection while implementing national and international law.

[10] See Dunoff and Trachtman, 'A Functional Approach to Global Constitutionalism', Harvard Public Law Working Paper No. 08-57, Harvard Law School, at 31; Krisch, 'Global Administrative Law and the Constitutional Ambition', LSE Law, Society and Economy Working Papers 10/2009, London School of Economics and Political Science, at 2.

[11] See I. Kaul *et al.*, 'Why Do Global Public Goods Matter Today?', in Kaul *et al.* (eds), *Providing Global Public Goods* (2003), at 3; Kaul and Mendoza, 'Advancing the Concept of Public Goods', in *ibid.*, at 87, 95, 107; Kaul *et al.*, 'How to Improve the Provision of Global Public Goods', in *ibid.*, at 23.

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2 Domestic Judges and Legal Systems from an International Legal Perspective

From the viewpoint of international law, the prevalence of the international legal system over domestic law[12] is a logical consequence of the requirement of the effectiveness of international norms *vis-à-vis* domestic law.

Nevertheless, domestic law is far from irrelevant with regard to international law. In this sense, for instance, the violation of certain domestic norms can occasionally entail the nullity of the products of the sources of international law;[13] international judicial bodies can examine domestic provisions with the aim of clarifying the content of state duties and commitments; and there are legal principles that either have their origin in domestic legal systems or require one to take into account what domestic law demands, such as the *pro homine* principle.[14] The importance of domestic law is also evinced when international bodies are required to assess its compatibility with international obligations that can be breached as a result of contradictions between domestic and international law, engaging a state's responsibility as a result of legislative action.[15]

Like other state agents, those who are entrusted with judicial functions have the capacity to engage the international responsibility of their state with their acts and omissions. Furthermore, the close link between judges and law, the application of which they are responsible for, entails that the former can generate additional violations when they confirm and give effect to decisions issued by other state authorities[16] the content of which breaches international law. This situation presupposes a dilemma for judicial authorities: according to the legal system of the state recognizing their competence and powers: they have a duty to apply its norms, but in so doing can engage the responsibility of the same state whenever domestic norms are incompatible with international law or prevent one acting in accordance with its tenets.

A *The Contacts between the Domestic and International Legal Systems before Judicial Stages*

It has been considered that the border between domestic and international levels may be somewhat diluted due to the spontaneous emergence of a *global legal space and the*

[12] See Arts 27 and 46 of the Vienna Convention on the Law of Treaties (VCLT) and Art. 32 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts issued by the International Law Commission.

[13] See Art. 46 VCLT.

[14] See Arts 5 of the International Covenant on Civil and Political Rights (ICCPR), Art. 5 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 29 of the American Convention on Human Rights, and Art. 53 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[15] See Art. 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts; *Case of Suárez Rosero v. Ecuador*, Inter-American Court of Human Rights (1997), Judgment of 12 Nov., at paras 97–99.

[16] See Art. 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, and para. 6 of the Commentary by the International Law Commission of the UN to that Art. (document A/56/10).

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increasing interaction among norms and participants of many legal systems.[17] Hence, the links between the international and domestic legal systems and their respective agents can contribute to ways of approaching their content and offering possibilities of interpretation that have the potential to harmonize their norms, thus avoiding eventual contradictions due to the furtherance of common aims and the erosion of the differences between the internal and supra-internal interests, bolstered by the human and ethical dimensions of dynamics in the current social context.[18] The frontier between internal and global or international issues and goals is further weakened because of the material expansion of international law, which encourages a growing congruity between the reach and scope of the application of internal and international legal systems in numerous areas, including those devoted to the protection of human dignity.[19] This overlapping, together with the multiplication of bodies entrusted with monitoring compliance with international law, facilitates the possibility of international norms *and decisions* being examined in domestic fora.

Simultaneously, this situation can lead to strengthening or weakening the prestige and applicability of international law, depending in part on how national judges treat its norms, given that they are able to send symbolic messages that contribute to its internal legitimization or de-legitimization.[20] In this regard, it is worth noting that ever since judicial fora have increasingly become battlefields within which sensitive issues with possible international connotations are discussed, it has been necessary to impose controls in order to check possible judicial abuses, with the condition of respecting the independence and impartiality of the judiciary.

There are many strategic and institutional positions with regard to courts. Therefore, parties to the disputes seised by courts, together with third parties (who can be non-state actors), may seek to make their interests prevail – a good reason why their claims are to be examined with a pinch of salt.[21] What those interests are is a difficult question, as those entities can have interests that are unique to them or are shared with other subjects, even by macro or micro-communities.

In turn, national judges are increasingly required to justify their decisions when they disagree with international decisions or foreign decisions based on the same

[17] See Kingsbury, Krisch, and Stewart, *supra* note 7, at 12–18; Koh, 'Review Essay: Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2646, at 2649–2650. On the harmonization made possible by human dignity see Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), at 37, 72–74.

[18] See Kingsbury, Krisch, and Stewart, *supra* note 7, at 9–10, 12–13; Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 1, at 52–55, 57; J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007), at 11; Del-Arenal, 'La nueva sociedad mundial y las nuevas realidades internacionales: un reto para la teoría y para la política', in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2001* (2002), at 53.

[19] See Gómez-Isa, 'International Protection of Human Rights', in F. Gómez-Isa and K. de Feyter (eds), *International Protection of Human Rights: Achievements and Challenges* (2006), at 19–21.

[20] See Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', 19 *EJIL* (2008) 725, at 735.

[21] See Caron, 'Towards a Political Theory of International Courts and Tribunals', 24 *Berkeley J Int'l L* (2007) 401, at 413–414, 417.

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norms or legal goods that are supported by the world legal community and global civil society, and they may resort to those decisions in order to support their conclusions when they agree with them, which explains the growing number of citations of external decisions in judicial conclusions[22] and the increasing closeness between judicial actors in a transnational context. In any case, national judges must strive to remain independent and impartial, and take into account that in some events alleged legal claims of some entities do not completely represent social claims,[23] but are political aspirations of some actors.

In this train of thought, let it be said that true dialogues *and* contacts between judges are taking place: (i) in the framework of judicial, transnational, or *inter*national networks;[24] or (ii) due to the spontaneous informal exchanges among several national and even international judges, based on the influence and persuasive nature of their decisions. This cross-fertilization is characterized by the absence of mediation, in the sense that judges can directly have regard to external decisions for a variety of reasons, such as the *auctoritas* of the issuing authority, the identity in the content of the legal good under examination, or the coincidence in the desired legal results, among others.

International bodies can also conduct a formal or an informal dialogue with national or non-international authorities[25] with the purpose of, *inter alia*, endorsing

[22] Mutual support of national judges belonging to different states can be explained by a coincidence of arguments and results of their decisions, or by the presence of analogous norms that are used. On these topics see Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102 *AJIL* (2008) 241, at 251–252, 273–274. It is also possible to resort to comparative law in order to explain the justification of changes in domestic law or legal practice, as happened regarding the limitations to the death penalty concerning children in the case of *Roper v. Simmons*, 543 US 551 (2005). On this judgment see Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', 119 *Harvard L Rev* (2005) 109; and Waldron, 'Foreign Law and the Modern Jus Gentium', 119 *Harvard L Rev* (2005). In *Graham v. Florida*, 560 US _ (2010), this comparative method has been resorted to again in the opinion of Judge Kennedy.

[23] See Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law* (1999), at 37, 46; Bianchi, 'The Role of Non-State Actors in the Globalization of Human Rights: An International Lawyer's Perspective', in G. Teubner (ed.), *Global Law Without the State* (1997), at 179, 185, 191–195, 201–203.

[24] Just as there are formal networks in which legal practitioners participate, there can be informal or sporadic links or contacts among judges, which are not to be underestimated. Formal links are also relevant. On the other hand, coinciding decisions can generate dialogues among national judges and lead to their modifying the interpretation of some normative aspects. Some of these topics are covered in: Bianchi, *supra* note 24, at 179–212; Josselin and Wallace, 'Non-State Actors in World Politics: A Framework', in D. Josselin and W. Wallace (eds), *Non-State Actors in World Politics* (2001), at 2–3; and see generally Slaughter, *supra* note 2.

[25] See García-Sayán, 'Una viva interacción: Corte Interamericana y Tribunales Internos', in *La Corte Interamericana: Un Cuarto de Siglo: 1979–2004* (2005), at 323, 328. These dynamics can be motivated by the aim of stimulating the cooperation of national judicial authorities or of rewarding the adoption of similar decisions, and are related to the role of national judges as guarantors of the effectiveness of international law. Additionally, see Buergenthal, 'The Evolving International Human Rights System', 100 *AJIL* (2006) 783, at 806; Knox, 'Horizontal Human Rights Law', 102 *AJIL* (2008) 1, at 19, 44; Office of the High Commissioner for Human Rights of the United Nations, 'Judicial Colloquium on the Domestic Application of International Human Rights Norms, Outcome Document', 23–25 Mar. 2009, Bangkok, Thailand.

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their decisions and assimilating their reasoning, requesting greater cooperation, making mutually beneficial compromises, or acknowledging the need for greater cooperation. Naturally, domestic judges can and in fact do contact non-state agents and legal participants.

Inter-judicial dialogues, which include quasi-judicial entities, have great potential, because coincidence in relevant opinions tends to reinforce the appearance of the legality of discourses that were previously deemed alternative or even political aspirations *de lege ferenda*,[26] thus being both promising and simultaneously risky. This makes it possible to speak of judges as transnational actors with an undeniable impact, given their function as 'guarantors' of law. Because of this, nothing prevents judges from participating in the complex phenomenon of the confusion of positive law and legal aspirations.[27] Accordingly, the publicity of judicial activities is essential,[28] because it constitutes a guarantee to counter arbitrariness and to examine critically judicial decisions.[29]

In this landscape, the norms protecting human dignity can operate in order to counter fragmentation and offer legal cohesion that integrates international and national legal systems. The imperative of protecting human beings necessitates harmonizing principles that prevent and sanction possible excesses of several dynamics, such as globalization and gaps arising from the formal separateness of legal systems. In our opinion, the protection of global legal goods can increase the likelihood of achieving this aim.

B *The Protective Goals of Legal Systems, and Judges as Their Guarantors*

With the purpose of ensuring the coordinated promotion of certain legal goods, and in order to prevent their being unprotected in any level of governance, it is useful to take into account rules of distribution of competences relating to the application of law and allocation of powers. They seek to determine at which level a decision must be made or under what conditions international action is to take place. These rules are derived from, among others, the principles or mechanisms of subsidiarity[30] and complementarity.[31]

[26] See Bianchi, *supra* note 24, at 196–197.

[27] *Ibid.*, at 185, 191, 195, 197, 202; E.A. Posner, *The Perils of Global Legalism* (2009), at 68.

[28] See General Comment No. 13, 'Article 14 (Administration of Justice)', Human Rights Committee, Twenty-first session (1984), at para. 6.

[29] See Human Rights Committee, General Comment No. 32, 'Right to equality before courts and tribunals and to a fair trial', Human Rights Committee, Ninetieth session (2007), at para. 28.

[30] See, for instance, Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *AJIL* (2003) 38; T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (2008).

[31] See Arts 2 of the Optional Protocol to the ICCPR, 3 of the Optional Protocol of the ICESCR, 35 of the ECHR, 46 of the American Convention on Human Rights, 17 of the Rome Statute of the International Criminal Court, and 14 and 15 of the Draft Articles of the International Law Commission on Diplomatic Protection (document A/61/10).

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By virtue of these principles, state judicial authorities have the opportunity to provide a pertinent and effective legal solution to the problems they examine.[32] These mechanisms also allow persons to resort to authorities that are closer to them and their cases in the first place. This opportunity is cheaper and easier for them in procedural terms, and the state is in turn offered the possibility of living up to the normative, individual, and social expectations that justify its powers subject to law – a subjection that conditions sovereignty.[33] However, if the state does not comply with its obligations due to inability or unwillingness, the possibility for affected parties to resort to different authorities and not be left unprotected by law would open up.[34]

The rules of coordination require national judges to strive to make their states guarantee the effective implementation of domestic law in a way that protects global legal goods – given that they are present simultaneously in domestic law – and respect international law, either directly, if domestic law permits it, or by employing interpretive tools.[35] This is consistent with the idea that domestic remedies are called upon to ensure the effective protection of international law.[36]

In connection with this, it must be considered that the evolution in international law as a result of its recognition of individual rights and duties that do not operate with the logic of reciprocity entails, regarding the obligation of protecting and ensuring the enjoyment of human rights, national judges cooperating and guaranteeing the protection of legal goods safeguarding human dignity that are commonly endorsed in the legal space of the global community. The growth in the number of international supervisory bodies does not go against the evolution of judicial cooperation. On the contrary, their assistance is necessary to avoid judicial congestion at the international level,[37] a consideration that has made some authors suggest that one important function of international judicial bodies can be that of clarifying the meaning and scope of some norms and solving complex legal questions[38] for authorities in other levels of governance, although it must be borne in mind that judicial authorities perform many other different functions.[39]

[32] See *Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (1999), Judgment of 19 Nov., at paras 225–226.

[33] See Nolte, 'Sovereignty as Responsibility?', in L.R. Helfer and R. Lindsay (eds), *Proceedings of the Ninety-Ninth Annual Meeting of the American Society of International Law* (2005), at 389; Peters, 'Humanity as the A and Ω of Sovereignty', 20 *EJIL* (2009) 513, at 534; Koh, *supra* note 1, at 2636, in nn 189 and 190.

[34] See Concurring Opinion of Judge A.A. Cançado Trindade in the *Case of Castillo-Petruzzi et al. v. Peru*, Inter-American Court of Human Rights (1998), Preliminary Objections, Judgment of 4 Sept., at para. 35.

[35] See C. Espósito, *La OMC y los particulares* (1999).

[36] See Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', 1 *EJIL* (1990) 210, at 220–221, 226–231.

[37] See Knox, *supra* note 26, at 2, 46.

[38] See Cebada-Romero and Nickel, 'El Tribunal Europeo de Derechos Humanos en una Europa asimétrica: ¿Hacia el pluralismo constitucional?', available at: www.jura.uni-frankfurt.de/l_Personal/wiss_Ass/nickel/Publikationen/Cebada_y_Nickel_ECHR_and_constitutional_pluralism_Sevilla_final.pdf, at 9–13; P. Leach *et al.*, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and Their Impact at National Level* (2010).

[39] See Caron, *supra* note 22, at 402, 405–410.

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The concept according to which national judges can contribute to guaranteeing international law implies that a negative attitude on their part may decrease its effectiveness. The power held by judges in the application of law permits them to make important decisions that will impact on the effectiveness of international law and the legal goods protected by the nascent global community. Certainly, the personal and professional identification of all individual judges with global interests[40] or the protection of human interests[41] over some selfish state interests is neither easy nor automatic for some judges, especially when faced with difficult and complex issues. Therefore, it is crucial to conduct a disaggregated analysis of states in order to identify the possible factors that may exert some influence in judges' convictions and decisions regarding the protection of the global community's legal goods. These elements are studied in the next section.

3 Some Functions of International Law for National Judges

Given judges' positions as individuals appointed by a state who assume a judicial role, the decisions of national judges concerning the application of international law and the guarantee of a global community's legal goods may obey a multiplicity of factors exerting to a greater or lesser extent some influence on their decisions, among which the following are found: personality, ideology, and other personal elements, together with strictly speaking legal limits and stimuli regarding the position of international law in a given domestic legal system. Judges can thus feel bound or constrained by moral,[42] professional, or political considerations to act in one way or another regarding some international norms or to give preference to domestic law. Nevertheless, those factors do not deny the personal freedom of judges, who may heed those factors or ignore them.

A *The Individual Dimension and the Personal Motivations of Judges*

The conscious or unconscious decisions and attitudes of national judges regarding international law may vary depending on the importance they attach to professional elements, such as the academic trajectory, the working environment, the legal theoretical orientation, and, in particular, their conception of international law and the role of the state. These factors are intimately related to considerations transcending the professional dimension, such as the philosophy, political affiliations, idea of justice, and ideology of each judge, among others.

[40] See Del-Arenal, *supra* note 19, at 29; Cassese, *supra* note 37, at 216; Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599, at 2633–2644, 2650, 2653, 2659; Van Staden and Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in G. Kreijen *et al.* (eds), *State, Sovereignty, and International Governance* (2002), at 165, 167–168.

[41] See Concurring Opinion of Judge A.A. Cançado Trindade to *Juridical Condition and Human Rights of the Child*, Inter-American Court of Human Rights (2002), Advisory Opinion OC-17/02, 28 Aug., at para. 19.

[42] See Posner, *supra* note 28, at 50–52.

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The aforementioned factors may generate a *prima facie* general perception of the role that international law *should* have at the domestic level, although this conception will be adjusted in each particular case examined by a judge, given the values that come into play and the judge being able to choose between different admissible legal options.

The decentralization and low institutionalization of international law often force states to face the task of interpreting its norms, sometimes judicially. Hence, proposed explanations of the reasons that may lead states to comply with international law are of the utmost interest. Some of the theories that have been put forward in this regard are the following: (i) pressure-coercion; (ii) (positive) stimuli; (iii) acculturation; (iv) moral and ethical considerations; (v) internalization; (vi) an assessment of costs and benefits; and (vii) the conviction of the necessity of cooperating in the pursuit of certain legal goals.

(i) It is possible to conceive pressure-coercion as a factor in the motivation of judicial attitudes in the form of their desire to avoid the materialization of threats of formal or informal sanctions to be applied in the event of a breach of international law or, in some cases, of compliance with it. The threat of sanctions may be directed towards the judges, a group with which they identify, or their state.[43]

In this regard, it has been considered, for instance, that unless they cooperate and interact with judges of other states, some national judges of weak states may feel disinclined or reluctant to scrutinize the activities of private regulators operating transnationally on the basis of international law, due to the adverse consequences that this (lawful and legitimate) attitude may generate for their countries, given possible non-state retaliations.[44]

The effectiveness of this element may diminish or increase as a result of power differences between the actors involved, the erroneous belief that they are complying with international law, or the staunch defence of internal or extra-legal interests. All of these considerations make clear that pressure-coercion alone cannot explain why judges show respect or lack thereof for international law. In the current context, it is not to be dismissed that judges may feel pressurized by the demands of groups that may be affected by decisions taken in conformity with international law.

(ii) Positive stimuli or encouragements, based on persuasion, incentives, or otherwise,[45] are yet another possible factor in the process leading judges to adopt a particular position with regard to international law, as judges envisage that they themselves, a group they support or with which they identify, or their states will obtain or preserve benefits in the event that they make decisions in accordance with or against international law. It is interesting to analyse this motivational factor in a context in which judges have the ability to act as representatives of the global

[43] See Goodman and Jinks, *supra* note 21, at 725–726, 728, 731, 743, 745–747; and Koh, *supra* note 18, at 2600–2601.

[44] See Benvenisti and Downs, 'National Courts Review of Transnational Private Regulation', Working paper, at 16-17, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742452.

[45] See Goodman and Jinks, *supra* note 21, at 726.

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community. Indeed, this is so because of the ability they have in an interdependent world of bearing in mind the aspirations of a multiplicity of actors and of contributing in their professional practice to generating legal benefits that reach beyond state borders.

(iii) The phenomenon known as 'acculturation' is another possible element in the positioning of national judges regarding *jus gentium*. It can be understood as the sincere or hypocritical imitation of the behaviour of other participants in a context of common belonging, as for instance happens in some transnational relations. These relations presuppose underlying mutual influences among actors who interpret international law in a way that can be internalized or assumed by others through practice. It must be noted that failure to follow the guidelines within a 'culture' may be attributed to internal difficulties, among other reasons.[46]

Concretizing the notion of acculturation, judges may assume the example of foreign or international authorities that belong to one same group of identities and relations – spontaneous or quasi-formalized – by means of processes that reinforce themselves with judicial dialogues that make spontaneous implicit agreements and generalized practices more likely, increasing the power of judicial authorities gradually as the entities comprised in dialogues are fewer and exclude some sources of information and influence (governmental, legislative, etc.).

On the other hand, acculturation can lead a judge to perceive erroneously certain aspirations *de lege ferenda* as positive law. This dynamic is particularly strong in the field of human rights, where some particular conceptions are sometimes put forward in the guise of official understandings in political statements that have normative aspirations, but which are not necessarily binding in nature. Certainly, this dynamic can lead to normative changes,[47] the origin of which can on occasion be traced back to judges.

(iv) Concerning the moral and ethical motivations that can impact on the guarantee of international law, some may consider that it is paradoxical that some judges feel a moral inclination to give priority to a legal system that has a scheme of participation of actors that in regard to the creation of norms that is so limited that it verges on having a lack of transparency.[48] Nevertheless, one must distinguish between *procedural* legitimacy and *substantive* justice[49] to comprehend this, because their presence can convince judges of the fairness and legitimacy of international law. In this fashion, some international norms and doctrinal works make it possible to infer that, in principle and in abstract terms, neither domestic law nor international law is in a position of moral supremacy or advantage in absolute and general terms that would make it have automatic preference, and this is so because the allocation of powers and competences at one level of governance or the other is a question to be

[46] Regarding this see Goodman and Jinks, *supra* note 21, at 728, 730–743.

[47] See Bianchi, *supra* note 24, at 185, 191, 193–195, 201–203; Andreopoulos *et al.*, 'Conclusion: Rethinking the Human Rights Universe', in G. Andreopoulos *et al.*, *Non-State Actors in the Human Rights Universe* (2006), at 335–336.

[48] See Posner, *supra* note 28, at 50–52.

[49] See Koh, *supra* note 18, at 2641–2644.

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settled by analysing the particular circumstances of every issue at stake in the light of general criteria, principles of distribution of powers, and competences (subsidiarity, complementarity, or others) and the examination of relevant factual data.[50]

Regarding substantive justice, there are events in which the content of international norms can be more beneficial for human beings, for example. Moreover, there are mechanisms ensuring that the most favourable normative content is applied, regardless of the legal system from which it originates, as is the case with the *pro homine* principle. The possibility given to judges by some legal techniques to take into account the most favourable norms, together with the duty that can be assigned to them to do their best to make their state abide by its international obligations, can generate a legal culture and practice that reinforce the protection of legal goods, such as human dignity or the environment.

Acknowledgment of international peremptory law, given its hierarchy,[51] can strengthen this reinforced protection of legal goods, to the extent that it provides lowest common denominator normative contents the effectiveness of which prevails over other legal manifestations attributable to any source or actor. This is to the extent that even opposing state norms are deprived of any possible effect or validity and individuals who violate that peremptory law may be sanctioned. This logic can be incorporated by domestic legal systems.

In summary, the content of an international norm may make national judges deem it 'just'.[52] Furthermore, as to procedural considerations, some international norms may have broad support or consensus, or may have emerged in transparent and participatory processes, events all of which may increase their legitimacy.[53] All of this, in turn, may generate the judicial perception of a moral duty or justification to guarantee at least some core tenets of international law in those events in which domestic law does not provide superior guarantees or is contrary to them – a sensation that may inspire the devising of legal strategies permitting the application of the content of those international norms.

(v) Internalization is a process that can have three variants: a social, a political, and a legal one. Concerning our discussion, the legal manifestation of this dynamic can be

[50] See Peters, *supra* note 34, at 535–536; Arts 17 of the Rome Statute of the International Criminal Court, 2 of the ICCPR, 2 of the Optional Protocol to the ICCPR, 3 of the Optional Protocol to the ICESCR, and 25 and 46 of the American Convention on Human Rights, among others. Additionally, see *Exceptions to the Exhaustion of Local Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) [of the] American Convention on Human Rights)*, Inter-American Court of Human Rights (1990), Advisory Opinion OC-11/90, 10 Aug., at paras 22–41. See also J.H. Jackson, *Sovereignty, the WTO and the Changing Fundamentals of International Law* (2006), at 73–76.

[51] See N. Carrillo-Santarelli, *Los retos del Derecho de Gentes – Ius Cogens: la transformación de los Derechos internacional y colombiano gracias al ius cogens internacional* (2007), at 32–35,161–167, 279.

[52] See the Concurring Opinions of Judge A.A. Cançado Trindade, *supra* note 41, at para. 20, and to *Juridical Condition and Rights of the Undocumented Migrants*, Inter-American Court of Human Rights (2003), Advisory Opinion OC-18/03, 17 Sept., at paras 48–50. On the procedural legitimacy of (international) law and substantive justice see Koh, *supra* note 18, at 2641–2644; T.M. Franck, *The Power of Legitimacy among Nations* (1990); T.M. Franck, *Fairness in International Law and Institutions* (2002).

[53] See A. Remiro-Brotóns *et al.*, *Derecho internacional* (2007), at 67, 71.

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characterized as a subtle *or* formal incorporation of the content of international law in a domestic legal system a possibility that increases as attitudes respectful of international law become more frequent, given that it is possible to identify instances in which international law modifies the identity or interests of national judges.[54]

As a result, if one takes into account both that the content of international law can be incorporated or perceived as relevant for domestic law, having the potential to guide national judicial actions, and the possibility of incorporating or referring to conceptions of international law that are not strictly positive law,[55] the landscape can be broadened in order to envisage the possibility of national judges interacting and operating as *participants* in international law (being capable of exerting an influence in its transformation, proper or not) alongside other actors.[56]

(vi) Some economic and rational analyses posit the idea that what causes law to be respected by its addressees is a 'rational' consideration or assessment of factors, such as of the costs and benefits that will result from compliance with legal norms. These theories allude to notions of convenience of behaving in a way that coincides with what is prescribed by law.[57] The not so praiseworthy way in which states sometimes behave regarding issues of the utmost importance[58] could perhaps be explained in part by this logic, given the greater capacity of infraction attributable to the most powerful actors in a legal system that, in spite of proclaiming formal equality, has a materially unequal substratum.[59]

The rational examination of cases can be performed by individuals with judicial functions. Patriotic feelings culturally induced or concern for the protection of domestic interests,[60] for instance, may lead a judge to disregard international law in order to defend domestic legal principles opposed to it. Nevertheless, this attitude could be overcome with constructive strategies and interpretations that integrate with synergy both international and domestic legal systems and the interests protected in common by them.

These considerations highlight the importance of the generation of perceptions of the existence of an integral global legal space that contains common goals and the importance of protecting them as 'essential interests' of a group to which the judge belongs: humankind. By giving preference to global legal goods in a way that is legally acceptable and reasonable through various mechanisms, including those available in domestic law, the possibility is reinforced that if their protection is deemed essential and non-negotiable by judges, judges may cease to be what some regard as mere

[54] See Koh, *supra* note 18, at 2633–2634, 2646, 2656–2659; Remiro-Brotóns *et al.*, *supra* note 53, at 53.

[55] See Bianchi, *supra* note 24, at 185, 191, 195, 197, 202; Posner, *supra* note 28, at 68.

[56] See T. Meron, *The Humanization of International Law* (2006), at 317; Nijman, 'Sovereignty and Personality: A Process of Inclusion', in Kreijen *et al.* (eds), *supra* note 40, at 109, 138–139.

[57] E.g., see Pae, 'Sovereignty, Power, and Human Rights Treaties: An Economic Analysis', 5 *Northwestern J Int'l Human Rts* (2006) 1.

[58] On this consideration see Remiro-Brotóns *et al.*, *supra* note 55, at 49–50.

[59] See Espósito, 'Soberanía e igualdad en derecho internacional', XIII *Anuario de la Facultad de Derecho de la UAM* (2009) 291.

[60] See Posner, *supra* note 28, at 40; Del Arenal, *supra* note 19, at 23, 28, 59–60.

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passive addressees of extra-national norms and turn into participants in the legal systems from which those norms originate, leading judges to make their states assume a position of guarantors of supra-state legal goods.

(vii) The judicial position on international law can also be somewhat influenced by a feeling of cooperation and commitment that flows from the conviction of the role, mission, or expectations experienced by or placed on a judge regarding its protection. This factor differs from mere *assimilation* because, in this case, there is a conscious conviction of a social or individual duty in the attainment of goals and interests that are shared with other participants in intertwined legal systems – international or domestic – and even norms issued by private entities.

Some scholars consider that national judges can invoke international law in order to reinforce their position and protect domestic principles and values.[61] This theory can be proven to be true under some circumstances, but other factors mentioned throughout this article can contribute to generate commitments arising out of the conviction of the importance of protecting shared legal goods in a global socio-legal context and not just national interests, even in order to benefit persons who have no nexus whatsoever with the state's judge who exercises jurisdiction.

Moreover, there are circumstances that stimulate the accomplishment of common tasks and the achievement of shared goals, as happens in relation to the protection of victims and the actions against impunity, which are furthered by judicial decisions favouring transnational litigation[62] or other ways in which it is possible to protect rights of victims in an extended fashion, as for instance by means of universal criminal jurisdiction. This extension of reach, however, is sometimes threatened by political pressure[63] exerted against the judiciary or other state actors.

No explanation of the reasons that may have some influence on the position of judges concerning international law is exhaustive or sufficient in itself,[64] and for this reason their mutual influence and varying importance in each case may impact somehow on the attitude of a judge who takes into account the possible effects of her actions, although, given her freedom and responsibility, and the formal constraints imposed on her conduct by her legal system, she may resist those factors.

Because of this, from a normative standpoint, it would be too simplistic to assume either that a judge can act in a whimsical manner without having to face any consequences or that his behaviour is pre-determined in an absolute manner or by circumstances.

[61] See Benvenisti, *supra* note 23, at 241–244, 247–252, 273–274. We consider that, on some occasions, national judges act in a manner contrary to the legal or political convictions of other state agents by means of invoking international norms even in order to protect supranational legal goods.

[62] See Martínez-Barrabés, 'La responsabilidad civil de las corporaciones por violación de los derechos humanos: un análisis del *Caso Unocal*', in V. Abellán-Honrubia and J. Bonet-Pérez (eds), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público: los actores no estatales: ponencias y estudios* (2008), at 236.

[63] Some examples are provided in Fischer-Lescano, 'Global Constitutional Struggles: Human Rights between colère publique and colère politique', in W. Kaleck *et al.* (eds), *International Prosecution of Human Rights Crimes* (2007), at 13, 21–22; Weiss, 'The Future of Universal Jurisdiction', in *ibid.*, at 29, 34–35.

[64] See Goodman and Jinks, *supra* note 21, at 443–445; Koh, *supra* note 18, at 2634, 2644, 2649.

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A pretended absolute irresponsible freedom is denied by recalling the existence of interpretations that are *permitted or allowed* by a domestic legal system, which highlight how each judge is empowered *and* limited by a legal-institutional framework[65] and cannot justify some decisions without exposing themselves to some sanctions envisaged by the system and to criticisms by public opinion. For these reasons, judges will try to move within the space of their domestic legal system, sometimes seeking the approval or lack of criticism of a certain (academic, social, or other) community. Domestic legal systems, however, contain mechanisms that permit the expansion of internal boundaries and the incorporation of external elements, as will be studied in the next section. Furthermore, judges can employ diverse tools in order to try to support their goals and convictions.

B *International Law in Domestic Law*

The first limit placed by domestic law on international law generally, and which must therefore be considered by judges, is that of its regime of reception and incorporation of international law.[66] Secondly, norms that are incorporated automatically or via transformation or reception can be further distinguished by their capacity to be directly applied – given their self-executing nature or lack thereof, among others – by national authorities, including judges.

When the regimes of reception are special or not automatic,[67] or when cumbersome requirements for incorporating international obligations are in place and there are no possible normative means of reconciling norms through interpretation, national judges will find themselves in the predicament of having to make their states respect the duties put in place by domestic law and breach those put in place by international law.

However, normative paradoxes can also be found in systems of automatic reception – generally or regarding some norms, as demonstrated in some controversial cases, such as *Medellín v. Texas*[68] decided by the US Supreme Court, or in the *Kadi* case,[69] decided by the European Court of Justice, where with a different train of thought an autonomous (almost hermetic) understanding of internal law with regard to international law prevailed.

It may happen that, in spite of the presence of the content of international law in domestic law – directly, via remission or due to internal normative transformation – its effects cannot be displayed as a consequence of its inapplicability before contrary domestic norms that internally have equal or superior hierarchy or prevail by virtue of domestic rules and principles of resolution of normative conflicts.

[65] See Caron, *supra* note 22, at 410, 417–418.

[66] See Nijman and Nollkaemper (eds), *supra* note 18.

[67] On considerations regarding those systems see Principle 4 of the Bangalore Principles on the Domestic Application of International Human Rights Norms and on Government under the Law, available at: http://www.genderandtrade.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf (last checked 5 Dec. 2011).

[68] See *Medellín v. Texas*, 552 US 491 (2008), Judgment of 25 Mar. 2008.

[69] Joined Cases C–402/05 P and C–415/05 P, *Yassin Abudullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I–6351.

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It is acknowledged that these rules and principles admit some flexibility. It is sometimes possible to invoke the principle of interpretation in the light of international law to attempt to reconcile normative positions or the principle of *lex specialis*. This is in order to make some international norms prevail over domestic norms that have been enacted after the domestic reception of the content of international norms when all of the norms involved have the same domestic hierarchy. On the other hand, there are constitutional institutions[70] that attach a greater hierarchical rank to some international norms, which thereby grant them a greater formal guarantee.

Apart from possibilities of remission, the indirect employment of international law can overcome domestic applicability impediments and obstacles and enable national judges to consider the content of the international law in order to adjust the effects to be displayed by domestic law, thanks to an interpretation that is consistent with international law.[71] The employment of this interpretive possibility has even led in some cases to references made by national judges to the interpretations of international norms made by international bodies,[72] binding norms,[73] and sometimes also recommendations or 'soft law', because some national judges employ them to support their legal reasoning or even to attach certain legal effect to them in domestic law indirectly.[74] Nevertheless, the non-binding character of those norms and recommendations permits judges to set them aside when they deem them inappropriate or wrong, and their (ab)use may circumvent democratic decisions regarding their normative status, although they can operate as a relevant element of discussion and interpretation[75] that can be supported or rejected.

Another mechanism that is somehow useful for domestic judges in the modulation of their opinions within the domestic legal boundaries is that of the 'margin

[70] See Art. 75.22 of the Argentinean Constitution reformed in 1994; M.A. Ekmekdjian, 4 *Tratado de Derecho Constitucional* (2002), at 614; Office of the High Commissioner for Human Rights of the United Nations, IV *Compilación de jurisprudencia y doctrina nacional e internacional, Volumen* (2003), at 23–27.

[71] See Principles 2 to 5 and 7 of the Bangalore Principles, *supra* note 67; subss (b) and (c) of the first section of the results in Office of the High Commissioner for Human Rights of the United Nations, *Judicial Colloquium on the Domestic Application of International Human Rights Norms, Outcome Document*; *The Charming Betsey*, 6 US 2 Cranch 64 (1804); Art. 10.2 of the Spanish Constitution.

[72] See Office of the High Commissioner for Human Rights, IV *Compilación de jurisprudencia y doctrina nacional e internacional, Volumen* (2003), at 23–27.

[73] See General comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', Human Rights Committee (2004), Eightieth session, at para. 13; Arts 2.2 of the ICCPR, 2.1 of the ICESCR, 2 of the American Convention on Human Rights; *Case of Durand and Ugarte v. Peru*, Inter-American Court of Human Rights (2000), Judgment of 16 Aug., at para. 137; Art. 4 and Ch. II of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *inter alia*.

[74] About the non-binding nature of recommendations and the need to consider them critically see *Case of Baena-Ricardo et al. v. Panama*, Inter-American Court of Human Rights (2001), Judgment of 2 Feb., at paras 191–192.

[75] See Remiro-Brotóns *et al.*, *supra* note 55, at 519. See also *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo*, ICJ Judgment of 30 Nov. 2010, at para. 66.

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of appreciation',[76] based on the alleged better position of state authorities to analyse what is the proper application of international norms by virtue of their knowledge of the particular circumstances they examine and their closeness with them. National judges can invoke this concept, although this margin of manoeuvre is not unlimited and is subject to controls.[77] Moreover, indicia point to little coherence in the handling of the concept by international bodies,[78] which evinces some uncertainty about its acceptance and application.

As a tool of last resort, it has been suggested that judges should declare and expose the existence of normative incompatibilities between their domestic law and international law that cannot be overcome by them, and ask for those contradictions to be resolved by the competent authorities.[79]

In any case, when their domestic legal system allows them to do so, some consider that judges are required to guarantee the respect of international law by domestic legal tools offered by their domestic legal system, even by exercising 'controls of the respect of international law' if their competences permit them to do so.[80]

Parting from the assumption that under some circumstances judges have the possibility of resorting to international law directly or indirectly, it is worth noting that the interpretation and application of international norms are complex activities that require the international hermeneutical principles to be taken into account and the respect of peremptory law, so that judges offer an interpretation that respects the content of international legal provisions.[81]

The use by national judges of these parameters will not necessarily lead to a uniform domestic interpretation of international law by different judges and jurisdictions,[82] but it can contribute to the development of a culture that takes into account some basic international interpretation criteria and employs a common

[76] See Report No. 48/00, Case 11.166, *Walter Humberto Vásquez Vejarano v. Perú*, Inter-American Commission on Human Rights (2000), 13 Apr., at para. 55; Cebada-Romero and Nickel, *supra* note 40, at 26–27.

[77] See the case of the Inter-American Commission on Human Rights referred to in the previous footnote, and App. No. 39272/98, *M.C. v. Bulgaria*, European Court of Human Rights (2003), Judgment of 4 Dec., at para. 150.

[78] See Cebada-Romero and Nickel, *supra* note 40, at 26–27.

[79] See Principle 8 of the Bangalore Principles, *supra* note 67.

[80] See Separate Opinion of Judge Sergio García-Ramírez to: *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, Inter-American Court of Human Rights (2006), Judgment of 24 Nov., at paras 10–13; *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, Inter-American Court of Human Rights (2006), Judgment of 24 Nov., at para. 128.

[81] See 'Conclusions of the work of the Study Group on the Fragmentation on International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the International Law Commission, Fifty-eighth session, A/61/10 (2006); Treves, 'Fragmentation of International Law: The Judicial Perspective', XXIII *Comunicazioni e Studi* (2007) 821, at 821–875.

[82] This is illustrated in judgment STC 237/2005 of 26 Sept. 2005 of the Spanish Constitutional Court, where the judicial reasoning concerning genocide, universal jurisdiction, and the interpretation of some treaty and customary norms differs from the way in which those issues were handled by other Spanish judicial organs.

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international legal language[83] and, in consequence, can also contribute to making national judges identify with and guarantee certain legal goods that are shared with other jurisdictions, going beyond the specificities of domestic law.

C *National Judges as Participants and Actors of International Law*

Among the *effects* that can be generated by national judicial interaction with international law besides the possible emergence of international responsibility of the state, the following are worth mentioning: (i) the generation of symbolic perceptions about law; (ii) the modification of equilibria or power (limiting faculties in order to decrease the likelihood of state and non-state abuses taking place); (iii) the extraterritorial protection of supranational legal goods; (iv) the legitimation or de-legitimation of international law and its greater or lesser effectiveness; and (v) the interaction with the sources of international law, which makes it possible to promote international legal changes, fill gaps, or declare as binding norms that originally lack such a force.

(i) Judges can send messages to society about the relevance of some legal goods that have a coinciding presence in international and domestic legal systems. This coincidence can be express or implicit, the latter being characterized by the possible reference to those legal goods via norms or interpretations made in the midst of one of the legal systems that interplay in a global legal space.

This reinforcement of legal goods can be the result of judges' protective emphasis on some rights or of the condemnation of certain conducts. These decisions send a symbolic message of legitimation of the legal goods that are protected, given the expressive dimension of every legal activity. The coincidence among internal judicial authorities, especially when they belong to different states, can strengthen the social message, while the statements of judges who have a superior hierarchical position or wide support or *auctoritas* can multiply this effect.

In any case, the expressive power of judicial decisions, which are components of a legal process not limited to legislation,[84] must not be overestimated: the *opinions* held by judges are subject to criticism and analysis, facilitated by the necessary publicity of their reasoning,[85] which is demanded by the conception of the judicial function as 'guarantor' of law,[86] independent and impartial.[87] These elements constitute a guarantee against possible judicial abuses. It is interesting to note how, in addition, judicial

[83] See Art. 5.3 of the Resolution of the *Institut de Droit International* on the Activities of National Judges and the International Relations of their State, Session of Milán, 1993; Francioni, *supra* note 1, at 587–598.

[84] See McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry', 4 *J Conflict Resolution* (1960) 337, at 341–353; and McDougal, 'The Identification and Appraisal of Diverse Systems of Public Order', 53 *AJIL* (1959) 1, at 9–10.

[85] See General comment No. 13, 'Article 14 (Administration of Justice)', Human Rights Committee (1984), Twenty-first session, para. 6; General Comment No. 32, 'Right to equality before courts and tribunals and to a fair trial', Human Rights Committee (2007), Ninetieth session, at para. 28.

[86] Concerning impartiality see General Comment No. 32, 'Right to equality before courts and tribunals and to a fair trial', Human Rights Committee (2007), Ninetieth session, at para. 21.

[87] See Arts 14 of the ICCPR, 6 of the ECHR, and 8 of the American Convention on Human Rights, among others.

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decisions can lose their persuasive power as a consequence of the disapproval of public opinion, which in turn can also err.

The expressive potential of the judicial activity should not be underestimated either. Indeed, the power of judges to make decisions based on legal reasonings forces legal operators and practitioners to study and take them into account, even if only to ignore them or differ from them.

(ii) A second effect that can be produced by the posture of judges with regard to international law is that of their possible contribution to the discussion, shaping emerging normative policies addressing or emanating from internal and external actors – domestic, transnational, and international, public and private – who participate formally and informally in the fight for the content and application of law.[88] These actors can carry out simultaneous efforts in order to try to adjust relevant legal systems in accordance with their multiple interests.[89] Those actors can be affected by judicial decisions, adapting their strategies in accordance with them, and may intend to exert a subtle or open influence on the judiciary.

(iii) Thirdly, an application of domestic law that takes into account the content of international norms permits national judges to enhance the protection of rights in an ambit that transcends boundaries, strengthening their effectiveness and protecting supranational legal goods, as can be attested to in the protection of victims through transnational litigation or universal jurisdiction.

In this context, it is even possible to protect those who have no links with the state exercising jurisdiction, something that turns state judges into representatives of the human global society. These factors point to the possibility that, nowadays, states, as members of the global community, have an interest in the preservation of common legal goods, embodied among others in peremptory law and *erga omnes* obligations,[90] the content of which can protect human dignity and be protected by their authorities.

There are many situations, tools, and norms that permit the national judicial invocation of international law, affecting in one way or another the accomplishment of the global community's common goals, the guarantee of which can be sought in more than one state.[91] Besides the possibilities provided by transnational litigation and

[88] See Pérez-Prat-Durbán, 'Actores no estatales en la creación y aplicación del Derecho Internacional', in V. Abellán-Honrubia and J. Bonet-Pérez (eds), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público: los actores no estatales: ponencias y estudios* (2008), at 21, 34–35.

[89] See, *inter alia*, Reinalda, 'Private in Form, Public in Purpose: NGOs in International Relations Theory', in B. Arts *et al.* (eds), *Non-State Actors in International Relations* (2001), at 11, 12–15; Annan, 'Foreword', *United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004), at pp. iii–iv; C. de Than and E. Shorts, *International Criminal Law and Human Rights* (2003), at 259–260.

[90] See para. 7 of the commentary to Chapter III in the Report of the International Law Commission on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, issued in its Fifty-third session (23 Apr.–1 June and 2 July–10 Aug. 2001), A/56/10; C.J. Tams, *Enforcing Obligations erga omnes in International Law* (2005).

[91] Concerning institutions that may contribute to overcoming obstacles to the examination of potential abuses and to protecting common interests of the international community in one state when other states do not do so see: I. Bantekas and S. Nash, *International Criminal Law* (2nd edn, 2003), at 9–10; C. Espósito, *Inmunidad del Estado y derechos humanos* (2007), at 102.

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universal jurisdiction, national judges can generate constructive interpretations that are complementary in the light of some principles (as for instance that of *aut dedere aut judicare/punire*), which are incorporated in norms that bind their states[92] and can be employed to extend judicial protection.

The differences among domestic legal systems and among judicial interpretations are sometimes the result of 'competitions' between non-guarantor legislations that seek to attract certain actors or promote some acts,[93] which in turn facilitate forum-shopping practices. In ethical terms, this situation compels judges and other state organs to harmonize a lowest common level of guarantees offered to individuals regardless of where they petition the protection of their rights, by virtue of the consistency required by the guarantee and promotion of common values protected by international norms.

(iv) Internal judicial practice also exerts an influence on the greater or lesser effectiveness and legitimacy of international law. This is especially noticed in fields of international law the progress and effectiveness of which depend to a large degree on national judges, as happens with human rights law.[94] For such a reason, judicial unwillingness to resort to international law, the desire to protect selfish 'national' interests at all costs, or the impossibility imposed by the limits of domestic law can lead to the lesser effectiveness of international law on the domestic plane. This reveals how judges can operate either as mediators or 'bridges' between international norms and those who request their application or as 'walls' between them.

(v) Finally, it must be said that judges also have the capacity to participate in the determination of the content of international law, modifying it or filling its gaps. The way in which judges reason when interpreting the content and scope of international law can lead them to interact with its sources and, therefore, to exert some sort of influence in the content of international law.

A paradigmatic case is that of the interaction between judges and international customary law. When applying it, judges often face the difficulties of determining what the reach and scope of its content are, uncertainties that arise because of the features of customary law. This is evinced, for example, in the divergence in the judicial examination of some customary norms.[95] As a consequence of these complexities, judges must employ multiple indicia and sources of information, such as comparative judicial decisions or legislation, reports of experts or international bodies, or codifications

[92] See, among others, Bantekas and Nash, *supra* note 93, at 9–10; Arts 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and 146 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[93] See Reinisch, *supra* note 18, at 54–55.

[94] See Knox, *supra* note 26, at 44; Buergenthal, *supra* note 26, at 806.

[95] See Francioni, *supra* note 1, at 588; Ramelli-Arteaga, 'La Corte Constitucional colombiana como intérprete de las costumbres internacionales', in R. Ferraro (ed.), *Estudio de derecho internacional humanitario consuetudinario: Memorias del evento de presentación, Bogotá – Colombia, marzo 7 de 2008* (2009), at 13, 14–16.

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and compilations, that can help them to disentangle what the possible legal customs pertinent for the cases they examine are and how to interpret them.[96]

A divergence in the election for or interpretation of these elements can make judges of the same state or from different states have a differing perception of a given custom.[97] As a result, the emergence of judicial blocks that adopt similar considerations can contribute to the emergence of one particular conviction of what is a customary international norm, as can be observed in the references to those judicial considerations for support,[98] and thus may impact on the *perception* of some legal practitioners.

Besides their influence in the clarification of the content of customary norms, national judges can exert an influence on the generation of state practice and *opinio juris*.[99] This is due to the binding nature of judicial decisions on the domestic plane, which can result in state agents adjusting their behaviour according to their domestic legal orders. This will sometimes generate a practice of their state that, if it coincides with that followed by other states, can generate or alter customary norms, especially if the judicial reasoning is convincing and is followed in other states or by international bodies. This possibility explains why judges can perform a relevant role in the formation of international customary law.[100] What is of the utmost interest in this process is the fact that some authors talk of a non-state *opinio juris* (*lex humana* or otherwise) that seeks to impact on the content of law.[101]

Similar considerations are predictable of the possibilities of national judicial influence in the generation of unilateral acts with international legal effects. The fact that unilateral legal acts do not require the concurrence of the behaviour of more than one state facilitates the impact of judicial decisions concerning this source, because judges may oblige or authorize state agents with the capacity to engage their states legally[102] to perform actions with international relevance.

National judges can also impact on treaties in many ways, such as by deciding on the validity/nullity, termination, or suspension[103] of treaties, because their decisions will bind state entities in domestic terms, conditioning the behaviour of those authorities on the international plane. Alternatively, if there are opposing views held by

[96] See art. 4 of the Resolution of the *Institut de Droit International, supra* note 83; Judgment STC 237/2005 of 26 Sept. 2005 of the Spanish Constitutional Court, at para. 6. On the difficulties surrounding the application of customary international law see J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (2009).

[97] See judgment STC 237/2005, *supra* note 96.

[98] See *Prosecutor v. Anto Furundzija*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1998), Judgment, 10 Dec., at para. 137; judgment STC 237/2005, *supra* note 96, at para. 6.

[99] See Remiro-Brotóns *et al.*, *supra* note 55, at 503.

[100] See Francioni, *supra* note 1, at 589–590; Benvenisti, *supra* note 23, at 248. About the power and potential of coinciding judicial decisions see Bianchi, *supra* note 24, at 194–197.

[101] On this see Fischer-Lescano, *supra* note 65, at 19–20.

[102] See Remiro-Brotóns *et al.*, *supra* note 55, at 296–297.

[103] See Art. 5 of the Resolution of the *Institut de Droit International, supra* note 83; and Case C–162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I–3655, at paras 45–60. Even though this judgment was issued in the midst of the EU, similar reasonings can be adopted by national judges.

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judges of different states parties to a given treaty, the origin of the controversy may be found in the national judicial activity.

Judges can also exert an influence on the life of treaties through decisions made during the intermediate phase of the formation of treaties, when they have been assigned that power.[104] Interestingly, whenever there are international norms that have been incorporated into the domestic legal system that are granted constitutional or supra-constitutional status, national judges with the relevant power may examine the compatibility of domestic international norms to which the state is or may prospectively be bound with peremptory international norms that form part of the domestic legal system.[105] In the event of this, those judges will guarantee the hierarchical legality of the international legal system and its superior legal goods.

Similar considerations can be predicated of the general principles of law, which in practice do not have a merely auxiliary or subsidiary[106] function and can be used as strategic instruments when interpreting international norms or for giving law some unity and consistency regarding some goals in order to enable it to produce desired legal effects,[107] as happens for instance with the effectiveness, *effet utile,* or *pro homine* principles.[108]

Nothing prevents judges from employing these tools when interpreting domestic norms or international norms that are incorporated or can have their content present somehow in their domestic legal systems. Moreover, general principles of law *in foro domestico* have their origin in their coincidence in several domestic legal systems,[109] and so criteria and principles employed by judges of different states may emerge as general principles when they arise in domestic case law in a coincident way.

On the other hand, the examination of the relationship of national judges with international doctrine as an auxiliary source of law[110] cannot be avoided. In this respect, the decisions of national judges may sometimes exert a significant influence on doctrine, as can be illustrated by the following example. The activities of a Spanish judge against Pinochet both endorsed and triggered a legal debate that had considerable international legal implications.[111] In other words, national judges can help to

[104] See, for instance, Art. 95.1 of the Spanish Constitution.

[105] See Carrillo-Santarelli, *supra* note 53, at 188–196, 210–216, 229–236, 243, 245.

[106] See Remiro-Brotóns *et al.*, *supra* note 55, at 515.

[107] See 'Conclusions of the work of the Study Group on the Fragmentation on International Law', *supra* note 83, ss. (1), (5), (18), (19), (20), (31), and (42), where the value of legal principles when attempting to apply and interpret the multiple international legal norms is acknowledged.

[108] See *Case of Baena-Ricardo et al. v. Panama*, Inter-American Court of Human Rights (2003), Competence Judgment, 28 Nov., at paras 66–67; *Case of Ivcher-Bronstein v. Peru*, Inter-American Court of Human Rights (2001), Judgment, 6 Feb., at paras 135–137; *Case of Las Palmeras v. Colombia*, Inter-American Court of Human Rights (2001), Judgment, 6 Dec., at paras 58, 60.

[109] See M. Diez-de Velasco, *Instituciones de Derecho Internacional Público* (2007), at 120–123.

[110] See Art. 38.1.d. of the Statute of the International Court of Justice; J.A. Pastor-Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (2008), at 155–156; Diez-de Velasco, *supra* note 111, at 129; Bianchi, *supra* note 24, at 183–185; Clapham, 'The Role of the Individual in International Law', 21 *EJIL* (2010) 25, at 25–26.

[111] See A. Remiro-Brotóns, *El caso Pinochet: los límites de la impunidad* (1999).

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generate or reinforce international legal trends, given their close relationship with both internal and external dimensions of law and the increasing closeness between legal levels that is permitted by some institutions of international and domestic law.[112]

In addition, *international* and domestic judicial decisions may also interact: in this regard, national judges may support or complement international decisions; and international judicial or quasi-judicial authorities may uphold national decisions that are deemed to be compatible with international law or with their own approach, incorporate analyses they had ignored until then or reject some decisions issued by national judges. Simultaneously, however, international supervisory entities value the support of national judges in practice, as the latter can manifest opposition to the decisions of international judges and render them ineffective,[113] especially when they are deemed abusive or wrong.

In this way, given the absence of *stare decisis* in the international legal system, domestic judges may call for the modification of international jurisprudence they consider to be improper or legally wrong. Given the mutual reliance of judges across levels of governance for the effectiveness of common and international legal goods, international judges may heed the views of domestic judges who so protest or opt to stick to their own opinion due to what they regard as just or legal.

National judicial opposition to perceived abusive international judicial 'activism' or other judicial challenges can thus exist. An interesting case is that of the Austrian Constitutional Court, which considered that one measure was not contrary to human rights and that an eventual judgment of the Grand Chamber of the European Court of Human Rights against Italy regarding somewhat similar facts *based on the same* international instrument interpreted by the Austrian Court would not contradict this position, because of the specificities and differences of the situation in each country.[114] This may be seen as a warning regarding what could have been perceived as undue intromission or excess of an international supervisory entity.

Furthermore, national authorities can invoke international law to protect domestic interests against what they perceive as threats from entities acting in a global landscape in which the state has lost power. If the international regulation or decisions seem opposed to those interests, they may oppose and attempt to shape them through direct or indirect interaction with the sources of international law, requesting other state authorities to oppose the threats, or by trying to shape global legal goods in a way which they consider to be satisfactory.

In conclusion, national judges can promote changes in international law or generate perceptions about its existence and content.[115] By not limiting themselves to their internal role, national judges can become important international legal actors and participants.

[112] One such institution is extradition.

[113] This can be for several reasons. See Benvenisti, *supra* note 23, at 248–249.

[114] Concerning this see an interesting analysis expressed on: www.turtlebayandbeyond.org/2011/council-of-europe/austria-crucifixes-in-public-nursery-school-not-unconstitutional-says-constitutional-court/ (last visited 22 July 2011).

[115] See Bianchi, *supra* note 24, at 185, 194–197.

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Yet, their acts can also deprive international law of its efficacy[116] and make it difficult to carry out a joint and cooperative protection of common legal goods. Thereby, domestic judges have a crucial role in guaranteeing and shaping international law.

4 National Judicial Activity and Humanitarian Global Legal Goods

As relevant actors in a globalized world, endowed with the capacity to build bridges between legal systems and actors, national judges are key operators in the explicit or implicit emergence and recognition of global legal goods. Moreover national judges can act with the purpose of ensuring at least some minimum levels of protection for global legal goods to the extent that their powers so enable them.

In this fashion, national judges can strive to orientate the norms they apply in the light of these legal values and the norms that protect them, some of which guarantee human dignity. Acting in this way, through reiteration and expansion of these practices, judges may end up feeling bound and guided by those legal goods. Furthermore, these legal goods can coordinate the coexistence of legal systems and enhance the protection of human dignity,[117] making law fulfil its potential vocation of being a social instrument of protection of the inner worth of human beings.

In this respect, we will briefly address the judicial protection of global legal goods, i.e., values and interests protected by law the normative protection of which is shared by legal systems interacting in a global legal space. Therefore, they have the potential to guide the activities of legal actors interacting in that space in which legal systems are connected. The powers and possibilities of interaction endow national judges with an essential role in the protection of those legal goods.

This is so because the effectiveness of the protection of the global community's shared legal goods often depends to a great extent on national judges. For this reason, it is imperative to reinforce the synergy among national judges and orientate it towards the pursuit of common goals protective of human dignity. This enhanced protection is to be coordinated, bearing in mind the phenomenon of interdependence in international and transnational relations and the possibility that decisions adopted in different states[118] may negatively or positively affect the desired level of protection of common humanitarian legal goods.

The possibility of judicial disagreements in the protection of certain legal goods and the risk of their being ignored make it necessary to coordinate legal systems with the purpose of promoting the protection of global legal goods and recognize the presence of the lowest common denominator of several legal systems. This acknowledgment

[116] See *Medellín v. Texas*, *supra* note 70, and the *agora* dedicated to it by 102 *AJIL* (2008) 529–572.

[117] See Nijman, *supra* note 57, at 126, 144.

[118] See Kingsbury, Krisch, and Stewart, *supra* note 7, at 5; Kaul and Mendoza, *supra* note 11, at 95, 107; Hobe, 'Individuals and Groups as Global Actors: The Denationalization of International Transactions', in R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law* (1999), at 115, 121–122.

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permits a minimum coherent application of the guarantees endorsing the protection of human dignity, and judges can play a relevant role in this recognition when interpreting norms protecting legal goods also present in other legal systems.

Global legal goods answer to the problems of cooperation in the complex globalized world by way of devising some criteria that can serve to identify norms that protect shared legal interests. These norms include those that recognize rights and impose duties that directly or indirectly protect legal goods, the protection of which is also required in other legal systems and by multiple actors. Identifying those legal goods may help to lay the foundations for solving problems of coordination. This involves national judges protecting individuals in a way that overcomes gaps, inconsistencies, and lack of coordination among legal systems with the implicit connection found in shared legal goods that address some common problems of the global community and must accordingly guide the behaviour of actors of the transnational, national, and international social and normative levels, including judicial ones.

The growing interdependencies,[119] the loss of the state's power due to privatization or the increasing or pre-existent power of some actors that can elude its control,[120] and the excessive importance attached to profit over humanitarian interests by some call for employing the normative potential to protect disfavoured people in a world with increasing legal differences and gaps.[121] This is in order to devise and recognize mechanisms to protect all victims in a way that tackles problems posed by globalization.

To achieve this, in addition to state action, it is essential to include the participation of various actors, both non-state and intra-state, as national and local judges to coordinate the effective protection of human dignity.

These reasons explain the importance of using the social tool of law, with the purpose of offering an effective protection to human beings that respects fundamental guarantees and rights, as required by legal goods shared by different legal systems; and bearing in mind that an isolationist legal strategy that strictly separates domestic and international legal systems ignores the necessity of coordinated regulations in order to protect human dignity effectively in a landscape where actors operate transnationally and each legal level may have shortcomings, a reason why their strategies must be complemented with other legal systems and actors that protect the same legal goods.

Therefore, global legal goods demand that problems of collective action be solved and encourage substantive cooperation and the coordination of judges and networks or informal groups in which national judges participate, urging them to apply law in the light of those legal goods.

[119] See Del-Arenal, *supra* note 19, at 29, 32, 34–36, 38, 52–54, 77.

[120] See Galindo-Vélez, 'Consideraciones sobre la determinación de la condición de refugiado', in S. Namihas (ed.), *Derecho Internacional de los Refugiados* (2001), at 60; Reinisch, *supra* note 18, at 75–76, 80–82; Del-Arenal, *supra* note 19, at 27–28, 34, 52–53, 64–66.

[121] See Alegre, 'Extreme Poverty In a Wealthy World: What Justice Demands Today', in T. Pogge (ed.), *Poverty as a Violation of Human Rights* (2007), at 237; Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World: Economic Crises – Impacts and Lessons Learned* (2009).

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The notion of global legal goods is related to but differs from that of global public goods,[122] which has been put forward as a model that can help to solve problems of collective action and of needs that are created or intensified by globalization.

Both theories attempt to: (i) fill participatory gaps that exclude relevant actors who can contribute to achieving aspirations protected in common by different levels; (ii) encourage cooperation in relation to some goods in a global space, highlighting the need for the entitlement to protective action in different legal systems and by different actors who must cooperate with each other towards the protection of common interests; and (iii) properly address challenges of globalization through a global strategy in order to benefit human beings.[123]

In the theory of global public goods, some goods with relevant legal connotations have been identified, such as public health, the protection of the environment, international peace and security, financial stability, cultural patrimony, and human rights.[124]

Regarding this, the notion of global public goods can be useful for a legal analysis in so far as it facilitates our comprehension of globalizing phenomena and can reveal proposals of cooperation and coordination concerning those goods. It is not our intention to develop a full theory of global legal goods in this article: we simply want to highlight how the notion of global legal goods should guide and determine the activity of national judges. What is more, we consider that the foundation of international human rights law is a global legal good that accordingly must integrate and guide the activities of national judges.

This last hypothesis is related to the consideration that, just as in legal theory it has been said that state powers can be justified by virtue of fiduciary models or a subjection to the respect and protection of human dignity,[125] the legitimacy of every normative manifestation – public or not – should rest on compliance with that requirement.[126] This demand is supported by the verification that every legal norm may affect individuals directly or indirectly,[127] and that accordingly law should

[122] See Kaul *et al.*, 'Why Do Global Public Goods Matter Today?', *supra* note 12, at 5–6, 9–10, 13, 16; Desai, 'Public Goods: A Historical Perspective', in Kaul *et al.*, *Providing*, *supra* note 12, at 63–64, 66–69, 73–74; Kaul and Mendoza, *supra* note 12, at 87, 91–92, 95–99, 101.

[123] On this issue see Kaul et al., 'Why Do Global Public Goods Matter Today?', *supra* note 12, at 2–3; Lavenex, 'Globalization, Global Governance and the *bonun commune*: A Conceptual Investigation', 6 *European J Law Reform* (2004) 371, at 383–384, 386–391.

[124] See I. Kaul, I. Grunberg, and M. A. Stern, *Global Public Goods. International Cooperation in the 21st Century* (1999); Kaul *et al.*, *Providing*, *supra* note 12.

[125] See Peters, *supra* note 34, at 543–544; Criddle and Fox-Decent, 'A Fiduciary Theory of Jus Cogens', 34 *Yale J Int'l L* (2009), at 387; Nijman, *supra* note 58, at 144; Concurring Opinion of Judge A.A. Cançado Trindade, *supra* note 41 at para. 19.

[126] On the notion of what authors such as Gunther Teubner call global law, which we deem more proper to call *lex privata* – created by private non-state actors – see Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law Without a State* (1997), at 14–19. See, moreover: R. Domingo, *Qué es el derecho global?* (2007), at 108, 159; Bianchi, *supra* note 24, at 203; Kingsbury, *supra* note 19, at 52–55.

[127] See General comment No. 31, *supra* note 73, at para. 9.

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respect and benefit them. The presence of a core of humanitarian legal goods protected in common must guide and limit the conduct of all interacting participants and systems, and lead them to protect shared legal goods in all levels of governance, being coordination and minimum protection demanded by the global legal space.

Taking into account that the theory of global public goods differs from that of global legal goods, it should be said that there are some interests and values protected in common by norms of different legal systems. Those legal goods are generated or strengthened in a legal space due to processes of convergence and acknowledgment of the necessity of protecting the same legal interests and values by all legal norms and processes that interact, such as international or domestic norms and the decisions of global institutions. Humanitarian global legal goods will encompass the lowest common denominator of the interests, values, and goals protected by principles, norms, and rights safeguarding human dignity across legal systems that must interact for the protection of those legal goods to be feasible and effective. Within this lowest common denominator, legal goods protected by *jus cogens* norms safeguarding human dignity are strong candidates for inclusion. This is due to the absolute prevalence and interaction of *jus cogens* with non-international legal systems, which if contrary to it are de-legitimized – a consideration that must be taken into account by national judges in their decisions.

This consideration is reinforced in so far as international peremptory law prevents national judicial decisions contrary to it from displaying any effects on the international plane and permits sanctioning of its violators, as has been considered by the ICTY in the *Furundzija* Case.[128] This does not mean, however, that legal goods protected by peremptory law are the only ones comprised in the category of global legal goods, which can be shaped by other norms protecting shared legal goods and are effective if protected jointly in a global legal space, given the fact that there are also legal goods that are not directly related to the protection of human dignity, but to other fields, such as that of environmental law.

5 Conclusions

National judges adopt decisions concerning international law by virtue of processes in which many considerations concur. National judicial decisions are taken in a socio-legal framework where they interact with actors of transnational, domestic and international levels. These actors are judges who are addressees of messages but simultaneously issuers of them, since they can exert pressure and promote the adoption of approaches to legal goods or be influenced by similar processes. Hence, national judges can truly be participants or actors in a supra-national dimension.

Law also exerts influence on judges, defining limits and parameters the ignorance of which may trigger sanctions or legitimacy questions, because judicial faculties are recognized and granted by a legal system and may be scrutinized by individuals

[128] See *Prosecutor v. Anto Furundzija, supra* note 98, at para. 155.

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and authorities. This being said, the boundaries of domestic legal systems may admit certain flexibility. In this context, several actors may try to exert their influence.

Furthermore, legal systems are currently exposed to contacts and interaction with others – a situation that is heightened in the globalizing context, making judges potential participants not only of their domestic law or of the international legal system, but also of a shared legal space.

The emergence of national judges as central characters in international legal life presupposes two forces that complement each other: first, it implies an expansion in participation in the international legal scene, by diluting the formerly pretended executive monopoly in the conduct of international relations, welcoming more influential actors.[129] This greater participation, if properly subject to legal controls that respect judicial independence, impartiality, and democratic checks, can lead to a balanced legal openness.

Simultaneously, national judges must often make difficult decisions as a result of the material expansion of international law and its possibility of sometimes being invoked domestically or overlapping with the content of domestic, or other, norms.

It is indispensable to take into account what is the social context that must be regulated by law in order to value properly the increasing participation of national judges: nowadays, globalization poses new challenges to individuals, and thus judges must take into account the possibilities offered in legal systems in order to identify coinciding (global) legal goods that can potentially guide judicial activity and coordinate a response to those challenges.

In this way, national judges can contribute to overcoming state-centred remnants of international law, and if they attach greater importance to global legal goods, they can contribute to overcoming and transforming (often selfish)[130] national interests that otherwise impede the protection of human dignity. By doing so, judges can take into account real human needs and what the input of many international, domestic and transnational actors is, in order to, agreeing or disagreeing with them, guide their own activity towards the protection of human beings, promoting changes in the *culture* of transnational actors[131] and enabling the punishment of their abuses thanks to the identification of core legal interests protected against all threats in a global society, regulated in some aspects in a global legal space that overcomes shortcomings presented by legal systems when considered in isolation.[132]

As individuals endowed with authority, judges can help to promote a new society that transcends the mere internationality of social and legal relations.[133] Moreover,

[129] See Benvenisti and Downs, *supra* note 46.

[130] See Del-Arenal, *supra* note 19, at 29; Cassese, *supra* note 37, at 216.

[131] See 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 Apr. 2008, at paras 27, 29–32; General Comment No. 14, 'The right to the highest attainable standard of health (art. 12)', Committee on Economic, Social and Cultural Rights (2000), Twenty-second session, at para. 55.

[132] See Bianchi, *supra* note 24, at 185, 194–197; Benvenisti, *supra* note 23; Francioni, *supra* note 1, at 598.

[133] See Clapham, *supra* note 112, at 30.

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being oriented by legal goods common to many systems and actors that are shaped in a global legal space of interaction, national judges can overcome the contingent limitations of nationality and regard themselves as guardians not only of their domestic legal systems,[134] but also of legal goods common to humankind.

This is a result, among other reasons, of the possibility of national judges employing normative interests safeguarded in common with legal systems protected by other judges – national or international – given that they are included in norms applicable by all of them. Those judges may be able to defend the legal goods protected by the common normative contents against normative or factual threats from both states and non-state entities alike by acting with supranational implications.

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[134] See Benvenisti and Downs, *supra* note 46, at 13.