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JUDICIAL POWERS, HARMONIZATION AND INFLUENCE AMONG INTERNATIONAL JUDGES IN THE CONTEXT OF A (SUBSTANTIVE) INTERNATIONAL JUDICIAL FRAMEWORK: BEYOND COMITY AND FRAGMENTATION

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Introduction

The idea put forward by some authors that international law must not blindly imitate and follow the steps of domestic legal systems given its specificities and the particular circumstances of the society it regulates is well known.[1] If this is so, it has to follow that the international judicial framework and international judicial practice must likewise be shaped in a way that is consistent with the unique features of the international level of governance.

Among some of those features, the absence of an institutional hierarchy (vertical dimension) or a judicial organization that envisages links among international judicial and quasi-judicial authorities –even horizontally-[2], coupled with the substantive specialization of international norms are to be taken into account. It has been considered that those elements, coupled with proliferation of international institutions, can be intimately related to the fragmentation of international law, ever since the decisions of international judges cannot usually be reviewed by superior authorities and can be considered by other international judges out of mere courtesy or comity.[3] In this regard, the *Mox Case* seems illustrate some of these issues paradigmatically.[4]

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[1] See Antonio Remiro Brotóns *et al.*, *Derecho Internacional: Curso General*, Tirant Lo Blanch, 2010, at 37; Michel Virally, *El devenir del derecho internacional: ensayos escritos al correr de los años*, Fondo de cultura económica, 1998.

[2] See Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, pars. 39-43.

[3] See the distinction between institutional and substantive dimensions of possible fragmentation issues in: International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/CN.4/L.644, 18 July 2003, par. 6, 7; Sergio Salinas Alcega and Carmen Tirado Robles, *Adaptabilidad y Fragmentación del*

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To my mind, however, recent judicial developments show how even absent formal institutional linkages, the guarantee of norms of the same legal system implies that international authorities are united in the pursue of the protection of the integrity of common legal goods (international or even global),[5] which provides links to them with each other. Therefore, the *substantive* dimension of an international *corpus juris*[6] can contribute to give cohesion not only to international norms, as commented by August Reinisch,[7] but also to judicial interactions of international authorities *inter se* and with national judges, ever since domestic authorities can operate as protectors of international legal goods.[8]

Additionally, the particular features of the international judicial scheme generate substantive capacities of international judges entirely unrelated to fragmentation issues but, rather, having to do with competences unique in their level of governance. Lastly, doctrine and practice show how international decisions can be checked in order to balance powers in the international legal field: by means of the emergence of norms that challenge decisions that are regarded as counter-productive, through the non-binding character of recommendations, and by domestic judicial challenges. In this brief article, I will succinctly examine the aforementioned issues.

I. From mere interaction to harmonization

The report and conclusions on the fragmentation of international law issued by the International Law Commission posits how the tendency of regimes and norms to be distanced from others can and must be countered by resorting to normative elements that point to the systematic nature of law: being part of the same system, norms must be interpreted in a way that takes into account other equally international norms, if possible, while respecting peremptory law,[9] which in turns illuminates the whole international legal system and conditions it, giving cohesion to it, as follows from the goals it embodies and

Derecho Internacional: la Crisis de la Sectorialización, Monografías del Real Instituto de Estudios Europeos, 1999.

[4] See European Court of Justice, *Commission of the European Communities v. Ireland*, Case C-459/03, Grand Chamber, Judgment of 30 May 2006.

[5] I consider than when there are legal goods protected in common by different legal systems, whose participants and mechanisms interact globally, i.e. in a global legal space, they become global legal goods. This notion will be further explained in more detail in forthcoming articles.

[6] The Inter-American Court of Human Rights has even considered that there are *corpus juris within* the human rights system, although it has also employed it broadly regarding human rights in general. In my opinion, the Court seems to consider that *corpus juris* are characterized by the common protection of some persons or rights. The notion is employed, for instance, in: Inter-American Court of Human Rights, *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, Judgment of 19 November, 1999, par. 194; Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, of 28 August 2002, pars. 24, 92, and paragraphs 15, 18, 31, 37, 50, 53-54 of the Concurring Opinion of Judge A. A. Cançado Trindade thereto.

[7] See August REINISCH, "The Changing International Legal Framework for Dealing with Non-State Actors", in Philip ALSTON (Ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp. 72-74.

[8] See footnote 22, *infra.*

[9] See International Law Commission, "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", 58th session, 2006, A/61/10. Conclusions 1, 2, 17-19, 31-33.

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the teleological way in which every norm must be interpreted.[10] This process, however, must be conducted by each interpreter/applier of international law, among which international judges are counted, and, as is well known, they may differ in their considerations regarding some issues.[11]

This last phenomenon can be explained by considering that, as the Special Tribunal for Lebanon has rightly pointed out, the international judicial reality reveals how it does not have institutional linkages, that is to say, it is characterized by the autonomy and equality of judicial and quasi-judicial international institutions that operate *prima facie* in institutional "isolation".[12]

The previous scene may mislead us and think that the international judicial reality is doomed to an isolationist landscape, in which each court, tribunal or supervisory body is a world in itself, hermetic save when it graciously considers what other authorities have suggested. However, a recent judgment issued by the International Court of Justice suggests something that I strongly believe: the approximation of judicial practice can be brought upon precisely because of the substantive provisions they must apply that, far from being inevitably fragmentary, form part of a system and contain *corpus juris* that are enriched by a mutual and joint judicial and quasi-judicial activity. Therefore, there is a substantial bond between international authorities that overcomes the institutional "separation". Let us examine what the Court said.

In the *Case concerning Ahmadou Sadio Diallo*, the ICJ resorted to the common ground of affirming that when interpreting international law it is not bound by the legal interpretation of other judicial or quasi-judicial authorities,[13] something that is evident given the absence of a *stare decisis* rule in current international law,[14] revealed by articles 38 and 59 of its Statute, that grant auxiliary nature to jurisprudence and even forbid one Court from treating its case-law as binding in future cases –although practice tends to deny this on occasions on pragmatic grounds-.

However, the ICJ could not but take into account something that has been commented in the midst of the Inter-American Court of Human Rights and in relation to debates of the role of the European Court of Human Rights: given the difficulty of resorting to international contentious procedures, because of the *auctoritas* of supervisory bodies, their judicial or quasi-judicial role, and the weight of its established case-law, some organs are by their very functions and missions special interpreters of norms whose guarantee they are entrusted with, and as a result their settled conclusions and decisions, if reasonable, can illustrate future and similar cases, something that will permit analogous

[10] See, e.g., Ibid., conclusions 13, 16, 21, 27, 29, 30; and Article 31 of the Vienna Convention on the Law of Treaties.

[11] See, for an example of different interpretations held by diverse international judicial authorities, International Court of Justice, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, pars. 399-407.

[12] See Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, pars. 39-43.

[13] See International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, par. 66.

[14] See John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge University Press, 2006, at 175.

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situations to be solved by domestic or other authorities, preventing judicial congestion, and that may even give a constitutional dimension to the international judicial function.[15]

This seems to be recognized by the ICJ in the *Diallo* case when, after affirming its independence *vis-à-vis* decisions of other supervisory bodies, it considered that when an international body can interpret and apply norms that are especially entrusted to another body, the former "must" "take due account of the interpretation of [an] instrument adopted by the independent bodies which have been specifically created […] to monitor [its] sound application",[16] even if the entity that oversees a norm issues merely recommendatory conclusions.[17] What is surprising is that the Court carefully chose to employ words that denote a rather strong encouragement or an imperative: "must" or "should ascribe great weight". This means that while a Court is free to form its own opinion, and may differ from what has been considered by another entity –possibility permitted by the applicability of the same normative content by different international authorities-,[18] in some cases it must at least study and analyze the case-law of a supervisory entity and assess it.

Therefore, the power of *persuasion* of international jurisprudence is now coupled with a duty of examination: therefore, not being it proper in some cases to ignore decisions of other entities under some circumstances, dialogues and interactions, cross-fertilizations and exchanges are not merely facultative but strongly urged. And the fact is that all international authorities are in fact not separated but united: as I said above, not institutionally, but *substantively united*, ever since they represent and must guarantee common norms.

Naturally, this does not ensure uniformity, and in fact this duty of due diligence of examining the jurisprudence of other authorities gives greater guarantees to the rule of law: it permits honest inter-judicial criticisms, ever since the flaws of the reasonings of others Courts and quasi-judicial entities can be detected. That such mistakes may occur is a result of human fallibility, and it must not be forgotten that a disaggregated analysis evinces that corporate judicial bodies are handled by human beings.[19] This brings me to the next section: controls and balances of judicial misinterpretations.

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[15] See Separate Opinion of Judge Sergio García Ramírez concerning the Judgment of the Inter-American Court of Human Rights in the Case of the *Dismissed Congressional Employees v. Peru*, of 24 November 2006, pars. 4 onwards; Alicia Cebada Romero and Rainer Nickel, "El tribunal europeo de derechos humanos en una Europa asimétrica: ¿hacia el pluralismo constitucional?", available on: http://www.jura.uni-frankfurt.de/l_Personal/wiss_Ass/nickel/Publikationen/Cebada_y_Nickel_ECHR_and_constitutional_pluralism_Sevilla_final.pdf

[16] See International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, par. 67

[17] Ibid., par. 66

[18] As revealed by the figure of *Lis pendens*, explained in Inter-American Court of Human Rights, *Case of Baena Ricardo et al. v. Panama*, Judgment of 18 November 1999, Preliminary Objections, pars. 47-59. Additionally, it has been considered that bodies with universal jurisdiction can apply regional instruments or vice versa, as shown in: Inter-American Court of Human Rights, *"Other Treaties" subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of 24 September 1982, pars. 20-21, 37-41, 43, 50-52; International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, par. 67.

[19] On the disaggregated analysis of entities that are legal constructs, see Eric A. Posner, *The Perils of Global Legalism*, The University of Chicago Press, 2009, at 40-42.

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II. Checks and balances

In his book on *Transnational Law*, Philip C. Jessup discussed examples of how States or international bodies have sometimes sought to control and counter judicial decisions that they opposed, and that they have done this by openly expressing their disagreement and viewpoint or by resorting to institutional means available in international organizations or to the sources of international law, in order to enact new legislation that binds judicial activity in a way that is considered proper or submits it to further judicial controls.[20]

Likewise, doctrine has pointed out that opposition of domestic judiciaries to international decisions, that rely on domestic cooperation for their effectiveness[21], has an undeniable impact, and in that sense I hold that a dialogue between international and domestic judges is unavoidable given the role of domestic authorities in the protection of legal goods of an international –or global- nature.[22]

Naturally, when international judicial examination of the case-law of other authorities takes place, the independence of each authority from the other ones gives the former the possibility of criticizing the latter and ruling in a different way, something easier when the decisions being contested are recommendatory and not binding.[23] However, this criticism will have to be addressed in the future by the entity being questioned, and thus the dynamic that ensues will further clarify normative positions and all the interests and interpretations involved.

Therefore, another set of controls of judicial misbehavior, besides the normative and domestic ones, arises precisely as a result of the closer substantive interaction of international authorities. In fact, this cross-fertilization will ensure that all opinions are considered, and this make the protection of international legal goods more robust, something that explains the satisfaction expressed by judge Antonio Cançado in its opinion to the *Diallo* case regarding the fact that norms are strengthened due to their being protected in common by different international judicial authorities, that can learn from each other.[24]

III. Capacities

Lastly, let it be said that the unique features of the international legal system not only make judicial interaction that favors the evolution of positive law thanks to substantive common grounds in spite of the judicial institutional separation possible. Additionally, those particular features make it necessary for judges of the international level to count with some capacities lest they are unable to properly perform their duties and

[20] See Philip C. Jessup, *Transnational Law*, Yale University Press, 1956, at 84-93.
[21] See the footnote 32, *infra*.
[22] See Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law", European Journal of International Law, Vol. 1, 1990, pp. 225-231.
[23] See Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v. Panama*, Judgment of 2 February 2001, pars. 191-192; International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, par. 66.
[24] See Separate Opinion of Judge Cançado Trindade to the Judgment of the International Court of Justice of 30 November 2010 in the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, pars. 216, 219, 232, 237-245.

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functions, such as the power to review their own competence, as follows from the institution of implied powers developed by the International Court of Justice itself.[25]

This is what was concluded by the Appeals Chamber of the Special Tribunal for Lebanon, that argued that besides implied powers there are events in which judges can have *inherent* capacities when they are not enjoyed as a matter of implied powers, whenever they are necessary for the judges to have in order to further some important legal goods – as human rights- and be able to discharge their activities.[26]

The interesting thing worth noting is that judicial practice employing these inherent powers, coupled with the absence of objections of litigant parties, among which non-state actors are counted, may constitute the normative source of those inherent capacities. The fact that judicial practice is naturally coupled with *opinio juris*, given the legal and normative character of judicial functions, led the Special Tribunal to assert this possibility, which ensures that international judicial and quasi-judicial authorities can strive to have powers to properly grant justice and guarantee the international legal system and exert influence in their reception by the legal system, becoming participants in the law-making process and evolution of international law itself in the process: the guarantor becomes also a generator of norms.

Additionally, the linkages between norms give international authorities a second potential capacity: even when there are norms that have poor institutional mechanisms of protection, as happens with international humanitarian law provisions, their linkages with international criminal law and human rights law, given the presence of common rights and goals in all of them,[27] for instance, enables supervisory entities of one of those formal branches to ignore artificial boundaries and protect somehow the respect of the content of all of them given its capacity to examine compliance with one branch that has connections with the others in the light of their content.[28]

Conclusions

Judicial authorities perform a unique role in international law: they must guarantee the effectiveness of the legal system and the international rule of law, but they are as prone

[25] See International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, pp. 8-10.
[26] See Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, of 10 November 2010, pars. 44-49.
[27] See the Preamble and Articles 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; Preamble to the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993; Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, 21 October 2010, pars. 117; C. de Than and E. Shorts, *International Criminal Law and Human Rights*, Sweet & Maxwell (ed.), 2003, pp. 12-13; F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 2001, at 203-204; Hersch Lauterpacht, *International Law and Human Rights*, Steven & Sons Limited, 1950, at 35-38; Articles 7, 8.a.b.xxi, or 8.c.ii of the Rome Statute of the International Criminal Court.
[28] See Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, 21 October 2010, pars. 116-126.

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to fail as any other authority and have at their disposal fewer resources than domestic judges.[29]

Despite this, acknowledging the need to consider the decisions of different judicial and quasi-judicial entities will attach greater *auctoritas* to conclusions, given the controls and filtering of reasonings as the result of judicial cross-fertilization, that may also facilitate arriving at proper and improved conclusions or to make disagreements conspicuous. Additionally, when domestic authorities consider international decisions,[30] if they are sound, it will be more likely that States will directly resolve international legal problems in the first place without further encumbering international authorities, as they ought to do given the normative expectations on State authorities.[31] Otherwise, when decisions are objectable, international and domestic criticisms alike along with debates may depurate them and bring about a better future case-law.[32]

It cannot be denied that there is not a formal international judicial institutional scheme that binds and links different authorities, but their capacity to acquire and possess capacities in order to be able to perform their functions and meet social and normative expectations, and their joint enterprise in the protection of common substantive norms that unites them, can make it possible to overcome difficulties and lead to the constant improvement of judicial practice, cohesion and harmonization of *jus gentium*, whose practice is not unchecked.

[29] See John H. Knox, "Horizontal Human Rights Law", *The American Journal of International Law*, Vol. 102, 2008, pp. 2, 19.

[30] On the relevance of international jurisprudence and norms for domestic judges, see, *inter alia* Principles 2, 4, 7 and 8 of the Bangalore Principles on the Domestic Application of International Human Rights Norms and on Government under the Law, 1988; Inter-American Court of Human Rights, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment of November 24, 2006, par. 128; and the Separate Opinion of Judge Sergio García Ramírez to this Judgment; Constitutional Court of Colombia, Judgment T-1319 of 2001, of 7 December 2001, par. 13, where the Constitutional Court considers that international jurisprudence is relevant for interpreting human rights internally, but ignores that not all conclusions of supervisory bodies are binding and can be prone to challenges.

[31] This follows from the complementary character of international judicial activity in some respects. Concerning this, see the Preamble to the American Convention on Human Rights. Additionally, on the role of the State in remedying violations before international bodies seize a case, see Concurring Opinion of Judge A. A. Cançado Trindade to the Judgment of 4 December 1991 of the Inter-American Court of Human Rights, Preliminary Objections, in the *Case of Gangaram-Panday v. Suriname*, par. 7.

[32] On domestic opposition to international decisions and interaction with international supervisory authorities, see Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts", *American Journal of International Law*, Vol. 102, 2008, pp. 248-249.