Judicial dialogue between international bodies protecting human rights as a means to enhance extraterritorial governance in the midst of an unpredictable political context

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Judicial dialogue emerged as a spontaneous practice that consists for an international body in referring to decisions or international instruments that are external sources to the system in which the considered body has to exercise its power of interpretation. This article explores the notion of judicial dialogue in the international legal order when linked to the effective protection of human rights. It questions judicial dialogue as a complementary method of interpretation of human rights instruments and principles and as a tool to achieve an international judiciary in spite of the multiple legal systems that were conceived as independent. This article analyses the development of judicial dialogue in the international legal order, its role in extraterritorial governance and its interactions with the political context that influences the effective implementation of human rights in domestic legal orders.

Keywords: judicial dialogue, interpretation, human rights, rule of law

Introduction[1]

In the international legal order, international bodies protecting human rights are both different and independent. Indeed, a hierarchical principle of organization still remains unknown and multiple legal systems protect human rights, either at the universal or regional level, in a judicial or quasi-judicial manner. Nevertheless, judicial dialogue emerged as a spontaneous practice that consists in referring to decisions or international instruments that are external sources to the system in which the international body has to exercise its power of interpretation (Allard Van Den Eynde, 2013; Romano, 2009; Hennebel, 2007). Therefore, judicial dialogue can be seen as an interpretive technique, allowing Courts to reach common interpretations of the substance, the meaning and the scope of international human rights treaties. Jurisprudential dialogue depends on judiciary systems, open to external sources to which autonomous and impartial interpreters refer to if they take the initiative to incorporate them in their decisions. This acknowledgement shows that international bodies play a normative role when applying and interpreting international instruments. If the willingness of States is still a cornerstone of international law, a form of judicial objectivism emerges from the practice of international bodies when they decide to refer to decisions and international instruments, external to their own systems and that are not part of directly applicable law, but are used to highlight the meaning, scope and content of rights

formulated in analogue terms, if not in identical ones. In this respect, the progressive expansion of judicial dialogue enhances extraterritorial governance by defining norms of reference and legal standards that need to be implemented in national legal orders.

Defining judicial dialogue and its role in extraterritorial governance

If the international systems protecting human rights have been conceived to be independent and governed by a non-hierarchical organization principle, in practice, it appears that interactions between those systems are revealed by the power of interpretation given to international bodies. Indeed, the Vienna Convention on the Law of Treaties (VCLT) that was adopted on May 23, 1969, defines general methods of interpretation and the subsidiary ones that apply in any case-law of international law when a treaty is applicable to a particular matter (McLachlan, 2005). Nevertheless, judges show creative interpretation methods when they enter into judicial dialogue (Ferrer Mac-Gregor, 2017; Ferrer Mac-Gregor, 2018).

It is true that Article 38(1)(d) of the Statute of the International Court of Justice (ICJ) defines judicial decisions as "subsidiary means for the determination of rules of law," as jurisprudence is not a direct source of international law but more a source of identification and interpretation of legal norms. Nevertheless, international bodies protecting human rights have a margin of appreciation and a necessary power of interpretation, as international human rights law is based on basic concepts formulated in vague terms such as the notion of integrity and human dignity, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, or the right to a fair trial, among many others. The content of procedural and substantial obligations, derived from those rights and imposed on States, was defined and developed by judicial decisions rather than by treaty instruments. Moreover, as international bodies adopt common methods of interpretation based on the VCLT, interpretative convergence can be seen as a process leading to normative convergence through their case-law, which is the final result of this process of interpretation. Normative convergence is reinforced through cross-referencing techniques when the substance and the content of human rights protected by international customary law or by international treaties in comparable or identical terms have to be clarified in order to reach their actual scope. Normative convergence arising from international bodies case-law can be illustrated notably through the consensus on the complementarity between international human rights law and international humanitarian law and the unanimity on the absolute prohibition of torture and its *jus cogens* nature (Maculan, 2015, Maculan, 2017).

Thus, judicial dialogue echoes the notion of global interpretation through normative and systemic interactions meaning, for an international body to confront international legal norms which are similar, even though they were adopted by separate and independent systems in order to reach a better interpretation of the rule. If the general debate on fragmentation of international law has penetrated various areas of the field, it seems the risks to the integrity and unity of norms has been exaggerated in regards to the notion of "self-contained regimes" (Simma and Pulkowski, 2003, p. 483), especially in international human rights law. Indeed, the aim of universality and the interdependent character of the rights was affirmed by the Universal Declaration of Human Rights (UDHR), adopted on December 10, 1948. As the Declaration was the root of binding international treaties related to human rights, rather than conceiving self-contained regimes, the universal and regional systems protecting human rights are more likely to have common grounds of practice and intersections making common interpretation not only possible, but necessary (Burgorgue-Larsen, 2018, pp. 187-2013).

The notion of global interpretation through normative and systemic interactions can also be identified as the "spirit of systemic harmonization" often highlighted in the case-law of the European Court of Human Rights (ECHR) (Peters, 2017, p. 671; Staes, 2014). It means an international body will confront international legal norms which are similar, even though they were adopted within separate and independent systems, in order to reach a better interpretation of the rule of law. Even though international bodies protecting human rights are quite different and formally independent, they tend towards self-regulation by using external sources. Indeed, the spontaneous practice of judicial dialogue will allow a process of self-limitation by referring to other sources in order to interpret a given legal provision, since it means including optional limits to the margin of appreciation. At the same time, the use of external sources will also lead to a self-expansion of the possibilities in matters of interpretation by considering solutions that were found by other interpreters in comparable legal disputes. Therefore, it appears that international jurisprudential dialogue can contribute both to coordinate and harmonize the application and interpretation of international human rights law by defining minimum standards to integrate into the national legal orders. Better argumentation in legal reasoning means a better decision showing a relevant and persuasive authority which is more able to convince other judges to follow the same ruling in similar cases (Glenn, 1987, p. 262; Zammit Borda, 2015, p. 29). This acknowledgment can enhance the persuasive authority of precedents especially as the *stare decisis* rule is not part of the international legal order. Indeed, if the use of precedent is formally binding in common law systems at the national level, it is not the case in civil law systems or in the international legal order, but it does not mean that precedent is absent in the practice of Courts when it is not mandatory. Indeed, each Court, whether national or international, tends to refer consistently to its own established precedents in order to demonstrate its attachment to the rule of law, to legal certainty and that its case-law is not based arbitrarily.

The main challenge remains the incorporation at the national level of decisions taken at the extraterritorial level in order to enhance the protection of human rights by holding and regulating political power. If States increasingly reject the regulation and the protection of human rights at the international level in the current context, then judicial power exercised at the national legal level, given its coercive capacity, has an important role to play in order to preserve the achievement of the rule of law in pluralist democracies.

Through globalization of the use of judicial dialogue and external sources, international bodies protecting human rights tend to adopt common methods of interpretation of human rights treaties and principles (Fitzmaurice, 2013; French, 2006, pp. 281-314). The notion of global interpretation through normative and systemic interactions needs to be envisioned within the context of classic methods of interpretation of international law enriched with the complementary ones such as those defined in the VCLT (McLachlan, 2005, pp. 279-320). The complementary methods are particularly relevant in the realm of international human rights law by a contextual setting of a specific instrument in regards to other rules showing similar characteristics and with reference to general principles that govern other systems.

The overall logic of interpretation is to confront rules first, to other analogue rules; second, to the general consistency of the foreign system according to principles, rules and methods commonly admitted in this system and third, to the pursued objective within the framework of necessity and proportionality that regulates judicial creative power. The process of judicial interpretation that leads to define the meaning and the scope of rules can be broadened by the interpreter who exercises a margin of appreciation through the spontaneous use of judicial

dialogue. Therefore, the confrontation of these parameters within the context of judicial dialogue can lead, on one hand to convergent and extensive interpretation of human rights treaties; and on the other to divergent and restrictive interpretation when it appears there is no consensus or a general tendency to harmonization. Parallel to this, judicial dialogue leads to constant interactions between universal and regional systems of protection of human rights. It always contributes to reinforce judicial reasoning and legal argumentation in judgements and decisions by including external sources to appreciate the extent, facts and rules applying to human rights violations under the consideration of the judicial body. Implicitly, judicial dialogue brings coherence to the plurality and diversity of human rights treaties throughout spontaneous coordination of human rights interpreters' adopting common methods of interpretation.

Indeed, the realm of human rights is especially favourable to cross-references and normative borrowing. Even though the universal and regional systems were conceived as formally independent, their substantial rules show interdependence in regards to their content (Jones, 2018; Deprez, 2017). Moreover, their coexistence in the international legal order is regulated by general principles of public international law which are at their foundation. Furthermore, systems protecting human rights have both a common object and purpose as they aim to guarantee their fundamental rights, integrity and dignity against States' violations of international obligations.

Judicial dialogue as a method of interpretation of key principles in international law

Sometimes, judicial dialogue as a spontaneous interpretative practice will show the existence of international common positions regarding certain aspects of human rights. This is the case regarding the entrenched consensus of the complementarity between international human rights law and international humanitarian law (Droege, 2008, p. 501; Jaquemet, 2001) or the binding nature of provisional measures indicated by international courts in legal proceedings in order to prevent irretrievable damage to parties (Tzanakopoulos, 2004, pp. 53-84). It is also the case concerning the extraterritoriality of human rights treaties leading to an enlargement of States' jurisdiction by enriching the principle of territoriality with respect to the notion of control exercised over persons or a foreign territory (Gondek, 2009, pp. 122-123). This acknowledgement expands States' jurisdiction and strengthens the protection offered to individuals, while increasing interactions between international legal systems protecting human rights and therefore showing a state of substantive interdependence. The complementarity aspect between international human rights law, international humanitarian law and international refugee law has also been highlighted while insisting on the necessity to adopt a systematic approach (Chetail, 2015, pp. 701-734) as to ensure an effective protection of human rights. This statement is especially relevant when linked to the hypothesis of vulnerable persons and persons facing an emergency or serious crisis, this context calls for an interpretation and application of the rule of law in accordance with the principle *pro homine*. The latter, well known by the Inter-American Court of Human Rights (IACHR), requires interpreting rights in the manner that is the most favourable to the protection of the integrity and dignity of human persons (Pinto, 1997).

Convergent case-law in regards to key principles, no matter which interpretation is considered, shows that some terms or assertions will be approached in the same way despite the differences characterizing each legal system (Cançado Trindade, 2004, pp. 309-312). Nevertheless, the use of external sources does not always lead to extensive interpretations since it can also highlight disagreements in which case restrictive interpretations are inevitable. The lack of consensus in the international legal order will be the ultimate limit to constructive judicial dialogue. Indeed, in cases of controversial issues, the reference to external sources can emphasize

divergent positions in matters of interpretation. One of the most significant examples is the difficulty in precisely determining the effect of peremptory norms when judges and/or courts encounter the immunities of States and their representatives in international law. The lack of consensus regarding the effect of peremptory norms, in conflict with the rules on immunity in international law, will lead to divergent interpretations dictated by restrictive positions considered to be respectful of States' sovereignty (Van Alebeek, 2012; Gaeta, 2009; Orakhelashvili, 2007). In these circumstances, the techniques of judicial dialogue can be seen as a positive process allowing judiciaries to confront different points of view, allowing an inevitably realistic process, when the lack of consensus and the *opinio juris* of States are reluctant to more flexible and evolutive interpretations.

Mutual inspiration and normative borrowing between international bodies protecting human rights do not always lead to more protective interpretations of human rights. Nevertheless, legal precedents could be used as a bulwark to fragmentation by contributing to the realization of a "global community of Courts [that exercise their] common function of resolving disputes under rules of law" (Slaughter, 2003, p. 192). Multidimensional interactions between courts through the cross-referencing of legal norms and decisions reflect the process of "Transjudicial communication" (Slaughter, 1994, p. 99). Indeed, the international legal system can be seen "as a collection of communities of practice" (Cohen, 2015, pp. 185-186), with each area of international law being embodied in a "community of practice" sharing its own conventions, leading principles and rules concerning argumentation and authority. In the field of the protection of human rights, the universal system and the regional systems represent one "community of practice," by coexisting together. They still exercise a different jurisdiction and have various functions, while having a common goal and purpose; namely the protection of human dignity and integrity.

Promoting judicial dialogue to counteract political power and to ensure the rule of law

The present political context appears to be strongly uncertain and is characterized by national populism, showing mistrust in international institutions, a strong resurgence of national sovereignty and the decline of multilateralism as part of the contest of transnational governance. In these circumstances, the effective protection of human rights can be jeopardized at the domestic and the international level, especially in times of armed conflict or for vulnerable persons such as persons exposed to forced migrations and persecutions. When the practice of judicial dialogue is confronted within this political context and with the dangers it represents to rights and liberties, one also has to question the persuasive authority of the international judiciary and its capacity to reach a normative convergence through the use of external sources that shows an interpretive convergence in the first place. Indeed, judicial dialogue could be used as a tool to counteract negative political consequences by coordinating and harmonizing the practice of courts and tribunals in judicial remedies in order to ensure the effective protection of human rights which have been harmed by legislative and political decision-making processes.

If the practice of judicial dialogue creates checks and balances in the international legal order by the confrontation between multiple points of view in regard to the interpretation of a specific provision, it also leads to a better quality of motivation of judgements and decisions. Moreover, when external sources are incorporated spontaneously by the interpreter in judicial decisions, the implication is that this justifies the legal ruling, not only in regards to the requirements of its own system, but also in the light of legal requirements that apply in other foreign systems. Consequently, the solution adopted in the court's decision will be justified with strong legal

argumentation, as it will be enhanced regarding other judicial decisions that reached the same solution when faced with common issues. Since stronger legal argumentation results in increased motivation, it also enhances the persuasive authority recognized in judgements and decisions that lack enforcement power, in comparison with the coercive power exercised by national tribunals and authorities. The legal reasoning and argumentation of decisions determine the extent of international obligations when decisions are justified in regards to multiple sources of law. Indeed, using multiple sources of law when justifying a legal ruling, whether these sources are judicial decisions or international treaties that show a converging normative content regarding the same crosscutting rule, improves the understanding of obligations arising from human rights violations. Moreover, the authority of external sources can be enhanced when legal reasoning and justification demonstrate the existence of cross-cutting obligations that do not apply to only one specific legal system, but are common to several of them.

For example, in order to establish a permanent forum of institutional dialogue, the first Joint Declaration of San José was adopted on July 18, 2018, by the Presidents of the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights, in order to organize regular meetings to exchange views, ideas and recent case-law between the three regional jurisdictions protecting human rights. This Declaration was updated on May 25-26, 2023,[2] to "reaffirm their commitment to the principles and goals of their respective regional human rights instruments." Thus, judicial dialogue could increasingly be practiced by not only international bodies, but also by national judges incorporating international case-law into the domestic legal orders. If the will of sovereign States remain at the very foundations of international law and legal systems protecting human rights, the spontaneous practice of judicial dialogue shows the emergence of jurisprudential objectivism that arises from the independence and impartiality recognized by a judicial body regarding its nature and functions.

The notion of public international order can be linked to the development of case-law of international bodies protecting human rights (Jimenez Solares, 2014; Orakhelashvili, 2002). The latter intervened as a last resort Courts to judge human rights violations when the action of national jurisdictions was insufficient. At the national level, safeguarding public order and security can be used to justify legal restrictions and derogations from the general law in case of exceptional circumstances. At the international level, the notion of public international order embodies shared values and common principles based on the necessity to protect the integrity and human dignity that are the cornerstone of the universality of human rights. Public international order also implies the respect of minimum standards and norms of reference notably through *jus cogens* norms and *erga omnes* obligations that are common to legal systems and of interest to the international community as a whole. It is also strongly linked to normative convergence and to jurisprudential objectivism. Indeed, normative convergence derived from case-law leads to the emergence and the consolidation of jurisprudential objectivism, opposed to State voluntarism. International obligations protecting core human rights are not based on the will of States but derive from the universality attached to these rights and the protection of the rule of law (Petersmann, 2010). This ascertainment requires the respect of minimum standards and norms of reference that need to be implemented into domestic legal orders and in light of which human rights violations have to be assessed (Gardbaum, 2008). Therefore, the growth of multidimensional dialogue between international bodies protecting human rights, between national judges and between international bodies and national judges contributes to the emergence

of a network of the international judiciary (Ulfstein, 2014). The latter is exercised within the context of distinct and independent legal systems in the international legal order.

Transjudicial interactions are still substantially linked by judicial practice that helps to define norms of reference and minimum standards of protection. These principles need to be incorporated into national legal orders for their full applicability and effectiveness, since the primary responsibility to ensure the respect of human rights is devolved to national authorities. International bodies, by applying and interpreting human rights treaties and by sanctioning violations that entail international responsibility of States, aim to achieve a limitation of power by framing legislative and political processes in accordance with the rule of law.

Strengthening judicial dialogue in order to enhance extraterritorial governance

Judicial dialogue can be seen as a way to coordinate and harmonize the interpretation of key principles in international law, and to realize the international judiciary through interactions between legal systems which strengthen extraterritorial governance in the realm of justice. International bodies, whether jurisdictional or quasi-jurisdictional, and national judges, whether ordinary or constitutional, should engage constantly on a long-term basis in judicial dialogue, especially when common legal problems are at stake, as this is often the case with human rights issues. This implies adopting a perspective of cooperation and solidarity among judicial bodies and other stakeholders, at the expense of the perception that there is a supranational government of judges emerging in the international legal order, which competes with national tribunals and undermines the sovereignty of States. Nevertheless, there remains the challenge of dissemination of jurisprudential achievements and case-law of international bodies into national legal orders, which is the primary responsibility of State authorities. Formal or informal meetings, exchanges and any other kind of regular interactions and relations that can be developed between national and international judges could constitute an essential asset. These could enhance the implementation of a multidimensional network spreading the information about improvements, challenges and difficulties faced in human rights case-law. Undoubtedly, judicial dialogue is a catalyst to the strengthening of the international judiciary in a globalized world which is more permeable to external sources. Moreover, just as international bodies refer to one another, they also tend to incorporate references to national tribunals when their case-law is notably relevant to a particular legal matter. On one hand, domestic ordinary tribunals tend to incorporate into the interpretation process domestic norms; international treaties binding on their State and customary international law; decisions and judgements coming from national or international jurisdictions and other non-judicial bodies. On the other hand, multiple constitutional or supreme Courts have adopted normative borrowing as common practice when applying and interpreting national Constitutions (Groppi and Ponthoreau, 2013). This acknowledgment shows an intensification of judicial dialogue at a multidimensional level, being both horizontal and vertical, but always spontaneous, without any hierarchical organization principle, being left to the initiative and appreciation of interpreters participating in extraterritorial governance.

Any judicial body interpreting human rights related to its jurisdiction, by integrating external sources in its margin of appreciation, stands from a global perspective of international law. Risks and issues arising from the fragmentation of international law were highlighted by Judge Gilbert Guillaume in his address to the General Assembly of the United Nations on October 26, 2001, and in the final report of the Study group of the International Law Commission adopted on April 13, 2006. Discussions and conclusions emphasized the multiplication of international jurisdictions and positive legal rules in the decentralized order, prone to threaten the unity and coherence of

international law. Nevertheless, the development of judicial dialogue during the past years between international bodies protecting distinct but analogue human rights treaties, shows that in spite of their independence and the absence of a hierarchical principle of organization, the power of interpretation that might lead to divergent jurisprudential achievements tends to self-regulation. Although external references are not included in all decisions and judgements of international courts and tribunal, they tend to be in important judgements and decisions, notably when common legal issues of a strong importance are at stake. Spontaneous normative borrowings seem to extend the margin of appreciation and interpretative authority of that body. The latter refers to instruments and decisions that are not initially part of its system and goes beyond the limits defined by the instrument falling into its jurisdiction which also delimitates its functions and powers. However, in human rights matters, considering similar case-law to rule on analogue, perhaps even identical legal issues, allows us to reach common solutions. This is part of development normative convergence which contributes to the process of harmonization by applying and interpreting human rights treaties. Moreover, because judicial dialogue is not a binding obligation, the opening of a particular body to external sources illustrates the search for and the willingness to reach an implicit perspective of universal justice, in reflection of the universality characterizing fundamental human rights, notwithstanding differences of cultures, traditions and legal practices (Frydman, 2007, p. 157).

The search for external instruments and decisions reflects the idea of existing common standards, transcending the differences and independence between legal systems and emerging as a determining factor in the interpretation and application of legal rules shared by multiple treaties protecting human rights. Thereupon, the eventuality of common standards and norms of references that could be identified in decisions or legal instruments coming under the jurisdiction of other international bodies, results in a *de facto* expansion of possibilities offered to the power of interpretation. Consequently, judicial power recognized to a given interpretative body is strengthened in its relations and interactions with other judicial powers in a mutual process of self-regulation embodied by the practice of judicial dialogue. Indeed, referring to the practice and achievements of other legal systems not only extends the margin of appreciation of the interpreter, but also narrows it. Spontaneously, that body will refer to other decisions and instruments that could limit its interpretive possibilities by showing a different state of law, a lack of consensus or the existence of a strong common interpretation regarding legal matters.

The multiplication of international tribunals and courts is part of the process of the jurisdiction of international human rights law. Far from resulting in a government of judges, it improves extraterritorial governance through a slow but constant movement towards interpretative harmonization of analogue legal rules reflected in the spontaneous practice of judicial dialogue. The reference to external sources, also frames the legitimate power of interpretation of international judicial bodies. Indeed, their power is based on the sovereign will of States that initially have chosen to create them as impartial and independent interpreters of legal norms. Still, they also exercise a margin of appreciation in interpretation processes that can lead to the expansion of international obligations as jurisprudential objectivism consolidates itself through consistent and coherent judicial practice.

ENDNOTES

1. The present article is based on ideas and reflections that were addressed in my doctoral thesis as the subject was the dialogue between international jurisdictions and quasi-jurisdictions protecting human rights, and the prohibition of torture being used as an example to illustrate the practice of judicial dialogue: Silviana, Cocan, *Le dialogue entre juridictions et quasi-juridictions internationales de protection des droits de la personne – l'exemple de la prohibition de la torture et autres peines ou traitements cruels, inhumains ou dégradants*, Paris, LGDJ-Lextenso, 2020, 666 pp.
2. Reaffirmation of Joint Declaration San José adopted on May 25-26, 2023. Available online https://www.echr.coe.int/documents/d/echr/san_jose_declaration_2023_eng.

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