

The Protection of Global Legal Goods

La protección de los bienes jurídicos globales

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SUMMARY: I. *Introduction*. II. *The Notion of Global Legal Goods*. III. *The Dynamics of Global Legal Goods*. IV. *Conclusions*. V. *Bibliography*.

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RESUMEN: Los bienes jurídicos globales son los intereses y valores protegidos en un espacio normativo de interacción global, y constituyen un mínimo común denominador que sustenta acciones jurídicas de protección e inspira u ordena estas acciones. Aquellos bienes están inscritos en un sistema de coordinación de múltiples niveles, en el cual acciones internacionales, internas y no estatales se complementan unas a otras de manera coordinada. Su reconocimiento es crucial en un mundo globalizado en el que acciones aisladas son incapaces de afrontar desafíos actuales, teniendo en cuenta que cada sociedad requiere determinado modelo jurídico y que las autoridades pueden proteger bienes jurídicos compartidos y con un origen distinto al local.

Palabras clave: bienes jurídicos globales, espacio normativo global, actores no estatales, sistemas normativos multi-nivel, globalización.

ABSTRACT: Global legal goods are the interests and values protected in a global legal space of interaction where multiple legal systems and actors interact, and constitute a lowest common denominator that can both constitute the basis of legal actions that protect and promote them and inspire and command such action. They are embedded in a multi-level system of coordination, where international, domestic and non-state actions complement each other in an arranged fashion. Their recognition is essential in a globalized world where isolated actions are unable to deal with current challenges to legal interests, taking into account that each society demands a proper legal framework and that authorities can protect extraneous and shared legal goods.

Descriptors: global legal goods, global legal space, non-state actors, multi-level normative frameworks, globalization.

RÉSUMÉ: Les biens juridiques globaux sont les intérêts et valeurs protégés dans un espace normatif de l'interaction global et constituent un minimum commun dénominateur que sustente des actions juridiques de protection et inspire ou ordonne ces actions. Ces biens se sont inscrits dans un système de coordination multi-niveaux, dans lequel les actions internationales, internes et non —étatiques se complémentent mutuellement d'une façon coordonnée. Sa reconnaissance est cruciale dans un monde globalisée dans lequel les actions isolées sont incapables de relever les défis actuels, en considérant que chaque société a besoin d'un modèle juridique particulier et que les autorités peuvent protéger des biens juridiques partagés et avec un origine différente au local.

Mots clés: bien juridiques globaux, espace normatif de l'interaction global, acteurs non étatiques, systèmes multi-niveaux, mondialisation.

I. INTRODUCTION

In a globalized world where individuals are often exposed and vulnerable before global actors and forces, with these actors sometimes being able to exert an influence on authorities in order to make them lower standards or not enact, implement or envisage coherent and required protections and guarantees, awareness of legal goods that are global and place human beings at their center will enable different actors in different levels of governance to resort to interpretations and quests of legal modifications or to employ complementary mechanisms that may help to prevent uncontrolled forces from abusing in impunity.

Every society needs specific legal systems, and a global world needs one as well. If on top of this human beings are placed at the center of that system, much will be gained. Additionally, from the perspective of social sciences and international relations, it has been pointed out that the regulation of non-state behavior is a pending task,¹ and this proves especially true when considering that human dignity can be both protected and violated by non-state behavior.

Jus gentium is but one system that interacts with other systems and is handled by many actors in legal practice, which if properly understood and employed can be used in conjunction with other legal manifestations, private —non-state— and public in order to further the protection of shared legal goods way that is required by today's challenges, to tackle the problems faced by human beings with a legal strategy adapted to them. Among other things, this is so because an international legal strategy is insufficient when trying to protect individuals in a globalized context in the face of privatization, non-state power, greater interdependence, elusion of public controls, and non-legal forces operating transnationally or domestically, out of the reach of international tools.

¹ See Halliday, Fred, "The Romance of Non-State Actors", in Josselin, Daphné and Wallace, William (eds.), *Non-State Actors in World Politics*, New York, Palgrave, 2001, pp. 34-37; Alston, Philip, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in Alston, Philip (ed.), *Non-State Actors and Human Rights*, New York, Oxford University Press, 2005, at 19; Calame, Pierre, "Non-state actors and world governance", Discussion paper, Forum for a new World Governance, 2008, at 18.

Thus, international law employs domestic authorities and norms in order to further the content of its norms.² Likewise, non-state private regulations lack the enforcement power of public law, and domestic law is prone to abuse by domestic authorities who are unconcerned about global common legal goods, weak, or that are constrained by norms of limited territorial reach, among others.

In the current context, acculturation and internalization of legal goods of a global nature in all systems and by all participants has the potential to foster compliance and enforcement through multiple judicial, non-judicial and non-legal mechanisms, which altogether have a greater likelihood of granting protection given their complementarity and joint efforts. In this paper, I purport to examine what global legal goods (hereinafter, GLGs) are.

II. THE NOTION OF GLOBAL LEGAL GOODS

Global legal goods are those interests, values and goals (legal goods) protected in a global space of legal interaction. In other words, they are the purposes and values that inspire and are guaranteed by norms of multiple normative systems and levels of governance that coincide in that regard or that are endorsed by multiple actors. Those legal systems—expressly or implicitly—and/or actors—either formally or informally—interact in a normative space that has thus a global character given the involvement of multiple levels and participants (national, transnational and international).

The notion of legal goods is borrowed mainly from criminal law theory, where it has been employed in order to analyze what interests are

² See, for example, how domestic law must protect rights in a way determined by international law, and how its authorities can perform functions protective of international legal goods, in: Knox, John H., “Horizontal Human Rights Law”, *The American Journal of International Law*, vol. 102, 2008, at 18-31, 44; Cassese, Antonio, “Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law”, *European Journal of International Law*, vol. 1, 1990, at 225-231; Separate Opinion of Judge Leval to the *Case of Kiobel v. Royal Dutch Petroleum*, United States Court of Appeals for the Second Circuit, 2008, pp. 42-49.

or ought to be protected by criminal norms. In the light of this conception, I hold that one can employ a notion of legal goods both from the perspective of the values that law protects *de lege lata* (objective theory) and from the viewpoint of what values should be protected by the legal system *de lege ferenda*, enabling a critical analysis of law (subjective approach),³ as for instance in regard to how effectively or comprehensively it protects legal goods and those who benefit from them. For example, it can be considered that the prohibition of homicide protects the right to life, whereas other criminal provisions protect other inter-

³ In this regard, Markus Dirk Dubber comments that criminal law responses are appropriate to the extent that they are employed to protect certain interests, and that otherwise their use could be deemed by some as *illegitimate*—although not unconstitutional, he argues—. This evinces the possibility of employing the concept of legal goods both from a descriptive approach, identifying what interests are protected by law, and from a critical standpoint. Additionally, Santiago Mir Puig has clarified the fact that legal goods are not only found in criminal law, but may be present in a legal system in general, and that only when some conditions are met, it is proper to employ criminal law mechanisms to protect those legal goods. Additionally, this author has argued that alongside a formal approach that identifies legal goods protected by the law, a substantive conception asks the question of what legal goods deserve legal protection, and that among them only in some cases that protection should be criminal. As can be seen, this conception has also inspired the two approaches to legal goods shown above in the main text. Let it be further said that Christoph J. M. Safferling posits the idea that the protection of some core human rights by criminal means amounts to the protection of some legal goods, illustrating how protecting human dignity (that is the foundation of human rights) is a value that can be regarded as a legal good. Finally, interpreting the case-law of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights has considered that the “juridical interests” being protected by the law are legal goods, or that some human rights are protected by municipal law given their status as legal goods. On all these issues, see Dubber, Markus Dirk, “The Promise of German Criminal Law: A Science of Crime and Punishment”, *German Law Journal*, Vol. 6, 2005, at 1069-1070; Puig, Santiago Mir, “Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State’s Power to Criminalize Conduct”, *New Criminal Law Review*, vol. 11, 2008; Safferling, Christoph J. M., “Can Criminal Prosecution be the Answer to massive Human Rights Violations?”, *German Law Journal*, vol. 5, 2004, at 1472; Inter-American Commission on Human Rights, Report No. 95/08, Admissibility, *Nadege Dorzema et al., or “Guayabin Massacre” v. Dominican Republic*, 22 December 2008, footnote 7, and Inter-American Commission on Human Rights, Report No. 64/01, *Leonel de Jesús Isaza Echeverry and Others v. Colombia*, 6 April 2001, para. 22, in connection with Inter-American Court of Human Rights, *Case of Durand and Ugarte v. Peru*, Judgment of 16 August 2000 (Merits), para 117; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/V/II.49, 11 April 1980, in: Chapter II, The Right to Life, para. 1 of section A. General Considerations.

ests, such as purely State rights or the protection of the environment, for example.

In accordance with the idea that some legal goods can be protected by extra-criminal means,⁴ ever since non-criminal norms are also designed to protect certain values or interests, I hold that international norms likewise seek to protect diverse interests and values, which would be the legal goods they aim to protect. From a critical approach *de lege ferenda*, it would be equally possible to assess which legal goods international law should begin to protect or to protect in a stronger manner. Therefore, from a programmatic perspective, global legal goods can serve as standards on whose basis to judge the fairness of international law in both procedural and material terms⁵ for, if it fails to protect them properly from a substantive or procedural point of view, it would need to be reformed.

These ideas seem simple enough, but their implications are great when one realizes that there are legal goods that are equally and coincidentally protected across different legal systems, both vertically, i.e. across levels of governance –local, national, transnational, international- and horizontally, that is to say across comparable legal systems belonging to the same level of governance, as comparative legal analyses can reveal. Due to the practical demands of a world with ever closer ties and greater interdependence,⁶ the situations in which the boundaries between legal systems and levels of governance are blurred⁷ can be

⁴ See Puig, Santiago Mir, *op. cit.*

⁵ Thomas Franck provided a valuable insight that distinguishes procedural and material elements of fairness of norms, which do not necessarily appear simultaneously. Franck identified legitimacy with the procedural component and distributive justice with the material one. I consider that the distinction is highly valuable, although I must confess that I disagree with holding distributive justice as the sole criterion of material justice and with the ethical relativism I perceive in his analysis of material justice. On the distinction put forward by Franck, see Franck, Thomas M., *Fairness in International Law and Institutions*, USA, Clarendon Press-Oxford, 1998, at 3-24.

⁶ See del Arenal, Celestino, “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*, Bilbao, 2002, pp. 32-34.

⁷ See Kingsbury, Benedict, Krisch, Nico, and Stewart, Richard, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, New York University, 2004, pp. 9-10, 12-13; Kingsbury, Benedict, “The Concept of ‘Law’ in Global Administrative Law”, *European Journal*

explained to a great extent by demands of protecting coincident legal goods.

From a subjective point of view, a disaggregated analysis of the State may equally show that State agents ought to operate as protectors of legal goods of an international origin or nature that find accommodation in State legal systems, becoming guarantors of the norms that embody those legal goods, a phenomenon that has increased nowadays due to instances of domestic protection of common international norms and values, through universal jurisdiction or the enforcement of *erga omnes* obligations, among other situations, as commented upon by Antonio Cassese.⁸ Ultimately, this merging of identities of law enforcers responds to the identification of common goals which are shared by different entities and legal systems and have to be protected simultaneously across levels of governance.

One example of the protection of common legal goods is that of the protection of human rights: the stage of their internationalization took place after their national recognition,⁹ and their current simultaneous protection in different levels of governance nowadays tends to be based on the principles of *subsidiarity or complementarity*, according to which the State must be permitted and required to *effectively* try to deal with a violation in the first place, given its proximity to the violation and the

of International Law, vol. 20 no. 1, 2009, pp. 52-55, 57; del Arenal, Celestino, *op. cit.*, at 53; Koh, Harold, "Why Do Nations Obey International Law?", *Yale L.J.*, Vol. 106, 1997, pp. 2624, 2631.

⁸ See Cassese, Antonio, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law", *op. cit.*, pp. 225-231.

⁹ On the internationalization of human rights, see Buergethal, Thomas, "The Evolving International Human Rights System", *American Journal of International Law*, vol. 100, 2006, at 787, 789-790; Gómez Isa, Felipe, "International Protection of Human Rights", in Gómez Isa, Felipe and De Feyter, Koen (eds.), *International Protection of Human Rights: Achievements and Challenges*, Bilbao, University of Deusto, 2006, pp. 24, 31; Hobe, Stephan, "Individuals and Groups as Global Actors: The Denationalization of International Transactions", in Hofmann, Rainer (ed.), *Non-State Actors as New Subjects of International Law*, Duncker & Humblot (ed.), 1999, p. 120; Villán Durán, Carlos, *Curso de Derecho Internacional de los Derechos Humanos*, Madrid, Trotta, 2006, pp. 68-75; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of August 28, 2002, *Juridical Condition and Human Rights of the Child*, paras. 15-34.

greater quantity of resources at its disposal when compared to international agents.¹⁰

Failing this, the international agents are competent to examine the situation. In such a scenario, the legal goods being protected are the same ones, and the existence of human rights obligations of the State oblige it to adjust its domestic legal system to the international one, bringing the each system's content closer to that of the other. Naturally, this proximity is not absolute, and there are mechanisms, as that of the margin of appreciation, that grant some leeway to the State to have its own understanding as long as it respects some criteria of minimum protection and is subject to international supervision.¹¹ This sort of mechanism is coherent with the need of allocating power in a balanced and careful manner across levels of governance and respecting democratic principles,¹² although use of these mechanisms has aroused controversy sometimes.

¹⁰ On the different availability of resources in different levels, see Knox, John H., *op. cit.*, pp. 2, 19, 44. About the principles of complementarity, subsidiarity, effectiveness of remedies, and the related figure of the exhaustion of domestic remedies, see Articles 17 of the Rome Statute of the International Criminal Court, 2.3 of the International Covenant on Civil and Political Rights, 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, or 25 and 46 of the American Convention on Human Rights, among others. Additionally, see Inter-American Court of Human Rights, *Case of Ivcher-Bronstein v. Peru*, Judgment of February 6, 2001, Merits, Reparations and Costs, paras. 135-137; Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Judgment of December 6, 2001, Merits, paras. 58, 60; Robinson, Darryl, "The Mysterious Mysteriousness of Complementarity", *Criminal Law Forum*, vol. 21, no. 1, 2010. Altogether, these principles presuppose that the exhaustion of domestic remedies is not required in order to resort to international remedies when domestic remedies are ineffective, inadequate, too burdensome, or access to them is extremely difficult. See European Court of Human Rights, *Case of Opuz v. Turkey*, Application no. 33401/02, Judgment, 9 June 2009, paras. 112, 116, 127, 152-153, 159, 175, 201; Inter-American Court of Human Rights, Advisory Opinion OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, August 10, 1990, paras. 31, 35; Article 15 of the Draft Articles on Diplomatic Protection, 2006.

¹¹ On the figure of the margin of appreciation, see Gross, Oren and Ní Aoláin, Fionnuala, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights", *Human Rights Quarterly*, vol. 23, 2001.

¹² See Jackson, John H., *Sovereignty, the WTO, and Changing Fundamentals of International Law*, New York, Cambridge University Press, 2006, pp. 73-76.

However, a common core or lowest common denominator exists in human rights law, and it lies in a *global* legal space of *interaction*, where multiple actors and legal systems participate. This is a notion that is similar to one employed by global administrative law theory and is also reminiscent of the idea of global law as comprising transnational, non-national, international, supranational and other legal manifestations.¹³ In the case of global legal goods, the space is generated as a result of the interaction of legal systems of different levels therein and the mutual influence of its participants, for just as the interpretation of international agents is to be considered by domestic authorities, the latter can exert an influence on the content of international law and exert pressure on international agents in the determination of the content and implementation of international law. In any case, the role of domestic authorities as guarantors of international law is undeniable, just as domestic judges are important for guaranteeing European Union law or the European human rights system, for example.¹⁴

Global legal goods, however, can be protected not only in a subsidiary or vertical manner, ever since in today's globalized world actors may interact either informally (from the periphery) or formally endorsed in order to promote legal goods protected by norms they support, carrying out this promotion activism in accordance to a criterion of simultaneity, in which non-state action reinforces or fills the gaps of public action (carried out by States and/or International Organizations).¹⁵ To continue with the example being employed, it is necessary to consider

¹³ Different legal regimes and systems, and a myriad of legal practices of various actors, can meet in emerging legal spaces. For the Global Administrative Law account of this, see Kingsbury, Benedict, Krisch, Nico, and Stewart, Richard, *The Emergence of Global Administrative Law*, *cit.*, pp. 12-18; Domingo, Rafael, *¿Qué es el derecho global?*, Pamplona (Spain), Thomson Aranzadi, 2007, at 108.

¹⁴ See Mangas Martín, Araceli and Liñán Noguera, Diego J., *Instituciones y Derecho de la Unión Europea*, Madrid, Tecnos, 2004, at 432-433; Buergenthal, Thomas, *op. cit.*, at 806.

¹⁵ See Calame, Pierre, *op. cit.*, at 19-20, 22-23; Pérez-Prat Durbán, Luis, "Actores no estatales en la creación y aplicación del Derecho Internacional", in Abellán Honrubia, Victoria and Bonet Pérez, Jordi (dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público: los actores no estatales: ponencias y estudios*, Barcelona, Bosch, 2008, at 26-38; Non-State Actors Committee of the International Law Association, *First Report of the Committee on Non-State Actors*, The Hague Conference (2010), at 10.

that actors such as NGOs often strive to impact on the content and application of human rights law, and as a result exert pressure with the aim of ensuring compliance by other entities with its tenets.

The interesting thing is that just as they exert pressure on States, International Organizations and even corporations in order to make them comply with *the content* of human rights law, as embodied in norms produced within legal systems where the legal production is to a great extent in the hands of States —international and domestic legal systems—, those or other actors may also issue norms of their own, which in turn may reflect the content of human rights as embodied in other legal systems or according to their own perspective —which is not necessarily devoid of controversies—. This is not really surprising, because just as non-state actors have been relevant throughout history, even in the international society where fictitious notions of state exclusivism have prevailed sometimes, “voluntary private agreement[s]”¹⁶ and other normative or social manifestations of non-state actors with regulatory relevance have been known of in many historical stages.

The previous dynamic is not limited to NGOs and can occur in two ways: non-state actors may either create norms of their own —private orderings— in an *self-regulatory* way, when an actor commits itself to respect certain regulations it has produced itself, as is the case of codes of conduct issued by the concerned corporation; or in a *hetero-normative* way, when the norm is created by a non-state actor and seeks to regulate the conduct of another actor or when an actor agrees to follow the regulations issued by a different non-state entity, as happens with codes of conduct or standards to which the author commits when they are issued by a different actor.¹⁷

¹⁶ See Jessup, Philip C., *Transnational Law*, New Haven, Yale University Press, 1956, pp. 109-110.

¹⁷ See Reinisch, August “The Changing International Legal Framework for Dealing with Non-State Actors”, in Alston, Philip (ed.), *Non-State Actors and Human Rights*, New York, Oxford University Press, 2005, at 42-53; Pérez-Prat Durbán, Luis, *op. cit.*, at 31-34; Gatto, Alexandra, “Corporate Social Responsibility in the External Relations of the EU”, *Yearbook of European Law*, 24, 2005, at 425-432; ISO 26000. See, moreover, the global compact, that is not directly or immediately binding for non-state entities, although legal effects could be derived from their actions in regard to it sometimes.

Naturally, many questions follow, the main one being: are those regulations legally binding? It depends on how one approaches the subject. For authors such as Günther Teubner, for instance, the self-reference, reiteration, and other aspects of private regulations that generate labels of legality or illegality warrant their being considered legal, even in the absence of State support, leading to what he terms global law or, according to Rafael Domingo, to their being truly binding regulations that he calls, with a coined term that is more accurate and explanatory, *lex privata*, normative manifestation that is compatible with the idea that law can exist and has existed without a State, with which I agree.¹⁸ While I agree with the authors regarding the legal character of those regulations, the term global seems misleading to me, ever since private non-state actors generate those regulations mostly but not exclusively in a transnational manner, and may have domestic norms outside the public legal system of a State: thus, I would rather allude to private non-state law.

If one agrees with this theory, it can be seen that just as States may enter into treaties or into non-binding agreements (memorandums of understanding),¹⁹ not all private regulations are destined to be binding from the perspective of non-state actors, but that yet some may be.

In any case, just as soft-law may have legal effects indirectly, so can non-legal private orderings produce legal effects—in regard to their authors or other entities that seem to endorse them somehow—for example due to the principle of good faith or to the protection of legiti-

¹⁸ This theory posits that non-state actors can develop legal norms outside the frameworks of domestic and international law, due to reiterative processes where behaviors are labeled as legal or illegal, during the course of processes of hierarchization, temporalization and externalization. About this, see Teubner, Gunther, “‘Global Bukowina’: Legal Pluralism in the World Society”, in Teubner, G. (ed.), *Global Law Without a State*, Vermont, Dartmouth (ed.), 1997, pp. 12-19; Kingsbury, Benedict, “The Concept of ‘Law’ in Global Administrative Law”, *op. cit.*, pp. 52-55. Additionally, see Domingo, Rafael, *op. cit.*, at 108, 159. The terminology of *global law* as equating with law emanating from private entities without reference to State-sponsored legal systems may be misleading, ever since alluding to globality is more reminiscent of an all-encompassing category, that surpasses just private entities and includes public actors as well. Therefore, I agree with Domingo’s backed up terminology. Aside from terminological matters, however, both theories offer interesting and many accurate insights.

¹⁹ See Aust, Anthony, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, at 20-21, 26-46.

mate expectations, coupled with the way in which a unilateral declaration is made, as attested by discussions in the midst of the International Law Association.²⁰

On the other hand, the content of (public or private) non-state regulations, just as soft-law, can also be incorporated by international or domestic norms, become an element of authoritative interpretation, or turn into an integral part of binding norms by virtue of reference—making it necessary to interpret the latter in the light of the former, for instance—,²¹ possibility that was considered in an agreement between the EU and Chile regarding corporate social responsibility, for instance.²² In this way, non-state private norms can be given effects, albeit indirectly, by other binding norms. One example is provided by the effects of standards issued by the ISO given under WTO law.²³ This, in the end, is not a novelty: a legal system can incorporate the content of legal or non-legal rules found in other normative systems, a possibility

²⁰ In the Non-State Actors Committee of the International Law Association it was discussed that “[m]any non-State actors, e.g. corporations and armed opposition groups, *commit themselves to upholding international law. However, they tend to do so as a matter of policy/soft law than as a matter of hard law.* In so doing, they may avoid legal accountability. *There may nevertheless be doctrines and principles that could be used to harden these soft commitments into hard law (duty of care/negligence/corporate organization/legitimate expectations/good faith/unilateral act...)*” (emphasis added). Excerpt from: Non-State Actors Committee of the International Law Association, *Preliminary Issues for the ILA Conference in Rio de Janeiro, August 2008 (Draft Report)*, Rio de Janeiro Conference, 2008.

²¹ See Inter-American Court of Human Rights, Advisory Opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, 14 July 1989, paras. 30-37; Simma, Bruno and Alston, Philip, “The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles”, *Australian Yearbook of International Law*, vol. 12, 1988-1989; de Feyter, Koen, “Globalisation and human rights”, in Gómez Isa, Felipe and de Feyter, Koen (eds.), *International Human Rights Law in a Global Context*, Bilbao, University of Deusto, 2009, at 79.

²² In this regard, a treaty can incorporate *soft law* or even regulations created by non-state actors or aimed at the regulation of their behavior, as was envisaged in a treaty (association agreement) between Chile and the EU that, however, in the end limited itself to recommending the observance of guidelines on corporate responsibility, although nothing prevented it from including harder provisions that incorporated those guidelines, turning them into mandatory for its purposes. Concerning this case, see Gatto, Alexandra, *op. cit.*, pp. 451-454. This dynamic can be present in regard to other norms involving non-state behavior or input, and originating in diverse legal systems.

²³ See Kingsbury, Benedict, *supra*, at 36-37.

that was handled at least as far back as in the case-law of the Permanent Court of International Justice, which according to Philip C. Jessup considered that non-international norms can be “found in treaties and [be] thus transformed into ‘true international law’”.²⁴

Finally, practice and the need to cope with social needs and difficulties may progressively and gradually pave the way for the acceptance of direct effects of non-state rules under international or domestic law, and a stage in that process may be the emergence of agreements or other instruments that have features that are highly normative and resemble instruments clearly binding under public legal systems. One such a case is that of agreements between non-state armed groups (e.g. JEM in Sudan is one such a case) and International Organizations (as the UN), which are sometimes agreed upon even when States with an interest affected by them protest (e.g. Sudan).²⁵

That non-state actors may enter into agreements or participate in the dynamic of other sources of international law is a possibility admitted by the International Law Commission itself, by doctrine or by arbitral practice, and discussed in the midst of the International Law Association and elsewhere,²⁶ and actors may resort to other sources and have been known to be potential members of or participants in International Organizations,²⁷ their internal rules being applicable to them therefore.

²⁴ See Jessup, Philip C., *op. cit.*, p. 95.

²⁵ See Memorandum of Understanding between the Justice and Equality Movement (JEM) and the United Nations *Regarding Protection of Children in Darfur*, Geneva, 21 July 2010.

²⁶ See International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, 1966, paragraph 5 of the commentary to article 2, and Commentary to article 3; International Law Association, *First Report of the Committee on Non-State Actors*, The Hague Conference (2010), Non-State Actors Committee, at 8-13. Moreover, as Antonio Remiro has mentioned, agreements to settle disputes by recourse to international arbitration constitute treaties and, as such, evince the *jus ad tractatum* or capacity of the parties thereto to celebrate treaties. In relation to this discussion, practice illustrates how, for instance, some non-state actors, such as the Sudan People’s Liberation Movement/Army, have been parties to arbitration agreements that make disputes be seized by the Permanent Court of Arbitration. Regarding these considerations, see Remiro Brotóns, Antonio *et al.*, *Derecho Internacional: Curso General*, Valencia, Tirant Lo Blanch, 2010, at 621-622; Crook, John R., “Abye Arbitration-Final Award”, *ASIL Insights*, vol. 13, Issue 15, 2009.

²⁷ See Cortés Martín, José Manuel, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional*, Seville, Instituto Andaluz de Administración

Regardless of those effects, however, from their own perspective and according to some authors, in practice non-state actors may have —legal or otherwise— norms of their own that may coincide with those of domestic and international law, and their striving for their application in the transnational, international or domestic levels may lead to the legal good in question being protected or having a greater likelihood of being protected. Thus, the action of any one actor in the global legal space of interaction impacts on all the participants and legal systems involved, for the protection is produced in respect of all of them ever since a legal good present in them is defended.

III. THE DYNAMICS OF GLOBAL LEGAL GOODS

The dynamics within the global legal space with its global legal goods, therefore, reinforce the protection available in all of its components, since the mechanisms available under each of them interplay either directly or indirectly with the others and complement them. Differences or distortions as to the content of legal goods, something not infrequent with non-state actors such as NGOs *vis-à-vis* public entities²⁸ or even among themselves,²⁹ would leave the not-agreed elements outside the scope of the “core” lowest common denominator of global legal goods.

Pública, 2008, pp. 111-114; Jessup, Philip C., *op. cit.*, at 78; article 3.1 of the Constitution of the International Labour Organization. Additionally, see ECOSOC Resolution 1996/31; Article 2 of the ILC’s draft articles on Responsibility of international organizations as of the version found in document A/CN.4/L.743 states that “International organizations may include as members, in addition to States, other entities”.

²⁸ See, for example, Bianchi, Andrea, “Globalization of Human Rights: The Role of Non-state Actors”, in Teubner, G. (ed.), *Global Law Without a State*, Vermont, Dartmouth (ed.), 1997, pp. 185, 191-195, 201-203.

²⁹ First of all, non-state actors may fail to represent civil society in some regards. On this, see Thürer, Daniel, “The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State”, in Hofmann, Rainer (ed.), *Non-State Actors as New Subjects of International Law*, Berlin, Duncker & Humblot (ed.), 1999, p. 46. Apart from this, non-state actors may disagree among themselves. One example that illustrates this was the abandonment of Amnesty International by former members due to their considering that the new policies of Amnesty regarding abortion were adopted without

Concerning the reinforcement and complementation of protection of legal goods available under legal systems that are part of the global legal core, given the pluri-legalism (presence of multiple legal systems and tools), *multi-level* governance³⁰ and the social *polycentrism* with some normative dimensions that is present as a result of the participation of non-state actors in the global society,³¹ dimensions all of which are related to the multiple participants and legal systems involved, let the following be said: besides inter-State cooperation in the protection of common legal goods —e.g. by means of the *aut dedere aut judicare/punire* principle—, all actors, regardless of which legal systems' protection they represent, can cooperate with each other in the protection of the same legal goods, something consistent with the possibility of inter-actor cooperation described by Friedmann and the joint enterprises or partnerships among States and non-state actors (multi-actor dimension),³² dynamics and phenomena that help to counter the ten-

much transparency or democracy and that they are contrary to the human rights philosophy that should inspire that NGO. Some of those members proceeded to create a new NGO, the Benenson Society, which in some regards cooperates with Amnesty but acts independently and autonomously and holds a very different policy and understanding in regard to the scope of protection of the right of life and the protection of the unborn human beings. See, for example, "Explanation for Withdrawal from Amnesty and Establishment of the Benenson Society", available in: <http://www.staloyisius.nsw.edu.au/associations/benenson/Withdrawal%20from%20Amnesty%20and%20establishment%20of%20the%20Benenson%20Society.pdf>.

³⁰ See Peters, Anne, "Humanity as the A and Ω of Sovereignty", *European Journal of International Law*, vol. 20, no. 3, 2009, pp. 535-536; Sano, Hans-Otto and Alfredsson, Gudmundur (eds.), *Human Rights and Good Governance: Building Bridges*, Leiden, Martinus Nijhoff Publishers, 2002, at 137-141; Calame, Pierre, *op. cit.*, pp. 19-20, 22-23.

³¹ See Nijman, Janne Elisabeth, "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality", *Amsterdam Center for International Law Research Paper Series, Non-State Actors in International Law, Politics and Governance Series*, 2010, pp. 8-9, 39-40; Domingo, Rafael, *op. cit.*, at 157.

³² Cf. Nijman, Janneke, "Sovereignty and Personality: A Process of Inclusion", in Kreijen, Gerard (ed. in Chief), *State, Sovereignty, and International Governance*, New York, Oxford University Press, 2002, p. 133-134; Kingsbury, Benedict, Krisch, Nico, and Stewart, Richard, *op. cit.*, p. 22; Kingsbury, Benedict, "The Concept of 'Law' in Global Administrative Law", *op. cit.*, p. 25; Josselin, Daphné and Wallace, William, *op. cit.*, p. 9; Van Staden, Alfred and Vollaard, Hans, "The Erosion of State Sovereignty: Towards a Post-territorial World?", in Kreijen, Gerard (ed. in Chief), *State, Sovereignty, and International Governance*, New York, Oxford University Press, 2002, at 177; Reinalda, Bob, "Private in Form, Public in Purpose: NGOs in International Relations Theory", in Arts, Bas and others (eds.), *Non-State Actors in*

dency towards selfishness of State interests, given their identity being based on exclusions —the foreigners are the others—, while non-state actors are checked in their possible abuses and distortions in turn,³³ leading to a system of global relations with spontaneous checks and balances in the light of the protection of common legal goods that is to be assessed by individuals from the viewpoint of their dignity.

Therefore, non-state actors that promote and further the protection of human dignity have an inherent capacity to participate in this promotion, and must be entitled to do so, formally and informally.

The presence of social interactions that are guided and shaped by common legal goods exerts an impact on future behavior, psychologically and socially due to internalization processes and normatively due to the interpretation of legal systems and norms that are obligatory

International Relations, United Kingdom, Ashgate Publ., 2001, pp. 24-26; Kirk, Elizabeth et al., “SUDS law: Non-State Actors and the Haphazard Route to Implementation of International Obligations”, *Non-State Actors and International Law*, Vol. 4, 2004; Domingo, Rafael, *op. cit.*, at 129; Non-State Actors Committee of the International Law Association, *First Report of the Committee on Non-State Actors*, The Hague Conference, 2010, pp. 5-6, 13-1; Kaul, Inge, Conceição, Pedro, Le Goulven, Katell, and Mendoza, Ronald U., “Why Do Global Public Goods Matter Today?”, in *Providing Global Public Goods*, USA, Oxford University Press, 2003, pp. 5-6, 9, 11, 13, 16; Kaul, Inge and Mendoza, Ronald U., “Advancing the Concept of Public Goods”, in *Providing Global Public Goods*, USA, Oxford University Press, 2003, pp. 105, 108; Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “How to Improve the Provision of Global Public Goods”, in *Providing Global Public Goods*, USA, Oxford University Press, 2003, pp. 29, 32, 34, 42, 50; Desai, Meghnad, “Public Goods: a Historical Perspective”, in *Providing Global Public Goods*, USA, Oxford University Press, 2003, at 63.

³³ On State selfishness, due to their interests —exclusive and not inclusive or non-fraternal—, and non-state bias, selectivity and partiality, see Domingo, Rafael, *op. cit.*, at 139; Lavenex, Sandra, “Globalization, Global Governance and the *Bonnum Commune*: a Conceptual Investigation”, *European Journal of Law Reform*, vol. 6, 2004, pp. 381, 388; del Arenal, Celestino, *op. cit.*, at 29; Casese, Antonio, “Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law”, *op. cit.*, at 216; Reinalda, Bob, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, *op. cit.*, pp. 12-15; Thürer, Daniel, *op. cit.*, pp. 46-47. Noam Chomsky has considered, for instance, that “states are not moral agents. They act in their own interests. And that means the interests of powerful forces within them”, as seen in: <http://www.chomsky.info/interviews/200105--.htm>; Posner, Eric A., *The Perils of Global Legalism*, USA, The University of Chicago Press, 2009, pp. 54-57, 205-206; Clapham, Andrew, *Human Rights: a Very Short Introduction*, New York, Oxford University Press, 2007, at 29; Non-State Actors Committee of the International Law Association, *First Report of the Committee on Non-State Actors*, The Hague Conference, 2010, at 13.

for participants in the light of global legal goods being pursued, whose protection is a legal goal that must be taken into account teleologically, being those legal goods part of the system or *corpus juris* that a systematic interpretation must therefore consider.

Moreover, the sovereignty of States, if interpreted in an extreme or supreme manner, may lead some practitioners to rely on an outdated absolutist assumption of not sharing power with anyone else —internally and externally—, and could pose many problems ever since it includes the germ of the potential legal justifications that may lead to the denial of global peace and respect of human dignity.³⁴ As a result, the emergence of other actors in the global legal stage must perforce be taken into account for analyzing how law can effectively be designed and implemented in the current sociological circumstances in a way that permits the contribution of different actors of promotion, for the sake of protecting individuals and world communitarian legal goods.

As to the framework of operation of elements interacting in the global space, when international and domestic laws interplay, cooperation in a subsidiary manner is the most frequent procedural interplay —although not the only possibility, as will be seen shortly—. It is based on the existence of multiple mechanisms, the presence of more resources at the disposal of entities closer to victims, and the idea of giving these entities the opportunity of protecting individuals in the first place, although permitting sometimes —which is still insufficient— victims to have a “last hope” if those authorities fail to protect them by way of permitting them to have their cases seized by supranational entities and authorities, stressing this logic how each level of protection is relevant in itself and for victims, yet how all levels are connected with the others and their authorities of protection, so as to not leave victims unprotected and without recourse to other remedies.³⁵

³⁴ See Franck, Thomas M., *op. cit.*, pp. 3-9.

³⁵ On all these issues, see European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment of 30 November 2010, para. 36; John H. Knox, “Horizontal Human Rights Law,” *The American Journal of International Law*, Vol. 102, 2008, pp. 2, 19, 44; Buergenthal, Thomas, *op. cit.*, pp. 804-806; Reinisch, August, *op. cit.*, pp. 88-89; Knox, John H., *supra*, p. 44; European Court of Human Rights, *Case of Opuz v. Turkey*, Application no. 33401/02, Judgment, 9 June 2009, pars. 112, 116, 127, 152-153, 159, 175, 201; Inter-American Court of Human Rights, Advisory Opinion OC-11/90, *Exceptions to the Exhaustion*

In turn, the protection of legal goods enshrined and shared in non-state produced norms, protected by their authors domestically, internationally or *transnationally*, tends to operate in accordance with what I call the criterion of complementarity, allusive to the way in which that protection operates: its taking place is unaffected by considerations of whether mechanisms in other levels of governance that protect the same legal goods (shared due to interactions and synergy) have been exhausted, being it possible thereby for non-state action to reinforce and complement actions in other levels of governance or to replace them in case they are not used or prove to be ineffective.

This logic is based on the co-ordination and input opportunities that the involvement of non-state actors in normative issues can provide, precisely given their expertise, flexibility and relevance in all levels of governance, as described in theories of global governance,³⁶ because the action of protection of norms of private and State-influenced legal systems that protect coinciding legal goods may be perfectly simultaneous, and actions in one level of governance will end up benefiting the others, because the coinciding legal goods will be protected.

Additionally, besides posing threats, non-state actors may exert an undeniable positive impact on the implementation and creation of norms belonging to the international legal system, which they can fur-

of Domestic Remedies, August 10, 1990, pars. 31, 35; Article 15 of the Draft Articles on Diplomatic Protection, 2006. As a consequence, international remedies are often truly the “last hope” of victims. See Concurring Opinion of Judge A.A. Cançado Trindade, Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et-al v. Peru*, September 4, 1998, para. 35.

³⁶ The term *international* governance is narrow in scope ever since it involves basically States and international organizations in comparison with that of *global* governance, that according to some authors comprises other actors. The relevance of the latter in normative strategies and the protection of legal goods, which they must respect, is thus envisaged by it. On these issues, see Sano, Hans-Otto, *op. cit.*, pp. 137-141; Calame, Pierre, *op. cit.*, pp. 19-20, 22-23; Nijman, Janne Elisabeth, “Non-State Actors and the International Rule of Law: Revisiting the ‘Realist Theory’ of International Legal Personality”, *op. cit.*, pp. 8-9, 15; Non-State Actors Committee of the International Law Association, *First Report of the Committee on Non-State Actors*, The Hague Conference, 2010, pp. 4, 24. Coordination with non-state actors is more flexible, and overcomes deadlocks permitted by a system that overestimates State voluntarism. The more accurate terminology discussed herein should be transplanted to the legal realm, where the label of international law fails to grasp the whole picture and reality of the regulation of that legal system.

ther from their private approach.³⁷ As a result, as commented above, they must be entitled to participate in the promotion of the respect of human dignity across various levels of governance.

In support of what has been said, let it be mentioned that Philip C. Jessup considered that legal goods of a legal system can be protected through mechanisms or by authorities or other legal systems,³⁸ and if this is so legal goods common to all legal systems can be especially protected by different actors and in different legal systems, levels and areas. In any case, from a substantive point of view, the core global legal goods ought to be always protected simultaneously, in a coordinated fashion, and in any event coinciding messages should be sent to all addressees of the legal systems involved in the global legal space at the same time. This reinforced and joint protection across levels and by different entities is consistent with the consideration that a single entity on its own, say the State, does not have the capability to protect a given need—protection of dignity—alone in a globalized world, lest it receives support from others and through different mechanisms.³⁹

³⁷ On the (positive and negative) impact of non-state actors on international law regarding protected legal goods of the world community, see, among others, Pérez-Prat Durbán, Luis, *op. cit.*; Reinisch, August, *op. cit.*, pp. 53, 68, 77; Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, New York, Oxford University Press, 2006; Buergenthal, Thomas, *op. cit.*, pp. 803-804; Bianchi, Andrea, *op. cit.*, pp. 189-190; Kabasakal Arat, Zehra F., “Looking beyond the State But Not Ignoring It”, in George Andreopoulos *et al.*, *Non-State Actors in the Human Rights Universe*, USA, Kumarian Press, Inc., 2006, pp. 4-18. The Inter-American Commission on Human Rights, for example, has requested both States and non-state actors to answer questionnaires on the same issues, highlighting how the participation of these entities is crucial, and those actors have also filed reports before treaty bodies of the universal human rights system in the United Nations, among others. On these issues, see Pérez-Prat Durbán, Luis, *op. cit.*, pp. 35-36; <http://www.cidh.oas.org/defenders/Cuestionario-Sociedad-Civil.Seguimiento.eng.htm> and <http://www.cidh.oas.org/defenders/Cuestionario-Estados.Seguimiento.eng.htm>.

³⁸ See Jessup, Philip C., *op. cit.*, at 102.

³⁹ See Badia Martí, Anna, “Cooperación internacional en la lucha contra la delincuencia organizada transnacional”, in Abellán Honrubia, Victoria and Bonet Pérez, Jordi (dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público: los actores no estatales: ponencias y estudios*, Barcelona, Bosch, 2008, pp. 337-338, 342-343; Even though Habermas says that human rights cannot properly be protected by States alone, which I consider true, at least from an effective point of view given the lesser flexibility States have, their territorial and ontological constraints and limitations of freedom of action or

Conversely, non-isolated strategies are the ones better suited to handle globalized problems faced by values protected by law.

The importance of a substantive coincidence (in terms of legal goods being protected) is the following: binding rules can have an educative, expressive and symbolic effect,⁴⁰ and may contribute in the modification of the attitude of those whose behavior it addresses. This was the case with international humanitarian law, whose explicit obligations of armed non-state actors led them to cease ignoring those rules and begin to justify their behavior in a way that sought to demonstrate their compliance with them.⁴¹

The next step is to realize that the same legal goods are protected in different legal systems, normative fields and branches or by multiple actors. Some global legal goods are related to the protection of human dignity, peace and security, or the prevention and sanction of certain crimes (crimes against humanity and war crimes, terrorism, transnational crimes, etc.). Other legal goods of a global character may be related to environmental or financial stability issues.

Concerning humanitarian global legal goods, that is to say, those legal goods concerned with the protection of human dignity in several branches (human rights law, IHL or refugee law, among others), it must be said that human rights protect human dignity and are not just those formally called as such (being human rights *lato sensu* or broadly

maneuvering and of some resources *vis-à-vis* some non-state actors, that have more room for maneuver. It is also true that non-state actors that promote human rights and global legal goods are necessary participants in that protection in the current legal society, and that yet they cannot be exclusive participants, given their shortcomings and the required checks among them, being it impossible for one given entity to represent a diverse and plural civil society, and the need of assessing all their and others' claims in the light of human dignity. About these ideas, see Domingo, Rafael, *supra*, at 82-83, 112-113; Van Staden, Alfred and Vollaard, Hans, *op. cit.*, pp. 172, 177, 181; Reinalda, Bob, *op. cit.*, pp. 25-26; Thürer, Daniel, *op. cit.*, pp. 42-43; Calame, Pierre, *op. cit.*; Badia Martí, Anna, *op. cit.*, at 320.

⁴⁰ On these legal effects, see Goodman, Ryan and Jinks, Derek, "Incomplete Internalization and Compliance with Human Rights Law", *European Journal of International Law*, Vol. 19 no. 4, 2008, at 735; García Villegas, Mauricio, "De qué manera se puede decir que la Constitución es importante", en Álvarez Jaramillo *et al.*, *Doce ensayos sobre la nueva Constitución*, Colombia, Diké, 1991, at 40. About the impact and influence of words in law regarding non-state actors, see Alston, Philip, *op. cit.*, at 3-4.

⁴¹ See Halliday, Fred, *op. cit.*, at 35.

speaking, as explained below), and because dignity is also protected by other norms that do not confer rights (humanitarian guarantees), being those rights and guarantees found across academic categories of normal branches that permit the same solutions to be applied across them.

This possibility is remindful of the idea defended by Ian Brownlie that human rights law is a descriptive category rather than a separate body of norms that makes it necessary to focus on applicable rights rather than on formal distinctions,⁴² and of the recognition by the Inter-American Commission of Human Rights of the presence of core rights commonly protected by different legal branches and the consideration of Andrew Clapham that treating human rights (*stricto sensu*) and IHL together helps to prove the falsehood of considering that the solutions found in the latter are not applicable in the former.⁴³

As a result, when the content of global legal goods coincides somehow (not necessarily completely) and to a relevant extent in all legal systems interacting in a global legal space, and at least in one of them some actors are considered to be bound to respect and even protect them, their actions and normative criticisms thereof in the light of the legal goods may have an educative influence on the remaining legal systems, especially so if the rationale or justification for this consideration can be accommodated in the remaining norms interacting globally. I consider this to be the case of human rights obligations of non-state actors, demanded by the foundational value of human dignity and the principle of equality and non-discrimination.

Additionally, substantive demands for clarification or designs of greater protection, as for example against all perpetrators, can arise due to pressure exerted by the participants of a legal system and civil society that call for following the example of more protective systems when they are aware of the deficits in some systems participating in the legal space that are not found in other systems much more robust that thus demonstrate the possibility and necessity of granting this greater

⁴² See Brownlie, Ian, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, Leiden, Martinus Nijhoff Publishers, 1998, pp. 65-66.

⁴³ 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, para. 117; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *supra*, at 73.

protection. In fact, this pressure can be explicit, as when they pressurize for compliance with law or exert peripheral or official pressure for law-making and implementation of existing legislation, or when *lex humana* claims are made;⁴⁴ and it can also be implicit, operating thanks to the acculturation or internalization of norms⁴⁵ experienced by the participants of the less inclusive systems or stimulated by the ethical appeal of the claims made on them, which may challenge their legitimacy in case they do not conform to their tenets.

Simultaneously, due to the necessity of making actors behave in accordance with criteria of global governance and *rule of law*,⁴⁶ in order to forbid their harming relevant legal goods, and out of demands of consistency when non-state actors demand compliance by others with rules deemed to be applicable universally, non-state actors are required by these additional justifications to comply with regulations with universal aspirations, lest they face a deserved backlash for acting with double standards: therefore, considerations of respect of dignity and peoples, of participation and publicness criteria, or accusations of selectivity and distortion of the differentiation between existing law and individual aspirations camouflaged as such, are to be addressed normatively.⁴⁷

⁴⁴ See Fischer-Lescano, Andreas, “Global Constitutional Struggles: Human Rights between *colère publique* and *colère politique*”, in Kaleck, Wolfgang *et al.* (eds.), *International Prosecution of Human Rights Crimes*, Germany, Springer, 2007, pp. 19-20; Bianchi, Andrea, *op. cit.*; Pérez-Prat Durbán, Luis, *op. cit.*; Losano, Mario G., “Towards a Common Good: A Path to Utopia?: From Philosophy through Legislation to the Dignified Life”, *European Journal of Law Reform*, vol. 6, 2004, at 323; Koh, Harold, *op. cit.*, pp. 2612, 2646, 2656; Andreopoulos, George J. *et al.*, “Conclusion: Rethinking the Human Rights Universe”, in George Andreopoulos *et al.*, *Non-State Actors in the Human Rights Universe*, USA, Kumarian Press, Inc., 2006, pp. 332, 335-336; Halliday, Fred, *op. cit.*, at 26. 29; Thürer, Daniel, *op. cit.*, pp. 44-46; Buergenthal, Thomas, *op. cit.*, p. 804; Noortmann, Math, Arts, Bas and Reinalda, Bob, “Non-State Actors in International Relations: Do They Matter?”, *Non-State Actors in International Relations*, United Kingdom, Ashgate Publ., 2001, pp. 301-302.

⁴⁵ See Goodman, Ryan and Jinks, Derek, *op. cit.*; Koh, Harold, *op. cit.*, at 2645-2659.

⁴⁶ See Nijman, Janne Elisabeth, “Non-State Actors and the International Rule of Law: Revisiting the ‘Realist Theory’ of International Legal Personality”, *op. cit.*, pp. 2, 7-19.

⁴⁷ See Halliday, Fred, *op. cit.*, p. 34-37; Thürer, Daniel, *op. cit.*, pp. 43, 58; Bianchi, Andrea, *op. cit.*, pp. 191, 202. Janne E. Nijman has said that there is a “normative reality of the international rule of law ideal: powerful entities that operate to some degree independently on the international plane should be controlled by law and held accountable for their actions. In other words: political or economic actors should be visible also in the international *legal*

Lastly, substantive mutual influence can operate by the force of example: as explained before in this Section, norms of a legal system may incorporate, replicate or remit to the content of a norm produced in another legal system. The fact that it is deemed that protection of a common legal good is deficient or not as good as it should be, and that it would be better if the example led by another legal system were to be followed, may operate as an incentive that leads law-makers of the other legal systems to be aware of the importance of emulating the good role model, or that leads the public to exert pressure and scholars to criticize and suggest the progressive development and adjustment of other legal systems to support the satisfactory legal system and complement it.

The substantive interaction being explained, it is necessary to turn to the procedural interplay of legal systems regarding global legal goods, in the understanding that the distinction between substantive and procedural dimensions of legal goods is not absolute, but rather employed in order to focus in detail in the *content* to be protected (substantive dimension) and the *mechanisms* with which protection is provided (procedural aspect), ever since doctrine⁴⁸ and norms on human rights and peremptory norms show that some norms with procedural regulations also constitute material guarantees, as is the case with the right to have a due process, or with the idea that *jus cogens* produces some procedural effects alongside the material prevalence of its content.⁴⁹

The reasoning underlying the theory being explained in this writing exemplifies how legal goods protected in a global legal space, which form part of a nascent global law, do not entail an absolute merge of legal systems, but rather form a core prone to expansion or to decrease that exerts influence in all directions, and constitutes a meeting point

order”, in: Nijman, Janne Elisabeth, “Non-State Actors and the International Rule of Law: Revisiting the ‘Realist Theory’ of International Legal Personality”, *op. cit.*, at 4. While I mostly agree that idea, I consider it necessary to clarify and add that besides powerful actors with considerable impact, any actor that can affect global legal goods positively or negatively deserves being regulated in that regard, no matter how insignificant politically, economically or in other aspects it may be from a general perspective.

⁴⁸ See Jessup, Philip C., *op. cit.*, at 71.

⁴⁹ See Bartsch, Kerstin and Elberling, Björn, “Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision”, *German Law Journal*, vol. 4, no. 5, 2003, pp. 486-487.

where actors and legal systems mutually reinforce the protection of the same legal goods.

As a result of this, legal goods permit the participants and norms of the global sphere they lie in to contribute with each other in their protection in a subsidiary or complementary way, filling the gaps and meeting the needs of protection by means of ensuring that no gap of which advantage can be taken by a violator exists. Therefore, for example, the same legal goods being protected in different legal systems and by different participants, once the jurisdictional reach in one level is limited and unable to provide protection in one case, as for example happens with the international level as a result of principles of competence and material limitations, then the mechanisms in other levels of governance, as happens with those employed by domestic authorities, judges or others, ought to complement the action of the limited level by protecting the shared legal interests.

As Scelle, Kelsen or Cassese put it, domestic authorities can act as protectors of international norms but, beyond this idea of protecting *norms* of other system,⁵⁰ which is valid, I would add that it is more important to emphasize that they can operate protecting *legal goods* common to all of them or whose origin is found in a different legal system, even by means of applying *norms* not shared by other legal systems but found only in the one they can apply, that yet protect the same legal goods. In fact, the possibility of protecting shared legal goods is more common and likely than that of protecting extraneous norms, which is however important and possible. The dynamic of protection of common legal goods takes place often and in other ways involving other actors and legal systems, just as non-state actors engage in it when they carry out promotion, activism and advocacy in regard to common (global) legal goods in a way that is complementary to that of international and domestic legal action.

In accordance to this understanding, in the global legal space of coordination possibilities offered by recognition of the coincident protection of legal goods can increase the likelihood of making operative

⁵⁰ See Cassese, Antonio, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublément fonctionnel*) in International Law", *op. cit.*

the idea put forward by Philip C. Jessup that from a transnational perspective jurisdiction determination should be guided by the search for “which authorities may deal effectively with which transnational situations” in a way that is “reasonable” and “conducive to the needs and convenience of all members of the international community”⁵¹, *although* on the condition that that jurisdiction is by no means exclusive to the level to which it is allocated but complementary to the actions of other levels of governance and actors, in order to truly offer hope to victims –actual or potential- that do not find protection under one given legal system/ level, paraphrasing Antonio Cançado Trindade.⁵²

In other words, aware of a violation of the common legal goods, and of the possibilities and limitations of the participants and legal systems involved, there ensues almost spontaneously a dynamic in which each actor tries to employ the means at its disposal to fill the gaps of the remaining mechanisms.

Take, for instance, the cases of transnational litigation, domestic enforcement of international criminal law or of universal jurisdiction, among others, that are precisely based on the existence of legal goods common to domestic and international legal systems and may perform a function not always conducted by international agents or agents of the territorial State where a violation took place, with domestic authorities operating in a way that protects the common legal goods and has effects in all the legal systems interacting in the global space: granting protection to legal goods originating outside the legal system that directly gives authority to an entity, and against all threats, thus becoming a truly *universal* protection (judicial and otherwise).

All in all, both from a substantive and from a procedural point of view, besides reinforcing the common protection, global legal goods generate a synergy that approaches and *integrates* legal systems and their agents and raise awareness as to the gaps to be filled, lest they can be

⁵¹ See Jessup, Philip C., *supra*, pp. 70-71.

⁵² See Concurring Opinion of Judge A.A. Cançado Trindade, Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et-al v. Peru*, September 4, 1998 (Preliminary Objections), para. 35; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of August 28, 2002, *Juridical Condition and Human Rights of the Child*, para. 22.

taken advantage of by potential violators in order to dismantle the common enterprise and get away with violations in impunity, a possibility looming frequently given the gaps and limitations of legal systems *vis-à-vis* actions that occur in the midst of globalization.

Violations of that sort, which can employ gaps of a given legal system, tend to be transnational in the sense that they transcend boundaries in some regard,⁵³ and are committed in a way that takes advantage and employs opportunities offered by globalization for non-state activities.⁵⁴

And the fact is that unless they interact and help each other in order to offer a joint protection of common goals (as GLGs), instead of acting in isolation—individually or ignoring other actors and systems—, each legal system and actor is insufficiently capable to protect GLGs on its own:

This is because domestic law assigns more resources than international law to its agents and enforcers, but States often act in accordance with selfish interests that do not assign priority to humanitarian concerns; additionally, in practice, States with satisfactory regulations may be weaker than actors such as enterprises, armed organizations or drug cartels; privatization or delegation may make the State to be farther away from a close inspection of the needs of protection or sometimes

⁵³ The definitions provided for in Article 3.2 of the United Nations Convention against Transnational Organized crime provide an interesting and useful version of what crimes or offenses “transnational in nature” are. It determines that an offense has that character if “(a) it is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State”. Additionally, see the category of transnational armed conflicts, which transcend State borders and involve non-state actors, explained in: Milanovic, Marko, “Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli *Targeted Killings* case”, *International Review of the Red Cross*, vol. 89, no. 866, 2007, at 381.

⁵⁴ See Badia Martí, Anna, *op. cit.*, at 319; *Working paper on human rights and non-State actors submitted by Gáspar Biró and Antoanella-Iulia Motoc*, E/CN.4/Sub.2/2005/40, 11 July 2005, paras. 42-45; Annan, Kofi A., “Foreword”, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations Office on Drugs and Crime, 2004, p. iii-iv. Available on: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

create certain risks besides some opportunities⁵⁵; and law-makers may be tempted by bribes or to undertake participation in race to the bottom regulations in order to attract actors (as investors), even if it means lowering standards of protection, procedurally or substantively speaking; among other problems that may be present in the domestic level.

International agents, in turn, tend to have fewer resources than domestic authorities, and may be limited to mechanisms that are non-binding or that rely overtly on consent. Transnational actors, meanwhile, may operate in a selective way,⁵⁶ partially—and in a partisan way—or with no means of enforcing or exerting pressure other than by condemning and shaming or depriving an actor of the possibility of participating in a given network or private society, not being these mechanisms always effective or operative.⁵⁷

Precisely because of this, global legal goods serve to approach actors and systems that counter the uncivil society in accordance with the rule of law,⁵⁸ highlight the common enterprise and raise conscience by demanding cooperation and joint-efforts, approaching the lagging behind legal systems to the reality they must deal with because, as the Romans put it, *sic societas sicut jus*,⁵⁹ i.e. each society must have a law adapted to it, lest it fails to tackle its problems and address its needs but also because, even more, I consider *jus* must be designed in a way that answers to *humanus necessitas*, that is to say, where there is an important human need, there must be a law that *properly* addresses it. In fact, Kofi Annan called for employing opportunities offered by globalization in order to protect victims, while other authors point out that just like violations are permitted by global factors, so must counter-measures

⁵⁵ See Salzman, Zoe, “Private Military Contractors and the Taint of a Mercenary Reputation”, *New York University Journal of International Law and Politics*, Vol. 40, 2008, pp. 872-874; Reinisch, August, *op. cit.*, pp. 75-82; Josselin, Daphné and Wallace, William, *op. cit.*, pp. 8-9; Lavenex, Sandra, *op. cit.*, pp. 377-379; Reinalda, Bob, *supra*, at 23-26.

⁵⁶ See, for example, Halliday, Fred, *op. cit.*, at 34.

⁵⁷ See Teubner, Gunther, *op. cit.*, pp. 9, 13, 18.

⁵⁸ See Badia Martí, Anna, *op. cit.*, at 320.

⁵⁹ See Remiro Brotóns, Antonio, *Derecho Internacional*, Valencia, Tirant Lo Blanch, 2007, p. 46.

take advantage of them in a lawful manner.⁶⁰ These opportunities are not only technical, but also social and legal, and a greater interaction and proximity of agents of legal systems may increase their protection.

This possibility of legal goods of a global nature helping to deal with problems of globalization is reminiscent of the importance of notions developed under non-legal disciplines, which yet may be related to law.⁶¹ One of these notions even has a similar denomination, albeit with a different definition: that of global public goods.

According to the proponents of that notion, global public goods are, among other things, goods from an economic perspective with the peculiarity that their supply and consumption, other actions concerning them, or lack thereof, have benefits —or costs, if not provided— as effects across State borders and eventually across generations,⁶² and in their supply and production the participation of actors other than States is crucial nowadays.⁶³ Furthermore, properly dealing with those global public goods can help to manage globalization.⁶⁴ Adherents to that no-

⁶⁰ See Annan, Kofi A., *op. cit.*, pp. iii-iv.; Badia Martí, Anna, *op. cit.*, pp. 319-320.

⁶¹ First of all, the close relationship of law with theology and philosophy that existed for a long period of time made many legal principles be rooted in such sciences. Additionally, different fields of knowledge, such as psychology or sociology, may help to understand for example why addressees comply with law. Lastly, if one conceives that the study of law is not limited to the implementation of norms and involves lawmaking and other processes, it is necessary to admit that several factors, whose understanding is facilitated by other sciences, disciplines, or dimensions of life, may have an impact on law. About these ideas, see Losano, Mario G., *op. cit.*, at 329; Koh, Harold, *op. cit.*, pp. 2603-2604; See Jessup, Philip C., *op. cit.*, at 109. Even though law is a discipline on its own, over-conceptualization that leads to artificial isolation is to be avoided, especially given the impact of law on human life. About this phenomenon of hyper-conceptualization brought about by some positivist tendencies, see Domingo, Rafael, *op. cit.*, pp. 22-23.

⁶² See Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “Why Do Global Public Goods Matter Today?”, *op. cit.*, at 3; Kaul, Inge and Mendoza, Ronald U., “Advancing the Concept of Public Goods”, *op. cit.*, pp. 87, 95, 107; Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “How to Improve the Provision of Global Public Goods”, *op. cit.*, at 23.

⁶³ Cf. Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “Why Do Global Public Goods Matter Today?”, *op. cit.*, pp. 9-10, 13-14, 16; Desai, Meghnad, *op. cit.*, p. 63.

⁶⁴ See Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “Why Do Global Public Goods Matter Today?”, *op. cit.*, at 3.

tion also consider that rather than over-relying on non-rivalry and non-excludability as elements that are inherent to an economic good, it is important to focus on the way in which society may give one or both of those features in a certain measure to a good for it to meet the global public condition.⁶⁵ Some advocates of this theory consider that protection of human beings can be a global public good.⁶⁶

The idea of *public* goods being such as determined by social factors must be handled with extreme caution in legal terms and should not be incorporated in the notion of *legal* goods, for I oppose the idea that protection is owed only when legal norms are created or a mechanism gives procedures to protect inherent rights, because dignity is not conditioned to this. Therefore, while *positive legal norms* on dignity may be non-existent or deficient in a legal system and thus socially pressure may lead to law modification *de lege ferenda*, the need and justice of defending dignity from a non-positivist perspective is unconditional. In fact, this need serves to judge positive law. The idea that even from the perspective of public goods some goods are public inherently and even some *de facto*, but that they may be given private features due to social processes, if transplanted would make us defend the idea that the universality of human dignity protection can be prone to being abusively limited in legal practice, as was in the past, and realizing this possibility must make one oppose such limitative attempts.

Just like global public goods, global legal goods of a *humanitarian* nature require the input of private non-state actors in the current context, given the limitations of legal systems on whose creation States have an important part and the formal and political limitations of States and public non-state actors, such as International Organizations.⁶⁷

⁶⁵ See Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “How to Improve the Provision of Global Public Goods”, *op. cit.*, pp. 22-23; Kaul, Inge and Mendoza, Ronald U., “Advancing the Concept of Public Goods”, *op. cit.*, pp. 81-89.

⁶⁶ About human rights and dimensions of the protection of human dignity as public goods, see Kaul, Inge, Conceição, Pedro, Le Goulven, Katell and Mendoza, Ronald U., “How to Improve the Provision of Global Public Goods”, *op. cit.*, pp. 37, 44; Kaul, Inge and Mendoza, Ronald U., “Advancing the Concept of Public Goods”, *op. cit.*, pp. 82-83, 84, 86, 95, 97-98, 100, 106.

⁶⁷ See Reinalda, Bob, *supra*, at 13-14. Given the independent personality of International Organizations, they are not to be confused with their members, and their official character

Additionally, both theories concur in the idea that managing globalization and dealing with its problems in an effective way requires theoretical and practical instruments that better respond to those realities, in the sense that they either explain in a more accurate way how goods operate nowadays —global goods—, which may provide insights on how to better satisfy the needs of people regarding their consumption or (legal) enjoyment.

An analysis of both theories permits me conclude that, in legal terms, it is crucial to identify how (legal) systems have links in the form of values and principles commonly or jointly protected, which therefore demand an equally joint effort and condition the way in which the (legal) systems and participants interacting in the global space must operate, i.e. in a way that respects, protects and promotes the common global (legal) goods, highlighting the need for a *coordinated* global action among actors and across (legal) systems in order to properly protect them.

In this regard, Rafael Domingo has considered that existing international and domestic frameworks are lagging behind the global reality, whose regulation is in need of adapted global legal tools, and that legal systems can be communicated with each other by means of a global law, that informs and illuminates them.⁶⁸ To my mind, practice is what lags behind pressing (socio-global) needs, because the possibilities of global interaction are latent and ready to be taken advantage of by legal practitioners.

The differences between the theories may, although not necessarily, lie in their nature —economical, legal, although they have contact points— and in their production/identification: global legal goods are not necessarily social products from a Jus naturalist perspective, for

endows them with a public taint. Conceptual difficulties would arise if the idea sustained by some that there are some International Organizations without legal personality were accepted. On this last discussion, see Cortés Martín, José Manuel, *op. cit.*, pp. 79-92. The ILC seems to endorse the view that all international organizations have legal personality when, in Article 2 of its current version on the draft articles on the Responsibility of International Organizations it is mentioned that “International organization means an organization established by a treaty or another instrument governed by international law and possessing its own international legal personality”. Extracted from the document A/CN.4/L.743.

⁶⁸ See Domingo, Rafael, *op. cit.*, pp. 112, 141, 153-154.

instance, but yet their formal positive recognition or inclusion may be sought or improperly modified, and therefore the subjective approach to global legal goods, complementary to the objective one, ensures that criticism of the law is always possible.

A second approach that may help to understand global legal goods is that of global governance, mentioned lines above, because it stresses the importance of acknowledging both that different actors operate in a way that impacts the global society and that their behavior may be regulated legally or otherwise—with other normative strategies—in order to increase the publicness and legitimacy of social interactions across various levels.⁶⁹ This is closely related to the idea that recognition of the existence of common principles and values should trigger interactions and cross fertilization precisely in order to strengthen those legal goods protected by legal systems in a coincident fashion.

Additionally, when examining the current social context and ways in which its challenges must be tackled, the ideas that were fleshed out paragraphs above have been similarly explained by global governance studies, whose ideas can therefore be used when examining global legal goods: mainly, that global governance is poly-centric and must be co-ordinated in a way that employs normative and not merely voluntaristic strategies.⁷⁰ In this regard, I deem that being aware of the presence of common legal goods that have legal effects in different legal systems and must guide the action of their participants, when coupled with awareness of the multiple systems and actors involved, must lead to strategies of co-ordination, complementarity and mutual reinforcement of protection.

Besides the symbolical/educative function of legal goods that is directed towards those bound to respect or protect them and the authorities entrusted with guaranteeing their integrity, that demands a *coordinated* strategy and a protective response to make the many involved legal systems and participants intervene effectively, legal goods of a global character may approach and coordinate legal systems while reinforcing the protection of the core values as a result of other more for-

⁶⁹ See Halliday, Fred, *op. cit.*, at 34-37; Reinalda, Bob, *op. cit.*, at 25; Sano, Hans-Otto, *op. cit.*, pp. 137-141; Calame, Pierre, *op. cit.*.

⁷⁰ See Reinalda, Bob, *op. cit.*, at 25; Calame, Pierre, *op. cit.*, at 3, 20-21.

mally normative functions: *teleological interpretation* and *prevalence, inter alia*, both of which are mechanisms that may help to counter normative fragmentation tendencies.⁷¹

As to the first instrument, a well known method of interpretation of law is that according to which a norm is to be interpreted, among other things, in the light of its goals and purposes. This method is present in international and domestic law,⁷² and as can be inferred from their practice, in the regulations of non-state actors.

In connection with this, their core character often presupposes that global legal goods have a foundational value, in the sense that their utmost protection constitutes an underlying aspiration that permeates the interacting legal system, in as long as many norms coincide on that purpose. One such example is that of human dignity, considered the foundational basis of human rights law and a central element of international/world law both by doctrine and international normative practice—being influential prior to and after law-making—.⁷³

⁷¹ 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.

⁷² See, e.g., Article 31 of the Vienna Convention on the Law of Treaties, and *Ibid.*, conclusions 13, 16, 21, 27, 29, 30.

⁷³ See the Preamble and Articles 1, 22 and 23 of the Universal Declaration of Human Rights; Villán Durán, Carlos, *op. cit.*, pp. 63, 92; Resolution 41/120 of the General Assembly; Helsinki Final Act of 1 August 1975 of the Conference on Security and Co-Operation in Europe; Domingo, Rafael, *op. cit.*, pp. 88, 142; Preamble to the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993; Preambles to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; 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, para. 117; de Than, Claire and Shorts, Edwin, *International Criminal Law and Human Rights*, United Kingdom, Sweet & Maxwell (ed.), 2003, pp. 12-13; Kalshoven, Frits and Zegveld, Liesbeth, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Geneva, International Committee of the Red Cross, 2001, pp. 203-204. In the Helsinki Final Act of 1 August 1975, it was declared that human rights “derive from the inherent dignity of the human person and are essential for his free and full development”; while in paragraph 4 of Resolution 41/120 of the General Assembly it is stressed that human rights norms should be mindful of the idea that those rights “derive from the inherent dignity and worth of the human person”.

The fact that legal systems interacting in the global space of legal interaction concur in the protection of the same legal goods, which permeate them and constitute goals both common to all legal systems involved and overarching within each of those legal systems, makes their protection a highly relevant normative purpose and goal. As a result, coupled with the *systemic interpretation* of law,⁷⁴ norms encompassed in all the legal systems participating in the global legal space of interaction should be interpreted in a way that is not only consistent with global legal goods but also that seeks or strives to protect them completely. This common interpretive process and labor is a fertile ground for dialogues and exchanges between legal systems and participants, creates normative links and bonds among participants, and may generate their approaching each other and designing ways in which the same minimum protective content is (to be) ensured and respected by all actors—due to their participation or being addressed by interacting norms—and in all levels, whereupon the different legal mechanisms within each system complement each other (within and without) due to the legal interaction, ensuring that they offer the required protection by replacing others and filling their gaps, as is necessary given the limits or deficiencies of the other mechanisms.

Regarding prevalence, it is to be commented that some—although not all—global legal goods are protected by peremptory norms that thus have a hierarchical superiority over dispositive law. This produces an effect of nullifying contrary normative manifestations (norms of legal effects) of inferior rank if no coherent interpretation or application with them is ever possible, or of depriving inferior norms of effects if the confrontation is occasional or if harmonization with peremptory law without the annulment or termination of a norm is possible.⁷⁵ This

⁷⁴ See Article 31 of the Vienna Convention on the Law of Treaties.

⁷⁵ See Carrillo Santarelli, Nicolás, “La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados”, *Revista Jurídica de la Universidad Autónoma de Madrid* (RJUAM), No. 18, 2009, at 60-63, 74-76, where it is explained that in order to preserve the effectiveness of *ius cogens* and a harmonic coexistence of norms, whenever occasional and not unavoidable contradictions with peremptory law exist, a dispositive norm may remain in the legal system as long as it is interpreted in a consistent way and the occasional contradiction is never given effect by means of not applying it in those cases or by means of choosing an interpretation or application consistent with peremptory law, taking into account that *jus*

ensures that deputation within all legal systems is afforded and that a harmonious framework in which global legal goods of a peremptory character are absolutely protected can be sought.

Apart from that, it will be pertinently asked whether the superiority of a norm protecting a global legal good in one legal system will be replicated in the other systems. This is not necessarily so, unless the norm is peremptory under international law, because the latter norms, or international *jus cogens* norms, have among the effects they display the de-legitimization of contrary norms created under other legal systems—e.g. by domestic laws—,⁷⁶ and this feature is so deeply entrenched into their content that it accompanies them to the global legal space. The fact that international peremptory law can legally, psychologically and socially constitute a lowest common denominator supported by individuals with identities that surpass the State in a globalized context, and that *jus cogens* also constitutes a minimum understanding of the international community, not only composed of States—factually and given the spiritual and emotional components of communities—,⁷⁷ that

cogens has both substantive and procedural contents and displays its effects in regards to both types of norms and legal dimensions, all of which must respect peremptory law. Additionally, see Carrillo Santarelli, Nicolás, *Los retos del derecho de gentes —Ius Cogens—: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, Colombia, Ibáñez, 2007, at 94.

⁷⁶ This power of depriving all contrary norms of effects that occurs in the international legal plane, regardless of the origin of the contrary norms, is one aspect of *jus cogens*. About this, see 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, *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, para. 155; Carrillo Santarelli, Nicolás, “La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados”, *op. cit.*, pp. 61-63.

⁷⁷ The fact that interactions lead to subtle and unofficial exchanges that help to transform international law, and that a myriad of actors is affected by this law and is interested in its content and implementation, justifies having this broad conception. From a legal standpoint, even traditionalists acknowledge the role and importance of International Organizations. Some hold that States have yet a quasi-monopoly on the formation of essential rules—peremptory ones—, although the input and interest of other *participants* concerning them is undeniable. It can be considered that the expression international community of States merely stresses the way in which international law is *traditionally* and *formally* created, whereas the expression international community can encompass a broader set of actors, although its wording (*international*) is misleading and ought to be replaced by another such

embodies the most important interests of that community, is in fact very close to the existence of global legal goods.

Let me present an example to illustrate these ideas: it has been considered by international doctrine and case law that the prohibition of torture is so absolute that it forms part of *jus cogens*,⁷⁸ and as commented in the previous paragraph this entails that domestic provisions that violate this prohibition are absolutely delegitimized. Therefore, say, a domestic law permitting torture in some situations would be void from an international perspective. When the core content of the legal good of protecting human dignity as manifested in the form of the prohibition of all torture is handled globally, this content is so minimum and essential that it cannot be ignored anywhere (physically and normatively), since otherwise the international content that interacts globally in a common legal space would be deprived of its basic features. An

as world or global community (being it also important to call international law *jus gentium*). This is one of the possible interpretations of: International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Paragraph (18) of the Commentary to Article 25. Additionally, see Nijman, Janne Elisabeth, "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality", *op. cit.*, pp. 11, 36. Concerning the idea of *participants* in the international legal system, it is stated by some that there is a need of including more participants. On this and their definition, see Noortmann, Math, "Non-State Actors in International Law," in Arts, Bas *et al.* (eds.), *Non-State Actors in International Relations*, United Kingdom, Ashgate Publ., 2001, pp. 62-63; Meron, Theodor, *The Humanization of International Law*, Leiden, Martinus Nijhoff, 2006, at 317; Nijman, Janneke, *op. cit.*, pp. 138-139; Clapham, Andrew. "The Role of the Individual in International Law", *European Journal of International Law*, vol. 21, no. 1, 2010, pp. 29-30.

⁷⁸ See 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, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 153-157; European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, paras. 30-31, 60, 61, 65, where the Court recognized the peremptory character of the prohibition of torture but failed to implement all the consequences of that conclusion, as explained in the Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and VajiĆ, and in: Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens-: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, *supra*, at 96-98. On the change of legal and non-legal identities and interests in the context of transnational relations and globalization, see Van Staden, Alfred and Vollaard, Hans, *op. cit.*, pp. 167-168; Koh, Harold, *op. cit.*, pp. 2633-2644, 2650, 2653, 2659.

understanding is thus formed in accordance with this content, and a signal is sent to all legal systems, among other effects, with the threat of ignoring any legal effects of contrary norms with which it enters into contact.

Then, legislation and judicial or quasi-judicial authorities must take into account this signaling, and if and when normative violations of *jus cogens* happen in a given legal system, possibility always looming given the regulatory character of law (which has a causality nexus of “ought” results instead of “necessary” consequences, according to Hans Kelsen)⁷⁹, as attested by the recognition that legislative conduct may engage responsibility,⁸⁰ the authorities involved are pressurized to argue in terms of the peremptory norms at stake.

Continuing with the example, domestic authorities may seek to argue that they have not violated the prohibition of torture but that their conduct falls outside the scope of its content or challenge the norm itself. In any case, these two strategies reveal in fact the effects displayed in other legal systems by peremptory law, because the first option entails an argument that can be true or false (most likely it will be a fallacy or distraction, because cruel, inhuman and degrading acts are also prohibited as a matter of *jus cogens*) that does not deny but ends up upholding the hierarchical superiority of the peremptory norm, while the second strategy is a blatant challenge that is either unconstitutional domestically speaking or, if not, that triggers unanimous condemnation and ostracism in that respect, with the global conscience of the legal effects of peremptory law having to have effects domestically being consciously acknowledged and reinforced. The influence of international *jus cogens* is thus undeniable.

The previous reasoning opens up the door to an interesting notion: that of implied duties and the duty to create specific duties regarding global legal goods, all justified by the existence of common interests that inform all legal systems and participants and that, if violated in any

⁷⁹ See Kelsen, Hans, *Pure Theory of Law*, Translation from the Second (Revised and Enlarged) German Edition by Max Knight, USA, University of California Press, 1978, at 76-80. In Spanish, it is said that law has to do with the “*deber ser*” instead of with laws of the “*ser*”.

⁸⁰ See, e.g. Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

way anywhere and by anyone, constitute legally relevant facts to be addressed by the legal system, which are condemnable as unlawful, ever since the substantive signal sent in all legal realities frowns upon any violation. In this manner, the connection between the theory of global legal goods and the duties of non-state actors in human rights terms is found, by tackling the same problem and necessity: the need of counting with a legal system that meets the necessities of potential and actual victims of non-state actors, that would be left unprotected if legal systems and actors operate in isolation and in an uncoordinated manner, or ignoring the content of the legal goods.⁸¹ In this case, the legal good of the protection of human dignity has a content that can only be ensured if protected against all threats, including non-state ones.

IV. CONCLUSIONS

Regarding the way in which GLGs work and the legal implications of its dimensions, it is possible to identify features that identify how their protection is based on the premise of mutually reinforcing actions by several actors and in different legal systems:

GLGs operate in accordance to several criteria of distribution of competences and allocation of responsibilities that complement each other. That is to say, as has just been explained, GLGs are protected in accordance to considerations of subsidiarity *and* simultaneity, when protected by public and private actors through different means that mutually reinforce the likelihood of protection without overlapping in their philosophy or operation.

Likewise, GLGs are protected in accordance with the criterion of specialization, in the sense that each legal system or actor carries out its functions and uses its own mechanisms, that may differ from those of other actors. In this sense, for instance, State, inter-governmental or supranational entities may seek to promote a culture that is respectful

⁸¹ See Badia Martí, Anna, *supra*, at 334-337, 342-343; Reinalda, Bob, "Private in Form, Public in Purpose: NGOs in International Relations Theory", *op. cit.*, at 25.

of dignity, in order to prevent abuses, to design legislation compatible with GLGs, or to implement other measures that *ex ante* seek to ensure the attainment of the goals of GLGs, while judicial actors seek to protect them *ex post facto*, i.e. after a violation has been found, in order to order reparations, or in a preventative fashion, reminding other entities of their incumbent duties and ordering them to adopt some measures that seek to prevent violations from taking place. The criterion of specialization leads to a global “social” distribution of work, because each entity will support and reinforce others, regardless of boundaries of legal systems, to further the same common global legal ground. This criterion is consistent with the consideration that cultural and non-judicial mechanisms are also important to protect human dignity.

This criterion, however, is complemented by the criterion of back-up or support, that envisages how one same legal tool or mechanism can be potentially employed by several agents of the protection of GLGs and across several legal systems, so that if one of the latter fails to implement it effectively, the same or an analogous tool that pursues the same goal can be employed in another interacting legal system and by another participant, preventing failures of remedies and actors from one legal system from permitting abuses being unaddressed, thus increasing the likelihood of employing relevant crucial mechanisms of protection.

The rationale and logic underlying the multi-level strategies of joint action just referred to are based on the assumption that given the shortcomings of every level of governance and actor, and their deficiencies, it is necessary to strengthen the defense of GLGs, protected by normative contents that are similar in nature and found across legal systems. These legal goods are also present in the aims of the actions of several actors. All of this prevents gaps in one legal system from making victims have no other remedy available, while at the same time respecting criteria regarding the due democratic allocation of powers in levels of governance.⁸²

Let me illustrate these ideas: *lex privata* mechanisms and instruments—normative components issued by private entities—, for instance, may suffer from shortcomings, such as the absence of access in the form

⁸² See Jackson, John H., *op. cit.*, pp. 73-76.

of reliable procedural mechanisms to formally request supervision of compliance with regulations —given their non-binding character or, if binding from the perspective of private entities, the lack of proper remedies—. For this reason, actions of authorities from the international or domestic legal systems —such as judges— may fill the gaps provided by those deficits by means of checking non-state behavior in other ways,⁸³ even by making them respect their “commitments.”

Likewise, the action of other private entities —as some NGOs, among others— may reinforce the protection of GLGs through other mechanisms —even non-judicial—. ⁸⁴ In this regard, it must be borne in mind that codes of conduct and instruments issued by private actors tend to offer no foreseeable safe protection, for the lack of means of complaining and the possibility that the whim of the offender may make it elude repairing caused injuries is far from the minimum protection standards that must be offered to human beings. If actors benefit from the social landscape, they must imperatively act consistently with the burdens they ought to have when they unfairly injure others during contacts with them.

Similarly, domestic authorities may act based on interests unique to their States, even of a selfish nationalistic nature —this has been mentioned above—, whereas “international” authorities often depend on the goodwill and diligence of other participants that interact in what in practice is a single legal framework of protection that surpasses formal borders between legal systems and actors. In fact, unless protection of human dignity works as a single system that has components across levels of governance, it will not function effectively and properly in practice, for the cooperation of legal practitioners and domestic authorities is crucial, as tacitly expressed by the President of the European Court of Human Rights and discussed by doctrine.⁸⁵

⁸³ See Benvenisti, Eyal and Downs, George W., “National Courts Review of Transnational Private Regulation”, Working paper, available on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742452.

⁸⁴ *Ibidem*, at 4-5.

⁸⁵ Discussions of issues of resources available to domestic authorities in comparison to those at the disposal of international ones, commented before, are not merely theoretical or abstract, as can be seen in a “Statement issued by the President of the European Court

On the other hand, international authorities may act based on bias and without attaching importance to a proper philosophy of allocation of powers and law-making capacities in different levels of governance, ignoring the legitimate claims of individuals in other levels, and thus they are to not operate unchecked lest they fall into the temptation of either “legislating” for the world in a way they are not entitled to and circumventing controls and/or preventing a proper allocation of powers in a multi-level scheme, or imposing their particular viewpoints, that may be justly challenged or questioned by some based on democratic criteria —whose claims are to be respectful of human dignity—.

For this reason, actors and legal systems complement and reinforce other legal systems interacting in the protection of global legal goods by means of the common existence of normative elements and contents that protect GLGs for all of them. In this fashion, in the global interaction all participant actors and legal systems (through their mechanisms) may complement and fill the gaps of the remaining ones —overcoming the shortcomings of each in this dynamic—, in accordance to simultaneous, subsidiary, and joint approaches, each having its own place.

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of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of the Court)”, available on: http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf, where the President asks both lawyers and applicants to behave responsibly and diligently, and State authorities to cooperate in the protection of human rights, hinting how, after all, there can be said to exist a global single framework of protection in which both national and international authorities and mechanisms are included, and interact mutually. This shows how a global legal space dismisses formal separations as highly artificial in a world of interdependencies, *interactions and common goals and normative contents*. It is to be noted that the President of the Court addressed both States and non-state entities (applicants, representatives and legal practitioners). Moreover, on the cooperation of national authorities and non-state actors, see Buergenthal, Thomas, *op. cit.*, pp. 804-806; Pérez-Prat Durbán, Luis, *op. cit.*

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