HUMAN RIGHTS TECTONICS

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Global Dynamics of Integration and Fragmentation

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FOREWORD

Human rights law scholarship is flourishing. Today's mid-career human rights law scholars in Europe vividly remember the birth and early childhood of their discipline. Throughout the 1990s, many law faculties were creating their first human rights chair and many academic human rights centres were founded. Gradually, 'human rights law' came to be seen as a discipline in its own right rather than as a part of constitutional law or public international law. In the meantime, the discipline of human rights law has moved to the next level, characterised by increased specialisation. Especially when it comes to research, not so many legal scholars of human rights identify as 'generalists', covering the entire field of human rights law. Indeed, both the proliferation of the output of some of the human rights monitoring bodies (in particular the European Court of Human Rights (ECtHR)) and the expansion of scholarship in this field have made it impossible for any single scholar to be completely up to date with all developments and insights. As a result, most scholars self-identify as experts in one or more sub-fields of human rights law, such as privacy law, free speech, minority rights or ECtHR case law. This is a positive development, testifying to the increasing maturity of the discipline and leading to ever more sophisticated insights. Yet at the same time, there is a risk that a focus on the trees might obscure the wood. As the human rights landscape expands, a holistic view becomes more, not less, relevant, and the same holds true for the study of the interactions and connections between different features in that landscape. This is an argument in favour of cherishing a degree of 'generalism' in human rights law scholarship, and a call for experts in sub-disciplines to occasionally reflect on the positioning of the contents of their box of choice within the broader field.

It may be argued that such a reflection is also relevant for those actors who play a crucial role in interpreting human rights law and who are by definition situated within their respective boxes, that is to say, supranational human rights monitoring bodies. Each of these bodies has its own jurisdictional and/or thematic specialisation, as well as its own mandate and context. This regularly results in idiosyncratic reasoning. Yet at the same time, many supranational human rights monitoring bodies also show an awareness of the work of other such bodies and occasionally align their work with that of others.

Both the idea of scholarship adopting a holistic approach to human rights law and the idea of exploring how the different layers or nodes of human rights law communicate and interact with each other are central to the research

project that provides the background to the present volume. The project 'The Global Challenge of Human Rights Integration: Toward a Users' Perspective' (2012–2017) was funded by the Belgian Federal Department of Science Policy (BELSPO). Within the framework of this project, I had the pleasure of working together with Emmanuelle Bribosia and Isabelle Rorive, the editors of this volume. Their work on the project and on this volume exemplifies how experts of a sub-field of human rights law (in this case equality and discrimination law) can contribute immensely to a holistic approach of the field. In the same vein, many other experts of specific themes (economic, social and cultural (ESC) rights, disability rights, etc.) or specific jurisdictions (the Court of Justice of the European Union (CJEU), the ECtHR, etc.) have accepted the editors' invitation to explore the dynamics of fragmentation and integration within that sub-field or between that sub-field and broader human rights law.

The result is a volume of high academic quality, in which coherence is assured by the common perspective, yet at the same time a range of current topics of human rights law is discussed. As such, it will be of interest to many scholars of human rights law.

Eva Brems

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INTRODUCTION TO HUMAN RIGHTS TECTONICS*

Emmanuelle Bribosia** and Isabelle Rorive***

The mass violence, countless killings and systematic extermination of certain categories of the population during the Second World War led to the development of the supranational legal protection of human rights. Since 1945, both the sources of human rights and the bodies which control them have multiplied and have superimposed themselves on the older constitutional protection systems.[1] In the last few decades, the legal landscape of these rights has become more complex and diversified without following a well-defined pattern. Protective instruments have developed following both a logic of regionalisation and a logic of specialisation, with categories of rights protected just as much as categories of people. From the common matrix of the values in the Universal Declaration of Human Rights of 1948, fundamental rights

* This book project was carried on in the framework of the IUAP project, *The Global Challenge of Human Rights Integration: Towards a Users' Perspective* (2012–2017), http://www.hrintegration.be. The authors are much indebted to Eva Brems and all partners of the IUAP project for their contributions to this research project, which inspired this collective volume and this introduction. In addition, the authors warmly thank Eimear O'Neill for the precious editing work.

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1 See, among others, the dossier 'Human Rights Integration: Theorizing the Multi-layered Nature of Human Rights Law' (2014) *European Journal of Human Rights* 289; E Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) 4 *European Journal of Human Rights* 447; E Brems, 'Smart Human Rights Integration' in E Brems and S Ould Chaib (eds), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Edward Elgar, Cheltenham 2018; L Hennebel and H Tigroudja, *Traité de Droit International des Droits de l'Homme*, Pedone, Paris 2016; O De Schutter, *International Human Rights Law*, 2nd edn, Cambridge University Press, Cambridge 2014; J Lacroix and J-Y Pranchère, *Le Procès des Droits de l'Homme – Généalogie du Scepticisme Démocratique*, Seuil, Paris 2016.

were deployed to shape a 'layered' architecture, whose relatively homogeneous content does not, however, form a coherent and systematic whole.[2] The resulting image is made of 'bits and pieces',[3] with overlap and overlays, most often without any hierarchical relationship.[4]

Fragmentation, extensively commented on in the context of general international law,[5] is also at work in human rights law, with certain peculiarities inherent in this area of law, which confers rights on individuals rather than providing for reciprocal rights and obligations between States. Initially, the different human rights protection systems functioned autonomously by interpreting their respective instruments of protection, whether international, regional or constitutional. With globalisation, an increasing permeability between these different systems has been observed, notably in the form of a 'global conversation' on the interpretation of human rights.[6] These different systems, influenced by various actors who favour the inter-systemic circulation of legal arguments and the use of comparative law,[7] have begun to resonate with one another. However, resonance is not always synonymous with convergence, and some lines of divergence may actually be beneficial to the effectiveness of the protection of human rights.[8]

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2 D Staes, 'When the European Court Refers to External Instruments: Mapping and Justifications', April 2017, doctoral thesis under the supervision of I Rorive and S Van Drooghenbroeck, defended at the Université libre de Bruxelles and the Université Saint-Louis as part of the Human Rights Integration project, pp 1–10.

3 For an overview of these 'parts and pieces', see, for instance, E Brems, 'Should Pluriform Human Rights Become One?', above n 1, pp 448–450; S Turgis and J Dhommeaux, *Les interactions entre les Normes Internationales Relatives aux Droits de la Personne*, Pedone, Paris 2012, pp 37–45.

4 A Buyse, 'Tacit Citing – The Scarcity of Judicial Dialogue between the Global an the Regional Human Rights Mechanisms in Freedom of Expression Cases', in T McGonagle and Y. Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives*, Cambridge University Press, Cambridge 2015, p 2 of the book chapter as it is available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279350.

5 Probably the best-known study on the topic of fragmentation of international law is the Report of the Study Group of the International Law Commission: M Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13.04.2006).

6 O De Schutter, this volume, pp 3–39; E Brems, 'Smart Human Rights Integration', above n 1. For a broad review of the literature on this 'global conversation', see D Staes, above n 2, p 5.

7 E Bribosia and I Rorive, 'Anti-discrimination Law in the Global Age' (2015) 1 *European Journal of Human Rights* 3–10; L van den Eynde, 'Interpreting Rights Collectively: Comparative Arguments in Public Interest Litigants' Briefs on Fundamental Rights Issues', doctoral thesis under the supervision of J Allard and E Bribosia, November 2015, defended at the Université libre de Bruxelles; B Frydman and C Bricteux (eds), *Les Défis du Droit Global*, Bruylant, Brussels 2017.

8 E Brems, 'Smart Human Rights Integration', above n 1; E Bribosia, G Caceres and I Rorive, 'Les signes religieux au cœur d'un bras de fer : la saga Singh' (2014) *Revue trimestrielle des droits de l'homme* 495.

WHAT DO WE MEAN BY HUMAN RIGHTS TECTONICS?

Without claiming it to be a perfect scientific superposition of phenomena, the theory of plate tectonics seems to capture the essence of international and regional human rights law, which is resolutely foreign to pyramidal organisation, even in the form of complex hierarchies.[9] The geophysical activity of our planet reflects the brutality of power relations and involves movements that interlock and respond to each other, even to the point of distorting or creating matter.

The 'Pangea' hypothesis, which refers to a supercontinent that contained almost all of today's land mass,[10] symbolises a form of unity that could be embodied in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. The theory of plate tectonics explains the different forces that created fracture lines and led to a 'drift' of continents. In the same way, human rights are multiple and form a fragmented legal universe. Like tectonic plates, the different strata of fundamental rights do not overlap perfectly. At the global scale, they are numerous, vary in size and are in perpetual movement.

This movement reflects developments in the protection of human rights, some of which are of such magnitude that they can be considered major upheavals. According to scientists, 'the convection drive plates tectonics through a combination of pushing and spreading apart at mid-ocean ridges and pulling and sinking downward at subduction zones'.[11] In the same way, the elaboration of new instruments of human rights protection, their mobilisation before various bodies (whether administrative, jurisdictional, quasi-jurisdictional, etc.) and the implementation of these decisions or recommendations translate into fights, battles, shocks, jolts or clashes, which are all the more significant as, at their heart, it is often human dignity which is in question.

Both the forces which characterise the dynamics of plate tectonics and the movements which create them have parables in the mechanisms of fundamental rights protection. The tectonic structures lead to a 'fracturing of the rock beyond a certain threshold of constraint'.[12] The faults thus produced are of various types,

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9 I Rorive, *Le revirement de jurisprudence : étude de droit anglais et de droit belge*, Bruylant, Brussels 2003, paras 48–49 and the references mentioned therein.

10 Alfred Wegener forged this concept (*Die Enstehung der Kontinente und Ozeane (L'origine des continents et des océans)*, 1915). See N Bardet, 'La « valse des continents » d'Alfred Wegener : un nouveau paradigme en Sciences de la Terre', http://www.saga-geol.asso.fr/Geologie_page_conf_Wegener.html.

11 B Oskin, 'What is Plate Tectonics?', *Livescience*, 19 December 2017, https://www.livescience.com/37706-what-is-plate-tectonics.html.

12 http://www.larousse.fr/encyclopedie/divers/tectonique/96183 (our translation).

resulting in the elongation, the shortening or the breaking up of the material. In addition, where the plates meet, their relative motion determines the type of boundary, which can be *convergent*, *divergent* or *transformative*, features that are reminiscent of the movement between the fragmentation and integration of human rights.[13] A combination of 'divergent boundaries' and certain 'hot spots' can lead to a dramatic increase in the ocean crust,[14] which echoes the climate of many human rights treaties, not to mention the 'shield' zones which protect these tectonic plates, whose 'interior is theoretically unalterable',[15] in a similar fashion to non-derogable or absolute human rights.

A COMBINATION OF AN INTEGRATED AND AN ISSUE-BASED APPROACH

The fight against human rights violations remains one of the major challenges of the twenty-first century. Since 1945, the development of a regime for international human rights protection has certainly led to progress; however, the protection of human rights is too often left to the sovereignty and goodwill of States.[16] This book takes stock of the fact that the traditional approach, which consists of studying different legal judicial systems individually, does not provide adequate conceptual and normative tools to understand the evolution of human rights on a transnational scale. Stemming from the tensions between the fragmentation and integration in human rights law, this volume fosters a critical reflection on the integration of international, European and non-European human rights law in a globalised era. In doing so, it opts for a pragmatic approach in the sense that human rights law is not understood as the set of rules laid down in the treaties or inscribed in existing formal sources. Emphasis is placed here on the actual state of the law as observed from the applications received. It is about giving tools to develop strategies which fit into the lines of tension between fragmentation and integration in order to advance causes. Thus, one point of originality of this book is the way in which it attempts to address problems faced by human rights users.[17] The 12 chapters do not merely focus on the plurality of human rights sources or monitoring bodies, but also aim to identify concrete

13 See O De Schutter, this volume, pp 3–39.
14 http://www.larousse.fr/encyclopedie/divers/tectonique/96183.
15 Ibid.
16 B Frydman and C Bricteux (eds), above n 7, p 19.
17 E Desmet, 'Methodologies to Study Human Rights Law as an Integrated Whole from a Users' Perspective', in E Brems and S Ouald Chaib (eds), above n 1; E Brems and E Desmet, 'Studying Human Rights Law from the Perspective(s) of its Users' (2014) 8(2) *HR&ILD* 111.

issues encountered by the courts, non-judicial bodies and individuals in this highly fragmented regulatory environment. This pragmatic and user-centred perspective distinguishes the book from other notable works, which look at or foster convergence in international human rights law.[18]

Through a theoretical and case study methodology, the book analyses the impact of the fragmentation of international and regional human rights, which can cause failures in effective legal protection or, on the contrary, can strengthen it. This book is part of the research project 'The Global Challenge of Human Rights Integration: Towards a Users' Perspective'.[19] The authors, from diverse legal backgrounds, had the opportunity to present a preliminary version of their work during an international symposium, organised in Ghent in December 2015.[20] Only some of these contributions have been retained in this volume, based on their quality and their complementarity. Over the course of an editing process of several stages, with the invaluable support of Ana Maria Corrêa,[21] the various authors have agreed to update and to revisit their contributions in greater detail. We thank them wholeheartedly for their commitment to this publication.

All contributions have high relevance to the three axes that we wanted to develop: first, investigating from different theoretical angles the promises and challenges of an integrated approach to fundamental rights at the global level; second, developing an issue-based approach through a case analysis which symbolises contemporary issues of struggle in international and regional human rights law; and, third, tightening the focus on Europe by identifying particular lines of convergence and divergence on this continent.

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18 C Buckley and A Donald, *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems*, Martinus Nijhoff Publishers, Leiden 2015; A Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff Publishers, Leiden 2010.

19 'The Global Challenge of Human Rights Integration: Towards a Users' Perspective' (Human Rights Integration – HRI) is a research network which aims to study human rights law as an integrated whole from a users' perspective. HRI is an Inter-university Attraction Pole (IAP) funded by the Belgian Science Policy Office (BELSPO). It consists of Universiteit Gent (UGent), Université libre de Bruxelles (ULB), Vrije Universiteit Brussel (VUB), Universiteit Antwerpen (UAntwerp), Université Saint-Louis-Bruxelles (USL-B) and Universiteit Utrecht (UU). See more on its website: http://www.hrintegration.be.

20 'The Global Challenge of Human Rights Integration – Towards a Users' Perspective', International Conference, 9–11 December 2015; see more details at: http://www.hrintegration.be/conferences. E Brems and E Desmet, 'Introduction: Theorizing the Multi-layered Nature of Human Rights Law' (2014) 3 *European Journal of Human Rights* 289–292; M Baumgärtel, D Staes and FJ Mena Parras, 'Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration' (2014) 3 *European Journal of Human Rights* 326–354; E Brems, 'Should Pluriform Human Rights Become One?', above n 1, pp 447–470.

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PROMISES AND CHALLENGES OF AN INTEGRATED APPROACH TO HUMAN RIGHTS

The opening section of the book highlights the promises and challenges of an integrated approach to human rights. To start with, Olivier De Schutter identifies the integration of human rights in 'The Formation of a Common Law of Human Rights', a kind of jus commune that is part of a collective deliberation between different bodies, whether jurisdictional or otherwise, the primary characteristics of which would be to be free from any form of hierarchical relationship and left entirely to the discretion of its authors.[22] Although the factors that favour the emergence of this 'global conversation' may be well known, the focus here is on the driving force behind it: strengthening the legitimacy of each instrument of human rights protection in an international context where States remain eager to preserve their sovereignty, knowing that both the international courts and the expert bodies have developed an interpretation of human rights instruments that focuses on contextual factors rather than on literal interpretation. Today, the permeability and resonances between the different strata of human rights is such that 'human rights bodies occasionally feel compelled to justify departing from precedents established by other such bodies, as if they were part of the same legal system – more precisely, as if such precedents had more than mere persuasive authority, and were actually binding'.[23] One of the main challenges to the formation of a common law of human rights lies in the opportunistic use of foreign jurisprudence, known as 'cherry-picking'. To address this, De Schutter calls on the various human rights bodies to be more transparent, but above all more consistent. To this end, he suggests that well-established foreign jurisprudence on a controversial point creates a kind of rebuttable presumption. In other words, 'foreign precedents' should be considered presumptions 'which could be set aside if the context in which the "receiving" court operates is different'.[24] In practice, such a phenomenon is triggered by different actors bringing these precedents to the knowledge of human rights courts and bodies. These actors can be non-governmental organisations (NGOs) defending a liberal or a conservative agenda, the many figures of third-party interveners or amicus curiae, judges, lawyers, scholars, etc. This model based on a stare decisis doctrine is appealing with respect to more human rights integration. It is a promising starting point to further flesh out the reasons according to which a precedent should be departed from.

In order to go deeper into the practical aspects of the formation of a common law of human rights and to further investigate its drawbacks,

22 O De Schutter, this volume, pp 3–39.

23 Ibid.

24 Ibid, p 35. A procedural approach is also favoured by E Brems, 'Smart Human Rights Integration', above n 1.

the next three chapters develop the distinct positions of particular actors that are part of an integrated approach to human rights. These are UN special procedures, the African Court on Human and Peoples' Rights and non-judicial bodies such as the European Fundamental Rights Agency.

UN special procedures are particularly relevant in this respect. They are not created in connection with a specific instrument for the protection of human rights. On the contrary, they are expected to draw on all relevant sources to extract the rights and obligations that apply to a particular state or subject, such as migrants' rights. A degree of flexibility on sources and leeway on legal strategies to advance their mandate have put UN special procedures in a unique position to truly engage in an integrated approach to human rights. Relying on a broad definition of the human rights user so as to include individuals, NGOs and civil society organisations, States themselves, institutions and entities within regional and international organisations, Rhona Smith addresses the provocative question of whether UN monitoring systems are system puppets or some (or all) of their users' saviours?[25] She first stresses the extent to which these procedures stem from a highly political organisation. She then goes on to analyse various sets of interactions they have with the Human Rights Council, other intergovernmental or international fora, regional organisations, other UN human rights monitoring systems, States, NGOs and civil society, individuals or even between themselves. A body of evidence supports their contribution towards the integration of human rights systems: 'filling protection gaps in law and practice, acting as a critical friend to States and non-State actors, and raising awareness of issues and the plight of individual whose voices would otherwise not be heard'.[26] At the crossroads of various human rights layers, UN special procedures are in a prominent position to foster convergence and integration. They are still struggling to do so as they remain entangled in a UN human rights system 'beset with the problems of politicisation, backlog and limited enforcement opportunities'.[27]

In comparison to other regional courts, the African Court on Human and Peoples' Rights (ACtHPR) is in a privileged position to pursue human rights integration. This is due to two main features. First, human rights integration is part of the drafting of the African Charter on Human and Peoples' Rights (ACHPR), which gives equal weight to all three generations of human rights. In other words, the indivisibility, interdependence and inter-relation of human rights are specifically entrenched in the text of the ACHPR. Second, human rights integration is part of the interpretation of the ACHPR as the ACtHPR enjoys the jurisdiction to interpret and apply not only the ACHPR but also any other relevant human rights instrument ratified by the States concerned. Furthermore,

25 R Smith, this volume, pp 41–68.
26 Ibid, p 67.
27 Ibid, p 68.

and very significantly, explicit provisions of the ACHPR direct the ACtHPR to draw inspiration from other international instruments when interpreting the rights enshrined in the ACHPR. Reliance on judicial borrowing in the practice of the ACtHPR fosters inter-systemic dialogue and the coordination of international jurisprudence. It also 'legitimises the ACtHPR in the eyes of its constituencies and audience during the first crucial years of its functioning'.[28] Based on an extensive analysis of the ACtHPR's case law, Adamantia Rachovitsa categorises the various ways according to which the ACtHPR uses international instruments. As she convincingly argues, there is considerable room to improve the transparency and quality of the ACtHPR's methodology and reasoning. To some extent, her guidance echoes that which Olivier De Schutter provided at the global level. Finally, she discusses whether 'there is a need to balance *international* human rights integration with the specificity of the ACHPR'[29] and how this could be done. As she puts it in line with the idea of 'smart integration', developed by Eva Brems,[30] '[h]uman rights integration should not be seen and used as an interpretative "bulldozer"; rather, it should highlight difference and variety in legal standards'.[31] In other words, reliance on precedents should be weighted against distinctive regional features.

With a focus on judicial dialogue and cross-fertilisation, human rights integration issues have often put the emphasis on courts. However, there is a growing need to go beyond a paradigm of human rights in which protection is the responsibility of the judiciary alone. Lorenza Violini sheds some light on to the role of non-judicial bodies.[32] She looks not only at regional organisations, such as the European Fundamental Rights Agency, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, but also at National Human Rights Institutions (NHRIs). She highlights major lines of convergence of these non-judicial actors and discusses whether and how these bodies might develop a dialogue to share common practices and enhance coordination so as to engage in a similar process to their judicial counterparts. However, such inter-systemic interaction is still at a preliminary stage.

HUMAN RIGHTS TECTONICS THROUGH AN ISSUE-BASED APPROACH

The second part of the book reflects on four issues of social justice where human rights tectonics are at play. They all relate to legal battles which mobilise,

28 A Rachovitsa, this volume, p 78.
29 Ibid, p 83.
30 E Brems, 'Smart Human Rights Integration', above n 1.
31 Rachovitsa, this volume, p 84.
32 L Violini, this volume, pp 89–107.

in one way or another, the principle of non-discrimination. They disclose various tensions, fights, battles and clashes that take place at the core of human rights protection. They illustrate the movement between the fragmentation and the integration of human rights, and the many crossroads that must be navigated to overcome the boundaries between the generations of human rights, the grounds of discrimination or the various systems of human rights protection. Here, again, various dynamics comparable to the movements of tectonic plates are observable. The dialectic between convergence and divergence points towards transformative tools for developing strategies to advance human rights causes in a globalised era.

In the first case study, we explore the commonalities between several battles where commercial companies appropriate the language of fundamental rights to justify differences in treatment based on gender, sexual orientation or religious beliefs. These companies claim a form of freedom of conscience, understood as the choice of values that constitute their identity. They do so in relation to the sexual and reproductive rights of women and the equal treatment of all people regardless of their sexual orientation. Furthermore, other instances where a company's policy of neutrality sometimes targets a symbol of a minority religion uncover the extent to which the corporate image of private companies seems to be linked to a form of conscience understood as an intrinsic part of their identity. To address this multi-faceted phenomenon and in line with the general perspective of this book, we support the view that there is a genuine need for a global approach[33] to anti-discrimination law, which would help to identify new areas for producing and implementing the law which are neither national nor international. This makes it possible to unveil some driving forces between different layers of human rights.[34] Against this background, this contribution provides an analysis of some symbolic cases from either side of the Atlantic to assess how anti-discrimination law is challenged and undermined when companies or associations invoke their 'conscience'.

In recent years, intersectionality has been considered to be a fruitful approach to foster human rights integration.[35] As a second case study on anti-discrimination law, Joanna Bourke Martignoni analyses selected examples where an intersectional lens is applied to sexual and reproductive rights issues within the practice of the UN's treaty monitoring bodies:[36] 'While the concept of intersectionality has occupied centre stage in much of the gender

33 B Frydman, 'A Pragmatic Approach to Global Law', in H Muir Watt and D Arroyo (eds), *Global Governance Implications of Private International Law*, Oxford University Press, Oxford 2015, pp 181–200.

34 E Bribosia and I Rorive, this volume, pp 89–107.

35 E Brems, 'Should Pluriform Human Rights Become One?', above n 1, p 466.

36 J Bourke Martignoni, this volume, pp 141–162.

and postcolonial studies literature produced since the 1980s, the use of intersectional perspectives by the international human rights mechanisms has a much more recent history.'[37] The UN human rights treaty bodies have mainly relied on a single-entry approach to enforce norms prohibiting discrimination. The resulting practice of these bodies has tended to reinforce fragmentation and discursive hierarchies about which experiences of discrimination are identified and redressed by international human rights law. With the impetus of the Committee on the Elimination of Discrimination against Women, things are changing. Bourke Martignoni not only takes stock of these developments, but also reflects on the potential and limitations of intersectional approaches to sexual and reproductive rights, as well as 'the capacity of the UN human rights monitoring mechanisms to engage in the nuanced, radical and frequently contradictory analyses of inequalities and power relations that such approaches require'.[38]

Drawing on literature from political and critical socio-legal theory, Valeska David challenges another kind of legal boundary: the one between cultural identity and economic empowerment.[39] This third case study is based on a body of case law of both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), which is frequently regarded as 'a jurisprudence of difference' related to the cultural identity, lifestyles and 'special needs' of minorities such as Roma, Travellers and indigenous peoples.[40] She argues that '[w]hile this case law has attracted extensive interest from the perspective of the "culturalisation" of human rights law,[41] less attention has been paid to the interaction between this legal phenomenon and the advancement of socio-economic equality claims'.[42] These cases are interlocked with claims over land, living conditions, housing, protection against eviction and access to and management of natural resources. David grapples with this interaction to explore whether and how far rights claims on the basis of cultural and economic disadvantage could be integrated into the legal reasoning of the ECtHR or the IACtHR. These two regional courts are more constrained by their specific legal mandate than the ACtHPR, which is urged to foster an integrated approach to human rights.[43]

The experience of persons with disabilities before the ECtHR provides a fourth case study to dig into Olivier De Schutter's account of the formation

37 Ibid, p 142.
38 Ibid.
39 V David, this volume, pp 163–192.
40 Ibid, p 164.
41 On this notion, see F Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, Oxford 2014.
42 V David, this volume, p 164.
43 See A Rachovitsa, this volume, pp 89–107.

of a common law of human rights. The ECtHR refers more and more often to external instruments to support the interpretation and application of the European Convention on Human Rights (ECHR) and its Protocols.[44] In disability cases, the instruments referenced include the UN Convention on the Rights of Persons with Disabilities,[45] documents of the UN Committee on the Rights of Persons with Disabilities, judgments of national Supreme Courts on disability and recommendations of the International Labour Organization. Based on an extensive and rigorous case law analysis, Dorothea Staes and Joseph Damamme draw a typology which is guided by the idea of 'human rights integration'.[46] From a top-down view on the human rights architecture, they show that the practice of referencing other instruments enhances the harmonious coexistence of the relevant norms. A bottom-up perspective also brings to light the potential of the practice to strengthen the protection of the human rights of persons with disabilities.

HUMAN RIGHTS DYNAMICS IN EUROPE

Europe is a genuine laboratory to investigate how a new instrument of human rights protection – the Charter of Fundamental Rights of the European Union – and its mobilisation before national judges, the Court of Justice of the European Union (CJEU) and even the ECtHR blurs the lines of convergence and divergence in a multi-layered human rights system.

The dominant view in legal literature, until recently, saw the relationship between the CJEU and the ECtHR as complementary and harmonious. During the beginning of the twenty-first century, two major developments have affected this relationship: the failed accession of the EU to the ECHR following Opinion 2/13[47] and the dominant role now played by the EU's Charter of Fundamental Rights in the practice of the CJEU when human rights issues are at stake. Taking stock of these developments, Bruno De Witte points out that the CJEU operates in an environment which does not necessarily pressure it to contribute to the effective enforcement of other international human rights instruments.[48] He highlights the extent to which human rights interactions between the EU and the outside world increasingly happen beside the judicial arena in the context of the EU's external relations, 'at least at the level of policy

44 On this issue, see D Staes, above n 2.

45 Convention on the Rights of Persons with Disabilities, adopted on 24 January 2007, G.A. Res. 61/106, UN Doc. A/RES/61/106 (entered into force on 3 May 2008).

46 D Staes and J Damamme, this volume, pp 193–221.

47 CJEU (Full Court), 18 December 2014, ECLI:EU:C:2014:2454.

48 B De Witte, this volume, pp 225–241.

documents, if not always in practice'.[49] Today, in addition to being more consistent in its action, one of the main challenges the EU faces is to link its own human rights norms to the development of international norms so as to refrain from becoming a 'solo singer' rather than a 'voice' in the choir of the legal protection of human rights.

Building on De Witte's chapter, Jasper Krommendijk explores in further detail the aftermath of Opinion 2/13, which 'reflects the increasing worries of the CJEU about the sometimes far-reaching case law of the ECtHR, which could hamper the effectiveness of EU law'.[50] Based on a solid review of the case law of the CJEU after Opinion 2/13 and on previous published work looking at the interactions between both European systems, Krommendijk assesses whether this Opinion has been 'a game-changer' in the CJEU's practice of referring to the case law of the ECtHR.[51] In this respect, not only does he identify a typology of the CJEU's practice of relying on precedents of the ECtHR, but he also looks at cases where the CJEU entirely omits any fundamental rights perspective, failing even to engage with the Charter of Fundamental Rights. This extensive case law review leads him to conclude that no marked changes can be identified in the practice of the CJEU since Opinion 2/13. Amongst the various explanations for this, two are worth underlining. Primarily, it is not surprising that the CJEU 'exercises some caution and damage control' after the 'heavy blow' of Opinion 2/13.[52] Furthermore, the trend to refer less often and more unassumingly to the ECHR and the case law of the ECtHR started before Opinion 2/13 with the 'Charter-centrism idea of the EU now having its "own catalogue" of fundamental rights'.[53]

To grasp the full extent of the dynamics operating in Europe, it is critical to look at the other side of the coin, bringing the focus on to the practice of the ECtHR. The allocation of the burden of proof in cases of racial discrimination is a topical example which can deepen the discussion on convergence and divergence in international human rights law. Starting with a discussion on the trend among international courts to adopt the shared burden of proof in cases of human rights violations, Kristin Henrard zooms in on the recent case law of the CJEU on the Race Equality Directive.[54] This allows her to bring a broader perspective on the ECtHR's struggle with the application of the allocation of the shared burden of proof in cases involving racially motivated crimes. Indeed, for once, it is EU law that has been the driving force behind the expansion of

49 Ibid, p 236.
50 J Krommendijk, this volume, p 243.
51 Ibid, p 246.
52 Ibid, p 267.
53 Ibid, and interviews referred to in footnote 139.
54 K Henrard, this volume, pp 271–301.

the right to equality and anti-discrimination in Europe.[55] Henrard invites the ECtHR to build on its existing judicial dialogue with the CJEU to further clarify and strengthen its precedents in this matter and to reduce the national margin of appreciation.[56]

As an expression of the principle of subsidiarity, the margin of appreciation is at the core of human rights dynamics in Europe. 'It represents the normative vision of agency that larger or more centralised units should not usurp functions that smaller or more local units are able to perform well enough'.[57] It also has a functional justification related to efficiency and competence. Furthermore, as to the interpretation and application of rights, it allows flexibility and pluralism. Oddný Mjöll Arnardóttir goes beyond discussing these key elements of the margin of appreciation doctrine. Starting from the divergent views of George Letsas and Andrew Legg, she revisits the issue of whether an internal conceptual framework can be constructed to encompass the various aspects of the doctrine reflected in the case law of the ECtHR.

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At a time when human rights are (again) 'on trial',[58] lawyers have to add their voice to that of political scientists in order to stress the robustness of the idea of human rights and to revitalise its emancipatory potential. This book is part of such a framework which posits a democratic defence of human rights. While the human rights legal landscape is still expanding, the case for an increased integration of human rights law needs to be addressed comprehensively and concrete issues faced by human rights users should not be overlooked.

With the imagery of plate tectonics in the background, this book aims to ascertain the extent to which human rights law is in perpetual construction and constant renewal. Semantically, one might bear in mind that the term plate tectonics comes from the Late Latin 'tectonicus', borrowed from the Greek 'τεκτονικός', which means belonging to carpentry or pertaining to building.[59]

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55 E Bribosia and I Rorive, above n 7, p 3.

56 In this respect, Henrard's contribution is directly linked to some findings of D Staes and J Damamme, this volume, pp 193–221.

57 OM Arnardóttir, this volume, p 315.

58 J Lacroix and J-Y Pranchère, *Human Rights on Trial: A Genealogy of the Critique of Human Rights*, Cambridge University Press, Cambridge 2018.

59 See, for instance, the Collins English Dictionary.