

# Introduction

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From the perspective of human rights users—both the rights holders and duty bearers—it might be difficult to make sense of the human rights system since it is an increasingly complex and ever-expanding field of law, consisting of different levels, actors and norms. The concept of human rights is, contrary to how it is often portrayed, not homogeneous. Instead, human rights appear in a fragmented way, differing in their scope, focus, legal force and level of governance. To what extent does this non-hierarchical accumulation of human rights provisions affect effective human rights protection? How do human rights users navigate through this complex and often uncoordinated legal architecture? How do they experience and view this fragmented human rights landscape? Is there a need for more integration in the field of human rights law? How can this integration be achieved? What are already existing good practices of human rights integration? What role do the users themselves play in the integration of human rights?

These questions and many others were examined in a research project called ‘The Global Challenge of Human Rights Integration: Towards a Users’ Perspective’.<sup>1</sup> Over the course of five years, the Human Rights Integration (HRI) network, an inter-university attraction pole involving scholars from six universities,<sup>2</sup> has been examining these issues from different angles (both theoretical and empirical) all the while using a wide variety of methodologies.

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<sup>1</sup> More information on the project can be found here <http://www.hrintegration.be/>.

<sup>2</sup> The six partners within the project are: Human Rights Centre, Ghent University; Institute for European Studies, Université libre de Bruxelles; Fundamental Rights & Constitutionalism Research Group, Vrije Universiteit Brussel; University College Roosevelt, Utrecht University; Centre interdisciplinaire de recherches en droit constitutionnel et administratif, Université Saint-Louis – Bruxelles; Law and Development Research Group, University of Antwerp.

In this volume, the authors build on five years of research, scholarly exchange, empirical input and involvement in the field. Contributors reflect on fragmentation, integration and the users' perspective on human rights, each in their own field of expertise, using different methodologies. This volume contains methodological, normative and empirical chapters with case studies covering a wide variety of human rights topics.

This introductory chapter will first explain the main research concepts. Next, it will give some insights in the chapters of this volume, followed by some concluding reflections.

## 1 INTRODUCING KEY CONCEPTS

### 1.1 Human Rights as a Fragmented Landscape

Human rights are indivisible and universal, at least, as a political and ethical project. As law however, they are fragmented;<sup>3</sup> there is no such thing as a single human rights catalogue or global human rights monitoring body. In the last few decades, the number of legal instruments addressing human rights has proliferated dramatically. Human rights texts dealing with particular groups (eg, women, children, persons with disabilities, indigenous peoples) or themes (eg, racial discrimination, enforced disappearance) have complemented the general human rights conventions. Global, regional and national human rights systems have been established, including a diversity of monitoring mechanisms.<sup>4</sup> These monitoring mechanisms and diverse instruments also differ at the level of their legal force. While numerous human rights norms—constitutions, treaties, customary law—are binding, human rights have also been included in formally non-binding soft law—eg declarations, resolutions—that may nevertheless have strong moral or political force.<sup>5</sup> The accompanying monitoring bodies in turn can be distinguished according to the level of control they exercise. A judgment of the European Court of Human Rights for example has, in principle, stronger effects than a decision of the Human Rights Committee. Further, the

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<sup>3</sup> Eva Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) 3 *European Journal of Human Rights* 447.

<sup>4</sup> Eva Brems and Ellen Desmet (eds), 'Human Rights Integration: Theorizing the Multilayered Nature of Human Rights Law' (2014) 2–3 *European Journal of Human Rights* 289.

<sup>5</sup> Brems (n 3) 450.

interpretation of and approach towards particular human rights norms might diverge depending on the human rights monitoring body that applies them.

Human rights law keeps expanding and it does not seem that this evolution will diminish.<sup>6</sup> To the contrary, as this volume will demonstrate, new human rights instruments are continually being created.<sup>7</sup> Moreover, the interpretation judges give to certain human rights broadens the scope of human rights law. This is, for example, the case for the right to give birth at home, as recognized as part of the right to private life by the European Court of Human Rights.<sup>8</sup> In addition, new groups, such as peasants, are entering the human rights scene, striving for a more comprehensive and tailored protection of their rights.<sup>9</sup>

Looking at this multileveled and complex human rights landscape from a users' perspective, this fragmentation may be problematic. In particular, the fact that rights holders and duty bearers are confronted simultaneously with differing human rights provisions and human rights protection bodies, might create obstacles for effective human rights protection, especially when coordination between these multiple protection mechanisms is lacking.

Yet fragmentation may also create opportunities for human rights users. Each additional layer of human rights law was created out of a perceived need for increased human rights protection, and in many cases, increased protection is indeed the result. Moreover, when rights holders have more than one mechanism they can turn to in search of rights protection, this can in the first place be considered an advantage.

When scholars look at human rights as an integrated whole and adopt the perspective of human rights users, it becomes possible to map the degrees of fragmentation and integration in human rights law, and to analyse their impact. It also becomes possible to imagine an integrated

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<sup>6</sup> Brems and Desmet (n 4) 289.

<sup>7</sup> See the contributions in chapters 3, 4 and 5.

<sup>8</sup> Maris Burbergs, 'The right to choose the circumstances of becoming a parent' (2011) at <https://strasbourgobservers.com/2011/01/13/the-right-to-choose-the-circumstances-of-becoming-a-parent/>.

<sup>9</sup> See Human Rights Council, Promotion and protection of the human rights of peasants and other people working in rural areas, 11 October 2012 (A/HRC/RES/21/19), establishing an 'open-ended intergovernmental working group with the mandate of negotiating, finalizing and submitting to the Human Rights Council a draft United Nations declaration on the rights of peasants and other people working in rural areas' (§ 1) referred to in Brems and Desmet (n 4) 289.

view of human rights, both as a project of normative development, and as a matter of procedural practice.

Central to this undertaking, both as a methodological tool and as a normative framework, are the concepts of human rights integration and the perspective of the user. In what follows, first the methodological approach of the user perspective will be explained (subsection 1.2), before zooming in on the manifestations of fragmentation and integration across the chapters of the book (section 2).

## **1.2 Studying Human Rights as an Integrated Whole from a Users' Perspective**

In chapter 1, Ellen Desmet sets out the 'users' perspective' as a methodological approach. The key element of this approach implies a shift in analytical focus. Instead of focussing on an individual specific legal instrument, topic or enforcement mechanism, it is kept in mind that the research topic is part of a greater system, namely human rights law. Indeed, as Brems argued elsewhere, in academia, a tendency towards specialization can be observed:

As the field of human rights law has emancipated, overall human rights experts have largely been replaced by experts in for example 'children's rights', or 'women's rights' or 'minorities', or experts in the European Convention or the UN system, or in one specific freedom, such as press freedom or non-discrimination, privacy, or religious freedom. While this has brought the discipline to a higher level, it has also contributed to creating a fragmented, compartmentalized view of human rights law.<sup>10</sup>

Adopting a users' perspective inevitably leads to an integrated view of human rights, as each user is subject to a multitude of human rights provisions that apply simultaneously to any situation in which they make use of or engage with human rights. Consequently, putting oneself in the shoes of human rights users,<sup>11</sup> will allow a deeper insight in the human rights system, in how it is used, what its strengths and weaknesses are and will further provide reflection on how it can be improved.<sup>12</sup>

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<sup>10</sup> Brems (n 3) 451.

<sup>11</sup> Ellen Desmet, "'Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and Research Agenda' (2014) 8(2) *HR&ILD* 121, 123–24.

<sup>12</sup> See also Brems (n 3) 452, who argues that: 'For human rights scholars, an integrated view of human rights is a very valuable – arguably even indispensable – approach.'

Traditionally, human rights holders are considered the main human rights users. Yet, duty holders can also be considered as human rights users who are confronted with the same fragmented legal reality as the rights holders, although from another perspective. A rights holder might for example be confronted with dilemmas such as to which human rights monitoring body it will turn to in search of protection, or which instrument it will invoke. In addition, a judge who is confronted with a human rights claim might be confronted with divergent interpretations of a certain human right and will thus have to make a decision on which interpretation to follow. Therefore, human rights users are considered to be any individual or composite entity who engages with human rights. Engaging with human rights should be interpreted broadly, as put forward and developed by Ellen Desmet. It includes rights claimants (who invoke human rights), rights realisers (who give effect to human rights), supportive users (who support the realization of human rights) and judicial users (who impose the implementation of human rights).<sup>13</sup> The first two categories of users can be considered direct users of human rights, while the two last categories are rather indirect users.<sup>14</sup> Yet all four categories of users share the experience of the simultaneous confrontation with all of these human rights provisions.<sup>15</sup>

In her chapter, Ellen Desmet explains how these categories can be further refined, introducing terms such as ‘enabling users’, ‘third-party users’ and ‘potential users’.<sup>16</sup> Desmet also accords particular attention to the role of academics as active human rights users. Indeed, in the field of human rights law it can be difficult to remain passive watchers at the side-line. Researchers are increasingly getting involved in particular human rights actions, whether this is through contributing to awareness raising, submitting third party interventions in legal cases or active lobbying in legislative processes.<sup>17</sup>

In practice, overlap between the categories of users can take place, depending on the particular situation. An academic for example who submits a third party intervention in a case against their country can be considered a supportive user of human rights. If because of their critical intervention they would be fired by their state university, and would file a lawsuit against the university for a breach of freedom of expression and academic freedom, this person would become a direct user of human

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<sup>13</sup> Desmet (n 11) 129–31.

<sup>14</sup> Ibid.

<sup>15</sup> Brems (n 3) 451.

<sup>16</sup> See chapter 1.

<sup>17</sup> See chapter 5.

rights as a rights claimer. Examining their situation from a users' perspective implies that the choices made in choosing a protection mechanism and human rights instruments would be closely examined and the consequences of these choices, being the way the claim is handled, would be critically assessed against the backdrop of human rights law as a whole.

## 2 'FRINTEGRATION'<sup>18</sup> ACROSS DIFFERENT HUMAN RIGHTS THEMES

The joint position adopted in this volume is that a holistic perspective of human rights law is valuable for human rights scholarship. This does not do away with the value of specialization. It is the story of the wood and the trees.

On the issue of fragmentation and integration as features of human rights law, the chapters in this volume adopt a nuanced view. The matter is approached from an empirical angle, as an object of study. The concluding chapter adopts a normative position that, however, attempts to present the benefits of both integration and fragmentation. Fragmentation as such, is neither good nor bad from the perspective of human rights users. To the contrary, fragmentation and integration in human rights law often go hand in hand and can be considered two sides of the same coin, as the chapters in this volume show.

In chapter 2, Mathias Holvoet and Paul De Hert reflect on how and why pluralism occurs within International Criminal Law (ICL). The authors consciously decide not to use the term 'fragmentation', but instead they use the concept of 'pluralism' to describe this complex reality with regard to instruments and monitoring bodies within ICL. They argue that fragmentation is insufficiently neutral and has a negative connotation. Further, they find that within ICL, a process of expansion is taking place, rather than fragmentation. Hence, they don't start from a perspective that fragmentation is problematic, instead they try to understand the occurring pluralism in ICL through a users' perspective. They identify several categories of users in ICL, being: the victims, NGOs, the accused, States, prosecutors, judges, academics and Human Rights Courts and Commissions of inquiry and explain how these users contribute to the pluralism within ICL. Indeed, ICL, according to the authors,

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<sup>18</sup> Concept inspired by the title of chapter 3, existing of combination of 'fragmentation' and 'integration'.

depends on the interpretation the users give to it and the context in which the users operate. The authors also highlight how ICL is used by other (human rights) bodies as a source of inspiration, since ICL principles are found to be integrated in case law of other human rights bodies, such as the European Court of Human Rights. Finally, Holvoet and De Hert also show how through collaboration, users play an important role in the field of human rights protection when the law is failing. In sum, the authors show, through the example of ICL, how pluralism is sometimes inevitable and they also demonstrate how pluralism is not necessarily an obstacle from a users' perspective. In fact, users themselves can be at the source of this pluralism.

The role of users in a fragmented human rights law landscape is also studied in chapter 3. In this chapter, Derek Inman, Stefaan Smis and Edson 'Krenak' Dorneles de Andrade examine which role indigenous peoples play in the fragmented field of law concerning their rights. They also evaluate to what extent these users' perspective is reflected in the law, in particular, with regard to the right on land. Adopting a law and literature methodological approach, they first study what the users' perspective on land entails. They do this through a reading of traditional stories on land in the Mundurucu community. They then turn to the law to see whether this insider perspective on land is included in human rights instruments and they conclude that it is the case. This is not surprising, as the authors explained how in recent years organizations advocating for the rights of indigenous groups actively lobbied to have their perspective recognized. Hence, the authors establish how users can actively influence the human rights landscape. It might therefore be argued that although on first sight this landscape appears to be fragmented in the field of the rights of indigenous peoples, through the action of users some integration is achieved since there appears to be a general accurate recognition of the indigenous peoples' perspective on land. In any case, the authors also illustrate how integration took place in a more explicit way. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) for instance is advanced as a textbook example of human rights integration, since as a specialized instrument it groups the most important principles and rights applying to indigenous peoples. The UNDRIP was established through an inclusive participatory process and therefore also represents the perspective of the actual rights holders. The authors further show how integration takes place in jurisprudence through cross-fertilization between courts across the globe. In sum, this chapter also demonstrates that fragmentation is not necessarily an obstacle to human rights protection, as long as the users' perspective is taken into account. In fact, in the field of indigenous peoples' rights, clear examples

of integration can be found, even if that means in practice that new instruments are created.

This is also the case in the field of the rights of persons living with a disability, as studied in chapter 4 by Barbara Oomen. Oomen demonstrates how the involvement of numerous actors, such as hundreds of NGOs, contributed to the fact that the Convention on the Rights of Persons with Disabilities (CRPD) was drawn up relatively swiftly, and entered into force in less than two years after its adoption. Also at the local level in the Netherlands, human rights users such as the rights holders and NGOs representing them played a pivotal role in the ratification process of the CRPD. At the same time, human rights bodies such as courts are found to interpret the rights of persons living with a disability in divergent ways, which contributes to the fragmentation of human rights law in this field. However, Barbara Oomen considers fragmentation and integration in human rights law to be two sides of the same coin. The diffusion of the norms in different settings and the need to negotiate their interpretation contribute according to Oomen to an 'ever-thicker normative web'.<sup>19</sup> In her chapter, Barbara Oomen explores what the users' point of view is on this development of fragmentation, in particular, on creating a new specialized treaty on the rights of persons living with a disability. She seeks an answer to this question by asking the perspective of the rights holders and organizations representing them, through empirical research. The majority of the respondents found that adopting another treaty is not a negative thing, since it would reinforce their struggle for human rights protection. Hence, another treaty, and thus the expansion of human rights law, is seen as an added value by the users. At the same time, this chapter also shows, like in chapter 3, how active involvement of these same users in legal developments concerning their rights is essential.

An insider perspective on how this involvement might take place is detailed by Emmanuelle Bribosia and Isabelle Rorive in chapter 5. They reflect in their chapter on the struggle for human rights protection for trans people in Belgium. With their Equality Law Clinic, both authors were in fact actively involved in this struggle. The field of human rights of trans people can be considered fragmented, as the authors show in their chapter. However, the Yogyakarta Principles 'on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity' adapted in 2007 can, according to the authors, be considered a milestone in the protection of trans people's rights which brings 'greater

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<sup>19</sup> Chapter 4, section 2.

clarity and coherence to States' human rights obligations'.<sup>20</sup> This additional instrument in this field of human rights law therefore can also be seen as achieving more integration. In their chapter, the authors show how the different fragmented sources of protection can in practice even be 'used' by actors in the field in their struggle for improved protection. Indeed, the different instruments formed the basis on which different actors relied in their actions, such as including strategic litigation, active lobbying and drafting a 'draft law' in the domestic legislative process. Additionally, through strategic litigation, the actors involved made a conscious choice of forum shopping by submitting a collective complaint before the Committee of Economic and Social Rights instead of other human rights monitoring bodies. Hence, the fragmented human rights landscape can be considered as a tool in a human rights struggle and grassroots mobilization, rather than an obstacle.

Turning to a more theoretical approach, Sébastien Van Drooghenbroeck and Olivier Van der Noot examine in chapter 6 how human rights integration can be translated to the context of constitutional reform. In monist jurisdictions, that allow for the direct effect of human rights treaties, the question arises whether constitutional bills of rights are still relevant. Through different case studies, they discern two important constitutional approaches towards international human rights norms. On the one hand, countries such as Belgium, the Netherlands and Luxemburg apply in their Constitution an assimilationist approach towards international human rights norms. In practice this means that international human rights norms are directly applicable in their domestic legal order and that the authoritative character of the interpretation given to human rights norms by supranational human rights judges is 'generously acknowledged' by their domestic judges.<sup>21</sup> On the other hand, the authors discern a movement of exclusion. Some countries, such as the United Kingdom and Russia, adopt indeed a more protectionist approach in their Constitution 'with the frankly worrying intention to get rid of the allegedly unbearable guardianship of international and European judges'.<sup>22</sup> Through the example of the Swiss Constitution, the authors also look at the subject of constitutional reform from a users' perspective, particularly on the importance of transparency of the Constitution, which is necessary for judges who have to apply them or have to take them into account. Another important question from a users' perspective advanced

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<sup>20</sup> Chapter 5, section 1.

<sup>21</sup> Chapter 6, section 1.1.1.

<sup>22</sup> *Ibid*, section 2.

in this chapter is to what extent users, in particular the rights holders, should be included in the process of constitutional reform. From the perspective of supranational human rights judges, the authors propose a third way to reform a constitution: integration. This would entail that a balanced conversation takes place between international human rights norms and the national constitutional tradition, which is in line with the concept of Smart Integration developed by Eva Brems.

In the concluding chapter 7, Eva Brems first presents the case for human rights integration, and then reflects on the positive sides of fragmentation. In this normative chapter, she discerns four main advantages of fragmentation in human rights law: specialization, contextualization, experimentation and strategic choice. In fact, several illustrations of these benefits can be found in this volume. Chapters 2, 3, 4 and 5 contain clear examples of specialization as one aspect of fragmentation, since respectively ICL, the UNDRIP, the CRPD and the Yogyakarta Principles were used by judges as a source of inspiration or led to actual integration in practice by applying the most important norms and principles to a certain group. Chapter 6 also shows the importance of contextualization in the light of national constitutions and how supranational judges take the national context into account. Experimentation, for example, takes place in the field of the protection of persons living with a disability, as Barbara Oomen shows in chapter 4. Indeed, judges interpret international instruments in divergent ways, which can either weaken or strengthen the level of protection of the rights holders. Finally, chapter 5 is an excellent example of strategic litigation which makes use of the multitude of existing norms to strengthen a case and of the diversity of available human rights bodies to increase their chance of success. Clearly, this overview shows that these aspects of fragmentation might benefit the human rights users. However, the benefits are not limitless. As argued by Brems, fragmentation should not lead to a race to the bottom. Therefore, although fragmentation makes strategic litigation for rights holders possible, another side of the coin is strategic interpretation by other users such as law makers or judges to the detriment of the protection of other users, in particular the actual human rights holders. As argued in chapter 4, 'interpretation shopping' might lead to a decrease of protection.<sup>23</sup> In chapter 5, for example, it is also argued that contextualization in light of national constitutions should remain within the limits of human rights law as an integrated whole. Hence, a balancing exercise is needed between human rights integration and fragmentation and at a

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<sup>23</sup> Chapter 4, section 4.

procedural level, as argued by Eva Brems, thus, intensifying the global human rights conversation is needed. The way forward is therefore, according to Brems, ‘smart human rights integration’, which moves towards integration, while maintaining the benefits of fragmentation in human rights. In Brems’ view, integration should not be confounded with uniformity. The challenge of human rights integration is not to make sure that all human rights monitoring bodies reason in the same way. Instead, what is expected is that each human rights implementation body shapes its specific function in a manner that shows awareness of it being a part of a project that transcends that particular body. Hence, the goal of human rights integration is not uniformization, but rather conversation.

### 3 USERS’ CENTRAL ROLE IN DYNAMICS OF FRAGMENTATION AND INTEGRATION

The chapters in this volume study fragmentation and integration in human rights from a users’ perspective. Both aspects are seen as two sides of the same coin. When combined, they could also be seen as a web which ideally is strong, interconnected, interdependent and an integrated whole consisting of a plurality of connecting dots. The research presented in this book illustrates that users play a pivotal role in keeping this web together and strong, whether through shaping, implementing, interpreting or further developing human rights law. Therefore, from a perspective of (smart) human rights integration it can be argued that it is important that users are aware of their potential role within the greater picture of human rights as an integrated whole. Traditionally, the obligation to respect, protect and fulfil are seen as responsibilities and obligations for States and official human rights protecting bodies. However, the research findings also show how rights holders and supportive users can play a tremendous valuable role in human rights protection. Although the responsibility for optimal human rights protection should never be placed with these users in the first place, reflecting on how their role can be further developed and strengthened might be the next challenge.