Human rights in network

Les droits de l'homme en réseau

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Abstract

This article analyses the development of global human rights adjudication through the lens of Ost and van de Kerchove's "law as a network" theory. It is submitted that the network metaphor (used liberally, albeit in line with Ost and van de Kerchove's thought) is useful to describe and interpret the evolution of human rights law as well as the strategies used by its main actors. In that respect, it emphasises three main features of the human rights web, i.e. its fluidity, polycentricity and interdependence. Importantly, these characteristics are not stable properties of human rights law but they are instead the result of endless tensions between openness and closure, centralisation and marginalisation, solidarity and authority. In that sense, the network metaphor keeps us from overdramatizing attempts to establish or restore some hierarchy and borders as well as converse endeavours to usher in an era of human rights oecumenism. These opposing trends are precisely the sign that human rights operate in a network-like environment. To put it differently, these conflicting moves nurture rather than undermine the human rights network.

Résumé

Cet article analyse le développement d'une justice globale des droits de l'homme à l'aide de la théorie du "droit en réseau" développée par Ost et van de Kerchove. Il défend l'idée que la métaphore du réseau (utilisée de manière libre, quoique dans le droit fil de la pensée d'Ost et van de Kerchove) est utile pour décrire et interpréter l'évolution du droit des droits de l'homme ainsi que les stratégies utilisées par ses acteurs principaux. Dans cette perspective, la présente contribution souligne trois caractéristiques principales du réseau des droits de l'homme, à savoir sa fluidité, sa polycentricité, et l'interdépendance de ses nœuds. Il insiste cependant sur le fait que ces qualités ne constituent pas des propriétés stables du droit des droits de l'homme mais sont bien plutôt la résultante de tensions infinies entre ouverture et fermeture, centralisation et marginalisation, solidarité et autorité. En ce sens, la métaphore du réseau nous invite à dédramatiser à la fois les tentatives consistant à (r)établir une hiérarchie et des frontières et, à l'inverse, les entreprises visant à inaugurer une ère d'œcuménisme des droits de l'homme. Ces tendances antagoniques sont précisément le signe que les droits de l'homme opèrent dans un environnement en réseau. Pour le dire autrement, ces forces opposées nourrissent plus qu'elles n'altèrent le réseau des droits de l'homme.

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I. Introduction

Human rights litigation and adjudication is going *global*. Fundamental rights disputes wholly limited to the playing-field of one specific legal order have become remarkably unusual.

Sometimes, the exotic feature of a dispute lies in the legal materials invoked by the litigating parties before a domestic court. The European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights and the International Covenant for Civil and Political Rights (ICCPR) are often relied upon by lawyers and courts in national fora. The same goes for the case-law of these documents' official interpreters – the European Court of Human Rights (Eur. Ct. H.R.), the Court of Justice of the European Union (ECJ) and, albeit to a lesser extent, the Human Rights Committee (H.R. Committee). Interestingly, such cross-references may extend beyond these well-known actors at the international level and take the form of a comparative exercise. Human rights lawyers and judges increasingly seek inspiration from the case-law of neighbouring countries' courts, thereby participating in a phenomenon that has been termed "judicial borrowing" or "judicial dialogue".

In other instances, the foreign element comes from the intervention of an "outside court" in an originally domestic dispute. This intervention may take place *in the very course* of the dispute, for example through the preliminary reference mechanism enabling the ECJ to assess the compatibility of EU secondary legislation and of Member State measures with EU fundamental rights standards. But the "alien court" may also step in *after* and *provided* that the national courts ruled on the case, as is provided for by Article 35 of the ECHR. Finally, it may happen that this intervention takes place *before* and *triggers* the opening of the case at national level, as is exemplified by the case-law on the recognition of foreign judgments.

Lastly, it should be noted that even purely internal judgments putting an end to exclusively domestic disputes can be given a transnational resonance through the way they inspire foreign lawyers and judges and contribute – whether explicitly or implicitly – to the crafting of foreign judgments. In that sense, human rights judgments are like messages sent out by ships at sea, doomed to either die out or be picked up, relayed and possibly distorted by others.

The above is all well known. Not less mundane is the conclusion that is usually drawn from these observations – human rights actors are connected with each other across national borders, which in turn is usually praised as an important stumbling block in the development of so-called "global constitutionalism".

But human rights litigation is also getting *messy*. The waning of national borders has not given rise to a new, global legal order – a faithful replica of the domestic ones on a worldwide scale : no Kelsen-like pyramid of human rights norms ; no

ultimate court imposing its interpretation on subservient actors; no universal "rule of recognition" governing the identification, the validity and the application of human rights norms. Citizens, lawyers and judges alike have no choice but to paddle their way through an ocean of more or less legal texts, more or less final courts and more or less absolute obligations and rights.

This twofold evolution of law in general and human rights law in particular has not gone unnoticed. In the last decades, lawyers resolved not to forsake their field to chaos have tried to craft a new vocabulary capable of reflecting this deep transformation of the law's functioning. The concepts of "multilevel governance" and "constitutional pluralism", to name just a few, were given a warm welcome by the lawyers' community.

As was the concept of "network".[2]

Yet, this notion is an elusive one, which can cover an infinity of meanings and lends itself to all sorts of uses. In their groundbreaking book *De la pyramide au réseau ? Pour une théorie dialectique du droit*,[3] François Ost and Michel van de Kerchove describe the network as follows: "*Par-delà la diversité des usages auxquels elle se prête, et en dépit de son évidente polysémie, la notion de « réseau » s'accompagne d'un « noyau dur de signification » relativement stable (…). De manière positive, on retiendra ainsi le fait que le réseau constitue une « trame » (…) composée d'« éléments » ou de « points » (…) reliés entre eux par des « liens » ou « liaisons » assurant leur « interconnexion » ou leur « interaction » (…). De manière négative, par ailleurs, on souligne généralement que, à la différence sans doute de la structure d'un système, et certainement d'une structure pyramidale, arborescente ou hiérarchique, dans un réseau, « aucun*

[2] See, e.g., the International Law Commission 2006 Report on "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (A/CN.4/L.682): "*One aspect of globalization is the emergence of technically specialized cooperation networks with a global scope: trade, environment, human rights, diplomacy, communications, medicine, crime prevention, energy production, security, indigenous cooperation and so on – spheres of life and expert cooperation that transgress national boundaries and are difficult to regulate through traditional international law. National laws seem insufficient owing to the transnational nature of the networks while international law only inadequately takes account of their specialized objectives and needs.*" (paragraph 481). The Report goes on to state: "*fragmentation takes place by the development of networks of international rules and instruments that for all practical purposes – including for the purpose if interpretation – are treated as a single "wholes" or "regimes".*" (p. 252). This fragmentation process of international law into a multiplicity of "networks" is also analysed by A. Fischer-Lescano & G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", *Mich. J. Intn'l Law*, vol. 25, 2004, p. 999. The network theory has been applied to the EU legal order by K-H. Ladeur: *see*, e.g., K.-H. Ladeur, "Towards a Legal Theory of Supranationality – The Viability of the Network Concept", *E.L.J.*, vol. 3, 1997, p. 33; K.-H. Ladeur, "European Law as Transnational Law – Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate ! ", *G.L.J.*, vol. 10, 2009, p. 1357. See also F. Giorgi & N. Triart, "National Judges, Community Judges: Invitation to a Journey through the Looking-Glass – On the Need for Jurisdictions to Rethink the Inter-systemic Relations benyond the Hierarchical Principle", *E.L.J.*, vol. 14, 2008, p. 693; P. Kjaer, "Embeddedness through Networks: A Critical Appraisal of the Network Concept in the *Œuvre* of Karl-Heinz Ladeur", *G.L.J.*, vol. 10, 2009, p. 483; L. Viellechner, "The Network of Networks: Karl-Heinz Ladeur's Theory of Law and Globalisation", *G.L.J.*, vol. 10, 2009, p. 515; A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la juriprudence communautaire. Essai sur la figure du juge traducteur*, Brussels, Publication des F.U.S.L. / Bruylant, 2009, pp. 483-488; A. Bailleux, *La compétence universelle au carrefour de la pyramide et du réseau*, Brussels, Bruylant, 2005. In the field of political sciences, the relationship between globalisation and networks has been analysed a.o. by A.-M. Slaughter: see, *inter alia*. A.-M. Slaughter & D. Zaring, "Networking Goes International: An Update", *Annu. Rev Law Soc. Sci.*, vol. 2, 2006, p. 211; A.-M. Slaughter, "The Future of International Law is Domestic (or, The European Way of Law)", *Harvard Int'l L.J*, vol. 47, 2006, p. 327. For a rebuttal of this new trend in legal thinking, see, e.g. A. Somek, "Kelsen lives", *E.J.I.L.*, vol. 18, 2007, p. 409.

[3] F. Ost and M. van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Brussels, Publications des Facultés universitaires Saint-Louis, 2002.

point n'est privilégié par rapport à un autre, aucun n'est univoquement subordonné à tel ou tel ». À la différence de la notion de système, celle de réseau paraît également n'impliquer aucune forme de « clôture », les réseaux étant des « structures ouvertes, susceptibles de s'étendre à l'infini, intégrant des nœuds nouveaux en tant qu'ils sont capables de communiquer au sein du réseau (…) »".[4]

Based on this description, it is suggested that networks have at least three distinctive characteristics. First, they are *fluid*.[5] As Lepka rightly points out, the network is the "*antithèse de la frontière*".[6] Networks do not have fixed boundaries. Their flexibility and indeterminacy give them a possibility of endless expansion, which comes about through a haphazard and spontaneous development. Second, networks are *polycentric*. At the opposite of a tree-like or a pyramidal structure, networks consist of a multiplicity of "dots", "foci", "nodes" or "neurones", and do not therefore revolve around a single gravity centre. No dot is irreplaceable. The elimination of one of its segments does not jeopardise the existence and further expansion of the network. Third, networks are based on the *interdependence* of their cells, which are both distinct from and related to each other.[7] This dependency is mutual in the sense that networks do not work according to a unilateral and top-down logic with emitting dots endlessly transmitting a one-way flow of information to receiving nodes. Each dot both receives and sends off messages from and to other dots and is therefore embedded in two-sided relationships.

It is submitted that these three features can, to some extent, be used to describe and characterise the current development of human rights litigation. The first part of this paper seeks to underline the *fluidity* of human rights litigation. This fluidity relates to the virtual infinity of materials available to litigants and courts in support of their claims and findings. These materials consist of legal texts, case-law, but also purely political documents. The second part sheds light on the polycentricity of the human rights network which, in the absence of an international court of human rights,[8] deprives any actor of the power to control and centralise the development of the law in that area. The third part of this paper attempts to unveil the interdependence of the nodes of the human rights web, showing that each of them is led to recognise the claims of the others without forsaking its own specificity.

But this well-trodden path brings us only halfway. It promises a refreshing walk through run-of-the-mill ideas but does not reveal the full potential of the network metaphor as theorised by Ost and van de Kerchove. As the subtitle of

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[4] *Ibidem*, pp. 24-25 (ref. omitted).
[5] See P.F. Kjaer, n. 1 above, p. 487 : "*[A] central feature of networks is their fluid character*".
[6] E. Lepka, *Les degrés de juridiction communautaire. À la croisée du système et du réseau*, doctoral dissertation presented on 4 December 2004 at the Robert Schuman University (Strasbourg III), p. 350 (ref. omitted).
[7] See K.H. Ladeur, "Towards a Legal Theory of Supranationality …", n. 1 above, p. 47 : "*The interest in using the concept [of network] lies in the complementarity and interdependence of the components*".
[8] For a plea in favour of the creation of such a court, see G. Oberleitner, "Towards an International Court of Human Rights ? ", in A. Mashwood *e.a.* (eds), *International Human Rights Law : Six Decades after the UDHR and Beyond*, London, Ashgate, 2010, chapter 19.

their book indicates, these two authors have sought to develop a *dialectical* theory of law, that is a theory which conceives law as the ever –developing resultant of the endless tension between antagonised forces – facts and values ; autonomy and heteronomy ; freedom and constraints ; etc.

The network metaphor captures this dialectical movement through which law develops. Networks have no fixed borders, no assigned centre, no pre-established organisation or shape. They operate and thrive through the spontaneous and disorderly interactions of their nodes. On the one hand, they are thus made of disorder and freedom, which they need in order to maintain their flexibility and nurture their development. But on the other hand, networks are organisations. They are not synonyms of chaos. They are specific entities – at least partly – distinct from the context in which they operate.

It would however be too simplistic to conclude that networks represent some sort of a middle point between, say, chaos and pyramids, and that they are constantly faced with the opposing risks of disaggregation on the one hand, and crystallisation on the other. In a dialectical perspective, networks are *necessarily* and *entirely made up of* the tensions between these forces. These tensions are therefore not *accidental*. They do not signal a defect in the network's functioning. They are rather the *essence* of the network. To put it differently, any action taken by any dot of the network can be categorised either as contributing to the cleansing and ordering of the network (pyramid-oriented move) or as pushing toward its dilution (chaos-oriented move).

Understood in that sense, such moves are not *per se* right or wrong. They do not threaten the existence of the network given that, once aggregated to each other, they *are* the network. This does not mean, however, that a network cannot operate and develop more or less dynamically and harmoniously. In that respect, acts that are overly dismissive of one of the network's facets should probably be seen as disrupting the good functioning of the network.

Each of the above-mentioned three characteristics of the network is the result of an endless tension between pyramid-oriented and chaos-oriented dynamics.

The *fluidity* of the network results from conflicting dynamics of openness and closure of the network. In that respect, we will see in Part II that human rights litigation is marked by an increasing exposure to "exotic" materials – exotic being understood in the sense of supranational, foreign or even squarely non-legal – which tends to blur the boundaries of the network (II.A.), but that it is equally impacted by attempts at closure or purification, with actors making every effort to stop or curb the endless development of the network (II.B.).

The *polycentricity* of the network is itself the result of an endless tension between centralisation dynamics on the one hand, which tend to organise the flow of

information around specific centres, and marginalisation strategies on the other hand, which work toward the decentralisation of the network. In Part III, we will see that some actors of the human rights web use a wide array of techniques in order to creep to the centre of the network (III.A.) whereas others try to move to its periphery, thereby increasing its looseness (III.B.).

Finally, the *interdependence* of the network's dots emerges as the product of conflicting dynamics, with moves toward independence and authority offsetting trends to solidarity and sympathy. Part IV will show that human rights litigation develops through such opposed actions, with some dots showing acute receptiveness to the messages sent out by the other nodes of the network (IV.A.) while others try to secure and reinforce their integrity and authority (IV.B.).

II. Fluidity

Networks do not have fixed boundaries. They adapt and develop by making new connections with their environment and integrating new dots into their remit. On the other hand, networks remain distinct from their environment. They are inclusive, but not indiscriminately so. As will be seen below, the human rights web develops through this tension between openness and closure, between inclusion and separation.

A. Openness

The human rights web spans across multiple nodes of both texts and actors open to their environment.

Human rights treaties and conventions are not drafted in clinical isolation from each other. Their content can often be traced back to other human rights bills. Take, for example, the EU Charter of Fundamental Rights the substance of which is drawn not only from the ECHR, but also from the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers and the Constitutions of the Member States. Article 52(3) and (4) of the EU Charter goes even further by providing that the rights contained in the Charter must be interpreted in accordance with the corresponding rights of the ECHR – including the Eur. Ct. H.R.'s case-law[9] – and with the constitutional traditions of the Member States from which they result. In itself, the Charter is therefore a text *open* to external influences. So is EU human rights law in general, as appears from Article 6(3) TEU which provides that "*fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

[9] See, the Explanations to the Charter, Explanation *ad* Article 52.

The same can be said about Member State's Constitutions. It is common ground that the bills of rights contained in the Constitutions of most European States are the result of a comparative law exercise, with the drafters taking their cue from the constitutional texts of neighbouring or otherwise inspiring countries.[10] Similarly, the recent Constitutions of central and Eastern-Europe countries were directly inspired from the human rights protection instruments drawn up under the auspices of the Council of Europe.[11]

This comparative exercise is obviously not limited to constitutional and European law. For example, Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which enshrines the right to a fair trial, was basically copy-pasted into the Statutes of the International Criminal Tribunals for Yugoslavia (ICTY – Article 21) and for Rwanda (ICTR – Article 20).

As is well known, courts also actively contribute to the openness and development of the network. Examples of such judicial borrowing are countless as are the articles and books purporting to study them.[12] The International Court of Justice's (ICJ) case-law contains references to rulings of the Eur. Ct. H.R.,[13] the Inter-American Court of Human Rights (I-A. Ct. H.R.),[14] the H.R. Committee,[15] the International Criminal Tribunal for Former Yugoslavia (ICTY),[16] and the International Criminal Tribunal for Rwanda (ICTR).[17] The Eur. Ct. H.R. in turn

[10] A good example thereof can be found in the Belgian Constitution of 1831, which was partly inspired from elements of Dutch, French and British constitutional law (L. le Hardÿ de Beaulieu, "Le Royaume de Belgique. Commentaire introductif", *Douze Constitutions pour une Europe*, Brussels, Kluwer, 1994, p. B-3). Even more illustrative is the case of the Luxembourg Constitution of 1868, which has fully integrated Title II of the 1848 Constitution ("Des Luxembourgeois et de leurs Droits"), which itself is directly inspired from Titre II of the 1831 Belgian Constitution (P.-H. Meyers, "Les droits fondamentaux dans la Constitution luxembourgeoise", *La refonte de la Constitution luxembourgeoise en débat*, Brussels, Larcier, 2010, p. 61).

[11] See, e.g., regarding Romania, R. Weber, "Romania", in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe. The European Convention on Human Rights and its member States (1950-2000)*, Oxford, Oxford University Press, 2001, p. 711.

[12] See, *ex multissimis*, C. Baudenbacher, "Judicial Globalization : New Development or Old Wine in New Bottles ? ", *Texas Int'l. L. J.*, vol. 38, 2003, p. 505 ; M. Delmas-Marty, "Marketing juridique ou pluralisme ordonné", *Le Débat*, n° 115, 2001, p. 57 ; A. Garapon, J. Allard, *Les juges dans la mondialisation*, Paris, Seuil, 2005 ; F. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems : The European Court of Justice", *Texas Int'l. L. J.*, vol. 38, 2003, p. 547 ; K. Kersch, "The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law", *W. U. G. S. L. R.*, 2005, vol. 4, p. 345 ; C. Koch, "Envisioning a Global Legal Culture", *Mich. J. Int'l. L.*, vol. 25, 2003, p. 1 ; C. Koch, "Judicial Dialogue For Legal Multiculturalism", *Mich. J. Int'l. L.*, vol. 25, 2004, p. 879 ; C. McCrudden, "A Common Law of Human Rights ? : Transnational Judicial Conversations on Constitutional Rights", *O. J. L. S.*, 2000, vol. 20, no. 4, p. 499 ; A.-M. Slaughter, "Court to Court", *A. J. I. L.*, 1998, vol. 92, p. 708 ; A.-M. Slaughter, "A Global Community of Courts", *Harv. Int'l. L. J.*, vol. 44, 2003, p. 191.

[13] See, e.g., ICJ, *Ahmadou Sado Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 19 June 2012, paragraphs 13, 24, 33 and 40 ; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February 2012, §§ 72, 73, 76, 78, 90 and 96.

[14] See, e.g., ICJ, *Ahmadou Sado Diallo*, n. 12 above, §§ 13, 18, 24, 33, and 40.

[15] See, ICJ, *Ahmadou Sado Diallo*, n. 12 above, paragraph 24 ; ICJ, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, § 39 ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, § 109.

[16] See, ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, notably §§ 190, 195 and 198.

[17] See, ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, n. 15 above, §§ 198 and 300.

refers to the case-law of the ECJ,[18] of the H.R. Committee,[19] of the I-A. Ct. H.R.,[20] of the ICJ,[21], of the ICTY,[22] as well as to the case-law of third-party supreme courts such as the U.S.,[23] Canada,[24] or South Africa.[25] The ECJ relies upon rulings of the Eur. Ct. H.R.[26] and of the ICJ,[27] but (unlike some of its Advocates General) has so far failed to refer to the case-law of the H.R. Committee, the I-A. Ct. H.R. or the International Criminal Tribunals. As for the Belgian constitutional court, its case-law is largely based on that of the Eur. Ct. H.R.[28] although it also occasionally draws on the decisional practice of the ECJ.[29] The Belgian constitutional judges have however never referred explicitly to the case-law of the H.R. Committee,[30] let alone of the I-A. Ct. H.R.

These cross-referencing practices are commendable in many respects. They increase the breadth and density of the network and contribute to its smooth functioning. It is therefore difficult not to applaud the ICJ when it declares that "*[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the [H.R. Committee], it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question*".[31]

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[18] For recent examples, see Eur. Ct. H.R. (GC), *Nada v. Switzerland*, 12 September 2012, appl. No. 10593/08, §§ 175-176 and 212; Eur. Ct. H.R. (GC), *Konstantin Markin v. Russia*, 22 March 2012, appl. No. 30078/06, §§ 65-70.

[19] For a recent example, see, Eur. Ct. H.R. (4th sect.), *Othman (Abu Qatada) v. The United Kingdom*, 17 January 2012, appl. No. 8139/09 (final since 9 May 2012), §§ 155-156, 158, 191 and 198.

[20] For a recent example, see Eur. Ct. H.R. (1st sect.), *Margus v. Croatia*, 13 November 2012, appl. No. 4455/10, § 37 (this judgment has been referred to the Grand Chamber).

[21] For a recent example, see Eur. Ct. H.R. (GC), *Catan and Others v. Republic of Moldova and Russia*, 19 October 2012, appl. Nos. 43370/04, 8252/05, 18454/06, § 75; Eur. Ct. H.R. (GC), *Al-Jedda v. The United Kingdom*, 7 July 2011, appl. No. 27021/08, §§ 48-50, 76 and 107.

[22] For a recent example, see Eur. Ct. H.R. (1st sect.), *Rantzev v. Cyprus and Russia*, 7 January 2010, appl. No. 25965/04 (final since 10 May 2012), §§ 142-145 and 280.

[23] For a recent example, see Eur. Ct. H.R. (4th sect.), *Hristozov and others v. Bulgaria*, 13 November 2012, appl. Nos. 47039/11 and 358/12 (final since 29 April 2013), §§ 59-64.

[24] For a recent example, see Eur. Ct. H.R. (4th sect.), *Hristozov and others v. Bulgaria*, n. 22 above, § 65.

[25] See, e.g., Eur. Ct. H.R. (GC), *Hirst v. the United Kingdom (No. 2)*, 6 October 2005, appl. No. 74025/01, §§ 38-39.

[26] For a recent example, see C-249/11, *Byankov*, Judgment of 4 October 2012, not yet reported, § 47; C-489/10, *Lukazs Marcin Bonda*, Judgment of 5 June 2012, not yet reported, §§ 36-44.

[27] See ECJ, C-366/10, *AITA*, Judgment of 21 December 2011, not yet reported, § 104.

[28] For a recent example, see C.C., Judgment no. 139/2012 of 14 November 2012, § B.13.

[29] For a recent example, see C.C., Judgment no. 65/2012 of 10 May 2012, § B.8.2.

[30] This silence was pinpointed with regret by members of the Constitutional Court itself: see, P. Martens and B. Renauld, "L'interprétation et la qualification de la norme de contrôle et de la norme contrôlée", Rapport du Groupe de travail n° 1, in A. Arts, I. Verougstraete, R. Andersen, G. Suetens-Bourgeois, M.F. Rigaux, R. Ryckeboer et A. De Wolf (eds), *Les rapports entre la Cour d'arbitrage, le Pouvoir judiciaire et le Conseil d'État*, Bruges, La Charte, 2005, p. 48.

[31] ICJ, *Ahmadou Sado Diallo*, n. 12 above, §§ 66-67.

Judicial borrowing may, however, extend beyond such uncontroversial good practices. In some instances, the borrower relies on outdated[32] or selective[33] case-law or takes it out of its context.[34] In other cases, courts refer to each other in support of *factual* findings. While such references are sometimes justified considering the expertise of the referred court[35] or body,[36] this is not always the case. In its *N.S.* judgment, for instance, the ECJ blindly relied on the findings of the Eur. Ct. H.R. in *M.S.S. v. Belgium and Greece* in order to conclude that "*there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers*"[37] and to claim that Member States are able to assess the existence of such deficiency when considering the transfer of an asylum seeker to another Member State.

But courts do more than cross-refer to each other's work. They sometimes directly use legal *texts* which fall outside their jurisdiction. Some of these texts are entrusted to an official interpreter and are usually relied upon in conformity with that interpreter's case-law.[38] However, it may happen that a court relies on a text that has not yet been applied by its official interpreter. Take for example the early references made by the Eur. Ct. H.R.[39] or the Belgian Constitutional Court[40]

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[32] See, Opinion of AG Geelhoed in case C-491/01, *B.A.T. (Investments) Ltd et al. v. Secretary of State for Health*, [2002] ECR I-11453, paragraph 108 invoking a ruling of the U.S. Supreme Court upholding an interpretation of the Commerce Clause that had been reversed in the meantime by that same Supreme Court.

[33] Think about the celebrated ruling of the U.S. Supreme Court in *Lawrence v. Texas* (539 U.S. 558 (2003)) regarding the rights of homosexuals, which referred to the case-law of the Eur. Ct. H.R. instead of seeking guidance from the interpretation of the ICCPR (binding on the U.S.) given by the H.R. Committee in *Toonen v. Australia*, communication No. 488/1992, 4 April 1994 (CCPR/C/50/D/488/1992).

[34] See, Opinion of AG Geelhoed in case C-301/04 P, *Commission v. Carbon* [2006] ECR I-8055, § 63 on the fact that the right or privilege against self-incrimination does not benefit corporations under the Fifth Amendent of the U.S. Constitution, without explaining to what extent this finding can be of any relevance for the interpretation of Article 6 ECHR. See also the dissenting opinion of Judge Keller in *Fäber v. Hungary* (judgment of 24 July 2012), regarding the expediency of the Court's reference to the findings of the H.R. Committee in *Kivenmaa v. Finland*, communication No. 412/1990, 9 June 1994 (CCPR/C/50/D/412/1990). At point 17 of her dissenting opinion, Judge Keller declares : "*While I am generally in favour of citing international law materials, the Court should do this only where it is helpful for the reasoning in the case at hand. Needless to say, it is dangerous to quote precedents from another jurisdiction without mentioning that those decisions or judgments are based on a different human rights concept (e.g. free speech according to the First Amendment to the US Constitution, rather than freedom of expression in Article 10 of the Convention) and handed down by a body having different functions and competences from those of our Court (e.g. a Federal Supreme Court, as opposed to an international court). The bare citation of such judgments outside the comparative context is overly simplified and therefore misleading*".

[35] Think about the references made by the ICJ to the ICTY's findings regarding the perpetration of core crimes during the civil war in former Yugoslavia in the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, n. 15 above : "*the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight*" (§ 223).

[36] See, e.g., the references of the I-A. Ct. H.R. to the findings of the United Nations Committee on the Elimination of Discrimination against Women regarding violations of women rights in Mexico in *Case of Gonzalez et al. ("cotton field") v. Mexico*, Judgment of 16 November 2009, e.g. §§ 119 and 127.

[37] C-411/10 and C-493/10, *N.S.*, Judgment of 21 December 2011, not yet reported, § 89.

[38] Beyond the well-known examples of cross-references between the Eur. Ct. H.R. and the ECJ, see, e.g., the references, by the Eur. Ct. H.R. and the I-A. Ct. H.R., to the positions adopted by the United Nations Committee on the Elimination of Discrimination against Women which was set up by the Convention on the Elimination of All Forms of Discrimination against Women : Eur. Ct. H.R. (3rd sect.), *Opuz v. Turkey*, 9 June 2009, appl. No. 33401/02, notably §§ 74-77 ; I-A. Ct. H.R., *Case of Gonzalez et al. ("cotton field") v. Mexico*, n. 35 above, notably §§ 254-255 and 394-395.

[39] See, Eur. Ct. H.R. (GC), *Goodwin v. The United Kingdom*, 11 July 2002, appl. No. 28957/95, § 100 ; *I* v. *The United Kingdom* (GC), 11 July 2002, appl. No. 25680/94, § 80 ; *Sorensen and Rasmussen v. Denmark* (GC), 11 January 2006, appl. Nos. 52562/99 and 52620/99, § 74.

[40] See, e.g., Judgment no. 101/2008 dated 10 July 2008.

to the EU Charter of Fundamental Rights, at a time when the ECJ had not yet dared to apply it.

Some other of these texts are deprived of any official "guardian" and are therefore subject to autonomous interpretations from different courts. A good illustration thereof is provided by Article 36 of the Convention on Consular Relations, which enshrines the right to information, notification and communication in the field of consular assistance, and which was given different meanings by the I-A. Ct. H.R.[41] and by the ICJ[42] on the one hand, and by the U.S. Supreme Court on the other hand.[43] Finally, some rights or principles cut across various texts so that their scope and meaning vary according to the selection operated by courts. Suffice it to mention the notion of genocide, which the Eur. Ct. H.R. has interpreted broadly based on a selective combination of texts and references[44] and in complete disregard of the case-law of the ICTY[45] and of the ICJ.[46]

These last examples show that openness may bring the network on the verge of chaos. This risk becomes even more glaring if one looks at the way human rights courts use *non-legal* instruments to substantiate their findings. Particularly telling is the case-law of the Eur. Ct. H.R., which is replete with references to so-called *soft law* instruments.[47] In *Grosaru v. Romania*, for instance, the Court relied upon the Code of Good Practice in Electoral Matters of the Venice Commission in order to decide that Romania infringed Article 3 of Protocol No. 1 by failing to provide for a *judicial* (as opposed to political) review of the application of the electoral rules.[48] Similarly, in *Mosley v. United Kingdom*,[49] the Court noted that "*the current system in the United Kingdom fully reflects the resolutions of the Parliamentary Assembly of the Council of Europe*" (para. 125) in support of the conclusion that this system did not upset the balance between the freedom of the press and the right to privacy.

One of the most blatant examples of soft law-nurtured reasoning is to be found in the *Bayatyan v. Armenia* judgment delivered on 7 July 2011 by the Grand Chamber. This judgment overrules a chamber judgment which concluded, based

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[41] I-A. Ct. H.R., *Advisory Opinion OC-16/99 –The right to information on consular assistance in the framework of the guarantees of the due process of law*, 1 October 1999.
[42] ICJ, *LaGrand Case (Germany v. United States)*, 27 June 2001; ICJ, *Avena and Other Mexican Nationals (Mexico v. United States)*, 23 December 2003.
[43] See, M. Kadish, "Article 36 of the Vienna Convention: The International Court of Justice in *Mexico v. United States* speaks emphatically to the Supreme Court of the United Stated about the fundamental nature of the right to consul", *Geo. J. Int'l L.*, vol. 36, 2004-2005, p. 1.
[44] Eur. Ct. H.R. (5th sect.), *Jorgic v. Germany*, 12 July 2007, appl. No. 74613/01 (final since 12 October 2007), notably § 113: "*In view of the foregoing, the Court concludes that, while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts. In these circumstances, the Court finds that the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he committed in 1992*".
[45] ICTY, Appeals Chamber, *Prosecutor v. Krstic*, 19 April 2004 (IT-98-33A).
[46] ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, n. 15 above.
[47] See, in that respect, F. Tulkens, S. van Drooghenbroeck, F. Krenc, "Le *soft law* et la Cour européenne des Droits de l'Homme. Questions de légitimité et de méthode", in I. Hachez *e.a.* (eds), *Les sources du droit revisitées*, vol. 1, Limal, Anthemis, pp. 387-393. The examples mentioned below are taken from that contribution.
[48] Eur. Ct. H.R. (3rd sect.), *Grosaru v. Romania*, Judgment of 2 March 2010, appl. No. 78039/01, § 56.
[49] Eur. Ct. H.R. (4th sect.), *Mosley v. The United Kingdom*, appl. No. 48009/08, Judgment of 10 May 2011.

on an *a contrario* reading of Article 4(3)b) ECHR,[50] that Article 9 ECHR does not recognise a right to conscientious objection against the military service obligation. The Grand Chamber judgment departed from this textual interpretation and held that Article 9 contains such a right. In support of this finding, the Court referred not only to a growing consensus on the existence of such a right among the States party to the Convention, but also to "*the equally important development concerning recognition of [that right] (...) in international fora*", as evidenced by the H.R. Committee's General Comment No. 22 and a number of documents emanating from the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.[51]

Obviously, the problem with such judgments does not lie with their outcome, but with their reasoning. Such examples of extreme openness are likely to undermine legal certainty. The fluidity of the network turns into a quasi-gaseous state, in which it becomes increasingly difficult to make out the existence of *a* boundary – whether gradual and porous – between the law's empire and the provinces of politics and morals. This impression is further enhanced by the fact that, on other issues, the Eur. Ct. H.R. develops an autonomous case-law which takes no heed of conflicting approaches taken by other human rights bodies.[52]

When they practice cross-references and intermingling across the board and in an indiscriminate manner, the dots of the human rights network also run the risk of being conflated and merged with each other. This conflation process results in an impoverishment of the network. Human rights are imbued with cultural values and rooted in constitutional traditions which far exceed the black-letter law of a unified international bill of rights. Stripping off these specificities undoubtedly undermines the functioning of the network and decreases the level of protection of human rights.

An illustration[53] of this danger can be found in the case law of the Belgian supreme courts regarding the provisions of the Constitution which give the legislature the exclusive power to regulate – and potentially restrict – the enjoyment of a handful of constitutional rights (freedom of expression, freedom of religion, right to privacy,...). In some cases,[54] the *Cour de cassation* and the *Conseil d'État* seem to overlook this more protective constitutional requirement and to satisfy themselves with a mere duplication of the legality requirement contained in Article 8

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[50] The relevant parts of Article 4 of the Convention provide: "*2. No one shall be required to perform forced or compulsory labour. 3. For the purpose of this Article the term "forced or compulsory labour" shall not include: ... (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service.*"

[51] See mainly §§ 105-107.

[52] For instance, the Eur. Ct. H.R.'s case-law on the exhibition of religious signs at school is completely oblivious of the more restrictive position adopted by the H.R. Committee on this issue: See, F. Tulkens, S. van Drooghenbroeck, F. Krenc, n. 46 above, p. 409. See also below.

[53] This example is taken from H. Dumont, "La Constitution: la source des sources tantôt renforcée, tantôt débordée", in I. Hachez *e.a.* (eds), *Les sources du droit revisitées*, vol. 4, Limal, Anthemis, p. 156.

[54] See, however, Cass., Judgment of 21 April 1998, *Pas.*, 1998, p. 204: "*Attendu que, dans le système juridique belge, la loi visée par l'article 8, paragraphe 2, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales est une loi au sens formel, qui est accessible et précise*".

to 11 of the ECHR. In other words, according to these courts, the fundamental rights enshrined in the Constitution can be regulated by any "*norm of internal law, whether written or not, as interpreted by the case-law, inasmuch as this norm is expressed in an accurate fashion and is available to the persons concerned*".[55]

It is submitted that this case-law mixes up the "democratic" requirements imposed by the Belgian Constitution with the – considerably more lenient – legal certainty imperative rooted in the ECHR. This conflation is all the more regrettable considering that the "subsidiarity clause" contained in Article 53 ECHR itself allows for the application of stricter national standards, particularly as it would not have taken much imagination for the above-mentioned courts to preserve the distinctively generous breadth of the constitutional requirement.

The decisional practice of the Belgian courts gives us yet another example of such conflation process. It appears from the published case-law that most Belgian judges, obviously keen to show vanguardism and europhilia, invoke and apply the provisions of the EU Charter of Fundamental Rights across the board, including in fields completely alien to EU law.[56] Oblivious to the limits imposed by Article 51 of the Charter on the field of application of the EU *bill of rights* (only applicable to Member States when they act within the scope of EU law), domestic judges tend to consider it as some sort of a new European Convention on Human Rights intended to bind the public authorities in all their actions.

In both instances, it can be assumed that the origin of these conflations can be found in the increasing exposure of domestic judges to the ECHR (in the first case) and EU law (in the second case). Constantly called upon to enforce provisions directly coming from the European legal order(s), national courts tend to develop a "European mindset" which, if not carefully exercised, can turn into a quasi-pavlovian reflex.

B. Closure

The web of human rights is not uniformly characterised by its openness toward its environment. It is equally marked by differentiation attempts, which tend to preserve the integrity of the network or the specificity of some of its nodes.

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[55] Cass., Judgment of 2 June 2006, *A&M*, 2006, p. 355, concl. av. gén. De Koster. Free translation of the following sentence: "*norme de droit interne, écrite ou non, telle qu'elle est interprétée par la jurisprudence, pour autant que cette norme soit énoncée de façon précise et soit accessible aux personnes concernées*"; C.E., nº 210000, 21 December 2010: "*À cet égard, il y a lieu de préciser que le terme 'loi' utilisé par l'article 9, paragraphe 2, de la Convention est un concept autonome qui ne renvoie donc pas au droit interne. Selon la jurisprudence de la Cour européenne des droits de l'homme, ce terme doit être compris dans son acception matérielle et non formelle, et inclut des textes de rang infra-législatif et le droit non écrit, y compris la jurisprudence, non seulement dans les pays de Common Law (arrêt Sunday Times du 26 avril 1979, paragraphe 47) mais aussi les pays continentaux (arrêt Kruslin du 24 avril 1990)*".

[56] On this issue, see A. Bailleux, E. Bribosia, "La Charte des droits fondamentaux de l'Union européenne", in S. van Drooghenbroeck and P. Wautelet (eds), *Droits fondamentaux en mouvement – Questions choisies d'actualité*, Liège, Anthemis, 2012, pp. 120-125. See, however, for a more rigorous analysis of the Charter's field of application, Cass., Judgment of 3 October 2012, P.12.0709.F, including the opinion of AG D. Vandermeersch, as well as C.C., no. 145/2012, Judgment of 6 December 2012, pt. B.10.3

These acts of resistance against the unifying dynamic and the expansion logic of the network can be more or less soft and, it is submitted, more or less beneficial to the development of the human rights web.

The "soft" category includes all types of actions which, while not closing the door to the spontaneous development of the human rights network, seek to control and steer it, either as a whole or by preserving the specificity of its individual dots.

An example of the first scenario can be found in the status given to the Explanations to the EU Charter of Fundamental Rights.[57] As is well known, these Explanations were drafted by the *praesidium* (i.e., president and vice-presidents) of the Convention which prepared the Charter. They were subsequently complemented and updated by the *praesidium* of the Convention which drafted the Treaty establishing a Constitution for Europe. These Explanations conceive themselves as "*a valuable tool of interpretation intended to clarify the provisions of the Charter*". In short, they are supposed to reflect the will of the Charter's drafters and, thereby, shed light on potential ambiguities and obscurities arising from the wording of the text. This document is therefore much more than a piece of *travaux préparatoires* within the meaning of Article 32 of the Vienna Convention on the law of treaties which would be available, like any other interpretive materials, to the ECJ and the national courts. It is *designed* to steer the interpretation of the Charter and could therefore be regarded as an "*agreement between the parties regarding the interpretation of the [Charter] or the application of its provisions*" within the meaning of Article 31(3) of the aforementioned Vienna Convention. In that sense, it is *imposed* on any judge called upon to apply the Charter. The imperative character of the Explanations is explicitly affirmed by Article 6(1) TEU, which provides that the Charter "*shall be* [...] *interpreted with due regard to the explanations*", and is further confirmed by Article 52(7) of the Charter.[58] Unsurprisingly, the ECJ's case-law on the Charter is replete with references to the Explanations and the Court has not so far explicitly deviated from their content. Undoubtedly, the Explanations are intended to channel and curb the interpretation of the Charter. Their central status makes it very difficult for the ECJ or the national courts to open their case-law to foreign influences that would contradict the wording of the Explanations.

The French *Conseil constitutionnel* shows us that this chilling effect can be obtained through more subtle tactics. On 19 November 2004, the Constitutional Council confirmed the constitutionality of the draft Treaty establishing a Constitution for Europe.[59] In its ruling, the Constitutional Council held *inter alia* that (1) the freedom of religion enshrined in Article 10 of the Charter does not contravene the

[57] *O.J.* C 303, 14 december 2007, p. 17.
[58] This provision reads: "*The explanations drawn up as a way of provising guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States*".
[59] Decision no. 2004-505 DC, *Traité établissant une Constitution pour l'Europe*. On this decision, see a.o. L. Azoulai, F. Ronkes Agerbeek, "*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of

principle of secularism (*laïcité*) ; (2) the right to a fair trial contained in Article 47 of the Charter is compatible with the in camera proceedings (*huis-clos*) organised under French law ; and (3) the Charter does not contain any minority rights which would contravene the centralised structure of the French Republic. In support of these findings, the Constitutional Council considered first that, pursuant to Article 52(3) and (4) of the Charter and to the Explanations, the Charter had to be interpreted in accordance with the ECHR and with the Member States' constitutional traditions. The Council went on to note that the Eur. Ct. H.R. recognises the principle of secularism and admits exceptions to the principle of publicity of hearings. It held further that no minority rights could be inferred from the constitutional traditions of the Member States. Based on the foregoing considerations, the Council concluded that the Charter could not be interpreted in a way that would contravene the aforementioned key pillars of the French constitutional order. This ruling is interesting insofar as it uses the network against itself. By strictly applying the conformity clause contained in Article 52 of the Charter, the Council precludes the development of any autonomous or progressive interpretation of the Charter. It turns it into a simple human rights registry, designed to merely record and reflect advances made by other nodes such as the Eur. Ct. H.R. and the constitutional courts of Europe.

The soft category of "closing moves" also encompasses actions and positions aimed at stressing and preserving the specificity of a particular node of the network rather than chilling the overall development of the human rights web. The case-law of international courts provides us with numerous examples of such an attitude.

In *Loizidou v. Turkey*,[60] the Eur. Ct. H.R. considered that the States party to the ECHR could not make their recognition of the Eur. Ct. H.R.'s jurisdiction subject to restrictions *ratione loci* and *ratione materiae*. The Court rejected the analogy with Article 36 of the ICJ Statute, which allows for such restrictions, on the ground that "*the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on inter alia to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention*".[61]

In the same vein, the ECJ considered that it should depart from the case-law of the Eur. Ct. H.R. in a case regarding the compatibility with the free move-

19 November 2004, on the Treaty establishing a Constitution for Europe", *C.M.L.R.*, 2005, vol. 42, p. 871 ; A. Levade, "Le Conseil constitutionnel aux prises avec la Constitution européenne", *R.D.P.*, 2005, p. 19.

[60] Eur. Ct. H.R. (GC), *Loizidou v. Turkey*, Judgment of 23 March 1995 (preliminary objections), appl. No. 15318/89.

[61] § 84.

ment principle of a Bulgarian legislation establishing a prohibition on leaving the national territory because of the non-payment of a tax liability. The Court held that "*admittedly, the possibility cannot be ruled out as a matter of principle, as has moreover been recognised by the European Court of Human Rights (see Riener v. Bulgaria, paragraphs 114 to 117), that non-recovery of tax liabilities may fall within the scope of the requirements of public policy. That can however, in the light of the rules of European Union law relating to the freedom of movement of Union citizens, be the case only in circumstances where there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society related, for example, to the amount of the sums at stake or to what is required to combat tax fraud*".[62] The ECJ thereby confirmed its Advocate General's view that "*the legal system of the European Union tolerates interference with the freedom of movement of Union citizens in much more limited cases and offers a higher level of protection than that offered by the ECHR system*".[63]

The nodes of the network may also adopt *hard* positions toward the development of the network.

Sometimes, they simply *ignore* the messages coming from the other dots of the network. In its Views on communication No. 1852/2008 of 4 December 2012, for instance, the H.R. Committee considered that France violated the ICCPR for having expelled a pupil from a public school for wearing a *keski* (a sort of mini-turban worn by Sikh children). In reaching that decision, the H.R. Committee did not refer to the conflicting case-law[64] of the Eur. Ct. H.R. invoked by France.[65] Interestingly, that case-law had itself been developed in complete disregard of earlier diverging positions of the H.R. Committee.[66] Similarly, the United States District Court for the District of Columbia paid no heed to the ECJ's judgment in the *Kadi* case, let alone of the H.R. Committee's Views in *Sayadi*,[67] when deciding that the freezing in the U.S. of Mr Kadi's assets did not breach his constitutional rights.[68]

In other instances, human rights actors go as far as to *cut off* any potential links with other foci of the network. Such hostile moves can stem from both States or courts alike.

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[62] C-434/10, *Petar Aladzhof*, [2011] ECR I-11659, § 37.
[63] Opinion delivered by AG Mengozzi on 6 September 2011, § 30.
[64] Eur. Ct. H.R. (5th sect.), dec. (inadm.), *Ranjit Singh v. France*, 30 June 2009, appl. No. 27561/08; Eur. Ct. H.R. (5th sect.), dec. (inadm.), *Jasvir Singh v. France,* 30 June 2009, appl. No. 25463/08.
[65] One year earlier, the H.R. Committee had already knowingly contradicted the Eur. Ct. H.R.'s case-law regardingthe right to wear religious signs on ID documents. See, on this issue, E. Brems, E. Bribosia, I. Rorive and S. van Drooghenbroeck, "Le port de signes religieux dans l'espace public: vérité à Strasbourg, erreur à Genève? ", *J.T.,* 2012, p. 602.
[66] H.R. Committee, *Concl. Obs. – France*, adopted on 31 July 2008 (CCPR/C/FRA/CO/4), § 23.
[67] H.R. Committee, *Nabid Sayadi and Patricia Vinck v. Belgium*, communication No. 1472/2006, 29 December 2008 (CCPR/C/94/D/1472/2006).
[68] *Yassin Abdullah Kadi v. Henry M. Paulson*, Judgment of 19 March 2012 (Civil Action No. 09-0108).

As regards States, suffice it to mention Protocol No. 30 to the Lisbon Treaty, according to which "*the Charter [of fundamental rights of the European Union] does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms"*. Article 1(2) of that Protocol provides further that "*[i]n particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law*".

This Protocol must undoubtedly be regarded as an attempt to shelter the UK and Polish legal orders from potential interferences caused by the EU's new Bill of Rights. Admittedly, the ECJ has considered that this Protocol "*does not call into question the applicability of the Charter in the United Kingdom or in Poland*" and "*does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions*".[69]

However, it is hardly disputable that this Protocol is intended to prevent the ECJ and the national courts from reading more into the Charter than what is already recognised in other sources of EU law or in the domestic legal orders. The goal that this Protocol seeks to achieve is indeed one of severance and crystallisation : the Charter can be used as a looking-glass, mirroring the level of human rights protection achieved at national level, but it cannot serve as a connection, as a spoke enabling the European "hub" to fertilise the domestic legal system.

Judges also may be inclined to cut off the connections that at least potentially link them to other points of the human rights network. A well-known example of this trend is the "judicial parochialism" championed by Justice Scalia and Justice Thomas in the U.S. Supreme Court, fending off any practice of judicial borrowing on the ground that it would "*impose foreign moods, fads, or fashions on Americans*".[70]

Perhaps more surprisingly, international courts also sometimes try to untie a knot of the human rights web. In the *Genocide* case,[71] for instance, the ICJ applied the "effective control" test developed in its *Nicaragua* judgment in order to conclude that the Former Republic of Yugoslavia was not responsible for the acts committed by General Mladić and other officers, authors of the Srebrenica genocide. In its judgment, the Court rejected the narrower "overall control" test adopted by the ICTY in *Tadic* well after the *Nicaragua* judgment. In order to justify this lack of regard *vis-à-vis* the ICTY's case-law, the ICJ stated : "*the ICTY was not called upon in the Tadic´ case, nor is it in general called upon, to rule on questions of*

[69] C-411/10 and C-493/10 *N.S.*, Judgment of 21 December 2011, not yet reported, §§ 119-120.
[70] Thomas J. (concurring), *Foster v. Florida* 537 U.S. 990 (2002) ; Scalia J. (dissenting), *Lawrence v. Texas* 539 U.S. 558.
[71] N. 15 above.

State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it".[72] It appears from this quote that the ICJ sticks to a very pyramidal vision of the international legal system, warning the ICTY (and other specialised Tribunals) "*that it should* (…) *not suggest solutions for* (…) *general international law problems*".[73]

III. Polycentricity

By definition, networks are not organised around a single centre. They rather consist of a multiplicity of nodes, none of which can claim centrality. Obviously, these nodes are not equally active or visible, but an essential feature of the network is that they are not based on a single, stable and pre-established hierarchy. The inner organisation of the network is to a large extent spontaneous, contingent and ultimately dependent upon the strategies developed by the nodes which belong to it.

Therefore, this polycentric feature is once again the result of a never-ending tension between conflicting trends, with some actors striving to move to the centre and others attempting to flee to the periphery.

A. Centralisation

Courts and legislatures can develop different kinds of strategies in order to creep toward the centre of the human rights network. The goal here is to increase one's influence in the network by becoming a forced-stop junction, a node through which all issues must transit.

The preliminary reference mechanism is, in itself, a powerful centralising tool. It gives a few courts the power to control the development of the case-law in a specific field. This preliminary guidance system has obviously made the Belgian constitutional court the central node of the Belgian human rights network.

[72] § 403.
[73] A. Cassese, "The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *E.J.I.L.*, 2007, vol. 18, p. 649, p. 651.

But the same can be said about Article 267 of the TFEU, which empowers national courts – and indeed obliges courts of last instance and courts harbouring doubts as to the validity of EU secondary legislation – to seek guidance from the ECJ when the interpretation or validity of EU law is at stake. This central role of the ECJ is increasingly relevant to our topic as the Court's jurisdiction in the field of human rights has dramatically expanded in the last decades. Not only does the Court have full jurisdiction to review the acts of all EU bodies with respect to human rights, but it is also empowered to ascertain the compatibility of national measures falling within the scope (or within the "field of application") of EU law with fundamental rights.[74]

The contours of this "scope" are increasingly uncertain and seem to vary from one case to another. Obviously, it is no longer disputed that national measures executing (i.e., without any margin of discretion)[75] or implementing (i.e., with some latitude)[76] EU law do fall within its scope for the purposes of human rights review. The same conclusion is commonly accepted for actions (or inactions) of the Member States which entail a *prima facie* breach of the economic fundamental freedoms (i.e., which hinder or render less attractive the exercise of an economic free movement right).[77]

But the recent case-law seems to suggest that the human rights jurisdiction of the Court could extend well beyond these three classical scenarios[78] and, under specific circumstances, even cover "purely internal situations"[79] and require the inapplicability of a national measure in a dispute between two private parties.[80] As a matter of fact, even when it acknowledges that a measure falls outside the ambit of EU law, the Court does not hesitate to remind the referring court of its duty to respect the ECHR *as a matter of international or constitutional law*.[81] On the other hand, the Court has refused to go as far as to consider that EU law – namely the reference to the ECHR contained in Article 6(3) TEU – requires "*the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the convention*".[82]

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[74] We will gloss over the debate around the restrictive wording of Article 51(1) of the EU Charter of Fundamental Rights, according to which Member States are only bound by the Charter when they *implement* EU law. It seems now widely acknowledged (including by the Court of Justice and its Advocates Generals) that this expression must not be understood as restricting the jurisdiction of the Court of Justice. On this issue, see A. Bailleux, E. Bribosia, n. 55 above, pp. 108-109.

[75] See, e.g., C-5/88, *Wachauf* [1989] ECR 2609.

[76] See, e.g., C-506/04, *Wilson* [2006] ECR I-8613.

[77] See, e.g., C-260/89, *ERT* [1991] ECR I-2925.

[78] On this issue, see A. Bailleux, E. Bribosia, n. 55 above, pp. 108-116.

[79] See, C-256/11, *Murat Dereci* [2011] ECR I-11315, paragraph 72 (first sentence); Opinion of AG Trstenjak delivered on 15 May 2012 in C-40/11, *Iida*, not yet reported, §§ 70-74.

[80] See, C-144/04, *Mangold* [2005] ECR I-9981; C-555/07, *Kücükdeveci* [2010] ECR I-365; *contra*: C-282/10, *Dominguez*, Judgment of 24 January 2012, not yet reported.

[81] See, *Murat Dereci*, n. 78 above, §§ 72 (second sentence) and 73; C-109/01, *Akrich*, [2003] ECR I-9607, § 58.

[82] C-571/10, *Servet Kamberaj*, Judgment of 24 April 2012, not yet reported, § 63.

The self-aggrandisement strategies developed by various actors of the human rights network are inevitably set to collide with each other, triggering new attempts to leapfrog a rival in the race toward the central position on the web. A prime example thereof can be found in the so-called "priority question on constitutionality" mechanism which was introduced in 2009 in both the French and Belgian legal orders. In a nutshell, the effect of this mechanism was to give the constitutional courts of these countries priority over the ECJ to review the compatibility of national measures with fundamental rights. In other words, according to this system, when confronted with a national measure possibly at odds with fundamental rights (and falling within the scope of EU law), national courts were first to seek – and obtain – preliminary guidance from their own constitutional court before being allowed to make a preliminary reference to the ECJ. The goal was to deprive national courts of the possibility to bypass their constitutional court and directly submit to the Luxembourg judges a problem that could have been solved at national level.

Unsurprisingly, the ECJ was rapidly called upon to rule on the compatibility of such mechanisms with EU law, and more specifically with the principle of primacy of EU law.[83] As could be expected, the ECJ took a harsh stance against such system. The Court did not bluntly condemn the priority question on constitutionality but held that such mechanisms were only compatible with EU law provided that the national courts "*remain free : – to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary, – to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law*".[84] It is hardly disputable that, by imposing such conditions, the ECJ has strongly undermined the effectiveness of the priority question on constitutionality mechanism.

It is remarkable – and slightly ironic – that the president of the Court of Justice requested the introduction of a similar mechanism for the benefit of its own institution in the course of the negotiations on the accession of the EU to the ECHR.[85] The negotiators heard that request and inserted the so-called "prior involvement" mechanism in the draft accession Treaty. That mechanism would apply to cases in which the EU would appear as a co-defendant before the Eur. Ct. H.R. regarding a matter that would not yet have been submitted to the ECJ. The prior involvement system is designed "*to ensure that the [ECJ] has the opportunity to review the*

[83] Regarding the French system, see C-188 and C-189/10, *Melki* [2010] ECR I-5667. Regarding the Belgian system, see C-457/09, *Chartry* [2011] ECR I-819 ; C-314/10, *Pagnoul*, [2011] ECR I-136 ; C-538/10, *Lebrun*, 2011] ECR I-137.
[84] See, *Chartry*, n. 82 above, § 57.
[85] See the Joint communication from Presidents Costa and Skouris dated 27 January 2011 : "*In order that the principle of subsidiarity may be respected (…), a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review*."

compatibility with the Convention rights at issue of the provision of EU law which has triggered the participation of the EU as a co-respondent, by ruling on, as the case may be, the validity of a provision of secondary law or the interpretation of a provision of primary law. Such review should take place before the [Eur. Ct. H.R.] decides on the merits of the application".[86]

Finally, it should be noted that these self-aggrandisement efforts do not necessarily take the form of institutional amendments. Such attempts can be unearthed in the case-law itself. Think about the reluctance of the German Constitutional Court to start a dialogue with the ECJ, preferring to strike down a national law for violation of the German Constitution instead of questioning the ECJ on the validity, against EU human rights standards, of the directive that the German legislation sought to transpose.[87] The centralising inclination of this court is further evidenced by its repeated claims regarding the fact that it enjoys the *kompetenz-kompetenz* and that it is the ultimate guardian of fundamental rights in Germany.[88]

It bears noting that Germany is not alone in this struggle against the centrality of Luxembourg. Similar instances of defiance can be found *inter alia* in the case-law of the House of Lords in the field of human rights[89] as well as in the decisional practice of the Italian Council of State,[90] which refused to make a preliminary reference to the ECJ in a case regarding a conflict between the right to health and the free movement and non-discrimination provisions of EU law on the ground that fundamental rights remained within the exclusive purview of the domestic courts.

International courts themselves are sometimes tempted to buttress their presence on the human rights web. Suffice it to mention the extensive interpretation given by the I-A. Ct. H.R. to its power to give advisory opinions on "*treaties concerning the protection of human rights in American States*".[91] As is well known, the I-A. Ct. H.R. has interpreted this mandate to include "*any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the*

[86] Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, January 2013, § 58.
[87] See, in that respect, the European Arrest Warrant judgment of 11 July 2005, 2 BvR 2236/04.
[88] The "Lisbon" ruling of 30 June 2009 seems to be the latest (significant) link in a chain of cases that goes back all the way to the *Solange I* judgment of 19 May 1974.
[89] See, e.g., the House of Lords decision of 11 November 1998, [1998] UKHL 40 regarding a conflict between free movement principles and the fundamental right to demonstrate, and the analysis by E. Szyszczak, "Fundamental Values in the House of Lords", *E.L.R.*, 2000, p. 443.
[90] Judgment no. 4207 dated 8 August 2005. For a comment and a partial French translation, see L. Daniele, "La protection des droits fondamentaux peut-elle limiter la primauté du droit communautaire et l'obligation de renvoi préjudiciel ? ", *C.D.E.*, 2006, p. 67.
[91] Article 64(1) of the American Convention on Human Rights. See, J.M. Pasqualucci, "Advisory practice of the Inter-American Court of Huyman Rights : Contributing to the Evolution of International Human Rights Law", *Stan. J. Int'l L.*, vol. 38, 2002, pp. 241-288 ; J. Calidonio Schmid, "Advisory opinions on human rights : moving beyond a pyrrhic victory", *Duke J. Comp. & Int'l L.*, vol. 16, 2006, p. 415.

inter-American system are or have the right to become parties thereto".[92] The Court has further specified that a treaty concerns the protection of human rights if it "*has bearing upon, affects or is of interest to this subject-matter* (…) *regardless of what the principal purpose of that treaty might be*".[93] This generous reading of its own competence has enabled the Court to pronounce on the meaning of provisions of a non-legally binding text[94] and of a treaty only remotely related to human rights, i.e. the Vienna Convention on Consular Relations, which contains an optional protocol referring all disputes to the ICJ…[95]

B. Marginalisation

Some actors of the human rights network make every effort to move *away* from the limelight. The lack of human or financial resources, an unbearable caseload or the genuine wish not to step on another actor's turf can explain these steps aside.

The best illustration of this trend can probably be found in Strasbourg. As is well known, the Eur. Ct. H.R. was originally conceived of as an actor in the background, called up on stage only when all the other human rights actors had (at least allegedly) failed in their mission. However, its dynamic case-law and its ''judicialisation'' through Protocol no. 11 progressively turned the Eur. Ct. H.R. into the central mouthpiece of the European human rights network. But this enhanced visibility and centrality made the Eur. Ct. H.R. the victim of its own success, literally snowed under with thousands of pending cases.

This situation led the Contracting States to provide the Eur. Ct. H.R. with a new weapon to fend off applications deemed not to raise important human rights issues. Since the entry into force of Protocol 14, the Eur. Ct. H.R. is empowered to reject as inadmissible any individual application if it considers that "*the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal*" (Article 35(3)(b) ECHR). The Eur. Ct. H.R. has so far used this instrument sparingly,[96] but not uncontroversially.[97] Other reforms aimed at easing the case-load of the Court – or at limiting the interventions of the Strasbourg Court, in the view of some Member States –

[92] I-A. Ct. H.R., Advisory Opinion OC-1/82, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court*, 24 September 1982.
[93] I-A. Ct. H.R., Advisory Opinion OC-16/99, n. 40 above, §§ 72 and 76.
[94] See, 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.
[95] See, Advisory Opinion OC-16/99, n. 40 above.
[96] Only 26 cases in two years time, according to the Court's statistics.
[97] See, e.g., Eur. Ct. H.R. (2nd sect.), dec. (inadm.), *Boelens v. Belgium*, 11 September 2012, appl. No. 20007/09, rejecting an application regarding a criminal fine imposed on individuals who refused to participate in the 2007 Belgian elections on political grounds, based on the fact that the fine was low and that the "political grounds" in question were no longer relevant due to a change in the Belgian legislation. The Court shied away from pronouncing on the very obligation to vote and participate in the running of elections, backed by criminal sanctions.

have been put on the agenda following the Brighton declaration : [98] particularly remarkable in that respect is the invitation made to the Court to declare inadmissible, based on Article 35(a) ECHR (manifestly ill-founded), the applications related to "*a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention*".[99] This political declaration has given rise to the adoption of Protocol no. 15. This Protocol inserts a reference to the margin of appreciation and the principle of proportionality into the preamble to the Convention. It also brings down to four months (instead of six) the time-limit for filing an application with the Court. Finally, this Protocol enables the Court to use the abovementioned *de minimis* inadmissibility requirement even where the case at hand has not been duly considered by a domestic tribunal.

As stated above, such (self-)marginalisation moves cannot all be explained by purely managerial considerations. Some of them seem to be rooted in a genuine concern not to encroach on another actor's territory. Illustrative of this trend is the well-known margin of appreciation doctrine, which is used by the Court to shuffle off delicate balancing exercises onto supposedly better placed national authorities. In that respect, it is interesting to note that the Eur. Ct. H.R. increasingly grants this latitude to domestic courts (as opposed to executive or legislative organs of the State), considering that *"[w]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts*".[100] One of the reforms lined up by the Brighton Declaration aims at giving this spontaneous exercise of self-restraint an explicit support – and, therefore, a quasi-mandatory character – in the preamble of the ECHR.[101]

This deferential attitude of the Eur. Ct. H.R. is even more pronounced with respect to the ECJ. In the *Michaud v. France* judgment of 6 December 2012, the Eur. Ct. H.R. seems to have added a condition to the famous "presumption of equivalent protection" granted to the EU in the *Bosphorus* judgment.[102] In stark contrast with earlier case-law,[103] this judgment seems to indicate that this presumption

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[98] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration 19-20 Avril 2012. The inadmissibility condition contained in Article 35 (3) (b) will itself be further extended. *See*, para. 15, b, of the Declaration : *"The Conference therefore : (…) Concludes that Article 35(3)(b) of the Convention should be amended to remove the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" ; and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013*".

[99] See, paragraph 15, d, of the Brighton Declaration.

[100] Eur. Ct. H.R. (GC), *Von Hannover v. Germany* (no. 2), 7 February 2012, appl. Nos. 40660/08 and 60641/08, § 107 (and case-law referred to).

[101] See, § 12, b of the Brighton Declaration : *"The Conference therefore : (…) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention*".

[102] Eur. Ct. H.R. (GC), *Bosphorus v. Ireland*, 30 June 2005, appl. No. 45036/98 (see below).

[103] See, Eur. Ct. H.R. (2nd sect.), dec. (inadm.), *Coopérative des Agriculteurs de Mayenne and Coopérative Laitière Maine-Anjou v. France*, 28 November 2006, appl. No. 16931/04, in which the presumption is applied regardless of the failure

of equivalence is granted out of respect for the ECJ itself rather than for the EU as a whole. In this case regarding the obligation for external lawyers to report suspicions of money laundering concerning their clients, the Court found that the presumption of equivalent protection did not apply even though the law and regulations in question resulted from the mere transposition of EU Directives.

In support of that finding, the Court explained that "*because of the decision of the* Conseil d'État *not to refer the question before it to the [EU] Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the* Conseil d'État *ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed*" (para. 115). The Eur. Ct. H.R.'s positioning is remarkable. Through its *Bosphorus-Michaud* case-law, it places the ECJ in the limelight and discreetly withdraws to the backstage whilst showing itself ready to jump into the driver's seat every time the ECJ's jurisdiction is bypassed.

On a final note, it is worth recalling that the ICJ considers itself (and the other international tribunals) as a subsidiary organ in the enforcement of individual rights, thereby giving precedence to domestic courts. According to the ICJ, *"[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law ; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system*".[104]

IV. Interdependence

A network is inherently made up of links connecting its dots to each other. These dots belong to a larger structure and are dependent on the other nodes that make it up. In the field of human rights, this intertwinement can be illustrated through multiple examples. Think about the *Kamberaj* case, in which the ECJ was asked to decide whether EU law requires national courts to set aside national measures incompatible with the… ECHR.[105] Conversely, one could mention applications brought before the Eur. Ct. H.R. against all the EU Member States regarding an

of the French Council of State to seek preliminary guidance from the ECJ on the validity of the EU regulation at stake.

[104] ICJ, *Interhandel (Switzerland v. United States of America)*, I.C.J. Reports 1959, p. 27, confirmed in subsequent case-law, e.g. in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 24 May 2007 (preliminary objections), § 42.

[105] C-571/10, *Servet Kamberaj*, judgment of 24 April 2012, not yet reported, § 63.

act adopted by an EU institution[106] as well as cases in which the Eur. Ct. H.R. is called upon to interpret pieces of EU secondary legislation.[107] In the same vein, the Eur. Ct. H.R. had to rule on complaints filed against The Netherlands for acts taken by the ICTY[108] and the ICC[109] on its territory.

This relation of mutual dependence also extends to domestic courts, with the ECJ relying on the latter's faithful application of EU law (including of the preliminary reference mechanism) while the authority of these courts hinges on the EU Court's approval of their own EU-related case-law. Besides, the links of the network reach out to non-judicial actors. By way of example, it appears from a recent judgment of the Brussels court of first instance that, whereas courts are dependent upon the resources made available to them by the executive power, they can conversely impose damages on the national authorities on the ground that insufficient staffing leads to protracted procedures tantamount to a breach of Article 6 ECHR.[110]

This fact triggers contrasted reactions among the nodes of the human rights network. Some of these reactions place the emphasis on the solidarity between the *foci* of the fundamental rights web. They take great care to recognise the claims and preserve the specificity of the other nodes – presumably sometimes excessively so (A). Other reactions point out the need to safeguard the integrity and authority of each node. They convey a hierarchical vision of the relations between legal orders which may result in a complete denial of the fact that each node of the network occupies a position and develops a vision, both of which are necessarily relative, "off-centre" and context-oriented (B).

A. Solidarity

The Eur. Ct. H.R. is undoubtedly one of the champions of solidarity on the human rights web. Very telling in this respect is the attitude of the Eur. Ct. H.R. toward the European Union. The Court has been very careful to recognise the specificity of the European integration process and has made every effort not to interfere with it.

EU citizenship, for example, has been acknowledged as an objective justification for a difference of treatment between Member State nationals and third-country

[106] See, e.g., Eur. Ct. H.R. (GC), dec. (inadm.), *Senator Lines v. Austria, Belgium, Denmark e.a.*, 10 March 2004, appl. No. 56672/00; Eur. Ct. H.R. (5th sect.), dec. (inadm.), *Connolly v. 15 Member States of the European Union*, 9 December 2008, appl. No. 73274/01; Eur. Ct. H.R. (5th sect.), dec. (inadm.), *Biret v. 15 Member States of the European Union*, 9 December 2008, appl. No. 13762/04.
[107] See, e.g., Eur. Ct. H.R. (2nd sect.), *S.A. Dangeville v. France*, 16 April 2002, appl. No. 36677/97 (final since 16 July 2002); Eur. Ct. H.R. (2nd sect.), *Aristimuno Mendizabal v. France*, 17 January 2006, appl. No. 51431/99 (final since 14 April 2006); Eur. Ct. H.R. (2nd sect.), *Sneersone and Kampanella v. Italy*, 12 July 2011, appl. No. 14737/09 (final since 12 October 2011).
[108] See, e.g., Eur. Ct. H.R. (3rd sect.), dec. (inadm.), *Galic v. The Netherlands*, 9 June 2009, appl. No. 22617/07.
[109] Eur. Ct. H.R. (3rd sect.), dec. (inadm.), *Djokaba Lambi Longa v. The Netherlands*, 9 October 2012, appl. No. 33917/12.
[110] Civ. Brussels, 14 December 2012, *J.L.M.B.*, 2013, pp. 366-371.

nationals.[111] In the same vein, the Eur. Ct. H.R. has considered that the duration of preliminary reference proceedings before the ECJ should not be taken into account in determining the existence of a breach of the right to be tried within a reasonable period of time. The Court has reasoned that "*even though it may at first sight appear relatively long, to take* [that period of time] *into account would adversely affect the system instituted by Article 177 of the EEC Treaty* [Art. 267 TFEU] *and work against the aim pursued in substance in that Article*".[112]

But the Eur. Ct. H.R. has done more than simply abstain from undermining the European integration process. In a number of judgments, it has used the rights enshrined in the ECHR as a tool to *actively* assist in the good functioning of the European Union. In *Hornsby v. Greece*,[113] for example, the Court held that non-compliance with a judgment of the ECJ amounted to a breach of Article 6(1) ECHR. The Court went a step further in *Ullens de Schooten* by holding that national courts whose decisions are not appealable would violate Article 6 ECHR if they failed to reason their refusal to make a preliminary reference to the ECJ.[114]

The same benevolent attitude underpins the *Bosphorus* judgment and its progeny.[115] The Eur. Ct. H.R. famously held in *Bosphorus* that where EU Member States act as simple agents of the (then) EC authorities (*i.e.*, without any margin of discretion), the restrictions that they impose on fundamental rights can be justified by the necessity to comply with their EC obligations insofar as the protection of fundamental rights ensured by the EC legal system is equivalent to that of the ECHR system. This – rebuttable – presumption of equivalent protection, which bears strong similarities with the *Solange II* judgment of the German Constitutional Court[116] and with the *M&Co v. Germany* decision of the former European Commission of Human Rights,[117] has been praised by a number of scholars and presented as the way forward in order to address the fragmentation of international law and the multiplication of *supra*- and international courts.[118]

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[111] Eur. Ct. H.R. (Chamber), *Moustaquim v. Belgium*, 18 February 1991, appl. No. 12313/86, § 49; *C v. Belgium* (Chamber), 7 August 1996, appl. No. 21794/93, § 38; Eur. Ct. H.R. (4th sect.), *Ponomaryovi v. Bulgaria*, 21 June 2011, appl. No. 5335/05, § 54.

[112] Eur. Ct. H.R. (Chamber), *Pafitis and others v. Greece*, 26 February 1998, appl. No. 20323/92, § 95.

[113] Eur. Ct. H.R. (Chamber), *Hornsby v. Greece*, 19 March 1997, appl. No. 18357/91.

[114] Eur. Ct. H.R. (2nd sect.), *Ullens de Schooten and Rezabek v. Belgium*, 20 September 2011, appl. Nos. 3989/07 and 38353/07, §§ 60-61.

[115] Eur. Ct. H.R., *Coopérative des Agriculteurs de Mayenne and Coopérative Laitière Maine-Anjou v. France*, n. 102 above; Eur. Ct. H.R. (3rd sect.), dec. (inadm.), *Nederlandse Kokkelvisserij v. The Netherlands*, 20 January 2009, appl. No. 13645/05.

[116] Ruling of 10 October 1986, 2 BVerfGE 197/83.

[117] Decision of 9 February 1990 (Appl. No. 13258/87).

[118] See, e.g., N. Lavranos, "The *Solange*-Method as a tool for regulationg competing jurisdictions among international courts and tribunals", *Loy. L.A. Int'l & Comp. L. Rev.*, vol. 30, 2008, p. 275: "*Indeed, a consistent and uniform application of the Solange-method by all international courts and tribunals would substantially reduce the risk of fragmentation of intenational legal orders (including regional legal orders). It would also foster and improve the understanding and informal cooperation between international courts and judges*" (p. 334). See also J.-P. Jacqué, "L'arrêt *Bosphorus*, une jurisprudence – *Solange II* – de la Cour européenne des droits de l'homme? ", *R.T.D.E.*, vol. 41, 2005, pp. 756-764: "(...) *si les traités communautaires et la Convention constituent deux systèmes distincts dont le seul point de contact est l'identité de certaines Parties contractantes, il n'existe aucun motif juridique de faire prévaloir l'un sur l'autre et la solution de compromis retenue par la Cour constitue un moyen raisonnable d'assurer la coexistence pacifique des deux systèmes* (...)"; F. Schorkopf, "The Judgment of the European Court of Human Rights in the Case of Bosphorus Hava Turizm *v.* Ireland", *G.L.J.*, vol. 6, 2005, no. 9, 7 p.

The attitude of the Eur. Ct. H.R. has, however, also met with criticism. Several commentators[119] and a handful of dissenting judges[120] considered that the Court had been overly generous and deferent in stamping on the EU an "equivalent protection" label. The strict admissibility requirements curtailing the right of individuals to launch annulment proceedings before the ECJ and the lack of jurisdiction of the latter in the third and – mainly – second pillars were produced as evidence of the fact that the EU did not deserve such a presumption. It appears from its subsequent case-law that the Eur. Ct. H.R. has tried to accommodate these concerns by confirming that this presumption of equivalence only applies to acts adopted within the – former – first pillar[121] of the EU and provided that the ECJ has had an opportunity to review the acts in question.[122]

Regardless of these recent adjustments, it is submitted that the *Bosphorus* case-law has sometimes been applied overzealously. The *Kokkelvisserij* decision is particularly illustrative of this overly conciliatory attitude of the Eur. Ct. H.R.[123] In this case, the Court decided that the lack of a right to reply to the Advocate General's opinion in the course of proceedings before the ECJ was not the sign of a manifestly deficient protection of fundamental rights in the EU legal order capable of reversing the presumption of equivalence granted in *Bosphorus*. In order to reach that compatibility judgment, the Eur. Ct. H.R. had to throw overboard its own case-law[124] and to adopt an overly generous (and, presumably erroneous) reading of the ECJ's practice regarding the re-opening of the oral procedure.

Equally illustrative of the Eur. Ct. H.R.'s overly pacifistic attitude is the *Biret* decision,[125] in which the Court rejected as inadmissible an application claiming that the conditions of *locus standi* for individual applicants before the ECJ amounted to a violation of Article 6 and 13 ECHR. In support of its decision, the Court ruled that this alleged failure in the system of judicial protection could not be attributed to the Member States of the EU insofar as they had not been directly involved in the litigation that gave rise to the application. This statement is hardly reconcilable with the Eur. Ct. H.R.'s judgment in *Matthews*[126] insofar as it implies that the EU Member States are not responsible for potential violations contained

[119] See, e.g., S. Adam, F. Krenc, "La responsabilité des États membres de l'Union européenne devant la Cour européenne des droits de l'homme", *J.T.*, 2006, no. 6212, p. 85; E. Bribosia and S. van Drooghenbroeck, "Emprunts et migrations entre le droit de l'Union européenne et celui du Conseil de l'Europe", in A. Bailleux, Y. Cartuyvels, H. Dumont and F. Ost (eds), *Traduction et droits européens : enjeux d'une rencontre. Hommage au Recteur Michel van de Kerchove*, Brussels, Facultés universitaires Saint-Louis, 2009, p. 133, pp. 169-171.

[120] See, the joint concurring opinion of judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky, and Garlicki.

[121] Eur. Ct. H.R., *M.S.S. v. Belgium and Greece*, n. 36 above, § 338.

[122] Eur. Ct. H.R. (5th sect.), *Michaud v. France*, 6 December 2012, appl. No. 12323/11 (final since 6 March 2013), § 115.

[123] Eur. Ct. H.R. (3rd sect.), dec. (inadm.), *Cooperatieve producentenorganisatie van de Nederlandse Kokkelvisserij v. The Netherlands*, 20 January 2009, appl. No. 13645/05.

[124] Eur. Ct. H.R. (GC), *Vermeulen v. Belgium*, 20 February 1996, appl. No. 19075/91, § 33 : "*Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Court of Cassation and to the nature of the submissions made by Mr du Jardin, the avocat général, the fact that it was impossible for Mr Vermeulen to reply to them before the end of the hearing infringed his right to adversarial proceedings*".

[125] N. 105 above.

[126] Eur. Ct. H.R. (GC), *Matthews v. The United Kingdom*, 18 February 1999, appl. No. 24833/94.

in *primary* law, i.e. for potential breaches committed in the exercise of their treaty-making power.

As could be expected, such deferential gestures do not go unnoticed in Luxembourg. In his opinion in *Commission v. Otis e.a.*, Advocate General Cruz Villalon pinpointed a difference of approach in the definition of the principle of equality of arms between the ECJ and the Eur. Ct. H.R., pointing out that "*the Court of Justice does not appear to have adopted the so-called 'doctrine of appearances' too enthusiastically and in most cases requires evidence of actual harm as a consequence of imbalance between the parties*".[127] However, the Advocate General declared further that "*the level of protection is essentially the same as that of the ECHR*". In support of that contention, AG Cruz Villalon referred to the *Kokkelvisserij* decision and considered that, through this ruling, "*the ECHR confirmed the conclusion reached by the Court of Justice in Emesa Sugar* [i.e. that the lack of a right to reply to the Advocate General's opinion does not breach the right to a fair trial]" (footnote 36). Remarkably, the mere finding of an absence of "manifest deficiency" in the protection of human rights in the EU is conveniently turned into a rejoinder of the Eur. Ct. H.R. on the ECJ's interpretation of Article 6 ECHR. This seemingly leads the Advocate General to conclude that the level of protection granted in the EU is not lower than that afforded in the ECHR. One could push this reasoning to its end by adding that the requirement of Article 52(3) of the Charter is hereby fulfilled…

The Eur. Ct. H.R. seems to adopt an even more reverential attitude toward the United Nations system. In its landmark *Behrami* decision, the Court held that "*[s]ince operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court*."[128] The Court stated further that "*[t]his reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission : such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim*". Finally, the Court mysteriously stated that, even if the violations complained of were attributable to individual States (*quod non*), a *Bosphorus*-like system of presumption would be inappropriate insofar as "*[t]here exists (…) a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases*" (para. 151).

[127] C-199/11, Opinion delivered on 26 June 2012, not yet reported, § 59.
[128] Eur. Ct. H.R. (GC), *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 2 May 2007, appl. Nos. 71412/01 and 78166/01, § 149.

In *Al-Jedda v. The United Kingdom*, the Eur. Ct. H.R. clarified its position by granting the UN Security Council a "human rights-friendly" presumption : "*the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law*."[129] This finding led the Eur. Ct. H.R. to consider that the UN Security Council Resolution at stake should not be interpreted as having "*required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention*" (para. 109).

In *Nada v. Switzerland*,[130] the Eur. Ct. H.R. was faced with a situation in which the aforementioned "human-rights friendly" presumption was "*rebutted* (...) *having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in [the UN Security Council] resolution*".[131] The Court seemed to have no other choice but to conclude that Switzerland was confronted with a conflict between its obligations under the UN Security Council resolution and its commitment toward the ECHR. However, the Court found a way out of this conundrum by considering, despite strong evidence to the contrary,[132] that "*Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council*" (para. 180). In the light of this finding, the Court concluded that the Swiss authorities "*have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent*" (para. 197).

These three judgments are undoubtedly very sympathetic to the goals and specificity of the United Nations. They, however, denote the Court's discomfort in trying to reconcile its faithfulness to the ECHR and its desire to exercise "judi-

[129] N. 20 above, § 102.
[130] Eur. Ct. H.R. (GC), 12 September 2012, appl. No. 10593/08.
[131] § 172.
[132] See, the joint concurring opinion of judges Bratza, Nicolaou and Yudkivska, § 6 : "*We similarly find no support for the view in paragraph 178 of the judgment that latitude was afforded to States by paragraph 8 of the Resolution itself, in which States were urged to take immediate steps to enforce and strengthen "through legislative and enactments or administrative measures, where appropriate, the measures imposed under domestic law or regulations against their nationals and other individuals or entities, operating on their territory, to prevent and punish violations of the measures referred to in paragraph 2 of this resolution". Certainly, as noted in the judgment, the words "where appropriate" contemplated that the authorities would have a choice between legislative and administrative measures and were thereby granted a certain flexibility in the means by which the measures were enforced and strengthened. But those words certainly do not suggest that any latitude was granted so far as concerned the obligations on States to give full effect to the terms of paragraph 2 of the Resolution*".

cial comity" and show a "pluralistic" and "open" attitude. It is submitted that the Court's solidarity with the UN system is somewhat excessive. This is particularly true for the *Behrami* and *Nada* judgments. In *Behrami*, the Court gives the Contracting Parties a blanket immunity when acting under the cover of a UN Security Council mandate. In *Nada*, the Court is forced to adopt a highly controversial reading of a UN Security Council resolution in order to avoid having to arbitrate a conflict between UN law and the ECHR. In both cases, the Eur. Ct. H.R. probably goes too far in expressing solidarity toward the UN.

Needless to say, the Eur. Ct. H.R. is not the only court being receptive to the claims uttered by other foci of the network. One could mention the Belgian Constitutional Court, which decided to bow to the *Melki* and *Chartry* rulings of the ECJ on the prior question of constitutionality by deferring to the ECJ questions regarding the compatibility, with the principles of equality and non-discrimination, of a piece of Belgian legislation aimed at transposing a EU Directive.[133]

In the same vein, it should be noted that the ECJ has become increasingly sensitive to Member States' claim regarding the preservation of their "constitutional identity".[134] This case-law developed first underground, starting with the Opinion of AG Van Gerven in *Grogan* (regarding Ireland and the right to life of the unborn)[135] and the landmark *Omega* judgment (concerning Germany and the principle of human dignity).[136] It was then taken up by a number of constitutional courts, such as the German Constitutional Court[137] and the French *Conseil constitutionnel*,[138] as a limit to the primacy of EU law over national constitutions. The Lisbon Treaty then gave the "constitutional identity" argument textual support by providing that "*the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*" (Art. 4(2) TEU). This officialization in turn has opened the door to express references to the "constitutional identity" claim before the ECJ.[139] In at least two cases, the Luxembourg Court took that argument seriously and recognised the legitimacy

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133 C.C., Judgment no. 54/2012, 19 April 2012, § B.10.3.

134 On this issue, see e.g. A. Von Bogdandy & S. Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty", *C.M.L.Rev.*, vol. 48, 2011, pp. 1417-1453.

135 C-159/90, *SPUC v. Grogan* [1991] ECR I-4685.

136 C-36/02, *Omega Spielhallen* [2004] ECR I-9609.

137 See the "Lisbon judgment" of 30 June 2009, which contains numerous references to the constitutional identity: *see*, e.g., paragraph 239: "*the Act approving an international agreement and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union of taking possession of Kompetenz-Kompetenz or to violate the Member States' constitutional identity, which is not open to integration, in this case, that of the Basic Law*."

138 See, e.g., the ruling no. 2006-540 DC of 27 July 2006, § 19: "*la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti*".

139 See, C-208/09, *Sayn-Wittgenstein* [2010] ECR I-3693, § 92; C-391/09, *Malgožata Runevič-Vardyn*, [2011] ECR I-3787 § 86; C-51/08, *Commission v. Luxembourg*, [2011] ECR I-4231, § 72; C-393/10, *Dermod Patrick O'Brien*, 1 March 2012, not yet reported, § 49; T-453/10, *Northern Ireland Department of Agriculture and Rural Development v. Commission*, 6 March 2012, not yet reported, § 31; C-202/11, *Las*, Opinion of AG Jääskinen delivered on 12 July 2012, § 60; C-399/11, *Melloni*, Opinion of AG Bot delivered on 7 October 2012, § 137 ff.

of legislation regarding family names which were *prima facie* at variance with the free movement and citizenship provisions of the TFEU.[140]

B. Authority

The actors of the human rights network are sometimes tempted to play along a "vertical" axis, placing the emphasis on the authority of law rather than on the need to accommodate diversity and pluralism.

The ECJ ranks among the champions of this "pyramid-minded" approach. The Court's timid openness to the "constitutional identity" argument should not be overestimated in this respect. By promoting the absolute primacy of EU law over national law, the ECJ seems exclusively concerned with preserving the integrity and authority of the EU legal order. A glaring illustration of this attitude can be found in its *Winner-Wetten* judgment.[141] This case was concerned with a German law establishing a State monopoly on sports betting, which had been declared unconstitutional by the *Bundesverfassungsgericht* on the ground that it violated the freedom of occupation contained in Paragraph 12(1) of the Basic Law. The German Constitutional Court had however decided that the effects of this legislation could be provisionally maintained so as to give the authorities an opportunity to improve the existing legal regime. The ECJ was called upon to rule on the compatibility of this provisional measure with the freedom of establishment and the free provision of services. After recalling that "*[r]ules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law*", the Luxembourg Court decided that the EU fundamental freedoms required the impugned legislation to be immediately disapplied, regardless of the German Constitutional Court's judgment. The Court held further that even had there been considerations of legal certainty warranting the maintenance of the effect of the legislation at stake, such a finding "*could be determined solely by the Court of Justice*".

The same logic underpins the opinion of AG Bot in the *Melloni* case.[142] At the origin of this case lies the case-law of the Spanish constitutional court according to which "*the execution of a European arrest warrant issued for the purposes of executing a judgment in absentia must always be subject to the condition that the convicted person is entitled to a retrial in the issuing Member State*" (para. 2). This case-law is more restrictive than the European Arrest Warrant Framework Decision, which does not provide for such a retrial requirement where the person subject to the arrest warrant has given a mandate to a lawyer to represent him at his trial. The Spanish Constitutional Court therefore sought guidance from the ECJ as to the interpretation and validity of the European Arrest Warrant Framework Decision, relying *inter alia* on Article 53 of the Charter which provides that "*[n]othing in*

[140] See C-208/09, *Sayn-Wittgenstein* and C-391/09 *Malgožata Runevič-Vardyn*, n. 138 above.
[141] C-409/06, *Winner Wetten* [2010] ECR I-8015.
[142] N. 138 above.

this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by (…) the Member States' constitutions".[143]

AG Bot considered that this provision should not be interpreted as "*a clause providing for a minimum standard of protection, characteristic of the international instruments protecting human rights, such as that contained in Article 53 ECHR*" (para. 91), which "*would enable a Member State to make the execution of a European arrest warrant issued in order to execute a judgment rendered in absentia subject to conditions designed to avoid an interpretation which limits or infringes the fundamental rights recognised by its constitution, without that higher level of protection in force within that Member State necessarily being extended to the other Member States by being adopted by the Court of Justice*" (para. 92).

AG Bot rejected such an interpretation on the ground that it would run contrary to the principle of primacy of EU law and undermine its effectiveness. He considered further that allowing the Spanish authorities to impose stricter requirements on the surrender of a person would "*upset the balance*" achieved by the EU legislature between respect for the procedural rights of the persons concerned and the objective of ensuring the execution of judicial decisions. The Advocate General therefore concluded that Article 53 simply "*expresses the idea that the adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of application of national law*" (para. 134).

In its judgment of 26 February 2013, the Court broadly endorsed AG Bot's approach. It however gave Article 53 a slightly more generous (and convincing) interpretation by considering that this provision "*confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*".[144] (para. 60).

This pyramid-minded approach is not confined to the relationship between the EU and the national legal orders. It is submitted that that same approach drove the reasoning of both the Court of Justice (hereinafter "CJ") and the General Court (hereinafter "GC") in their famous *Kadi* judgments. The factual background of this case is well known, and so are the contradictory findings of the two Luxembourg judicatures. Suffice it therefore to underline the features of these judgments which illustrate that vertical and authoritarian approach.

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[143] This issue regarding the meaning of Article 53 of the Charter was raised, but not settled, by the "Legislation" Division of the Belgian Council of State in its opinion regarding the ratification of the Lisbon Treaty (Avis 44.028/AV donné sur sur un avant-projet de loi "portant assentiment au Traité de Lisbonne modifiant le Traité sur l'Union européenne et le Traité instituant la Communauté européenne, et à l'Acte final, faits à Lisbonne le 13 décembre 2007", *Doc. parl.*, Sénat, Doc. 4-568/1, pp. 345-346).

[144] See also the judgment handed down on that same day in the case C-617/10, *Åkerberg Fransson*, § 29.

Let us start with the judgment of the GC.[145] The reasoning of the Court regarding the human rights claims made by the applicants can be summarised in four steps. First, the Court notes that the Regulation imposing the freezing of Mr. Kadi's assets was adopted in accordance with a UN Security Council Resolution which gave the Member States no margin of discretion whatsoever. The Court goes on to consider that the review of the Regulation in light of the EU fundamental rights standards would *de facto* entail a review of the UN Security Council Resolution, which the GC is not entitled to perform. However, the Court holds further that it "*is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible*" (para. 226). Finally, the GC clears the impugned Regulation, "*measured by the standard of universal protection of the fundamental rights of the human person covered by jus cogens*" (para. 238).

It can hardly be disputed that this reasoning is driven by a hierarchical, and indeed monist approach to the relationships between legal orders. The Court provides us with a vision of one global legal order, wholly integrated and organised under a principle of hierarchy. Admittedly, such a legal order is not as centralised as the EU legal order, since even regional courts are allowed to review the validity of central norms against the supreme standards of the global legal system. But this precisely highlights the point : the GC seems to assume that the – necessarily – decentralised nodes of the network are able to abstract themselves from their outlying position in order to give an objective, neutral, external and conclusive judgment on the validity of norms falling outside their jurisdiction in light of other norms which also – arguably – likewise escape their purview.

The *Kadi* judgment of the CJ can be summarised in three steps.[146] First, the Court rejects as irrelevant the fact that the Regulation was adopted in execution of a UN Security Council Resolution. Second, the Court reviews the validity of the EU Regulation in light of the EU fundamental rights standards. Third, the Court strikes down the EU Regulation as contravening such standards.

This CJ's approach is both opposed and similar to the GC's reasoning. It differs from it insofar as it is premised on a dualist approach, which assumes a clear-cut separation between the international legal order and the domestic (here, EU) one. In order to take EU fundamental rights seriously, it adopts an autarchic or even autistic attitude – outside the EU legal order, there is nothing but (irrelevant) facts. But the CJ's reasoning is as pyramid-minded as the GC's judgment. The only difference is that it is based on a small – EU-sized – pyramid instead of a large –

[145] T-315/01 *Kadi* [2005] ECR II-3649.
[146] C-402/05 P *Kadi* [2008] ECR I-6351.

global – one. Neither judgment leaves room for pluralism and accommodation of diversity.

Importantly, there is no value judgment in this appreciation. In a situation like this one, it seems hard to discern a middle ground between obedience (*Behrami*) and resistance (*Kadi*), between an excess of sympathy for the host legal system (*Behrami*) and converse attempts to control (*Kadi*, GC) or ignore (*Kadi*, CJ) it.

V. Conclusion

This paper has tried to show the potential of the network metaphor as applied to the current development of human rights law. It is submitted that this metaphor is useful to *describe* and *interpret* the evolution of human rights law as well as the strategies and tactics used by its main actors. In that respect, it places the emphasis on three main features of the human rights web, i.e. its fluidity, polycentricity and interdependence. More specifically, it helps us to understand that these characteristics are not stable properties of human rights law but that they are instead the result of endless tensions between openness and closure, centralisation and marginalisation, solidarity and authority. In that sense, the network metaphor keeps us from overdramatizing attempts to establish or restore some hierarchy and borders as well as converse endeavours to usher in an era of human rights oecumenism. These opposing trends are precisely the sign that human rights operate in a network-like environment. To put it differently, these conflicting moves nurture rather than undermine the human rights network.

It is however submitted that the network metaphor is not devoid of any normative content. We have seen that some actions go as far as to *deny* the very existence of a network either by doing away with any idea of border, centre and authority or by completely ignoring its open-ended, polycentric and interdependent structure. Such extreme positions are not only harmful to the good functioning of the network (after all, this can be the very purpose that they seek to achieve). They also undermine their own persuasiveness and the credibility of their authors. One can try to steer the shape and direction of the network either by attempting to enhance its pyramid-like features or by conversely bolstering its open and horizontal dimension. But pretending that one does or should not act in a networked environment is condemning oneself to ineffectiveness, isolation and, eventually, silence.

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