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Afraid of Fragmentation? Keep Calm and Apply the European Convention on Human Rights on Environmental Matters

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Abstract

The European Court of Human Rights (ECtHR) was not originally designed to have a mandate including environmental issues. However, for the past thirty years, it has created a diverse body of case law due to its capacity to interpret the European Convention on Human Rights as a living instrument. The present research relating to fragmentation has raised general criticism of such a development, where several institutions have a mandate over the same issues. Consequently, the focus in this article is to analyse the relationship between the ECtHR and other relevant actors in the field of human rights and environmental law. The aim is to ascertain if the ECtHR has increased or decreased institutional and substantive fragmentation in the field of international environmental law.

Key words: human rights law, environmental law, fragmentation, European Court of Human Rights, ITLOS

Introduction

Fragmentation, "cross fertilization", "multilevel governance or constitutional pluralism" refer to the network of legal norms, instruments and institutions.[1] Fragmentation can be divided into two different forms: substantive fragmentation, referring to the specialization of laws and institutional fragmentation, referring to parallel institutions governing same matters.[2] The discussion on the fragmentation of international law has been continuous and diverse.[3] Scholars have had decidedly divided views on the pros and cons of the fragmentation of international law.[4]

The pro-fragmentation argumentation rests on the idea that regulation can be improved through fragmentation, litigant autonomy is strengthened[5] and close judicial co-operation

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* Post doc., School of Management, University of Tampere. The research was funded by the Strategic Research Council at the Academy of Finland; project ALL-YOUTH with decision no. 312689.

[1] Lixinski, Taming the Fragmentation Monster through Human Rights? International Constitutionalism, "Pluralism Lite" and the Common Territory of the Two European Legal Orders, The EU accession to the ECHR, Ed. Koska, Skoutaris and Tzevelekos, *Modern Studies in European Law*, 2014, pp. 219–235, 225, Fischer-Lescano and Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Mich. J. Intern. Law*, Vol 25, 2004, p. 999. Ajevski, Fragmentation in international human rights law – beyond conflict of laws, *Nordic Journal of Human Rights*, No 2, May 2014, pp. 87–98, p. 88., Koskenniemi and Webb, *International Judicial Integration and Fragmentation*, Oxford University Press 2013.

[2] ILC Fragmentation Report, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, UN Doc. A/CN4/I/682 (2006), para 423, 413.

[3] Burke-White, International Legal Pluralism, *25 MICH. J. INT'L L*. 963, 965 (2004).

[4] Gerhard Hafner, Pros and Cons Ensuing from Fragmentation of International Law (2004) *25 Michigan Journal of International Law* 849, Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, New York, 2010), pp. 18–20, Burke-White, International Legal Pluralism, 25 *MICH. J. INT'L L*. 963, 965 (2004).

[5] Tim Stephens, *International Courts and Environmental Protection, Cambridge Studies in International and Comparative Law*, Cambridge University Press, 2010, p. 278.

prevents the possible negative consequences.[6] In addition, the interaction between international courts as jurisprudential teamwork is particularly relevant to the new branches of law[7]. For example, Geir Ulfstein has underlined that the benefits of having various alternative legal forums include "possibilities for designing the institutional set-up to the specific needs of the problem at hand; giving focus to marginalized interests; and increasing the pool of experience in developing policy-making and jurisprudence".[8] In addition, the increase of expertise in several institutions can "create coherence" and serve as "monitoring" for other institutions and their decisions.[9] Fragmentation has consequently been defined as "normalized, or accepted, as both politically inevitable and legally manageable".[10]

The criticism of fragmentation holds that fragmentation creates "conflicting obligations in multiple treaties"[11], erosion and emergence, conflicting rulings[12], the loss of certainty and predictability, overlapping jurisdictions[13] and forum shopping.[14] In addition, there is a risk that tribunals not specifically designed for environmental claims, lack adequate expertise to assess such claims.[15]

The aim of this article is to analyse both institutional and substantive fragmentation of law in relation to the environmental case law and human rights law. The analysis focuses on the role of the European Court of Human Rights as it has actively made reference to "similar or identical norms" in other regimes relating to the

[6] Pemmaraju Rao Sreenivasa, 'Multiple Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation? (2004) *25 Michigan Journal of International Law 929*, Jonathan I Charney, The Impact on the International. Legal System *of the* Growth *of* International Courts and Tribunals, 1999, 31 *NYU J Int'l L & Pol.* 697, Georges Abi-Saab, Fragmentation or Unification: Some Concluding Remarks, *31 NYUJ Int'l L. & Pol.* 919, Charney, Jonathan, Is International Law Threatened by Multiple International Tribunals?, *Recueil des Cours* 271 (1998): 101–382, Fischer-Lescano, Andreas, and Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Michigan Journal of International Law* 25.4 (2004): 999–1046, ILC Analytical Study 2006, ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Michigan Journal of International Law* 25.4 (2004): 999–1046, ILC Conclusions 2006. ILC, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions (A/CN.4/L.702) (18 July 2006), Jenks, C. Wilfred. "Conflict of Law-Making Treaties." *British Year Book of International Law* 30 (1953): 401, Martti Koskenniemi, The Fate of Public International Law: Between Technique and Politics, *Modern Law Review* 70(1) (2007): 1–30.

[7] CRP Romano, 'Deciphering the grammar of the international jurisprudential dialogue', *International law and Politics Journal*, Vol 41, No 4, 2009, p. 755–787, p. 771.

[8] Geir Ulfstein, Treaty Bodies and Regimes, ed. Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann with Athene E Richford, *Research Handbook of the Law of Treaties*, Edward Elgar 2014, p. 444

[9] Mihaela Papa, Sustainable Global Governance? Reduce, Reuse, and Recycle Institutions, Global Environmental Politics, 15:4, Nov. 2015, pp. 1–20, pp. 4–8.

[10] Tomer Broude, Keep calm and carry on: Martti Koskenniemi and the fragmentation of international law, TEMPLE INT'L & COMP. L.J p. 280. However, critics also exist: Hafner, Risks ensuing from fragmentation, 2000, p. 147, *Kingsbury*, Is the proliferation of international courts and tribunals a systemic problem? 1999, 31, New York University Journal of International Law and Politics, pp. 679–696, p. 683, Dupuy, The danger of fragmentation or unification of the international legal system and the international court of justice, 1999, 31, New York University Journal of International Law and Politics, pp. 791–807.

[11] Christopher J. Borgen, Treaty Conflicts and Normative Fragmentation, ed. Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann with Athene E Richford, *Research Handbook of the Law of Treaties*, Edward Elgar 2014, p. 449.

[12] Ulfstein, p. 444.

[13] Borgen, p. 449.

[14] Dupuy, 791–807.

[15] Stephens, p. 277.

environment[16]. Even though the European Convention on Human Rights does not include the right to a healthy environment, the ECtHR has accumulated a well-established corpus of environmental case law covering close to a hundred cases. The development of the environmental case law started approximately 30 years ago and has been continuous. The ECtHR has not defined "environment" nor restricted its approach to what type of rights it ensures relating to the environment as it has assessed the environmentally related issues under Articles 2, 3, 5, 6, 8, 10, 11, 13 and the first Article of the First Additional Protocol of the European Convention on Human Rights[17].

The case law covers a wide range of circumstances, such as natural disasters[18], waste-related cases[19], industrial pollution[20], water-related cases[21], noise pollution[22] and airport-related nuisances.[23]

The ECtHR has been active in its case law in making reference to the comparative materials. These references includes both hard law and soft law[24]. Reference has been made in general to: "UN documents, other regional human rights instruments, Council of Europe (CoE) documents from the Parliamentary Assembly, material from the EU, like Directives, the EU Charter of Fundamental Rights, EU Court cases, judgments from other international Courts specialized in international treaties and judgments from foreign jurisdictions".[25] Consequently, the first research question in this article relates to institutional fragmentation. The purpose is to discuss what kind of institutional fragmentation occurs in relation to environmental issues and how the

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16 Benedikt Pirker, Interpreting Multi-Sourced Equivalent Norms: Judicial Borrowing in International Courts in Multi-Sourced Equivalent Norms in International Law, *Studies in International Law*, Hart Publishing, Oxford 2011, p. 70–71

17 Heta-Elena Heiskanen, *Towards Greener Human Rights Protection. Rewriting the Environmental Case Law of the European Court of Human Rights*, Tampere University Press, 2018, p. 17.

18 ECtHR, *Murillo Saldias and Others v. Spain*, 28 November 2006 (decision on admissibility), ECtHR, *Budayeva and Others v. Russia*, 20 March 2008, ECtHR, *Viviani, and Others v. Italy*, 24 March 2015 (decision on admissibility), ECtHR, *Kolyadenko and Others*, 28 February 2012, ECtHR, *Özel and Others v. Turkey*, 17 November 2015.

19 ECtHR, *Brânduse v. Romania*, 7 April 2009, ECtHR, *Di Sarno and Others v. Italy*, 10 January 2012, pending application: ECtHR, *Locascia and Others v. Italy*, Appl no. 35648/10.

20 ECtHR, *Lopez Ostra v. Spain*, 9 December 1994, ECtHR, *Băcilă v. Romania*, 30 March 2010, ECtHR, *Taşkın and Others v. Turkey*, 10 November 2004, ECtHR, *Öçkan and Others v. Turkey*, 28 March 2006, ECtHR, *Lemke v. Turkey*, 5 June 2007, ECtHR, *Fadeyeva v. Russia*, 9 June 2005, ECtHR, *Ledyayeva and Others v. Russia*, 26 October 2006, ECtHR, *Giacomelli v. Italy*, 2 November 2006, ECtHR, *Tătar v. Romania*, 27 January 2009, ECtHR, *Dubetska and Others v. Ukraine*, 10 February 2011, ECtHR, *Apanasewicz v. Poland*, 3 May 2011, ECtHR, *Koceniak v. Poland*, 17 June 2014 (decision on admissibility), ECtHR, *Smaltini v. Italy*, 24 March 2015 (decision on admissibility), pending applications: ECtHR, *Locascia and Others v. Italy*, Appl. no. 35648/10, ECtHR, *Cordella and Others v. Italy*, Appl. no. 54414/13 and ECtHR, *Ambrogi Melle and Others v. Italy*, Appl. no. 54264/15.

21 ECtHR, *Dzemyuk v. Ukraine*, 4 September 2014.

22 ECtHR, *Powell and Rayner v. the United Kingdom*, 21 February 1990, ECtHR, *Hatton and Others v. the United Kingdom*, 8 July 2003 (GC), ECtHR, *Flamenbaum and Others v. France*, 13 December 2012, ECtHR, *Moreno Gómez v. Spain*, 16 November 2004, ECtHR, *Mileva and Others v. Bulgaria*, 25 November 2010, ECtHR, *Zammit Maempel and Others v. Malta*, 22 November 2011, ECtHR, *Chiş v. Romania*, 9 September 2014 (decision on the admissibility), ECtHR, *Frankowski and Others v. Poland*, 20 September 2011, ECtHR, *Deés v. Hungary*, 9 November 2010, ECtHR, *Grimkovskaya v. Ukraine*, 21 July 2011, ECtHR, *Fägerskiöld v.Sweden*, 26 February 2008 (decision on admissibility), ECtHR, *Vecbaštika and Others v. Latvia*, Appl. no. 52499/11 (pending application), ECtHR, *Borysiewicz v. Poland*, 1 July 2008, ECtHR, *Leon and AgnieszkaKania v. Poland*, 21 July 2009, ECtHR, *Martinez Martinez and María Pino Manzano v. Spain*, 3 July 2012.

23 Heiskanen, pp. 15–16.

24 See Jurgen Friedrich, International Environmental "Soft law", Springer 2013, on the role of development of treaty law, pp. 157–158, role in the development of general principles, pp. 155–156.

25 Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System, An analysis of the ECtHR and the Court of Justice of the EU, Intersentia 2011, p. 256.

ECtHR has reacted to these in its case law. The second research question is related to substantive fragmentation analysing whether the ECtHR has actually contributed to fragmentation. The first question is analysed primarily by means of a literature review, whereas the latter question is more concerned with a case review. The cases were selected from the 73 cases included in the Fact Sheet on ECtHR environmental cases[26]. Cases included the criterion that the case includes references to international or regional environmental legal instruments, such as declarations, resolutions, conventions or other types of agreement.

Institutional Fragmentation and Environmental Matters

In international environmental law and human rights law, multiple institutions may be applicable to the same situation. Nikolaus Lavranos provides an example in the context of the conflict between Ireland and the UK concerning the MOX plant[27]. Radioactive contamination polluted the Irish Sea and caused health problems. The legal forums available to deal with the issue included the EU court as well as a dispute settlement tribunal. In addition, depending on the legal instruments available, the scope of protection was slightly different. The relevant instruments included UNCLOS, EU directives and regulations as well as the Aarhus Convention (not ratified at the time).[28]

Similarly, the European Court of Human Rights has developed environmental case law in various areas where there are other institutions available. The ECtHR has shown awareness of the institutional fragmentation of environmental matters. It has not taken up its mandate to environmental claims as self-evident and automatic. This has been reflected in the environmental case law such that the ECtHR has frequently noted that there are other international organs available. The case of *Atanov v. Bulgaria* illustrates this tendency. The Court held that "other international instruments and domestic legislation are better suited to address such issues" and referred to the Council of Europe's Parliamentary Assembly recommendations related to environmental protection[29]. In *Kyrtatos v. Greece*, the Court referred to other international instruments and its own role as supplementary:

> Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect[30].

Despite the limitations explicitly stated by the ECtHR in relation to the general protection of the environment, it has suggested in its case law that the environment is a public interest, which should be protected[31]. In addition, its awareness of the parallel institutions has not prevented it from developing the case law on environmental matters. Consequently, the ECtHR has acknowledging its role in assessing the realization of human rights

[26] See Factsheet – Environment and the ECHR: https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.

[27] See also for MOX plant case: Stephens, pp. 232–240, 280–281, 295–302.

[28] *Nikos Lavranos*, The Ospar Convention, the Aarhus Convention and EC Law: Normative and Institutional Fragmentation on the Rights of Access to Environmental Information, in Multi-Sourced Equivalent Norms in International Law, Studies in International Law, Hart Publishing, Oxford 2011, Chapter 7.

[29] ECtHR, *Atanasov v. Bulgaria*, App. no. 12853/03, 2 December 2010, para 77, for recommendations, see paras 55–57.

[30] ECtHR, *Kyrtatos v. Greece*, Appl. no 41666/98, 22 May 2003, para 52.

[31] Heiskanen, p. 20–21.

in the environmental context, while still aware of the mandate of other actors at the international and domestic level. I will now assess the institutional fragmentation and the division of labour between the European Committee of Social Rights, the international courts and the EU Court in relation to the ECtHR.

Internal Institutional Fragmentation: the ECtHR and the European Committee of Social Rights

There is institutional overlap between the ECtHR and the European Committee of Social Rights in safeguarding environmentally related human rights. Both actors have evaluated issues related to the realization of human rights in the context of mining and water. The ECtHR itself has not made reference to the practice of the European Committee of Social Rights, but the latter has acknowledged in the cases of *Marangopoulos Foundation for Human Rights v. Greece*[32], *International Federation for Human Rights (FIDH) v. Greece*[33] the congruent mandates of the ECtHR and the Committee in relation to Article 11 of the Charter and Articles 2, 3 and 8 of the European Convention on Human Rights[34]. The European Committee of Social Rights defined the relationship between these two organizations as a "normative partnership" based on the shared fundamental values between the two legal instruments and institutions[35].

The institutional fragmentation is evidenced due to the existing parallel case law on the same subject matter and the findings of the European Committee of Social Rights acknowledged the parallel mandate of the two institutions. In substantive terms, the European Committee of Social Rights has recognized the jurisprudence of the ECtHR and ensured the harmonious interpretation, thus it seems that there is no conflicting interpretation and thus no incentive for forum shopping. In Ragnar Nordeide's estimation, the international courts have a role in diminishing challenges of fragmentation through "systemic integration".[36] This is also the case between the European Committee of Social Rights and the ECtHR.

The Division of Labour Between the ECtHR and the UN International Courts and Tribunals

In addition, systems parallel to the ECtHR safeguarding human rights law and international environmental law include two international courts, the International Court of Justice (ICJ)[37] and the International Tribunal of the Law of the Sea (ITLOS)[38]. Both of these judicial organs differ from the mandate of the ECtHR. The International Court of Justice is a general international court hearing claims between states and thus there is no forum shopping option for individual claimants. The International Tribunal on the Law of the Sea has a limited mandate to rule only on issues related to the law of the sea. Compared to the two UN Courts the ECtHR is a regional

32 *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Decision of 6 December 2006 (Merits), paras 195–196.
33 *International Federation for Human Rights (FIDH) v. Greece*, Complaint No. 72/2011, 23 January 2013, para 50.
34 *Ibid.* 50–51.
35 *Ibid.* 50.

36 Ragnar Nordeide, The ECHR and its Normative Environment: Difficulties Arising from a Regional Human Rights Court´s approach to Systemic Integration, p. 122.
37 Lynda Collins, The United Nations, human rights and the environment, (eds.) Anna Grear and Louis J. Kotze, Research Handbook on Human Rights and the Environment, Edward Elgar, 2015, pp. 233–234.
38 Mohamed Sameh M, Amr, The role of the International Court of Justice as the Principal Judicial Organ of the United Nations. The Hague [etc.]: *Kluwer Law International*, 2003, Al-Qahtani, Mutlaq: The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions, *Leiden Journal of International Law*, Vol. 15, 2002, p. 781–804.

court having the capacity to process individual claims related to various human rights and environmental claims.

In most of the cases, the ECtHR has meticulously followed the practices of the ICJ and exceptions have been rare.[39] The ECtHR has distinguished its position from that of the ICJ only in cases where the ICJ has taken a position favourable to the state instead of protecting the interests of human rights[40]. Forowicz has pointed out that the ECtHR has the primary duty to protect human rights and thus in some circumstances the reduction of fragmentation may be a secondary aim.[41]

The Law of the Sea is a special environmental regime supervised by the International Tribunal for the Law of the Sea and other dispute settlement mechanisms provided by the Convention.[42] The Convention on the Law of the Sea and the Tribunal are very different from the ECHR and the ECtHR. The scope of protection is not human rights-based and the Convention on the Law of the Sea allows disputes also to be settled by other mechanisms in other ways. In addition, ITLOS has the capacity to give advisory opinions. The ECtHR itself has acknowledged in the case of *Mangouras v. Spain* that "While conscious of the fact that the Tribunal's jurisdiction differs from its own, the Court nevertheless observes that the Tribunal applies similar criteria in assessing the amount of security".[43] It can therefore be concluded that, due to the fundamental differences between the two institutions, institutional fragmentation occurs only rarely in practice, but when it does, the ECtHR practices harmonious interpretation.

Harmonious Relationship: the EU Court and the ECtHR

The relationship between the European Court of Human Rights and the EU Court has received increasing scholarly interest.[44] The basis for the discussion is the Bosphorus established by the ECtHR regarding its relationship with the EU. The key content of the doctrine is that organizations enjoying a level of human rights protection similar to what the ECHR requires may have obligations related to that organization so that there is an assumption of compliance with the ECHR.[45]

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[39] Arne Vandenbogaerde, Jurisdiction Revised. Attributing Extraterritorial State Obligations under the International Covenant on Economic, Social and Cultural Rights, *HR&ILD* 1 (2015), p. 14.

[40] Nordeide, p. 122.

[41] Forowicz, p. 106.

[42] Vukas, Budislav, Main features of courts and tribunals dealing with the law of the sea cases, *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, ed. by Myron H. Nordquist and John Norton Moore. The Hague: Martinus Nijhoff, 2001, p. 217– 222.

[43] ECtHR, *Mangouras v. Spain*, 28 September 2010, Appl. no 12050/04, para 89.

[44] Leonard F.M Besselink, Should the European Union ratify the European Convention on Human Rights? Some remarks on the relationship between the European Court of Human Rights and the European Court of Justice, *The European Court of Human Rights in a National, European and Global Context*, Ed. Andreas Follesdal, Birgit Peters, Geir Ulfstein, Cambridge 2013, pp. 310–312, Johan Callewaert, The European Convention on Human Rights and European Union Law: a Long Way to Harmony, *European Human Rights Law Review* (no. 6, 2009) pp. 768–783, Douglas-Scott, Sionaidh, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, *Common Market Law Review* (2006) 43, pp. 629–665, Morano-Foadi, Sonia & Andreadakis, Stelios, Reflection on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights, *European Law* 9/2011, pp. 595–610, Aida Torres Pérez, Conflicts of Rights in the European Union: A Theory of Supranational Adjudication. Oxford University Press. 2009, Tuomas Ojanen, Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Legal Structure and Effects of Fundamental Rights under the Charter Court of Justice of the European Union, Decision of 6 October 2015 in Case C-362/14, Maximillian Schrems v. Data Protection Commissioner, *European Constitutional Law Review*, 2016, Jörg Polakiewicz, EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?, Available at SSRN 2331497, (2013).

[45] *Bosphorus Hava Yallari Turizm ve Ticaret Anonim Sirkeri v. Ireland*, 42 EHRR (2006), see also: Fisnik Korenica, Paul

In addition, the EU and the ECHR provide additional sources of law for the interpretation for both courts[46]. This is seen in the environmental case law of the ECtHR, which has actively utilized EU law in order to clarify the content and scope of protection under its own Convention.

In addition, the relationship between the Luxembourg and Strasbourg Courts is discussed in relation to the overlapping mandate on certain issues. There is a double control over compliance. The control is first at the implementation level:

> When implementing EU legislation, Member States' compliance with the Convention's principles will also be controlled by the Court of Justice of the European Communities in Luxembourg, which has developed an important body of case law relating to the Convention.[47]

Furthermore, the control could be exercised at the level of complaints. For example, depending on the circumstances, both courts may have a mandate to process applications relating to state obligations of the Environment Impact Assessment. In some circumstances, the ECtHR may even "fill the gaps in the Directives."[48] Therefore, to some extent, there is a risk of forum shopping between these two courts.[49]

Even though both institutions have a mandate to deal with the same norms, the field of human rights and the environment, this has not resulted in conflicting findings[50]. Rather, there has been judicial co-operation and dialogue.[51] The EU Court has a longer and stronger tradition in environmental case law[52], whereas the human rights approach in all fields of EU law is newer.[53] Consequently, the interpretation of human rights in the EU Court has been strongly

De Hert, European Accession to the European Convention on Human Rights, Regulating the Multi-Layered European Human Rights Space and Pushing for More International Liability for the Union, *Zeitschrift für öffentliches Recht*, Vol. 70, No. 1, March 2015, pp. 9–10.

[46] George Letsas, Strasbourg's Interpretive Ethic: Lesson for the International Lawyer, *The European Journal of International Law*, Vol 21, No 3, p. 521.

[47] Jörg Polakiewicz, The Status of the Convention in National Law (eds.) Robert Blackburn, Jörg Polakiewicz, *Fundamental Rights in Europe, The ECHR and its Member States*, 1950–2000, Oxford University Press, 2001, p. 37.

[48] Armelle Gouritin, *Can International Environmental Law and Human Rights Law Fill the Gaps of EU Environmental Law? The Case of Environmental Responsibility*, Dissertation, 2011/2012, Institute for European Studies, Vrije Universiteit Brussels, p. 268.

[49] Ole W Pedersen, 'The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law', *European Public Law*, Vol 16, No. 4, 2010, pp. 571–595, p. 593. "Thus, it would appear that the ECHR's environmental jurisprudence may by time become less relevant as it will operate as a set of underlying minimum standards on which a wide range of EU environmental rules may be built":

[50] Christina Eckes, EU accession to the ECHR: Between Autonomy and Adoption, *The Modern Law Review* (2013), 76(2) MLR, p. 285.

[51] Gregor Heissl, The EU´s Accession to the ECHR, Recent Developments and Remarks on the Relationship between the ECJ and the ECtHR, *European Yearbook on Human Rights*, Vol 2014, p. 310.

[52] Article 4 § 2 e) TFEU, OJ C 326, 26 January 2012. See also for EU and environmental governance: Ingmar von Homeyer, The Evolution of EU Environmental Governance (ed.) Joanna Scott, *Environmental Protection, European Law and Governance*, Oxford, 2009, pp. 1–26, Jürgen Lefevere, A Climate of Change: An Analysis of Progress in EU and International Climate Change Policy, (ed) Joanna Scott, *Environmental Protection, European Law and Governance*, Oxford, 2009, pp. 171–211.

[53] See for EU and human rights, historical considerations: Andrew Williams, EU Human Rights Policies, A Study in irony, *Studies in European Law*, Oxford University Press, 2004, Patrick Twomey, The European Union: Three Pillars Work Without a Human Rights Foundation, (eds.) D. O'Keete and P. Twomey, *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, 1994, pp. 121–132, A.G. Toth, The European Union and Human Rights: the Way Forward? CML Rev 34, 1997, pp. 491–529, Armin, van Bogdandy, The European Union as a Human Rights Organization? Human Rights and the Core of the EU, CML Rev. 37, 2000, pp. 1307–1338, Manfred Nowak, Human Rights Conditionality in the EU, in P Alston et al. (eds.), *The EU and Human Rights*, Oxford University Press, 1999, pp. 687–698, Joseph Weiler, Does the EU

influenced by the ECHR and the ECtHR. The EU Court has made reference to the ECHR throughout the years[54], whereas the ECtHR has drawn inspiration and models from the EU Court in environmental issues. The EU Court and the ECtHR have acted as multi-sourced equivalent courts engaging in vivid judicial dialogue with each other[55].

Consequently, the overlapping jurisdictions[56] have not so far led to significant forum shopping[57] leading to contradictory rulings[58] or the loss of certainty and predictability. Instead, there have been several benefits of having two regional institutions with overlapping mandates. The personal scope of the ECHR is considerably wider than EU law, whereas EU law may have a wider impact on the horizontal situation and involvement of private parties[59]. As the development of the environmental jurisprudence of the ECtHR provides a minimum standard and safeguards to such countries as Turkey, Russia and Romania, the role of the ECtHR should not be disregarded[60]. At the same time, the EU is not restricted to following only minimum standards set by the ECtHR but can extend the protection if it so wishes[61].

The ECtHR, Substantive Fragmentation and Environmental Matters

The ECtHR currently uses the comparative materials in multiple ways: as a rhetorical tool, as a source of inspiration and as support for the authority and legitimacy of the chosen solution. By rhetorical use, Mc Crudden refers to references that do not have a substantive meaning, but rather a stylistic meaning. Mc Crudden has also analysed how the Court uses the comparative materials to provide support in the new fields of protection as inspiration. In addition, the third purpose is to receive support and justifications for the chosen path by using comparative arguments from other courts.[62] One important way is also to use international law and jurisprudence in order to build consensus argumentation[63]. Therefore, the second set of research questions relates to the analysis of the substantive fragmen-

Need a Human Rights Charter? *European Law Journal* 6, 2000, pp. 95–97

54 For older cases see: Elspeth Guild and Guillaume Lesieur, The European Court of Justice on the European Convention on Human Rights, Who Said What, When? Kluwer Law International 1998, Marton Varju, European Human Rights Law as a Multi-layered Human Rights Regime, Preserving Diversity and Promoting Human Rights, ed. Jan Erik Wetzel, The EU as a "Global Player" *Routledge Research in Human Rights Law*, 2001, pp. 52 and 54.

55 Benedikt Pirker, Interpreting Multi-Sourced Equivalent Norms: Judicial Borrowing in International Courts in Multi-Sourced Equivalent Norms in International Law, *Studies in International Law*, Hart Publishing, Oxford 2011, p. 70–71.

56 Christopher J. Borgen, Treaty Conflicts and Normative Fragmentation, ed. Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann with Athene E Richford, *Research Handbook of the Law of Treaties*, Edward Elgar 2014, p. 449.

57 Stephens, pp. 275–278.

58 Ulfstein, p. 444.

59 *Xavier Groussot and Eduardo Gill-Pedro*, The scope of EU rights versus that of ECHR rights. in: Janneke Gerards & Eva Brems (ed.) Shaping Rights in the ECHR, The Role of the European Court of Human Rights in Determining the Scope of Human Rights, p. 247–248, 253–254.

60 Pedersen, p. 593–594.

61 Groussot & Gill-Pedro, p. 378.

62 Mc Crudden, Judicial Comparativism and Human Rights in Trücü (ed.), *Comparative Law, A Handbook*, Oxford, Hart 2007, p. 378

63 Kanstantsin Dzehtsiarou, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, German Law Journal, Vol 12 No. 10, pp. 1730–1745, p. 1733–1734, Kanstantsin Dzehtsiarou, Interaction between the European Court of Human Rights and Member States: European consensus, advisory opinions and the question of legitimacy, The European Court of Human Rights and its discontents, Turning criticism into strength, Ed. Spyridon Flogaitis, Tom Zwart and Julie Fraser, Edward Edgar, 2013, pp. 129–134, Pauli Rautiainen, Moninaisuudessaan yhtenäinen Eurooppa: konsensusperiaate ja valtion harkintamarginaalioppi, *Lakimies* 6/2011 s. 1152–1171.

tation: has the ECtHR increased the substantive fragmentation or taken a harmonized approach?

The ECtHR confirmed in the case of *Al-Adsani v. the United Kingdom*, that the ECHR "cannot be interpreted in a vacuum" and "it should so far as possible be interpreted in harmony with other rules of international law of which it forms a part."[64] The approach was further developed in the case of *Demir and Baykara v. Turkey*, where the Court supported its arguments with other human rights law instruments[65]. In *Demir and Baykara v. Turkey* established that the ECtHR "can and must" take account of international law. The ECtHR has further in the case of *Nada v. Switzerland* the ECtHR explained how it recognizes and respects the diversity of coexistence of different applicable norms of international law[66]. The Court took a stand that it does not claim that the ECHR prevails or has *de facto* primacy over other rules of international law.

The development of environmental jurisprudence is closely connected to the cross-fertilization of rights. In *Demir and Baykara v. Turkey*, the Court used environmental context as an example of the approach taking into account the use of international sources.[67] *Demir and Baykara* case is a landmark ruling, so the recognition of the cross-fertilization in environmental context illustrates that the environmental jurisprudence is not an isolated area of jurisprudence, but normalized practice, which is closely connected to the development of general doctrines.

List of Relevant Law: Showing Awareness of Parallel Norms

Each of the judgments of the ECtHR has a section named the "relevant list of law". The list may not be exhaustive but rather includes the legal instruments that the ECtHR itself or through parties, including third parties, has identified. The international sources listed in the "relevant list of law" section in a single judgment or decision illustrate the capacity of the ECtHR to identify the institutional and substantive connections between its own jurisprudence and that of other actors relating to the environmental and human rights issues. The implied awareness of the parallel case law or instruments indicate the harmonizing intent of the ECtHR. The inclusion of the instruments in the list of relevant law does not necessarily have a clear impact on the forming of the judgment. However, it illustrates the awareness of the relevant rules in respect to the case at hand. The Court would probably assess the other instruments in substantive terms if the ECtHR were to make an autonomous interpretation resulting in a conflicting result.

The ECtHR has included in its list of relevant case law various instruments of the Council of Europe. These instruments include the PACE resolutions and recommendations[68]. The same applies to the Committee of Minister's recommendations[69]. In addition, in the case of

[64] ECtHR, *Al-Adsani v. the United Kingdom*, App. No 35763/97, 21 November 2001, para 55.

[65] ECtHR, *Demir and Baykara v. Turkey*, App. No 34503/97, 12 November 2008, paras 147–151. For case comment, see Hendy Ewing The Dramatic Implications of Demir and Baykara, Industrial Law Journal, March 2010, 39 Indus L. J.Z. pp. 1–33.

[66] ECtHR, *Nada v. Switzerland*, Appl. no 10593/08, 12 September 2012.

[67] Heiskanen, pp. 25–28.

[68] See ECtHR, *Okay and Others v. Turkey:* Recommendation 1614 (2003) on Environment and Human Rights, ECtHR, *Grimkovskaya v. Ukraine*, Appl. no. 38182/03, 21 July 2011: Recommendation 1614 (2003) of 27 June 2003 on environment and human rights, ECtHR, *Tătar v. Romania*: Resolution 1430 (2005) on Industrial hazards, Öneryıldız v. Turkey PACE Resolution 587 (1975) on problems connected to the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste.

[69] ECtHR, *Brosset-Triboulet and Others v. France* (GC): Recommendation No. R (97) 9 of the Committee of Min-

Öneryıldız v. Turkey [70] the ECtHR included the two CoE treaties in the relevant list of law.[71] Similarly, in *Guerra and Others v. Italy*[72] and *Öneryıldız v. Turkey*[73] the ECtHR included the relevant Council of Europe documents, such as Parliamentary Assembly Resolution 1087 in the relevant list of law.

Furthermore, the ECtHR has frequently included the Stockholm Declaration and the Rio Declaration in the relevant list of law[74]. Similarly, the ECtHR included the Convention on the Protection of the Environment through Criminal Law (ETS No. 172) in the relevant list of law in the case of *Öneryildiz v. Turkey* even though the treaty had not even entered into force.[75]

The case follows the relaxed approach of the ECtHR in using a different set of legal instruments even if this is not binding in nature. Legal instruments include declarations, resolutions and agreements that have not entered into force. As Nordeide has observed in relation to the case of *Demir and Baykara v. Turkey*, the court makes no distinction between binding and non-binding instruments[76]. Despite the non-binding nature of the instrument, the Court used the instrument as a source of inspiration.

As George Letsas has explained, the ECtHR relies on soft law instruments in order to seek coherence:

> it does so in a holistic way, looking at how each and every part of the international law can be made coherent with every other. In striving for coherence, the Court increasingly stresses that the interpretive questions it faces are not questions about the linguistic meaning of a Convention term, but rather questions about what can be considered "compatible with a democratic society and the values expounded in the Convention".[77]

In addition to the recommendations, declarations and treaties, the ECtHR has included case law from the ICJ, *Gabcikovo Nagymaros*[78] in the list of relevant law in the case of *Tătar v. Romania*[79]. Similarly, to the CoE and United Nations instruments and case law, the ECtHR has included the EU instruments, such as Directives and the case law of the EU Court in the relevant list of law.[80]

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isters on a policy for the development of sustainable environment-friendly tourism, *Depalle v. France* (GC): Recommendation No. R (97) 9 of the Committee of Ministers on a policy for the development of sustainable environment-friendly tourism.

[70] Dinah Shelton, Legitimate and necessary: adjudicating human rights violations related to activities causing environmental harm or risk, Journal of Human Rights and the Environment, Vol 6, No. 2, Sept 2015, p. 147.

[71] ECtHR, *Öneryıldız v. Turkey* (GC) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No 150), Öneryıldız v. Turkey (GC) Convention on the Protection of the Environment through Criminal Law (ETS No. 172).

[72] ECtHR, *Guerra and Others v. Italy*, Appl. no 116/1996/735/932, 19 February 1998, para 34.

[73] ECtHR, *Öneryıldız v. Turkey* (GC), 30 November 2004, Appl no 48939/99, para 59.

[74] ECtHR, *Okay and Others v. Turkey*: Rio Declaration, Taşkın and others v. Turkey: Rio Declaration, Tătar v. Romania: Stockholm Declaration, Rio Declaration.

[75] ECtHR, *Öneryıldız v. Turkey* (GC), 30 November 2004, Appl no 48939/99, para 61.

[76] Nordeide, p. 131, *Demir and Baykara v. Turkey*, App. No 34503/97, 12 November 2008, para 67.

[77] George Letsas, Strasbourg´s Interpretive Ethic: Lessons for the International Lawyer, *The European Journal of International Law*, Vol 21, no 3, p. 523.

[78] See ICJ, *Gabcikovo Nagymaros,* (Hungary v. Slovakia), *1997, Rep. 68*. For case analysis, see Fitzmaurice, John: The ruling of the International Court of Justice in the Gabcˇíkovo-Nagymaros case: a critical analysis, *European Environmental Law Review*, Vol. 9, 2000, p. 80–87.

[79] See ECtHR, *Tătar v. Romania,* 27 January 2009, (Appl. no. 67021/01) ECtHR. For a case analysis, see James Harrison, International law: significant environmental cases 2008–2009, *Journal of Environmental Law*, Vol 21, no 3, 2009, pp. 506–508.

[80] ECtHR, *Mangouras v. Spain*, Appl. no 12050/04, 28 September 2010: EC Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, EC Directive 2005/35/EC of the European Parliament and of the Coun-

It can be concluded that the frequency and diversity of instruments included in the relevant list of law demonstrates the awareness of the ECtHR of the parallel regulation and practice relating to the environment and human rights issues. However, it is more difficult to show the direct influence of the instruments in these cases, as the ECtHR does not explicitly explain the contribution of the instruments to its interpretation

Harmonious Interpretation between ECtHR and Other Institutions

In addition to the mere inclusion of law in the relevant list of law, the ECtHR has specifically noted the relevance of the instruments. For example, the International Tribunal for the Law of the Sea has provided support for the ECtHR in its development of the standards of environmental case-law. In *Mangouras,* the Court held that:

> While conscious of the fact that the Tribunal's jurisdiction differs from its own, the Court nevertheless observes that the Tribunal applies similar criteria in assessing the amount of security, and that the fact that it has a duty not to prejudice the merits of the case does not prevent it from making determinations bearing on the merits when these are necessary for the assessment of a reasonable bond (see, in particular, the Tribunal's judgment of 6 August 2007 in the case of Hoshinmaru (Japan v. the Russian Federation), § 89, cited at paragraph 46 above).[81]

The ECtHR specifically acknowledged the differences in relation to jurisdiction. Despite the ECtHR capacity to claim autonomic interpretation in relation to concepts, it chose to support its own approach from the alignments developed by another institution. The facts of the case in *Mangouras* were related to maritime pollution, which makes it a natural choice to seek relevant materials from the ITLOS framework. As has been shown, the ECtHR used the case-law International Tribunal of the Law of the Sea in order to ensure harmonious interpretation rather than to increase substantive fragmentation.

The ECtHR has used the EU principles and legislation especially in relation to the assessment of the precautionary principle.[82] This ruling strengthened the minimum standard under the ECHR considerably in regard to risk assessment and precautionary measures. The precautionary principle has been developed at both international and domestic levels[83]. International instruments on the precautionary principle, such as the Rio Declaration and the Stockholm Declaration, were referred to in detail in the case of *Tătar v. Romania*. The ECtHR held that:

> Concernant ce dernier aspect, la Cour rappelle, dans l'esprit des principes no 21 de la Déclaration de Stockholm et no 14 de la Déclaration de Rio, le devoir général des autorités de décourager et prévenir les transferts dans d'autres États de substances qui provoquent une grave détérioration de l'environnement (voir pp. 21 et 23 cidessus). La Cour observe également qu'audelà du cadre législatif national instauré par la loi sur la

cil of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, ECJ judgment Case C-308/06 on validity of Directive 2004/35/EC, ECtHR, *Tătar v. Romania*, January 2009 Appl. No. 67021/01: EC Directive No. 2004/35/CE, EU Directives 2006/21/CE and 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, EU Commission Communication COM/2000/0664 final on security of mining activities.

[81] ECtHR, *Mangouras v. Spain*, Appl. no 12050/04, 28 September 2010, para 89.

[82] *Ibid.* 111–112.

[83] *E.J Hollo*, Comparative analysis of the precautionary principle in the Nordic Countries: Finland, 2007 Implementing the precautionary principle. London: Earthscan, pp. 76–84, Marr, Simon: The precautionary principle in the law of the sea: modern decision-making in international law. The Hague [etc.]: Nijhoff, 2003.

> protection de l'environnement, des normes internationales spécifiques existaient, qui auraient pu être appliquées par les autorités roumaines[84]

The ECtHR made reference to the spirit of these two declarations in order to support its view on the duty of the authorities to prevent environmental damage both in its own territory, but also in other countries. Thus, the transfer of hazardous substances should be prevented. The Court further stated that the international standards were applicable with respect to the Romanian authorities.

The strength of the EU law in the interpretation and development of the environmental jurisprudence under the ECHR was also illustrated in the case of *Tătar v. Romania*. The focus of the Court was on arguing the essence of positive obligations of the state authorities to assess and mitigate risks caused by hazardous toxic substances. This obligation is directly related to the Environmental Impact Assessment Procedure (EU EIA Directive). The Court established that the minimum standards require the establishment of the regulative framework. The duties of the framework include e.g. licensing, settlement, operation and control of the hazardous activity and conducting public surveys and studies allowing the public to assess the environmental risks.[85]

Furthermore, the importance of the EU environmental legislation was illustrated in the case of *Giacomelli v. Italy*[86]. The ECtHR found failure of the domestic authorities to comply with the requirements of environmental impact assessment (EIA) procedure. The national law implementing the EU's EIA directive was not respected in regard to issuing a license and modifying the license of a waste treatment facility. In addition, the Court considered the adequacy of the regulatory framework in the case of *Hardy and Maile v. the United Kingdom*.[87] The Court held that the domestic framework had the capacity to sufficiently supervise the rights related to environmental issues in question. These requirements include permissions, consent and control procedures and mechanisms.[88] While the obligations related to environmental risk assessment and prior control are also an essential part of EU legislation, more specifically the EIA Regulations, the ECtHR and EU Courts may have overlapping mandates to deal with the same issues in such situations[89].

In conclusion, the cases referred to confirm earlier findings of the literature. Dinah Shelton has explained that different tribunals focusing on the environmental matters have different priorities, but similar legal grounds to take into account in their interpretation.[90] This is also the case in relation to the approach that the ECtHR has adopted. In addition, there was "no collision or conflict with mainstream environmental jurisprudence" and the case law of the ECtHR.[91]

Concluding discussion

Frédéric Vanneste has taken the view that "human rights courts, in general, respect the general international law and try to contribute to a better understanding of the general international law. They do not undermine, or fragmentize,

[84] ECtHR, *Tatar v. Romania*, Appl. no 67021/01, 21 January 2009, para 111.
[85] *Ibid.* para 88.
[86] ECtHR, *Giacomelli v. Italy*, (2006) 5 EHRR 871.
[87] ECtHR, *Hardy and Maile v. United Kingdom*, Appl. no. 31965/07, 14 February 2012.
[88] *Ibid.*
[89] As a relevant list of law, the Court included: Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended ("the EIA Directive"), Article 1(1), 2(1) and 3(1).
[90] Dinah Shelton, Legitimate and necessary: adjudicating human rights violations related to activities causing environmental harm or risk, *Journal of Human Rights and the Environment*, Vol 6, No. 2, Sept 2015, pp. 139–155, p. 140.
[91] Stephens, p. 320.

the existing legal order".[92] The same observation applies to the ECtHR as it has taken into account the substantive fragmentation in its case law.[93] The assessment of the environmental case law of the ECtHR reveals that there is institutional overlap between the CoE, UN and EU systems on the protection of human rights relating to the environment. The relationship between these different institutions is not exceptional or specific to environmental matters but also present in other areas of law.

As an answer to the first research question, there has been institutional fragmentation, but it has not caused any significant substantive fragmentation due to the approach adopted by the ECtHR. The environmental case law of the ECtHR illustrates how the ECtHR is aware of the other legal instruments and institutions available. The existence of parallel regimes is reflected in the statement of the ECtHR recognizing the other actors and referring to the instruments available. Similarly, other institutions, such as the European Committee of Social Rights, have acknowledged the parallel protection of the ECtHR regarding human rights related to environmental matters.

The ECtHR has a tendency to use several different instruments in complex cases. For example, the case of *Mangouras v. Spain* aptly illustrates the use of network. The Court relied on EU law, United Nations legal instruments and the regulations from the Council of Europe[94]. On the basis of international and regional development, the Court found that the proportionality test[95] was satisfied in setting the high bail[96]. The case of *Taskin* is another example making reference to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the Rio Declaration and the European Union law.[97]

The main findings on the second research question relating to substantive fragmentation is that the ECtHR has had a harmonizing effect on regional and universal standards. The ECtHR has adopted very relaxed criteria for using international instruments, which supports the idea that it ensures the harmonious interpretation rather than an approach conducive to the fragmentation of norms. In some environmental cases, the Court has included the international sources in the relevant list of law while making no reference to the instruments in any substantive manner. The inclusion of the instruments in the relevant list of law may be interpreted as a signal of the awareness of the ECtHR of the existence and the relevance of the other environmental instruments. In a few cases, the ECtHR has even used a legal transplant from another international court. Consequently, it can be concluded that the ECtHR is fully aware and informed about the relevant external sources and has no intention of increasing fragmentation, but rather of taking the parallel norms and practice into account in its interpretations.

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[92] Frédéric Vanneste, *General International Law Before Human Rights Courts, Assessing the Specialty Claims of International Human Rights Law*, 2010, p. 579.

[93] James Harrison, Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Dispute and the Development of International Environmental Law, Special issue: Environmental Law: Looking Backwards, Looking Forwards, *Journal of Environmental Law*, Vol 25, No 3, 2013, pp. 506–507, Forowicz, p. 104

[94] See, ECtHR, *Mangouras v. Spain*, Appl. no 12050/04, 28 September 2010, paras 33–55.

[95] For proportionality test, see for example Jonas Christoffersen, Fair balance: proportionality, subsidiarity and primarily in the ECHR, *International Studies in Human Rights*, Vol 99, Martinus Nijhoff 2009.

[96] ECtHR, *Mangouras v. Spain*, Appl. no 12050/04, 28 September 2010, para 86.

[97] See *Taşkin* for reference to the Aarhus Convention and *Tătar* for reference to Article 191 of the TFEU.