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Introduction

Gabriel Michanek

The twenty-first issue of Nordic Environmental Law Journal includes an article authored by Heta Heiskanen: *Afraid of Fragmentation? Keep Calm and Apply the European Convention on Human Rights on Environmental Matters*. During the last decades, the European Court of Human Rights has interpreted certain articles in the European Convention on Human Rights (ECtHR) to include environmental aspects. For example, pollution has in a few cases been regarded as a violation of the right to respect for private and family life, and home in article 8 (e.g. *Lopez Ostra v. Spain*, 9 Dec. 1994, Application no. 16798/90). However, present research relating to fragmentation has criticised a legal development where several institutions have a mandate over the same issues. In the paper, Heiskanen analyses if the liberal interpretation of ECtHR has increased or decreased institutional and substantive fragmentation in the field of international environmental law.

As indicated in Nordic Environmental Law Journal 2017:2, a two year Nordic Master Programme in Environmental Law (NOMPEL) will commence in fall 2019. NOMPEL is a collaboration between Uppsala University, University of Eastern Finland (Joensuu) and UiT the Arctic University of Norway (Tromsø). See further: [http://www.uu.se/en/admissions/master/selma/program/?pKod=JMI2N&pInr=&ласar=19%2F20](http://www.uu.se/en/admissions/master/selma/program/?pKod=JMI2N&pInr=&ласар=19%2F20).

Another important event in 2019 is the shift of editor for Nordic Environmental Law Journal. From now on, Professor Charlotta Zetterberg, Faculty of Law at Uppsala University will be chief responsible for the Journal. The first issue was published in 2009 and many persons have contributed to the development of the Journal. First of all, the authors. The collective of articles published has covered a variety of topics of environmental law and included specific Nordic as well as global matters. The reviewers have spent considerable time to read and comment on the manuscripts. The co-editors Helle Tegner Anker, Ole Kristian Fauquald and Timo Koivurova has provided support when I have asked for it. I wish you and Charlotta Zetterberg all luck in the future! Roger Johansson, Harnäs Text & Grafisk Form AB, has formatted the texts ably and rapidly. The Law Faculty in Uppsala has funded the formatting. Many thanks to you all and to all the readers!

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

Heta Heiskanen*

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 strengthened5 and close judicial co-operation


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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,
prevents the possible negative consequences.\textsuperscript{6} In addition, the interaction between international courts as jurisprudential teamwork is particularly relevant to the new branches of law\textsuperscript{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”.\textsuperscript{8}


In addition, the increase of expertise in several institutions can “create coherence” and serve as “monitoring” for other institutions and their decisions.\textsuperscript{9} Fragmentation has consequently been defined as “normalized, or accepted, as both politically inevitable and legally manageable”.\textsuperscript{10}

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

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


\textsuperscript{12} Ulfstein, p. 444.

\textsuperscript{13} Borgen, p. 449.

\textsuperscript{14} Dupuy, 791–807.

\textsuperscript{15} Stephens, p. 277.
environment\textsuperscript{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\textsuperscript{17}.

The case law covers a wide range of circumstances, such as natural disasters\textsuperscript{18}, waste-related cases\textsuperscript{19}, industrial pollution\textsuperscript{20}, water-related cases\textsuperscript{21}, noise pollution\textsuperscript{22} and airport-related nuisances.\textsuperscript{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\textsuperscript{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”.\textsuperscript{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


\textsuperscript{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.

\textsuperscript{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, Kołyszenko and Others, 28 February 2012, ECtHR, Özel and Others v. Turkey, 17 November 2015.

\textsuperscript{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.


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.

\textsuperscript{21} ECtHR, Dzemenyuk v. Ukraine, 4 September 2014.


\textsuperscript{23} H. Heiskanen, pp. 15–16.


\textsuperscript{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. 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. 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).

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.

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.

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. 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

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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, App. 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

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\(^{34}\) Ibid. 50–51.

\(^{35}\) Ibid. 50.


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. 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. The ECtHR has the primary duty to protect human rights and thus in some circumstances the reduction of fragmentation may be a secondary aim.

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. 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”. 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. 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.

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40 Nordeide, p. 122.
41 Forowicz, p. 106.
43 ECtHR, Mangouras v. Spain, 28 September 2010, Appl. no 12050/04, para 89.
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. This is seen in the environmental case law of the ECHR, 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.

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.”

Therefore, to some extent, there is a risk of forum shopping between these two courts.

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. Rather, there has been judicial co-operation and dialogue. The EU Court has a longer and stronger tradition in environmental case law, whereas the human rights approach in all fields of EU law is newer. Consequently, the interpretation of human rights in the EU Court has been strongly

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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”.


influenced by the ECHR and the ECtHR. The EU Court has made reference to the ECHR throughout the years\textsuperscript{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\textsuperscript{55}.

Consequently, the overlapping jurisdictions\textsuperscript{56} have not so far led to significant forum shopping\textsuperscript{57} leading to contradictory rulings\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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.\textsuperscript{62} One important way is also to use international law and jurisprudence in order to build consensus argumentation.\textsuperscript{63} Therefore, the second set of research questions relates to the analysis of the substantive fragment-
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.” 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. 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. 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. *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. The same applies to the Committee of Minister’s recommendations. In addition, in the case of

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69 ECtHR, *Brosset-Tribolet and Others v. France* (GC): Recommendation No. R (97) 9 of the Committee of Min-
Oneryildiz v. Turkey the ECtHR included the two CoE treaties in the relevant list of law. Similarly, in Guerra and Others v. Italy and Oneryildiz v. Turkey 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. 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 Oneryildiz 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. 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, Gabčíkovo Nagymaros in the list of relevant law in the case of Tătar v. Romania. 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.

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).  

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. 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. 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’audela du cadre législatif national instauré par la loi sur la

81. Ibid. 111–112.
protection de l’environnement, des normes internationales spécifiques existaient, qui auraient pu être appliquées par les autorités roumaines.

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 ECtHR 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.

Furthermore, the importance of the EU environmental legislation was illustrated in the case of Giacomelli v. Italy. 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. 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. 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.

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. 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.

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, the legal order.”

84 ECtHR, Tatar v. Romania, Appl. no 67021/01, 21 January 2009, para 111.
85 Ibid. para 88.
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).
91 Stephens, p. 320.
the existing legal order”. The same observation applies to the ECtHR as it has taken into account the substantive fragmentation in its case law. 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. On the basis of international and regional development, the Court found that the proportionality test was satisfied in setting the high bail. 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.

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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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.