Human rights in a changing environment

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INTRODUCTION

This chapter considers the relationship between human rights and environmental law against the backdrop of the emerging paradigm of transnational environmental law. The arrival of the environmental human rights agenda as a self-standing legal doctrine, situated between established disciplines of international law, human rights law and environmental law, is at least in part explained through the prism of transnational movements. On the account put forward here, the environmental human rights doctrine embodies the characteristics of a transnational movement of law by virtue of it exhibiting a strong sense of norm migration across traditional legal boundaries. Moreover, traditional lawmakers have, to a point, played a minor role in developing and strengthening the environmental human rights doctrine. Instead, courts and tribunals, primarily in regional human rights regimes, have filled this power vacuum through their eagerness to progress the environmental human rights doctrine, and they have done so by taking inspiration from extrinsic sources of law. With this eagerness, however, come challenges and responsibility. Most notably this responsibility includes the need to appreciate the potential risks associated with readily applying rules and norms external to the jurisdiction. At present, it is not clear that human rights courts and tribunals are alert to this.

TRANSNATIONAL ENVIRONMENTAL HUMAN RIGHTS

Before examining the engagement of human rights law with environmental claims, it is worth considering the extent to which the emergence of environmental rights maps on to ideas and definitions of transnational environmental law. Considering that one of the main characteristics of transnational environmental law is the process of norm migration across legal boundaries, the emergence of environmental human rights in international and domestic law comes across, at first sight, as inherently transnational.[1] The merging of two otherwise self-standing

[1] E.g. Gregory Shaffer and Daniel Bodansky, 'Transnationalism, Unilateralism and International Law' (2012) Transnational Environmental Law 31-34.

disciplines and practices of law (human rights law and environmental law) represents a paradigmatic example of migration of rules and norms from one legal discipline and setting to another. This transnational dynamic manifests in the environmental rights discourse in two ways: first, in the express adoption of environmental rights provisions in a subset of regional human rights systems and in domestic constitutions and, secondly, in their adjudication primarily before international human rights tribunals.

Traditionally, environmental law can be defined as an area of law heavily influenced by scientific and technological impulses, responding to a complex set of interactions between human activities and environmental elements.[2] Typically, the legal responses to these impacts coalesce into a discipline which is heavily influenced by scientific consideration (for example, how much of a given substance can be emitted into a particular resource), produced and implemented through technocratic decision-making processes (involving, for example, administrative agencies, international and supranational agencies in the standard setting), and often anchored in procedures of cost-benefit analysis and impact assessment. Against these scientific and technocratic impulses stands the discipline of human rights law which, in general terms, embodies norms and values that are judged to be inalienable, universal and able to 'trump' other types of norms.[3] The emergence of a common ground between these two disciplines, however simplistic this outline may be, arguably represents a merging of two different regimes whose foundations and conceptual cores are entirely distinct from one another. The often technocratic and scientific ethos of environmental law stands in sharp contrast to the strongly normative and often unqualified nature of human rights.

A further distinction of the emergence of the environmental human rights agenda is that the forces most prominently promoting this agenda are not necessarily the norm-creating actors traditionally encountered in international law. As of present, there is no express recognition in international law of a 'right to environment' and there is little to suggest that the adoption of such a right is forthcoming (thought there are examples of regional human rights treaties recognizing such a right).[4] The lack of express recognition in international law does not, naturally, detract from the important yet distinct increase in the recognition of environmental

[2] E.g. Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), *OJ L 334, 17.12.2010, p. 17–119*.
[3] Ole W Pedersen, 'Environmental Law and Constitutional and Public Law' in Jorge Vinuales and Emma Lees (eds), *The Oxford Handbook on Comparative Environmental Law* (Oxford University Press 2019) 1073-1090.
[4] See e.g. essays in John H Knox and Ramin Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press 2018).

rights at the domestic level, where this often manifests in constitutional provisions.[5] In the absence of express state recognition of such a right in international law, the norm-creating endeavours have been left to non-state actors, international organizations and, most prominently, international tribunals. In this context of non-traditional norm creation, important work has been undertaken by the Independent Expert and Special Rapporteurs on human rights and the environment appointed by the United Nations (UN) Human Rights Council in terms of clarifying and synthesizing the conceptual and legal obligations arising from the emergence of human rights and environmental law.[6]

More importantly, a serious and sustained effort to recognize the links between human rights law and the environment has played out before human rights tribunals and courts across a range of jurisdictions. Sometimes this effort has been undertaken under the auspices of regional human rights systems that expressly recognize a right to environment, such as the American Convention on Human Rights[7] and the African Charter of Human and Peoples Rights.[8] However, in other instances, such as in the case law of the European Court of Human Rights (ECtHR) which incorporates environmental concerns into the European Convention on Human Rights (ECHR),[9] environmental rights norms are created in the absence of expressive state endorsement, in a striking example of judicial 'vacuum filling'.[10] Over time, the ECtHR has gone on to develop a rich body of case law which engages with the intersection between environmental issues and human rights law.[11] Ironically, the European human rights system – which does not expressly incorporate a right to environment – has proven a much more fertile ground for environmental claims than certain human rights systems that expressly include a right to environment.[12] Two reasons underpin the decision to highlight the human rights system

[5] See e.g., Joshua Gellers, *The Global Emergence of Constitutional Environmental Rights* (Routledge 2017).
[6] See e.g. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox Mapping Report UN Doc (A/HRC/25/53) and Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox Compilation of good practices UN Doc (A/HRC/28/61).
[7] (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Cultural and Social Rights, 1989 28 ILM 1561.
[8] (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 24. See also Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in *Knox and Pejan* (n 4) 59-85.
[9] (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[10] *Shaffer and Bodansky* (n 1).
[11] See e.g. Council of Europe, *Manual on Human Rights and the Environment* (2012), <https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf> (accessed September 20 2019).
[12] The number of environmental cases (widely defined) heard by the ECtHR presently stands at over 250 cases, which is in sharp contrast to the number of cases heard by the African Court of Human Rights and the Inter

of the European Convention in the context of the transnational emergence of environmental rights. First, the ECtHR has over the years developed a rich case law on environmental rights. In the absence of an express recognition of any link between human rights and the environment in the Convention itself, it has been forced to look to different contexts, cultures and sources in order to respond to the many environmental claims before it. Secondly, the ECtHR's case law provides the most comprehensive one-stop case study of environmental rights adjudication, which contributes to a better understanding of the relationship between environmental rights and transnational environmental norms.

The earliest examples of the emergence of a nexus between human rights and environmental concerns are commonly traced to international environmental law and the Stockholm Declaration on the Human Environment ('Stockholm Declaration')[13] which makes what now seems the rather obvious point that basic environmental conditions are central to the enjoyment of human rights.[14] The positivistic origin of the link between human rights and the environment in the Stockholm Declaration does not in itself, however, suggest a specifically transnational emergence of environmental human rights. The Stockholm Declaration is, after all, an international document agreed to and endorsed by states. Notwithstanding its non-binding nature, the Declaration is therefore a quite traditional document of international environmental law, created and endorsed by states with the view to capture predominant understandings of the law. The real rise of environmental human rights as a transnational force has, however, emerged slowly through a combination of judicial endorsement and express recognition in international legal documents. Examples of this include the forceful separate opinion by Judge Weeramantry in the decision of the International Court of Justice (ICJ) in *Gabčíkovo-Nagymaros* in which he famously observed, in tune with the Stockholm Declaration, that environmental protection is a fundamental prerequisite for the enjoyment of basic human rights.[15]

Real progress towards recognizing the synergies between human rights law and environmental issues has, however, been confined to regional and domestic arenas. The standout examples of

American Court of Human Rights. Ole W Pedersen, **'**Of Successes and Failures: Greening the European Convention of Human Rights', ('Human Rights in the Anthropocene' conference presentation, Raoul Wallenberg Institute of Human Rights, Lund University, 16-17 October 2019).

[13] Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972).

[14] Declaration of the UN Conference on the Human Environment, June 16, 1972, 11 ILM 1416.

[15] *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), 1997 ICJ 7, 88, (separate opinion of Vice-President Weeramantry.

this include the adoption of the African Charter on Human and Peoples' Rights, which came into force in 1986 and includes a right to a 'satisfactory environment favorable to their development'.[16] Though sparse compared to that of the European Court of Human Rights, the case law emerging from the African Court of Human and Peoples' Rights, as well as that of the Commission on Human and Peoples' Rights, indicates that the right to environment imposes a due diligence obligation on states to take reasonable steps to prevent pollution and ecological degradation.[17] Similarly in a recent advisory opinion, the Inter-American Court of Human Rights has interpreted the right to environment in the American Convention on Human Rights as being owed not just to present generations but also to future generations and, importantly, as being applicable extraterritorially.[18] Significantly, the rights in the Protocol to the American Convention are backed by specifically adopted indicators for assessing the progress made by contracting states in implementing the Protocol.[19]

In parallel, progress towards positive recognition of environmental human rights was made with the adoption of the Aarhus Convention on access to environmental information, public participation and access to justice in environmental matters in 1998 ('Aarhus Convention').[20] The Convention is the first multilateral environmental agreement (MEA) specifically dedicated to environmental rights. Though the Convention is a regional agreement, it has a strong transnational character. The rights to access to environmental information, public participation and access to justice in environmental matters implicitly give force to the non-binding content of Principle 10 of the 1992 Rio Declaration on Environment and Development ('Rio Declaration') which itself, much like the Stockholm Declaration before it, highlights the link between effective environmental protection and rights, albeit through the focal point of procedural rights. On this reading, the Aarhus Convention – a regional MEA – provides a legally binding regime on the back of a non-binding international declaration. This development highlights that non-binding environmental norms may over time (indeed, a relatively short time span) migrate into formal legally binding rules, but also how such norms migrate across legal boundaries; from the international to the regional.

[16] (n 8).
[17] E.g. *SERAC v Nigeria Comm*. 155/96 ACHPR Doc. Comm/A044/1 and *African Commission on Human and People's Rights v Republic of Kenya* (appl. no. 006/2012) (decision of 26 May 2017). See also Chenwi (n 8).
[18] Inter-American Court of Human Rights, Advisory Opinion, OC-23/17 of November 15, 2017, 79-80.
[19] Organization of American States, Progress Indicators for Measuring Rights under the Protocol of San Salvador, Second ed. Available on http://www.oas.org/en/sedi/pub/progress_indicators.pdf.
[20] (adopted 25 June 1998, entered into force from 30 October 2001) 2161 UNTS 450.

The most recent initiative to highlight the transnational migration of environmental rights is the Escazú Agreement on access to information, public participation and access to justice in environmental matters by Latin American and Caribbean States.[21] The adoption of regional MEAs specifically providing for environmental rights across two regions which otherwise differ significantly in level of development and legal culture is a significant indicator of the importance attached to environmental rights and the ability of the rights terminology to migrate across traditional legal boundaries. This point is all the more relevant when considering that the inclusion of Principle 10 in the Rio Declaration was primarily a result of the work undertaken by developing states, even though the origin of the underlying ideals is most commonly traced back to domestic environmental law provisions found in developed countries.[22] A commonly cited origin for the underlying objective in Principle 10 of the Rio Declaration is that of the obligations in the National Environmental Policy Act adopted by the United States (US) Congress in 1972.[23] To the extent that this is the case, and to the extent it is possible to verify this potential migration in detail, the movement from domestic law to international environmental law further strengthens the argument that environmental rights are inherently migratory and transnational.

Beyond the recognition of the link between human rights law and the environment in regional environmental rights regimes and non-binding international environmental law instruments, a significant development which further underlines the migratory and transnational character of the environmental rights discourse is the speed with which domestic legal systems have embraced the environmental rights agenda. The endorsement of environmental rights provisions is particularly prominent in the context of domestic constitutional documents across the world.[24] Provisions on environmental rights are consequently found in dozens of constitutions across a wide range of developed, developing, post-Communist countries and emerging democracies. Though the exact definition, meaning and scope of each constitutional environmental rights provision varies from context to context and jurisdiction to jurisdiction, the inclusion of environmental rights provisions in domestic constitutional documents stands

[21] (adopted 4 March 2018), available at: <https://www.cepal.org/en/subsidiary-bodies/regional-agreement-access-information-public-participation-and-justice/text-regional-agreement>. See also Emily Barritt, 'Global Values, Transnational Expression: From Aarhus to Escazú' in Veerle Heyvaert and Leslie-Anne Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar, 2020).

[22] E.g. OECD, *Decision-Recommendation of the Council concerning Provision of Information to the Public and Public Participation in Decision-making Processes related to the Prevention of, and Response to, Accidents Involving Hazardous Substances*, C(88)85/Final, 8 July 1988.

[23] S. 102 of 42 US Code 4321.

[24] E.g. James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2015).

as one of the more prominent examples of the rights revolution in modern times.[25] Many of the constitutional environmental right movements thus resemble the developments that have taken place on the international plane and, in addition to provisions establishing rights to a 'healthy', 'sustainable', or 'favourable' environment, include provisions providing for rights of public participation, access to environmental information and access to independent review procedures.[26]

The narrative which emerges in the context of environmental rights is consequently best summed up as an example of migration and cross-fertilization of norms from one jurisdiction to another. This migration is not, however, one-directional but crisscrosses domestic, regional and international jurisdictions. Examples of migration consequently include norm migration from domestic legal systems and cultures, making their way into international instruments and documents framed in the vocabulary of rights (procedural as well las substantive). Similarly, this migration manifests itself in the non-binding international instruments of the Stockholm and Rio Declarations, which ultimately anchor themselves in treaty law, creating binding obligations on states, ultimately finding expression in domestic law (including in national constitutions). This emergence and solidification ultimately results in adjudication before courts and tribunals, including human rights tribunals.

FROM DISCOURSE TO ADJUDICATION

In order to substantiate the claim that the emergence of environmental human rights is essentially a transnational development, the case law of the European Court of Human Rights needs to be scrutinized in further detail. Further analysis will show that the ECtHR makes use of a series of different interpretive mechanisms and tools in order to fit environmental claims within the Convention system.

The main rule to surface from the Court's case law is that where environmental conditions in a responding state become sufficiently severe to threaten the enjoyment of an applicant's home and family life, or where the environmental conditions pose material risks to an applicant's life

[25] See Hong Sik Cho and Ole W Pedersen, 'Environmental Rights and Future Generations' in Mark Tushnet et al, *Routledge Handbook of Constitutional Law* (Routledge 2013) 401-412. See also Louis J. Kotze, 'The Transnationalization of Environmental Constitutionalism' in *Heyvaert and Duvic-Paoli* (n. 21).
[26] *Pedersen* (n 3).

and well-being, the state is under a positive obligation to put in place a regulatory response.[27] The case law of the ECtHR is thus rich with examples of a state being found in violation of the Convention as a result of its failure to provide sufficient protection against environmental harm. Examples include heavy industrial activities which cause immediate and severe harm to the applicant's family,[28] mining activities which cause immediate risks to the life and well-being of neighbouring families,[29] and the nuisance caused by heavy traffic[30] and noisy nightlife activities.[31] Ordinarily, however, in order for a claim to arise under the Convention, the Court has repeatedly stressed that, among other things, the material nuisance must attain a minimum level of severity (namely, exceed what is ordinarily expected as part of normal life).[32] Similarly, a central theme to emerge from the Court's case law is the fact that the ECtHR will take into account whether a responding state has allowed applicants the right to respond to and influence the decision making against which a complaint arises.[33] In *Hatton v United Kingdom*, the Court specifically held that the fact that the applicants had had the chance to make representations against the government decision which they sought to impugn suggested that no violation had taken place.[34] This move represents a significant development as the ECtHR effectively read provisions of a procedural nature into the substantive rules.

In developing its environmental rights-based jurisprudence, the main interpretive instrument of the Court has of course been the assumption that the Convention is not a static instrument but is a text which must be interpreted in light of the present-day conditions.[35] When keeping this in mind it becomes evident how the Court has been able to develop environmental rights from the Convention which is otherwise silent on the issue. So much so that it is now accepted by responding states that 'the protection of the environment is an increasingly important consideration'[36] in the context of human rights instruments. One driver behind this practice is of course that, once the ECtHR has accepted that environmental conditions are relevant in the context of the Convention, it is in practical terms forced to look beyond the Convention itself

[27] For an overview see Ole W Pedersen, 'The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law' (2010) 16 European Public Law 571.
[28] *López Ostra v. Spain*, (1995) 20 EHRR 277 and *Fadeyeva v. Russia*, (2007) 45 EHRR 10.
[29] *Taşkin and others v. Turkey*, (2006) 42 EHRR 50 and *Tătar v. Romania*, decision of 27 January 2009 **(**Appl. No. 67021/01).
[30] *Dees v Hungary*, decision of 9 November 2010 (application no 2345/06).
[31] *Moreno Gómez v. Spain*, (2005) 41 EHRR 40.
[32] *Fadeyeva v. Russia* (n 28).
[33] *Hatton and others v. United Kingdom*, (2003) 37 EHRR 28.
[34] Ibid para 128.
[35] *Tyrer v United Kindgom*, (1978) 2 EHRR 1 at 26.
[36] *Fredin* v. *Sweden*, No. 12033/86 (European Court of Human Rights, 1991).

towards developments in other areas and disciplines of law in order to develop a doctrine. In other words, the Convention does not provide much interpretive guidance when the Court needs to substantiate the legal obligations in the context of a claim touching on environmental conditions. In doing so, the Court is increasingly willing to draw inspiration from, and in some instances rely directly on, other sources of environmental law, including international environmental law, European Union environmental law as well as domestic legal regimes.

Examples of this include the Court relying expressly on the Rio Declaration in response to environmental claims. In *Taşkin v. Turkey*, the Court referred extensively to the Declaration (as well as the right in the Turkish constitution to a healthy environment) when substantiating the Convention's obligations on public participation in environmental matters and underlining the importance of independent review mechanisms of environmental decision making.[37] Similarly, in justifying its interpretation of the Convention to include procedural-type environmental rights, the Court has relied extensively on the Aarhus Convention.[38]

Elsewhere, when hearing claims raising questions of environmental harms and risks, the ECtHR has found support in other external sources such as European Union (EU) environmental law. Thus in *Giacomelli v Italy*,[39] the Court held that the failure of the domestic authorities to effectively apply national legislation on environmental assessment, giving force to the EU's directive on environmental impact assessment,[40] constituted a violation in the context of the operation of a large waste plant operating in proximity to the applicant's home. In *Tatar v Romania*,[41] when seeking to apply the precautionary principle in the context of the Convention, the ECtHR found support in the EU Commission's communication of 2000 on the principle, as well as then- Article 174 of the Treaty of the European Community (TEC; now 191 of the Treaty on the Functioning of the European Union (TFEU)).[42] More explicitly, in *Di Sarno v Italy*,[43] relating to the failure of the Italian government to effectively deal with waste in Southern Italy, the Court found against the Italian government on the basis of EU law,

[37] *Taşkin and others v. Turkey* (n 29).
[38] Ibid, and *Ivan Atanasov v Bulgaria* case of December 2, 2010 (application no. 12853/03).
[39] *Giacomelli v. Italy*, (2006) 5 EHRR 871.
[40] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ L 175, 5.7.1985, p. 40–48.
[41] *Tătar v. Romania*, decision of 27 January 2009 (application no. 67021/01).
[42] Communication from the Commission on the Precautionary Principle, COM/2000/1 final and Article 174 TEC now found in 191 TFEU.
[43] *Di Sarno* v. *Italy*, decision of 10 January 2012 (application no. 30765/08) at 111.

including the Waste Directive[44] and the Landfill Directive,[45] as well as primary EU legislation in the form of Article 174 TEC, and decisions by the Court of Justice of the European Union (CJEU). In particular, the ECtHR found support for its findings of non-compliance in the CJEU's decision holding that the Italian government had failed to meet its obligations under the 2006 Waste Directive, which was delivered two years prior to the ECtHR decision.[46]

External sources of law become relevant to the ECtHR not only in order to furnish an interpretive basis and argument for accommodating environmental claims, but also in the context of applying specific standards. In a series of cases, the Court has applied standards developed by other international organizations in order to substantiate its environmental jurisprudence. In *Fägerskiöld v Sweden*, the ECtHR readily applied standards promulgated by the World Health Organization (WHO) on community noise when considering whether the noise from wind turbines constituted a violation of Article 8 ECHR. The Court ultimately found that it did not.[47] Moreover, in dismissing the claim of the Italian government that the non-compliance was justified as a result of *force majeure*, the ECtHR 'simply reiterate[d] the terms of Article 23 of the Articles of the United Nations International Law Commission on State Responsibility for internationally wrongful acts', highlighting further the Court's willingness to look to other legal regimes for inspiration when interpreting the Convention.[48]

From this it becomes clear that a central force in the ECtHR's interpretation of environmental claims is the borrowing and application of rules and norms from non-ECHR regimes (be they treaty law, primary and secondary sources of EU law or non-binding international documents).[49] In fact, without the application of and reliance on external norms it is arguable that the Court would not have been able to expand the Convention to include environmental rights. The evolution of, in particular, Articles 2 and 8 of the Convention, under certain circumstances, to include environmental claims consequently stands as a central exemplar of the transnational development of environmental rights.

Importantly, however, the emergence of environmental rights through the borrowing and reliance on external sources of law is not unique to the European human rights system of the

[44] Directive 2006/12/EC on waste OJ L 114, 27.4.2006, p. 9–21.
[45] Directive 1999/31/EC on the landfill of waste OJ L 182, 16.7.1999, p. 1–19.
[46] Commission of the European Communities v Italy Case C135-05.
[47] *Fagerskjöld v. Sweden*, decision of 26 February 2008 (Appl. no. 37664/04).
[48] *Di Sarno* v. *Italy*, decision of 10 January 2012 application no. 30765/08 at 111.
[49] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010).

ECHR.[50] In its advisory opinion on the extraterritorial application of the environmental rights provisions of the San Salvador Protocol, the Inter-American Court of Human Rights relied extensively on sources from outside the American Convention.[51] Strikingly, and much like the ECtHR, the Inter-American Court found support in the Aarhus Convention. This is even more remarkable than in the case of the ECtHR, considering the specific European scope of the Aarhus Convention.[52] The Convention was not, however, the only European source of inspiration utilized by the Inter-American Court, as it also found support in the many cases decided by the ECtHR.[53]

Again, scrutiny of the case law from the most established human rights tribunals and their engagement with environmental claims reveals a readiness to rely extensively on decisions and sources of law from other legal systems and human rights regimes in the attempt to respond to environmental claims.

TRANSNATIONAL CHALLENGES AND LIMITATIONS

One point to consider in light of the transnationalization of environmental rights and norms is whether human rights courts and tribunals are suited for such norm-entrepreneurship around environmental rights. In the case of the ECtHR, this entails shoehorning environmental rights into a legal regime which is deliberately silent on the issue, notwithstanding several attempts by the Council of Europe's Parliamentary Assembly to adopt a protocol to the Convention on environmental rights.[54] On the one hand, the doctrine of interpreting the European Convention in light of present-day conditions is well established and has been applied across a range of issues, including to issues which the framers of the Convention had expressly excluded from Convention protection (for example in the context of the Court's case law on the right not to join a trade union).[55] As Letsas argues, the Court has developed Convention rights not just with regard to issues which the framers of the Convention could not reasonably have foreseen (such

[50] For a wider discussion see Jonathan B Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295.
[51] Inter-American Court of Human Rights, Advisory Opinion, OC-23/17 of November 15, 2017.
[52] The Aarhus Convention was moreover relied upon by the ECtHR in the *Taşkin and others v. Turkey* decision notwithstanding Turkey not being a party to the Convention (the Convention though remains open to signature for non-UNECE parties).
[53] Including the ECtHR's *Lopez Ostra* decision, the *Guerra v Italy* decision, the *Hatton* decision, and the *Öneryildiz* decision, e.g. in para 5 of the decision.
[54] E.g. See Council of Europe, Parliamentary Assembly, *Environment and Human Rights*, Doc. 9791 16 April 2003.
[55] *Matthews v. United Kingdom*, decision of 18 February 1999 (application no. 24833/94).

as the environment), but also to issues which the framers sought to exclude.[56] In principle, this extension of Convention protection might well be justified on the moral imperative inherent in human rights doctrines that seek to protect minorities from the prevailing impulses of majority decision makers.[57] In the case of environmental claims, however, it might be argued that this need for counter-majoritarian correction is not as strong as it might be elsewhere. Many of the claims before the ECtHR do not argue that the responding state ought to take positive steps to enact and put in place regulatory regimes to protect individuals (though there is a subset of cases in which the line of argument is pursued),[58] but instead advance the claim that the responding state has failed to effectively apply existing regimes and rules of environmental law already in place in the responding state. On this reading, the legal landscape of the responding states arguably already reflects present-day conditions, and recognizes the need for environmental protection.

As noted above, however, the central theme in many of the environmental cases before the ECtHR relates to the situation where a government has failed to give effective force to its statutory framework of environmental law. Often, when finding that a responding state has not fully discharged its positive duty under the Convention to minimize environmental risks, the ECHR expressly points out that the state has failed to strike a fair balance between interests of the state in, say, maintaining economically valuable activities which cause environmental harm, and the risks to which these activities expose the individual claimant. In such cases, there is scope to conceptualize the ECtHR's willingness to include environmental claims under the Convention as fitting within the general impetus to protect individual claimants from counter-majoritarian decisions. A theme that consequently emerges in many of the cases in which the ECtHR decided to expand the scope of the Convention to include environmental claims, is one akin to traditional ideas of environmental justice. The focus on justice, here, is in support of attempts to redress situations where certain individuals bear a disproportionate burden of environmental harms.[59] That is, where the failure of the responding state to effectively apply and implement its own regulatory regime of environmental law gives rise to a situation where a subset of individuals are exposed to a significantly higher environmental risk, the ECHR

[56] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy' (2012) available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (accessed 11 February 2019).

[57] Ibid.

[58] *Hardy and Maile v United Kingdom* (2012) 55 EHRR 28.

[59] E.g. *Jugheli and others v Georgia*, decision of 13 July 2017 (application no. 38342/05) and *Fadeyeva* v *Russia* above. See also Ole W Pedersen, 'Environmental Justice in the UK: Uncertainty, Ambiguity and the Law' (2011) LS 279.

implies a positive duty on the state. This line of reasoning sits well within traditional conceptions of human rights doctrines as having a purpose of providing protection to minorities.

Similarly, in the ECHR environmental rights case law, where the majority of the claims before the ECtHR center on the argument that the responding state has failed to effectively apply domestic environmental law already in place, the Court is not so much acting as a norm-entrepreneur as it is simply enforcing the law.[60] From this perspective, the central focus of the environmental claims before the ECtHR is not so much on expanding the reach of the Convention as about it is on securing respect for the rule of law through the enforcement of already enacted domestic law.[61] The standout example of this rule of law emphasis is the *Taşkin* decision, where the Court expressly emphasized the important failure of the Turkish government to shut down polluting activities, operating in clear contravention of domestic legal obligations.[62] Similarly, in *Kyrtatos v Greece* the Court expressly pointed out that general environmental harm does not necessarily trigger application of the Convention.[63] Where breaches of domestic law are involved, the extension of the reach of human rights obligations to cover environmental issues is not expansionary at all. In fact, the environmental element of a given claim might even be seen as peripheral to the case, since the main argument in many such claims focuses on the fundamental need to respect positively enacted rules in the domestic legal order. It does not necessarily require the Court to develop a new doctrine of law. On this assumption, human rights tribunals act simply as enforcers of the law, providing legal authority where domestic governments have failed in doing so and the application of environmental claims to established human rights systems is arguably less radical than it might otherwise appear.

Against this, one problem associated with the adjudication of environmental claims before human rights tribunals and the transnational response adopted by these tribunals is the readiness with which tribunals draw on external sources of law. A challenge arising from this is coping with the inherent diversity between legal systems when it comes to purpose, design of rules and interpretive doctrines. The meaning, definition and role played by, for example, the

[60] See Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance', (2007) 13 Columbia Journal of European Law 565, for an enlightening discussion.
[61] Pedersen the Ties that bind above.
[62] *Taşkin and others v. Turkey* above at 135-138.
[63] *Kyrtatos v. Greece* (2005) 40 EHRR 16.

precautionary principle, is likely to vary from one legal context to another.[64] The conceptualization of the precautionary principle in the TFEU, in the European Commission's Communication from 2000 and in associated CJEU case law is a reflection of the EU's legal order with its emphasis on, amongst other things, the creation of a common market which respects a high level of environmental protection. It is also influenced by the particular legislative process through which EU environmental law is adopted.[65] By the same token, the definition of the precautionary principle in the Rio Declaration arguably reflects a very different decision-making process and understanding of the role and purpose of, in this case, a non-binding legal instrument adopted by states in international law. Similarly, it does not necessarily follow as a matter of course that the ECtHR ought to assume that decisions by, for example, the CJEU, responding to a particular set of infringement procedures brought by the European Commission following a Member State's failure to implement the Waste Directive, are instructive when it comes to determining whether a contracting party fulfills its positive obligations under a human rights treaty.[66] The same might be said of the reliance by the ECtHR on the findings of the International Law Commission in the *Di Sarno* decision. While these different decisions and norms are no doubt highly persuasive, the Court's willingness to so readily apply them in the context of the ECHR arguably overlooks the distinctive nature of the legal systems and legal cultures in which the rules and norms were developed.

The point here is not so much that human rights tribunals are an inappropriate forum for the adjudication of environmental claims. Nor is it an attempt to suggest that human rights tribunals ought not to involve themselves with adjudication on issues that raise questions of resource allocation, as environmental law often does. The point is simply that, when entertaining environmental claims, human rights tribunals ought to do so bearing in mind the importance of context. In the field of transnational environmental law scholarship, Fisher has highlighted the need for scholars to be alert to 'the finer details of legal culture'.[67] This proposition arguably applies with equal force to courts and tribunals. This means that, when hearing environmental claims which raise novel questions of law and which invite courts to consider aspects of legal

[64] See Elizabeth Fisher 'Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community' (2002) 9 Maastricht Journal of European & Competition Law 7; Ole W Pedersen, 'From Abundance to Indeterminacy: The Precautionary Principles and its Two Camps of Custom', (2014) Transnational Environmental Law 323.
[65] For one standout example see Bettina Lange, *Implementing Pollution Control* (Cambridge University Press 2008).
[66] See also Ole W Pedersen in John Knox and Ramin Pejan above 86-96.
[67] Elizabeth Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) Transnational Environmental Law 43, 48.

regimes that are external to the system in which the claim is heard, the relevant court ought to be alert to the fact that taking inspiration from and borrowing of legal rules, principles and concepts is done with caution. At the very least, the phenomenon of judicial borrowing ought to take place with the appreciation that the meaning, purpose and role of a given rule, principle or concept is very likely to vary from context to context. It is not clear that human rights tribunals are presently alert to this.

CONCLUSION

The successful emergence of environmental human rights as a legal discipline and self-contained doctrine is clearly transnational. The account put forward in this chapter has explained how the emergence of environmental human rights as a concept crisscrosses domestic environmental law, international and regional human rights law and general international law. Often this crisscrossing is, in the absence of express state support, driven by judicial ingenuity and a willingness to take inspiration from a wide range of backgrounds and sources. On the one hand, the emergence of environmental human rights has been hugely successful. It provides individuals facing particularly poor environmental conditions with an additional option of enforcement against their own state and, in the future, perhaps also extraterritorially. Where this is the case, the willingness by human rights tribunals to develop environmental rights doctrines serves an important purpose of delivering environmental justice and the rule of law to individuals. On the other hand, in delivering these important goals, human rights tribunals are arguably somewhat careless in the way in which they so readily develop new doctrines from scratch by importing extrinsic norms and sources into their respective treaty regimes. Notwithstanding these challenges, the intervention by human rights tribunals nevertheless shows that human rights tribunals are remarkably adept at responding to the modern human challenges facing the human rights system, including the urge by claimants to expand the application of human rights into new territories of law.