

# Environmental Rights and Climate Rights

## Erga Omnes Obligations in International Law and EU Law?\*

Ottavio Quirico\*\*

### Abstract

*Is there an erga omnes right (and duty) to a sustainable environment in international law? Is an erga omnes right (and duty) to a sustainable climate developing within this framework? What is the contribution of EU law to this trajectory? This article explores the pace, nature and scope of application of the right to a sustainable environment as well as that of a possible right to a sustainable climate within this framework from the intertwined perspectives of international law and EU law. The article fundamentally claims that an erga omnes right and duty to a sustainable climate is developing in international law; EU law has largely contributed to this development and is currently essentially aligned with international law in this regard. By contrast, EU law seems to be more progressive than international law with respect to the development of the right to a sustainable climate as a specific erga omnes claim.*

**Keywords:** environmental rights, climate rights, erga omnes obligations, sustainable development goals, EU Charter of Fundamental Rights.

### 1. Introduction

*Environmental rights* have undergone a significant development in international law, particularly since the 1970s. Regulatory instruments spanning the 1972 Stockholm Declaration of the UN Conference on Human Environment (UNCHE)<sup>1</sup> and the Convention on Biological Diversity<sup>2</sup> are key steps in the trajectory towards the establishment of environmental protection as a right, possibly having an *erga omnes* scope of application. Within this context, little attention has been devoted to the question of *climate rights* and, within this framework, to the possible development of the *right to a sustainable climate* as an *erga omnes* obligation. Nonetheless, at the normative level, the UN Framework Convention

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\*\* Ottavio Quirico: associate professor of law, University of New England, Australia and Australian National University, Centre for European Studies; Fernand Braudel Senior Fellow, European University Institute, Florence.

1 UNCHE, Report, UN Doc A/CONF 48/14/Rev 1 (16 June 1972).

2 Opened for signature 5 June 1992, 1760 UNTS 79, entered into force 29 December 1993.

on Climate Change (UNFCCC)<sup>3</sup> clearly establishes certain principles and objectives in the matter that have attracted quasi-universal participation. This raises the question whether a right to a stable climate is emerging internationally, possibly as a universal duty.

Such developments are taking place not only at the global level, but also at the regional level. In particular, EU law has provided a meaningful contribution to the development of the right to a safe environment in international law, whereby the EU CFR<sup>4</sup> has played a key role, notably, in light of Article 37 on environmental protection. Significant developments are also taking place with respect to the possible recognition of the right to a safe climate, as the EU is adopting a progressive policy in the area, particularly *via* Resolution 2020/2134(INI) on the Effects of Climate Change on Human Rights and the Role of Environmental Defenders on This Matter.<sup>5</sup>

This article sets out to develop an essential analysis of the evolution of the right to a safe environment and the right to a safe climate as obligations *erga omnes* in international law and EU law as parallel and intertwined regulatory systems. Three perspectives are fundamental to the development of this research. (i) First, along the lines of the analysis developed by Hohfeld, it is considered that rights and duties are necessarily correlated notions and structures.<sup>6</sup> (ii) Secondly, the analysis develops against the background of the sources of international law, particularly as classified under Article 38 of the Statute of the ICJ, and, more specifically, the distinction between the general principles of international law, which have customary nature, under Article 38(1)(b), and the general principles of law inferred from domestic legal system under Article 38(1)(c). Indeed, although these sources are different, at least to a certain extent, by their very nature they create rights and duties that are *erga omnes* in scope.<sup>7</sup> (iii) Thirdly, it is necessary to consider the different meanings of the concept of an '*erga omnes* obligation'. Literally, the Latin expression '*erga omnes*' simply means '*vis-à-vis* everyone'.<sup>8</sup> Therefore, an *erga omnes* obligation could simply be regarded as the duty of a legal person entailing the corresponding rights of all other legal persons under international law and EU law. According to the well-known *obiter dictum* of the ICJ in *Barcelona Traction*, *erga omnes* obligations are not only universal duties, but, more specifically, duties owed by a legal person to 'the international community as a whole', entailing a general interest in protection.<sup>9</sup> From this perspective, *erga omnes* obligations overlap with peremptory obligations (*jus cogens*), which are non-derogable universal rights and duties under Article 53 of the Vienna Convention on the Law of Treaties (VCLT) and the Vienna

3 Opened for signature 28 December 2009, 1771 UNTS 107, entered into force 21 March 1994.

4 Adopted 7 December 2000.

5 Res. 2020/2134(INI) of 19 May 2021.

6 Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, Vol. 26, 1916, p. 717.

7 Hugh Thirlway, *The Sources of International Law*, Oxford University Press, Oxford, 2019.

8 Britannica, *Erga Omnes*, at [www.britannica.com/topic/erga-omnes](http://www.britannica.com/topic/erga-omnes).

9 ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain) Second Phase (Judgment)*, ICJ Reports 1970, p. 32, paras. 33-34.

Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO).<sup>10</sup>

The analysis is divided into two parts. The first part considers the evolution of the right to a sustainable environment as an *erga omnes* obligation under international law and subsequently deals with the right to a sustainable climate as an *erga omnes* one within this context. The second part focuses on the development of the right to a sustainable environment as an *erga omnes* one under EU law and considers, within this framework, the possible evolution of a separate right to a sustainable climate as an *erga omnes* obligation.

## 2. The Right to a Sustainable Environment and the Right to a Sustainable Climate: Erga Omnes Obligations in International Law?

### 2.1. The Right to a Sustainable Environment

Since the *Trail Smelter* arbitral award, the no-harm and polluter-pays rules, and thus, the right to a sustainable environment, are well-established in international law. Indeed, in the foundational *Trail Smelter* case, an Arbitral Tribunal, adjudicating upon the case of a lead and zinc plant located in Canada and emitting smoke causing damage to crops, livestock and timber across the border with the US held that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein”.<sup>11</sup> States are therefore internationally responsible for trans-boundary (air) pollution, and in *Nuclear Weapons*<sup>12</sup> the ICJ held that this duty is “part of the corpus of international law relating to the environment”, implying that it has a customary nature and therefore a general scope of application.

At times, the *erga omnes* nature of the right to a sustainable environment has been explicitly affirmed in international law. Notably, in his dissenting opinion in *Gabcykovo-Nagymaros*,<sup>13</sup> Judge Weeramantry put forward the idea that the right to a safe environment is an *erga omnes obligation under customary international law*. Weeramantry indeed underscored the ‘*erga omnes* connotation’ of environmental damage<sup>14</sup> and highlighted that “international environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.”<sup>15</sup> This argument was later developed by the Inuit in their Petition against the US to the IACCommHR for excessive GHG emissions, claiming

10 Thomas Weatherall, *International Law and Social Context*, Cambridge University Press, Cambridge, 2015, p. 351; Antônio Augusto Cançado Trindade, *International Law for Humankind*, Brill, Leiden, 2020, p. 291.

11 *Trail Smelter (US v Canada)*, 16 April 1938 and 11 March 1941, 3 RIAA p. 1965.

12 ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports 1996, pp. 241-242, para. 29.

13 ICJ, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, judgment, ICJ Reports 1997, p. 7.

14 Id. Separate Opinion of Judge Weeramantry, p. 89.

15 Id. p. 118.

that “[t]he right to a healthy environment is [...] a right of customary international law”.<sup>16</sup>

More recently, the UN Human Rights Committee (HRC) adopted a Resolution acknowledging that “the right to a safe, clean, healthy and sustainable environment” is ‘a human right’.<sup>17</sup> This is only a recognition of soft law and it is yet to be seen how the UN General Assembly will react to such an approach; however, the Resolution is particularly meaningful, as it allows the development of significant considerations on the *erga omnes* nature of the right to a safe environment. Indeed, besides being interdependent and indivisible, human rights are in principle universal,<sup>18</sup> and therefore, if the right to a safe environment qualifies as a fundamental one, it follows that it should also have a universal scope of application. In any case, the recognition of the right to a safe environment as a fundamental one would shift the focus from its interstate structure to a right primarily held by individuals *vis-à-vis* all other legal persons in the international community. Considering the duty-right to a safe environment from an intertemporal perspective,<sup>19</sup> some scholars have noted that the recognition of the human right to a healthy environment as an autonomous claim under general international law has a collective scope as a universal norm not only *vis-à-vis* present generations, but also the future ones.<sup>20</sup> To a certain extent, the obligation to protect the environment is also considered an *erga omnes* duty along the lines of the decision of the ICJ in *Barcelona Traction*,<sup>21</sup> thus approaching the notion of *jus cogens*. Indeed, scholars have noted that the duty to protect the environment should be equated to normative prohibitions, such as those against genocide and aggression.<sup>22</sup>

Having regard to the classification of the sources of international law under Article 38 of the ICJ Statute, it may be asserted that the right to safe environment could be emerging as an *erga omnes* obligation under Article 38(2)(c), rather than Article 38(c)(b), that is, as a *general principle of law*

- 16 IACCommHR, *Inuit Petition to the Inter- American Commission on Human Rights, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, P-1413-05, 7 December 2005, p. 74.
- 17 HRC, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/48/L.23/Rev.1, 2021, p. 3, para. 1.
- 18 Mark Gibney & Sigrun Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, Philadelphia, 2010.
- 19 Emily Grabham & Siân Beynon-Jones (eds.), *Law and Time*, Routledge, London, 2018.
- 20 Bridget Lewis, ‘Human Rights as a Basis for Institutions for Future Generations’, in Jan Linehan & Peter Lawrence (eds.), *Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice*, Edward Elgar, Cheltenham, 2021, p. 62.
- 21 ICJ, *Barcelona Traction*, 1970, p. 32.
- 22 Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2006, p. 65. See also Mission of Colombia to the United Nations, Panel Discussion regarding Opinión Consultiva OC-23/17, 15 November 2017, Medio Ambiente y Derechos Humanos, 2018, p. 1.

rather than a general principle of international law.<sup>23</sup> In other words, given that 178 States acknowledge the right to a sustainable environment *via* domestic regulation,<sup>24</sup> the right to a safe environment could be classified as a universal obligation recognized as such by most legal systems in the world. Moreover, in light of the fact that more than 100 States recognize the right to environmental sustainability at the constitutional level, it might be assumed that, also taken from the perspective of the general principles of law, it is evolving into a fundamental right.<sup>25</sup> For instance Section 112 of the Norwegian Constitution posits that “[e]very person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained”, entailing a duty to manage natural resources on the basis of comprehensive long-term considerations that will also safeguard this right for future generations.

Overall, it is possible to consider that the right to a safe environment is evolving as an *erga omnes* right and duty under international law.<sup>26</sup> However, this approach is not yet clearly and fully established. Furthermore, it is not without systemic problems. Indeed, (i) first, there are different meanings of the notion of an ‘*erga omnes* obligation’.<sup>27</sup> (ii) Secondly, the right to environmental protection is quite general and encompasses a sub-set of rights, spanning biodiversity, the protection of forests and watercourses. Logically, if the right to a sustainable environment has an *erga omnes* scope of application, also the rights to the protection of forests and watercourses should be *erga omnes* in scope. In practice, declaring the *erga omnes* nature of the right to a sustainable environment would be tantamount to declaring the *erga omnes* nature of international environmental law as such.

## 2.2. The Right to a Sustainable Climate

The right to a sustainable climate is clearly affirmed in the Sustainable Development Goals, which acknowledge the necessity “to take action to combat climate change and its impacts” (Goal 13).<sup>28</sup> Within such a framework, the UNFCCC regime outlines an obligation to protect the environment from excessive GHG emissions.

Normatively, according to Article 2 UNFCCC, the parties to the Convention commit to the “stabilization of greenhouse gas concentrations in the atmosphere

23 Stefan Vogenauer & Stephen Weatherill, *General Principles of Law*, Hart, Oxford, 2017; Imogen Saunders, *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice*, Hart, Oxford, 2020; Pierre-Marie Dupuy, *Customary International Law*, Edward Elgar Publishing, Northampton, 2021.

24 John Knox, *Preliminary Report on Human Rights and the Environment*, UN Doc A/HRC/22/43 5, 24 December 2012, para. 12.

25 David Boyd, ‘The Right to a Healthy and Sustainable Environment’, in Yann Aguila & Jorge Vinales, *A Global Pact for the Environment-Legal Foundations*, University of Cambridge, Cambridge, 2019, p. 30.

26 See Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Clarendon Press, Oxford, 1997, p. 157.

27 Cf. the introductory section.

28 UN GA, *Transforming Our Goals*, RES/70/01, 2015, para. 59.

at a level that would prevent dangerous anthropogenic interference with the climate system”, aiming to ensure sustainable development. According to Article 3, the protection of the climate system should benefit both the present and future generations of humankind. This duty is reinforced by Article 4 UNFCCC, which compels the parties to implement national and regional programs, policies and measures to mitigate climate change, as well as adaptation measures. Along these lines, Article 2 of the Paris Agreement<sup>29</sup> provides that, within the context of sustainable development, the Parties aim to strengthen the response to climate change by, inter alia, keeping global average temperature increase well below 2°C above pre-industrial levels and pursuing efforts to limit such increase to 1.5°C, *via* adequate mitigation measures. These duties have been interpreted by scholars either as an obligation to prevent climate change<sup>30</sup> or as a recommendation belonging to soft law,<sup>31</sup> whereby an overall substantive duty of conduct to reverse the long-term trend of GHG emissions clearly emerges.<sup>32</sup>

Whether the right to a sustainable climate can also be regarded as an *erga omnes* obligation is a complex question. The UNFCCC and the Paris Agreement are subject to the relative effectiveness of treaties, according to Article 34 VCLT and VCLTIO; however, the UNFCCC has thus far been ratified by 197 Parties, while 192 parties have ratified the Paris Agreement.<sup>33</sup> Quasi-universal participation in these conventions could indicate the emergence of a universal duty and right to a safe climate, according to well-established international legal theory.<sup>34</sup> Meaningfully, in *Certain Activities carried out by Nicaragua in the Border Area*,<sup>35</sup> Judge Dugard noted that

“the obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is certainly an obligation *erga omnes*.”<sup>36</sup>

29 Opened for signature 12 December 2015, entered into force 4 November 2016.

30 Christina Voigt, ‘State Responsibility for Climate Change Damages’, *Nordic Journal of International Law*, Vol. 77, Issue 1-2, 2008, p. 5.

31 Malgosia Fitzmaurice, ‘Responsibility and Climate Change’, *German Yearbook of International Law*, Vol. 53, 2010, p. 106.

32 Daniel Bodansky, ‘The Legal Character of the Paris Agreement’, *Review of European, Comparative and International Environmental Law*, Vol. 25, Issue 2, 2016, p. 146; Benoît Mayer, ‘Obligations of Conduct in the International Law on Climate Change: A Defence’, *Review of European, Comparative and International Environmental Law*, Vol. 27, Issue 2, 2018, p. 135.

33 UNFCCC, Status of Ratification, at <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention>; Paris Agreement, Status of Ratification, at <https://unfccc.int/process/the-paris-agreement/status-of-ratification>.

34 Mark Villiger, *Customary International Law and Treaties*, Martinus Nijhoff, Dordrecht, 1985, p. 159.

35 ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, ICJ Reports 2018, p. 15.

36 Id. Dissenting Opinion of *ad hoc* judge Dugard, p. 120.



Some scholars have even sought to collect evidence that the duty to curb GHG emissions might be evolving as a peremptory obligation belonging to *jus cogens*.<sup>37</sup>

Considering human rights, while the obligation to curb GHG emissions is not qualified directly as a fundamental right in the UNFCCC regime, the Preamble to the Paris Agreement states that climate change is “a common concern of humankind” and the Parties should “respect, promote and consider their respective obligations on human rights” in “taking action to address climate change” In 2019, the Special Rapporteur to the UN HRC on the Environment and Human Rights, Professor Boyd, considered that States have an obligation to respect, protect and fulfil “the right to a safe climate” through their own actions, including mitigation and adaptation measures.<sup>38</sup> Naturally, acknowledging the human rights nature of the right to a sustainable climate would also entail recognizing its *erga omnes* scope of application, given the universal nature of fundamental rights.<sup>39</sup> This would also entail a shift in focus from the interstate nature of the right and duty under the UNFCCC to a claim primarily addressing individuals as the right-holders, *vis-à-vis* not only present generations, but also future ones. Indeed, a Declaration on Climate Change and Human Rights recently adopted by the Global Network for Human Rights and the Environment (GNHRE) acknowledges that, within the context of the human right to a sustainable environment, ‘everyone’ has “the right [...] to be free from dangerous anthropogenic interference with the climate system such that rising global temperatures are kept well below 2 degrees centigrade above preindustrial levels” [Principle I(5)].<sup>40</sup>

It cannot also be excluded that the right to safe climate emerges *de lege ferenda* as an *erga omnes* obligation under domestic constitutions. Some scholars have indeed underscored that fundamental norms provide “robust institutional structures to address climate change”, as they protect the intrinsic value of environmental sustainability and guarantee procedural environmental rights.<sup>41</sup> Most significantly, in the case of *Juliana v US*, the US Court for the District of Oregon ‘undoubtedly’ affirmed that “the right to a climate system capable of sustaining human life” is “fundamental to a free and ordered society.”<sup>42</sup> This statement entails the possibility of interpreting the right to a sustainable climate as a human right and therefore as an *erga omnes* obligation. However, in the

37 Ottavio Quirico, ‘Towards a Peremptory Duty to Curb Greenhouse Gas Emissions?’, *Fordham International Law Journal*, Vol. 44, Issue 4, 2021, p. 923.

38 David Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/74/161, 15 July 2019, p. 18, para. 65.

39 Gibney & Skogly, 2010.

40 Kirsten Davies *et al.*, ‘The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy Change’, *Journal of Human Rights and the Environment*, Vol. 8, Issue 2, 2017, p. 250.

41 Samantha Julien, The Secretary-General Addressed the Role of Constitutions in Combating the Climate Crisis, IDEA, 2021, at [www.idea.int/news-media/news/secretary-general-addressed-role-constitutions-combating-climate-crisis](http://www.idea.int/news-media/news/secretary-general-addressed-role-constitutions-combating-climate-crisis).

42 *Juliana v United States*, 217 F. Supp. 3d, D. Or. 2016, p. 1250. See also Valerie Brown, *Climate Change*, 2019, The Revelator, at <https://therevelator.org/constitution-right-climate>.

absence of an explicit (constitutional) recognition of the right to a sustainable climate in most legal systems of the world, it would be difficult to assert that it is emerging as a general principle of law under Article 38(2)(b) of the ICJ Statute.

### 3. EU Law Developments

#### 3.1. *An Erga Omnes Right to a Sustainable Environment? Lessons from Article 37 EU CFR*

Along the lines of the jurisprudence of the CJEU, EU law has developed a high level of environmental protection. Several rules within the EU system focus on the need to ensure sustainable development. Notably, the Preamble to the TEU establishes that the EU promotes economic and social progress, taking into account the principles of sustainable development and environmental protection. Along these lines, Article 3(3) TEU, which regulates the fundamental principles of the Union, establishes that the EU internal market promotes sustainable development and a high level of protection and improvement of the quality of the environment. Article 21(2)(f)-(g) TEU further transposes these principles within the sphere of the EU external action, aiming to preserve and improve the quality of the environment and the sustainable management of global natural resources. Moreover, within Title XX TFEU, which focuses on the 'Environment', Article 191 establishes that the Union acts to protect and improve environmental quality, particularly in its external action, with a focus on climate change. More specifically, Article 11 TEU posits that environmental protection must be integrated into the definition and implementation of Union policies and activities, with a view to promoting sustainable development. These rules are summarized from a human rights perspective in Article 37 of the EU CFR (Environmental Protection), which provides for the integration of a high level of environmental protection and the improvement of the quality of the environment into the policies of the Union, in accordance with the principle of sustainable development.

While this is not tantamount to establishing a right to a sustainable environment or better yet a right having an *erga omnes* scope of application, it indicates the centrality of environmental protection as a core value of the EU. Article 37 EU CFR tends to crystallize at the EU level a trend that is already embedded in regional instruments such as the African Charter on Human and Peoples' Rights, notably under Article 24. This approach has also developed within the Inter-American human rights protection system; notably, in November 2017, upon request by Colombia, the IACtHR adopted an advisory opinion that acknowledges the link between environmental protection and the rights to life and health.<sup>43</sup> The opinion states that *a decent environment is a necessary pre-condition for a decent life and health*,<sup>44</sup> and is thus indispensable to fulfil the general obligations to respect and ensure the rights to life and personal

43 IACtHR, *Advisory Opinion OC-23/17 of 15 November 2017 Requested by the Republic of Colombia on the Environment and Human Rights*.

44 *Id.* paras. 110-111.



integrity.<sup>45</sup> Besides such implications, the opinion acknowledges the existence of a justiciable human right to a healthy environment, particularly in the light of Article 11 of the San Salvador Protocol to the American Convention on Human Rights,<sup>46</sup> as a claim distinct from other human rights.<sup>47</sup>

However, while environmental protection is already established as a fundamental right in the African human rights protection system and is being progressively established in the Inter-American system, it is unclear whether Article 37 EU CFR establishes a right rather than principle. Only if environmental protection qualifies as a right under Article 37 EU CFR, could its further nature as an *erga omnes* obligation be asserted. According to the majority of scholars, the wording of Article 37 EU CFR, focusing on the policies of the EU rather than individual rights, allows the *recognition of environmental sustainability as a principle, but not as an 'individual (human) right'* to a healthy environment.<sup>48</sup> However, the case law is more nuanced and, in a string of cases, *the CJEU has developed a right-oriented interpretation of Article 37 EU CFR*. Specifically, in *Romonta* the General Court mentioned the necessity of approaching Article 37 EU CFR in terms of 'rights and freedoms'.<sup>49</sup> In *European Air Transport*, Advocate General Villalón considered that Article 37 EU CFR "expressly recognizes the right to environmental protection".<sup>50</sup> In *Association de médiation sociale*, Villalón further determined that Article 37 EU CFR posits a "fundamental right".<sup>51</sup> Similarly, Advocate General Colomer considered that "[c]ommunity citizens are entitled to demand fulfillment of responsibility under Article 37 of the Charter of Fundamental Rights of the European Union."<sup>52</sup> Therefore, some scholars claim that Article 37 EU CFR might at least evolve into a right-duty relationship *de lege ferenda*.<sup>53</sup>

Of significance is the Resolution on the Effects of Climate Change on Human Rights and the Role of Environmental Defenders on This Matter recently passed by the European Parliament and Council.<sup>54</sup> The Resolution urges the European Commission to monitor the situation of human rights and climate change and to integrate the mainstreaming of human rights into all aspects of national and

45 Id. para. 243.

46 Opened for signature 22 November 1969, 1144 UNTS 123, entered into force 18 July 1978.

47 IACtHR, *Advisory Opinion OC-23/17 of 15 November 2017*, para. 63.

48 Elisa Morgera & Gracia Marin-Duran, 'Article 37', in Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart, Oxford, pp. 984, 995-96.

49 Judgment of 24 October 2014, *Case T-614/13, Romonta v Commission*, ECLI:EU:T:2014:835, para. 77.

50 Opinion of Advocate General Villalón Delivered on 17 February 2011, *Case C-120/10, European Air Transport SA*, ECLI:EU:C:2011:94, para. 78.

51 Opinion of Advocate General Villalón Delivered on 18 July 2013, *Case C-176/12, Association de Médiation Sociale*, ECLI:EU:C:2013:491, para. 44.

52 Opinion of Advocate General Colomel Delivered on 8 January 2004, *Case C-87/02, Commission v Italy*, ECLI:EU:C:2004:13, para. 36.

53 See e.g. Kristof Hectors, 'The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as a Human Right', *European Energy & Environmental Law Review*, Vol. 17, Issue 3, 2008, pp. 166 and 172.

54 European Parliament Resolution of 19 May 2021 on the Effects of Climate Change on Human Rights and the Role of Environmental Defenders on This Matter, 2020/2134(INI).

international climate action, in cooperation with the UN HRC and High Commissioner on Human Rights (HCHR).<sup>55</sup> Within this framework, besides invoking full compliance with Article 37 EU CFR, the Resolution urges the EU to introduce “a right to a safe and healthy environment” in the Charter.<sup>56</sup> This is critical evidence in favor of the interpretation that *Article 37 EU CFR does not yet establish a human right to a safe environment*, which is nonetheless progressively developing in the EU legal system. It can therefore be assumed that for the time being, the right to a safe environment is not yet clearly established under EU law, neither at the interstate level, nor at the inter-individual level. However, it is evolving as such particularly from a human rights perspective and it should prospectively develop as an *erga omnes* obligation with regard to both state and non-state persons within the EU legal sphere.

### 3.2. An Evolving *Erga Omnes* Right to a Sustainable Climate?

There is no official recognition of the right to a sustainable climate as an *erga omnes* obligation in EU law. Nonetheless, there are significant initiatives where such a right emerges, possibly *via* a universal approach. Two recent regulatory instruments are particularly important: the Council and Parliament Regulation Establishing the Framework for Achieving Climate Neutrality (2021/1119)<sup>57</sup> and the above-mentioned European Parliament Resolution on the Effects of Climate Change on Human Rights and the Role of Environmental Defenders on This Matter.<sup>58</sup>

According to Recital (6), Regulation 2021/1119 operates within the framework of the EU CFR, particularly Article 37. Within this context, under Article 1 (Subject matter and scope), the Regulation establishes climate neutrality in the Union by 2050 as a “binding objective”, aiming to achieve the long-term temperature goals and adaptation aims of the Paris Agreement. Consequently, Article 2 establishes that EU institutions and Member States take necessary measures to enable the achievement of neutrality, in light of relevant considerations of cost-effectiveness, which underscores the nature of the commitment as one of conduct rather than result. It can therefore be observed that EU law is fully aligned with the UNFCCC regime and does not allow the development of any additional insights as concerns the *erga omnes* nature of the obligation to curb GHG emissions. Essentially, this duty has a relative scope of application within the remit of the UNFCCC and the Paris Agreement, with the potential to develop into an *erga omnes* one in light of quasi-universal participation in these Conventions.<sup>59</sup>

By contrast, EU law seems to be particularly progressive from the standpoint of human rights, whereby Resolution 2020/2134 is a particularly meaningful instrument and has the potential to produce a significant impact on the

55 Id. para. 8.

56 Id.

57 Res. 2021/1119 of 30 June 2021.

58 Res. 2020/2134(INI) of 19 May 2021.

59 See Section 2.2 above.

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recognition and shape of the fundamental right to a sustainable climate. Substantively, while it generally focuses on the intersection between climate change and first- and second-generation human rights, climate rights emerge in the text of the Resolution as a component of the broader third-generation right to a safe environment. The Resolution stresses the human rights impacts of climate change, *e.g.* in terms of biodiversity loss (Principle 2), water scarcity and peace (Principle 3). As a consequence, it underscores the necessity for the EU and its Member States to act as a reliable global partner supporting and implementing legislation inspired by a comprehensive human rights-based approach to climate action, with respect to both mitigation and adaptation (Principle 1). More generally, the Resolution commits the EU to supporting the mandate of the UN Special Rapporteur on Human Rights and the Environment in his endeavor towards the global recognition of the fundamental right to a safe, clean, healthy and sustainable environment, so that both the Union and its Member States foster the global recognition of such a right by the UN General Assembly, including relevant procedural implications, particularly access to information, public participation in environmental decision-making and access to justice (Principle 7).

Within this framework, while recalling the legal duty to respect ‘the right to a safe, clean, healthy and sustainable environment’ as a condition for sustainable economic activities, the Resolution notes that international human rights entail legal remedies to redress damage caused by climate change, thus holding not only States, but also businesses and individuals accountable for their actions (Principle 5). As a consequence, the European Parliament and the Council call on the Commission to ensure the concrete implementation of human rights in relation to the environment and climate change (Principle 6). In light of this, the Resolution underscores that ‘*all people*’ should be granted the “*fundamental right to a safe, clean, healthy and sustainable environment and to a stable climate*”, without discrimination, which must “be delivered through ambitious policies” and must be “*fully enforceable through the justice system at all levels*” (Principle 9).<sup>60</sup> This is a significant acknowledgement, where the right to a safe climate emerges as a fundamental claim within the broader context of the human right to a safe environment. Furthermore, the fundamental right to a stable climate emerges as a universal one, and thus as an *erga omnes* right. In light of the necessary correspondence between rights and duties,<sup>61</sup> this entails the acknowledgment of the right to a stable climate as an *erga omnes* obligation.

On this basis, Resolution 2020/2134 reiterates the importance of protecting the Arctic from climate change and adopting an EU Arctic policy for this purpose (Principle 16). The Resolution also goes as far as to acknowledge the necessity of recognizing the crime of ecocide under the Statute of the International Criminal Court (Principle 11). As offences under the Preamble to the Rome Statute have, in principle, a peremptory nature, this approach might support the view that serious violations of the right to a sustainable climate entail peremptory implications.

<sup>60</sup> Emphasis added.

<sup>61</sup> Hohefeld 1916, p. 717.

Procedurally, the Resolution calls for the establishment of climate focal points within the relevant services of the Commission and the European External Action Service (EEAS), aiming to climate-proof all EU external dealings (Principle 12).

#### 4. Conclusion

International law has progressively developed, and is still developing, towards the recognition of the right to a *sustainable environment* as a universal (*erga omnes*) obligation. A decisive contribution to this development is coming from the progressive recognition of the human rights nature of such a claim, particularly upon the initiative of the HRC. EU law has contributed significantly to this evolution, notably through the EU CFR, and is developing at the same pace as international law. In this context, the right to a *sustainable climate* seems to sporadically emerge internationally as a parallel claim, possibly as a fundamental and universal (*erga omnes*) one, specifically *via* the jurisprudence of the ICJ and the initiative of some non-governmental organizations and scholarly work. In this respect, the EU provides a more holistic *de lege ferenda* framework for a fundamental right to a sustainable climate, hence an *erga omnes* duty, particularly via targeted regulatory initiatives, notably Resolution 2020/2134 of the Parliament and the Council. While affirming the peremptory (*cogens*) nature of the right to a safe environment seems to be logically impossible, it is not possible to exclude that the right to a safe climate evolves as such *de lege ferenda*: meaningful inferences can be developed in this respect from intersections with international criminal law under Resolution 2020/2134.