
INTEGRATING HUMAN RIGHTS AND ENVIRONMENTAL DUTIES: PROSPECTIVE IMPLICATIONS OF ARTICLE 37 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

Ottavio Quirico*

ABSTRACT

Two complementary models have been envisaged to integrate environmental protection and fundamental rights: achieving environmental sustainability via first- and second-generation human rights or recognizing a third-generation human right to environmental protection. Within such a context, along the lines of the fundamental tenet of sustainable development, Article 37 of the Charter of Fundamental Rights of the European Union (EUCFR) provides that a high level of environmental protection must be integrated into the policies of the European Union (EU). In light of recent developments in scholarly work and case law, this article reviews the structure of EUCFR Article 37 and assesses its impact on the relationship between environmental protection and fundamental rights. It is argued that, despite structural limits implied by its nature as a disability-immunity rule, EUCFR Article 37 can contribute to a complete integration between environmental duties and human rights via the establishment of an emerging human right to a sustainable environment, both regionally and internationally. This would further help to clarify the relationship between the fundamental right to environmental sustainability and specific, possibly fundamental, environmental rights, spanning from the right to a sustainable climate to the duty to protect biodiversity, as well as their international legal status.

* Associate Professor, University of New England, Law School, Australia; Adjunct, Australian National University, Research School of Social Sciences, Centre for European Studies; Alumnus, European University Institute – oquirico@une.edu.au; ottavio.quirico@anu.edu.au; ottavio.quirico@eui.eu. With the support of the Erasmus+ Programme of the European Commission. 620604-EPP-1-2020-1-AU-EPPJMO-PROJECT. Contents reflect the view of the author only.

CONTENTS

INTRODUCTION.....	42
I. EVOLUTION OF EUCFR ARTICLE 37.....	46
<i>A. The Evolution of EUCFR Article 37 in the Context of EU Law.....</i>	46
<i>B. Article 37 as Progressive International Law Development</i>	50
II. STRUCTURE OF EUCFR ARTICLE 37	56
<i>A. EUCFR Article 37 as a Binding Principle and a Source of Duties</i>	56
<i>B. EUCFR Article 37 as a Source of Rights and Immunities</i>	62
III. PROSPECTIVE IMPACT OF EUCFR ARTICLE 37 ON ENVIRONMENTAL PROTECTION VIA HUMAN RIGHTS IN INTERNATIONAL LAW	69
CONCLUSION.....	76

INTRODUCTION

Together with the concept of equitable economic progress, the notion of environmental protection is one of the essential elements of the “third-generation” right to sustainable development.¹ Indeed, the Brundtland Report of the World Commission on Environment and Development (WCED) provides that the concept of sustainable development encompasses the “environment’s ability to meet present and future needs.”² Accordingly, the Legal Principles annexed to the Report affirm that “[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.”³ This declaration is formulated based on a human rights terminology, which has not been replicated in binding international law instruments. In fact, only non-binding international instruments have thus far recognized the fundamental right to environmental protection, notably Principle 1 of the 1972 UN Stockholm Declaration on the Human Environment⁴ and Article 2

¹ On first-, second-, and third-generation human rights from an environmental perspective, see Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, STAN. J. INT’L L. 103, 122 (1991); Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471, 471-72 (2006) [hereinafter Boyle, *Human Rights or Environmental Rights*].

² World Comm’n on Env’t & Dev., *Report of the World Commission on Environment and Development: Our Common Future*, ch. 2, ¶ 1, U.N. Doc. A/42/427, Annex (Aug. 4, 1987) [hereinafter WCED, *Brundtland Report*].

³ *Id.* Annex 1, ¶ 1.

⁴ U.N. Conf. on the Hum. Env’t, *Report of the U.N. Conference on the Human Environment*, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 5-16, 1972) [hereinafter

of the 1999 UNESCO Bizkaia Declaration on the Right to Environment.⁵ Similarly, the work of different Special Rapporteurs on the issue of environmental protection within the context of human rights has variously acknowledged the fundamental claim to a “sustainable,” “satisfactory,” “safe,” “clean,” or “healthy” environment.⁶

The “soft” recognition of a human right to environmental protection has prompted some international institutions to develop an extensive interpretation of specific first- and second-generation human rights, that is, civil, political, economic, social and cultural claims, so as to afford environmental protection. For instance, the Committee on Economic, Social and Cultural Rights (CteESCR) has interpreted the right to health under Article 12 of the homologous International Covenant on Economic, Social and Cultural Rights⁷ as encompassing “a wide range of socio-economic factors,” including a “healthy environment.”⁸ Similarly, Article 24(2)(c) of the Convention on the Rights of the Child (CRC) provides that, in order to fulfil the right to health, States must take measures “[t]o combat disease and malnutrition, including within the framework of primary health care . . . taking into consideration the dangers and risks of environmental pollution.”⁹ The Committee on the Rights of the Child considered that, under CRC Article

Stockholm Declaration].

⁵ U.N. Educ., Sci. & Cultural Org., *Declaration of Bizkaia on the Right to the Environment*, art. 2, U.N. Doc. 30 C/INF.11 (Sept. 4, 1999) [hereinafter UNESCO, *Bizkaia Declaration*].

⁶ Fatma Zohra Ksentini (Special Rapporteur), *Human Rights and the Environment*, ¶¶ 119, 242, U.N. Doc. E.CN.4/Sub.2/1994/9 (July 6, 1994); John H. Knox (Independent Expert), *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Report*, ¶ 58, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) [hereinafter Knox, U.N. Doc. A/HRC/22/43]; John H. Knox (Independent Expert), *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, ¶1, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013); David R. Boyd (Special Rapporteur), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, ¶1, U.N. Doc. A/HRC/40/53 (Jan. 8, 2019); see also BURNS WESTON & DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 29 (2013).

⁷ International Covenant on Economic, Social & Cultural Rights, art. 12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁸ U.N. Comm. Econ., Soc. & Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health*, ¶ 4, U.N. Doc. E/CN.12/2000/4 (Aug. 11, 2000).

⁹ Convention on the Rights of the Child, art. 24(2)(c), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

24, “States should regulate and monitor the environmental impact of business activities that may compromise children’s right to health, food security and access to safe drinking water and to sanitation.”¹⁰

A two-way integration system is therefore envisaged between environmental duties and human rights in international law, whereby environmental protection can be achieved via first- and second-generation fundamental rights or via the recognition of a third-generation human right to environmental sustainability.¹¹ The two patterns are considered complementary rather than mutually exclusive, but, whilst the technique of “greening” traditional human rights is already binding law, the fundamental right to a healthy environment is only recognized as soft law.¹²

At the regional level, the Treaty establishing the European Economic Community (EEC Treaty), as initially signed in Rome in 1957, did not embed any provisions on environmental protection.¹³ This is a logical consequence of the fact that the initial primary aim of the EEC was the establishment of a common market.¹⁴ However, since the 1970s, environmental protection has progressively acquired normative effectiveness, following the parallel establishment of environmental sustainability in international law.¹⁵ This process has been implemented particularly via the case law of the European Court of Justice (ECJ) and the definition of the EU environmental action plans.¹⁶

Normative recognition of environmental sustainability within the sources of EU law was achieved in 1987, with the adoption of the Single European Act, which amended the EEC Treaty, thus providing an explicit mention of

¹⁰ U.N. Comm. on the Rights of the Child, *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, ¶¶ 49, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

¹¹ U.N. High Comm’r for Human Rights, *Analytical Study on the Relationship between Human Rights and the Environment*, ¶¶ 7-9, U.N. Doc. A/HRC/19/34 (Dec. 16, 2011) [hereinafter *OHCHR Analytical Study*]; see Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 EUR. J. INT’L L. 613, 614-15 (2012) [hereinafter Boyle, *Human Rights and the Environment*].

¹² *OHCHR Analytical Study*, supra note 11, ¶ 7.

¹³ Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (effective Jan. 1, 1958) [hereinafter EEC Treaty].

¹⁴ *Id.* pt. 1, art. 2.

¹⁵ David Baldock & Edward Keene, *Incorporating Environmental Considerations in Common Market Arrangements*, 23 ENVTL. L. 575, 584 (1993); NICOLAS DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 7 (2014).

¹⁶ Matthew L. Schemmel & Bas de Regt, *The European Court of Justice and the Environmental Protection Policy of the European Community*, 17 B.C. INT’L & COMP. L. REV. 53, 57-59 (1994); Francis Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, 18 J. ENVTL. L. 185, 186 (2006).

the environment in Article 100A (Internal Market)¹⁷ and a separate title on the environment under Article 130R-T.¹⁸ This framework crystallized in 1992, with the adoption of the Treaty on European Union (TEU) and the amendment of the EEC Treaty.¹⁹ The further approval of the EU Charter of Fundamental Rights (EUCFR)²⁰ as a non-binding instrument in 2000 and its consolidation as a binding tool via the Treaty of Lisbon entering into force in 2009²¹ established environmental protection within primary EU law with a human rights focus beyond the international legal framework, notably through EUCFR Article 37. This rule integrates environmental sustainability within the EU policy from a human rights perspective.²²

A few scholars have explored specific aspects of EUCFR Article 37, particularly as a source of principles rather than rights, according to the distinction embedded in EUCFR Article 51.²³ Building on available scholarship and recent developments in the case law of the Court of Justice of the European Union (CJEU), this article aims to shed light on the structure of EUCFR Article 37 and its impact on the two-way integration system envisaged between environmental protection and human rights in international law. The key assumption is that international law entails a presumption against normative conflicts and requires a harmonious interpretation of legal relations, rules and regulatory regimes, as underscored by the International Law Commission's (ILC) work on the fragmentation of international law, developed under the guidance of Special Rapporteur Martti Koskenniemi.²⁴ International law also involves the application of specific mechanisms for conflict resolution, notably hierarchy, whereby higher-ranking rules (*lex superior*) override lower-ranking ones; specialty, giving priority to specific norms (*lex specialis*) over general rules; and inter-

¹⁷ Single European Act art. 18, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506 [hereinafter SEA].

¹⁸ *Id.* art. 25.

¹⁹ Treaty on European Union, July 29, 1992, O.J. (C 191) 1 [hereinafter TEU].

²⁰ Charter of Fundamental Rights of the European Union art. 37, Dec. 12, 2000, 2000 O.J. (C 364) 1 [hereinafter EUCFR].

²¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

²² EUCFR art. 37.

²³ See, e.g., DE SADELEER, *supra* note 15, at 21; Elisa Morgera & Gracia Marín-Durán, *Article 37*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 983, 983, 984, 995-97 (Steve Peers et al. eds., 2014).

²⁴ ILC, Rep. on the Work of Its Fifty-Eighth Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, at 25 (2006) [hereinafter ILC, *Fragmentation of International Law*].

temporality (*lex posterior*), whereby subsequent law overrides prior law.²⁵ Harmonization further implies the consideration of regionalism, entailing normative integration in the EU functioning as a “privileged forum for international law-making,” with specific regard to human rights.²⁶

The analysis proceeds in five steps. First, the investigation elucidates the evolution of EUCFR Article 37 within the context of EU law. Second, the article explores similarities and differences between EUCFR Article 37 and environmental protection afforded via other regional and international human rights protection mechanisms. Third, the analysis delves into the structure of EUCFR Article 37, reviewing the scope of the norm as a principle and a source of duties. Fourth, the analysis explores Article 37 as a source of rights, specifically in light of the Hohfeldian correlativeness between fundamental legal concepts. Finally, the investigation considers the prospective impact of EUCFR Article 37 on the integration between environmental protection and human rights in international law, including the complementary human rights protection system established by the European Convention on Human Rights (ECHR),²⁷ to which the EU should accede, as provided for in TEU Article 6(2).²⁸

I. EVOLUTION OF EUCFR ARTICLE 37

A. *The Evolution of EUCFR Article 37 in the Context of EU Law*

EUCFR Article 37 (Environmental Protection) provides that “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”²⁹ This rule embeds three fundamental concepts: environmental protection, sustainable development, and comprehensive integration of environmental protection within the policies of the EU.

As pointed out in the Explanatory Notes to the EUCFR, Article 37 of the EUCFR is basically grounded in Article 11 of the Treaty on the Functioning of the European Union (TFEU),³⁰ according to which, “*environmental*

²⁵ *Id.* at 35, 207.

²⁶ *Id.* at 25.

²⁷ *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

²⁸ TEU art. 6(2); Case C-2/13, Opinion 2/13 of the Court, EUR-Lex 62013CV0002 ¶ 124 (Dec. 18, 2014).

²⁹ EUCFR art. 37 (emphasis added).

³⁰ Explanations Relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303) 17, explanation on art. 37 [hereinafter Explanations Relating to the EUCFR];

protection requirements must be *integrated into the definition and implementation of the Union's policies and activities*, in particular with a view to promoting *sustainable development*.”³¹ In light of the common purpose of ‘greening EU policy’, the two norms are also commonly referred to as the ‘integration rule.’³²

The close relationship between EUCFR Article 37 and TFEU Article 11 is confirmed by the historical evolution of these norms. The substance of these rules was not embedded in the EEC Treaty initially signed in Rome in 1957.³³ It is the ECJ that developed EU environmental law; current EU primary regulation, including EUCFR Article 37, is largely a codification of its jurisprudence.³⁴ More specifically, the Court recognized the EC competence to pass legislation in the matter of environmental sustainability and further declared it a “mandatory requirement” of Community law, including Member State obligations.³⁵ When the EEC Treaty did not yet incorporate the word “environment” in its text, the ECJ justified environmental protection based on implied powers under primary EC rules; for instance, the court held that specific directives of the Council of the European Communities could validly include environmental provisions, according to the possibility of approximating laws under EEC Treaty Article 100.³⁶ The Court went as far as to hold that environmental sustainability can limit fundamental freedoms in the common market.³⁷ Crucially, before the entry into force of the Single European Act, adjudicating upon the implementation of EU law ensuring the safe collection and disposal of waste oils in France, the ECJ held that “environmental protection” is “one of the Community’s essential objectives,” and that Member States’ legislation implementing EU law “must be designed to protect the environment” from harmful effects.³⁸ The mandatory nature of

Consolidated Version of the Treaty of the Functioning of the European Union art. 11, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

³¹ TFEU art. 11 (emphasis added).

³² LUDWIG KRAMER, *EC ENVIRONMENTAL LAW* 20 (7th ed. 2011); Beate Sjøfjell, *Quo Vadis Europe*, in *NON STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS* 254 (Cecilia Bailliet ed., 2012); Beate Sjøfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, in *THE GREENING OF EUROPEAN BUSINESS UNDER EU LAW: TAKING ARTICLE 11 TFEU SERIOUSLY* 53 (Beate Sjøfjell & Ana Wiesbrock eds., 2014).

³³ See generally EEC Treaty.

³⁴ See Hans Vedder, *The Treaty of Lisbon and European Environmental Law Policy*, 22 *J. ENVTL. L.* 285, 296 (2010).

³⁵ See, e.g., Case 302/86, *Comm’n v. Denmark*, 1988 E.C.R. 4627, 4629-30 [hereinafter *Danish Beer Bottles*].

³⁶ See Case C-91/79, *Comm’n v. Italy*, 1980 E.C.R. 1099, 1106.

³⁷ See *id.* at 1103; JOANNE SCOTT, *EC ENVIRONMENTAL LAW* 67-68 (1998).

³⁸ Case C-240/83, *Procureur de la République v. Association de Défense des Brûleurs*

environmental sustainability was later confirmed in cases such as *Danish Beer Bottles*,³⁹ *Walloon Waste*,⁴⁰ and *Preussen Elektra*.⁴¹

Following the jurisprudence of the ECJ, the EC Treaty adopted in 1992 included the text of Article 6, which was almost identical to the text of TFEU Article 11.⁴² EUCFR Article 37 first came into existence as a non-binding provision with the adoption of the Charter in 2000, basically along the lines of EC Treaty Article 6.⁴³ The 2004 Treaty Establishing a Constitution for Europe⁴⁴ incorporated rules similar to EUCFR Article 37 and EC Treaty Article 6 in a single instrument. In fact, Part II of the Constitutional Treaty embodied the EUCFR, and thus the text of Article 37 of the Charter (Environmental Protection) was included in Article II-97 of the Constitution for Europe.⁴⁵ Article 6 of the TEU was embedded in Article III-119 of the Constitutional Treaty, within the context of the general provisions of the Part on the Policies and Functioning of the Union.⁴⁶ The rejection of the Treaty Establishing a Constitution for Europe and the subsequent adoption of its norms under the TEU, TFEU and EUCFR, via the Treaty of Lisbon, ultimately led the EU to adopt similar provisions on environmental protection in two different instruments under EUCFR Article 37 and TFEU Article 11.⁴⁷ The evolution of the sources of EU law thus shows that EUCFR Article 37 developed in the shadow of TFEU Article 11.

Like TFEU Article 11, EUCFR Article 37 is firmly embedded in the principle of sustainable development. This was underscored by Advocate General Léger in his opinion in *Corporate Shipping*, where he argued that, in

d'Huiles Usaagées, 1985 E.C.R. 531, 549.

³⁹ See *Danish Beer Bottles*, 1988 E.R.C. at 4629-30.

⁴⁰ See Case C-2/90, *Comm'n v. Belgium*, 1992 E.C.R. I-4431, I-4479 (the ECJ justified measures restricting market freedoms based on "imperative requirements of environmental protection").

⁴¹ See Case C-379/98, *PreussenElektra AG v. Schleswag AG*, 2001 E.C.R. I-2099, I-2185-86; see also Case C-440/05, *Comm'n v. Council*, 2007 E.C.R. I-9097, I-9126; Case C-176/03, *Comm'n v. Council*, 2005 E.C.R. I-7879, I-7923; Case C-513/99, *Concordia Bus Finland Oy Ab v. Helsingin Kaupunki & HKL-Bussiliikenne*, 2002 E.C.R. I-7213, I-7276.

⁴² "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 [Activities of the Union], in particular with a view to promoting sustainable development." Consolidated Version of Treaty Establishing the European Community art. 6, Dec. 24, 2002, 2002 O.J. (C 325) 42 [hereinafter EC Treaty]; see TFEU art. 11.

⁴³ EUCFR art. 37; EC Treaty art. 6.

⁴⁴ Treaty Establishing a Constitution for Europe arts. II-97, III-119, Dec. 16, 2004, 2004 O.J. (C 310) 49, 55 [hereinafter Constitutional Treaty]; see EUCFR art. 37; EC Treaty art. 6.

⁴⁵ See Constitutional Treaty art. II-97; EUCFR art. 37.

⁴⁶ Constitutional Treaty art. III-119; see TEU art. 6.

⁴⁷ See, e.g., TEU art. 6; EUCFR art. 37; TFEU art. 11.

line with the Brundtland Report, according to the principle of integration,⁴⁸ “it is necessary not to set development against the environment but on the contrary to let them evolve in coordinated fashion.”⁴⁹ This approach is consistent with primary EU law. Notably, the Preamble to the TEU provides that the EU promotes “economic and social progress for [EU] peoples, *taking into account the principle of sustainable development*” within the context of the “internal market and of reinforced cohesion and *environmental protection*.”⁵⁰ Integration between environmental protection and sustainable development is further spelled out in detail in TEU Articles 3(3) and 21(2)(g)-(f).⁵¹

Despite essential overlap, the text of EUCFR Article 37 is slightly different from that of TFEU Article 11 in three respects. First, EUCFR Article 37 only refers to the “policies,” but not to the “activities,” of the EU.⁵² A literal interpretation would thus exclude the application of EUCFR Article 37 from regulatory areas such as free movement of goods and the common commercial policy, which are labelled as “activities” under TFEU Article 3.⁵³ Second, EUCFR Article 37 specifically requires a “high level” of environmental protection and the “improvement” of environmental quality.⁵⁴ The notion of “high level of environmental protection” is quite broad and has been interpreted by the ECJ as a duty to continuously improve the standard of environmental protection in the EU, but it does not entail “the highest [standard] that is technically possible.”⁵⁵ Third, environmental protection must be ensured under EUCFR Article 37 “in accordance with” sustainable development, which explicitly qualifies as a “principle,” unlike TFEU Article 11, which envisages the implementation of environmental protection “with a view to promoting” sustainable development.⁵⁶

Given the subtlety of the textual differences between EUCFR Article 37

⁴⁸ EUCFR art. 37.

⁴⁹ Case C-371/98, *Queen v. Sec’y of State for the Env’t, Transp. and the Regions ex parte First Corp. Shipping Ltd.*, 2000 E.C.R. I-9235, I-9247.

⁵⁰ TEU Preamble (emphasis added).

⁵¹ TEU arts. 3(3), 21(2)(g), 21(2)(f).

⁵² Compare EUCFR art. 37 with TFEU art. 11.

⁵³ *Morgera & Marín-Durán*, *supra* note 23, at 993-994.

⁵⁴ EUCFR art. 37. These requirements are also embedded in TEU arts. 3 and 21, as well as in TFEU art. 191. The Explanatory Notes to the Charter clearly state that, besides TFEU Article 11, EUCFR Article 37 is based on TEU Article 3 and TFEU Article 191. Explanations Relating to the EUCFR, *supra* note 30, explanation on art. 37.

⁵⁵ See C-341/95, *Bettati v. Safety Hi-Tech Srl.*, 1998 E.C.R. I-4355, I-4377 (citing to EC Treaty art. 130r(2)); Case C-284/95, *Safety Hi-Tech Srl. v. S. & T. Srl.*, 1998 E.C.R. I-430, I-4347 (citing to EC Treaty art. 130r(2)).

⁵⁶ Compare EUCFR art. 37 with TFEU art. 11.

and TFEU Article 11, these rules must be interpreted harmoniously,⁵⁷ in light of Article 31(3)(c) of the Vienna Conventions on the Law of Treaties.⁵⁸ A harmonious interpretation is consistent with TEU Article 6(1), which confers upon the EUCFR the same legal status as the TEU and TFEU,⁵⁹ and with EUCFR Articles 52(2) and 53, which provide that the Charter must be consistent with the EU founding treaties.⁶⁰

B. Article 37 as Progressive International Law Development

EUCFR Article 37 departs from the parallel human rights protection system established in Europe by the ECHR. Owing to the fact that it is grounded in first- and second-generation human rights, the ECHR currently does not include a specific rule on environmental protection.⁶¹ In the 1970s, within the context of increased consciousness about environmental problems in the European and international communities,⁶² the Parliamentary Assembly of the Council of Europe (CE) proposed that the Committee of Ministers develop studies on the creation of a human right to a safe environment in the ECHR system, in line with the Stockholm Declaration.⁶³ This trend evolved into the elaboration of more specific projects in the 1990s. Particularly, in Recommendation 1431/1999, the CE Parliamentary Assembly proposed to supplement the ECHR with a claim to a “healthy and viable environment as a basic human right.”⁶⁴ Complementing that proposal, Recommendation 1614/2003 on “Environment and Human Rights” advocated for the recognition of a “human right to a healthy, viable and decent environment which includes the objective obligation for States to protect the environment, in national laws, preferably at constitutional level,” to be embedded in a Protocol Additional to the ECHR.⁶⁵ The recommendation additionally advocated for including safeguards to

⁵⁷ Morgera & Marín-Durán, *supra* note 23, at 992-5.

⁵⁸ Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); *see* ILC, *Fragmentation of International Law*, *supra* note 24, ¶¶ 424-32.

⁵⁹ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 142 (7th ed. 2020).

⁶⁰ EUCFR, arts. 52(2), 53.

⁶¹ *See* ECHR § 1.

⁶² Baldock & Keene, *supra* note 15, at 584; DE SADELEER, *supra* note 15, at 7; *see* text accompanying note 15.

⁶³ Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, 24th Sess., Rec. No. 683, ¶ 3 (1972).

⁶⁴ Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, Nov. Standing Comm. Sess., Rec. No. 1431, ¶ 8 (1999).

⁶⁵ Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, 3d Pt. Sess., Rec. No. 1614, ¶¶ 9.2, 10.1, 10.2 (2003).

procedural rights regarding environmental matters grounded in the Aarhus Convention.⁶⁶ Based on the fact that the ECHR already affords environmental protection via first- and second-generation human rights, however, the CE Committee of Ministers rejected the proposals.⁶⁷

The debate on the drafting of a Protocol Additional to the ECHR on the Right to a Healthy Environment was fueled again by discussion on climate change, via Recommendation 1883/2009. Similar to previous proposals, Recommendation 1885/2009 envisaged the drafting of a Protocol including the “fundamental right of citizens to live in a healthy environment” and the correlative “duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations.”⁶⁸ In this respect, the CE Committee of Ministers noted the impact of climate change on fundamental rights and the importance of a “healthy, viable and decent environment” as “relevant to the protection of human rights.”⁶⁹ However, the traditional approach grounding environmental protection in first- and second-generation human rights eventually prevailed again.⁷⁰

The normative discrepancy between EU law and the ECHR has contributed to determining a different approach to environmental sustainability via human rights in the case law of the former ECJ, now CJEU, and that of the European Court of Human Rights (ECtHR). Whilst the CJEU and ECJ have approached environmental protection as a fundamental principle per se, helping to outline EUCFR Article 37, the ECtHR protects the environment via specific first- and second-generation human rights,⁷¹

⁶⁶ *Id.* ¶¶ 6, 9.3, 10.

⁶⁷ Eur. Consult. Ass., *Reply of the Comm. of Ministers*, 1st Pt. Sess., Doc. No. 10041 (2004).

⁶⁸ Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, 4th Pt. Sess., Rec. 1885, ¶¶ 1, 10.1 (2009). This proposal followed: Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, Mar. Standing Comm. Sess., Rec. No. 1653 (2004); Eur. Consult. Ass., *Resol. of the Parl. Ass.*, 1st Pt. Sess., Res. No. 1655 (2009); Eur. Consult. Ass., *Resol. of the Parl. Ass.*, 4th Part Sess., Res. No. 1682 (2009); Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, 1st Pt. Sess., Rec. No. 1862 (2009); Eur. Consult. Ass., *Rec. to the Comm. of Ministers*, 3d Pt. Sess., Rec. No. 1879 (2009).

⁶⁹ Eur. Consult. Ass., *Reply of the Comm. of Ministers to Recs. 1883 and 1885*, 3d Pt. Sess., Doc. No. 12298, ¶ 7 (2010).

⁷⁰ *See id.* ¶ 10; *see also* Eur. Consult. Ass., *Human Rights and Climate Change*, 4th Meeting of the Group of Experts on Biodiversity and Climate Change, Doc. No. T-PVS/Inf (2009) 4 (document prepared by Maria Blazogiannaki); Conf. of INGOs of the Council of Eur., Standing Comm., *Climate Change and Human Rights: Declaration from the Conference of INGO's of the Council of Europe to the Warsaw Climate Change Conference* (Nov. 5, 2013).

⁷¹ *See* Ilina Cenevska, *A Thundering Silence: Environmental Rights in the Dialogue between the EU Court of Justice and the European Court of Human Rights*, 28 J. ENVTL. L.

imposing on the State an indirect duty to respect and protect the environment,⁷² which has been defined as a “minimum level of environmental protection.”⁷³ Substantively, the ECtHR considers that the right to life under ECHR Article 2 generates a State duty to prevent violations resulting from dangerous activities or natural disasters and to afford adequate remedies in the case of a breach.⁷⁴ Indirect environmental protection has also been afforded via the right to private and family life under ECHR Article 8, given that, for instance, noise pollution and urban development affecting the environment can also have a negative impact on individual well-being and prevent an individual from fully enjoying his or her home.⁷⁵ In *Tatar v. Romania*, the ECtHR followed this logic to the extent of recognizing that the right to private and family life includes the “enjoyment of a healthy and protected environment.”⁷⁶

ECHR provisions can be interpreted so as to also cover the right to health, which was recognized as a means to afford environmental protection by the European Committee of Social Rights (ECtSR) in *Marangopoulos*,⁷⁷ according to Article 11 of the European Social Charter (ESC).⁷⁸ Moreover, Article 1 of Protocol 1 Additional to the ECHR⁷⁹ is considered to require the State to adopt measures ensuring environmental standards adequate for guaranteeing the peaceful exercise of the right to property.⁸⁰ Procedurally, it is assumed that first- and second-generation rights give rise to a claim to participation in decision-making.⁸¹ Furthermore, ECHR Article 10 on

301, 305-06 (2016) (discussing the traditional approach to environmental protection and human rights).

⁷² Boyle, *Human Rights or Environmental Rights*, *supra* note 1, at 486.

⁷³ DE SADELEER, *supra* note 15, at 112.

⁷⁴ See Öneriyildiz v. Turkey, 2004-XII Eur. Ct. H.R. 24-25; see also COUNCIL OF EUR., MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT 34-41 (2d ed. 2012).

⁷⁵ See Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 28-34.

⁷⁶ John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc.A/73/188 (July 19, 2018) (translating *Tatar v. Romania*, App. No. 67021/01, ¶¶ 107, 112, Eur. Ct. H.R. (2009)); see also COUNCIL OF EUR., *supra* note 74, at 44-60.

⁷⁷ *Marangopoulos Found. for Hum. Rts. v. Greece*, Complaint 30/2005, Decision, European Committee of Social Rights [Eur. Comm. of Soc. Rts.], ¶ 202 (Dec. 6, 2006); see also COUNCIL OF EUR., *supra* note 74, at 122-127.

⁷⁸ European Social Charter art. 11, Oct. 18, 1961, 529 U.N.T.S. 104.

⁷⁹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

⁸⁰ See, e.g., *Budayeva v. Russia*, 2008-II Eur. Ct. H.R. 33-36; see also COUNCIL OF EUR., *supra* note 74, at 61-73.

⁸¹ See *Tatar*, App. No. 67021/01, Eur. Ct. H.R. at 33, 37-39; COUNCIL OF EUR., *supra*

freedom of expression grants access to information in environmental matters,⁸² whilst provisions such as ECHR Article 6 on fair trial and Article 13 on remedies grant access to effective environmental justice.⁸³ It is thus clear that the ECtHR can only afford environmental protection indirectly, via different non-environmental human rights (*lex generalis*).⁸⁴ Direct protection is basically prevented by the fact that the ECHR does not embed the “third-generation” human rights to development and environmental sustainability (*lex specialis*).⁸⁵

Whilst it is progressive with respect to the ECHR, EUCFR Article 37 is in line with other regional human rights instruments, where a tendency emerges to integrate environmental protection and sustainable development in a human rights context.⁸⁶ Significantly, the Preamble to the San Salvador Protocol (SSP) to the American Convention on Human Rights posits the “right of peoples to development.”⁸⁷ Furthermore, by means of a formulation that meaningfully overlaps with EUCFR Article 37, SSP Article 11 acknowledges that “(1) [e]veryone shall have the right to live in a healthy environment” and “(2) [t]he States Parties shall promote the protection, preservation, and improvement of the environment.”⁸⁸ However, under Article 19(6) of the Protocol, the right to a healthy environment is not one of the rights that are justiciable before the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR).⁸⁹

note 74, at 87-92.

⁸² See *Steel v. United Kingdom*, 2005-II Eur. Ct. H.R. 30; see also COUNCIL OF EUR., *supra* note 74, at 76-81.

⁸³ See *Kyrtatos v. Greece*, 2003-VI Eur. Ct. H.R. 8, ¶¶ 33-43; see also COUNCIL OF EUR., *supra* note 74, at 94-109.

⁸⁴ See *Cenevska*, *supra* note 71, at 307-314. By virtue of EUCFR Article 52(3), which provides that, when there is overlap, rights under the EUCFR must be interpreted in light of the ECHR, environmental protection can be afforded via first- and second-generation human rights also via the EUCFR. See *Case C-361/88, Comm'n of the Eur. Cmty. v. Germany*, 1991 E.C.R. I-2567, ¶ 1; see also *Case C-237/07, Janecek v. Bayern*, 2008 E.C.R. I-06221, ¶ 22.

⁸⁵ See *Hatton*, 2003-VIII Eur. Ct. H.R. 3, ¶ 1221; see also Nicolas de Sadeleer, *Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases*, 81 NORDIC J. INT'L L. 39, 61 (2012).

⁸⁶ See Lynda Collins, *Are We There Yet? The Right to Environment in International and European Law*, 3 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 119, 144-45 (2007); Boyle, *Human Rights or Environmental Rights*, *supra* note 1, at 478-79.

⁸⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Preamble, Jan. 1, 1989, 28 I.L.M. 161 [hereinafter Protocol of San Salvador].

⁸⁸ *Id.* art. 11(1-2).

⁸⁹ *Id.* art. 19(6).

Taking a collective approach to the question of environmental protection, Article 24 of the African Charter on Human and Peoples' Rights (ACHPR) recognizes that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development."⁹⁰ Furthermore, under ACHPR Article 22 development is considered a binding obligation: "(1) [a]ll peoples shall have the right to their economic, social and cultural development" and "(2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development."⁹¹ Accordingly, in *Ogoniland* the African Commission on Human and Peoples' Rights (ACoMHPR) held that ACHPR Article 24 "requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."⁹²

EUCFR Article 37 is also in line with general international law and a number of instruments focusing on sustainable development.⁹³ Among those, Principle 4 of the 1992 Rio Declaration on Environment and Development provides that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."⁹⁴

In the *Iron Rhine* arbitration, it was held that integration between environmental protection and sustainable development constitutes a general principle of international law: "[e]nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm."⁹⁵

More generally, the Office of the High Commissioner for Human Rights (OHCHR) highlighted the possible "integration of human rights and the

⁹⁰ African Charter on Human and Peoples' Rights art. 24, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR].

⁹¹ *Id.* art. 22(1-2).

⁹² Social & Econ. Rights Action Ctr. v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 52 (Oct. 27, 2001).

⁹³ G.A. Res. 41/128, at 6 (Dec. 4, 1986); G.A. Res. 18/3, ¶¶ 10-11 (May 1, 1990); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶¶ 10-11, U.N. Doc. A/CONF.157/23 (June 25, 1993); G.A. Res. 55/2, ¶¶ 21-23 (Sept. 18, 2000); Human Rights Council, Rep. of the High-Level Task Force on the Right to Development on Its Sixth Session, U.N. Doc. A/HRC/15/WG.2/TF/2/Add.2, annex, 1(h) (2010).

⁹⁴ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

⁹⁵ *Iron Rhine Ry.* (Belg. v. Neth.), XXVII R.I.I.A. ¶ 59 (Perm. Ct. Arb. 2005).

environment under the concept of sustainable development” whereby “societal objectives must be treated in an integrated manner” and “the integration of economic, environmental and social justice issues is done with a view to the concept of sustainable development.”⁹⁶ Furthermore, the ILC underscored the nature of sustainable development as a “special principle” within the context of environmental law.⁹⁷

However, like the ECHR, general international law has not (yet) systemically integrated sustainable development, environmental protection and human rights. Indeed, the no-harm rule, that is, the prohibition of transboundary environmental pollution established in *Trail Smelter*,⁹⁸ has no implications in terms of fundamental rights, and thus general international law currently does not include any binding human rights provisions on environmental protection.

Among soft law initiatives, Principle 1 of the UN Stockholm Declaration states that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁹⁹ A similar approach emerges in the 1994 UN Draft Principles on Human Rights and the Environment¹⁰⁰ and the 1999 Bizkaia Declaration.¹⁰¹

Along these lines, the former UN Special Rapporteur on Human Rights and the Environment, John H. Knox, acknowledged the possible emergence of a human right to environmental protection as a general principle of law based on domestic constitutions and regional conventions.¹⁰² Knox indeed considers that “were the Universal Declaration to be drafted today, it is easy to imagine that it would include a right [to a sustainable environment] recognized in so many national constitutions and regional agreements.”¹⁰³

⁹⁶ *OHCHR Analytical Study*, *supra* note 11, ¶ 9.

⁹⁷ ILC, *Fragmentation of International Law*, *supra* note 24, ¶ 136.

⁹⁸ See *Trail Smelter (US v Canada)*, Award II RIAA 1905 (1938/1941) 1965; see also Marte Jervan, *The Prohibition of Transboundary Environmental Harm: An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule*, PluriCourts Research Paper No. 14-17, 21 (Aug. 25, 2014) (discussing the development of the no-harm rule in *Trail Smelter*).

⁹⁹ *Stockholm Declaration*, *supra* note 4, Principle 1.

¹⁰⁰ Ksentini, *supra* note 6, Annex I, (declaring that “an ecologically sound environment” is a human right and “sustainable development and peace are interdependent and indivisible”).

¹⁰¹ UNESCO, *Bizkaia Declaration*, *supra* note 5, at 4 (“[e]veryone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment.”).

¹⁰² See Knox, U.N. Doc. A/HRC/22/43, *supra* note 6, ¶¶ 12, 14.

¹⁰³ *Id.*, ¶¶ 12, 14; see also Shelton, *supra* note 1, at 128-29.

However, the former Special Rapporteur and the current one, David R. Boyd, have not yet acknowledged the existence of the human right to environmental protection as a general principle of international law.¹⁰⁴ In fact, whilst environmental sustainability is considered fundamental to the enjoyment of all other human rights,¹⁰⁵ the existence of an international fundamental right to environmental protection has often been denied.¹⁰⁶ EUCFR Article 37 is therefore progressive with respect to international law.¹⁰⁷

II. STRUCTURE OF EUCFR ARTICLE 37

A. EUCFR Article 37 as a Binding Principle and a Source of Duties

The nature of EUCFR Article 37 is a debated question. Notably, the issue has been raised as to whether this norm simply generates “principles” or rather justiciable “rights,” according to the distinction posited in EUCFR Article 51, which states that EU institutions and Member States “respect the rights” and “observe the principles” embedded in the provisions of the Charter.¹⁰⁸

The Explanatory Notes to the EUCFR specify that the distinction between “rights” and “principles” is not clearly established and cannot be determined based on the wording embedded in a specific provision, so much so that some provisions of the Charter may include elements of both rights and principles.¹⁰⁹ According to the Notes, however, EUCFR Article 37 is an example of a principle.¹¹⁰ Therefore, it is acknowledged that the wording of EUCFR Article 37 permits the recognition of environmental sustainability as a principle, akin to environmental protection as an objective under TFEU

¹⁰⁴ *But see* Collins, *supra* note 86, at 135-36.

¹⁰⁵ *See* Gabcikovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, 88, 91 (Sept. 25) (separate opinion by Weeramantry J.); *OHCHR Analytical Study*, *supra* note 11, ¶ 7; U.N. High Comm’r for Human Rights, *Report on Climate Change and Human Rights*, A/HRC/10/61, ¶ 18 (Jan 15, 2009) [hereinafter *OHCHR Report*]; Shelton, *supra* note 1, at 112-17.

¹⁰⁶ *See* Knox, U.N. Doc. A/HRC/22/43, *supra* note 6, ¶ 14; Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 *GEO. INT’L ENVTL. L. REV.* 73, 74, 81 (2008); Boyle, *Human Rights or Environmental Rights*, *supra* note 1, at 615.

¹⁰⁷ *Compare* Knox, U.N. Doc. A/HRC/22/43, *supra* note 6, at 6, with Explanations Relating to the EUCFR, *supra* note 30, explanation on art. 37. This raises issues of consistency between, on the one hand, the international treaties signed by the Union and international customary practices and, on the one other, the EU high standard of environmental protection.

¹⁰⁸ EUCFR art. 51(1).

¹⁰⁹ Explanations Relating to the EUCFR, *supra* note 30, explanation on art. 52.

¹¹⁰ *Id.*

Article 191, but not as an “individual (human) right” to a healthy environment.¹¹¹

It has indeed been observed that EUCFR Article 37 is not formulated based on typical subjective rights, since it does not include the expression “everyone has the right to,” but addresses EU organs (“the policies of the Union”): this would exclude the possibility of postulating a “substantive” human right to environmental sustainability under EUCFR Article 37.¹¹² In this respect, it is nevertheless commonly acknowledged that EUCFR Article 37 sets out duties to protect the environment binding upon EU organs while implementing their policies (“the policies of the Union must”).¹¹³

More analytically, the question of the legally binding nature of EUCFR Article 37 entails a two-pronged answer, concerning first the nature and secondly the scope of the normative effects of the provision, with regard to the Union and State level of EU law. Approaching the question in light of the parallel debate on TFEU Article 11 helps to elucidate the issue.¹¹⁴

With respect to the nature of the effects of EUCFR Article 37, along the lines of the scholarly debate on TFEU Article 11, the obligatory implications of the verb “must” under EUCFR Article 37 have been underscored in terms of binding duties.¹¹⁵ Such a compulsory language, which is different from that of TFEU Articles 3 and 21, was introduced in TFEU Article 11, and subsequently in EUCFR Article 37, following a suggestion by the European Commission to make environmental integration tighter.¹¹⁶ In this respect, it is also noticeable that the text of EUCFR Article 37 is more compelling than that of other EU integration clauses, such as consumer protection under

¹¹¹ Morgera & Marín-Durán, *supra* note 23, at 984, 995-96.

¹¹² *Id.*

¹¹³ See Michael Doherty, *The Status of the Principles of EC Environmental Law*, 11 J. ENVTL L. 354 (1999); EU NETWORK OF INDEP. EXPERTS, COMMENTARY TO THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 315 (2006); Jacobs, *supra* note 16, at 192; David Anderson & Cian Murphy, *The Charter of Fundamental Rights, in EU LAW AFTER LISBON* 155, 166 (Andrea Biondi et al. eds, 2012).

¹¹⁴ See Morgera & Marín-Durán, *supra* note 23, at 991-92.

¹¹⁵ PETER G.G. DAVIES, EUROPEAN UNION ENVIRONMENTAL LAW: AN INTRODUCTION TO KEY SELECTED ISSUES 32 (2004); SUZANNE KINGSTONE, GREENING EU COMPETITION LAW AND POLICY 107 (2011); Christina Voigt, *Article 3 TFEU in the Light of the Principle of Sustainable Development in International Law*, in THE GREENING OF EUROPEAN BUSINESS UNDER EU LAW: TAKING ARTICLE 11 TFEU SERIOUSLY 45-46 (Beate Sjøfjell & Ana Wiesbrock eds., 2014); see also DE SADELEER, *supra* note 15, at 21.

¹¹⁶ See Julian Nowag, *The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach*, in THE GREENING OF EUROPEAN BUSINESS UNDER EU LAW: TAKING ARTICLE 11 TFEU SERIOUSLY 15, 21-22 (Beate Sjøfjell & Ana Wiesbrock eds., 2014).

TFEU Article 12¹¹⁷ and EUCFR Article 38.¹¹⁸

More specifically, scholars have pointed out that EUCFR Article 37 generates four fundamental obligations in the matter of environmental protection, that is, the duties to take action, to undertake specific action under specific circumstances, to act within the framework of the general objectives of the EU and to seek a balance between them.¹¹⁹ Concretely, this would lead to prioritizing,¹²⁰ or weighing,¹²¹ environmental protection with respect to other aims in institutional decision-making, in accordance with the precautionary principle. In this regard, in *Romonta*, based on EUCFR Article 37, the CJEU considered that greenhouse gas (GHG) allowances under the EU Emission Trading System are proportionate and do not disrupt equitable competition.¹²² In *Essent Belgium*, Advocate General Bot held that EUCFR Article 37 “does not require that priority should always be given to environmental protection,” but entails that it “be routinely balanced against the European Union’s other fundamental objectives.”¹²³

In practice, EUCFR Article 37 has effectively shaped the integration of environmental protection into the different EU policies and activities. For instance, in light of EUCFR Article 37, Directive 2011/92/EU¹²⁴ made environmental impact assessments compulsory for public and private

¹¹⁷ TFEU art. 12 (“Consumer protection requirements *shall be taken into account* in defining and implementing other Union policies and activities”) (emphasis added).

¹¹⁸ EUCFR art. 38 (“Union policies *shall ensure* a high level of consumer protection.”).

¹¹⁹ Sjøfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, *supra* note 32, at 53.

¹²⁰ *Id.*; Ana Wiesbrock & Beate Sjøfjell, *The Jigsaw Puzzle of Sustainability*, in *THE GREENING OF EUROPEAN BUSINESS UNDER EU LAW: TAKING ARTICLE 11 TFEU SERIOUSLY* 181-82 (Beate Sjøfjell & Ana Wiesbrock eds., 2014); *see also* DE SADELEER, *supra* note 15, at 21-33.

¹²¹ Morgera & Marín-Durán, *supra* note 23, at 996-97.

¹²² Case T-614/13, *Romonta GmbH v. Comm’n*, ECLI:EU:T:2014:835, ¶¶ 76, 89 (2014), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013TJ0614>.

¹²³ Case C-204/12 & C-208/12, *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits-en Gasmarkt*, 2013 EUR-Lex CELEX LEXIS 294, ¶ 97 (May 8, 2013) (Opinion of Advocate Gen. Bot); *see also* Case T-629/13, *Molda AG v. Comm’n*, 2014 EUR-Lex CELEX LEXIS 834, ¶¶ 74-75 (Sept. 26, 2014); Case T-630/13, *DK Recycling v. Comm’n*, 2014 EUR-Lex CELEX LEXIS 833, ¶¶ 73-74 (Sept. 26, 2014); Case T-631/13, *Raffinerie Heide GmbH v. Comm’n*, 2014 EUR-Lex CELEX LEXIS 833, ¶¶ 76-77 (2014); Case T-634/13 *Arctic Paper Mochenwangen GmbH v. Comm’n*, 2014 EUR-Lex CELEX LEXIS 828, ¶¶ 72-73 (Sept. 26, 2014). *See also* Case C-320/03, *Comm’n v. Austria*, 2005 E.C.R. I-9871, 9902; Case C-161/04, *Austria v. Parliament & Council*, 2006 E.C.R. I-7183, 7199-7200, Case C-371/98, *The Queen v. Sec’y of State for Env’t. ex parte First Corp. Shipping Ltd.*, 2000 E.C.R. I-9235, 9246-47 (similarly concerning former EC Treaty art. 6).

¹²⁴ 2012 O.J. (L26) 1.

projects having relevant environmental implications and in 2014 it was amended to strengthen public access to information and transparency.¹²⁵ EC Directive 2009/29 amended Directive 2003/87/EC so as to improve and extend the GHG emission allowance trading scheme of the community, and, most significantly, states that it “respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.”¹²⁶ EUCFR Article 37 has thus contributed to shaping the climate policy of the EU from a human rights perspective.¹²⁷

Obligations under EUCFR Article 37 address primarily EU institutions, notably, the Commission, Parliament and Councils.¹²⁸ A harmonious interpretation of EC Treaty Article 6 supports this approach.¹²⁹ With respect to EC Treaty Article 6, in *British Aggregates Association*, the ECJ held that “it is for the Commission” to “take account of the environmental protection requirements” and integrate them “into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market.”¹³⁰ Furthermore, EUCFR Article 37 should have a binding effect on the CJEU, compelling it to abide by the environmental integration rule and to ensure that primary EU institutions act accordingly upon recourse by other EU institutions, Member States, and natural or legal persons.¹³¹

EUCFR Article 37 is also binding on EU Member States. In fact, in a case opposing the EC Commission and Italy, Advocate General Colomer upheld the responsibility of Italy under EUCFR Article 37 for not assessing the environmental impact of public and private projects in the construction sector.¹³² Although EUCFR Article 37 only directly addresses the Union, EUCFR Article 52(5) provides that “the provisions of this Charter which

¹²⁵ Directive 2014/52/EU, O.J. (L 124) 1; European Comm’n, *2015 Report on the Application of the EU Charter of Fundamental Rights* 129 (Oct. 26, 2016), <https://op.europa.eu/en/publication-detail/-/publication/96c4349a-41ac-11e6-af30-01aa75ed71a1>.

¹²⁶ O.J. (L 140) 69, ¶ 50.

¹²⁷ *Romonta*, T-614/13, ¶ 83; see also Christel Cournil & Anne-Sophie Tabau, *Climate Change and Human Rights: EU Policy Options*, EXPO/B/DROI/2011/20 28 (Aug. 2012).

¹²⁸ De Sadeleer, *supra* note 85, at 46-47.

¹²⁹ EC Treaty art 6.

¹³⁰ Case C-487/06 P, *British Aggregates Ass’n v. Commission*, 2008 E.C.R. I-10505, ¶ 90; see also Case C-336/00, *Republik Österreich v. Martin Huber*, 2002 E.C.R. I-7699, ¶ 33. For a scholarly opinion, see Doherty, *supra* note 113, at 379-382; de Sadeleer, *supra* note 85, at 46.

¹³¹ Sjäfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, *supra* note 32, at 62.

¹³² See Case C-87/02, *Comm’n v. Italy*, Opinion of Advocate General Colomer, 2004 E.C.R. I-05975, ¶¶ 36, 45.

contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by *acts of Member States* when they are implementing Union law, in the exercise of their respective powers.”¹³³ Notably, an obligation for States to integrate environmental protection arises from the necessity of ensuring consistency between the legislation of the EU Member States and the founding Treaties, and from a binding obligation on the Member States to implement the EU objectives.¹³⁴ This approach is currently codified in TEU Article 4(3), according to which EU Member States “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” and “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.”¹³⁵

EUCFR Article 37 also establishes State responsibility with the provision that environmental protection, save the conservation of marine biological resources under the common fisheries policy according to TFEU Article 3(1)(d), is a shared competence internally under TFEU Article 4(2)(e) and externally under TFEU Article 191(4).¹³⁶ This provision makes EU environmental action subsidiary with respect to that of the Member States under TEU Article 5(3).¹³⁷ Thus, for instance, in implementing assessment and authorization procedures for Natura 2000 sites according to the Habitats Directive,¹³⁸ States are implicitly required to take into account the precautionary principle.¹³⁹ With particular regard to the introduction of a common system for the conservation and management of fishery resources, in a case opposing the European Commission and the UK, the ECJ held that there is a duty “for the Member States, as regards the maritime zones coming within their jurisdiction, to take the necessary conservation measures in the common interest and in accordance with both the substantive and the procedural rules arising from Community law.”¹⁴⁰

In any case, under TFEU Article 263 the CJEU has jurisdiction on actions brought, *inter alia*, by a Member State for an infringement of EU law.¹⁴¹ It is thus possible to infer that an EU Member State has an obligation not to

¹³³ See DE SADELEER, *supra* note 15, at 48 (emphasis added).

¹³⁴ Case C-13/83, *Parliament v. Council*, 1985 E.C.R. 1513, ¶ 2.

¹³⁵ Sjøfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, *supra* note 32, at 66-67.

¹³⁶ TFEU arts. 4(2)(d)-(e), 191(4); TEU art. 5(3).

¹³⁷ TFEU arts. 4(2)(d)-(e), 191(4); TEU art. 5(3).

¹³⁸ Council Directive 92/43, art. 3, 1992 O.J. (L 206) 7, 10 (EEC).

¹³⁹ DE SADELEER, *supra* note 15, at 40-88.

¹⁴⁰ Case 32/79, *Comm'n v. United Kingdom*, 1980 E.C.R. 2403, 2404.

¹⁴¹ TFEU art. 263.

implement an EU act inconsistent with EUCFR Article 37 and to bring such inconsistent acts to the attention of the CJEU.¹⁴² Furthermore, EUCFR Article 51(1) supports the application of EUCFR Article 37 to both the EU and its Member States by providing that the Charter is binding not only upon EU institutions, but also on Member States implementing EU acts.¹⁴³

Within this context, it is possible to argue that EUCFR Article 37 is sufficiently clear and unconditional to create obligations directly binding EU Member States vis-a-vis their citizens. Indeed, adjudicating upon the prohibition of customs duties under then EEC Treaty Article 12, in *Van Gend and Loos*, the ECJ upheld the possibility that clear and unconditional primary EU law creates obligations directly binding within the Member States.¹⁴⁴ Although the clarity of EUCFR Article 37 is questionable,¹⁴⁵ the principles of clarity and non-conditionality have been progressively relaxed, and, in *Mangold*, the ECJ went as far as to hold that, with respect to the “observance of a general principle of Community law,” it is “the responsibility of the national court” to provide “the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.”¹⁴⁶ The CJEU could contribute to this evolution by relying on the principle of environmental protection under EUCFR Article 37 in interpreting national law within the context of the preliminary ruling procedure under TFEU Article 267.¹⁴⁷

¹⁴² Sjäffjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, *supra* note 32, at 69.

¹⁴³ EUCFR art. 51(1).

¹⁴⁴ Case C-26/62, *Van Gend En Loos v. Nederlandse Administratis Der Belastingen*, 1963 E.C.R. Special Edition 3, ¶ 76.

¹⁴⁵ Kristof Hectors, *The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as a Human Right*, 17 EUR. ENERGY & ENVTL. L. REV. 165, 175, 168 (2008) (“Also the content of the core meaning of sustainable aspects [of Article 37] were not made clear.”); *but see* Doherty, *supra* note 113, at 384 (the meaning of vague principles could be constructed from other external sources).

¹⁴⁶ Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-09981, ¶¶ 76-77; *see also* Pierre Pescatore, *The Doctrine of Direct Effect: an Infant Disease of Community Law*, 8 ELR 155 (1983); Jacobs, *supra* note 16, at 200-01. In *Urgenda*, dealing with the adequacy of GHG mitigation policies of The Netherlands, a Dutch District Court controversially held that, “although Urgenda cannot directly derive rights’ from international rules, including TFEU Article 191, these still help to determine ‘whether the State has failed to meet its duty of care towards Urgenda[.]’ Urgenda v. Netherlands, Case No. C/09/456689/HA ZA 13-1396, Judgment, ¶ 4.52 (2015).

¹⁴⁷ 2016 O.J. (C 202) 164.

B. EUCFR Article 37 as a Source of Rights and Immunities

Scholars who assume that EUCFR Article 37 establishes principles, and thus, EU and State responsibility, but not an “autonomous right to environment,”¹⁴⁸ ultimately radically argue that the provision is a simple “yardstick against which to measure the relative success (or otherwise) of Union/national regulatory activity.”¹⁴⁹

However, the category of principles posited in EUCFR Article 37 is not clearly outlined, and it has been noted that the concepts of a “principle” and a “right” are not mutually exclusive.¹⁵⁰ Thus, according to a diametrically opposed stance, EUCFR Article 37 would establish a right to environmental protection.¹⁵¹ Notably, balancing the fundamental rights of operators of installations subject to emission allowance trading and environmental protection, in *Romonta* the CJEU spoke of “reconciling the requirements of the protection of those different rights and freedoms.”¹⁵² Even more explicitly, in *European Air Transport SA v Collège d’Environnement de la Région de Bruxelles-Capitale and Others*, Advocate General Villalón acknowledged that “Article 37 expressly recognises the right to environmental protection.”¹⁵³ In *Association de médiation sociale v Union locale des syndicats CGT and Others*, Villalón considered that the concept of a “fundamental right” embedded in the title of the EUCFR “applies to all its provisions, meaning that principles can contain rights and vice versa.”¹⁵⁴

Advocate General Colomer approached EUCFR Article 37 as a right in two cases: respectively opposing the EC Commission to the Council and to Italy. In light of EUCFR Article 37, Colomer indeed spoke of “[t]he right to an acceptable environment and public responsibility for its preservation.”¹⁵⁵ Colomer also 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” and “any measure which strays from the

¹⁴⁸ Morgera & Marín-Durán, *supra* note 23, at 984, 1002.

¹⁴⁹ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 C. M.L.R. 617, 663 (2008).

¹⁵⁰ Christopher Hilson, *Rights and Principles in EU Law: A Distinction without Foundation?*, 15 MAASTRICHT J. ENVTL. & COMP. L. 193, 213, 215 (2008).

¹⁵¹ *See id.*

¹⁵² *Romonta*, T-614/13, ¶ 77; Collins, *supra* note 86, at 143.

¹⁵³ Case C-120/10, *European Air Transport SA v. Collège d’Environnement de la Région de Bruxelles-Capitale*, Opinion of Advocate General Villalón, 2011 E.C.R. 2011 I-07865, ¶ 78.

¹⁵⁴ Case C-176/12, *Association de Médiation Sociale v. Union Locale des Syndicats CGT*, Opinion of Advocate General Villalón, ECLI:EU:C:2013:491, ¶¶ 44 (July 18, 2013).

¹⁵⁵ Case C-176/03, *EC Comm’n v. Council*, Opinion of Advocate General Colomer, 2005 E.C.R. 2005 I-07879, ¶¶ G-66, 69.

general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently.”¹⁵⁶ Some scholars thus argue that, if EUCFR Article 37 does not yet establish a right to environmental protection, it has at least the potential to evolve into establishing such a right—notably via the interpretation of the CJEU.¹⁵⁷ This approach is consistent with the stance that the European Council held in Dublin in 1990, where it was considered necessary to “guarantee citizens the right to a clean and healthy environment,” including areas ranging from air to noise and quality of residential zones.¹⁵⁸

The question whether EUCFR Article 37 establishes a principle or a right is controversial and must be considered analytically, in light of the fundamental legal notion of a “right.” Legal theorists who explored logical connections in the law have underscored a fundamental correlativeness between legal concepts. In particular, Hans Kelsen pointed out that the “‘right’ or ‘claim’ of an individual is merely the obligation of the other individual or individuals,” since “if one designates as ‘right’ the relation of one individual toward whom another individual is obligated to a certain behavior, then this right is merely a reflection of the obligation.”¹⁵⁹ In more detail, Wesley Newcomb Hohfeld underscored that “a duty is the invariable correlative of that legal relation which is most properly called a right or claim,” whilst the absence of a right (‘no right’) generates a correlative “‘privilege.’”¹⁶⁰ Furthermore, the concept of “power,” that is, the “ability” to “effect the particular change of legal relations,”¹⁶¹ integrates the notion of “liability,” that is, the subjection “to have a duty created,”¹⁶² which is the opposite of a “disability-immunity” relation.¹⁶³

¹⁵⁶ *Comm’n v. Italy*, 2004 E.C.R. I-05975, ¶ 36.

¹⁵⁷ See Cenevska, *supra* note 71, at 306-07; de Sadeleer, *supra* note 85, at 74; Hectors, *supra* note 145, at 166, 172; Pedersen, *supra* note 106, at 104. With reference to any principles included in the EUCFR, see *Association de Méditation Sociale*, 2011 E.C.R. 2011 I-07865, ¶ 50.

¹⁵⁸ Presidency Conclusions, Dublin European Council, at 29 (June 25-26, 1990).

¹⁵⁹ HANS KELSEN, *PURE THEORY OF LAW* 127 (1989).

¹⁶⁰ Wesley Necomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30, 33 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]; Wesley Necomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L. J.* 710 (1916) [hereinafter Hohfeld, *Fundamental Legal Conceptions*].

¹⁶¹ Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 160, at 44-45.

¹⁶² *Id.* at 53.

¹⁶³ *Id.* at 55.

Applying the Hohfeldian scheme to EUCFR Article 37, it ought to be assumed that environmental protection, which *must* be integrated into the policies of the EU, is a duty and is necessarily matched by a correlative “right” under EUCFR Article 37.¹⁶⁴ Literally, EUCFR Article 37 is formulated based on the concept of a “duty,” rather than that of a “right,” taking into account the obligatory component of a legal relationship, but the latter is necessarily implied in the former.¹⁶⁵ Christopher Hilson indeed considers that “many of the proper EU environmental principles (ordinary as well as general) do confer subjective rights; or, in other words, while they have an undoubted collective content, they are also justiciable at the suit of individuals.”¹⁶⁶ This approach is less explicit, but it is consistent with other environmental norms in the field, focusing on the “right to (a safe) environment.”¹⁶⁷

Regionally, whilst the first limb of SSP Article 11 recognizes the “right of everyone” to “live in a healthy environment,” the second limb posits a State duty to protect and improve the environment.¹⁶⁸ The similarity between the second limb of SSP Article 11, matching individual rights, and EUCFR Article 37, addressing State organs, is immediately apparent.¹⁶⁹ From a collective perspective, according to the AComHPR, the right of “all peoples” to a “satisfactory environment” under ACHPR Article 24 entails a State duty to ensure environmental sustainability.¹⁷⁰ More specifically, similar to SSP Article 11 and ACHPR Article 24, the duty-right relation under EUCFR Article 37 limits the legislative “power” of EU institutions vis-à-vis their citizens, thus creating an area of “disability-immunity” with respect to the inability to pass legislation regardless of environmental protection.¹⁷¹

Fundamentally, EUCFR Article 37 focuses on the position of the duty-

¹⁶⁴ EUCFR art. 37; Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 160, at 33.

¹⁶⁵ EUCFR art. 37; Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 160, at 44, 53.

¹⁶⁶ Hilson, *supra* note 150, at 213.

¹⁶⁷ Protocol of San Salvador, *supra* note 87, at 3; Knox, U.N. Doc. A/HRC/22/43, *supra* note 6, ¶¶ 12, 14.

¹⁶⁸ Protocol of San Salvador, *supra* note 87, art 11; ACHPR, *supra* note 90, art. 24; *see* text accompanying note 88.

¹⁶⁹ *See id.*; EUCFR art. 37; *see also* U.N. Conference on Environment and Development, Draft Statute of the International Environmental Agency and the International Court of the Environment presented at the UNCED Conference in Rio de Janeiro, June 1992, art. 6.

¹⁷⁰ *Social & Econ. Rights Action Ctr.*, Communication 155/96, at 8; *see* text accompanying note 90.

¹⁷¹ EUCFR art. 37.

bearer rather than that of the right-holder.¹⁷² EUCFR Article 37 is indeed embedded in Title IV of the Charter, which concerns “solidarity rights,” that is, third-generation claims owned by collectives,¹⁷³ and, ultimately, in the case of the environment, humanity as a whole.¹⁷⁴ This matches the idea of “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” embedded in Article 1 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹⁷⁵

In this respect, it is interesting to note that, like EUCFR Article 37, “procedural environmental rights” embedded in the Aarhus Convention are also framed in terms of duties of European (and non-European) authorities.¹⁷⁶ In fact, Article 4 of the Convention, governing access to environmental information, provides that “[e]ach Party shall ensure that . . . public authorities, in response to a request for environmental information, make such information available to the public.”¹⁷⁷ Articles 6 through 9 of the Aarhus Convention, governing public participation and access to information in environmental matters, follow the same normative pattern.¹⁷⁸ Procedural environmental rights are commonly recognized as human rights.¹⁷⁹

More generally, EUCFR Article 37 operates within the context of the duty-right dimension of the principle of sustainable development. Under Article 1(1) of the UN Declaration on the Right to Development (UNDRD), sustainable development is covered by an individual and collective right: “[t]he right to development is an inalienable human right by virtue of which *every human person* and all *peoples* are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.”¹⁸⁰ This

¹⁷² See Collins, *supra* note 86, at 143 (broadening the analysis to other fundamental areas of the law, it is interesting to note that the First Amendment to the US Constitution protects fundamental rights, such as freedom of speech, in a similar way).

¹⁷³ Shelton, *supra* note 1, at 124. See also Hilson, *supra* note 150, at 213.

¹⁷⁴ See Boyle, *Human Rights and the Environment*, *supra* note 11, at 635.

¹⁷⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S. 450 [hereinafter Aarhus Convention].

¹⁷⁶ Id. Preamble, ¶¶ 7-8.

¹⁷⁷ Id. arts. 3-4.

¹⁷⁸ Along similar lines, under the IEA and ICE Draft Statute, the right-duty to environmental protection is complemented by procedural rights to information, participation and remedial action under Articles 2-4. *Id.* arts. 2-4.

¹⁷⁹ See Boyle, *Human Rights and the Environment*, *supra* note 11, at 621-622.

¹⁸⁰ G.A. Res. 41/128, Declaration on the Right to Development, *supra* note 93, art. 1(1) (emphasis added).

is matched not only by a correlative State duty under UNDRD Articles 3(1) and 4(1),¹⁸¹ but also by a correlative State right under UNDRD Article 2(3). These Articles ultimately outline a disability-immunity relation: “States have the right [power] and the duty [disability] to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.”¹⁸² Therefore, the collective and individual dimensions of the right to environmental protection under EUCFR Article 37 should coexist. In fact, with reference to former Article II-97 of the Treaty Establishing a Constitution for Europe (now EUCFR Article 37), Advocate General Colomer held that “thus emerges a right to enjoy an acceptable environment, not so much on the part of the individual as such, but as a member of a group, in which the individual shares common social interests.”¹⁸³ Furthermore, following the structure of the sustainable development principle as a common duty and right, the correlative, collective duty (disability of the EU and Member States) to protect the environment under EUCFR Article 37 should also be envisaged as a right (power).¹⁸⁴ Within the Hohfeldian scheme, environmental protection under EUCFR Article 37 should thus be conceived of as a duty(right)-right relation between, on the one hand, the EU and Member States, and, on the other, EU citizens.¹⁸⁵ Ultimately, EUCFR Article 37 outlines a disability-immunity relation between, on the one hand, the EU and Member States, and, on the other, EU citizens.¹⁸⁶ However, like the right to environmental protection, the right to development is a third-generation claim, and, for the time being,¹⁸⁷ its status as binding law is uncertain.¹⁸⁸

¹⁸¹ See *id.* art. 3(1) (“States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development”); *Id.* art. 4(1) (“States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”); see also *id.* art. 2(3).

¹⁸² *Id.* art. 2(3) (confirming that both EUCFR Article 37 and TFEU Article 11 have relevant human rights implications); see John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/31/52, ¶ 59 (Feb. 1, 2016).

¹⁸³ *EC Comm’n*, 2005 E.C.R. 2005 I-07879, ¶ 67.

¹⁸⁴ EUCFR art. 37.

¹⁸⁵ See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 160, at 710.

¹⁸⁶ See *id.*

¹⁸⁷ The ICJ has started to refer to the “need to reconcile economic development with protection of the environment aptly expressed in the concept of sustainable development.” See *Gabcikovo-Nagymaros Project*, 1997 I.C.J. ¶ 140; see also *Pulp Mills on the River Uruguay (Uruguay v. Argentina)* 2010 I.C.J. 14, ¶ 76.

¹⁸⁸ STEPHEN P. MARKS, *Obligations to Implement the Right to Development*:

The interpretation of EUCFR Article 37 as a source of rights is also confirmed by the Explanatory Notes to EUCFR Article 37, which state that the provision “also draws on some national constitutions.”¹⁸⁹ In fact, several constitutions recognize a fundamental right to environmental protection and a correlative State duty. For instance, Article 45 of the Spanish Constitution not only states that “everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it,” but also affirms that “public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment.”¹⁹⁰ Other constitutional texts only acknowledge a State duty to protect the environment. For instance, the Greek Constitution establishes that “the protection of the natural and cultural environment constitutes a duty of the State.”¹⁹¹ The State duty under these constitutional instruments can be considered equivalent to the recognition of an individual right, giving rise to individual claims. In fact, Advocate General Colomer held that “[s]upplementing that right [to environmental protection under domestic constitutions] are the correlative duties on public authorities . . . [t]he human dimension of that environmental concern is implicitly enshrined in the European Union, [Article 37 of the] Charter of Fundamental Rights.”¹⁹² This proves that it is possible to identify a constitutional tradition common to the Member States concerning the existence of a right to a healthy environment.¹⁹³ Viewing EUCFR Article 37 as a source of duties and corresponding rights is therefore consistent with EUCFR Article 52(4), according to which the provisions of the Charter must be interpreted in harmony with fundamental rights resulting from common

Philosophical, Political, and Legal Rationales, in DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS 57, 71 (Bard A. Andreassen & Stephen P. Marks eds., 2nd ed. 2010).

¹⁸⁹ 2007 O.J. (C 303) 27.

¹⁹⁰ CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 45, Dec. 7, 1978 (Spain); *see also* ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION] May 14, 2004, art. 44 (Slovk.); 1958 CONST. Charter for the Environment (Fr.).

¹⁹¹ 2008 SYNTAGMA [SYN.] [CONSTITUTION] 2, art. 24 (Greece); *see also* Grundgesetz [GG] [Basic Law] art. 20(a), *translation available at the website* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0116.

¹⁹² *EC Comm'n*, 2005 E.C.R. 2005 I-07879, ¶ 68; *see also* Alexandre Kiss, *Environmental and Consumer Protection, in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW AND POLICY 247, 253 (Steve Peers & Angela Ward eds., 2004); Boyle, *Human Rights or Environmental Rights*, *supra* note 1, at 481.

¹⁹³ *See* Case C-277/02, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, Opinion of Advocate General Léger, 2004 E.C.R. I-11957, ¶ 9; Pedersen, *supra* note 106, at 108-10; *but see* Morgera & Marin-Durán, *supra* note 23, at 989.

constitutional traditions.¹⁹⁴ Advocate General Villalón thus acknowledged that “[a]rticle 37 expressly recognises the right to environmental protection . . . [which] does not arise in a vacuum but instead responds to a recent process of constitutional recognition in respect of protection of the environment, in which the constitutional traditions of the Member States have played a part.”¹⁹⁵

In light of the extensive interpretation of the direct effect of primary EU law developed by the ECJ in *Mangold*,¹⁹⁶ it could be further assumed that the principle of environmental protection under EUCFR Article 37 is covered not only by vertical legal relations between the EU, Member States and their citizens, but also by horizontal relations between individuals and other legal persons within the EU. In fact, the ECJ held that primary EU rules have not only a direct “vertical” effect, creating domestic legal relations between legal persons and a Member State, but also a direct “horizontal” effect, creating legal relations between legal persons and other non-State legal persons within the EU.¹⁹⁷ This would lead to further positing the existence of a right-duty relation to environmental protection between individuals and non-State legal persons within the Union. The policy content of EUCFR Article 37, nevertheless, and thus the disability-immunity relation it establishes, might prevent such an implication.¹⁹⁸

A relevant limitation inherent in the definition of EUCFR Article 37 as a right rather than a principle is justiciability under EUCFR Article 52(5), which provides that general principles under the Charter are “judicially cognisable only in the interpretation” and “the ruling on the legality” of “legislative and executive *acts* taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are

¹⁹⁴ 2012 O.J. (C 326) 406.

¹⁹⁵ *European Air Transport SA*, 2011 E.C.R. 2011 I-07865, ¶¶ 78-79. Within this framework, it is difficult to explain what the difference is between the “observance” of environmental protection as a principle, as opposed to “respect” for rights, under EUCFR Article 51(1). See Explanations Relating to the EUCFR, *supra* note 30, at 35. Possibly, the word “observance” has a more general scope, and thus encompasses not only the duty to respect fundamental rights but also the obligations to protect and fulfil them. See Asbjørn Eide (Special Rapporteur), *Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987)).

¹⁹⁶ See *Mangold*, 2005 E.C.R. I-09981, ¶ 77 (holding that national courts must provide “legal protection which individuals derive from Community law . . . setting aside any provision of national law which may conflict with that law . . .”); see also text accompanying note 146.

¹⁹⁷ See, e.g., Case 43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena*, 1976 E.C.R. 456, ¶¶ 39-40.

¹⁹⁸ See text accompanying note 171.

implementing Union law, in the exercise of their respective powers.”¹⁹⁹ This formulation was not initially embedded in the text of the Charter adopted in 2000,²⁰⁰ but was included in Article II-112(5) of the EU Constitutional Treaty.²⁰¹ Such a normative evolution signals that the justiciability of EUCFR Article 37 before the CJEU under TFEU Articles 263 and 265 is confined to positive measures,²⁰² but does not encompass a failure to take action by the EU and its Member States.²⁰³ A similar limit also applies to action in domestic courts if EUCFR Article 37 is considered to produce a direct effect in the territory of the Member States. Indeed, the Explanatory Notes to the EUCFR generally restrict the justiciability of EUCFR Article 37 to ““direct claims for positive action [before] the Courts.”²⁰⁴ It is difficult, however, to reconcile this stance with the “twin” TEFU Article 11, which, absent any specific provisions on justiciability, is considered to cover both action and inaction of the EU and Member States.²⁰⁵

III. PROSPECTIVE IMPACT OF EUCFR ARTICLE 37 ON ENVIRONMENTAL PROTECTION VIA HUMAN RIGHTS IN INTERNATIONAL LAW

EUCFR Article 37 can have different implications for the evolution of the two-way system of protection of the environment via human rights. This was particularly underscored by Judges Costa, Ress, Türmen, Zupančič and Steiner in their joint dissenting opinion in *Hatton*, mentioning EUCFR Article 37 as an example of “awareness of the need for the protection of environmental human rights.”²⁰⁶ On the one hand, enhanced environmental protection under EUCFR Article 37 can further facilitate the “greening” of first- and second-generation human rights in international law, notably under the ECHR, thus generating positive feedback, along the lines of the “cross-

¹⁹⁹ 2012 O.J. (C 326) 407 (emphasis added); see Hilson, *supra* note 150, at 215 (arguing that it would be preferable to only have rights in the EUCFR, possibly involving different degrees of justiciability).

²⁰⁰ See 2000 O.J. (C 364) 21 (omitting language clarifying the justiciability of principles referenced in the Charter of Fundamental Rights).

²⁰¹ See 2004 O.J. (C 310) 53.

²⁰² Including measures actually “implementing” or “not implementing” EU law. With reference to EC Treaty Article 6, see Case C-94/03, *Comm’n v. Council*, 2006 E.C.R. I-00001, ¶¶ 26-27 and Morgera & Marín-Durán, *supra* note 23, at 997-98.

²⁰³ Explanations Relating to the EUCFR, *supra* note 30, at 35.

²⁰⁴ *Id.*

²⁰⁵ Sjäfjell, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, *supra* note 32, at 62; Julian Nowag, ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENT LAWS 37 (2016).

²⁰⁶ See *Hatton*, 2003-VIII Eur. Ct. H.R., Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič, Steiner, ¶ 1.

fertilization of ideas between different human rights protection systems.”²⁰⁷ On the other hand, in light of the ILC’s assumption that regionalism is a “privileged form of international law-making,”²⁰⁸ EUCFR Article 37 could support the establishment of a human right to environmental protection under the ECHR and general international law.²⁰⁹

In 1996, Alan Boyle questioned “what is left for a substantive human right to a decent environment to do that has not already been done” via other human rights.²¹⁰ Whilst it is not the purpose of this article to underscore in detail the limits of greening human rights rather than recognizing a fundamental right to a healthy environment, it is useful to outline some crucial points: “greening” human rights entails shortcomings. The fact that the ECHR and general international law only afford environmental protection via first- and second-generation human rights implies diminished safeguard for the environment.²¹¹

In particular, it is quite complex to establish a link between environmental pollution and fundamental rights, such as the rights to life, private and family life or health.²¹² For instance, in *Tatar* the ECtHR required the proof of a specific link between an industrial incident causing environmental pollution in the municipality of Baia Mare in Romania and the claimant’s health in order to uphold State responsibility for breaching the obligation to respect the right to private and family life under ECHR Article 8.²¹³ The Court considered that the claimant had not sufficiently proved the existence of a link between exposure to sodium cyanide and asthma on a probabilistic basis.²¹⁴ However, the Court held that the existence of a serious risk for health entailed State responsibility for breaching the duty to adopt adequate measures to protect the right to private and family life, which was interpreted so as to encompass the right to a healthy environment.²¹⁵

²⁰⁷ Hectors, *supra* note 145, at 170, 175; Boyle, *Human Rights or Environmental Rights*, *supra* note 1, at 479, 504.

²⁰⁸ ILC, *Fragmentation of International Law*, *supra* note 24, ¶ 205.

²⁰⁹ Pedersen, *supra* note 106, at 111.

²¹⁰ Alan Boyle, *The Role of International Human Rights in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43, 56 (Alan Boyle, & Michael Anderson eds., 1996).

²¹¹ Peter Burdon, *Environmental Human Rights: A Constructive Critique*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 61, 61 (Anna Grear & Louis Kotzé eds., 2015).

²¹² Armelle Gouritin, EU ENVIRONMENTAL LAW, INTERNATIONAL ENVIRONMENTAL LAW, AND HUMAN RIGHTS LAW 169 (2016).

²¹³ *Tatar*, App. No. 67021/01, Eur. Ct. H.R. ¶ 75.

²¹⁴ *Tatar*, App. No. 67021/01, Eur. Ct. H.R. ¶¶ 103-06.

²¹⁵ *Tatar*, App. No. 67021/01, Eur. Ct. H.R. ¶ 107.

The approach taken by the ECtHR in *Tatar* works in the case of localized sources of pollution, but is less suitable when the sources are de-localized, as in the case of GHG emissions. Indeed, it is quite complex to determine responsibility for inadequate mitigation policies causing loss of life as a consequence of climatic events such as Typhoon Haiyan.²¹⁶ Based on these premises, in 2006 the IACoHR rejected an Inuit petition alleging the responsibility of the US for breaching the American Declaration on the Rights and Duties of Man because of excessive carbon emissions.²¹⁷ The US Court for the District of California upheld this stance in rejecting a claim submitted by Inuit people living in Kivalina against US energy corporations, such as Chevron and ExxonMobil, for producing excessive GHG emissions, in breach, inter alia, of the fundamental right to property.²¹⁸

In *Marangopoulos*, the ECtSR took a different approach, assessing the allegation that Greece had failed to comply with its obligation to protect public health against air pollution under ESC Article 11.²¹⁹ The Committee held Greece responsible for allowing the operation of lignite mines and power stations fueled by lignite, also triggering excessive GHG emissions, without taking all necessary steps to reduce their environmental impact.²²⁰ Total suspended particulates emitted by processing lignite were found to cause an abnormally high prevalence of respiratory diseases. Based, inter alia, on the UN Framework Convention on Climate Change (FCCC), the Kyoto Protocol, EC implementation measures (including the Emission Trading System), provisions of the TEC ensuring a high standard of environmental protection, the Aarhus Convention, and environmental rules under the Greek Constitution, the ECtSR upheld the plaintiff's claim.²²¹ More specifically, in light of the case law of the ECtHR, IACoHR, ACoHPR, and UN Committee on Economic, Social and Cultural Rights,

²¹⁶ *OHCHR Report*, supra note 105, ¶ 70; see also Malgosia Fitzmaurice, *A Human Right to a Clean Environment: A Reappraisal*, in *THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE* 2015 219, 221 (Giuliana Ziccardi Capaldo ed., 2016).

²¹⁷ 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* 1 (2005), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf; Inter-American Commission on Human Rights, Letter to Sheila Watt Cloutier and Others Petition P-1413-05 (2006), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf.

²¹⁸ *Native Village of Kivalina & City of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

²¹⁹ *Marangopoulos Found. for Hum. Rts.*, Complaint 30/2005, ¶ 11.

²²⁰ *Marangopoulos Found. for Hum. Rts.*, Complaint 30/2005, ¶¶ 209-10, 214.

²²¹ *Marangopoulos Found. for Hum. Rts.*, Complaint 30/2005, ¶¶ 221, 240.

the ECtSR held Greece in breach of the right to health embedded in ESC Article 11, including the “right to a healthy environment.”²²²

Yet, scholars have correctly pointed out that policies that result in damage to the environment, but not to life and health, cannot be adequately taken into account under first- and second-generation human rights.²²³ Indirect environmental protection via fundamental rights entails a margin of appreciation that does not ensure adequate coverage when substantive regulatory standards are insufficient to effectively protect the environment per se.²²⁴ Thus, in *Balmer Schafroth v. Switzerland*, the ECtHR considered lawful a decision of the Swiss Federal Council to extend a license for the operation of a nuclear power plant.²²⁵ The Court held that a direct link between the operating conditions of the power station and the right to physical integrity had not been proved, in the absence of evidence of a direct exposure to a serious, specific and imminent danger entailed by the use of nuclear energy.²²⁶ Minority justices held:

[T]he majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and [natural] heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage.²²⁷

The environment could thus not be protected per se, because environmental safety was subordinated to a low standard of safeguard for physical integrity.

Typical human rights instruments also have a limited territorial scope of application. In particular, Article 2(1) of the International Covenant on Civil and Political Rights requires a Member State to respect and ensure fundamental rights “to all individuals within its territory and subject to its jurisdiction.”²²⁸ Such a geographical constraint is based on the limits of State sovereignty, which contrasts with the extraterritorial impact of pollution.²²⁹

²²² *Marangopoulos Found. for Hum. Rts.*, Complaint 30/2005, ¶¶ 195-96, 221.

²²³ Margaret DeMerieux, *Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 21 OXFORD J. LEGAL STUD. 521, 543, 560-61 (2001); de Sadeleer, *supra* note 85, at 62, 66, 67-68; Collins, *supra* note 86, at 151; *see also* Asselbourg v. Luxemburg, 1999-VI Eur. Ct. H.R. 399, 410.

²²⁴ DE SADELEER, *supra* note 15, at 112-14.

²²⁵ *See generally* Balmer-Schafroth v. Switzerland, 1997-IV Eur. Ct. H.R. 1.

²²⁶ *Balmer-Schafroth*, 1997-IV Eur. Ct. H.R. at 12.

²²⁷ *Balmer-Schafroth*, 1997-IV Eur. Ct. H.R. at 17.

²²⁸ International Covenant on Civil and Political Rights, art 2, ¶ 1, opened for signature Dec. 19, 1966, 999 U.N.T.S. 173 (1976) [hereinafter ICCPR].

²²⁹ *See* Noah D. Hall, *Transboundary Pollution: Harmonizing International and*

If logically framed along the lines of the no-harm rule,²³⁰ an independent human right to environmental sustainability would allow such attrition to be overcome.²³¹

Moreover, unlike first- and second-generation human rights, which mainly address natural persons, the right to environmental protection indistinctly addresses natural and legal persons.²³² Whilst ECHR Article 34 allows action not only by individuals, but also by “groups” and “non-governmental organizations (NGOs),” thus including environmental organizations,²³³ its application ultimately depends on the right at issue on a case-by-case basis. For instance, in *Urgenda* an NGO was considered unable to act against the climate policy of the Netherlands on the mere basis of ECHR Articles 2 and 8.²³⁴

Furthermore, inferring procedural environmental rights from first- and second-generation human rights entails shortcomings. For example, ECHR Article 6, concerning the right to a fair trial, can provide a basis for inferring a fundamental right to a judicial remedy in environmental matters.²³⁵ However, ECHR Article 6 only covers civil and criminal proceedings, not administrative proceedings, which are routine when adopting environmental policy measures.²³⁶ Conversely, an independent right to environmental protection naturally complements and presupposes procedural environmental rights in all types of proceedings.²³⁷ Recognizing the right to a healthy

Domestic Law, 40 U. MICH. J.L. REFORM 681, 681-746 (2007).

²³⁰ See generally *Trail Smelter*, Award II RIAA 1905 (1938/1941) (controversy between the U.S. and Canadian governments regarding damage incurred within the territorial boundaries of the U.S. due to Canadian industry activity within the territorial borders of Canada); see Convention on the Law of the Sea art. 194(2), Dec. 10, 1982, 1833 U.N.T.S. 478 (1994); *Stockholm Declaration*, *supra* note 4; *Rio Declaration*, *supra* note 94, principle 2; ILC, Rep. on the Work of Its Fifty-Sixth Session, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, U.N. Doc. A/56/10, (2001).

²³¹ COUNCIL OF EUR., *supra* note 74, at 112-15 (2d ed. 2012; see also Hectors, *supra* note 145, at 174; Shelton, *supra* note 1, at 134,138; Boyle, *Human Rights and the Environment*, *supra* note 11, at 634, 637, 640-41; de Sadeleer, *supra* note 85, at 66.

²³² Hectors, *supra* note 145, at 174.

²³³ See DeMerieux, *supra* note 223, at 559.

²³⁴ See *Urgenda*, C/09/456689/HA ZA 13-1396 ¶ 4.45 (“[T]he court considers that *Urgenda* itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR . . . unlike a natural person, a legal person’s physical integrity cannot be violated nor can a legal person’s privacy be interfered with.”); see also de Sadeleer, *supra* note 85, at 65.

²³⁵ DeMerieux, *supra* note 223, at 545.

²³⁶ *Id.*, at 546; de Sadeleer, *supra* note 85, at 63.

²³⁷ See Ksentini, *supra* note 6, Annex I; de Sadeleer, *supra* note 85, at 71; see also text accompanying note 175.

environment under the ECHR should thus necessarily entail the explicit acknowledgment of complementary rights to participation, information and access to justice in environmental matters. As convincingly showed by Tim Hayward, the establishment of a substantive human right to environmental protection is functional to procedural environmental rights and reciprocally procedural environmental claims imply a substantive human right to environmental protection.²³⁸

Dinah Shelton sees the international recognition of a human right to a healthy environment as necessary because of climate change.²³⁹ In 2015, Boyle changed his views in favor of the inclusion of a right to a decent environment in the International Covenant on Economic, Social and Cultural Rights. Boyle considers that such a right “would modernize the Covenant, while also giving it greater coherence and consistency with contemporary international environmental law and policy,” helping to “counteract the evident inaction of States revealed by the Copenhagen and Cancun negotiations,” since “[u]nrestrained carbon emissions are not a recipe for a decent environment of any kind.”²⁴⁰ Similarly, the High Court of Lahore considered that the State of Pakistan must reduce its GHG emissions, inter alia, in light of the fundamental “right to a clean and healthy environment,” arguing that “[f]rom environmental justice, which was largely localized and limited to our own ecosystems and biodiversity” it is necessary “to move to Climate Change Justice.”²⁴¹ In *Juliana v. United States*, the US Court for the District of Oregon rejected a motion to dismiss a claim challenging governmental climate policies in the US, considering that undoubtedly “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”²⁴² Along these lines, John Knox recommended that the UN General Assembly recognize the “human right to a healthy environment” in “a global instrument,”²⁴³ which would “provide a series of important and tangible benefits,”²⁴⁴ with particular regard to issues of

²³⁸ TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 38, 58, 86 (2005).

²³⁹ Shelton, *supra* note 1, at 138.

²⁴⁰ Boyle, *Human Rights and the Environment*, *supra* note 11, at 633.

²⁴¹ *Leghari v. Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Court Green Bench) 2, ¶7.

²⁴² *Juliana v. United States*, 217 F. Supp. 3d 1224, 1225 (D. Or. 2016); *see also* *Juliana v. United States*, 947 F.3d 1159, 1179 (9th Cir. 2020) (Staton, J. dissenting).

²⁴³ John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/73/188, ¶¶ 37, 46 (July 19, 2018).

²⁴⁴ *Id.*, ¶ 39.

causation and territoriality.²⁴⁵ More specifically, the former Special Rapporteur concluded that the “[r]ecognition of the right to a healthy environment by the United Nations would complement, reinforce and amplify the regional and national norms and jurisprudence developed over the past 45 years.”²⁴⁶ The current Special Rapporteur on Human Rights and the Environment, David R. Boyd, encouraged the “recognition of the right to a healthy environment at the global level”²⁴⁷ and acknowledged that the failure of States to adequately address climate change is in breach of such a right, which is recognized in the majority of State constitutions.²⁴⁸ The international recognition of a fundamental right to environmental sustainability would thus further lead to clarifying its relationship to specific, possibly fundamental, environmental rights, spanning from the right to a sustainable climate to the duty to protect biodiversity, as well as their international legal status.²⁴⁹

Within this context, it is possible to consider that EUCFR Article 37 crucially strengthens the emergence of the human right to a healthy environment as a general principle of law acknowledged by the UN Special Rapporteurs on Human Rights and the Environment in their Reports to the Human Rights Council.²⁵⁰ Interpreting the recognition of a general principle of law under Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) as a tacit customary practice²⁵¹ further facilitates moving to the recognition of the right to environmental protection as a customary general principle of international law under ICJ Statute Article 38(1)(b).²⁵² Such a recognition would crystallize current soft law embedded in the Stockholm

²⁴⁵ *Id.*, ¶¶ 15-27.

²⁴⁶ *Id.*, ¶ 39.

²⁴⁷ David R. Boyd (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/43/54, ¶ 63 (Jan. 23, 2020).

²⁴⁸ David R. Boyd (Special Rapporteur on Human Rights and the Environment), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/74/161, ¶¶ 43-44 (July 15, 2019).

²⁴⁹ See ILC, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, 158-200 (2018) (Guidelines on the Protection of the Atmosphere); Press Release, U.N. Human Rights of High Comm’r, Failing to Protect Biodiversity Can Be a Human Rights Violation – UN Experts (June 25, 2019) (on file with the U.N. Human Rights of High Comm’r).

²⁵⁰ See Knox, U.N. Doc. A/HRC/22/43, *supra* note 6, ¶¶ 12, 14; Boyd, U.N. Doc. A/HRC/43/54, *supra* note 247, ¶ 63; see also text accompanying note 102.

²⁵¹ GEORGES SCELLE, *PRECIS DE DROIT DES GENS: PRINCIPES ET SYSTEMATIQUE* (2008).

²⁵² Statute of the International Court of Justice, art. 38, ¶ 1(b), June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945).

and Bizkaia Declarations into binding law.²⁵³ Within this framework, however, whilst EUCFR Article 37 can contribute to outlining an *omnium* international right to environmental sustainability, because of its nature as a disability-immunity rule it cannot enhance the definition of international environmental protection as an international *erga omnes* right.²⁵⁴

From a regional perspective, EUCFR Article 37 could revive the debate on the inclusion of environmental sustainability as an independent human right in the ECHR, as foreshadowed by dissenting judges in *Hatton*.²⁵⁵ This will be particularly compelling if the EU accedes to the ECHR, according to TEU Article 6(2).²⁵⁶ In fact, under the current text of the EUCFR and ECHR, accession would create an asymmetrical situation, whereby the CJEU, a non-specialized human rights body, could afford direct environmental protection via the fundamental right to a sustainable environment, whilst the ECtHR, a specialized human rights organ, could only afford indirect protection via first- and second-generation human rights.

CONCLUSION

Systemic analysis shows that EUCFR Article 37 (*lex specialis*) comprehensively integrates environmental protection into the policy of the

²⁵³ See WCED, *Brundtland Report*, Annex I ¶ 2.1; see generally *Stockholm Declaration*, *supra* note 4; UNESCO, *Bizkaia Declaration*, *supra* note 5.

²⁵⁴ On the *erga omnes* nature of the right to a sustainable environment, see *Gabcikovo-Nagymaros Project*, 1997 I.C.J. 88, 117-18 (1997) (separate opinion by Weeramantry, J.); MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 157 (1997); Patrick Hamilton, *Counter[measur]ing Climate Change: The ILC, Third State Countermeasures and Climate Change*, 4 MCGILL INT'L J. SUST. DEV. L. & POL'Y 83, 110 (2008); Louis Kotzé, *In Search of a Right to a Healthy Environment in International Law*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 136, 151 (John Knox & Ramin Pejman eds., 2018).

²⁵⁵ *Hatton*, 2003-VIII Eur. Ct. H.R. Dissenting Opinion of Judges Costa and Others, ¶ 1; *Balmer-Schafroth*, 1997-IV Eur. Ct. H.R., Dissenting Opinion of Judge Pettiti, 17; see DeMerieux, *supra* note 223, at 555, 557. With reference to prior Article II-97 of the Constitutional Treaty, see Collins, *supra* note 86, at 147.

²⁵⁶ See *Completion of EU Accession to the European Convention on Human Rights*, EUROPEAN PARLIAMENT, <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr> (last updated Jan. 21, 2021). If it were to be recognized under the ECHR along the lines of the aforementioned proposals, according to TEU Article 6(3), an independent human right to environmental protection would become part of the general principles of EU law. See Cenevska, *supra* note 71, at 322; see also text accompanying notes 182-195. In fact, although the general principles of the EU can be inferred from primary EU law, it is assumed that considering that EUCFR Article 37 establishes a “principle” does not necessarily establish a “general principle” of EU law. See Hilson, *supra* note 150 at 198-99; Vedder, *supra* note 34, at 289.

EU from a human rights perspective, within the context of sustainable development. The provision brings EU law into line with the ACHPR and the SSP to the ACHR.

In light of EUCFR Article 51, scholars have recognized the nature of EUCFR Article 37 as a binding principle and a source of duties. Following the broad interpretation of the principles of clarity and non-conditionality developed by the ECJ in *Mangold*, it is possible to assume that EUCFR Article 37 imposes duties upon the EU and Member States that are also binding vis-à-vis individuals. Along these lines, in light of the necessary correlativeness between duties and rights, case law and scholarly opinions demonstrate that EUCFR Article 37 can be interpreted so as to create ‘vertical’ claims upon individuals vis-à-vis the EU and Member States. Conversely, a direct ‘horizontal’ effect might be precluded by the Hohfeldian immunity-disability nature of the rule. However, since, according to the Explanatory Notes, EUCFR Article 37 establishes a “principle,” under EUCFR Article 52(5) literally EUCFR Article 37 only permits the justiciability of action, not that of a failure to act. In this respect, EUCFR Article 37 is less progressive than ACHPR Article 24, which establishes a right to a sustainable environment that is fully justiciable, but more progressive than SSP Article 11, which establishes a right to a healthy environment that is non-justiciable.

EUCFR Article 37 is more advanced than the ECHR and general international law, which only afford environmental protection via first- and second-generation human rights (*lex generalis*). Greening traditional human rights entails shortcomings with respect to causation, extraterritoriality, the threshold of damage, injured persons and procedural claims, with specific regard to de-localized phenomena such as climate change. However, the question of global warming has revived the debate on the inclusion of a human right to a healthy environment in the text of ECHR. Furthermore, within the context of the progressive development of international law, the UN Special Rapporteurs on Human Rights and the Environment have acknowledged the possibility of recognizing a human right to environmental protection as a general principle of law based on domestic constitutions and as a further customary rule.

In this framework, EUCFR Article 37 has the potential to contribute to greening traditional human rights and to definitively establishing the emerging third-generation human right to environmental sustainability as a general principle of international law. Similarly, based on the foreseeable accession of the EU to the ECHR, EUCFR Article 37 could be relied upon to green first- and second-generation human rights in the ECHR and to revive the debate on the inclusion of a third-generation human right to environmental protection in the ECHR. The further question would then be exploring the relationship between the fundamental right to a sustainable

environment and specific, possibly fundamental, environmental rights, spanning from the right to a sustainable climate to the duty to protect biodiversity. Along the lines of the principle of harmonization proposed by the ILC, EUCFR Article 37 can thus become an important step in achieving consistent environmental protection via human rights in a regulatory framework that is currently highly fragmented.