

BEFORE THE SUPREME COURT OF NORWAY

Föreningen Greenpeace Norden & Natur og Ungdom

v.

The Government of Norway

AMICUS CURIAE BRIEF

**OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT
AND THE UNITED NATIONS SPECIAL RAPPORTEUR ON TOXICS AND HUMAN RIGHTS**

Dr. David R. Boyd

United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Associate Professor of Law, Policy & Sustainability
Institute for Resources Environment & Sustainability
School of Public Policy and Global Affairs
2202 Main Mall
University of British Columbia
Vancouver, BC V6T 1Z4, Canada
Tel: +1 250 539 8181
Email: david.r.boyd@ires.ubc.ca

Dr. Marcos A Orellana

United Nations Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Professorial Lecturer of International Environmental Law
George Washington University School of Law
Adjunct Professor of International Law
American University Washington College of Law
Tel: +1 917 705 8603
Email: morellana@law.gwu.edu

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IDENTITY AND INTEREST OF AMICUS

We, David R. Boyd and Marcos A Orellana, have prepared this amicus curiae brief in our roles as United Nations Special Rapporteur on the human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment, and as United Nations Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, respectively.¹ Dr. Boyd was appointed to this post on 1 August 2018, and Dr. Orellana was appointed to this post on 1 August 2020, by the Human Rights Council. These voluntary positions form part of the UN's special procedures, experts selected from across the world to contribute to the fulfillment of human rights in areas related to their professional expertise. We work closely with the Office of the High Commissioner for Human Rights (OHCHR) and report annually to both the Human Rights Council and the General Assembly. In that capacity, Dr. Boyd has reported on the impacts of climate change on human rights and the associated State obligations.²

Dr. Orellana also teaches International Environmental Law at the George Washington University School of Law and International Law at the American University Washington College of Law. His practice as legal advisor has included work with United Nations agencies, governments and non-governmental organizations. He has intervened in cases before the Inter-American Court of Human Rights, the International Tribunal for the Law of the Sea, the International Centre for Settlement of Investment Disputes and the World Trade Organization. His practice in the climate space includes representing the eight-nation Independent Association of Latin America and the Caribbean in the negotiations of the Paris Agreement on climate change. He also served as senior legal advisor to the Presidency of the 25th Conference of the Parties of the UN Framework Convention on Climate Change.

Dr. Boyd is also a professor at the University of British Columbia in Canada, jointly appointed in the Institute for Resources, Environment and Sustainability and the School of Public Policy and Global Affairs. He has worked as an environmental lawyer for 25+ years, served as an advisor to many governments on environmental policy, constitutions and human rights, and published nine books and more than 100 articles, reports, and book chapters. He has extensive expertise in comparative constitutional law, including books (e.g. *The Environmental Rights Revolution*, 2012), articles (e.g. *The Constitutional Right to a Healthy Environment*, 2012), and book chapters (e.g. *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, 2019).

As Special Rapporteur, Dr. Boyd had the opportunity to visit Norway in September 2019, at the invitation of the Norwegian Government. In his report to the Human Rights Council on the visit, he

¹ Authorization for the positions and views expressed by the UN Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies. This third-party intervention is made by the United Nations Special Rapporteurs on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

² Special Rapporteur on human rights and environment (David R. Boyd), *A Safe Climate*, UN Doc. A/74/161 (2019); Right to a Healthy Environment: Good Practices, UN Doc. A/HRC/43/53, (2020).

observed that in some respects, Norway is at the forefront of the global transition to a fossil-fuel-free economy.³ He cited the Norwegian International Climate and Forest Initiative, which provides substantial funding to nations with large areas of tropical forest to prevent deforestation, as a leading example of a good practice. He pointed out that Norway is one of the largest donors to the Green Climate Fund, which finances mitigation and adaptation in developing countries, and recently announced a doubling of its contribution for the period 2020–2023. However, he commented on the Norwegian paradox: that Norway’s leadership in addressing the global climate emergency is undermined by its ongoing dependence on a large petroleum industry. He also spent three days north of the Arctic Circle with members of the Indigenous Sámi Community, learning about the devastating impacts of climate change upon the reindeer herding activities that are at the heart of their culture and their economy. In his conclusions, he recommended that in order to fulfill its international environmental and human rights obligations, Norway should prohibit further exploration for fossil fuels and reject further expansion of fossil fuel infrastructure. In the dialogue following his presentation of the report to the Human Rights Council in 2020, he was heartened to hear the distinguished delegate from Norway commend his work and state that while Norway’s oil and gas industry will not close down overnight, Norway does need to develop alternatives.⁴

SUMMARY OF ARGUMENT

There are two main issues addressed in this brief, set in the context of an unprecedented global climate emergency. First, whether the Court of Appeal’s interpretation of Article 112 of the Norwegian Constitution is consistent with comparative constitutional law and international law on human rights and the environment. Second, whether the Government of Norway’s decision to issue permits for offshore petroleum exploration is consistent with international human rights and environmental obligations and principles. The conclusions reached—through the combined application of comparative constitutional law, international human rights law, and international environmental law—are that Article 112 clearly provides an enforceable, justiciable human right and that permits issued for additional petroleum exploration in Norway’s coastal waters violate this right.

INTRODUCTION: THE GLOBAL CLIMATE CRISIS AND IMPACTS ON HUMAN RIGHTS

As the Borgarting Court of Appeal acknowledged, the world faces a climate crisis. The current level of warming is unprecedented in the last ten thousand years, an interglacial period with a stable climate that coincided with the rise of human civilization. Today’s levels of carbon dioxide in the atmosphere last occurred three million years ago, during the Pliocene epoch before *Homo sapiens* evolved. Our species is in uncharted, dangerous waters. In 2018, the Intergovernmental Panel on Climate Change (IPCC) called for significant emissions reductions – 45% from 2010 levels – by 2030 to avoid crossing the 1.5°C threshold.

³ Special Rapporteur on human rights and environment (David R. Boyd), *Norway Country Visit: Report*, UN. Doc. A/HRC/43/53/Add.2 (2020).

⁴ <http://webtv.un.org/search/id-sr-on-sustainable-environment-14th-meeting-43rd-regular-session-human-rights-council/6137625246001/?term=&lan=english&cat=Regular%2043rd%20session&sort=date&page=6#player>

Human rights bodies have consistently affirmed the linkage between human rights and climate change. In 2008, the Human Rights Council adopted its first resolution on climate change and human rights.⁵ The Council expressed its concern that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights. Since then, the Human Rights Council has repeatedly adopted resolutions reiterating its concerns about the effects of climate change on human rights, particularly those of the most vulnerable people.⁶

In September 2019, five human rights treaty bodies issued a compelling Joint Statement on Human Rights and Climate Change. The treaty bodies stated that “adverse impacts on human rights are already occurring at 1°C of warming and every additional increase in temperatures will further undermine the realization of rights.”⁷ The treaty bodies further observed that “Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.” To comply with those obligations, States “must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.”⁸

The resolutions of the Human Rights Council and the observations of human rights treaty bodies have a robust scientific foundation. The IPCC, in its most recent assessment of the state of knowledge concerning the science of climate change (the 5th Assessment Report (AR5) from 2014), concluded that “Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems.”⁹

At the time of IPCC’s AR5, two degrees Celsius was generally considered the critical limit above which there is risk of dangerous climate change. But in 2018 the IPCC released its Special Report on 1.5°C, which identifies dramatic impacts for people and planet if temperature were to rise beyond 1.5°C. The IPCC’s Special Report on 1.5°C observes that rising levels of greenhouse gases in the atmosphere already have caused global average temperature to increase 1.1°C above pre-industrial levels.¹⁰ The effects of the changing climate already include increased precipitation and flooding in some areas, and heat waves, drought and wildfires in others.¹¹ Sea levels are rising, endangering low-lying coastal communities. During his UN country mission to Fiji in 2018, Dr. Boyd

⁵ Human Rights Council resolution 7/23.

⁶ See e.g., Human Rights Council resolution 18/22.

⁷ *Joint Statement on Climate Change and Human Rights*, The Committee on the Elimination of all Forms of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, September 2019, para. 5.

⁸ *Id.* para. 11.

⁹ IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, pg. 40.

¹⁰ IPCC, *Global Warming of 1.5°C. An IPCC Special Report* (2018), p. 51.

¹¹ *Id.* p. 53.

traveled to Vunidogaloa, one of the first communities in the world forced to completely relocate because of climate change, resulting in serious human rights consequences.¹²

Climate change undermines production of major crops, such as wheat and maize,¹³ threatening widespread hunger and famine. The increase in the severity of extreme weather events such as hurricanes, typhoons and monsoons has killed thousands of people and threatens to displace millions more. Climate change is also one of the main drivers of loss of biological diversity and natural ecosystems, which make irreplaceable and invaluable contributions to the material, cultural and spiritual wellbeing of people worldwide.¹⁴

Unless States take urgent and sustained actions to reduce emissions, the future impacts of climate change will be even worse. Human rights, and the right to a healthy environment in particular, provide a moral and legal compass for humanity to face the climate crisis.

I. THE COURT OF APPEAL'S INTERPRETATION OF ARTICLE 112 OF THE NORWEGIAN CONSTITUTION AS AN ENFORCEABLE RIGHT IS CONSISTENT WITH COMPARATIVE CONSTITUTIONAL LAW AND INTERNATIONAL LAW ON HUMAN RIGHTS AND THE ENVIRONMENT

The interpretation of the Borgarting Court of Appeal regarding the enforceability of the right to a healthy environment (Article 112) in relation to the specific wording and architecture of the Norwegian Constitution, found in the chapter titled Human Rights, is also consistent with comparative constitutional law. The right to a healthy environment enjoys constitutional recognition in 110 out of the 193 member States of the United Nations.¹⁵ Most national constitutions that recognize the right to a healthy environment also contemplate its enforceability by concerned individuals and organizations.¹⁶ The justiciability of the right to a healthy environment empowers citizens and civil society, strengthening democratic decision-making and fostering accountability for political decisions. Access to justice is itself a fundamental human right, including in the context of environmental harms.¹⁷

The Court of Appeal's interpretation of Article 112 is also consistent with international law on human rights and the environment. This body of law has clarified State's human rights obligations

¹² Special Rapporteur on human rights and environment (David R. Boyd), *Fiji Country Visit: Report*, UN. Doc. A/HRC/43/53/Add.1 (2020).

¹³ IPCC, *Global Warming of 1.5°C. An IPCC Special Report* (2018), p. 236; UN Food and Agriculture Organization et al., *The State of Food Security and Nutrition in the World 2018*, p. 39.

¹⁴ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers* (2019), p. 5.

¹⁵ Special Rapporteur on human rights and the environment (David R. Boyd). Good Practices in the recognition and implementation of the right to a safe, clean, healthy and sustainable environment. A/HRC/43/53, Annex II (2020).

¹⁶ David R. Boyd. *The Environmental Rights Revolution: Constitutions, Human Rights and the Environment*. University of British Columbia Press, 2012.

¹⁷ Special Rapporteur on human rights and the environment (John Knox), *Framework Principles on human rights and environment* UN. Doc. A/HRC/37/59, Annex (2018).

with respect to a healthy environment.¹⁸ The enforceable right to a healthy environment is a key tool to transform these obligations into reality for individuals and society.

I.i. Comparative constitutional law illustrates how constitutional protection of the right to a healthy environment can be enforced by courts of law

The roots of the human right to a healthy environment can be traced back to the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) of 1972, in which the first principle stated 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.”

Since 1972, the right to a healthy environment has gained widespread legal recognition across the world. At the national level, Portugal became the first country to adopt a constitutional “right to a healthy and ecologically balanced human environment”, in 1976. Since then, the right to a healthy environment has achieved legal recognition in more than eighty percent of UN member states (156 out of 193) through constitutions, environmental legislation, court decisions and regional treaties (including the Aarhus Convention to which Norway is a party).¹⁹

1. Many national constitutions contemplate an enforceable right to a healthy environment

Constitutional provisions related to environmental protection can be grouped into four major categories: government’s responsibility to protect the environment; substantive rights to environmental quality; procedural environmental rights; and individual responsibility to protect the environment.²⁰

A wide majority of the 110 national constitutions that include recognition of a right to live in a healthy environment include provisions that clearly support enforceability.²¹ Also, of the 140+ constitutions that incorporate environmental responsibilities for governments, most include explicit provisions that support enforceability.²²

The right to a healthy environment includes a set of procedural and substantive elements, drawn from four decades of domestic and international jurisprudence. Procedural elements include access to information, participation in decision-making, and access to justice. Substantive elements include clean air, a safe climate, access to clean water and adequate sanitation, healthy

¹⁸ Special Rapporteur on human rights and the environment (John Knox), Framework Principles on human rights and environment UN. Doc. A/HRC/37/59, Annex (2018).

¹⁹ David R. Boyd, “Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment”, in *The Human Right to a Healthy Environment*, John H. Knox and Ramin Pejan, eds. (Cambridge, Cambridge University Press, 2018).

²⁰ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, UBC Press, 2012) pg. 52.

²¹ *Id.* at pg. 72.

²² *Id.* at pg. 74.

and sustainably produced food, healthy ecosystems and biodiversity, and non-toxic environments in which to live, work, study and play. The vital importance of a safe climate, as part of the right to a healthy environment, reflects the UN Framework Convention on Climate Change, wherein States pledged to “prevent dangerous anthropogenic interference with the climate system.” A growing number of national courts have recently recognized the failure of States to take adequate steps to address climate change can constitute a violation of the right to a healthy environment.²³

2. Courts of law around the world routinely enforce the right to a healthy environment

Over the past forty years, national courts have contributed to defining the content, scope and parameters of the right to a healthy environment, as well as its relationship with other human rights. As the Supreme Court of Mexico stated in a 2020 decision, courts are obligated “to ensure that the authorities comply with human rights, such as the right to a healthy environment, so that these fundamental rights have a real impact on our country and are not reduced to mere ideals or good intentions.”²⁴ The following examples from France, Chile, and Colombia illustrate the role of courts in enforcing the right to a healthy environment.

France

France added the right to a healthy environment to its constitution in 2005 through the enactment of a Charter for the Environment. The right to a healthy environment (Article 1) is justiciable and has been integral in both challenging government actions and justifying government legislation.²⁵ For example, the Constitutional Council relied on the right to a healthy environment in upholding the constitutionality of a French law that prohibits hydraulic fracturing for the exploitation of shale gas.²⁶

Chile

In 2019, the Supreme Court of Chile issued a powerful decision condemning the government’s longstanding failure to address industrial air pollution in the Quintero-Puchuncaví region.²⁷ The court concluded that the constitutional right to a healthy environment had been violated and ordered the government to implement a suite of remedial actions to protect public health and the environment.

Colombia

In Colombia in 2018, the Supreme Court ruled in favor of 25 young people who had filed a lawsuit to protect their constitutional rights to life, food, water, and a healthy environment. The plaintiffs sought an order requiring the government to honor its commitment to address climate change,

²³ Supreme Court of Colombia, *Demanda Generaciones Futuras v. Minambiente*, 5 April 2018. Lahore High Court, *Leghari v. Federation of Pakistan*, W.P. No. 25501/201, April 2015. Second Chamber of the Supreme Court of Mexico, Amparo 610/2019, 22 January 2020.

²⁴ Second Chamber of the Supreme Court of Mexico, Amparo 610/2019, 22 January 2020.

²⁵ M. Prieur et al., *Droit de l'environnement*, Dalloz, 2019, p. 82.

²⁶ Constitutional Council, 2013-346, QPC, 11 October 2013, Schuepbach Energy LLLC

²⁷ Francisco Chahuan Chahuan versus Empresa Nacional de Petróleos, ENAP S.A, Case No. 5888-2019, (May 28, 2019).

with a particular focus on stopping the country's worsening deforestation.²⁸ The court found a violation of the right to a healthy environment and gave the Colombian government four months to develop an effective plan to halt deforestation in the Amazon river basin.

3. The Constitution of Spain illustrates the legal principle that constitutionally recognized human rights are enforceable unless justiciability is explicitly excluded

In general, constitutionally recognized human rights are enforceable unless justiciability is explicitly excluded. The Constitution of Spain offers an example of a non-justiciable recognition of the right to a healthy environment. This right is not included in Chapter 2, "Rights and Freedoms," which are justiciable. Instead, it is included in Chapter 3, "Guiding Principles of Social and Economic Policy." These guiding principles are explicitly not justiciable because Article 53(3) states: "The recognition, respect and protection of the principles recognized in the Third Chapter will inform positive legislation, judicial practice and the actions of the public powers. They may only be alleged before the ordinary Jurisdiction in accordance with the provisions of the laws that develop them."²⁹ This is clearly distinct from the Norwegian Constitution, where the right to a healthy environment is in the chapter "Human Rights" and there is no provision explicitly precluding or restricting its justiciability.

1.ii. International law on human rights and the environment lends strength to the justiciability of Article 112

At the regional level, human rights commissions and courts have played an active role in defining the scope of the right to a healthy environment and the corresponding obligations upon Governments. In so doing, these authoritative tribunals give effect to their mandates to protect a foundational right that enables human civilization and the effective enjoyment of all other rights.

1. The European Court of Human Rights has given normative force to the right to a healthy environment when found in the Respondent Party's national constitution

The European Court of Human Rights has given normative weight to the constitutional protection of the right to a healthy environment of a respondent State. The case of *Taskin v Turkey*, for example, involved allegations that the use of cyanide for gold mining violates the right to a healthy environment. The European Court concluded that the right to a healthy environment constituted an enforceable civil right under Turkish law because it was protected by Article 56 of the Turkish Constitution. As a result, the Court held that the applicants' right, under Article 6 of the European Convention on Human Rights (ECHR), to a fair and public hearing within a reasonable time by an independent and impartial tribunal, had been violated.³⁰ A similar case involved allegations that

²⁸ Demanda Generaciones Futuras v. Minambiente, 11001 22 03 000 2018 00319 00, Decision of 5 April 2018.

²⁹ Google translation of the Spanish original, "El reconocimiento, el respeto y la protección de los principios reconocidos en el Capítulo Tercero informarán la legislación positiva, la práctica judicial y la actuación de los poderes públicos. Sólo podrán ser alegados ante la Jurisdicción ordinaria de acuerdo con lo que dispongan las leyes que los desarrollen."

³⁰ European Court of Human Rights, *Taskin and others v Turkey*, Application No. 46117/99, Final Judgment, 30 March 2005.

domestic court decisions had not been enforced despite Turkish courts concluding that the right to a healthy environment was violated by pollution from coal-fired power plants. The European Court of Human Rights concluded that Turkey had violated Article 6 of the ECHR.³¹

2. The Inter-American Court of Human Rights has confirmed the justiciability of the right to a healthy environment in the San Salvador Protocol

In 2017, the Inter-American Court of Human Rights ruled that the right to a healthy environment under Article 11 of the San Salvador Protocol protects individuals and collectives, including future generations, and can be used to hold States responsible for cross-border violations that are within their “effective control”.³² The Inter-American Court stated that: “Environmental damage may cause irreparable damage to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.”³³

In 2020, the Inter-American Court issued a decision applying the right to a healthy environment for the first time, ruling that Argentina’s failure to stop activities, such as illegal logging, that damaged the environment in the territory of Indigenous peoples violated the right to a healthy environment protected by Article 26 of the American Convention on Human Rights.³⁴

3. The African Commission on Human and Peoples’ Rights has applied the right to a healthy and satisfactory environment in the African Charter on Human and Peoples Rights

The African Commission on Human and Peoples’ Rights produced a ground-breaking decision in 2001, concluding that pollution caused by the oil industry violated the Ogoni people’s right to a healthy environment under the African Charter (Art. 24). The Commission determined that Governments have clear obligations under Art. 24 “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”.³⁵

II. THE COURT OF APPEAL ERRED WHEN IT FOUND THE NEW LICENCES DO NOT VIOLATE THE ARTICLE 112 RIGHT TO A HEALTHY ENVIRONMENT OR PROTECTED EUROPEAN CONVENTION RIGHTS

Having established that the right to a healthy environment in Article 112 is an enforceable human right, the remaining question is whether the constitutional protection of this right allows the government to issue new petroleum licences when the intended and foreseeable outcomes (discovery of oil, production, export, combustion, release of greenhouse gas emissions) exacerbate the threat of climate change. We respectfully submit that it does not. Addressing the foreseeable

³¹ European Court of Human Rights, *Okyay and others v. Turkey*, Application No. 36220/97, Final Judgment, 12 October 2005. See also *Tatar v. Romania*, Application No. 67021/01, Judgment, 27 January 2009.

³² Inter-American Court of Human Rights, Advisory Opinion, OC-23-17, 15 November 2017, para 79.

³³ Inter-American Court of Human Rights, Advisory Opinion, OC-23-17, 15 November 2017, para. 59.

³⁴ Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat Association v Argentina*, Judgment, February 6, 2020, para 289.

³⁵ African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, para. 52.

human rights impacts from climate change requires measures that decarbonize the economy and reduce, not increase, emissions.

II.i Production licenses result in a real and immediate risk to the right to a healthy environment

Three facts set the context for the legal analysis.

1. Climate change poses existential risks to human society and human rights

As explained in the introduction, climate change poses an existential threat to the effective enjoyment of human rights, is causing widespread adverse impacts already, and threatens catastrophic impacts in the future. Even a seemingly modest increase in average global temperatures, to 1.5°C above pre-industrial levels, will substantially increase the number of people subjected to poverty, disasters, food insecurity, illness and death.³⁶ A larger increase in temperature, such as the current 3.0°C trajectory (assuming States fulfil existing pledges under the Paris Agreement), would worsen these adverse impacts.³⁷

2. Existing reserves of oil, gas and coal cannot be burned without going far beyond the internationally agreed temperature goals, so seeking additional reserves is counter-productive

As long ago as 2012, the International Energy Agency has estimated that two-thirds of proven fossil fuel reserves must not be burned if we are to limit warming to 2°C.³⁸ A similar study published in 2015 concluded that 82 per cent of known coal reserves, 49 per cent of gas reserves and 33 per cent of oil reserves cannot be burned if we are to avoid dangerous climate change of more than 2°C.³⁹ In 2016, the International Energy Agency wrote “The unavoidable conclusion is that there is an urgent need for immediate radical reductions in energy sector CO₂ emissions if there is to be any chance of achieving the 1.5°C goal.”⁴⁰ The future greenhouse gas emissions contained in known reserves of fossil fuels are three times larger than the carbon budget remaining to stay under the 2°C commitment in the Paris Agreement. The Borgarting Court of Appeal acknowledged that current reserves are already larger than the world’s remaining carbon budget.⁴¹ The obvious conclusion is that exploration for additional fossil fuel resources will both lock in a future that precludes achieving the required emission reductions and result in extensive, expensive stranded assets.

³⁶ Among other threats to human health, ground-level ozone air pollution and vector-borne illnesses will increase with rising temperatures. IPCC, *Global Warming of 1.5°C*, pp. 240-41.

³⁷ UN Environment Programme. *Emissions Gap Report 2019*.

³⁸ International Energy Agency, *World Energy Outlook 2012*.

³⁹ Christophe McGlade and Paul Ekins, “The geographical distribution of fossil fuels unused when limiting global warming to 2°C”, *Nature*, vol. 517 (January 2015).

⁴⁰ International Energy Agency, *World Energy Outlook 2016*, pg 76.

⁴¹ Borgarting Lagmannsrett p. 23.

3. Additional greenhouse gas emissions increase the risk of tipping points

Third, scientists are increasingly concerned about tipping points in the Earth's climate system, which, if crossed, could cause serious disruptions to ecosystems, economies and society.⁴² There is a risk that self-reinforcing feedbacks could cause long-term destabilization of the climate, with continued disruption even if anthropogenic greenhouse gas emissions are reduced in the future. The uncertainties and dangers associated with crossing this possible planetary boundary highlight the importance of the precautionary principle and the urgency of immediate steps to decarbonize the global economy. Licensing intended to secure new discoveries of fossil fuels aggravates climate risks, at a time when human rights and human wellbeing are in grave jeopardy. Tipping points were mentioned by the Court of Appeal but do not appear to have influenced the Court's decision.⁴³

II.ii. Discretion of authorities to fulfil their responsibilities under Article 112 cannot extend to measures that will significantly harm the environment

To answer the question of whether the new petroleum licences in the Barents Sea violated Article 112, the Borgarting Court of Appeal first considered the importance of comprehensively assessing emissions from the combustion of Norwegian petroleum, including emissions from combustion after export. This approach is consistent with the scope of Article 112 and the practical reality that combustion emissions are roughly twenty times higher than production emissions.⁴⁴ Then the Court engaged in a detailed assessment of measures that the Government of Norway has promised to take in the future, including domestic actions and participation in the European Emissions Trading System, in order to reduce Norway's emissions to 40 percent below 1990 levels by 2030. However, the Court did not refer to the fact that Norway's promise to reduce emissions does not offset or even take into consideration the emissions caused by the combustion of fossil fuels exported from Norway, which dwarf domestic emissions. The Court of Appeal correctly noted that "fulfilment of the targets in the Paris Agreement requires drastic cuts in emissions," and that "This is directly in opposition to searching for new discoveries."⁴⁵

The Court looked for a way out of this compelling predicament by reasoning that government decisions regarding the prioritization of greenhouse gas emissions are beyond the power of the courts to review under Article 112. However, we respectfully submit this reasoning does not withstand scrutiny, because the appellants' challenge is not to the prioritization of emissions. Rather, this case is about how, in the face of a climate emergency, a government decision in one of the world's wealthiest nations that will foreseeably increase greenhouse gas emissions from new and additional reserves of fossil fuels violates human rights, including the constitutional right to a healthy environment and the European Convention rights to life and family and private life.

The Court of Appeal stated that "the authorities have a great amount of discretion in choosing measures" to fulfil their responsibilities under Article 112. This is generally true, but we

⁴² Will Steffen et. al., *Trajectories of the Earth System in the Anthropocene*, (August 2018).

⁴³ Borgarting Lagmannsrett p. 24.

⁴⁴ Borgarting Lagmannsrett p. 20.

⁴⁵ Borgarting Lagmannsrett p. 26.

respectfully submit the discretion of authorities must apply to measures that protect the environment and in this particular situation, reduce emissions. The discretion cannot extend to measures that will significantly harm the environment, and in this particular case, substantially increase emissions.

Norway is a party to the United Nations Framework Convention on Climate Change, wherein States pledged to “prevent dangerous anthropogenic interference with the climate system,” and the Paris Agreement, which indicates that a temperature increase above 1.5°C or at most 2.0°C would indeed be dangerous. These commitments inform the substantive content of the right to a healthy environment under Article 112, which necessarily includes a safe climate (along with clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy ecosystems and biodiversity).⁴⁶

II.iii. Legal principles, drawn from international human rights law and international environmental law, shed light on how the licences violate the right to a healthy environment in Article 112 and protected European Convention rights

The UN Human Rights Committee has stated that obligations of States under international environmental law should inform their human rights obligations.⁴⁷ This is increasingly recognized at the national level, as demonstrated by the Supreme Court of Mexico in a recent decision relying on the Ramsar Convention on Wetlands of International Importance to determine if the destruction of a mangrove forest violated the constitutional right to a healthy environment.⁴⁸ Similarly an Australian court rejected a proposed coal mine in 2019, relying on the Paris Agreement and an analysis of the remaining global carbon budget to conclude it was “the wrong place at the wrong time ... Wrong time because the GHG emissions of the coal mine and its coal product will increase total global concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions.”⁴⁹

Five legal principles, drawn from international human rights law and international environmental law, are relevant to the issue of whether the right to a healthy environment in Article 112 has been violated, including common but differentiated responsibilities and respective capabilities, prevention, the precautionary principle, highest possible ambition, and extraterritorial obligations.

All of these principles, individually and cumulatively, support the same conclusion, namely that the Government of Norway’s decision to issue new licences for offshore petroleum exploration is inconsistent with its constitutional obligation to respect, protect and fulfill the right to a healthy

⁴⁶ Special Rapporteur on human rights and environment (David R. Boyd), *A Safe Climate*, UN Doc. A/74/161 (2019).

⁴⁷ General Comment No. 36, para. 62. See Inter-American Court, *Advisory Opinion on Human Rights and the Environment*, para. 180 (“States must act in keeping with the precautionary principle . . . to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty.”).

⁴⁸ First Chamber of the Supreme Court of Mexico, Amparo 610/2019, 22 January 2020.

⁴⁹ *Gloucester Resources Limited v Minister of Planning*, New South Wales Land and Environment Court, [2019] NSWLEC 7, 8 Feb. 2019, para 698.

environment. A fortiori, these principles also require the consideration of combustion emissions of petroleum exported from Norway.

1. Common but differentiated responsibilities and respective capabilities

Both the UN Framework Convention on Climate Change and the Paris Agreement (UNFCCC) refer to the principle of common but differentiated responsibilities and respective capabilities.⁵⁰ The content of this principle is articulated in UNFCCC Article 3 on Principles, which underlines that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” This provision does not include a territorial limitation; and rightly so, given the global nature of climate change. It would be antithetical to the “global partnership” called for at the UN Conference on Environment and Development,⁵¹ which adopted the UNFCCC, if developed country Parties such as Norway were to only consider and combat the adverse effects of climate change that materialize in their own territories.

Norway enjoys one of the highest per capita incomes in the world and one of the largest sovereign wealth funds in the world. Given the resources available to Norway, its historical and current roles as a major oil producer, and current high levels of per capita greenhouse gas emissions, the country has a relatively high level of both responsibility and capacity relevant to addressing its commitments under the UNFCCC and the Paris Agreement. Exploring for additional petroleum reserves is incompatible with Norway’s heightened responsibilities to reduce greenhouse gas emissions. In this regard it is worth noting that a number of substantially less wealthy States, including Belize, Costa Rica, France and New Zealand, have already prohibited further offshore oil and gas exploration in order to address climate change.⁵²

2. Prevention

An undisputed element of international law is that States have an obligation to protect against reasonably foreseeable harms to human rights, including from environmental degradation.⁵³ States must not only refrain from violating human rights through their own actions, but must prevent third parties from causing human rights violations. Back in 1972, the Stockholm Declaration clarified that “States have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”⁵⁴ The obligation of prevention arises when there is a risk of “significant damage.”⁵⁵ Given the severity of the global climate crisis, and the existential risks to human society and human rights imposed by climate change, it is clear that the principle of

⁵⁰ Paris Agreement, Articles 2 and 4.3.

⁵¹ See Rio Declaration on Environment and Development, second preambular paragraph.

⁵² UN Environment Programme. 2019. *Production Gap Report 2019*.

⁵³ See, e.g., Human Rights Committee, General Comment No. 36, para. 18; European Court of Human Rights, *Öneryıldiz v. Turkey*, no. 48939/99 (2004), *Budayeva v. Russia*, no. 15339/02 (2008).

⁵⁴ Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 2.

⁵⁵ International Court of Justice, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, para. 101; *Certain Activities and Construction of a Road (Costa Rica v. Nicaragua)*, I.C.J Rep. 2015, para. 104.

prevention applies to the Government of Norway's decision to authorize new exploration for petroleum.

3. The precautionary principle

UNFCCC Article 3 on Principles provides that "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."⁵⁶ The precautionary principle is also part of the Rio Declaration on Environment and Development, and it requires that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."⁵⁷

The UN Human Rights Committee has urged States to "pay due regard to the precautionary approach" when addressing threats like climate change.⁵⁸ Similarly, the Inter-American Court of Human Rights noted that "the precautionary approach is an integral part of the general obligation of due diligence."⁵⁹ The Inter-American Court continued:

States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to prevent possible damage.⁶⁰

The precautionary principle is particularly important in relation to climate change, given the IPCC warning that "pathways that overshoot 1.5°C run a greater risk of passing through 'tipping points', thresholds beyond which certain impacts can no longer be avoided even if temperatures are brought back down later."⁶¹

It is true that there is some uncertainty about whether new oil reserves will be discovered, produced, and combusted. However, in light of the conclusive evidence about the existential threat climate change poses to human rights, authorizing petroleum exploration that, if successful, will exacerbate the global crisis is clearly inconsistent with the precautionary principle.

The Borgarting Court of Appeal concluded that the new exploration licences do not result in a 'real and immediate risk' because it is "uncertain whether emissions will occur based on the decision, and that these will in any event be marginal when compared with total global emissions."⁶²

⁵⁶ UNFCCC Article 3.3.

⁵⁷ Rio Declaration on Environment and Development, 1992, Principle 15.

⁵⁸ Human Rights Committee, General Comment No. 36, para. 62.

⁵⁹ Advisory Opinion 23/17, para. 177.

⁶⁰ Advisory Opinion 23/17, para. 180.

⁶¹ IPCC, *Global Warming of 1.5°C*, p. 283.

⁶² Borgarting Lagmannsrett p. 33.

These findings, however, contradict climate science and the precautionary principle. The fact is that, in light of the climate emergency that humanity is facing, every molecule counts. There are no marginal or insignificant emissions. The Court of Appeal relied on published estimates indicating that when combustion emissions are included (as they should be), the new production licences could result in 100 to 370 million tonnes of CO₂ emissions. This can scarcely be considered marginal when the IPCC has stated, “Every bit of warming matters, every year matters, every choice matters.”⁶³

4. Highest possible ambition

The Paris Agreement commits each Party to reflect its “highest possible ambition” in its nationally determined contribution to the Agreement’s long-term temperature goal.⁶⁴ During the negotiations of the Paris Agreement, Norway proposed and defended the inclusion of this principle.⁶⁵ Norway argued that the principle of highest possible ambition embodied due diligence requirements, which allowed for a principled and dynamic differentiation of commitments between Parties, in light of national circumstances.

The principle of highest possible ambition closely aligns with the duty of the state to exercise due diligence in both human rights and environmental contexts. In the face of existential risk, governments must take measures commensurate with that risk. States with greater capabilities are required to do more to decarbonize their economies and reduce emissions.

While the judiciary may defer to the executive regarding the appropriate measures to reduce emissions, courts must ensure respect for human rights, including the right to a healthy environment, in the face of government actions where the foreseeable outcome is an increase in emissions. Awarding production licences for petroleum moves in the wrong direction because instead of decarbonizing the economy, exploring for additional fossil fuels leads to increased emissions of greenhouse gases and concomitant climate risks.

5. Extraterritorial obligations

The Joint Statement on Human Rights and Climate Change by five human rights treaty bodies, referred to in the introduction above, confirms that States have extraterritorial obligations.⁶⁶ These obligations include protecting those whose rights are affected by a State’s activities in “a direct and reasonably foreseeable manner.”⁶⁷ Transboundary environmental harm can have such

⁶³ IPCC, *Global Warming of 1.5°C*, Foreword at (vi).

⁶⁴ Paris Agreement, Article 4.3.

⁶⁵ Christina Voigt and Felipe Ferreira, ‘Dynamic Differentiation’: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement, *Transnational Environmental Law*, 5:2 (2016), pp. 285–303.

⁶⁶ Joint Statement, *supra* note 7, para. 10.

⁶⁷ General Comment No. 36 (on the right to life), UN Doc. CCPR/C/GC/36 (30 October 2018), para. 63. See also See African Commission on Human and Peoples’ Rights, General Comment No. 3 (Nov. 2015), para. 14 (in relation to the right to life, defining extraterritorial jurisdiction as whether a State’s activities could “reasonably be foreseen to result in an unlawful deprivation of life”); European Court of Human Rights, *Andreou v. Turkey*, no. 45653/99 (2009) (applying a “direct and immediate cause” standard).

effects, giving rise to extraterritorial obligations on the part of the State with control over the sources of the harm. As the Inter-American Court of Human Rights has stated:

States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.⁶⁸

The Committee on the Rights of the Child has already applied these principles to climate change in its review of Norway's country report. In its concluding observations, the Committee recommended that in light of Norway's continuing exploitation of fossil fuels, "it increase its focus on alternative energy and establish safeguards to protect children, *both in the State party as well as abroad*, from the negative impacts of fossil fuels."⁶⁹ Similarly, the Committee on Economic, Social and Cultural Rights expressed concerns about the extraterritorial effects of Argentina's plan to engage in hydraulic fracking.⁷⁰

From the perspective of greenhouse gas concentrations in the Earth's atmosphere, it makes no difference where petroleum produced in Norway is combusted. Whether in Norway or another nation, the ensuing emissions contribute to the global climate crisis. For this reason, we respectfully submit that the Borgarting Court of Appeal was correct in concluding that emissions from combustion of exported petroleum products are relevant in evaluating whether the Government of Norway complied with its obligations under Article 112.⁷¹

II.iv. The 2019 Urgenda decision of the Supreme Court of the Netherlands contributes to understanding how the legal principles on human rights and the environment apply to the existential risks posed by climate change

A number of the foregoing principles were discussed and applied by the Supreme Court of the Netherlands in the *Urgenda* case.⁷²

The first principle raised involves common but differentiated responsibilities and respective capabilities. The Supreme Court concluded that the Netherlands had an obligation "to do 'its part' in order to prevent dangerous climate change, even if it is a global problem."⁷³ The Court rejected the arguments that a State does not have to take any responsibility if other States do not comply with their responsibilities or if its contribution to emissions is very small on a global scale.⁷⁴ On this point, the Supreme Court of the Netherlands directly contradicts the finding of the Borgarting

⁶⁸ Advisory Opinion on the Environment and Human Rights, OC-23/17 (15 November 2017), para. 101.

⁶⁹ UN Doc. CRC/C/NOR/CO/5-6 (4 July 2018), para. 27 (emphasis added).

⁷⁰ E/C.12/ARG/CO/4 (1 November 2018), para. 13.

⁷¹ Borgarting Court of Appeal, pg. 21.

⁷² *Netherlands v Urgenda*, no. 19/00135, Supreme Court of the Netherlands, (2019) (hereinafter *Urgenda*).

⁷³ *Urgenda*, para. 5.7.1.

⁷⁴ *Urgenda*, para. 5.7.7.

Court of Appeal, which suggested that even if the new exploration activities in the Barents Sea result in the production and combustion of petroleum, the ensuing emissions will be “marginal.”⁷⁵ As noted above, from a scientific perspective, the reasoning of the Dutch Court is preferable as it recognizes that all emissions matter in a global climate crisis.

The second principle addressed in the *Urgenda* decision was prevention. Drawing on the jurisprudence of the European Court of Human Rights construing the rights to life and to family and private life, the Dutch Supreme Court held that a State is obliged to take preventive measures against the foreseeable risks of climate change.

Third, the Dutch Supreme Court used the precautionary principle to buttress the duty of the state to take preventive measures, even if the materialization of the danger is uncertain.⁷⁶ After surveying the science on climate change, including the danger of tipping points that may change the climate abruptly, the Court noted that “The need to reduce greenhouse gas emissions is becoming ever more urgent. Every emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere, and thus contributes to reaching the critical limits of 450 ppm [to keep at 2°C] and 430 ppm [to keep at 1.5°C].”⁷⁷

The application of these principles resulted in the Dutch Supreme Court’s conclusion that climate change triggered State obligations to reduce emissions more deeply and quickly in order to protect the rights to life (Art. 2) and family and private life (Art. 8) under the European Convention on Human Rights.

The Borgarting Court of Appeal, (handed down before the Netherlands Supreme Court’s decision) acknowledged that the Netherlands Court of Appeal in its *Urgenda* decision had broken new ground for the application of the European Convention on Human Rights in the context of climate change. The Netherlands Supreme Court has since confirmed, and indeed strengthened, that interpretation of ECHR Articles 2 and 8. However, Norway’s Court of Appeal distinguished the two cases, concluding that “the decision has little transfer value,” and finding “no conflict between the result the Court of Appeal has arrived at in this case and the result in the *Urgenda* case.”

With respect, there is an inescapable conflict. This is because the Borgarting Court of Appeal erred in finding that hundreds of millions of tonnes of expected emissions are “marginal” and therefore the new production licences do not pose a threat to human rights to a healthy environment (Article 112), or to life and private and family life (Articles 2 and 8 of the European Convention).

After determining that the emissions from exported petroleum should be included in the assessment under Article 112, the Court of Appeal overlooked the fact that those emissions are not included in Norway’s accounting of the emissions reductions it plans to undertake. Even if the Government of Norway fulfilled its pledge to reduce domestic emissions and purchase carbon credits so as to reduce Norway’s emissions 40% by 2030, this ignores the hundreds of millions of tonnes of emissions expected to be produced by exporting additional oil. In the face of our shared

⁷⁵ Borgarting Lagmannsrett p. 28.

⁷⁶ *Urgenda*, para. 5.3.2.

⁷⁷ *Urgenda*, para. 4.6.

atmosphere, reducing emissions at home while exporting emissions that are an order of magnitude larger simply aggravates the global climate emergency.

The Government of Netherlands' subsequent efforts to comply with the Dutch Supreme Court's judgment in *Urgenda* illuminate the tangible impacts of protecting human rights from climate impacts. The Dutch government is closing down coal-fired power plants, including at least one large facility built just five years ago, illustrating the urgent imperative of reducing emissions and the concomitant risk of stranded assets resulting from continued investment in fossil fuels given foreseeable impacts on human rights.⁷⁸

CONCLUSION

To summarize, the world faces a dire and unprecedented global climate emergency that is already inflicting grievous impacts on human rights, disproportionately affecting poor, vulnerable and marginalized people.

New petroleum discoveries, intended for production and combustion, aggravate the existential risk posed by climate change to humanity. They contribute to the associated impacts upon human rights, and they raise the risk of surpassing tipping points that will exacerbate climate disruption.

If Norway can approve an activity that is intended to and will foreseeably produce hundreds of millions of tonnes of emissions, then Article 112 is effectively meaningless in the context of climate change, the greatest environmental challenge of our time.

In light of its obligations pursuant to constitutional law, international human rights law and international environmental law, we respectfully submit that it is incumbent upon Norway, as a wealthy State, to refrain from approving exploration for additional fossil fuels. The issuance of licences to explore for petroleum in the Barents Sea violates the right to a healthy environment in Article 112 and violates Articles 2 and 8 of the European Convention on Human Rights.

⁷⁸ The Guardian, *Dutch officials reveal measures to cut emissions after court ruling*, April 24, 2020.