

***Greenpeace Nordic and others v. Norway***  
**Application no. 34068/21**

**Fifth Section**  
**European Court of Human Rights**

**Amicus Curiae Brief submitted by\***

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**Marcos A. Orellana, UN Special Rapporteur on toxics and human rights**

**Respectfully submitted on this 3rd day of May 2022,**

A handwritten signature in black ink that reads "DR Boyd". The signature is written in a cursive style with a horizontal line underneath the name.

*David R. Boyd*, UN Special Rapporteur on human rights and the environment

A handwritten signature in black ink that reads "Marcos Orellana". The signature is written in a cursive style with a horizontal line underneath the name.

*Marcos A Orellana*, UN Special Rapporteur on toxics and human rights

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## I. Introduction: The Climate Emergency and Human Rights

1. The reports published by the Intergovernmental Panel on Climate Change (IPCC) in 2021 and 2022 highlight the gravity of the global climate crisis.<sup>1</sup> UN Secretary General Antonio Guterres described these reports as “code red for humanity” and “an atlas of human suffering”. 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 atmospheric carbon dioxide last occurred four million years ago, during the Pliocene epoch before *Homo sapiens* evolved.

2. The climate emergency is already causing widespread adverse impacts to the effective enjoyment of human rights, including the European Convention rights to life (Art. 2) and private and family life (Art. 8). As Michelle Bachelet, the UN High Commissioner for Human Rights, warned, “The world has never seen a human rights threat of this scope. This is not a situation where any country, any institution, any policy-maker can stand on the sidelines.” Human rights courts and tribunals have a pressing and profound responsibility to confront one of the gravest threats that humanity has ever faced.

3. The European Court of Human Rights has faced serious challenges but perhaps none like this one. In the wake of the 1992 UN Conference on Environment and Development and the emergence of the sustainable development paradigm, the Court opened its doors to environmental cases. It applied and extended the tools and principles of human rights law, such as positive obligations to protect rights and the fair balance between the interests of society and the individual. Over time, the Court’s approach to integrating environmental issues within its jurisprudence has secured remedies for countless individuals whose rights were infringed by various environmental harms.

4. In 2021, the UN Human Rights Council recognized the human right to a clean, healthy and sustainable environment.<sup>2</sup> This Court has made repeated references to the right to a healthy environment.<sup>3</sup> National constitutions of many European States, including Norway, incorporate references to this fundamental right. A healthy environment necessarily includes a safe climate, as courts and experts have acknowledged.<sup>4</sup> The present case, in which the climate crisis interferes with the enjoyment of human rights, offers an opportunity for the Court to extend its environmental jurisprudence and contribute to the achievement of climate justice.

5. This brief presents two lines of argument. First it argues that the Court’s existing approach to cases dealing with human rights and the environment can be tailored to address the specificities of climate change cases. Second, it argues that principles, obligations and commitments drawn from international environmental law can help the Court approach climate cases in a principled manner that builds upon its existing jurisprudence.

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<sup>1</sup> Intergovernmental Panel on Climate Change, Working Groups I, II and III, 2021-2022. See <https://www.ipcc.ch>

<sup>2</sup> UN Human Rights Council, 2021, “The human right to a clean, healthy and sustainable environment”, A/HRC/RES/48/13.

<sup>3</sup> See, for example, *Tatar and Tatar v Romania* (2009) No. 67021/01 as well as *Taşkın and Others v. Turkey*, App. No. 46117/99, 42 Eur. Ct. H. R. 50 (2004), ¶¶ 98-100.

<sup>4</sup> Inter-American Court of Human Rights, Advisory Opinion 23/17. Special Rapporteur on human rights and the environment, “A Safe Climate,” July 2019, A/74/161.

## II. Principles derived from the Court’s jurisprudence on human rights and the environment are relevant to adjudication of climate-related cases

6. Over almost three decades, dating back to the *López-Ostra* decision of 1994, the Court has produced a rich jurisprudence on human rights and the environment. This body of law is of material relevance to climate cases. One of the basic principles in the Court’s jurisprudence is that the presence of risk to the enjoyment of Convention rights triggers positive obligations of protection for States Parties.<sup>5</sup> The Court has also affirmed the State’s duty to effectively regulate environmentally hazardous activities,<sup>6</sup> as well as State responsibilities in cases involving transboundary environmental issues.<sup>7</sup> In discharging their positive obligations, States must arrive at a fair balance between the competing interests of the individual and the community, which involves scrutinizing whether procedural guarantees have been observed (i.e., rights to information, participation and justice) or undue burdens imposed on the individual, among other considerations and safeguards.

7. While this construct is central to the Court’s approach to environmental cases, a particular characteristic of climate change calls for its adjustment. In climate cases, the interests of the individual and the community are not competing. Both the individual and the community share a common interest in a safe climate system. Moreover, this interest is common to all Convention Parties, as well as to the international community as a whole. This common interest is expressed in the objective of the UN Framework Convention on Climate Change to “prevent dangerous anthropogenic interference with the climate system” (Article 2) and in the more granular global mitigation goal of the Paris Agreement, which indicates that a temperature increase above 1.5°C or at most 2.0°C would indeed be dangerous (Art. 2.1.a).

8. Accordingly, a different yardstick is necessary for the Court to assess whether a State Party is adequately carrying out its positive obligations of protection to avert climate risks. We respectfully submit that the human right to benefit from scientific progress can aid the Court in scrutinizing the sufficiency of governmental action in the face of the catastrophic risks posed by climate change.<sup>8</sup> This approach finds additional support in the preamble of the Paris Agreement, which recognizes “the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge.”

9. The best available science has confirmed that the impacts of anthropogenic climate change have significant detrimental effects on mental health, especially for young people. In 2022, the IPCC pointed out that:

Mental health challenges, including anxiety and stress, are expected to increase under further global warming in all assessed regions, particularly for children, adolescents, elderly, and those with underlying health conditions (*very high confidence*).<sup>9</sup>

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<sup>5</sup> *Öneryıldız and others v. Turkey*, no. 48939/99 (2004). See also *Budayeva and others v. Russia*, no. 15339/02 (2008).

<sup>6</sup> *Öneryıldız and others v. Turkey*, no. 48939/99 (2004), ¶¶ 71 and 89.

<sup>7</sup> *Tatar and Tatar v Romania* (2009) No. 67021/01.

<sup>8</sup> UN Special Rapporteur on toxics and human rights, *The right to science in the context of toxic substances*, A/HRC/48/61, Sept 2021. See also, UN Committee on Economic, Social and Culture Rights, General Comment No. 25 (2000) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights).

<sup>9</sup> Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022, *Impacts, Adaptation and Vulnerability: Summary for Policymakers*, B.4.4, p. 15.

The IPCC added that “Children and adolescents are particularly vulnerable to post-traumatic stress after extreme weather events, and the effects may be long-lasting, with impacts even on their adult functioning”.<sup>10</sup>

10. The best available science is also calling for an urgent reduction of emissions. In 2018, the IPCC called for rapid and deep emissions reductions – 45% from 2010 levels – by 2030 to avoid crossing the dangerous 1.5°C threshold.<sup>11</sup> In 2022, the IPCC concluded that all pathways to fulfilling the commitments of the 2015 Paris Agreement “involve rapid and deep and in most cases immediate GHG emission reductions in all sectors.”<sup>12</sup> Furthermore, “Limiting global warming to 2°C or below will leave a substantial amount of fossil fuels unburned and could strand considerable fossil fuel infrastructure (*high confidence*)”.<sup>13</sup>

11. Most States are not taking sufficiently ambitious and effective climate action, as demonstrated by UN Environment Programme (UNEP) projections that even if all current Nationally Determined Contributions (NDCs) are fulfilled (an unlikely scenario), the world is facing warming of at least 2.7°C.<sup>14</sup> UNEP also reported in 2021 that current pledges, if fulfilled, will reduce global emissions only 7.5% by 2030, while a reduction of 55% by 2030 is required to meet the 1.5°C goal of the Paris Agreement.<sup>15</sup>

12. To achieve a global reduction of 45% by 2030, wealthy States must make even deeper, faster reductions, in accordance with the principle of common but differentiated responsibilities and respective capabilities articulated in the UN Framework Convention on Climate Change and the Paris Agreement. States still enjoy flexibility to determine which specific emissions *reduction* and decarbonization measures may work best for their particular socio-economic situations. However, in light of the compelling scientific evidence on the climate emergency, wealthy State actions that will foreseeably *increase* emissions are inconsistent with their obligation to protect the human rights to life and private and family life from grave and foreseeable risks.

13. In addition to the right to science, the convention control doctrine could help the Court approach and assess national level judicial decisions. Originally developed by the Inter-American Court of Human Rights, convention control calls on domestic judges to ensure that State laws and their application align with the guarantees of the American Convention on Human Rights.<sup>16</sup> According to this principle, “every judge must ensure the *effet utile* of international instruments so that they are not reduced or annulled by the application of domestic laws and practices contrary to the object and purpose of the international instrument or standard for the protection of human rights”.<sup>17</sup>

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<sup>10</sup> Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022, *Impacts, Adaptation and Vulnerability*, Full Report, Ch.7, p. 15.

<sup>11</sup> IPCC (2018): *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* page 12 (¶C.1).

<sup>12</sup> Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022, *Mitigation of Climate Change: Summary for Policymakers*, C.3, p. 32.

<sup>13</sup> *Ibid*, p. 36.

<sup>14</sup> UNEP, *Emissions Gap Report 2021: The Heat Is On, Executive Summary*, p. iv.

<sup>15</sup> UNEP, *Emissions Gap Report 2019: The Heat Is On, Executive Summary*, p. xi.

<sup>16</sup> *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006).

<sup>17</sup> *Heliodoro Portugal v Panama*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 180 (Aug. 12, 2008).

### III. International environmental principles, obligations, commitments and standards are relevant to realizing human rights protections

#### III.i. The integration of international environmental law and international human rights law

14. Unprecedented levels of global environmental degradation are compromising the effective enjoyment of human rights, as reflected by the growing number of environmental cases being brought to national, regional and global human rights courts and mechanisms. The question is no longer whether, but how human rights courts should address the impacts of environmental harms on the enjoyment of human rights.

15. The United Nations Human Rights Committee addressed this question and offered a vision of integration in its revised General Comment on the right to life.<sup>18</sup> It observed that:  
Environmental degradation, **climate change** and unsustainable development **constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant**, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. (emphasis added)

16. This statement expresses an important principle, building a bridge for dialogue between obligations in the human rights and environmental fields that goes beyond the right to life. With regard to customary and conventional environmental norms and general principles that impose substantive obligations—such as in relation to the principles of precaution and prevention of harm; the duty to conduct an environmental impact assessment; rights of access to information, participation and justice; and inter-generational equity—this approach focused on obligations enables their use by human rights bodies.<sup>19</sup>

17. A second important bridge involves the core human rights principle of non-discrimination. It is well established that marginalized and vulnerable populations—including children, women, Indigenous peoples, minorities, migrants, persons with disabilities and older persons—bear a disproportionate burden of the adverse impacts of environmental harms, including climate change.<sup>20</sup> The obligations of States to prohibit discrimination and to ensure effective protection against discrimination apply to the equal enjoyment of human rights relating to a clean, healthy and sustainable environment. Discrimination may be direct, as when someone is treated less favourably than another person in a similar situation for reasons related to a prohibited ground, or indirect, when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights.<sup>21</sup>

18. This general approach to dialogue between human rights and environmental norms has already been applied by regional human rights courts. For example, this Court has referred to the procedural obligations relating to good governance and democratic accountability articulated in the Aarhus

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<sup>18</sup> UN Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶162.

<sup>19</sup> Framework Principles on Human Rights and the Environment, 2018, A/HRC/37/59.

<sup>20</sup> UN Special Rapporteur on human rights and the environment and UN Special Rapporteur on human rights and toxics, The Right to a Clean, Healthy and Sustainable Environment: Non-toxic Environments, A/HRC/49/53.

<sup>21</sup> Framework Principles on Human Rights and the Environment, 2018, A/HRC/37/59.

Convention.<sup>22</sup> The case of *Taskin and others*, which involved the authorization of a permit to operate a gold mine using the cyanide leaching process and the related decision-making processes, is instructive. In *Taskin*, the Court considered the standards of the Aarhus Convention to be relevant, despite the fact that Turkey had neither signed nor acceded to the treaty.<sup>23</sup> The evolution of norms, principles and obligations pursuant to international environmental law have led the Court to see Aarhus as a relevant regional instrument in the application of the European Convention on Human Rights. It is worth noting that the objective of the Aarhus Convention is “to contribute to the protection 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” (art. 1).

19. At the same time, as a matter of principle, the dialogue between human rights and environmental norms need not be confined to *obligations*. Because human rights guarantees are often articulated in general and abstract terms (e.g. Articles 2 and 8 of the Convention), their application to environmental issues calls for a degree of specificity that human rights instruments do not contain. In order for human rights guarantees to offer effective protection in environmental cases, they need to incorporate specific environmental normative content. This content is often found in environmental standards and commitments.

20. For example, in 2010, the Inter-American Court of Human Rights decided the case of the *Xákmok Kásek Indigenous Community*. This case involved the loss of ancestral lands of the Indigenous community, with concomitant negative impacts on the Indigenous people’s rights to culture, life and property, among other rights. The Inter-American Court analyzed the right to a decent existence, under the terms of the right to life enshrined in the American Convention on Human Rights. In that frame, it examined issues of access to and quality of water, relying on international standards for water quantity and quality to scrutinize State conduct.<sup>24</sup> The Inter-American Court employed the non-binding, international standards developed under the framework of the World Health Organization to give content to the right to a decent existence in the American Convention. The application of this technique to other environmental issues, such as climate change, would follow the same principled approach.

21. In the context of the climate crisis, there are several possible scenarios where binding and non-binding environmental standards and commitments could contribute to specifying the normative content of internationally protected human rights. Specific climate commitments and standards elaborated in the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement can inform the normative requirements of human rights obligations. In the *Urgenda* case, for example, the Supreme Court of the Netherlands followed this approach and gave normative strength to non-binding standards adopted by the Parties to the Kyoto Protocol.<sup>25</sup> Also, Germany’s Federal Constitutional Court, taking into account the Paris Agreement, IPCC reports, and human rights obligations in the German Constitution, concluded that existing climate change legislation violated

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<sup>22</sup> The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), Jun.25, 1998, 2161 U.N.T.S. 447.

<sup>23</sup> *Taşkin and Others v. Turkey*, App. No. 46117/99, 42 Eur. Ct. H. R. 50 (2004).

<sup>24</sup> Corte IDH, *Caso Comunidad Xákmok Kásek c. Paraguay*, Serie C, No 214, para 195. The Court concluded that “the measures taken by the State [...] have not been sufficient to provide the members of the Community with water in sufficient quantity and of adequate quality, and this has exposed them to risks and disease.” (¶196).

<sup>25</sup> *Netherlands v Urgenda*, no. 19/00135, Supreme Court of the Netherlands, (2019) ¶¶ 6.3 and 7.2.3. The Court also observed: “According to ECtHR case law, an interpretation and application of the ECHR must also take scientific insights and generally accepted standards into account.” ¶1.5.4.3.

human rights by creating an unacceptable risk of future impairments of fundamental rights.<sup>26</sup> Similarly, a human rights court could interrogate whether a government has applied its maximum effort under a due diligence standard in formulating and implementing its climate commitments, using scientific evidence as a normative yardstick.

### III.ii Principles of international environmental law are relevant to the adjudication of climate-related cases by the European Court of Human Rights

22. We respectfully submit that the Court should seize the opportunity to elaborate on key principles of international environmental law that are particularly relevant to the adjudication of climate change cases, including the precautionary principle, prevention and common but differentiated responsibilities and respective capabilities.

#### III.ii.i. The Precautionary Principle

23. Article 3 of the UN Framework Convention on Climate Change provides that “The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>27</sup> The precautionary principle is also in the Rio Declaration on Environment and Development, requiring 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.”<sup>28</sup> The Treaty of the European Union states that Union policy on the environment shall be based on the precautionary principle.<sup>29</sup>

24. The UN Human Rights Committee has urged States to “pay due regard to the precautionary approach” when addressing threats like climate change.<sup>30</sup> Similarly, the Inter-American Court of Human Rights noted that “the precautionary approach is an integral part of the general obligation of due diligence.”<sup>31</sup> 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.<sup>32</sup>

25. The precautionary principle is particularly important in relation to the climate crisis, given the IPCC’s 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.”<sup>33</sup> Scientists are increasingly concerned that crossing tipping points could cause serious disruptions to ecosystems, economies and society.<sup>34</sup> In regards to extreme weather events, it is noteworthy that the 2021 decision of the Federal Constitutional Court of Germany, which ruled on the breach of fundamental rights resulting from the insufficiency of Germany’s legislated targets for reducing greenhouse gas emissions by 2030, observed that:

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<sup>26</sup> German Federal Constitutional Court, First Senate, 1 BvR 2656/18, 1 BvR78/20, 1BvR 96/20 and 1 BvR 288/20, Decision dated 24 March 2021.

<sup>27</sup> United Nations Framework Convention on Climate Change, Article 3.3.

<sup>28</sup> Rio Declaration on Environment and Development, 1992, Principle 15.

<sup>29</sup> EU Treaty, Article 191.

<sup>30</sup> Human Rights Committee, General Comment No. 36, ¶ 62.

<sup>31</sup> Advisory Opinion 23/17, ¶ 177.

<sup>32</sup> Advisory Opinion 23/17, ¶180.

<sup>33</sup> IPCC, *Global Warming of 1.5°C*, p. 283.

<sup>34</sup> Will Steffen et. al., *Trajectories of the Earth System in the Anthropocene*, (August 2018).

In terms of the negative implications for humanity and the environment, the crossing of tipping points would actually be more problematic than the direct consequences of temperature increase. It could trigger a qualitative transformation of major environmental subsystems.<sup>35</sup>

26. This Court has already recognized the importance of the precautionary principle in the case of *Tatar and Tatar v. Romania*.<sup>36</sup> We respectfully submit that the precautionary principle should be a key component of the principled approach to be applied by the Court in climate change cases.

27. The principle has a double role: it provides a normative basis for ambitious climate action by Governments, and it also requires Governments to act with determination to reduce their emissions of greenhouse gases to face the climate emergency. In this latter sense, as conceptualized by the Inter-American Court and the International Tribunal for the Law of the Sea, the precautionary principle should be seen as an element of due diligence.<sup>37</sup>

### III.ii.ii Principle of Prevention of Environmental Harm

28. Back in 1972, the Stockholm Declaration on the Human Environment proclaimed 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.”<sup>38</sup> As expressed by the International Court of Justice, “the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.”<sup>39</sup>

29. The principle of prevention is often articulated as a duty to prevent significant transboundary environmental harm. As formulated by the International Law Commission in its project on the protection of the atmosphere, States have the obligation to protect the atmosphere by exercising due diligence.<sup>40</sup>

30. Given the severity of the global climate crisis, and the existential risks to human society and human rights imposed by climate change, the principle of prevention provides a solid normative foundation for the principled intervention of this Court in climate cases.

31. Both of the foregoing principles, precaution and prevention, require States to identify and evaluate, at the *earliest* possible stage in a decision-making process, the full extent of greenhouse gas emissions that could result because of the granting of a permit. As noted in the commentary to the Framework Principles on Human Rights and the Environment,

Prior assessment of the possible environmental impacts of proposed projects and policies is generally required by national laws, and the elements of effective environmental assessment are widely understood: the assessment should be undertaken as early as possible in the decision-making process for any proposal that is likely to have significant effects on the

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<sup>35</sup> German Federal Constitutional Court, First Senate, 1 BvR 2656/18, 1 BvR78/20, 1BvR 96/20 and 1 BvR 288/20, Decision dated 24 March 2021, ¶ 161.

<sup>36</sup> *Tatar and Tatar v Romania* (2009) No. 67021/01, ¶¶ 109 and 120.

<sup>37</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of 1 Feb. 2011, ¶ 132.

<sup>38</sup> 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.

<sup>39</sup> International Court of Justice, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, ¶ 101; *Certain Activities and Construction of a Road (Costa Rica v. Nicaragua)*, I.C.J Rep. 2015, ¶ 104.

<sup>40</sup> See e.g., International Law Commission, Special Rapporteur, Sixth Report on the protection of the atmosphere, Guideline 3, ¶¶ 45-52 (Feb. 11, 2020), A/CN.4/736.

environment; the assessment should provide meaningful opportunities for the public to participate, should consider alternatives to the proposal, and should address all potential environmental impacts, including transboundary effects and cumulative effects.<sup>41</sup>

### III.ii.iii. Common but Differentiated Responsibilities and Respective Capabilities

32. The UN Framework Convention on Climate Change highlights the principle of common but differentiated responsibilities and respective capabilities, concluding that “Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof” (Art. 3(1)).<sup>42</sup> The clear meaning is that if global reductions of 55% are required to meet the 1.5C target by 2030, then it is incumbent upon wealthy states to make even deeper, faster reductions. And in any event, wealthy States should not adopt measures that will foreseeably *increase* GHG emissions.

## IV. Obligations and commitments under the Paris Agreement are relevant to the adjudication of climate-related cases

33. 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.<sup>43</sup> During the negotiations of the Paris Agreement, the inclusion of this principle was premised on due diligence requirements, which allowed for a principled differentiation of commitments between Parties, in light of national circumstances.

34. 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 an existential risk such as the climate emergency, governments must take measures commensurate with that risk, taking all appropriate and necessary actions to address public and private behaviour, including adopting necessary regulations, monitoring and enforcement.<sup>44</sup> At the very minimum, States must utilize scientific evidence as a baseline yardstick in defining their level of emissions reductions. According to five UN treaty bodies, States must “dedicate the maximum available resources to the adoption of measures aimed at mitigating climate change” and “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.”<sup>45</sup> In this regard it is worth noting that a number of States, including Costa Rica, France and New Zealand, have already prohibited further offshore oil and gas exploration.<sup>46</sup>

35. In 2012, the International Energy Agency (IEA) estimated that two-thirds of proven fossil fuel reserves must not be burned if we are to limit warming to 2°C.<sup>47</sup> In 2020, the IEA concluded that

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<sup>41</sup> Framework Principles on Human Rights and the Environment, Principle 8, para. 20, A/HRC/37/59.

<sup>42</sup> UN Framework Convention on Climate Change, art 3(1).

<sup>43</sup> Paris Agreement, Article 4.3.

<sup>44</sup> International Court of Justice, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, ¶ 187. See also Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area’ (Advisory Opinion, International Tribunal for the Law of the Sea 1 February 2011, p. 10).

<sup>45</sup> *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, ¶ 7 and 11.

<sup>46</sup> UN Environment Programme. 2019. *Production Gap Report 2019*. See <https://beyondoilandgasalliance.com/who-we-are/>

<sup>47</sup> International Energy Agency, *World Energy Outlook 2012*.

“unabated combustion of all today’s fossil fuel reserves would result in three times more CO<sub>2</sub> emissions than the remaining CO<sub>2</sub> budget” to stay under the 2°C commitment in the Paris Agreement.<sup>48</sup> In 2021, the IEA warned that no new oil and gas fields should be approved for development and no investments should be made in new fossil fuel infrastructure.<sup>49</sup>

36. The principle of due diligence is well established in the environmental jurisprudence of this Court. In the case of *Cordella v. Italy*, the Court wrote:

161. The Court notes that, while it is not for it to determine precisely what measures should have been taken in the present case in order to reduce the level of pollution more effectively, **it is undoubtedly for it to determine whether the national authorities approached the question with due diligence.**<sup>50</sup> (emphasis added)

37. In the context of the climate emergency, the principle of due diligence means, inter alia, that every State must establish the highest possible emission reduction commitments based on the scientific evidence identified by the IPCC and then do its utmost, using the maximum available resources, to fulfill those commitments. These obligations are necessary to meet the extreme risks posed by the climate crisis, as any further delay in ambitious action will make it impossible to stay within the temperature limits set forth in the Paris Agreement. Fulfilling the rights of children and youth lends added impetus to the importance of timely action to address the climate crisis. The principle of due diligence also means that Convention Parties are required to constructively participate in international cooperation on climate change. In this regard, failure to take sufficient, effective and equitable climate measures can be found to breach the guarantees of the Convention.

## V. Domestic European Courts are Applying these Principles in Cases involving Human Rights and Climate Change

38. The 2019 *Urgenda* decision of the Supreme Court of the Netherlands and the 2021 *Neubauer* decision of Germany’s Constitutional Court contribute to understanding how the legal principles on human rights and the environment apply to the existential risks posed by climate change.<sup>51</sup> 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.”<sup>52</sup> 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.<sup>53</sup> The German Constitutional Court reached similar conclusions in the *Neubauer* case.<sup>54</sup>

39. The second principle addressed in the *Urgenda* decision was prevention. Drawing on the jurisprudence of this Court construing the rights to life and to private and family life, the Dutch Supreme

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<sup>48</sup> International Energy Agency, 2020, *The Oil and Gas Industry in Energy Transitions*, p.97.

<sup>49</sup> International Energy Agency, 2021, *Net Zero by 2050: A Road Map for the Global Energy Sector*.

<sup>50</sup> *Cordella v. Italy* (2019), No. 54414/13 and 54264/15, 24 January 2019.

<sup>51</sup> *Netherlands v Urgenda*, no. 19/00135, Supreme Court of the Netherlands, (2019) (hereinafter *Urgenda*). German Constitutional Court, First Senate, 1 BvR 2656/18, 1 BvR78/20, 1BvR 96/20 and 1 BvR 288/20, 24 March 2021 (hereinafter *Neubauer*).

<sup>52</sup> *Urgenda*, para. 5.7.1.

<sup>53</sup> *Urgenda*, para. 5.7.7.

<sup>54</sup> *Neubauer*, para. 225.

Court held that a State is obliged to take preventive measures against the foreseeable risks of climate change.

40. 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.<sup>55</sup> After surveying the science on climate change, including the danger of tipping points that may change the climate abruptly, the Dutch Supreme 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].”<sup>56</sup> Germany’s Constitutional Court ruled that “the legislator has violated fundamental rights by failing to take sufficient precautionary measures to manage the obligations to reduce emissions in ways that respect fundamental rights”.<sup>57</sup> The Court warned that Germany’s failure to undertake deep emission reductions prior to 2030 would largely exhaust Germany’s fair share of the global carbon budget, leading to a risk of “radical abstinence” for younger generations, who would be unable to enjoy their fundamental freedoms post-2030.<sup>58</sup>

41. In *Neubauer*, the application of these principles resulted in the German Constitutional Court’s determination that the federal Climate Change Act needed to be revised to incorporate stronger emission reduction targets and timelines. In *Urgenda*, 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 private and family life (Art. 8) under the European Convention on Human Rights. As the former President of the European Court of Human Rights noted:

"By relying directly on the Convention, the Dutch judges highlighted the fact that the European Convention on Human Rights really has become our shared language and that this instrument can provide genuine responses to the problems of our time."<sup>59</sup>

## VI. Conclusion

42. Humanity faces a global climate emergency that is already inflicting grievous impacts on human rights. Rapid, systematic and transformative changes are required to prevent catastrophic climate disruption and the tsunami of human rights violations that would ensue. Where a State approves activities that will foreseeably exacerbate the climate crisis, lessen the likelihood of achieving the Paris Agreement’s objectives, and raise the risk of surpassing dangerous tipping points, international human rights courts can and should provide timely protection, such as for young people whose mental health is being adversely affected by the climate crisis.

43. The time for action to address the climate emergency and prevent catastrophic impacts on human rights is rapidly running out. As the IPCC has stated, “Every bit of warming matters, every year matters, every choice matters.”<sup>60</sup>

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<sup>55</sup> *Urgenda*, para. 5.3.2.

<sup>56</sup> *Urgenda*, para. 4.6.

<sup>57</sup> *Neubauer*, para. 182.

<sup>58</sup> *Neubauer*, para. 193.

<sup>59</sup> Judge Linos-Alexandre Sicilianos, former President of the Court (2019-2020), Speech, 31 January 2020. See [https://www.echr.coe.int/Documents/Speech\\_20200131\\_Sicilianos\\_JY\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20200131_Sicilianos_JY_ENG.pdf)

<sup>60</sup> IPCC, *Global Warming of 1.5°C*, Foreword at (vi).