

**Oslo District Court**

October 26, 2017

PO Box 8023

Dep NO-0030 OSLO, NORWAY

GREENPEACE NORDIC ASSOCIATION AND NATUR OG UNGDOM (NATURE &  
YOUTH),

*Plaintiffs,*

against

THE GOVERNMENT OF NORWAY, represented by the Ministry of Petroleum and Energy,

*Defendant.*

**Case No: 16-166674TVI-OTIR/06**

**AMICUS BRIEF PREPARED BY  
THE ALLARD K. LOWENSTEIN  
INTERNATIONAL HUMAN RIGHTS CLINIC  
YALE LAW SCHOOL  
NEW HAVEN, CONNECTICUT, U.S.A.**

October 26, 2017

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**TABLE OF CONTENTS**

I. Lowenstein Clinic’s Mandate and Role ..... 1

II. The State of Norway Has an Obligation to Respect, Protect, and Fulfill the Many Human Rights Threatened by Climate Change .....2

    A. Climate change will have devastating effects on the enjoyment of human rights that the government of Norway is obliged to protect. ....3

        1. The Right to Life.....3

        2. The Right to Health.....6

        3. The Right to Non-Interference in Private and Family Life.....7

    B. To safeguard these rights, the government of Norway must act in accordance with principles of intergenerational equity, sustainable development, and international cooperation.....10

        1. Intergenerational Equity and Sustainable Development.....10

        2. International Cooperation .....13

    C. The harms that climate change will inflict on the enjoyment of human rights are serious, empirically verified, and already underway. ....14

III. By Contributing to Climate Change, the Decision by the Government of Norway to Issue Licenses Breaches These Duties.....15

IV. To Fulfill the State’s Human Rights Obligations, an Effective Remedy Is Necessary ...18

Signatories Supporting the Submission and Content of this Amicus Brief

Annexes

## I. LOWENSTEIN CLINIC'S MANDATE AND ROLE

The Allard K. Lowenstein International Human Rights Clinic at Yale Law School (the Clinic) respectfully submits for the Court's consideration this *amicus curiae* brief regarding the Norwegian State's obligations under international human rights law, in regard to the government's decision to award petroleum production licenses in its 23rd licensing round.

The Clinic is a Yale Law School program that gives first-hand experience in human rights advocacy to juris doctor candidates under the supervision of Yale Law School faculty who are experienced international law practitioners. This brief was prepared under the supervision of James J. Silk, Binger Clinical Professor of Human Rights<sup>1</sup> and Alisha Bjerregaard, Robert M. Cover-Allard K. Lowenstein Fellow in International Human Rights.<sup>2</sup> The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses.<sup>3</sup> Past Clinic projects have promoted the work of regional and international organizations that protect human rights, including in the context of climate change. The Clinic has prepared briefs and other submissions for the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and various treaty bodies of the United Nations, as well as for national courts, including courts in the United States and in other countries in Europe, Africa, and the Americas. Previous work on climate change includes, for example, a memo for the Expert Group on Global Climate Obligations explaining the nature and international law sources of human rights obligations with regard to climate change.<sup>4</sup>

Under § 15-8 of the Norwegian Dispute Act, written submissions may be submitted by "organisations and associations within the purpose and normal scope of the organisation" in order to "throw light on matters of public interest."<sup>5</sup> The present case concerns the impact of recently awarded Norwegian petroleum production licenses on global climate change. Climate change is a matter of great public interest in Norway and throughout the world. As emphasized in the preamble of the U.N. Framework Convention on Climate Change, "change in the earth's climate and its adverse effects are a common concern of humankind."<sup>6</sup> The

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<sup>1</sup> See James J. Silk, YALE LAW SCHOOL, <https://www.law.yale.edu/james-j-silk> (last visited Feb. 4, 2017).

<sup>2</sup> See Alisha Bjerregaard, YALE LAW SCHOOL, <https://www.law.yale.edu/alisha-bjerregaard> (last visited Feb. 4, 2017).

<sup>3</sup> See Allard K. Lowenstein International Human Rights Clinic, YALE LAW SCHOOL, <https://www.law.yale.edu/centers-workshops/orville-h-schell-jr-center-international-human-rights/lowenstein-clinic> (last visited Feb. 4, 2017); see also *Lowenstein Clinic Past Project Highlights*, YALE LAW SCHOOL, <https://www.law.yale.edu/centers-workshops/orville-h-schell-jr-center-international-human-rights/lowenstein-clinic/lowenstein-clinic-past-project-highlights> (last visited Feb. 4, 2017).

<sup>4</sup> Ben Farkas et al., *Human Rights and Climate Change Obligations: Draft Memorandum for the Experts' Group on Global Climate Obligations*, ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC (Apr. 2013), [https://www.law.yale.edu/system/files/documents/pdf/Climate\\_and\\_Human\\_Rights\\_Memo.Final.pdf](https://www.law.yale.edu/system/files/documents/pdf/Climate_and_Human_Rights_Memo.Final.pdf). Clinical Professor Silk, as a member of the Expert Group, was a principal author of the Oslo Principles on Global Obligations to Reduce Climate Change. See *Oslo Principles on Global Climate Change Obligations*, EXPERT GROUP ON GLOBAL CLIMATE OBLIGATIONS (Mar. 1, 2015) [hereinafter *Oslo Principles*], <http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf>.

<sup>5</sup> Act of 17 June 2005 No. 90 Relating to Mediation and Procedure in Civil Disputes (The Dispute Act), unofficial English translation available at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

<sup>6</sup> United Nations Framework Convention on Climate Change (UNFCCC), preamble, May 9, 1992, 1771 U.N.T.S. 107, [https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch\\_XXVII\\_07p.pdf](https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf).

Clinic, as a contributor to the international legal discussion about human rights and climate change, has a significant interest in having the Court consider both the harmful effects of climate change on the enjoyment of fundamental human rights and the Norwegian State's obligations under international human rights law.

In this submission, the Clinic seeks to contribute to the Court's analysis of the human rights impact of the petroleum production licenses in the 23rd licensing round by detailing: (1) the human rights obligations that the government of Norway has committed to uphold but that are undermined by the climate change consequences of its decision to award these licenses; (2) the Norwegian State's obligations to respond to climate change under international human rights law; and (3) the nature of the remedy that international human rights law requires.

## **II. THE STATE OF NORWAY HAS AN OBLIGATION TO RESPECT, PROTECT, AND FULFILL THE MANY HUMAN RIGHTS THREATENED BY CLIMATE CHANGE**

Norway enshrines respect for the right to a healthy environment in its constitution. Article 112 of the Norwegian Constitution provides:

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. . . . The authorities of the state shall take measures for the implementation of these principles.<sup>7</sup>

Norway is a party to many human rights treaties that help illuminate the content of the constitutional "right to an environment that is conducive to health," including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC). Ratifying these conventions obliges the government of Norway to respect the rights enshrined in them. As this honorable Court knows, the State has gone a step further by incorporating the ECHR, the ICCPR, and the ICESCR into domestic law and giving them primacy over conflicting legislation. The Human Rights Act of 1999 provides that these treaties "shall have the force of Norwegian law" and "shall take precedence over any other legislative provisions that conflict with them."<sup>8</sup>

Actions that contribute to climate change threaten the human rights enshrined in the Constitution and in domestic and international law. The government's granting of licenses will lead to increased carbon emissions that contribute to climate change. Climate change and

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Norway ratified the UNFCCC on July 9, 1993. *Chapter XXVII: Environment, 7. United Nations Framework Convention on Climate Change*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en) (last visited Feb. 4, 2017).

<sup>7</sup> GRUNNLOVEN, May 17, 1814 (amended May 2016), art. 112, official English translation available at <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>.

<sup>8</sup> Act Relating to the Strengthening of the Status of Human Rights in Norwegian Law (The Human Rights Act) (1999), §§ 2-3, unofficial English translation available at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990521-030-eng.pdf>.

its attendant environmental harms pose risks to the rights to life, health, and family life of Norwegian citizens and others. The Clinic respectfully requests that the Court assess whether issuing this round of licenses is consistent with the State's obligations under international law and consider the detrimental effects these licenses will have on the enjoyment of human rights. Having concluded that the licenses are inconsistent with the State's obligations, the Clinic urges the Court to provide an effective remedy by voiding the licenses.

## **A. Climate change will have devastating effects on the enjoyment of human rights that the government of Norway is obliged to protect.**

### *1. The Right to Life*

As a party to the ECHR, ICCPR, and CRC,<sup>9</sup> the State of Norway has agreed to protect the right to life. Article 2(1) of the ECHR states, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."<sup>10</sup> The European Court of Human Rights (European Court) has clarified States' duties under Article 2(1). In environmental contexts, when a State performs, commissions, or allows a third party to engage in activities "in which the right to life may be at stake,"<sup>11</sup> it has three positive obligations. First, States must "put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."<sup>12</sup> Second, States must effectively manage those activities such that the risk to life is reduced through appropriate "licensing, setting up, operation, security and supervision of the activity."<sup>13</sup> Finally, States must ensure public disclosure of the risks these activities pose to

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<sup>9</sup> Norway ratified the ECHR on January 15, 1952. Treaty Office, *Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE, [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures) (last visited Feb. 4, 2017). Norway ratified the ICCPR on September 13, 1972. *Chapter IV: Human Rights, 4. International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en) (last visited Feb. 4, 2017). Norway ratified the CRC on January 8, 1991. *Chapter IV: Human Rights, 11. Convention on the Rights of the Child*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en) (last visited Feb. 4, 2017).

<sup>10</sup> European Convention on Human Rights (ECHR) (Convention for the Protection of Human Rights and Fundamental Freedoms), art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>11</sup> *Kolyadenko and Others v. Russia*, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, § 158 (Feb. 28, 2012), <http://hudoc.echr.coe.int/eng?i=001-109283>; see also *Brincat and Others v. Malta*, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, § 80 (July 24, 2014), <http://hudoc.echr.coe.int/eng?i=001-145790>; *Vilnes and Others v. Norway*, App. Nos. 52806/09 and 22703/10, § 220 (Dec. 5, 2013), <http://hudoc.echr.coe.int/eng?i=001-138597>; *Budayeva and Others v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 130, ECHR 2008-II (extracts) (Mar. 20, 2008), <http://hudoc.echr.coe.int/eng?i=001-85436>; *Öneryıldız v. Turkey* [GC], App. No. 48939/99, § 71, ECHR 2004-XII (Nov. 30, 2004), <http://hudoc.echr.coe.int/eng?i=001-67614>.

<sup>12</sup> *Kolyadenko and Others v. Russia*, supra note 11, § 157; see also *Brincat and Others v. Malta*, supra note 11, § 101; *Vilnes and Others v. Norway*, supra note 11, § 220; *Budayeva and Others v. Russia*, supra note 11, § 129; *Öneryıldız v. Turkey*, supra note 11, § 89.

<sup>13</sup> *Kolyadenko and Others v. Russia*, supra note 11, § 158; see also *Brincat and Others v. Malta*, supra note 11, § 101; *Vilnes and Others v. Norway*, supra note 11, § 220; *Budayeva and Others v. Russia*, supra note 11, § 132; *Öneryıldız v. Turkey*, supra note 11, § 90.

the right to life.<sup>14</sup>

In evaluating whether a State has complied with its positive obligations under ECHR Article 2(1), the European Court considers a broad set of factors, including whether a State followed its domestic law and decision-making processes, adequately mitigated against any risks to life, and appropriately evaluated the risk to life posed by the activity.<sup>15</sup> Scientific and technical knowledge plays an important role in a State's upholding of its Article 2 obligations. As the European Court emphasized in *Brincat and Others*, if a State's regulatory framework does not adequately respond to available scientific information regarding the risk to life, it might constitute a violation of Article 2.<sup>16</sup>

The ICCPR and the CRC also obligate States Parties to protect the right to life, which the Human Rights Committee, the body established by the ICCPR to monitor States' compliance with the treaty's provisions, has described as the "supreme right."<sup>17</sup> The ICCPR requires States to undertake all necessary steps and measures to give effect to the right to life.<sup>18</sup> In formulating environmental policy and legislation, States Parties commit not only to refrain from interfering with the right to life,<sup>19</sup> but also to exercise due diligence to prevent future harms to the right to life.<sup>20</sup> The Human Rights Committee's most recent Draft General Comment on the right to life crystallizes the applicability of the due diligence obligation to environmental harms, saying, "The duty to protect life also imposes on States parties a due diligence obligation to take long-term measures to address the general conditions in society that may eventually give rise to direct threats to life. . . . States parties should . . . take

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<sup>14</sup> *Kolyadenko and Others v. Russia*, *supra* note 11, § 159; *see also Brincat and Others v. Malta*, *supra* note 11, § 101; *Vilnes and Others v. Norway*, *supra* note 11, § 220; *Budayeva and Others v. Russia*, *supra* note 11, § 132; *Öneryıldız v. Turkey*, *supra* note 11, § 90.

<sup>15</sup> *Kolyadenko and Others v. Russia*, *supra* note 11, § 161; *see also Brincat and Others v. Malta*, *supra* note 11, § 101; *Vilnes and Others v. Norway*, *supra* note 11, § 220; *Budayeva and Others v. Russia*, *supra* note 11, § 136.

<sup>16</sup> *Brincat and Others v. Malta*, *supra* note 11, §§ 106, 109.

<sup>17</sup> Human Rights Committee, *General Comment No. 6 on Art. 6: Right to Life*, ¶ 1 (Apr. 30, 1982), [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/INT\\_CCPR\\_GEC\\_6630\\_E.doc](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6630_E.doc).

<sup>18</sup> International Covenant on Civil and Political Rights (ICCPR), arts. 2 & 6, Dec. 19, 1966, 999 U.N.T.S. 171, [https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf). The most recent Draft General Comment to the ICCPR explicitly connects the duty to protect right to life with environmental pollution. Human Rights Committee, *Draft General Comment No. 36, Art. 6: Right to Life*, ¶ 28, U.N. Doc. CCPR/C/GC/R.36/Rev.2 (Sept. 2, 2015), [www.ohchr.org/Documents/HRBodies/CCPR/Draft\\_GC\\_115thsession.doc](http://www.ohchr.org/Documents/HRBodies/CCPR/Draft_GC_115thsession.doc).

<sup>19</sup> Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <http://legal.un.org/docs/?symbol=CCPR/C/21/Rev.1/Add.13> ("The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant.").

<sup>20</sup> *See id.* ¶ 8. ("[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.").

adequate measures to protect the environment against life-threatening pollution.”<sup>21</sup> Similarly, under the CRC, States must “ensure to the maximum extent possible the survival and development of the child.”<sup>22</sup> The Committee on the Rights of the Child, the body established by the CRC to monitor States’ compliance with that treaty’s provisions, emphasizes that children’s “right to survival and development” requires “a healthy and safe environment.”<sup>23</sup>

The Office of the U.N. High Commissioner for Human Rights (OHCHR) and the U.N. Human Rights Council have repeatedly connected the right to life to the effects of climate change.<sup>24</sup> For example, a 2009 OHCHR report linked the adverse effects of climate change to violations of the right to life under the ICCPR and the CRC.<sup>25</sup> As recently as July 1, 2016, the Human Rights Council reaffirmed this view, emphasizing that “the adverse effects of climate change have a range of implications, which can increase with greater warming, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life.”<sup>26</sup>

States, including Norway, that have ratified the ECHR, the ICCPR, and the CRC have bound themselves to protect the right to life. Discharging this commitment requires States Parties to take all necessary steps to mitigate threats to the right to life, including by using the best available scientific evidence to evaluate risks to life; publicly disclosing the results of those evaluations; and reducing potential harms through legislative, administrative, and regulatory frameworks. In light of these commitments under international human rights law, it is respectfully submitted that the government of Norway has undertaken both a duty to perform comprehensive due diligence before undertaking or authorizing drilling that may exacerbate climate change and a duty to publicly disclose risks to life posed by greenhouse-gas emissions that result from such further drilling.

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<sup>21</sup> *Draft General Comment No. 36, Art. 6: Right to Life*, supra note 18, ¶ 28. Although still under consideration by the Human Rights Committee, Draft General Comment No. 36 represents an authoritative, comprehensive, and contemporary expert understanding of the scope and content of the right to life under Article 6 of the ICCPR. The draft general comment reflects “all of the [Human Rights Committee’s] output that referred to article 6, including its Views, concluding observations and other general comments.” Human Rights Committee, 115th Sess., 3213th mtg. ¶ 2, U.N. Doc. CCPR/C/SR.3213 (Oct. 29, 2015). Furthermore, the rapporteurs responsible for drafting the general comment enriched it with “the output of other treaty bodies, special procedures and . . . the relevant practice of regional human rights bodies.” *Id.*

<sup>22</sup> Convention on the Rights of the Child (CRC), art. 6(2), Nov. 20, 1989, 1577 U.N.T.S. 3, [https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf).

<sup>23</sup> Committee on the Rights of the Child, *General Comment No. 7 (2005) on Implementing Child Rights in Early Childhood*, ¶ 10, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006), <http://legal.un.org/docs?symbol=CRC/C/GC/7/Rev.1>.

<sup>24</sup> See John H. Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶¶ 7-22, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) [hereinafter 2016 Report by Special Rapporteur John Knox], <http://legal.un.org/docs/?symbol=A/HRC/31/52> (detailing “[i]ncreasing attention to the relationship between climate change and human rights” by the Human Rights Council, the United Nations, and other international bodies). The Human Rights Council is a body created by the U.N. General Assembly to strengthen the promotion and protection of human rights. G.A. Res. 60/251, preamble & ¶¶ 2-5 (Apr. 3, 2006), [www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251\\_En.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf).

<sup>25</sup> U.N. Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, ¶¶ 18, 21-24, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009), <http://legal.un.org/docs?symbol=A/HRC/10/61>.

<sup>26</sup> Human Rights Council Res. 32/33, preamble, U.N. Doc. A/HRC/RES/32/33 (July 18, 2016), <http://legal.un.org/docs/?symbol=A/HRC/RES/32/33>.

## 2. *The Right to Health*

As a party to the ICESCR, the State of Norway committed to use “all appropriate means,”<sup>27</sup> including legislative, judicial, administrative, financial, educational and social measures,<sup>28</sup> to protect the right “of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>29</sup> Article 12 of the ICESCR emphasizes that State Parties have specific duties to take steps necessary “for the healthy development of the child” and for “the improvement of all aspects of environmental and industrial hygiene.”<sup>30</sup> In addition, by ratifying the CRC, the State reaffirmed its duty to protect the rights of children “to the enjoyment of the highest attainable standard of health.”<sup>31</sup>

The right to health under ICESCR Article 12 confers obligations beyond merely ensuring a system of health care. Rather, it obligates States Parties to “promote conditions in which people can lead a healthy life” and protect “the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”<sup>32</sup> Furthermore, the Committee on Economic, Social and Cultural Rights, the body charged with interpreting the ICESCR’s provisions, has clarified that States must use all available means to prevent and reduce “the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”<sup>33</sup> Adopting “laws or policies that interfere with the enjoyment of any of the components of the right to health”<sup>34</sup> would, therefore, constitute a violation of a State’s obligation to respect the right to health under the ICESCR. Respecting and protecting the right to health under the CRC imposes similar obligations; States Parties agree “to combat disease and malnutrition . . . through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”<sup>35</sup> Under each of these international human rights treaties, States are obligated to adopt policies that protect the right to health.

Climate change threatens the right to health for both adults and children. The Human Rights Council has noted that climate change poses “a grave threat to human health, including the social and environmental determinants of health such as clean air, safe drinking

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<sup>27</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3, [https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch\\_IV\\_03.pdf](https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf).

<sup>28</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, ¶¶ 2-8, U.N. Doc. E/1991/23 (Jan. 1, 1991), [http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1\\_Global/INT\\_CESCR\\_GEC\\_4758\\_E.doc](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/INT_CESCR_GEC_4758_E.doc).

<sup>29</sup> ICESCR, *supra* note 27, art. 12(1).

<sup>30</sup> *Id.* art. 12(2).

<sup>31</sup> CRC, *supra* note 22, art. 24(1).

<sup>32</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 4, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), <http://legal.un.org/docs?symbol=E/C.12/2000/4>.

<sup>33</sup> *Id.* ¶ 15.

<sup>34</sup> *Id.* ¶ 50.

<sup>35</sup> CRC, *supra* note 22, art. 24(2)(c).



water, sufficient food and secure shelter.”<sup>36</sup> Climate change causes premature death and disease as temperatures increase, air pollution worsens, extreme weather events occur more frequently, disease vectors expand, and well-being diminishes due to tolls on mental health and nutrition.<sup>37</sup> Children are “uniquely vulnerable” to respiratory and infectious diseases associated with climate change.<sup>38</sup> UNICEF has emphasized the particular susceptibility of children by highlighting that “more than 88 per cent of the existing global burden of disease due to climate change occurs in children under the age of five.”<sup>39</sup> In 2013, the Committee on the Rights of the Child concluded that States’ “[e]nvironmental interventions should, inter alia, address climate change, as this is one of the biggest threats to children’s health and exacerbates health disparities. States should, therefore, put children’s health concerns at the centre of their climate change adaptation and mitigation strategies.”<sup>40</sup>

Because climate change and the right to health are inextricably connected, the duty under the ICESCR and the CRC to protect the right to health—especially children’s right to health—obligates States to protect against harms caused by climate change. Accordingly, as a Party to these conventions, the State of Norway has taken on the obligation to use all available means including “through the provision of judicial or other effective remedies,” to prevent climate change from negatively affecting the right to health.<sup>41</sup>

### 3. *The Right to Non-Interference in Private and Family Life*

Article 8 of the ECHR guarantees the right to private life and family life, including in the environmental context. In cases concerning environmental harms, the European Court of Human Rights has interpreted Article 8 broadly,<sup>42</sup> protecting not only the enjoyment of the home against severe environmental pollution,<sup>42</sup> but also the rights to health and well-being

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<sup>36</sup> U.N. Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights: Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 9, U.N. Doc A/HRC/32/23 (May 6, 2016) [hereinafter OHCHR 2016 Report], <http://legal.un.org/docs?symbol=A/HRC/32/23>.

<sup>37</sup> *Id.* ¶¶ 4-8.

<sup>38</sup> Council on Environmental Health, *Global Climate Change and Children’s Health*, 136 PEDIATRICS 992, 993 (2015), <http://pediatrics.aappublications.org/content/pediatrics/136/5/992.full.pdf>; *Children’s Health ‘Uniquely’ Affected by Climate Change, Pediatricians Say*, GUARDIAN (Oct. 26, 2015), <https://www.theguardian.com/environment/2015/oct/26/children-climate-change-health-american-academy-pediatrics>.

<sup>39</sup> UNICEF, *Climate Change: Children’s Challenge*, 5 (2013), [https://unfccc.int/files/cc\\_inet/application/x-httpd-php/ccinet\\_getfile.php?file=245](https://unfccc.int/files/cc_inet/application/x-httpd-php/ccinet_getfile.php?file=245).

<sup>40</sup> Committee on the Rights of the Child, *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*, ¶ 50, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013), <http://legal.un.org/docs?symbol=CRC/C/GC/15>.

<sup>41</sup> *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, supra note 28, ¶ 5; see also Committee on the Rights of the Child, *General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)*, ¶¶ 24-25, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003), <http://legal.un.org/docs?symbol=CRC/GC/2003/5>.

<sup>42</sup> *López Ostra v. Spain*, App. No. 16798/90, § 51, Series A No. 303-C (Dec. 9, 1994), <http://hudoc.echr.coe.int/eng?i=001-57905> (“[S]evere environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, *without*, however, seriously endangering their health.”) (emphasis added).

and to the enjoyment of a healthy environment.<sup>43</sup> Article 8 “does not merely compel the State to abstain from arbitrary interference,” but also sets out a positive obligation to effectuate respect for private and family life.<sup>44</sup> In *Di Sarno v. Italy*, the Court reiterated that States Parties to the European Convention are “under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment.”<sup>45</sup> Similarly, in *Tătar v. Romania*, the Court found that “the existence of a serious and substantial risk to the health and welfare of the applicants” requires States “to take reasonable and appropriate measures able to protect the rights to respect for their private life and their home and . . . to the enjoyment of a healthy and protected environment.”<sup>46</sup>

Article 8 provides for both substantive and procedural obligations.<sup>47</sup> The substantive obligation of Article 8 requires States to (1) protect against irreversible harms to the environment that can affect individuals’ private life, including their health and welfare,<sup>48</sup> and (2) ensure that individuals are protected against various types and degrees of environmental health harms, including threats to life, serious health risks, and sustained physical or mental nuisances.<sup>49</sup> The procedural obligation requires (1) a minimum level of due diligence by the State, taking into account both the needs of the community and the potential harms;<sup>50</sup> and (2) disclosure of essential information such that individuals may “assess risks to their health and lives.”<sup>51</sup> In addition, for States, including Norway, that are party to the Aarhus Convention,<sup>52</sup> the Court has emphasized further procedural duties under Article 8, such as

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<sup>43</sup> See *Fadeyeva v. Russia*, App. Nos. 55723/00, §§ 88-89, 92, ECHR 2005-IV (June 9, 2005), <http://hudoc.echr.coe.int/eng?i=001-69315>; *Tătar v. Romania*, App. No. 67021/01, §§ 88, 107, (Jan. 27, 2009), available in French at <http://hudoc.echr.coe.int/eng?i=001-90909>; see also *Dubetska and Others v. Ukraine*, App. No. 30499/03, §§ 111, 140, 144 (Feb. 10, 2011), <http://hudoc.echr.coe.int/eng?i=001-103273>. These cases clearly demonstrate that, although the ECHR does not protect a right to a clean environment for its own sake, *Kyrtatos v. Greece*, App. No. 41666/98, § 52, ECHR 2003-VI (extracts) (May 22, 2003), <http://hudoc.echr.coe.int/eng?i=001-61099>, environmental harms that impede the right to health violate the ECHR.

<sup>44</sup> *Di Sarno and Others v. Italy*, App. No. 30765/08, § 105 (Jan. 10, 2012), <http://hudoc.echr.coe.int/eng?i=001-108480>.

<sup>45</sup> *Id.* § 110. See also *Tătar v. Romania*, *supra* note 43, § 88 (citing *Budayeva and Others* for the proposition that “[t]he positive obligation to take all reasonable and appropriate steps to protect the rights which the applicants draw from the paragraph 1 of Article 8 implies, above all, for States, the primary duty to put in place a legislative and administrative framework for effective prevention of environmental damage and human health”) (translated from French by authors).

<sup>46</sup> *Tătar v. Romania*, *supra* note 43, § 107 (translated from French by authors).

<sup>47</sup> The European Court has noted that the positive obligations imposed by Article 8 largely overlap with the obligations that protect the right to life under Article 2. *Kolyadenko and Others v. Russia*, *supra* note 11, § 216.

<sup>48</sup> *Tătar v. Romania*, *supra* note 43, §§ 85, 87-88, 107.

<sup>49</sup> *Id.* §§ 85-88, 107; *López Ostra v. Spain*, *supra* note 42, § 51; *Hatton and Others v. the United Kingdom* [GC], App. Nos. 36022/97, § 96, ECHR 2003-VIII (Jul. 8, 2003), <http://hudoc.echr.coe.int/eng?i=001-61188>.

<sup>50</sup> *Hatton and Others v. the United Kingdom*, *supra* note 49, §§ 98-99, 101.

<sup>51</sup> *Brincat and Others v. Malta*, *supra* note 11, § 102; see also *Vilnes and Others v. Norway*, *supra* note 11, § 235.

<sup>52</sup> Norway ratified the Aarhus Convention (formally known as the United Nations Economic Commission for Europe’s Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) on May 2, 2003. *Chapter XXVII: 13. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, U.N. TREATY

“[p]romoting public participation in decision-making concerning issues with an environmental impact.”<sup>53</sup> These procedural duties under Article 8 apply to environmental harms caused by public and private actors alike.<sup>54</sup>

Although States have discretion in choosing the means by which they fulfill their Article 8 obligations, that discretion is limited.<sup>55</sup> In *Brincat and Others v. Malta*, “the seriousness of the threat at issue” outweighed “the State’s margin of appreciation as to the choice of means”; consequently, the European Court found that Malta had failed to fulfill its positive obligations under Articles 2 and 8.<sup>56</sup> In cases involving serious environmental harm, the Court has applied the precautionary principle to require “effective and proportionate measures to prevent a risk of serious and irreversible damage to the environment.”<sup>57</sup>

Climate change threatens the right to private and family life because, in part, it threatens the right to life itself. But aspects of climate change that do not threaten life can, nevertheless, threaten private and family life. For example, in addition to the harms to health and well-being discussed above,<sup>58</sup> the displacement of persons or communities—a near certainty in the climate change context—also constitutes a violation of the right to non-interference with home and private life.<sup>59</sup>

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COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-13&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&clang=_en) (last visited Feb. 4, 2017).

<sup>53</sup> *Grimkovskaya v. Ukraine*, App. No. 38182/03, § 39 (July 21, 2011), <http://hudoc.echr.coe.int/eng?i=001-105746>. In *Grimkovskaya*, the Court considered Ukraine’s ratification of the Aarhus Convention as a relevant factor in reaching its conclusion that Article 8 had been violated:

72. Overall, the Court attaches importance to the following factors. First, the Government’s failure to show that the decision to designate K. Street as part of the M04 motorway was preceded by an adequate environmental feasibility study and followed by the enactment of a reasonable environmental management policy. Second, the Government did not show that the applicant had a meaningful opportunity to contribute to the related decision-making processes, including by challenging the municipal policies before an independent authority. Bearing those two factors and the Aarhus Convention (see paragraph 39) in mind, the Court cannot conclude that a fair balance was struck in the present case.

73. There has therefore been a breach of Article 8 of the Convention.

*Id.* §§ 72-73. The Court has further explained that it has used “principles enshrined in” the Aarhus Convention to build its understanding of Article 8’s procedural duties in environmental cases. *See, e.g., Demir and Baykara v. Turkey* [GC], App. No. 34503/97, § 83, ECHR 2008 (Nov. 12, 2008), <http://hudoc.echr.coe.int/eng?i=001-89558>. The Court has even applied these principles to States that have not ratified the Aarhus Convention. *Id.*

<sup>54</sup> *Hatton and Others v. the United Kingdom*, *supra* note 49, § 98 (“Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly.”); *see also Fadayeve v. Russia*, *supra* note 43, § 89; *Tătar v. Romania*, *supra* note 43, § 87; *López Ostra v. Spain*, *supra* note 42, §§ 52, 58.

<sup>55</sup> *Hatton and Others v. the United Kingdom*, *supra* note 49, § 98; *Tătar v. Romania*, *supra* note 43, §§ 99-104.

<sup>56</sup> *Brincat and Others v. Malta*, *supra* note 11, § 116.

<sup>57</sup> *Tătar v. Romania*, *supra* note 43, §§ 109, 120. For further discussion of the precautionary principle, *see infra* note 94 and accompanying text.

<sup>58</sup> *See supra* notes 24-26, 36-40 and accompanying text.

<sup>59</sup> *López Ostra v. Spain*, *supra* note 42, §§ 42, 57-58.

**B. To safeguard these rights, the government of Norway must act in accordance with principles of intergenerational equity, sustainable development, and international cooperation.**

*1. Intergenerational Equity and Sustainable Development*

In making decisions that will have a significant environmental impact, the State has a duty to act in a manner that secures the rights to life, health, and private and family life, not only for the current generation, but for future generations. Article 112 of Norway's Constitution enshrines a requirement to consider the effects on future generations before acting in a way that might infringe on such generations' right to an environment conducive to health. According to the principle of intergenerational equity, "the present generation . . . must pass the Earth on to future generations in a condition no worse than that in which it was received so that future generations may meet their own needs."<sup>60</sup>

In both the domestic and international contexts, intergenerational equity has developed into a justiciable principle. For example, the International Court of Justice has considered the health of future generations on several occasions. Two decades ago, in an advisory opinion on nuclear weapons, the Court recognized that "the environment is under daily threat" and that "the environment is not an abstraction, but represents the living space, the quality of life and the very health of human beings, *including generations unborn*."<sup>61</sup> In partial dissent, Judge Christopher Weeramantry urged the Court to recognize more explicitly the rights of future generations, noting:

At any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations. . . . This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law[,] . . . must, in its jurisprudence, pay due recognition to the rights of future generations. . . . [T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.<sup>62</sup>

In a separate opinion in the *Pulp Mills* case, Judge Antônio Augusto Cançado Trindade of the International Court of Justice wrote, "Nowadays, in 2010, it can hardly be doubted that the acknowledgment of inter-generational equity forms part of conventional wisdom in International Environmental Law."<sup>63</sup> In a later case, he added that intergenerational equity is present "in a wide range of instruments of international environmental law, and indeed of

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<sup>60</sup> EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 24 (1989) (available in Annex 1). This principle applies not only to the conservation of the diversity of natural and cultural resources, but also to the conservation of the quality of the environment. *Id.* at 42.

<sup>61</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 1996 I.C.J. 226, 241, ¶ 29 (July 8, 1996), <http://www.icj-cij.org/docket/files/95/7495.pdf> (emphasis added).

<sup>62</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion): Dissenting Opinion of Judge Weeramantry*, 1996 I.C.J. 226, 455 (July 8, 1996), <http://www.icj-cij.org/docket/files/95/7521.pdf>.

<sup>63</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay): Separate Opinion of Judge Cançado Trindade*, I.C.J. Reports 2010, ¶ 122 (Apr. 10, 2010), <http://www.icj-cij.org/docket/files/135/15885.pdf>.

contemporary public international law.”<sup>64</sup> Domestic courts in Pakistan and India have also relied on intergenerational equity in cases adjudicating climate change and the sustainable use of natural resources, respectively.<sup>65</sup>

As the U.N. Secretary-General’s 2013 report on the needs of future generations confirms, States may not disregard the developmental and environmental needs of future generations when managing their natural resources.<sup>66</sup> In particular, the Committee on Economic, Social, and Cultural Rights has emphasized that the rights to food and water, which are critical underlying determinants of health that are fundamental to human survival, as well as other economic and social rights, belong to future generations. In its 1999 General Comment on the right to adequate food, the Committee explained:

The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations. The precise meaning of “adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while “sustainability” incorporates the notion of long-term availability and accessibility.<sup>67</sup>

The Committee’s 2003 General Comment on the right to water clarified that this right, too, must be understood in light of principles of intergenerational equity and sustainable development, declaring, “States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.”<sup>68</sup> The Committee has since confirmed that “[m]any provisions of the [ICESCR] link with environment and sustainable development, and the Committee in its dialogue with States parties has regularly stressed the interlinkages of specific economic, social and cultural rights, as well as the right to development, with the sustainability of environmental protection and development efforts.”<sup>69</sup> Intergenerational equity is also a core principle of the CRC.<sup>70</sup> The Committee on the Rights of the Child has affirmed that States Parties “shall protect children’s rights when making decisions related to mobilizing resources through natural

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<sup>64</sup> *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening): Separate Opinion of Judge Cançado Trindade* (unreported), ¶ 47 (Mar. 31, 2014), <http://www.icj-cij.org/docket/files/148/18146.pdf>.

<sup>65</sup> See *Asghar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015, ¶ 4 [Lahore High Court] (Sept. 14, 2015), <http://cer.org.za/wp-content/uploads/2015/10/Leghari-2.pdf>; *Intellectuals Forum v. State of A.P.*, 3 S.C.C. 549, ¶ 63 [Supreme Court of India] (Feb. 23, 2006), <https://indiankanoon.org/doc/1867873>.

<sup>66</sup> U.N. Secretary-General, *Intergenerational Solidarity and the Needs of Future Generations*, ¶¶ 21, 25-28, U.N. Doc. A/68/322 (Aug. 15, 2013), <http://legal.un.org/docs/?symbol=A/68/322>.

<sup>67</sup> Committee on Economic, Social, and Cultural Rights, *General Comment No. 12: The Right to Food (Art. 11)*, ¶ 7, U.N. Doc. No. E/C.12/1999/5 (May 12, 1999), <http://legal.un.org/docs/?symbol=E/C.12/1999/5> (emphasis in original).

<sup>68</sup> Committee on Economic, Social, and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, ¶ 28, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), <http://legal.un.org/docs/?symbol=E/C.12/2002/11>.

<sup>69</sup> Committee on Economic, Social, and Cultural Rights, *Statement in the Context of the Rio+20 Conference on “The Green Economy in the Context of Sustainable Development and Poverty Eradication,”* ¶ 5, U.N. Doc. E/C.12/2012/1 (June 4, 2012), <http://legal.un.org/docs/?symbol=E/C.12/2012/1>.

<sup>70</sup> Committee on the Rights of the Child, *General Comment No. 15, supra* note 40, ¶ 50 (“Environmental interventions should include addressing climate change as this is one of the biggest threats to children’s health and to exacerbating health disparities. States should, therefore, put children’s health concerns at the centre of their climate change adaptation and mitigation strategies.”).

resource extraction,” including by considering “impacts they might have on current and future generations of children.”<sup>71</sup>

More than 25 international agreements refer to intergenerational equity or the rights of future generations.<sup>72</sup> Concern for future generations animates the first clause of the U.N. Charter, the founding document of modern international law.<sup>73</sup> Intergenerational equity is incorporated into the preamble of the U.N. Framework Convention on Climate Change (UNFCCC),<sup>74</sup> as well as its first listed principle.<sup>75</sup> Most recently, the Paris Agreement, ratified by Norway in June 2016,<sup>76</sup> called on all parties to “promote and consider their respective obligations on human rights . . . as well as gender equality, empowerment of women and intergenerational equity.”<sup>77</sup> Article 4 of UNESCO’s 1997 Declaration on the Responsibilities of the Present Generations Towards Future Generations, while not legally binding, exemplifies the recognition of a collective moral duty “to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems . . . .”<sup>78</sup> Article 5(4) of the Declaration notes that “present generations should take into account possible consequences for future generations of major projects before these are carried out.”<sup>79</sup>

Article 14 of the ECHR, which prohibits discrimination on the basis of age, further illuminates the significance of the rights of future generations.<sup>80</sup> Both today’s children and children yet to be born face more serious risks to their lives and health because of climate change than do older people. States have a responsibility to prevent the present generation

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<sup>71</sup> Committee on the Rights of the Child, *General Comment No. 19 (2016) on Public Budgeting for the Realization of Children’s Rights (Art. 4)*, ¶ 80, U.N. Doc. CRC/C/GC/19 (July 20, 2016), <http://legal.un.org/docs?symbol=CRC/C/GC/19>.

<sup>72</sup> For a complete list of instruments, see U.N. Secretary-General, *Intergenerational Solidarity and the Needs of Future Generations*, *supra* note 66, ¶¶ 33-35.

<sup>73</sup> See U.N. Charter preamble, <https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf> (“We the Peoples of the United Nations determined to save future generations from the scourge of war . . .”).

<sup>74</sup> United Nations Framework Convention on Climate Change (UNFCCC), *supra* note 6, preamble (“The Parties to this Convention . . . [d]etermined to protect the climate system for present and future generations . . .”).

<sup>75</sup> *Id.* art. 3, ¶ 1 (“The Parties should protect the climate system for the benefit of present and future generations of humankind . . .”).

<sup>76</sup> *Chapter XXVII: 7.d Paris Agreement*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en) (last visited Feb. 6, 2017).

<sup>77</sup> Paris Agreement, preamble, Dec. 12, 2015, C.N.62.2016.TREATIES-XXVII.7.d, [https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch\\_XXVII-7-d.pdf](https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf).

<sup>78</sup> United Nations Educational, Scientific, and Cultural Organization (UNESCO), Declaration on the Responsibilities of the Present Generations Towards Future Generations, art. 4, Nov. 12, 1997, [http://portal.unesco.org/en/ev.php-URL\\_ID=13178&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13178&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>79</sup> *Id.* art. 5(4).

<sup>80</sup> Article 14 does not include age in the list of specifically prohibited bases of discrimination, but age is included in “other status.” See *Schwizgebel v. Switzerland*, App. No. 25762/07, §§ 76, 85, ECHR 2010 (extracts) (June 10, 2010), <http://hudoc.echr.coe.int/eng?i=001-99288>; *D.G. v. Ireland*, App. No. 39474/98, §§ 111-16, ECHR 2002-III (May 16, 2002), <http://hudoc.echr.coe.int/eng?i=001-60457>; *Bouamar v. Belgium*, App. No. 9106/80, § 67, Series A no. 129 (Feb. 29, 1988), <http://hudoc.echr.coe.int/eng?i=001-57445>.

from shifting the burdens of its actions to today's children or to future generations. As in more blatant forms of discrimination, such blindness to climatic consequences penalizes those without political power: children and the future citizens of Norway and the earth.

Furthermore, the principle of sustainable development entails a commitment to safeguard intergenerational equity. The principle requires that any development “[meet] the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>81</sup> According to two respected scholars, “[t]here can be little doubt that the concept of ‘sustainable development’ has entered the corpus of international customary law.”<sup>82</sup>

Under the principles of both intergenerational equity and sustainable development, States may not permit environmental projects that will damage future generations' environment or sociocultural rights, including their rights to food and water. At a minimum, the government of Norway has an obligation to consider the effects that proposed actions will have on future generations' enjoyment of their human rights.

## 2. *International Cooperation*

All States have a duty to cooperate with the international community to protect the human rights threatened by climate change. The duty of international cooperation derives from three main binding sources.<sup>83</sup> First, under the ICESCR, each State Party to the treaty “undertakes to take steps, individually and *through international assistance and co-operation* . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”<sup>84</sup> Acting alone to protect the rights to health, food, and water does not satisfy the obligation to work cooperatively to protect those rights. Second, and similarly, States Parties to the CRC “undertake to *promote and encourage international co-operation* with a view to achieving progressively the full realization of the right” of children to the “highest attainable standard of health.”<sup>85</sup> Given that climate change endangers children's health, States must encourage international cooperation to mitigate and protect against harms caused by climate change. Third, the U.N. Charter states that members “pledge themselves to take *joint* and separate action in co-operation with the Organization” to promote, among other goals, “higher standards of living,” “solutions of international economic, social, health, and related problems,” and “universal respect for, and observance of, human rights and fundamental freedoms.”<sup>86</sup> By ratifying the Charter, the State of Norway has

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<sup>81</sup> United Nations World Commission on Environment and Development, *Our Common Future* (Brundtland Report), *appended as annex to Report of the World Commission on Environment and Development*, p. 54, U.N. Doc. A/42/427 (Aug. 4, 1987), <http://legal.un.org/docs/?symbol=A/42/427>.

<sup>82</sup> PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 208 (3rd ed. 2012) (available in Annex 2).

<sup>83</sup> The preambles of other treaties, as well as declarations and other sources of soft law, acknowledge the duty of international cooperation. *See, e.g., Oslo Principles*, *supra* note 4, preamble (“International law entails obligations to act cooperatively to protect and advance fundamental human rights, including in the context of climate change . . .”); *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, preamble, 29 NETH. Q. HUM. RTS. 578 (2011) [hereinafter *Maastricht Principles*], <https://www.maastrichtuniversity.nl/file/2180/download?token=ABzkHYaY> (affirming States’ “obligation to realize progressively economic, social and cultural rights . . . when acting individually and through international assistance and cooperation”); sources cited *infra* notes 88-90.

<sup>84</sup> ICESCR, *supra* note 27, art. 2(1) (emphasis added).

<sup>85</sup> CRC, *supra* note 22, art. 24 (emphasis added).

<sup>86</sup> U.N. Charter arts. 55 & 56, <https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf> (emphasis added).

committed to work with other States to promote rights-respecting solutions to problems like climate change.

Climate change presents an especially compelling case for international cooperation.<sup>87</sup> Major multilateral climate change agreements, such as the UNFCCC and the Paris Agreement, express, in their text and preambles, the need for cooperation.<sup>88</sup> As the Human Rights Council has acknowledged on three separate occasions, “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”<sup>89</sup> Unlike purely local rights violations, the harms of which are felt almost exclusively within one country and the solutions to which may be effected in that same country, climate change disperses its effects without regard to national borders and, thus, violates human rights on a global scale.<sup>90</sup> No country acting alone will be able to solve climate change; many must act in concert.

### **C. The harms that climate change will inflict on the enjoyment of human rights are serious, empirically verified, and already underway.**

Climate change has already caused, and will continue to cause, devastating damage to the fulfillment and enjoyment of the rights to life, health, and family life. According to the OHCHR:

Climate change is real, human-made greenhouse gas emissions are its primary cause, and it contributes, among other things, to the increasing frequency of extreme weather events and natural disasters, rising sea levels, floods, heatwaves, drought and the spread of tropical and vector-borne diseases. These extremes alter ecosystems, disrupt food production and water supply, damage infrastructure and settlements and increase morbidity and mortality. They are also responsible for the displacement of affected communities, among whom

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<sup>87</sup> 2016 Report by Special Rapporteur John Knox, *supra* note 24, ¶¶ 42-48.

<sup>88</sup> The Preamble to the UNFCCC states, “Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response . . . .” United Nations Framework Convention on Climate Change (UNFCCC), *supra* note 6, preamble. Article 2 of the Paris Agreement explains that its core aim is “to strengthen the global response to the threat of climate change”; its preamble underscores the cooperative nature of that project by explaining that climate change “requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response.” Paris Agreement, *supra* note 77, art. 2.

<sup>89</sup> Human Rights Council Res. 18/22, U.N. Doc. A/HRC/RES/18/22, at 2 (Oct. 17, 2011), <http://legal.un.org/docs/?symbol=A/HRC/RES/18/22>; Human Rights Council Res. 26/27, U.N. Doc. A/HRC/RES/26/27, at 2 (July 15, 2014), <http://legal.un.org/docs/?symbol=A/HRC/RES/26/27>; Human Rights Council Res. 29/15, U.N. Doc. A/HRC/RES/29/15, at 1 (July 2, 2015), <http://legal.un.org/docs/?symbol=A/HRC/RES/29/15>. The Human Rights Council employed identical language in all three resolutions.

<sup>90</sup> 2016 Report by Special Rapporteur John Knox, *supra* note 24, ¶¶ 40, 42. Furthermore, Norway has bound itself to preventing extraterritorial harms to human rights enshrined in treaties it has ratified. *See, e.g.*, Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 19, ¶ 6. With regard to the State’s duties to prevent extraterritorial harms to social, economic, and cultural rights protected by the ICESCR, the CRC, and other human rights treaties, see generally *Maastricht Principles*, *supra* note 83. In the climate change context, the Oslo Principles specifically affirm State obligations to prevent extraterritorial harms. *See Oslo Principles*, *supra* note 4, preamble & ¶ 21.



an important consequence is an increased incidence of poor mental and physical health. *Thus, climate change directly and indirectly threatens the full and effective enjoyment of a range of human rights*, including the rights to life, water and sanitation, food, health, housing, self-determination, culture and development.<sup>91</sup>

The death toll from climate change is high and rising. The OHCHR cited one study that found that 400,000 deaths worldwide each year could already be linked to climate change.<sup>92</sup> The World Health Organization estimates that within the next thirty years, climate change will cause 250,000 additional deaths per year from malnutrition, malaria, diarrhea, and heat stress alone.<sup>93</sup>

States may not disregard this overwhelming evidence of present and future human suffering. The precautionary principle, as embodied, for example, in the Oslo Principles on Global Climate Change Obligations (Oslo Principles), requires that States base their decisions about appropriate action to mitigate climate change “on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts.”<sup>94</sup> The worst-case scenario is one of complete devastation. Left unchecked, climate change will create “a world where hundreds of thousands die prematurely, where millions go hungry or are driven from their homes, where conflict proliferates and desperation breeds. It is a graveyard for entire ecosystems, entire peoples, and entire ways of living.”<sup>95</sup> In light of these severe consequences, the Clinic respectfully submits that the government of Norway must consider the evidence carefully and act decisively in response.

### **III. BY CONTRIBUTING TO CLIMATE CHANGE, THE DECISION BY THE GOVERNMENT OF NORWAY TO ISSUE LICENSES BREACHES THESE DUTIES**

Considered in light of international human rights obligations by which Norway has agreed to be bound, the government’s 23rd licensing round is inconsistent with the State’s duty to safeguard the rights to life, health, and family life. Awarding the licenses will lead to increased oil production, which will, in turn, increase greenhouse gas emissions and contribute to climate change. Because climate change will cause grave and widespread harms to the human rights of present and future generations, the government has a duty to mitigate those harms, not to contribute to them. According to the OHCHR,

it is not enough to simply focus on ensuring that action against climate change respects human rights. A rights-based approach requires States to take affirmative action to respect, protect, promote and fulfill all human rights for all persons. *Failure to prevent foreseeable human rights harm caused by*

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<sup>91</sup> OHCHR 2016 Report, *supra* note 36, ¶ 4 (emphasis added).

<sup>92</sup> *Id.* ¶ 8.

<sup>93</sup> World Health Organization, *Quantitative Risk Assessment of the Effects of Climate Change on Selected Causes of Death, 2030s and 2050s*, at 13 (2014), [http://apps.who.int/iris/bitstream/10665/134014/1/9789241507691\\_eng.pdf?ua](http://apps.who.int/iris/bitstream/10665/134014/1/9789241507691_eng.pdf?ua).

<sup>94</sup> *Oslo Principles*, *supra* note 4, Principle 1. The Oslo Principles were drafted to set out States’ legal obligations to constrain climate change and outline a means of meeting those obligations. *Id.* preamble.

<sup>95</sup> U.N. Office of the High Commissioner for Human Rights, *Statement by Kate Gilmore United Nations Deputy High Commissioner for Human Rights at the Panel Discussion on Climate Change and Right to Health*, (Mar. 3, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17133&LangID=E>.

*climate change*, or at the very least to mobilize maximum available resources in an effort to do so, *constitutes a breach of this obligation*.<sup>96</sup>

To fulfill its commitments under international human rights law, the State has an obligation to demonstrate that it has given all appropriate consideration to the effects that granting new oil and gas licenses will have on the rights of present and future generations to life, health, and family life. These due-diligence obligations require the government to perform and make publicly available a detailed impact assessment that recognizes the global impacts of the new licenses' contributions to climate change.<sup>97</sup> A proper assessment requires meaningful evaluation of the demands of intergenerational equity and sustainable development, considering not only the current generation's enjoyment of human rights, but that of future generations as well. Such an assessment would adhere to the precautionary principle,<sup>98</sup> rather than minimizing its evaluation of the licenses' impact. In light of the State's international commitments, including the Paris Agreement, it is respectfully submitted that before the government of Norway may issue any such licenses, it must first provide sufficient evidence that it has considered both the anticipated effects on the State's ability to meet its international climate obligations and the potential of such licenses to exacerbate the human rights harms caused by climate change.

The Clinic further respectfully submits that issuing this round of licenses is inconsistent with Norway's international commitments to cooperate under the UNFCCC and the Paris Agreement. Under these binding agreements, each State Party commits to take measures, both individually and in cooperation with other States, to respond to the threat of climate change.<sup>99</sup> In its most recent nationally determined contribution under the UNFCCC and the Paris Agreement,<sup>100</sup> the State of Norway articulated a national commitment to achieving "an at least 40% reduction of greenhouse gas emissions by 2030 compared to 1990 levels."<sup>101</sup> In addition, by ratifying the Paris Agreement, the State bound itself to "strengthen the global response to the threat of climate change" by "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to

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<sup>96</sup> OHCHR 2016 Report, *supra* note 36, ¶ 48 (emphasis added).

<sup>97</sup> See *supra* notes 43-54 and accompanying text.

<sup>98</sup> Oslo Principles, *supra* note 4, Principle 1.

<sup>99</sup> 2016 Report by Special Rapporteur John Knox, *supra* note 24, ¶¶ 44-48.

<sup>100</sup> Leading up to the Paris Agreement, the Conference of Parties resolved to invite each State Party to the UNFCCC to communicate a clear and transparent "intended nationally determined contribution" (INDC) toward achieving the objective of the UNFCCC. Conference of the Parties, *Further Advancing the Durban Platform*, ¶ 2(b) (Nov. 23, 2013), in Report of the Conference of the Parties on its Nineteenth Session, Addendum, at 3, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014), <http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>. The Paris Agreement reinforced the role of these contributions by requiring that States communicate their commitments to the secretariat and implement domestic policy calculated to achieve their respective nationally determined contributions. Paris Agreement, *supra* note 77, art. 4(2), 4(12). Because Norway did not communicate a new nationally determined contribution when it submitted its instrument of ratification of the Paris Agreement, its 2014 INDC became its nationally determined contribution under the Paris Agreement as well. See Conference of the Parties, *Adoption of the Paris Agreement*, ¶ 22 (Dec. 12, 2015), in Report of the Conference of the Parties on its Twenty-First Session, Addendum, at 2, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016), <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

<sup>101</sup> Norway, *Submission by the Norwegian Government to the ADP: Norway's Intended Nationally Determined Contribution*, § 2 (Mar. 6, 2014), <http://www4.unfccc.int/ndcregistry/PublishedDocuments/Norway%20First/NorwayINDC.pdf>.

limit the temperature increase to 1.5°C above pre-industrial levels.”<sup>102</sup> Special Rapporteur Knox has emphasized that, in order to uphold the duty of international cooperation, “States should fully implement all of the commitments they have made in relation to the Paris Agreement and strengthen their commitments in the future, in order to ensure that global temperatures do not rise to levels that would impair a vast range of human rights.”<sup>103</sup>

By initiating the 23rd licensing round, the government of Norway will preclude the possibility of fully implementing the State’s commitments under the UNFCCC and the Paris Agreement. These licenses for drilling in previously untouched areas, allowing further petroleum production in the Arctic, will aggravate—not mitigate—climate change.<sup>104</sup> These new licenses also set a dangerous precedent for the international responsibility to cooperate in effectively responding to climate change. Under the Paris Agreement, developed countries “should continue taking the lead by undertaking economy-wide absolute emission reduction targets.”<sup>105</sup> If other countries follow the lead of Norway, the first developed country to ratify the Paris Agreement, the consequences for human rights around the world, both in our lifetimes and for future generations, will be catastrophic.

Even if, hypothetically and improbably, the government were able both to issue these licenses and to meet its nationally determined contributions, issuing the licenses would, nevertheless, lead to further human rights harms. First, reliable scientific evidence indicates that the government of Norway’s existing climate change policies are “not consistent with limiting warming below 2°C, let alone with the Paris Agreement’s stronger 1.5°C limit.”<sup>106</sup> This shortcoming also holds true for all States’ nationally determined contributions taken together: According to a U.N. Environment Programme analysis released on November 3, 2016, full implementation of all States’ nationally determined contributions will cause an increase in the earth’s average surface temperature above pre-industrial levels of between 2.9 and 3.4°C by 2100.<sup>107</sup> According to Special Rapporteur John Knox, an increase in global temperature of more than two degrees would have disastrous consequences for human rights; thus, “even if they meet their current commitments, States will not satisfy their human rights obligations.”<sup>108</sup> Second, opening a new round of licenses locks Norway into a multi-decade pattern of dependence on harmful emissions, thereby guaranteeing harm will continue in the

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<sup>102</sup> Paris Agreement, *supra* note 77, art. 2(1)(a).

<sup>103</sup> 2016 Report by Special Rapporteur John Knox, *supra* note 24, ¶ 88.

<sup>104</sup> As a party to the ICESCR, the Norwegian State cannot take deliberately retrogressive actions. *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, *supra* note 28, ¶ 9. See also *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, *supra* note 32, ¶ 32 (“As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible.”).

<sup>105</sup> Paris Agreement, *supra* note 77, art. 4(4).

<sup>106</sup> *Norway (2016)*, CLIMATE ACTION TRACKER (Nov. 2, 2016), <http://climateactiontracker.org/countries/developed/norway/2016.html>. The Climate Action Tracker “is an independent scientific analysis produced by three research organisations” that tracks 32 countries’ policies, nationally determined contributions, and progress toward successfully limiting global warming to less than 2°C. *What is CAT?*, CLIMATE ACTION TRACKER, <http://climateactiontracker.org/about.html> (last visited Feb. 27, 2017).

<sup>107</sup> U.N. Environment Programme, *The Emissions Gap Report 2016*, xviii (Nov. 2016), [https://uneplive.unep.org/media/docs/theme/13/Emissions\\_Gap\\_Report\\_2016.pdf](https://uneplive.unep.org/media/docs/theme/13/Emissions_Gap_Report_2016.pdf).

<sup>108</sup> 2016 Report by Special Rapporteur John Knox, *supra* note 24, ¶ 76.

future. Guaranteeing future harm is antithetical to the Oslo Principles, which require States and businesses to “refrain from starting new activities that cause excessive [greenhouse gas] emissions.”<sup>109</sup> The Clinic respectfully submits that, by guaranteeing harm to the exercise of the rights to life, health, and private life, now and in the future, the decision to award these licenses was inconsistent with the State’s obligations under binding international human rights law.

#### IV. TO FULFILL THE STATE’S HUMAN RIGHTS OBLIGATIONS, AN EFFECTIVE REMEDY IS NECESSARY

Where a State breaches its human rights obligations, Article 13 of the ECHR requires that everyone “shall have an effective remedy before a national authority.”<sup>110</sup> The ICCPR,<sup>111</sup> the ICESCR,<sup>112</sup> and the CRC<sup>113</sup> similarly require access to an effective remedy.

We respectfully submit that the appropriate and effective remedy in this context would be to declare the licenses invalid. In the climate change context, providing damages in the future is not an effective remedy. Climate change, if left unchecked, will cause massive and irreparable harm on a scale to which courts will not be able to respond. No court system, however robust, will be able to hear the millions of cases or assign to individual wrongdoers the responsibility to pay damages—much less effect the reversal of catastrophic environmental harm.<sup>114</sup> The fundamental protection of life, family life, health, and a healthy environment is at stake. Therefore, the Clinic respectfully urges the Court to ensure a remedy that will spare current and future generations the harms to these fundamental rights that the new licenses will inescapably inflict.

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<sup>109</sup> Oslo Principles, *supra* note 4, Principle 8. *See also id.* Principles 21 & 23 (“States must refrain from providing new subsidies, aid, credits, grants, guarantees, or insurance for installation of major new facilities or major expansion of existing facilities that will result in the emission of unnecessarily high . . . quantities of [greenhouse gas], either within or outside their territories.”).

<sup>110</sup> ECHR, *supra* note 10, art. 13.

<sup>111</sup> ICCPR, *supra* note 18, art. 2(3).

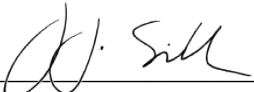
<sup>112</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, U.N. Doc. E/C.12/1998/24, ¶ 3 (Dec. 3, 1998), <http://legal.un.org/docs/?symbol=E/C.12/1998/24> (“Questions relating to the domestic application of the Covenant must be considered in the light of . . . article 8 of the Universal Declaration of Human Rights, according to which ‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’”); *see also id.* ¶ 9 (noting that although effective remedies may take various domestic forms, an ultimate appeal to a judicial remedy is necessary to give life to the Covenant’s rights).

<sup>113</sup> *General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44)*, *supra* note 41, ¶ 24 (“For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.”).

<sup>114</sup> Jaap Spier, a leading thinker on law and climate change and a principal author of the Oslo Principles, *see supra* note 4, concluded that a damages remedy for harms caused by climate change faces such immense practical obstacles that it “is an option only for dreamers.” JAAP SPIER & ELBERT DE JONG, SHAPING THE LAW FOR GLOBAL CRISES: THOUGHTS ABOUT THE ROLE THE LAW COULD PLAY TO COME TO GRIPS WITH THE MAJOR CHALLENGES OF OUR TIME 190 (2012) (available in Annex 3). According to Spier, courts should instead focus on avoiding “nightmare scenarios” by providing preventative, injunctive relief. *Id.* at 194-98.

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Respectfully submitted,

  
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## TABLE OF ANNEXES

With the exception of the documents listed in the annexes below, all sources cited in this Amicus Brief are available through hyperlinks in their respective footnotes.

ANNEX 1: EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 17-46 (1989).

ANNEX 2: PHILIPPE SANDS & JACQUELINE PEEL, *Sustainable Development*, in PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 187-237 (3rd ed. 2012).

ANNEX 3: JAAP SPIER & ELBERT DE JONG, *Remedies*, in SHAPING THE LAW FOR GLOBAL CRISES: THOUGHTS ABOUT THE ROLE THE LAW COULD PLAY TO COME TO GRIPS WITH THE MAJOR CHALLENGES OF OUR TIME 181-99 (2012).