ENNHRI European Network of National Human Rights Institutions

Written observations in application no. 34068/21

Greenpeace Nordic and Others v. Norway

1. Introduction

1. This third-party intervention will address the Court's questions 1, 3c, d, and 4a, b and d. ENNHRI will not comment on the Court's question 3a and b. However, to fully assess the environmental implications at stake, ENNHRI makes the following preliminary points of a general nature.

2. *First,* climate change is often portrayed as a problem caused by the accumulated effects of all since the dawn of industrialised modern societies. In fact, it is primarily caused by the extraction and ultimate combustion of fossil fuels, which account for 81-91% of the anthropogenic CO2 emissions,[1] and mostly since 1990.[2] These emissions may be traced back to specific decisions allowing exploration and extraction. For instance, the 17GtCO2 of historic exported emissions[3] from the Norwegian continental shelf originated in nine decisions to open areas for extraction.[4]

3. *Second,* the Intergovernmental Panel on Climate Change (IPCC) warns that the 1.5°C and well below 2°C targets "could move out of reach" unless there are "dedicated efforts to early decommissioning", "reduced utilization of existing fossil fuel infrastructures" and "cancellation of plans for new fossil fuel infrastructure".[5] This is because the estimated future emissions from existing fossil fuel infrastructure already exhaust the remaining carbon budget to limit warming to 1.5°C, with planned fossil fuel infrastructure set to exhaust the 2°C budget.[6] The International Energy Agency (IEA) thus stipulates that any new approval of oil and gas development after 2021 is inconsistent with limiting warming to 1.5°C.[7] Several States have banned exploration for oil and gas.[8]

4. *Third,* scientists argue that oil and gas in the Arctic, in particular, should remain undeveloped if the world is to limit warming to 1.5°C.[9] It is estimated that 17 GtCO2 worth of recoverable oil and gas remains on the Norwegian continental shelf, half of which is undiscovered, and approximately 65% of which is in the Arctic (Barents Sea).[10] It may take 17 years from opening and exploration until production. Hence, a short term need for gas in Europe due to current events in Ukraine, cannot be met by exploration for new oil and gas in the Arctic. The EU has stressed that gas is merely "a transitional energy source", and the "strategic investment in our independence" is renewables.[11]

5. To avoid duplication, ENNHRI reiterates the points made in our intervention in *Klimaseniorinnen.*[12] As substantiated there, States may be held accountable for contributing to climate harm because each State has a responsibility to cut emissions that will "slow the pace of global emissions increases, no matter what happens elsewhere".[13]

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[1] IPCC, *AR6 Climate Change 2021 The Physical Science Basis*, 09.08.2021, pp. 676, 687, 688.

[2] Stainforth et al., "More than half of all CO2 emissions since 1751 emitted in the last 30 years", Institute for European Environmental Policy, 29.04.2020.

[3] Norwegian Petroleum Directorate, "The Shelf in 2021" jan. 2022, p. 13; Andrew Robbie, "Norway's emissions exports", 01.09.2021, available at: https://folk.universitetetioslo.no/roberan/t/export_emissions.shtml.

[4] Royal Norwegian Ministry of Petroleum and Energy, "Meld. St. 36 (2012–2013) Nye muligheter for Nord-Norge – åpning av Barentshavet sørøst for petroleumsvirksomhet", pp. 16–17. Opening decisions of 1965, 1979, 1981, 1983, 1984, 1985, 1989, 1994, 2013 (Barents Sea South East).

[5] IPCC, *Climate change 2022: Mitigation of climate change,* 04.04.2022, p. 2-72.

[6] Ibid, p. TS-26 ("existing fossil fuel infrastructure alone are 660 (460-890) GtCO2 and from existing and currently planned infrastructure 850 (600-1100) GtCO2").

[7] IEA, *World Energy Outlook 2021*, 2021, p. 112; IEA, *Net Zero by 2050*, 2021, pp. 23, 99.

[8] Denmark, Costa Rica, France, Greenland, Ireland, Quebec (CA), Sweden and Wales have banned new oil and gas exploration. They are core members of the Beyond Oil & Gas Alliance (BOGA). New Zealand, California and Portugal are associate members of BOGA. New Zealand has ended new offshore oil exploration.

[9] Welsby et al., "Unextractable fossil fuels in a 1.5 °C world" *Nature* 597 (2021) pp. 230-231, 233.

[10] Norwegian Petroleum Directorate, "Petroleumsvirksomhet i nordområdene", 02.04.2019, p. 2, available at: https://www.npd.no/globalassets/1-npd/publikasjoner/rapporter/petroleumsvirksomhet-i-nordomradene.pdf.

[11] "Statement by President von der Leyen with Norwegian Prime Minister Støre", 23.02.2022.

[12] ENNHRI, *Written observations in application no. 53600/20 Verein Klimaseniorinnen Schweiz et autres c. la Suisse* p. 1, available at: https://ennhri.org/wp-content/uploads/2021/09/Third-Party-Intervention-Klimaseniorinnen-_-website.pdf

[13] *Massachusetts v. EPA*, 549 U.S. 497 (Supreme Court of the United States), 02.04.2007, p. 23. Also, *Neubauer and others v. Germany*, BvR 2656/18 (Federal Constitutional Court of Germany), 24.03.2021, paras. 149, 202; *Urgenda v. the Netherlands,* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands), 20.12.2019, paras. 5.7.1-5.7.8.

2. Locus standi under Article 34 (Question 1)

6. Article 34 does not allow *actio popularis*. This does not mean, however, that potential violations are excluded from judicial review simply because of their prevalence.[14] As seen by the Court's approach most recently in *Ukraine v. Russia (X),* and noted by the German Constitutional Court, the "mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights".[15] Hence, an individual who is *directly affected* by an alleged violation is a victim for the purposes of Article 34, even if countless others are similarly affected. One direct effect could for instance be climate anxiety in children and young people, which may trigger victim status under the Convention on the Right of the Child.[16] Moreover, the Court also exceptionally allows complaints over *potential violations* if there is "reasonable and convincing evidence of the probability of the occurrence of a violation". The certainty of latent future climate harm and it's "effectively unchallengeable" nature at a time when dangerous warming above 1.5°C may still be prevented, suggests that a non-formalistic interpretation of Article 34 may be appropriate to ensure effective rights in the context of climate change.[17]

7. An association will normally be granted victim status only if it is directly affected by the measure in question.[18] NGOs may be directly affected by a denial of the right to information and access to appropriate investigations and studies.[19] Moreover, if "individual members of the applicant association suffered from a vulnerability that prevented them from lodging an application", an association may exceptionally be granted *locus standi* in a case concerning personal rights under Articles 2, 3 and 8.[20] The exception applies to alleged violations of negative and positive obligations alike.[21]

8. Children and youth are vulnerable to climate change, not only by virtue of their dependency and age, but also because they in political and economic terms have "less possibility than adults to make a strong case for their interests"[22] within the "rapidly closing window of opportunity" remaining to secure "a livable future" for themselves.[23] Hence, to safeguard their rights before the finite carbon budget is exhausted, children and youth are particularly reliant on rights enforcement in courts. Yet, under Norwegian law, minors lack the capacity to bring a lawsuit in their own name, requiring representation by a guardian.[24] The risk of receiving abuse and harassment, particularly for minors, when fronting a high-profile climate case[25] may also make the task exceedingly difficult. Hence, the observation in *Gorraiz*[26] that "recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively" holds true in the context of climate change, perhaps particularly so when youth challenge complex decisions that may benefit vested interests.

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[14] See e.g. *Cordella et al. c. Italie* (54414/13 etc.) 24.09.2019, §§ 104, 100–109, 172, used as a basis for judgements regarding other applicants in the same exposed regions: *A. and Others v. Italy* (37277/16), *Perelli and Others v. Italy* (45242/17), *Ardimento and Others v. Italy* (4642/17), *Briganti and Others v. Italy* (48820/19) 05.05.2022.

[15] *Ukraine v. Russia (X)* (11055/22) on interim measures to prevent "massive human rights violations" committed "by the Russian troops", ECHR 068; *Big Brother Watch et al. v. the United Kingdom* [GC] (58170/13 etc.) 25.05.2021 §§ 467–472 with further references; *Neubauer* paras. 110, 113.

[16] *Sacchi et al. v. Germany et al.*, UN Doc. CRC/C/88/D/107/2019, 08.10.2021, para 9.13; Hickman et al., "Climate anxiety in children and young people and their beliefs about government responses to climate change: a global survey" *The Lancet Planetary Health* 5, nr. 12 (2021).

[17] See further in ENNHRI, *Written observations in application no. 53600/20,* p. 2-4.

[18] *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (37857/14) 07.12.2021, § 38.

[19] *Association BURESTOP 55 et autres c. France* (56176/18 etc.) 01.07.2021, §§ 54, 57, 88, 115; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* (39534/07) 28.11.2013, §§ 33; the Aarhus Convention, Article 9 § 3.

[20] *Yusufeli* § 42; *Association Innocence en Danger et Association Enfance et Partage c. France* (15343/15, 16806/15) 04.06.2020, §§ 119-132.

[21] *Association Innocence,* § 127 re §§ 157, 160.

[22] Committee on the Rights of the Child, *General comment No. 14,* UN Doc. CRC/C/GC/14, 2013, para. 37.

[23] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability,* 2022, p. SPM-35.

[24] The Norwegian Dispute Act of 2005, Section 2-2.

[25] *Beizaras and Levickas v. Lithuania* (41288/15) 14.01.2020, §§ 80–83; The Guardian, "Teen climate activist subjected to sexist and racist abuse amid federal court climate case", 12.04.2022, available at: https://www.theguardian.com/law/2022/apr/12/teen-climate-activist-subjected-to-sexist-and-racist-abuse-amid-federal-court-climate-case

[26] *Gorraiz Lizarraga and Others v. Spain* (62543/00) 27.04.2004, § 38.

3. Applicability of Articles 2 and 8 (Question 3c)

9. While the ECHR does not guarantee the right to a "clean and quiet environment", Articles 2 and 8 protect populations in areas exposed to harmful environmental risks. The Committee of Ministers (CoM) has noted that the Convention "indirectly contributes to the protection of the environment through existing rights and their interpretation in the evolving case law of the [ECtHR]".[27] Assuming that this case-law will "continue to evolve in this area",[28] the CoM has not adopted recommendations by PACE on a new green protocol. The non-adoption hardly reflects a *common State practice*, by which is meant acceptance by a "vast majority of States",[29] but rather a lack of unanimity.[30]

10. The primary positive obligation under Article 2, to adopt a framework providing effective deterrence against threats to the right to life, applies to any activity in which the right to life "may be at stake", and *a fortiori* in the context of inherently dangerous activities.[31] The secondary obligation, to take preventive operational measures, requires that the risk to life is "serious" or "real and immediate".[32] The term "immediate" is applied in a flexible manner, and cannot be interpreted as requiring the State to "to wait for disaster to strike before taking measures to deal with it."[33] Similarly, the ICJ has ruled that a risk can be "immediate" as soon as it is established and thereby certain, even though the risk will materialise in the long term.[34] The existing and latent risks of life-threatening climate change may thus trigger Article 2.

11. The Court generally states that environmental nuisance falls within the scope of Article 8 only where there has been "an actual interference with the applicant's private sphere" and that this interference must have attained "a level of severity".[35] However, the ECtHR has adopted another approach where an environmental hazard is a *potential risk* in the future. Here, Article 8 applies "where the dangerous effects of an activity to which the individuals concerned are likely to be exposed" establish a "sufficiently close link" with interests protected under Article 8.[36] Were it not so, the positive obligation to protect "would be set at naught."[37] This prospective test has since been reiterated, also in the absence of environmental impact assessments establishing the requisite link.[38] It would be the pertinent test in the case at hand.

12. Geographical vicinity between the applicants' home and the dangerous activity is not a decisive criterion for applying Article 8.[39] Such a rule would run counter to unrefuted scientific knowledge,[40] to which the Court generally relies,[41] since greenhouse gas (GHG) emissions and other pollutants do not necessarily lose their harming potential with distance. Hence, it is a pollutant's *capacity to harm* which determines an area of exposure.[42]

13. Reports by the IPCC reaffirm that "there is a near-linear relationship between cumulative anthropogenic CO2 emissions and the global warming they cause".[43] Several courts have thus established that there is a causal link between decisions

[27] CoM Doc. 12298, 19.06.2010, para. 9; CM/AS(2004)Rec1614-final, 23.01.2004, paras. 4, 5; CoM Doc. 8892 20.11.2000.
[28] CM/AS(2004)Rec1614-final para. 4, appendix I, para. 5.
[29] *Magyar Helsinki Bizottság v. Hungary (GC)* (1803/11) 08.11.2016, § 124.
[30] Statutes of the Council of Europe, Article 20.
[31] *Nicolae Virgiliu Tănase v. Romania* [GC] (41720/13) 25.06.2019, § 135 with further references.
[32] *Nicolae Virgiliu Tănase*, § 136; *Brincat et al. v. Malta* (60908/11) 24.07.2014, § 82; *Budayeva and Others v. Russia* (15339/02 etc.) 20.03.2008, § 146.
[33] *Kurt v. Austria* [GC] (62903/15) 15.06.2021, §§ 175–176; *A et al. v. the United Kingdom* [GC] (3455/05) 19.02.2009, § 177.
[34] ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25.09.1997, para. 54.
[35] See e.g. *Hatton et al. v. the United Kingdom* [GC] (36022/97) 08.07.2003, § 96 and *Jugheli et al. v. Georgia* (38342/05) 13.07.2017, §§ 62–64 with further references. The more restrictive applicability test formulated in *Ivan Atanasov v. Bulgaria* (12853/03) 02.12.2010, § 66 has not been cited by the Court.
[36] *Taşkin et al. v. Turkey* (46117/99) 10.11.2004, § 113.
[37] Ibid, § 113.
[38] *Tătar c. Roumanie* (67021/01) 17.01.2009; *Öçkan et al c. Turquie* (46771/99) 28.03.2006 § 38; *Lemke c. Turquie* (17381/02) 05.06.2007 § 36; *Brânduşe c. Roumanie* (6586/03) 07.04.2009 § 64; *Hardy and Maile v. the UK* (31965/07) 14.02.2012 § 189; *Dzemyuk v. Ukraine* (42488/02) 04.09.2014 § 81.
[39] See e.g. *Vilnes and others v. Norway* (52806/09, 22703/10) 05.12.2013, §§ 9, 14, 20, 233, 273.
[40] Katalin Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge University Press, 2020) p. 155.
[41] *Tătar* §§ 95, 100, 105–107, *Cordella,* §§ 106, 163–168, *Smaltini c. Italie* (43961/09) 24.03.2015, § 58 ; *Solyanik v. Russia* (47987/15) 10.05.2022 § 43.
[42] *Cordella*, § 172 ("pollution environnementale mettant en danger la santé […] de l'ensemble de la population résidant dans les zones à risque»); Sulyok, p. 163.
[43] IPCC, *AR6 Climate Change 2021 The Physical Science Basis*, 2021, p. SPM-28 (D.1.1).

facilitating fossil fuel extraction and their negative consequences for humans through climate change.[44] The Full Federal Court of Australia has for example held that the facilitation of 100 MtCO2 emissions through the combustion of exported coal constitutes a "reasonably foreseeable" risk of death or personal injury to Australian children alive today, since "even an infinitesimal increase in global average surface temperature" above 2°C could set off a catastrophic "tipping cascade" triggering a 4°C warmer "hothouse Earth".[45] The same line of reasoning may in principle apply to smaller fossil fuel projects. The IPCC notes that "every tonne of CO2 emissions adds to global warming", causing changes in extremes to become larger and increasing the risk of trigging tipping points.[46] For instance, the 8,6–27,9 MtCO2 emissions that could result from the combustion of 20–65 million barrels of oil discovered as a result of the 23rd licensing round in the Sputnik-field (Barents Sea South)[47] may in principle constitute a sufficient link with interests protected by Article 2 and 8, as it could add significantly to the overshoot of an already depleted 1,5°C carbon budget.

14. Articles 2 and 8 would not seize to apply retrospectively in cases where fossil fuel exploration did not in in fact lead to recoverable discoveries. Since it is for companies to decide whether to pursue a discovery or relinquish a license, it would leave the applicability of Articles 2 and 8 to their discretion. Such an interpretation would also deprive Articles 2 and 8 of their preventative scope, underlined by the Court's reliance on the principle of precaution in e.g. *Asselbourg* and *Tătar*.[48] It would allow States to use inherent uncertainties to the detriment of the environment, contrary to the principle of precaution, and contrary to how the same uncertainty is treated in the economic forecasts guiding investment decisions and tax deductions at the time. In particular, the "public's right to information" cannot be made to turn on *facta supervientes*. It is one of the "preventive measures" to be taken under Articles 2 and 8,[49] and would be illusory if postponed until a fossil fuel project is on the brink of approval. As discussed below in Section 5, the public's right to information to safeguard environmental interests must normally be exercised early in a process to be effective. Hence, the applicability must turn on an assessment of the *likely* risks *at the time* of a decision allowing exploration, with a view to what the ultimate impacts of extraction may be.[50]

15. Apex courts in the France, Germany, Ireland, the Netherlands, Norway, the US, Canada, Colombia, and Nepal all consider climate change a real and serious threat to human lives,[51] while UN Treaty Bodies warn that climate change poses one of the "most pressing and serious threats" to the right to life.[52] **ENNHRI therefore invites the Court to find that, in principle, exploration and facilitation of new fossil fuel infrastructure is likely to move the 1.5°C target out of reach, thereby exposing individuals to physical and psychological harm that is "likely", "real" and "immediate, and with a "sufficiently close link" to the interests protected by Articles 2 and 8.**

[44] *Gloucester Resources Ltd v. Minister for Planning* (2019) 234 LGERA 257, para. 525; *Gray v. Minister for Planning and others* [2006] 152 LGERA 258, paras. 93-100; *Minister for the Environment v. Sharma* [2022] FCAFC 35, paras. 293, 332, 403 and 423; see also *Shell* (appealed) paras. 4.4.37, 4.4.49.

[45] *Sharma,* paras. 293, 332, 403 and 423. While the Full Federal Court upheld the findings on the foreseeability of harm on appeal, it disagreed with the single judge of the Federal Court that tort law could be used as a basis for a duty of care towards children.

[46] IPCC, *AR6 Climate Change 2021 The Physical Science Basis,* 2021, pp. SPM-15 (B.2.2), 19–24, 35, 41 and 11-47.

[47] Wood Mackenzie, "Lift off as Sputnik partners hit oil", 20.08.2019, available at: https://www.woodmac.com/press-releases/sputnik/. The range of potential C02-emissions are converted according to the U.S. Environmental Protection Agency standard, using 0.43 metric tons CO2/barrel.

[48] *Asselbourg et al. v. Luxembourg (dec.)* (29121/95) 29.06.1999, p. 7; *Tătar,* §§ 109, 112.

[49] *Vilnes,* § 235 with reference to *Kolyadenko and Others v. Russia* (17423/05 etc.) 28.02.2012, § 159.

[50] *Vilnes,* § 235.

[51] *Commune de Grande-Synthe v. France,* no. 427301 (Le Council d'Etat) 19.11.2020, para. 3; *Notre Affaire à Tous et al. v. France*, no. 1904967, 1904968, 1904972, 1904976/4-1 (Administrative Court of Paris), 03.02.2021, paras. 16 ff.; *Neubauer* paras. 147–148; *Friends of the Irish Environment v. Ireland,* Appeal No: 205/19 (Supreme Court of Ireland) 31.07.2021, paras. 1, 3.6; *Urgenda* para. 5.6.2; *HR-2020-2472-P* (Supreme Court of Norway), 22.12.2020, paras. 45–55, 167; *Massachusetts* p. 23; *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Supreme Court of Canada), 25.03.2021, para. 171; *Future Generations v. Ministry of the Environment et al.*, STC4360-2018 (Supreme Court of Colombia), 05.04.2018, p. 34; *Shrestha v. Office of the Prime Minister et al.*, no. 10210, no. 074-WO-0283 (Supreme Court of Nepal), 25.12.2018, pp. 5, 11.

[52] HRC, *General Comment No. 36 on Article 6 Right to Life*, UN Doc. CCPR/C/GC/36, 2018, para. 62; Joint Statement by CESCR, CEDAW, CMW, CRC and CRPD, *Human Rights and Climate Change*, UN Doc. HRI/2019/1, 2020, para. 3; CRC, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, UN Doc. CRC/C/GC/15, 2013, para. 50.

4. Substantive obligations under Articles 2 and 8 (Question 4a and b)

16. In its assessment of the substantive merits of the national authorities' decision, the Court may rely on best available science[53] and specialised international norms, binding or non-binding.[54] ECtHR case-law shows that the common ground doctrine is applied to cases involving dynamic interpretations in general,[55] and environmental cases in particular.[56] The "common ground" reflected in the IPCC reports, representing best available science endorsed by States, and the 1992 UN Framework Convention on Climate Change (UNFCCC), including the 2015 Paris Agreement[57] and the subsequent Glasgow-pact, informs the obligations under the Convention. Apex courts in Germany, France and the Netherlands, with the apparent exception of the Supreme Court of Norway, have all relied on common ground to interpret State obligations to mitigate climate change in relation to the right to life and physical integrity.[58]

17. It is scientific common ground, as reflected in the IPCC's reports, that existing fossil fuel infrastructure more than exhausts the 1.5°C carbon budget, and that cancellation of new fossil fuel plans is among the measures necessary to keep both the 1.5°C and the well below 2°C target within reach.[59] It is also common ground that the 1.5°C target constitutes the critical threshold to prevent dangerous climate change for the right to life and physical integrity. In Article 2.1a of the Paris Agreement, States Parties agreed to "pursue efforts to limit" the global temperature increase to 1.5°C, with a maximum increase to "well below 2°C". New insights in the IPCC 2018 report, confirmed in the IPCC 2021 and 2022 reports, establish that limiting the temperature increase to 1.5°C instead of 2°C would substantially reduce the risks for humans.[60] These reports are shifting the political and legal consensus.[61] Hence, in the 2021 Glasgow Climate Pact, the Parties to the Paris Agreement resolved "to pursue efforts to limit the temperature increase to 1.5°C".[62] The 1.5°C target thus reflects updated scientific consensus to prevent "dangerous" climate change having "significant deleterious effects" on humankind, which is the objective of the UNFCCC and the Paris Agreement.

18. The margin of appreciation normally granted to States in environmental cases[63] might be narrower in climate change cases because the risk is existential, "man-made" and "susceptible to mitigation" [64] with irreversible intergenerational ramifications.[65] In fossil fuel cases, the premise that could justify deference – the latitude of available mitigation measures – does not necessarily hold. As is reflected in the best available science, the only way to stay within the Paris temperature goals is for States to phase out fossil fuels.[66] As of 2022, there are no "substitute[s] for deep emission reductions".[67] Reliance on *negative-emission technologies* such as carbon capture and storage (CCS) is a high-risk approach that may jeopardise the 1.5°C target as ""[i]mplementation of CCS currently faces technological, economic,

[53] *Brincat,* § 112; *Cossey v. the United Kingdom* (10843/84) 27.09.1990, § 40; *Fretté v. France* (36515/97) 26.02.2002, §42; S.*H. & Ors v. Austria* [GC] (57813/00) 03.11.2011, §§ 97-118.

[54] *Demir and Baykara v. Turkey [GC]* (34503/97) 12.11.2008, §§ 69–86 with further references. In an environmental context, see *Tătar,* § 112.

[55] *Rees v. the United Kingdom (Plenary),* (9532/81) 17.10.1986, para. 47; *Cossey v. the United Kingdom (Plenary)* (10843/84) 27.09.1990, para. 40.

[56] *Oluic v. Croatia* (61260/08) 20.05.2010, paras. 29-31, 60 ("level of noise exceeded the international standards as set by the World Health Organisation and most European countries"); *Brincat,* §§ 37-41, 112 ("did not take sufficient account of the state of scientific knowledge about the subject matter at the relevant time"), *Fägerskiöld v. Sweden* (37664/04) 26.02.2008 ("WHO's Guidelines for Community Noise")

[57] All State Parties to the ECHR are also parties to the UNFCCC, and all but Turkey have ratified the Paris Agreement.

[58] *Neubauer,* paras. 3–10, 158 ff., 209–210; *Grande-Synthe,* paras. 9, 12; *Urgenda*, paras. 7.2.1–7.2.11; conversely, HR-2020-2472-P, para. 174.

[59] IPCC, *Climate change 2022: Mitigation of climate change,* 04.04.2022, pp. 2-72, TS-26.

[60] Ibid; IPCC, *1.5°C Report,* 2018, pp. 177–181; IPCC, *AR6 Climate Change 2021 The Physical Science Basis*, 2021, pp. SPM-19 to SPM-24.

[61] Regulation (EU) 2021/1119, 09.07.2021 (European Climate Law), Preamble rec. 3; Climate Change Act (2020) [Denmark], art. 1.2; Prop. 182 L (2020–2021) [Norway], p. 3., *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937),* art. 15; *Shell,* ECLI:NL:RBDHA:2021:5339 (The Hague District Court), 26.05.2021 (appealed), paras. 2.3.3, 4.4.27; *Urgenda*, para. 4.3; *Friends of the Irish Environment*, para. 3.4.

[62] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), *Draft decision -/CMA.3 Glasgow Climate Pact,* 13.12.2021, paras. 20–22.

[63] *Hatton,* § 101 from 2004 describes the margin of appreciation as "wide", while *Cordella,* § 158 from 2019 describes it as narrower ("certaine").

[64] *Budayeva,* §§ 135 and 137. See also *Sharma*, para. 293 ("none of this is the fault of nature itself") and IPCC, *AR6 SPM 2021*, pp. 5 and 36.

[65] *ICJ, Whaling in the Antarctic (Australia. v. Japan), 06/02/2014 Rep. 226,* Separate Opinion by Judge Trindade, para. 47; Paris Agreement Preamble recital 11; *Neubauer,* paras. 146, 183, 192 and 205-206; *Sharma*, para. 293; *Leghari,* para. 13; *Shrestha*, p. 11; *Future Generations*, p. 34.

[66] IPCC, *Climate change 2022: Mitigation of climate change,* p. 2-72; The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), *Draft decision -/CMA.3 Glasgow Climate Pact,* 13.12.2021, para. 36 ("the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies"); the UN Secretary General has called investments in new fossil fuel infrastructure "moral and economic madness", SG/SM/21228, 04.05.2022.

[67] IPCC, *Climate change 2022: Mitigation of climate change,* p. SPM-37 (C.4.6), 6-118 and 12-38.

institutional, ecological-environmental and sociocultural barriers".[68] The precautionary principle implies that States cannot rely on negative-emission technologies, unproven at scale, to compensate for combustion emissions arising from fossil fuel extraction.[69] **Hence, the onus would be on States[70] to justify how new fossil fuel licensing is compatible with an obligation to protect life and physical integrity against warming above 1.5°C, or at least well below 2°C.**

5. Procedural obligations under Articles 2 and 8 (Question 3d)

19. The ECtHR has held that where a State "must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake."[71] The Court increasingly requires impact assessments to fulfil these requirements.[72] This is in line with the International Court of Justice's holding that environmental impact assessments (EIA) of transboundary harm are required "under general international law", and the Inter-American Court of Human Rights' conclusion that an EIA "must be carried out" if an activity involves a "risk of significant harm" to the right to life and physical integrity.[73]

20. *In 3d, the Court asks to what degree – factually and legally – environmental consequences in continuation of the licenses granted may realistically be considered at any later stages of the administrative process.*

21. As a matter of law, Section 4-2 of the Petroleum Act, read in the light of Section 112 (2) of the Norwegian Constitution, requires exported combustion emissions to be included EIAs prior to the approval of plans for development and operation of petroleum deposits (PDOs). The Supreme Court of Norway assumes that the climate effects of combustion emissions "will be subject to an environmental impact assessment in connection with a possible PDO application".[74] Moreover, EIAs of the environmental effects of combustion emissions are also required by Directive 2011/92/EU, as amended by Directive 2014/52/EU (EIA directive).[75]

22. As a matter of fact, the climate effects of combustion emissions are not assessed as part of an EIA prior to PDO approvals. Even though the Ministry argued in the Supreme Court that it would be preferable to conduct an EIA of combustion emissions at the PDO stage as opposed to the opening stage, combustion emissions have not been included in EIAs in a manner consistent with the Supreme Court's interpretations. As pointed out by the Norwegian National Human Rights Institution (NHRI), the Ministry has approved PDOs without a prior and publicly available EIA of combustion emissions also after the Supreme Court's judgement on 22 December 2020.[76] It was only on 8 April 2022,

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[68] Ibid; IPCC, *1.5°C Report,* 2018, pp. 96, 121; IPCC, *AR6 FAQ* 2021 FAQ 5.3; DNV, *Energy Transition Outlook 2021*, p. 4.

[69] *Neubauer*, para. 33 and *Urgenda*, para. 7.2.5. See also, *mutatis mutandis*, *Sharma,* para. 256.

[70] E.g. *Öneryildiz,* § 89; *Budayeva*, § 132; *Cordella,* §§ 161, 173; *Dubetska et al. v. Ukraine* (30499/03) 12.02.2011, §§ 145, 155. Similarly, *Urgenda*, para. 5.3.3.

[71] See e.g. *Taşkin,* § 119 and *Hatton [GC],* § 128 with further references.

[72] *Tătar,* § 112, *Giacomelli,* §§ 94-95; Steering Committee for Human Rights, *Manual on human rights and the environment (3rd edition),* 01.02.2022, p. 81.

[73] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 20.04.2010, para 204; *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), 16.12.2015, para 104; *Advisory Opinion (OC-23/17)*, 15.11.2017, para. 160.

[74] *HR-2020-2472-P*, para. 241, see also paras. 218, 241, 216, 218. Please be aware of a previous translation error of para. 241 which may have found its way to *R (Finch) v. Surrey County Council et al*, Court of Appeal, Case No: C1/2021/0261, 17.02.2022, para. 74 (appealed to the UK Supreme Court).

[75] EIA Directive art. 3.1, re Annex IV para 5 requires IEAs of "indirect" and "cumulative" effects of a project, for example trough "long-term" and "secondary" "greenhouse gas emissions"). The EIA amendment in 2014 rec. nr. 7, 13, 15, 18, 23 and 25 illustrate the need to assess GHG emissions. The European Court of Justice (ECJ) has held in C-2/07 *Paul Abraham and Others v Region of Wallonia and Others*, para. 43–46, see also the *Opinion of the Advocate General Kokott*, 29.11.2007, paras. 31-36, that it would be too simplistic to assess only the impacts from the project itself, and not "the environmental impact liable to result from the use and exploitation of the end product". In the same direction, the minority of the Supreme Court of Norway, paras. 259-267, held that the "global climate impact of the combustion of Norwegian petroleum is undoubtedly comprised by the term 'environmental effects' in Article 5 of the SEA Directive", which mirrors the formulations in the EIA Directive. The majority found it unnecessary to conclude on this point, para. 211.

[76] Letter from NIM to the Oil and Energy Ministry of March 18, 2022 (Section 2.3), available at: https://www.nhri.no/wp-content/uploads/2022/03/Utredning-om-Grunnloven-%C2%A7-112-og-plan-for-utbygging-og-drift-av-petroleumsforekomster.pdf. On April 21, 2022, the Ministry acknowledged before Parliament that it had approved PDOs until February 2022 without any assessments of combustion emissions: https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=88985. See also letter to the Parliamentary Standing Committee on Energy and the Environment, 27 April 2022, available at: https://www.nhri.no/2022/skriftlig-innspill-til-dokument-8236-s-2021-2022/.

after the Norwegian NHRI warned that this practice violated the Constitution, that the Ministry declared that it would henceforth "follow-up the Supreme Court judgement".[77] However, the Ministry has so far failed to withdraw PDO approvals that were granted without an EIA of combustion emissions after the Supreme Court's decision, in effect leaving the EIA requirements without legal consequences.[78] While little information has been given about future assessments, it seems that they will not be required as part of the publicly available EIAs prior to any decision-making. Rather, they will be communicated in the PDO decisions themselves.[79] This fails to comply with the above-mentioned domestic and EEA environmental regulations, which require publicly available environmental impact assessments prior to – not as part of – the final decision.[80] It may be recalled that a failure to comply with domestic environmental regulations, or an undue delay of the obligation to carry out EIAs, deprives procedural guarantees of any useful effects.[81]

23. *The Court also asks whether the scope, depth, quality and efficiency of any such subsequent assessment will render unnecessary under the Convention a prior assessment of the environmental consequences of future extraction*.

24. While it is not required under the Convention that "comprehensive and measurable data" are "available in relation to each and every aspect of the matter to be decided", the authorities must carry out "sufficient studies" which "allow them to predict and evaluate in advance the effects" of "activities which might damage the environment and infringe individuals' rights".[82] This includes "potential risks" in the long term.[83] It is internationally endorsed in protocols and guidelines that companies are accountable for combustions emissions.[84] In addition, domestic courts in Europe, the United States and Australia increasingly rule that these emissions are part of the legal responsibility of a State or a company.[85] Future emissions from combustion of exported oil and gas would thus be "effects" of a decision opening an area for exploration and extraction.

25. The decision-making process shall ensure public participation through "access to the relevant information" enabling citizens to i) assess "the danger to which they are exposed", ii) "contribute to the decision-making" and iii) challenge "any decision, act or omission".[86] The right to information is "rendered meaningless if the information provided by the competent authorities was insincere, inaccurate or even insufficient".[87] In cases concerning major environmental risks, the public must have access to a remedy which can control the content and quality of the information.[88]

26. The importance of early and publicly available environmental impact assessments when all options are open is reflected in **international law**, especially the Strategic Environmental Assessment Protocol to the Espoo Convention on

[77] Royal Norwegian Ministry of Petroleum and Energy, "Tilleggsmelding til Meld. St. 11 (2021-2022)", 08.04.2022, section 3.5.1, avaliable at: https://www.regjeringen.no/contentassets/e38e9f5393fc4f109b6394f61bd750f8/no/pdfs/stm202120220011000dddpdfs.pdf

[78] See also the questions from the Efta Surveillance Authority (ESA) to Norwegian authorities in ESA, *Request for Information concerning the requirements to carry out environmental assessments and environmental impact assessments under the SEA and EIA Directives*, 04.11.2021, p. 4.

[79] "Tilleggsmelding til Meld. St. 11 (2021-2022)" section 3.5.1.

[80] Petroleumsforskriften § 22(3), § 22a(4); EIA Directive, Article 6.4: the public concerned shall "be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

[81] *Taşkin*, § 124-125, *Dubetska*, § 154, *Fadeyeva v. Russia* (55723/00) 09.06.2005, § 95; *Giacomelli v. Italy*, §§ 94-95.

[82] *Taşkin,* § 119; *Dubetska,* § 143 with further references.

[83] *Hardy and Maile,* §§. 191-192; *Taskin,* § 113, cf. 107 ("20-50 years"); see also *Burestop,* § 109, regarding a hypothetical major environmental risk "sur plusieurs générations".

[84] *Shell* (appealed), para 4.4.11–4.4.25, especially 4.4.18.

[85] *HR-2020-2472-P,* paras. 149, 155, 167 and 260; *Shell,* para. 4.4.19, 4.4.25; *Ctr. for Biological Diversity v. Bernhardt (Liberty)*, 982 F.3d 723 (9th Cir. 2020), p. 19–23; *Sovereign Inupiat for a Living Artic et al v. Bureau of Land Management et al. (Willow)*, p. 28–31., District Court of Alaska; *Friends of the Earth et al. v. Debra A. Haaland et al. Civil Action,* No.: 21-2317 (RC) (Friends of the Earth), District Court of Columbia, 27.01.2022, p. 23– 40, *Gloucester,* para 513, with reference to e.g. *Gray,* para 126 and a tenfold of other cases in paras. 499–512.

[86] *Guerra et al. v. Italy* [GC] (14967/89) 19.02.1998, § 60; *Taşkın,* § 119; *Tătar,* § 88; *Vilnes,* § 235; *Dubetska,* § 143.

[87] *Association BURESTOP* §§ 108, 109.

[88] *Association BURESTOP* §§ 108, 109.

EIAs in a Transboundary Context[89] and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[90]

27. Similarly, in **European law**, environmental impact assessments, regulated by the EU Directive 2001/42/EC (SEA directive) and the EIA Directive, are "one of the fundamental mechanisms to protect the environment".[91] The objective of the SEA Directive, which regulates the opening stage of petroleum exploration, is to provide for "a high level of protection for the environment" by subjecting plans which are "likely to have significant effects on the environment" to an environmental assessment "during their preparation and before their adoption".[92] Hence, SEAs must be made available for public comment and scrutiny prior to a decision.[93] As with EIAs, SEAs must "identify, describe and assess" the likely "indirect significant effects" of a plan on the climate.[94] This includes future combustion emissions assessed against international "environmental protection objectives", such as the temperature targets of the Paris Agreement.[95] The CJEU has held that an EIA under the EIA Directive "cannot lead to an exemption" from and "cannot be used to circumvent the obligation" to carry out an SEA under the SEA Directive".[96] Therefore, the assessment of future combustion emissions cannot be deferred to an EIA at the PDO stage alone. In view of the Court's reliance on EU law in other cases,[97] and EU environmental directives in particular,[98] the SEA Directive might inform the procedural obligations at stake.[99]

28. In **comparative domestic law**, SEAs are also viewed as independent to EIAs, which later *complement* rather than replace the strategic assessment. The UN Environment Programme (UNEP), in an analysis of SEAs and EIAs worldwide, observes that EIAs are undertaken too late to influence public policy decisions, with several limitations; they i) happen after a planning decision has been made, and are thus "unlikely to change the course of the investments planned", ii) are "financed by the project proponent" and thus often "steered in favour of the project", and iii) fail to "adequately consider the cumulative impacts".[100] A SEA, on the other hand, may be conducted at an earlier stage when "major alternatives are still open and there is far greater scope than at the project level to integrate environmental considerations into development goals and objectives", providing an "early warning of large-scale and cumulative effects".[101] Courts in Argentina and the United States have thus required rigorous SEAs at the exploration stage of oil and gas licensing.[102] The D.C. Federal Court, for instance, vacated a lease sale allowing exploration because the climate effects of potential combustion emissions had not been sufficiently assessed.[103] The court noted that the PDO stage was 'ill-suited' for considering the collective impacts of all leases. Since there was no guarantee that the impacts would be assessed at the PDO stage, postponement amounted to an "impermissible 'just trust us' from the agency" (p. 19).

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[89] *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context,* art. 1 and 8. Kiev, 21.05.2003, Doc. ECE/MP.EIA/2003/2. 33 European States are Parties to the Protocol, including Norway.

[90] The Aarhus Convention art. 5, 6.4 and 6.6 *b*. The Convention is relevant to the interpretation of the Convention, see *Demir and Baykara,* § 83; *Taskin,* §§ 99, 119.

[91] The European Court of Justice (ECJ) in Case C-261/18, *European Commission v Ireland*, 12.11.2019, para 116.

[92] SEA Directive art. 1, art. 4.1; *A and Others*, C-24/19, ECLI:EU:C:2020:503, para. 46.

[93] SEA Directive art. 4.1, 6.1.

[94] HR-2020-2472-P, para. 263 (minority).

[95] SEA Directive 6.1 re Annex I e); EIA Directive art. 5.1b), re Annex IV para 5.1e), 5.2. See also European Commission, *Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU)*, 2017, p. 41.

[96] *Verdi Ambiente e Società (VAS)–Aps Onlus' and Others*, C-305/18, EU:C:2019:384, para 56; the SEA Directive, art. 11.1. Further to the majority's ruling in *HR-2020-2472-P*, ESA has asked whether Norwegian authorities considers "the requirements under the SEA Directive […] to be effectively the same as" the ones "under the EIA Directive", thereby replacing instead of complementing each other, see also note 78.

[97] See e.g. *N.D. and N.T. v. Spain* [GC], (8675/15, 8697/15) 13.02.20, §§ 177, 182.

[98] *Tătar,* § 69 g), *Di Sarno et al. v. Italy,* § 111 (Directive 2006/12,waste); *Hardy and Maile,* §§ 131, 191, 248 (the EIA Directive); *Kapa and others v. Poland,* §§ 107-117 (Directive 2002/49/EC, noise and Directive 2008/50/EC, air pollution); *Cordella,* §§ 83–86, 168 (Directive 2010/75/EU, pollution prevention).

[99] Absent a conclusive interpretation by the Court to the contrary (*Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway* (45487/17) 10.06.2021, §§ 107, 108), ENNHRI assumes that the Bosphorus presumption applies to EEA law (*Avotiņš v. Latvia* [GC] (17502/07) 23.06.2016, §§ 101–127).

[100] UNEP, *Assessing Environmental Impacts – A Global Review of Legislation*, 2018, p. 4.

[101] UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach,* 2004, pp. 86–87; *Verdi,* paras. 57 and 58 with further references.

[102] *Greenpeace Argentina et. al., v. Argentina et. al.* (58/2022), 11.02.2022, pp. 19–20; *Friends of the Earth et al.*

[103] *Friends of the Earth et al.*, pp. 18–19.

29. Similarly, in **Norway**, there is no guarantee that the cumulative impacts of combustion will be considered at a later stage. As explained above, the climate effects of combustion emissions are not included in publicly available EIAs at the PDO stage. Moreover, the Ministry may waive the PDO and EIA requirements for minor projects or new fields in connection with existing infrastructure.[104] Since December 2020, the Ministry has absolved as many projects from the PDO requirement as it has approved.[105] As a result, the climate effects may be spread across several minor or adjacent projects thereby evading later assessment. And even if rigorous EIAs of the climate effects of combustion emissions were to be conducted at the PDO stage, it would still be too late to fundamentally reassess a given project.[106] To illustrate this point, only two PDO application has ever been denied by the Ministry.[107]

30. The European consensus on SEAs suggests that the *margin of appreciation* for assessing combustion emissions should be narrow. Moreover, as all relevant issues arising under Article 8 will not have been included in a decision-making process excluding the climate effects of combustion, deference should not readily be accorded.[108] Assessments of the climate effects should be rigorous because decisions facilitating the ultimate extraction and combustion of fossil fuels significantly contribute to climate change and the risk of tipping points.[109] They should not be seen in a vacuum, but held up against international environmental protection objectives, such as the objective to protect from harm by limiting warming to the critical temperature threshold of 1.5°C. In light of the precautionary principle, uncertainty should favour the environment. Arguably, it would not be appropriate to base the assessment on speculations of *market substitution*.[110] Just as a State cannot "evade its responsibility" for contributing to climate harm by pointing to emissions in other States, it should not be permitted to evade the responsibility for extracted emissions under its "control and influence" by pointing to the hypothetical emissions of others.[111] Indeed, the "environmental impact remains unacceptable regardless of where it is caused" and irrespective of any "hypothetical but uncertain alternative development" that *might* cause the same unacceptable environmental impact."[112] To the extent that market substitution is assessed, it must be based on publicly available data and methodology, considering that speculations of this kind have been invalidated in courts for being "arbitrary and capricious", invalid or "flawed".[113]

31. **Against this background, and considering that the right to information is a prerequisite for democracy, ENNHRI invites the Court to hold that Articles 2 and 8 obligate States to assess whether the combustion emissions that are likely to arise from the opening of oil and gas fields would be compatible with limiting warming to 1.5°C, or at the very least well below 2°C.**

6. Applicability and obligations of Article 14 (Question 4d)

32. The ancillary protection of Article 14 extends to indirect discrimination of a general policy, measure or de facto situation that has "disproportionately prejudicial effects on a particular group [...] even where it is not specifically aimed

[104] The Petroleum Act, Section 4-2 (6) and the petroleum regulations, Sections 22a and 22b, the EIA Directive, art. 4.1, Annex I, no. 14.
[105] VG, «MDG: Krever innsyn i regjeringens oljetillatelser», 07.05.2022, avaliable at: https://www.vg.no/nyheter/innenriks/i/qW4Qy0/mdg-krever-innsyn-i-regjeringens-oljetillatelser.
[106] Hans Christian Bugge, "Norsk miljølovgivning og dens anvendelse på klima" in *Klimarett* (Oslo: Universitetsforlaget, 2021) p. 388; Inge Lorange Backer, "Plenumsdommen i klimasøksmålet" *Lov og Rett* 60, nr.3 (2021) p. 155; Henrik Bjørnebye, "Spørsmålet om mangelfull utredning av klimavirkninger i HR-2020-2472-P" *Lov og Rett* 60, nr. 3 (2021) pp. 174, 176, 177.
[107] Ulf Hammer mfl., *Petroleumsloven. Lovkommentar, § 4-2. Plan for utbygging og drift av petroleumsforekomster,* Juridika, 10.05.2022.
[108] Hatton § 128; *Animal Defenders International v. the United Kingdom* [GC] (48876/08) 22.04.2013, para. 108.
[109] IPCC, *AR6 Climate Change 2021 The Physical Science Basis,* 2021, pp. SPM-15 (B.2.2), SPM-19–24, 11-47.
[110] The claim that "reducing production in one location will simply lead to an equal amount being produced elsewhere", UNEP et al., *The Production Gap Report,* 2019, p. 50, box 6.1.
[111] *Neubauer,* paras. 149, 202; *Urgenda,* paras. 5.7.1, 5.7.7-5.7.8; *Shell,* para. 4.4.49 (appealed).
[112] *Gloucester,* para. 525.
[113] *Liberty,* pp. 18–23, *Willow,* pp. 28–31, *Friends of the Earth*, p. 23–40, *Shell,* para. 4.4.50 (appealed), *Gloucester,* para. 538. UNEP has noted that perfect substitution of oil and gas "defies basic economics of supply and demand", *Production Gap Report* 2019, p. 50; see also *Welsby* et al., *UK oil and gas policy in a 1.5°C world,* 2021, p. 4.

at that group and there is no discriminatory intent".[114] To be discriminatory, the treatment must be based on a personal and innate characteristic of the person or group, which includes age and association with a minority. Indirect discrimination may arise where a State has failed to take adequate measures to protect vulnerable minorities from the disproportionate effects of environmental harm.[115] In cases where statistics establish that a measure or situation disproportionately affects a particular group, a prima facie presumption of indirect discrimination may arise and it is for the respondent State to prove otherwise.[116]

33. Children and young people are already disproportionality affected by the impacts of climate change on account of their developmental vulnerabilities and will be increasingly impacted by climate change throughout their lives.[117] For example, children who were under ten in 2020 will "experience a four-fold increase in extreme events under 1.5°C, and a five-fold increase under 3°C warming", which "would not be experienced by a person aged 55 in the year 2020 in their remaining lifetime under any warming scenario".[118] Allowing present generations to "consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort" would also leave "subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom" in the future.[119] The disparate impacts of climate change itself and the uneven distribution of the reduction effort may be seen as indirect discrimination based on age, generation or birth-cohort. This interpretation would be consistent with the principle of intergenerational equity,[120] the ECJ's prohibition of discrimination between generations or birth-cohorts,[121] as well as the recommendations of UN Treaty Bodies.[122]

34. According to the IPCC, climate change impacts in the Arctic are already occurring "at a magnitude and pace unprecedented in recent history".[123] Arctic indigenous peoples, including the Sami people, are disproportionally impacted by the effects of climate change due to their high level of dependence on climate-sensitive ecosystems for their health and wellbeing, food security, transmission of cultural knowledge and traditional livelihoods, which for the Sami people include fishing and reindeer herding.[124] Such harmful effects are likely to worsen in the future if emissions are not drastically reduced, with the IPCC warning that temperatures in the Arctic region are projected to increase by two to four times the global average by the end of the century, triggering changes that would be "potentially irreversible for hundreds of years, if not millennia".[125] **Hence, a failure to assess the long-term disproportionate effects on vulnerable groups such as children and indigenous peoples of a decision which may ultimately lead to extraction of fossil fuels, could amount to indirect discrimination.**

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[114] *S.A.S v. France* [GC] (43835/11) 01.07.2014, § 161 with further references; *Zarb Adami v. Malta* (17209/02) 20.06.2006, § 76 with further references.

[115] *Mossville Environmental Action Now v. United States*, Inter-Am. Comm'n H.R., Report No. 43/10, 17.03.2010 (admissibility decision), para. 42; UN Special Rapporteur on Human Rights and the Environment, *Framework Principles on Human Rights and the Environment*, Principles 3 and 14; *Report on the Relationship Between Children's Rights and Environmental Protection,* para 64, 24.01.2018, UN Docs. A/HRC/37/58 and 59.

[116] *Di Trizio v. Switzerland* (7186/09) 02.02.2016, § 86; *Talpis v. Italy* (41237/14) 02.03.2017, § 145 with further references.

[117] See for example, IPCC, *AR5 Climate Change: Impacts, Adaptation, and Vulnerability*, 2014, pp. 717-718; Lawrence R. Stanberry et al.,"Prioritizing the needs of children in a changing climate" *PLOS Medicine* 15, nr. 7 (2018); Nick Watts et al., "The 2020 report of The Lancet Countdown on health and climate change: responding to converging crises" *The Lancet* 397, nr. 10269 (2021).

[118] IPCC, *AR6: Overarching Frequently Asked Questions and Answers*, 28.02.2022, p. 5 (question 3).

[119] *Neubauer,* para 192.

[120] Recognised in e.g. Statute of the Council of Europe, Preamble rec. 1 ("preservation of human society and civilisation"); UN Charter, Preamble rec. 1 (""save succeeding generations"); ICJ, *Whaling in the Antarctic (Australia. v. Japan), 06/02/2014 Rep. 226,* Separate Opinion by Judge Trindade, para. 47; Paris Agreement, Preamble rec. 11; Stockholm Declaration, Principle 1; UNFCCC, art. 3; *Neubauer,* paras. 146, 183, 192 and 205; *Sharma*, para. 293; *Leghari*, para. 13; *Shrestha*, p. 11; *Future Generations*, p. 34.

[121] See for example, *Petersen* (C-341/08) § 65; *Georgiev* (C-240/09); *Commission v. Hungary* (C-286/12).

[122] Joint Statement by CESCR, CEDAW, CMW, CRC and CRPD, *Human Rights and Climate Change*, UN Doc. HRI/2019/1, 16.09.2019, para. 9; Human Rights Committee, *General Comment No. 36*, para. 62.

[123] IPCC, *Climate Change 2022: Impacts, Adaptation and* Vulnerability, p. CCP6-2 and CCP6-7.

[124] Ibid pp. 4-87, 4-56, 13-61, CCP6-2, CCP6-3, CCP6-21, SPM-7 and SPM-10; OHCHR, *Report of the Special Rapporteur on the rights of indigenous peoples,* UN Doc. A/HRC,36/46, 2017, p. 3; Zentner et al., "Ignoring Indigenous peoples - climate change, oil development, and Indigenous rights clash in the Arctic National Wildlife Refuge" *Climactic Change* 155 (2019) pp. 533-544; Jaakkola et al., "Holistic Effects of Climate Change on the Culture, Well Being, and Health of the Saami, the Only Indigenous People in the European Union" in *Current Environmental Health Reports* 5, nr. 4 (2018).

[125] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability,* pp. 13-3 and CCP6-2; IPCC, 2022, *AR6 WGII, CCP6 Supplementary Material*, Table SMCCP6-2; IPCC, 2021, AR6 *WGI The Physical Science Basis*, p. 4-55.