The Environment vs. the State

A Critical Criminological Analysis of the use of law in combating Climate Change in Norway and The Netherlands

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Abstract

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The climate crisis is one of the most crucial issues of today. National and international agreements and legislation have, for decades, emphasized the importance of national and multilateral cooperation in tackling the climate crisis. Subsequently, we are witnessing the increasing use of Courts in the task of challenging and combating climate change and the insufficient measures taken by States to do their part. In 2013, the Dutch State was sued by the Urgenda Foundation for their lack of adjustments to combat climate change, resulting in the first Supreme Court decision that ordered a State to reduce greenhouse gas emissions. Three years later, in 2016, Greenpeace and Nature & Youth Norway sued the Norwegian Ministry of Petroleum and Energy for issuing further petroleum production licenses in the Barents Sea. This became a high-profile lawsuit that eventually ended in a Supreme Court decision in favor of the Norwegian State, and the resulting view of a constitution unable to protect its citizens from the environmental consequences of Norwegian oil and gas production.

Through a comparative case analysis, this project examines the legal and extralegal similarities and differences surrounding, and potentially, affecting the Dutch and Norwegian climate change cases, which ultimately led to the contrasting Supreme Court decisions. Further, it contributes to the growing literature devoted to analyzing how to succeed in climate change litigation. With a theoretical framework consisting of green, critical criminology, eco-philosophy and, to some degree, social movement theory, this project explores climate change as a form of state-corporate crime, in which interests of the State and/or corporations are prioritized above the protection of citizens at risk of experiencing the environmental consequences of their actions.

The findings suggest that the cause of action and the interpretation of the legal basis were the main differences that influenced the outcomes of the cases. Similarly, the different interpretations and applications of the Precautionary Principle, which were dependent on the cause of action and legal interpretations, were influential in the final decisions as well. Both cases also involved questions of judicial review legitimacy, and the role of the Courts in determining climate change policies, in which it was found that there seems to be high levels of trust between the Norwegian State and Court, thus resulting in a higher threshold for the Norwegian Court to decide against the State. The findings also suggest that the cross-national responsibilities of States, in terms of protecting non-citizens from their greenhouse gas emissions, is not a fruitful basis for litigation as States are not bound to protect or provide rights for non-citizens. However, the effects of a successful climate change case will nonetheless have positive consequences for others than merely the litigants in a case.

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My time at the University of Oslo is slowly coming to an end. Although I am excited to see the final product of this project, I know that finishing this project also means closing a chapter of my life. I leave the University of Oslo with gratitude, great memories, new friendships and new knowledge, to which I owe a few ‘thank yous’ for.

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Ingeborg

Contents

1. **Introduction:** Climate Change and legal solutions

Climate change and global warming is the most pressing issue in the world today (White, 2011). It affects everyone and everything, and is potentially life-threatening for humanity, non-human species and entire ecosystems. Climate change has increasingly taken presence in politics, academia and in everyday life in the past decades, and is now a commonly discussed topic around the world. Different views on its causes, and solutions for combating the crisis have been contrasting. This has caused debates both nationally and internationally for decades. Today, there is large consensus that climate change is real, that humans play a distinct role in causing it, and that drastic change is needed to halt global warming and limit the dangerous consequences threatening the world. Environmental harm and environmental destruction are undoubtedly connected to States, corporations and powerful actors in society, and the consequences are often global in nature (White, 2017). This requires global, cooperative solutions by those same powerful actors. The development of International Environmental Law began the legal process of tackling the issues of environmental harm and crime and serves as a framework for multilateral cooperation. Many States have also incorporated environmental protection into their national legislation. The increasing incorporation of the environment into national and international law has resulted in the subsequent use of strategic litigation to hold States and corporations accountable for their contributions to climate change.

In October of 2016, *Greenpeace Nordic* and *Nature & Youth* Norway sued the Norwegian State's Ministry of Petroleum and Energy for issuing ten new petroleum production licenses in the Barents Sea. The plaintiffs contended that the licenses breached the State's responsibility to reduce CO_2 emissions as committed in the Paris Agreement, and further breached the right to a healthy environment granted in the Norwegian Constitution §112, as well as Articles 2 and 8 of the European Convention on Human Rights (ECHR) (HR-2020-2472-P, 2020). The organizations argued that there were processing errors related to the climate impact assessments conducted prior to issuing the licenses, claiming that the State had insufficiently determined the potential environmental consequences of the licenses. The State argued that their assessments were sufficient, and that there were no direct links between the licenses

and potential environmental harms (HR-2020-2472-P, 2020). The Oslo District Court decided in favor of the State in January of 2018, before the case proceeded in the Court of Appeal in November of 2019, and further in the Supreme Court of Norway in a Plenary Session in November of 2020 (Klimasøksmål Arktis, n.d.). On December 22nd of 2020, the Supreme Court upheld the decision with a majority agreement (eleven to four) (HR-2020-2472-P, 2020). The environmental rights paragraph of the Norwegian Constitution was not able to protect citizens from the potential consequences of climate change caused by the Norwegian State's oil industry. Nor was the ECHR interpreted in such a way that it provided protection from environmental damage.

There is growing literature devoted to the analysis of climate change litigation in attempts to create a "recipe for success" (Peel & Markey-Towler, 2021, p. 1484). The Urgenda Foundation case against the Dutch State has been studied as a model example of how to successfully bring climate change to Court. The case signifies that the European Convention on Human Rights *does* involve rights provisions connected to the environment and that the Dutch State is responsible for protecting its citizens from the consequences of climate change, based on their international commitments to reduce national greenhouse gas (GHG) emissions (Nollkaemper & Burgers, 2020). The Dutch case began in 2013 when Urgenda brought the State to the District Court in The Hague. The lawsuit was based on the Intergovernmental Panel on Climate Change's conclusion in 2007, that global warming was largely the result of human activity, and that consequences were now unavoidable (Minnesma, 2012). The Dutch State's policy to reduce emission targets from 30% to 20% thus sparked the lawsuit and the claims that the Dutch State was not doing enough to combat the crisis. The District Court ordered the Dutch State to lower emissions in June of 2015. The case was treated by the Court of Appeal and further by the Supreme Court, which finally upheld the decision and ordered the State to reduce emissions by 25% (compared to 1990) by 2020 (ECLI:NL:HR:2019:2007, 2019).

This project is thus a contribution to the growing literature on climate change litigation and the analysis of what constitutes a successful climate change case. It represents a criminological, comparative study of the ways in which States may attempt to disclaim responsibility for their contributions to climate change and the discourses that allow

them to get away with harmful acts. The research question developed for this project thus asks

> *What legal and extralegal factors may have influenced the decisions and outcomes of the Norwegian and Dutch climate change cases?*

Subsequently, this involves a consideration of the similarities and differences between the cases and the socio-political circumstances surrounding each case. This will provide insight into the discourses that may have influenced different interpretations of legislation, concepts, and circumstances, and subsequently the influences affecting the contrasting decisions made by the Supreme Courts. Further, this project offers lessons to be drawn from the two cases in terms of inspiration for future climate change litigation, and what constitutes a successful climate change case.

1.1 Overview of the chapters

This project is situated within *critical criminology* which emphasizes the social constructions of crime and harm, and questions the criminogenic power dynamics and systems in society (DeKeseredy, 2015). The project is further situated within *state-corporate crime* which studies the crimes of the powerful, and the processes that allow those in power to get away with harmful and, at times, criminal actions (Tombs & Whyte, 2003). *Green criminology* involves the criminological study of environmental harm and crime. It is inherently critical as it extends definitions of crime, harm and victimization to include the consequences for the environment and the non-human species, as well as its focus on crimes of the powerful (Sollund, 2021). *Eco-philosophy* influences how criminologists (and others) might study environmental crime and harm; it guides the investigator's interpretation of harm and crime, and who or what they view as victims (White & Heckenberg, 2014). *The Precautionary Principle* is a prominent feature of contemporary environmental policy and requires that where there is a known threat, measures should be taken to prevent the threat from materializing, despite scientific uncertainty (Steel, 2015). Lastly, this project encompasses cases that are brought forward by the Environmental Movement, which places this project within the realms of *Social Movement Theory* and *Strategic litigation*. These theoretical

frameworks, as well as some of the background information, which form the basis for the subsequent analysis, are presented in chapter two.

Chapter three consists of the design and methodology for this project and explains the steps taken and choices made throughout the process. It describes the qualitative, comparative case-study method, document analysis, the data material used for this project, and the analysis strategy and technique. This chapter also reflects on the ethical considerations relating to this project.

In chapter four the cases are introduced in more detail, as well as the socio-political contexts in which they happened. This chapter is first divided into sub-chapters dedicated to *Climate Change Litigation* and *International Environmental Law*. These sub-chapters place the cases within an international society clearly concerned for the environment and devoted to enforcing mechanisms for combating the climate crisis. Further this chapter is focused on how Norway and the Netherlands are situated in an international context in terms of environmental policy, their contributions to environmental legislation, green transformation and their abilities to adjust to climate change. Another focus in this chapter is the discussion of the proceedings in each case, what claims were involved, what grounds the cases were based on and how the States responded. Further, chapter four discusses the national political and social atmospheres in each country at the time of the cases, this provides insight into the discourses potentially influencing the claims, arguments and decisions. Lastly, the final decisions and outcomes of the cases are discussed, as well as some of the responses to the cases. This chapter can be understood as *explanation building* or *process-tracing* (Yin, 2014), which is necessary for the subsequent analysis.

Although there are comparisons in chapter four, chapter five constitutes the comparative analysis of the Supreme Court Decisions, and is thus the main focus of this project. The comparison is based on five factors: (1) cause of action, (2) legal basis, (3) separation of powers, (4) the Precautionary Principle, and (5) national and cross-national responsibilities. These subchapter and areas of focus are both derived from the cases themselves, as well as the theoretical framework of the project. The *cause of action* in each case was different, which was therefore understood to be a main factor in the different outcomes. Similarly, parts of the *legal basis* were the same,

which was thus considered an essential point to analyze. The *separation of powers* and the role of the Courts in determining or influencing climate politics was also questioned by both States, which raised questions of judicial review legitimacy. The focus on the *Precautionary Principle* was derived out of the theoretical framework and the perceived importance of this in the outcomes of the cases. And lastly, the consideration of the *national and cross-national responsibilities* highlighted the importance of the global aspect of climate change and its consequences, and portrayed the notion of environmental justice which is also an essential part of the theoretical framework.

Finally, chapter six offers a summary of the project. Here the project is tied together by combining the findings in chapters four and five with each other, as well as in light of the theoretical framework. This provides the prerequisites to finally answer the research question. In addition, chapter six includes some proposals for further research.

2. Background and Theoretical Perspectives

The theoretical perspectives and background information introduced in this chapter form the basis for the subsequent analysis. Critical criminology encompasses the study and analysis of the crimes and harms of the powerful, as well as structures in society and how these foster crime (DeKeseredy, 2015). Green criminology, as an extension of critical criminology, studies the harms and crimes perpetrated towards the environment, non-human animals, ecosystems and humans as part of ecosystems. Green criminology is intrinsically critical, first because it extends definitions of crime to include unconventional victims and perpetrators. And secondly, because it studies systems of inequality and exploitation, and the social, political and economic structures that continue these disadvantages, and the subsequent crimes and harms that unfold from these structures (Sollund, 2021). An important aspect of critical and green criminology is the discussion of criminalization and the social construction of crime. Meanwhile, eco-philosophy provides an overview of the different perspectives within green criminology and what they might mean for the study of green crime. Eco-philosophy has a bearing on how green criminologists do green criminology and influences the different strands of the environmental movement (White & Heckenberg, 2014). The precautionary principle involves risk assessment and risk management and reflects upon the potential effects of certain practices. It argues that these potential effects should guide decisions relating to the given issue (Steel, 2015). Lastly, Social Movement Theory (SMT) provides guidelines for understanding and interpreting how social movements unfold and theorizes how movements become successful in mobilizing and gaining momentum. Within social movements, law is increasingly being used to invoke systemic change, often understood within the concepts of legal mobilization and strategic litigation.

2.1 Critical Criminology

“What is currently known as critical criminology used to be labelled “radical criminology” and was rooted in Marxist theory” (DeKeseredy, 2015, p. 239). Walter DeKeseredy (2015, p. 239) describes it as the study “of the criminogenic processes of

contemporary capitalist society"[1]. The roots in Marxist theory influenced the focus on political economic theory and the importance of capitalism within its understandings of crime. Critical criminology thus focuses on the systems and "flaws in the fabric of societies" that result in and sustain criminality, rather than on individual criminals (DeKeseredy, 2015, p. 240). Issues such as racism, sexism and inequality are understood as sources for crime (DeKeseredy, 2015), both in terms of the disadvantaged being exploited, but also in the sense that marginalized groups and individuals might be driven to criminality, or otherwise their lifestyles or actions being criminalized by society and its institutions. Critical criminology often attempts to transform the social order and create a more just society in which social inequalities are addressed and questioned (DeKeseredy, 2015). It often studies the crimes of the powerful, organized and corporate crime, with particular concern for *social harm* (Sollund, 2021). It aims at "exposing corrupt institutions and systemic inequalities and abuses of power" (White & Kramer, 2015, p. 397). Critical criminology's focus lies in uncovering political, economic, institutional and social issues that are connected to, for instance, global warming (White & Kramer, 2015). Thus, critical criminologists might ask questions such as

- Who has the real power in society?
- Do those who wield power and authority get away with murder - both literally and figuratively?
- What do social class and poverty have to do with crime and deviance?
- Why do affluent people commit so many crimes?
- Are people well informed or deluded about the nature of crime?
- What do racism and sexism have to do with crime and deviance?

(DeKeseredy, 2015, p. 240).

[1] Notably, critical criminology is not exclusively concerned with the criminogenic processes of capitalist societies. For example, the environmentally destructive practices in Russia and other Asian nations, with other economic systems, may also be of interest to critical criminologists. The focus on capitalism within this project is, however, found to be sufficient as capitalist society is greatly influential in the environmental situation we are in today, as well as influential in climate change mitigation issues in many Western societies.

This Marxist turn within criminology has been critiqued by Paul Roberts (2017, p. 24), who writes that this has caused “the sacrifice of scholarly judgement to ideological dogma, an elementary betrayal of genuinely critical thought”. Roberts (2017, p. 27) argues that critical criminologists are “engaged in criminal justice, (rather than criminology) [which] implies a wholehearted engagement with normative philosophy”. Jeffrey Reiman (2017) on the other hand, writes that criminology, as a social science, cannot be free from philosophy, as philosophical debate is precisely what distinguishes it from being part of the legal system. If criminology simply accepts criminal law definitions of crime, and studies only the crimes defined by the legal system, criminology would simply be an extension of the state (Reiman, 2017). Criminology must, therefore, involve engagement in different definitions of crime and the concept of harm. Critical criminology, in turn, “frequently strays onto the methodological territory of Criminal Law Theory, where questions of criminalisation are keenly debated with growing theoretical sophistication” (Roberts, 2017, p. 28).

One of the critiques of criminology persistent within critical criminology is that crime “has no ontological reality” (Hillyard & Tombs, 2004, p. 11). Nils Christie (2004) writes that norms are created, recreated and kept alive through long and complicated social processes. Crime, therefore, does not exist, only actions exist. And these actions are understood and interpreted differently in different social frameworks which in turn create the concept of crime (Christie, 2004). Similarly, Richard Quinney (2001) writes that crime is created by the formulations and administration of behaviors defined as crime by agents of law. I shall, however, rather agree with Reiman and Leighton (2017, p. 87) that “this is *not* what we have in mind when we say that the reality of crime is created”. This understanding of the creation of crime involves the notion that criminality only includes behaviors or actions that are defined as crime by criminal law (Reiman & Leighton, 2017). Reiman and Leighton (2017) instead argue that it is the appropriate application of the label to behaviors that is of importance. The point of prohibiting an act or behavior is to protect society from danger, harm and injustice. Reiman and Leighton’s (2017, p. 88) “hypotheses about the way in which the public’s image of crime is created” thus involves the recognition that the definitions of crime, criminals, arrests, judicial decisions, convictions, and sentences “do not reflect the only or the most dangerous” individuals, behaviors, actions, or harms that are committed or experienced. They also contend that these criminal justice processes and decisions

portray crime as acts committed by the poor, which are ultimately reinforced and identified by the representations of crime in the media. This shall not be discussed in further detail but serves to emphasize the need to focus on crimes of the powerful.

The most widespread and harmful acts are often not criminalized, in fact they are often completely legal (Reiman & Leighton, 2017). Subsequently, those who experience the consequences are not always identified as victims, or otherwise acknowledged and redressed for the harms they have experienced. Critical criminology therefore engages in uncovering those harms and/or crimes that go undiscovered or ignored. This ultimately means that critical criminology takes harm and social harm seriously and bases its studies accordingly. The concepts of harm and social harm are nonetheless also problematic due to their broadness, "it could be objected that harm is no more definable than crime" (Hillyard & Tombs, 2007, p. 17). A social harm approach is, however, socially positive and progressive as it includes the experiences of individuals rather than sticking to definitions made by the State (Hillyard & Tombs, 2007). Hillyard and Tombs (2007, p. 17) thus exemplify types of harms that may be relevant to a (anthropocentric) social harm approach; "*physical* harms", "*financial/economic* harms" and "*cultural safety*". This might involve "premature death or serious injury", work injuries, exposure to pollution, food insecurity, loss of property or cash, "notions of autonomy [and] access to cultural, intellectual and informational resources" (Hillyard & Tombs, 2007, p. 17).

The commonly cited article by Howard Becker (1967) asks 'Whose side are we on?', which brings into focus the ethics of partisanship (Roberts, 2017). This naturally influences one's conception of crime. Becker (1967, p. 239) argues that social research cannot be "uncontaminated by personal and political sympathies". Social research is conducted based on a personal or societal interest or issue of societal importance (Becker, 1967). It is criminologists' job to inform and produce knowledge, which must involve uncovering those harms and crimes that go unnoticed or ignored (Roberts, 2017). This necessarily means listening to and giving a voice to those who are underrepresented or who cannot speak for themselves. "Not surprisingly [then], critical criminologists are on the side of the socially and economically marginal and disadvantaged" (DeKeseredy, 2015, p. 242), as they often seek to explore "social, political and economic justice from alternative perspectives" (The official Journal of the

ASC Division on Critical Criminology, n.d., para. 1). These alternative perspectives may be, amongst other things, anarchist, feminist, cultural or green criminological perspectives (Roberts, 2017).

2.1.1 Green Criminology

In accordance with critical criminology, green[2] criminology extends the definitions of harm to include unconventional victims and perpetrators in its subject of study. Ragnhild Sollund (2015, p. 2) writes that, "the divide between mainstream criminology and (critical) green criminology persist today" because of mainstream criminology's tendency to exclude different topics from the criminological agenda "by continually repeating […] assumptions about the nature of criminology and crime" (Lynch & Stratesky, 2014, p. 4). Green criminology thus, studies "environmental harm, environmental laws, and environmental regulations" (White, 2009, p. 229), and deals with the various "crimes, harms and offences related to the environment, different species and the planet" (Brisman & South, 2020, p. 40). It is the study of harm against humans, the environment, ecosystems, and non-human animals perpetrated either by national and international states and corporations and/or individual actors (Bernie & South, 2007). There is not a clear definition of green criminology, which may be a strength, as it remains fluid and able to connect and collaborate with different theoretical perspectives within criminology, as well as across other disciplines (Brisman & South, 2020). Green criminology has, from its outset, attracted commentators and collaborations with a variety of subjects within the sociological field, such as politics and anthropology, as well as the legal fields of criminal law, international law and international environmental law (Hall, 2014).

Rob White (2008, p. 14) writes that "there is no green criminology *theory* as such", but rather a green perspective, "however, most environmental criminologists can be distinguished on the basis of *who or what precisely is being victimised*". Green criminology also tends to focus on "crimes of the powerful, and [tend] to be infused with issues pertaining to power, justice, inequality and democracy" (White, 2008, p.

[2] The term 'green' is sometimes interchanged with 'environmental or 'conservation' criminology, but 'environmental' criminology has associations with place-based criminology which distorts the use of the term. 'Conservation' criminology is, to me, associated with a slimmer conception of the types of crimes/harms applicable, therefore, 'green' is deemed sufficient.

14). This highlights its close connections to, and position within, critical criminology. White (2008, p. 15) writes that there are three general perspectives in green criminology; (1) “Environmental rights and environmental justice”, (2) “Ecological citizenship and ecological justice”, and (3) “Animal rights and species justice”. These perspectives correspond with the Eco-philosophical perspectives which will be discussed further below.

White (2008, p. 27) expresses that “a central aim for green criminology is to investigate the *nature of environmental harm*”, which involves (1) identifying definitions of environment, and ways of analyzing this in socio-legal ways, (2) identifying types of crimes and developing typologies, and (3) “to question what constitutes environmental crime from” different perspectives. A second “aim of environmental criminology is to investigate the *nature of regulatory mechanism and the social control of environmental harm*” (White, 2008, p. 28) which involves; (1) identifying “regulatory processes in relation to environmental crime, as well as to develop a working register of existing control mechanisms and laws” (White, 2008, p. 28); (2) investigating existing measures to protect environments, and; (3) “explicate the reactive measures available, such as investigation, prosecuting and use of sanctions” (White, 2008, p. 28). Lastly, White (2008, p. 28) writes that green criminology can “investigate the *nature of the relationship between changes in or to specific environments and the criminalisation process*”. Additionally, green, or environmental criminology ought to partake in development of socio-legal frameworks, conceptual analyses and practical interventions. This involves cross-disciplinary collaborations and analyses (such as this project’s focus on judicial judgements). Ultimately, as Sollund (2021, p. 307) writes “the role of critical criminology is not only to describe and analyse crimes and harms committed by the powerful”, but also to

> *change* the current world order by rejecting capitalism and consumerism as the leading values of our time, the unfair distribution of wealth and power, the criminalisation of the powerless, and the exploitation of those who cannot defend themselves and those whom the police and judicial system fail to protect.

Green criminology is a rather new criminological perspective and continues to evolve. It first developed as a separate field within criminology in the 1990s, although its topics

had been discussed within criminology long before that (Goyes & South, 2017). As mentioned, critical or Marxist criminology focus(ed) on crimes of the powerful and various damages to the environment, while 'New Deviancy' approaches, as described by Goyes and South (2017, p. 168), directed attention toward the "powerless and marginalised" which has clear links to "speciesism, the treatment of indigenous peoples and environmental injustice". Feminist criminology has also had "profound impact [on the] victimisation and marginalisation of women as […] criminals, victims, protestors" (Goyes & South, 2017, p. 168), which connects to similar analyses as those of abuses and exploitations of non-human species and the environment. Peacemaking criminology was groundbreaking in that it called "for criminology to see the power of respect, conflict mediation and reconciliation" (Goyes & South, 2017, p. 168), which involves the philosophical consideration of humanity's duty to respect earth and all its contents. These critiques constituted a counter-narrative in which a continuation of the combining of personal and political issues, for some, included the environment and earth itself (Goyes & South, 2017). Therefore, as Nigel South (2014, p. 7) pointed out, there was no need for 'firsts' in defining green criminology, as a green criminology was "inevitable and necessary". Green criminology has followed "scientific interests and political challenges of the moment" and reflects this in its research areas (South, 2014, p. 7).

However, it is also worth noting that "while most of what is acknowledged as modern green criminology has been produced in English and in English-speaking countries, in fact, green criminological research has been conducted in a much wider range of countries" (Goyes & South, 2017, p. 169). Green criminology arguably already existed before it was recognized and called 'green criminology' in the West. Western green criminology, however, with its focus on capitalism and class society as sources of crime, often ignores research conducted, and knowledge produced, in other (non-Western) parts of the world. Obviously, this limitation also applies to my own project.

2.1.2 Climate Change and Criminology

Green criminology focuses on both localized and globalized environmental harm (White, 2008). Climate change and global warming are both global and local issues, which encompasses a variety of environmental harms and crimes happening around the world today, and which will continue to unfold in the years to come. These issues

“pose a number of important questions for criminology” (White, 2011, p. 38). “Climate change is arguably the most important issue, problem and trend in the world today” (White, 2011, p. 36; White, 2012) and has taken an increasingly prominent place in criminological research and literature. Criminologists tend to explore climate change issues in two different ways. Either by studying the consequences of climate change, such as increased social conflicts, struggles over food and resources, and climate-induced migration. Or by studying the causes of climate change, such as destructive practices and greenhouse gas (GHG) emissions from national and international states and corporations (White, 2011; White & Heckenberg, 2014).

White (2012, p. 2) writes that the “failure to act [to climate change] is criminal” and that the growing harms continue by the hands of the powerful perpetrators who serve only their own interests. Ronald C. Kramer (2013), and Kramer and Michalowski (2012, p. 71) for example, write about climate change being a state-corporate crime in which, particularly the fossil fuel industry, intentionally and unintentionally “cause widespread environmental and social harm”. Sollund (2012) writes about the double morality of the Norwegian State’s oil industry, in which the State seemingly justifies its climate change contributions by making remedies and mitigation contributions elsewhere in order to continue its own practices “free from guilt” (Sollund, 2012, p. 137). In addition, Sollund (2012) writes about the species decline which is a local and national consequence of climate change in Norway. This inexhaustive mention of the ways in which climate change may be studied through a criminological lens is merely to emphasize that the issue at hand is not new, nor scarcely researched. There is, however, a growing trend in which climate change and its perpetrators are being subjected to litigation for insufficient adjustments to, or otherwise, contributions to climate change. The project at hand is thus situated within this area of criminology, as well as within a larger cross-disciplinary field exploring the use of law in combating climate change.

Andrew Franz (2012, p. 90) writes that “Climate change involves market failure, political failure, scientific failure, and social failure, [which all] in turn lead to rights violations. The courts are where [these failures] are vindicated”. Climate change has now taken its place within the courts, and criminology should thus, “broaden its theoretical scope to consider, more deeply, the source of law” (Franz, 2012, p. 105), a task now taken on by the project at hand. Climate change litigation is a growing concept

in which “There exists a considerable disjunction between what is officially labelled environmentally harmful from the point of view of criminal and civil law, and what can be said to constitute the greatest sources of harm from an ecological perspective” (White, 2008, p. 11). Matthew Hall (2014) writes that the question remains as to how well civil law can sufficiently be used to combat climate change, as the tendency of the criminal justice process is to focus on individuals as criminals.

Although both climate cases in this project are quite recent - which means that the literature and research devoted to the cases is in its infancy - the Dutch case has received some academic attention for its (hopefully) transferability. Some have for example attempted to use the case as a basis for a “recipe for success” (Peel & Markey-Towler, 2021, p. 1484). Peel and Markey-Towler (2021, p. 1485) identify six characteristics that contribute to the systemic impact of strategic climate litigation and find that although “climate change cases alone will not solve the climate crisis”, they do raise awareness and potentially influence cases beyond the individual case (Peel & Markey-Towler, 2021 p. 1498). Further, by studying these cases from cross-disciplinary perspectives we are also able to determine how best to take climate change to court in future cases. Valentina Jacometti (2020, p. 12) also finds that each case may have strong impacts “on the future of emerging trends of climate change litigation” and “Even unsuccessful cases might well inspire litigation around the world”. Several others have made similar remarks about the importance of climate change litigation in combating the crisis, as well as the importance of studying these cases to explore how other plaintiffs may want to proceed (see for example Nollkaemper & Burgers, 2020; Spier, 2020; van Zeben, 2015). Mari Syrrist (2020) wrote a Master’s thesis of Law comparing the Norwegian Court of Appeal’s judgement to the Urgenda case. There are also several recent commentaries on the Norwegian climate case that portray the interest in, and importance of, the case to academia (see for example Backer, 2021; Fauchald, 2021; Nesdam, 2020). The Norwegian case is even more recent than the Dutch and it is a plausible assumption that there will be several more comparative analyses of these cases in the future.

2.1.3 State-corporate crime

States and corporations contribute with the largest amounts of carbon emissions are the largest “drivers of global warming” (White, 2017, p. 247). Their environmental

harms and crimes are connected to "'normal' business practices" (White, 2017, p. 247), which constitutes what is defined as state-corporate crime. State-corporate crime involves political and economic processes that allow states and corporations to continue to use destructive practices that result in, for example, death, harm, bad health, and financial loss, without these practices being criminalized or actions punished. Tombs and Whyte (2003, p. 6) define state crime and corporate crime as

> commissions or omissions of the state or corporations that occur as a result of a breach of the criminal or administrative law that regulates the activities of public and government authorities and private businesses; or commissions and omissions by public or government authorities and private business which result in victimization for which legal redress is available to the victim.

Tombs and Whyte's (2003) definition is however tied to legal structures and requires 'legal redress', 'victims' or 'breaches of criminal or administrative law', which, as discussed above, is not always sufficient within criminological research. Instead, Michalowski and Kramer's (2006, as cited in White & Heckenberg, 2014) definition of state-corporate crime includes the notion of 'illegality or socially injurious' actions, which is found to be more fitting. State-corporate crime is, thus, the

> Illegal or socially injurious actions that result from a mutually reinforcing interaction between (1) policies and/or practices in pursuit of the goals of one or more institutions of political governance and (2) policies and/or practices in pursuit of the goals of one or more institutions of economic production and distribution.
>
> (Michalowski & Kramer, 2006 as cited in White & Heckenberg, 2014, p. 112).

Kramer (2013) argues that climate change and global warming is a form of state-corporate crime where (especially) states continuously fail in their attempts to make considerable changes to laws and regulations relating to the climate. Although many States acknowledge that climate change is real and seek to do their part in reducing emissions and lowering their contributions through national and international agreements and legislation, there still seems to be reluctance to fully combat the crisis.

Tombs and Whyte (2003) write that State and corporate crime often has more devastating economic, physical and social costs than 'conventional' crime and criminals. But it should also be noted that solving State and corporate crime/harm also tends to bear great social and financial costs, perhaps causing the unwillingness to explore and solve them.

"Crime and power are inextricably linked phenomena in a variety of often contradictory ways" (Tombs & Whyte, 2003, p. 3). Furthermore, States and corporations hold power in society, in which their crimes subsequently become interlinked with power. This is important as these same institutions "play key roles in defining the laws which they so constantly violate" (Tombs & Whyte, 2003, p. 3). Antonio Gramsci (1932/1971, p. 327) famously wrote about hegemony and the "complex of practical and theoretical activities with which the ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules". Inspired by Gramsci (1932/1971), Tombs and Whyte (2003, p. 10) write that "hegemony relies not just on material power […] but also in moral and intellectual leadership, so that certain ideas become predominant". Therefore, the idea that those who hold power in society also define and determine crime, results in the continuous struggle against holding those in power accountable for their actions. It also results in their ideas and morals becoming dominant and persistent, which, from a critical perspective, should be questioned and challenged.

"Most environmental harms stem from legal economic activities [and] only a minority of instances […] are accounted for by criminal activity" (Potter, 2010, p. 10-11). The Treadmill of Production theory has been applied to environmental crime and harm to describe the "normalized expectations associated with the nature of productive and consumptive economic system structures under capitalism" (Long, Stratesky, Lynch & Fenwick, 2012, p. 339). The ultimate goal of profit in capitalist societies is connected to the exploitation of nature and natural resources, so much so that the exploitation is seen as a normal component of the cycle of the economy, politics, production and consumption (Long, et al., 2012). The nature of environmental crime and harm is thus normalized in capitalist society through its institutions and processes, resulting in the ignorance of seeing these as criminal or illegal.

2.2 Eco-Philosophy

“The starting point for investigation and action on matters relating to environmental criminology is philosophy. In other words, it is values, assumptions and theories – that inform how individuals, groups and institutions perceive issues and intervene in the real world” (White, 2008, p. 30). Eco-philosophy, or “Environmental ethics[,] is the discipline in philosophy that studies the moral relationship of human beings to, and also the value and moral status of, the environment and its non-human contents” (Brennan & Norva, 2021, para. 1). Eco-philosophy influences how criminologists (and others) define crime, as well as how they understand the role of the victim. A general distinction can be drawn between anthropocentrism, biocentrism, and ecocentrism (White & Heckenberg, 2014). Anthropocentrism focuses on the value and rights of humans as parts of the ecosystem. Biocentrism focuses on the intrinsic value of animals and their rights. And ecocentrism focuses on the value of nature and physical spaces. Eco-philosophy might influence political outcomes, as each of these perspectives will have different goals based on who they view as victims, or what/who they focus on in a given situation (White & Heckenberg, 2014). The Norwegian and Dutch climate cases fall within the anthropocentric category as they are based in Human Rights. Although, different Social Movement Organizations might have different ambitions for the cases, dependent on their eco-philosophy and which consequences of climate change they focus on.

Arne Næss (2005) argues that there are two different ecological movements, a shallow one, in which concern is expressed for the health and wellbeing of people in the developed countries. The other, deep ecology movement, “has deeper concerns, which touch upon principles of diversity, complexity, autonomy, decentralization, symbiosis, egalitarianism and classlessness” (Næss, 2005, p. 7). Deep ecology is “ecological awareness that goes beyond the logic of biological systems to a deep, personal experience of the self as an integral part of nature” (Weyler, 2018, para. 23). Brennan and Nova (2021) write that, historically, the environmental movement has been characterized by Christianity and the belief that humans are the only, or at least the most, intrinsically valuable beings on earth and that non-human animals and environmental resources are to be used freely by humans. Today, different strands of the environmental movement include deeper understandings of the relationships humans have with the environment and other animals within it, and focuses on the

protection of these. As mentioned above (in 2.1.1), White (2008, p. 15) introduces three main theoretical frameworks in which green criminologists tend to work; (1) “environment rights and environmental justice”, (2) “ecological citizenship and ecological justice”, and (3) “animal rights and species justice”. These frameworks follow this deeper understanding of humans’ relationships to nature and all its components. I shall not delve deep into all three perspectives, but rather focus on the one that this project exemplifies; environmentalism and environmental justice.

2.2.1 Environmentalism and Environmental justice

It is unclear when and where environmentalism and the Environmental Movement first began. In many Indigenous populations around the world, environmentalism is a large and natural part of the way people live; environmentalism has thus, in a way, always existed (Grable, n.d.). There is, however, a contemporary Environmental Movement, in which social and political action is taken in order to combat the environmental issues facing humanity, animals and the natural environment today. It might be misleading to discuss this Environmental Movement as one entity. It can hardly be discussed as a single, collective movement as it is divided into numerous sub-movements focusing on many different issues. It also changes its focus from time and space, depending on the objectives of the sub-movement, or in other words, depending on their eco-philosophy. Some parts of the environmental movement, for example, focus on wildlife, animal rights, species justice and species conservation, while others might focus on the intrinsic value of the environment and ecosystems.

Despite the ever-changing focus, the ongoing environmental destruction and climate change (although affecting everyone and everything) is disproportionately affecting those with the least amount of resources. Marginalized and vulnerable groups in society are, and have historically been, disproportionately victimized by climate related and environmental harm/crime, and subsequently disproportionately redressed for the damages they experience (White, 2011). There is substantial literature on cases where States and corporations have led environmentally destructive projects in areas where the majority of the population are marginalized and/or minority groups; The Dakota Access Pipeline, Trafigura, Exxon Valdez, and Flint Michigan, to name a few.

Therefore, the (anthropocentric) environmental movement cannot be discussed without discussing environmental justice and environmental racism.

Environmental Justice

"Although everyone experiences the effects of climate change, the effects of climate change are not the same for everyone" (White & Heckenberg, 2014, p. 106). The United States Environmental Protection Agency (n.d., para. 1) defines Environmental Justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies". White (2008, p. 15) defines it as the "distribution of environments among peoples in terms of access to and use of specific natural resources in defined geographical areas, and impacts of particular social practices and environmental hazards on specific populations". It thus involves "distributive, procedural and recognitional justice" relating to the environment (De Vries, Buijs & Snep, 2020, p. 1).

The term environmental justice first emerged and became widely used in response to the 1982 decision to site a toxic waste landfill in a primarily Black community in North Carolina in the USA (Murdock, 2020). The demonstrations in response to the decision illuminated the structural racism in the decision-making process relating to the environment and the access to healthy environments to live in. The term Environmental Justice first emerged out of the American Civil Rights movement, to which it may still be applied, but it can also be applied to other forms of discrimination of people in political and civil processes involving the environment. Environmental discrimination is evident both nationally in the relevant countries to this project, as well as internationally in terms of, for example, Norwegian and Dutch climate emissions and their affects in developing countries. An example from the Netherlands is that neighborhoods with low socioeconomic status were found to have lower presence of, and quality scores in greenspaces. This, in turn, resulted in lower standards in health and well-being in those communities (De Vries, Buijs & Snep, 2020). Similarly, many Norwegian Sami populations have continuously been subjected to their native and sacred land and resources being taken away from them, or in other ways damaged. In the recent Fosen-case, for instance, the Norwegian government gave concessions for wind power developments in an area where the Sami people carry out reindeer husbandry.

This was found to be in violation with the Sami people's cultural practice (Supreme Court of Norway, 2021). The Alta-case is also a well-known environmental case where the plans to expand a watercourse in Finnmark were met with harsh criticism and resistance for its violations of the Sami people's interests, reindeer husbandry and environmental interests (Borring, 1981). These examples show how vulnerable groups in society might be disproportionately affected by, or excluded from decisions, or decision-making processes, relating to the environment.

Internationally, it has become more evident that those who contribute the least, and who often also are those with the least resources, are those who experience the effects of climate change the most. These issues are included in international environmental agreements, such as the Kyoto Protocol and the Paris Agreement in which the developed nations and economies are expected to contribute more to combating climate change and are expected to reduce more emissions than those nations and economies that are less developed (United Nations Framework Convention on Climate Change (UNFCCC), n.d.a; UNFCCC, n.d.b). This is both due to their own contributions to climate change being much higher than those countries who actually experience the effects, as well as their abilities to overcome catastrophes and/or environmental damage if they become subject to it (which they often are not). Henry Shue (2014, p. 36) writes that "a commitment to justice includes a willingness to choose to accept less good terms than one could have achieved – to accept only agreements that are fair to others as well as to oneself". This would mean environmental agreements in which States should consider the consequences of climate change for citizens outside their own jurisdictions, and protection of the environment regardless of whether the consequences are being experienced within a given State territory. Justice involves disabling States from negotiating agreements which maximize their own self-interest and leaves those unable to bargain (e.g. States that lack resources and industrialization) to suffer the consequences (Shue, 2014).

2.2.2 Environmentalism in Norway and the Netherlands

Around the same time as Norway found oil in the Ekofisk area in 1967, environmental concerns started being recognized globally. The industrialization after World War II also led to increased attention given to the destructive consequences of the industrial

developments (Nordby, 2021). In 1972, Norway created their first Nature Conservation Act; the same year as the United Nations held its first environmental conference in Stockholm (Nordby, 2021). This was also the year that Norway created the Ministry of Environment (now the Ministry of Climate and Environment) (Regjeringen, 2022). In *Our Common Future*, the first international environmental report, emphasis was given to the urgency to act *now* as well as the global responsibility to act *together* (Norby, 2021). In 1988, The Norwegian Green Party was established, but it was not until 2013 that they had representatives elected into parliament (Miljøpartiet De Grønne, n.d.).

The emergence of the Dutch environmental movement was also linked to the national and international developments of the late 1900s. The Netherlands was particularly influenced by expansions in "transportation and media facilities after the Second World War" (Jamison, Eyerman, Cramer & Læssøe, 1990, p. 121). The Netherlands is characteristically small in size, and it is one of the most densely populated countries in the world. The country is largely human made in the form of dikes and polders, and it is likely that its inhabitants are aware of the scarcity of their natural environment. This has potentially caused their engagement in environmentalism (Jamison, Eyerman, Cramer & Læssøe, 1990).

Friends of the Earth Norway (Naturvernforbundet) was the first environment and nature protection organization in Norway, and was founded in 1914 (Naturvernforbundet, 2019). In the Netherlands, environmental concerns had largely been communicated by scientists and nature conservationists since the 1940s (Jamison, Eyerman, Cramer & Læssøe, 1990), which ultimately led to the creation of the Milieudefensie (the Dutch Friends of the Earth) in 1971 (Milieudefensie, n.d.). Since then, however, many other environmental organizations have emerged in both countries as well. Greenpeace for example, is notable in Norway and the Netherlands (and internationally) for their campaigns with peaceful civil disobedience. Both branches of the organization have also turned to the courts to hold powerful actors accountable for their contributions to environmental destruction.

More recently, the younger generation has continued the environmental movement. Greta Thunberg for example, started the school strike for the climate, which has turned into Fridays for Future, "a youth-led and –organized global climate strike

movement" (Fridays for Future, n.d.). Fridays for Future insist on changes in policies based on the scientific certainty of climate change, and aim "to put moral pressure on policymakers [and that they] take forceful action to limit global warming" (Friday for Future, n.d., *Our goals*). This strand of the movement follows a future-oriented perspective which involves requests for precautionary measures and action which will stop the climate crisis from becoming more devastating than it is.

2.3 The Precautionary Principle

Heidi Mork Lomell (2014) writes that there is a changing trend in the public's expectations for authorities to prevent and protect them from harm and crime. It is no longer only expected that serious crimes and harms are prosecuted, but that the police avert and prevent those crimes and harms from happening (Lomell, 2014). The response to this from the authorities is often a change in legislation involving incorporation of measures that allow intervention to happen at a preventive stage (Lomell, 2014). The idea behind this is that it is unacceptable to behave passively when there is a grave risk of an offense or an abuse happening. Lomell (2014) writes that prosecuting someone for a crime they have not committed, is synonymous with prosecuting the innocent, but by changing the wording to 'prosecuting someone for a crime they have not committed *yet'*, the situation is changed drastically. In contrast to preventive or proactive criminal law, which is what Lomell (2014) describes, the precautionary principle in environmental policies refers to risks and uncertainties of the consequences of today's actions, or risks and uncertainties of the consequences of future planned actions and the ability to hold actors accountable for these potential threats. The increased expectations for authorities to take preventative measures relating to the environment and climate change has also become prominent in the past decades and is particularly prominent in the actions taken against States and corporations for them to adhere to the agreements and legislation they have signed, or otherwise for their insufficient actions to prevent disastrous climate change and global warming.

The commonly cited 1992 Rio Declaration on Environment and Development states that

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
>
> (United Nations General Assembly, 1992, §15).

In general terms, the precautionary principle (PP) involves risk analysis and risk management. It is highly influential in climate politics and regulation, and is incorporated in many international climate agreements (Stefánsson, 2019). It is also increasingly used in judicial proceedings, both in international and national level courts (Sunstein, 2005). Daniel Steel (2015) argues that the PP can be used to influence climate politics because it allows for the consideration of potential effects of environmentally destructive practices. Similarly, Lomell (2012) writes that the principle demands that, where there is a threat for substantial harm, lack of scientific evidence should not lead to passivity. Simultaneously, decisions should consider what is beneficial for potential victims, thus potentially supporting the distribution of consequences prior to the criminal or harmful act (Lomell, 2012).

Although the PP is prominent in many European societies, and subject to much academic literature, it remains highly controversial for its ambiguity and lack of a clear definition (Steel, 2015). Cass Sunstein (2005, p. 16) states that “some people have gone so far as to claim that the Precautionary Principle is becoming a binding part of customary international law”. While H. Orri Stefánsson (2019) contends that it is simply a principle, not a law, and is thus not a binding agreement. There are many ways in which the concept of the PP might be interpreted, resulting perhaps in insufficient measures being taken, ultimately meaning that the PP is perhaps just a concept of loose promises.

Steel (2015) argues that the PP involves three core themes: (1) The Meta-Precautionary Principle (MPP), (2) The “Tripod”, and (3) Proportionality. “The MPP asserts that uncertainty should not be a reason for inaction in the face of serious environmental threats” (Steel, 2015, p. 9). This is an interpretation of PP which Steel

(2015) refers to as "weak". 'Meta' in this regard refers to the lack of definition of laws or policies to be used; it only mentions that uncertainty of the potential risk that should not lead to inaction. The 'tripod' "refers to the knowledge condition, and recommended precaution involved in any application of PP" (Steel, 2015, p. 9). This relates to the several ways of determining knowledge and harm conditions and the recommended precaution in each application of PP, resulting in normative and subjective decisions relating to precaution measures. Lastly, proportionality refers to the proportionality of the aggressiveness of the precaution in relation to the severity of the threat. The "strong" versions of PP, Steel (2015, p. 17) writes, "are decision rules designed to satisfy the requirements of the meta-precautionary principle". Steel (2015, p. 10) writes that "the most fundamental distinctive feature" of this interpretation of the PP "ties together aspects of PP that are usually treated as separate or even conflicting".

Thus, Steel (2015) offers three ways of characterizing the role of PP which ties these components together. First, PP can be characterized as a *procedural requirement,* meaning a set of constraints on how to make decisions. Secondly, as a *decision rule*, which guides choices relating to environmental policies. Or thirdly, as an *epistemic rule*, which might determine "how scientific inferences should proceed in light of risks of error" (Steel, 2015, p. 11). For instance, Steel (2015, p. 11) states that "MPP is an example of a procedural requirement [which] places general constraints on the sorts of decision rules that should be used, but it does not specify which policy option should be chosen", while *decision rules* provide specific policies and what mechanisms to use to, for instance, reduce greenhouse gas emissions. *Epistemic rules* then determine what evidence should be used in a given scenario. The three components of Steel's (2015, p. 11) interpretation of the PP thus "jointly function as a decision rule" as each component cannot be considered in isolation. Steel's (2015) interpretation of the PP can thus be understood in line with how Sunstein (2005, p. 24) defines the "strong" versions, in which "regulation is required whenever there is a possible risk to health, safety, or the environment, even if the supporting evidence remains speculative and even if the economic costs of regulation are high". However, as Vidar Halvorsen (2018, p. 38) states, "it cannot be plausibly invoked without the incorporation of a moral principle, the principle of proportionality".

2.4 Social Movement Theory and Strategic Litigation

Environmental groups and the environmental movement play a crucial role in the protection and improvement of the environment (Abbot & Lee, 2021). The theory of collective behavior derived from an understanding of collective episodes being "described […] as if they were the work of mysterious forces" (Smelser, 2008). The theory of collective behavior thus emphasizes that "although wild rumors, crazes, panics, riots, and revolutions are surprising, they occur with regularity" (Smelser, 2008, p. 79). There are tendencies in collective behavior, and they emerge in certain groups at certain times. They can thus be theorized and explained. Social movements are defined by Bruce and Yearley (2006) as collective, goal-oriented action. Further, social movements can be understood as "networks of interaction between individuals and organizations engaging in collective action aimed at achieving or resisting social change" (Saunders, 2013, p. 6). Social movement theory (SMT), among other things, describes how and why social movements unfold, and how they are organized and mobilized. SMT is often divided into three categories: *resource mobilization*, *political opportunity structures*, and *cultural cognitive perspectives* (Gahan & Pekarek, 2013). These perspectives/theories can be used to understand social movements and offer different explanations and understandings of why and how social movements develop, organize themselves, and mobilize to reach their goals.

There is general consensus among social movement researchers that the availability of resources influences "the likelihood of collective action" (Edwards & McCarthy, 2004, p. 116). However, resources alone are not sufficient, they must be coordinated in strategic efforts. Resource mobilization theory (RMT) stems from rational choice theory, and studies how internal resources are *mobilized* to reach a social movement's goals (Gahan & Pekarek, 2013). "It examines the variety of resources that must be mobilized, the linkages of social movements to other groups, the dependence of movements upon external support for success, and the tactics used by authorities to control or incorporate movements" (McCarthy & Zald, 2008, p. 105). Theorists within this tradition conceptualize social movements as "comprised of organizations with some degree of formality" (Saunders, 2013, p. 74), and highlights that the variables that affect social movement organization's actions are related in some way or another to resources (Saunders, 2013). However, as Clare Saunders (2013, p. 79) explains,

RMT cannot fully explain social movements, but is “rather an analytical tool to assist understanding of particular aspects of movements”.

Political opportunity structures criticize the resource mobilization theory for being too concerned with internal resources and opportunities, and rather focuses on external power positions and political opportunities which influence the movement (Gahan & Pekarek, 2013). This theory argues that political environments influence the emergence, development, strategies and impacts of social movements (Sauders, 2013; Kriesi, 2004). It suggests, for example, that moderate, but large, movements are often found in open States, while small, radical, and sometimes violent movements are produced in closed, hostile States (Saunders, 2013). Within this tradition there are several factors concerning the structures of politics and electoral systems which influence social movements. Sidney Tarrow (1998, p. 77-79), for example, identifies four aspects of political opportunity which influences political contention: (1) “access to participation”, (2) “instability of political alignments”, (3) “conflicts within and among elites” and “(4) the presence of influential allies within the […] elite”.

States where there is little *access to participation* (in politics) are, for example, likely to see more contention, while democracies where “elections are routine events […] are usually dominated by institutional parties, which pass rules to maintain their monopoly of representation” (Tarrow, 1998, p. 78). In other words, democracies might have fewer public/social grievances as the public is actively part of decision-making. *Instability in political alignments* is further described as a way for the public to gain access to political influence. Hanspeter Kriesi (2004), for example, writes that those electoral systems with a greater number of parties generate greater possibilities for access. “Changing fortunes of government and opposition parties create uncertainty among supporters, encourage challengers to try to exercise marginal power, and may even induce elites to compete for support from outside the polity” (Tarrow, 1998, p. 78). The public may thus influence politics more in these societies, while systems where there is little competition “makes any sign of political instability a signal and a source for contention” (Tarrow, 1998, p. 79).

“Divisions among elites not only provide incentives to resource-poor groups to take the risks of collective action; they encourage portions of the elite that are out of power to

seize the role of “tribunes of the people”” (Tarrow, 1998, p. 79). The *division among elites* thus provides opportunities for movements to exploit the “conflicts within and among elites”, but also for elites to “make common cause with” movements or oppressed groups (Tarrow, 1998, p. 79). The fourth aspect, *influential elites*, helps movements as “challengers are encouraged to take collective action when they have allies who can act as friends in court, as guarantors against repression, or as acceptable negotiators on their behalf” (Tarrow, 1998, p. 79). Ultimately, the *Political Opportunity Structures* approach views social movement actions and behaviors to be affected by the political atmosphere in which they exist.

Lastly, cultural cognitive perspectives explore the role that social movements play in forming identities and “generating new conceptions of collective interests” (Gahan & Pekarek, 2013, p. 760). This perspective gives attention to the “cultural environment” that movements occur in, and what these environments do to the collective actions within them (Williams, 2004, p. 91). Theorists within this tradition might be interested in how “symbols, language, discourse, identity, and other dimensions of culture” are used to sustain and grow social movements (Williams, 2004, p. 93). The ‘framing’ perspective is the most well know of the cultural approaches (Williams, 2004). Framing incorporates the analysis of how movements use symbolism and meaning to communicate their protests, to attract supporters, and to rationalize their arguments and actions, as well as propose “solutions to adherents, bystanders, and antagonists” (Williams, 2004, p. 93). Further, this involves analyzing “connections between cultural *producers* ([for example] movement activists and elites), cultural *receivers* ([for example] bystander publics, or potential adherents), and the cultural *object* itself (usually a public claim made by a social movement)” (Williams, 2004, p. 97). The symbolism of framing climate change as a state-corporate crime is, for example, an important way in which the environmental movement might be able to attract the support of bystanders or adherents, and ultimately a way of challenging the antagonists.

“Social movements have increasingly incorporated legal strategies into their repertoires of contention” (Lehoucq & Taylor, 2020, p. 166). Legal mobilization refers to how the law is used in an explicit and conscious way by invoking formal institutional mechanisms (Lehoucq & Taylor, 2020; Sandvik, Ikdahl & Lohne, 2021). Historically,

there has been disagreement concerning the conceptualization of the concept of legal mobilization. A commonly used definition is attributed to Frances Zemans (1983, p. 700): “[t]he law is (…) mobilized when a desire or want is translated into a demand as an assertion of one’s rights”. Legal mobilization, thus, theorizes “the use of legal strategies by social movements, as well as other types of individual or collective actors” (Lehoucq & Taylor, 2020, p. 167).

Strategic litigation refers to the strategic selection and performance of a case in a national, regional or international court, tribunal, committee, etc. with the intention to create effects beyond the specific case; it is a legal remedy for a political objective (Block, 2011). Strategic litigation has a tradition within social movements to serve as a way of achieving structural change and increasing and strengthening individual rights (Lohne & Rua, 2021). The urgent climate crisis has influenced “an increasing turn to the courts to accelerate action” (Peel & Markey-Towler, 2021, p. 1484). The goal of the strategic use of law in combating climate change is often to improve climate change policy, to raise awareness (and arguably strengthen the environmental movement), and to transform “government or corporate behavior” (Peel & Markey-Towler, 2021, p. 1484).

However, not all climate change litigation is strategic. “Strategic litigation [...] is consciously designed to produce ambitious and systemic impacts extended beyond an individual case” (Peel & Markey-Towler, 2021, p. 1486). Recently, strategic litigation literature has increasingly considered “the types of legal arguments that achieve high salience in the media and public debate” (Peel & Markey-Towler, 2021, p. 1485). Peel and Markey-Towler (2021) identify different factors involved in the strategies used by plaintiffs for external impacts such as: selecting certain plaintiffs to articulate the message, communicating a specific message, using a competent legal team, choosing the right defendants to target, creative arguments, and requesting remedies that go beyond the case at hand. Additionally, Øystein Block (2011) writes that a basic requirement for strategic litigation is that the plaintiffs have a legal issue which can be tried in court. Furthermore, strategic litigation should be used when it is deemed as a more effective way of achieving a goal than traditional ways of political influencing.

The analysis of the Dutch and Norwegian social movements could be a dissertation in and of itself and would require a more in-depth chapter about Social Movement Theory. A direct analysis and application of these theories therefore falls outside the scope of this project. A brief introduction to these theories is however necessary as a basis for understanding the use of law in combating climate change. Despite the lack of a direct analysis of the ways in which the environmental movement has played out in the cases at hand, some of these typologies will be applied to the processes involved and to certain outcomes. Further, the cases in themselves exemplify aspects of these theories and the success of the social movements in terms of their ability to organize and mobilize to bring their grievances to court.

3. Methodology

Research methods are used to uncover *how* or *why* social phenomena occur and are useful for researching new topics or understanding complex issues (Hennink, Hutter & Bailey, 2020). Qualitative methods differ from quantitative methods by using more individualistic approaches, in which the goal is to study a small number of cases to, for example, understand and interpret individual understandings, feelings and perspectives, rather than creating generalizing theories or statements about the studied social phenomena. When choosing a research method for a project, it is essential to choose a method that provides the best prerequisites to answer the research question (Hennink, Hutter & Bailey, 2020).

As presented in the introduction, this project explores the international movement in which States (and/or governments) and corporations are increasingly being sued for their use of environmentally destructive practices, and/or their failure to take sufficient preventative measures in relation to climate change and environmental crime/harm. The main theme of the project is thus a critical criminological exploration of the way in which the climate crisis is being combatted in Court, and subsequently asks what legal and extralegal factors (including social and contextual factors) might determine the success or failure of a climate change case. More specifically it explores the differences and similarities between the Urgenda case and the Greenpeace/Nature & Youth case. This research project requires a qualitative method in which the goal is to *understand* and *interpret* the legal and extralegal factors involved in or affecting the outcomes of the Norwegian and Dutch climate change cases. This involves studying the documents produced in the decisions as well as studying the decisions in light of the texts devoted to the contextual circumstances in which the cases were happening. Further, this project constitutes a comparative case-study method, in which focus lies on analyzing the similarities and differences between the final Supreme Court decisions.

3.1 Methodological approach

Text, or document analysis is a way of systemically drawing conclusions either about surrounding conditions or about the author's idea and intentions (Bratberg, 2019).

Texts may provide knowledge about concrete and factual conditions, or information about central actors within a conflict, actor's ideas, and ideological basis for different sides of a given conflict (Bratberg, 2019). The term document refers to any type of information which has been made into text and which are available for researchers to analyze; anything from interviews that have been transcribed, to government documents, to grocery lists (Duedahl & Jacobsen, 2010; Thagaard, 2018). Text analysis involves interpreting what texts mean, and how meaning is created through different linguistic tools (Thagaard, 2018). Researchers explore texts and documents in order to understand social phenomena based on what is being said in the documents, but also by focusing on what is not being said; this ultimately affects how an argument or idea is developed (Rapley, 2018). "Descriptions are never neutral but produce a specific version or understanding of the world", one must therefore consider "how […] specific identities [are] produced, sustained or negotiated within texts" (Rapley, 2018, p. 126).

3.1.1 The Case Study method

Case studies study social phenomena in their real context (Bukve, 2021). By using case studies, the goal is often to be able to say something about the studied phenomena in a larger context. This means that case studies have the potential to develop new understandings and interpretations of social actions (Bukve, 2021). Wilbur Schramm (1971) describes the case study method as being concerned with why decisions are made. From this perspective, every case study deals with the decisions about carrying out and initial decision, the situations in which those decisions were made, and procedures involved in, and effects of, decisions (Schramm, 1971). Schramm's (1971) use of decisions as the study subject is highly relevant to this project as it is precisely the decisions in the cases that are the main focus, as well as the decisions leading up to the cases and how these might have unfolded by the influence of the social and political atmospheres surrounding the cases. Others may use "organizations", "individuals", or "processes" as the study of subject, rather than decisions (Yin, 2014, p. 15), which are arguably interchangeable. Nonetheless, the overarching argument is that case studies study how social phenomena unfold (Yin, 2014). Further, Robert Yin (2014, p. 16-17) argues that the definition of a case study is divided and defines the case study method as such:

(1) an empirical inquiry that [1] investigates a contemporary phenomenon (the "case") in depth and within its real-world context, especially when [2] the boundaries between phenomenon and context may not be clearly evident.
(2) [an] inquiry [which] copes with the technically distinctive situation in which there will be many more variables of interest than data points, and as one result relies on multiple sources of evidence, with data needing to converge in a triangulating fashion, and as another result benefits from the prior development of theoretical propositions to guide data collection and analysis.

The case study method thus suits this project because it is precisely the analysis of the occurrence of the social phenomena (the climate change cases) that is being studied in relation to its contextual circumstances. The interpretation of the cases is seen in relation to the contexts in which they were happening, and further in relation to the theoretical frameworks of critical, green criminology and state-corporate crime that the project is based upon. Further, this project benefits from the prior theory that certain differences in the cases caused the different outcomes. This is a strategy which Yin (2014, p. 136) describes as "relying on theoretical propositions".

Furthermore, a case is defined "as an instance of a class of events", and a "class of events" refers to the social phenomena of interests that is chosen for a research project in which the goal is to develop knowledge about the similarities and differences among the cases (George & Bennett, 2005, p. 17). Thus, the class of events within this project is the international movement in which States are being sued for climate change related issues, while the cases are the Dutch and Norwegian lawsuits. Further, the aim of a case study - "developing theory (or generic 'knowledge') regarding the causes of similarities or differences among instances" (George & Bennett, 2005, p. 18) - complements the aim of this project; exploring and developing 'theories' or explanations for why certain cases are successful and others not.

The case study method was developed, in part, to "discourage decision-makers from relying on a single historical analogy in dealing with a new case" (George & Bennett,

2005, p. 67). Its aim was to draw explanations from and analyze several cases which allowed for a broadened and more complex understanding of theories or hypotheses (George & Bennett, 2005). In this sense, the case study ought to be comparative. Comparative methods are, however, sometimes distinguished from case study methods for analyzing more than a single case. Nonetheless, the case study method is now often understood to include both single cases as well as comparative analysis of a small number of cases (George & Bennett, 2005).

A comparative method involves focusing on a limited number of cases which should be studies to find differences between the cases (Bukve, 2021). Further, a comparative design involves analyzing on two different levels; first by analyzing each case individually to find case internal development features. And secondly, by analyzing each case compared to the other to find similarities and variations across the cases (Bukve, 2021). The strategy and technique for this will be discussed in 3.2.2 and 3.2.3.

Although some may think that case studies should be used to develop theories, which is connected to an inductive research logic, others believe that the social sciences should rather seek to understand and interpret phenomena (Bukve, 2021). This project, however, seeks to combine inductive and deductive reasoning in order to understand and explain the different outcomes in the two cases under study. Some might also argue that case studies are only valuable as a starting point for other research projects; as "the explanatory phase of an investigation" (Yin, 2014, p. 7). However, this would mean that the case study cannot be used to "describe or test proportions", which is not the case (Yin, 2014, p. 7). A research question which asks *how* or *why* will likely use a case study method, because these types of questions require tracing the studied phenomena over time (Yin, 2014, p. 10). This again, suits this project as it asks *why* some climate change cases are successful and others not. This involves exploring *how* decisions were being made and analyzing the interpretations of legislation and different roles in the task of climate change mitigation. At large, this project is also situated within the question of *how* climate change is being combated in courts, to which this project offers examples of two ways this has been done. Lastly, Yin (2014) writes that using a case study is beneficial when there is a large variety of evidence to investigate. This can be documents, interviews, observations and so on, which go beyond what would be available for a historical study

for example. This, again, matches this project which uses a variety of documents, articles, and websites for understanding the context in which the cases were happening.

3.2 Data and strategy

Qualitative research has traditionally involved close connections between the researcher and the research subjects, such as interview studies, and ethnographic or observation studies (Thagaard, 2013). However, in an increasingly global and technologically connected world, research has also increasingly involved studying things from afar or online. Tove Thagaard (2018) writes that qualitative research mirrors the developments in society and data such as websites, and visual and/or audio forms of expression are increasingly being used as important sources for qualitative analysis. Analysis of written or verbal communication provides a way of understanding, and interpreting patterns that influence how people communicate, and analysis of visual and digital data provides cultural understandings (Thagaard, 2018).

'Document/literature studies' "focus on broad range of texts as they try to show the 'styles of thought' as they emerge, consolidate and compete across and between texts" (Rapley, 2018, p. 130). For this project, and for this reason, it was important to look at both the court documents which produce the concrete decision upon which this study is based, but also to include documents produced by the litigants and other academics who discuss the topics discussed in the case to supplement the different understandings of the case. Additionally, analyzing the contextual circumstances, through websites, academic literature and public polls, provided the external interpretations and public and organizational understandings of the climate situation, which in turn provide insight into the processes involved in bringing the cases to court.

Qualitative research is often based on strategic selection. Researchers chose participants or cases with specific qualities or characteristics related to the research question or based on theoretical perspectives which the project is based within (Thagaard, 2013). Strategic selection will not provide a sample which is theoretically representative for the research topic or question if the aim is to create generalizing theories or statements (Bukve, 2021). However, a chosen sample can be used as an

example for further theory-testing studies or hypotheses. Thus, the findings from the Dutch and Norwegian cases will only be representative to those two cases and cannot serve as a theory for all climate change litigation. They do, however, serve as an example as to how a case might succeed, which could further be tested or applied to different cases.

The Norwegian case was naturally selected for its relevance to my own position as a Norwegian student and the relevance this has to Norwegian criminology. Further, the Dutch case was strategically selected based on its relation to the Norwegian case. In terms of answering the research question, it was important that the second case had a different outcome than the Norwegian one to be able to explore what factors affected the success/failure of the cases. Additionally, the cases had several similarities, which implied that they were comparable. Both cases were based in the European Convention on Human Rights (ECHR) Articles 2 and 8 and questioned the State's responsibility to protect its citizens from the consequences of climate change, as well as their responsibility to reduce emissions to avert these consequences (Norwegian National Human Rights Institution [NIM], 2020). My assumption was that, because they shared similarities, further comparative analysis would provide insight into the factors leading to the different decisions. As the project is situated within the frameworks of critical, green criminology, and the subsequent hope/push for societal change, it is also relevant to note that the Dutch case was selected for its publicity and status as a groundbreaking step in the environmental movement. The decisions of the Dutch case were thus understood as the right way of doing the task, and the goal is thus to understand how the Norwegian case differs from that standard. The cases are further relevant as part of the international community in which both countries are influential in European politics and climate regulation, and the cases thus have potential to influence future climate change litigation. Studying their processes is therefore understood to be important for the growing literature on climate change litigation.

3.2.1 Data material

Duedahl and Jacobsen (2010) explain that documents used for analysis should be considered based on four criteria: authenticity, credibility, representativeness and its significance to the research issue. Authenticity and credibility refer to the document's

quality; that is, whether the document is trustworthy in terms of being what it portrays itself to be (Duedahl & Jacobsen, 2010). For example, making sure the court documents and decisions are the authentic documents from each case, or determining whether the online websites devoted to the cases are reliable. This also relates to the aspect of producing and sharing research, and the researcher's responsibility to reflect upon and judge the quality and accuracy of the knowledge used as data, so that the research and knowledge produced is also authentic and credible (Norwegian National Committee for Research Ethics [NESH], 2019).

One of the shortcomings of this, is for example, the Dutch Supreme Court decision not being an official translation, perhaps influencing my interpretation of the case. Similarly, Dutch political party programs were not available in English, which meant that I had to use Google Translate to gain insight into the party's environmental strategy. This was, however, not a large enough part of the project for it to have dire consequences for the entirety of the project. Further, the website used for election results in the Netherlands were unknown to me prior to the project, however, by doing some research into the organizations that produce this information, and because of the information being general election results, I regard these sources as sufficient. This information is also not necessarily determining to the project at large. In general, it was easier to assess the Norwegian sources as they were derived out of websites I could understand and that I had prior knowledge about.

Representativeness involves choosing documents which vary across the variables which are being studied so that the results appear more credible (Duedahl & Jacobsen, 2020). This is done by using, for example, those websites discussed above, as well as academic literature about politics, elections, and litigation, as well as reports, supporting legal documentation, and the final decisions. This creates variety in the information used to interpret the phenomena. Lastly, documents should be significant and relevant to the research question (Duedahl & Jacobsen, 2010). This last criterion is fulfilled by choosing these various texts/documents devoted to the cases, or otherwise, devoted to the context of the cases.

The data used in this project can be characterized as secondary data. This involves data or literature/documents that have been collected or produced by someone other

than the researcher themselves. David Silverman (2014, p. 316; Silverman, 2020) describes this type of data as “naturally occurring data” or “*naturalistic* data”, that is, data that is produced for other purposes than for the specific research project, or which “exist independently of the researcher” (Silverman, 2014, p. 316). However, it should be noted that, no data are entirely “untouched by human hands” (Silverman, 2014, p. 316). The benefit of using secondary data though, is that it is unbiased in terms of being produced to answer a specific research question. The data is thus not tied to any subconscious idea of what should be said in order to provide an answer to a question.

For chapter four - which constitutes the contextualization of the two cases - the data material consists of political party programs, election results, Environmental Reviews by the Organization for Economic Co-operation and Development, International Environmental Law literature, climate change litigation literature, news articles and supporting literature devoted to national politics or the cases. Thagaard (2013) emphasizes that qualitative research involves empathy, this in turn, involves that, in order to gain an understanding, researchers must place themselves within the social situation in which what they are studying are part of. The Supreme Court decisions are the result of individual judges’ opinions. By analyzing the decisions, I am analyzing several individuals’ interpretations of the situation. It is therefore necessary to explore the contexts in which these cases were happening, as well as the meaning of International Environmental Law in order to better understand the decisions that were made.

The main data material for this project is the two Supreme Court judgements which provide both the litigants’ claims and arguments, the States’ responses and the final decisions. Additionally, some of the supporting legal documents are used to supplement the findings in the decisions, such as letters of appeal and a letter to the Dutch Government. Further, supporting literature discussing topics found in the analysis provides strength in terms of supporting claims made about specific findings. This will constitute chapter five and the comparative analysis. The Dutch Supreme Court judgement is specified as not being an official translation but is rather produced for informative purposes. This could be a weakness as the language and subsequent discourse is not official, in turn, potentially affecting the interpretation of the case. Similarly, the disproportionate availability of official documents (for example, political

party programs) in English created a difference in the number of documents used in the analysis and their reliability. Likewise, my own prior knowledge of the Norwegian case, the Norwegian political system and Norwegian society was much more extensive than that of the Dutch circumstances. This has potentially influenced my own interpretations of the cases and the contextual circumstances.

3.2.2 Analysis strategy: hermeneutics and discourse analysis

Qualitative research "is concerned with how the social world is realized, interpreted, understood and experienced, or produced", and is thus, fundamentally interpretivist (Upadhyay, 2012, p. 123). Clifford Geertz (1973, p. 5) writes that analyzing cultures, or social actions, should involve interpretation and explanation "in search of meaning". Meanings are created through culture. Culture in turn, is as Geertz (1973) believes (inspired by Max Weber), semiotic, in so far as it is created by humans and their "webs of significance" (Geertz, 1973, p. 5). Culture is therefore a set of ways of acting socially, created and maintained through those ways of acting. However, as Geertz (1973, p. 14) writes, "culture is not a power […] it is a context, something within which [social events, behaviors, institutions, or processes] can be intelligibly – that is, thickly – described". *Thick descriptions* thus involve interpreting, understanding and explaining underlying contents of meaning that must be understood to make sense of a social action. By highlighting the role of interpretation in qualitative texts, one is also highlighting the importance of how the researcher interprets the data and what influences their theoretical background has on their interpretation (Thagaard, 2013). It is thus also important to problematize what the research represents by considering what influences the researcher's views have on the text produced. The interpretive approach is linked to theories such phenomenology, hermeneutics and symbolic interactionalism which assists in understanding and interpreting the phenomena being researched (Thagaard, 2013).

Hermeneutics highlight interpretation and focus on analyzing phenomena by focusing on deeper, underlying contents of meaning that are not immediately apparent (Thagaard, 2013). The hermeneutic tradition is not only concerned with interpreting phenomena, but also interpreting phenomena in light of its historical or social context (Bukve, 2021). Hermeneutics can be understood as a way of 'reading' culture through

phenomena (Thagaard, 2018). It relates to critical theory as it is concerned with the established ideologies and structures in society and aims at uncovering how these are created and given meaning through text or communication (Thagaard, 2018). Thagaard (2013) writes that critical research can be understood as triple hermeneutics. If single hermeneutics is the self-reflection of one's own interpretation of oneself and one's situation and reality, double hermeneutics is the researcher's interpretation of that reality. The triple hermeneutic interpretation involves double hermeneutics as well as a critical reflection and interpretation of the processes involved in, or underlying, both the researcher and the subject's interpretations: to uncover 'truths' that are not apparent to the subjects themselves (Thagaard, 2013). Further, critical research aims at uncovering ideologies that influence actions, and holds a critical view of the established structures in society (Thagaard, 2013). The natural connection between this project's theoretical frameworks and the method thus provides the correct prerequisites to answer the research question.

Discourse analysis (DA) is a way of 'doing hermeneutics'. In general, DA assumes that the understandings and interpretations that individuals in society have, are influenced by the culture and time they are living in. When communicating with others, understandings of reality are created which in turn create a basis for how to act and behave (Thagaard, 2018). Therefore, discourses involve ways of speaking, as well as frameworks for what is rational to think and believe in a given context (Bratberg, 2019). The aim of DA is to provide insight into the underlying notions that produce text, as well as insight into how the text reproduces and sustains these notions (Bratberg, 2019). Øivind Bratberg (2019) writes that discourse is a cognitive and normative fellowship (or in other words, a community of subconscious thoughts about reality) which is expressed through language. Norman Fairclough (2010, p. 8) writes that "a primary focus of [critical discourse analysis] is on the effect of power relations and inequalities in producing social wrongs, and in particular on discursive aspects of power relations and inequalities". DA thus relates to what Gramsci (1932/1971) defined as hegemony, in terms of reinforcing discourses that maintain and justify dominant ideologies, and the analysis and exposure of these. Through analyzing discourses, researchers can gain insight into how people understand their reality by analyzing how they talk about it.

Critical discourse analysis (CDA) involves “a critique of some area of social life” which, through interpretation and explanation, has the potential to “contribute to righting or mitigating” social wrongs (Fairclough, 2010, p. 8). Fairclough (2010, p. 10) suggests that CDA must involve three characteristics: normativity, in which it seeks to address and change social wrongs through analyzing their discursive aspects, and not just describing them. It must involve analysis of texts, not “just general commentary on discourse”. And lastly, it must be “part of some form of systematic transdisciplinary analysis of relations between discourse and other elements of the social process”, not “just analysis of discourse (or more concretely texts)” (Fairclough, 2010, p. 10). In other words, CDA involves analyzing discourses (through texts/documents) in a systematic way which incorporates the critical analysis of the social context in which the studied social phenomenon is or was happening. Ultimately, CDA uncovers social wrongs and offers normative understandings of them.

3.2.3 Analysis technique

Yin (2014, p. 147) describes five analytical techniques which may be used in case study research, one of which is described as “explanation building”. In political science research, *explanation building* might also be referred to as *process tracing* (Yin, 2014). Yin (2014, p. 147) writes that this “procedure is mainly relevant to explanatory case studies” where the “goal is not to conclude a study but to develop ideas for further study”. As expressed in chapter two, the growing literature on the ways to successfully bring climate change to court is precisely designed to offer “ideas for further study” (Yin, 2014, p. 147) or as inspiration for future climate change litigation. Further, Yin (2014, p. 147) writes that explanation involves providing presumptions about the causal links of a phenomenon “or ‘how’ or ‘why’ something happened”. Therefore, the analysis is divided into two chapters, where chapter four constitutes the *process tracing*, in which the cases are explored separately to find case-internal development features (as mentioned in 3.1.1), as well as provide the contexts which assist in the subsequent analysis and interpretation of the decisions.

The main objective of this project is to explore the different legal and extralegal factors that might have influenced the outcomes of the two climate change cases. To do this, I have chosen a few aspects to focus on. First, in chapter four, I provide a short

introduction to Climate Change Litigation and International Environmental Law which serves as further contextual or background information about the international context in which the cases can be placed. Further I discuss some of the contemporary environmental circumstances in each country, meaning, their contributions to climate change, how they are attempting to transition into green societies, and their international standing in terms of environmental protection. Further, I will focus on the political contexts which, in turn, reflect the public's views on climate change policies and tactics, as well as the State's plans for green transformation. In support to this, I use available statistics on public opinions on climate change and/or environmental issues, as well as news articles and/or articles on websites which illuminate how climate change mitigation strategies, and the litigation are portrayed in society.

In chapter five I compare the two Supreme Court decisions. After making myself familiar with the documents, I chose five factors to focus on. Naturally it was necessary to explore the differences in the cause of action, meaning the plaintiffs' reasons for suing the States. Secondly, I chose to focus on the legal basis, as they both used the ECHR. The Courts' different interpretations of the convention could therefore be a cause for the different outcomes. Another aspect that was important in both cases was the Separation of Powers, and the actors' interpretations of the role of the Court in political matters. Next, I chose to analyze the application of the precautionary principle, this was somewhat influenced by the theoretical framework of the project, but it was also derived out of the extensive reflections of the principle in the Dutch case, and the lack of its consideration in the Norwegian case. Lastly, I focus on the consideration of national versus cross-national responsibilities of the States, which was also a topic of concern in both decisions. This, as well, was derived out of the concept of environmental justice introduced in 2.2.1.

By analyzing the context in which the cases were happening through studying texts produced in or written about those circumstances, as well as analyzing the final decisions in each case, I am 'doing hermeneutics' through discourse analysis, and analyzing the factors involved in the outcomes of each case in a comparative manner. This, in turn, provides ideas for further studies.

3.3 Ethical considerations

Research ethics relate to trust and protection of individuals and communities, as well as integrity and carrying out the correct conduct (Israel & Hay, 2012). Israel and Hay (2021) express that empirical researchers have two ethical tasks; to develop ethical ways of working, as well as to meet the demands of regulations for research ethics. In other words, researchers must ensure that they follow the guidelines and regulations for ethical conduct, but they must also act and conduct their research in an ethical manner. This involves continuously reflecting upon the ethical way of doing every aspect of the research project.

The nature of this project requires less ethical considerations than in an interview study, or than a project devoted to a more sensitive topic. This project has, for example, not been treated by the Norwegian Centre for Research Data, and does not have to consider the confidentiality or anonymity of any individuals. However, "[r]esearchers owe a professional obligation to their colleagues to handle themselves honestly and with integrity" and there are ethical considerations to be made throughout the research project that relate to the validity, reliability and credibility of the project, as well as the processes involved in knowledge production (Israel & Hay, 2012, p. 505).

Document analysis is in principle 'harmless field work' because the document researcher rarely comes into contact with the people who are being studied (Duedahl & Jacobsen, 2010). However, The National Committee for Research Ethics in the Social Sciences and the Humanities (NESH) (2019) provides four ethical factors which are especially relevant for internet research[3]: the publicity of the statements/documents, the information's sensitivity, the vulnerability of those affected, and the consequences of the research interaction. NESH (2019) writes that it is important to distinguish between public documents and publicly available documents. Not all publicly available documents are considered public. Court decisions might for example be publicly available, but they can involve information that should be treated accordingly to ethical guidelines, specifically relating to anonymization of individuals or

[3] Internet research is perhaps often understood as research about the internet or about specific websites and forums, but I argue that this project falls within this category as most of the document are available online, and are open to the public. I understand internet research to also include this type of study where I am researching from afar and using texts and documents from the internet.

sensitive information. The documents used in this project, however, are considered public as they can be found on the open Web, and because the statements, arguments and decisions have been publicized through various media.

NESH's (2019) consideration of the importance of protecting children and vulnerable people is not applicable to this project either. Although the Norwegian climate case was brought forward by a youth organization, its representatives are adults, and are seen as public individuals. The six individual youths who have appealed the Norwegian case to the European Court of Human Rights have also done so publicly. Further, researchers have an obligation to inform and obtain consent from research participants, including those online, and should consider both lawful and ethical considerations on whether to inform the 'owners' about the project and collect consent (NESH, 2019). However, as the documents and websites used in this project are not access restricted and are available to all, consent to use them has been deemed unnecessary.

Confidentiality and anonymity is highly important in qualitative data. It is, however, debatable when individuals are public persons. Persons who make statements or give interviews in edited media should be aware of the possibility of these statements being used for research purposes (NESH, 2019). Anonymization and confidentiality of these people is therefore not always necessary. The researcher is responsible for reflecting upon and judging whether this is necessary in each case (NESH, 2019). Although the use of statements made by individuals is not a large part of this project, those statements or interviews that have been used are public statements either from the decisions, media or from public websites, and it is thus reasonable to consider them public (NESH, 2019).

Lastly, NESH (2019, *Sharing of data,* para. 1) discuss the importance of sharing data: "sharing of data is important for verification and re-use of research material". Similarly, transparency is important for society's trust in science. Publishing, or publicizing research is also important for its reliability. It should, for example, be possible for other researchers to conduct the same study and find similar results. This creates reliability (Bukve, 2021). Although there are not as many ethical considerations to this project as in other types of qualitative research studies, it is essential that the person conducting

the research is open, honest and reflective about their own positions within the study, their influences, and their choices.

4. Climate Change Litigation and Climate Change Legislation: Contextualizing the cases

The main objective of this research project is to explore and interpret the legal and extralegal factors involved in or influencing two climate change cases. To do so, this chapter will explore the national and international contexts in which the two cases were happening, including the countries' international recognitions and the national socio-political atmospheres surrounding the cases. The distinction between background information and contextual information in this project is blurred, this chapter will thus explore the background legislation relating to the two cases in such a way that the information provides the context for the cases. It will begin with an overview of climate change litigation and International Environmental Law, followed by case-internal analyses of both cases.

4.1 Climate Change Litigation

The past decades have witnessed an increase in national and international law concerning climate change (United Nations Environment Programme [UNEP], 2017). Many Western countries have ratified numerous conventions and/or implemented international agreements and conventions into their own legislation, protecting both the environment and the human and non-human animals within it. Consequently, there has been an increase and shift in how the consequences of environmental damage and climate change are responded to (UNEP, 2017). New laws "have recognized new rights and creates new duties", and the legitimacy and application of these have subsequently been litigated (UNEP, 2017, p. 4).

The Sabin Center for Climate Change Law database (2022) reports hundreds of ongoing climate change cases against governments globally. The UNEP (2021, p. 13) identify six categories of climate change litigation in which most cases fall into at least one of the categories; "(1) climate rights; (2) domestic enforcement; (3) keeping fossil fuels in the ground; (4) corporate liability and responsibility; (5) failure to adapt and the impacts of adapting; and (6) climate disclosure and greenwashing". *Climate rights* refer to the group of cases which assert that actions that are insufficient to mitigate climate change violate the plaintiffs' rights to life, health, food, water etc. *Domestic enforcement* refers to the cases where governments and their agencies are being sued

for their failure to implement or uphold the commitments made regarding climate change regulation. *Keeping fossil fuels in the ground* are the cases in which resource-extraction and resource-dependent projects are being challenged based on their potential climate change implications. These cases are increasingly calling for a proper consideration of the impacts and consequences of the projects. *Failure to adapt and impacts of adaptation* are the cases in which governments and private parties fail to (or chose not to) adapt in face of known threats to the climate, and/or cases seeking "compensation for adaptation efforts that caused harm or damaged property" (UNEP, 2021, p. 23). Lastly, *climate disclosure and greenwashing* refer to the cases in which plaintiffs allege corporate statements about climate change are misleading or untrue (UNEP, 2021).

Another way to categorize the different climate change cases is by their legal basis; on what grounds the plaintiffs are suing. The Sabin Center for Climate Change Law (2021) divides cases between suits against States and suits against corporations, and further between categories such as 'access to information', 'GHG emissions reduction and trading' and 'failure to adapt'. The Norwegian National Human Rights Institution (NIM) (2020) published the report *Climate and Human Rights* which distinguishes the cases that are based in the European Convention on Human Rights (ECHR). Climate change cases based in the ECHR often involve articles 2 and 8 of the convention; the right to life (Article 2) and the right to private life (Article 8), and at times Article 1 of the additional protocol 1: the protection of property. The convention aims at strengthening international bonds through the realization of Human Rights and Fundamental Freedoms which create a foundation for justice and peace. These provisions are held accountable through democracy and the collective understanding and commitment to the Human Rights (Council of Europe, 1952).

Two of the cases NIM introduces are the high-profile cases between the Urgenda Foundation against the Dutch State, and the Greenpeace/Nature & Youth case against the Norwegian state. In relation to the ECHR, the issue at hand is to what extent the convention binds signatory States to avert risks stemming from dangerous climate change (NIM, 2020). This can be explored in two separate ways; either by questioning the States' responsibility to protect inhabitants from the existing and unavoidable changes to the climate. Or by questioning their responsibility or obligation to reduce

GHG emissions to avoid dangerous and harmful climate change (NIM, 2020). The two cases both argue that the state is not doing enough to reduce GHG emissions so to avoid dangerous climate change, as well as question the States' responsibility to protect citizens from existing and future consequences.

The European Court of Human Rights (ECtHR) is the international court that decides in cases where States have been accused of breaching the ECHR. The ECtHR follow principles of interpretation which supplement and guide the international law principles for treaty interpretation. This includes methods such as purpose-oriented interpretation, dynamic interpretations, interpretations considering subsidiarity, considering principles of discretion and with consideration of international law (NIM, 2020). Normally Human Rights Court's decisions are influential for the interpretation of the ECHR. Although, national courts are also invited to interpret the convention in their own way, even if this deviates from the interpretation given by the ECtHR (Gerards & Fleuren, 2014). However, as the Supreme Court of Norway has expressed, the interpretation should be similar to that of the ECtHR, but it should be the European Court that further develops the convention, not individual States (Elgesem, 2003). Some cases might not have similar ECtHR cases as a basis for interpretation and adjudication, and must therefore interpret in their own way. However, the increasing use of the ECHR in climate change cases creates the potential for a new standard to be set regarding how to interpret the convention in relation to environmental issues.

4.2 Climate Change Legislation: International Environmental Law

Although the cases in this project were legally based in instruments other than international environmental law (IEL), a discussion of IEL contextualizes the global environmental politics and the global recognitions of the need to legally protect the environment in the years leading up to the two cases. The cases also inevitably include pieces of IEL in their arguments and the States' obligations under IEL to alter their measures to prevent further environmental damage and climate change. Through a brief historical review of some of the main pieces of IEL, this sub-chapter will provide an overview of the global context in which the two cases took place.

IEL, Human Rights, national constitutions and other national and/or international law often overlap, and even though a State is not found to violate the legal basis upon which it is sued, it might be in violation of other IEL. It should also be recognized that "[t]he climate crisis puts human life in grave peril. Laws that fail to fully confront this reality will prove to be irrelevant, abstract and ineffectual" (Wood, 2022, p. 243). This raises the question of whether IEL (and other legislation) has any purpose when it comes to protecting the environment and redressing the damage resulting from environmental destruction when legislation is often found not to have been breached. This ultimately constitutes the definition of state-corporate crime in which the political processes where climate change policy (or in the Norwegian case, issuing petroleum licenses) creates a system where States are able to make policies suitable to their own goals, despite their illegality or otherwise socially injurious consequences.

As a branch of international law, IEL relies on the same legal sources, including treaties, rules and principles of international law, binding acts of international organizations, and judgements from an international court or tribunal (Peel, 2015). Like international law, IEL "consists of rules, rights, and obligations that are legally binding on States and other members of the international community" (Peel, 2015, p. 60). There are different definitions of what International Environmental Law is depending on one's perspective. The *Doctrinal Approach,* held by most lawyers, concerns itself with determining "what the legal norms are and how these norms apply to particular situations" (Bodansky, 2010, p. 5). The *Policy Approach* includes considerations of what laws *should be,* rather than just what they are. And the *Explanatory Approach* is often the perspective of political scientists, viewing International Law from the outside (Bodansky, 2010). Although in-depth discussions of IEL and how it is applied in the cases will not find place in this project, the interpretation of IEL most suiting for this project is a mix between the *Policy Approach* and the *Explanatory Approach.*

Furthermore, the term *law* offers some implications. Law often "requires enforcement mechanisms" and consequences for those who breach it, and without such mechanisms, international environmental law might be considered politics or moral norms (Bodansky, 2010, p. 13). What Daniel Bodansky (2010) calls the 'orthodox' view, defines IEL by its sources. "A norm qualifies as law if (and only if) it was created through a recognized lawmaking process", such as through treaties and conventions

(Bodansky, 2010, p. 13). However, the problem with this unfolds as treaties and conventions often lack binding agreements. They often simply offer recommendations for action (Bodansky, 2010). This becomes evident in climate change litigation for example, where States claim that they are not *legally* bound to act.

Bodansky (2010, p. 21) writes that there are three waves relating to the emergence of international environmental law: “(1) a conservationist stage”, “(2) a pollution-prevention stage”, “and (3) a sustainable development stage”. Each stage follows a cycle in which an issue is discovered, (usually as the result of a dramatic event) where the public becomes interested for a while, causing a governmental response, often serving as an example for other nations for what to do (or not to do) in similar situations, before the difficulties of resolving the issue become diffuse, tiresome or expensive, and the original issue becomes overshadowed by a new dramatic event, causing the issue “to be addressed in a routine, low-key manner” (Bodansky, 2010, p. 21). The first wave of IEL, from the beginning to the mid-twentieth century, focused on the protection of wildlife. The failed London Convention of 1900 for example, aimed to protect African Wildlife, but failed to gain enough signatures (Greene, 2020). The pollution-prevention wave was characterized by the establishment of multilateral agreements and organizations in the 1960s and 70s. Lastly, the third wave was distinguished with the shift towards sustainable development in the 1980s, continuing until today (Bodansky, 2010). “Each successive stage has not displaced its predecessors. Rather, the phases have had a cumulative quality, and, today, the international environmental landscape includes elements of all three” (Bodansky, 2010, p. 21).

A proposal for a fourth, current, wave is this: *the stage of redress*, in which IEL is commonly used to redress victims of environmental harm and to hold States and corporations accountable. It would be a relatively new wave, but its contents seem to be growing both in public interest, and in actual numbers concerning the use of law in combating climate change. The fourth stage also continues the development of IEL as the cases result in new findings relating to IEL and how to use it, who/what it protects and who/what it *should* protect, or how it should be applied in the future.

IEL has developed exponentially since the United Nations Conference on the Human Environment in 1972 (also known as the Stockholm Convention), the same year as the

United Nations Environment Programme (UNEP) was created (Turner, 2019). The UNEP, until this day, functions as a global authority that sets the environmental agenda, promotes the implementation of environmentally sustainable developments and advocates for the protection of the global environment (UNEP, n.d.). In 1992, the Rio Declaration reaffirmed the Stockholm Declaration, recognizing the evidence of human-made climate change (often in correlation with the pursuit of economic growth), and the importance of sustainable development (Greene, 2020). However, it was not until the Kyoto Protocol in 1997 that signatory nations were legally bound to any commitments. The Kyoto Protocol was a historical milestone, being the first treaty committing industrialized countries to reduce GHG emissions with individual, agreed targets for reduction (United Nations Framework Convention on Climate Change [UNFCCC], n.d.b.). Another significant aspect of the protocol was that it recognized that the industrialized countries with large economies were the worst polluters, and were thus responsible for more environmental damage, and in turn, responsible to contribute more to the reduction of GHG emissions.

However, “the absence of effective operation targets and failures to meet national commitments by countries involved showed the Kyoto enforcement system to be lacking” (Derwent, Blachowicz, Hugel, Blanco, Xing & Franco, 2016, p. 8). The Paris Agreement thus signalized a hopeful beginning of an era where climate change would finally be taken seriously by a global, state-led commitment to reducing emissions. “Its goal is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels” (UNFCCC, n.d.a, paragraph 2). It was a landmark in international climate change legislation as it was the first binding agreement bringing all nations together to combat the climate crisis (UNFCCC, n.d.a). At the time, the Paris Agreement was celebrated as “the world’s greatest diplomatic success” (Harvey, 2015, *Title*) which would “[unite the world] in a common goal of slashing emissions for the first time” (Digges, 2015, *Title*). But like many treaties before it, the Paris Agreement has not quite had the affects that lawmakers hoped it would.

The Paris Agreement *did* successfully define what society considers dangerous climate change (Lewis, 2016). And the past decades of increased amount of international environmental laws have shown there is a global consensus of the need to protect the environment through multilateral approaches. However, the “”hard” rules

of international environmental law are yet to develop" (Peel, 2015, p. 71), and the long-standing challenge of "ensuring adequate and effective implementation and enforcement of international obligations" remains (Peel, 2015, p. 77). Perhaps international environmental law is, as Bodansky (2010) reflected, simply moral norms and ideas for action. Nonetheless, these international developments symbolize the international recognition of human-made climate change and a 'will' to challenge it. They also form the basis for the two climate cases discussed in this project.

4.3 Greenpeace/Nature & Youth v. Norway

There are several potential points of departure for the Norwegian climate case. Marius Nordby (2021) writes that it began already in 2010, when the Stoltenberg administration made an agreement with Russia relating to the border between the two States in the Barents Sea. When the maritime border was clarified, the government could officially open a new area for petroleum activity, which would later lead to the 23rd licensing round in which the case and decisions are based (Nordby, 2021). On the other hand, the official climate case website states the point of departure to be April of 2016, when Norway signed the Paris Agreement (Klimasøksmål Arktis, n.d.). The incompatibility of Norwegian national and international environmental policy and the issuing of further oil and gas production licenses thus sparked the lawsuit against the state. However, the Norwegian government has long been, not only aware, but actively taking part in the reduction of climate change mitigation and transformation, even serving as a source of inspiration for other nations to follow. This sub-chapter will explore how the Norwegian climate case unfolded in light of the contextual circumstances in which it was happening.

4.3.1 International recognition and National legislation

Norway has been recognized as a country with high ambitions and strict policies when it comes to the environment and sustainable development. Although it is not a member of the European Union (EU), Norway has often adopted EU directives into national law and remains highly influenced by, but also greatly influences the EU in terms of environmental policy (Organization for Economic Co-operation and Development [OECD], 2011). In 2017, Norway adopted its Climate Change Act "to promote the implementation of Norway's climate targets as part of its process of transformation to

a low-emission society by 2050" (HR-2020-2472-P, 2020, para. 61). Norway also has several other Acts relating to the climate, in addition to its strict regulations for petroleum production safety (HR-2020-2472-P, 2020). Prior to the incorporation of Article 110 b of the Norwegian constitution (which was the predecessor of Article 112), there were also several suggestions and proposals for what to include in "the right to a healthy environment" (HR-2020-2472-P, 2020, para. 93). Criminologist Nils Christie, for example, proposed a bill which would require a two-third (alternatively three-fourth) majority vote for significant intrusion on the environment, in which local and county authorities could reject decisions by the Storting which were intrusive to the environment. "The bill was [however] unanimously rejected by the Storting" (HR-2020-2472-P, 2020, para. 93).

Further, Norway continues to hold a battling position between being a global advocate and frontrunner in climate change mitigation on the one hand, and a major oil and gas (O&G) producer on the other (OECD, 2017). However, the International Energy Agency (IEA) "acknowledges Norway's contributions to global energy security and regards its oil and gas resources and revenue management as commendable and a model for other countries to follow" (OECD, 2017, p. 9). In fact, because the Norwegian government policies on O&G management were perceived as sufficiently integrated by environmental considerations, the IEA encouraged Norway to continue its O&G exploration (in an environmentally sound manner) (OECD, 2017).

This signalizes an international view of Norway as a state with sufficient environmental policy and emission mitigation, potentially (or actually) influencing the Norwegian government to issue further licenses. This view has, however, changed more recently. A report from the International Energy Agency (2021, p. 21) states that "there is no need for investment in new fossil fuel supply in our net zero pathway", and no projects beyond those "already committed as of 2021" have been approved. However, the Norwegian government does not see the need to stop oil and gas exploration any time soon (Hovland, Lorentzen & Fjellberg, 2021).

Further, the Norwegian O&G industry has also received much criticism. In a briefing published by Oil Change International, the Norwegian government is criticized for their continuing ambitions to explore and develop new areas for oil and gas despite their

supposed environmentally friendly climate policy (Lundberg, 2022). Although Norway was one of the first countries to sign the Paris Agreement, they have not only continued, but also increased the amount of O&G exploration licenses in the past ten years (Lundberg, 2022). The environmental organization (Oil Change International) argues that if the Norwegian government "wants to be taken seriously on climate issues, it must review the country's oil and gas policies and align them with the goals of the Paris Agreement and with the principles of global equity" (Lundberg, 2022, p. 9).

The current Russian invasion of Ukraine is also an example of the intricate issue of Norwegian O&G. The agreement of reducing and/or completely stopping the use of Russian O&G, has led to increased use and necessity of Norwegian O&G. Likewise, because the Norwegian industry is often described as the most environmentally sound industry, the reduction in Norwegian O&G would lead to increased O&G production elsewhere which would likely cause more devastating global environmental effects than if the Norwegian industry kept its production. This exemplifies the complexity of the issue, but a further discussion of this would fall out of the scope of this project. Mentioning this is simply to address the intricate issue at hand, and to recognize the understanding of the inability of the Norwegian government to simply reduce or stop its oil industry.[4]

4.3.2 Case proceedings

When Greenpeace Norway and Nature & Youth (the organizations from now) sued the Norwegian State (specifically the Ministry of Petroleum and Energy) in October of 2016 it was based on these circumstances of Norway's goals of being an environmentally sustainable nation, while continuing its O&G production (Klimasøksmål Arktis, n.d.). In the subpoena, the plaintiffs point to the potential environmental destruction that may follow from the issued production licenses in the Barents Sea, and the breach of the State's responsibilities (as committed in the Paris Agreement) to reduce CO_2 emissions (Hambro & Feinberg, 2016). Additionally, the plaintiffs argued that there were processing errors related to the basis upon which the extraction-licenses were

[4] The Norwegian State has recently (26.04.22) used the Russian war in Ukraine as an argument for the ECtHR to decline the appeal of the case to the European Court, which has received critique from the organizations (see Aasen, Skifjeld & Kaupang, 2022) and Professor of International Environmental Law, Christina Voigt (see ABC Nyheter, 2022). The critique involves the notion that the current situation has nothing to do with the case and that legal claims based on decisions made in 2013 and 2016, cannot be excused by the current situation (ABC Nyheter, 2022).

given, which meant they should have been invalidated and/or reconsidered. Further, the licenses represent a violation of the right to a healthy environment granted in the Norwegian constitution paragraph 112, as well as the ECHR articles 2 and 8 (HR-2020-2472-P, 2020).

The organizations argued that the state had issued licenses to begin petroleum activities in a completely new area of the Barents Sea which might lead to further burdens for the environment. Additionally, the far distance between the oil field and land would increase the chance of catastrophes in an especially vulnerable area of the arctic (Nordby, 2021). The plaintiffs also sketched out the climate crisis and presented that in order to prevent further global warming, all undiscovered oil and gas must stay in the ground (Nordby, 2021).

In their response, the State expressed that the Norwegian government has a goal to be a leader in health, safety and the environment in the petroleum industry. And that their regulation and management is based on extensive and long-term experience from very demanding conditions (Sejersted, 2016). The issuing of the licenses is thus the result of extensive political and professional processes with careful consideration for the potential environmental impacts, where democratically elected representatives have come to an agreement. They also state that GHG emissions from petroleum activity have long been on the political agenda, and have become thoroughly investigated, assessed, and later regulated (Sejersted, 2016). The potential CO_2 emissions from exploring the new area were determined marginal. Besides, it was too early to say what the consequences would be for extractions from the area, as it was unknown what would even be found and what requirements would be set for the potential developments. Thirdly, the State explains that the principles of the international agreements, such as the Paris agreement, place the responsibility on the countries that consume the oil and gas, and not on the producer. There were thus no case processing errors relating to the lack of investigation into environmental consequences as alleged by the organizations (Sejersted, 2016).

4.3.3 National politics and public opinions

By November of 2017, the Grandparents Climate Campaign had joined as litigants, and the hearings started in the Oslo District Court, just a couple of months after the

Norwegian national elections. Changes in political agendas are in constant interaction with media prioritizations, different party's strategic communications and voters' perceptions. Elections also reflect voters' views and attitudes, which are in turn influenced by their own social, economic, and cultural contexts (Hesstvedt, Bergh & Karlsen, 2021). National politics and elections are thus a significant source of information for understanding the socio-political context in Norway before and during the climate change case.

In 2017, 20.7% of voters stated that the environment was one of the two most important issues for their vote in the elections (Hesstvedt, Bergh & Karlsen, 2021)[5]. The two largest parties (at the time, but also consistently in the past decades), the Labour Party (Arbeiderpartiet) and the Conservative Party (Høyre), also express ambitious goals and increased focus on environmental issues in their party programs. Arbeiderpartiet (2017) wrote that their five main climate initiatives for Norway were to (1) take the lead in securing Norway's climate goals, (2) carry out a radical change of the transport sector, (3) make Norwegian industry a world leader in sustainability, (4) make it easier to make climate-friendly choices, and (5) develop Norwegian leadership internationally. Despite receiving 27.4% of the votes, it was the Conservative party that continued its majority coalition government in 2017. In their party program, Høyre (2017) wrote, amongst other things, that their environmental goals include becoming a low-emission society by 2050, making the transportation industry emission-free, and that Norway should be a pioneer in renewable energy.

Hesstvedt, Bergh and Karlsen (2021) write that people brought up in societies where materialistic needs have been met are often more concerned with issues such as the environment, equality, political participation, and self-realization. This is often reflected in Green politics, where young voters are overrepresented compared to other demographics (Otjes & Krouwel, 2015). This is somewhat evident in a global perspective as well. Norway is for example, a country with high living standards, where most materialistic needs are met, and poverty levels are low. This, perhaps, allows for increased attention to environmental issues and focus on, as well as having the

[5] Environmental interests do not automatically mean concern for the environment, but rather represent interest in environmental politics, or interest/agreement in a party's environmental political stance.

resources for, green transformation. However, Norway holds a conflicting position, as many of the nation's materialistic and economic needs are covered precisely by the oil and gas industry which is responsible for large amounts of national emissions. In turn, Norway's position as a sustainable oil nation creates debate as conflicting interests meet. One side might hold the view that Norway must continue its oil and gas industry to uphold these high living standards, and thus express reluctance to lower O&G exploration. While the other side might express willingness to lower living standards (or lower national wealth) in order to protect the future of the planet.

Hesstvedt, Bergh and Karlsen's (2021) study found that the climate and environment were growing topics of interest to voters in the past thirty years, and particularly so in the past three elections. The party programs of the two largest parties in Norway (Høyre and Arbeiderpartiet) in 2013 and 2017 also show interest in green transformation, oil and gas politics, and climate change (see Arbeiderpartiet, 2013; Arbeiderpartiet, 2017; Høyre, 2013; Høyre, 2017). This symbolizes the presence of the environment on the political agenda. The emergence and recent success of the Norwegian Green Party, as well as smaller left wing parties, shows a slight shift towards a more liberal society. However, as the left parties tend to gain votes from people concerned about climate change and biodiversity, the Right-wing parties gain support from voters who are more critical of the climate issue (Hesstvedt, Bergh & Karlsen, 2021). Thus, although the environment is on the political agenda, there is disagreement as to how important the Green transformation is, or how it should be done.

This ultimately portrays the difficulty of handling the climate crisis within politics, and thus the want/need for taking the issue to court. Because of the different views of the urgency to act, or even the existence of the threat, it is problematic to come to an agreement that is sufficient. Therefore, the agreements that have been made (such as the Paris Agreement) should be used to hold signatory parties responsible for their breaches.

In January of 2018, the Oslo district court decided in favor of the State and ruled that the licenses do not stand in conflict with §112 of the Constitution, nor the articles of ECHR, nor were there case processing errors related to the basis of validity for the

license (Klimasøksmål Arktis, n.d.; Nordby, 2021). After a failed attempt to appeal directly to the Supreme Court, the case proceeded in the Court of Appeal in November of 2019. By then, Friends of the Earth Norway (Naturvernforbundet) had joined as litigants. It was Naturvernforbundet that, in 1980, ensured that environmental organizations would be recognized as legal parties in matters concerning the environment (Azari, 2019).

As Social Movement research has suggested before, “coalitions and alliances between social movements and organizations offer possibilities of combining resources and influence”, thus generating a stronger position in a conflict (Steinman, 2019, p. 1072). Erich Steinman (2019, p. 1073) writes that the three key factors involved in the success of coalitions are “significant *threats to shared interests*”, “broad, inclusive or flexible *ideologies*”, and “the existence of *social ties”.* Naturvernforbundet is the parent organization of Nature and Youth, thus sharing similar views and goals, as well as having an established connection. The Grandparents Climate Campaign aims at protecting their ‘grandchildren's’ futures and is thus campaigning against the same threats and holds similar views as the other litigants. It is likely that the collaboration between the organizations had a positive impact on the general social movement and undoubtedly brought more resources into the lawsuit. However, it did not seem to have a distinctive affect in the outcome of the case.

4.3.4 Final decision

Despite the assistance from both the Grandparents Climate Campaign and Naturvernforbundet, the Court of Appeal also decided in favor of the State. The organizations appealed to the Supreme Court, where the court once again upheld the judgement in favor of the State in December of 2020 (Klimasøksmål Arktis, n.d.). However, 4 out of 15 judges found the licenses to be invalid due to processing errors relating to assessment of global emissions resulting from Norwegian petroleum activity (HR-2020-2472-P, 2020; Fisher, 2020). In conclusion, Justice Webster wrote that the assessments did not comply with the Strategic Environmental Assessment (SEA) Directive. This was found to be a procedural error, due to the lack of omission identification, descriptions, and assessment of the climate impacts. Although the uncertainty of petroleum resources to be found would limit a potential assessment of the consequences, “an overall analysis would have sufficed” (HR-2020-2472-P, 2020,

para. 274). In relation to §112, Justice Webster notes that this is a perpetual obligation of the state, meaning that there is every reason to believe that “climate considerations are adequately assessed already before the opening decision” (HR-2020-2472-P, 2020, para. 273). This is in accordance with the above notion regarding the Norwegian government and Norwegian climate change policies being sufficient, and that the processes involved in issuing licenses are carefully considered.

The result of the climate case was provocative to the organizations and its supporters who argued that it showed little consideration and understanding of the severity of the climate issue (Fisher, 2020). The leader of Greenpeace Norway, Frode Pleym, also expressed that it is frightening and absurd that the constitutional right to a livable environment cannot be used as a basis to stop the most environmentally damaging practice that Norway uses (Fisher, 2020). Therese Woie (former leader of Nature & Youth Norway) expressed that the Supreme Court has let down the younger generations and have given politicians the power to continue on a path to an unsafe future. In an interview, she expressed a hope for young voters to take matters into their own hands by voting consciously in the (then) upcoming 2021 national election (Fisher, 2020). This, in turn, reflects and supports the Defendants' view that the matter is best suited within politics, not in the courts. The case has received much attention within the field of law, with many commentators sharing their understandings of the case, many of which whom characterize the case as ‘the case of the century’ (Wengen & Libell, 2020). Ultimately the final decision supports the notion of state-corporate crime in which processes of environmental policy-making are in favor of the state and its business partners, despite the potential negative consequences for citizens.

In June 2021, six young activists, in collaboration with Greenpeace and Nature & Youth, appealed the case to the European Court of Human Rights (ECtHR). The ECtHR are considering the case and are (at the time of writing) awaiting a response from the Norwegian government by April 13^{th,} 2022. In their letter to the Norwegian government, the ECtHR requests that the parties answer a list of questions relating to (1) the applicants’ *locus standi*, (2) whether the applicants have “exhausted all domestic remedies”, (3a) “to what degree […] the applicants arguments […] fall within the scope of the case before the court” (European Court of Human Rights, 2022, p. 2-3), (3b) whether the applicants could have brought their Convention violations before

domestic courts in a different way, (3c) what the direct link is between the Licenses and the violation in question, (3d) whether the environmental consequences presented by the organizations will – factually and legally - be taken into account in later stages of the administrative process relating to oil and gas production, and (4) whether there have been any violations of articles 2, 8, 13 and 14 of the Convention (European Court of Human Rights, 2022). A significant aspect of the appeal to the ECtHR is that it may create a basis for interpretation for ECHR claims relating to the environment. This may serve as inspiration for future climate change cases.

4.4 Urgenda Foundation v. the Netherlands

The beginning of the Dutch case can be identified as 2007, when the Intergovernmental Panel on Climate Change (IPCC) concluded that the rises in global warming could, for the most part, be attributed to human activity (Minnesma, 2012). The scientific certainty of human-made climate change was definite, and the consequences unavoidable, "(albeit not with the same consequences or to the same extent in all countries and regions)" (Minnesma, 2012, p. 1). Even before the climate change conferences in Copenhagen and Cancun, (and years before the Paris Agreement), the European Commission expressed the need to lower emissions before 2020 in order to reach the 2°C target (Minnesma, 2012). The EU and Dutch reluctance to complete the necessary changes to combat dangerous climate change formed the background for Urgenda's lawsuit against the Dutch State. The unfolding of the Urgenda case and the context surrounding it will be the focus of this sub-chapter.

4.4.1 International recognition and National Legislation

In the early 2000s the Netherlands struggled to realize its climate goals, and CO_2 emissions were still largely linked with economic growth. Studies at the time provided skepticism regarding the Dutch government's ability to reach its climate goals by 2010 (Minnesma, 2003). The OECD *Environmental Performance Review* in 2015 found that the Netherlands was fifth highest among OECD countries in the use of fossil fuels in its energy supplies, and 95% of habitats, and 75% of species were considered threatened in 2015 (OECD, 2015). The Netherlands was the second-most densely populated OECD country (at the time of the report, and still has high population density), and the expansion of urbanization and transportation (as well as

industrialization, agriculture and fishery activities) were the main reason for loss of natural habitats and landscapes over the OECD review period (OECD, 2015).

However, similar to Norway, the Netherlands has also been recognized as a forerunner in environmental policy (OECD, 2015). “The Dutch Ministry of VROM has always been very prominent in pushing for climate policies with ambitious goals in the international arena” (Minnema, 2003, p. 47). From 2000 to 2014 the country managed to decouple GHG emissions from economic activity, meaning that stability or reduction in GHG emissions no longer limited economic growth. The Netherlands was also one of the top OECD countries “in the area of waste management” by eliminating landfills, and shifting towards incineration with energy recovery (OECD, 2015, p. 22). The country was also able to meet its commitments under the Kyoto Protocol through carbon credits, and “the number of deaths from outdoor air pollution […] declined”, and was, in 2010, “significantly lower than the OECD average” (OECD, 2015, p. 23).

The small size and large population in the Netherlands, as well as its location below sea level, has caused the Dutch to heavily interfere with the natural environment. This is reflected, for example, in their heavy industrialization and man-made dikes (van Zeben, 2015). Due to their environmental circumstances, the Dutch have also long been advocating for “environmental leadership and international cooperation on environmental problems that are particularly difficult to resolve unilaterally, including climate change” (van Zeben, 2015, p. 340).

4.4.2 National Politics and public opinions

“The Netherlands constitutes ideal territory for parties that focus on Green politics, due to the open electoral system and widespread post-materialist values among the population” (Otjes & Krouwel, 2015, p. 996). Environmental issues have long been of interest to Dutch voters, and many ‘non-green’ parties have focused on environmental issues for decades. This debilitated the creation of a Green party for many years, until four left-wing parties merged into a single party in 1991: the GreenLinks (The GreenLeft). Today, there are “two electorally significant” green parties in the Netherlands, the GreenLeft and *Partij voor de Dieren* (Party for the Animals), which have both won seats in several elections (Otjes & Krouwel, 2015, p. 991). In the 2012

national elections the two Green parties respectively received 2.3% and 1.9% of the votes, and in 2017, 5.6% and 3.84% (International Foundation for Electoral Systems, n.d.). The existence and success of two Green political parties signalizes a society highly interested in, and concerned for, the environment.

The People's Party for Freedom and Democracy (VVD from now) have held office in the Netherlands for the past four terms. VVD's climate agenda in 2012 stated that a sustainable nature policy is realistic and feasible, in which the government should work in collaboration with nature organizations and the agriculture sector to build and uphold an attractive landscape to live and work in (VVD, 2012). The VVD wanted an effective environmental policy, based on rationality and facts, where results count. The VVD (2012) also stated that the development and export of new knowledge and technology is key to solving environmental issues and is an important driver for economic growth. In the European Parliament Election in 2014, VVD states that it is their intention to use less fossil fuels to become less dependent on third parties, pay less in energy bills and help the environment (VVD, 2014). This too, is now likely affected by the current Russian war in Ukraine.

A public survey from 2014 showed that, in general, the Dutch population found the protection of the environment to be an important issue. From a list, the top five most important environmental issues were *water pollution*, *air pollution*, *depletion of natural resources, health impacts from chemicals used in everyday products*, and *consumption habits* (European Commission, 2014). Most Dutch people believed that when it came to protecting the environment, decisions should be made jointly with the EU, rather than nationally. Similarly, there should be more EU funding to support environmentally friendly activities, and EU environmental legislation was deemed necessary in order to protect the environment in the Netherlands. The Dutch also believed that the EU should be able to check that environmental laws were being applied correctly, and that the EU should assist non-EU countries to improve their environmental standards (European Commission, 2014).

More recent polls from 2021 show that most Dutch people aged 18 and above are concerned with the impact of climate change on future generations and wish that the Netherlands would use *less* fossil fuels, and *more* sustainable energy sources

(Statistics Netherlands, 2021). Additionally, approximately half of the adult population thinks that it is positive that the government wishes to make the Netherlands free of natural gas, because of the negative effects it has on the environment (Statistics Netherlands, 2021). Consequently, the literature on Green politics in the Netherlands and the seemingly general understanding of the urgency of the environmental threat, contextualizes the Dutch case within a society greatly concerned with and interested in the environment. The environmental discourse is thus understood as providing an atmosphere in which a climate change case may be of interest to the population.

4.4.3 Case Proceedings

The legal proceedings in the case against the Kingdom of the Netherlands began in November of 2013 when the Urgenda Foundation brought the State to the District court in The Hague. In the subpoena, the Urgenda Foundation (2014) provided extensive background knowledge about global climate change and its devastating effects, and the explanation as to why emissions must be radically reduced to avoid disastrous impacts. The core of the case was Urgenda (and all other plaintiffs) seeking proceedings to result in an order for "the Dutch State to take action to limit the amount of CO_2 emissions to 40% below the 1990 level by 2020" (Urgenda Foundation, 2014, p. 21). Urgenda also argued that the basis for the claims that the Dutch State was legally obliged to act, was in the State's signing of the United Nations Framework Convention on Climate Change (UNFCCC). In general, Dutch climate change policies are also formed by the international agreements that it has committed itself to, including the UNFCCC, the Kyoto Protocol and the Paris Agreement (Government of the Netherlands, n.d.). Urgenda Foundation (2014, p. 117) thus argued that the "national political grounds as to whether these decisions can be accepted is therefore no longer at issue", as Urgenda was simply asking the State to do what it had already committed itself to do.

The Dutch State replied that they acknowledged the facts about climate change and the potentially devastating consequences, as well as its failure to do its part in avoiding dangerous climate change. However, "The key disagreement between the two parties revolved around the urgency with which these reductions should take place" (van Zeben, 2015, p. 344). The State also rejected that it is legally obliged to act, and that

the reduction of emissions is a political issue which does not belong in the Court (Urgenda Foundation, n.d.). The oral arguments were presented at the District Court in The Hague in April of 2015, and in June of 2015 the Court ordered the Dutch State to lower its emissions by at least 25% before 2020 compared to 1990 levels.

Despite the public, academic and legal calls to accept the decision, the Dutch State appealed the judgement in September of 2015 (while simultaneously taking steps to meet the target set by the Court) (Urgenda Foundation, n.d.). In October of 2018, The Hague Court of Appeal decided to uphold the 2015 decision. During this time, VVD was still in government, but the second largest party in the 2017 elections was the far-right *Party for Freedom* (van Holsteyn, 2018). Right-wing populism has been on the rise in many European countries, which is often followed by attitudes consistent with climate change skepticism (Kulin, Sevä & Dunlap, 2021). *Party for Freedom (PVV)* leader, Geert Wilders, for example, ridicules opponents for their focus on climate change (Wilders, 2017).

It is well documented that there is a link "between political right-wing orientation and climate change denial" (Jylhä, Strimling & Rydgren, 2020, p. 10226). Right-wing, conservative ideologies tend to be less concerned for anthropogenic climate change and often oppose multilateral environmental agreements and taxes related to securing the environment (Kulin, Sevä & Dunlap, 2021). The increased success of the PVV in 2017 exemplifies the rise in right-wing populism in which the issue of nationalism and anti-multiculturalism has high priority. Additionally, studies have shown that people are often unable to worry about several issues at the same time, so that "when concern about one issue goes up, concerns about other issues go down" (Duijndam & van Beukering, 2021, p. 355). Thus, increased nationalism and anti-globalization may result in less focus on climate change and environmental issues.

"The results of the 2017 elections [also] demonstrate […] the openness of the Dutch party system" (van Holsteyn, 2018, p. 1368). Political parties can easily participate in elections in the Netherlands, and any party that wins 0.67% of the national vote will get a seat in the parliament (van Holsteyn, 2018). The widespread political system with many small parties might create difficulties in realizing party ambitions. This may cause

the failure of sufficient climate change policy and thus the resulting use of the judicial system.

4.4.4 Final decision

In 2019, the State filed its appeal to the Supreme Court, challenging a variety of findings made by the Court of Appeal, including the notion that they were obliged by the human rights to reduce Dutch emissions. In April of 2019, two chief advisors to the Supreme Court published an Advisory Opinion stating that the Court of Appeals judgement should be upheld, and in December 2019, the Supreme Court decided "that the Dutch government must reduce emissions immediately in line with its human rights obligation" (Urgenda Foundation, n.d., last paragraph).

The Urgenda case has received much attention for being the first climate case with a Supreme Court decision where the State has been required to reduce GHG emissions (Spier, 2020). It has also laid pointers for how to proceed in similar cases (Nollkaemper & Burgers, 2020). In 2021, a case against Royal Dutch Shell based itself in similar legal arguments as the Urgenda case and won in the District Court in the Hague (Pols, 2021). Further, Josephine van Zeben (2015, p. 356) writes that "the academic, political and judicial discussions following Urgenda" were hoped to be influential in the (then) upcoming Conference of the Parties-21 and the resulting Paris Agreement. The growing use of courts to tackle the global climate problem has accelerated since 2015 and it is evident that litigants "aim to produce ambitious and systemic outcomes" (Peel & Markey-Towler, 2021, p. 1484).

4.5 Concluding remarks

International Environmental Law has developed exponentially the past few decades and most countries recognize the imminent global climate crisis. Many countries are also taking steps to combat this crisis and have committed themselves to international agreements and multilateral initiatives to halt global warming. Subsequently, many nations are increasingly being sued for their lack of adjustments and/or failure to meet their commitments, ultimately resulting in their failure to protect their citizens from the consequences of climate change.

Despite its pending continuation, the Norwegian case has received international attention (see for example BBC, 2017; Fouche, 2017), and Norwegian oil-politics are for example, criticized by the *United Nations Special Rapporteur on human rights and the environment* for violating human rights (see Boyd, 2019). Despite the organizations' loss, the case nevertheless provides insight into ways to use the judicial system in climate change related cases. The judgement is nevertheless important for the "future of climate change litigation, and to great inspiration for climate activists across the globe" (Colby, Ebbersmeyer, Heim & Røssaak, 2020, p. 180). The Urgenda case against the State of the Netherlands was groundbreaking as the first climate change case that ended with a Supreme Court ruling where the State was required to reduce their GHG emissions (Spier, 2020). Nolkaemper and Burgers (2020) also write that the ruling in the Urgenda case is a landmark for future climate cases and includes important pointers for how best to proceed in similar cases.

The UNEP (2021, p. 27) suggests that the future may hold a variety of developments in climate change litigation such as "consumer and investor fraud claims, pre- and post-disaster cases, implementation challenges, increased attention to climate attribution, and an increasing use of international adjudicatory bodies". The UNEP (2021) states that although every case will have unique factors, with corresponding results, previous cases will be able to portray how new cases may be resolved. Similarly, the amount of national and global attention that these cases receive may contribute to the overall increase in, and success of, climate change litigation. The literature on how to succeed in climate change litigation is growing, and future climate change litigation might have better prerequisites to succeed because of it. The use of law to combat climate change might also have the potential to further develop international environmental law and set new standards for how to protect the environment. It might also provide strength to the environmental movement, again, in the form of providing ways in which activists can use the judicial system to reach their goals.

5. Comparative Analysis: Norway and the Netherlands

"People in general, and social scientists in particular, are engaged in 'constant comparison'. Comparison is what enables us to make sense of events as they unfold across time and space" (Boswell, Corbett & Rhodes, 2019, p. 6). Discussing climate change litigation cases in isolation would merely provide information about that case. Comparing cases has the potential to say something more general about what works, and what does not. This comparative analysis will discuss the similarities and differences in the Dutch and Norwegian Supreme Court decisions, to illuminate which factors may have caused the contrasting outcomes of the cases.

5.1 Cause of action

One of the core differences between the two cases is the grounds upon which the States were sued. Or in other words, the cause of action. While the Dutch State was sued for their insufficient reduction in greenhouse gas (GHG) emissions, the Norwegian State was sued for issuing petroleum licenses. The Norwegian Supreme Court stated that the judgement in the Urgenda case "has little transfer value" because it (1) "questioned whether the Dutch government could reduce the general emission targets it had already set" and (2) "it was not a question of challenging the validity of an administrative decision" (HR-2020-2472-P, 2020, para. 173). The Norwegian Supreme Court thus deemed the cause of action inapplicable to its own case.

However, specific arguments have been argued to be applicable, despite the different causes of actions. In their appeal to the Supreme Court, Greenpeace and Nature & Youth argued that the Norwegian case dealt with issues similar to those in the Dutch case. Specifically, the appeal to the Norwegian Supreme Court was partly based on the comment in the Court of Appeal's decision, that the reduction of Norwegian oil and gas could lead to increased use of more environmentally destructive energy sources elsewhere. Thus, the global emissions could still not be met, even if Norway completed its reductions (Hambro & Feinberg, 2020). The organizations thus argued that there is never a discharge of responsibility for one country if other countries do not do what they are required to do. In their appeal, the organizations thus referred to the Urgenda case where the Supreme Court Found that the Dutch State could not use this as an

argument, and therefore, it should not be used as an argument in the Norwegian case either (Hambro & Feinberg, 2020).

Further, the different causes of action were influenced by the national contexts of each case, which was discussed in chapter four. The Dutch are already experiencing the consequences of climate change in the form of bad air quality and rising sea-levels directly threatening the natural environment on which Dutch citizens rely (ECLI:NL:HR:2019:2007, 2019). Both Urgenda and the Dutch state endorse climate science and acknowledge that dangerous climate change is a threat, it "will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now" (ECLI:NL:HR:2019:2007, 2019, *Dangerous climate change*, para. 2). The urgency to act was thus more imminent in the Dutch case and was thus an important aspect of the lawsuit. In her letter to the Prime Minister, the executive director of Urgenda stated that "The Netherlands [...] has above-average security and economic interests in reducing greenhouse gas emissions as much as possible as a means of combating or mitigating dangerous climate change" (Minnesma, 2012, p. 5).

On the other hand, the Norwegian cause of action is clearly influenced by the fact that Norway is an 'oil nation'. It was the plaintiffs' perspective that

> Norway's responsibility must be assessed based on Norway's status as a large oil exporter with resources to restructure. Norway must take a proportionately larger share of the climate cuts, both because we have produced oil and gas resulting in major emissions, and because we have the economic capacity to do so.
>
> (HR-2020-2472-P, 2020, para. 26).

The specific use of a licensing round as the grounds for litigation was thus an attempt to force the government to reduce its most environmentally destructive practice. Additionally, this argument portrays the view that Norway as a successful oil and gas nation, with the corresponding resources, has even more responsibility to do its part in combating climate change. Which is further consistent with international environmental agreements signed by the Norwegian State.

Additionally, the Dutch case is based upon a much more general complaint than that used in Norway. Urgenda sued for the general lack of reduction in GHG emissions (based on the State's cuts in climate mitigation goals), while the Norwegian organizations sued for the potential invalidity of a specific licensing round. "The rules of procedure for opening of new marine areas for petroleum production follow from the Petroleum Act and the Petroleum Regulations" (HR-2020-2472-P, 2020, para. 185). In addition, the issuing of petroleum licenses follows intricate political processes where political parties and experts together determine what decisions should be made. The more specific cause of action in Norway, as well as the tightly controlled process, was thus likely influential in the outcome of the case.

> Although the Ministry has a wide leeway when it comes to which investigations and assessments to carry out, it must be borne in mind that the purpose of the assessment is to provide the Government and the Storting with a solid basis for decision making. In this respect, it must be emphasised that petroleum extraction has a large impact on society in general, that various interests clash, and that the views among the political parties and among people vary. This implies that the assessment tends to be more extensive than what is the case for other decisions.
>
> (HR-2020-2472-P, 2020, para.187).

It follows from this that the Norwegian Supreme Court evaluates the processes involved in decision making regarding petroleum licenses as sufficient. However, the first sentence does acknowledge that there could be potential errors (or exclusions of certain assessments that could give other results) within the Ministry's 'wide leeway'. The quote does, however, emphasize the importance of considering the political process which follows from this investigation and assessment process, which in turn, emphasizes that although there are disagreements regarding petroleum production, the decisions are democratically made. Nonetheless, this reflects a situation where a state organ decides what frameworks it must adhere to, and thus decides the basis upon which other state organs rely for making their decisions. The State is thus able to determine both which assessments should be made, as well as whether they have followed those assessments correctly. This may have been an influential factor in the

litigation as the decision was made partly based on the perceived sufficient assessments and political processes made by the State before issuing the licenses. The State was thus able to influence the decision through the processes they determine and conduct themselves.

State-corporate crime sometimes refers to actions perpetrated by a State or corporation with the intent to get away with a harmful act in pursuit of economic or otherwise beneficiary interests. However, state-corporate crime might also involve situations where States/corporations are intentionally trying to avoid harm through regulations, legislation and careful considerations, yet end up causing environmental harm. The Norwegian Court expresses that “The basic intent behind rules is to ensure that the environmental effects are adequately clarified and assessed before possible implementation” (HR-2020-2472-P, 2020, para. 246), and “The climate effects are politically assessed on a regular basis” (HR-2020-2472-P, 2020, para. 241). The likelihood of a decision being unlawful is therefore small. Although assessments might be deficient, it is unlikely that the Norwegian State has intentionally chosen to avoid assessments that would portray a harmful outcome, despite their ‘wide leeway’. This is, however, a practical example of how States are able to get away with harmful acts, precisely because of the systems surrounding their actions. It should also be noted that the harms from the petroleum licenses have not yet materialized in the Norwegian case, and the discussion is therefore concerned with the probability of these potential harms and the measures that should be taken to prevent them. It can thus be interpreted that the State has done everything in its power to assess and determine the protection of the environment and Norwegian citizens in its preparation for the licenses. Although, it was also of the dissenting opinion, that climate impact assessments were not carried out sufficiently.

The Dutch case on the other hand, focused on the State’s choice to reduce its emissions from what it had already committed itself to. Until 2011, Dutch climate policy concluded that a 30% reduction was necessary to reach the 2°C target. But in 2011, the State reduced this target to 20%, which they argued would be sufficient, despite the internationally agreed 25-40% reductions (ECLI:NL:HR:2019:2007, 2019). The State ultimately failed to explain how these reductions would suffice in reaching the subsequent goals for 2030 and 2050, which led to the Court’s decision that the State

must reduce 25% of emissions by 2020 (ECLI:NL:HR:2019:2007, 2019). In the Supreme Court decision, it is expressed that

> virtually every country has regularly pointed out the necessity of acting in accordance with the scenario of the IPCC and achieving a 25-40% reduction of greenhouse gas emissions in 2020. The Scientifically supported necessity of reducing emissions by 30% in 2020 compared to 1990 has been expressed on multiple occasions by and in the EU.
>
> (ECLI:NL:HR:2019:2007, 2019, "*What, specifically",* para. 2*).*

The Court thus found it difficult to comprehend how the decision made by the State to reduce its target goals would result in sufficient protection of citizens from dangerous climate change and was thus understood as inadequate by the Court. This contrasts with the Norwegian Court where it was found that the State had done sufficient assessments regarding their decision.

In addition, not only are most States in agreement that reduction is necessary (which would be why they signed the Paris Agreement) but are also aware that the target is a *maximum*. The Dutch Court thus recognizes this attempt to push the target or alternate the amount of reduction as inadequate in regard to the commitments the Dutch State has made. The Court stated that

> the maximum targets of 1.5°C or 2°C and the related concentrations of a maximum 430 or 450 ppm are based on estimates. It is therefore possible that dangerous climate change will occur even with less global warming and a lower concentration of greenhouse gases, for example because a tipping point is reached or because ice melts at a higher rate.
>
> (ECLI:NL:HR:2019:2007, 2019, para. 7.2.10).

In contrast to the Norwegian case, the Dutch State's attempt to reduce its emission goals is perhaps an example of a more intentional state-crime in which the State is intentionally trying to save expenses or other resources and denying its legal

responsibility to do its part in GHG reduction. By dismissing its legal obligations, the Dutch State is also dismissing its moral obligations to do its part in combating climate change, in time, resulting in what may be understood as an attempt to get away with harmful actions. The Discourse found in the Dutch decision (represented in the above quote) thus symbolizes a more State-critical view, in which it is expressed that the choice to reduce the national target was not sufficient in relation to the national and international understandings of the climate crisis. At last, the cause of action in the Dutch case resembles more of a state crime than in the Norwegian case, resulting in the decision *against* the State. The Norwegian case on the other hand, followed a more precise cause of action, resulting in a more intricate proceeding of determining the validity of political processes, ultimately resulting in the Court determining the State actions as sufficient.

5.2 Legal basis

Both the Norwegian and Dutch lawsuits are based in the European Convention on Human Rights (ECHR) Articles 2 and 8, while the Norwegian case is also based in the Norwegian constitution §112. Despite the Norwegian State's dismissal of the applicability of the Dutch case to its own, it is essential to look at the different interpretations of the ECHR in order to understand the effect of this legal basis on the outcome of the lawsuit. Had for example, the Norwegian Supreme Court interpreted the ECHR in a similar manner as the Dutch, the result may have been quite different. Similarly, had the Norwegian Constitution not included an environmental human right, the ECHR might have been more relevant in the case.

5.2.1 The Norwegian Constitution §112

The Norwegian Constitution §112 states that

> 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.

> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
>
> The authorities of the state shall take measures for the implementation of these principles.
>
> (Norwegian Constitution, 1814, §112).[6]

There is no doubt that this article of the constitution covers the effects of GHG emissions and the effects of climate change (Norwegian National Human Rights Institution, 2020). Greenpeace and Nature & Youth thus based their claims on Norwegian citizens' constitutional right to a healthy environment and claimed that the petroleum licenses granted by the State violated this right.

In the Supreme Court decision, it was found that the groundwork and preparatory work repeatedly expressed the intention of Article 112 to be legally binding and with legal significance. It is thus “not merely a declaration of principle, but a provision with a certain legal content” (HR-2020-2472-P, 2020, para. 144). The constitutional provision involves “both positive and negative measures [and the] purpose of the constitutional provision would largely be lost if the provision does not also involve a duty to abstain from making decisions violating Article 112 subsection 3” (HR-2020-2472-P, 2020, para. 143).

However, the Supreme Court concluded that subsection 3 of Article 112 clearly states “that the authorities as a starting point decide which measures to implement […]. Article 112 may nonetheless be asserted directly in court when it concerns an environmental issue that the legislature has not considered” (HR-2020-2472-P, 2020, para. 139). Their interpretation is thus that the assessments made by the authorities hold a standard that sufficiently considers the protection of the provisions of Article 112. Ultimately, this means that claims of violations of the first subsection are only valid if the Court deems the assessments of the Government to be insufficient. The threshold

[6] Paragraph 112 was added to the Norwegian Constitution in 2014 (Tverberg, 2014).

to interpret the right to a healthy environment literally is thus high and is dependent on the government's assessments. On the other hand, the dissenting opinion states that "the duty to carry out an impact assessment under section 3-1 of the Petroleum Act meet the requirements under Article 112 subsection 2 of the Constitution" (HR-2020-2472-P, 2020, para. 281). Thus, suggesting that the lack of an environmental impact assessment does breach the Constitution §112, resulting in Justice Webster's conclusion that "the result of the inadequate assessment of the climate impact must be invalidity" (HR-2020-2472-P, 2020, para. 288).

The wording of paragraph 112 is also discussed in the Supreme Court judgement and there are contradictory views of the Supreme Court's interpretation. The Supreme Court stated that

> The wording "these principles" in Article 112 subsection 3 refers to the rights mentioned in subsections 1 and 2. From a purely linguistic perspective, "principle" is naturally interpreted as something other than a "right". A principle is closer to a norm or an axiom - and nothing on which one may base a legal claim.
>
> (HR-2020-2472-P, 2020, para. 90).

Further the Supreme Court states that "the rather wide and general wording – as well as the use of "principles" - clearly suggests that a possible right is at least not as extensive as the duties for the authorities, which means that the category is somewhere in-between" (HR-2020-2472-P, 2020, para. 91). The Court thus found that "no individual right [...] relating to environment or climate is established by any convention. Thus, this interpretation has no support in the wording of such sources" (HR-2020-2472-P, 2020, para. 92).

However, the Norwegian National Human Rights Institution (NIM) (2020) argued that a natural interpretation of the wording, specifically in subsections 1 and 2, dictates that subsection 1 constitutes a rights provision. Additionally, NIM (2020) argued that the preparatory works for article 112, the purpose considerations, the systematics of Norwegian constitutional rights and considerations of the actuality of the matter, all

result in the conclusion that paragraph 112 constitutes a rights provision. Furthermore, NIM (2020) found that within the preparatory works, the committee also referred to practices consistent with those from the ECtHR, and that the State has both a positive and a negative obligation to avoid interference with, and to ensure implementation of the human rights. Thereby, it can be argued that the State's interpretation of the Constitution and the subsequent interpretation by the Court is rather strict, which might in turn be influenced by the Court's high threshold to intervene in the case (which will be discussed further below).

5.2.2 The European Convention on Human Rights

Paragraph 112 of the Norwegian constitution was found to be the dominant legal basis in the Norwegian case, although the plaintiffs did also contend that ECHR Articles 2 and 8 could be applied as well. In contrast, the Dutch case largely relied on the application of the ECHR. In relation to Articles 2 and 8 of the ECHR, and the State's positive obligation "to protect the lives of citizens within its jurisdiction" (ECLI:NL:HR:2019:2007, 2019, *Articles 2 and 8 ECHR*), the Dutch Supreme Court stated that "if the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible" (ECLI:NL:HR:2019:2007, 2019, *Articles 2 and 8 ECHR*). The Dutch Court also found that "climate change threatens human rights" (ECLI:NL:HR:2019:2007, 2019, para. 5.7.9) and that "Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger" (ECLI:NL:HR:2019:2007, 2019, para. 5.8).

On the other hand, the Norwegian Supreme Court stated that

> There is no doubt that the consequences of climate change in Norway may lead to loss of human lives […] The question is whether there is an adequate link between production licenses in the 23rd licensing round and possible loss of human lives, which would meet the requirement of "real and immediate" risk […]. Although the climate threat is real, the decision does not involve, within the

> meaning of the ECHR, a “real and immediate” risk of loss of life for citizens in Norway. Thus, no violation of Article 2 of the ECHR is found.
>
> (HR-2020-2472-P, 2020, para. 167-168).

Regarding Article 8, the Norwegian Supreme Court stated that article 8 “only [comes] into play if there is a direct and immediate link between the impugned situation and the applicant’s home or private or family life” (HR-2020-2472-P, 2020, para. 170). Besides, the Government argued that “The environmental groups cannot invoke the ECHR, since they are not a “victim” under the Convention. Neither Article 2 nor Article 8 of the ECHR has been violated, among other things due to the requirements of causality” (HR-2020-2472-P, 2020, para. 43). The State’s interpretation thus, involves the understanding that the harms/breaches must have already happened in order to apply Articles 2 and 8 ECHR. The potential effects of the 23rd licensing round were thus not found to fall within the scope of Article 8 of the ECHR either. The Norwegian Court’s interpretation is thus more concerned with the lack of evidence, which goes against the principle of precaution. The alternative conclusion offered by Justice Webster would perhaps result in a different interpretation. A climate impact assessment could have portrayed the links between the licenses and environmental consequences, perhaps resulting in the Court’s interpretation of the ECHR as applicable. The legal basis was thus influential in the outcome of the case in so far as the interpretation of the cause of action influenced the interpretation of the ECHR.

Consequently, the two interpretations of the ECHR are quite different. The Dutch interpretation has a precautionary standpoint, where the Court acknowledges that it is the State’s obligation to prevent breaches and to do what is in its power to avoid violations. While the Norwegian Supreme Court interpretation - which corresponds with the defendant’s interpretation - is that the lack of a direct link between the cause of action and the legal basis does not require the State to act or change its actions. This ultimately relates to the cause of action where Urgenda has laid more *general* claims on harms that *have* materialized, while the Norwegian case is based in more concrete and specific claims where the harm has not yet happened, or which otherwise cannot be directly linked to the issued licenses.

The Norwegian Constitution is *lex superior,* meaning that its provisions will override other legislation (HR-2020-2472-P, 2020). The constitutional human right to a healthy environment (§112) can thus be understood as a sufficient implementation of the ECHR (including Articles 2 and 8), and thus legitimize the dismissal of the application of ECHR in this lawsuit. The importance of the ECHR in the Dutch case could thus have been a result of the lack of similar rights in their own legislation. On the other hand, it is also evident that the different interpretations of the ECHR were influential in the application of the convention. The Norwegian Supreme Court dismissed its relevance by interpreting it to not be directly connected to the petroleum licenses. While the Dutch interpretation had a precautionary basis, the Norwegian interpretation did not. Had Norway used a similar interpretation this could have resulted in a quite different outcome. Similarly, based on the dissenting opinion had the Court found the climate impact assessments to result in invalidity of the license, the interpretation might have been more akin to the Dutch. Considering the precautionary principle, the assessments made in Norway were perhaps deemed sufficient and inclusive of precaution. However, when interpreting the relevance of the ECHR, the Norwegian court did not include the idea that the harms that might materialize in the future could be protected by the ECHR.

Malone and Pasternack (2003, p. 10) write that a successful environmental human rights claim should satisfy three conditions: "(1) existence of environmental degradation; (2) a nation-state action or omission that results in or contributes to that environmental degradation; and (3) a deprivation of human rights that result from the environmental degradation". It can, therefore be argued that the Dutch environmental Human Rights claim was successful because the harms have already materialized and are being experienced in the Netherlands. However, NIM (2020) reiterates that the convention is not limited to situations where lives have been lost, but also involves situations where there is the risk of loss of life. This is also recognized by the Dutch Court. The lack of precautionary considerations, and high threshold held by the Norwegian State and Court were thus influential in the application of the ECHR in the case. Consequently, the lack of a *direct* link between the potential harm and the state action was an important aspect of the Norwegian decision.

Nollkaemper and Burgers (2020, p. 4) write that one of the “important takeaways from this part of the judgement”, referring to the application of the ECHR “is that the risks caused by climate change are sufficiently real and immediate to bring them within the scope of Articles 2 and 8” (Nollkaemper & Burgers, 2020, p. 4). This suggests that the Dutch case has potential to influence other cases with similar legal basis – it shows that the ECHR *can* be used and interpreted in such a way that it includes environmental harms – also those harms that might materialize in the future. Ultimately, while both the Dutch and the Norwegian State acknowledge the harmful and inevitable effects of climate change, it is only the Dutch Court that interprets the ECHR to be applicable to the *future* consequences of climate change. It is also only the Dutch case that finds the ECHR applicable to the cause of action in the case.

5.3 Separation of Powers

The “separation of powers has been considered an essential feature of democracy and good governance” for centuries (van Zeben, 2015, p. 352). This separation is often constituted in the separation between three branches of government which operate as a system of checks and balances which inhibits the potential abuse of power by one of the branches (van Zeben, 2015). Judicial review is one of the control mechanisms used by the judicial power to determine whether the legislative power follows the law. The issue of the separation of powers was prominent in both the Urgenda case and the Norwegian case, where it was discussed whether climate change and the environment should even be considered in court because of the issue’s political nature, and to what extent the Court is allowed to intervene in political decisions. For example, Syrrist (2020) found that the Norwegian Court of appeal held a high threshold compared to the Dutch Supreme Court in deciding against a political decision, and that the Courts had different understandings of their own role in the climate change cases. It was thus, not merely the legal basis which influenced the results, but also the Court’s willingness to go against the elected representatives, as well as their own understanding of their role in the case, which influenced the results (Syrrist, 2020).

The Norwegian Supreme Court found that “courts must control that the decision-making body has struck a fair balance of interests before implementing “measures”

according to Article 112 of the Constitution subsection 3" (HR-2020-2472-P, 2020, para. 182). In relation to environmental issues, it is argued

> that the courts must be able to set limits on the political majority when it comes to protecting constitutionalised values. On the other hand, decisions involving basic environmental issues often require a political balancing of interest and broader priorities. Democracy considerations also suggest that such decisions should be made by popularly elected bodies, and not by the courts.
>
> (HR-2020-2472-P, 2020, para. 141).

This supports the defendant's argument that the matter at hand is political and should not be handled in court. However, it also acknowledges the Court's role to make sure that the State followed the law. NIM (2020) points out that the Supreme Court has a particular responsibility to interpret, clarify and develop the human rights provisions of the constitution. This is perhaps relevant for the separation of powers, and the Court's ability to interpret differently than the State. However, as seen in the Court's decision, the threshold for the Court to intervene is very high based on the extensive democratic processes involved in decision-making in Norway. This suggests high levels of trust between the different branches of government.

Similar to the Norwegian case, the Dutch State argued "that it is not for the courts to undertake the political consideration necessary for a decision on the reduction of greenhouse gas emissions" and that "the decision-making on greenhouse gas emissions belongs to the government and parliament" (ECLI:NL:HR:2019:2007, 2019, "*The courts"*, para. 2). The decision in the District Court, which was upheld by the Courts of Appeal, was thus argued to be impermissible because (1) "the order amounts to an order to create legislation" (ECLI:NL:HR:2019:2007, 2019, para. 8.1) which is not allowed by Supreme Court case law, and (2) "it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions" (ECLI:NL:HR:2019:2007, 2019, para. 8.1).

The Dutch Court expressed that the State has a legal obligation to protect its citizens based on articles 2 and 8 ECHR. The Court can thus order the State to comply with this duty:

> If the government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party […]. This is a fundamental rule of constitutional democracy, which has been enshrined in our legal order. As far as the rights and freedoms set out in the ECHR are concerned, this rule is consistent with the right to effective legal protection laid down in Article 13 ECHR.
>
> (ECLI:NL:HR:2019:2007, 2019, para. 8.2.1).

Dutch Supreme Court case law is based in, amongst other things, the "consideration that the courts should not intervene in the political decision-making process involved in the creation of legislation" (ECLI:NL:HR:2019:2007, 2019, para. 8.2.3). The Court, however, interpreted this to mean that it is "not permitted to issue an order to create legislation with a particular, specific content" (ECLI:NL:HR:2019:2007, 2019, para. 8.2.6). The State is thus free to determine which measures should be taken to achieve the Court's order. It is then the Court's job to determine whether these measures are in accordance with the laws that the State is bound by. The Dutch Court's interpretation of the ECHR was thus also a determining factor for the Court's ability to decide against the State.

"Discussions of review legitimacy are [...] likely to persist; disagreements over how review is practiced from case to case will continue to spark debate" (Kierulf, 2018, p. 260). One of the issues that Anine Kierulf (2018) expresses in this regard is the *input-output entanglement*. Kierulf (2018) writes that it is easy to wrongfully critique the institution/process of judicial review based on an unsatisfactory outcome of such a review. It is thus easy to have a distorted view of the legitimacy of the outcome because one does not agree with it. This could very much be the case for the reactions after the Norwegian case, where the disappointment over the results potentially has overweighed the recognition of the decision's legitimacy. It is, however, interesting that the Norwegian Courts are unable, or unwilling, to interpret the only environmental human right in the constitution in such a way that it protects citizens from real threats

of harmful effects of climate change (generally accepted as factual), predominantly based on the lack of *direct* links between the act and the harm.

Additionally, Kierulf (2018) writes that Norway is considered one of the most democratic countries in the world. The claim that judicial review might undermine democracy relies on the fact that Courts are assigned the authority to set aside decisions made by elected representatives of parliaments. An appeal to an international Court (for example the ECtHR) is further argued to undermine the democracy and the abilities of the national institutions. Thus, on the one hand, it is problematic to disagree with the State's argument that climate change is political, and the policies surrounding it should be determined democratically, as this would mean that one does not wish to be able to influence climate change policy through democratic processes. However, it becomes problematic again when the democratic processes undermine the urgency and legitimacy of the crisis, and potentially undermine national and international agreements and rights of individuals which must be followed. It is certainly problematic when the State acknowledges that harm and negative effects will happen, but continues to avoid doing their part, or claims not to be legally bound to take more action. From a state-corporate crime perspective, despite the already discussed subject of intentionality in the case, the Norwegian State in particular, has the potential to put in place political processes which suit their interests. Ultimately this portrays an authoritative discourse, by which I mean a discourse where the authorities' arguments are seen as more legitimate than the claims made against them. And in turn, illuminates the high threshold of the Court to intervene.

The concept of *transformative constitutionalism*, as defined by Karl E. Klare (1998, p. 150) refers to a "long-term project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction". Eklavya Vasudev (2022, para. 2) writes that transformative constitutionalism "seeks a transformation of societies to a culture of justification, substantive equality, a commitment to social and economic rights and reflexivity". Vasudev (2022, para. 8) found that the Urgenda case included transformative constitutionalism in the way the Supreme Court emphasizes "a culture of justification" by requiring *justification* for the State's change in GHG reduction policy. Similarly, the Court's consideration of

developed countries' responsibilities to reduce higher amounts of GHG emissions than developing countries, shows transformation towards justification and equality (Vasudev, 2022). This is also recognized by the Norwegian Supreme Court. Beyond this, the Norwegian Court has little inclusion of *transformative constitutionalism* in its judgement, seen for example in its high threshold and strict interpretations. However, the high levels of democracy in Norway, as well as possibilities to participate in politics, are transformative in the way that the public can support or vote against policies that they choose.

Ultimately, both States had similar argumentation relating to the Courts' role in climate politics, viewing the issue at hand to be unfit for the courts, due to its political nature. The Dutch court, however, found that based on the Court's duty to determine whether political decisions are lawful or not, that the State had breached its duty to protect its citizens. This, naturally, relied upon the Court's interpretation of the ECHR, and the consideration of the precautionary principle. The Norwegian Court on the other hand, although based in the same considerations of the Court's role to determine the legality of political decisions, seemed to hold a higher threshold in terms of their duty to intervene. This is also naturally dependent on their interpretation of the ECHR and §112 of the constitution. This results in the Norwegian State having quite a lot of power to decide what it should do.

5.4 The Precautionary Principle

"The soundness of precautionary thinking […] is entirely dependent on how its basic element, the precautionary principle (PP), is interpreted and applied" (Halvorsen, 2018, p. 36). Wewerinke-Singh and McCoach (2021, p. 280) write that "Appropriately, the [Dutch] Supreme Court highlights the precautionary principle as applicable. It recognizes that based on the precautionary principle, 'more far-reaching measures should be taken to reduce greenhouse gas emissions, rather than less far-reaching measures". The Norwegian Supreme Court, on the other hand, does not include the precautionary principle (PP) in its judgement. Perhaps because it is not deemed applicable based on the assessments made in preparation for the licensing round. As discussed in chapter two, the PP is influential in international climate agreements, and is generally influential in climate politics and regulations (Stefánsson, 2019). The

application (or lack of application) of the PP is rather dissimilar in the two cases, arguably serving as a factor in the outcome of the cases.

The Dutch Supreme Court states that

> The fact that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking does not mean, given the due observance of the precautionary principle, that the State is entitled to refrain from taking measures. The high degree of plausibility of that efficiency is sufficient.
>
> (ECLI:NL:HR:2019:2007, 2019, *The State's Defences*, para. 6).

A distinction to be made between the Dutch and Norwegian case in this regard, is the issue of the harms having already materialized in the Netherlands, as well as the potential future harms being more pressing. The Dutch interpretation of the PP thus leans on the 'high degree of plausibility' of the harms materializing. However, if one uses this as an argument it goes against the very purpose of the precautionary principle. The harms should not have had to have materialized for the consideration of the principle. However, the situation in the Netherlands does make it more crucial for the Dutch State to take precautionary measures than for other States. The view held by the Norwegian State and Court on the other hand, viewed the potential harms to be highly unlikely (although simultaneously acknowledging the harms of climate change) and thus, excluded a consideration of the PP.

In relation to the Dutch State's argument that the Intergovernmental Panel on Climate Change (IPCC) 4th assessment report (AR4) was outdated, the Court noted that the new scenarios presented in the IPCC 5th assessment report (AR5) did not mean that the State could opt out of reductions. AR5 stated that the reductions in GHG emissions will not be sufficient, and focus must lie in attempting to *remove* GHG from the atmosphere. However, the Court expressed that the State would have to take serious risks in by using AR5 as a starting point for climate change policy. "Taking such risks would run counter to the precautionary principle that must be observed when applying Articles 2 and 8 ECHR and Article 3(3) UNFCC" (ECLI:NL:HR:2019:2007, 2019, para. 7.2.5). This suggests that even though the State potentially followed the approach to

climate change mitigation offered in the AR5, the Court found that this would result in substantial risks, which would counter the rights provided in the ECHR.

Further, the Dutch Court argues that

> The obligation to take appropriate steps pursuant to Articles 2 and 8 ECHR also encompasses the duty of the state to take preventative measures to counter the danger, even if the materialisation of that danger is uncertain. This is consistent with the precautionary principle.
>
> (ECLI:NL:HR:2019:2007, 2019, para. 5.3.2).

Not only does this then follow the PP, but it also recognizes that the ECHR itself holds a precautionary element in which States are required to protect citizens from *potential* harm. Meanwhile, the Norwegian case includes the word precaution *once,* in the dissenting opinion:

> In my view, the omission to identify, describe and assess the climate impact of combustion of petroleum that might be produced in the southeast Barents Sea was a procedural error. As it was uncertain prior to the opening decision which petroleum resources would be found, an overall analysis would have sufficed. The so-called scenarios could have been taken as a starting point. The assessment would have had to meet the requirements, and contain a description of environmental targets and remedies/precautions within the scope of Article 5 (2) of the SEA Directive.
>
> (HR-2020-2472-P, 2020, para. 274).

The incorporation of the precautionary principle in the Norwegian case is arguably in the assessments made in the preparatory work for the petroleum licenses. The assessments portrayed a situation where no direct links can be determined between environmentally harmful outcomes and the production licenses, and thus no reason to apply the PP to the decision. However, as the dissenting opinion stated, climate impact assessments were not conducted, which naturally would result in no links to be found.

Nevertheless, the PP often involves the notion that lack of scientific evidence should not result in inaction. The State expresses that “emissions from the 23rd license round are in any case uncertain” (HR-2020-2472-P, 2020, para. 42), which should be enough (based on the PP) for the State to take precautionary steps towards limiting those effects. Similarly, the State’s acknowledgement of the harmful effects of fossil fuel combustion, should render the PP applicable.

Meanwhile, the dissenting opinion of the Norwegian Court acknowledges the lack of assessments regarding potential omissions from combustion, stating that “the political debate in society in general and within the Government and the Storting, could have been different if the impact assessment had included the effects of combustion emissions” (HR-2020-2472-P, 2020, para. 277). Nonetheless, it is also of the dissenting opinion that it “seems unlikely that the outcome would have been different if the effects on the climate had been included in the impact assessment” (HR-2020-2472-P, 2020, para. 278) because the effects from combustion on the climate are already regularly discussed in the Storting, and because “there has been a clear majority in the Storting for continuing the petroleum activities” (HR-2020-2472-P, 2020, para. 278). This, however, suggests that the assessments of combustion effects *could have* caused the licenses to be deemed invalid based on the precautionary steps the State must take in regard to the environment. This would also mean that the licenses might not have been given out had the discussions and opinions in the Storting been greatly affected by the climate impact assessments.

Additionally, it was the opinion of the Dutch Court that the United Nations Framework Convention on Climate Change (UNFCCC) article 3(3) was applicable. Article 3(3) (as cited in ECLI:NL:HR:2019:2007, 2019, para. 5.7.3) reads “parties “should take precautionary measure to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects””. The UNFCCC includes the Kyoto Protocol and the Paris Agreement, to which Norway is signatory as well. Additionally, the Dutch Court recognizes, as mentioned in 5.1, that the agreed targets for reduction are a *maximum*, and environmental harms may occur before the world reaches the 1.5 - 2°C limit. This supplemented the basis upon which the Dutch Court made its decision about the State’s responsibility to act in a preventative manner. It is, however, unlikely that the Norwegian Court had come to a similar conclusion regarding the PP unless the cause

of action was different, because of the Court (and State's) perspective of the lack of link between the license and climate change. However, the Norwegian State should have, based on the UNFCCC article 3(3), anticipated the consequences which could have influenced the interpretation of the PP.

Ultimately, as Justice Webster states "it is futile to speculate on how political processes could and would have advanced had the impact assessment had a different outcome" (HR-2020-2472-P, 2020, para. 278). It is, however, useful to explore the differences between these two Courts' application of the PP to understand how the Norwegian case might have ended up differently had it followed more similar steps as the Dutch case or had similar (less strict) interpretations of the legal basis. One of the prominent differences following this is that the circumstances of the potential environmental harms are quite different, resulting in the different application of the PP. The Dutch are already experiencing the effects of climate change. Although these effects may not be directly linked to Dutch emissions, they are nonetheless happening, and the Dutch nonetheless continue causing emissions. This, although not entirely consistent with the PP, suggests that the effects are more pressing and thus require more immediate precautions to be taken. The Dutch Court also interpreted the ECHR in a way which included precaution, thus influencing the overall application of the PP in the case.

The Norwegian case on the other hand, partly deals with the lack of assessments made regarding the potential climate effects. It can thus be interpreted that precautionary measures have either been successfully incorporated in the assessments made prior to the licenses, or it can be interpreted that because there were no assessments made regarding the potential harmful effects of combustion, the PP could not be applied because no potential harms were found. To go against what Justice Webster suggests one does, one can speculate whether the inclusion of the assessments of climate effects would result in the application of PP in Court, and further resulting in a different outcome based on the precautionary principle. However, this is also dependent on the cause of action and the interpretation of the legal basis in each case.

5.5 National and cross-national responsibilities

Combating the climate crisis, being a global task, must involve the consideration of the harms happening all over the world. Both the Dutch and the Norwegian climate change

cases include reflections upon the State's responsibility for protecting and avoiding harms of citizens outside their jurisdictions, as well as harms that might materialize for citizens in the future. Article 1 ECHR states that its commitments apply to citizens of a state committed to the convention. The Norwegian Constitution is also understood to only protect citizens of Norway. However, NIM (2020) writes that the Council of Europe's handbook states that the ECtHR's case law includes that extraterritorial and transnational applications of the ECHR can be relevant for environmental legal questions. Both the Dutch and the Norwegian Supreme Courts recognize the global nature of climate change and its effects, as well as the need for global cooperation in combating the crisis. However, both State's also argue that their national reductions have little effect on a global scale, thus limiting the necessity for them to intensely reduce emissions. The main difference is perhaps that the Dutch Court concludes that these insignificant reduction does not take away the State's responsibility to do its part, while the Norwegian Court arguably supports the notion that the Norwegian State can continue its emissions because its effects are minimal to Norwegian citizens.

The Dutch State challenged whether Urgenda could act on behalf of current and future generations of citizens of countries other than the Netherlands (van Zeben, 2015). To this, the Supreme Court stated that "since individuals who fall under the State's jurisdiction may rely on Articles 2 and 8 ECHR, which have direct effect in the Netherlands, Urgenda may also do so on behalf of these individuals" (ECLI:NL:HR:2019:2007, 2019, *Urgenda's Standing,* para. 1). The Dutch Supreme Court also found that

> The UNFCCC is based on the idea that climate change is a global problem that needs to be solved globally. Where emissions of greenhouse gases take place from the territories of all countries and all countries are affected, measures will have to be taken by all countries. Therefore, all countries will have to do the necessary.
>
> (ECLI:NL:HR:2019:2007, 2019, para. 5.7.2).

The Court continued by referring to the United Nations International Law Commission's Draft Articles on the *Responsibility of States for Internationally Wrongful Acts,* which states that when environmental damage is caused by several States, each State is

responsible for their part (ECLI:NL:HR:2019:2007, 2019). This led to the conclusion that the Dutch State must still do its part, despite other State's inadequate responses. This was also built upon the UNFCCC idea that "*States have (…) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*" (UNFCCC as cited in ECLI:NL:HR:2019:2007, 2019, para. 5.7.2). The Dutch Court thus held a rather open perspective on the global, or cross-national, responsibilities of the Dutch State to do its part.

However, the Court's decision was primarily based in Dutch citizen's (or residents of the Netherlands') claims to the rights provided in the ECHR. Wewerinke-Singh and McCoach (2021, p. 281) write that "As for the rights of non-residents, the Supreme Court excluded these from the scope of its analysis altogether". The outcome of the successful use of the ECHR in the case will nonetheless likely have positive consequences for non-Dutch citizens, as well as current and future generations of Dutch citizens. Thus, the results will benefit those who have not been considered directly regardless. This might suggest that it is perhaps not as relevant to include the harms of climate change experienced in other parts of the world or by citizens other than those of the State being sued, as they do not have direct legal grounds on which to base their claims. The focus on residents and citizens holds a stronger position, and the positive outcomes of such a case will have positive affects beyond those it was intended for anyways. This view is nonetheless problematic as it portrays a somewhat unflattering patriotic position in which each country should fend for itself, and those who cannot fend for themselves will merely have to wait for the benefits of the rich to trickle down to them as well. This goes against the concept of environmental justice in which the goal is to create fair and equal participation and consideration of all people in environmental decisions. After all, it is a global problem which needs global solutions.

On the other hand, the Norwegian Supreme Court stated that

> Article 112 does not provide general protection against actions and effects outside its realm. However, if Norway is affected by activities taking place

> abroad that Norwegian authorities may influence directly on or take measures against, this must be relevant to the application of Article 112.
>
> (HR-2020-2472-P, 2020, para.149).

Norway is thus understood to only be required to act if there are direct links between their actions and harms that are occurring, and only if those affects are happening in Norway or to Norwegian citizens. The Norwegian Court does however note that the Paris Agreement requires "affluent countries, such as Norway, carry a larger responsibility" and that "all parties do their part" (HR-2020-2472-P, 2020, para. 58). An interpretation of this is that the State, although not required to protect and provide rights to citizens other than their own, should do whatever is in their power to reduce environmental harm and GHG emissions, despite the lack of harm affecting Norwegian citizens directly. This is, however, perhaps more of a principle, and cannot be used as a basis in court. Although the State's commitments to do its part, as signed in the Paris Agreement, *should* and *could* be able to hold the State accountable for consequences outside of Norway, further legal basis would likely need to be incorporated in such a claim. Ultimately, the Norwegian Court had a stricter perspective than the Dutch in the interpretation of international agreements and the duties of the signatory States.

Furthermore, the Dutch interpretation of the ECHR, which was discussed above, was not entirely unproblematic. Wewerinke-Singh and McCoach (2021, p. 280) note that "the assumption that dangerous climate change is exclusively a future concern remains problematic for several reasons". Wewerinke-Singh and McCoach (2021) argue that the Dutch Supreme Court's interpretation of Article 2 ECHR excluded the recognition of the ongoing harms of climate change. Certainly, the Dutch Caribbean is experiencing the consequences, through increased extreme weather, such as hurricane Irma in 2017. Neither Urgenda nor the State concretely included the residents of the Dutch Caribbean, other than Urgenda suing on behalf of Dutch citizens or residents of the Netherlands (Wewerinke-Singh & McCoach, 2021). They write that "from a human rights perspective, [the Court's interpretation] stands in stark contrast with the experience of those whose rights are already being violated as a result of climate impacts" (Wewerinke-Singh & McCoach, 2021, p. 281). On the one hand, the Dutch Court has an open interpretation of the convention and its relevance to

environmental harm and the State's responsibilities to do its part. But at the same time, it also excludes a consideration, and undermines the experiences, of citizens in other Dutch territories.

Further, the Norwegian organizations argued, in their appeal to the Supreme Court, that the Court of Appeal did not consider what effects the State's measures will have in the future, nor *when* they might materialize (Hambro & Feinberg, 2020). The Court of Appeal also failed to consider whether the measures would, in sum, result in emissions exceeding the agreed target. The discourse found in the Court of Appeal's judgement thus suggests that the State may consider measures which are less far reaching. This suggests that because there is room for more emissions before the temperature target is reached, and because Norwegian emissions have limited impact globally, and because other States might be comprisable on what is responsible State behavior, that the State can choose not to take more responsible steps to limit emissions (Hambro & Feinberg, 2020). The Organizations disagreed on the legitimacy of this decision, stating that the State's responsibility to do its part cannot be reduced because of other State's insufficient actions. Based on deliberations from the United Nations, concerning the urgency to reduce emissions to reach the climate goals, it is unlikely that there is much more room for emissions. Delaying the reduction targets of the State will only increase the climate threat and societal risks. The Organizations, therefore, argued that the Court's reasoning implies that States should race towards being the country to continue production for as long as possible (Hambro & Feinberg, 2020). Lastly, the Organizations argued that the Court's logic accepts the *Tragedy of the Commons* in which shared resources are exploited for self-interest until this ultimately results in the harm of oneself (Hambro & Feinberg, 2020; Battersby, 2017).

Similarly, the Dutch State argued that its emissions, in a global perspective, are minimal, and that the Dutch State alone cannot solve the issue. The Dutch Court found that these arguments could not hold:

> The Court of Appeal, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in/on its territory, within its

> capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change.
>
> (ECLI:NL:HR:2019:2007, 2019, *The State's Defences,* para. 5).

Eventually, this could be interpreted as the Dutch Court's acknowledgement that the Dutch State is indirectly protecting the rights of citizens outside Dutch jurisdiction through upholding the State's responsibility to collectively reduce emissions.

It cannot be said that the Dutch and Norwegian State did not consider the effects of climate change on less fortunate groups of people. Both States recognize the issue that the effects are disproportionate, but they have also in a way come to the conclusion that there is not much they can do, at least not in terms of the legal basis of the cases. However, a successful environmental Human Rights claim in Norway or the Netherlands will eventually mean a successful claim for persons outside those jurisdictions, precisely because the effects (both negative and positive) are global. This does, however, suggest that one cannot claim rights for people who are not protected under the specific State's constitution (or another legal basis). Both Courts also acknowledge that all State's must do their part in reducing emissions, as part of the international agreements, but it is ultimately only the Dutch Court that decides that this is enough evidence to rule against the State, and require them to act. This, in turn, is also dependent on the cause of action, and the more direct consequences of Dutch emissions than Norwegian emissions from the specific licensing round.

6. Conclusion

The findings presented in chapter four provide contextual information about the societies in which the Norwegian and Dutch climate change cases were happening. These factors are important for understanding the environmental movement, and the subsequent use of law in the process of combating climate change. Meanwhile, in the form of a comparative analysis, chapter five explored the legal factors which influenced the outcomes of the cases. Some of these factors are connected to aspects of the social and political factors, which will be tied together in this final chapter. Additionally, to concretely reflect upon the relevance of these cases to the theoretical framework of this project, this last chapter will apply some of the concepts discussed in chapter two to the findings in chapters four and five.

6.1 Critical, green criminology and precautionary thinking

This project naturally falls into the category of critical criminology as it questions the power of the State and its institutions, as well as their attempts to avoid responsibility. From a critical criminological perspective, and the sub-category of state-corporate crime, the two climate change cases exemplify what can be understood as state crime (see chapter two for definitions). This is seen in the processes involved in, and consequences of, democratic decision-making – especially in the Norwegian case. Further, the plaintiffs in each case claimed that the State was breaching their responsibilities to reduce GHG emissions, or otherwise failing to protect citizens – their claims were thus, in and of themselves, claims of State crime. The States' arguments that they were not legally obliged to act, further supports a discourse in which the States acknowledge that their contributions are affecting climate change, but that they are not willing to do what it takes to halt it. This, in turn, represents the notion of state crime in which the State acts in a way that causes harm, in pursuit for their own goals. The Norwegian Court's decision further supports this, and continues the discourse in which State actions, although they might be environmentally destructive, are interpreted as legitimate.

Further, as discussed in chapter five, the Dutch State's attempt to reduce its emission targets portrayed a more intentional attempt at getting away with harmful actions. On the other hand, the Norwegian case emphasized that State crime may also involve

situations of State's following a completely legal process of decision-making, which nonetheless results in environmental harm. The main issue here is how this may be handled in court, as there is not much that can be done if the State has followed the law. This is reflected in the process of judicial review, and the main reason for the separation of powers – to check the balance of power and determine whether the legislative power has followed the law.

Although the precautionary principle is not a theory *per se*, it played a large role in the Dutch case and in the decisions by the Courts. The lack of its application in the Norwegian case influenced the outcome of the case in terms of a lack of consideration of the potential effects of the licenses. Further, it can be argued that the lack of precautionary thinking illuminates specific concepts in green, critical criminology. The concept of harm, for example, can be understood as a form for precautionary thinking in terms of not relying on a crime to have happened for action to be taken. In the Norwegian case for instance, the fact that the Norwegian State acknowledges that there *are* environmental harms happening caused by the petroleum industry, yet still find that they are not required to do anything, can be interpreted as if both the State and the Courts require a breach of law for action to be taken. This reflects both the precautionary principle's main contention, as well as critical criminology's main focus, namely the focus on the constructions of crime and the important concept of harm as a basis for redress/action.

Precautionary thinking was also highly influential in the Courts' interpretation of the legal basis. In the Dutch case the ECHR was understood to include protection from potential future environmental harms, while the ECHR was generally not found applicable to the Norwegian case for the lack of victims and/or lack of imminent risk for loss of life. This, in turn, was influenced by the contexts of each country. As discussed, the Dutch are facing more dire and imminent risks from the consequences of climate change than in Norway. However, it should also be recognized that the Dutch Court generally held a more open interpretation of the State's responsibilities to act if there was a known threat – which there was in both cases. The Norwegian Court's interpretation was thus more strict, and ultimately went against the precautionary principle in requiring a harm/crime to have happened, and for victimization in order for it to be applicable. This eventually supported Malone and Pasternack's (2003) theory

of how to make a successful ECHR environmental claim, in which there must exist an environmental degradation caused by the State which resulted in a breach of the ECHR.

It was also clear that the cause of action in each case was influenced by the circumstances in each country. The Dutch are already experiencing the consequences of climate change, resulting in a more pressing situation for Dutch citizens to seek more far-reaching measures by the State. Similarly, the claims made by the Norwegian plaintiffs were based on Norway being an oil nation, arguing that this requires the Norwegian State to do its equivalent part in reducing emissions compared to the emissions they are causing. The Courts in both countries acknowledge the plaintiffs' arguments, and agree that the States have a responsibility, as every country has, to reduce emissions. However, in the end, it was only the Dutch Court that decided against the State. An interpretation of this can be linked to the socio-political (and economic) atmospheres surrounding the cases. Norwegian citizens and the Norwegian State enjoy the benefits of the oil industry in a completely different way than what the Dutch do from their fossil fuels. This may have resulted in a discourse where there is generally more acceptance and desire in the Netherlands to reduce emissions than in Norway.

6.1.1 Environmental Injustice

Further, this project clearly involves topics relevant to green criminology and the concepts of environmental harm/crime, environmental justice and, to some degree, environmental racism. From an environmental justice perspective, the lack of protection from Dutch and Norwegian GHG emissions afforded to citizens outside the countries' jurisdiction can be understood as a form of environmental injustice. Calls from internationals who are experiencing the consequences of climate change (although not directly connected to Dutch or Norwegian pollution) exemplifies the problem of State's not being held accountable for their share in global emissions. The issue of climate change being a global problem which needs global responses, is in both cases flipped upside down when it comes to the States' perceived responsibility to do their part. Their arguments go against the notion that every state must do its part in order to succeed, by choosing to argue that their contribution has no effect unless

others do their part. The Dutch court however, found that the State has a responsibility to not cause damage outside its jurisdiction. However, this was not found to be sufficient as grounds for protection for non-Dutch citizens, nevertheless. An interpretation of this afforded in chapter five was that the attempt of non-citizens to claim protection from a State is unfruitful, as States are only required to protect its own citizens. Nevertheless, positive effects of a successful claim in Norway or the Netherlands would ultimately have positive effects for non-citizens as well. This, however, undermines the rights of individuals in other countries, and ultimately goes against the concept of environmental justice and equal participation and redress for environmental crimes/harms.

The Norwegian Court recognizes the disproportionate effects of climate change for marginalized groups. “The most exposed groups are the poor, Indigenous peoples and local communities depending on agriculture and small-scale fishing along the coast. For the Arctic, the difference between 1.5 and 2 degrees of global warming will be immense” (HR-2020-2472-P, 2020, para. 52). This is, however, in reference to the Indigenous people and local communities *within* Norway, and not necessarily the marginalized and poor groups around the world (who are experiencing the consequences already). Although this was not discussed in chapter five, it is important to illuminate that the Norwegian Court *did* acknowledge the concept of environmental injustice, and included a consideration of the disproportionate effects of climate change in its decision. However, it became evident that there were not really any cross-national responsibilities that the State had to consider, other than their collective responsibility to combat climate change in cooperation with other States. Rather, the Court’s decision was found to be in support of the Tragedy of the Commons, in which the Norwegian State is encouraged to continue its oil production for as long as possible, because ‘there is still room for more emissions before the target is reached, and because the Norwegian oil industry is viewed as more environmentally friendly than other oil and gas industries’.

6.2 Social Movement Theory applied

By incorporating some of the theories introduced in chapter two regarding social movements and their mobilization, strategies and opportunities, one can uncover

further aspects of how to succeed in climate change litigation, or more precisely, what factors may have influenced the success/failure of the cases.

As suggested by Tarrow (1998, p. 78), “instability in political alignments” influences the access to political participation, which, in turn, influences social movements and getting one’s message into the political sphere. Similarly, as Kriesi (2004) writes, systems with a large spectrum of political parties encourages the public to engage in politics that suit them, which might allow the public to more directly affect politics – and thus face fewer grievances (see chapter two for further discussions). As seen both in Norway and the Netherlands, both political systems are constituted of many political parties, and the ability of small parties to gain seats in parliament are quite high, especially in the Netherlands. The access for the public to influence climate mitigation and environmental policies, is thus potentially large in both countries. However, the “instability in political alignments” (Tarrow, 1998, p. 78) could also result in the inability of the political parties to come to agreements regarding sufficient climate change mitigation, which in turn has caused the need for collective action.

The very existence of green parties, and other left-wing, liberal parties could also be influential in the general discourse in each country. The presence of political parties that support more intruding climate change policies creates debate which potentially influences public opinions, and in turn the discourse surrounding the cases. However, these circumstances were quite similar in both countries, which suggests that this was not a determining factor. On the other hand, the growing far-right populism could also threaten the discourse in which climate change is taken seriously. The political misalignments could therefore also foster a discourse in which the Dutch Court found it particularly important to emphasize the urgency of climate change.

Another factor to point out regarding collective action and the climate litigation cases, is the movement’s ability to mobilize vast groups of people. The Norwegian case, for example, began with Greenpeace and Nature & Youth as litigants, while it gained support from both the Grandparents Climate Campaign and Friends of the Earth by the time it reached the Supreme Court. Although this can be seen as success for the Environmental movement and its ability to gain momentum and support, it did not have a drastic impact on the outcome of the case. Similarly, the Dutch VVD party recognizes

the importance of working together with organizations and other actors in society to create better environments to live in (see chapter 4.4.2). This supports the idea of *influential elites* (see chapter 2.4) and the positive effects of having allies within the elite who can support and negotiate on the movement's behalf. Although this may not have been a large influence in the case, it symbolizes the aspect of SMT regarding collaborations and mobilizing amongst different groups in society in order to achieve the movement's goals.

6.3 Further research

As proposed in chapter two, it is a plausible assumption that further comparative research devoted to analyzing what aspects of climate change litigation work and what aspects do not, will continue to evolve. It is also likely that the Norwegian climate change case will continue to grow within academic research. With the increasing occurrence of climate change litigation in general, there will likely be an increase in academic attention devoted to these developments. Further, it is of my understanding that most existing analyses are produced from a legal perspective, there is, thus, perhaps a shortage of the criminological analysis of this issue. Although the understanding of climate change as a state-corporate crime is not new to the field of criminology, the comparative analysis of this phenomenon is perhaps in its infancy. The cross-disciplinary study of climate change litigation, with different theoretical backgrounds, different prior understandings and standpoints, has the potential to illuminate different aspects of these types of cases and can thus, in collaboration, provide a deeper understanding of the issue at hand.

As I have also suggested in chapter two, a proper application of different theories within Social Movement Theory to these cases could be of interest to social researchers. This would provide a more in-depth understanding of the social processes and influences in the cases. To dive deeper into the social movements in each country would provide useful information to the strategies and choices made throughout the process. This could be done with different methods than those used in this project, for example through expert interviews or interviews with participants within the social movements. This would potentially further uncover the discourse in society and the public's understandings and views of climate change policies, as well as their understandings

of the use of law in combating climate change. Additionally, there are certainly further aspects of the cases that could have been analyzed in more detail. An extensive study of any single one of the topics in chapter five could arguably also have constituted a full research project (for example a study focusing on the causes of action in climate change litigation).

Finally, the fact that the Norwegian case is being treated in the ECtHR offers further potential for studying the continuation of the case. Depending on the outcome, the appeal to the ECtHR and the potential case could provide further evidence of state crime, or otherwise how legitimate processes cause environmental harm and breaches of rights. By analyzing the State's response to the ECtHR[7], one could also further uncover the discourse in which the State is justifying its actions and legitimizing its decisions. If the case is taken on by the ECtHR it should also be interesting to see the development of ECHR interpretation and its relevance to environmental rights claims. The Norwegian case is one out of three cases that is currently being treated by the ECtHR (Aasen, Skifjeld & Kaupang, 2022), a comparative analysis of these could further contribute to the literature on the "recipe for success" in climate change litigation (Peel & Markey-Towler, 2021, p. 1484).

6.4 Final remarks

Chapters four and five found that there were many similarities between the two climate change cases, both in terms of the socio-political atmospheres surrounding the cases, the countries' environmental policies and their attempts at being environmentally friendly and contributing to green transformation. There were also many similarities in the climate change litigation, in terms of similar topics being discussed in both cases. This project found that the different interpretations of the European Convention on Human Rights (ECHR), the Precautionary Principle (PP), the Separation of Powers, and the States' responsibilities (as part of the international community cooperating to halt climate change) have all been influential in the outcome of the cases. However,

[7] In their response to the ECtHR the State has, for example, requested that the Court concludes that the appeal is inadmissible due to no violations of the Convention, and due to neither the organizations, nor the individual plaintiffs being victims under the convention (Busch & Thengs, 2022).

the main factor contributing to the different outcomes of the cases (and which determined the interpretations of the other factors) was the cause of action.

The cause of action determined the Courts' interpretations of the applicability of the ECHR and the PP. The Dutch case was based on the State's policy to reduce its emission targets, which constitutes a more intentional state-crime in which the State is actively trying to get away with a harmful action. On the other hand, the Norwegian case was based on the legitimacy of the State issuing petroleum licenses, a decision which follows an intricate, democratic process in which political debates determine the State action. In this sense, the Norwegian case is still a form of state-crime, but the processes involved were deemed legitimate, despite the harms those decisions may result in. The perceived legitimacy of the Norwegian State's assessments further influenced the Court's interpretation of the legal basis, in which the Court understood the State's assessments to involve considerations of the Norwegian Constitution §112.

Further, the findings suggest that the Dutch Court had a less strict interpretation of the ECHR, which involved precautionary thinking and the relevance of the ECHR to potential *future* environmental harms. On the contrary, the Norwegian Court (and State) interpreted that the ECHR was not applicable due to no current violations of the convention, and that none of the litigants were victims under the convention. Despite the Dutch Court's interpretation of the ECHR to involve future potential harms, it was also evident that the current Dutch situation, and the materialization of harms happening in the Netherlands already, was influential in their decision. The findings from both cases thus suggest that, in order to succeed in an ECHR environmental claim, the environmental harm must have already materialized or be dangerously close to materializing. This was, in turn, also evident in terms of the Separation of Powers and the concept of judicial review, in which Courts should only determine whether the State has acted in accordance with the law. The perceived lack of breaches of the legal basis in the Norwegian case thus resulted in the inability of the Court to decide against the State.

The application of the PP is naturally determined by the perceived threat. Because the Norwegian Court supported the State's argument of no direct links between the licenses and environmental consequences or breaches of rights, the threat was not

deemed imminent. The lack of direct links could thus be interpreted to mean that there was no need for the application of PP in the case. Otherwise, the Court found that the assessments made prior to the issuing of the licenses were sufficient, perhaps meaning that precautions were already considered. However, based on the PP, the acknowledgement of the potential future consequences of Norwegian oil and gas production, should be enough to require the State to act or change its actions despite the uncertainty of the extent of those consequences.

Finally, this project has shown that Climate Change is a form of state-crime, and the findings suggest that a successful climate change case requires State actions that breach the law or violate rights. The outcome of a climate change case is highly dependent on the Court's interpretations, which (because litigation does not happen in a vacuum) are influenced by society. However, the similar socio-political contexts of the two cases, yet resulting in different outcomes, suggests that the cause of action was the main factor in determining the success. This project therefore finds that a strong claim which clearly links a State action to societal environmental harms is a prerequisite for a successful climate change litigation case. Further, to clarify, the definition of success is twofold. Success refers to the success of litigants in winning their case, which the Dutch case exemplifies. Secondly, success refers to the effects of the litigation beyond the individual case, and the ability of the litigation process to cause meaningful change or influence in society and politics moreover. The two cases, and arguably all climate change litigation, can serve as inspiration for future climate change litigation, and offers inspiration for how, or how not to, proceed in similar cases. In this sense, all climate change litigation is successful, because it brings the climate crisis to the legal, academic, political and social agenda, and creates debate and movement. Ultimately, this project has contributed to the growing literature on climate change litigation and the analysis of what factors contribute to the outcome of a climate case, and to some degree, how to succeed in climate change litigation.

Word count: 36 250

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