

ARTICLE

IN SEARCH OF A FAIR SHARE:

ARTICLE 112 NORWEGIAN CONSTITUTION, INTERNATIONAL LAW, AND AN EMERGING INTER-JURISDICTIONAL JUDICIAL DISCOURSE IN CLIMATE LITIGATION

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ABSTRACT

Climate change is a common sphere where an inter-jurisdictional judicial discourse gradually evolves. Engaging with the reasoning of other courts strengthens controversial judicial pronouncements in a complex area of law and it reduces the risk of being an “outlier” when domestic law is applied in the light of international law on climate change. It upholds the promise of cooperative international law where states address a common concern of humankind collectively, in this instance, through their judicial branches. A coordinated, inter-jurisdictional judicial discourse protects the climate if regulatory gaps arise or domestic efforts of governments in reducing emissions remain inadequate. Conversely, deference to executive branches implies granting a wide margin of appreciation to governments, even in pursuing policies that risk achieving the Paris Agreement’s temperature goal. The latter approach nurtures the perception that climate change is an inherently foreign policy issue, largely excluding judicial review. This Article rebuts this perception and offers a legal analysis from the viewpoint that justiciable climate change standards are defined by international law and

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that domestic law—including constitutional law—must be interpreted and applied in the light of this international law. It spells out legal parameters of effective rights protection within this framework of international and national law and uses the right to a healthy environment in the Norwegian Constitution as primary example to develop an analytical argument that can be transferred to other jurisdictions. This analytical argument comprises the full dimension of the legal consequences that arise from the threat that extraterritorial emissions pose to that constitutional right, given the global nature of climate change impacts. In January 2020, the Borgarting Court of Appeal was the first to recognize that extraterritorial emissions resulting from combustion of Norwegian oil are significant for determining the risk for the right to a healthy environment. This recognition was confirmed by the Supreme Court of Norway in December 2020. This insight paves the way for judiciaries to scrutinize the cumulative effects of global emissions for their impact on the protection of constitutional rights to a healthy environment. Judgments of other courts are used as “comparative units” to substantiate that the dichotomy between deference to governments and access to justice can be overcome if courts refuse to accept climate change as a “no-go” area; and even enter into an inter-jurisdictional judicial discourse to strengthen their position.

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I. INTRODUCTION

2020 was envisaged to be the year of rising ambition of the international community in its endeavor to achieve net-zero emissions by mid-century,¹ at a time when the public health crisis caused by the COVID-19 pandemic was already looming and a record-breaking heatwave in Siberia was well under way.² As the first western country to report enhanced ambition, Norway submitted its updated climate target under the Paris Agreement on February 7, 2020 before many parts of the world went into their first “lockdown.”³ The new climate target forms part of

1. See *2020 Is a Pivotal Year for Climate – UN Chief and COP26 President*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Mar. 9, 2021), <https://unfccc.int/news/2020-is-a-pivotal-year-for-climate-un-chief-and-cop26-president> [<https://perma.cc/Q4TA-G8N6>]. For the analysis of national pledges so far, see UNFCCC, SYNTHESIS REPORT ON NATIONALLY DETERMINED CONTRIBUTIONS UNDER THE PARIS AGREEMENT, FCCC/PA/CMA/2021/2 (2021).

2. Carlo Caduff, *What Went Wrong: Corona and the World After the Full Stop*, MED. ANTHROPOLOGY Q. 467, 468-69 (2020); see also WORLD WEATHER ATTRIBUTION, PROLONGED SIBERIAN HEAT OF 2020 1 (2020), <https://www.worldweatherattribution.org/siberian-heatwave-of-2020-almost-impossible-without-climate-change/> [<https://perma.cc/N6Z9-FBR5>].

3. Norway updated its first NDC as required by Decision 1/CP.21 para. 24 (and for the future under art. 4(9) of the Paris Agreement.) The Paris Agreement, Dec., 12, 2015, U.N.T.S. I-54113. The Norwegian Climate Change Act in § 5 requires the Government (“shall”) to update its national target in 2020 and every 5 years thereafter and to report this to the Storting (the Norwegian Parliament). See *Lov om klimamål (klimaloven) (Act Relating to Norway’s Climate Targets) (2018)*, available at <https://lovdata.no/dokument/NLE/lov/2017-06-16-60> [<https://perma.cc/AZN7-7FJ7>] (last visited Mar. 29, 2021) [hereinafter *Climate Change Act*]. The target must be based on the best available science and as far as possible quantitative and measurable. *Id.* The UNFCCC Secretariat published on February 26, 2021, the initial version of the report that synthesizes information from the 48 NDCs, representing 75 Parties, that had submitted by December 31, 2020, new or updated NDCs in response to paragraphs 23–24 of decision 1/CP.21. See Rep. of the Conference of the Parties on Its Twenty-First

Norway's updated nationally determined contribution ("NDC").⁴ At the domestic level, the Norwegian Climate Change Act envisages the country's transition to a low-carbon society by 2050.⁵ Accordingly, the country pledged to reduce its national greenhouse gas ("GHG") emissions "by at least 50% and towards 55% compared to 1990 levels by 2030."⁶ As part of the extended climate cooperation between the European Union ("EU"), Iceland, and Norway, the government promised to fulfil the target of at least 40% GHG emission reductions between January 1, 2021 and December 31, 2030 in accordance with the EU's climate and energy framework.⁷

Session, *Framework Convention on Climate Change*, 1/CP.21, FCCC/CP/2015/10/Add.1, paras. 23-24. New NDCs are required from Parties in case the INDC contained a timeframe of only up to 2025. *Id.* para. 23. For the UNFCCC Synthesis Report, see Rep. of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, FCCC/PA/CMA/2021/2. The following eight countries have submitted their second NDCs: Grenada on December 1, 2020, Nepal on December 8, 2020, Tonga and Suriname on December 9, 2019, Papua New Guinea on December 16, 2020, United Arab Emirates on December 29, 2020, Argentina on December 30, 2020, and Marshall Islands had updated its second NDC on 31 December 2020. For the interim registry on NDCs, see *NDC Registry (Interim)*, UNFCCC, <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> [<https://perma.cc/R229-QWAF>] (last visited Mar. 14, 2021).

4. Ole Mathismoen, *Regjeringen skjerper Norges klimamål. Vil halvere norske utslipp på ti år.*, *AFTENPOSTEN* (Feb. 7, 2020), <https://www.aftenposten.no/norge/i/mRdXnL/regjeringen-skjerper-norges-klimamaal-vil-halvere-norske-utslipp-paa-ti-aar> [<https://perma.cc/KP2R-9RE5>].

5. *Climate Change Act*, *supra* note 3, § 1. The Climate Change Act defines "A low-emission society means one where greenhouse gas emissions, on the basis of the best available scientific knowledge, global emission trends and national circumstances, have been reduced in order to avert adverse impacts of global warming, as described in Article 2(1)(a) of the Paris Agreement of 12 December 2015." *Id.* § 4.

6. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]. The new NDC states "Norway seeks to fulfil the enhanced ambition through the climate cooperation with the European Union. In the event that Norway's enhanced nationally determined contribution goes beyond the target set in the updated nationally determined contribution of the European Union, Norway intends to use voluntary cooperation under Article 6 of the Paris Agreement to fulfil the part that goes beyond what is fulfilled through the climate cooperation with the European Union." *Id.*

7. Decision of the EEA Joint Committee para. 7, Oct. 25, 2019, No 269/2019, <https://ec.europa.eu/clima/sites/clima/files/news/20191025.pdf> [<https://perma.cc/M8W2-3XWF>]. In Decision No 269/2019 of 25 October the European Union, Iceland, and Norway formally agreed to extend the climate cooperation for the period 2021–2030 by amending Protocol 31 of the EEA Agreement. *Id.*

The renewed Norwegian climate strategy is undoubtedly ambitious. Nonetheless, it neglects one important challenge: the petroleum industry. Norway is one of the biggest petroleum producers in the world,⁸ and the oil and gas industry accounts for 50% of its annual Export Value.⁹ The majority of Norway's petroleum is exported, resulting in GHG emissions from combustion worldwide. These are often referred to as downstream or scope-3 emissions. Norway is the seventh biggest contributing state to the world's total scope-3 emissions, and fossil fuel exports constitute ten times the country's national emissions.¹⁰ This double role as self-proclaimed climate leader and oil giant has been nicknamed the "Norwegian Paradox."¹¹

The "Norwegian Paradox" was put on the agenda when the Ministry of Petroleum and Energy decided to award ten new production licenses for petroleum activity in the Barents Sea in June 2016 ("the decision").¹² The decision was described as "a new chapter for the Norwegian petroleum industry,"¹³ and was quickly subjected to public debate. Several environmental organizations argued that the decision was in conflict with the global need to reduce the concentration of greenhouse gases in the atmosphere and Norway's ratification of the Paris Agreement, which took place only days after the decision was made.¹⁴ The

8. See *Total Energy Production 2018*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/international/rankings/world?pa=12&u=0&f=A&v=none&y=01%2F01%2F2018> [https://perma.cc/J3TN-SR2T] (last visited Mar. 18, 2021).

9. NORSK OLJE OG GASS, FAKTA OM NORSK OLJE OG GASS 3 (Apr. 2019).

10. Hannah McKinnon et al., *The Sky's the limit. Norway. Why Norway should lead the way in a managed decline of oil and gas extraction*, OIL CHANGE INT'L (Aug. 9, 2017), <http://priceofoil.org/2017/08/09/the-skys-limit-norway-why-norway-should-lead-the-way-in-a-managed-decline-of-oil-and-gas-extraction/> [https://perma.cc/X5QB-EQUH].

11. Somini Sengupta, *Both Climate Leader and Oil Giant? A Norwegian Paradox*, N. Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/world/europe/norway-climate-oil.html> [https://perma.cc/5AJA-DWH4].

12. *Tildeling av Leteareal i 23. Konesjonsrunde*, REGJERINGEN.NO (May 18, 2016), <https://www.regjeringen.no/no/aktuelt/23.-konesjonsrunde-tildeling/id2500924/> [https://perma.cc/QD7T-HJGB]. Prior to a decision on awarding concrete production licences, an "opening" of relevant maritime areas for petroleum activities must occur. See Lov om petroleumsvirksomhet (Act Relating to Petroleum Activities) § 3-1 (1996), <https://www.npd.no/en/regulations/acts/act-29-november-1996-no2.-72-relating-to-petroleum-activities/> [https://perma.cc/KY2L-RXNP] [hereinafter *The Petroleum Act*].

13. *Tildeling av Leteareal i 23. Konesjonsrunde*, *supra* note 12.

14. Anne Cecilie Remen, *Bellona-Hague: Flaut og Pinlig*, NRK (May 18 2016), <https://www.nrk.no/norge/23.-konesjonsrunde-er-brudd-pa-parisavtalen.-1.12950784> [https://perma.cc/SF24-66X8]; see generally Paris Agreement, *supra* note 3; UNFCCC,

environmental organizations Greenpeace Nordic and Nature and Youth challenged the decision and sued the Ministry of Petroleum and Energy, claiming that it violated their right to an “environment that is conducive to health” guaranteed by Article 112 of the Norwegian Constitution (“Article 112”).¹⁵

The judgment of the Oslo District Court in *Greenpeace Nordic*,¹⁶ as well as the subsequent judgments of the Borgarting Court of Appeal¹⁷ and the Supreme Court of Norway,¹⁸ are part of an emerging international trend of climate change litigation.¹⁹ A groundswell of cases demonstrates how rights provisions and procedural duties of authorities that ultimately originate in rights

supra note 6; Rep. of the Conference of the Parties on its Twenty-First Session, *Framework Convention on Climate Change*, U.N. Doc. FCCC/CP/2015/10/Add.1 (2016); Norge Har Ratifisert Parisavtalen, REGJERINGEN.NO (June 21, 2016), <https://www.regjeringen.no/no/aktuelt/norge-har-ratifisert-parisavtalen/id2505365/> [<https://perma.cc/8Z8X-WSMY>].

15. Grunnlov [Grl] [Constitution] art. 112 (Nor.), <https://lovdata.no/dokument/NLE/lov/1814-05-17?q=grunnloven> [<https://perma.cc/RMT9-LU5J>] [hereinafter *The Norwegian Constitution*]. The Norwegian Constitution was adopted on May 17, 1814, and the official translation is provided by the Storting (Norwegian Parliament). *Id.* The Norwegian Constitution is the second oldest written Constitution still in force. *The Constitution*, STORTINGET, <https://stortinget.no/en/In-English/About-the-Storting/The-Constitution/> [<https://perma.cc/A2NQ-KBEF>] (last visited Mar. 2, 2021).

16. Oslo tingrett [Oslo District Court], 2018-01-04 TOSLO-2016-166674 (Nor.) [hereinafter *Greenpeace Nordic* District Court].

17. Borgarting lagmannsrett (Borgarting Court of Appeal) 2020-01-23, 18-060499ASD-BORG/03 [hereinafter *Greenpeace Nordic* Court of Appeal].

18. Norges Høyesterett, (Supreme Court) 2020-04-20, 20-051052SIV-HRET [hereinafter *Greenpeace Nordic* Supreme Court]. The decision was adopted by a majority of 11 votes against 4, with three votes joining Justice Webster in dissent. *Id.*

19. There is a vast amount of literature in the field, analyzing different cases, strategies, and the role of climate litigation generally. See Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT’L L. 679 (2019); Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 114 AM. J. INT’L L. UNBOUND 56, 56-60 (2020); Brian J. Preston, *The Evolving Role of Environmental Rights in Climate Change litigation*, 2 CHINESE J. ENV’T L. 131 (2018); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT’L ENV’T L. 37 (2017); Jacqueline Peel et al., *Shaping the “Next Generation” of Climate Change Litigation in Australia*, 41 MELB. U. L. REV. 793 (2017); Geetanjali Ganguly et al., *If at First You Don’t Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841 (2018); Kim Bouwer, *Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation*, TRANSNAT’L ENV’T L. 1 (2020); David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, 64 FLA. L. REV. 15 (2012).

protection,²⁰ are being utilized to influence regulatory climate action of states in many different countries of the world, including the examples discussed in this Article as “comparative units.”²¹ These are the decision of the Supreme Court of the Netherlands in *State of the Netherlands v. Urgenda Foundation* (“*Urgenda*”),²² the judgment of the High Court of New Zealand in *Thomson v. Minister for Climate Change Issues* (“*Thomson*”),²³ the ruling of the Land and Environment Court of New South Wales (Australia) in *Gloucester Resources Limited v. Minister for Planning* (“*Gloucester*”),²⁴ the decision of the High Court of South Africa in *Earthlife Johannesburg v. The Minister for the Environment* (“*Earthlife Johannesburg*”),²⁵ the judgment of the National Environment Tribunal of Kenya in *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.* (“*Save Lamu*”),²⁶ the ruling of the UK Court of Appeal in *R. (on the application of Plan B Earth) v. Secretary of State*,²⁷ and the recent judgment of the UK Supreme Court that overturned the decision of the UK Court of Appeal.²⁸ While necessarily only representing a selection amidst other potentially relevant judicial decisions, these cases represent jurisdictions in the Global North and the Global South, and

20. John H. Knox (Special Rapporteur to the Human Rights Council), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. A/HRC/37/59, annex (Jan. 24, 2018); PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 817 (4th ed. 2018); see also *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* (John H. Knox & Ramin Pejan eds., 2018).

21. For traditional and new categories of comparative units in law, see Mathias Siems, *The Power of Comparative Law: What Types of Units Can Comparative Law Compare?*, 67 AM. J. COMP. L. 861, 874 (2019).

22. Hoge Raad der Nederlanden 20 december 2019, NJ 2020, 19/00135 m.nt. (Staat der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *The State of the Netherlands v. Urgenda*].

23. *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 (N.Z.) [hereinafter *Thomson*].

24. *Gloucester Resources Limited v. Minister for Planning*, [2019] NSWLEC 7 (Austl.) [hereinafter *Gloucester*].

25. *Earthlife Johannesburg v. Minister of Environmental Affairs* 2017, Case No. 65662/16, (S. Afr.) [hereinafter *Earthlife Johannesburg*].

26. *Save Lamu v. National Environmental Management Authority* (2016), case No. NEMA/ESIA /PSL/3798 (Kenya) [hereinafter *Save Lamu*].

27. *R. (on the application of Plan B Earth Ltd.) v. Secretary of State for Transport* [2020] EWCA (Civ) 214 [hereinafter *R. (on the application of Plan B Earth Ltd.)*].

28. *R. (on the application of Friends of the Earth Ltd. and others) v. Heathrow Airport Ltd* [2020] UKSC 42 [hereinafter *Heathrow*].

involve states with economies at different income levels.²⁹ In all of these cases, the outcome was determined through the judicial approach towards applying domestic law in the context of international law on climate change. Therefore, these cases cover the two important dimensions of legal developments needed to meet the Paris Agreement's objectives. The first dimension is the enactment of new laws on setting and implementing national emission targets, and the second concerns the interpretation of existing laws, including administrative and planning legislation, to meet those climate targets.

The outcomes of climate lawsuits do not always allow for identifying clear victories or failures. Legal progress can be, and often is, small and subtle.³⁰ Significant legal developments can even be embedded in ostentatious unsuccessful cases. The rapidly evolving climate science resolves scientific uncertainty,³¹ but that does not always directly translate into reducing the legal

29. For the latest economic data of the World Bank on country specific income rating, see *World Bank Country and Lending Groups*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> [<https://perma.cc/MY3J-L89S>] (last visited Mar. 6, 2021).

30. See, e.g., Verwaltungsgericht (VG) [Administrative Trial Court] Oct. 31, 2019, Case 10 K 412.18, *Backsen v. Germany* (Ger.) [hereinafter VG]. The case was the first “*Urgenda*”-style lawsuit against the German Federal Government. The case was filed with the Berlin Administrative Court in 2018. *Id.* The Court held that the climate policy of the Federal Government did not fall outside the judicial capacity of the courts, and that the State had a duty to protect fundamental rights from climate change impacts. *Id.* at 12, 22-24. However, the measures taken by the government were not considered to be below the minimum standard as required by the German Constitution. *Id.* at 23; see also Petra Minnerop, *The First German Climate Case*, 22 ENV'T. L. REV. 215 (2020). Compare with Peel & Lin, *supra* note 19; Preston, *supra* note 19; Ganguly, *supra* note 19; Brian J. Preston, *The Influence of Climate Change Litigation on Governments and the Private Sector*, 2 CLIMATE L. 485 (2011) [hereinafter Preston, *Influence of Climate Change*].

31. See Nick Watts et al., *The 2019 report of The Lancet Countdown on health and climate change: ensuring that the health of a child born today is not defined by a changing climate*, 394 LANCET 1836 (2019); Friederike E.L. Otto et al., *Towards an inventory of the impacts of human-induced climate change*, BULL. AM. METEOR. SOC'Y 1972 (2020); Geert Jan Oldenborgh et al., *Attribution of Extreme Rainfall from Hurricane Harvey, August 2017*, 12 ENV'T. RSCH. LETTERS 12124009 (2017). For the latest figures see WORLD METEOROLOGICAL ORG., THE STATE OF GREENHOUSE GAS IN THE ATMOSPHERE BASED ON GLOBAL OBSERVATIONS THROUGH 2018 (2019); *Scientific Consensus: Earth's Climate is Warming*, NAT'L AERONAUTICS SPACE ADMIN., <https://climate.nasa.gov/scientific-consensus/> [<https://perma.cc/XZT3-WC5F>] (last visited Feb. 26, 2021); Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENV'T. L. REP. 10,121, 10,130 (2017).

challenges of climate litigation.³² Much depends on the concrete facts and the domestic legal frameworks.

While courts might not yet have found a united judicial voice in the climate change context, this Article uses the case law it discusses to point out where the line between policy and law has been drawn by the respective courts, and how they make reference to other cases in defining their own standard of review. At least in some instances, these decisions can be explained as examples of an evolving inter-jurisdictional judicial discourse. An emerging openness to foreign judicial reasoning in the climate change context is especially apparent in two circumstances: when judges cite the reasoning of foreign courts to strengthen their own interpretation of national law in light of international law; and when courts are opposing the legal positions of their own governments. These references to decisions of foreign courts are highly significant in a complex area such as climate change, where judicial self-restraint is often not only induced by scientific complexity, conflicting political questions, and different interests at stake, but because of the perceived risk that “no-one” will follow.³³

The pivotal point in the decision of the Borgarting Court of Appeal is that the Court clarified—for the first time since the right to a healthy environment was incorporated in the Norwegian Constitution—that GHG emissions from oil and gas exported from Norway *are* relevant when assessing the State’s measures under Article 112 of the Norwegian Constitution. The Oslo District Court had ruled in the first instance in favor of the Norwegian government in January 2018³⁴ and the Borgarting Court of Appeal confirmed the decision in January 2020.³⁵ However, the Court of Appeal significantly changed the interpretative scope of Article 112 in relation to extraterritorial

32. See *Massachusetts v. EPA*, 549 U.S. 497, 504-05 (2007); Margaret Rosso Grossman, *Climate Change and the Individual*, 66 AM. J. COMPAR. L. 345, 353 (2018). For a novel approach to resolve causation in law, see Petra Minnerop & Friederike E.L. Otto, *Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic*, 27 BUFF. ENV’T. L.J. 49 (2019-2020).

33. Ivar Alvik, *The First Norwegian Climate Litigation*, 11, J. WORLD ENERGY L. & BUS. 541, 544 (2018).

34. *Greenpeace Nordic* District Court, *supra* note 16.

35. *Greenpeace Nordic* Court of Appeal, *supra* note 17.

emissions.³⁶ The Supreme Court of Norway granted leave to appeal in April 2020 and delivered its judgment on December 22, 2020, shortly after the hearing on November 4, 2020.³⁷ The Supreme Court confirmed that climate change consequences are more significant when emissions from combustion abroad are also taken into consideration.³⁸

Consistently, all three Norwegian courts agreed that Article 112 must be understood as a substantive rights provision that can be invoked before the courts accordingly.³⁹ The Court of Appeal, however, went further than the District Court in saying that local environmental harm resulting from petroleum production is not the only consideration in Article 112 cases. Instead, the Court included “all environmental harm that has been cited—local environmental harm, greenhouse gas emissions that occur in connection with the production of petroleum and greenhouse gas emissions that occur in connection with combustion.”⁴⁰ Based on this interpretation of Article 112, the Court held that the measures taken by the government had to be assessed against this comprehensive definition of environmental harm⁴¹ and this

36. *Id.*

37. *Greenpeace Nordic* Supreme Court, *supra* note 18. The date for the hearings has been announced on the Supreme Court’s webpages. See *Berammingsliste*, NORGES HOYESTERETT, <https://www.domstol.no/Enkelt-domstol/hoyesterett/saksliste/berammingsliste/> [https://perma.cc/97ZT-DHZZ] (last visited Mar. 13, 2021).

38. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 155. It should be noted that the proceedings before the Supreme Court only concerned a reduced number of production licenses. *Id.* One license in Barents Sea South and two in Barents Sea South-East had been surrendered prior to the judgment, and in the case of the production license that remained for the Barents Sea South-East, the operator had applied to surrender 62 per cent of the area. However, parties and the Supreme Court agreed that the legal interests still existed. *Id.* para. 18.

39. For a detailed discussion on a number of proposals from Members of the Storting regarding the introduction of a right to an environment in the Constitution see *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 93-103. The Supreme Court found that the former Article 110 b was already intended for individuals or groups to be able to bring the matter before the courts based directly on the constitutional provision when the legislature has not taken a position on an environmental problem. *Id.* para. 104. This was also the case for Article 112. *Id.* para. 139. It was not disputed between the parties that Article 112 covered both (traditional) environmental harm and climate deterioration. *Greenpeace Nordic* District Court, *supra* note 16, at 18. The Court of Appeal confirmed that Article 112 grants rights that can be reviewed before the courts. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 18.

40. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 19.

41. *Id.* at 7.

analysis was confirmed by the Supreme Court. The Supreme Court found that “if activities abroad . . . cause harm in Norway, this must be capable of being included.” The Court went on to point out that “[o]ne example is combustion abroad of oil or gas produced in Norway, when it leads to harm in Norway as well.”⁴²

The Authors’ argument in this Article is anchored in this broader definition of environmental harm which must be considered when measures are taken by the State that could affect the material scope of the right. The Authors draw out three major implications of this interpretation of the constitutional right under Article 112 for the State’s decision-making on granting licenses to produce oil and for the judicial review of these decisions. The first implication concerns the application of statutory law—including the necessary Environmental Impact Assessments (“EIA”)—in the process of awarding production licenses, in the light of, and to give effect to, constitutional law.

The second implication concerns the role of international law for constitutional interpretation. International commitments of reducing emissions and achieving a temperature goal jointly with other states affect the margin of discretion the government and the Storting have when granting oil production licenses.⁴³ These international climate protection commitments have also been democratically endorsed by the Storting. The Authors contend that the rule of law demands that licensing decisions are justiciable on the basis of Article 112 directly and that the commitments of the State under the Paris Agreement narrow the State’s margin of appreciation when it adopts measures that could pose a threat to the right.

The third implication is that the decisions in *Greenpeace Nordic* can be examined against the background of an emerging inter-jurisdictional judicial discourse, where new legal patterns for addressing the climate challenge through law emerge. In the

42. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 149.

43. The final decision on the opening of a new area for oil exploration rests with the Storting. See *Petroleum Act*, *supra* note 12, §§ 1-2; Regulations to Act Relating to Petroleum Activities § 6d, available at <https://www.npd.no/en/regulations/regulations/petroleum-activities/> [https://perma.cc/BFQ7-ZX73] (last visited Mar. 29, 2021) [hereinafter *Petroleum Regulations*]. For an explanation of the discretion the Storting and the government have when opening new maritime areas and granting oil production licenses, see *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 157.

context of this third implication, the Authors draw on comparative case law⁴⁴ to show how finding a justiciable standard that traces a state's existing international commitments to climate protection is not an insurmountable challenge.⁴⁵ The case law evidences that other courts have found ways to define the boundaries of state functions⁴⁶ in the climate change context. This supports that the agreed temperature goal of the Paris Agreement and the size of the remaining global carbon budget that flows from it,⁴⁷ have been used by these courts to limit their respective government's margin of appreciation for decision-making at different levels of governance.⁴⁸ Furthermore, integrating *Greenpeace Nordic* within this emerging pattern of a judicial practice where recourse is taken to foreign judgments, stresses the importance of the case for finding that extraterritorial emissions must be included in the scope of a constitutional right to a healthy environment. This sends a strong signal to other jurisdictions.

This Article proceeds in three Parts. In Part II, the Authors will first consider the substantial content of the right to a healthy environment under Article 112, beginning with the drafting history of the provision, before analyzing the Borgarting Court of Appeal's judgment and the Supreme Court's judgment in *Greenpeace Nordic*. Given that scope-3 emissions pose a risk to the constitutional right, Part II then examines how the Norwegian Petroleum Act accounts for the wider risk analysis that is required by the Constitution.

44. These cases will be our units of comparison in a transnational perspective.

45. See Mathias Siems, *supra* note 21, at 874 (2019); see also Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission*, in *COMPARATIVE INTERNATIONAL LAW* 161 (Anthea Roberts et al. eds., 2018).

46. See Han-Ru Zhou, *Legal Principles, Constitutional Principles, and Judicial Review*, 67 *AM. J. COMP. L.* 899 (2019).

47. The IPCC defines the remaining carbon budget as follows: "Estimated cumulative net global anthropogenic CO₂ emissions from a given start date to the time that anthropogenic CO₂ emissions reach net zero that would result, at some probability, in limiting global warming to a given level, accounting for the impact of other anthropogenic emissions." IPCC, *SPECIAL REPORT: GLOBAL WARMING OF 1.5°C* 26 (2018) [hereinafter IPCC 2018].

48. As such, learning from the reasoning of other courts has an immediate practical function within comparative law. See JOHN H. MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW* 478 (1999).

Part III discusses if and how Article 112 can be interpreted in the light of international law on climate change. In Part IV, the Authors draw on the emerging jurisprudence of other courts, where judicial review has tested governmental and administrative decisions because of their climate change impacts. These decisions are examples of courts' interventions to identify the respective state's "fair share" and administrative diligence in tackling climate change, thereby spelling out the consequences of their own government's international climate commitments.

On that basis, this Article develops a transferable, analytical argument for finding a concrete standard of judicial review and tests it against the main counterargument: the wide margin of appreciation of the State in climate policy-making. For brevity and clarity, the argument is developed and tested in relation to Article 112 of the Norwegian Constitution and the State's margin of appreciation in protecting the rights thereunder. However, a structurally similar argument applies to other jurisdictions that include, explicitly or impliedly, a fundamental right to a healthy environment that must be interpreted in the context of international climate protection commitments and the promise of a temperature goal that avoids the worst-case scenarios of climate change.

II. CONSTITUTIONAL INTERPRETATION OF ARTICLE 112 OF THE NORWEGIAN CONSTITUTION AND ITS APPLICATION IN THE CASE LAW

The right to a healthy environment in Article 112 was implemented during the constitutional reform in 2014 to strengthen the constitutional guarantee of an environmental right.⁴⁹ Article 112 combines a substantive rights provision in its first two paragraphs with a requirement for the authorities to fulfil

49. Ole K. Fauchald, *Forfatning og miljøverk – en analyse av grunnlovens § 110 b*, 1 TIDSSKRIFT FOR RETTSVITENSKAP 71-73, 82-83 (2007). After analyzing the use of Article 100 b by Norwegian courts and authorities, the Author argues that the article has had little legal effect, and that it was primarily used as a supportive argument. Kontroll og Konstitusjonskomiteen (The Standing Committee on Scrutiny and Constitutional Affairs), Innst.187 S (2013-2014) (May 7, 2014) at 25 (Preparatory document regarding the Constitutional Reform).

an “active duty” to take “adequate and necessary” measures in order to protect the environment in the third paragraph.⁵⁰

The English version of Article 112⁵¹ in the official translation reads:

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.⁵²

This Part now turns to the constitutional interpretation of Article 112 based on the drafting history and the scholarly discussion, before turning to the application in the case law.

50. Preparatory document regarding the Constitutional Reform, *supra* note 49.

51. The Norwegian Constitution, *supra* note 15, art. 112 (Article 112 will also be referred to throughout the text as the right to a healthy environment).

52. *Id.*

A. The Drafting History

Article 112 is based on the former Article 110 b,⁵³ which was adopted in 1992.⁵⁴ Article 110 b was introduced in the aftermath of the 1987 Brundtland Commission's report *Our common future*, which pointed out the need for legal reforms in order to ensure sustainable development.⁵⁵ At this time, several other countries were also introducing environmental provisions in their constitutions,⁵⁶ or ratifying regional human rights treaties to include a specific or implied right to a clean or healthy environment.⁵⁷ Some courts are interpreting existing human

53. Article 110 b was adopted on May 25, 1992 by the Storting and came into force the same day. Kgl. res. (Kongelig Resolusjon) 463 (FOR-1992-06-19-463) (1992) (Nor.). Article 110 b reads:

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 State Authorities shall issue further Provisions for the implementation of these Principles.

Id. This is the translation used by the Supreme Court. See *Greenpeace Nordic Supreme Court*, *supra* note 18, para. 105.

54. The Standing Committee on Scrutiny and Constitutional Affairs, *supra* note 49, at 25.

55. See U.N. Report of the World Commission on Environment and Development: *Our Common Future* ann. I (1987) (proposing legal principles for the protection of the environment). The World Commission on Environment and Development was created in accordance with U.N. G.A. 38/161 and chaired by the Norwegian Prime Minister Gro H. Brundtland. See generally *id.* "The State Authorities shall issue further Provisions for the implementation of these Principles." See *Greenpeace Nordic Supreme Court*, *supra* note 34, para. 105.

56. In respect of adopting special provisions on *climate* protection at constitutional level, it is worth to mention that only nine States include responsibilities concerning climate change in their constitutions. These are Côte d'Ivoire, Cuba, the Dominican Republic, Ecuador, Thailand, Tunisia, the Bolivarian Republic of Venezuela, Vietnam, and Zambia, with draft constitutions in The Gambia and Yemen also addressing climate change. See David R. Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Right to a healthy environment: good practices*, para. 50, U.N. Doc. A/HRC/43/53 (Dec. 30, 2019).

57. See *id.* para. 9 (emphasizing that the legal recognition of this right constitutes "good practice, whether by means of constitutional protection, inclusion in environmental legislation or through ratification of a regional treaty that includes the right."); DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF*

rights dynamically and innovatively so as to include a right to a healthy environment,⁵⁸ thereby demonstrating a growing understanding of the scope of human rights instruments in the context of the protection of natural resources.⁵⁹ These provisions and interpretations recognizing the right to a healthy environment not only identify legal obligations which the State owes to the individual, they may also call for a collective responsibility for environmental protection. For instance, Article 20 of the Constitution of Finland states that “[n]ature and its biodiversity, the environment and the national heritage are the responsibility of everyone.”⁶⁰

The aims of introducing Article 110 b (the predecessor of the current Article 112) were again confirmed during the discussion over constitutional reform in 2014. The inclusion of a constitutional right to a healthy environment was viewed as a

CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2012); JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* (2014).

58. On February 6, 2020, the Inter-American Court of Human Rights handed down a landmark decision in *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina*, (*Indigenous Communities Members of the Lhaka Honhat Ass'n v. Argentina*), Inter-Am. Ct. H.R. (Feb. 6, 2020) (using Article 26 of the IACHR for the first time in a contentious case). In an Advisory Opinion in 2018, the Court had already found that the right included the right to a healthy environment. Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23. Article 26 reads: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.” American Convention on Human Rights art. 26, Nov. 22, 1969, 1144 U.N.T.S. 123. For an overview of the protection of indigenous peoples in the Inter-American system, see Maria Antonia Tigre & Sarah Slinger, *A Voice in Development: The Right to Participation of Indigenous Groups in Amazon Countries*, in *INDIGENOUS AMAZONIA, REGIONAL DEVELOPMENT AND TERRITORIAL DYNAMICS: CONTENTIOUS ISSUES* 460 (Walter Leal Filho et al. eds., 2020). Human rights and environmental standards may even merge at the domestic level into a new implied constitutional right to a healthy environment, an example is the ruling of the High Court of Ireland where the increasing awareness of the need for environmental protection led to the explicit recognition of an implied constitutional right. *Friends of the Irish Environment v. Fingal County Council* [2017] IEHC 695 [264] [hereinafter *Friends of the Irish Environment*].

59. See the 2020 ILA Guidelines in Annex I of the Draft Resolution No 4/2020 on “The Role of International Law in Sustainable Natural Resources Management for Development,” Adopted during the Kyoto Conference of the International Law Association, Nov. 29th-Dec. 13, 2020, para. 4.1.2.

60. Suomen perustuslaki (Constitution of Finland) 1 luku, § 20.

means to provide rights and duties, and not purely principles,⁶¹ for two main reasons. The first reason concerns the Constitution's supremacy over other legislation. As anticipated by the so-called Lønning Commission,⁶² a constitutional provision would be paramount for the interpretation of ordinary legislation.⁶³ Consequently, Article 110 b was envisaged to give guidance for interpreting and applying administrative rules and procedures.⁶⁴ The second reason was to guarantee access to judicial review in the absence of specific legislation that would allow for courts to enforce environmental protections. In those circumstances, the constitutional provision was projected to be a guarantee for individuals and organizations to access judicial review, based on the constitutional right itself.⁶⁵

The main motivation for replacing Article 110 b Norwegian Constitution with the new Article 112 was to clarify that "the authorities have an active duty to take care of the environment through various forms of measures."⁶⁶ The Lønning Commission acknowledged that there would still be room for political discretion.⁶⁷ However, the Commission specifically emphasized that, in the light of the case law of the European Court of Human

61. The Standing Committee on Scrutiny and Constitutional Affairs, *supra* note 49, at 25-26. The Committee held that Article 110 b was a rights provision, but that it was found necessary to underline the Government's duty to take active measures and ensure that the provision had a function beyond being used as a principle for interpretation. *Id.*

62. Prior to the constitutional revision in 2014, the Storting's Presidium appointed a commission to consider the constitutional establishment of human rights, led by Inge Lønning. The report from the so-called Lønning Commission or Human Rights Commission was submitted to the Storting as Document No. 16 (2011-2012) [hereinafter The Lønning Commission or The Human Rights Commission].

63. *See id.* at 243; *see also* Utenriks- og Konstitusjonskomiteen (The Standing Committee on Foreign and Constitutional Affairs), Innst. S. nr 163 (1991-1992), at 5 (holding that a constitutional environmental right will supersede other legislation and regulations).

64. The Lønning Commission, *supra* note 62, at 243.

65. *Id.* This purpose was confirmed for the provision of Article 112 by the Supreme Court. *Greenpeace Nordic Supreme Court*, *supra* note 18, para. 139 ("Nevertheless, Article 112 could be directly used before the courts when addressing environmental problems for which legislators have not taken a position. What specifically is present in a possible limitation of instances where legislators *have* taken a position on an issue may nevertheless be unclear, since there are few 'statutory voids' in this area. In addition, a distinction between when a position on an issue *has* been taken and when it has *not* can be difficult to deal with in practice.").

66. The Lønning Commission, *supra* note 62, at 245-46; *see also* The Standing Committee on Scrutiny and Constitutional Affairs, *supra* note 49, at 25.

67. The Lønning Commission, *supra* note 62, at 246.

Rights (“ECtHR”), the authorities could not be passive witnesses to major environmental destruction.⁶⁸ Instead, they were required to adopt positive measures to ensure the protection of a healthy environment for this and for future generations.⁶⁹ The Commission concluded that “this should be more clearly expressed in the Norwegian constitution.”⁷⁰ The Commission’s reference to the ECtHR underlines the significance of the European Convention on Human Rights (“ECHR”)⁷¹ for the development of the constitutional right to a healthy environment and for the aim to enhance compliance with the legal⁷² concepts developed by the ECtHR in relation to environmental protection.⁷³

The nature of Article 112 as a rights provision in combination with the State’s duty to adopt protective measures was discussed in the Norwegian Parliament (the “Storting”). As evidenced by the Storting’s debate, the fundamental environmental principles of the Brundtland Commission—which heavily influenced the first wave of reforms to include the right to a healthy environment—continued to exert a strong influence in the formulation of Article 112.⁷⁴ As a result, the original provision was carried forward, confirming the rights-nature of the provision and including some changes clarifying the authorities’—including the Storting’s—active duty to take care of the environment through various measures, in the third paragraph.⁷⁵

Notably, Article 112 includes the right for future generations as well.⁷⁶ This entails a further standard against which protective

68. *Id.*

69. *Id.*

70. *Id.*

71. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. I-2889.

72. The Supreme Court in *Greenpeace Nordic* stated that

The Storting committee thus intended . . . for the constitutional provision to have a number of legal effects. The provision was to be a constitutionally-established guideline for the legislative work. In addition, the provision was to serve as an element in statutory interpretation and as a mandatory consideration in the exercise of administrative discretion.

Greenpeace Nordic Supreme Court, *supra* note 18, para. 113.

73. *Id.*

74. The Lønning Commission, *supra* note 62, at 246.

75. This was confirmed by the Supreme Court. *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 134, 137.

76. For an excerpt of Article 112 of the Norwegian Constitution, see *supra* Part I.

or restrictive measures under the provision must be evaluated. Even if the right of the present generation is not restricted, the right of future generations may well be, and it is this right of future generations that must be equally protected even if there is no immediate benefit for the present generation.⁷⁷

B. Application of Article 112

The environmental rights provision has previously been used only sporadically in cases before the courts. For example, the judgment of the Norwegian Supreme Court in the case *Lunner Pukkverk* concentrated on the obligation of the authorities to adopt protective measures.⁷⁸ It did not elaborate on the material scope of Article 112 as a fundamental right. In fact, the rights quality of Article 112 remained a contested issue until the decision of the Oslo District Court in *Greenpeace Nordic*.⁷⁹

Greenpeace Nordic concerned the decision from the Ministry of Petroleum and Energy to award ten new production licenses in the South and South East of the Barents Sea.⁸⁰ A production license gives the licensee the right to conduct exploration activities in the awarded area. The licensee also becomes the owner of any petroleum that is discovered.⁸¹ However, a production license does not entail that extraction or production can begin immediately. If the exploratory activities result in findings, the license holder is required to develop a plan for building and operation.⁸² The exact amount of forecasted CO₂ emissions resulting from potential petroleum extraction based on the awarded licenses is thus uncertain at this point. However,

77. HANS C. BUGGE, *LÆREBOK I MILJØFORVALTNINGSRETT* 171 (5th ed., 2019). Bugge explains that actions or inactions by the State can be deemed unconstitutional if they neglect or contribute to environmental problems that can have a negative effect on people and/or nature in the future. *Id.*

78. Norsk Rettstidende [Rt.] [Reporter for Norwegian Supreme Court] 1993, p. 528, 534-535 Rt-1993-528 (204-93).

79. See *Greenpeace Nordic* District Court, *supra* note 16, at 13-18. See also Alvik, *supra* note 33, at 543.

80. Press Release, Ministry of Energy and Petroleum, *Tildeling av utvinningstillatelser—23. Konesjonsrunde* (June 10, 2016), <https://www.regjeringen.no/no/aktuelt/tildeling-av-utvinningstillatelser—23.-konesjonsrunde/id2503831/> [<https://perma.cc/9B7T-N6BQ>].

81. *The Petroleum Act*, *supra* note 12, §§ 3-1, 3-3. The legal framework that regulates the process of granting production licenses will be discussed in detail *infra* Section I. C.

82. *The Petroleum Act*, *supra* note 12, § 4-2.

estimates suggest extraction and production result in 4.5–22 million tonnes of CO₂ emissions nationally, and 100–370 million tonnes of CO₂ emissions abroad from the exported petroleum.⁸³ Environmental organizations Greenpeace Nordic and Nature and Youth claimed that the decision to award new production licenses would therefore result in elevated CO₂ emissions worldwide and increase Norway’s contribution to the climate crisis.⁸⁴ They argued that this violated the constitutional right to “an environment that is conducive to health” and the State’s obligation to manage natural resources in line with long-term considerations “which will safeguard the right for future generations” in Article 112 of the Norwegian Constitution.⁸⁵

The State, represented by the Ministry of Petroleum and Energy, rejected any violation of Article 112.⁸⁶ The State argued that Article 112 did not provide for substantive rights enforceable in court.⁸⁷ In the State’s view, the Article protected common interests and should function as a guideline for legislative and regulatory activities.⁸⁸ However, the Ministry acknowledged that Article 112 included a duty for the authorities to take measures to protect the environment.⁸⁹ The Ministry took the position that this duty was adequately fulfilled through the general rules provided by the Parliament and the government.⁹⁰ In any event, it argued that the duty did not include measures regarding emissions from exported petroleum.⁹¹

The Oslo District Court agreed with the claimants that Article 112 was a substantive rights provision.⁹² However, the Court also concluded that emissions from combustion were too remote and involved overall assessments outside of the scope of judicial review.⁹³ It concluded that the decision to award new

83. *Greenpeace Nordic* District Court, *supra* note 16, at 21-22.

84. *Id.*

85. The Norwegian Constitution, *supra* note 15, art. 112.

86. *Greenpeace Nordic* District Court, *supra* note 16, at 9.

87. *Id.* at 9, 10.

88. *Id.* at 10

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.* at 18.

93. *Id.* at 28. The Court also found that how Norwegian authorities would be able to fulfill their duty to take measures for exported oil and gas had not been clarified. *Id.* at 19.

production licenses did not violate the right.⁹⁴ This was confirmed by the Borgarting Court of Appeal, but with a slightly different reasoning.⁹⁵ The Borgarting Court of Appeal confirmed Article 112 as a rights provision that could be invoked before the courts, after a careful examination of the preparatory works in the context with the predecessor provision of Article 110 b.⁹⁶ In this regard, the Court held that:

. . . based on the background and the preparatory works for Article 110 b, it must be assumed that the provision could be invoked directly in areas where there were no 'specific provisions' under the third paragraph, and for the right to information under the second paragraph, but it was unclear whether the provision granted rights beyond this.⁹⁷

The Court of Appeal also clarified that Article 112 addressed a right of future generations, to ensure that natural resources are managed in a way that "will safeguard this right for future generations as well."⁹⁸ For the Court of Appeal, the reference to future generations implied a concern for democracy, given that future generations were unable to influence today's political processes.⁹⁹

In contrast to the District Court, the Court of Appeal reasoned that scope-3 emissions, arising from extraterritorial combustion, *are* relevant when assessing the State's measures to protect the right.¹⁰⁰ The Court of Appeal stated that "Article 112 of the Norwegian Constitution will lose its function as a limit for this type of emissions if the harmful effects are only assessed in isolation."¹⁰¹ While the Court of Appeal recognized that the starting point for effective protection must be emissions that will result from the decision, in this instance the twenty-third Licensing Round, the greatest emissions occur in connection with combustion.¹⁰² Therefore, and out of the need for a

94. *Id.* at 28.

95. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 11.

96. *Id.* at 17.

97. *Id.* at 14.

98. The Norwegian Constitution, *supra* note 15, art. 112.

99. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 17-18.

100. *Id.* at 21.

101. *Id.* at 20.

102. The Court found that these would be about twenty times greater than the emissions in the production. *Id.* at 21.

comprehensive approach to protect future generations, the Court of Appeal held that emissions from the combustion after export and their effects on the climate must also be examined.¹⁰³

Furthermore, the Court of Appeal addressed the government's argument that the international climate agreements, including the Paris Agreement, are based on the obligation of each state to account only for territorial GHG emissions. The Court pointed out that the accounting rules under the international climate change regime were not based on an inherent legal limitation but on practical reasons.¹⁰⁴ The Court emphasized that the international approach would not stand in the way of considering emissions from combustion at the national level, to guarantee a full protection of the right under Article 112.¹⁰⁵

The Supreme Court took a more conservative stance and reasoned that national climate policy was based on the division that resulted from international agreements. It stated that a clear principle that could be derived from these agreements was that each state is responsible for the combustion on its own territory.¹⁰⁶ The Supreme Court acknowledged, however, that the climate impacts would "particularly come to the fore when emissions from combustion, which mainly occurs abroad, are included."¹⁰⁷

The Court of Appeal had held that even in a situation where total GHG emissions must be reduced, there could still be "room" for emissions, "even in a low emissions society."¹⁰⁸ According to the Court, this would depend:

on the existence of measures directed at other emissions and an overall strategy for the measures. There is no reason to conceal the fact that such an exercise can be difficult, in purely [practical] terms as well as in terms of demarcation of what should remain political processes. A separate question is whether such an assessment means that any decision with climate consequences can be challenged irrespective of how

103. *Id.*

104. *Id.*

105. *Id.* See also *id.* at 31 ("The Court of Appeal wishes to emphasise that it is particularly when emissions are also included from the combustion that the climate-related consequences come to the fore").

106. *Greenpeace Nordic* Supreme Court, *supra* note 18, at para. 159.

107. *Greenpeace Nordic* Court of Appeal, *supra* note 17, para. 155.

108. *Id.* at 27-28.

significant the isolated consequences of the decision might be.¹⁰⁹

However, awarding a production license is not just any decision with climate consequences. It is the starting point for, and lays the foundation of, further fossil fuel production and consumption.¹¹⁰ The Supreme Court acknowledged that “the consequences of climate change in Norway will undoubtedly lead to loss of human life, for example through floods or landslides.”¹¹¹ However, it also held that there was no sufficiently clear link between the production licenses in the twenty-third Licensing Round and the possible loss of human life, so that the requirement for “actual and imminent risk” was not met.¹¹² Thus, while accepting that a general causal link existed between increasing emissions and the certainty that lives will be lost because of climate change impacts, the Supreme Court was not convinced that a specific causal link could be established between future emissions that would result from the production license and an imminent risks for individual rights.¹¹³

This reasoning seems to ignore the reality that production licenses are awarded with the purpose of oil production, even if production cannot begin immediately.¹¹⁴ Furthermore, the amount of additional GHG emissions can be calculated based on the size of the resource base, i.e., the expected amount of fossil fuel that will be discovered.¹¹⁵ However, at no point in time were

109. *Id.* at 20. The Supreme Court made reference to the reports that were presented to the Storting that buttressed the finding of the Borgarting Court that there will be room for oil and gas in a low-carbon society, without repeating explicitly that such room-making could occur. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 237.

110. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 234 (“Combustion emissions abroad are a general consequence of Norwegian petroleum activities and petroleum policy.”).

111. *Id.* para. 167.

112. *Id.* paras. 167-68. At this point the Court was considering the rights under the European Convention on Human Rights, Article 2 (the right to life) and Article 8 (the right to family life). The Court confirmed that “The ECHR has been incorporated into Norwegian law with precedence over other law, see Section 2 of the Norwegian Human Rights Act, see Section 3.” *Id.* para. 165.

113. *Id.* para. 168 (stating “Firstly, it is uncertain whether or to what degree the decision actually will lead to emissions of greenhouse gases.” and secondly, “the possible effect for the climate is a good piece into the future.”).

114. For an overview of the process, see *infra* Section II.C.

115. See *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 194 (“The report to the Storting on the opening of Barents Sea South-East, Report to the Storting No. 36

these concrete expected future emissions considered in their cumulative potential to interfere with the constitutional right during the decision-making process that led to awarding the licenses. This omission was acknowledged by the Court of Appeal and by the Supreme Court.¹¹⁶ The Supreme Court referred to the decision-making power of the government in relation to the assessment how emissions from combustion will affect the climate, i.e. depending on whether they would replace the use of coal or compete with gas from other suppliers.¹¹⁷ This hypothetical deliberation of the potential net contribution of the expected emissions corroborates why the process of granting the licenses was flawed in the present case. The decision to grant production licenses was made without considering the effect of the additional emissions, and without enabling the courts to review the basis for the decision accordingly.

The Court of Appeal and the Supreme Court both laid out the criteria of the Norwegian Regulations on the Environmental Impact Assessment (“EIA”) where environmental impacts “shall include positive, negative, direct, indirect, temporary, permanent, short-term and long-term effects.”¹¹⁸ Despite acknowledging the relevance of emissions from combustion for the constitutional right, the Court of Appeal could not see how a “deficient assessment of emissions in connection with combustion that occurs after export of oil and gas could have been relevant for the substance of the decision.”¹¹⁹ The Supreme Court confirmed that the scope and content of the EIA needed to be determined with consideration for the effect from emissions of CO₂ and other greenhouse gasses—whether emitted domestically or abroad.¹²⁰ This finding was an “absolutely fundamental aspect which must carry great weight in the

(2012–2013), page 13, mentions that the resource estimate for Barents Sea South-East ‘shows substantial estimated recoverable resources and a large upside potential’.”).

116. *Id.* para. 208.

117. *Id.* para. 234.

118. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 41; *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 225 (discussion of the content and scope of the EIA).

119. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 41. The argument here was that emissions from combustion are a known consequence of production, however, “the net effect is simultaneously complicated and disputed, and the question of cuts in the petroleum activities is the subject of ongoing political debate.” *Id.*

120. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 225.

determination of the substance of the assessment duty.”¹²¹ The Supreme Court emphasized the procedural element of Article 112 that required the rules governing petroleum activities of the Norwegian Petroleum Act and the Petroleum Regulations to be interpreted in the light of the constitutional provision.¹²² Nevertheless, the Supreme Court found that “[e]ven though the effects of combustion of Norwegian oil and gas after any eventual export after production in the Barents Sea South-East were not specifically exemplified in the impact assessment itself—and later in the opening report—the relevance for the global climate of opening the area was a topic that was high on the political agenda.”¹²³

Both courts appeared to be reluctant to draw out the consequences that flow from their interpretation of Article 112. The result curtails, if not contradicts, the interpretation of both the substantive scope and the full procedural dimension of the constitutional right. Thus, the question of granting a production license, without considering the concrete expected amount of emissions, inevitably becomes a constitutional one.¹²⁴

Two issues arise from that. First, because of the nature of Article 112 as a constitutional rights provision, the right must be accounted for when domestic law is applied by the authorities, to ensure that statutory law is applied in conformity with the higher-ranking constitutional law. Second, in a situation where the ordinary law does not sufficiently protect the constitutional right or fails to be interpreted in accordance with the Constitution, the constitutional right itself must serve as legal basis for judicial review, as acknowledged in the preparatory works of the environmental rights provision.¹²⁵ These two issues will be addressed in turn.

121. *Id.*

122. *Id.* para. 184.

123. *Id.* para. 229. The Supreme Court pointed out that a number of environmental organizations had emphasized the role of climate change and the IPCC reports in a consultation that followed the impact assessment. *Id.* para. 230.

124. This was acknowledged by the Court of Appeal, however, it then stated that “There is no reason that the bases the Court of Appeal has set for the substantive review against Article 112 of the Norwegian Constitution, related to threshold and intensity of review, should apply in the same manner to the procedural review.” *Greenpeace Nordic Court of Appeal*, *supra* note 17, at 37.

125. *See supra* Section II.A.

C. Application of the Norwegian Petroleum Act in accordance with Article 112 of the Norwegian Constitution

Article 112 is a substantive rights provision, albeit one that has been, according to the Authors' analysis, not adequately accounted for in the application of the procedural rules of the Norwegian Petroleum Act. This is in contrast to the Borgarting Court of Appeal's reasoning—confirmed by the Supreme Court—that the Norwegian Petroleum Act must be read in connection with Article 112 of the Norwegian Constitution.¹²⁶ The Constitution demands that the State in its decision-making process considers the territorial and extraterritorial GHG emissions that occur in connection with combustion.¹²⁷ Yet at no point in the process—beginning with the opening of a new area for exploration and granting petroleum licenses under the Petroleum Act to the point where production can start—do the procedural provisions *require* that the forecasted potential total of GHG emissions is considered in the decision-making. In other words, the legal obligation to protect the right from breaches through extraterritorial emissions that arises under the Constitution, does not translate into a specific provision at the level of the current ordinary legislation. The opportunity to establish an explicit legal rule that stipulates scrutinizing the risk comprehensively, at a point in time where the State could still effectively protect its people from further climate change, has not materialized so far.

The Norwegian Petroleum Act provides for three main stages in the process of petroleum production in a newly designated area. The first stage consists of opening a new area.¹²⁸ The final approval of the decision at this first stage rests with the Storting, which bases its decision on the EIA¹²⁹ conducted by the

126. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 26; *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 184.

127. *But cf.* *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 155, 184.

128. *The Petroleum Act*, *supra* note 12, § 3-1. For the development of the regulatory regime see Erling Selvig, *The Petroleum Act – A Regulatory Regime in Development*, 513 SCANDINAVIAN INST. MAR. L. Y.B. 1 (2019).

129. See Neil Craik, *The Assessment of Environmental Impact*, in OXFORD HANDBOOK OF COMP. ENVTL. L. 880 (Jorge E. Viñuales & Emma Lees eds., 2019). For the argument that climate change assessment forms part of an EIA as an emerging rule of customary international law, see Benoit Mayer, *Climate Assessment as an Emerging Obligation under Customary International Law*, 68 INT'L & COMP. L. Q. 271 (2019). For the aspect of

Ministry for Petroleum and Energy.¹³⁰ At the second stage, production licenses are awarded (the award of these licenses triggered the proceedings in *Greenpeace Nordic*) and this constitutes the transfer of exclusive rights to the licensee to conduct surveys and search for petroleum within the geographic area covered by the license.¹³¹ The license assigns ownership of the petroleum to the licensee, however, it does not grant the permission to start production.¹³² Production can only begin after the third stage is completed. The third stage concerns the approval of the plan for development and operation (“PDO”) which the licensee must submit before production can begin.¹³³ The PDO must be approved through a decision of the Ministry.¹³⁴ The Supreme Court clarified in *Greenpeace Nordic* that from its point of view, the production license does not entitle the license holder to a legal claim to approval of a PDO.¹³⁵

An EIA must be conducted at the first stage in this process and is usually required at the third stage,¹³⁶ but not for the second stage where the production licenses are granted.¹³⁷ This has several consequences for the protection of the constitutional right. At the first stage of opening a new area and designating it for future licensing, the EIA has the objective to “elucidate the consequences the opening of an area for petroleum activities may have on commercial activities and environmental aspects, including the possibility of pollution and expected economic and social effects.”¹³⁸ The Petroleum Act provides a list of aspects that

procedural law, see Jutta Brunnée, *Community Obligations in International Environmental Law: Procedural Aspects*, in *COMMUNITY OBLIGATIONS ACROSS INTERNATIONAL LAW* 150 (Eyal Benvenisti & Georg Nolte eds., 2018).

130. *The Petroleum Act*, *supra* note 12, §§ 3-5, 3-7.

131. *Id.* § 3-3.

132. Alvik, *supra* note 33, at 543. *See also Greenpeace Nordic Supreme Court*, *supra* note 18, para. 220 (stating the primary effect is that no others can produce).

133. *The Petroleum Act*, *supra* note 12, § 4-2.

134. *Id.*

135. *Greenpeace Nordic Supreme Court*, *supra* note 18, para. 220.

136. *See, e.g.*, Petroleum Regulations, *supra* note 43, § 22b (“The Ministry may, on application from the licensee, grant exemption from the requirement relating to impact assessment if the development concerned will not entail production of oil and natural gas for commercial purposes where the amount produced exceeds 4.000 barrels per day in respect of oil and 500.000 m³ natural gas per day in respect of gas, and it is otherwise not expected to have significant effects on commercial activities or the environment.”).

137. *See* Petroleum Regulations, *supra* note 43, §§ 6c, 22a.

138. *Id.* at § 6a.

must be considered in the EIA, such as the impacts on living conditions for animals and plants and in relation to water and air; the climate is also mentioned.¹³⁹ However, this has so far not been interpreted as an obligation to assess the “overall consequences for the world’s climate resulting from increased Norwegian production of oil and gas as a result of opening new areas.”¹⁴⁰ In *Greenpeace Nordic*, the State argued that prospective findings were still too uncertain to take combustion into account at that point.¹⁴¹ The Supreme Court found that no procedural errors had occurred at this first stage where the EIA was conducted; downstream emission that would occur from combustion could not be considered because there was still great uncertainty regarding the quantity of petroleum that would be found.¹⁴²

At the third stage and in advance of the submission of the PDO, the licensee must submit to the Ministry a proposed program for impact assessment and the Ministry will again assess the economic prospects and environmental consequences of developing the resource base into a producing field.¹⁴³ At this stage, the State has already transferred exclusive rights on the resource base to the licensee.¹⁴⁴ While the required PDO needs to be approved by the Ministry and even in the light of the fact that there is no legal right that the PDO will be approved as noted

139. *Id.* at § 6c(e) (“A description of the impact of opening the area for petroleum activities in relation to, i.e.: living conditions for animals and plants, the sea bed, water, air, climate, landscape, emergency preparedness and risk, and the joint impact of these. . .”). The authorities have a general duty to investigate under procedural law to clarify the case and provide information. Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) (Act Relating to Procedure in Cases Concerning the Public Administration) (1970) (Nor.).

140. Alvik, *supra* note 33, at 543, n.8.

141. *Greenpeace Nordic* District Court, *supra* note 16, at 12; *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 10.

142. *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 223, 239. This is in sharp contrast to the case law of the European Court of Justice. See Case C-404/09, *European Comm’n v. Kingdom of Spain.*, 2011 E.C.R. I-11897, paras. 78-80 (regarding the scope of application for the Environmental Impact Assessment Directive, the Court held an isolated assessment cannot be made of the environmental effects and that the cumulative effects must be analyzed).

143. Petroleum Regulations, *supra* note 43, § 22.

144. *The Petroleum Act*, *supra* note 12, § 3-3. This was also acknowledged by the Supreme Court. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 220 (stating that “the licence holder is ensured an exclusive right to production through the production licence, but the primary effect is that no others can produce.”).

above,¹⁴⁵ it is highly unlikely that the plan would be disapproved in a way that would void the production license granted at the previous stage of the process. This dilemma was acknowledged by the Court of Appeal:

The parties disagree on whether denial, or approval of conditions which in practice mean a denial, is a real alternative. At this stage, a licensee will normally have incurred costs in connection with exploration, on the basis of an assumption of being able to cover these if commercially exploitable discoveries are made.¹⁴⁶

It is indeed difficult to see how a complete denial of the PDO at that point in the process could be in accordance with the law.¹⁴⁷ The wording of the Petroleum Act points towards limiting the options to certain amendments of the PDO which cannot amount to a factual withdrawal of the production license.¹⁴⁸ Furthermore, while the Act creates a legal requirement to submit a PDO for approval prior to production, an EIA with a detailed account of the impact on the environment with respect to a larger defined area is at that point not necessarily conducted. By contrast, the Ministry has discretion in that situation to decide if it demands an extensive EIA prior to the PDO's approval or not, it may ask for it "when particular reasons so warrant."¹⁴⁹ In *Greenpeace Nordic*, the

145. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 222.

146. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 26.

147. It should be noted that this third stage was not part of the contentious proceedings, the case concerned the production licenses at the second stage.

148. *The Petroleum Act*, *supra* note 12, §§ 4-1, 4-2.

149. *The Petroleum Act*, *supra* note 12, § 4-2 states:

If a licensee decides to develop a petroleum deposit, the licensee shall submit to the Ministry for approval a plan for development and operation of the petroleum deposit.

The plan shall contain an account of economic aspects, resource aspects, technical, safety related, commercial and environmental aspects, as well as information as to how a facility may be decommissioned and disposed of when the petroleum activities have ceased. The plan shall also comprise information on facilities for transportation or utilisation comprised by Section 4-3. In the event that a facility is to be placed on the territory, the plan shall in addition provide information about what applications for licences etc. have been submitted according to other applicable legislation.

The Ministry may, when particular reasons so warrant, require the licensee to produce a detailed account of the impact on the environment, possible risks of pollution and the impact on other affected activities, in respect of a larger defined area.

Supreme Court reasoned that the third stage would indeed be the most appropriate time for assessing the specific global climate effects of the production, and could even serve as a “remedy” to correct previous decisions.¹⁵⁰ It remains to be seen how this interpretation of the Petroleum Act by the Supreme Court might indeed raise the bar for the approval of a PDO through placing a greater emphasis on the requirement of a comprehensive EIA at that stage in the future.

If the Ministry issues a request for an EIA at that stage, the licensee must produce “a detailed account of the impact on the environment, possible risks of pollution and the impact on other affected activities, in respect of a larger defined area.”¹⁵¹ The wording of the Petroleum Act implies that the environmental impacts that require closer consideration at that point will be territorial and not related to the exploration and production process. There is no explicit mention of climate change impacts at that stage.¹⁵² The wording and the context of the relevant provision in the Petroleum Act indicate that the provision aims at

If the development is planned in two or more stages, the plan shall, to the extent possible, comprise the total development. The Ministry may limit the approval to apply to individual stages.

Substantial contractual obligations must not be undertaken, nor construction work be started, until the plan for development and operation has been approved, unless by consent from the Ministry.

The Ministry may on application from a licensee waive the requirement to submit a plan for development and operation.

The Ministry shall be notified of and shall approve any significant deviation or alteration of the terms and preconditions on which a plan has been submitted or approved and any significant alteration of facilities.

The Ministry may require a new or amended plan to be submitted for approval.

150. *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 216, 218, 246. “The authorities will thus be able to correct – ‘remedy’ – through the ongoing process any deficient assessment prior to the opening in 2013 of the combustion effect abroad from future production of petroleum in Barents Sea South-East.” *Id.* para. 246. The lack of a comprehensive EIA was not seen by the dissent as a procedural error in the light of Article 112 nor as an option to “rectify” the fact that the EIA should have been carried out at the opening stage. *Id.* paras. 273, 285 (Webster, J., dissenting).

151. *Id.*

152. For the wording of § 4-2, see *supra* note 149. The Supreme Court may have changed the interpretation of the requirements for the future; it found that climate effects will be assessed in the event of any application for a PDO. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 241.

minimizing local environmental harm that could be caused through the production process.¹⁵³

It would indeed be difficult for the Ministry to demand from the licensee that GHG emissions from combustion are addressed at that stage, or in fact at any other stage during the procedure. Even if that were to happen, requiring a change in the PDO based on the fact that the production will lead to GHG emission from combustion would be irreconcilable with the granting of the production license in the first place. The license is awarded with a view to starting production which will result in consumption, in fact consumption is not only the consequence but the purpose of production and the producer pays a license fee accordingly. Thus, even if the licensee conducts an EIA at the third stage prior to the PDO's approval, this would, *de lege lata*, not include scrutiny of the expected GHG emissions abroad and their effect for the protected right under Article 112.

It is, however, possible that the PDO is approved under certain conditions. Yet these additional burdens can also not lead to a de-facto denial of production nor can further conditions be conceived on the basis that GHG emissions from combustion will occur. These form the core objective of granting the license and are not included in the circumstances that the Petroleum Act envisages as reasons that may lead to stricter requirements for the operation of production activities.

This interpretation of the Petroleum Act, based on its wording, may now change in the light of the judgment of the Supreme Court in *Greenpeace Nordic*. As already indicated above, the Court found that

section 4-2 of the Norwegian Petroleum Act must nevertheless be read in connection with Article 112 of the Constitution. If the situation at the production stage has become such that approving the production will be contrary to Article 112 of the Constitution, the authorities will have both the power and the duty not to approve the plan.¹⁵⁴

153. *The Petroleum Act*, *supra* note 12. For the wording, see *supra* note 149. *The Petroleum Act*, *supra* note 12, §§ 1-2, 3-1, 4-2, 5-3, 7-2, 10-1, 10-2, 10-10 (provisions of the Petroleum Act referencing the environment).

154. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 222.

So far, however, the remaining point in time at which a constitutionally meaningful EIA that includes all potential GHG emissions could have potentially been conducted, was the first stage when new areas are designated for future licensing. This also marks the point in time when the State still has full control over the activities and thus, the protection of Article 112. In the specific situation of granting the licenses in the Barents Sea, the EIA at the first stage, when the area was opened for licensing, was flawed not only because there were no precise calculations on the extent of the resource base, but due to the fact that the Norwegian Petroleum Directorate's report on the resource base (based on a geological survey) had not been available.¹⁵⁵ In other words, GHG emissions from combustion had not been taken into account.¹⁵⁶ Crucially, they were not even considered by the authorities as being missing from the information that was examined. Thus, despite the fact that GHG emissions from combustion are relevant for defining whether or not the constitutional right is under threat, the procedure under the Petroleum Act does not stipulate that these are addressed when licensing petroleum production that is anticipated to lead to additional GHG emissions.

Furthermore, even if additional constraints based on concerns for climate protection were placed on the licensee at the third stage when the PDO is approved or even after that—which would in accordance with the analysis offered here be outside the explicit procedure under the Petroleum Act—the State has at that stage already given away exclusive rights in relation to the resource base. While the outcome of the impact assessment may lead to some constraints for the operator, these can neither amount to a complete denial of production nor to

155. In the words of the Borgarting Court of Appeal, “At the stage for impact assessment, the basis was particularly weak, in that the Norwegian Petroleum Directorate's report on the resource base, based on a geological survey, was still not available.” *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 39.

156. The Borgarting Court stated that “It would have been simple to calculate such emissions on the basis of estimates for the high and low scenarios. This could have been done to advantage.” *Id.* at 41. *See also Greenpeace Nordic* Supreme Court, *supra* note 18, para. 272 (Webster, J., dissenting) (“the Government acknowledges that the climate impacts from the combustion emissions have not been assessed and evaluated in the impact assessment. Nor have the combustion emissions been assessed and evaluated specifically for Barents Sea South-East in other situations.”).

enforcing constitutional constraints for extraterritorial fossil fuel consumption to limit GHG emissions. Lastly, it was only in 2020 that the Borgarting Court of Appeal clarified for the first time that scope-3 GHG emissions can interfere with the protected right.¹⁵⁷ The national law has not been and could not have been applied to give effect to this novel constitutional interpretation during the opening of the maritime area and when the production licenses in the twenty-third licensing round were issued. The Supreme Court may now have found a way out of this situation in placing an additional and potentially even remedial weight on the EIA before approving the PDO.¹⁵⁸

In a situation where the interpretation and application of the ordinary law does not protect the constitutional right, the rights dimension of Article 112 has an immediate effect in accordance with the preparatory works of Article 112. As discussed above, if the legislation does not create a mechanism through which the right can be protected, then the right itself serves as the direct basis for judicial review.¹⁵⁹ The Borgarting Court of Appeal took the view that the threshold for judicial review will be high, given the margin that the State must retain for making economically important decisions.¹⁶⁰ The Supreme Court raised the bar and stated that the threshold must be very high, and that:

Article 112 of the Constitution must be read, when the Storting has considered a matter, as a safety valve. In order for the courts to set aside a legislative decision by the Storting, the Storting must have grossly disregarded its duties under the third paragraph of Article 112. The same must apply for other Storting decisions and decisions to which the Storting has consented. The threshold is consequently very high.¹⁶¹

This confirms the view that has been expressed in the literature that a duty of the State to make economic sacrifices cannot be inferred from Article 112 of the Norwegian Constitution alone, nor can reasonably be expected to apply if no other state will follow.¹⁶² The Supreme Court exercised judicial

157. *Greenpeace Nordic*, Court of Appeal, *supra* note 17, at 41.

158. *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 222, 246.

159. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 14.

160. *Id.* at 11, 19.

161. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 142.

162. Alvik, *supra* note 33, at 544.

self-restraint because it considered the function of Article 112(1) as a rights provision that is sub-ordinated under the duty of the Storting to take measures pursuant to Article 112(3). Since the production license is a direct consequence of the Storting's consent to the opening of the maritime areas in question, the Court found that "there is little left for the Supreme Court to check."¹⁶³ The Supreme Court limited the scope of judicial review to gross disregard.¹⁶⁴

However, the Supreme Court also held that wider judicial review was possible for administrative procedures¹⁶⁵ and this is where, as explained above, the lack of consideration for emissions from combustion occurred. The following Part disputes the premises upon which the argument that an unrestrained wide margin of appreciation exists for decision-making that leads to GHG emissions from combustion rests. It does this in two steps. It will first be shown that existing international commitments lower the threshold for judicial scrutiny because the margin of appreciation that the State has is narrowed through its international obligations. These international obligations were also consented to by the Storting, and they define a minimum standard of protection for the constitutional right. The rule of law demands that courts exercise judicial scrutiny based on Article 112 directly, in the light of international climate commitments, in a situation where the climate effects were not considered during the licensing process. The precondition for this is that international law is relevant for the interpretation of the Norwegian Constitution. The second step concerns the perception that "no one else will follow." It will be demonstrated that this view can no longer be supported on the basis of burgeoning case law from other jurisdictions, where courts identified benchmarks to measure executive and administrative decision-making in the context of international law on climate change.

163. *Greenpeace Nordic Supreme Court*, *supra* note 18, para. 157.

164. *Id.*

165. *Greenpeace Nordic Supreme Court*, *supra* note 18, para. 182.

III. INTERPRETING ARTICLE 112 IN THE LIGHT OF
INTERNATIONAL LAW

A. *The Relevance of International Law for Constitutional
Interpretation*

The relevance of international law for constitutional interpretation has sparked a debate amongst Norwegian legal scholars. Different schools of thought revolve around the dichotomy of a stricter autonomous approach—where it is argued that international non-incorporated sources can only have a limited indirect influence in constitutional interpretation—¹⁶⁶ and the presumption that all domestic law complies with international law.¹⁶⁷ The former school of thought is based on legal hierarchy, with the Constitution holding the highest rank. Pursuant to a strict understanding of the *lex superior* principle, legal sources placed lower in the judicial hierarchy cannot determine constitutional content.¹⁶⁸ A literal application of the principle entails that incorporated human rights treaties cannot influence the interpretation of a constitutional right.¹⁶⁹ Even less then, can non-incorporated international sources be considered, due to their lack of democratic legitimacy.¹⁷⁰

Conversely, the latter school of thought relies on the *presumption principle* and holds that both incorporated and non-incorporated international law are relevant for the interpretation of the Constitution.¹⁷¹ The presumption principle posits that domestic law shall be presumed to be in accordance with international law, and interpretation gives effect to this

166. EIVIND SMITH, KONSTITUTSJONELT DEMOKRATI 142- 143 (Fagbokforlaget, 4th ed. 2017).

167. Anine Kierulf, *Innenfra og utenfra- Grunnloven og menneskerettighetene, in 1814-2014* 455 (Eirik Holmsøyvik ed. 2013).

168. For a closer examination of the *lex superior principle*, see SMITH, *supra* note 166, chs. II.4, III.

169. *Id.* at 106-07.

170. Norway has a dualist legal system that requires incorporation of international treaties into domestic law before they become legally binding for the State. This is the opposite of a monist system. See JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 48-50 (8th ed. 2012); see also MARIUS STUB, TILSYNSFORVALTNINGENS KONTROLLVIRKSOMHET 100 (2011).

171. Kierulf, *supra* note 167, at 455.

presumption.¹⁷² Consequently, a statutory provision must be interpreted to achieve harmonization with international law.¹⁷³ This school of thought is supported by the Norwegian Human Rights Commission. The Commission has stated that the Constitution cannot be interpreted in isolation and that international sources of law can be useful to supply the often scarce and general wording of constitutional provisions.¹⁷⁴

The Supreme Court also aligns its interpretation of constitutional rights with international law, for instance in relation to respect for one's private life and children's rights to respect for their human dignity.¹⁷⁵ According to the Supreme Court, constitutional rights must be interpreted in the light of the parallel provisions of the human rights treaties incorporated in the 1999 Human Rights Act,¹⁷⁶ to avoid that the "protection

172. See MORTEN RUUD & GEIR ULFSTEIN, *INNFØRING I FOLKERETT* 68-70 (5th ed. 2018); FREDRIK SEJERSTED ET AL., *EØS-RETT* 165 (3d ed. 2011).

173. RUUD & ULFSTEIN, *supra* note 172, at 68; Alf Petter Høgberg & Benedikte Moltunmyr Høgberg, *Tolkning av Grunnloven*, 48 *JUSSENS VENNER* 193, 205-06 (2013) (arguing that the *lex superior principle* cannot be used to prohibit the use of international law or human rights law but rather as a consolidator to harmonize the legal sources in order for domestic and international law). The argument can be extended in the context of an emerging inter-judicial discourse, where domestic law is not only applied in harmony with international law by courts but international law is used in an attempt to restrain governments. See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *A. J. INT'L L.* 241 (2008); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *EUR. J. INT'L L.* 59, 65 (2009); Olga Frishman, *National Courts and Interpretive Approaches to International Law*, in *THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE* (Helmut P. Aust & Georg Nolte eds., 2016).

174. MENNESKERETTIGHETSUTVALGET [THE HUMAN RIGHTS COMM'N], *DOK. NO. 16, RAPPORT FRA MENNESKERETTIGHETSUTVALGET [REPORT FROM THE HUMAN RIGHTS COMMISSION]* 88 (2011) (Preparatory document from the Human Rights Commissions regarding the Constitutional reform). See *supra* note 62 and accompanying text.

175. The Norwegian Constitution, *supra* note 15, arts. 102, 104.

176. Lov om styrking av menneskerettighetenes stilling i norsk rett [Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act)] (1999-30) (Nor.). The Norwegian Supreme Court has emphasized in *Finnsbråten*, Rt. 2009 s. 1118, and in *Maria*, Rt. 2015 s. 93, that constitutional interpretation is a primary function of the Court. Already in the groundbreaking judgment *Grev Wedel Jarlsberg v. Marindepartementet* from 1866 the Norwegian Supreme Court held that the Court would not apply any law as far as the law was found to be in conflict with the Constitution. See Arnfinn Bårdsen, *The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms*, *CTR. FOR EUR. L.* para. 10 (Sept. 18, 2017), <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf> [<https://perma.cc/CP5U-D5JW>].

provided by the constitutional Bill of Rights falls short to that provided for by the human right treaties to which Norway is a party.”¹⁷⁷ Furthermore, the Supreme Court awards significant weight to statements from the UN Committee on the Rights of the Child despite these being a non-legally binding source.¹⁷⁸ The Supreme Court has stated that the Committee’s reports constituted a “natural basis” for constitutional interpretation.¹⁷⁹ This is further evidence of the use of the *presumption principle* in constitutional interpretation and shows that international sources of law are regarded by the Supreme Court as being highly relevant for constitutional interpretation, even without being incorporated or legally binding.¹⁸⁰

B. Interpreting Article 112 in the Light of the Climate Change Regime

Given that the Supreme Court itself opens the Constitution to an interpretation that reconciles the fundamental rights provision with international law, this Section proceeds to discuss how Article 112 can be interpreted under the legal framework of the current international climate change regime. The term “international climate change regime” is used here comprehensively to describe the United Nations Framework Convention on Climate Change (“UNFCCC”)¹⁸¹ and the Paris Agreement, both to which Norway is a contracting party.¹⁸² The

177. See Bårdsen, *supra* note 176, para. 23.

178. See, e.g., Norsk Rettstidende [Rt.] [Reporter for Norwegian Supreme Court], 2015 paras. 57, 64, Rt. 2015 s. 93 (Nor.) (stating that the Committee’s statements are a natural starting point for interpretation); Geir Ulfstein, *Høyesteretts anvendelse av traktatorganers tolkningspraksis*, LOV OG RETT 395 (2016); Randi Sigurdson, *Den rettskildemessige betydningen av Barnekomiteens generelle kommentarer*, 1 RETFÆRD 43 para. 64 (2014); Malcolm Langford & Beate K. Berge, *Norway’s Constitution in a Comparative Perspective*, 6 OSLO L. REV. 198, 219, 222 (2019); see also Comm. on the Rights of the Children, General Comment No. 14 (2013); On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, U.N. Doc. CRC/C/GC/14 (2013).

179. Rt. 2015 s. 93, para. 64.

180. In fact, this was again confirmed by the Supreme Court in *Greenpeace Nordic*, where it stated that the ECHR has precedence over other law. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 165.

181. UNFCCC, *supra* note 6.

182. Paris Agreement, *supra* note 3. Norway ratified the UNFCCC on July 9, 1993. See *Multilateral Treaties Deposited with the Secretary-General*, UN TREATY COLLECTION, https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=_en [<https://perma.cc/KF9V-9FHM>] (last visited Feb. 26, 2021). Norway ratified the Paris Agreement on June 20, 2016, and the Kyoto Protocol on May 30, 2002. See *Norway*, UN

analysis will demonstrate how the global objectives in the regime establish a standard against which the Norwegian State's actions can be measured, in order to comply with its constitutional obligations in Article 112.

According to Article 2 of the UNFCCC, the ultimate objective of the Convention is to stabilize the concentration of GHG in the atmosphere and thus “prevent dangerous anthropogenic interferences with the climate system.”¹⁸³ It is important to note that the objective is focused on the concentration of GHGs in the atmosphere rather than on individual emissions. This reflects the global nature of climate change in relation to both, its causes and its impacts.¹⁸⁴ Article 4(1) of the UNFCCC sets out the general commitment of all parties to implement national and regional programs concerning their mitigation measures.¹⁸⁵ Furthermore, Annex I countries¹⁸⁶ should take the lead in combating climate change. To that end, they have committed themselves to adopting national policies and take corresponding measures on the mitigation of climate change, through modifying longer-term trends in anthropogenic emissions, “recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouses would contribute to such modification.”¹⁸⁷ This concurs with the aspiration to return, individually or jointly, to their 1990 levels by the end of 2000 at the time when the UNFCCC was concluded.¹⁸⁸

The Paris Agreement is explicitly designed to enhance the implementation of the objectives under the UNFCCC.¹⁸⁹ Its

CLIMATE CHANGE, <https://unfccc.int/node/61132> [<https://perma.cc/6LA7-PUG6>] (last visited June 2, 2020).

183. UNFCCC, *supra* note 6, art. 2.

184. DANIEL BODANSKY ET AL., *INTERNATIONAL CLIMATE CHANGE LAW* 125 (2017).

185. UNFCCC, *supra* note 6, art. 4(1).

186. This distinction underpins the UNFCCC's bifurcated approach between developed and developing countries. The latter include emerging economies such as China, India, Brazil, and South Africa. See *UNFCCC Parties*, UN CLIMATE CHANGE, https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states?field_national_communications_target_id%5B515%5D=515 [<https://perma.cc/XW26-TBUH>] (last visited Feb. 26, 2021).

187. UNFCCC, *supra* note 6, art. 4(2)(a).

188. *Id.* art. 4(2)(b).

189. Paris Agreement, *supra* note 3, art. 2(1); see also Cinnamon P. Carlarne & J.D. Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement & The Future of*

overarching aim is to “strengthen the global response to the threat of climate change”¹⁹⁰ by keeping the average temperature below 2 °C and pursuing efforts to limit the increase to 1.5 °C above pre-industrial levels.¹⁹¹ Furthermore, in order to reach the agreed temperature target “Parties aim to reach global peaking of greenhouse gas emissions as soon as possible.”¹⁹² Parties have also agreed to set and report on nationally determined contributions (“NDCs”)¹⁹³ that reflect their best possible ambition and represent a progression when compared with the previous national target,¹⁹⁴ and to make their best efforts in reducing emissions and achieving the agreed objectives.¹⁹⁵ The temperature goal of the Paris Agreement endorses scientific evidence, a temperature increase of below 2 °C, ideally limited nearer to 1.5 °C, is considered to be “safer” with regards to the expected climate change impacts.¹⁹⁶ Norway has committed itself to pursuing this goal.¹⁹⁷

Both the UNFCCC and the Paris Agreement are international treaties¹⁹⁸ and are therefore legally binding under

International Climate Change Law, 27 N.Y.U. ENV'T L.J. 107 (2019); Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. & INT'L ENV'T. L. 148 (2016).

190. Paris Agreement, *supra* note 3, art. 2(1).

191. *Id.* art. 2(1)(a).

192. *Id.* art. 4(1).

193. For the interim NDC registry, see *Interim NDC Registry*, *supra* note 3.

194. Paris Agreement, *supra* note 3, art. 4(3).

195. Paris Agreement, *supra* note 3, art. 4(2), 3; BODANSKY ET AL., *supra* note 184, at 231-36.

196. This “safety” aspect of the temperature goal is intertwined with the human rights protection envisaged in the preamble of the Paris Agreement. See John H. Knox, *The Paris Agreement as a Human Rights Treaty*, in HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT AND THE ENVIRONMENT (Dapo Akande et al. eds., 2018).

197. Bugge, *supra* note 77, para. 165; Gøran Ø. Thengs, *En standardtilnærming til Grunnloven § 112 [A standard approach to Article 112 of the Constitution]*, 1 TIDSSKRIFT FOR RETTSVITENSKAP 28 (2017). However, this is not an unanimously agreed view. See, e.g., Eivind Smith, *Miljøparagrafen – kritisk lest [The environmental article – read critically]*, in MELLOM JUS OG POLITIKK 151, 151-73 (Ole K. Fauchald ed., 2019).

198. MALCOLM N. SHAW, INTERNATIONAL LAW 66 (7th ed. 2014) (discussing the variety of names under which international obligations may be entered into: “Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants. All these terms refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and arrangements are laid out which the parties oblige themselves to carry out.”).

the 1969 Vienna Convention on the Law of Treaties (“VCLT”).¹⁹⁹ However, the legal form of these instruments must be distinguished from the legal character of their specific provisions. The scope of the legal obligations must therefore be determined through interpretation of each provision.²⁰⁰ The 2018 “Paris Rulebook” was adopted during the Katowice Conference of Parties and provides further clarification on Parties’ common understanding for the interpretation of the Paris Agreement and for identifying the legal character of its provisions.²⁰¹

Given its nature as a framework convention, it has been held that UNFCCC Parties are left with considerable discretion when defining rights and obligations.²⁰² Following this view, the UNFCCC would not support the existence of specific legal obligations for its Contracting Parties to take climate change measures. However, it has been argued that specific legal obligations to adopt climate protection measures can be established by interpreting the Convention’s objective to stabilize GHG emissions (Article 2) in conjunction with the commitments to mitigate climate change (Article 4(2)).²⁰³ The objective can be operationalized if scientific evidence is translated into domestic action that is able to achieve the UNFCCC’s object and purpose. This is indeed supported by the requirement arising under the

199. See Vienna Convention on the Law of Treaties art. 26, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. For a discussion regarding the Paris Agreement, see Daniel Bodansky, *The Paris Climate Change Agreement: A new hope?*, 110 AM. J. INT’L L. 288, 296 (2016). For a different perspective, see Anne-Marie Slaughter, *The Paris Approach to Global Governance*, PROJECT SYNDICATE (Dec. 28, 2015), <https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12?barrier=accesspaylog> [<https://perma.cc/SM3J-23R3>]. For a general overview of the development under the UNFCCC, see BENOIT MAYER, *THE INTERNATIONAL LAW ON CLIMATE CHANGE* (2018).

200. Bodansky, *supra* note 199, at 296.

201. See Lavanya Rajamani & Daniel Bodansky, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion*, 68 INT’L & COMP. L. Q. 1023 (2019); Petra Minnerop, *The Legal Effect of the ‘Paris Rulebook’ under the Doctrine of Treaty Interpretation*, in GLOBAL ENERGY IN TRANSITION. TOWARDS RULES-BASED MULTILATERAL GOVERNANCE OF GENERATION, MARKETS AND INVESTMENT (P. Cameron, X. Mu & V. Roeben eds., 2020); Jolene Lin & Alexander Zahar, *Introduction to the Special Issue on the Paris Rulebook*, 9 CLIMATE L. 1 (2019) (pointing out that the Paris Rulebook is still incomplete).

202. See Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT’L L. 1, 5-7 (2008).

203. *Id.* at 7.

VCLT that a state is “obliged to refrain from acts which would defeat the object and purpose of a treaty.”²⁰⁴

It has been pointed out that the Paris Agreement contains provisions of the following diverse nature: those that create legal obligations, those that generate expectations, provisions stating recommendations or offering encouragement, provisions that set aspirations, and others that capture understandings.²⁰⁵ This is indicated by the deliberate wording in the Agreement, for example, the use of the words “shall” and “aim” in Article 4(1) and 4(2) respectively, as well as the differentiating references to “each Party” or “Parties” throughout the text of the Agreement, implying a varied strength in the legally binding force of rules for the individual Party. The Paris Agreement’s influence that results from this distinct set of international rules in domestic law has been identified as a “ripple effect.”²⁰⁶ Indeed, the tiered composition of rules ranging from concrete legal obligations for each Party, to those provisions that establish a strong expectation that all Parties will change their conduct to achieve a goal set for the collective of Parties, does not prevent the Paris Agreement from unfolding a distinct normative impact on domestic legal orders. The clearly established commitment of the international community to the temperature goal spelled out in the Paris Agreement evidences the Parties’ shared understanding that greater temperature increases will cause further adverse effects on the climate.²⁰⁷ Infrastructure projects that lead to further emissions, even if they are extraterritorial, will have an effect on the ability of all states to meet this temperature target.

204. Vienna Convention, *supra* note 199, art. 18.

205. Bodansky, *supra* note 199, at 296; Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COM. INT’L ENV’T L. 142, 145-47 (2016); BODANSKY ET AL., *supra* note 184, at 251 (Table 7.1). For a critical stance, see Lucas Bergkamp & Scott J. Stone, *The Trojan Horse of the Paris Agreement on Climate Change: How Multi-Level, Non-Hierarchical Governance Poses a Threat to Constitutional Government*, 23 ENV’T LIAB., L. PRACT. & POL. 119, 127-28 (2015).

206. Brian J. Preston, *The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II)*, J. ENV’T L. 1, 21 (2020).

207. See Vienna Convention, *supra* note 199, art. 31(3)(a); see also Rajamani & Bodansky, *supra* note 201, at 1027. For an interpretation of the Paris Rulebook in line with the ILC Draft Conclusions, see Minnerop, *supra* note 201; see also 2018 ILC DRAFT CONCLUSIONS ON SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO INTERPRETATION OF TREATIES, https://legal.un.org/ilc/guide/1_11.shtml [<https://perma.cc/8ATR-EJ32>] (last visited Mar. 29, 2021).

For the Norwegian State, the commitment to the global temperature goal means that the right under Article 112 will be protected from a higher temperature increase. This was confirmed in *Greenpeace Nordic*. The Borgarting Court of Appeal and the Supreme Court both agreed that international agreements are relevant, with the Borgarting Court being very explicit in saying that they will “be able to contribute to clarifying what is an acceptable tolerance limit and appropriate measures.”²⁰⁸

The next logical step would have been to acknowledge that the temperature goal of the Paris Agreement gives a clear direction for clarifying the tolerance limit and for defining national measures accordingly, given that Parties designed the Paris Agreement to include a strong “bottom up” approach whereby national ambition complements an aspiring global goal. In line with that, the Norwegian Climate Change Act sets out to achieve “reductions of greenhouse gas emissions of the order of 80-95% from the level in the reference year 1990,” a target that was introduced to “avert adverse impacts of global warming, as described in Article 2.1(a) of the Paris Agreement.”²⁰⁹ However, despite acknowledging the significance of scope-3 emissions for protecting the right to a healthy environment, in *Greenpeace Nordic*, the courts refused to spell out the legal consequences of their own interpretation of the material scope of Article 112. The Court of Appeal and the Supreme Court did not accept that the additional extraterritorial GHG emissions limit the margin of appreciation for the State and thereby re-define the threshold for judicial review.²¹⁰ The Court of Appeal considered the role of prioritization of GHG emissions and the use of flexibility mechanisms to “make room” for the expected emissions as essential tools for the State to still be able to meet its climate targets.²¹¹ As explained above, the State has not provided the

208. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 22. The Supreme Court is less explicit on the matter. See *Greenpeace Nordic* Supreme Court, *supra* note 18, paras. 159, 174, 175.

209. *Climate Change Act*, *supra* note 3, § 4.

210. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 19, 22, 29.

211. *Id.* at 29; *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 234 (stating that “In my view, it must then be up to the Ministry and the Government to decide whether it was appropriate to refer to and deal with the question of climate effects at an

evidence that this “room making” process can indeed take place, conversely, the State acknowledged the high per capita GHG emissions in Norway. It is difficult to see how this could be reconciled with the agreed temperature goal under the Paris Agreement. The Supreme Court recognized that on the one hand, the rule of law calls upon the judiciary to set limits, including for a political majority, when it comes to protecting constitutional rights.²¹² On the other hand, the Court reasoned that decisions in cases regarding fundamental environmental issues often involve political balancing and broader prioritization, thereby going beyond the competence of the courts.²¹³ While this is true, this should not allow the Court to avoid answering the question, as a matter of the rule of law, how the international agreements and the scientific evidence that they endorse, are accounted for in the assessment of the margin of the State. It is not clear why some international law, as demonstrated above, is crucial for constitutional interpretation, while other legal instruments are not given a similar weight. This risks ignoring that the commitments made under the Paris Agreement already determine much of the political balancing and the broader prioritization that can still occur in any state.

As mentioned earlier, the Paris Agreement unfolds a wider influence on domestic legal processes through providing states with a rather unique composition of provisions. All of these are targeted at guiding the conduct of states towards achieving the required reductions of GHG concentrations in the atmosphere.²¹⁴ The following explains how this wider normative influence of the Paris Agreement can be traced in some examples of the case law.

overarching level – in other words, as part of the Norwegian climate policy – instead of discussing them in the specific impact assessment.”).

212. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 141.

213. *Id.*

214. It should be noted that the normative dimension of the Paris Agreement, for instance the expectation that ambition will raise with each subsequent cycle of NDC submissions in Article 4(3), has also been incorporated in more recent climate change legislation. The German Climate Protection Act states in section 3(3) that climate targets can only be increased not decreased. Deutscher Bundestag Drucksache [Climate Protection Act], Oct. 22, 2019 19/14337 19 (Ger.). For further discussion of progression in NDCs, see Lavanya Rajamani & Jutta Brunnée, *The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement*, 29 J. ENV'T L. 537, 543 (2017).

Particular attention will be given to instances where an emerging inter-jurisdictional judicial climate discourse can be identified.²¹⁵

IV. AN ANALYTICAL ARGUMENT EMERGING FROM AN INTER-JURISDICTIONAL JUDICIAL DISCOURSE

This analysis will concentrate on the following judgments as “comparative units:” *Urgenda*,²¹⁶ *Thomson*,²¹⁷ *Gloucester*,²¹⁸ *Earthlife Johannesburg*,²¹⁹ *Save Lamu*,²²⁰ and the decisions of the Court of Appeal and the Supreme Court in *Heathrow*.²²¹ These judgments are chosen because they represent decisions of courts situated in different regions of the world, in states at various stages of economic development, and because climate change was pivotal for the outcome of these cases. While each of them presents rather unique circumstances, the significance of applying domestic law in the light of international law on climate change in order to define the standard of judicial review resonates from all of them at least to some extent. However, it should also be noted that even within jurisdictions, a fragmented picture can arise, as will be seen in the different approaches of the Court of Appeal and the Supreme Court in *Heathrow*.

While for brevity and clarity this Article will analyze only those cases mentioned at the outset, it is important to stress that the selected cases form part of a wider picture of climate-relevant litigation. The outcome of climate-related cases in courts does not always allow identification of clear victory or failure; legal developments can be small and subtle. Incremental changes can occur in cases where climate protection concerns the periphery rather than the legal core of the proceedings, such as cases concerning the free allocation of emission allowances,²²² and they

215. Petra Minnerop, *Integrating the ‘duty of care’ under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case*, 37 J. ENERGY & NAT. RES. L. 149, 173 (2019).

216. *The State of the Netherlands v. Urgenda*, *supra* note 22.

217. *Thomson*, *supra* note 23.

218. *Gloucester*, *supra* note 24.

219. *Earthlife Johannesburg*, *supra* note 25.

220. *Save Lamu*, *supra* note 26.

221. *R. (on the application of Plan B Earth Ltd.)*, *supra* note 27; *R. (on the application of Friends of the Earth Ltd and others)*, *supra* note 28.

222. *INEOS Köln GmbH v. Bundesrepublik Deutschland*, C-572/16, CJEU (Feb. 22, 2018).

can be embedded in less favorable outcomes for plaintiffs. An example for the latter situation is *Juliana v. United States*, where the US District Court noted “the gravity of the plaintiffs’ evidence” and found that the substantive constitutional right to a “climate system capable of sustaining human life” existed when analyzing redressability.²²³ As the latest development in that case, a petition for was filed by the plaintiffs for a writ of certiorari on Feb. 17, 2021.²²⁴ Similarly, while the first German Climate Case was unsuccessful due to a lack of specific legal interest (Klagebefugnis) of the plaintiffs—a procedural requirement under the Code of Administrative Court Procedure—the Berlin Administrative Court nevertheless held that the claim as such was justiciable and that the government could not claim that the case concerned a non-justiciable core of “executive sole responsibility” (Kernbereich exekutiver Eigenverantwortung).²²⁵ Furthermore, the Berlin Administrative Court found that the protection of fundamental rights as guaranteed in the German Basic Law would require the Federal government to observe the “Untermassverbot” which defines the minimum standard of rights protection that the State must observe when adopting measures to protect the climate, despite having a margin of appreciation.²²⁶ In other words, while the State enjoys a margin of appreciation when adopting measure to protect fundamental rights, this excludes measures that would undermine or undercut

223. *Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020). In *Juliana v. United States*, the court confirmed that “[t]he plaintiffs’ alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%.” *Id.* It also found that “federal subsidies and leases have increased those emissions.” *Id.* “Plaintiffs met the injury and causation requirements for Article III standing because at least some plaintiffs had alleged concrete and particularized injuries caused by fossil fuel carbon emissions that were increased by federal subsidies and leases.” *Id.* To establish Article III redressability; the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court’s power to award. *Id.* Redress need not be guaranteed, but it must be more than “merely speculative.” See Grossman, *supra* note 32, at 355.

224. Mot. to Stay the Mandate Pending Filing and Disposition of a Petition for a Writ of Certiorari of Plaintiffs-Appellees, *Juliana v. United States* No. 18-36082 (9th Cir.).

225. *VG*, *supra* note 30, at 9-12. Bundesverfassungsgericht [BVerfG] [13. Federal Constitutional Court] Nov. 22, 2001, case No. 2BvE 6/99.

226. The Berlin Administrative Court explained that a Party to the Paris Agreement could not use the inaction of other States as an excuse for its own inaction. *VG*, *supra* note 30, at 21-22.

this minimum standard. Lastly, while plaintiffs could not overturn the planning permission for a new runway at Dublin Airport in the case of the *Friends of the Irish Environment v. Fingal County Council*, the ruling of the High Court of Ireland set a precedent in finding an implied right to an environment that is:

consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution.²²⁷

Victorious cases, on the other hand, may not necessarily represent a milestone for climate change mitigation or adaptation, yet often they spur a fresh reading of the law, thereby unfolding a sustained influence on the legal reasoning of courts in other jurisdictions, as well as setting a precedent for administrative authorities.

A. Comparative Units

Hugely influential in other jurisdictions was the landmark decision in *Urgenda*, where The Hague Court of Appeal upheld The Hague District Court's injunction ordering the Dutch State to reduce its GHG emissions by 25% (compared to pre-industrial levels) towards the end of 2020.²²⁸ The Hague Court of Appeal based its decision on the State's 'duty of care' in accordance with Articles 2 and 8 of the ECHR, and found that the current emission reduction of around 17% was insufficient to mitigate the real and imminent threat posed by climate change.²²⁹ The ruling of The Hague Court of Appeal was confirmed by the Supreme Court of the Netherlands.²³⁰ The Supreme Court's reasoning was rooted in the argument that the global nature of climate change requires each state to do what it "necessary" to achieve the global temperature goal.²³¹ The Supreme Court also acknowledged that

227. *Friends of the Irish Environment*, *supra* note 58.

228. Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Sheen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *Urgenda* Court of Appeal].

229. *Id.* paras. 71-75.

230. *Urgenda* Supreme Court, *supra* note 22.

231. *Id.* paras. 5.6.1-5.8.

“States will have to agree among themselves on their respective individual share in reducing greenhouse gas emissions and make the necessary choices and considerations in this regard.”²³² While such agreements existed in the UNFCCC and the Paris Agreement, the Supreme Court found that these remained only general at that level. However, the Court explained that these general obligations and principles entailed that “a fair distribution must take place, taking into account the responsibility and state of development of the individual countries.”²³³

Concretizing these obligations in the Dutch constitutional system would fall into the political domain, subject to parliamentary oversight. However, according to the Supreme Court, that general allocation of responsibilities does not restrain that:

the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken worldwide against dangerous climate change. It is clear, for example . . . that the State cannot at any rate do nothing at all and that the courts can rule that the State is in breach of its obligation . . . if it does nothing.²³⁴

For the definition of the required necessary action, the Supreme Court referred to the consensus in an international context about the distribution of measures.²³⁵ The courts can then establish “what—in accordance with the widely supported view of States and international organisations, which view is also based on the insights of climate science—can in any case be regarded as the State’s minimum fair share.”²³⁶

This judicial function to review if the State is doing its minimum share was also grounded in the right to effective legal protection under Article 13 of the ECHR.²³⁷

232. *Id.* para. 6.2.

233. *Id.*

234. *Id.* para. 6.3.

235. *Id.* paras. 6.3, 7.5.1. The Court emphasized that in respect to the State’s positive obligations to take measures to prevent climate change pursuant to Articles 2 and 8 of the ECHR, the 25% reduction target was an absolute minimum. *Id.* para. 7.5.1.

236. *Id.*

237. *Id.* paras. 5.5.1-5.5.3. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 71.

Crucially, the Supreme Court held that the State must “properly substantiate that the policy it pursues meets the requirements to be imposed, i.e., that it pursues a policy through which it remains above the lower limit of its fair share.”²³⁸ Thus, the Supreme Court found that both the international commitments of the State and the scientific evidence available would not only bind the State’s domestic decision-making when defining what was necessary to do “its fair share,” but also mark the line between political discretion and justiciability, where courts can scrutinize if the State remains above the lower threshold when defining its fair share.

Urgenda played a significant role even before it was confirmed by the Supreme Court. The ruling at first instance was extensively cited in New Zealand’s leading climate case, *Thomson v. The Minister for Climate Change Issues*.²³⁹ In *Thomson*, the contested issues were whether New Zealand’s 2050 target set under domestic legislation had to be reviewed by the government following updated international scientific consensus on climate change, and whether the 2030 target was amenable to judicial review despite not being required under domestic legislation.²⁴⁰ The High Court found that the government was granted discretionary power to review the 2050 climate target pursuant to the Climate Change Response Act.²⁴¹ However, this statutory discretionary power is to be exercised “in accordance with its purpose” and consistently with New Zealand’s international obligations.²⁴² The purpose of the Act is to enable New Zealand to meet its international obligations under the UNFCCC.²⁴³ The High Court held “the Paris Agreement has been entered into in “pursuit of” the Convention’s objective and guided by its principles.”²⁴⁴ Furthermore, the High Court found that the Minister was required to review the target in the light of scientific

238. *Urgenda* Supreme Court, *supra* note 22, para. 6.5.

239. *Thomson*, *supra* note 23 (giving the *Urgenda* case detailed consideration).

240. *Id.* paras. 6, 7; Maria L. Banda, *Climate Science in the Courts A Review of U.S. and International Judicial Pronouncements*, ENV’T L. INST. 105 (2020).

241. Climate Change Response Act 2002, No. 40 (N.Z.).

242. *Thomson*, *supra* note 23, para. 88.

243. Climate Change Response Act 2002, No. 40 (N.Z.). This Act has since been amended several times to give effect to international obligations, the purpose is defined in section 3(1)(aa), (a).

244. *Thomson*, *supra* note 23, para. 88.

changes that occurred between the IPCC Assessment Reports, however, the requirement of “this cause of action has been overtaken by subsequent events” given that the new government had announced to set a new 2050 target while the case was pending.²⁴⁵

By contrast, the 2030 target also considered in *Thomson*, was not set by the government under domestic legislation, but rather in direct response to the obligation under the Paris Agreement to submit the State’s nationally determined contribution (“NDC”).²⁴⁶ The Court’s jurisdiction to review the NDC decision which set the 2030 target arose from the common law, pursuant to which the exercise of a public power by the executive having important public consequences is potentially amendable to review.²⁴⁷ Notably, in this context, the Court considered how other courts reviewed their governments’ action or inaction under the Paris Agreement.²⁴⁸ Based on its assessment of foreign judicial pronouncements, including the District Court’s ruling in *Urgenda*,²⁴⁹ the Court concluded that “it may be appropriate for domestic courts to play a role in Government decision making about climate change policy.”²⁵⁰

The High Court especially found that:

The courts have not considered the entire subject matter is a “no go” area, whether because the state had entered into international obligations, or because the problem is a global one and one country’s efforts alone cannot prevent harm to that country’s people and their environment, or because the Government’s response involves the weighing of social, economic and political factors, or because of the complexity of the science. The courts have recognised the significance of the issue for the planet and its inhabitants and that those within the court’s jurisdiction are necessarily amongst all who are affected by inadequate efforts to respond to climate change. The various domestic courts have held that they have

245. *Id.* para. 178.

246. *Id.* para. 101.

247. *Id.* para. 101.

248. *Id.* para. 105.

249. *Thomson* was decided in 2017, before the judgments of the Hague Court of Appeal and the Supreme Court in *Urgenda*. *Thomson*, *supra* note 23; *Urgenda* Court of Appeal, *supra* note 228.

250. *Thomson*, *supra* note 23, para. 133.

a proper role to play in Government decision making on this topic, while emphasising that there are constitutional limits in how far that role may extend. The IPCC reports provide a factual basis on which decisions can be made. Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body.²⁵¹

Consequently, the High Court concluded that the importance of climate change warranted some scrutiny of the executive through the judiciary.²⁵² Such scrutiny was recognized by various other courts, while acknowledging that if a weighing of public policies was required, constitutional grounds required the Court to refer the matter back to elected powers.²⁵³ It then found that the NDC was not based on a ministerial error and thus not outside the power of the executive, and that the international framework had been followed.²⁵⁴

Thus, the High Court in *Thomson* cited decisions of foreign judiciaries to support its exercise of judicial review under the common law, and to reject the argument that climate change was foreign policy and therefore beyond the reach of the judiciary. Conversely, in the same way as in other areas where deference to the executive branch is the alternative course of action, the Court reserved the right to review the decision of the government within constitutional limits. This clarifies that judicial review of governmental decision-making in the climate change context follows the same rules as in other important policy areas, and that ministerial errors in the decision-making process as well as the non-application of the international legal framework, are flaws that judicial review can identify.

This scrutiny of courts extends to the application of national planning law in the climate change context in cases where planned projects will lead to further emissions. *Gloucester* concerned the Minister of Planning's rejection of an open cut coal mine in the Gloucester Valley in Australia. The mining company, Gloucester Resources Limited, appealed the rejection to the Land and Environmental Court (LEC) of New South Wales

251. *Id.*

252. *Id.* para. 134.

253. *Id.*

254. *Id.* para. 179.

(“NSW”).²⁵⁵ The appeal was dismissed due to the direct and indirect impacts the mine would have on the local environment and the global climate through GHG emissions,²⁵⁶ and thorough consideration was given to the reasoning of The Hague District Court and The Hague Court of Appeal in *Urgenda*.²⁵⁷

The LEC found that all GHG emissions must be taken into account, including from the combustion of produced coal by consumers.²⁵⁸ This decision was based on the environmental impacts of the mine and the public interests.²⁵⁹ Furthermore, the LEC emphasized that all GHG emissions would contribute to climate change, no matter where the combustion was taking place.²⁶⁰ In this context, the Court strengthened its argument by reference not only to Australian case law, but turned to the US Supreme Court²⁶¹ and the decision in *Urgenda*, underlining that:

many courts have recognised this point that climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources.²⁶²

The LEC admitted that neither the Paris Agreement nor Australia’s NDCs prescribed how the State must act in order to reduce its emissions or prohibit new fossil fuel projects.²⁶³ However, the Court stressed that limitations for national emissions would flow from the global temperature goal²⁶⁴ and held that “there is a causal link between the project’s cumulative

255. *Gloucester*, *supra* note 24, paras. 1-8.

256. *Id.* paras. 8, 686-99.

257. *Gloucester* was decided before the Supreme Court confirmed the previous instances.

258. *Gloucester*, *supra* note 24, paras. 486-513.

259. *Id.* para. 513. For a discussion of the crucial role of EIAs and the inclusion of scope 3 emissions, see Brian J. Preston, *Contemporary Issues in Environmental Impact Assessment*, 37 ENV’T & PLAN. L. J., 423 (2020).

260. *Gloucester*, *supra* note 24, para. 515.

261. *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497 (2007); Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 L. & POL. 236, 239 (2013). For a thorough analysis of the ruling and its lasting legacy, see RICHARD J. LAZARUS, *THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT* (2020).

262. *Gloucester*, *supra* note 24, para. 516.

263. *Id.* paras. 525-526.

264. *Id.* para. 527.

GHG emissions and climate change and its consequences.”²⁶⁵ The LEC explained in respect of the obligations under the UNFCCC and the Paris Agreement that:

the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve the objectives set out in Article 4.1 and 2.1 (a) of the Paris Agreement.²⁶⁶

The LEC also relied on scientific reports explaining that most fossil fuel resources must be left in the ground in order to stay within the carbon budget;²⁶⁷ a stance that has been welcomed.²⁶⁸

Similar to *Urgenda*, *Gloucester* thus established that the Paris Agreement sets forth an objective climate change standard based on the global temperature goal, in the context of the overarching objective of the UNFCCC and the Paris Agreement to reduce emissions. This global temperature goal articulates the overarching object and purpose of both treaties,²⁶⁹ and it can be operationalized when it is coupled with the scientific evidence on “safe” emissions levels that define the carbon budget that allows to keeping the temperature below 2 °C. The Australian State’s actions—the Ministry of Planning’s rejection of the proposed mining project—was then measured against this standard. Even though the LEC did not award the Paris Agreement with direct legal effect, the “rapid and deep” reductions in GHG emissions, required by the Agreement’s temperature goal in particular, established an objective to which the State’s actions must correspond.²⁷⁰

The decision in *Gloucester* has already set a precedent and ensued a wider impact on subsequent planning decisions. In August 2019, the Independent Planning Commission denied a

265. *Id.* para. 525.

266. *Id.* para. 527.

267. *Id.*

268. See, e.g., Lesley Hughes, *The Rocky Hill Decision: A Watershed for Climate Change Action?*, 37 J. ENERGY & NAT. RES. L. 341, 351 (2019) (“By placing an understanding of the rapidly dwindling carbon budget at the core of the argument against the mine, it would seem that the law, at least in this case, has caught up with the scientific understanding of global climate change.”).

269. In the context of treaty purposes pursuant to the Vienna Convention. Vienna Convention, *supra* note 199, art. 31(1).

270. *Gloucester*, *supra* note 24, para. 527.

five-year extension to the Dartbrook Coal Mine based on climate change considerations in line with the LEC's decision in *Gloucester*.²⁷¹ However, it should be noted that the applicant filed appeal on the merits to the LEC in August 2020.²⁷² A month after the Independent Planning Commission's decision on the coal mine in Dartbrook, approval for another large coal mine in the Bylong Coal Project was also rejected, based on the reasoning in *Gloucester*.²⁷³ The Independent Planning Commission explicitly agreed with the LEC that all GHG emissions, including scope-3 emissions, will adversely impact the environment in New South Wales and not assist in achieving the global temperature goal of the Paris Agreement.²⁷⁴ Furthermore, the Independent Planning Commission concluded that the project was not in the public interest because it interfered with the principle of intergenerational equity. The predicted economic benefits would accrue to the present generation while "the long-term environmental, heritage and agricultural costs will be borne by the future generation."²⁷⁵

The significance of the reference to *Urgenda* in *Gloucester* can hardly be over-estimated. Courts in both instances faced the

271. *Statement of reasons for Decision: Dartbrook Coal Mine - Modification 7*, NEW SOUTH WALES GOV. INDEP. PLAN. COMM'N, DA231-7-2000 MOD7 at para. 129, (Aug. 9, 2019), <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/02/dartbrook-coal-mine-modification-7/determination/dartbrook-coal-mine-mod-7-statement-of-reasons-for-decision.pdf> [<https://perma.cc/7TAN-YRGD>].

272. *Merits Appeal Proceedings in NSW Land and Environment Court*, NEW SOUTH WALES GOV. INDEP. PLAN. COMM'N (Aug. 19, 2020), <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/02/dartbrook-coal-mine-modification-7/merits-appeal/statement-from-the-ipc/200904dartbrook-appeal.pdf> [<https://perma.cc/NWG7-B7K3>].

273. *Statement of reasons for Decision: Bylong Coal Project*, NEW SOUTH WALES GOV. INDEP. PLAN. COMM'N, SSD 6367 (2019), <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/10/bylong-coal-project/determination/bylong-coal-project-ssd-6367-statement-of-reasons-for-decision.pdf> [<https://perma.cc/5YUZ-5RNB>]. The Commission went on to acknowledge that:

NSW is currently in a transition away from the use of fossil fuels as an energy source. In that context, the Commission is of the view that the cumulative environmental impact of the Project and Recommended Revised Project needs to be considered when weighing the acceptability of GHG emissions associated with the mine. The Commission agrees with Preston CJ at [555] in *Glouster* . . .

Id. at 692.

274. *Id.* para. 690.

275. *Id.* paras. 806, 817.

challenge of applying international commitments to national decisions; one at the level of reviewing the adequacy of a national climate target and one in planning law. Neither of them used the Paris Agreement as a directly applicable legal source, however, the courts agreed that the global temperature goal together with the obligations under the Paris Agreement, set a justiciable, objective standard against which inner-state decisions at different levels of governance are to be measured.²⁷⁶ This standard entails that the State defines and fulfils its fair share, which includes pursuing policies and prioritizing courses of action that reduce GHG emissions so that the State's contribution remains at least above the lower threshold of its fair share.²⁷⁷

The importance of accounting for climate change impacts when planning future infrastructure projects that lead to further GHG emissions is acknowledged in states across the developed/developing country divide, thus not restricted to Annex I countries who are expected to take the lead in combating climate change and its adverse effects.²⁷⁸ In *Earthlife Johannesburg v. The Minister for the Environment*, the dispute concerned the granting of permission for a new coal fired power plant despite the lack of consideration of climate change impacts for the environmental authorization under the National Environmental Management Act ("NEMA").²⁷⁹ The permission had been granted by the Department of Environmental Affairs and confirmed by the Minister for the Environment.²⁸⁰ *Earthlife Johannesburg* appealed on the grounds that under Article 240 NEMA all relevant factors had to be taken into account in the EIA and that the failure to include climate change impacts invalidated the permission.²⁸¹

It is noteworthy that the High Court of South Africa stated that the absence of an explicit provision in the statute requiring

276. *The State of the Netherlands v. Urgenda*, *supra* note 22, paras. 6.3., 7.5.1; *Gloucester*, *supra* note 24, paras. 252-527.

277. *The State of the Netherlands v. Urgenda*, *supra* note 22, para. 6.5.

278. UNFCCC, *supra* note 6, arts. 3(1), 4(2)(a); Paris Agreement, *supra* note 3, Preamble, arts. 4(4), 9(3).

279. National Environmental Management Act 107 of 1998, (S. Afr.).

280. *Earthlife Johannesburg*, *supra* note 25, para. 2.

281. *Id.* para. 12 ("Earthlife's case centers on the proposition that section 240(1) of NEMA, properly interpreted, requires, as a mandatory pre-requisite, a climate change impact assessment to be conducted and considered before the grant of an environmental authorisation.").

a climate change impact assessment did not mean that there was no legal duty of the authorities to consider climate change impacts of the proposed project.²⁸² In fact, the Court explained that whether or not such a legal duty existed was an interpretative question in administrative law.²⁸³ The High Court found that Article 240 NEMA had to be interpreted “purposively and consistently” with the constitutional right to a clean environment²⁸⁴ protected in Article 24 of the Constitution of South Africa²⁸⁵ and “consistently with international law.”²⁸⁶ The Court specifically mentioned the various international agreements on climate change, the “precautionary principle” under Article 3(3) UNFCCC and the “obligation on all state parties to take climate change considerations into account their relevant environmental policies and actions, . . . that arises from Article 4(1)(f) UNFCCC.”²⁸⁷ Only a formal report that considered the climate change impacts from the coal fired power plant would fulfil the evidentiary requirements of the authorization process. The High Court of South Africa chose to remit the case back to the Minister for the Environment to consider the climate change impacts as part of the administrative appeal procedure.²⁸⁸

In a similar fashion, in *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.*, the National Environment Tribunal of Kenya set aside the Environmental Impact Assessment License²⁸⁹ issued by the National Environmental Management Authority. The Tribunal stated that the EIA failed to consider the project’s climate impacts and that NEMA had not carried out effective public participation

282. *Id.* para. 88.

283. *Id.* para. 88.

284. *Id.* para. 80. *See also id.* para. 82.

285. S. AFR. CONST. art. 24, 1996.

286. *Earthlife Johannesburg, supra* note 25, para. 83 (invoking section 233 of the Constitution which demands that any court must give effect to any reasonable interpretation that is consistent with international law over any alternative interpretation that is not consistent with international law.).

287. *Id.*

288. *Id.* para. 121.

289. *Environmental Impact Assessment License*, NAT’L ENV’T MGMT. AUTH., No. NEMA/EIA/PSL/3798 (Sept. 7, 2016), <https://s3-ap-southeast-1.amazonaws.com/amupower/ESIA/Nema+Amu+Power+EIA+license.pdf> [<https://perma.cc/6ULJ-SAP8>].

in planning this first coal-fired power plant in Kenya.²⁹⁰ The National Environment Tribunal defined the purpose of the EIA in the context of the Sustainable Development Goals²⁹¹ was to “assist a country in attaining sustainable development when commissioning projects.”²⁹²

The National Environment Tribunal made extensive reference to case law from other jurisdictions. It concluded from its analysis of the case law, international law, and comparative law, that public participation in the present case was required.²⁹³ Furthermore, the National Environment Tribunal found that the EIA was flawed because it did not comply with all relevant national laws and reasoned that since “climate change issues are pertinent in projects of this nature,” consideration of, and compliance with, all laws relating to climate change was necessary.²⁹⁴

Having thus found that the process was flawed, the National Environment Tribunal addressed the consequences of such failure. Again, the Tribunal explicitly stated that it was necessary to “draw judicial support” from other courts,²⁹⁵ before coming to the conclusion that the flaws were sufficiently serious to invalidate the EIA.²⁹⁶ According to the World Bank criteria,²⁹⁷ South Africa

290. *Save Lamu*, *supra* note 26, para. 151.

291. For more information, see *Take Action for the Sustainable Development Goals*, U.N., <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> [<https://perma.cc/U2KY-5UH4>] (last visited Mar. 15, 2021).

292. *Save Lamu*, *supra* note 26, para. 16 (“The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.”).

293. The National Environment Tribunal quoted the analysis conducted by the Constitutional Court of Kenya. *Save Lamu*, *supra* note 26, paras. 25, 26. See also Constitutional Petition No. 305 of 2012, *Mui Coal Basin Local Community & 15 others v. Permanent Secretary Ministry of Energy & 17 others* (2017) e.K.L.R. (Kenya).

294. *Save Lamu*, *supra* note 26, para. 138.

295. *Id.* para. 76.

296. *Id.* para. 77.

297. For the current 2021 fiscal year, low-income economies are defined as those with a GNI per capita of \$1,035 or less in 2019; lower middle-income economies are those with a GNI per capita between \$1,036 and \$4,045; upper middle-income economies are those with a GNI per capita between \$4,046 and \$12,535; high-income economies are those with a GNI per capita of \$12,536 or more. See *World Bank County and Lending Groups*, *supra* note 29.

is an upper middle-income economy and Kenya is a lower middle-income economy and yet the High Court of South Africa and the National Environment Tribunal of Kenya agreed that climate change considerations were too important to be ignored when planning individual projects which would result in additional GHG emissions, despite various socio-economic interests at stake.²⁹⁸ In particular, the National Environment Tribunal of Kenya effectively reconciled development and economic progress within the notion of the SDGs.²⁹⁹

The importance of considering climate change impacts and the use of the precautionary principle³⁰⁰ in the planning process is apparent in the recent decision of the UK Court of Appeal concerning the expansion of the Heathrow Airport.³⁰¹ The case centered on the question whether the Secretary of State had given sufficient consideration to climate change as required under the Planning Act in section 5(8).³⁰² The UK Court of Appeal

298. See, e.g., *Earthlife Johannesburg*, *supra* note 25, para. 82; *Save Lamu v. National Environmental Management Authority* (2016), case No. NEMA/ESIA /PSL/3798 (Kenya), para. 89.

299. *Save Lamu*, *supra* note 26, para. 16. See also *supra* note 292 (citing excerpt from the decision regarding SDGs).

300. Rep. of the United Nations U.N. Conference on Environmental Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (1992). Principle 15 states, “[i]n 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.” *Id.* at 3. See also UNFCCC, *supra* note 6, art. 3(3); Meinhard Schroeder, *Precautionary Approach/Principle*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1603?rskey=eIP1vb&result=1&prd=MPIL> [<https://perma.cc/5WJ6-LWZR>].

301. *R. (on the application of Plan B Earth Ltd.)*, *supra* note 27.

302. Planning Act 2008, c. 29 (UK) § 5 (2008):

(1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement—

(a) is issued by the Secretary of State, and
(b) sets out national policy in relation to one or more specified descriptions of development.

(2) In this Act “national policy statement” means a statement designated under subsection (1) as a national policy statement for the purposes of this Act.

...

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.

understood the provision to be wider than legislation and adhered to a literal interpretation.³⁰³ On that basis, it criticized the decision of the Secretary of State for not taking the Paris Agreement into account as a “fundamentally wrong turn in the whole process.”³⁰⁴ The Court found that even if the Secretary of State exercised his discretion as to whether or not to consider the Paris Agreement when making the planning decision on the third runway:

the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker . . . there can be some unincorporated international obligations that are “so obviously material” that they must be taken into account. The Paris Agreement fell into this category.³⁰⁵

Notably, the Court of Appeal quoted the precautionary principle as expressed in Principle 15 of the Rio Declaration³⁰⁶ when explaining which GHG emissions would need to be taken into account.³⁰⁷ This part was a reply to the argument of the government that scientific uncertainty remained as to the amount of expected CO₂ and non- CO₂ emissions. The Court found that:

the fact that there would be non- CO₂ effects was acknowledged and it was recognized that they would be more than twice the CO₂ effects. In line with the precautionary principle, and as common sense might suggest, scientific uncertainty is not a reason for not taking something into

303. *R. (on the application of Plan B Earth Ltd.)*, *supra* note 27, para. 224 (“Next it is important to appreciate that the words “Government policy” are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, we can find no warrant in the legislation for limiting the phrase “Government policy” to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation.”).

304. *Id.* para. 276.

305. *Id.* para. 237.

306. See U.N. Conference on Environmental Development, *supra* note 300.

307. *R. (on the application of Plan B Earth Ltd.)*, *supra* note 27, para. 259.

account at all, even if it cannot be precisely quantified at that stage.³⁰⁸

The Court also stated that:

This is one of those cases in which it would be right for this court to grant a remedy on grounds of ‘exceptional public interest.’ The nature and degree of that public interest hardly needs to be set out here. The legal issues are of the highest importance The issue of climate change is a matter of profound national and international importance of great concern to the public—and, indeed, to the Government of the United Kingdom and many other national governments, as is demonstrated by their commitment to the Paris Agreement.³⁰⁹

The Court of Appeal granted relief through declaring the designation decision as unlawful.³¹⁰ The failure to consider the Paris Agreement in the light of the government’s own firm policy commitments on climate change under the Agreement thus invalidated the planning decision. The Court stated that this would not pre-determine that the Secretary of State was obliged to reach any particular outcome.³¹¹

The UK Supreme Court overturned the decision, it disagreed with the Court of Appeal in its interpretation of the meaning of “Government policy” in section 5(8) of the PA 2008.³¹² It replaced the Court of Appeal’s interpretation with a “purposive interpretation,” and stated:

The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of “Government policy”, which points toward a policy which has been cleared by the relevant departments on a government-wide basis.³¹³

308. *Id.* para. 258.

309. *Id.* para. 277.

310. *Id.* para. 280.

311. *Id.* para. 238.

312. *Heathrow*, *supra* note 28. The analysis begins at paragraph 101.

313. *Id.* para. 105.

The Supreme Court acknowledged that the Government set its national climate targets in response to the Paris Agreement.³¹⁴ However, “Government Policy” within the meaning of the PA 2008 only included a formal written statement of established policy.³¹⁵ The Court observed that “although the point had been a matter of contention in the courts below, no party sought to argue before this court that a ratified international treaty which had not been implemented in domestic law fell within the statutory phrase ‘Government policy.’”³¹⁶ Nevertheless, the Supreme Court addressed the role of ratification for “Government Policy.”

The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense. Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, “are not part of UK law and give rise to no legal rights or obligations in domestic law.”³¹⁷

On that basis, the Court concluded that the “Government’s approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was still in a process of development” and that “the Paris Agreement itself is not Government Policy.”³¹⁸ This statement is surprising and may have been derived from a strict understanding of the dualist doctrine for the relationship between national and international law³¹⁹ that was implied in the reasoning of the Supreme Court.³²⁰ However,

314. *Id.* para. 97.

315. *Id.* para. 106.

316. *Id.* para. 108.

317. *Id.*

318. *Id.* paras. 111, 112.

319. For the different doctrines of monism and dualism, see Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1056?rskey=0rkfiW&result=2&prd=MPIL> [<https://perma.cc/5F29-5HS3>].

320. *Heathrow*, *supra* note 28 para. 108 (“Ratification does not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty. Moreover, it cannot be regarded in itself as a statement devoid of relevant qualification for the purposes of domestic law, since if treaty obligations are to be given effect in domestic law that will require law-making steps which are uncertain and unspecified at the time of ratification.”)

denying the Paris Agreement *any* qualification as government *Policy* is not easily reconciled with the view of the Court that the national climate policies *are* developed in line with the international commitments. Even if, under the United Kingdom’s dualist approach to international law, the Paris Agreement does not provide directly applicable legal obligations at the level of domestic law, it is not compelling to also refuse that it could qualify as “Government Policy.” Doing so risks conflating legal obligations (that cannot arise directly from the Paris Agreement in UK domestic law without a further act of Parliament) with shaping “Government Policy” in the sense of Article 5(8) PA 2008 through the commitment that ratification of an international treaty entails. The decision underpins the importance of designing domestic planning laws so that they can account for climate protection commitments made by states at the international level.

As part of the overall analysis of the case law discussed here, the UK Supreme Court decision may serve best to buttress the argument that some legal developments resulting from litigation can be rather short-lived, and that they are not following a linear trajectory in terms of translating climate commitments of governments into justiciable standards to scrutinize the climate impacts of major infrastructure projects. Nevertheless, the cases that were considered in this Section demonstrate the extent to which courts utilize their State’s international climate protection commitments when assessing compliance of national decisions, even though these international commitments fall short of spelling out individual states’ GHG emissions reduction targets. Some courts are more inclined than others to give effect to the international obligations and the temperature goal under the climate change regime, whether this concerns reviewing a country’s GHG emission reduction target at national level or administrative decisions in planning law. Moreover, the precautionary principle is invoked in some instances to overcome remaining uncertainties pertinent to scientific evidence.³²¹

321. See *Save Lamu*, *supra* note 26, para. 139; see also *R. (on the application of Plan B Earth Ltd.)*, *supra* note 27, paras. 258-60 (making reference to the established case law of the Court of Justice of the European Union, Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee* and *Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris Van Landbouw, Natuurbeheer en Visserij*, 2004 E.C.R. I-07405).

However, while there is an increasing trend in some of the judgments to engage with foreign judicial pronouncements, the picture remains fragmented, especially in the light of the younger judgments that originate in the Global North. In this situation, it becomes even more important to stress the significance of the “small and subtle” legal developments, such as the view held by the Borgarting Court of Appeal and confirmed by the Norwegian Supreme Court that extraterritorial emissions must be included in the wider scope of the right to a healthy environment. One may even have to be content with the fact that there is an intra-jurisdictional judicial discourse as to whether the Paris Agreement qualifies as “Government Policy.”

In all these cases, the scope of judicial review was defined through country-specific constitutional and legal frameworks. Some courts then used the decisions of other courts to strengthen their positions when facing governments and administrative authorities whose climate policy and planning decisions undermined their international climate commitments—especially those arising from the Paris Agreement. This approach is particularly important in a situation where no further administrative control is available to rectify the identified legal flaws, or where courts reject their governments’ own interpretation of relevant international climate commitments. The presumed risk that no-one else will follow is certainly diminished in the light of some of the here-discussed decisions, in situations where explicit reference is made to preceding judicial pronouncements.

B. The Analytical and Transferrable Argument

None of these cases contend that the UNFCCC or the Paris Agreement themselves should serve as the legal basis of a claim directly. Conversely, the provisions used as legal basis for these claims are enshrined in constitutional or statutory law. However, the case law demonstrates that some courts accept the Paris Agreement as an international treaty that articulates a standard against which national decisions at different levels of governance are to be examined. This standard is defined by the global temperature goal and the international obligations of the Paris Agreement, as well as the wider normative context of the climate change regime. The national decisions analyzed in this Article

comprise of setting stringent national GHG emission reduction targets and evaluating planning decisions in the light of their climate impacts.

Two claims can be derived from the discussed case law. First, the internationally agreed global temperature goal forms part of an inter-state promise.³²² This goal is firmly based on climate science and is vital to avoid the most serious climate change consequences.³²³ It translates scientific knowledge related to the increase of severity and frequency of climate impacts—which is directly proportional to the increase of GHG emissions globally—³²⁴ and incorporates it into a legally binding international agreement. Therein lies the legal nature of this temperature goal; while no state can be held solely responsible for achieving it, every state's consent to the Paris Agreement represents a legally binding commitment to the temperature goal. States have made a mutual inter-state promise at the international level to achieve the goal as an international community and individual commitments at the national level flow from this promise. Holding the temperature below 2 °C or even closer to 1.5 °C can only be achieved through ambitious domestic action and this action is unconditional in accordance with the wording of the Paris Agreement. It is not dependent on spelling out concrete individual reduction targets for each Party at the international level. Thereby, the Agreement defines an objective standard against which states' actions, including their demonstrated ambition, can be measured,³²⁵ as seen in *Urgenda* and *Thomson*. The fact that compliance with the commitment to pursue

322. For a discussion of interactional sources of environmental law, see Jutta Brunnée, *The Sources of International Environmental Law: Interactional Law*, in THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 960 (Samantha Besson & Jean d'Aspremont eds., 2017).

323. Watts et al., *supra* note 31, at 1836; IPCC 2018, *supra* note 47, at A.3; IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT v (Rajendra K. Pachauri et al. eds., 2015), https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf [<https://perma.cc/96SM-JZVE>]; *The State of the Netherlands v. Urgenda*, *supra* note 22, paras. 4.1-4.8.

324. See IPCC 2018, *supra* note 47. See also WORLD METEOROLOGICAL ORG., GLOBAL ANNUAL TO DECADEAL CLIMATE UPDATE TARGET YEARS: 2020 AND 2020-2024 (2020), https://hadleyserver.metoffice.gov.uk/wmolc/WMO_GADCU_2019.pdf [<https://perma.cc/3R6A-7ZKL>].

325. This view corresponds to the rule of law in addressing climate change. See Brunnée, *supra* note 322, at 964-969.

ambitions national reduction efforts is not sanctioned through a legal mechanism *per se* is irrelevant for the legal nature of this temperature goal. Legal force does not require penalizing non-compliance and adherence to rules is not only driven by effective sanctioning.³²⁶

Second, by committing to this international standard, states have reduced their political margin of appreciation, through an act of sovereign external decision-making which was subsequently endorsed by national parliaments. The inter-state promise of achieving the temperature goal becomes a state-individual promise, through approval in domestic ratification avenues. Consequently, the temperature target is not only an objective standard but also a guarantee of protection for the individual against adverse effects of climate change that will occur if the temperature goal is exceeded. It thereby becomes a rights-based standard. Meeting the temperature target through their best efforts is thus a duty the government not only owes to other states, but also to the individual, as consequence of the ratification of the Paris Agreement and the democratic endorsement that the ratification process entails

This international commitment reduces the margin of appreciation and thus allows for judicial review of governmental decisions, which is notably different from making decisions on behalf of the government or the authorities. Decisions on climate protection have already been made by the executive branch of government and pledges must be fulfilled at the national level. However, the fact that domestic decisions can have consequences for the likelihood with which the temperature goal can be accomplished not only allows, but calls for the courts' scrutiny, especially with a view to the subjective rights dimension of this goal. The qualification of the expected GHG emissions as territorial or extraterritorial is not decisive. The link to the responsibility of the State is established by the fact that it can

326. Harold H. Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2601 (1997); Benedikt Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 *MICH. J. INT'L L.* 345, 352 (1998); Richard B. Bilder, *Beyond Compliance: Helping Nations Cooperate*, in *COMMITMENT AND COMPLIANCE. THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEMS* 65 (Dinah Shelton ed., 2000); Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 *EUR. J. INT'L L.* 105, 118 (2003).

control its own decisions and that it must account for their climate change impact in the light of its constitutional law and its international commitments.

The line of argument that flows from these two claims could be transferred to other jurisdictions in a similar fashion, however, this Article concentrates in the following on Norway. The Norwegian courts must be able to assess whether there has been a violation of the constitutional right and to determine what it takes to comply with the right to ensure a healthy environment, while leaving the government the freedom to decide how to comply with its duty. If statutory law does not include a provision that requires an EIA to account for all climate impacts of the proposed project, the constitutional right can only be effectively protected at the level of norm application. This demands that the legal provisions are interpreted in conformity with the constitution. The alternative to this would be to legislate so that the constitutional requirement of a comprehensive risk analysis that includes all emissions becomes enshrined at the level of administrative law as well.

The decision to allow and invest in new petroleum activity in the Barents Sea will contribute to further GHG emissions and thus, climate change. It will therefore not assist in “achieving the rapid and deep reductions necessary” in order to “reach a global peaking of greenhouse gas emissions as soon as possible” and the temperature target set out in the Paris Agreement,³²⁷ which is grounded in Article 2 of the UNFCCC. Nor will it further the main objective to stabilize the concentration of GHG in the atmosphere to prevent dangerous anthropogenic interference with the climate system.³²⁸ In *Greenpeace Nordic* the Borgarting Court of Appeal held that a gradual reduction of emissions would provide room for some emissions, even in a low-emissions society.³²⁹ This led the Court to conclude that the decision to select which emissions should be prioritized would be beyond its power.³³⁰ This reasoning is based on the premise that the right to a healthy environment is currently well protected and that

327. *Gloucester*, *supra* note 24, para. 527; Paris Agreement, *supra* note 3, arts. 2, 4(1).

328. UNFCCC, *supra* note 6, art. 2.

329. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 27-28.

330. *Id.*

prioritization of GHG emissions can safely occur in a low-emissions society.³³¹

However, even if the State had substantiated how it would pursue its room-making policy, the argument of sufficient rights protection could only be made if the world was indeed on track towards a 1.5 °C target, or at least a 2 °C target. The world is not on track to achieve the 2 °C target, even not under the most optimistic emission scenarios.³³² Consequently, it is hardly convincing that emissions can be safely prioritized. It is also difficult to see how emissions that add further to already too high levels of global emissions can be aligned with the required level of protection under Article 112, and the demand that the State takes active measure to protect the right. The Court has missed the opportunity to demand effective action that increases the level of protection for the constitutional right, and instead decided to transfer the responsibility for rights protection to the political branch. Therefore, this reasoning entails that Norwegians continue to live in a world that is heading towards global warming above 3 °C, with warming in some areas, such as the Arctic, progressing at a threefold rate greater than the world's average.³³³ While it is true that no single state can significantly shift the temperature trajectory, the pattern where the responsibility for action is passed on to other branches within the State and to the international level and other states, is part of the complexity of the challenge that climate change poses. Especially the observed warming in the Arctic carries the potential for catastrophic consequences, including for Northern countries.³³⁴

331. This argument relates to the statement of the Court of Appeal in *Greenpeace Nordic* that a “gradual reduction of emissions in line with the 1.5-degree target will also provide room for some emissions that may be prioritised, including in a low-emissions society.” *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 27.

332. See IPCC 2018, *supra* note 47.

333. See WORLD WEATHER ATTRIBUTION, *supra* note 3. See also Somini Sengupta, *Intense Arctic Wildfires Set a Pollution Record*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/07/07/climate/climate-change-arctic-fires.html> [<https://perma.cc/8AQL-URNU>]; *Arctic Report Card: Update for 2020*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. 2, <https://www.arctic.noaa.gov/Report-Card/Report-Card-2020> [<https://perma.cc/K3VA-LS4N>] (last visited Feb. 26, 2020).

334. *Arctic Report Card: Update for 2020*, *supra* note 333. Furthermore, Norway's coastal areas will be affected by sea-level rise, for the role of international law in that respect. See Nilufer Oral, *International Law as an Adaptation Measure to Sea-level Rise and Its Impacts on Islands and Offshore Features*, 34 MARINE & COASTAL L. 415, 425 (2019). The UN ILC decided at its seventy-first session (2019) to include the topic “Sea-level rise in

These scientifically-predicted consequences of climate change were the reasons for the decision of the LEC in *Gloucester* that all GHG emissions contribute to further climate change impacts.³³⁵ They also underlie the finding in *Save Lamu*, that the United Nation's Sustainable Development Goals are an "urgent call for action," so that "contrary to popular belief the purpose of environmental audits are not meant to hinder development but to ensure economic progress in a country takes into account environmental impacts of such proposed economic activity."³³⁶

By contrast, the arguments that "room" can be created for these additional emissions (as reasoned by the Borgarting Court of Appeal), or that a concrete, internationally agreed-to determination of specific quantified national emission reduction targets must be identified prior to taking national action, or even that others should reduce their emissions before one's own action can occur, are not convincing in the light of the scientific forecasts.³³⁷ Furthermore, these arguments are not suitable to relieve the State from its duty to protect its own people from an encroachment on their constitutional right in a situation where only the State can control the relevant decisions. In fact, these arguments impliedly acknowledge what the right course of action for the government would be, while using the global nature of the challenge and the "drop in the ocean" argument to justify measures that are insufficient to protect the right.

C. Addressing the Counterargument: The State's wide Margin of Appreciation

As demonstrated above, the courts in *Greenpeace Nordic* restricted their judicial review due to the wide margin of appreciation of the executive branch. The courts acted with judicial self-restraint with a view to the "scientific and political"

international law" in its program of work. See Int'l Law Comm'n Rep. of the work of Its Seventy-First Session, U.N. Doc. A/73/10, at 326 (2018).

335. *Gloucester*, *supra* note 24, para. 514.

336. *Save Lamu*, *supra* note 26, para. 17.

337. See IPCC 2018, *supra* note 47. See also SYNTHESIS REPORT, *supra* note 3, para. 11. The Berlin Administrative Court used a similar argument as the Borgarting Court of Appeal, in the first German Climate Case, when it stated that as far as it could be seen, no other industrialized state would apply the carbon budget approach. See *VG*, *supra* note 30; see also *Minnerop*, *supra* note 30.

character of the case.³³⁸ Climate change is a global challenge but not an inherently foreign policy issue.³³⁹ Reviewing if a constitutional right has been violated, remains the function of domestic courts in the context of climate change as in other areas. However, clarifying the “justiciable part” of the right remains a challenging exercise. The State of the Netherlands in *Urgenda* argued that questions regarding CO₂ reduction were too complex for the Court to decide on, and that the Court should refrain from interfering with the “system of the separation of powers.”³⁴⁰ However, the Supreme Court of the Netherlands decided that courts are competent to address the issue of setting a national reduction target because climate change poses a serious, real and immediate risk for human rights.³⁴¹ It is interesting to note in this context that General Advocate Kokott of the Court of Justice of the European Union has argued in a similar fashion that even if complex scientific or technical assessments are necessary, state discretion can be limited and must be reviewed even more intensively in cases where there are particularly serious interferences with fundamental rights.³⁴²

For every state, political decision-making in the climate change context requires balancing different interests, and often entails sacrificing short-term economic benefits with longer-term benefits that come with higher immediate costs but carry the promise to “pay off.” The difficulty for states is that the extent to which investments in these longer-term benefits fulfil their

338. *Greenpeace Nordic* Court of Appeal, *supra* note 17, at 27. The State’s margin of discretion is emphasized in the preparatory works concerning the Constitutional reform in 2014. See The Standing Committee on Scrutiny and Constitutional Affairs, *supra* note 49, at 25.

339. For a discussion to draw a distinction between international law and policy in general, see Martti Koskenniemi, *The Politics of International Law* 1 EUR. J. INT’L. L. 4, 7 (1990); see also Jutta Brunnée, *Reweaving the Fabric of International Law?*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 101 (Rüdiger Wolfrum & Volker Röben eds., 2005).

340. *The State of the Netherlands v. Urgenda*, *supra* note 22, para. 30.

341. *Id.* paras. 5.6.1-5.6.4, 8.1-8.1.3.5. “[T]he Netherlands is bound by the ECHR and the Dutch courts are obliged under Articles 93 and 94 of the Dutch Constitution to apply its provisions in accordance with the interpretation of the ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law.” *Id.* para. 3.3.3.

342. Case C-723/17, *Craeynest v. Brussels Hoofdstedelijk Gewest*, ECLI:EU:C:2019:533, para. 43.

potential depends not only on own action, but also on the action of other states—notably major emitters—and on the timeliness of all of these efforts. Thus, the future success of a single state's GHG emission reduction policy is, to a large extent, defined by the *action* of other states and the *timeframe* of these actions. In contrast, the short-term benefits of a less costly climate policy, including the use of fossil fuels, are solely controlled by each state. The Paris Agreement, in setting forth the global temperature target, addressed this dilemma to some degree. Nevertheless, the Paris Agreement will only come to full fruition if domestic action of all Parties is in line with the global goal. Ambitious national climate protection policies and the pertinent decisions necessary for achieving the global temperature goal at all levels of the domestic administration—from planning law to defining a national emissions reduction target—remain risky endeavors insofar as, and to the extent that, the existing international law on climate protection is not taken into account, or that action is delayed. The full potential of ambitious climate policy decisions will only be realized if a critical mass of states achieves equally significant reductions within a very similar timeframe. That also means that a state that continues to pursue policies that increase global GHG emission levels, will do so at the cost of other states.

However, this uncertainty does not mean that *courts* have neither a right nor a duty to assess, on the basis of available scientific evidence, whether their government has violated an objective legal standard or a constitutional right. Moreover, in situations where governments are pursuing policies that increases the risk of further climate change impacts and thus risk breaching individual rights, the function of the courts is to act as guardians of these rights. If the temperature target of the Paris Agreement is not met, the people's right to a healthy environment is under extraordinary threat—this is not disputed by the Norwegian State or its courts. The temperature goal constitutes the overarching objective for the domestic process of balancing interests and defines the national legal framework for judicial review, even in the absence of internationally prescribed reduction targets.

The so defined judicial review is not equivalent with identifying the best temperature target or prescribing a concrete climate policy on behalf of the State. Yet it remains the courts' function to trace the obligations which the State owes to the

individual, regardless of whether these obligations originate in international or national fora. It is up to the courts to evaluate whether a measure that potentially limits the State's capacity to ensure effective protection of the constitutional right, has been based on justifiable legal standards.³⁴³

The case law discussed earlier demonstrates that some courts will trace the legal effects of their State's international commitments in national law and act as guardians of subjective rights in a democratic state. It is in that function that the judiciary is called to translate the sovereign decision made on behalf of the people, at the international level, into national law. This role of the courts is further supported by the ECHR, an international human rights treaty to which Norway is a party.³⁴⁴ Under Article 13, the ECHR spells out the procedural guarantee of an effective remedy.³⁴⁵ In *Hatton v. the United Kingdom*, the European Court of Human Rights ("ECtHR") referred to its earlier decision in *Grady v. the United Kingdom*,³⁴⁶ and explained that judicial review was not an effective remedy in cases where "the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts."³⁴⁷ Therefore, the ECtHR emphasized that a "scope of review by domestic courts that was limited to the classic English public-law concepts, such as irrationality, unlawfulness and patent unreasonableness," was too

343. Kurt Winter, *The Paris Agreement: New Legal Avenues to Support a Transboundary Harm Claim on the Basis of Climate Change*, in *INTERNATIONAL JUDICIAL PRACTICE ON THE ENVIRONMENT* 188, 188 (Christina Voigt ed., 2019); Meredith Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation*, 26 *DUKE ENV'T L. & POL'Y F.* 131, 133-34 (2015); Elisabeth Fisher & Eloise Scotford, *Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment*, 18 *J. ENV'T. L.* 3, 4 (2016). John H. Knox has stressed that adjudication might be especially important in the absence of regulatory action. See *REPORT OF THE SPECIAL RAPPORTEUR ON THE ISSUE OF HUMAN RIGHTS OBLIGATIONS RELATING TO THE ENJOYMENT OF A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT: FRAMEWORK PRINCIPLES*, UN A/HRC/37/59, para. 11 (Jan. 24, 2018).

344. See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 71.

345. *Id.* art. 13 ("Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity").

346. *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R., paras. 135-39.

347. *Hatton v. the United Kingdom*, 37 Eur. Ct. H.R. 611, para. 140 (2003).

limited to comply with the requirement of Article 13 ECHR.³⁴⁸ Therefore, the ECtHR determined in *Hatton* that the scope of review as defined by the UK Court of Appeal and the House of Lords had been too limited and violated the right under Article 13 ECHR.³⁴⁹ Thus, while it is true that the State has a margin of appreciation when choosing the right policies to protect fundamental rights and prioritizing conflicting aspects of its policies, this margin of discretion is narrowed with a view to the State's obligations under the ECHR. The procedural right to an effective remedy reflects the ultimate limit of the State's discretion.

V. CONCLUSION

Judicial review requires that a legal framework exists in which courts can evaluate claims in a reasoned manner.³⁵⁰ This Article has demonstrated that such a legal framework does exist. It is defined by international climate change law and the respective domestic legal orders of states. The temperature goal of the Paris Agreement forms part of a legally binding international treaty and represents the overarching objective of national and international climate action. This finding resonates from the “comparative units” discussed in this Article.

Article 112 of the Norwegian Constitution and the Norwegian Petroleum Act further define the specific legal framework by which the licensing decision for oil exploration and production is reviewed by Norwegian courts. It is a matter for courts to review that the statutory law is applied in accordance with the constitutional right. The constitutional right defines the standard for decisions taken by the authorities *and* the Storting as confirmed by the Supreme Court in *Greenpeace Nordic*, even if the standard for reviewing the latter's decisions is “very high.”³⁵¹ Article 112 can be used to invoke judicial review if no alternative legal basis is available. This is confirmed by the drafting history of Article 112 as discussed in this Article.

348. *Id.* paras. 141-42.

349. *Id.* para. 142.

350. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1239 (D. Or. 2016). *See also Thomson*, *supra* note 23, para. 114.

351. *Greenpeace Nordic* Supreme Court, *supra* note 18, para. 142.

As demonstrated, the Petroleum Act lacks an explicit requirement to take climate change impacts into account during the licensing procedure, from designating a new area for exploration up to the point where petroleum production can begin. This is in contrast to the finding in *Greenpeace Nordic*, as confirmed by the Supreme Court, that the right to a healthy environment protects against the consequences of all environmental harm, including downstream emissions from exported petroleum. The Supreme Court of Norway has consistently held that statutory law must be applied in accordance with the Constitution. This is again the case in the climate change context, where the constitutional right under Article 112 must be complied with when applying the Petroleum Act. Therefore, prospective scope-3 emissions must be taken into account in the EIA during the licensing procedure, at a point where the State can still control if these additional emissions from petroleum production can safely occur. The standard for the EIA must be defined by the protection that Article 112 requires.

These emissions could only occur safely, if, in accordance with the decision of the State made with the ratification of the Paris Agreement, the global temperature increase would not exceed 2 °C (ideally remaining closer to 1.5 °C). Only then could the State argue that it can make room for these emissions while at the same time claiming to protect the rights under Article 112 of the Constitution. However, the current reality is that the world is heading towards 3 °C at the end of the century,³⁵² it is therefore impossible to argue that additional downstream emissions will nevertheless protect the rights of the Norwegian people.

Not only must the statutory law be applied to give effect to the constitutional right that is protected under Article 112, the constitutional right must also be interpreted in light of the international climate change regime in accordance with the approach taken by the Norwegian Supreme Court towards international law. Furthermore, Article 112 comprises the right

352. See IPCC 2018, *supra* note 47. See also UNFCCC, *supra* note 1, paras. 11-13. By 2025, emissions will be 2.0% higher than the 1990 level, and by 2030, emissions will be 0.7% lower than in 1990 and 0.5% lower than in 2010. *Id.* para. 11. “According to the SR 1.5 SR, to be consistent with pathways with no or limited overshoot of the 1.5 °C goal, global net emissions need to decline by about 45 per cent from the 2010 level by 2030.” *Id.* para. 13.

to a healthy environment for future generations as well, even if there is no immediate benefit for the present generation. Climate change is a long-term challenge with consequences to be felt by generations yet to come. However, the severity of these consequences depends on mitigation and adaptation measures adopted by the *present* generation. The State must demonstrate that its decision-making reflects the balancing of *all* interests and the full dimension of all rights within its own legal framework.

Conversely, waiting for the definition of quantified absolute GHG emission reduction targets to be developed in international fora, or even for a change of international accounting procedures to include scope-3 emissions, risks an effective and timely response and it misinterprets climate change as a matter of inherently foreign policy. However, climate change is not even primarily a foreign policy matter, but rather a global challenge that demands national efforts of all branches and at all levels of government to reduce GHG emissions. The existing international commitments enable all states to define their fair share of necessary national emission reductions within their own specific legal frameworks for integrating international and national law. The analytical argument developed here is applicable to any domestic legal framework, and therefore can readily be transferred to other jurisdictions.

Some courts are not only poised to review and invalidate domestic decisions at different levels of governance because of their wider climate change consequences (including downstream emissions), they are also inclined to engage in a productive inter-jurisdictional discourse in tackling the global challenge that climate change poses. There may even be an emerging trend of heeding foreign judicial pronouncements in the climate change context more regularly when courts are used as a last resort to enforce states' climate commitments. In that situation, courts are confronted with the task of safeguarding fundamental rights or ensuring compliance with administrative rules, against their own executive branches or administrative authorities. This judicial strategy reduces internal pressures and signals that the respective court is not an international outlier and, most importantly, it advances transnational legal developments in climate change law. It remains to be seen whether the comprehensive interpretation of the material scope of the right to a healthy environment will

lead the way further into this common sphere of inter-jurisdictional judicial discourse.

