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Oil giant, climate saviour, or somewhere in between? Human rights and the Norwegian climate paradox

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Abstract
Norway's recent decision to expand oil and gas exploration further North into the Barents Sea is contrasted with its active leadership role in global climate policymaking. We argue that this contradiction is a result of the key role petro-capitalism still plays in Norway, in addition to the country's geopolitical aspirations in the Arctic. However, solely legalistic approaches to human rights and sustainability often miss out on the dynamics of power, capitalism, and industry interests and their influences on climate litigation. Thus, this article presents a critical assessment of climate and environmental litigation at the European Court of Human Rights by also looking at the recent application *Greenpeace Nordic and Others against Norway*. The goal is to understand both the possibilities and limitations of the human rights-sustainability

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framework vis-à-vis fossil fuel industries and the overall position of environmental rights claims within global capitalism.

Keywords
human rights, climate change, Norway, ECtHR, oil industry

“Earth provides enough to satisfy every man's need, but not every man's greed.”
- M.K. Gandhi, as cited in E. F. Schumacher, Small is Beautiful (1973).

1. Introduction

Norway is promised to be a leader and take an active role in fighting the climate crisis, yet, paradoxically, the oil and gas sector constituted around 18 percent of the Norwegian GDP and 62 percent of the country’s exports in 2018 (Arvin, 2021). The Norwegian Ministry of Petroleum and Energy estimated that in 2021, the government’s total net cash flow from the petroleum industry was around NOK 272 billion, making oil and gas Norway's largest sector in terms of value-added, government revenues, investments, and export value (Norwegian Ministry of Petroleum and Energy & Norwegian Petroleum Directorate, 2022). Similarly, the Norwegian oil fund (*Oljefondet*), created by Parliament in 1990, has grown exponentially over the years and is a crucial source of funding for the Norwegian welfare state (Davidson & Takle, 2021), as well as other sectors.

Even though most greenhouse gas emissions are the result of combustion, the extraction of fossil fuels also generates emissions that contribute to the acceleration of climate change (Gavenas et al., 2015). Therefore, this research is particularly concerned with the intersection between human rights and sustainability (Hawkins, 2019), and how these concepts relate, respond to, or clash with the reality of petro-capitalism. Petro-capitalism is understood as: “a form of capital accumulation founded on the extraction, distribution, and consumption of petroleum” and “it may also describe a particular country whose dependence on oil exports shapes not just its economy, but also its political institutions” (Rogers et al., 2013, online source). With that in mind, is human rights the most adequate framework to address the climate crisis? And how likely is it that legal remedies will force or incentivize states (namely, Norway) to move away from fossil fuels? These and other questions will be discussed throughout the text in order to provide a critical account of current legal action in the field of climate-environmental rights litigation, especially in the context of the European Court of Human Rights (ECtHR).

At a defining moment in time, when changes observed in the Earth’s climate are intensifying, the literature on the welfare state advocate for green policies and post-growth economies: is Norway going to rise to the occasion? Taking this scenario into account, alongside the recent recognition of the right to a healthy environment by the UN Human Rights Council (and the expansion of legal responses to the climate emergency), this article presents a critical assessment of climate and environmental litigation at the ECtHR by looking at the recent Application no. 34068/21 (Greenpeace Nordic and Others against Norway) [1] and past judgments involving similar issues.

The applicants argue that Norway’s decision to push for further oil and gas exploration in the Arctic violates the human right to a healthy environment and harms the well-being of future generations, requesting the new licences for oil and gas exploration be judged invalid (Greenpeace Norge, 2021). In fact, Norway’s decision to expand oil exploration in previously untouched areas of the Arctic arises concerns about not only environmental protection calls but

also regarding the geopolitical stability of the region (Sutterud & Ulven, 2020). Given this context and the need to think about the future of human rights and sustainability vis-à-vis the Norwegian fossil fuels industry, this article offers a critical academic assessment of Greenpeace Nordic and Others against Norway and the overall position of environmental claims within global capitalism.

2. Research Methodology

Where does Norway stand at the crossroads of climate advocacy, human rights, and a booming oil industry? What consequences the recent case at the European Court in Strasbourg can bring about concerning sustainability and the future of the Norwegian oil and gas sector? To provide some insights into these questions, as well as others, the study adopts a qualitative approach, which involves data collection from multiple sources, inductive analysis, and a holistic account of the issue under exploration. This is essentially an exploratory research article as well as a conceptual one. The theoretical background of the research is embedded in the larger frameworks of critical legal theory, ecosocialist approaches to environmental human rights, and the concept of petro-capitalism, among others.

The article is divided as follows: (i) Introduction; (ii) Research Methodology; (iii) Research Background: Sustainability and the Human Right to a Healthy Environment in the Context of Climate Litigation; Environmental/Climate Litigation and the 'Greening' of the European Court of Human Rights; (iv) Results & Discussion: Human Rights, Sustainability, and Norway's Oil Paradox; Greenpeace Nordic and Others against Norway; (v) Concluding remarks.

Firstly, the debate over human rights and sustainability is presented, alongside the role of the ECtHR in advancing the environmental/climate agenda. Secondly and ultimately, the conflicting interests of Norway's oil expansion as opposed to sustainable development practices are discussed in light of the theories aforementioned. Two key databases were used throughout the research process regarding case-law identification and collection: HUDOC/The Council of Europe, and the Global Climate Change Litigation Database provided by the Sabin Centre for Climate Change Law.

3. Research background

3.1 Sustainability and the human right to a healthy environment in the context of climate litigation

One of the most popular internationally disseminated notions of sustainability (portrayed in the language of sustainable development) originates from the World Commission on Environment and Development – chaired by Norway's first female Prime Minister Gro Harlem Brundtland. The Commission's famous report *Our Common Future* (1987), defines sustainability as the "ability to meet the needs of the present without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development, 1987, p. 16). Since then, both the concepts of sustainability and sustainable development have been subjected to a lot of discussion at academic and policy levels (see, for example, Hajian & Kashani, 2021).

The relation between human rights and sustainability is also a contested one: while many environmental activists and scholars have framed environmental claims in the language of human rights, the dominant liberal/normative human rights framework often clashes with more 'radical demands' from environmental justice (Woods, 2010). However, there are many ways through which sustainability claims and human rights demands can indeed join forces in the task of advocating for a more just and sustainable future for humankind. While human rights

were initially worried about the (positive and negative) obligations of state and non-state actors toward present generations, the new discourse on human rights and sustainability introduces a temporal component that extends to future generations (Hawkins, 2019).

In addition to that, one of the major debates in the field of human rights since the post-Second World War scenario has been around the issue of enforceability (Shelton, 1980), usually translated into the notions of justiciability and compliance, i.e., scholars, jurists, and activists have questioned how to translate human rights aspirational guarantees into justiciable, enforceable standards that can 'correct' state behaviour (and more recently the behaviour of non-state actors as well). Nonetheless, environmentalists often face the same struggles when trying to bridge the gap between written policies and actual practices of environmental protection (or lack thereof) (Weis, 2018). In response to the urgent environmental and climate emergencies, new legal responses and mechanisms have arisen in the context of environmental democracy (Peeters, 2020), environmental constitutionalism (Weis, 2018), and environmental rule of law (Gill & Ramachandran, 2021), which aim at realizing and effectuating environmental rights, envisioning sustainability transformations towards eco-social justice. Concerning international human rights law more specifically, the conception of a *human right to a healthy environment* (United Nations, 2021) is the latest attempt at approximating the human rights narrative to the sustainability framework through legal/judicial tools. However, we share Kerri Woods's doubt that the dominant paradigm of human rights can be appropriated for green ends (Woods, 2010), and some of the reasons for that are discussed below.

A recent report by Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy has shown that environment lawsuits, climate change litigation more specifically, have more than doubled, globally, since 2015. And as of May 2021, 1,841 cases of climate change litigation from around the world had been identified by the report, and 1,387 of them were filed before Courts in the United States (Setzer & Higham, 2021). However, the report also reveals that human rights arguments were used in only forty-eight of all these cases, as opposed to constitutional or administrative law, which are used very often as a strategy to request compliance with climate commitments (Setzer & Higham, 2021). Therefore, the language of human rights is still incipient when it comes to climate change litigation.

It is quite clear that 'climate change threatens the effective enjoyment of a range of human rights', including the rights to "life, water and sanitation, food, health, housing, self-determination, culture and development" (United Nations, 2022, online source). Therefore, many international organizations, but mainly the United Nations, have suggested a human rights-based approach (HRBA) to climate change, which means that climate change can be interpreted as "a human rights violation that is legally attributable to States as the primary duty-bearers under international human rights law" (Knur, 2014, p. 41). With that, some argue that the discussion will move from the political sphere to the area of (international) law (Knur, 2014). The counterargument here is that climate change will never be apolitical inasmuch as the global human rights regime will never be (Carey et al., 2010; Ibhawoh, 2011). Thus, mere legalistic approaches to sustainability, climate change, and human rights, often miss important structural problems posed by the architecture of the international community and the actual stage of global capitalism (da Silva & da Luz Scherf, 2020). The challenges of an unequal and unregulated global economy that is literally fuelled by fossil fuels should not be deemed irrelevant, as about 80 percent of the world's energy still come from coal, oil, and natural gas (Environmental and Energy Study Institute, 2021).

The issue of causality in International Human Rights Law is another source of concern. According to David McGrogan, the problem of causality refers to the challenge of drawing reliable causal conclusions (McGrogan, 2016, p. 617), which becomes particularly tricky in climate litigation cases. Establishing a causal nexus between, let us say, oil drilling and a

specific environmental phenomenon such as a heat wave - which could result in a breach of fundamental human rights - is not a trivial task (Quirico, 2018).

On that note, causality and temporality are intimately related. Professor Chris Hilson argues that, in current climate change litigation, there is a tension between future-looking scientific framings of time and present-based ones, and depending on how these 'opposing' views are interpreted, notions of causality can drastically change as well (Hilson, 2019). There is also a debate on whether or not future generations can be bearers of any rights at all (Beckerman & Pasek, 2001). Perhaps the most helpful jurisprudence on that matter, in the European context, arises from the decision in *Neubauer et al. versus Germany*, where the German Constitutional Court recognized the intertemporal component of human rights law, and "unanimously declared the Federal Climate Protection Act partly unconstitutional because it does not sufficiently protect people against future infringements and limitations of freedom rights in the wake of gradually intensifying climate change" (Kotzé, 2021, p. 1424). How will the European Court of Human Rights approach the questions of causality and temporality in climate change litigation is yet to be determined.

In general, there is also a limited potential of the traditional liberal human rights framework to hold non-state actors accountable for human rights violations. While businesses and companies often ignore human rights (especially in the extractive industries), international human rights law mainly 'regulates' states and not companies; while national law better regulates business activities, these are usually transnational and not confined to state boundaries (Sjåfjell, 2020). Since 1965, twenty companies have contributed to 35 percent of all carbon dioxide and methane emissions globally, accelerating the climate emergency with little to no accountability whatsoever (Taylor & Watts, 2019).

Of course, this picture is starting to change for the better, although at a slow pace, starting with the Milieudefensie et al. v. Royal Dutch Shell decision, where the Hague District Court ordered the Shell company to reduce its emissions by 45 percent by 2030.[2] To sum up, human rights approaches to climate change that ignore the political and economic *état de choses* of the world today are likely going to miss important pieces of the puzzle, given the structural constraints of the global political economy. And climate litigation without political/collective action will produce far from ideal results concerning climate change mitigation. Human rights are still at odds with climate change litigation in many aspects, and this complex relationship cannot be easily reasoned. With that said, the next sessions will discuss some of these issues concerning Norway and the role of the European Court of Human Rights in climate-related litigation.

3.2 Environmental, climate litigation, and the 'greening' of the European Court of Human Rights

The European human rights system has been successfully used by environmental lawyers and activists as a strategic tool to help tackle environmental problems through human rights law (The Council of Europe, 2022). So far, the ECtHR has ruled on about 300 environment-related cases, applying concepts such as the right to life (Article 2 of the European Convention on Human Rights), free speech (Article 10), and family life (Article 8) to a wide range of issues that include pollution, human-induced environmental disasters, and access to environmental information (The Council of Europe, 2022). In addition, Strasbourg case law has also stressed the validity of the human right to a healthy environment, mainly through 'attraction' under the meanings of Articles 8 and 2 of the Convention (Fechete, 2012). This means that all contracting states have both negative and positive obligations under the Convention concerning environment protection efforts, despite differences in countries' capabilities.

Yet, some legal scholars argue that for sustainability to evolve into an adjudicatory norm, it would perhaps need its own legal regime, instead of having to rely on non-specialized legal fora to achieve significance (Gillroy, 2006). According to them, “sustainability must not only be a legal principle but a rule-generating adjudicatory norm. This has not occurred for sustainability because the ‘principle’ of sustainable development itself is not of a sufficiently definitive rule-creating character” (Bosselmann, 2010, p. 338). But in many cases, environmental human rights defenders have tied the concept of environmental sustainability to human rights principles when putting their cases forward against environmental threats to human dignity (Woods, 2010). Regarding the ECtHR particularly, the Court is usually concerned with the individual dimension of the sustainability pillar, given the ‘practical and effective’ doctrine, and not necessarily on the more idealistic goals of sustainable development or the intrinsic value of the environment in itself (Folkesson, 2013). Therefore, for the human rights-sustainability nexus in the European human rights system (and beyond), challenges remain in the terrain of distributive environmental justice and the ability to produce effects beyond the particular circumstances of a case (Raible, 2021).

When it comes to climate litigation at the ECtHR more specifically, a number of cases are currently pending before the Court. *Duarte Agostinho and Others v. Portugal* (Application No. 39371/20), the first one to be filed with the Court, was brought forward by six Portuguese children and young people with the help of human rights organizations and takes on thirty-three contracting states for allegedly contributing to global warming and heat peaks, which would impact the living conditions and health of the applicants:[3] they “complain about the non-compliance by these 33 States with their positive obligations under Articles 2 and 8 of the Convention, read in the light of the commitments made under the 2015 Paris Climate Agreement (COP21).”[4]

On the other hand, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* (Application No. 53600/20), was filed by a Swiss association (to which hundreds of elderly women are members) who complain about their country’s climate policy and health problems that undermine their living conditions during heatwaves.[5] Since 2016 they have unsuccessfully requested many national authorities to make up for their shortcomings in lieu of the 2030 goals set by COP21, in particular, to limit global warming to well below 2 degrees Celsius compared to pre-industrial levels.[6]

Another climate-related case has also been recently added to the Court’s docket, *Carême v. France* (Application 7189/21), which was transferred to the Grand Chamber. The Grand Chamber usually hears cases that raise important and complex issues related to the interpretation or application of the Convention.

Despite their particularities, these cases raise similar questions surrounding state action (or lack thereof) regarding climate change mitigation goals and their impact on fundamental human rights. They also raise similar concerns around Articles 2 and 8 of the European Convention.

Although well-intentioned, timely, and important, these cases bring up relatively novel issues to the Court that requires critical socio-legal analysis. Challenges during (and after) the proceedings might include: monetarisation, i.e., the risk of states ‘buying their way out’ of climate commitments through just satisfaction payments (Keller et al., 2022); evidentiary problems linked to the proof of damage, which can be difficult in climate-related cases (and the question of causality, discussed priorly) (Keller et al., 2022); the capacity of these cases to result in remedial approaches that are not solely declarative or monetary, as aforementioned (Keller et al., 2022); in addition to the very limits of Strasbourg jurisprudence concerning industry/financial interests and lobbying within the state-parties (Nature Climate Change, 2019).

Of course, given the extensive Strasbourg case law on environmental protection, it is reasonable for us to say that the ECtHR has a strong interest in setting standards for member states to comply with human rights norms pertaining to the climate emergency, there is no doubt of that. However, it does not mean that the applicants will have an easier time in arguing their cases, for all the reasons aforementioned:

> In short, there is a compelling basis for pursuing climate change claims before the ECtHR and there have been important successes in domestic law laying some of the groundwork for the present claim. That does not mean, however, that the claimants have an easy job on their hands. In fact, there is reason to believe that they might have a trickier job than litigants in domestic courts (Pedersen, 2020, para. 5).

Judge Tim Eicke, in a lecture at the Department of Law of Goldsmiths University (2021), entitled "Human Rights and Climate Change: What role for the European Court of Human Rights", has clearly stated that the Convention does not make space for abstract violations, suspicion, or mere conjecture (Eicke, 2021), therefore, applicants will have to work hard to make concrete connections between actions (or omissions) of state parties regarding climate change, and the alleged human rights violations. Some of these issues, as well as others, will be discussed going forward in the analysis of Greenpeace Nordic and Others against Norway.

4 Results and discussion

4.1 Human rights, sustainability, and Norway's oil paradox

According to the Cambridge Dictionary, a paradox is "a situation or statement that seems impossible or is difficult to understand because it contains two opposite facts or characteristics" (Cambridge University Press, 2022, online source). Norway's recent decision to expand Arctic oil and gas drilling (Solsvik, 2022) directly contradicts its commitments to environmental human rights, sustainability, and climate change mitigation goals. However, this paradox is anything but novel. Since the first oil discovery on the Norwegian continental shelf in 1967 (Norwegian Petroleum Directorate, 2022), petroleum activities have been vital to the Norwegian economy and have played a key role in the development of the welfare state in Norway (Norwegian Petroleum Directorate, 2022).

At the same time, Norway has been showcased as an environmental pioneer country to the rest of the world (Anker, 2016). The country recycles 97 percent of its plastic drinks bottles, Norwegians in big cities usually prefer to travel by public transport, bicycle, or electric car, and the Parliament has decided that all new cars sold by 2025 should be zero emissions (Meydel & Catania, 2021). Yet, Norway continues to be one of the world's biggest oil producers, although almost all of it goes to exportation (Sengupta, 2017). There lies, essentially, the Norwegian paradox: on one hand, there is a reliance on the fossil fuels industry for wealth generation, and on the other, there is a will to be the world's 'pioneer country' concerning environmental and climate policies (Anker, 2016).

Notwithstanding, the roots of Norway's sustainability paradox can be traced back to the very nature of the capitalist system. Capitalism as a social, political, and economic system, is based on the principle of infinite accumulation (Piketty, 2014), accompanied by ruthless exploitation of human and natural resources by both nations and corporations (Singh, 2010). Central to this process are fossil fuels: "oil is the foundation of modern capitalist economies. It is the basis of entire states' budget revenues. It drives global transport networks from North

American suburban sprawl to air-based logistics. It is the number one traded global commodity" (Huber, 2017, p. 1).

Therefore, petroleum and its products play a central role in the organisation of the global economy, and it is likely to continue to do so despite the emergence of renewable energy sources, and this is particularly true regarding the Norwegian economy: as Norway produces more oil per person than the majority of other nations in the globe (Teigen, 2018). The question is, can this be reconciled with environmental rights and sustainability claims?

Proposers of market solutions to the environment/climate crisis would say yes, mechanisms such as carbon capture and storage technologies (CCS) and tradable energy quotas (TEQs) could lead us to a 'green capitalism', a win-win situation based on a green economy, green growth, and the market as a tool for tackling climate change and other major ecological crises (Kenis & Lievens, 2015). Therefore, capital accumulation could be made compatible with ecology and guarantee a healthy and balanced environment to present and future generations. On the other side of the political spectrum, radical economists and ecosocialists might argue that efforts to move beyond oil (and other fossil fuels) might require moving beyond capitalism altogether and its destructive logic of infinite growth and accumulation over matters of social and environmental nature (Huber, 2017; Tanuro, 2014).

The current state of the Earth's climate has already revealed that the first strategy (i.e. market-based solutions) has predominantly failed (Batalla, 2020). In fact, if environmental human rights are not envisioned as a counter-hegemonic strategy, they might run the risk of being commodified and monetarised. Instead, realising the human right to a healthy environment may require a greater focus on social and political action toward a radical transformation of the contemporary global economy (da Silva & da Luz Scherf, 2020). This leads to the understanding that Norway cannot have the best of both worlds, it cannot play the image of a leader/pioneer of global environmental and climate policy at home while at the same time boosting the fossil fuels industry abroad (Anker, 2016).

4.2 Greenpeace Nordic and others against Norway

In the wake of events concerning Norway's decision to expand oil exploration and drilling into the Barents Sea, six persons aged between 20 and 27 as well as Greenpeace Norge and Young Friends of the Earth filed a lawsuit in the domestic courts claiming that these new petroleum licences issued to Equinor (the state-controlled oil company) by the Norwegian government would violate the human right to a healthy environment, enshrined in Section 112 of the Norwegian Constitution (Voigt, 2021).

Commonly referred to as *The People v. Arctic Oil*, Norway's first climate case received its final ruling from the Norwegian Supreme Court on 22 December 2020, which sided with the Government in its decision to uphold the earlier rulings of the lower courts and maintain the validity of the oil exploration licenses (Reuters & Adomaitis, 2020). According to Voigt (2021, p. 698), the Supreme Court issued a 'backward-looking' decision that was led not by the law but by politics: "by aligning the content of the Constitution with prevailing politics, the Supreme Court has ultimately rendered a highly political decision". After exhausting all domestic mechanisms, the plaintiffs decided to trigger the jurisdiction of the ECtHR.

In the heart of the Norwegian Supreme Court's decision lies the argument that the constitutional protection of the environment applies not as a right per se but as a subsidiary limit to governmental action, that is, as long as the Norwegian Government has done something (as opposed to nothing), it has satisfied its procedural obligations under Article 112 (Voigt, 2021, p. 707), completely dismissing the argument that Norway has a substantive duty to reduce utilisation of fossil fuels in light of its climate commitments (European Network of National Human Rights Institutions, 2022). The decision was not unanimous however, four of the fifteen

sitting judges agreed that the Norwegian Government did not undertake a sufficient assessment of climate impacts when issuing the new licences for oil and gas extraction (Greenpeace Norge, 2021).

This case is particularly important because of the considerably vulnerable ecosystem of the Arctic. According to the World Wide Fund for Nature (2021, para. 4) "the vast size, remote location, and extreme weather conditions—combined with the complete lack of infrastructure for responding to oil spills—make drilling in the Arctic Ocean extremely dangerous", with potentially negative impacts on wildlife and Indigenous communities due to new environmental stressors (World Wide Fund for Nature, 2021). Similar to other environment-related cases judged by the ECtHR, the applicants have framed their case around Articles 2 and 8 of the European Convention on Human Rights (ECHR), in conjunction with Articles 13 and 14. Nonetheless, despite the validity of the questions raised by the applicants, and the extensive jurisprudence of the Strasbourg Court on the human right to a healthy environment, the ECtHR has never decided on a case similar to this one before, which leaves very little room to guess what the outcome can be. But the very fact that the Court judged the application admissible is in itself a positive achievement for the applicants, given the ECtHR's quite intricate admissibility procedure (Graham, 2020).

With that said, some obstacles are likely to arise during the proceedings. The question of whether or not state parties to the ECHR are required to mitigate the risks linked to climate change leads to two pathways, at least: (i) given the Court's precedents, it appears that the contracting states have a positive obligation obliged under Articles 2 and 8 of the Convention to protect citizens from known risks of environmental disasters, hazards, and to provide emergency relief after these incidents - which would include harm caused by past or upcoming climate change (Norwegian National Human Rights Institution, 2021); (ii) the second contention concerns states' duty, under the ECHR, to reduce greenhouse gas emissions to prevent the harmful effects of climate change in the future, and this is still unsettled (Norwegian National Human Rights Institution, 2021).

Norway, however, has considerably reduced domestic emissions and is promised to be a frontrunner in the European net zero debate, becoming 'carbon neutral' by 2050 (and the goal could even be expedited to 2030) (Centre for International Climate Research [CICERO], 2019). Therefore, it seems that the crucial issue in dispute here is whether or not the Norwegian state has a positive obligation under the ECHR to mitigate the effects of climate change both at home and abroad, by moving away from fossil fuels, that is, a duty of care to achieve a transition to renewable sources. In its unprecedented judgment, the Norwegian Supreme Court stated that the fundamental right to a healthy environment is only applicable in Norway (Gociu & Roy, 2021), under very limited circumstances (Voigt, 2021), largely overlooking the Strasbourg jurisprudence on extraterritorial human rights obligations for example (Haeck et al., 2022). The case law on extraterritorial human rights obligations under the ECHR is contentious, however, lacking a clear methodology to solve complex cases:

> The Court, in Al-Skeini, i.e. the leading judgment on extraterritoriality, established a state's extraterritorial jurisdiction and therefore possible responsibility through the use of two models, i.e. (1) when an individual is located within a territory or area over which the state has effective control (spatial jurisdiction); (2) when an individual is subject to the authority or control of a state agent (personal jurisdiction) [...] [.] Overall, the case-law on extraterritorial jurisdiction has received a good deal of criticism. The most outspoken is judge Bonello, who held that it was 'a patch-work case-law at best', with 'case-by-case improvisations, more or less inspired, more or less insipid, cluttering the case-law with doctrines which are, at best, barely compatible and at worst blatantly contradictory' (Haeck et al., 2022, p. 126).

Ultimately, the ECtHR will have to decide if the applicants have a right under the Convention to be protected against the potentially damaging effects of extraterritorial oil and gas exploration. Here, more challenges will likely appear, including: "the requirement of the existence of a real and immediate risk to the life of an identified individual or individuals" (*Mastromatteo v. Italy* as cited in Stoyanova, 2020, p. 605), *versus* the state obligation to provide 'general protection to society' regarding the right to life and future risk assessments (Stoyanova, 2020); the need to satisfy the requirements for the 'victim status' under Article 34 of the ECHR (European Court of Human Rights, 2022); the establishment of a connection between the exploration licenses and future production and distribution licenses that would at a later stage generate environmental consequences (i.e. the causation nexus),[7] among other things.

At last, there is no way of predicting how will the ECtHR decide *Greenpeace Nordic and Others against Norway*. Trying to predict the way the Court will decide any of the cases mentioned here, we risk saying, is a fool's errand, especially given the complexity of the questions they raise. However, even if the Court sides with the applicants and declares Norway's decision to expand oil and gas exploration in the Barents Sea to be incompatible with the ECHR, what is the probability that the Norwegian Government will abandon its geopolitical aspirations in the Arctic region? The probability is, we also risk saying, very low. Norwegian society and economy have thrived in tune with the petroleum industry (which dominates the country's economy), and petroleum policy and climate policy remain in completely different policy fields at the national level in Norway (Bang & Lahn, 2019).

Given the current state of petro-capitalism, oil policy remains fundamentally a question of *Realpolitik* (Duong, 2006; Goldberg et al., 2020), subjected to domestic, regional, and global political forces. Although individuals and organizations have been relatively successful – in some cases - in framing climate litigation in the language of human rights, the role of the judiciary in climate change policymaking remains unclear (Colby et al., 2020). One thing is indeed clear, nonetheless: the Courts alone cannot save the climate. Yet, the ECtHR has been presented with a unique opportunity to set the tone regarding climate commitments: will it fulfill its role as "the conscience of Europe", that is, an institution designed to reflect "Europeans' better selves?" (Greenberg, 2020, p. 417). Or will it succumb to the political interests of state parties and industry representatives?

5. Concluding remarks

Whether or not Norway has a positive obligation under the ECHR to move away from the fossil fuels industry - considering its climate and human rights commitments - is yet to be determined. Nevertheless, the Norwegian Government's decision to expand oil and gas exploration in the Barents Sea is at least morally appalling given the current state of the Earth's climate. The effects of climate change have been felt everywhere through an "increased frequency and magnitude of extreme weather events, which include heatwaves, droughts, flooding, winter storms, hurricanes, and wildfires" (United Nations Environment Programme, 2022, online source). The burning of fossil fuels is the main accelerator of global warming and the primary cause of climate change (Kverndokk, 1994). Thus, if Norway wants to assume a leadership role in global climate policymaking, it should move away from building new oil and gas infrastructure in the Arctic. It should be viewed as answerable for the combustion of its oil exports because they equally contribute to the hastening of the climate emergency.

Given the absence of clarifying case law from the ECtHR in this area, European national courts have provided different interpretations of the ECHR concerning climate change and the human rights-sustainability framework. On one hand, in the famous *Urgenda* case, for

example, the Dutch Supreme Court has determined that the Government's existing goal to reduce emissions by 17% is insufficient, issuing the first decision commending a sovereign state to limit greenhouse gas emissions.[8] On the other hand, the Norwegian Supreme Court issued what has been deemed as a 'backward-looking' decision, in *People v. Arctic Oil*, stating that the human right to a healthy environment does not apply to new oil developments in the Arctic region. Therefore, with a new flow of climate litigation cases, the ECtHR has been presented with an opportunity to possibly harmonize the interpretation of the ECHR concerning climate policy. This will not be an easy task, as the Strasbourg Court is not a climate expert body, and it will have to decide on a theme that is highly politicised and particularly sensitive to some of the contracting states, especially Norway.

Ultimately, despite the attempts to frame climate litigation in the language of human rights, the liberal rights tradition might not offer sufficient tools to address the roots of the climate crisis. Petro-capitalism is the main force behind the acceleration of the climate emergency and will not likely be dismantled through legal action alone. There is a lot of scepticism around the idea that we can make capitalism "green" and "clean" through market-based solutions, consequently, environmental human rights scholars and activists ought to bear in mind that only radical changes in the structure of the global economy might be able to move us closer to the realisation of the human right to a healthy environment. As previously stated by Bell (2015, p. 7) "to achieve environmental justice, then, it appears necessary to at least minimise the negative impacts of capitalism but perhaps even to begin to dismantle the capitalist system altogether." Thus, there might be little space under the constraints of capitalism to solve the most pressing environmental issues of our time.

There is no way of saying how will the ECtHR decide *Greenpeace Nordic and Others against Norway*. Trying to predict the way the Court will decide any of the cases mentioned here, we risk saying, is a fool's errand, especially given the complexity of the questions they raise. But one thing is already known: there is extensive support in the Norwegian Government for new oil and gas developments, and to some extent among regular Norwegian citizens as well.[9] Therefore, the outcomes of this case have the potential to completely change the relationship between Oslo and Strasbourg, either for better or for worse. Under both scenarios, the chances of Norway drastically changing its oil policy and abandoning its geopolitical aspirations in the Arctic are unlikely.

For future research, studies could address the ways by which climate litigation can be combined with other social and political strategies to raise awareness around climate change and encourage bottom-up reforms through individual and collective action. Perhaps the most significant achievements regarding sustainable development will only come when we re-design the social contract and considerably shift the priorities of our society altogether.

Notes

1. *Greenpeace Nordic and Others against Norway* [2022] ECtHR, Fifth Section, Application no 34068/21.

2. *Milieudefensie et al v Royal Dutch Shell plc* [2021] District Court in the Hague, C/09/571932 / HA ZA 19-379 ECLI:NL:RBDHA:2021:5339 (District Court in the Hague).

3. Request No 39371/20, *Cláudia DUARTE AGOSTINHO and others against Portugal and 32 other states* [2020] European Court of Human Rights, Fourth Section (Subject of the case and questions).

4. Ibid.

5. *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (communicated case) [2021] European Court of Human Rights, 53600/20.

6. Ibid.

7. See Question 3 (d) raised by the ECtHR in *Greenpeace Nordic and Others against Norway*.

8. *Urgenda Foundation v. State of the Netherlands* [2015] HAZA C/09/00456689.

9. A recent poll has shown that around 65 percent of voters in Norway continue to support future oil and gas exploration/production. See Norwel (2021) and Loe & Kelman (2016).

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