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ARTICLE

Special Issue: Strategic Litigation in EU Law

Strategic Climate Litigation before National Courts: Can European Union Law be used as a Shield?

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Abstract

The climate emergency is unfolding. Efforts to reduced greenhouse gas emissions globally, including the efforts of the European Union and the Member States, are severely insufficient to hold global warming below the 1.5°C temperature limit. In light of this public institutional failure, civil society actors increasingly resort to strategic climate litigation. However, the EU has very restrictive standing requirements for direct actions against general acts. Therefore, most strategic climate litigation is brought to national courts. In 2023 and 2024, national judges have in several cases allowed defendant states to use EU law as a shield against the litigants' demands to declare national climate targets and policies insufficient. This Article argues that in light of the fact that EU climate policy is inadequate and nearly impossible to challenge, it is highly problematic when national judges accept EU law to be an obstacle to (full) judicial review. First, EU law itself is not an obstacle to judicial review of national climate policy. Second, the European Convention on Human Rights, read in light of *KlimaSeniorinnen*, imposes higher requirements on Member States than EU law. Third, the European Court of Human Rights would not accept the "EU law as a shield" argument.

Keywords: climate litigation; primacy of EU law; EU climate targets; access to justice

A. Introduction

The climate emergency is unfolding.[1] Despite the universal political recognition that global warming needs to be halted below an increase of 1.5°C compared to pre-industrial levels,[2] a consistently large gap exists between the actions of states and the global emission reductions necessary in order to achieve that target.[3] Actions of the European Union and the Member States also fall short. The Climate Action Tracker, an independent scientific project that tracks countries'

[1]Copernicus Climate Change Service, *ERA5 Dataset*, https://climate.copernicus.eu/climate-reanalysis (last visited Sept. 03, 2024). IPCC, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 1–34 (Hoesung Lee & Jose Romero eds., 2023) [hereinafter IPCC AR6 SYR], https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf.

[2]See United Nations Climate Change Conference, *COP 28: What Was Achieved and What Happens Next?*, https://unfccc.int/cop28/5-key-takeaways (last visited Sept. 03, 2024). United Nations Climate Change Conference, *Glasgow Climate Change Conference—October–November 2021,* https://unfccc.int/conference/glasgow-climate-change-conference-october-november-2021 (last visited Sept. 03, 2024).

[3]UNEP, Emissions Gap Report 2023: Broken Record (2023), https://www.unep.org/emissions-gap-report-2023.

mitigation efforts towards meeting the Paris Agreement temperature limit, rates the efforts of the EU as "insufficient."[4] In light of this public institutional failure, civil society actors increasingly resort to strategic climate litigation.[5] However, the EU has very restrictive standing requirements for direct actions against general acts. Therefore, most strategic climate litigation is brought to national courts. In 2023 and 2024, national judges have in several cases allowed defendant states—to different degrees—to use EU law as a shield against the litigants' demands to declare national climate policy insufficient. Illustrative examples are the rulings of the Spanish Supreme Court of July 2023—*Greenpeace vs Spain I and II*[6]—the Czech Supreme Administrative Court of February 2023—*Klimatická žaloba ČR*[7]—and the Italian Court of First Instance in Romein February 2024—the *A Sud* case.[8] In addition, the Court of Appeal in *Klimaatzaak*, decided in Belgium in November 2023, while explicitly holding that the state could not hide behind EU law, was strongly influenced by the EU target in its substantive review.[9] In all of these cases, the defendant states argued that EU law was an obstacle to challenging national climate action in national courts in light of other legal obligations, such as tort law and human rights, including as they are guaranteed under the European Convention on Human Rights (ECHR).

This Article concludes that in light of the fact that EU climate policy is inadequate and nearly impossible to challenge, it is highly problematic when national judges accept EU law to be an obstacle to full judicial review. First, EU law itself does not require national judges to interpret EU law as an obstacle to judicial review of national climate policy. While political and also legal tensions may arise when national courts declare EU-compatible national mitigation action insufficient and unlawful such tensions do not amount to a doctrinal legal argument that EU law sets aside all other legal obligations of Member States. Second, the ECHR, read in light of *KlimaSeniorinnen*, imposes higher requirements on Member States than EU law. Third, the European Court of Human Rights (ECtHR) would not accept, in the context of climate mitigation, the "EU law as a shield" argument, protecting Member States from responsibilities under the ECHR. As such, Member States do not face responsibility under EU law, when national judges review national climate policies; however, they may face responsibility under the ECHR, when national judges fail to do so. In addition, closing down the judicial avenues for demanding justification for inadequate climate policies, not only in the EU Courts but also in national courts, is problematic from a democratic and separation of powers perspective.

The term "strategic *climate* litigation" is here used in line with the introductory article's definition of strategic litigation as "legal action initiated to achieve broader social, political, or economic ends" for litigation against EU Member States challenging the sufficiency and hence lawfulness of national climate policy.[10] In line with this Special Issue's focus on EU law, this Article focuses on those cases and parts of judicial reasoning that engage with EU law. It does not consider

[4]Climate Action Tracker, *EU Summary*, https://climateactiontracker.org/countries/eu (last visited Sept. 03, 2024). *See also* UNEP, *Emissions Gap Report 2022*, https://www.unep.org/resources/emissions-gap-report-2022.

[5]Joana Setzer & Catherine Higham, *Global trends in climate change litigation: 2022 Snapshot* (2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.

[6]S.T.S., July 24, 2023 (J.T.S., No. 1079) (Spain) [hereinafter *Greenpeace v. Spain I*], (available at https://climatecasechart.com/non-us-case/greenpeace-v-spain/); S.T.S., Jul. 18, 2023 (J.T.S., No. 1038) (Spain) [hereinafter *Greenpeace v. Spain II*], (available at https://climatecasechart.com/non-us-case/greenpeace-v-spain-ii/); Tribunale Ordinario di Roma [Civil Court of Rome], 26 Feb. 2024, n. 39415 (Italy) [hereinafter *A Sud v. Italy*], (available at https://climatecasechart.com/non-us-case/a-sud-et-al-v-italy/).

[7]Nejvyšší správní soud ze dne 20.02.2023 (NSS) [Decision of the Supreme Administrative Court of Feb. 20, 2023], čj. 9 As 116/2022-166 (Czech) [hereinafter *Klimatická žaloba*].

[8]*A Sud v. Italy*.

[9]Cours d'Appel [Court of Appeals] Bruxelles (2nd ch.), Nov. 30, 2023, J.L.M.B., 2023, 24/045 (Belgium) [hereinafter *Klimaatzaak* (Court of Appeal)].

[10]Pola Cebulak, Marta Morvillo and Stefan Salomon, *Strategic Litigation in EU Law: Who does it Empower?*, 25(6) German L.J. (2024) (in this Issue).

litigation against companies that does not directly challenge public policy, narrower sectorial litigation against specific measures, "non-strategic" litigation that primarily serves the interest of the litigant without "exert[ing] influence over policies and political processes,"[11] or litigation against states that are not Member States of the EU. This Article aims to contribute to the second dimension highlighted by the analytical framework of this special issue, namely "the specific legal structures of EU law" and how they "determine the legal conditions for strategic litigation" in Europe.[12] The Article adds to the doctrinal debates surrounding the interaction of legal layers within the EU's multilayered legal landscape, examining the relations and interactions between: National, human rights and tort; international, United National Framework Convention on Climate Change (UNFCCC), Paris Agreement, and ECHR; and supranational/regional law, such as EU law. The judgment of the ECtHR in *KlimaSeniorinnen* of April 9, 2024 raises new questions about the Member States' climate obligations under the ECHR.[13]

While this Article does not necessarily reveal the ambivalence of strategic litigation,[14] it speaks to the ambivalence of EU law in strategic litigation in the field of climate change. It proposes that, while EU law seems *prima facie* empowered when courts decline jurisdiction or limit their review because of EU law, ultimately, this level of deference of national courts, in combination with the strictly limited possibilities to challenge judicially EU climate policy before the European Court of Justice (ECJ), closes off necessary channels for disagreeing and demanding further justification. These avenues are part of modern democracies based on the rule of law and separation of powers. Closing off channels for judicial contestation entirely weakens the democratic legitimacy of the EU's and the Member States' climate policy.

Section B sets out the EU's role in adopting climate mitigation policies. The EU is competent to adopt comprehensive climate policies—Section B.*I*.—and does so—Section B.*II*. Yet, because of the way the EU legal order is set up, it is excessively difficult to challenge EU climate targets and policies—Section B.*III*. This makes it all the more relevant whether the targets and emission reduction plans adopted by the EU can protect Member States from legal challenges brought before national courts, in other words act as a "shield." Section C discusses what role international legal norms play in the relationship between the EU and the Member States. It focuses on the UNFCCC, the Paris Agreement, and the ECHR. Section D addresses the main research question of whether and how membership in the EU frames national judges' ability to review national climate targets and policies. Section D.*I*. examines strategic climate litigation in Europe as to the judges' position on the role of EU law as an obstacle to judicial review. Section D.*II*. sets out why EU law cannot be a shield against other legal obligations and does not stand in the way of judicial review by national courts. Section E concludes.

B. Preliminary Note on EU Law

The EU has extensive powers to adopt climate and environmental policies—Section B.*I*.—which are then binding on the EU Member States and enjoy, as a matter of principle, primacy over national law. The EU has also *de facto* adopted a wide range of climate-related measures, for example in the context of the European Green Deal—Section B.*II*. At the same time, EU climate policies are difficult to challenge—Section B.*III*. Much has been written about the overly stringent interpretation in the *Plaumann* line of case law on the standing of individuals under now-Article

[11] *Id.*

[12] *Id.*

[13] KlimaSeniorinnen v. Switzerland, App. No. 53600/20 (Apr. 9, 2024) [hereinafter *KlimaSeniorinnen*], https://hudoc.echr.coe.int/?i=001-233206. Agostino v. Portugal, App. No. 39371/20 (Apr. 9, 2024) [hereinafter *Duarte Agostino*], https://hudoc.echr.coe.int/?i=002-14303.

[14] *See* Cebulak et al., *supra* note 10, Section B.*I*.

263(4) TFEU.[15] This limitation, if anything, becomes particularly apparent in the context of climate change which affects everyone in some way. In short, EU law sets mitigation standards that are difficult to challenge in court, while as we will see, they fall short of what the EU needs to do to mitigate climate change.

I. Competence Division in Climate Matters

Law-making in the EU is framed by the applicable legal basis. Pursuant to Articles 191–193 TFEU, the EU may legislate on environmental and climate matters. This is a shared competence, which means that Member States can only enact rules if the EU has not already exercised its powers or has explicitly relinquished them, otherwise the Member States are pre-empted from adopting national measures.[16]

However, EU primary and secondary law expressly allow Member States to adopt and implement more ambitious climate mitigation targets and policies than those required under EU law. The EU adopts measures based on 192 TFEU pursuing the Treaty objectives set out in 191 TFEU. Article 193 TFEU stipulates that "measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties." The general rule of pre-emption, pursuant to which Member States can no longer act when the EU has regulated a specific issue or occupied a regulatory field, is hence modified. Secondary law confirms Member States' competence to adopt more stringent climate policy by imposing minimum harmonization. Examples are the European Climate Law and the Effort Sharing Regulation (ESR), which speaks of an obligation to "limit its greenhouse gas emissions *at least* by the percentage set for that Member State."[17] The ECJ confirmed that Member States may not only set higher standards in the context of minimum harmonization but that these higher standards fall outside the scope of EU law.[18]

II. EU Climate Targets and Policies

The EU set a binding target of climate neutrality for 2050 and a net GHG emission reduction target for 2030 of 55% compared to 1990.[19] It is in the process of adopting a binding target for 2040.[20] For the execution of these targets, it defers to the Member States through the adoption of National Energy and Climate Plans (NECPs) setting out how they plan to realize the targets.[21]

[15] *See generally* ECJ, Opinion of Advocate General Jacobs, Case C-50/00 P, Unión de Pequeños Agricultores v. Council (Mar. 21, 2002) [hereinafter *UPA*], https://curia.europa.eu/juris/liste.jsf?language=en&num=C-50/00. ECJ, Case T-177/01, Jégo-Quéré v. Commission, ECLI:EU:T:2002:112 (May 3, 2002) [hereinafter *Jégo-Quéré*], https://curia.europa.eu/juris/liste.jsf?language=en&num=T-177/01. Michael Rhimes, *The EU Courts Stand Their Ground: Why Are the Standing Rules for Direct Actions Still So Restrictive?* 9 EUR. J. LEGAL STUD. 103, 151 (2016). Ioanna Hadjiyianni, *Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies*, 58 COMMON MKT. L. REV. 777 (2021).

[16] Treaty on the Functioning of the European Union art. 2, Oct. 26, 2012, 2012 O.J. (C 326/01) [hereinafter TFEU].

[17] Regulation 2021/1119, of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations 401/2009 (EC) and 2018/1999 (EU), 2021 O.J. (L 243/1) (EU) [hereinafter European Climate Law]. Regulation 2023/857, of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and Regulation (EU) 2018/1999, 2023 O.J. (L 111/1) (EU) [hereinafter Effort Sharing Regulation (ESR)], recital 3 (emphasis added); *See also* ESR, recitals 8 and 27.

[18] ECJ, Case C-609/17, Terveys-ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvoitialan liitto ry, ECLI:EU:C:2019:981 (Nov. 19, 2019), paras. 46 et seq., https://curia.europa.eu/juris/liste.jsf?num=C-609/17&language=en.

[19] European Climate Law arts. 2,4; *see also infra* note 21 (listing a broad range of individual (general and sectoral) legislative acts).

[20] European Commission, *2040 Climate Target*, https://climate.ec.europa.eu/eu-action/climate-strategies-targets/2040-climate-target_en (last visited Sept. 03, 2024).

[21] Regulation 2018/1999, of the European Parliament and of the Council of 11 December 2018 on the Governance Climate Action, amending Regulations 663/2009 (EC) and 175/2009 (EC) of the European Parliament and Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the

The NECPs in turn require further implementation, ultimately coming down to decisions on individual projects, authorizations, and sector targets.

Fourteen of the twenty-seven EU Member States have net zero targets by 2050 or earlier enshrined in national law.[22] Eight further Member States have committed to net zero in 2050 in policy declarations.[23] Again, two others have made a pledge in this respect and two are in the process of taking an official position.[24] One Member State has not taken any official position.[25] The ESR emphasizes the importance of *fairness*, understood as taking into account the different capacities of Member States by differentiating targets according to Gross Domestic Product (GDP) per capita and then adjusting targets to reflect cost-effectiveness for those Member States with an above average GDP per capita, and *solidarity* among Member States.[26] It also offers *flexibility* mechanisms.[27] The 2023 EU ESR increases the emission reduction target for the covered sectors from 29% to 40% by 2030, compared to 2005 levels.[28] The ESR accounts for nearly 60% of EU GHG emissions.[29] The remaining emission fall under the market-based mechanism of the Emission Trading System (ETS) Directive and the Land Use, Land Change and Forestry (LULUCF) Regulation.[30] The EU also adopts specific sectorial policies that pursue the aim to reduce CO2 emissions, such as performance standards for passenger cars.[31]

III. Challenging the Legality of the EU's Climate Policies

EU climate targets and policies have been challenged several times before the ECJ. The most well-known climate case before the ECJ is the case of *Carvalho*, also called the *People's Climate Case*—a direct action that failed on the EU's restrictive standing requirements for individuals, including associations.[32] The next subsection—Section B.*III.1*—engages with the substance of these

Council, Council Directives 2009/119/EC and 2015/652 (EU) and repealing Regulation 525/2013 (EU) of the European Parliament and of the Council, 2018 O.J. (L 328/1) (EU) [hereinafter Governance Regulation], art. 3; European Climate Law art. 7.

[22]As of May 2024: Finland for 2035; Austria for 2040; Germany and Sweden for 2045; European Union, France, Spain, Ireland, Portugal, Hungary, Greece, Slovakia, Croatia, Netherlands, and Luxembourg for 2050.

[23]Italy, Belgium, Lithuania, Slovenia, Romania, Latvia, Malta, and Cyprus.

[24]Pledge: Denmark and Estonia. In discussion: Bulgaria and Czech Republic.

[25]Poland. *But see* Robert Hodgson, *Poland's New Government Commits to Join EU "Fight" Against Climate Change*, Euronews (Jan. 15, 2024), https://www.euronews.com/green/2024/01/15/polands-new-government-commits-to-join-eu-fight-against-climate-change.

[26]ESR, *supra* note 17, recital 12 ("In its conclusions of 11 December 2020, the European Council stated that the new 2030 greenhouse gas emission reduction target will be delivered collectively by the Union in the most cost-effective manner possible, that all Member States will participate in that effort, taking into account considerations of fairness and solidarity.").

[27]*Id.* Arts. 5–7, 10(2).

[28]*Id.* (including buildings, agriculture, waste, small industry, and transport).

[29]Eur. Parliament, Revising the Effort-Sharing Regulation for 2021-2030: "Fit for 55" Package (2023), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698812/EPRS_BRI(2021)698812_EN.pdf.

[30]*See* Directive 2023/959, of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision 2015/1814 (EU) concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, 2023 O.J. (L 130/134) (EU) [hereinafter ETS Directive]; Regulation 2018/841, of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, 2018 O.J. (L 156/1) (EU) [hereinafter LULUCF Regulation].

[31]Regulation 2019/631, of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations No 443/2009 (EC) and No 510/2011 (EU) (recast), 2019 O.J. (L 111/13) (EU) [hereinafter CO2 Emission Performance Standard Regulation].

[32]ECJ, Case T-330/18, Carvalho v. Parliament and Council, ECLI:EU:T:2019:324 (May 8, 2019) [hereinafter *Carvalho*], https://curia.europa.eu/juris/liste.jsf?num=T-330/18&language=en; ECJ, Case C-565/19 P, Carvalho v. Parliament and Council, ECLI:EU:C:2021:252 (Mar. 25, 2021) [hereinafter *The People's Climate Case*], https://curia.europa.eu/juris/liste.jsf?num=C-565/19&language=EN.

challenges, concluding that indeed the EU's climate targets and policies fall short what is needed to stay below the 1.5°C temperature limit. The following two subsections set out the difficulties to challenge EU climate targets and policies before the ECJ in direct—Section B.*III.2*—and indirect—Section B.*III.3*—actions, respectively.

1. EU Climate Targets and Policies Are Incompatible with 1.5°C

EU target and policies are insufficient to keep global warming below the long-term temperature limit of 1.5°C as enshrined in the 2015 Paris Agreement[33] The IPCC reports on emission reduction pathways that if followed provide *a certain likelihood* of remaining below *different temperature levels*. According to the IPCC, to maintain a 50% chance of holding temperatures below 1.5°C, global emissions need to be reduced by 43% by 2030 compared to 2019 levels.[34] The EU is not meeting this necessary reduction level. According to the independent scientific institute Climate Analytics, the EU would need to reduce its emission by 66% by 2030 compared to its 1990 levels in order to stay on the IPCC global pathway.[35]

The IPCC global pathways, however, are an inappropriate standard by which to determine the sufficiency of the EU's efforts in staying below the 1.5°C temperature limit. The UNFCCC and the Paris Agreement establish as a central guiding principle of distribution of efforts the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC).[36] Other guiding normative principles that are relevant for assessing countries' climate ambitions are the precautionary principle, the principle of progression, and the 'highest possible ambition'.[37] While these principles necessarily require further concretization, they are legally binding and establish unambiguously that those Contracting Parties with *high responsibility* for the accumulation of emissions in the atmosphere and *high economic and technical capabilities*, have a *higher* responsibility to ensure the necessary emission reductions.[38] IPCC pathways, however, are generally based on global cost efficiency considerations and do not take into account equity considerations as is required by the principle of CBDR-RC.[39] In other words, determining the *fairness* of EU and national efforts as a sufficient contribution to the *collective* efforts of all states necessary to achieve the 1.5°C temperature limit does not flow from the scientific information alone but requires a normative—legal—assessment on compatibility with international and domestic law.

In a 2021 article, leading scholars on law and climate science quantified the fair share responsibilities of states based on a principled reasoning rooted in international

[33]Paris Agreement to the United Nations Framework on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16–1104 [hereinafter Paris Agreement] (The Paris Agreement commits its signatories to the goal of holding the increase in global temperatures to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C." Subsequent scientific findings of the already severe impacts of global warming at 1.5°C have lead to a increased focus on the need to hold the temperature increase below that limit, which was subsequently laid down in the COP decisions at COP26 in Glasgow (2021) and COP27 in Sharm El-Sheikh (2022)).

[34]IPCC, AR6 SYR 37, Table SPM.1.

[35]Climate Analytics, An Assessment of the Adequacy of the Mitigation Measures and Targets of the Respondent States in Duarte Agostinho v. Portugal and 32 Other States (2022), at 55, https://ca1-clm.edcdn.com/assets/final_report_ca_glan.pdf?v=1697119896.

[36]United Nations Framework Convention on Climate Change art. 3(1), May 9, 1992, 1771 U.N.T.S. 107 [hereafter UNFCCC]; Paris Agreement art. 2(2).

[37]Paris Agreement arts. 3, 4(1)–(3).

[38]*Id.* Art. 6(2) (stating that this responsibility can be met both through emission reductions within the own territory, as well as through enabling emission reductions elsewhere through "internationally transferred mitigation outcomes").

[39]IPCC AR6 SYR 79, Cross-Section Box.2: Scenarios, Global Warming Levels, and Risks. *See also KlimaSeniorinnen*, para. 324.

law.[40] Based on this assessment, the EU's fair share responsibility for remaining below the 1.5° C temperature limit would be to reduce emissions to a level of 111% below its 2010 levels by 2030.[41] This means that by 2030, the EU will have used up its fair share of emissions space and need to achieve "net-negative" emissions of 11%. According to the study, "[i]f such a level is not reachable with domestic emission reductions, these states will need to correspondingly scale up the support they offer to others to reduce their emissions, based on the principle of cooperation."[42]

The *Carvalho* case*, which predates the aforesaid study,* used a comparable fair share analysis to show the insufficiency of EU targets.[43] Also, similar to the evidence used in *KlimaSeniorinnen*,[44] the plaintiffs put forward different methodologies for determining the fair share of the remaining global carbon budget, each of which would require emission reductions that lie far beyond the EU targets.

The challenge that the EU's climate policy does not meet the standard of fairness has further been confirmed by the European Scientific Advisory Board on Climate Change (ESABCC), established under the European Climate Law with the aim to advise the EU on how to take the necessary measures towards climate neutrality.[45] In its 2023 report, the ESABCC addressed the question of what the EU's reduction target for 2040 should be.[46] It set out a two-pronged assessment. First, it determines the EU's fair share carbon budget for 1.5°C in light of the discussed equity principles of international law, concluding that under certain fairness considerations, the EU's fair share budget is already exhausted.[47] Second, it assessed the feasibility of pathways for reducing emissions within the EU's territory. On the basis of this assessment, it recommends an EU reduction target for 2040 of 90-95% compared to 1990.[48] However, based on the preceding fairness considerations, the ESABCC also highlights that "none of the assessed pathways towards climate neutrality fully align with the *fair share estimates*, additional measures need to be pursued to account for this shortfall."[49] Therefore, "[a]mbitious domestic reductions need to be complemented by *measures outside the EU* to achieve a *fair contribution* to climate change mitigation."[50] In this context the ESAB notes that increasing the 2030 target from 55% to 70% or more would "increase the fairness of the EU's contribution to global mitigation."[51]

2. Direct Challenges

The ability of natural and legal persons to challenge EU legal acts is framed by the procedural rules under the Treaties. If a person has suffered harm due to the actions or inaction of an EU

[40] Lavanya Rajamani, Louise Jeffery, Niklas Höhne, Frederic Hans, Alyssa Glass, Gaurav Ganti & Andreas Geiges, *National "Fair Shares" in Reducing Greenhouse Gas Emissions Within the Principled Framework of International Environmental Law*, 21 Climate Policy 983 (2021).

[41] *Id.* at 997, Fig. 5.

[42] *Id.* at 999.

[43] Applicants' Reply to the Defendants' Pleas of Inadmissibility, T-330/18, Carvalho, para. 83, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181210_Case-no.-T-33018_reply.pdf.

[44] *KlimaSeniorinnen*, App. No. 53600/20, at para. 569.

[45] European Climate Law art. 3; European Scientific Advisory Board on Climate Change, *Towards EU Climate Neutrality: Progress, Policy Gaps, and Opportunities* (Jan. 18, 2024). https://climate-advisory-board.europa.eu/reports-and-publications/towards-eu-climate-neutrality-progress-policy-gaps-and-opportunities.

[46] ESABCC, *Scientific Advice for the Determination of an EU-wide 2040 Climate Target and a Greenhouse Gas Budget for 2030-2050* (June 15, 2023), https://climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-the-determination-of-an-eu-wide-2040.

[47] *Id.* at 10, 26–29.

[48] *Id.* at 10, 32–45.

[49] *Id.* at 10.

[50] *Id. See also id.* at 15–16.

[51] *Id.* at 10.

institution, they may bring a case *directly* to the General Court under the requirements of Article 263(4) TFEU.[52] This is the "default tool for strategic litigation."[53] Article 263(4) TFEU grants legal standing to persons and, in an even more limited fashion, associations to challenge three different EU acts: acts addressed to the applicant (first option); regulatory acts, executive acts of a general nature, that are of direct concern to them and do not involve further implementation, (third option); and other legal acts if the applicant is directly and individually concerned (second option). Many scholars have criticized the standing rules for direct actions against other legal acts as too restrictive, in particular in the context of environmental harm.[54]

In particular, the requirement of *distinctiveness*, in other words, that applicants need to demonstrate that they are uniquely affected, maintained by the ECJ, while being far from clearly defined, has been widely criticized as overly formal and "paradoxically denying legal protection when harm is serious and wide-spread," as is precisely the case in the context of the climate emergency.[55]

The ECJ also takes a restrictive approach to access to justice of, especially environmental, associations.[56] Traditionally, associations have only been able to challenge EU acts after having been granted a specific prerogative or procedural right in prior decision-making procedures.[57] Associations do not meet standing requirements to challenge EU acts that affect collective interests.[58] Among other things, the ECJ makes standing of association depend on the members of the association meeting the standing requirements.[59]

Several European cities—infra-state entities—brought legal challenges against Commission acts implementing EU climate laws,[60] motivated by the intention to strengthen climate action. The Cities argued that the Commission acts, allowing for higher emissions than the legislation they implemented, directly affected their powers concerning air quality and traffic regulation.[61] The ECJ disagreed. It confirmed that infra-state entities must meet the same requirements and individuals, and declared the applications inadmissible.[62] Member States, however, as privileged applicants, may pursue annulment actions without having to meet further standing requirements.[63]

[52]*See also* TFEU art. 265 (on the action for failure to act).

[53]*See* Cebulak et al., *supra* note 10, C.*II.1*.

[54]*See* Rhimes and Hadjiyianni, *supra* text in note 15.

[55]Gerd Winter, *Plaumann Withering: Standing Before the EU General Court Underway from Distinctive to Substantial Concern*, 15 Eur. J. Legal Stud. 86, 125 (2023).

[56]Matthijs van Wolferen & Mariolina Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-compliance with the Aarhus Convention*, *in* Research Handbook on EU Environmental Law 148, [pincite] (M. Peeters, & M. Eliantonio eds., 2020).

[57]Case C-355/08 P, WWF-UK v. Council, 2009 E.C.R. I-00073.

[58]Case T-585/93, Greenpeace v Comm'n, 1995 E.C.R. II-2209, paras. 51, 59-66; Case C-321/95 P, Stichting Greenpeace Council (Greenpeace International) v. Comm'n, 1998 E.C.R. I-01651

[59]*See* Case T-173/98, Unión de Pequeños Agricultores v. Council, 1999 ECR II-3359, para. 47; *see also* ECJ, Case C-622/20 P, Validity Found. v. Comm'n, ECLI:EU:C:2021:310 (Apr. 15, 2021), para. 45, https://curia.europa.eu/juris/liste.jsf?num=C-622/20&language=EN.

[60]GC, Joined Cases T-339/16, T-352/16, & T-391/16, Ville de Paris v. Comm'n, ECLI:EU:T:2018:927, Judgment of 13 Dec. 2018, https://curia.europa.eu/juris/liste.jsf?num=T-339/16&language=en.

[61]Regulation 715/2007, of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, 2007 O.J. (L 171/1) (EC).

[62]ECJ, Joined Cases C-177/19 P, C-178/19, & C-179/19 P, Ville de Paris v. Comm'n, ECLI:EU:C:2022:10, Judgment of 13 Jan. 2022, https://curia.europa.eu/juris/liste.jsf?num=C-177/19.

[63]*See* Case T-625/22, Austria v. Comm'n, 2022 O.J. (C 24/43).

3. Indirect Challenges

Because of the difficulties of satisfying the standing requirements for direct actions, more cases are filed via *indirect* routes.[64] The Aarhus Convention is the foundational international agreement establishing information, participation, and access to justice rights in the context of environmental law. The EU implemented most of the Convention's obligations that apply to EU institutions via the 2006 Aarhus Regulation, as amended in 2021.[65] The 2021 Aarhus Regulation gives environmental associations and other members of the public, subject to certain eligibility criteria, the right to initiate an internal administrative review of EU acts based on an alleged violation of EU environmental law.[66] Criteria include demonstrating independence, non-profit status, a primary objective of promoting environmental protection, at least two years of active pursuit of this objective, and alignment of the subject matter with the association's activities.

Importantly, parties to the internal review can take a second step by filing legal action before the ECJ when not satisfied with the review's outcome, or when the EU does not rectify the non-compliance. Environmental associations have taken this route several times. After the Commission rejected their internal review request concerning the Taxonomy Regulation,[67] the associations went to the General Court, which affirmed their direct interest in the decision regarding the internal review request but not in the Taxonomy Regulation 2020/852.[68] This indirect route hence determines the framing of the legal action, directing it away from a substantive challenge of the EU legal instrument.

In addition, if national courts have doubts about the interpretation or validity of EU law, they may ask preliminary questions to the ECJ. Highest-instance courts must do so.[69] The ECJ takes the position that legal protection before national courts in combination with the preliminary reference procedure complements direct actions and that these two avenues together form a complete system of remedies.[70] However, many challenge the effectiveness of the "complete system of remedies."[71] First, while taking an important role in interpreting and applying EU law, national courts do not have jurisdiction to declare EU law invalid. Second, preliminary references are not a right exercised by the parties and the questions are framed by national judges. Third, a preliminary reference adds a time delay and costs to the proceedings. Fourth, the ECJ cannot establish the facts, for example, on the basis of climate science, but limits its review to matters of law. Thus, preliminary review is subject to significant limitations.

However, in line with its general conception that judicial review by national courts complements direct judicial review by the EU Courts, the ECJ imposed a duty on national courts

[64]*See* ECJ, Joined Cases C-191/14, C-192/14, C-295/14, C-389/14, C-391/14, C-392/14, & C-393/14, Borealis Polyolefine GmbH v. Minister for Land, Forestry, Environment, and Water Management, ECLI:EU:C:2016:311, Judgment of 28 Apr. 2016), https://curia.europa.eu/juris/liste.jsf?num=C-191/14&language=en; ECJ, Case C-148/14, Bundesrepublik Deutschland v Nordzucker AG, ECLI:EU:C:2015:287 (Apr. 29, 2015), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-148/14.

[65]Regulation 2021/1767, of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, 2021 OJ (L 356/1) (EU).

[66]Regulation No 1367/2006, on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, 2006 O.J. (L 264/13) (EC) [hereinafter Aarhus Regulation], art. 10.

[67]GC, Case T-215/23, ClientEarth v. Comm'n, 2023 O.J. (C 235/62); GC, Case T-214/23, Greenpeace v. Comm'n, 2023 O.J. (C 235/46); GC, Case T-579/22, ClientEarth v. Comm'n, 2022 O.J. (C 45/16).

[68]*ClientEarth v. Comm'n*, Case T-215/23.

[69]TFEU art. 276(b).

[70]*UPA*, Case C-50/00 P at para. 40; *Jégo-Quéré*, Case C-263/02 P at para. 30. S*ee also supra* note 15 (providing literature).

[71]*See* Aarhus Convention Compliance Committee (ACCC), Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union (Apr. 14, 2011), at para. 90, https://unece.org/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf (finding that the preliminary ruling procedure had drawbacks and fails to compensate for the restrictive standing in annulment procedures and finding on the communication).

to offer wider access to justice to associations to be able to challenge administrative decisions implementing EU environmental law.[72] It pointed out that national law could not make it "effectively impossible" for associations to bring a challenge in line with Article 9(3) Aarhus Convention.[73] Thus, EU law has here given greater effect to the Aarhus Convention and widened access to justice before national courts.

By way of conclusion, the EU adopts, within its competence, climate targets and policies that raise serious concerns as to their sufficiency and fairness. Yet, they are very difficult to challenge judicially because of the strict standing requirements for actions for annulment brought by individuals and associations. Preliminary references and challenges via the Aarhus Convention Regulation are only insufficient complementary channels for judicial challenges to reach the ECJ. Questionable EU climate targets and policies that cannot be judicially challenged are already problematic in and of themselves, as they affect human rights but deny the opportunity to demand additional justification to those whose rights they affected. However, the situation becomes even more problematic when national courts decline or seriously limit their jurisdiction because of their existence.

If EU law should be the legal layer where climate policy is democratically made, with an authoritative force, binding the Member States, it should allow also for judicial challenges to its own policy. Shutting the doors of the ECJ may be expected to shift the discussion to national courts and the ECtHR. However, the ECJ and the Commission may not reasonably expect that national courts, let alone the ECtHR, then look to the ECJ for guidance. However, if national courts and the ECtHR do not look to the ECJ for guidance, this may then necessarily lead to political and legal tensions. Moreover, being a "climate leader,"[74] as the EU projects itself, also entails allowing dissenting voices to enter the institutional discourse regarding what constitutes adequate climate policy. The adoption of adequate climate policies is a continuous process of exchange between many voices from different layers, in other words national, infra-state, EU, ECHR, and international. To better understand why the "EU-law-as-a-shield" argument is problematic in the multilayered legal context and what the legal consequences could be for the EU and the Member States if this argument is followed, we examine in the next section what international legal obligations rest on the EU and the Member States and how they relate to EU law.

C. Beyond EU Law: Obligations Under the ECHR and International Law

EU Member States are bound by their national constitutions, EU law, and international law. Legal obligations may be interpreted in light of and, at times, even displaced by EU law. However, displacement is not necessarily the result of the prevailing understanding that EU law enjoys primacy over national law and that international agreements rank between EU primary and secondary law. This section sets out the international legal obligations of the EU and the Member States as a background consideration on the potential legal consequences—responsibility under the ECHR—if national courts mistakenly interpret EU law as a shield.

I. International Obligations of the EU

The EU is not itself a member of the ECHR. Thus, it is not bound by the ECHR under international law. Yet, the ECHR has exceptional authority and status under EU law, confirmed by

[72]ECJ, Case C-873/19, Deutsche Umwelthilfe v. Ger., ECLI:EU:C:2022:857 (Nov. 8, 2022), paras. 66 et seq., https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-873/19&jur=C (indicating the duty is based on Art 9(3) of the Aarhus Convention in combination with Article 47 CFR—with the former lacking and the latter having direct effect).

[73]*Id.* at para. 69.

[74]Joyeeta Gupta & Lasse Ringius, *The EU's Climate Leadership: Reconciling Ambition and Reality,* Int'l Env't Agreements: Pol., L. & Econ. 281 (2001).

the Treaties and the ECJ, and is via EU law applicable both to EU and national actors.[75] Human rights obligations under national constitutional law, the EU Charter of Fundamental Rights (CFR), and the ECHR largely converge but also, at times, differ.[76]

By contrast to the ECHR, the UNFCCC and the 2015 Paris Agreement are a mixed agreement, binding under international law both on the EU and the Member States. Thus, if a national court declares that a Member State's mitigation efforts that comply with EU targets breach the state's obligations under the ECHR read in light of the state's commitments under the Paris Agreement—and decisions of the Conference of the Parties (COPs) under the UNFCCC—one could *prima facie* assume that this also entails that the EU is not complying with its obligations under the CFR and acts contrary to the ECHR, interpreted in light of the same means.

II. International Obligations of EU Member States Under the Paris Agreement

Member States are bound by the UNFCCC and the Paris Agreement, directly and under EU law, via Article 216 TFEU. Even if these international treaties cannot directly be relied on by individuals against the state and do not formulate binding emission reduction targets, they qualify as norms in the light of which courts must evaluate other legal obligations resting on the state.

The UNFCCC and the Paris Agreement, with its bottom-up approach of nationally determined contributions (NDCs) and the 1.5°C temperature limit, are unlikely to meet the requirements of direct effect under EU law.[77] Even the softer route of allowing review of EU law in light of international agreements where secondary legislative acts make explicit reference to provisions of an agreement—for example, in *Fediol* and *Nakajima* case law[78]—was shut down by the ECJ in the context of the Aarhus Convention.[79] Nonetheless, national courts remain required to interpret national law and other EU law consistently with EU international agreements.[80]

In other words, while EU law does not establish that the UNFCCC and the Paris Agreement are independent yardsticks of review of the legality of national or EU law, it vests principles and obligations under the UNFCCC and the Paris Agreement with additional authority and requires consistent interpretation when identifying the content of other legal obligations, including human rights.

III. ECHR Obligations of the EU Member States

On April 9, 2024, the ECtHR—the first international court to do so—decided with *KlimaSeniorinnen* its first climate case. The case was brought by four elderly women and the association "KlimaSeniorinnen," whose members are all older women. Driven by their concerns about the consequences of the climate emergency on their living conditions and health, they argued that Switzerland breached its Convention obligations by failing to take sufficient climate action. The ECtHR found Switzerland in violation of Articles 8—right to private and family life—

[75]*See* Christina Eckes, *EU Powers Under External Pressure—How the EU's External Actions Alter its Internal Structures* chapter 6 (2019); Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326/13) [hereinafter TEU], art. 6(3). The ECJ now more often refers to the 'corresponding rights' under the European Charter of Fundamental Rights, art 52(3).

[76]Christina Eckes, *Mutual Trust and the Future of Fundamental Rights Protection in the EU's Compound Legal Order*, *in* Human Rights in Transition (Nehal Bhuta ed., 2024).

[77]ECJ, Joined Cases C-401/12 P, C-402/12 P, & C-403/12 P, Council v. Vereniging Milieudefensie, ECLI:EU:C:2015:4, Judgment of 13 Jan. 2015, para. 18, https://curia.europa.eu/juris/liste.jsf?num=C-401/12.

[78]ECJ, Case 191/82, Fediol v. Comm'n, 1988 E.C.R. 04155, paras. 19–23; ECJ, Case C-69/89, Nakajima v. Council, 1991 E.C.R. I-02069, paras. 29–32.

[79]*Vereniging Milieudefensie*, Joined Cases C-401/12 P to C-403/12 P at paras. 56 et seq.

[80]ECJ, Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, 2011 E.C.R. I-01255 [hereinafter *Slovak Bears I*] and ECJ, Case C-243/15, Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín, ECLI:EU:C:2016:838 (Nov. 8, 2016), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-243/15 [hereinafter *Slovak Bears II*]; *see also Deutsche Umwelthilfe*, Case C-873/19 at para. 66.

and Article 6(1)—access to justice in civil matters—ECHR.[81] *KlimaSeniorinnen* establishes above all the obligations to quantify a fair share national carbon budget in line with the global 1.5°C limit—Section C.*I.1.*—and to ensure access to justice for associations—Section C.*I.2.* Both obligations are binding on the EU Member States and, by extension, relevant to the EU.

1. Procedural and Substantive Obligation

In *KlimaSeniorinnen,* the ECtHR confirmed "positive obligations of States relating to the setting up of a regulatory framework . . . geared to the specific features of [climate change]," emphasizing that "each State is called upon [under the Paris Agreement] to define its own pathway."[82] It distinguished between a *reduced* margin of appreciation applying to setting of appropriate climate aims and objectives and the *ordinary* margin of appreciation applying to the choice of means.[83]

The Court further emphasized that each state had an obligation "to do its part"—its *fair share*—to ensure effective protection from serious adverse effects of climate change and that its "primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change."[84] Agreeing with the German Federal Constitutional Court (GFCC), the ECtHR rejected the argument of the Swiss government that there is "no established methodology to determine a country's carbon budget," including by reference to the CBDR-RC principle.[85] It confirmed, by contrast, that the CBDR-RC "principle requires the State to act on the basis of equity and in accordance with their own respective capabilities."[86]

More specifically, the Court established a *duty to quantify a fair share national carbon budget* in relation to the global 1.5°C target. It explained that when assessing whether a State stays within its reduced margin of appreciation in relation to the setting of its targets, it will examine whether the State has had:

> [D]ue regard to the need to . . . adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions in line with the overarching goal for national and/or global climate-change mitigation commitments.[87]

The court determined that no such fair share carbon budget had been set by Switzerland. To the contrary, the court concluded on the basis of Switzerland's current climate targets it would emit significantly more that "even an 'equal per capita emissions' quantification approach would entitle it to use."[88] In fact, Switzerland does not do enough because it claims a two-times larger share of the remaining carbon budget for itself than its share of the world population.[89] Importantly, the duty to quantify is not a purely procedural duty but has a *significant substantive* dimension.

In this context, the ECtHR also made clear that an *implied budget* "provided by an estimate of the remaining Swiss carbon budget under the current situation, taking into account the targets and pathways introduced by the Climate Act" *is not enough*, concluding that it "is not convinced that

[81] *See KlimaSeniorinnen*, App. No. 53600/20 at paras. 537–38 (The applicants also claimed a violation of Article 2 (right to life) ECHR, the applicability of which the Court found unnecessary to examine. However, the Court acknowledged broad parallels between Articles 2 and 8 ECHR.).

[82] *Id.* at para. 547.

[83] *Id.* at para. 543.

[84] *Id.* at para. 545.

[85] *Id.* at paras. 570-71, referring to *Neubauer et al. v. Ger.*, *see infra* note 136.

[86] *Id.* at para. 571.

[87] *Id.* at para. 550 (general remarks).

[88] *Id.* at para. 569.

[89] *Id.* at para. 323 (sharing an expert report indicating that Switzerland would apportion itself 0.2073% of the remaining global CO2 budget as of 2022, compared to a population share of 0.1099%).

an effective regulatory framework concerning climate change could be put in place *without quantifying*, through a carbon budget or otherwise, national GHG emissions limitations."[90] In other words, the Court rejected that the necessary quantification of the remaining carbon budget could be drawn implicitly from an established emission reduction percentage—that is, percentage reductions by 2030 and 2040—but demanded that the national carbon budget is determined on the basis of a "fair share" of the remaining global carbon budget for staying below the global 1.5°C target.

In more general terms, two types of obligations flowing from strategic climate litigation should be distinguished: *Substantive* obligations to reduce emissions by a *minimum* and *procedural and substantive* obligations to *quantify* a national budget. As to the first, the Dutch[91] and Belgian[92] courts established a *substantive minimum* that the respective state had to reach in terms of emission reductions—25% in 2020 and 55% in 2030, respectively. This substantive minimum falls short of equity because judges—based on separation of powers considerations[93]—do not enter into the difficult task of determining what is *fair* but only establish what the absolute substantive minimum reduction percentage, which when adopted by all states does not add up to staying below the 1.5°C temperature limit.[94] As to the second, *KlimaSeniorinnen* established the duty to quantify a fair share carbon budget. Here, the ECtHR emphasized that any such quantification must be based on *substantive* considerations, including not only a "domestic pathway" setting out what is needed in light of climate science to stay below the 1.5°C temperature limit but also applying legal principles giving expression to ethical norms ensuring that national efforts are *fair* in relations to what is needed globally.[95]

2. Access to Justice for Associations

In addition, *KlimaSeniorinnen* established a procedural obligation to ensure adequate access to justice by environmental associations. To establish standing before the ECtHR, the Court extensively referred to the Aarhus Convention, which gives great importance to associations as vehicles of public participation and speaks of "an evolution in contemporary society as regards recognition of the importance of associations to litigate issues of climate change on behalf of affected persons."[96] At the same time, the Court mentioned in a sidenote that standing of associations in the context of climate-change litigation was not covered by the Aarhus Convention and emphasized that preventing *actio popularis* under the ECHR requires a more restrictive approach to the standing of associations, informed by "the specific features of climate-change litigation," than provided by the Aarhus Convention, which deal with "more linear and localized (traditional) environmental issues."[97] Whether the Aarhus Convention applies to strategic climate litigation is at best controversial and may depend on the circumstances.[98] It is in any event not for the ECtHR to determine the scope of the Aarhus Convention.

[90]*Id.* at paras. 569 and 570, *respectively* (emphasis added).

[91]HR 20 december 2019, NJ 2020/41 (Netherlands) [hereinafter *Urgenda* (Supreme Court)]; Hof Den Haag, 9 oktober 2018, JB 2019/10 (Netherlands) [hereinafter *Urgenda* (Court of Appeal)]; Rechtbank Den Haag, 24 juni 2015, AB 2015/336 (Netherlands) [hereinafter *Urgenda* (First Instance)].

[92]*Klimaatzaak* (Court of Appeal).

[93]*See Klimaatzaak* (Court of Appeal) at paras. 190–97.

[94]Gerry Liston, *Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "Fair Share Question" in the Context of International Human Rights Law,* 9 Cambridge Int'l L.J. 248 (2020).

[95]*See KlimaSeniorinnen*, App. No. 53600/20 at para. 569 (The ECtHR acknowledges this in the formulation "under its current climate strategy, Switzerland allowed for more GHG emissions than even an 'equal per capita emissions' quantification approach would entitle it to use.").

[96]*Id.* at paras. 489–94 and 496, *respectively*. In total, the Court refers to the Aarhus Convention 51 times.

[97]*Id.* at paras. 494 and 501, *respectively*.

[98]While the Aarhus Convention does not cover challenges against legislative acts, excluding strategic climate litigation entirely from the Aarhus Convention appears to contradict the broad understanding of "law relating to the environment."

In any event, the ECtHR confirmed the exceptional relevance of associations to defend common interests in the context of climate litigation, which "involves complex issues of law and fact, requiring significant financial and logistical resources and coordination" and the outcome of which "will inevitably affect the position of many individuals."[99] It widened the standing requirements *under the Convention* in the climate context to allow associations standing "as representatives of the individuals whose rights are or will allegedly be affected" and "despite the fact that it cannot itself claim to be the victim of a violation"[100] Importantly, associations do not have to establish the victim status of their members.[101] This is a pragmatic way of bundling floods of cases brought by individuals before they reach the court and improving the evidentiary and legal foundations of these actions by being able to rely on the significant knowledge, expertise, and resources of associations, while protecting the democratic contribution that associations can make to decision-making, including through judicial recourse.[102]

Finding a violation of Article 6 ECHR for the part of the applicant association's action before national courts that concerned an alleged failure to enforce existing laws,[103] the ECtHR re-emphasized "the key role which domestic courts have played and will play in climate-change litigation" and found that the fact that the substance of the complaint had not been dealt with at any level led to an impairment of the "very essence of the right."[104] The Swiss courts did not deal with the standing of *KlimaSeniorinnen* at all; yet, the ECtHR's reasoning and its approach to standing in Strasbourg indicates that simply denying access to justice to environmental associations by introducing disproportionately high standing requirements is a breach of the Convention, particularly in *climate* litigation.

The two legal layers of EU law and the ECHR, under which the EU Member States operate, interpret the role of associations differently. The ECJ could so far be accused of failing to acknowledge the particular relevance of access to justice of associations for collective interests *before the EU courts*. Direct and individual concern remains an excessively high hurdle. However, in line with the ECJ's position that direct actions are complemented by preliminary references, the ECJ has pushed Member States to offer greater access to justice to associations before national courts.[105] Arguably, this could meet the ECHR's standard. However, if Member States were able to use EU climate targets and policies as a shield in national proceedings, broader standing of associations under national law would not *actually* result in judicial review of climate targets and policies. In other words, Member States may still breach the ECHR standard of access to justice by avoiding substantive assessment of their climate policies.

3. Bosphorus: Equivalent Protection Under EU Law?

The ECtHR has shown great deference to the EU and the ECJ. In *Bosphorus*, it recognized that Convention Parties remain "responsible ... for all acts and omissions of ... [their] organs regardless of whether the act or omission in question was a consequence of domestic law or of the

See ACCC, Findings and recommendations with regards to communication ACCC/C/2015/128 concerning compliance by the European Union (Mar. 17, 2021).

[99] *KlimaSeniorinnen*, App. No. 53600/20 at para. 497.

[100] *Id.* at para. 498.

[101] *Id.* at paras. 521–26 (standing in the context of the applicability of Art 8 ECHR) and para. 502 (members do not need to be victims).

[102] *See Id.* at para. 484 (difficulties of individuals to seek recourse) and paras. 498–99 (role of associations in this), regarding the latter point.

[103] *Id.* at para. 633–40. The part concerning the legislative process fell outside the scope of Article 6(1) ECHR.

[104] *Id.* at paras. 639 and 638, *respectively*.

[105] ECJ, Case C-432/05, Unibet v. Justitiekanslern, 2007 E.C.R. I-02271, para. 42; *Deutsche Umwelthilfe*, Case C-873/19; *Slovak Bears I*, Case C-240/09.

necessity to comply with international legal obligations."[106] They cannot be absolved "completely from their Convention responsibility."[107] However, states may use compliance with obligations resulting from the membership of an international organization—in other words, the EU—as a valid justification that there is no breach of the Convention, "as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[108] The protection does not have to be identical; this "could run counter to the interest of international cooperation."[109] It merely has to be "comparable." In other words, the "systemic equivalence of systems" leads to a "concrete presumption of compliance."[110]

The ECtHR did not engage in a more detailed review of the ECJ's interpretation of the standing rules under Article 263(4) TFEU in *Bosphorus*, but concluded more globally that the rights protection offered by the EU was systemically equivalent to the protection under the ECHR. In line with this, the European Commission argued in its third-party intervention in the case of *Duarte Agostinho* before the ECtHR that:

> [W]hen applying the *Bosphorus* criteria, EU law can be considered to provide for an equivalent level of protection of human rights to that of the Convention in the field of environmental protection. Therefore, Member States of the EU can be presumed not to have departed from the requirements of the Convention when they implement the legal obligations flowing from their membership to the EU.[111]

However, the ECtHR conceded in *Bosphorus* that "any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection."[112] And that "any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient."[113] The extensive engagement of the ECtHR with the exceptionality of climate change and its willingness to adapt its settled case law on environmental issues in order to "tailor" it to these exceptional circumstances indicates that the Court grasps the omnipresent and unprecedented manner in which the climate crisis does and will affect Convention rights of nearly everyone within the territory of the Contracting Parties.[114] One could imagine that, with increasingly grave climate impacts in Europe, the ECtHR could find a "manifest inadequacy" that justifies a rebuttal of the *Bosphorus* presumption if the EU does not take adequate measures. This includes failing to ensure the right to access to justice of associations representing human rights claims in the climate context.

What is more, in its later case law, the ECtHR specified that "a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably

[106]Bosphorus Hava Yollari Turizm veTicaret AS v. Ir., App. No. 45036/98 (June 30, 2006), 42 EHRR 1 at paras. 154–55 (emphasis added); Christina Eckes, *Does the European Court of Human Rights Provide Protection from the European Community?—The Case of Bosphorus Airways*, 13 EUR. PUB. L. 47 (2007). Many treaties allow contracting parties to exercise their duties through international organizations (United Nations Convention art 48(2); Paris Agreement art 4(16) and (18)). However, they can be held responsible for not meeting their legal obligations.

[107]*Bosphorus*, App. No. 45036/98.

[108]*Id.* at para. 155.

[109]*Id.*

[110]Cecilia Rizcallah, *The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law—A Critical Appraisal*, 24 GERMAN L.J. 1062, 1066 (2023).

[111]European Commission, *Written observations in Duarte Agostino* (Dec. 2, 2022) at para. 72.

[112]*Bosphorus,* App. No. 45036/98 at para. 155.

[113]*Id.* at para. 156. *See also* Rizcallah, *supra* note 110, at 1072 (regarding the possibility of rebuttal).

[114]See *KlimaSeniorinnen*, App. No. 53600/20 at paras. 414–22 (regarding exceptionalism), paras. 422, 434, 501 (regarding a tailored approach).

where it has *exercised State discretion*."[115] In other words, because EU law permits Member States to adopt more stringent national climate targets and policies—see Section B.*I.*—they do not benefit from the *Bosphorus* presumption.

By way of conclusion, *KlimaSeniorinnen* established climate obligations under the ECHR that are higher than the Member States' climate obligations under EU law. While the Paris Agreement is unlikely to enjoy direct effect under EU law, it forms as an EU agreement part of EU law and must therefore serve a means of interpretation for other legal obligations resting on the Member States. In addition, the EU itself does not meet the climate obligations under the ECHR, as established by *KlimaSeniorinnen*. The restrictive access to justice requirements for associations before the EU courts are not in line with Article 6 ECHR as interpreted by the ECtHR in the context of climate change. Moreover, the EU has not only thus far failed to quantify its fair share carbon budget for 1.5°C, but existing scientific analysis also leaves little doubt that the EU's climate targets and policies *substantively* do not comply with what is needed in terms of global emission reductions, see Section B.*III.1*.

These tensions between obligations under the ECHR and EU law expose Member States to potential responsibilities under the ECHR if national courts accept the "EU-law-as-a-shield" argument. The *Bosphorus* presumption is not applicable. This is a consequentialist argument against hiding behind EU law that should be taken seriously by the defendant states and the deciding national judges. Nonetheless, the next section shows that several national judges have—before *KlimaSeniorinnen* was decided—used EU law to either deny jurisdiction or limit their judicial review of national climate policies. In addition, it explains why, from the perspective of EU doctrine, this is indefensible.

D. EU Law as an Obstacle to More Stringent National Climate Action?

This section first sketches four cases of strategic climate litigation, in which national judges have in 2023 and 2024 accepted different versions of the "EU-as-a-shield" argument—Section D.*I.* It then argues that judges were mistaken from the doctrinal perspective of EU law to do so—Section D.*II*.

I. EU Law Acting as a Shield in Strategic Climate Litigation

In strategic climate litigation, states regularly put forward their compliance with EU climate law and policy as an argument in favor of the position that national courts could not review national climate law and policy. EU law was used in different stages of the procedure to argue for lack of jurisdiction or limited powers of national courts. In *A Sud* (Italy), EU law was considered already in the context of admissibility, while in *Klimatická žaloba* (Czech Republic) and *Greenpeace v Spain I and II,* EU law was raised as imposing boundaries to the court's review.

A striking example is *Greenpeace v Spain I* before the Spanish Supreme Court. While the Court acknowledged that EU laws establish "minimum limits"[116] and hence do not prohibit the Member States from going further, it expressed concerns about the implications of declaring unlawful Spanish policy that complies with the "ambitious" EU targets. It pointed out that "the appellants themselves admit that Spain ha[d] complied with the commitments on effort sharing for the reduction of GHG emissions imposed internally by the EU" and held that any finding that the Paris Agreement requires a greater emission reduction than what EU law requires of Spain would affect "the Spanish State's relations with the Union" by "implicitly . . . questioning whether the policy of the Union, also a signatory to the [Paris Agreement], would [equally] be contrary to those commitments, because . . . both Spain, individually, and the Union, as a regional

[115]M.S.S. v Belg. and Greece, App. No. 30696/09 (Jan. 21, 2011) [hereinafter *M.S.S.*], https://hudoc.echr.coe.int/fre?i=001-103050 (emphasis added).

[116]*Greenpeace v. Spain I* at para. 57.

organisation, ha[d] assumed the same commitments by signing, separately, the [Agreement]."[117] Moreover, the court wrongly considered the Paris Agreement "nothing more" than a COP decision[118] and emphasized throughout the judgment that EU climate policies are "ambitious," and even an example of "the most ambitious policies in the international sphere." It did so, however, without explicating its yardstick of what is ambitious. By way of summary, the Spanish court concluded that it could not find in favor of the plaintiffs because the standards on which they relied were not legally binding (1.5°C temperature limit and science) and that it could not "implicitly" declare that EU law did not comply with international law. *Greenpeace v Spain I* is an illustrative example of how EU law can stand in the way of judicial review of national climate actions—yet it does not stand alone.

The Czech Supreme Administrative Court held in *Klimatická žaloba* earlier in 2023 that it could not conclude that the EU's collective NDC reduction target under the Paris Agreement entailed any individual obligation of the Czech Republic.[119] National obligations under this collective target should be determined in the EU's political and legislative process. Furthermore, the primacy of EU law prevented the court from reviewing the Czech climate target in light of other norms. It did not see it as its task "to undertake a comprehensive analysis of the sectoral provisions of EU law here, especially in a situation where the applicants ha[d] not based their climate action primarily on a breach of those provisions. Moreover, that legislation [was] gradually changing as the EU's climate goals as a whole increase."[120] In other words, the Supreme Administrative Court deferred to the political process in the EU specifying Czech climate obligations and did not carry out an autonomous assessment.

The Court of Appeal in *Klimaatzaak* (2023) concluded that the fact that the EU has adopted a binding legal framework for emission reduction cannot allow the Belgian state to hide behind these provisions.[121] The court also concluded that it could not go further than holding the state to an absolute minimum.[122] Besides pointing repeatedly at the principle of separation of powers, emphasizing that effort-sharing is based on political values, and arguing that if scientific studies "retained" scenarios based on a 50% likelihood—rather than only a 67% likelihood—it could also only hold the state to a 50% likelihood,[123] the court came to this conclusion by relying heavily on EU law.[124] The Court then explicitly assessed whether the EU target of 55% reduction was compatible with the threshold of 1.5°C in a scenario of a 50% chance of success.[125] Ultimately, it came down on precisely the EU target of 55% as the minimum threshold for Belgium.[126] Thus, in *Klimaatzaak*, while not standing in the way of judicial review, the EU target greatly influenced what the court was substantively willing to hold the Belgian state and its regions to do as a minimum, in light of separation of powers.

In *A Sud* in Italy, the CFI (Rome) concluded in 2024 that the plaintiffs, in this civil law case, had essentially requested the Court to annul national climate measures, which reflected political choices of the legislature and the executive and aimed to implement obligations under international and EU law.[127] The court found that if it acted upon this request, it would violate the principle of separation of powers. After reconstructing the EU law framework, the Court pointed out that the plaintiffs had not used their remedies provided by European law to challenge the

[117] *Id.* at para. 61.
[118] *Id.* at para. 63.
[119] *Klimatická žaloba* at para. 130.
[120] *Id.* at para. 158
[121] *Klimaatzaak* (Court of Appeal) at para. 161.
[122] *Id.* at paras. 201–02.
[123] *Id.* at paras. 190–95
[124] *Id.* at paras. 198 et seq.
[125] *Id.*
[126] *Id.* at paras. 201–02.
[127] *A Sud v Italy*.

lawfulness of the EU acts under Article 263 TFEU.[128] It further explained that what the plaintiffs asked was "liability of the so-called State-legislator, which cannot be predicated except in cases of violation of European Union law."[129] EU law played a considerable role in justifying the inadmissibility of the plaintiff's complaint, ultimately because any review would encroach upon "the sphere reserved by the Constitution to the legislator State."[130] Thus, while the Italian court was not as outspoken as the Spanish Constitutional Court about the way EU law constituted an obstacle to judicial review by the national court, it becomes clear from the Italian court's reasoning that the existence of an EU legal framework for emission reduction that was not challenged by the plaintiffs and the fact that the plaintiffs did not argue that national climate action failed to comply with EU law were central to its declaration of *inadmissibility*.

To complete the picture, however, in two earlier landmark cases by the Dutch Supreme Court and the GFCC, respectively, EU law was not considered an obstacle to judicial review. In *Urgenda*, the Dutch Supreme Court concluded unambiguously that the Netherlands is bound to its human rights obligations under the ECHR and that this means that the State may need to adopt stronger mitigation measures than what is required under EU law to meet its own Convention obligations.[131] The Court of Appeal in the *Urgenda* case (2018) confirmed that "Article 193 TFEU states that protective measures adopted under Article 192 TFEU do not prevent a Member State from maintaining and adopting more ambitious protection measures, provided that such measures are in line with the Treaties."[132] The Dutch State argued, similarly to the reasoning of the Spanish Supreme Court, that the decision of a national court that the EU-compliant Dutch climate policy was unlawful would entail an implicit decision that the EU policies—ETS and ESR—are also unlawful.[133] By contrast, the procureur general argued that because Member States may, from the perspective of EU law, adopt more stringent reduction targets, any judgment that the Dutch State is obliged by norms other than EU law—for example, the duty of care under the ECHR—to go further than what EU law requires, does not entail even an implicit position about the lawfulness of EU targets and policies.[134] The national judge assesses the Dutch States' obligations in light of the specific circumstances of the case—GHG emission per capita, reduction so far, et cetera.[135] This does not allow a generalization to other states or the EU. In *Neubauer*, from 2021, the GFCC explained even more to the point that the EU-derived mitigation targets are irrelevant for the assessment of the lawfulness of a state's conduct.[136] This is due to the framing of the constitutional complaint procedure and the standpoint of the GFCC on the relation between EU law and rights protected under the German Constitution.

In other words, the relevance of an EU legal framework in the context of strategic climate litigation is interpreted very differently by national courts. If anything, however, in more recent cases, judges have given greater weight to the "EU-law-as-a-shield" argument. It should be added though that all examples predate the ECtHR's judgment in *KlimaSeniorinnen*, which may remind national judges of the Convention obligations resting on the defendant states.

[128] *Id.* at 9 (unofficial English translation).

[129] *Id.* at 12 (machine translation).

[130] *Id.* at 12 (machine translation) (quoting from case law reference).

[131] *Urgenda* (Supreme Court) at para. 7.3.3. *See also* Městský soud v Praze ze dne 15.06.2022 (MS) [Decision of the Municipal Court in Prague of June 15, 2022], sp.zn 14A 101/2021 – 248 [hereinafter *Klimatická žaloba* (First Instance)].

[132] *Urgenda* (Court of Appeal) at para. 54.

[133] Conclusie P-G F.F. Langemeijer en M.H. Wissink 13 september 2019, JA 2020/10 [hereinafter Procureur-Generaal *Urgenda*], at para 4.110.

[134] *Id.* at para 4.116.

[135] *Id.* at para 4.118.

[136] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18 [hereinafter *Neubauer et al. v Germany*].

II. Assessing the "EU Law as a Shield" Argument

In none of the climate cases discussed in the previous section, EU law was challenged. Yet, when national courts determine that a Member State's EU-compliant climate policy is unlawful in light of national and/or international human rights law, this could be seen as entailing an implicit "view" about the insufficiency and/or unlawfulness of the EU's targets and policies. However, an implicit view that EU efforts are *insufficient* is *legally possible* and arguably even *legally mandated*. This does not change that national judges cannot formally declare EU law *unlawful*.

Critics argued that declaring national emission reduction targets incompatible with the ECHR "implies that those EU targets, on which the national ones were explicitly based, are in the view of the [national court] equally in conflict with the relevant provisions of the ECHR."[137] When we consider this argument, we need to distinguish between substance and form. We must distinguish between the substantive sufficiency, in other words scientific soundness in light of legal and political commitments, such as the 1.5°C temperature limit,[138] on the one hand, and the lawfulness as determined by the national judge in light of the applicable legal norms, on the other. *Substantively*, the conclusion of an assessment of the facts—scientific and political commitments—that national climate action is insufficient could be transferrable to the extent that the facts are the same—for example, scientific evidence, COP commitments under the UNFCCC, but also considerations of cost efficiency. *Formally*, however, the legal grounds that the national judge puts forward in her reasoning are not applicable to the EU. A national court's reasoning and decision that national climate targets and/or policies infringe human rights norms as they are binding on the state under the national constitution, as in *Neubauer*, or the ECHR, as in *Urgenda*, or even ordinary tort law,[139] *cannot* and *do not* challenge EU law. First, national courts *do not have jurisdiction*, nor did they pretend in any of the examined cases to have jurisdiction, to review the validity of EU law. Second, a national judge's decision that national climate action is unlawful results from an autonomous application and interpretation of the *legal grounds* on which the national judge bases her decision. These legal grounds would also have to be applicable to the EU, which is not the case for national law—be it the national constitution or tort law—and is also not directly the case for the ECHR. Admittedly, the ECHR applies to the EU via the EU Treaties, including the CFR. However, it does so only via the ECJ's autonomous interpretation of the ECHR.[140] In other words, legal norms apply formally differently to the EU and the Member States. Legal grounds of a judgement are the autonomous interpretation of these norms by a judge within her jurisdiction to the case at hand.

As long as EU law allows for more stringent measures, the primacy of EU law cannot be seen to stand in the way of other national obligations requiring more stringent action. EU law explicitly permits more stringent national measures in the context of climate governance, whether they result from *legislative* acts or from decisions of the *judiciary*. The European Commission accepted in *Duarte* that minimum harmonization does not create a legal obstacle to Member States setting themselves more ambitious targets.[141] Under these circumstances, the *judgment* of a national court that a state must do more in terms of climate mitigation is not contrary to EU law. It should also be added that several Member States have adopted national climate targets and policies that go well beyond their EU law obligations.[142]

[137]Leonard Besselink, *The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives*, 18 EUR. CONST. L. REV. 155, 175–76 (2022).

[138]This is what Section B.*III.1* discusses with regard to the EU's climate targets and policies.

[139]*See also Urgenda* (First Instance), AB 2015/336 (ruling based on Article 6:162 of the Dutch Civil Code).

[140]Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, 76 MOD. L. REV. 254 (2013) (explaining the status and interpretation of the ECHR in the EU legal order).

[141]European Commission, *Written observations in Duarte Agostino* at para. 21 ("In order to achieve the objectives indicated in the NDCs of the EU and its Member States, the EU sets Union-wide binding targets for climate and energy that all Member States have to comply with and achieve through national implementation. *At the same time, nothing precludes Member States from adopting even more ambitions GHG emissions reduction targets at national level.*") (emphasis added).

[142]European Commission, *supra* note 20. As explained above, several countries have net-zero emission targets that lie well before that of the EU. Finland for 2035; Austria for 2040; Germany and Sweden for 2045.

Furthermore, national judges must remain in the position to review national climate action in order to avoid an unacceptable *lacuna* in judicial protection. National judges are mandated and legally required to rule on disputes brought before them in light of the applicable, valid, and binding law within the legal order of their state. As a result, they must interpret and concretize what the legal obligations resting on the state mean, potentially in light of other international, European, and national norms, facts and other means of interpretation. In light of the above conclusion that EU climate targets and policies cannot be adequately subjected to judicial review brought by natural and legal persons, including associations, national judges' blind deference to EU law would create a judicial vacuum, which—as explained above—cannot be filled by referring a preliminary question to the ECJ. Additionally, if national judges do not assess the legal obligations and responsibilities of their state in light of all binding, valid and applicable legal norms, but stop at stating that their state's climate policy is in line with EU law, they deprive all other—non-EU—international and national legal obligations and principles, including human rights, of value within their legal order. This would result in an all-prevailing force of EU law that goes further than the interpretation of primacy by the ECJ.

Finally, in light of the formal limitations of the effects of rulings of national courts and the fact that EU law permits the adoption of more stringent national law, be it a legislative act or a judicial decision, any obligation of the national judge to ask a preliminary question, when she declares unlawful national climate policies that implement EU law, is also questionable.

E. Conclusions

The EU takes a central role in the adoption of climate targets and policies in Europe. It is competent to adopt climate targets and policies and does so. Yet, the EU's targets and policies remain insufficient in that they fall far short of a fair share contribution to global emission reductions interpreted in light of equity principles of international law. They are even insufficient when compared to global pathways that are based on cost efficiency rather than equity considerations.

At the same time, natural and legal persons, including associations, find it notoriously difficult to challenge EU climate targets and policies. Direct actions against EU laws are subject to strict standing requirements. Indirect actions via the preliminary ruling procedure and the Aarhus Convention Regulation do not put parties in the position to challenge EU climate acts on their merits. Because of these procedural hurdles, strategic climate litigation is largely brought before national courts.

In 2023 and 2024, the Czech Supreme Administrative Court, the Spanish Supreme Court, and the Court of First Instance in Rome accepted EU law at different stages of the procedure to be an obstacle to judicial review. In the Czech and Spanish cases, EU law led to a restrictive interpretation of judicial powers in light of separation of powers. In the Italian case, it led to a declaration of inadmissibility. In addition, the Belgian Court of Appeal in 2023 heavily relied on EU law to construe a yardstick of what is the absolute substantive minimum of emission reduction. Thus, even where EU law does not exclude judicial review, it may affect the way national judges review national climate policy on the merits.

The combination of the EU not doing enough and setting up high procedural hurdles for civil society actors to challenge its policies is as such highly problematic. It hinders civil society and individuals to demand additional justification for alleged failure to protect them from the climate crisis. It closes down an avenue for democratic exchanges about EU climate policies. When national judges then allow states to hide behind the EU's multilayered legal order and justify that they do not review national climate policy because it complies with EU law the situation becomes even more problematic.

When national courts accept the "EU-law-as-a-shield" argument, EU Member States are exposed to the possibility of being held responsible for violating the ECHR. EU Member States have their own legal obligations under their national constitutions and international law, such as

the ECHR, the UNFCCC, and the Paris Agreement. The ECtHR confirmed in *KlimaSeniorinnen* the justiciability of human rights infringements through inadequate climate policy. Some international obligations of the EU Member States may be shaped or even strengthened by EU law; yet Member States cannot—as the ECtHR already held in its *Bosphorus* decision of 2006—use EU law as a shield when Member States exercise discretion, as they do in the climate context, when not adopting possible more stringent measures, or when the EU structurally and manifestly fails to uphold human rights. The ECtHR has demonstrated in *KlimaSeniorinnen* how seriously it takes the all-encompassing problem of the climate emergency. Arguably, the EU fails on both obligations explicated in *KlimaSeniorinnen*: It does not offer Convention-compliant access to justice to associations, and it does not give sufficient consideration to equity principles of international law when quantifying its fair share domestic carbon budget in relation to the global 1.5°C temperature target.

This Article demonstrated how the structural features of the EU legal order may become problematic in interplay with national and international law in the context of strategic climate litigation. However, as the Article also showed EU law does not require national courts to decline or limit review of national climate policies. From the standpoint of EU law, EU law is not an obstacle to judicial review of national climate action by national judges. National judges cannot only review but also declare the national emission reduction targets insufficient and unlawful *without infringing EU law*. From the perspective of EU law, it is possible for national courts to impose a positive duty to adopt more ambitious climate mitigation targets than those enshrined in EU legislation. Finding that national climate targets fall *below* what the state is obliged to do by higher ranking norms in light of international political commitments, science, and principles of international law cannot and is not a judgement about the lawfulness of EU climate laws.

Finally, the combination of the EU not offering ECHR-compliant access to justice for associations in strategic climate litigation and national courts accepting the EU-law-as-a-shield argument results in a situation that human rights and democracy are lost in between the different legal layers in Europe. If EU climate law, which itself is more weakly democratically legitimized than national law and particularly immune to judicial challenges, particularly in the climate emergency,[143] is interpreted as an obstacle in strategic climate litigation before national courts, EU law becomes a negative limitation on institutional decision-making processes. This includes the legislature, the executive and *the judiciary*, which all three form part of the *trias politicas* that underpins the democratic process.[144] Again, in the particular context of the climate emergency, which is complex, multi-layered, concerns every aspect of living, and has exceptional re-distributive consequences, both in terms of impact and mitigation measures, robust democratic exchanges constitute an important pre-requisite for adequate problem-solving.

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[143] *See KlimaSeniorinnen*, App. No. 53600/20 at paras. 414–22.
[144] *See also KlimaSeniorinnen*, App. No. 53600/20 at para. 550 (referencing *all three branches*).

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