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ECOLOGIES OF JUSTICE IN THE CLIMATE CRISIS: EUROPE'S SOCIO-LEGAL TURMOIL

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Abstract

Climate litigation before the European Court of Human Rights, the International Court of Justice, and national courts reveals the gap between States' proclaimed climate ambitions and their actual emission reductions. It compels governments to justify inaction and engages them in processes of public reason-giving. This contribution argues that such judicial engagement plays a vital democratic role in Europe's response to the climate crisis. By establishing factual truth and fairness amid polarization, courts enhance the rationality of deliberation and strengthen democratic legitimacy. Situating these practices within broader 'justification relationships' among institutions, the analysis shows law's capacity to mediate tensions. Against this backdrop, it critically examines the role of the European Union in mitigating the climate crisis and the reluctance of the Court of Justice of the European Union to address the EU's climate obligations. It contends that the Court of Justice's judicial engagement is essential to uphold both democratic legitimacy and ecological justice in Europe.

1. Introduction

Humans experience in a new way the relevance of nature for their own lives: wild fires, flash floods, extreme precipitation, heatwaves, water and food shortages change how they live and relate to each other. These climate impacts may also have far-reaching consequences for the socio-economic fabric that underpins democracy, globally, but also in Europe.

Collectively, we fail to respond adequately to the climate crisis. Whether we generalize the principles of our actions in a Kantian fashion or whether we quantify global emissions by proportionately multiplying our own, we cannot but conclude that the European Union (EU) and its Member States are no exception. Everywhere, public institutions make disingenuous

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claims to the contrary. Who is to blame is answered very differently by different actors. Political rifts open up between fundamentally opposed positions on how we should respond. This feeds into already existing political polarization and populism, and also mobilization, including climate litigation as a form of mobilizing the law.

Litigation against public authorities is one tool to trigger an exchange on what is a State's and the EU's part in mitigating the climate crisis. This exchange takes place within and beyond the courtroom. It unearths existing tensions *within* and *between* EU, national, and international law. Within one legal layer these tensions arise when foundational background norms, such as human rights, clash with gaps in regulating emission reductions and polluting activities. Litigation is a process that draws public actors into reasoned exchanges on how these tensions should be understood and reconciled. The judge is then placed in a powerful position to propose a coherent reading of the applicable norms in the individual case.

The International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and numerous national courts in Europe have engaged with public obligations in the climate crisis. Thus far, the Court of Justice of the European Union has remained an outlier amongst European courts by not participating in the exchanges on what we owe each other in mitigating the climate crisis. This raises the question: What may we expect of the EU and the Court of Justice in response to the twin challenges of the climate crisis and democratic backsliding?

From a democratic perspective, many climate cases are *prima facie* suspicious. They appear to give activists 'more weight and impact in shaping the political process than they deserve'[1] and seem to have at least the potential to bring the 'fragile collective process' out of balance at a time of exceptionally 'high stakes'.[2] Mitigation cases seeking to oblige States to reduce their overall emissions have sparked intense controversies about their potential negative consequences for the democratic process. Political resistance to judicial decisions has led to calls for courts to retreat, leaving more space for political processes to unfold. One repeated warning is that judicial institutions may be delegitimized or ignored if they constrain the majoritarian politics of the day.

Taking as a lens the question of a State's part in addressing the climate crisis, I argue that courts in climate litigation have, in significant measure,

1. Cristina Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (OUP 2019) 27.

2. Judge Nolte, declaration to the ICJ's Advisory Opinion of 23 June 2025, available at <www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-07-en.pdf> (all websites last visited 14 November 2025).

fulfilled the democratic role that deliberative theorists attribute to them. Courts spelled out obligations and exposed where States failed to offer justifications for not meeting these obligations. I examine the justificatory practices of different institutions and highlight how these practices inherently give rise to structural fault lines between public institutions. Against this background, I reflect on the role of the EU and the Court of Justice in navigating the climate and democratic crises and more broadly on how law, lawyers, and legal scholars can help establish truth[3] and bring reason to the discourse on our mutual obligations in the climate crisis.

2. Climate litigation: Suing States to do their part

Environmental associations, cities, and natural persons – often with a specific profile, such as elderly women or young persons – have struggled to meet the admissibility conditions of different jurisdictions.[4] They have brought a range of different claims to national and European courts. The many litigants and cases illustrate that a substantial segment of civil society seeks to engage the judiciary as a means of placing long-term climate concerns onto the political agenda. Simultaneously, actors prioritizing predominantly short-term economic interests seek to mobilize the electorate, while also increasingly turning to courts and arbitration tribunals to challenge climate policies.

The ICJ's 2025 Advisory Opinion and the ECtHR's 2024 *KlimaSeniorinnen* ruling, but also earlier the German Federal Constitutional Court (GFCC)'s 2021 *Neubauer* and the Dutch Supreme Court's 2019 *Urgenda* decisions stand out for recognizing in different ways that a State is obliged 'to do its part'.[5] Establishing what a State's legal mitigation responsibilities are is one of the core tasks of law, judicial review, and legal scholarship in relation to the climate crisis. I argue that a State's part consists, first, of staying within its *fair share* of the global emissions budget associated

3. Established intersubjectively, avoiding the pitfalls of both objectivism and subjectivism, see Jürgen Habermas, *Truth and Justification* (MIT Press 2003).
4. Sabin Center's Climate Litigation Database on global litigation: <www.climatecasechart.com/search?cpl=category%2Fother>.
5. International Court of Justice (ICJ), *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025 (ICJ, AO); *KlimaSeniorinnen Schweiz et al v Switzerland* App No 53600/20 (ECtHR, 9 April 2024); German Federal Constitutional Court (GFCC), *Neubauer*, <climatecasechart.com/non-us-case/neubauer-et-al-v-germany>; Supreme Court of the Netherlands, *The State of the Netherlands v Stichting Urgenda*, ECLI:NL:HR:2019:2007. See in particular: *KlimaSeniorinnen*, para 545; *Urgenda* 2019, para 5.7.1.

with the long-term temperature limit (LTTL); and, second, of doing what is feasible on its territory.[6]

As to the first, any quantification of a State's fair share carbon budget should start by dividing the global carbon budget linked to a certain likelihood of keeping global warming below the agreed LTTL of 1.5°C among all States, often on the basis of its population ('equal per capita'). The global carbon budget reflects the world's limited capacity for pollution. Apportioning this capacity is the most logical way of linking an individual State's contribution to the legally agreed LTTL. The fairness aspect additionally requires States to justify their contribution in light of international equity principles under the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement, such as common but differentiated responsibilities and respective capabilities.

The second, to do what is feasible, becomes increasingly more important as budgets vanish. The ICJ spelled out 'that each party *has to do its utmost to ensure that the NDCs* [nationally determined contributions] *it puts forward represent its highest possible ambition* in order to realize the objectives of the [Paris] Agreement'.[7] This places a high burden on a State to do or at least justify why it does not do what formally recognized scientific (advisory) bodies, such as the Intergovernmental Panel on Climate Change (IPCC) and the European Scientific Advisory Board (ESAB), consider feasible.[8] IPCC reports are, as numerous national courts, the ECtHR, and the ICJ confirmed, the 'best available science' against which omissions of States should be evaluated. For the EU, the ESAB explained that 70% emission reduction in 2030 and 95% in 2040 are fairer (than the current target of 55% and the proposal of 90%) and feasible.[9]

The premise that only if every State does its part can we stay within the global carbon budget associated with 1.5°C is rooted in international law and has been repeatedly confirmed by States and the EU – the same actors that do not do what is necessary and feasible. The international law obligations to do one's part rest on EU Member States, as parties to human rights and climate treaties, and as international actors. To the EU, these international law obligations apply as signatory of the climate treaties, an international actor, and an integration organization through which Member States

6. ICJ, AO, section on highest possible ambition, paras 242–249, at 246.

7. ICJ, AO, 246 (emphasis added).

8. See <www.ipcc.ch>, see in particular, WG III, *Mitigation of Climate Change* <www.ipcc.ch/working-group/wg3/> and <climate-advisory-board.europa.eu>.

9. See 'Scientific Advice for the Determination of an EU-Wide 2040 Climate Target and a Greenhouse Gas Budget for 2030–2050' (European Scientific Advisory Board on Climate Change, 15 June 2023) <climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-the-determination-of-an-eu-wide-2040>.

act and discharge their obligations. In addition, the EU and its Member States are committed under EU law to both international law and specifically the ECHR. This begs the question of where litigants can turn to seek clarity on whether the EU and its Member States are doing their share, and how they can demand justification if this is not the case.

3. Judicial truth-finding

Unverified climate-related claims compete for attention with credible research in an environment of information overflow and distortion in our one-liner online communication culture. Under these conditions, litigation that establishes what constitutes a State's part in mitigating the climate crisis reveals the capacity of the judicial process to expose factual truths, demand justification, and, ultimately, inject some fairness and justice into the democratic process.

The ICJ and the ECtHR characterized the climate crisis as 'an existential problem of planetary proportions that imperils all forms of life' and 'in the longer term, … [as posing] existential risks for humankind', respectively.[10] Neither left any doubt that it falls within the very core of human rights protection.[11]

International human rights law recognizes a right of victims to receive a judicial verification of the facts of the violation and the role of those responsible.[12] This right is related to the State obligation to conduct an effective investigation into certain serious rights violations, including of the right to life. The judicial fact-finding may take place in any proceedings – civil, administrative, or criminal – that are capable of reaching factual conclusions and determining the lawfulness of the acts of those responsible. While it remains contested whether the right to the truth extends to society as a whole, the significance of judicial truth-finding for political processes is widely acknowledged. A defining difference to the political process and public debate is that in the judicial process what is established as truth is confined either to claims agreed upon by the parties (in civil law) or claims substantiated by evidence deemed technically (in accordance with the law) sufficient by judges. This procedurally limits the influence of unsubstantiated claims.

10. ICJ, AO, para 456; ECtHR, *KlimaSeniorinnen*, para 421.
11. ICJ, AO, paras 389 and 393; ECtHR, *KlimaSeniorinnen*, paras 410–413.
12. Marloes van Noorloos, 'A Critical Reflection on the Right to the Truth about Gross Human Rights Violations' (2021) 21(4) HRL Rev 874, doi: 10.1093/hrlr/ngab018.

A salient European example of injecting transparency and truth into the political exchange is the ECtHR's 2024 ruling in *KlimaSeniorinnen.*[13] Switzerland claimed that it had an ambitious climate policy in conformity with its international obligations and the LTTL. The ECtHR asked Switzerland to justify the national emissions budget that it implicitly allocated to itself through its climate policies, in light of the global 1.5°C carbon budget. However, the judicial process revealed that the national emission reduction target was entirely divorced from the LTTL. The Court further asked Switzerland how the budget it allocated itself fit into the fairness principles under the UNFCCC and the Paris Agreement. Yet, after weighing the evidence the Court concluded that 'Switzerland allowed for more GHG emissions than even an "equal per capita emissions" quantification approach would entitle it to use', that is, without applying any fairness considerations.[14] Needless to say, these fairness principles demand more of historically and currently high-polluting and highly capable States like Switzerland.

In an information environment that allows political representatives to seek influence by evading confrontation with their own misaligned claims, the roles that the law, judges, lawyers, and legal scholars may have in exposing contradictions and contributing to truth-finding has become more vital than ever.

4. Demanding justification

The judiciary's truth-finding function chimes well with the scholarship on *the right to justification.* In Rainer Forst's constructivist theory of justice, human rights and (discursive) democracy are rooted in the right to justification. He defines this right as the 'right never to be treated in a manner for which he or she cannot (on demand) be given adequate reasons'.[15] This right follows from the assumption that 'law's claim to legitimate authority is plausible only if the law is demonstratively justifiable to those burdened by it in terms that free and equals can accept'.[16] Similarly, Mattias Kumm argues that judicial review 'is as basic an institutional commitment underlying liberal-democratic

13. Christina Eckes, '"It's the Democracy, Stupid!" in Defence of *KlimaSeniorinnen*' (2024) 25 ERA Forum 451, doi: 10.1007/s12027-025-00828-w.

14. *KlimaSeniorinnen*, para 569, read also in light of party submissions summarized in para 303.

15. Rainer Forst, *Das Recht auf Rechtfertigung* (Suhrkamp 2007); Rainer Forst, 'The Rule of Reasons. The Theory of Deliberative Democracy as an Alternative to Liberalism and Communitarianism' (2001) 14(4) Ratio Juris 345, doi: 10.1111/1467-9337.00186.

16. Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review' (2010) 4(2) Law & Ethics of Human Rights 142, doi: 10.2202/1938-2545.1047.

constitutionalism as an equal right to vote' because it gives citizens a 'right to contest acts of public authorities that impose burdens on the individual', which in turn 'expresses the commitment that legitimate authority over any individual is limited by what can be justified in terms of public reason'.[17] He concludes that 'courts compel public authorities into a process of reasoned engagement', which 'put[s] [them] on the spot and draw[s] [them] into a process they might otherwise have resisted'.[18]

This conceptualization of the judicial process as a forum for demanding justification connects exceptionally well with the reality of general emission reduction cases. States are drawn into a process of reason-giving that they resist as it confronts them with the misalignment of what they do with what they claim they do. This process also uncovers misrepresentations of the adequacy and ambition of their climate targets and policies. It finally exposes the contradictions between claims made in their internal and external relationships of justification.

In the democratic process, relationships of justification are structured ways in which institutions and individuals explain their actions or decisions to others, creating a reasoned framework of accountability and legitimacy. I distinguish between internal justification relations within a polity, for example among domestic public institutions and between these institutions and their citizens, and external justification relations between domestic public institutions and third-country institutions or citizens. All these relations are governed, or at least informed, by domestic and international law, including human rights law.

Legislatures usually justify laws by appealing to democratic legitimacy and policy goals, sometimes international law or human rights. Their primary addressees are citizens, arguably mostly those that are eligible to vote (internal). Governments may refer to election promises or international commitments. They address their citizens (internal) and, in international relations, representatives of third countries (external). Courts are legally bound to justify their decisions by reference to law, including constitutional principles and human rights. They provide justifications towards the parties and, more indirectly, towards society at large and other public institutions (internal). International law and human rights bring fairness considerations into the courtroom that go beyond internal relations of justification within the domestic democratic process. In a democracy, these justificatory relationships allow actors, including in conditions of disagreement or conflict, to make legitimacy claims which give them some power to restrain each other. This is the ideal of separation of powers.

17. Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 European Journal of Legal Studies 28 at 29–30.

18. Kumm (n 16) 154.

Reason-giving practices in climate litigation create a web of justification relationships. Actors explain their decisions to one another and, ultimately, to the public. The judicial process is distinctive: it admits only legally relevant claims and it relies on the judge to establish coherence between these claims and the applicable norms through recognized methods of legal interpretation.

This makes climate litigation uniquely well-placed to expose the incoherences or even conflicts between recognized scientific facts and a State's legal and political commitments, on the one hand, and its actions, on the other. States are regularly unable to substantiate the factual claims about the adequacy of their climate actions in court. In turn, however, these inconvenient truths lead politicians and governments to challenge the judiciary's powers or legitimacy.

The EU and its Member States are committed to the rule of law and the process of justifying public acts in courts (both domestic and international). The EU and many Member States are committed to *strong* judicial review that allows courts to examine the constitutionality of public acts, sometimes including legislative acts. This conception of separation of powers is based on the understanding that the judiciary has a place in and makes a distinct contribution to the justification relationships underpinning the democratic process.

If rights and democracy are rooted in the right to justification, justification is necessarily procedural and substantive. As the law is only legitimate if it can be justified to those bearing its burden, substantive criteria can only be validated discursively in procedures that themselves meet the requirements of the principle of justification.[19] These procedures must allow for rational discourses characterized by inclusion, equality, and sincerity in such a way that only the compelling force of the better argument counts.[20] Within the institutional setting of modern European democracies committed to the rule of law, the judicial process forms part of these procedures that together allow for a rational discourse and may thus develop substantive norms that have the capacity to be generalized.

5. Fault lines

Inevitable and necessary tensions arise between the universal aspirations of human right norms and the justification processes within our bounded democratic states of law.[21] These tensions are neither new nor limited to

19. Forst, *Das Recht auf Rechtfertigung* (n 15).
20. Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996) 103, 305–306.
21. On universal moral and membership duties see Seyla Benhabib, *Rights of Others* (CUP 2004) eg at 15.

the climate crisis. They surface as part of the discursive practices within all State institutions, where legitimacy claims are made with a bounded group of addressees of justification in mind. However, the temporal, solidaristic, and spatial dimensions of the climate crisis deepen the fault lines.

The temporal dimension is that, under the current technological and scientific developments, our present emissions inflict irreparable and grave human rights violations on others in the future. The solidaristic dimension is that many of those most affected have very limited actual power in the democratic process – children cannot vote and the socio-economically disadvantaged struggle to mobilize beyond the formal right to vote. The spatial dimension is that those currently most affected live in other parts of the world. All three come with deep distributive implications that seemingly pitch those currently living against future generations, rich against poor, and local against international interests.

Hence, a State's part in mitigating the climate crisis comes down to what we owe to children and future generations (temporal), children and the socio-economically disadvantaged (solidaristic), and those living in locations that bear the brunt of climate impacts (spatial dimension). In the democratic process, however, these questions are not asked because the predominant relationships of justification do not extend to children, future generations and foreigners, and often give little weight to those most affected as the addresses of justification.

In addition, the current political climate of polarization and populism is characterized by competition rather than deliberation. This competition feeds the temptation to exploit seemingly contradictory interests, crises situations, and incoherent representations for othering. Othering also extends to judges and contributes to undermining their legitimacy, irrespective of whether they uphold legal norms or not.

Claims based on international law and human rights carry persuasive weight beyond the bounded democratic community. A State's part in mitigating the climate crisis is firmly linked to international justice considerations. This is what States signed up to under the UNFCCC and the Paris Agreement, interpreted in line with international environmental and customary international law. Whatever States do or fail to do in terms of climate mitigation requires external justification in that light.

Under these circumstances, distinct legitimacy claims rooted in (universal) rights and principles, on the one hand, and representation of the interests of a bounded community, on the other, entrench the fault lines between the judiciary and the elected institutions. This is exacerbated by the different relationships and addressees of justification. We can see this happening in the national, ECHR, and international context.

In addition, the EU, as compared to many States, formally gives considerable legal weight to international law and strong judicial review. However, formal principles and structures do not tell the whole story. In practice, the law – including judicial decisions and opinions – only has force to the extent that public institutions commit to it and ensure compliance.

6. What role for the EU?

Against these factual and legal developments in Europe, we cannot escape the question of the role of the EU and the Court of Justice. How should and could the EU and the Court of Justice contribute to addressing the climate crisis within the given democratic constraints?

In 2019, the EU launched the European Green Deal as a comprehensive sustainability programme bringing together a wide range of policies. It has set itself the emission reduction targets of 55% in 2030 and net zero in 2050. 90% is proposed for 2040. The EU presents these targets as 'ambitious' and in line with international obligations.[22] However, *KlimaSeniorinnen* and the ICJ's Advisory Opinion spell out obligations that the EU does not currently meet. For the EU to do its part would require it to reduce emissions more steeply. The ECHR entails a duty first to quantify a State's national fair share carbon budget in light of international equity principles and best available science and second to regulate climate mitigation accordingly.[23] Fairness considerations require funding emission reductions abroad *on top of* 90% domestic emission reductions. Instead, the EU is in the process of watering down the proposed 90% target for 2040 by allowing offsetting, that is, *compensation* for its failure to reduce domestic emissions with financing emission reductions abroad. This would make the EU's target even less fair.

Doing one's part also requires States and the EU to do everything *feasible*. The ESAB confirmed that, for the EU, 70% emission reduction in 2030 and 95% in 2040 are feasible (and fairer).[24] In other words, currently, the EU is not doing its part but instead of offering a justification it claims that it does.

22. See eg <climate.ec.europa.eu/eu-action/european-climate-law_en>.
23. Eckes (n 13); Dennis van Berkel and others, 'Quantifying a 1.5°C Fair Share Carbon Budget: Human Rights Obligations on Climate Change after *KlimaSeniorinnen*', *Amsterdam Law School Legal Studies Research Paper Series*, No 2025-11, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=5265958>.
24. See n 9.

Even more concerning is that the EU, rather than increasing its efforts in response to the international obligations spelled out by the ECtHR and the ICJ, is in the process of dismantling the Green Deal. Its recent deregulation initiative, ie the rollback of the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD) in the so-called Omnibus packages, disregards the duty to regulate as formulated by the ECtHR in *KlimaSeniorinnen.* Instead, it prioritizes 'competitiveness and unleash[ing] growth' over sustainability.[25] This deregulation is problematic not only in terms of achieving real emission reductions, but also because it preserves room for misalignment between claims and actions and misrepresentation of the latter. Hollowing out the CSRD and CSDDD allows about 80% of corporations to not disclose how they contribute to the climate transition. This protects – if not creates – the conditions that allow public and private actors to continue putting forward irreconcilable justifications to different addressees. This further feeds into political blame games and polarization.

Fundamentally, the climate crisis may confront the EU not only with justification difficulties but an identity crisis. Not only the emission reductions required from the EU and its Member States under international law (fair share and highest possible ambition) but also their current (inadequate) emission reduction targets appear incompatible with the objective of continuous economic growth. To allow for growth while drastically reducing emissions would require decoupling growth from using fossil fuels. This is currently not (yet) the case.[26] Carbon dioxide removal cannot (yet or ever) be deployed at scale to allow reconciling growth of fossil-fuel-dependent economies and lifestyles with steep emission reductions. Degrowth scenarios, however, face insurmountable political obstacles and conflict with the core ideological association of EU integration with economic expansion, rather than with genuine prosperity or well-being. This may explain why the EU struggles to leave behind the paradigm of competitiveness and economic growth. Illustrative are the competitiveness focus in the Draghi Report and the objective of increasing trade, including in high-emission goods, in currently negotiated EU trade agreements.

The EU's retreat from its previously stated ambitions under the Green Deal is closely tied to internal political shifts and pressures, themselves shaped by the broader geopolitical climate in which the EU operates. No single explanation could capture these dynamics and it is unlikely that any one intervention would

25. European Commission, 'Omnibus package' <finance.ec.europa.eu/news/omnibus-package-2025-04-01_en>.

26. Błażej Suproń, 'Environmental Pollution and Economic Growth in the European Union Countries: A Systematic Literature Review' (2025) 11(1) Economics and Business Review 7, doi: 10.18559/ebr.2025.1.1777.

remedy the EU's backtracking. Yet, we do know that thus far the Court of Justice has not reminded the other EU institutions of their human rights and international law obligations in mitigating the climate crisis. This leaves the political space to be occupied by claims and actions without making them subject to judicial scrutiny and formal reasoned engagement, including in relation to universal human rights and principles that carry persuasive weight externally.

The ICJ clarified that States (and hence also the EU) are expected to prepare NDCs that must be capable of making an adequate contribution to achieving the LTTL of 1.5°C.[27] For the EU and its Member States, any domestic emission budget that could make a reasonable claim to fairness and aligns with 1.5°C is either already exhausted or will be exhausted before 2030. The EU would need to make serious additional efforts to fund reducing emissions abroad on top of what is feasible in terms of domestic reductions, inlcuding to avoid accumulating 'carbon debt', which may arguably result in 'carbon take back obligations' and compensation claims.[28] However, if the EU fails to change course from prioritizing economic growth to prioritizing sustainability, align its next NDCs with its fair-share carbon budget, and implement the feasible emission reductions outlined by the ESAB, where can we turn to demand justification?

7. What role for the Court of Justice?

Instead of adequately reducing emissions, European and national political institutions seem to test how long they will get away with ignoring the law and not doing their part. This puts considerable pressure on the Court of Justice as the EU's domestic court that should press them for justification in an area governed by EU law.

Thus far, the Court of Justice has refrained from engaging with the question of how fair and justified the EU's own climate targets and policies are. The Court has stuck to its restrictive interpretation of individual standing requirements, making direct actions against EU climate policies all but impossible.[29]

This stands in stark contrast to what national and international courts have done. Many EU Member States have – often repeatedly – been taken to national courts over their inadequate ambitions to reduce emissions. A considerable number of these cases have been successful. Some unsuccessful cases have been escalated to the ECtHR. This trend is likely to continue after

27. ICJ, AO, para 242 and 224 (1.5°C).

28. *Carbon Take Back Obligation, an Economic Evaluation* (Jun. 2022), cedelft.eu/publications/carbon-take-back-obligation-an-economic-evaluation/.

29. Cases C-565/19 P, *Carvalho and Others v Parliament and Council*, EU:C:2021:252 and C-297/20 P, *Sabo and Others v EP and Council*, EU:C:2021:24.

KlimaSeniorinnen set out mitigation obligations under the Convention and broadened (collective) standing for associations. Thus, many national courts and the ECtHR participate in the exchanges that constitute the institutional backbone of modern European democracies. These exchanges take place across legal layers – that is, sub-national, national, and EU law – but also the ECHR and international law.

Refusing to take part in the deliberation on what we owe each other in one of the defining crises of the 21st century would be a sign that the Court of Justice is sinking into irrelevance. In climate cases, litigants ask the judiciary to contribute its distinct perspective, based on its own legitimacy claims and situated within its own net of justification relationships. Seyla Benhabib captured the dynamic processes of continuous and overlapping public justifications that co-shape rights claims by interpreting, challenging, and concretizing them in processes of 'democratic iterations'.[30]

The ECtHR acknowledged that the climate crisis requires a 'tailored approach' that allows the judiciary to play its part.[31] The Court of Justice could conclude the same and participate in the internal and idiosyncratic EU processes of democratic iterations. On the logic that universal climate impacts do not diminish but rather heighten the need for judicial review, the Court could adapt its interpretation of 'individual concern' in this specific context. Alternatively, it could address how we should understand the EU's part in mitigating the climate crisis in a potential preliminary question emerging from a dispute about national climate action asking for an interpretation of EU (secondary) law or a potential request for an opinion on an envisaged international agreement, such as the EU-Mercosur Deal.

The Court of Justice cannot leave this discussion to national courts and the ECtHR, as the specific discourse on what is the EU's part must – at least also – take place in the institutional exchanges among the different branches of government within the EU legal order. One of the EU's pressing internal challenges is that Member States are affected differently by climate impacts and have different capacities to address the crisis. This may be expected to test intra-EU solidarity. The Court of Justice conceives of itself as the *domestic* court of the EU's autonomous domestic legal order, different from international law.[32] In relation to the Member States, the Court of Justice acts as the (quasi-)federal court, ensuring the 'primacy, unity, and

30. Benhabib (n 21) 19.
31. *KlimaSeniorinnen*, para 422.
32. Christina Eckes, 'The Autonomy of the EU Legal Order' (2020) 4(1) Europe and the World: A Law Review, doi: 10.14324/111.444.ewlj.2019.19.

effectiveness' of EU law within the national legal order.[33] The Court of Justice's distinct judicial perspective as the EU's 'domestic' court is a missing piece in the deliberation on what EU Member States and States globally owe each other.

If the Court of Justice maintains its refusal to engage, EU law may evolve into a space where Member States hide from international obligations to avoid doing their part. This would constitute quite a U-turn in the EU's history as, so far, the EU has been relatively committed to its international roots and rule-based multilateralism. The Court of Justice has repeatedly ensured that national courts give effect not only to EU law but also to international law binding on the EU and its Member States.

Thus, in addition to – but not instead of – contributing to articulating what is the EU's part, the Court of Justice could and should continue to engage national courts in the processes of deliberation on the Member States' mitigation obligations. In some national climate litigation, EU law and the Court of Justice's case law on the effective implementation of the Aarhus Convention played a decisive role for admissibility.[34] This is not to encourage double standards but to emphasize the Court of Justice's other role, namely as a quasi-federal court *vis-à-vis* the Member States. In that role, the Court of Justice should ensure that Member States comply with their obligations under mixed international agreements, such as the UNFCCC and the Paris Agreement, which – because the EU is a party – form part of EU law.

Particularly at a time of strained discourse conditions characterized by misinformation and misrepresentation, the law and the judicial process, but also legal scholars, have a role in preserving and defending inclusion, equality, and sincerity to allow for reason-based processes of justification, where the compelling force of the better argument prevails. Under such conditions, one may wonder to what extent economic or geopolitical considerations may stand as intersubjective reasons for failing to adequately address a threat of an existential nature.

Judges have become bearers of inconvenient climate truths. States have greater difficulties ignoring them than ignoring scientists and activists. All courts, and the Court of Justice in particular, depend on the support of the other institutions. The effectiveness of EU law and compliance with the Court of Justice's rulings are continuously negotiated in

33. Case C-399/11, *Melloni*, EU:C:2013:107; Christina Eckes, *EU Powers under External Pressure* (OUP 2019) 1–14.
34. Higher Administrative Court (OVG) Berlin-Brandenburg, *DHU v Germany (Building Sector)*, 30 November 2023, 22–26.

institutional exchanges. This also means that the Court of Justice – at least structurally – can only go as far as the numerous other institutions that follow it. Yet, it seems that many national courts, as well as the ECtHR and the ICJ are ready to engage. The Court of Justice should bear in mind that authority may be eroded not only by action, but also by inaction.