UNIVERSITY OF CAMBRIDGE

Cambridge Pro Bono Project

THE UPTAKE OF EUROPEAN COURT OF HUMAN RIGHTS CASE LAW CONCERNING CLIMATE PROTESTS IN THE JUSTICE SYSTEMS OF THE UNITED KINGDOM, GERMANY, AND FRANCE

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ABOUT THE CPP

This research report addresses certain legal issues relating to the obligations of the Member States of the European Convention of Human Rights to adhere to the Convention's rights protecting freedom of peaceful assembly and freedom of expression in handling climate protests. It specifically discusses case studies of the jurisdictions of the United Kingdom, France & Germany.

This report has been authored by members of the Cambridge Pro Bono Project (CPP), an initiative run out of the Faculty of Law at the University of Cambridge. The CPP is established to provide independent academic research on legal issues of public importance by drawing on the expertise of the researchers who study and work at the Faculty.

The report was provided exclusively on a pro bono basis to Extinction Rebellion so that it may inform their work in this area. The preparation and completion of this report was student-led and researched, without the input of legal counsel. It is not supplied on the basis of a client-practitioner relationship, or on some other client-advisor relationship. This document, and the CPP's communications with Extinction Rebellion, are not given as legal advice. The CPP remains an independent academic team and reserves the right to collaborate with other groups or persons working in this area, and to supply its research findings to those persons or groups. Neither this report nor its contents shall be construed as constituting legal advice or the provision of legal services for any person. No reliance may be placed by any person on this report, and the issuers of this report exclude all liability (to the extent lawfully permissible) for any losses suffered by any person in connection with any purported reliance.

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EXECUTIVE SUMMARY

CLIMATE CHANGE AND CLIMATE PROTEST

It is no longer possible to ignore climate change. Seemingly each day there are cases of severe flooding, rampant fires, extreme heat waves, and catastrophic storms that result in tragic loss of human life in all parts of the world. This loss of life and destruction of cities, towns, human homes, and infrastructure occurs alongside rising sea levels, melting polar ice, and declining animal populations and other biodiversity on our planet. Climate change is impacting humanity right now—and will only worsen for future generations unless the global community can drastically reduce its carbon emissions. Many governments have agreed to meet reduction targets, as set out in the 2015 Paris Agreement, which require ambitious social and economic transformation.[1] Convincing governments and those in power to meet those targets and to take the steps necessary to combat the devastating impacts of climate change is another matter.

In the legal realm, individuals, and organisations are bringing climate change litigation actions against states, including lawsuits challenging insufficient climate targets[2] or based on human rights.[3] Outside of lawsuits, many climate activists have sought to bring forth social and political awareness by campaigning to encourage government action to combat climate change. These climate activists are active throughout the global community. Some prominent examples include Extinction Rebellion, FridaysforFuture, Just Stop Oil, the Sunrise Movement, Lützerath Lebt, Last Generation, among others. Many receive donations from foundations; for example, the Climate Emergency Fund funds climate protest groups, which is funded by non-profit organisations founded by

[1] See United Nations Climate Change, 'The Paris Agreement' <https://unfccc.int/process-and-meetings/the-paris-agreement> accessed 6 March 2024.
[2] The Federal Constitutional Court ruled in 2021 that the provisions in Germany's Federal Climate Change Act of 12 December 2019 (Bundesklimaschutzgesetz – KSG) were not compatible with the Fundamental Rights of the Basic Law (the German constitution). See César Rodríguez-Garavito, 'The Global Rise of Human Rights-Based Litigation for Climate Action' in César Rodríguez-Garavito (eds), *Litigating the Climate Emergency* (Cambridge University Press, 2023) 9.
[3] ibid 9-14.

oil fortune-families trying to reduce the harm that oil has caused.[4] In Europe, as in many other places around the world, many of these organisations are grassroots and decentralised, meaning that members can articulate various campaign activities as part of the global movement. There are accordingly many different examples of individual forms of expression and group protest. A key theme of such protests is the use of symbolism. To illustrate, French protestors removed the President's portrait from town halls to symbolise his absence in the global fight against climate change; XR protestors dressed as clowns and handed out 'wanted' posters looking for (lost) earth; many protestors have glued themselves to famous paintings to symbolise the loss of culture if the earth is destroyed by climate change. However, while some of these expressive and protest activities elicit public awareness and change, oftentimes they are met with backlash from governments, legislatures, the police, corporations, private property owners, and members of the public. Some governments, like the current UK Government, have sought to pass repressive legislation granting the police with immense powers,[5] with similarly debated legislation being introduced in other jurisdictions. Climate activists and organisations are also met with state refusals to permit peaceful protests, protestors are arrested and prosecuted for their peaceful expressive and protest activities, or are otherwise subjected to prohibitive and chilling injunctions.[6]

This research project arose out of Extinction Rebellion's recent engagement in Zurich, described below, where the group was denied permission by the authorities to engage in an announced planned, peaceful protest. When members went ahead with the protest, they were arrested, detained, and prosecuted because of their protesting.[7]

As protestors in Europe face arrest, imprisonment, and criminal convictions, there is a need for protestors and advocates to know their rights enshrined in the European

[4] See, for example, Cara Buckley, 'These Groups Want Disruptive Climate Protests. Oil Heirs Are Funding Them.' (The New York Times, 10 Aug 2022) <https://www.nytimes.com/2022/08/10/climate/climate-protesters-paid-activists.html> accessed 6 March 2024.
[5] See part 5 on the United Kingdom, below.
[6] See, for example, Factual Background section, below.
[7] See Factual Background section, below.

Convention of Human Rights (ECHR), and for domestic courts to appropriately consider and apply ECHR rights, especially Article 10 (protecting the right to freedom of expression) and Article 11 (protecting the right to peaceful assembly), and the cases and jurisprudence concerning these rights as decided by the European Court of Human Rights (the ECtHR or the Court). This project's main aim is to explain the ECHR rights applicable to climate protest activities and to review whether and how three Member States to the ECHR—the United Kingdom, France, and Germany—are applying ECHR rights and jurisprudence to cases of climate protestors.

LIMITATIONS OF THIS REPORT

The aims of this report are both ambitious and modest. Firstly, they are ambitious because there is a relative lack of scholarly work and legal research concerning the application of ECHR rights to climate protests. In that sense, this report seeks to shed light on this area of law and to move the conversation forward in the hopes that this report will be a starting point or catalyst for others to continue to develop this work with the aim of ensuring climate protestors are assured of their ECHR rights before domestic courts. However, this report is also modest because it is one of the first pieces of research to examine this area and there are significant limitations on what it can accomplish. These limitations include that climate protests are typically grassroots and decentralised, have various differing fact scenarios (from organised sit-ins, like 'Rebellion against Extinction', to individuals taking action such as gluing themselves to roads or artwork), there are sometimes substantially different laws in each ECHR jurisdiction concerning protest, many protestors are self-represented and therefore may not have presented the best legal defence to their case, and there is a lack of publicly available judicial decisions in some jurisdictions. Accordingly, the intention of this report is not to provide a comprehensive and detailed review of every relevant case, which would be well beyond the scope of the project. Rather, this report seeks to start the conversation about the relevant ECHR rights to climate protest and to provide an overview of the body of law that can be used by climate protestors facing legal action and their advocates, by the judiciary and courts to ensure that they apply

the correct law, and by scholars to build on this body of work. Despite these limitations, this report is valuable because it highlights the key elements of ECHR law concerning protest and reviews how courts in three jurisdictions are currently applying ECHR rights.

This report has relied on certain facts, particularly those set out in the Factual Background section, as reported to the Cambridge Pro Bono Project by Extinction Rebellion. This Report has not independently corroborated those facts.

KEY FINDINGS

The ECHR and ECtHR

The ECHR is an international treaty binding on all Member States. It forms part of the domestic law of the UK, Germany, and France via the relevant constitutional arrangements in each jurisdiction[8] and should therefore be taken into consideration by domestic courts when adjudicating on any case involving climate protest. Once an applicant has exhausted the domestic court process, they can bring an application to the ECtHR alleging a violation.[9] The main function of the ECtHR is to make decisions on applications alleging that a Member State has violated the ECHR. The ECtHR's case law sets out the various obligations that Member States must refrain from violating and to positively protect those rights.

Member States must abide by final judgments of the ECtHR in cases to which they are parties.[10] They also must put an end to any breach and to make reparations (usually in the form of damages) to the claimant.[11] Over the years, the ECtHR has devised the

[8] For example, the ECHR was implemented in the UK via the Human Rights Act 1998, whereas in Germany international law typically has the status of domestic law with ascension and in France on ratification and publication in the Official Journal: see Vladimíra Pejchalová Grünwaldová, 'General and Particular Approaches to Implementation of the European Convention on Human Rights' (2018) 55 Canadian Yearbook of International Law 248 - 292 <https://www.cambridge.org/core/journals/canadian-yearbook-of-international-law-annuaire-canadien-de-droit-international/article/general-and-particular-approaches-to-implementation-of-the-european-convention-on-human-rights/6E4848AD5878BCA4B48537C73F1ABF4F> accessed 6 March 2024.
[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 35 (hereinafter ECHR).
[10] ibid art 46.
[11] ibid art 41.

'Pilot-Judgment Procedure'[12] to find solutions for identical or similar cases brought to the Court that deal with similar claims stemming from similar underlying problems. This mechanism aims to tackle many cases dealing with the same root cause by following a set pattern. First, the Court determines whether there is violation of the Convention, then identifies the root cause of the problem under domestic law, followed by giving indications to the State to remove or otherwise ameliorate those root causes, and lastly, it enumerates domestic remedies to deal with similar cases, including the ones pending before the Court. This procedure has received mixed reception, having also garnered criticism for its potential to threaten the delivery of individual justice.[13] In certain instances, while hearing individual cases, the Court may also take liberty under Article 46 to make recommendations to States to take long-term measures by changing domestic policies. [14] The Court often fixes pecuniary and non-pecuniary damages and costs and will often list specific measures for Member States to help them fulfil their obligations. While judgments are not strictly binding on non-party Member States to the dispute, if a similar problem exists in another Member State, they likely have obligations to remedy it. It is important to note that when the ECtHR assesses whether there was a violation of a Convention right, it grants the State a 'margin of appreciation' which may be narrow or wide (depending on the type of case and according to the Court's assessment), possibly allowing the State some discretion in how it fulfils ECHR obligations. The principle of subsidiarity also influences the level of scrutiny employed by the ECtHR when assessing claims of violations. While this report does not make conclusive findings regarding the applicability of the margin of appreciation concerning climate protest cases, typically a court will apply a narrower margin when a State criminally convicts a protestor or where significant freedom of expression considerations are also involved, but may apply a wider margin when there are violent protests, for example. A further important consideration for whether the

[12] European Court of Human Rights, 'Pilot Judgment Procedure' https://www.echr.coe.int/documents/d/echr/pilot_judgment_procedure_eng accessed 11 March 2024.
[13] Dembour, ' "Finishing Off" Cases: The Radical Solution to the Problem of the Expanding ECtHR Caseload' (2002) 5 European Human Rights Law Review
[14] European Court of Human Rights, 'Q&A – When the ECHR asks a State to take action under Article 46' https://www.echr.coe.int/documents/d/echr/Press_Q_A_Art_46_ENG#:~:text=The%20Court%20asks%20States%20to,violations%20of%20human%20rights%20there accessed 11 March 2024

margin is broad or narrow comes down to whether an impartial, independent domestic court has made a decision in the case on the basis of the ECHR and principles from ECtHR doctrine.

Freedom of Peaceful Assembly and Freedom of Expression

The most relevant ECHR rights to climate protest are Articles 10 and 11, neither of which are absolute (assemblies organised for the purposes of violence or individuals engaging in violence for example, may not be entitled to assert protection).[15] Moreover, a Member State is entitled to infringe on peaceful assembly rights if they can demonstrate that the infringement was (a) prescribed by law, (b) necessary, and (c) proportionate. This test reflects the general approach to assessing infringement of qualified rights in the ECHR.

ARTICLE 10 Freedom of expression

1.Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[15] *Kudrevičius and Others v Lithuania* [GC] App. No. 37553/05 (ECtHR, 15 October 2015) para 91; *Taranenko v Russia* App No 19554/05 (ECtHR, 15 May 2014) para 65.

ARTICLE 11 Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Although Articles 10 and 11 are both relevant to climate protests, German and UK courts typically assess protest activities under Article 11 (peaceful assembly); however, Article 10 (freedom of expression) should still underly and inform the court's analysis (and it appears to be important in French court decisions). In all cases, claimants will likely want to assert and argue both rights (even if any eventual decision focuses on Article 11).

Article 11 should not be interpreted restrictively—there is no criteria defining, restricting, or limiting the meaning of 'assembly', which is an autonomous concept in the ECHR and is not defined through domestic law.[16] Moreover, while Article 11 is limited to 'peaceful' assemblies, the meaning of 'peaceful' is also an autonomous concept in the ECHR and not defined or restricted by domestic law and is generally subject to a generous interpretation[17]. In contrast, the meaning of 'violent' assemblies is narrowly construed according to: whether the organisers had violent intentions; whether the individual applicant had violent intentions; and whether the individual

[16] *Navalnyy v Russia [GC]* App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 15 November 2018) para 98; Obote v Russia App No 58954/09 (ECHR, 19 November 2019) para 35.

[17] *Taranenko v Russia* App. No. 19554/05 (ECHR, 15 May 2014) para 65; *Navalnyy v Russia* [GC] App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECHR, 15 November 2018) para 98.

applicant committed bodily harm against another.[18] Therefore, if some protestors were violent, that does not mean the protest itself is not a 'peaceful assembly' or that other individuals were not engaged in 'peaceful assembly'. In the context of environmental protests, the ECtHR grants a wide interpretation to the meaning of 'peaceful assembly'.[19] This bodes well for instances of climate protests—Member States should therefore not unduly restrict, define, or limit protests on the basis that they are not 'peaceful' even if the protests are disruptive to social life. For Member States to limit climate protests, there must most likely be evidence that the organisers had violent intentions, or that specific protestors were engaged in violence.

A Member State may place restrictions on the right before a peaceful assembly takes place (e.g., refusing to grant authorisation for a protest to occur) or after the peaceful assembly has taken place (e.g., by way of fines, tactics for dispersal, criminal convictions, etc.) but the Member State must justify its restriction:

- If a Member States refused authorisation or restricts assembly before it occurs, it must justify such action by: (a) providing reasons as to why the demonstration was not authorised in the first place, considering (b) the public interest at stake, and (c) the risks represented by the demonstration.[20]

- Crucially, a State may take measures during an on-going protest (e.g., kettling to maintain public safety).[21] In these instances, and in restricting assembly rights more generally, a State is limited to imposing restrictions where: (a) the

[18] *Alekseyev v Russia* Apps. Nos. 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010) para 80; *Shmorgunov and Others v Ukraine* Apps. Nos. 15367/14, 16280/14, 18118/14, 20546/14, 24405/14, 31174/14, 33767/14, 36299/14, 36845/14, 42180/14, 42271/14, 54315/14, 19954/15 and 9078/14 (ECtHR, 21 April 2021) para 491.Violations of domestic laws, threats to public order and disruptions as such do not render an assembly violent, see Kudrevicius and others v Lithuania [GC] App no. 37553/05 (ECtHR, 15 October 2015) para 93 <https://hudoc.echr.coe.int/eng?i=001-158200>; M.C v Germany App no 13079/87 (ECtHR, 6 March 1989). Organisers and participants must not have violent intentions, see Navalnyy v Russia *[GC]* App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 15 November 2018) para 98; Obote v Russia App No 58954/09 (ECHR, 19 November 2019) para 98. Physical violence towards individuals and serious property damage typically suffice, see *Alekseyev v Russia* Apps. Nos. 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010) para 80; *Sergey Kuznetsov v Russia* App. No. 10877/04 (ECtHR, 24 October 2008) para 45. as does incitement to violence and rejection of the foundations of a democratic society, see Kudrevicius and others v Lithuania [91]. Mere possibility of violent counter-protests OR extremists joining the protest is not decisive, see Christian Democratic People's Party v Moldova App no 25196/04 (ECtHR, 2 February 2010) para 32.]

[19] ibid.

[20] *Kudrevicius and others v Lithuania* [GC] App no. 37553/05 (ECtHR, 15 October 2015) <https://hudoc.echr.coe.int/eng?i=001-158200> para 151.

[21] *Primov and Others v. Russia* App. No. 17391/06 (ECtHR, 12 June 2014) para 119.

restriction is 'prescribed by law' (there must be a legal provision that permits the restriction);[22] (b) the aims are 'legitimate' (which typically are for national security or public safety and must be interpreted narrowly);[23] and (c) the interference with the right to peaceful assembly is 'necessary' (the ECtHR has devised a test where the Member State must demonstrate a 'pressing social need' to justify any infringement and that the measures taken against the applicant must be proportionate to one of the legitimate aims listed in Article 11(2).[24] A 'pressing social need' making the restriction 'necessary' cannot be merely speculative, e.g., detaining activists before they participate in a protest without sufficient evidence; rather, the State must provide evidence proving the level of disruption it asserts justifies its subsequent infringements, and its actions must be 'proportionate', e.g., criminal convictions for cases causing minimal disruption is likely not proportionate).

Characterising the State's aims and the protestors' aims are key. The ECtHR may consider whether the State's infringing actions were designed to punish or silence the protestors for their views or whether the State was pursuing a legitimate aim—and will also likely consider whether the State could have used alternative means to achieve the 'pressing social need' other than in restricting it. The ECtHR may also consider the aims of the protest (e.g., whether the primary aim was to protest climate change, or whether the aim was to unlawfully destroy property). Correspondingly, sometimes in domestic jurisdictions, a court may focus on characterising the protest as one aiming to disrupt traffic, for example, rather than characterising it as a protest aimed at bringing public attention to the global plight of climate change, and enumerate a list of alternative means the protestors could have taken to achieve their intended aim.

Ultimately, ECtHR case law makes clear that Member States must show a 'degree of tolerance' to protest activities, including disruptive protests and 'unlawful but

[22] *Éva Molnár v. Hungary* App. No. 10346/05 (ECtHR, 7 October 2008) para 34.
[23] E.g., Taking measures for the purpose of 'maintaining the orderly circulation of traffic' is a permissible restriction of the right to peaceful assembly in the context of the protection of the rights and freedoms of others. (ibid para 34).
[24] *Nemtsov v Russia* App. No. 1774/11 (ECtHR, 31 July 2014) para 75.

peaceful' assemblies. ECtHR case law also makes clear that Member States have positive obligations to secure peaceful assembly rights for its citizens, for example, by protecting demonstrators and taking measures to ensure the smooth conduct of protest events.

Summary

Scope of Article 11

- ➔ Article 11 is a fundamental right that is a foundation of democracy.
- ➔ Article 11 is not interpreted restrictively.
  - 'Assembly': There are no criteria defining, restricting, or limiting the meaning of 'assembly'.
  - 'Peaceful': Article 11 is limited to 'peaceful' assemblies.
  - 'Violence' is narrowly construed according to: whether the organisers had violent intentions; whether the individual applicant had violent intentions; and whether the individual applicant committed bodily harm against another. If some protestors were violent that does not mean the protest itself is not a 'peaceful assembly' or that other individuals were not engaged in 'peaceful assembly'.
- ➔ The ECtHR has granted a wide interpretation of 'peaceful assembly' in the context of environmental protests:
  - 'violent' protest is narrowly construed (e.g., if some individuals are violent, that should not be attributable to the whole group);
  - A non-violent but disruptive protest falls within the ambit of Article 10.
- ➔ Article 11 should be read in light of Article 10 protections for freedom of expression.

Justifying an Infringement of Article 11

- ➔ A State may place restrictions on the right before a peaceful assembly (e.g., refusing to grant authorisation) or after the peaceful assembly (e.g., by way of fines, tactics for dispersal, criminal convictions, etc.).

Factors in restricting a peaceful assembly before it occurs

➔ State must justify its decision not to grant authorisation for an assembly: (a) why the demonstration was not authorised in the first place; (b) the public interest at stake; (c) the risks represented by the demonstration.

Factors in justifying a restriction of peaceful assembly rights

➔ A State may 'restrict' Article 11 only if:

- The restriction is 'prescribed by law' (there must be a legal provision that permits the restriction);
- The aims are 'legitimate' (as listed in Article 11(2)) which typically are for national security or public safety and must be interpreted narrowly);
- To determine whether the interference with the right to peaceful assembly is 'necessary', the Court has devised the test of 'pressing social need', according to which the measures.

Factors in the 'necessary' analysis

➔ A 'pressing social need' making the restriction 'necessary' cannot be merely speculative (e.g., detaining activists before they participate in a protest without sufficient evidence).

➔ Any State action must be justified as proportionate and necessary (e.g., police dispersing a crowd with pepper spray after they were protesting for ½ hour with little traffic disruption was not proportionate).

➔ State must provide evidence proving the level of disruption it asserts to justify its subsequent infringements (e.g., that all traffic was blocked, length of time it was blocked, etc.)

➔ State action must be 'proportionate' (e.g., criminal convictions for cases causing minimal disruption is likely not proportionate).

Characterising the States' aims

- ➔ Purpose of infringement: The ECtHR may consider whether the State's infringing actions were made to punish or silence the protestors for their views or whether the State was pursuing a legitimate aim.
- ➔ Alternative means: The ECtHR will also likely consider whether the state could have taken an alternative means to achieve the 'pressing social need' other than in restricting it.

Characterising the Protestors' aims

- ➔ Purpose of the Protest: The ECtHR will consider the aims of the protest (e.g., whether the aim was to protest claim change, or whether the aim was to unlawfully destroy property).
- ➔ any 'alternative means' protestors could have used to express their cause and advocate policy changes. This is highly fact dependent.

Member State Responsibilities & Margin of Appreciation

- ➔ States have positive obligations to allow and enable the exercise of peaceful assembly.
- ➔ States must show a 'degree of tolerance' to disruptive protests and "unlawful but peaceful' assemblies.
- ➔ States must justify any infringement of peaceful assembly (as set out above).
- ➔ If a State criminally convicts a protestor, the ECtHR will apply strict scrutiny requiring the State to strictly justify its actions.
- ➔ The ECtHR may employ a narrow margin of appreciation where the State interference with a combined Article 10 and Article 11 application; however, the ECtHR also grants a wider margin where there are violent protests.

THE APPLICATION OF ECHR RIGHTS IN THE UK, GERMANY, AND FRANCE

With that background on the ECHR and the ECtHR's case law interpreting those rights, the following provides a snapshot of how the courts in the domestic jurisdictions of the UK, France, and Germany have applied the ECHR rights of freedom of peaceful assembly and freedom of expression in cases of climate protest. There are both common threads and differences in how domestic law limits and restricts protest activities and how courts apply ECHR rights.

In the United Kingdom, Articles 10 and 11 of the ECHR are incorporated into law through the Human Rights Act 1998. UK courts must 'take into account' ECHR case law and typically courts refer (directly or cursorily) to ECHR rights in decisions.[25] It is also unlawful for a 'public authority' (including a UK court) to act in a way which is incompatible with those rights.[26]

In France 'freedom of expression' and 'freedom to demonstrate' are core constitutional rights enshrined in the Declaration of the Rights of Man and of the Citizen. In particular, 'freedom to demonstrate' is subject only to a prior declaration under art. 211-2 of the Code of Internal Security. While the ECHR is applicable, French courts tend to analyse protest cases with reference to domestic Constitutional law (and often use 'freedom of expression' rights language).[27] The Constitution ranks higher in French law than a treaty, including the ECHR, and so it is generally legally unnecessary for French courts to extensively focus on Art. 11 ECHR because there is a national constitutional right. (It would, however, be necessary to raise ECHR rights when the argument of the claimant

[25] UK Human Rights Act 1998, s 2.
[26] ibid s 6.
[27] E.g., Cour de cassation, Chambre sociale, 12 July 2018, 17-13.029 (ECLI:FR:CCASS:2018:CR03068) and Cour de cassation, Chambre criminelle, 18 November 2018, 18-85.161 (ECLI:FR:CCASS:2018:CR03070). In these cases, relating to applications against judicial supervision measures, both Articles 10 and 11 of the ECHR were invoked by the latter but they have seem to have focused their pleas on freedom of opinion, and the Court only assessed whether or not the measures interfered with freedom of opinion. For more fulsome analysis, see France section 'Domestic Consideration of Climate Protest Cases'.

is that there is a distinctive interpretation of the right in the ECHR which would lead to a different interpretation from that normally given to domestic law). The only decision, among those analysed, in which a strong and eventually successful argument was made by protestors on the ground of Article 11 of the ECHR, was in a case where activists and associations made an application to obtain the suspension of an order banning demonstrations aimed at challenging the Climate and Resilience bill during its examination by the National Assembly.[28] However, French courts rarely analyse ECHR rights in-depth (in the few instances that activists have invoked them) so there is not a well-developed body of legal analysis examining whether the state had 'legitimate objectives' or whether its actions were 'proportionate'. French courts have, however, given great weight to 'political expression' including acts of protest causing some non-violent damage to property.[29]

Like France, German courts consistently interpret fundamental rights in light of the German constitution, which protects the right to 'freedom of assembly' and the right to 'freedom of expression'.[30] The Constitutional Court of Germany has consistently interpreted the constitution's fundamental rights in the light of the ECHR but often does not refer directly to the ECHR and does not require a complete harmonisation of German and ECHR law.[31] The ECHR or ECtHR case law may be referred to where it is unclear whether the constitutional standard complies with the requirements of the ECHR and ECtHR case law may be invoked as 'persuasive authority' to inform the interpretation of the fundamental rights of the German constitution.[32] ECHR rights may also be referenced next to substantially identical national law to increase the persuasiveness of the legal claim.[33]

[28] Administrative court of Paris, 13 April 2021, no 2107627.
[29] E.g., Cour de cassation, Chambre criminelle, 26 February 2020, 19-81.827 (ECLI:FR:CCASS:2020:CR00035) which involved a feminist activist, appeared topless at the Grévin Museum with the inscription 'Kill Putin' on her chest, stabbed a Putin's wax-statue several times with a partially red-painted stake.
[30] The Germany Constitution outlines two main rights applicable to climate protest: the fundamental freedom of assembly (Art. 8 Grundgesetz [GG]) and freedom of expression (Art. 5 GG) in the Basic Law.
[31] Bundesverfassungsgericht (BVerfGE) 148, 296 (351 f.); 74, 358 (370); 83, 119 (128).
[32] For a case in which the Federal Constitutional Court of Germany invoked ECtHR-decisions to inform its interpretation of the constitution see BVerfGE 148, 196 (308 ff.).
[33] In Bayerische Verwaltungsgerichtishof (BayVGH) 10 B 14.2246 22 September 2015, para 57, for example, the ECHR was referred ton next to the (substantially identical) provision of the Assembly Act of Bavaria.

In all jurisdictions the right to assembly is broad but is not an absolute right. An interference with peaceful assembly rights is authorised only if the restriction (a) has a legal basis, (b) pursues a legitimate objective, and (c) is proportionate to the pursuit of that legitimate objective, but there are nuances to how the test is applied in each jurisdiction (for example, Germany generally uses a four-part test with respect to fundamental rights and analyses (a) legitimate aim, (b) suitability, (c) necessity, and (d) appropriateness (sometimes referred to as proportional in a narrow sense)).

Accordingly, the UK, Germany, and France all have similar protections for freedom of peaceful assembly and freedom of expression mirroring the ECHR provisions.

Each jurisdiction has a body of laws that limit protests. In the UK, there are various Public Order Act offences for breach of the peace (or similar offences) as well as outright bans on protesting in politically significant areas.[34] There are also limits on public processions and assemblies and laws allowing police to impose restrictions on protest. The UK Government recently passed the Public Order Act 2023 which broadened police powers and further limited protest.[35] France has similar laws restricting protest,[36] including trespass, with particular laws prohibiting face concealment.[37] In Germany, laws restricting protest are a mixture of federal and state laws, creating a complex and non-uniform system of 'Assembly Acts' outlining various notification requirements and prohibitions on protesting on federal highways as well as criminal laws and general police laws.[38]

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[34] See, for example, in England & Wales, offences in the Public Order Act 1986; the Police, Crime, Sentencing and Courts Act 2022 (PCSC); and a common law offence of 'breach of the peace' limit protest rights. In Scotland, s 38 of the Criminal Justice and Licensing (Scotland) Act 2010 similarly sets out an offence for 'breach of the peace'. In Northern Ireland the Public Order (Northern Ireland) Order 1987 governs protest rights. For a more fulsome description, see UK Section, 'Main Laws that Impact Climate Protests' below. [Pages 78 to 83].

[35] There are also now a raft of further offences relating to civil disobedience tactics typically employed by protestors in the climate space, see e.g., Public Order Act 2023, s 1 – s 2 (locking on), tunnelling (s 3 – s 5), disruption of major transport works (s 6) and key national infrastructure (s 7 - s 8), stop and search powers (s 11) and an offence of obstructing stop and search (s 14).

[36] Demonstrations are regulated by the Internal Security Code (CSI) and is based on a declaration system (CSI, L.211-1).

[37] For example, see Conseil d'Etat, 5 / 3 SSR, 12 November 1997, 169295; Conseil d'Etat, 25 June 2003, 223444; Conseil d'Etat, 10 / 7 SSR, 12 October 1983, 41410.

[37] Conseil d'État, Juge des référés, 26 July 2014, 383091; Cour de cassation, Chambre criminelle, 8 June 2022, 21-82.451. Arts 4 and 7 of the 10 April 2019 law 2019-290 aimed at strengthening and guaranteeing the maintenance of public order during demonstrations. A more fulsome discussion is located in the section on France's 'Main Laws that Impact Climate Protests' [pages 100 to 111 below].

[38] The 'law of assembly' limits protests according to either state or federal law. Seven states have passed state assembly laws (See BayVersG, VersFG BE, NVersG, VersG NRW, Sächsisches Versammlungsgesetz, VersammG LSA, VersG SH) while the other nine states are governed by the Federal Assembly Act ('Bundesversammlungsgesetz' [BVersG])

The depth of consideration of ECHR rights varies considerably between cases in each jurisdiction. UK courts often consider ECHR rights but gives greater consideration in criminal and sentencing decisions, and less consideration in civil cases (notably, UK courts often find that the rights of enjoyment of private property of landowners' warrants issuing an injunction prohibiting protest).[39] In France, applicants rarely raise ECHR rights, and these rights are consequently not often analysed in depth by French courts. But where ECHR rights have been raised by applicants or analysed by courts, there have been more positive outcomes for protestors.[40] In Germany, cases are typically analysed based on Germany's constitutional laws protecting freedom of peaceful assembly and expression rather than conducting an independent assessment of ECHR law.[41] There is therefore wide discrepancy in the overt application of the ECHR between and within jurisdictions. What is clear is that climate protestors often *do not adequately assert their constitutional rights* in each jurisdiction to peaceful assembly and expression or refer to their ECHR rights. When these rights are directly asserted, more positive outcomes for protestors have been noted in some cases.

In regards to the purposes of climate change protest, some German, French, and UK judges have recognised the importance of advocating about climate change and to take into account the importance and sincerity of the protestors' views when making decisions; but on other hand, and problematically, some UK judges are prohibiting climate protestors from speaking to the jury about their purposes of engaging in protesting activities (though some sympathetic juries are nonetheless choosing to acquit).[42] Framing or characterising the protest is key: some prosecutors and courts will equate the effects of a protest (e.g. disrupting traffic) with the purpose of the protest (e.g., raising awareness of climate change inaction).

(Art 125a (1) GGGesetz über Versammlungen und Aufzüge' (BGBl. 1978 I, p. 1789), as amended by Gesetz vom 30. November 2020' (BGBl. 2020 I, p. 2600). For a more fulsome analysis, see German section, 'Main Laws that Impact Climate Protests' [pages 121 to 130 below].

[39] See UK section, Domestic Consideration of Climate Protest Cases [pages x to x, below].

[40] See France section, 'Domestic Consideration of Climate Protest Cases [pages x to x, below].

[41] See Germany section, Domestic Consideration of Climate Protest Cases [pages x to x, below].

[42] See, e.g., UK section, 'Recent Cases' [pages x to x] and Sandra Laville, 'Court restrictions on climate protesters 'deeply concerning', say leading lawyers' (The Guardian, 8 March 2023) <https://www.theguardian.com/environment/2023/mar/08/court-restrictions-on-climate-protesters-deeply-concerning-say-leading-lawyers> accessed 18 March 2023.

As to the results of mainly criminal judicial proceedings, in all three jurisdictions some climate protestors have been acquitted, but many protestors have also been convicted (usually receiving relatively small fines or suspended sentences.[43] In some cases, however, protestors have been sentenced to jail, ranging from days to months). Many acquittals have arisen because of defects in certain proceedings (e.g. defects in a charge), because the state did not adequately justify its infringement, or simply because the jury chose to acquit. In all jurisdictions, the defence of 'necessity' (the argument that protestors have a legal excuse of the acts constituting the offence because climate change poses an imminent and inevitable threat to life and property and their actions were a proportionate response) has generally been unsuccessful.[44] However, raising this argument has garnered judicial sympathy in some cases.[45]

This report also briefly assesses chilling effects in each jurisdiction, which are understood broadly in this Report as the discouragement of protest activities with the threat of legal sanction.[46] This report finds that there is evidence of chilling effects in each jurisdiction as a result of domestic law, and application of that law by police, prosecutors, and courts, limiting protest. These range from efforts by the UK Government to criminalise protesting on motorways and imposing stiffer penalties on protestors, to courts in all jurisdictions issuing injunctions preventing protestors from protesting on private property and then convicting them (sometimes with jail sentences) for breaching those injunctions. These fines and sentences can also dissuade from other would-be climate supporters from engaging in protest activity for fear of sanction.

[43] See UK, France, German sections under heading 'Fines and Penalties' located, respectively, at pages 94 - 95, pages 113 - 115, and page 132 below.
[44] Each of the UK, France, and Germany sections assesses the defence of necessity.
[45] See, e.g., UK section 'Recent Cases' [pages x to x].
[46] Each of the UK, France, and Germany sections assesses 'chilling effects'.

SUMMARY: THE UNITED KINGDOM

Legal Framework

- ➔ The ECHR rights to freedom of peaceful assembly and freedom of expression are incorporated into domestic British law in the Human Rights Act 1998. Any interference with those rights must (a) be prescribed by law; (b) necessary, and (c) proportionate.

Laws that Limit Protest

- ➔ Public order offences, harassment and stalking offences, trespass, public nuisance, obstructing a highway. Specific laws impose conditions and allow police to impose conditions on public processions and assemblies. Specific provisions prevent disruptive activities at Parliament Square and the Palace of Westminster.

Domestic Consideration of Cases

- ➔ Courts consider Articles 10 and 11 of the ECHR, but the depth of consideration varies considerably. Applicants should ensure that they bring submissions regarding these rights and argue each element of the test that the State must prove to justify its infringement of those rights (e.g., necessity, proportionality).
- ➔ Courts typically consider ECHR rights in greater depth in sentencing decisions and appeals of sentencing decisions as opposed to civil disputes (e.g., injunctions brought by landowners).
- ➔ Courts generally have not found for protestors where their actions have breached a court order (contempt of court or failing to adhere to an injunction). Applicants may wish to consider appealing any negative court order rather than risk being held in contempt of court by breaching a court's order.
- ➔ UK courts consistently grant significant protection to landowners and private property owners when such land/property is occupied by protestors.

- ➔ How a right is framed is key: Applicants should ensure that they are framing their right as the right to protest (e.g., against climate destruction, etc.) and not as a right to camp or occupy a certain area (even if the protesting activities have the ancillary effect of occupying land, for example) which the Member State must show a high 'degree of tolerance' towards.
- ➔ In a positive development, a recent UK case (*DPP v Ziegler)* held that courts should consider whether the views of the protestors relate to 'very important issues' and whether the protestors believed in the views they were expressing and further reminded the court that a 'degree of tolerance' is expected towards protest activities.

Defences

- ➔ Defences that have been successful include: (a) arguing that the sentence is disproportionate and (b) providing compelling accounts to juries concerning the urgency of climate change motivating the protest activities.
- ➔ Judges have ruled that the defence of 'necessity' cannot be presented to the jury; however, in some cases the juries have acquitted anyways.

Penalties

- ➔ Fines and prison sentences have been levied against protestors.

Chilling Effects

- ➔ The current UK Government is seeking to pass laws to further restrict claim protestors and enact harsher sentences and grant the police greater powers.
- ➔ Many courts will issue injunctions to prevent protestors from conducting protests on public and private property.

SUMMARY: GERMANY

Legal Framework

- ➔ The ECHR is part of German law. German courts are not obliged to give precedence to the ECHR over German statutory law but in practice courts typically do.
- ➔ Germany is a federal state and state law differs regarding protest laws, but state law must also comply with the ECHR.
- ➔ Freedom of assembly and freedom of expression are central tenants of German constitutional law. Most cases are resolved with reference to German constitutional law rather than the ECHR.
- ➔ Freedom of assembly protects peaceful protests (without weapons) and it can be infringed only if (a) based on a formal statutory law, and (b) it is proportionate and necessary. German courts impose a high proportionality requirement.
- ➔ Courts typically analye protest cases under freedom of assembly rather than expression.

Laws that Limit Protest

- ➔ Law of Assembly at federal and state level regulate assemblies and have notification requirements and outline a state's ability to impose restrictions or dissolve the assembly. Certain laws restrict assemblies on highways (which is currently being challenged) and wearing uniform-like clothing. Some provisions also permit body searches and permit identity controls.
- ➔ General laws may restrict protest (e.g., Bavaria allows preventative custody) and criminal laws also impose certain restrictions on assemblies (e.g., notification requirements, duty to refrain from assembly after dissolution, etc.).
- ➔ Criminal provisions typically include trespass, coercion, and resistance to enforcement officials. Coercion is typically used where protests impede traffic or members of the public, such as by street blockades.

- ➔ Factors the court looks at in determining a conviction for coercion include (the 'reprehensibility test': the duration and intensity of the protest, prior notice, alternative routes for affected persons, the importance of the blocked transport, the substantive connection between the persons whose freedom of movement is restricted and the subject of the protest; and the communicative goal of the protest.
- ➔ One court decision found that protesting against CO2 emissions by demonstrating the science behind the global CO2 budget through a street blockade (thereby demonstrating how a failure to reduce CO2 will result in serious restrictions on freedom of movement) was not reprehensible. It is therefore likely important to link and climate protest action to the impact that a failure to tackle climate change will have.

Defences

- ➔ Courts are open to finding no reprehensibility where the protest action is sufficiently linked to the effect of a failure to tackle climate change.
- ➔ The defence of necessity is available but has received little success.
- ➔ Defendants typically get more favourable outcomes if the permits of climate change are discussed as part of the defence.

Penalties

- ➔ Those convicted typically are sentenced to fines (circa 200-600 euros) although a few have been given prison sentences (they stated that they refused to cease blockading activities).

Chilling Effects

- ➔ Preventive custody in Bavaria, prohibiting uniform-like clothing; uncertainty around the reprehensibility test; and potentially hard penalties for climate protest activities given the urgency and severity of climate change.

SUMMARY: FRANCE

Legal Framework

- ➔ The ECHR applies in France, including Articles 10 and 11. 'Freedom of expression' and 'Freedom to demonstrate' are key tenants of French constitutional law. 'Freedom to demonstrate' is not absolute but is contingent on a declaration system (protestors typically must seek approval to hold an assembly) and may be subject to sanction if that process is not complied with. 'Freedom of expression' holds particular legal and cultural significance in France and is enshrined in the Declaration of the Rights of Man and Citizen.

Laws that Limit Protest

- ➔ Participating in unauthorized/undeclared protests may be punishable.
- ➔ Specific criminal offences for participating in a mob and concealing one's face in a mob.
- ➔ Offences typically involve trespass, theft, or receiving stolen goods. Group action (as opposed to individuals acts) may lead to further offences (i.e., 'condemnation proceedings').
- ➔ Some civil actions brought for denigration (e.g., of a trademark or defamation type claims).

Domestic Consideration of Cases

- ➔ In France, the ECHR (and Articles 10 and 11) are typically not directly raised or argued and Court's therefore do not consistently consider ECHR rights. When it is raised Article 10 is typically solely relied on while Article 11 is rarely raised.
- ➔ The Court applies French Constitutional law to analyse (1) whether the acts were non-violent protest or expressive activity (e.g., stealing a portrait of a president may be an expressive act), and (2) whether any State interference was justified: (a) if it had a legal basis, (b) pursued a legitimate objective, and (c) was proportionate in pursuit of that objective.
- ➔ Often the Court's analysis of the proportionality element is cursory.

- ➔ Courts have been persuaded with the expressive elements of protest activities (e.g., wearing a shirt with the group's logo/advocacy information on it to raise public awareness; that they act without personal or financial gain; distribute leaflets or other public information).
- ➔ In cases where climate protestors have been successful, the Court has engaged in a more rigorous ECHR analysis indicating a correlation between asserting ECHR rights and a better chance of a successful outcome.

Defences

- ➔ Defences have been successful where there have been irregularities or defects in summons/orders/police custody. Courts have found disproportionate police decision and criminal sentences. Courts have found certain laws/actions constitute unlawful surveillance of climate protestors.
- ➔ Defence of 'necessity' has been argued but has not been successful. In some cases, protestors did not raise any defence other than 'necessity' whereas they may benefit by asserting other defence and ECHR rights.

Penalties

- ➔ Many cases against climate protestors result in conviction but typically involve fines.

Chilling Effects

- ➔ Often the convicted protestor is prohibited from engaging in similar acts or else will be subject to the suspended fine, which can lead to protestors choosing not to participate in even lawful and peaceful protests out of fear they will be subject to a penalty.
- ➔ There have been cases of preventative house arrests (either because a protestor was engaged in a prior violent protest or, problematically, based on security service intelligence collected on suspected environmental protestors).
- ➔ Police detaining protestors on route to a protest (which has been documented by Amnesty International).

ORGANISATION OF THIS REPORT

This report proceeds as follows. It first examines the impetus for this report stemming from the mass arrests of 'Rebellion against Extinction' protestors in Zurich and further background regarding the activities of climate activists in Europe. Second, it provides an overview of the ECtHR, its jurisdiction, and relevant procedural matters including how individuals can make applications alleging that a Member State has violated a Convention right. Third, it provides an overview of (a) the substantial ECHR law concerning protest and expression as well as the limitations to those rights, and (b) the substantial ECHR law applicable to climate protests specifically. Next, it provides a case study for each jurisdiction—the United Kingdom, France, and Germany—providing the following: (a) the legal framework examining how the ECHR jurisprudence operates within each jurisdiction; (b) the main laws that prohibit certain acts of protest and assembly; (c) how domestic adjudicators consider ECHR rights of protest and assembly when deciding cases; (d) the success of certain defences; (e) the results and penalties or fines that domestic legal systems have imposed on protestors found guilty of offences; (f) observations regarding the chilling effects of the operation of domestic systems in handling cases of climate protests. Each section of this report contains a summary box highlighting key information.

This report is largely descriptive because it does not aim to address a single fact pattern, which for the reasons discussed above, can significantly differ in the context of climate protests. As such, this report may be best used as a general guide to identify the relevant law, to help advocates and scholars identify the best or most relevant arguments for different fact situations that may arise, and as a starting point for further research concerning these issues.

1. FACTUAL BACKGROUND

REBELLION AGAINST EXTINCTION

The impetus for this case study stems from the 'Rebellion against extinction' event organised by Extinction Rebellion (XR) Switzerland which took place from the 4th – 8th of October 2021 in Zurich. According to XR, the following events took place.[47] First, the protest reportedly occurred following an unanswered letter to the Swiss Federal Council asking for a stronger climate response.[48] Then, prior notification of the protests was given to the police and authorisation was requested but rejected.[49] Consequently, the protests nevertheless took place. The core protest actions included sit-ins on and blockages of main traffic roads in the city centre of Zurich from 4th – 8th of October.[50] Sit-ins were supposed to be accompanied by 'visibility activities, briefings, moments of emotional support and stands in different places of the city'.[51] Sit-ins were planned to start at around noon; preparatory briefings from around 10 am were planned for each protest day at Platzspitz park.[52]

According to XR, the protest lasted for five days as follows. On Sunday 3rd of October, an opening ceremony was held with concerts and speeches from scientists and protesters.[53] After that, 250 people lay down (in a 'die-in') in the central hall of Zurich's main station.[54] On Monday 4th of October, about 200 people from across all parts of society (including children) sat on the motor traffic intersection of Uraniastraße with Bahnhofstraße, to 'open a space for exchange and discussion in the heart of the city'.[55]

[47] Thomas Guibentief, 'Appendix - «The Rebellion against Extinction» (Zurich 10/22) - short report' (letter to the Cambridge Pro Bono Project, 1 August 2022); Extinction Rebellion Switzerland, '3…2…1' (Extinction Rebellion, 1 October 2021) <https://www.xrebellion.ch/en/news/20211001-newsletter/>accessed 12 December 2023.
[48] Ibid.
[49] ibid.
[50] Extinction (n 47).
[51] ibid.
[52] ibid.
[53] Extinction Rebellion Switzerland, 'IT'S ON' (Extinction Rebellion, 3 October 2021) <https://www.xrebellion.ch/en/news/20211003-newsletter-day1> accessed 12 December 2023.
[54] ibid.
[55] Thomas (n 47).

Behaviour on the occupied streets remained peaceful and addressed the climate crisis; one large placard of street-width was held saying 'Es tut uns Leid' (We're sorry).[56] On Tuesday 5th of October, two sites were blocked by protestors - Rudolf Brun Bridge and again the intersection Bahnhofstraße/Uraniastraße.[57] Demonstrations on the bridge were peaceful, a guitar was played, and two people glued their hands together.[58] On Bahnhofstraße, a bamboo structure was erected on which demonstrators sat and handed out flyers.[59] It took the police several hours to take the structure down.[60] Meanwhile 'clowns' were dispersing 'wanted'-posters across town, looking for the (lost) earth.[61] On Wednesday 6th of October, a police force of about one hundred officials prevented protestors from getting to Bahnhofstraße/Uraniastraße by, among other measures, conducting extensive ID checks at the pre-protest meeting point Platzspitz.[62] As a consequence of this police action, a protest was improvised in the main hall of Zurich train station, which, among other things, comprised of a large banner with the words 'ACT NOW' being laid out and music being played.[63] The police ordered the dispersal of the gathering, allowing protesters to leave one by one and issued, for every single protester, a 24 hour ban from the city of Zurich.[64] Protesters not willing to leave the site were detained.[65] On Wednesday 7th of October, several people went back to Uraniastraße/Bahnhofstraße and sat down on a zebra crossing wearing a placard stating 'Arrested, because I'm worried'.[66] On Thursday 8th of October, the last day of XR's protest, people displaying visible affiliation with XR were met with immediate police reprisals and were prevented from coordinated protest action.[67] Protestors

[56] Extinction Rebellion Switzerland, 'REBEL DAILY 2: CITIZENS ARE GETTING ARRESTED BECAUSE THE FEDERAL COUNCIL DOESN'T DO SHIT!' (Extinction Rebellion, 5 October 2021) <https://www.xrebellion.ch/en/news/20211004-newsletter-day2/> accessed 12 December 2023.
[57] Extinction Rebellion Switzerland, 'REBEL DAILY 3: TWO SITES BLOCKED, AN IMPOSSIBLE TOWER, AND THE CLOWNS COME BACK' (Extinction Rebellion, 5 October 2021) <https://www.xrebellion.ch/en/news/20211005-newsletter-day3> accessed 12 December 2023.
[58] ibid.
[59] ibid.
[60] ibid.
[61] ibid.
[62] Thomas (n 47); Extinction Rebellion Switzerland, 'REBEL DAILY 4: TWICE AS MANY AS YESTERDAY!' (Extinction Rebellion, 7 October 2021) <https://www.xrebellion.ch/en/news/20211006-newsletter-day4/> accessed 12 December 2023.
[63] ibid.
[64] ibid.
[65] ibid.
[66] Extinction Rebellion Switzerland, 'REBEL DAILY 5: "ARRESTED BECAUSE I CARE"'(Extinction Rebellion, 8 October 2021) <https://www.xrebellion.ch/en/news/20211008-newsletter-day5> accessed 12 December 2023.
[67] Extinction Rebellion Switzerland, 'REBEL DAILY 6: REPRESSION... DOESN'T WORK ON A NON-VIOLENT CIVIL DISOBEDIENCE MOVEMENT' (Extinction Rebellion, 9 October 2021) <https://www.xrebellion.ch/en/news/20211008-newsletter-day6> accessed 12 December 2023.

nevertheless attempted to sit down with banners on pedestrian crossings and die-ins were performed on Rathausbrücke.[68]

Over the five days of the protest, according to XR, the police were involved in and took the following actions (in chronological order):

1. Confiscated a flag from a person upon their arrival at the station on 3rd of October 2021;[69]
2. Redirected traffic because of the occupied roads;[70]
3. On Monday 4th of October, detained approx. 130 people because they did not disperse within half an hour after being demanded to do so. Thirty people were detained for about 48 hours, some without prosecutorial hearing;[71]
4. On Tuesday 5th of October, protestors were given 5 minutes to disperse from sit-ins. More than 12 people were arrested, 10 of them spending two nights in detention;[72]
5. On Wednesday 6th of October, ID checks were conducted by the police at Platzspitz (see above).[73] At 14:26 on that day, the police broadcasted the following message on the public information channel (via Telegram): 'All persons associated with XR (e.g. wearing XR logos) will be checked in the city of Zurich and expelled.[74] Action material will be confiscated. In the event of further checks/violations, the person will be arrested.'[75]
6. In the hours and days after the above broadcast was made, dozens of people were served 'level 3 expulsion orders' under § 34 sentence 2 PolG Kanton Zürich ('PolG').[76] The legal context: § 33 PolG authorises the police to order a person to leave or to prevent them from returning to a specific site for up to 24 hours (level 1). If a person defies a § 33-order, the police is authorised by § 34 sentence

[68] ibid.
[69] Thomas (n 47).
[70] Extinction (n 53).
[71] Thomas (n 47).
[72] ibid.
[73] ibid.
[74] ibid.
[75] ibid.
[76] Polizeigesetz 550.1 (Kanton Zürich, 23 April 2007)

1 PolG to detain them at the police station and to issue a written prohibition order for that person to not return to the specified location (level 2). In exceptional cases, when a specific person repeatedly defies a § 33-order, the police is authorised by § 34 sentence 2 PolG to make a prohibitive order - as described in § 34 sentence 1 - for up to 14 days (level 3). XR reported that dozens of XR protestors were subjected to such level 3 expulsion orders covering the whole city territory until 16th of October 2021.[77] According to XR records, one person received a level 3 expulsion order simply because they were recognised by an official as having participated in the rally on Monday.[78]

7. On Thursday 7th of October, the four people sitting on the road and wearing the placard 'Arrested, because I'm worried' were immediately arrested and taken into custody for 48 hours.[79]
8. On Friday 8th of October, anyone attempting a sit-in was arrested immediately. Dozens of people conducting a 'die-in' in the pedestrian zone towards the Rathausbrücke were 'controlled'.[80]

The conditions whilst being in police detention reportedly varied. Two cases of police violence were made subject to a complaint.[81] XR reported 'nearly 20 strip searches and nearly 20 DNA-readings'.[82] Several of those arrested on Monday 4th of October reported of cramped and insufficiently ventilated conditions in custody, which is of particular concern in light of the COVID pandemic.[83]

As of July 2022, more than 120 people have been charged with coercion ('Nötigung') under Art. 181 of the Swiss Penal Code,[84] which, in case of a conviction, may lead to a criminal record. Many sought judicial review of the penal orders that had been issued, yet, the ensuing court proceedings led mainly to convictions.[85] XR expressed concern

[77] Thomas (n 47).
[78] ibid.
[79] ibid; Extinction (n 66).
[80] Thomas (n 47).
[81] Thomas (n 47).
[82] ibid.
[83] ibid.
[84] Swiss Criminal Code 311.0 (21 December 1937) accessed 16 April 2023.
[85] Thomas (n 47)

that criminal proceedings were 'systematically separated despite repeated joinder requests, thereby preventing accused from joint defences, representations, and effectively isolating individuals in the penal system.[86]

The issued penal orders are nearly identical in each case (with evidence that the orders were merely copy-pasted given that names of other accused appear in the address-field).[87] An example indictment reads:[88]

> The accused person was part of this illegal action since she also sat on the street which paralysed traffic. Through the accused person's conduct, she rallied behind the goals of the organisation «Extinction Rebellion», which intended to paralyse Zurich, therefore putting her own will above those of the population. With that, she forced numerous road users to unwillingly take a detour or to remain stuck in traffic and lose time. Those affected had to adapt their original plans to this situation, which the accused person intended or at least blatantly accepted.

Judgments in these cases were (on August 1st 2022) ongoing to be received, but had so far resulted mainly in convictions.[89] The convictions held defendants to be complicit ('Mittäterschaft') to the offence of coercion, the subjective elements and unlawfulness of which are discussed further below. Freedom of assembly (Article 11 ECHR) is addressed by the courts in these convictions as follows:[90]

> The demonstrators' primary aim was to obstruct motorised traffic by creating an insurmountable obstacle through the gathering of people and the sit-in blockade, thus preventing motorised traffic from using the otherwise busy Uraniastrasse. The purpose of the meeting, namely to draw attention to the climate crisis and to warn of the climate catastrophe and its consequences, is thus relegated to

[86] ibid.
[87] ibid.
[88] ibid.
[89] ibid.
[90] ibid.

> the background. Moreover, the blockade of the Uraniastrasse in Zurich for several hours on a Monday afternoon clearly exceeds the degree of political influence and expression of opinion that can be tolerated in the context of a political dispute. Thus, the blockade is no longer within the factual scope of protection of the right to freedom of assembly.

Accordingly, many courts have not accepted the argument that the disruption was legitimate because it was necessary to achieve the stated purpose of the protest. XR claims there have been some acquittals, but which have resulted mainly from a lack of evidence.[91]

CLIMATE GRASSROOTS ORGANISATIONS ACROSS EUROPE

The 'Rebellion against Extinction' protest is one example of many climate protests and protest groups. Climate grassroots organisations across Europe take different forms. Some of these organisations, including XR, frequently include disruptive elements in their protests. Protestors in such organisations face the risk of administrative and criminal convictions and the accompanying significant personal costs (monetary and otherwise). For example, activists in the movement 'Take down Macron' in France have stolen or attempted to steal portraits of the French President, Emmanuel Macron, to call attention to France's failure to meet its climate targets.[92] In Germany, the Movement 'Lützerath Lebt', actively supported by XR,[93] sought to impede the (legally sanctioned) destruction of the village Lützerath, where hundred million tons of coal

[91] ibid. See *Jevgeniy Bluwstein, Clémence Demay and Lucie Benoit,* 'Ist Klimaprotest ein Menschenrecht?' (Translation: Is climate protest a human right?) (17 May 2023): <https://www.humanrights.ch/de/ipf/menschenrechte/klima/dossier-klima-menschenrechte/brennpunkte-klima/klimaprotest-menschenrecht> and *Jevgeniy Bluwstein, Clémence Demay and Lucie Benoit,* 'Civil disobedience and climate trials in Switzerland' Swiss National Science Foundation (17 May 2023) < https://www.humanrights.ch/cms/upload/pdf/2023/230517_Ziviler_Ungehorsam_und_Klimaprozesse_in_der_Schweiz_EN.pdf>.

[92] Le Monde & AFP, 'Décrocher un portrait d'Emmanuel Macron pour dénoncer l'inaction climatique peut relever de la liberté d'expression, selon la Cour de cassation' (Le Monde, 22 September 2021) <https://www.lemonde.fr/societe/article/2021/09/22/decrocheurs-de-portraits-d-emmanuel-macron-la-cour-de-cassation-casse-un-arret-de-la-cour-d-appel-de-bordeaux_6095654_3224.html> accessed 16 April 2023.

[93] Extinction Rebellion Germany, "We go beyond the fight against fossil fuels. In a system where profits and not the needs of humans are counting, there can't be any social justice." (Twitter, 4 Jan 2023) <https://twitter.com/ExtinctionR_DE/status/1610736295495467027> accessed 16 April 2023.

were planned to be extracted and burned.[94] The 'Last Generation' (*Letzte Generation*) in Germany organises non-violent protests to draw attention to insufficient state climate action and dangerous tipping points in the earth's system.[95] 'Just Stop Oil' combines protest methods comparable to the *Letze Generation* with a specific policy demand: the immediate suspension of all approved licensing for the exploration and development of fossil fuels in the UK.[96]

A fundamental feature of these movements is their broad societal appeal, and their backing by diverse segments from public life, including doctors, academics, and scientists.[97] Anyone can join these organisations. What unites these movements is an emotional appeal for a more just and equitable society alongside a call for immediate action. Arguments and justifications of drastic action are often tied with appeals to constitutionally protected rights, especially the right to life.[98]

The appeal to constitutional rights is shared by both activist organisations and other movements such as 'Klimaseniorinnen',[99] which, through comprehensive legal action, seeks to enforce *existing* rights. The case of Klimaseniorinnen and others, where the movement's respective national government is being sued for insufficient climate action, is currently pending before the grand chamber of the ECtHR.[100] As such, legal climate action and protests addressing ongoing violations of fundamental rights are complementary parts of a global and societal movement towards climate protection and justice.

[94] Lützerath Lebt, "What is Lützerath Lebt" (Lützerath Lebt Homepage) <https://luetzerathlebt.info/en/what-is-luetzerath-lebt/> accessed 16 April 2023.
[95] Letzte Generation, "Letzte Generation vor den Kippunkten – Der Plan für Sommer 2023" <https://letztegeneration.de/plan-2023/> accessed 16 April 2023.
[96] Just Stop Oil, "FAQs" <https://juststopoil.org/faqs/> accessed 16 April 2023.
[97] Health for Extinction Rebellion, "Welcome" <https://www.doctorsforxr.com/> accessed 16 April 2023.; Mike Scialom, 'Scientists for XR Cambridge forms on the spot at climate emergency event' (Cambridge Independent, 21 September 2022) <https://www.cambridgeindependent.co.uk/news/scientists-for-xr-cambridge-forms-on-the-spot-at-climate-eme-9275059/> accessed 16 April 2023.
[98] e.g. under Art. 2 of the ECHR or Art. 2 (2) sentence 1 of the German Basic Law.
[99] KlimaSeniorinnen Schweiz, "Climate Action" <https://en.klimaseniorinnen.ch/> accessed 16 April 2023.
[100] Verein KlimaSeniorinnen Schweiz and Others v Switzerland App No. 53600/20 (ECtHR, April 2022).

Many climate activists have been arrested across Europe and across the world for various alleged offences. There is a wide spectrum of protest activities that have occurred—ranging from peaceful demonstrations to other protest acts—and domestic justice systems adjudicate these very disparate claims. For countries where the ECHR is applicable, adjudication of these cases lies within the ambit of ECHR convention rights—especially Article 10 and Article 11 protecting the rights of expression and peaceful assembly an association.

2. OVERVIEW OF THE ECtHR

The following chapter provides a brief overview explaining (1) what the ECtHR is and what the ECHR protects vis-à-vis protests; (2) the ECtHR approach to interpreting the ECHR; (3) how the ECtHR judgments are binding on states parties to disputes before the ECtHR and its jurisprudence binding on Member States in general; and (4) the procedure for filing an application with the ECtHR and the admissibility requirements for such applications.

WHAT IS THE EUROPEAN COURT OF HUMAN RIGHTS

The ECtHR is an international court located in Strasbourg, France. It was established and operates under the auspices of the Council of Europe (CoE). The Member States of the CoE undertake to secure the fundamental civil and political rights enshrined in the ECHR to everyone within their jurisdiction.[101] The ECtHR's primary responsibility is to make decisions on cases brought before it that allege violations of the rights set out in the ECHR. Both States and individuals can make applications to the ECtHR. Its judgments are legally binding on State parties and its case law is applicable to domestic legal systems of the Member States (discussed more fully in the section on margin of

[101] ECHR, Article 1

appreciation, below). The ECtHR thus monitors the respect of human rights of the 700 million people currently residing in the 46 Member States of the CoE.[102]

While both Member States and individuals can bring claims before the ECtHR, most claims are brought by individuals. This has resulted in an immense workload for the Court such that there are no clear indication or guidance on when the Court will examine an application other than that the Court examines applications based on the urgency of the matter, not based on the filed date).[103]

The ECtHR's Approach to Interpreting the Convention

As an international treaty, the ECHR is generally interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties which states that a treaty is to be interpreted according to the *wording* in its *context* and in the light of a treaty's o*bject and purpose*.[104] However, the Court has developed in part its own jurisprudential approach, both widening and narrowing the scope of the rights protected.[105] ECHR jurisprudence has developed to emphasise that the object and purpose has been identified in general terms as 'the protection of individual human rights' and the maintenance and promotion of 'the ideals and values of a democratic society'.[106] It seeks to guarantee rights that are 'practical and effective' and not merely 'theoretical

[102] Council of Europe, 'The Court in brief' (European Court of Human Rights, Council of Europe) <https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> accessed 14 April 2023. Until 2022, the CoE had 47 members. The Russian Federation, who joined the CoE on 28 February 1988, was expulsed from the CoE on 16 March 2022 and ceased to be a contracting party of the ECHR on 16 September 2022. At the end of 2022, there were still 16750 cases against Russia pending before the ECtHR.

[103] European Court of Human Rights, 'The Court's Priority Policy' (ECtHR, 22 May 2017) <https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf> accessed 14 April 2023. During the 'Interlaken Reform Process', initiated in 2010, it became obvious that the practical aim of decreasing the Court's workload to maintain its effectiveness was fueled by an internal and public debate over the future role of the ECtHR: Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacoby, White, and Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2021) 53.

[104] Arguably, the Vienna Convention on the Law of Treaties (VCLT) does not apply directly, see Article 4 VCLT. Further, e.g. France has never signed or ratified the VCLT. However, already in Golder v United Kingdom the Court accepted to take the VCLT into account for interpreting the ECHR as it was found to 'enunciate in essence generally accepted principles of international law'. It is also quite likely the VCLT forms customary international law.

[105] Angelika Nussberger, *The European Court of Human Rights* (Oxford University Press, 2020) 73 - 74. See in detail on the interpretation of the ECHR by the Court, and also with different emphasis Harris, O'Boyle, and Warbrick, *Law of the European Convention on Human Rights* (5th edn Oxford University Press 22 March 2023) 6-24; Rainey, McCormick and Ovey (n 102) 63-83; Nussberger (n 105) 73-108.

[106] Harris, O'Boyle, and Warbrick, *Law of the European Convention on Human Rights* (5th edn Oxford University Press 22 March 2023) 6-7 with reference to the Court's jurisprudence. See also the ECHR's preamble and *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 36 where the Court reaffirmed its earlier judgment in Wemhoff v Germany, holding that 'given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties. See also Harris, O'Boyle, and Warbrick (n 106) 7.

and illusory'.[107] Concomitantly with emphasising the underlying values of the ECHR in a practical and effective way, the ECtHR has interpreted the Convention dynamically as a 'living instrument', according to the standards currently accepted in European society, and not those prevalent at the time when the ECHR was adopted. [108] Its jurisprudence has also developed to allow rulings on situations and corresponding rights (e.g., concerning the environment) that were not initially foreseen or conceptualised by the drafters of the Convention.[109]

The Limits of the ECtHR's Case Law on Domestic Jurisdictions

There are two key doctrines that set boundaries around the ECtHR case law's impact in domestic jurisdictions: the doctrine of the margin of appreciation and the principle of subsidiarity.

First is the doctrine of the margin of appreciation. The margin of appreciation doctrine is a general tenet of the ECHR.[110] While state parties are bound by the ECtHR's decisions, the ECHR and associated jurisprudence, a Member State is allowed a certain measure of discretion when it takes action bearing on a Convention right—this is called the 'margin of appreciation'.[111] This means that the ECtHR accepts that in some cases there is not only one correct solution, but that different – even opposite – approaches can be adjudged to constitute 'no violation' of a Convention Right.[112] As a result,

[107] Nussberger (n 105) 74-76.
[108] Tyrer v the United Kingdom App no 5856/72 (ECtHR, 25 April 1978) para 31. The Court famously held that it must 'also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.
[109] European Court of Human Rights, *The European Convention on Human Rights - A living instrument* (European Court of Human Rights, 2022)' <www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf>
[110] It has been given renewed emphasis with its inclusion in the preamble to the Convention. The preamble of the ECHR now reads in recital 6: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'. During the 'Interlaken Reform Process', initiated in 2010, it became obvious that the practical aim of decreasing the Court's workload to maintain its effectiveness was fueled by an internal and public debate over the future role of the ECtHR. In response to the legitimacy issue, it was proposed to place more emphasis upon the margin of appreciation doctrine and the principle of subsidiarity. It is debatable and remains to be seen how this will influence the Court's jurisprudence and whether it will attach more emphasis to these principles. See Bernadette Rainey, Pamela McCormick and Clare Ovey (n 102) 53 Harris, O'Boyle, and Warbrick (n 106) 7.42.
[111] ibid, 88-89. *Handyside v the United Kingdom* App no 5493/72 (*EctHR, 7 December* 1976) paras 48-49.
[112] ibid.

Member States have some latitude in determining how to respect and uphold Convention rights. The Court also relies on the doctrine of margin of appreciation when assessing whether a Member State has done enough to comply with its positive obligations under the ECHR, in assessing the proportionality of a Member State's act and by possibly giving a certain degree of deference to the judgment of national authorities when they consider competing public and individual interests.[113]

When applying the margin of appreciation, the Court uses a specific methodology to determine if, in a specific case, it grants a wide or narrow margin of appreciation, or none at all. For example, in *A, B and C v Ireland*, the Court held regarding Article 8: [114]

> a number of factors must be taken into account when determining the breath of the margin of appreciation […|. Where a particularly important *facet of an individual's existence or identity* is at stake, the margin allowed to the State will normally be restricted […] Where, however, there is no *consensus within the Member States of the Council of Europe*, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises *sensitive moral or ethical issues*, the margin will be wider.

In subsequent cases the ECtHR added that it would usually accord a wide margin of appreciation where a Member State 'is required to strike a balance between competing private and public interests or Convention rights'[115] and that it 'would require strong reasons to substitute its view for that of the domestic courts' where 'the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law.'[116]

Given that, as explained below, there are not many ECtHR cases specifically ruling on climate protests, this research paper does not comment on the narrowness or breadth

[113] And the principle of subsidiarity. Harris, O'Boyle, and Warbrick (n 106) 14-17.
[114] *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) para 232 (emphasis added).
[115] *SH and Others v Austria* App no 57813/00 (ECtHR, 3 November 2011) para 94.
[116] *Von Hannover v Germany (No. 2)* App nos 40660/08 and 60641/08 (ECtHR, February 2012) para 107. See also Nussberger (n 105) 94.

of a margin of appreciation that the ECtHR would grant to Member States in restricting or penalizing climate protestors. However, it may be interesting to note that an applicant bringing a case to the ECtHR or in asserting the ECHR before a domestic court would likely want to assert that a domestic jurisdiction has a narrow margin to restrict Articles 10 or 11 given the important individual, collective, and global interests at stake in ameliorating climate destruction. Any analysis, however, would likely be highly fact dependent on the circumstances of the protest and the Member States' alleged restriction of Articles 10 or 11.

The second important doctrine is the principle of subsidiarity. The principle of subsidiarity holds that 'the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities.'[117] In *S.A.S. v France*, the Court held for the first time that the ECtHR had 'the duty to exercise a degree of restraint in its review of the Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question'.[118] As well as indicating limits to the Court's role, the subsidiarity principle imposes obligations upon states parties. In *Fabris v France*, the Court noted that where an applicant's claim relates to a Convention right, national courts 'are required to examine them with particular rigour', as 'a corollary of the principle of subsidiarity'.[119]

Accordingly, while the ECtHR adjudicates on admissible applications before it, it may be constrained by the doctrine of the margin of appreciation and the principle of subsidiarity by granting the Member State certain latitude and deference if the circumstances warrant such. At the same time, the principle of subsidiarity places an obligation on national courts to properly adjudicate alleged violations of Convention rights.

[117] *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000) para 152. According to Angelika Nussberger (Nussberger (n 105) 95.), this principle lies at the heart of the debate about the Court's legitimacy and its introduction into the preamble is meant as a sort of 'exclamation mark' reminding the Court to accept its own limits.
[118] *SAS v France* App no 43835/11 (ECtHR, 1 July 2014) para 154. See also ibid.
[119] *Fabris v France* App no 16574/08 (ECtHR, 7 February 2013) paras 72 and 75.

BINDING EFFECT OF ECtHR JUDGMENTS

Binding Effect on State Parties to a Dispute

Under Article 46(1) ECHR, Member States have undertaken to abide by the final judgments of the ECtHR in cases which they were party to. Article 46 imposes upon respondent States a 'legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.'[120] Generally, a State will be 'under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects'.[121] Respondents are 'in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach.'[122] However, under Article 41 ECHR, the Court has developed a long-standing practice to fix pecuniary and non-pecuniary damages as well as costs and expenses in cases where it finds a violation of the ECHR.[123] The Court has also become more bold in outlining measures to be taken 'with a view to helping the respondent State to fulfil its obligations under Article 46'.[124] Depending on the situation, measures may be individual or general and can be mandatory or mere recommendations.[125] By ordering general measures, the Court has taken more influence in the implementation of its judgments.[126] If the ECtHR identifies systemic problems, it may call on governments to bring their domestic legislation into line with the ECHR and outline general measures that need to be taken.[127]

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[120] *Papamichalopoulos and others v Greece (Article 50)* App no 1455/89 (ECtHR, 31 October 1995) para 34.
[121] *Verein gegen Tierfabriken (Vgt) v Switzerland (No. 2)* App no 32772/03 (ECtHR, 30 June 2009) paras 85-86.
[122] *Papamichalopoulos and others v Greece* (n 119).
[123] Cedric Marti, *Framing a Convention Community: Supranational Aspects of the European Convention on Human Rights* (Cambridge University Press 2021) 109.
[124] *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) para 195.
[125] Cf. Marti (n 123), 111; Nussberger (n 105) 166, also as to examples and the scope orders by the Court may take.
[126] General measures were introduced by the Court as part of the 'pilot judgment' procedure, developed to address 'systemic problems' in Member States arising from the non-conformity of their domestic law with the Convention: see now Rule 61 Rules of the Court ('ECtHR Rules').
[127] European Court of Human Rights, 'The Court in 50 Question' (European Court of Human Rights, 2021) <https://www.echr.coe.int/Documents/50Questions_ENG.pdf> accessed 14 April 2023.

Article 46(2) ECHR embeds the execution of judgments in the institutional context of the CoE. When the Court delivers a judgment finding a violation, it transmits the file to the Committee of Ministers,[128] which confers with the Member State concerned to decide how the judgment should be executed and how to prevent similar ECHR violations occurring in the future. This process might result in general measures, amendments to legislation, and individual measures.

Binding Effect on Non-party States to a Dispute

In principle, ECtHR decisions bind State parties to a dispute without extending such obligations to third party States. Article 46 thus incorporates the *res judicata* principle. However, while the Convention is silent on the general effects of ECtHR case law, article 1 ECHR obliges Member States to secure and observe ECHR rights domestically and not only execute judgments directly applicable to them. As stated above, the Court noted in *Fabris v France* that Member States must ensure 'the full effect of the Convention standards, as interpreted by the Court'.[129] The Court linked consistent interpretation to Article 1 ECHR by holding that a State's responsibility for a breach of the Convention may be engaged because of the manner in which a domestic court interprets domestic law.[130] Hence, despite the unequivocal wording of Article 46 ECHR, the concept that ECtHR judgments are binding on all Member States (e.g., an *erga omnes* effect) remains controversial.[131] It is in any case obvious that States cannot just ignore the conclusions to be drawn from judgments. If the same problem exists in their own legal system, the State would risk challenges under the Convention and adverse judgment by the ECtHR. Therefore, it is arguable that judgments have at least *de facto* and *erga omnes* effect. The CoE called this the principle of *res interpretata,* based on Articles 1, 19, 32 and 46 ECHR.[132] This *de facto erga omnes* effect or principle of *res interpretata* is an important factor contributing to the efficacy of the Court's

[128] The Committee is composed of government representatives of all Member States, see Statute of the Council of Europe art 14
[129] *Fabris v France* (n 119) para 75.
[130] Marti (n 123) 178.
[131] Nussberger (n 105) 173.
[132] Steering Committee for Human Rights, 'The longer-term future of the system of the European Convention on Human Rights' (Council of Europe, 11 December 2015) (<https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 14 April 2023.

jurisprudence; especially judgments on new legal problems controversially debated throughout Europe can thereby have far-reaching consequences.[133]

In addition to the binding effect of the ECHR and the ECtHR's case law under international law, the ECHR is also binding domestically because Member States incorporate the ECHR into domestic law.[134] National courts usually take the Court's interpretation into account when applying the ECHR, either implicitly or by systematic references. They thereby recognise both the *res interpretata* effect and the direct applicability of ECtHR case law. Thus, if today the Court hands down a judgment, it can be considered immediately valid and effective within the Member States.[135]

LODGING A PROCEDURE AND ADMISSIBILITY OF CASES

Formal Requirements

The procedure for lodging an individual complaint is governed by Rules 45 and 47 of the ECtHR Rules. To file an application under Article 34 ECHR, applicants are required to use the current application form available on the Court's website (47(1)1 ECtHR Rules).[136] Rules 45 and 47 ECtHR Rules further set out the requirements for the content and form of individual complaints. Cases may be sent to the Court in any official language of a Member State (34(2) ECtHR Rules). The assistance of a lawyer is not necessary at the start of the proceedings. Cases may be brought by individuals themselves or through a representative. In the case of joint appeals ('class actions' in a formal sense) involving more than ten complainants on the same facts, the authorised representative should, in addition to the appeal form and the required documents, prepare a table containing information on the person of each individual complainant through the template provided on the Court's website.[137] From the moment the complaint is served on the respondent state, the proceedings shall take place in one of

[133] Nussberger (n 105) 173-174.
[134] Marti (n 123) 182.
[135] Marti (n 123) 183-184.
[136] See <www.echr.coe.int/Pages/home.aspx?p=applicants/forms&c=> accessed 14 April 2023.
[137] See European Court of Human Rights, 'Grouped applications and multiple applicants' <www.echr.coe.int/Documents/Applicants_Table_ENG.pdf> accessed 14 April 2023.

the official languages of the Court (Article 36(2) ECHR) and the applicant must generally be represented by a lawyer domiciled in one of the Member States (Article 36(2) and (4) ECHR). There are no court costs for proceedings before the Court.

The Court's website contains extensive further information on filing a complaint and on the procedure before the Court.[138]

Admissibility

Many applications are struck out as inadmissible. The Court's website provides a checklist to determine the admissibility of individual cases under Articles 34 and 35 ECHR.[139] Article 34 ECHR governs the–so-called 'victim status'. The capacity to sue is first granted to natural persons, without restrictions based on age, residence, nationality, or any other status. However, Article 34 ECHR requires that the natural person claims to be a *victim* of a violation of a Convention right by a contracting party. The 'victim status' is given if complainants substantiate and conclusively submit that they are directly affected in one of their Convention rights by a sovereign act or omission.[140] The Court has encountered difficulties in considering cases of applicants who complained as 'potential victims' (normally where they argued that there was a threat or risk of them being directly affected by a particular measure). The Court has expressed on several occasions that it does not allow for a so-called *actio popularis* and that the Convention does not form the basis of a claim made on the mere theoretical basis that a particular law may contravene the Convention. However, by way of exception, the Court allows for complaints that are directly directed against statutory provisions and has done so in cases in which the complainant belonged to a group of persons who were legally required to change their behaviour to avoid possible criminal prosecution measures.[141] For a non-governmental organisation to be a party under

[138] See <www.echr.coe.int/Pages/home.aspx?p=applicants&c=> accessed 14 April 2023.
[139] See European Court of Human Rights, 'Application check list', <http://app.echr.coe.int/checklist/?cookieCheck=true&lang> accessed 14 April 2023.
[140] According to the Court's jurisprudence, a complaint in terms of damage or disadvantage of any kind is not required. A damage or disadvantage is only relevant in the context of Article 41 ECHR.
[141] Harris, O'Boyle, and Warbrick (n 106) 88-89.

Article 34(1) ECHR, it must assert its own rights and not only those of its members.[142] This actio popularis can be contrasted with a group of persons bringing applications against a state in pursuit of a common interest - for instance because they have been subjected to sanctions following attendance of the same protest. In this scenario, the individuals do not purport to be represented or acting collectively through an organised group, and accordingly do not make any claim to a distinct legal capacity of the group to bring applications, thus avoiding the actio popularis concerns of the Court.

Other additional admissibility criteria are governed by Article 35 ECHR. Most of the admissibility criteria are procedural in nature, such as the 'four-month' and 'exhaustion of domestic remedies' rules. Other criteria, however, such as the 'manifestly ill-founded' and the 'no significant disadvantage' rule require the Court to assess the merits of a case in the preliminary phase.[143]

Article 35(1) provides that the Court may only deal with the matter after all domestic remedies have been exhausted and within a period of four months from the date in which the final decision was taken. Exhaustion of local remedies requires, in principle, that the applicant appeals against an unfavourable decision to a Member State's highest court. Exceptions can only be made if a remedy is bound to fail, for example because of recent negative case law in factually or legally similar cases and where there is no likelihood of the national court reversing its own recent precedent.[144] As to the four month time limit, the relevant date will, according to Rule 47(6)(a) ECtHR Rules, be the date on which an application form satisfying the requirements of Rule 47 ECtHR Rules is sent to the Court. It is therefore key to ensure that any application is made within the time limit.

On a more substantial level, the admissibility criterion of 'no significant disadvantage' enshrines the principle of *de minimis non curat praetor*. In cases concerning Articles 10

[142] ibid 91.
[143] See for an overview of the admissibility criteria European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (Council of Europe/European Court of Human Rights, 2023) <www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 14 April 2023.
[144] Harris, O'Boyle, and Warbrick (n 106) 56.

and 11 ECHR, the Court will usually reject a respective objection to admissibility if it finds that an issue is subjectively important to the applicant and objectively a matter of public interest.[145] Another ground for denying admissibility based on the merits would be that the application is 'manifestly ill founded' within the meaning of Article 35(3) ECHR, which requires a preliminary examination of a complaint's substance.[146]

JUDGEMENTS CONCERNING ARTICLES 10 AND 11

Since the Court's establishment in 1959 and until 2023, the Court has delivered a total of 25,674 judgments,[147] more than one-third of which concerned three Member States: Turkey, the Russian Federation, and Italy. In 21,784 of these judgments, the Court found a violation of at least one Convention article, with about half of the judgments involving a violation of Article 6 ECHR. In comparison, only 1067 violations of Article 10 and 418 violations of Article 11 have been found in the same period. As regards to the Member States whose jurisprudence is further analyzed in this report, a total of 785 judgments found violations of the ECHR by France, with 42 of them concerning Article 10 and six concerning Article 11 ECHR. In proceedings against Germany and the UK, a total of 531 ECHR violations were found with 24 judgments concerning Article 10 and six judgments concerning Article 11 ECHR.[148] Recent cases show similar figures. In 2022, the Court delivered 1,163 judgments with 1059 finding a violation of at least one Convention article. More than half of the judgments concerned Russia, the Ukraine and Turkey. Twenty-five judgments were handed down against France, and four against the UK and Germany respectively. Only two judgments, both concerning France, found violations of Article 10. No violation of Article 11 by any of these Member States was found in 2022.[149]

[145] European Court of Human Rights, (n 142). Note that even without a significant disadvantage a case will still not be declared inadmissible where respect for human rights requires an examination on the merits.
[146] See for further details European Court of Human Rights, (n 142).
[147] Note that for much for much of the ECHR's existence, applicants had to apply to the now abolished European Commission of Human Rights which would decide whether to hear the case. The Commission was abolished in 1998, the ECtHR was enlarged, and individuals could apply directly to the Court.
[148] European Court of Human Rights, 'Violations by Article and by State 1959-2022' <https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf> accessed 14 April 2023.
[149] ibid.

3. ECHR CASE LAW ON ARTICLE 11

THE ECTHR'S APPROACH TO ARTICLE 11

The main rights enshrined in the ECHR applicable to climate protestors and climate protests generally are the right to freedom of assembly and association set out in Article 11 and the right to freedom of expression as set out in Article 10. While freedom of expression is typically intrinsically engaged in the act of protesting, as discussed below, the ECHR has typically adjudicated on protest cases primarily by examining Article 11. Accordingly, this report focuses on Article 11 but includes a section below on the relationship between Articles 10 and 11 in the context of protest cases. Neither freedom of assembly and association or freedom of expression is absolute. Freedom of assembly is only applicable to peaceful assemblies—violent assemblies or protestors engaging in violent acts of protest may not be able to claim the freedom of assembly in the first place. Moreover, even once freedom of assembly or association is established, a Member State may still be entitled to restrict or infringe that freedom if such infringements are 'prescribed by law', 'legitimate' and 'necessary in a democratic society'. Articles 11 and 10 are as follows:

ARTICLE 10 Freedom of expression

1.Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11 Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The Scope of the Freedom to Peaceful Assembly

Under Article 11(1) of the Convention, everyone has the right to freedom of peaceful assembly.[150] The right to peacefully protest falls within the scope of this right. [151] The right to freedom of assembly is considered a fundamental right and a foundation of democracy.[152]

Consequently, because of its nature and importance, the ECtHR has held that the right to freedom of assembly should not be interpreted restrictively.[153] To ensure that this right is not construed and applied restrictively, the ECtHR has refrained from formulating the notion of assembly; likewise, the Court has not exhaustively listed criteria that would define this concept,[154] thereby avoiding limiting the scope of

[150] The right to protest is examined in the light of the right to freedom of peaceful assembly derived from the provisions of Article 11 of the ECHR. Article 11 comprises two paragraphs. Paragraph 1 of Article 11 guarantees everyone, in addition to the right to freedom of peaceful assembly, the right to freedom of association with others, which includes the right to form and join trade unions for the protection of his or her interests. Paragraph 2 of Article 11 deals with the conditions under which the rights set out in paragraph 1 of Article 11 may be restricted.

[151] At the outset, one should bear in mind that the right to protest is not explicitly prescribed in the ECHR. However, as a result of the ECtHR's interpretation of the ECHR, this right is recognised, exercised, and protected under Article 11 of the ECHR.

[152] *Kudrevičius and Others v Lithuania [GC]* App No 37553/05 (ECtHR, 15 October 2015) para 91.

153 *Taranenko v Russia App No 19554/05* (ECtHR, 15 May 2014) para 65.

[154] *Navalnyy v Russia [GC]* App Nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 15 November 2018) para 98.

protection. The concept of 'assembly' is autonomous,[155] and the characterisation of an event or gathering in domestic law, as well as whether the event complies with domestic law or not, is irrelevant for the purpose of affording protection under the ECHR.[156] Thus, it is up to the ECtHR to decide whether a particular gathering satisfies the concept of 'peaceful assembly' and deserves the guarantees derived from Article 11 and not from the Member States.[157]

The ECtHR has been so far flexible in interpreting the concept of 'peaceful assembly', and, accordingly, it has subsumed gatherings and events of different types and forms, such as private and public meetings,[158] marches,[159] demonstrations,[160] pickets[161] and sit-ins,[162] under the concept of assembly. Moreover, the right to freedom of peaceful assembly covers static gatherings as well as those taking place in the form of a procession.[163] Gatherings falling under the concept of 'peaceful assembly' do not only differ in terms of their forms and types; they also differ in terms of the number of persons involved. The number of participants involved in protests, demonstrations, as well as other forms of meetings and gatherings varies, and the case law of the ECtHR has covered assemblies of different sizes: from those comprising a dozen participants[164] to those that could be aptly described as mass protests numbering thousands[165] of participants. Regardless of the form of the peaceful assembly and the number of

[155] *Obote v Russia* App No 58954/09 (ECtHR, 19 November 2019) para 35.
[156] *Navalnyy* (n 154) para 98.
[157] Accordingly, the Court assesses on a case-by-case basis whether the event in question is considered an assembly. The existence of the assembly triggers the application of Article 11.
[158] *Gün and Others v Turkey* App No 8029/07 (ECtHR, 18 June 2013).
[159] *Kasparov and Others v Russia (No 2)* App No 51988/07 (ECtHR, 13 December 2016) para 29; *Navalnyy and Yashin v Russia* App No 76204/11 (ECtHR, 4 December 2014) para 56.
[160] *Kudrevičius and Others v Lithuania* (n 152).
[161] *Sergey Kuznetsov v Russia* App. No. 10877/04 (ECtHR, 24 October 2008); *Taranenko v Russia* (n 152) para 69; *Fáber v Hungary* App. No. 40721/08 (ECtHR, 24 July 2012) para 50; *Novikova and Others v Russia* App. Nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13 (ECtHR, 26 April 2016) para 91; *Navalyy v Russia* App. Nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 2 February 2017) para 46.
[162] *Cisse v France* App. No. 51346/99 (ECtHR, 9 April 2002).
[163] *Kudrevičius and Others v Lithuania* (n 152) para 91.
[164] In the case of Promo Lex and Others v the Republic of Moldova, the ECtHR found Article 11 applicable in relation to the demonstration involving approximately twenty individuals. *Promo Lex and Others v the Republic of Moldova* App. No. 42757/09 (ECtHR, 24 February 2015) paras 8, 21-28.
[165] In the case of Frumkin v Russia, the assembly in question falling under the protection of Article 11 comprised between 8,000 and 25,000 participants. *Frumkin v Russia* App. No. 74568/12 (ECtHR, 5 January 2016) para 108. In the case of Shmorgunov and Others v Ukraine, the ECtHR had to deal with the demonstration, whose number of participants initially varied between 50,000 and 100,000, and subsequently between 400,000 and 800,000. *Shmorgunov and Others v Ukraine* Apps. Nos. 15367/14 16280/14 18118/14 20546/14 24405/14 31174/14 33767/14 36299/14 36845/14 42180/14 42271/14 54315/14 19954/15 9078/14 (ECtHR, 21 January 2021) para 10.

participants involved therein, the right to freedom of assembly may be exercised by the organisers of the gathering and individual participants[166] and they may choose the time, place, and modalities of the assembly.[167] In addition to physical and juridical persons, unincorporated organisations are entitled to exercise the right to freedom of peaceful assembly.[168]

Violent Assemblies

The guarantees of Article 11 are for assemblies that are 'peaceful'. Accordingly, those assemblies whose organisers or participants have violent intentions or otherwise act in a manner not within the foundations of a 'democratic society' are exempt from the scope of Article 11 since such assemblies do not satisfy the requirement of peacefulness.[169]

To distinguish 'violent' from 'peaceful assemblies', the Court has formulated a series of criteria to establish whether an applicant may claim the protection of Article 11, the Court takes into consideration:

- whether the assembly intended to be peaceful or whether the organisers had violent intentions;
- whether the applicant had demonstrated violent intentions when joining the assembly; and
- whether the applicant had inflicted bodily harm on anyone.[170]

[166] *Lashmankin and Others v Russia* Apps. Nos. 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12, 37038/13 (ECtHR, 7 February 2017) para 402.
[167] *Sáska v. Hungary* App. No. 58050/08 (ECtHR, 27 November 2012) para 21.
[168] In the case of Hyde Park and Others v Moldova, one of the applicants was the non-governmental organisation Hyde Park, which ceased to exist during the proceedings conducted before the ECtHR (*Hyde Park and Others v Moldova (no. 3)* App. No. 45095/06 (ECtHR, 31 March 2009)). The reasons for the discontinuation of the registration of Hyde Park were alleged pressure and intimidation by the State. Hence, among others, the ECtHR had to deal with the question of admissibility. The ECtHR held that the fact that Hyde Park is unincorporated does not affect its capacity to pursue the proceedings before the Court. (*Hyde Park and Others v Moldova*, para 16)
[169] *Alekseyev v Russia* Apps. Nos. 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010) para 80.
[170] *Shmorgunov and Others* (n 165) para 491.

If organisers or participants engage in acts of violence, the public authorities enjoy a wider margin of appreciation when assessing whether there should be interference with freedom of assembly.[171] Moreover, the violent conduct of those participating in demonstrations and protests authorizes the imposition of a sanction for such reprehensible acts, and sanctions imposed in the context of 'unpeaceful' assemblies may be considered to be compatible with the guarantees of Article 11 of the Convention.[172] Nonetheless, sanctions and measures imposed on the participants of unpeaceful assemblies are assessed in the light of the proportionality principle.[173] Therefore, when demonstrators resort to violence, it is worth stressing that particular weight is given to the nature of the applicant's conduct. Accordingly, even when the applicant engages in acts of violence during public gatherings, this does not necessarily deprive him or her of the guarantees of Article 11. In such a case, the Court takes into account whether the acts concerned were sporadic in nature, as well as whether the applicant was amongst those responsible for the disruption of the assembly or prompting the use of force by the police. For instance, in the case of *Barabanov v Russia*, even though the applicant displayed violent behaviour towards the police, the Court established a violation of Article 11 since the applicant's role in the assembly was minor and he had only incidental involvement in the clashes.[174] In contrast, in the case of *Razvozzhayev v Russia and Ukraine and Udaltsov v Russia*, the Court declared the first applicant's complaint in relation to an alleged violation of Article 11 as inadmissible since his violent behaviour triggered the onset of clashes between the police and the demonstrators.[175] Hence, those taking part in assemblies, may enjoy the safeguards of Article 11 provided that such participants are not among those responsible for the acts of aggression contributing to the deterioration of the assembly's peaceful character.[176] The facts and circumstances of each case will, however, matter greatly.

[171] ibid para 492.
[172] ibid para 492.
[173] ibid para 492.
[174] *Barabanov v Russia* App. No. 4966/13 and 5550/15 (ECtHR, 30 January 2018) paras 70-78.
[175] *Razvozzhayev v Russia* and *Ukraine and Udaltsov v Russia* Apps. Nos. 75734/12, 2695/15 and 55325/15 (ECtHR, 19 November 2019) para 284.
[176] ibid para 283.

Unlawful But Peaceful Assemblies

One additional category of assemblies that occupies a prominent place in the Court's case law is unlawful assemblies; however, the Court's approach to unlawful assemblies, if they are peaceful, is favourable. Specifically, the Court has held that the public authorities must show a certain degree of tolerance towards peaceful but unlawful gatherings.[177] Therefore, the fact that a demonstration took place and proceeded without prior authorisation does not necessarily give the public authorities the green light to interfere with a person's right to freedom of assembly.[178]

Accordingly, even in the absence of prior authorisation and the 'lawfulness' criterion, the public authorities are bound by the proportionality requirement of Article 11, which obliges them to establish:

- why the demonstration was not authorised in the first place;
- what the public interest at stake was; and
- what risks were presented by the demonstration.[179]

In addition to the above, when assessing the proportionality of the interference, an important factor is the method used by the police for discouraging the protestors, which may include containing protesters in a particular place or dispersing the demonstration.[180] Such an approach was employed in the case of *Oya Ataman v Turkey*, in which the police, using a kind of tear gas known as 'pepper spray', dispersed the group of forty to fifty persons who unlawfully protested against prison conditions in Turkey; afterwards, thirty-nine demonstrators, including the applicant, were arrested and taken to a police station.[181] In the case concerned, one factor that the Court considered was the scope of the demonstration, including the number of participants engaged and that it lasted only half an hour before being disrupted by police action.

[177] *Kudrevičius and Others* (n 152) para 150; *Navalnyy v Russia* (n 151) para 143.
[178] *Oya Ataman v Turkey* App. No. 74552/01 (ECtHR 2006-XIII, 5 December 2006) para 39.
[179] *Kudrevičius and Others* (n 152) para 151.
[180] *Primov and Others* (n 21) para 119.
[181] *Oya Ataman v Turkey* (n 178) paras 4-12.

All in all, the peaceful behaviour of the group and the surrounding circumstances led the Court to conclude that the group itself did not constitute a danger to public order, save for a possible traffic disruption. Consequently, the Court found a violation of the right to freedom of peaceful assembly since the police action was disproportionate and not necessary in a democratic society and, therefore, contrary to the meaning of Article 11(2).[182]

The Interference with the Right to Freedom of Peaceful Assemblies

Article 11(1) imposes primarily a negative obligation on the State in the sense that the State is required to refrain from taking actions or measures that interfere with the right to freedom of peaceful assembly.[183] Nonetheless, it is not contrary to the spirit of Article 11 if the exercise of this right is subjected to authorisation and regulations for reasons of public order and national security.[184] Therefore, the right to freedom of peaceful assembly is not absolute and it may be susceptible to permissible restrictions provided that such restrictions are prescribed by law, pursue one of the legitimate aims listed in Article 11(2), and are deemed necessary in a democratic society. Thus, any restriction must be applied in accordance with these three criteria to be deemed permissible in light of Article 11(2). Moreover, it is worth emphasising that the term 'restrictions' is interpreted broadly, as it includes both measures taken before or during the public assembly and those measures, such as punitive measures, taken after the meeting.[185] Examples of measures that constitute restrictions in the context of the right to peaceful assembly are, among others, arrest, detention, and the ensuing administrative charges brought against participants.[186]

A violation of Article 11 requires that interference with the right to peaceful assembly took place. After establishing that the public authorities interfered with the right to

[182] *Oya Ataman v Turkey (n 178)* paras 33-44.
[183] This is the State's main obligation with regard to the right to freedom of peaceful assembly.
[184] *Djavit An v Turkey* App. No. 20652/92 (ECtHR, 20 February 2003) paras 66-67; *Oya Ataman v Turkey (n 178)* para 37.
[185] *Ezelin v France* App. No. 11800/85 (ECtHR, 26 April 1991) para 39; *Sergey Kuznetsov v Russia* (n 158) para 35.
[186] *Nemtsov v Russia* (n 24) para 74.

freedom of peaceful assembly, the Court employs its three-tier test to assess whether such interference was in accordance with the provision of Article 11(2) of the ECHR.[187] The three-tier test is examined here.

1) Prescribed by Law

According to Article 11(2), States are entitled to impose 'lawful restrictions' on the exercise of the right to freedom of assembly.[188] Such restrictions must be grounded on provisions of domestic law.[189] In that context, the contentious issue may be the absence of applicable domestic law governing the interference. For instance, in the case of *Djavit An v Turkey*, the applicant, a northern Greek Cypriot, wanted to travel from northern to southern Cyprus for the purpose of participating in a peaceful assembly with Greek Cypriots. Nevertheless, the respondent Government did not refer to any provision of domestic law when refusing to issue permission to the applicant to cross the border, which led the Court to find a violation of Article 11.[190] Article 11(2), nonetheless, does not only require the existence of a provision of domestic law upon which the restriction is based, but it also requires that the law governing the interference satisfy certain criteria. In that regard, a norm of domestic law prescribing the restriction must be 'formulated with sufficient precision',[191] meaning that the citizen must be able to foresee the consequences that a given action may entail, albeit to a degree that is reasonable in the circumstances, even if that necessitates seeking appropriate advice.[192] Otherwise, if a norm is not formulated with sufficient precision (i.e., foreseeable) it cannot be regarded as a law.[193] However, the Court has recognised that some laws are inevitably couched in vague terms[194] and that absolute precision in the framing of laws is impossible to attain, particularly in fields in which the situation changes according to the prevailing views of society.[195]

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[187] *Primov and Others v. Russia* App. No. 17391/06 (ECtHR, 12 June 2014) para 121.
[188] *Éva Molnár v. Hungary* App. No. 10346/05 (ECtHR, 7 October 2008) para 34.
[189] However, as discussed above, unlawful peaceful assemblies enjoy the protection of Article 11, and a public gathering that takes place contrary to the provisions of domestic law is not automatically deprived of the guarantees of Article 11.
[190] *Djavit An v Turkey* (n 184) paras 3, 64-69.
[191] *Primov and Others v. Russia* (n 187) para 125.
[192] *Ezelin v France* (n 185) para 45.
[193] ibid.
[194] *Rekvényi v Hungary [GC]* App. No. 25390/94 (ECtHR 1999-III, 20 May 1999) para 34.
[195] *Ezelin v France* (n 185) para 45.

2) **Legitimate Purpose**

Article 11(2) of the Convention prescribes the following legitimate aims that may justify the restriction of the right to freedom of peaceful assembly:

- the interests of national security or public safety;
- the prevention of disorder or crime;
- the protection of health or morals; and
- the protection of the rights and freedoms of others.[196]

Thus, any permissible interference with the right to peaceful assembly is conditioned upon the existence of a legitimate purpose or aim in a particular case. Moreover, the enumeration of legitimate aims contained in Article 11(2) is exhaustive[197] and is to be interpreted narrowly.[198] However, in the Court's case law, the issue of legitimate purpose as a ground for assessing the justifiability of restrictions is rarely very important since the Court usually finds a violation of Article 11 because a restriction was not prescribed by law or was not necessary in a democratic society or the contested measure was not proportionate to the legitimate aim pursued.[199] For instance, in the case of *Alekseyev v Russia*, the ban on the gay pride parade organised by the applicant was disproportionate, which led to a violation of Article 11; however, the Court refrained from explicitly deciding on the issue of whether there was a legitimate aim.[200] Similarly, in another case concerning Russia, where a peaceful opposition speaker was arrested and remanded in custody after a demonstration, the Court again failed to decide on the question of a legitimate aim. Instead, the Court held that in the present case, 'the questions of lawfulness and of the existence of a legitimate aim are indissociable from the question of whether the interference was 'necessary in a

[196] Taking measures for the purpose of 'maintaining the orderly circulation of traffic' is a permissible restriction of the right to peaceful assembly in the context of the protection of the rights and freedoms of others. (*Éva Molnár v. Hungary* (n 185) para 34)
[197] The State cannot invoke any other legitimate aim as a ground for imposing a permissible restriction on the right to freedom of peaceful assembly.
[198] *Galstyan v Armenia* App. No. 26986/03 (ECtHR, 15 November 2007) para 114.
[199] William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 512. In the majority of cases dealing with violations of the so-called qualified rights—that is, the rights derived from Articles 8, 9, 10, and 11—the Court finds a violation of the abovementioned Articles on account of the fact that the interference was not prescribed by law or did not satisfy the requirement of necessity.
[200] *Alekseyev v Russia* (n 169) paras 71-88.

democratic society' and, for that reason, the Court considered that it was not necessary to examine these questions separately.[201]

3) **Necessary in a Democratic Society**

In general, the necessity for any restriction imposed upon the right to freedom of peaceful assembly must be convincingly established.[202] The Member States enjoy a certain margin of appreciation when examining the necessity of the restrictions of rights and freedoms guaranteed by the Convention, but such a margin of appreciation is not unlimited.[203] A margin of appreciation is limited by the scrutiny exercised on the part of the Court since it is up to the Court to determine, in the context of the circumstances of a particular case, whether the restriction was compatible with the Convention.[204] To determine whether the interference with the right to peaceful assembly is 'necessary', the Court has devised the test of 'pressing social need', according to which the measures taken against the applicant must be proportionate to one of the legitimate aims listed in Article 11(2).[205] The test of 'pressing social need' is quite a stringent one. An illustrative example of the application of this test is the case of *Vajnai v Hungary*, where the Court stressed that a social need must not only be pressing but also clear and specific to justify limitations of the rights arising under the Convention.[206] Accordingly, at least in the context of political protests, 'the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a 'pressing social need'.[207] In the context of the right to peaceful assembly, the Court has also taken a sceptical view of the preventive detention imposed on the applicant with the aim of generating a chilling effect. In the case of *Schwabe and M.G. v Germany*, the Court concluded that the measure imposed upon the applicants, specifically, the six-day detention that prevented them from taking part in the demonstrations against the G8 summit, was not proportionate in a

[201] *Nemtsov v Russia* (n 24) para 75.
[202] *Kudrevičius and Others* (n 152) para 142.
[203] ibid.
[204] ibid.
[205] *Obote v Russia* (n 155) para 40.
[206] *Vajnai v Hungary* App. No. 33629/06 (ECtHR, 8 July 2008) para 51.
[207] ibid para 55.

democratic society and, therefore, constituted a violation of Article 11.[208] Also, in accordance with Article 11(2), the public authorities should have applied less intrusive measures to achieve the desired aims in a proportionate manner.[209] Other instances in which the Court has found a violation of Article 11(2) concern the use of unnecessary and unproportionate force vis-à-vis demonstrators who did not display violent behaviour, and whose action did not constitute a danger to public order.[210]

Positive Obligations on Member States

According to the ECtHR, the protection of individuals against arbitrary interference by public authorities is the essential object of Article 11 of the Convention.[211] In other words, the core obligation of the State in relation to the freedom of peaceful assembly is a negative one: the public authorities must refrain from undertaking actions that interfere with the right to freedom of peaceful assembly contrary to the ECHR. However, mere passive behaviour of the State towards protests, demonstrations, marches and other forms and types of gatherings would not suffice and would not exhaust the State's obligations stemming from Article 11. In that connection, the Court has gone one step further and construed Article 11 in the sense that the right to freedom of peaceful assembly imposes positive obligations on the State with the aim of securing the effective enjoyment of this right.[212] In the context of Article 11, the concept of positive obligations was first formulated in the landmark case of *Plattform 'Ärzte für das Leben' v Austria*.[213] Even though the ECtHR did not find a violation of Article 11, its judgment is significant. The ECtHR held that the obligation of the State to secure genuine and effective freedom of peaceful assembly requires more than mere compliance with the duty not to interfere since a purely negative conception of this right would run contrary to the object and purpose of Article 11.[214] Accordingly, Article 11 also obliges States to undertake positive measures, even if undertaking such

[208] *Schwabe and M.G. v. Germany* App. Nos. 8080/08 and 8577/08 (ECtHR, 1 December 2011) paras 77-78, 115-118.
[209] ibid.
[210] *Oya Ataman v Turkey (n 178)* paras 33-44.
[211] *Barankevich v Russia* App. No. 10519/03 (ECtHR, 26 July 2007) para 33.
[212] *Wilson, National Union of Journalists and Others v the United Kingdom* App. Nos. 30668/96, 30671/96 and 30678/96 (ECtHR 2002-V, 2 July 2002) para 41.
[213] Krešimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Brill, 2017) 347.
[214] *Plattform 'Ärzte für das Leben' v Austria* App. No. 10126/82 (ECtHR, 21 June 1988) para 32.

measures requires intervening in relations between private individuals provided that there is a proper need.[215] That obligation exist even when a demonstration may be viewed as offensive or annoying by individuals holding opposing ideas or claims to those promoted by the demonstration.[216] The public authorities are obliged to take adequate measures to protect the participants in peaceful assembly from violent attacks, or at least limit their extent.[217] Moreover, the Court has stressed the duty of the public authorities to take preventive security measures to guarantee the smooth conduct of any event, meeting or other gatherings, regardless of whether the event is of political, cultural or of another nature.[218] The positive obligation to secure effective enjoyment of the right to freedom of peaceful assembly extends to those participating in counter-demonstrations as well, and the public authorities should opt for the least restrictive measure so that both protesters and those disagreeing with their view may exercise their right pursuant to Article 11.[219]

As seen above, the concept of positive obligations formulated in the context of Article 11 requires the State to secure the effective exercise of the right to freedom of peaceful assembly.[220] In addition to protecting participants, it also must investigate its alleged failure to ensure the effective exercise of the right to freedom of peaceful assembly. For instance, in the case of *Promo Lex and Others v the Republic of Moldova*, the protesters were attacked by six masked men who physically assaulted them and sprayed tear gas and paint over them.[221] The event was supposedly filmed by plain-clothes police officers.[222] Even though the police identified all six attackers, only two of them ended up being convicted.[223] The ECtHR found a violation of Article 11 because the Moldovan authorities failed to protect the applicants from acts of physical violence and to conduct an effective investigation into the circumstances of the incident.[224]

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[215] ibid para 32.
[216] ibid para 32.
[217] *The United Macedonian Organisation Ilinden and Ivanov v Bulgaria* App. No. 44079/98 (ECtHR, 20 October 2005) para 115.
[218] *Oya Ataman v Turkey (n 178)* para 39; *Kudrevičius and Others [GC]* (n 152) para 160.
[219] *Fáber v Hungary* (n 158) para 43.
[220] The obligation to provide demonstrators with protection from violence is a substantive positive obligation.
[221] *Promo Lex and Others v the Republic of Moldova* (n 161) para 8.
[222] ibid para 9.
[223] ibid para 27.
[224] ibid para 28.

All in all, one may reach the following conclusion when it comes to the positive obligations in the context of the right to freedom of peaceful assembly, namely, the State is required to provide those exercising the right to freedom of peaceful assembly with adequate protection from physical violence. Furthermore, if the State fails to take preventive measures in this context, such a failure on the part of the State triggers another obligation derived from Article 11; specifically, the State must conduct an effective investigation into an alleged breach of its duty to ensure effective enjoyment of the right to freedom of peaceful assembly.

The Relationship between Freedom of Peaceful Assembly and Freedom of Expression

In the context of protest, the right to freedom of expression and the right to freedom of peaceful assembly are intertwined. Protests and other forms of gatherings falling under the scope of freedom of assembly undoubtedly involve the exercise of freedom of expression.[225] In the context of protests, participants express themselves not only verbally but also through means of non-verbal expressions such as raising banners or placards.[226] Accordingly, there are views under which the right to freedom of peaceful assembly is one facet of the more general right to freedom of expression.[227] Some authors even argue that an assembly is a form of expression and that freedom of assembly could hardly exist without freedom of expression.[228]

The right to freedom of expression is guaranteed by Article 10 of the Convention, which has the same structure as Article 11.[229] According to the Court's case law, the relationship between the former and the latter is a relatively straightforward. The

[225] Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law' (2018) 20 International Journal of Speech-Language Pathology 13.
[226] UN Human Rights Committee, 'Kivenmaa v Finland' (31 March 1994), Communication No. 412/1990, UN Doc. CCPR/C/50/D/412/1990.
[227] ibid para 3.4.
[228] John P. Humphrey, 'Political and Related Rights' in Theodor Meron (ed), in: Human Rights in International Law, Legal and Policy Issues (Clarendon Press Oxford 1984) 188.
[229] Whereas paragraph 1 of Article 10 stipulates that everyone has the right to freedom of expression, paragraph 2 of the same Article deals with the restrictions of this right.

Court has held that Article 10 is regarded as a *lex generalis* in relation to Article 11, which is a *lex specialis*.[230] In other words, 'the rights enshrined in Article 11 are specific concerning those in Article 10 of the Convention'.[231] Despite the interconnection between Articles 10 and 11, the latter has its own autonomous role and particular sphere of application.[232] Nonetheless, Article 10 is relevant even when the ECtHR classifies a certain event as an assembly under Article 11. In such a case, the ECtHR has consistently held that Article 11 must be considered in light of Article 10.[233] The ECtHR's rationale is that freedom of peaceful assembly derived from Article 11 aims to protect personal opinions, which are secured by Article 10.[234] Accordingly, assemblies and other meetings and gatherings serve as means or venues for the exercise of the right to freedom of expression. It follows that guarantees derived from Article 10 are typically applicable to events falling within the scope of Article 11; however, the relation between Article 10 and 11 does not flow in the opposite direction since the guarantees of Article 11 are not automatically applied to events primarily assessed in the light of Article 10.[235] In situations of assembly, the ECtHR typically assesses the matter in accordance with Article 11 rather than Article 10.[236] In an assembly, participants typically express their opinions together with others;[237] accordingly, solo demonstrations or demonstrations involving fewer participants are more likely to be examined in light of Article 10.[238] For instance, in the case of *Yezhov and Others v Russia*, the applicants, who were arrested at the scene of the protest action against the government policies were part of a group of about thirty people and were remanded in custody for almost four months.[239] Subsequently, because of their participation in the protest action, after their arrest, the applicants were charged and sentenced to two years and six months' and to three years' imprisonment respectively, which the

[230] *Navalnyy v Russia [GC]* (n 151) para 101.
[231] *Tatár & Fáber v Hungary*, App. Nos 26005/08 and 26160/08 (ECtHR, 12 June 2012) para 38.
[232] *Ezelin v France* (n 185) para 37.
[233] *Ezelin v France* (n 185) para 37; *Schwabe and M.G. v. Germany* App. Nos. 8080/08 and 8577/08 (ECHR, 1 December 2011) para 101. The Court sometimes establishes a violation of Article 11 'interpreted in the light of' Article 9 (*Church of Scientology Moscow v Russia* App. No. 18147/02 (ECtHR, 5 April 2007) para 98) or simply specifies that it has taken into account other Articles in the context of Article 11 (*Young, James and Webster v the United Kingdom* (ECHR Series A no. 44, 13 August 1981) para 66).
[234] *Ezelin v France* (n 185) para 37.
[235] Orsolya Salát, 'Comparative Freedom of Assembly and the Fragmentation of International Human Rights Law' (2014) 32 Nordic Journal of Human Rights 148.
[236] *Schwabe and M.G. v. Germany* (n 230) para 101; Hakim Aydın v Turkey App. No. 4048/09 (ECHR, 26 May 2020) para 41.
[237] *Primov and Others v Russia* (n 184) para 91.
[238] *Novikova and Others v Russia* (n 161) para 91.
[239] *Yezhov and Others v Russia* App. No. 22051/05 (ECHR, 29 June 2021) para 27.

Court characterised as a violation of Article 10 and the right to freedom of expression.[240] In the case *Tatár & Fáber v Hungary*, the Government argued that the applicants' freedom of expression and a violation thereof should have been assessed in the context of Article 11 and freedom of assembly.[241] However, the ECtHR rejected the Government's arguments and instead found Article 10 applicable since the Court concluded that the expressive interaction of the only two applicants should not have been qualified as an assembly.[242] The ECtHR stressed that the mere fact that an expression takes place in the public space does not necessarily turn such an event into an assembly.[243] Similarly, in the case of *Schwabe and M.G. v Germany*, the applicants based their submissions on alleged violations of Articles 10 and 11, claiming that their detention prevented them from participating in the G8 summit and exercising their rights to freedom of expression under Article 10 and freedom of peaceful assembly under Article 11.[244] However, the ECtHR proceeded solely on the basis of Article 11, even though it acknowledged that the issue of freedom of expression could not be entirely separated from that of freedom of assembly.[245]

Even though events falling under the autonomous meaning of the notion of assembly are governed primarily by Article 11, this does not mean that Article 10 and the right to freedom of expression is not applicable. In the case of *Gül and Others v. Turkey*, the applicants complained that their convictions for reading certain periodicals, participating in demonstrations, and shouting slogans amounted to a breach of Articles 10 and 11.[246] Nonetheless, the Court examined the applicants' complaints solely in light of Article 10.[247] Among others, the Court noted that some of the slogans shouted had a violent tone in their literal meaning, but it also characterized the slogans in question as well-known, stereotyped leftist slogans, and stressed that they were shouted during lawful demonstrations.[248] Consequently, the Court took the view that the applicants'

[240] ibid paras 27-28.
[241] *Tatár & Fáber v Hungary* (n 231) para 23.
[242] ibid para 40.
[243] ibid para 38.
[244] *Schwabe and M.G. v Germany* (n 233) paras 94-95.
[245] ibid paras 101.
[246] *Gül and Others v Turkey* Ap. No. 4870/02 (ECHR, 8 June 2010) para 32.
[247] ibid para 34.
[248] ibid para 41.

conduct could not have impacted 'national security' or 'public order' since their slogans did not encourage the use of violence.[249] As a result, the ECtHR held that the interference in question was not 'necessary in a democratic society', finding a violation of Article 10.[250]

On the other hand, in some cases, the principles of Article 11 may be considered in relation to Article 10. The Court employed this approach in the case of *Manannikov v Russia*, decided in 2022, the Court examined the applicability of Article 11 case law in relation to Article 10 in the context of counter-demonstrations, albeit without finding a violation of Article 10. In the case in question, the applicant expressed his opposition to a large public gathering of several thousand participants by holding a banner that read 'Putin is better than Hitler'.[251] Among others, the Court held that the principles developed in the cases that dealt with the right to freedom of peaceful assembly are relevant to the present case since the applicant expressed his opinion during a public event.[252] Subsequently, the applicant was convicted of an administrative offence and small fine.[253] The applicant complained that his conviction of an administrative offence and the fine imposed on him constituted an interference with the right to freedom of expression, leading to a violation of Article 10.[254] The Court, when assessing the applicant's complaint, particularly took into account that the conviction and the fine did not appear to be excessive and that the applicant himself was not forcefully removed from the site of the protest, even though his banner was taken away on the part of the police by the use of force. The Court also distinguished the contrasting factual circumstances of this case from those of the case of *Fáber v. Hungary*. In that case, the applicant held a counterdemonstration outside of the crowd of protestors, whereas in the case of *Manannikov v Russia*, the applicant raised the banner in the middle of a crowd of his opponents even though he could have taken the same action in a place in an adjacent area. The Court held that 'the applicant's location among the

[249] ibid para 44.
[250] *Gül and Others v Turkey* (n 246) para 45.
[251] Manannikov v Russia App. No. 9157/08 (ECHR, 1 February 2022) paras 5-11.
[252] ibid para 25.
[253] ibid para 38.
[254] ibid para 18.

demonstrators was a key factor' and that it could have been obstructive in allowing the police to ensure the peaceful conduct of the event.[255] These factors lead the Court to reach the conclusion that there was no violation of Article 10.[256]

Based on the above, the exercise of the right to freedom of expression is protected in accordance with Article 10, even when the applicant exercises this right in the course of an event that could be rightly qualified as an assembly. This is demonstrated in *Manannikov v Russia*, where the Court proceeded on the basis of Article 10 despite the fact the applicant's actions took place in the context of a demonstration involving several thousand participants. On the other hand, measures preventing or obstructing the gathering of a substantial number of participants or that lead to the dispersal of such a gathering are considered in light of Article 11. In the case of *Schwabe and M.G. v Germany*, discussed above, in essence, the applicants were deprived of their rights to both freedom of expression and assembly. The applicants were denied their assembly rights because they were subject to preventative detention which the Court found was a violation of Article 11. However, the applicants were also deprived of the right to freedom of expression since they were prevented from displaying banners with slogans that they wanted to use to criticize the police's management in securing the summit, which the Court referred to, but still focused its analysis on Article 11.

ECHR CASE LAW ON CLIMATE PROTESTS

While the prior section canvassed the ECtHR's consideration of Article 11 generally, this section analyses the applicable case law concerning climate and environmental protests specifically. Notably, there has not been an ECtHR decision dealing directly with a climate protest comparable to the facts in the case of XR in Zürich.[257] The most prominent climate cases currently pending before the ECtHR concern an alleged lack

[255] ibid para 35-36.
[256] ibid para 39.
[257] Over 50 ECtHR cases on protest, decided between 1979 and spring 2023 were preliminary evaluated for this section, and a select handful of cases dealing with protests with environmental background were analysed in depth. Those cases included grand chamber judgments which reference many other cases, and which are being themselves cross-referenced by other cases as 'leading'.

of systemic state climate action and potential violations of positive obligations stemming from fundamental rights (i.e., the right to life and the right to respect for private and family life) but do not directly engage freedom of assembly or expression.[258] There is, however, a pending case (*Friedrich v Poland*) which concerns a disruptive environmental protest.[259] The applicants in *Friedrich* are several Greenpeace activists, who, accompanied by journalists, had anchored a ship at the polish coal port in Gdansk, blocking a cargo ship carrying imported coal and preventing it from unloading. The applicants, met with strong reprisals by border guards and later charged under criminal proceedings, argue that their rights to freedom of assembly and expression were violated. They argue that sanctions against them illegally understated the importance of the social issue they addressed and that reprisals were primarily aimed at preventing them from engaging in further protest.[260] The underlying question in *Friedrich*, which this section will address, is if and to what extent the importance of environmental or indeed climate action may serve as a conduit for stricter protection by Article 10 even where protest deliberately impedes the lawful activity of others.

Notwithstanding the shortage of case law from the ECtHR concerning environmental protests specifically, there are several ECtHR decisions that have engaged with specific factual situations involving protests concerning environmental matters, and the subsequent discussion of such may help shed light on how well national jurisdictions are handling climate protests in conformity with the ECHR. However, caution is advised because, as discussed below, every case involving protests typically engages different considerations (e.g., whether the protest was highly disruptive, violent, and so forth) and these factual differences are key to addressing whether Member State's actions conform with the ECHR or not.

[258] European Network of Human Rights Institutions (ENNHRI), ENNHRI intervenes before the Grand Chamber of the European Court of Human Rights in three historic climate cases <https://ennhri.org/news-and-blog/ennhri-intervenes-before-the-grand-chamber-of-the-european-court-of-human-rights-in-three-historic-climate-cases/> accessed 16 April 2023.
[259] *Friedrich v Poland*, App. No 25344/20 (ECtHR, communicated 24 February 2021) <https://hudoc.echr.coe.int/eng?i=001-208840>.
[260] ibid para 57.

Furthermore, regarding transferability of the findings of this section to the sections on national jurisdiction below, most ECtHR cases regarding Articles 10 and 11 involving obstructive protests deal with criminal and administrative fines (e.g. mainly for disobedience of police orders). However, the case studies on the national jurisdictions (below), also briefly consider injunctions to enforce private rights in the civil content. In principle, the ECtHR is not prevented from scrutinising national authorities' application of norms of private law liability, which address the relationship between private individuals.[261] This is because national courts acting as quasi-administrative organs when imposing civil liability sanctions are also bound by the provisions of the ECHR,[262] which the ECtHR's recent case guidance on freedom of assembly confirms.[263] Nonetheless, while the ECtHR has stressed that Articles 10 and 11 do not in themselves create access rights to private property, there may be positive obligations on states in certain cases to enable the exercise of assembly rights, even on land that might be privately owned.[264]

The Scope of Article 11 in Climate & Environmental Protests

The first issue the ECtHR addresses is the scope of the right to peaceful assembly, as outlined in the prior section. Mirroring the ECtHR's approach to protests generally, the cases of *Drieman*[265] as well as *Steel*[266] confirm that disruptive protest in the realm of environmentalist demonstrations does not directly equate to 'violent' protest. Even if the lawful activity of others is physically impeded by the protest, the court embraces a narrow understanding of 'violence' (as discussed in the prior section concerning ECHR case law concerning protests generally). For example, in the leading case of *Kudrevicius*, which involved a roadblock protest by farmers against a national

[261] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) <https://hudoc.echr.coe.int/fre?i=001-57534>, concerning provisions of family law.
[262] As was shown for Freedom of Expression in the libel case Steel and Morris (*Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005) < https://hudoc.echr.coe.int/eng?i=001-68224>, concerning a UK court's legal aid decision in a libel proceeding between private parties; see also *Sunday Times v UK* App no 6538/74 (ECHR 18 May 1979), concerning an injunction in a private dispute.
[263] ECtHR, Guide on Art. 11 of the ECHR, < https://www.echr.coe.int/documents/d/echr/Guide_Art_11_ENG> version of 31 Aug 2022.
[264] *Appleby and others v UK* App no 44306/98 (ECtHR 6 May 2003) <https://hudoc.echr.coe.int/eng?i=001-61080> para 47; ibid para 21; on positive obligations see above.
[265] *Drieman and others v Norway* App no 33678/96 (ECtHR, 4 May 2000) <https://hudoc.echr.coe.int/eng?i=001-5290>.
[266] *Steel and others v UK* Apps no 67/1997/851/1058 (ECtHR, 23 September 1998) <https://hudoc.echr.coe.int/rus?i=001-58240>.

agricultural policy, the Grand Chamber confined the term 'violence' to the direct infliction of bodily harm on others.[267] Moreover, the Chamber held that if there is sporadic violence among some demonstrators which is not automatically attributable to all other demonstrators,[268] the state must consider each protester's liability properly and individually, rather than equating the actions of one or a minority of the group's actions to others not involved in violence. As such, a Member State's purported reasoning that a non-violent but disruptive protest falls outside of the scope of Article 11 may be considered misplaced in light of the case law of the ECtHR. It is more apt that such non-violent protest activities fall within scope and that any state interference must meet the necessity and proportionality tests, described below.

The Interference with the Right to Freedom of Peaceful Assembly

The test for whether an interference with Articles 10 and 11 is justified is the same for environmental protests as it is for protests generally: an interference must be 'prescribed by law'; it must pursue a 'legitimate aim'; and it must be 'necessary in a democratic society' in that a 'pressing social need' must be established.[269] A 'pressing social need' is typically the most crucial limb of the violation test. It is established when 'relevant and sufficient' reasons by national authorities for the interference are adduced and when the measures taken were 'proportionate to the legitimate aims pursued'.[270] The legal tests are conducted on a case-by-case basis, but through jurisprudence of the ECtHR, certain factors which inform the ECtHR's decisions can be identified and will be examined below.

In assessing whether a Member States' interference with Article 11 was justified, the ECtHR has assessed the following factors in cases concerning environmental protest:

[267] Kudrevicius and others v Lithuania [GC] App no. 37553/05 (ECtHR, 15 October 2015) para 93 <https://hudoc.echr.coe.int/eng?i=001-158200>.
[268] ibid para 94.
[269] On the general framework see above.
[270] *Bumbes v Romania* App no 18079/15 (ECtHR, 3 May 2022) para 91 <https://hudoc.echr.coe.int/eng?i=001-216937>.

1. Environmental Protest as Protected Political Speech

The motive and political aim behind a demonstration/expression can be considered a relevant factor for the ECtHR's proportionality analysis. Environmental motives can inherently be regarded as 'issues of general concern' and thus enjoy, in principle, a high level of protection under Articles 10 and 11. In some cases, the margin of appreciation awarded to states was regarded as 'particularly narrow' or 'narrower' when interfering with environmentalist expressions of protest or opinion.[271] In *Bumbes v Romani,* for example, which concerned an environmental protest, the Court said that there is 'little scope' under Article 10(2) ECHR for restrictions of political speech noting the significant chilling effect that broad restrictions of political speech have.[272]

2. The Limit to the Degree of Tolerance to Disruption

As noted in the prior section, the ECtHR has established that there is a certain level of disruption that any demonstration in a public place may cause to which authorities must show a 'certain degree of tolerance'.[273] In the recent example of *Kotov and others v Russia (2022)*, applicants had organized a car rally against a state authorised landfill because of its environmental hazards. The court found no violence on behalf of the demonstrators, nor did it agree with the government's submission that the car rally had caused disruption and the blocking of roads. Administrative convictions imposed on the applicants by the state were thus found disproportionate.[274] In general, sanctions of a criminal nature for peaceful protest are subject to strict scrutiny by the ECtHR.[275]

However, just how much tolerance a Member State must afford to a disruptive process is not a concrete line and the ECtHR has found in several cases that the line was crossed by protestors. In assessing disruptive protests, the ECtHR has categorised different types of protests depending on (a) the level of disruption the protest caused to ordinary life and (b) whether such disruption was to deliberately cause harm. The outcome of

[271] *Mamère v France* App no 12697/03 (ECtHR, 7 November 2006) <https://hudoc.echr.coe.int/eng?i=001-77843> para 20; Animal Defenders International v UK App no 48876/08 (ECtHR, 22 April 2013) <https://hudoc.echr.coe.int/eng?i=001-119244> para 102.
[272] Bumbes v Romania (n 270) para 92.
[273] *Kotov and others v Russia* App nos. 6142/18 and 13 others (ECtHR, 11 October 2022) <https://hudoc.echr.coe.int/eng?i=001-219648> para 146; Kudrevicius and others v Lithuania [GC] 2015 (n 267) para 155.
[274] *Kotov and others v Russia* (n 273) paras 139, 145-146.
[275] *Ekrem Can and others v Turkey* App no 10613/10 (ECtHR, 8 March 2022) para 92 <https://hudoc.echr.coe.int/eng?i=001-216156>.

said categorisation may drastically affect the level of protection granted by Article 10 and the level of margin of appreciation awarded to states in handing out tough sentences, including criminal sanctions. For example, in *Steel and others v UK (1998), Drieman and others v Norway (2000)* and *Kudrevicius and others v Lithuania (2015),* the Court held that 'obstructive' protest aimed at the disruption of ordinary life 'cannot enjoy the same privileged protection under the Convention as political speech or debate on questions of public interest or the peaceful manifestation of opinions on such matters'[276] and that 'Contracting States enjoy a wide margin of appreciation in their [factual and legal] assessment of the necessity in taking measures to restrict such conduct'.[277]

In *Kudrevicius*, the Court developed the category of 'reprehensible' conduct as a type of obstructive protests deliberately aimed at impeding lawful activities of others. In that case, farmers' protests against the government's agricultural policy took the form of moving tractors on a highway thereby deliberately impeding traffic to draw attention to their needs and government inaction.[278] The Court held that such protest, while not 'violent', was of such severity that the imposition of penalties, even of criminal convictions, was justifiable.[279] The applicants unsuccessfully argued that their legitimate political aim related to governmental agricultural policy warranted a more lenient treatment than other cases of obstructive protest.[280] The Court rejected this assertion, holding that tolerance towards a certain degree of disruption of ordinary life was not warranted where the blocking of traffic was aimed at pressuring the government into taking a certain action.[281] The long-term government inaction complained of was not a 'sudden political event, calling for an immediate reaction'.[282] The court also emphasised the lack of a 'direct connection' between the activity (the impeded traffic) and the political aim of the demonstrations.[283]

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[276] *Kudrevicius and others v Lithuania [GC] (n 267)* paras 97, 156, 171; see also *Drieman and others v Norway* (n 262) and *Steel and others v UK* (1998) (n 263).
[277] *Kudrevicius and others v Lithuania [GC] (n 267)* paras 156, 171-172.
[278] *Kudrevicius and others v Lithuania [GC] (n 267).*
[279] ibid paras 97, 149, 172-175.
[280] ibid para 120: the 'last resort' argument.
[281] ibid para 170.
[282] ibid para 166.
[283] ibid para 171.

Another example of stricter treatment of 'obstructive' protest is *Chernega* (2019).[284] Demonstrations were held against an environmentally harmful road construction project which had received administrative approval. When tree felling for the project commenced, some protesters climbed the trees while others placed themselves in front of machinery.[285] Criminal convictions were handed down, mainly for non-compliance with police orders to leave the site. The convictions and arrests of some applicants were found to be a violation of Article 11 because the national court did not take into account that the police orders imposed on those applicants was confusing and not sufficiently clear.[286] For other applicants, however, the ECtHR noted the lack of 'cogent elements' to question the factual assessments of the national court and concluded that those other applicants 'acted in a deliberately obstructive way in an area of danger'.[287] In upholding their arrest and convictions as proportionate, the Court emphasized that the latter applicants were not arrested 'for their protest action as such' but for disobeying police orders.[288] This decision demonstrates that the Court granted the national jurisdiction (vis-à-vis its police delivering orders) latitude in handling the protest.

In *Kudrevicius*, the ECtHR also declined to challenge the national authority's factual finding that to other lawful means to advocate policy changes were available to the protestors other than obstructive protest.[289] In *Chernega,* while analysing the 'proportionality' step, the Court similarly found that applicants' opportunity to partake in a public consultation process for the contested construction project constituted an 'alternative means' rather than an engagement in an obstructive protest.[290] Other existing means of protesting therefore appears to be an important factor in the Court's assessment of proportionality.

[284] *Chernega and others v Ukraine* App no 74768/10 (ECtHR, 18 June 2019) < https://hudoc.echr.coe.int/eng?i=001-193877>.
[285] ibid paras 27-30.
[286] ibid paras 248-258.
[287] ibid para 259.
[288] ibid para 259.
[289] *Kudrevicius and others v Lithuania [GC]* 2015 (n 267) paras 168-169.
[290] *Chernega and others v Ukraine* (n 284) paras 246-247; see also the reasoning in *Drieman* (n 262).

3. Member States Must Have 'Relevant and Sufficient' Reasoning

Some environmental protestors have obtained successful judgements before the ECtHR because a Member State did not have relevant and sufficient reasoning to infringe the right to peaceful assembly. In *Bumbes*, for example, the Court held that the reasoning provided by Romania for interference was found not to be 'relevant and sufficient'.[291] At issue was a bill which effectively authorised an environmentally controversial mining project. On the day the bill was passed, the applicant and three other demonstrators handcuffed themselves to one of the barriers blocking access to the parking area of the government's headquarters to raise public awareness of the bill. The applicant incurred an administrative fine of approximately EUR 113 under Romanian law for breaching 'certain norms of social coexistence and the public order and peace'.[292]

The broad and relatively vague provisions of Romanian law on which the fines were based, subjecting any kind of assembly, even spontaneous ones, to a prior notification-requirement, raised concerns with the 'prescribed by law' test.[293] In determining the necessity of the police's action and the national court's assessment, the ECtHR centred its argument on Article 10 'read in light of Article 11'.[294] The Court reasoned that since there were only four demonstrators protesting for a very short time, in response to 'a rather spontaneous decision' of the government, the national court's action was found to mainly punish demonstrators and the applicant for specific views.[295] The Court's reasoning intoned that a certain 'degree of tolerance' must be displayed by national authorities towards disruptions of ordinary life such that states must 'duly consider' the extent of such disruptions when considering taking action.[296] The Court ultimately viewed the protest as not sufficiently disrupting ordinary life to warrant the imposition of fines.[297] Romanian courts and national authorities were found to have violated this duty because they had failed to undertake a proper proportionality assessment by giving

[291] *Bumbes v Romania* (n 270) para 102.
[292] ibid paras 7-8, 13.
[293] ibid paras 74-85.
[294] ibid.
[295] ibid paras 46, 69 considering Art. 10 ECHR; on principles of the ECtHR's case-law regarding both Art. 10 and 11, see paras 93-95.
[296] ibid para 96.
[297] Ibid.

preponderant weight to the demonstration's formal 'unlawfulness' but failing to adequately account for the limited disruption it caused.[298]

Potentials and Weaknesses in the ECtHR's Decisions on Climate Protest

Accordingly, Member States are obliged to give protestors a degree of tolerance even if protesting activities interrupt or obstruct ordinary activities in life. However, the Court is clear that there are limits to this tolerance, and factors that have influenced the Court in drawing lines around such conduct include: (a) how disruptive the protest activities were (e.g., did the activities entirely disrupt certain ordinary activities?), typically requiring the Member State to provide evidence of that disruption, and (b) whether the disruption to ordinary life was deliberate or the main aim of the protest; (c) whether the protestors breached a prior court order (and even a mere police order); (d) whether the protest sought to remedy a long-term government inaction (versus a more immediate or spontaneous government decision); and (e) whether there are other means available to the protestors to convey their views. In successful decisions, the protestors' activities either entailed no disruption of any other person's (lawful) conduct and was not considered 'obstructive' in the first place (*Bumbles*), or the Member State was unable to prove that the protestors disrupted ordinary life (e.g., the flow of traffic), or the ECtHR found that it was the applicants deliberate aim to disrupt traffic (as opposed to the aim of protesting) (*Kotov*).[299]

Some of these factors are clearly concerning and should arguably be limited to the facts of the respective cases. For example, it is questionable why prolonged governmental inaction to solve a problem should be given significant weight in the climate change context because long-term government and global inaction has already caused such a widespread and devastating problem. Moreover, giving credence to a mere police order (without judicial authorization or review) is concerning. However, as these cases are

[298] ibid paras 97-99; See also *Kotov and others v Russia (*n 273) paras 144-147.
[299] *Kotov and others v Russia* (n 273), ibid, paras 144-147.

very fact-dependent and as new problems are brought to the Court, there is room for the Court's reasoning to shift as new facts and problems emerge. But these problems with the Court's reasoning should be noted and adequately addressed in any future submission concerning Article 10 rights.

There is potential to argue that the public interest in climate change *per se*, or systemic state inaction regarding climate change, warrants a higher degree of protection under Article 10. [300] But the Court has not yet expressly made that holding (likely because a case with that fact pattern has not yet been adjudicated by the Court). There are, however, indications that the Court might pay stronger regard to the connection between substantive convention rights, the climate crisis and the right to protest in the future. Applicants in *Kotov* had argued systemic state inaction to protect them from environmental hazards which address their rights in Article 8 and joined these arguments with a violation of Article 11. Although the majority opinion failed to directly elaborate on a connection between the two rights,[301] Judge Serghides, in his concurring opinion, addressed the connection as follows:[302]

> The jurisprudential principles relating to the right to freedom of peaceful assembly apply in a fairly standard manner to environmentalist demonstrations […] The sub-right of an environmental character, implicit in Article 8 and other Convection provisions, should be buttressed, not only by procedural rights […] but also by the exercise of the Article 11 right to demonstrate peacefully, the demonstration in the present case having been staged by the relevant applicants against the depositing of waste at the place where they lived.
>
> The authorities […] discouraged and prevented the applicants from holding a 'green' and peaceful public demonstration, and thus from asserting their right to respect for their private life under Article 8 and their environmental sub-right

[300] *Bumbes v Romania* (n 270) para 14.
[301] See the operative findings on Art. 11 ECHR, *Kotov and others v Russia* (n 270) paras 138-151.
[302] Ibid.

> under this provision. Therefore the finding in the present judgment of a violation of Article 11 […] was necessary. And this finding, together with the additional award by the Court to the relevant applicants in respect of non-pecuniary damage, show that a 'green' and peaceful public demonstration can be recognised by the Court as a means of asserting environmental rights in a democratic society.

Establishing such connection between other convention rights and Articles 10 or 11 creates room for future applicants to possibly strengthen their 'no alternative means available' arguments because of the persistent threat to their Convention rights (e.g. Articles 8 or 2) caused by systematic state inaction. Another possible argument climate protestors may rely on is the consideration that climate protests are more altruistic in nature and require a higher level of protection for all individuals subject to state authority, in contrast to the farmers' obstructive protest in *Kudrevicius* for instance, which merely aimed at the enforcement of goals of a particular group. Any further application to the ECtHR may also want to consider the inclusion of successful cases brought before national jurisdictions where non-violent protestors have been acquitted and any growing recognition of the importance of science-based policies to stop devastating impacts of climate change.[303]

[303] Extinction Rebellion UK, Breaking News from 15 November 2022, <https://extinctionrebellion.uk/2022/11/15/breaking-court-finds-doctors-for-xr-not-guilty-for-lambeth-bridge-blockade/> accessed 20 April 2023.

4. CASE STUDIES: UK, FRANCE, GERMANY

OVERVIEW

The following research was conducted in late 2022 and early 2023. Although the researchers initially sought to review all pertinent case law in each jurisdiction, there were several hurdles that prevented such an in-depth review. First, as climate protestors continue their demonstrations their involvement with law enforcement remains ongoing; similarly, legal proceedings also remain ongoing and are subject to rapid evolution. Thus, relevant case law will continue to accumulate. Second, not all jurisdictions publish (or rarely publish) judicial decisions. This is particularly true in France, where the vast majority of cases concerning climate protests are not made publicly available but are typically only sent to individuals involved in the legal proceedings. In contrast to Germany, however, where there are many publicly available decisions. In the examination of all jurisdictions, some reliance was placed on cases as reported in mainstream news outlets, but caution was provided because the reporting often contained legal inaccuracies. Third, different legal regimes within a national jurisdiction sometimes had different laws applicable to protests. For example, in Germany, protest cases are typically resolved based on state law where there are variances between state jurisdictions. In the United Kingdom, the majority of the research focused on cases in England & Wales, but the jurisdictions of Northern Ireland and Scotland each have relevant laws concerning protests as well. Based on these limitations and the scope of the project, the research and conclusions drawn below are based on a high-level review of cases in each jurisdiction and are not intended to be comprehensive. The research, however, remains valuable as it provides a snapshot of how these three domestic jurisdictions, each experiencing significant climate protest activities because of the ongoing threat of climate change and the perceived lack of timely intervention from government and industry to stem the associated global harms, are handling climate protest activities. An additional point worth mentioning is that

each jurisdiction has its own culture of protest and expression which inevitably impacts on domestic law.

The case study of each jurisdiction includes the following overviews: (1) the legal framework of how the ECHR jurisprudence operates within each jurisdiction; (2) the main laws that prohibit certain acts of protest and assembly; (3) how domestic adjudicators consider ECHR rights of protest and assembly when deciding cases; (4) the success of certain defences; (5) the results and penalties or fines that domestic legal systems have imposed on protests found guilty of an offence; (6) observations concerning chilling effects of the operation of domestic systems in handling cases of climate protests.

THE UNITED KINGDOM

Legal Framework

In England and Wales, the right to peaceful protest is protected specifically by the European Convention on Human Rights. The rights to freedom of expression (Article 10) and freedom of assembly (Article 11) are directly incorporated into domestic British law in Schedule 1 of the Human Rights Act 1998.[304] Section 6 of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with those rights. Where the rights are engaged, any interference of such right must be: (a) prescribed by law; (b) necessary, in the terms provided for by Articles 10.2 and 11.2 of the European Convention; and (c) proportionate. Under Article 2 of the Human Rights Act 1998, the UK courts must 'take into account' ECHR case law.

Notwithstanding the protection of peaceful protest and expression, there are, however, national laws that limit the right to protest. The usual offences under which climate protestors are charged in the UK include trespass, private nuisance, public nuisance,

[304] The Human Rights Act 1998 plays an important role in protecting rights, as the legal system is largely founded on 'negative freedom' (from external interference by the State).

and harassment. The following laws are the preeminent laws that impact the right to protest in UK jurisdictions:

- In England & Wales, offences in the Public Order Act 1986, the Police, Crime, Sentencing and Courts Act 2022 (PCSC), and a common law offence of 'breach of the peace' limit protest rights;
- In Scotland, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 similarly sets out an offence for 'breach of the peace';
- In Northern Ireland the Public Order (Northern Ireland) Order 1987 governs protest rights.

The Main Laws that Impact Climate Protests

Public Order Offences

Relevant offences contrary to the Public Order Act 1986 (POA 1986) may include threatening, abusive or insulting words or behaviour, or display of visible representations, which:

- section 4 POA 1986: Are likely to cause fear of, or to provoke, immediate violence;
- section 4A POA 1986: Intentionally cause harassment, alarm or distress;
- section 5 POA 1986: Are likely to cause harassment, alarm or distress (threatening or abusive only words or behaviour only – not insulting).

As a defence in response to an offence under section 4A and section 5 POA 1986, the accused may demonstrate that their conduct was reasonable, which must be interpreted in accordance with the freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference with them must be convincingly established, and a prosecution may only proceed if necessary and proportionate.

Harassment and Stalking Offences

The offence of harassment contrary to section 1 and section 2 of the Protection from Harassment Act 1997 is committed where a person engages in a course of conduct which

amounts to the harassment of another person, and they know or ought to know that it amounts to harassment. What constitutes a 'course of conduct which amounts to harassment' is a fact-specific assessment. It requires behaviour on more than one occasion, but this need not be the same behaviour on each occasion. Behaviour which begins as a legitimate complaint or inquiry may turn into harassment if unreasonably prolonged or persistent. It is a defence to prove the conduct was reasonable which must also be interpreted in accordance with the freedom of expression and other freedoms. Again, if these freedoms are engaged, a justification for interference with them must be convincingly established, and a prosecution may only proceed if necessary and proportionate.

Offences Involving Trespass

Trespass is not of itself a criminal offence. However, there are some offences in which trespass is an essential element. Examples of such offences that may be committed during a protest include trespassory assemblies (s. 14B Public Order Act 1986) and aggravated trespass/disrupting lawful activity (contrary to s.68(1) Criminal Justice and Public Order Act 1994).

Police, Crime, Sentencing and Courts Act 2022

The Police, Crime, Sentencing and Courts Act 2022 introduced several measures to significantly limit any disruption caused by protesters. New measures include:

i) Public Processions and Public Assemblies

Section 12 (imposing conditions on public processions) and s. 14 (imposing conditions on public assemblies) of the Public Order Act 1986 (POA 1986) are amended by ss. 73-75 of the PCSC Act 2022.[305] The Public Order Act 1986 defines a march or moving protest as a 'procession' and a static gathering as an 'assembly'. The difference is important because the police have more powers to control a procession than an assembly. Section

[305] s. 14 was used in the case of Bennett v DPP [2022] EWHC 1822 (Admin) for instance, where the complainants appealed against the Crown Court's dismissal of their appeals against their convictions for the offences of failing to comply with a condition imposed upon an assembly contrary to the Public Order Act 1986 s.14.

12 of the POA 1986 allows the police to impose any type of condition on a public procession necessary to prevent: serious disorder; serious damage to property; serious disruption to the life of the community; or intimidation. Note that conditions that may be imposed on a public assembly were previously more limited, being restricted to specifying their maximum duration, maximum attendance and location.

The main points to note are:

- New subsection 14(1A) POA 1986 enables the police to place any condition on a public assembly (that is necessary to prevent disorder, damage, disruption, impact or intimidation), aligning it with s. 12 conditions that may be imposed on a public procession.
- Amendments to ss. 12 and 14 POA 1986 broaden the range of circumstances in which the police can impose conditions on a procession or assembly, to include where the police 'reasonably believe' the noise generated by persons taking part may have a significant relevant impact on persons in the vicinity or may result in serious disruption to the activities of an organisation which are carried on in the vicinity.
- New subsections 12(2A) and 14(2A) POA 1986 provide that the cases in which a procession or assembly may result in serious disruption to the life of the community include, in particular, where it may result in a significant delay to the supply of a time-sensitive product to consumers of that product or a prolonged disruption of access to any essential goods or essential services, including those listed.
- The *mens rea* of the offences under ss.12 and 14 POA 1986, relating to the breaching of conditions placed on a procession or assembly by an organiser or participant, were amended so that instead of having to prove that a person 'knowingly' failed to comply with a condition, it now needs to be proven that 'at the time the person fails to comply with the condition, the person knows or ought to know that the condition has been imposed'.
- The maximum penalties for the offences of breaching conditions imposed under ss.12 and 14 POA 1986 have also been increased. The penalty for ss. 12 and 14

offences for organising an assembly or inciting another is increased from 3 months' imprisonment and/or fine to 6 months' imprisonment and/or a fine.[306]

ii) Public Order Act 2023

In announcing the purposes of the Public Order Bill 2022 (which became the Public Order Act 2023) the Government stated that the Bill 'will build on the public order measures in Part 3 of the Police, Crime, Sentencing and Courts Act 2022, taking account of the disruptive and dangerous tactics employed in recent months by protest groups such as Extinction Rebellion, Insulate Britain and Just Stop Oil.'[307] The Public Order Act 2023[308] describes its purposes as 'An Act to make provision for new offences relating to public order; to make provision about stop and search powers; to make provision about the exercise of police functions relating to public order; to make provision about proceedings by the Secretary of State relating to protest-related activities; to make provision about serious disruption prevention orders; and for connected purposes'. It creates a raft of further offences relating to civil disobedience tactics typically employed in the climate protest space, including:

- An offence of locking on in s 1 (covering instances of people locking themselves on to objects or lands) and in s 2 having equipment used for locking on and having the intention of using it for locking on purposes;
- An offence of tunnelling (creating a tunnel) or having equipment for creating a tunnel in ss 3-5;
- An offence of obstructing major transport works in s 6;
- An offence of obstructing key national infrastructure in ss 7-8;

[306] Crown Prosecution Service, "Offences during Protests, Demonstrations or Campaigns" (*CPS*, 24 January 2019) <https://www.cps.gov.uk/legal-guidance/offences-during-protests-demonstrations-or-campaigns>, accessed 5 April 2023.
[307] UK Government, "Public order bill: European Convention on Human Rights Memorandum" (*GOV.UK.*, updated 30 August 2023), <https://www.gov.uk/government/publications/public-order-bill-overarching-documents/public-order-bill-european-convention-on-human-rights-memorandum>
[308] United Kingdom, Public Order Act 2023

- Additional stop and search powers granted to police (without requiring police to have suspicion of a crime) in s 11 and the creating of a new offence of obstructing stop and search in s 14;[309]
- Provisions permitting the Secretary of State to bring a civil action (e.g., including applications for injunctions) against protestors impacting key national infrastructure or essential goods in s 18 and to apply to the court to attach power of arrest to the injunctions without the police requiring a warrant in certain instances;
- Provisions allowing the court to make a serious disruption prevention order upon the conviction of a protestor in ss 20-29.

The Bill was subject to scrutiny of the Joint Committee of Human Rights which criticized large sections of the Bill. [310]

iii) Palace of Westminster & Parliament Square

Sections 76 and 77 of the PCSC Act 2022 amends the legal framework in Part 3 of the Police Reform and Social Responsibility Act 2011 (PRSR Act 2011), which is designed to prevent 'disruptive activities' in the vicinity of the Palace of Westminster, and to ensure vehicular access to Parliament. It is a summary offence to fail, without reasonable excuse, to comply with a direction from a constable or authorised person to cease prohibited activity under s. 143(8) PRSR Act 2011.

iv) Intentionally or Recklessly Causing Public Nuisance

Section 78 PCSC Act 2022 introduces the new statutory offence of causing public nuisance, abolishing the common law offence of public nuisance.

v) Wilful Obstruction of the Highway

Section 80 of the PCSC Act 2022 amends s.137 of the Highways Act 1980 to:

[309] The Joint Committee on Human Rights that these provisions expose those engaging in peaceful protests to the ungirdled power of the police for stop and search, which could further dissuade people from exercising their right to protest: Legislative scrutiny: Public order bill - joint committee on human rights. p17 [43]
Available at: https://publications.parliament.uk/pa/jt5803/jtselect/jtrights/351/report.html.
[310] Legislative scrutiny: Public order bill - joint committee on human rights. p17
Available at: https://publications.parliament.uk/pa/jt5803/jtselect/jtrights/351/report.html.

- Increase the maximum sentence for the offence of obstruction of the highway from a level 3 fine to 6 months' imprisonment (51 weeks when section 281(5) of the Criminal Justice Act 2003 comes into force) or an unlimited fine, or both.

Domestic Consideration of Climate Protest Cases

As outlined here, UK courts clearly account for ECHR law in making decisions concerning protest. However, three key observations can be made. First, UK courts appear to draw little distinction between the application of Articles 10 and 11 and the different rights entrenched in those provisions do not appear to alter judicial assessment of the necessity and proportionality tests. Second, Articles 10 and 11 considerations take place in all the cases but the depth of consideration and analysis varies considerably. Such consideration is sometimes superficial, in the sense of the court stating that Articles 10 and 11 apply but then omitting any substantive analysis. For instance, a judge may, in a couple of sentences, deem that Articles 10 and 11 ought to be balanced against the right to the enjoyment of private property of a land owner, and then issue an interim injunction preventing a climate protest. To illustrate, in *Heathrow Airport Ltd v Garman*, an injunction was granted to prevent protests at Heathrow airport as the judge concluded that the protests would have serious and damaging consequences on the running of the airport and would increase the risk of a terrorist attack on the users of the airport. The judge held that,

> In all the circumstances, I conclude that the Claimants should be granted injunctive relief. The balance of convenience clearly lies in favour of granting it. I further conclude that such relief is necessary and proportionate for the reasons I have set out. Thus, even applying the higher test urged upon me by the Defendants, I have no difficulty in finding that it is satisfied.[311]

[311] *Heathrow Airport Ltd v Garman [2007]* EWHC 1957 (QB), para. 116.

While the Court did not specifically address the necessity and proportionality tests in its holding it intoned it had sufficiently considered those in reaching its decision. A lack of specific analysis of ECHR provisions is common in UK decisions concerning climate protest. Third, the consideration of necessity and proportionality is typically more extensive in the context of proportionate custodial sentences and the review of sentences. For example, in *R v Roberts* the Court of Appeal repeatedly referred to the Strasbourg jurisprudence and the Strasbourg Court, holding that it: [312]

> has accepted as proportionate both immediate sentences of imprisonment and suspended sentences in cases where the conduct in question caused less harm and was less culpable. In this way, the ECHR marches with the common law. The underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences.

The Court of Appeal therefore followed ECHR law and noted the importance of taking account the culpability of the protestor's conduct and whether and to what extent harm was caused in making any sentencing determination. The Scottish Court of Session came to a similar determination in *Transocean Drilling UK Ltd v Greenpeace Ltd*[313] (which concerned Greenpeace's occupation of an oil rig) when it considered what sanction, if any, would be proportionate for the purposes of Articles 10 and 11. The Court specifically accounted for the nature and duration of the conduct (Greenpeace had infringed a prior court order) and the nature of the person or entity against whom the protest was directed. The Court deemed that the appellant was a commercial entity engaged in lawful conduct which Greenpeace sought to obstruct in the form of their direct action. Greenpeace's conduct involved a form of 'compulsion' or 'coercion' to hinder or stop the appellant's activities. Greenpeace's occupation of the rig led the appellant to obtain the order to protect itself against unlawful interference. By the time the order was granted, the Court noted that Greenpeace's point had been made,

[312] *R. v Roberts (Richard) [2018]* EWCA Crim 2739, para 43.
[313] *Transocean Drilling UK Ltd v Greenpeace Ltd [2020]* CSOH 66.

and their conduct had crossed the line and ceased to fall within the core of the rights which Articles 10 and 11 protected. As a result, it deemed that the imposition of a sanction in respect of Greenpeace's contempt of court was necessary in a democratic society in pursuit, first and foremost, of the aim of maintaining the Court's authority, and for the protection of the rights and freedom of others. Of note here, the Court intoned that it would have been more lenient had Greenpeace ceased its occupation when the Court had made its initial order (and when Greenpeace had 'made its point').

Lastly, and significantly, while the UK courts apply Articles 10 and 11 of the ECHR in protest cases, they have largely and resoundingly concluded that (a) those rights do not surpass the rights of landowners or property holders who are impacted by the protesting activities and (b) will look to whether there are alternative means for the protestors to articulate their views other than by engaging in activities that impeded on property owners. Several key cases highlight this observation. In *R v Edward Thacker*,[314] the Court of Appeal disagreed with Liberty's core submission that section 1(2)(b) of the Aviation and Maritime Security Act 1990 should be interpreted restrictively to ensure that rights guaranteed by Articles 10 and 11 of the ECHR were not interfered with.[315] The Court of Appeal held: 'We do not accept that these articles could be used to support a proposition that protesters are entitled to enter the secure area of an airport, which, after all, is kept secure for obvious and sound reasons of general security and passenger safety. There are many alternative ways available for protest and articulation of views.'[316] Similarly, in *Hillingdon LBC v Persons Unknown*,[317] the High Court upheld a ban on overnight sleeping on private land by protestors rallying against the construction of HS2, a large high speed railway, because it would impede enjoyment of the land by others and cause unavoidable sanitary conditions; the Court held that 'being a protestor does not give you rights that others do not have' and 'invoking articles 10 and 11 of the Convention does not put you in a better legal position than other ordinary members of

[314] *R v Edward Thacker* [2021] EWCA Crim 97.
[315] Section 1(2)(b) details that it is 'an offence for any person by means of any device, substance or weapon unlawfully and intentionally—to disrupt the services of such an aerodrome'.
[316] *R v Edward Thacker* (n 310) para 52.
[317] *Hillingdon LBC v Persons Unknown* [2020] EWHC 2153 (QB).

the public who are not allowed to camp.'[318] A criticism of this reasoning, however, is that the rights of people to camp are not the crux of the activity that the protestors are asking to be protected—it is the act of protesting that they are seeking to assert, which arguably has only the ancillary effect of them needing to occupy land to camp. Any applicant should be mindful of the importance of framing the underlying case in a way that support the exercise of peaceful protesting rights.

UK Courts have nonetheless been reluctant to give more importance to the right to assembly vis-à-vis the exercise of land ownership rights. In *Islington LBC v Persons Unknown*, the High Court decided that a local authority was entitled to an order for possession against environmental protesters who had occupied land which it wished to redevelop. The local authority's property rights and the rights of others in the vicinity were deemed to outweigh the protesters' right to freedom of expression under ECHR Article 10 and their right to freedom of assembly and association under Article 11. [319] Similarly, in *Islington LBC v Wells*, the High Court deemed that the protest was a peaceful manifestation of genuinely held environmental and political views but the balance clearly came down in favour of upholding the local authority's rights as freeholder as a necessary interference with the protesters' Articles 10 and 11 rights. The court was satisfied that it was proportionate to make a possession order and that it was not possible in the circumstances to make some less intrusive order.[320] Further, in *National Highway Ltd v Springorum*, the High Court did not consider European Convention rights, as the case was on the breach of an injunction, where: [321]

> On an application for committal for contempt proportionality is not a live issue in determining whether there has been a breach of an order. Whilst

[318] para 111.
[319] *Islington LBC v Persons Unknown [*2020] EWHC 3509 (Ch).
[320] *Islington LBC v Wells* [2021] EWHC 528 (Ch): 'There is no dispute that these rights are engaged on the facts of this case. I therefore have to balance the Council's right to possession of its property as against the Article 10 and Article 11 rights of the protesters.' (para. 18) and 'Thus, the issue for me today is the appropriate balance to be struck between the Council's interest in possession of its land, and the rights of Mr Loveridge and his fellow protesters under Articles 10 and 11 of the European Convention. As identified by Marcus Smith J on the appeal against the Deputy Master's order this requires: 'a fact-sensitive, evaluative assessment of those rights, and the extent to which it is permissible for Islington to interfere with them, even though Islington is asserting undisputed possessory rights over the land'.' (para. 21).
[321] ibid para 29.

> proportionality is a matter to be considered when an order is made, the submission is that it is unrealistic to expect full consideration to be given to that issue when (as here) the initial order was made without notice.

One of the reasons why claims by protestors that interim injunctions against protesting infringe on the rights to freedom of expression and assembly is that some courts unintentionally and mistakenly collapse the 'balance of inconvenience'[322] factor into the proportionality test assessing ECHR rights. In *Esso Petroleum Co Ltd v Breen*[323] for instance, the High Court's title of section 3 is 'The balance of convenience and proportionality'. While each test requires a balancing exercise by the Courts, the two tests are ultimately different in nature. However, as this case concerned protestors disrupting the transportation of fuel to an airport, the Court was concerned about the impact on trade and transport of people and the lawful activity of constructing the pipeline, and ultimately held that the injunction struck a fair 'balance' between the 'rights of the protestors, the Claimant, the contractors, and the general public', noting that the injunction only protected a certain area where the pipeline was to be constructed and protestors could protest outside of it. The Court concluded that 'the balancing exercise I have performed comes down very clearly in the Claimant's favour given the importance of the works and the threat posed by the protestors to disrupt and cause damage against the protesters' rights under Articles 10 and 11'.[324] However, the Article 10 and 11 jurisprudence does not condone a 'balancing exercise' between the protestor and the landowner. It specifically requires that any infringement on protestors' right meet the 'necessity' and 'proportionality' tests as set out in the ECHR which ought to govern given that the rights to peaceful protest and expression are fundamental.

[322] From the American Cyanamid injunction test from *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1
[323] *Esso Petroleum Co Ltd v Breen* [2022] EWHC 2664 (KB).
[324] ibid.

As these cases demonstrate, courts are often more protective of landowner rights than the right of peaceful assembly. There have, however, been two recent developments in UK case law that have shifted the landscape of protest law in the UK.

First, *DPP v Ziegler and others* [2021] UKSC 23 arguably provides some enhanced protections for certain protestors in the context of convicting protestors. The Court held that in enumerating the 'necessity test' the Court must balance the rights of protestors with the 'general interest of the community'. [325] The Court initially enumerated the traditional factors to consider, including: (a) The extent of the breach of law, (b) location of the protest, (c) duration of the protest, (d) degree of occupation of land, and (e) extent of the interference with the rights of others. But then, significantly, Lord Neuberger added two additional factors: (f) whether the views giving rise to protest relate to 'very important' issues, and (g) whether the protestors believed in the views they were expressing (as it would be hard to conceive of a situation in which it would be proportionate for protestors to interfere with the rights of others based on views in which the protesters did not believe).[326]

As a result, the Court expanded the factors to consider the importance and sincerity of the protestors views. The UKSC directed that the trial court should be mindful that, 'there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.'[327] Though the judgment lends sympathy to protest rights, and affords protestors wider protection, it does not allow protestors to take any action and then seek to justify it on the grounds of proportionality.

However, a second significant recent decision (Attorney General Reference No. 1 [2022] EWCA Crim 1259) which relates to the 'Colston 4' case, clarified that prosecution and conviction for protest activity resulting in criminal damage to property is 'proportionate' per the ECHR. In 2022, four protestors who played a role in pulling down

[325] *DPP v Ziegler and others* [2021] UKSC 23 para 57.
[326] ibid.
[327] ibid para 68.

the statue of slave trader Edward Colston in Bristol and throwing it into the harbour during a 2020 Black Lives Matter protest were acquitted of criminal damage by a jury. A range of defences were used in the case, and the Court of Appeal was asked to consider one that argued that a conviction for damage to the statue would have been a disproportionate interference with the defendants' right to protest under the ECHR. After a reference to the Attorney General, seeking an opinion on three questions of law which were said to have arisen from the trial in the Bristol Crown Court, the Lord Chief Justice, Lord Burnett of Maldon, said: 'We have concluded that prosecution and conviction for causing significant damage to property during protest would fall outside the protection of the convention, either because the conduct in question was violent or not peaceful, alternatively (even if theoretically peaceful) prosecution and conviction would clearly be proportionate.'[328] In effect, the judgment limits the protection afforded by Articles 10 and 11 in the context of extensive criminal damage.

Defences and Arguments

General

Arguably, there are two main ways that climate protestors have been successful:

- Arguing a disproportionality of sentence: Appellate Courts appear more willing to review sentences and decide them to be disproportionate under the Convention in comparison to many other types of cases (private injunctions, etc., the Court often merely completed a cursory assessment of ECHR Articles 10 and 11 rights).
- The jury system allows climate protestors to make an (indirectly) compelling account of the urgency of climate change and attract juror sympathy. However, in a recent case, protestors were sanctioned for giving reasons for protesting by the judge. Therefore, the tide may be turning when it comes to attracting sympathy for the reason for protest.[329]

[328] Attorney General Reference No. 1 [2022] EWCA Crim 1259 para 115.
[329] The Guardian, Court restrictions on climate protesters 'deeply concerning', say leading lawyers, https://www.theguardian.com/environment/2023/mar/08/court-restrictions-on-climate-protesters-deeply-concerning-say-leading-lawyers, accessed 18 March 2023.

Lesser sanctions are largely recognised as appropriate in decisions, such as in *National Highways Ltd v Buse*, where the High Court described that:

> Although Articles 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms, to which domestic effect was given by the Human Rights Act 1998, are engaged, this is not relevant to the issue of whether the protestors acted in breach of the order. This is because when imposing the order, the judge will have taken into accounts the rights of the protestors to protest and balanced those interests against the rights of others in deciding whether to make the order, breach of which has penal consequences.[330]

> The issue of suspension is a significant factor where a contempt takes place in the course of a protest. Articles 10 and 11 of the European Convention on Human Rights are engaged. As was made clear in Heyatawin and others and Cuadrilla, the conscientious motives of protestors are relevant because most will not be conventional law breakers but motivated by a desire to improve matters, as they see it. A lesser sanction may be appropriate because the sanction can be seen as part of a dialogue with the defendant so that they may appreciate 'the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's activities are contrary to the protestor's own moral convictions'. The reason for this duty is because it would not be possible to co-exist in a democratic society if individuals chose which laws they decided to obey.[331]

Alternatively, the basis on which protestors appear least successful are in using Articles 10 and 11 against interim injunctions. In *City of London Corp v Samede* [2012] EWHC 34 (QB) for instance, it was not disputed that when exercising their rights under Articles 10 and 11, the protestors were, in principle, entitled to express their views and to assemble peacefully in a public place to do so. When the balance between the right to

[330] ibid para 24.
[331] ibid para 29.

assembly and the rights of others was struck, the factors for granting relief outweighed the factors against. The court deemed that it would not be disproportionate to grant the relief sought, as the proposed interference with protestors' Convention rights was the least intrusive way in which to meet the pressing social need, and struck a fair balance between the needs of the community and the individuals concerned so as not to impose an excessive burden on them. The freedoms and rights of others, the interests of public health and safety, the prevention of disorder and crime, and the need to protect the environment of that part of the City of London all demanded the remedy brought by the orders imposed. The court decided that the interference with the protestors' rights was entirely lawful and justified at common law and within the statutory regimes Parliament had enacted to safeguard the public right to use the highway and for the effective enforcement of planning control. It was also necessary and proportionate.[332] Such reasoning on proportionality for granting interim relief is commonplace in English courts.

Further, it is important to note that in the UK, in assessing the balance between competing rights in protest cases, judges state that it is not for the Courts to choose between different political causes.[333]

Defence of 'Necessity'

In several cases, protestors have sought to raise the defence of 'necessity', arguing they had a legal excuse for the acts constituting the offence of which they were accused. Protestors argue that climate change poses an imminent and inevitable threat to life and property, and that their acts of protest were a proportionate response. In several cases they have sought to rely on evidence from the Intergovernmental Panel on Climate Change in support of this position. However, judges have ruled that it is not a permissible defence.

[332] ibid paras 147-149, 159-166.
[333] *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (QB); *City of London Corporation v Samede* [2012] PTSR 1624.

Recent Cases

1. R v Bramwell ('The Shell Six Case')

On 23 April 2021, a jury at Southwark Crown Court acquitted six protestors who were charged with criminal damage caused to Shell's headquarters after spray painting slogans and breaking windows during the course of Extinction Rebellion protests in April 2019. According to BBC, the judge allowed defendants to provide evidence of their motivations but informed the jury that even if they were 'morally justified' they had no defence at law.[334] The jury nonetheless acquitted the activists.

2. R v Eastburn ('The DLR Three Case')

On 19 December 2021, three protestors were convicted of obstructing an engine or carriage by an unlawful act, contrary to section 36 of the Malicious Damage Act 1861 by a jury at Inner London Crown Court. The three protestors had climbed onto a Docklands Light Railway train during rush hour on 17 April 2019. The judge ruled that the necessity defence could not be presented to the jury. Protestors were given conditional discharges and required to pay a contribution to court costs.

3. R v Ditchfield

An XR protester was initially cleared of criminal liability for defacing a council building after successfully arguing that she was acting to defend her property. Angela Ditchfield was arrested after spray-painting two 'XR' symbols onto the headquarters of the Cambridgeshire County Council during a protest in December 2018. She argued that she had a legal excuse under section 5 of the Criminal Damage Act 1971, which provides an excuse for criminal damage when it is committed to protect the property of another, because she believed climate disaster posed an imminent threat to her property. On 1 November 2019 she was found not guilty at Cambridge Magistrates' Court, which found that she was acting to protect land and homes. However, the decision was subsequently successfully appealed to the High Court. On 12 January 2021 the appeal was allowed and the Court held that as an act intended to convince a government authority to take

[334] BBC, 'Extinction Rebellion: Jury acquits protestors despite judge's direction' (23 April 2021) <www.bbc.co.uk/news/uk-england-london-56853979>

action on an issue was incapable of providing immediate protection to property; it did not fall within the ambit of the statute and a guilty verdict was substituted.[335]

The above cases illustrate that though the defence of 'necessity' has generally been unsuccessful, juries may find that protestors are justified in their acts and acquit them. Juries in this jurisdiction do not give an explanation for their verdict, though they will be guided by a judge's directions. Nonetheless, in spring 2023, three non-violent Insulate Britain activists were jailed for telling juries why they were protesting.[336] They were on trial for public nuisance for taking part in a roadblock in the City of London in October 2021 as part of a campaign by Insulate Britain which says it wants to pressurise the government to insulate UK homes to reduce carbon emissions. Nixon was convicted of public nuisance. The jury failed to reach verdicts in the trial of Lewis and Pritchard and a decision is due on 31 March on whether a retrial will take place. The rulings were made by Judge Silas Reid at Inner London Crown Court. Addressing the juries, the judge said the trials were not about climate change, or whether the actions of Insulate Britain and similar organisations were to be applauded or condemned, but whether or not the protesters caused a public nuisance. The defendants' motivations for acting the way they did had no relevance, he said. Pritchard and Lewis were each jailed for seven weeks for contempt. Lewis, a councillor from Dorset, told the court why she had breached the judge's ruling: 'There are thousands of deaths every year in the UK from fuel poverty, and thousands of deaths around the world due to climate change. There is no choice but to give voice to truth and to not be silenced'.[337]

4. Colston Four

Lastly, to return to the 'Colston Four' case, two defences were brought to the jury's attention. The first argument (relied on by two of the defendants) was based on a specific defence in the Criminal Damage Act 1971 itself: damaging property is lawful

[335] *R v Ditchfield*, [2021] EWHC 1090 (Admin), 2021 WL 01759038. At the time of writing it is unknown as to whether there have been any further appeals.
[336] Sandra Laville, 'Court restrictions on climate protesters 'deeply concerning', say leading lawyers', (*The Guardian*, 8 March 2023) <https://www.theguardian.com/environment/2023/mar/08/court-restrictions-on-climate-protesters-deeply-concerning-say-leading-lawyers > accessed 18 March 2023.
[337] ibid.

where the defendant honestly believes that those, he considered to be entitled to consent to the damage, would have consented to it had they known of all the circumstances. This defence is heavily subjective, turning on the defendant's belief, whether reasonable or not. It was therefore open to the two defendants to assert that they thought the statue belonged to the people of Bristol and that they believed that Bristolians would have consented to the damage they caused to it. The second argument (relied on, in some form, by all four defendants) was that they used reasonable force to prevent the commission of a criminal offence. The defendants relied principally on the 'public display' of 'any indecent matter' (Indecent Displays (Control) Act 1981) and/or the display of a 'visible representation' which is 'abusive' within the sight of someone likely to be caused 'distress thereby' (Public Order Act 1986). According to the jury's verdict on 5 January 2022, the four defendants who helped pull down the statue of Edward Colston and throw it into Bristol harbour were not guilty of an offence under the Criminal Damage Act. However, since juries do not provide reasons for their decisions in the UK, we shall never know why the jury decided to acquit the four defendants.

Fines and Penalties

Penalties vary considerably, given that the specific facts also do. Cases range from breaching interim injunctions to prevent the slowing down of traffic,[338] the renewal of injunctions to prohibition actions preventing the construction of an oil pipeline project,[339] the breach of injunctions,[340] precautionary injunctions to restrain unnamed defendants from trespassing and causing nuisance on land on which the HS2 high-speed railway line was being constructed,[341] bringing of actions of trespass,[342] interim relief to restrain protestors from obstructing the operations of fuel tankers, appeal of order

[338] *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB).
[339] *Esso Petroleum Co Ltd v Breen* [2022] EWHC 2664 (KB).
[340] *National Highways Ltd v Buse* [2021] EWHC 3404 (QB).
[341] *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB): It was considered appropriate to grant a precautionary injunction to restrain numerous named and unnamed defendants from trespassing and causing a nuisance on and around land on which the HS2 high-speed railway line was being constructed. The nominated undertaker had sufficient title to the land to bring an action in trespass, it was appropriate to make the injunction against 'persons unknown', and although the terms of the injunction would interfere with the lawful right to protest against the HS2 project, that interference was justified.
[342] *R. v Brown (James Hugh)* [2022] EWCA Crim 6.

for imprisonment for contempt of court to Insulate Britain protestors who had taken part in two protests on the M25 motorway in breach of a court order and had glued themselves to the court steps,[343] and appeal of a decision to prosecute an offender who had superglued himself to an airplane at London City Airport under the offence of public nuisance.[344] The resulting penalties for the offences mentioned vary from a suspended sentence of 2 years of 14 days' imprisonment for breach of an injunction,[345] a sentence of two months' imprisonment for contempt of court for a number of members of the Insulate Britain campaign group who had protested on the M25 motorway in breach of an injunction,[346] and a four month prison sentence for a person supergluing themselves to an airplane.[347] Though so far most custodial sentences have been suspended, the government is seeking to enact and enforce harsher penalties and sanctions for climate protestors.[348] A recent decision (March 2023) has also resulted in the imprisonment of a climate protestor for 5 weeks after blocking motorway traffic, though at the time of writing, the judgment was not publicly accessible.[349]

[343] Damien Gayle, Five Insulate Britain members jailed for defying M25 protest injunctions (*The Guardian*, 2 February 2022) <https://www.theguardian.com/environment/2022/feb/02/five-insulate-britain-members-jailed-for-defying-m25-protest-injunctions> accessed 18 March 2023.

[344] Zoe Blackler, 'Paralympian who scaled a plane guilty of public nuisance' (Extinction Rebellion, 29 July 2021) <https://extinctionrebellion.uk/2021/07/29/paralympian-who-scaled-a-plane-guilty-of-public-nuisance/> accessed 18 March 2023.

[345] *North Warwickshire BC v Aylett* [2022] EWHC 2458 (KB): A local authority had proved beyond reasonable doubt that an interim injunction prohibiting protestors from organizing or participating in protests at and in the vicinity of an oil terminal had been personally served on one of three defendants to an application for committal for contempt of court for alleged breach of the injunction. However, the wording of the injunction was reasonably susceptible to more than one meaning and the meaning more favourable to the remaining two defendants was adopted, with the result that the contempt application in respect of them failed for want of service. The third defendant's conduct in occupying a tunnel within the terminal, causing a public highway to be closed, was so serious that only a custodial sentence was appropriate. He was sentenced to 14 days' imprisonment, suspended for two years.

[346] *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) - The defendants were members of Insulate Britain, a protest group highlighting climate change. After a number of protests in September 2021 involved disrupting and obstructing traffic to the M25, the court issued an injunctive order prohibiting 'persons unknown causing the blocking, endangering, slowing down, obstructing or otherwise preventing the free flow of traffic onto or along the M25 motorway for the purpose of protesting'. All of the instant defendants had been validly served with the injunction. On 8 October the first and second defendants took part in a further protest disrupting and obstructing traffic to the M25. On 27 October all the defendants took part in another such protest. The court was satisfied that each defendant had deliberately breached the injunction; the only issue was as to sanction.

[347] *R. v Brown (James Hugh)* [2022] EWCA Crim 6: A decision to prosecute an offender who had superglued himself to an airplane at London City Airport under the offence of public nuisance rather than as aggravated trespass was not an abuse of process. His offending went well beyond aggravated trespass and had a serious knock-on effect of delayed and cancelled flights, and seriously disrupted the public's right to use the airport. His sentence of 12 months' imprisonment was reduced to four months' imprisonment in light of the context of peaceful protest and his visual impairment.

[348] Damien Gayle, 'Keir Starmer backs stiff sentences for climate protesters who block roads' (*The Guardian*, 24 October 2022) <https://www.theguardian.com/politics/2022/oct/24/keir-starmer-backs-stiff-sentences-for-climate-protesters-who-block-roads> accessed 18 March 2022.

[349] Niamh Lynch, 'Climate change protester jailed for five weeks after blocking motorway traffic' (*Sky News*, 13 March 2023) <https://news.sky.com/story/climate-change-protester-jailed-for-five-weeks-after-blocking-motorway-traffic-12832843> accessed 18 March 2023.

Chilling Effects

There are several features of the law in England & Wales that chill and deter protestors from engaging in peaceful protest activities. The first is the recent enactment of the PSCS Act 2022, which makes 'noisy' and disruptive protests offences. The second is the Public Order Bill, which is currently, at the time of writing this report, in the House of Lords due for a second reading. The Public Order Bill would impose tougher sanctions for climate protesters who have repeatedly blocked traffic on Britain's busiest motorway, including up to six months' imprisonment. The police will also be granted new powers to seize equipment that may be used to 'lock-on' protesters. Another example of how the law prevents protestors from engaging in peaceful protest is the propensity for UK courts to protect the rights of private landowners and issue injunctions prohibiting protestors from entering or protesting on that space. In many of those cases, the courts often find that the granting of an injunction in favour of the claimant strikes a fair balance between the right to protest of the defendant and the right for the claimant to enjoy their property. Then, the risk of a breach of order and contempt of court for protestors that continue to protest is a compelling chilling effect.

FRANCE

Legal Framework

As outlined below, French courts typically apply France's domestic constitutional law rights in cases concerning protest. Nevertheless, the ECHR influences French case law.[350] French supreme courts have accepted the superiority of treaty law over statutes.[351] In practice, the risk of the State being held liable and ordered to compensate the damage resulting from the intervention of a law adopted in disregard of France's international commitments will lead Parliament to amend the law in

[350] Case relating to certain aspects of the laws on the use of languages in education in *Belgium v Belgium*, App no 1474/62 (ECtHR, 23 July 1967).
[351] The priority of the Convention arises from Art. 55 of the Constitution.

question in order to make it compatible with the treaties. [352] With regard to the specific influence of the ECHR, there are now many examples of French laws being repealed, or reformed, after the issuance of an ECtHR decision.

Freedom to Demonstrate

The freedom of demonstration has been constitutionally recognised since a decision of the Constitutional Council in 1995,[353] but does not benefit from an explicit textual concretisation in the texts of constitutional value,[354] notably because of a complicated history with the public authorities. Article 431-1 of the Criminal Code also indirectly protects the freedom to demonstrate by punishing the act of obstructing, in a concerted manner and with the help of threats, the exercise of the freedom to demonstrate. The Court of Cassation has defined a demonstration as any gathering, whether static or mobile, on the public highway of an organised group of people for the purpose of expressing collectively and publicly an opinion or a common will.[355]

The freedom to demonstrate, however, is not an absolute freedom. It is currently regulated by the Internal Security Code (CSI) and is based on a declaration system (CSI, L.211-1), which, in theory at least, makes it a rather liberal system. Such a declaration has to be made, 3 to 15 days in advance, to the town hall of the commune (or Prefect of Police for Paris) where the demonstration is to take place. If the demonstration is deemed to be likely to disturb public order, it can be banned by the competent authority (CSI, L211-4), which in practice makes it quite similar to an authorisation system. The administrative judge is then in charge of controlling such a ban. The only reason for justifying a ban on demonstrations is the risk of disturbing public order.[356] The circumstances taken into account to assess the need for a ban are: the circumstances surrounding the demonstration, the itinerary or the location of the

[352] Conseil d'Etat, 8 February 2007, no 279522 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000018005399/,>
[353] Constitutional Council, 18 January 1995, decision DC 94-352, *Loi d'orientation et de programmation relative à la sécurité* <https://www.conseil-constitutionnel.fr/decision/1995/94352DC.htm>
[354] Article 16 of the draft Constitution of 19 April 1946 provided for such a consecration, but was not adopted eventually.
[355] Under the principle of subsidiarity: Cour de cassation (Chambre criminell, 9 February 2016) 14-82.234, Publié au bulletin <https://www.legifrance.gouv.fr/juri/id/JURITEXT000032050154/> accessed 4 January 2023.
[356] Conseil d'Etat, 5 / 3 SSR, 12 November 1997, no 169295. <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007953148/> accessed 4 January 2023.

demonstration, if they are such as to make it difficult for the police to intervene,[357] whether the organisers are calling for damage to be done,[358] and the course of previous demonstrations organised by the same people.[359]

Several criminal sanctions are specifically provided for in the context of demonstrations. Firstly, the organisation of an undeclared or prohibited demonstration is punishable by a prison sentence of 6 months and a fine of 7,500 EUR (Criminal Code, Article 431-9), while participation in a prohibited demonstration is punishable by a fine. On the other hand, participation in an undeclared demonstration does not constitute an offence.[360] Secondly, Articles L.431-3 et seq. of the French Criminal Code provide for a series of sanctions in the event of participation in a mob, defined as any gathering of persons likely to disturb public order. These penalties include prison sentences and fines for participating in a mob after summons to disperse by the police, for concealing one's face in an assembly to avoid being identified, for carrying a weapon, or for provoking an armed assembly. Finally, other sanctions have recently been added to the existing repressive arsenal, such as the registration of persons banned from demonstrations in the wanted persons file and the possibility of suspending the civic and residence rights of those who conceal their face during a demonstration or organise a banned demonstration. Concealment of the face is now punishable when it takes place during a demonstration on the public highway where there has been or is likely to be a disturbance of public order, without the demonstration having to be classified as a mob.[361]

Nevertheless, the Constitutional Council has set in the past certain barriers to potential interferences with the right to demonstrate. During the constitutionality review of the

[357] Conseil d'Etat, 5ème et 7ème sous-sections réunies, 25 June 2003, no 223444 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008208206/> accessed 4 January 2023.
[358] Conseil d'Etat, 10/ 7 SSR, 12 October 1983, no 41410 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007689878> accessed 4 January 2023.
[359] Conseil d'Etat, Juge des référés, 26 July 2014, no 383091 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000029338225> accessed 4 January 2023.
[360] Cour de cassation, Chambre criminelle, 8 June 2022, no 21-82.451 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000045905056?init=true&page=1&query=2182451&searchField=ALL&tab_selection=all> accessed 4 January 2022.
[361] Articles 4 and 7 of the 10 April 2019 law no 2019-290 aimed at strengthening and guaranteeing the maintenance of public order during demonstrations.

so-called 'anti-troublemakers' law of 2019, the Constitutional Council recalled that infringements of the freedom of collective expression of ideas and opinions must be necessary, appropriate, and proportionate to the objective pursued. In this respect, it censured one of the provisions of the law which provided for the possibility for the administration to ban a person from demonstrating for one month throughout the country, because of its vagueness and potential scope.[362]

Freedom of Expression

The freedom to express one's opinions is protected in a number of ways, both constitutionally, through Article 11 of the Declaration of the Rights of Man and the Citizen, and conventionally, through Article 10 of the ECHR.[363] Freedom of expression is protected in different relationships: in the relationship between an individual and the State, which means that the State has a negative obligation not to interfere disproportionately with an individual's freedom of expression through the laws it adopts, and in the relationship between private persons. In the latter case, the State has a positive obligation to protect an individual's exercise of his or her freedom of expression from excessive interference by another individual in the exercise of his or her rights. Yet, freedom of expression is not absolute, and its exercise can lead to sanctions. Thus, the Law on the Freedom of the Press of 29 July 1881 sanctions certain comments made in a public setting. First of all, insult, defined as an offensive expression, term of contempt, or invective which does not contain the imputation of any fact, is punishable by a fine of up to 45,000 EUR and a jail sentence of one year if it is a xenophobic insult (Article 33). Insults, defined as attacks on a function (particularly on persons holding public authority) and not on a person, are also punishable (Criminal Code, Article 433-5). Secondly, defamation, i.e., 'any allegation or imputation of a fact which is prejudicial to the honour or consideration of the person

[362] Loi visant à renforcer et garantir le maintien de l'ordre public lors des manifestations [2019], French Constitutional Council, No. 2019-780 DC, [18]-[26] Please find hereinafter the link to this decision as well : https://www.conseil-constitutionnel.fr/decision/2019/2019780DC.htm. The commentary on the Conseil constitutionnel website provides good guidance on the limits on the power of the administration and the deference of the courts to the administration's assessment of factual situations. It is also to be noted that the President of the Republic brought the proceedings to annul art. 3 of this law in order to prevent an excessive amount of police power conferred by a parliamentary amendment to a Government bill.

[363] This protection is intended to be broad, as the ECHR has indicated that everyone's freedom of expression extends even to statements which 'offend, shock or disturb the State or any section of the population: *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976)

or body to which the fact is imputed is defamation', is also punishable by a fine of up to €45,000 and a year's imprisonment, under certain conditions (Articles 30 to 32 of 29 July 1881 law on the freedom of press). Provocation to crimes and offences, whether by speech or writing, is also punishable by up to 5 years' imprisonment and a fine of 45,000 EUR (Articles 23 and 24). The 29 July 1881 Law has been supplemented and amended over time.

The Main Laws that Impact Climate Protests

In France, climate activists have been prosecuted on varied charges typically because the modus operandi have been quite varied. With regard to criminal charges, which seem to be the most frequent ground for lawsuits against climate protestors, a number of activists have been charged for theft and the receival of stolen goods in following cases where presidential portraits were being taken down in town halls as protest.[364] Charges related to the trespassing in certain places (cultural site,[365] nuclear plant,[366] aeronautical facility,[367] railway tracks,[368] among others) constitute specific offences. In addition to the trespassing, certain cases also involve the degradation of the facilities that have been intruded upon,[369] or damage without intrusion.[370]

A common feature of these different cases is perhaps the aggravating circumstance of protestors acting in concert with others. There are also some ongoing cases involving

[364] See, for instance, Cour de cassation, Chambre criminelle, 30 November 2022, no 22-80.959, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046683130?Datedecision=&init=true&page=1&query=n%C2%B022-80.959&searchfield=ALL&tab_selection=juri>

[365] Cour de Cassation, Chambre criminelle, 12 October 2022, no 21-87.005 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046437414?Datedecision=&init=true&page=1&query=21-87.005&searchfield=ALL&tab_selection=juri>

[366] Criminal court of Valence, 7 September 2021, no 134747/21.

[367] Criminal Court of Criminal court of Bobigny, 12 November 2021, no 674/21.

[368] Court of Appeal of Caen, 20 November 2009, no 09/00244.

[369] Cour de cassation, Chambre criminelle, 15 June 2021, no 20-83.749, https://www.courdecassation.fr/decision/60c8420a754b9981c00ca89d, accessed 8 January 2023.

[370] Criminal court of Tours, 4 October 2021 (Case not publicly available online).

individual protest action, including an instance of a protestor disrupting a tennis tournament[371] and a film festival.[372]

Domestic Consideration of Climate Protest Cases

One striking element in the analysed case law is the scarce invocation of the ECHR. As mentioned earlier, this is likely because the Constitution provides explicit rights for expression and demonstrations which are typically invoked. Accordingly, there is a noticeable absence of the invocation of Article 11 ECHR. Indeed, on the rare occasions where it was referred to by protestors in their defence, it was through a mere mention of the Article without any strong argument developed alongside. Instead, activists, when invoking the ECHR, seem to focus on Article 10,[373] even though, as mentioned above, most cases involve actions fitting in with the definition of a protest. The reason for the reluctance of protestors to defend using Article 11 is not clear, especially since Article 11 is supposed to act as *lex specialis* to Article 10. It might be because of the complicated history of the right to demonstrate in the French legal order—but it seems that the tendency is broader and is mirrored at the European level. Yet, in some cases relating to judicial supervision, Article 11 of the ECHR was not invoked by the activists even though the measure they were contesting was aimed directly at the exercise of their right to protest (Article 10 ECHR was also not invoked).[374] The only decision, among those analysed, in which a strong and eventually successful argument was made by protestors on the ground of Article 11 of the ECHR was in a case where activists and

[371] Le Monde, 'Roland-Garros: la demi-finale entre Ruud et Cilic interrompue par une activiste pour le climat', (*Le Monde*, 3 June 2022) <https://www.lemonde.fr/sport/article/2022/06/03/roland-garros-la-demi-finale-entre-ruud-et-cilic-interrompue-par-une-activiste-pour-le-climat_6128879_3242.html> accessed 6 March 2023.

[372] Samuel Azemard, 'César 2023: la cérémonie interrompue par une militante de Dernière Rénovation' (*Le Journal du Dimanche*, 24 February 2023) <https://www.lejdd.fr/culture/cesar-2023-la-ceremonie-interrompue-par-une-militante-de-derniere-renovation-132990> accessed 6 March 2023.

[373] Cour de cassation, Chambre criminelle, 28 November 2018, no 18-85.152, <https://www.courdecassation.fr/decision/5fca7f236b18d06e76c33731> accessed 13 January 2023, and no 18-85.161 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000037787049?init=true&page=1&query=18-85.161&searchfield=ALL&tab_selection=all> accessed 13 January 2023. In these cases, relating to applications against judicial supervision measures, both Articles 10 and 11 of the ECHR were invoked by the latter but they have seem to have focused their pleas on freedom of opinion, and the Court only assessed whether or not the measures interfered with freedom of opinion.

[374] Administrative court of appeal of Bordeaux, 4ème chambre - formation à 3, 4 May 2017, no 16BX02819 and Conseil d'Etat, Section du Contentieux, 11 December 2015, no 394993 and no 394991 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000031631217> accessed 13 January 2023). In these cases, the claimant only relied on freedom of movement, without precising the textual basis he relied on (under French law, this right is protected by constitutional and conventional norms). This defence does not seem to be irrational in the sense that the measure was indeed interfering with his freedom of movement, and not only with its freedom to protest. Yet, nothing was preventing the claimant to rely on both grounds and it endorses the idea that freedom of protest seems to be perceived as a weak ground of defence.

associations made an application to obtain the suspension of an order banning demonstrations aimed at challenging the Climate and Resilience bill during its examination by the National Assembly.[375]

The application of Article 10 of the ECHR has become more frequent since it was successfully invoked in a case unrelated to climate activism in which the Court of Cassation endorsed the view that political protest may justify sexual exhibition.[376] In that case, a feminist activist appeared topless at the Grévin Museum with the inscription 'Kill Putin' on her chest, stabbed a wax-statue of Putin several times with a partially red-painted stake while uttering insults to Putin (referred to below as the feminist activist case). The act was characterized an offence both for its material and intentional components, as well as for the wilful damages to other people's property.[377] Yet, the Court of Cassation, noting the expressive and political nature of the act, held that criminalising the behaviour would constitute a disproportionate interference with the freedom of expression of the protestor. Since this decision, it can be observed that activists are increasingly referring to freedom of expression to justify their actions and escape criminal convictions. For instance, in the portrait-unhooking cases (in which activists went to town halls to take down the portrait of the President of the Republic in order to symbolise his absence in the fight against global warming) freedom of expression was invoked, which resulted in the courts handing down relatively small, suspended fines, and some acquittals.[378]

A Relatively Satisfactory but Demanding Application of the ECHR

When it comes to application of the Articles 10 and 11 of the ECHR, the assessment of the existence of a violation thereof is assessed in a two-stage process. First, a court

[375] Administrative court of Paris, 13 April 2021, no 2107627.
[376] Cour de cassation, Chambre criminelle, 26 February 2020, no 19-81.827 <https://www.courdecassation.fr/en/decision/5fca5b90a3ddd0332424ee18> accessed 13 December 2022.
[377] The intentional feature of a sexual exhibition is intended as the awareness and willingness to commit an act of a sexual nature (ibid).
[378] Court of Cassation, Chambre criminelle, 18 May 2022, no 21-86.64 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000045836578?Datedecision=18%2F05%2F2022+%3E+18%2F05%2F2022&isadvancedresult=&juridictionjudiciaire=Cour+de+cassation&page=3&pagesize=10&pdcsearcharbo=&pdcsearcharboid=&query=*&searchfield=ALL&searchproximity=&searchtype=ALL&sortvalue=DATE_DESC&tab_selection=juri&typepagination=DEFAULT> accessed 20 December 2022.

will assess whether an act constitutes an act of expression or a non-violent protest. If so, Articles 10 and/or 11 of the ECHR apply, and an interference with the latter is authorised only if (a) it has a legal basis, (b) it pursues a legitimate objective, and (c) it is proportionate to the pursuit of that legitimate objective. Based on the analysed decisions, it seems that the French courts carry out a relatively satisfactory but incomplete, or rushed, application of the ECHR when it is invoked by activists. More precisely, it appears that in almost all the cases reviewed, one of the aforementioned steps was not reflected in the court's decision.

1. Act of Expression

First, sometimes the Courts do not explicitly state that a certain action qualifies as an act of expression for the purposes of establishing the legal basis for the application of the ECHR. In one of the portrait-unhooking cases, for example, the Court noted that the 'militant' dimension of the theft (the language of 'militant' is commonly used in French case law to refer to protestors and protesting activities) was not immediately apparent since it was publicized only later, which led to confusion about its purpose. Yet, the Court carried on with the proportionality review of the freedom of expression, suggesting but without explicitly stating that a theft of a portrait by deception and late publicity of such an action could still qualify as an act of expression.[379] Second, and quite similarly, it is very rare for the Court to explicitly confirm that the interference with the freedom of expression or freedom to demonstrate has an explicit and accessible legal basis: it was only done twice in the cases reviewed.[380] Third, the same could be said about the identification of the legitimate objective pursued, which was only done in a handful of cases.[381] However, the lack of details in the Court's decision with regard to these steps is not necessarily detrimental to the outcome of these decisions, since the completion of these steps is often implicit. As long as the application of the ECHR is not denied, it does not seem crucial that the decision displays how the act constitutes an act of express or a non-violent protest. In the batch of

[379] ibid.
[380] Court of Appeal of Toulouse, 27 April 2022, no 21-0n, 1.622 and Criminal court of Tours, 4 October 2021.
[381] ibid; Administrative Court of Appeal of Versailles, 21 June 2016, no 16VE01026.

scrutinised decisions where it has been invoked, not a single act has been denied the qualification of an act of expression. In the same vein, the legal basis of the interference is suggested by mentioning the textual basis of the charge, and its accessibility and publicity can be presumed.

2. Legitimate Objectives

Similarly, the legitimate objectives pursed are also relatively straightforward: protection of public order for any crimes, protection of property rights for the charges of theft or trespassing. Yet, sometimes, the legitimate objective pursued is not that obvious. For instance, in a 2020 case, a group of around 100 persons were charged for attempting to disrupt the operation of an airport and damage property of others after having been apprehended by the police while they were cutting a fence to enter an airport.[382] In its reasoning, the court considered that the charge was justified because the defendants' behaviour constituted a danger to their own safety.

3. Proportionality Test

French courts have not consistently applied the proportionality test, as evidenced in several cases. For instance, in a series of cases regarding applications by activists against measures of judicial supervisions they were subject to, the Court of Cassation conducted a mere summary test of the interference of the measures with the rights of the claimants.[383] The claimants were indicted for participation in an unarmed gathering in spite of several dispersal warnings, but also for possession of incendiary or explosive substances found in a backpack whose owner had not been identified. During the time of the investigation, they were prohibited from travelling to a specific department and from reaching out to certain people. The Court held that the judicial supervision did not preclude the defendants from exercising their rights to freedom of opinion, since they were still able to conduct their activist activities, with the only exception of not being allowed to go to certain places and associate with certain people. In addition to

[382] Criminal court of Bobigny, 12 November 2021, no 674/21.

[383] Court of Cassation, Chambre criminelle, 28 November 2018, 18-85.156 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000037787048?Datedecision=&init=true&page=1&query=18-85.156+&searchfield=ALL&tab_selection=juri> and 18-85.152 <https://www.courdecassation.fr/decision/5fca7f236b18d06e76c33731> accessed 13 January 2023.

the application of a rather summarised test of proportionality, the Court only referred to the absence of interference of the measures with the claimants' freedom of opinion, while the applicants referred to Articles 10 and 11 of the ECHR in their appeal, even if it did not appear to be sufficiently substantiated. In another case, where 34 activists entered a nuclear power plant without authorisation and filmed their action to denounce the danger of the aging plant, the criminal court of Valence did not appear to have applied the ECHR at all. In its written decision, the Court only gave a summary description of the facts and did not set out the defendants' defences, while it seems that the latter developed an argument on both necessity and the freedom of expression.[384]

Notwithstanding those examples, in some other cases, the Courts did carry out a rather satisfactory proportionality test. In the portrait-unhooking saga, the Court of Cassation deployed a proportionality test in its different decisions.[385] The facts were quite similar in all these cases: one or several portraits of the President of the Republic were stolen by group of individuals in town halls and, often, something was left instead of it (e.g., a leaflet indicating that the action was a temporary requisition of the portrait until a policy consistent with the COP21 commitments was initiated,[386] a poster with the silhouette of the Head of the State and the formula 'Social and climate emergency, where is Macron').[387] Afterwards, the protestors were usually posing with the portrait in front of the town hall for a photograph, enhancing the expressive nature of their action. Under the proportionality tests carried out for these cases, the Court of Cassation assessed the different facts, such as, on the one hand, the presence of journalists (which enhanced the argument that taking down portraits might constitute

[384] Criminal court of Valence, 7 September 2021, no 134747/21.
[385] Court of Cassation, Chambre criminelle, 18 May 2022, no 20-87.272 <https://www.courdecassation.fr/decision/62848ec8426c40057d6d29ba> accessed 20 December 2022; no 21-86.685 <https://www.courdecassation.fr/decision/62848ec8426c40057d6d29b5> accessed 20 December 2022; no 21-86.647 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000045836578?Datedecision=18%2F05%2F2022+%3E+18%2F05%2F2022&isadvancedresult=&juridictionjudiciaire=Cour+de+cassation&page=3&pagesize=10&pdcsearcharbo=&pdcsearcharboid=&query=*&searchfield=ALL&searchproximity=&searchtype=ALL&sortvalue=DATE_DESC&tab_selection=juri&typepagination=DEFAULT> accessed 20 December 2022; Court of Cassation, Chambre criminelle, 30 November 2022, no 22-80.959 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046683130?Datedecision=&init=true&page=1&query=n%C2%B022-80.959&searchfield> accessed 17 December 2022,.
[386] Court of Cassation, Chambre criminelle, 18 May 2022, no 21-86.685.
[387] Court of cassation, 'Urgence climatique et sociale, où est Macron?,' 22 September 2021, no 20-85.434.

an act of expression), the militant context, the absence of previous convictions of the activists, the humorous nature of the action. On the other hand, the Court assessed the material and symbolic value of the stolen portrait, the use of deception to enter into a town hall, and the irreversibility of the damages characterized by the refusals to give back the portrait once the picture of the militants posing with it has been taken, and, last but not least, the contemplated sanction.[388] In another case, eight militants dismantled a fence to enter the Notre-Dame Cathedral restoration site before climbing onto a crane and affixing a banner with the inscription 'Climate, take action.' The Court of Cassation indicated that the proportionality review requires an overall examination which must take into account, in concrete terms and among other things, the circumstances of the facts and the seriousness of any damage caused.[389] In that case, the Court has taken into account that the intrusion on the restoration site had stopped the work for a day and affected the safety of the workers who had to check the state of the crane.

In some cases that courts have found that the restrictions imposed on protestors convicted for several previous serious offences were proportionate to the threat to public order they represented.[390] But the fact that the exact same measures were deemed to be proportionate in another case with regard to an individual, who has never been the subjects of any convictions or even criminal proceedings, suggest that the threshold for a measure to be disproportionate is very, or even exceedingly high.[391] In that particular case, the individual was assigned to reside for several weeks on the territory of his municipality and to report three times a day to the police station of the municipality. The Court of Appeal held that the measure was proportionate as it did

[388] Court of Cassation, Chambre criminelle, 18 May 2022, no 21-86.647. The stage where this element was taken into account is not very clear, and it appears prima facie that the Court took it in consideration both when assessing the qualification as an act of expression and when operating the test of proportionality.

[389] Court of Cassation, Chambre criminelle, 12 October 2022, no 21-87.005 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046437414?Datedecision=&init=true&page=1&query=21-87.005&searchfield=ALL&tab_selection=juri>, accessed 6 January 2023.

[390] Conseil d'Etat, 11 December 2015, no 394993 and no 394991 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000031631217> accessed 13 Jan 2023. The proportionality test was here conducted with regard to the freedom of movement, also protected by the ECHR, under an article constructed in a similar way to those relating to freedom of expression and demonstration. Therefore, these cases remain relevant for the present analysis.

[391] Administrative Court of Appeal of Versailles, 21 June 2016, no 16VE01026, following the first instance decision Administrative court of Cergy-Pontoise, 18 February 2016, no 1510889

not prevent him from expressing his opinions or receiving or communicating information by other means. Such an approach to the test of proportionality could be closer to a control for lack of manifest disproportionality than to a strict proportionality check.

Another illustration of the demanding approach of the courts with regard to the proportionality test can be found in the portrait cases, where the Court of Cassation had consistently refused to condone the theft of a portrait on the ground of freedom of expression, while the material value of the portrait and its frame was at most of a few dozen euros. The Court of Cassation added a symbolic value to the portrait's material value, which had not been mentioned by the lower jurisdictions. The decisions can be read in two ways, depending on the frame of reference adopted: either the proportionality test can be considered to be well-balanced with regard to the small amount of the sanction pronounced in relation to the sanctions incurred, or it can be considered to be quite demanding with regard to the importance of the sanction in relation to the low material value of the portrait. But the approach taken by the French jurisdiction to fully exempt climate activists from penalties in the portraits unhooking saga appears demanding especially when puts in contrast to the feminist activist case,[392] which confirmed the French court's acceptance of the potential Article 10 of the ECHR's paralysing effect vis-à-vis sanctions, and where the activist was entirely exempted from any liability for a behaviour that one might consider as more disruptive (because of the nudity, of the violence of the stabbing of the statue and the insulting vocabulary used) than the theft of a portrait of petty, at least from a material perspective.

Successful Invocation of the ECHR

Among the cases where the ECHR enabled activists to leave the courtroom without sanction, a distinction might be drawn between two older cases where the defence of freedom of expression prevented the characterisation of an infringement, and three

[392] Court of Cassation, Chambre criminelle 26 February 2020, no 19-81.827 <https://www.courdecassation.fr/en/decision/5fca5b90a3ddd0332424ee18> accessed 13 December 2022

other cases which seem to be in the same line with the approach to the ECHR in the feminist activist case.[393]

The first 'old' case implicated Greenpeace France and Greenpeace New Zealand.[394] Both associations were charged with denigration of a trademark (the trademark infringement was assimilated to an abuse of the freedom of expression) for having reproduced, on their website, the stylized letter A of the Areva brand , the name Areva[395] with skull and crossbones, and the slogan 'Stop plutonium - l'arrêt va de soi' ('Stop plutonium - stopping it is a matter of course'), with the letters A in the logo placed on the body of a dead fish. The Court of Cassation overruled the symbolic fines that had been imposed by the Court of Appeal, holding that both associations had acted in the public interest by means proportionate to that end and thus had not abused their right of expression under Article 10 ECHR. Here, the Court of Cassation reverses the analysis it later used in the feminist activist case, by assessing whether or not the action of the activists followed a legitimate purpose and was proportionate to that end, instead of assessing the proportionality of an interference with the freedom of expression of the associations. This might be explained by the fact that the Court sought to identify whether there was an abuse of expression, i.e., whether the act was an act of expression and fell within the scope of freedom of expression.

The second older case also involved Greenpeace, which faced a liability action for denigration brought by ESSO because of Greenpeace's use of the terms ''STOP ESSO', 'STOP E$$O' and 'E$$O', which the latter considered as discrediting its brands.[396] The Court of Cassation, confirming the Court of Appeal's decision on this part, held that the association had not abused its right to free expression by using certain elements of Esso's trademark to criticise it's environmental policy. The Court took into account that

[393] Ibid.
[394] Cour de cassation, First Civil Chamber, 8 April 2008, no 07-11.251 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000018644039?Init=true&page=1&query=07-11.251&searchfield=ALL&tab_selection=all> accessed 10 January 2023.
[395] Areva, now Orano, is a company whose activity generates nuclear waste.
[396] Cour de cassation, Commercial Chamber, 8 April 2008, no 06-10.961 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000018644102?Init=true&page=1&query=n%C2%B0+06-10.961.&searchfield=ALL&tab_selection=all> accessed 10 January 2023.

the object of Greenpeace is the protection of the environment and the fight against all forms of pollution and nuisance and that it used the offending signs in the context of a campaign intended to inform citizens about the means used to prevent the implementation of the Kyoto Protocol on climate change, as well as to denounce the damage to the environment and the risks to human health caused by certain industrial activities. Thus, the Court found that the use of elements of the well-known trademark, distinguishing the goods and services of that company, in a modified form summarising those criticisms in a polemical context, constituted a means proportionate to the expression of such criticisms.

With regards now to the cases where the approach taken is more akin to that of the feminist activist case, the first one concerned the portrait theft which was first dealt with by the Court of Appeal of Toulouse after which the Court of Cassation annulled the judgement of another Court of Appeal and referred it back to that of Toulouse.[397] The Court of Appeal started by noting the constitutional value of the freedom of expression, before completing the first step of the proportionality test, namely observing that the conduct in question constituted a theft by association, the punishment for which is provided by the Criminal Code with the legitimate aim of protecting the property of others. Afterwards, the Court weighed the criminal nature of the defendants' behaviour against the fact that they had hung a poster in place of the portrait and were wearing a T-shirt bearing the name of their movement, which aims to inform and raise awareness among the public and the government of the urgent need for action on climate change. All these elements were analysed by the Court of Appeal as being part of a political and militant action to alert the public on a subject of general interest. Finally, the Court of Appeal noted that the perpetrators had acted without any personal or financial interest and that the stolen property had very little market value. Eventually, the Court of Appeal concluded that the criminal charge constituted a disproportionate interference with the defendant’s freedom of expression.[398] It must be noted that this decision was issued prior to the aforementioned

[397] Court of cassation, 22 September 2021, no 20-85.434.
[398] Court of Appeal of Toulouse, 27 April 2022, no 21-0n, 1.622.

ones handed down by the Court of Cassation. Unlike the latter, the Court of Appeal did not take into account the symbolic value of the portrait and the irreversibility of the damage identified in some case on the basis of a refusal to return the portrait despite a request from municipal authorities.

The second case involved the voluntary degradation of a Member of Parliament's office. The defendant was prosecuted for having put up a poster and made chalk inscriptions on the MP's office, namely 'Vote Boulet' and 'Who will be the worst?'[399] with other people, non-identified.[400] The action was filmed and broadcasted. The Criminal Court of Tours noted that the damage to the permanent office and its publicity were part of a militant approach and therefore constituted an act of expression. Next, the Court deemed that the restriction that the prosecution wished to impose on the defendant was provided for by a clear and accessible legal text and pursued a legitimate objective, namely the protection of other people's property. However, the Court considered that such an infringement of the freedom of expression was not necessary in a democratic society and would constitute a disproportionate interference with the defendant's freedom of expression. In reaching this conclusion, the Court noted that the defendant's action was political and should therefore be afforded a high degree of protection, that the member of parliament had not upheld his complaint, that the acts had not resulted in significant material damage, and that the inscriptions were in the nature of mockery and did not contain any calls to violence or hatred.

Finally, the last completely successful case reviewed concerned an application from protestors and associations for the suspension of an order of the Paris police prefect banning several demonstrations in front of the National Assembly against the Climate and Resilience Bill examined by the Members of Parliament at the time.[401] The rationale for the ban was based on the need to manage the Covid 19 epidemic, the impossibility for the prefecture of police to maintain order due to this situation, and the

[399] Pun with the name of the MP and a French word meaning 'dimwit.'
[400] Criminal Court of Tours, 4 October 2021.
[401] Administrative court of Paris, 13 April 2021, no 2107627.

consequences on the number of police officers available. The administrative court of Paris held that the freedom of expression and of demonstration had to be reconciled with the constitutional objective of protecting health and maintaining public order. Then, carrying out a strict proportionality test, the Court held that there was no evidence of potential public order disturbance since the previous demonstrations organised by the same organisers had not led to any disorder, and that the small number of participants expected and announced (twenty), alongside with the topography of the square where the demonstrations was to take place, did not suggest that the demonstration would give rise to any particular health risk. Therefore, the order was suspended.

In these last three cases, all of which found in favour of the protestors, the Courts provided the most in-depth analysis of ECHR rights.

Defences and Arguments

In a few cases protestors alleged a violation of ECHR rights but were successful without the need for the Court to consider these arguments. For example, in 2019, the Ministry of the Interior set up a unit called the 'Demeter unit' under an agreement with two agricultural unions. The aim of this unit was to combat criminal acts of which the agricultural world could be the victim (i.e., damage, theft, etc.) and to prevent actions of an ideological nature. Under this second branch of Demeter's mission, the gendarmerie members of this cell monitored the activities and meetings of local associations working for the protection of the environment. Some associations demanded the cancellation of the agreement that gave birth to Demeter, claiming among other things, that there had been an infringement of freedom of expression and freedom of association. However, before examining the arguments relating to a possible violation of the ECHR, the Administrative Court concluded that the implicit refusal of the Ministry of the Interior to cancel the agreement was illegal on the grounds of an error of law: the task of preventing denigration of the agricultural sector did not fall

within the remit of the gendarmerie as defined in Article L.421-1 of the Internal Security Code.[402] Similarly, Greenpeace activists who infiltrated the tarmac at Roissy airport and painted a plane green had their trial annulled by the Bobigny criminal court on the grounds of a procedural defect relating to the illegality of police custody.[403] Likewise, demonstrators occupying the Sivens dam site were acquitted of the charges against them for their unarmed participation in an assembly after being summoned to disperse, due to defects in their summons.[404]

In a significant number of cases, the climate activists unsuccessfully only relied on the defence of necessity. This defence has been raised by protestors for several decades[405] but the defence has never been successful[406] as the conditions required for that defence to succeed are very difficult to meet. Indeed, it is necessary to establish that (i) the danger to which the illegal action responds in real, (ii) that danger is in the process of being realised or is likely to be realised in the immediate future by directly threatening the person who carried out the unlawful act, and (iii) that the act in question was the only way to avoid the realization of the danger.[407] In applying this test to a protest concerning climate change, it may be challenging for a protestor to successfully invoke the third criterion if it is strictly applied.

Yet, the state of necessity defence remains the most invoked defence, even in cases where the ECHR would have probably provided a good defence. For instance, in 2017, some activists were prosecuted and convicted for blocking access to a nuclear reactor construction site, preventing employees from entering and leaving the site in order to draw public attention to the threat allegedly constituted by such site. They unfruitfully only invoked the state of necessity.[408] In another case, a group of militants obstructed

[402] Administrative court of Paris, 1 February 2022, no 2006530.
[403] Criminal court of Bobigny, 4 November 2021, No 21065000004.
[404] Le Point, 'Sivens: relaxe quasi-générale pour 15 zadistes' (Le Point, 9 September 2015) <https://www.challenges.fr/afp/sivens-15-zadistes-en-proces-soutenus-par-100-manifestants_66698>.
[405] Court of Cassation, 19 November 2002, no 02-80.788.
[406] Apart from some very rare decisions from first instance courts, overruled afterwards on appeal.
[407] Ibid.
[408] Court de Cassation, Chambre criminelle, 11 July 2012, no 11-87.287 <[1] https://www.legifrance.gouv.fr/juri/id/JURITEXT000026181824?Init=true&page=1&query=11-87.287&searchfield=TITLE&tab_selection=all> accessed 11 January 2023.

the railways in various ways while others displayed banners of an anti-nuclear non-violent action group to protest against the passage of a train carrying radioactive waste. Not only did the defendants not invoke any defence other than the state of necessity, but the representative of the public's prosecutor office asked for an increase in the sentences pronounced by the first instance court because of the media's echo of the activists' action. Yet, it was not followed by the Court of Appeal.[409]

Even though some of the numerous cases where the state of necessity was invoked predate the feminist activist case, the defence has still been invoked in very recent cases, post the feminist activist case. For example, a group of six activists chained themselves together to block the 19th stage of the Tour de France 2022 in order to raise awareness on the climate emergency. They pleaded the defence of necessity and did not invoke any article of the ECHR.[410] The invocation of the ECHR could have been all the more fruitful as the Court underlined the absence of violence of the activists, which will have left the door open to a defence on the ground of the freedom of demonstration.

Fines and Penalties

In France, in most cases relating to climate protests, prosecutions result in convictions. However, the sentences are relatively low, and consist, for the majority of them, in suspended small fines, regardless of the offence. Indeed, in four different cases relating respectively to the theft of the French President of the Republic's portrait,[411] the trespassing into the restoration site of the Notre-Dame Cathedral,[412] the intrusion and damage to Roissy airport,[413] and the blockade of a stage of the Tour de France,[414] the activists were sentenced to a 500 EUR suspended fine. (A striking point is that, when a

[409] Court of Appeal of Caen, 20 November 2009, no 09/00244.
[410] Criminal Court of Auch, 24 January 2023, no 38/2023.
[411] Court de Cassation, Chambre criminelle, 18 May 2022, no 20-87.272 <https://www.courdecassation.fr/decision/62848ec8426c40057d6d29ba> accessed 20 December 2022.
[412] Court de Cassation, Chambre criminelle, 12 October 2022, no 21-87.005 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046437414?Datedecision=&init=true&page=1&query=21-87.005&searchfield=ALL&tab_selection=juri> accessed 6 January 2023.
[413] Criminal Court of Bobigny, 12 November 2021, no 674/21.
[414] Criminal Court of Auch, 24 January 2023, no 38/2023.

sanction was imposed, it does not necessarily appear to be diminished by the invocation of a particular defence by the activists. An illustration of that can be found in the portrait cases, in which the Court of Cassation acknowledged that the theft of portraits may constitute a mode of expression protected by Article 10 of the ECHR and thus carried out a proportionality test, thus giving some weight to the defence arguments of the activists in its reasoning. Conversely, in the case of the blockade of the Tour de France, the applicants' defence strategy based on the state of necessity was rejected in its entirety, and therefore did not influence the judges' decision. Yet, activists were sentenced to the same fine in both cases.)

However, it does not mean that the defence based on the Articles 10 and/or 11 of the ECHR are not successful before the French courts, as shown by the few acquittals obtained on these grounds.[415] Several elements might explain this curious alignment of sanctions despite defences of diverging effectiveness. First, the maximum penalty for activists was higher for theft[416] than for blocking traffic.[417] Second, the sentences were not pronounced by the same courts. Finally, it might not be completely unrealistic to assume that judges share a certain sympathy for the concerns of activists, which leads them to impose fairly moderate sanctions for behaviours that are objectively criminal, leaving activists with what a commentator has described as 'militant war wounds' of a light nature. [418]

While courts therefore have imposed moderate sentences, in some cases more significant penalties have been imposed, such as the joint sentencing of activists to several tens of thousands of euros in material and moral damages against EDF for the trespassing on a nuclear plant[419] and the suspended imprisonment of activists involved

[415] Criminal Court of Tours, 4 October 2021 and Court of Appeal of Toulouse, 27 April 2022, no 21-01.622.
[416] Criminal Code, Article 311-4 <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006841235> accessed 20 December 2022.
[417] Traffic Code, Article L.412-1 para. 1, <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006841235> accessed 20 February 2023.
[418] Renaud le Guehenec, 'Affaire des « décrocheurs » »: désobéissance civile et liberté d'expression... La Cour de cassation précise la mise en oeuvre du contrôle de proportionnalité en matière pénale' (*Légipresse*, 2022) < https://www.legipresse.com/011-51723-affaire-des-decrocheurs-desobeissance-civile-et-liberte-dexpression-la-cour-de-cassation-precise-la-mise-en-oeuvre-du-controle-de-proportionnalite-en-matiere-p.html>
[419] Criminal court of Valence, 7 September 2021, no 134747/21. The decision does not provide any transcription of the debates and arguments put forward, simply indicating the facts, the charges and the sentences, but it seems that the defendants did invoke an

in the trespassing within a laboratory and destruction of experimental GMO plants therein.[420]

Chilling Effects

The chilling effects in the French courts' practice seem to adopt two forms. Firstly, a chilling effect is found where protestors are sentenced to suspended fines or imprisonment on condition that they do not repeat their protesting activities. If the protestor continues their protest activity, they may have to pay or serve the suspended sentence as well as any new sentence. Moreover, in several cases some individuals have been put under judicial supervision in order to prevent them from attending some protests in the context of particular event, such as the Conference of Parties 2021.[421] In some of these cases, the decision appeared to be justified by former convictions for acts of deliberate violence during former protests,[422] but in others, the individuals subject to such measures had never been convicted before[423] and the decisions were based on memos from intelligence services, the use of which is highly controversial.[424] Other measures are also likely to have a chilling effect, not only to the people subject to these measures, but to anyone considering taking action in the future. A good illustration is provided by an order issued by the 'Tribunal de grande instance' of Cherbourg pursuant to which anyone was prohibited to disrupt the transport of nuclear waste in the Cherbourg area within a certain period of time, on the request of the company in charge of managing this waste.[425] The order provided for a fine of 75,000 EUR per person and per offence in case of violation thereof. This decision is particularly

argument based on freedom of expression (Greenpeace's tweet dated 7 September 2021, https://twitter.com/greenpeacefr/status/1435266204562829312, accessed the 8 January 2023, and 'Intrusion au Tricastin: des amendes pour Greenpeace' (*La Provence*, 09 September 2021) <https://www.laprovence.com/actu/en-direct/6483294/intrusion-au-tricastin-des-amendes-pour-greenpeace.html>accessed the 8 January 2023).

[420] Cour de cassation, Chambre criminelle, 19 November 2002, no 0280.788 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007625983/> accessed 19 December 2022. It must however be noted that the defendants only relied on a defence based on the state of necessity in this case.

[421] Tribunal administratif de Bordeaux, 4 May 2017, no 16BX02819.

[422] ibid; Tribunal administratif de Rennes, 30 November 2015, no 1505395 and no 1505396 confirmed that the measure was proportionate to the threat to public order posed by these individuals by the Conseil d'Etat, 11 December 2015, no 394993 and no 39499 <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000031631217>

[423] Administrative Court of Appeal of Versailles, 21 June 2016, no 16VE01026.

[424] The use by courts of 'notes blanches' ('white memos') drafted by the intelligence services to adopt liberticidal measures is controversial because of the legal vagueness surrounding those notes and their evidential weight. For more information on this point, see Jean-Philippe Foegle, Nicolas Klausser, ' La zone grise des notes blanches'. Foegle, Jean-Philippe, et Nicolas Klausser. « La zone grise des notes blanches », Délibérée, vol. 2, no. 2, 2017, pp. 41-45.

[425] Order of the Tribunal de Grande Instance of Cherbourg, 5 September 20218, no RG 18/127.

open to criticism in that it was taken after a non-adversarial procedure.[426] Indeed, the applicant, and the Court, justified derogating from the adversarial principle on the grounds that, on the one hand, it was difficult to identify precisely the activists likely to disrupt the transport operation and, on the other hand, by the fact that if the activists were informed of the request, they could organise themselves more to disrupt the transport. The latter argument, however, seems to contradict the applicant's claimed objective of avoiding any disruption of the convoy. Indeed, since the activists were not informed of the existence of the order and the fine, they could only have become aware of it once being prosecuted for a breach of that order. A secondary impact is that the breath of such prohibitive orders may deter people from protesting in the future out of fear there may be some Court order prohibiting protesting. Similarly, in another case involving a group of protestors that obstructed a railway to protest against the passage of a train carrying radioactive waste, the prosecution sought to impose increased sentences because the media reported on the activists' action.[427] While the prosecution was successful in its argument, such tactics can intimidate protestors for protest activities. Finally, protesters might also be dissuaded or prevented from attending a gathering through the action of law enforcement forces. A number of acts constitute *prima facie* interference with the freedom to demonstrate, if not violations, but are not subject to any judicial decision because they do not give rise to any prosecution by the judicial authorities or complaints by the people subjected to them. In a 2020-report, Amnesty International reported on the widespread practice of taking demonstrators into custody on their way to the site of protests on the basis of elements that were sometimes incomplete.[428] In addition, the violence with which officials may maintain order during demonstrations, documented in several reports[429]

[426] French Civil Procedure Code, Article 493,
[427] Court of Appeal of Caen, 20 November 2009, no09/00244.
[428] Amnesty International, 'Arrêté·e·s pour avoir manifester: la loi comme arme de répression des manifestant·e·s pacifiques en France', (*Amnesty International,* 2020) <https://www.amnesty.org/fr/documents/eur21/1791/2020/fr/> accessed 10 January 2023.
[429] Ibid; Aline Daillère, 'l'ordre et la force, enquête sur l'usage de la force par les représentants de la loi en France' (*ACAT*, 2017) <https://www.acatfrance.fr/public/rapport_violences_policieres_acat.pdf> accessed 06 March 2023, and ACAT, 'Après plus de 100 jours de manifestations des Gilets Jaunes, quel bilan? (*ACAT*, 7 March 2019) <https://www.acatfrance.fr/public/acat---note-d-analyse----100-jours-de-manifestation-quel-bilan-mars-2019_3.pdf> accessed 06 March 2023.

and marked by extreme episodes such as the death of an environmental activist,[430] or the disfigurement of several activists of the Yellow Vests movement,[431] is likely to dissuade people from attending demonstrations.

GERMANY

The Legal Framework

The German constitution follows a dualistic system with regards to international law.[432] This means that international obligations must be transformed into national law in order to be valid under the German jurisdiction. The ECHR was transformed into German law in 1952 by formal statute.[433] Its status as nationally binding law is therefore uncontested.[434] However, its rank within the German legal system remains controversial.

The adoption by federal statute suggests that the ECHR 'only' ranks equal to other statutes; this would mean that it could be derogated by any other statute (*lex posterior derogat legi priori*) or by the constitution (*lex superior derogate legi inferiori*) and that it could not be subject to constitutional complaint.[435] The Federal Constitutional Court of Germany generally ascribes to this interpretation but has recognized the constitution's commitment to or 'friendliness towards international law' (so called 'Völkerrechtsfreundlichkeit' of the German constitution). [436] This means that all national provisions are to be interpreted in light of the international obligations of the Federal Republic of Germany as far as methodologically justifiable. In its *Görgülü*

[430] Le Monde avec AFP, 'Sivens: Rémi Fraisse aurait eu les mains en l'air quand il a été tué' (*Le Monde*, 25 March 2016) <https://www.lemonde.fr/police-justice/article/2016/03/25/sivens-remi-fraisse-avait-les-mains-en-l-air-lorsqu-il-a-ete-tue-selon-de-nouveaux-temoignages_4890382_1653578.html> accessed 06 March 2023.
[431] Carole Sterlé et Olivier Debruyn, 'Gilets jaunes : mutilées par des grenades ou des tirs de LBD, ces «gueules cassées» racontent' (*Le Parisien*, 16 November 2019) <https://www.leparisien.fr/faits-divers/gilets-jaunes-mutilees-par-des-grenades-ou-des-tirs-de-lbd-ces-gueules-cassees-racontent-16-11-2019-8194566.php> accessed 06 March 2023.
[432] BVerfGE 111, 307 (318): '[The German constitution ascribes to] the classical perception that [the] relation between international law and national law [is] a relation of two [legal systems]'.
[433] Art. II (1) Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten, August 7th 1952 (BGBl. 1952 II, p. 685).
[434] Oliver Dörr, Rainer Grote and Thilo Marauhn, *EMRK/GG Konkordanzkommentar*, (Mohr Siebeck, 3rd ed, 2022) Chapter 2 para 45.
[435] ibid Chapter 2 para 47 f; see also BVerfGE 111, 307 (317).
[436] BVerfGE 111, 307 (317); 148, 296 (351). BVerfGE 111, 307 (317); 148, 296 (351 f.).

decision, the Constitutional Court of Germany stated: 'As long as […] methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention.'[437] While the court has repeatedly stressed that this does not call for a complete harmonization of German law and ECtHR case law,[438] (and therefore a theoretical possibility that a German court would not give precedence to ECHR standards exists) no case involving such a conflict has arisen. The Constitutional Court of Germany has consistently interpreted the constitution's fundamental rights in the light of the ECHR.[439] Moreover, regular statutes may even be assessed in regards to ECtHR case law—it is unlikely that a statute would be declared void because it is incompatible with the ECHR itself but it may be declared incompatible with the German constitution that is interpreted in the light of the ECHR.[440] The ECHR therefore holds a high rank in German law. While it formally only ranks as statutory law, its superiority over other statutes is achieved by way of interpretating the fundamental rights of the German constitution.

As the German constitution is interpreted in light of the ECHR, and all state powers are bound by the constitution, state law must comply with the standards of the ECHR as well. As far as methodologically justifiable, statutory provisions must be interpreted in a way that is compatible with the constitution (and thus with the ECHR). If such an interpretation is not methodologically possible, the provision will usually be declared unconstitutional by the Federal Constitutional Court of Germany. However, since the direct legal standard is the German constitution, not the ECHR, explicit references to the ECHR or ECtHR case law are rare. In most cases, German courts and administrative agencies will only reference the fundamental rights of the German constitution; yet their interpretation is informed by ECtHR case law.

Therefore, climate protesters should, in most cases, primarily invoke the fundamental rights of the German constitution or demand that statutory law is interpreted in a

[437] BVerfGE 111, 307 (329).
[438] BVerfGE 111, 307 (329); 148, 296 (350). BVerfGE 111, 307 (324): „courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow [it].'
[439] BVerfGE 148, 296 (351 f.); 74, 358 (370); 83, 119 (128).
[440] BVerfGE 148, 296 (352).

constitutional manner. However, the ECHR or ECtHR case law may be referred to in two situations: Firstly, where it is unclear whether the constitutional standard complies with the requirements of the ECHR, ECtHR case law may be invoked as 'persuasive authority' to inform the interpretation of the fundamental rights of the German constitution.[441] Secondly, ECHR rights may be referenced next to substantially identical national law to increase the persuasiveness of the legal claim.[442]

Like the ECHR, the German Constitution outlines two main rights applicable to climate protest: the fundamental freedom of assembly (art. 8 Grundgesetz [GG]) and freedom of expression (art. 5 GG).

Freedom of Assembly

The national counterpart to the ECHR's right to assembly (article 11) is art. 8 of the Basic Law ('Grundgesetz' [GG]). In the words of the Federal Constitutional Court of Germany, art. 8 GG 'protects a person's freedom to gather with other people at one place for the purposes of jointly joining in a debate or rally aimed at shaping of public opinion'.[443] It is limited to peaceful assembly without weapons. Like its ECHR counterpart, this restriction is interpreted narrowly.[444]

Climate protests will regularly fall under the scope of art. 8 GG. Its protection extends to travel both to[445] and from[446] the protest or assembly. Furthermore, infrastructure that is necessary for the execution of the protest (e.g. tents for a protest-camp) is protected by art. 8 GG even if if the item itself does not have an assembly-specific purpose.[447]

[441] For a case in which the Federal Constitutional Court of Germany invoked ECtHR-decisions to inform its interpretation of the constitution see BVerfGE 148, 196 (308 ff.).
[442] In VGH München, Urt. v. 22.9.2015 – 10 B 14.2246, para 57, for example, the ECHR was referred ton next to the (substantially identical) provision of the Assembly Act of Bavaria.
[443] BVerfGE 128, 226 (250).
[444] BVerfGE 104, 92 (106); Schneider, in, *BeckOK GG* (Verlag C.H BECK München 2016) Art. 8 Para 13.
[445] BVerfGE 150, 244 (295); it should be noted that the special Assembly Acts are only applicable for the assembly itself, BVerwG, Urt. v. 24.5.2022 – 6 C 9.20 I, para 11.
[446] Schneider (n 444) 8 para 22.
[447] BVerwG, Urt. v. 24.5.2022 – 6 C 9.20 I, para 11.

Encroachments of the right to assembly can be justified if they are:

- based on a formal statutory law (art. 8 [2] GG) and
- proportional, i.e. suitable, necessary, and proportionate.

The standard of proportionality is applied both to the statutory authorization itself and to its application in the individual case. Unlike article 11 ECHR, art. 8 GG does not explicitly require that the restrictions are 'necessary in a democratic society'. However, the Federal Constitutional Court of Germany has emphasized the democratic importance of the freedom of assembly in its *Brokdorf* decision: '[The freedom of assembly is] one of the most distinguished human rights of all, which is constitutive for a free and democratic state order'.[448]

Because of its constitutive meaning for democracy, the Federal Constitutional Court of Germany demands that restrictions on the freedom of assembly are justified by an imminent threat to an important common good and strictly proportional.[449] In result, this standard is identical to (if not stricter than) that of by article 11 of the ECHR.

Freedom of Expression

The freedom of expression (article 10 of the ECHR) is constitutionally protected by art. 5 GG as the 'right freely to express and disseminate [one's] opinions'. Opinion is defined by the Federal Constitutional Court of Germany as any expression that contains an element of opinion or belief.[450] Encroachments of this right have to be:

- based on a 'general law' (art. 5 (2) GG), i.e. a law which is not directed against the expression of a specific opinion as such but serves the protection of a good that is to be protected per se, regardless of a specific opinion;[451] and
- both the statutory authorization and its application have to be proportional.

[448] BVerfGE 69, 315 (344), non-official translation.
[449] Schulze-Fielitz, *Dreier, Grundgesetz Kommentar* (Mohr Siebeck, 3rd edn, 2018) Art. 8 para 80.
[450] BVerfGE 61, 1 (8); Schemmer, in: BeckOK GG, Art. 5 para 4.
[451] BVerfGE 7, 198 (209 f.); Schulze-Fielitz, (n 449) Art. 5 para 142.

As with art. 8 GG, the Federal Constitutional Court stresses the constitutive importance of the freedom of expression for democracy.[452]

Generally, art. 5 GG (freedom of expression) is applicable next to art. 8 GG (freedom of assembly).[453] However, courts tend to focus on the stricter protection of art. 5 GG ('general law' as opposed to any law) when the state measure focuses on the content of the assembly. When the state measure is concerned with the mode or form of expression, the focus tends to be on art. 8 GG.[454] Since measures directed against climate protests regularly do not take issue with the matter of concern but with the form of protest (street blocking, glue-on etc.), art. 8 GG will regularly be the applicable constitutional standard. Since the standard of proportionality is identical to that of art. 5 GG, there is not a big difference in practice.

The Main Laws that Impact Climate Protests

The following section sets out three main areas of law that can impact climate protests: (a) assembly laws, (b) general police laws, and (c) criminal law. The subsequent section outlines the specific German constitutional protections to freedom of assembly and association that should have bearing on State action to repress any climate protestor or climate protest.

Domestic Consideration of Climate Protest Cases

Public Law I – Assembly Law

While the 'law of assembly' ('Versammlungsrecht') used to be a federal competence (art. 74 (1) GG),[455] it has now been transferred into state competence (art. 30 GG). This means that the 16 German States may pass their own Assembly Acts and seven of them have done so.[456] For the remaining nine States, the Federal Assembly Act

[452] BVerfGE 7, 198 (208).
[453] BVerfGE 82, 236 (258); Schulze-Fielitz, in: Dreier, GG, Art. 8 para 128.
[454] BVerfGE 90, 241 (246, 250 f.); Schulze-Fielitz (n 449) Art. 8 Para 128.
[455] Art. 74 (1) Nr. 3 GG old version, changed by 'Gesetz zur Änderung des Grundgesetzes' from 28.08.2006, BGBl. 2006 I p. 2043.
[456] See Bayerisches Versammlungsgesetz (GVBl S. 421) BayRS 2180-4-I (22 July 2008) < https://www.gesetze-bayern.de/Content/Document/BayVersG08>; Versammlungsfreiheitsgesetz Berlin (VersFG BE) (23 Februar 2021) < https://gesetze.berlin.de/bsbe/document/jlr-VersammlFrhGBErahmen>; Versammlungsgesetz des Landes Nordrhein-Westfalen (Versammlungsgesetz NRW - VersG NRW) (17 December 2021) < https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&bes_id=47651&aufgehoben=N>; Sächsisches Versammlungsgesetz

('Bundesversammlungsgesetz' [BVersG][457]) remains in place (art. 125a (1) GG). Considering this complexity, a comprehensive overview on German assembly law is beyond the scope of this report. When determining relevant legal standards, it is important for climate protesters to be aware of the law applicable in their state. This section will (1) point out some characteristics that all German assembly acts have in common, (2) highlight some provisions that are problematic regarding climate protests, and (3) outline some arguments that may be used against certain practices on a case-by-case basis.

In terms of general characteristics, all assembly acts generally recognize the right to peaceful assembly and define requirements for state-interference with assemblies. Important measures that feature in every assembly act are:

- the duty of notification,[458]
- the state's ability to impose restrictions on the assembly,[459] and
- the dissolution of the assembly.[460]

As discussed above, restrictions on and dissolutions of an assembly have to meet a high standard of proportionality: the respective provisions require an imminent threat for public security and prescribe the strict application of the principle of proportionality. On a general level, this meets the requirements of articles 10 and 11 of the ECHR – the decisive question is whether the legal criteria are actually met in their application (see below). The duty of notification is also compatible with ECtHR case law, especially since spontaneous and urgent assemblies are exempt from the duty to notify authorities 48 hours before the assembly.[461] However, these exemptions could be expressed much more clearly in the wording of some assembly acts.[462]

(SächsGVBl. S. 54, 25 January 2012) <https://www.revosax.sachsen.de/vorschrift/12206-Saechsisches-Versammlungsgesetz>; Gesetz des Landes Sachsen-Anhalt über Versammlungen und Aufzüge (Landesversammlungsgesetz - VersammlG LSA) (3 December 2009) < https://www.landesrecht.sachsen-anhalt.de/bsst/document/jlr-VersammlGST2009rahmen>

[457] Gesetz über Versammlungen und Aufzüge (BGBl. 1978 I, p. 1789), last amended by Gesetz vom 30. November 2020 (BGBl. 2020 I, p. 2600).

[458] E.g. Section 14 (1) BVersG, Section 10 (1) VersG NRW, Section 12 (1) VersFG BE.

[459] Section 15 ( ) BVersG, Section 13 (1) VersG NRW, Section 14 (1) VersFG BE.

[460] Section 15 (1) BVersG, Section 13 (2) VersG BE, Section 14 (1) VersFG BE.

[461] Oliver Dörr, Rainer Grote and Thilo Marauhn, *EMRK/GG Konkordanzkommentar*, (Mohr Siebeck, 3rd ed, 2022) Ch. 19 para 89 f.

[462] Ibid, para 89.

There are some restrictive provisions. Some state assembly acts go beyond these 'standard' restrictions. One assembly act that is particularly restrictive with regards to climate protests is that of North Rhine-Westphalia (VersG NRW). Particularly relevant for environmental protests – and which are currently being litigated against – are the following provisions:

- Section 13 (1) s. 3 VersG NRW excludes federal highways as legitimate places of demonstration.[463] It is questionable whether such restrictions are 'necessary in a democratic society', especially considering the ECtHR's requirement of a 'certain degree of tolerance' towards a certain level of disruption. The fact that protestors often assert a connection between traffic and climate change also makes it questionable whether the general exclusion of assemblies on highways is compatible with the ECHR.

- Section 18 VersG NRW forbids the wearing of 'uniform-like clothing […] which suggests readiness for violence and therefore has an intimidating effect.'[464] Despite its open formulation, this provision impedes protest groups such as 'Ende Gelände' from engaging in anonymous, hooded protest.[465] The arguably vagueness of the legal criteria in section 18 VersG NRW and the fact that its violation is considered a criminal offense (section 27 (8) VersG NRW) also arguably creates a chilling effect on climate protest (see below). Furthermore, it is referenced by other provisions that allow, for example, identity controls and body searches (section 15 (1, 2)) VersG NRW. It may be arguable that the constitutionality of section 18 VersG NRW is questionable on the grounds of (its lack of) legal certainty, i.e. the vagueness of its criteria.[466] In this regard, it seems important to note, however, that the German constitutional standard for legal certainty is higher than that required by the ECtHR. Under the ECHR, the

[463] Katharina Leusch, ‚Demonstrieren schwer gemacht' (Verfassungsblog, 16 January 2023) < https://verfassungsblog.de/demonstrieren-schwer-gemacht/> accessed 13 March 2024
[464] Non-official translation.
[465] The justification for the law explicitly references climate protest, see NRW LT-Drs. 17/12423, p. 77.
[466] Katharina Leusch (n 463)

application of Section 18 VersG NRW to climate protests may be discussed under the proportionality test if – beyond the wearing of white hoods – no additional circumstances prevail that justify the classification of the protest as 'intimidating'.

Since most provisions in the German Assembly Acts are not problematic on a general level – some exceptions were discussed under the last bullet point – the relevant question in most cases is whether these provisions were applied in a constitutional (proportional) manner. This can be clarified on a case-by-case basis before the lower administrative courts. One important requirement is that the actions of single participants generally cannot justify restrictions on the whole assembly.[467]

One common and highly problematic practice of German assembly authorities that must be highlighted here, however, is the use of so called 'pain grips' to remove protesters from blockades. These grips are thought by some commentators to violate art. 3 ECHR (prohibition of torture).[468] However, even if 'pain grips' cannot be treated as generally contrary to the Convention, their application has to follow strict proportionality. Therefore, their application in unlocked sitting blockades where protesters can simply be carried away may arguably not fulfil the criterion of necessity.[469]

General Police Law

All assembly acts qualify as *leges speciales* to general risk prevention/police law; thus, general police competences are inapplicable for the duration of the assembly ('Polizeifestigkeit des Versammlungsrechts').[470] However, before and after assemblies, they remain applicable. Particularly relevant for climate protesters has been a provision

[467] Schneider (n 438) Art. 8 Rn. 15.
[468] Prof. Anna Katharina Mangold, Tweet (Twitter, 6 December 2022) <https://twitter.com/feministconlaw/status/1600055344566177793> accessed 13 March 2024.
[469] Alexander Cremer and Dr. Felix W. Zimmermann, ‚Androhung "unfass-barer Sch-merzen" laut Polizei Berlin rechtmäßig' (LTO, 18 November 2022) <https://www.lto.de/recht/nachrichten/n/debatte-gewalt-polizei-letzte-generation-schmerzgriffe-verhaeltnismaessigkeit/>
[470] BVerwGE 82, 34; Paula Fischer, 'Infrastruktur bei Protestcamps und der Schutzbereich der Versammlungsfreiheit' (NVwZ 2022) 253 (254) <https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fnvwz%2F2022%2Fcont%2Fnvwz.2022.353.1.htm&anchor=Y-300-Z-NVWZ-B-2022-S-353-N-1>

allowing preventive custody in Bavaria (art. 17 ff. BayPolG). This provision has been used against activists of the 'Rebellion of the Last Generation', who were held in preventive custody for 30 days because of their blockades of streets (and which had an immense chilling effect on climate activism in Bavaria). From a legal point of view, this measure impacts the right to assembly (art. 8 GG) and the right to liberty (art. 2 (2) s. 2 GG in conjunction with art. 104 (1) GG). The preventive custody can be applied if it is 'inevitable to prevent the perpetration of administrative offenses of considerable weight or criminal offenses' (art. 17 (1) Nr. 2 BayPolG). At least the former threshold ('administrative offenses of considerable weight') does not meet the requirement of art. 5 (1) lit. c) ECHR, which requires a criminal offense.[471] But even if the activists' actions qualify as criminal offenses, the severity of their crimes should be considered when deciding on the application and length of preventive custody.[472] This is a requirement of proportionality. It is highly questionable whether these requirements were met in past applications of art. 17 ff. BayPolG.[473]

Criminal Law

Unlike general police law, criminal law remains applicable during all assemblies. The criminal offenses relevant to climate protesters can be divided up into the assembly specific criminal law and general criminal law.

Assembly-specific criminal law may differ from state to state.[474] It penalizes the violation of assembly-specific duties, e.g.

- the duty to notify the authority about the assembly (section 26 Nr. 2 BVersG),
- the duty to obey conditions on the assembly (section 25 Nr.2 BVersG),
- the duty to refrain from assembly after dissolution (section 26 Nr. 1 BVersG).

[471] ECHR, Guide on Article 5 of the European Convention on Human Rights, p. 23.
[472] ibid.
[473] Ralf Poscher and Maja Werner, ‚Gewahrsam als letztes Mittel gegen die „Letzte Generation"?', (Verfassungsblog, 24 November 2022) <https://verfassungsblog.de/gewahrsam-als-letztes-mittel-gegen-die-letzte-generation/>
[474] This is contested by some who argue that assembly-specific criminal law does not fall under the state's competence for assembly law (Art. 30 GG) but under the federal competence for criminal law (Art. 74 (1) Nr. 1 GG)

Since the assembly specific duties (e.g. the duty to leave a dissolved assembly) only come into existence if the principle of proportionality was duly considered, it is generally compatible with the ECHR to penalise a violation (but that would depend on the individual case).

The applicability of general criminal law to climate protests is highly dependent on the facts of each case. Recently, climate protesters have been prosecuted regularly for the following criminal offenses:[475]

- coercion (section 240 Criminal Code) which will be covered extensively below;
- trespass (section 123 Criminal Code) which requires the unlawful entering of or staying at enclosed properties; and
- resistance to enforcement officials (section 113 Criminal Code) which requires resistance to the lawful acts of some public officials (including police) by force or threat of force. This requires active behaviour (that is directed against the official);[476] mere passive resistance is not covered.[477]

The criminal offense of coercion (section 240 Criminal Code) is especially relevant for street blockades. It penalizes the 'compel[ling of] a person to do […] or refrain from an act […] by force or threat of serious harm'. These requirements have been found by the Federal Criminal Court to be fulfilled in the case of street blockades: while the protesters do not use force directly, the Court reasoned that the blockade acts as a psychological force to the first row of car drivers who then stop and pose a physical obstacle to the second and following rows (so called 'second-row-jurisdiction').[478]

The Federal Constitutional Court of Germany has generally approved this legal reasoning.[479] This is why section 240 Criminal Code is a common charge against climate protesters; it has been the basis for hundreds of penal orders and many convictions

[475] Tages Spiegel, 'Bisher keine Freisprüche: 511 Strafbefehle und 39 Verurteilungen gegen Klimaschutz-Demonstranten in Berlin' (Tagesspiegel, 14 February 2023) <https://www.tagesspiegel.de/berlin/bisher-keine-freispruche-511-strafbefehle-und-39-verurteilungen-gegen-klimaschutz-demonstranten-in-berlin-9347591.html>
[476] This is not always applied stringently by the courts, see e.g. BVerfG, 23. 8. 2005, 2 BvR 1066/05.
[477] Dallmeyer, in: *BeckOK StGB § 113* (von Heintschel-Heinegg, 01 October 2007) Rn. 7.
[478] BGHSt 41, 182 (184 f.).
[479] BVerfGK 18, 365 ff.

against members of the protest group 'Aufstand der letzten Generation' ('Rebellion of the Last Generation').[480] However, pursuant to section 240 (2) Criminal Code, a coercion is only illegal if it is 'reprehensible in respect of the desired objective'. This requires a case-by-case test. Focusing on the test of reprehensibility may prove a feasible defence strategy for climate protesters. According to the Federal Constitutional Court of Germany, the Court has to assess the circumstances of the case in a comprehensive manner, and has noted that the following factors are key:

- the duration and intensity of the [protest],
- prior notice,
- alternative [routes for affected persons],
- the importance of the blocked transport, and
- the substantive connection between the persons whose freedom of movement is restricted and the subject of the protest.[481]

These criteria can be read as a concretization of the ECtHR's 'certain degree of tolerance'-standard or – relatedly – a concretization of the ECtHR's distinction between obstructive and non-obstructive protest. Importantly, the Federal Constitutional Court of Germany also requires courts to consider the communicative goal of the protest: 'Whether an action is to be considered as a reprehensive coercion cannot be ascertained without considering its intended purpose'. […] Decisive from the point of view of Art. 8 GG is the communicative purpose which the assembly pursues'.[482]

Despite these specifications by the Federal Constitutional Court of Germany, the reprehensibility test is still associated with significant uncertainties. So far, the question of the reprehensibility of street blockades by climate protesters is answered

[480] Tagesspiegel, 'Bisher keine Freisprüche: 511 Strafbefehle und 39 Verurteilungen gegen Klimaschutz-Demonstranten in Berlin' (Tagesspiegel, 14 February 2023) < https://www.tagesspiegel.de/berlin/bisher-keine-freispruche-511-strafbefehle-und-39-verurteilungen-gegen-klimaschutz-demonstranten-in-berlin-9347591.html>
[481] BVerfGE 104, 92 (112) – non-official translation.
[482] BVerfGE 104, 92 (109) – non-official translation. The widespread practice of German criminal courts to exclude long-term goals from consideration in the reprehensibility test (see for example BGH, 05.05.1988, 1 StR 5/88) seems incompatible with this requirement (Preuß, NZV 2023, 60 [69]).

in the affirmative by most courts but negated by some.[483] The legal uncertainty involved can best be exemplified with two legal judgements handed down by different judges of the same court on the same day. In one decision, a conviction was handed down with the following reasoning:

> Political actions which impair fundamental rights of [uninvolved third parties], do not become socially tolerable just because they relate to a topic which – like climate protection – affects virtually everyone. […] Afterall, this is an intentional obstruction […] for obstruction's sake in pursuit of […] political goals that only have a very general, connection with the [damaged third parties].[484]

In the other case, the court – similar to the ECtHR in some cases – stressed the importance of looking for a connection between the means and the ends of the protest for the reprehensibility test: '[While] the court is not entitled to an evaluation of the defendant's concern as useful and valuable or as worthy of disapproval […] the communicative goal 'climate protection' […] has to be put in relation to the means of […] a 'street blockade'.'[485] In applying this standard, the court stated: 'The purpose of making car-drivers aware of the daily traffic load caused by rush-hour traffic and CO2 emissions has a direct substantial link to the blockade of these exact car-drivers'.[486] Furthermore, the court drew attention to the recent decision *Neubauer v. Germany* in which the Federal Constitutional Court of Germany court stressed that 'provisions that allow CO2 emissions in the present pose an irreversible legal risk to future freedom because every amount of CO2 that is allowed today irreversibly depletes the remaining budget' and that 'any exercise of freedom involving CO2 emissions will be subject to more stringent restrictions that will be necessary under constitutional law.'[487] From this, the court drew the conclusion that

[483] See for example AG Freiburg, judgement of 21.11.2022, 24 Cs 450 Js 18098/22; a similar decision was struck by AG Berlin but later reversed by LG Berlin.
[484] AG Freiburg, 22.11.2022, 28 Cs 450 Js 23773/22, paras 40 f. – non-official translation.
[485] AG Freiburg, 21.11.2022, 24 Cs 450 Js 18098/22, paras 34 f., – non-official translation.
[486] AG Freiburg, 21.11.2022, 24 Cs 450 Js 18098/22, para 50, – non-official translation.
[487] BVerfGE 157, 30 (132 f.).

> [it had to be considered that] as the CO2 budget continues to be used up, more and more urgent restrictions on CO2-relevant behavior are constitutionally required, which means that the restrictions on individual freedom of movement with cars will be tightened by the state until 2030. Drawing attention to the – perceived – inaction by the government and the coming restrictions of CO2-usage by way of street blockade is therefore a direct linking of means and end. Showing the finitude of the CO2-budget as well as to the more serious restrictions to the freedom of movement that will be constitutionally necessary in the future is […] not reprehensible in the cases at hand.[488]

The comparison of these two cases shows that the legal findings (in criminal law cases) is highly dependent on the degree to which the communicative goal (climate change) and the characteristics of climate change itself are taken into account. This can also be seen when looking at potential legal defenses for climate protesters, which this report will turn to next.

Civil Cases

Civil liability of climate protesters under German tort law has received no attention from German courts and little attention from German legal academia so far. However, in light of the German energy corporation 'RWE' claiming 1.4 million EUR in damages from a climate activist for participating in the blocking of a coal mine,[489] this is starting to change. A discussion of the implication of civil cases is beyond the scope of this report but identified here as an avenue open for further research by scholars. [490]

[488] AG Freiburg, 21.11.2022, 24 Cs 450 Js 18098/22, para 57, <https://openjur.de/u/2461049.html> – non-official translation.
[489] LTO, RWE will 1,4 Millionen Euro von Aktivisten' (LTO, 18 January 2023) < https://www.lto.de/recht/nachrichten/n/energiekonzern-rwe-schadensersatzklage-14-millionen-euro-klimaaktivisten-blockade-kohlekraftwerk-neurath/>
[490] So far, the topic has been covered by Patros/Pollithy, NJOZ 2023, 1 ff. and Behme, NJW 2023, 327 ff., who have come to almost diametrically opposed results in their respective articles.

Defences and Arguments

While the reprehensibility test is unique to the offense of coercion, the legal defence of necessity (section 34 Criminal Code) is applicable to all criminal offenses. The defence of necessity requires a four-tier test: The behaviour in question must be (a) suitable and (b) necessary to avert a present danger to a legal interest which cannot otherwise be averted. Furthermore, (c) the protected interest must substantially outweigh the one interfered with and (d) the behaviour must be an adequate means to avert the danger (s. 2).

This legal defence has been invoked by climate protesters multiple times. While legal academia has discussed the applicability of section 34 Criminal Code controversially,[491] courts have mostly rejected it at least in those cases in which there was only a symbolic relation between the protest and climate change.[492] In a case discussed above, for example, the court stated that the application of section 34 Criminal Code: '[is] to be denied at the latest within the weighing of interests in which […] the priority of state measures [against climate change] must be taken into account. […] Pointing out that government action has so far been insufficient, does not justify violating the right of any individual to move freely.'[493]

A different conclusion was drawn in a case in which a protester attempted to prevent the cutting-down of trees. The court found: 'taking into account the high value of climate protection, as required under constitutional law, when examining the necessity of the action within the meaning of section 34 of the Criminal Code, high requirements must be placed on the […] equal suitability of alternative actions'.[494]

[491] See for example Preuß, NZV 2023, 60 (72); Jana Wolf, 'Klimaschutz als rechtfertigender Notstand' (Verfassungsblog, 14 November 2022) <https://verfassungsblog.de/klimaschutz-als-rechtfertigender-notstand/#comments>
[492] See for example OLG Celle , Order of 29.07.2022 (2 Ss 91/22); AG Freiburg, judgement of 22.11.2022 (28 Cs 450 Js 23773/22). Many other decisions are not available in full text yet.
[493] AG Freiburg, 22.11.2022, 28 Cs 450 Js 23773/22, para 45 <https://openjur.de/u/2461050.html> – non-official translation.
[494] AG Flensburg, 06.12.2022, 440 Cs 107 Js 7252/22, para 90 <https://openjur.de/u/2461050.html>.

This decision has drawn controversial reactions from German legal academia[495] and is still under appeal at the time of writing of this report. Still, two conclusions can be drawn from it: Firstly, the successful invocation of the defence of necessity is more likely if the protest directly contributes to climate protection. The court addressed this explicitly in para. 32f and concluded: '[I]nsofar as there is a direct causal link between the act […] and the averting of the danger [and not just an indirect one through political protest,] the court is convinced that that act can also be qualified as suitable within the meaning of section 34 of the Criminal Code.'[496] Secondly, regardless of the outcome of the appeal, this ruling reiterates the earlier finding that the outcome of cases is much more favourable for climate protesters if the characteristics of climate change and the importance of climate protection are discussed in the case. A substantive decision on climate change by a high court – such as *Neubauer v Germany* – seems to raise the chances of this happening.[497] This has important implications for the ECHR and ECtHR case law as well: from the standpoint of legal strategy, the outcome of the climate cases before the ECtHR should not be seen as separate issues from cases involving climate protesters. Rather, the former may drastically influence the outcome of the latter: if state action on climate change is found to be insufficient and in violation of human rights, this may (factually) increase the legitimacy of climate protest and their chances in court. In any case, at least in the German jurisdiction, the efficiency of any legal defence strategy seems dependent on the court's willingness to consider the factual situation regarding climate change.

[495] Rouven Dieskjobst, ‚Klimanotstand über Gewaltenteilung?' (Verfassungsblog, 11 December 2022) <https://verfassungsblog.de/klimanotstand-uber-gewaltenteilung/>; Jan-Louis Wiedmann, , Den Baum vor lauter Wald nicht sehen – oder umgekehrt?' (Verfassungsblog, 13 December 2022) <https://verfassungsblog.de/den-baum-vor-lauter-wald-nicht-sehen-oder-umgekehrt/> ; Jana Wolf, ‚Flensburger Einhorn' (Verfassungsblog, 16 December 2022) <https://verfassungsblog.de/flensburger-einhorn/> .

[496] AG Flensburg, 06.12.2022, para 32 f.; 440 Cs 107 Js 7252/22 <https://openjur.de/u/2459076.html>.

[497] Considering the scarcity of available decisions of German courts, this claim cannot be backed up with quantified evidence. However, the consequences of 'Neubauer v. Germany' are broadly discussed in German legal academia. The court cases provided in this report provide further evidence.

Fines and Penalties

The criminal penalties are again dependent on the criminal offense at hand. So far, however, courts for the most part stayed in the lower range of possible penalties. For the offenses discussed above, courts have mostly set financial fines in the low to mid-hundred euro range. In the cases analysed for this report, the fines ranged from 200 to 600 euro. In a recent case, however, two protesters were sentenced to a prison sentences of two and three months that was not set out on probation for committing a coercion (section 240 Criminal Code).[498] This was considered 'necessary to influence the perpetrator's personality,'[499] likely because the activists announced they would continue to engage in street blockades. Such announcements clearly increase the risk of higher penalties.

Chilling Effects

Chilling effects are evident in Germany by statutory provisions that (a) do not set out their requirements in a way that makes their application predictable for citizens and/or (b) set out legal consequences that are or can be disproportionate in light of the committed acts. As discussed above, particularly problematic are: (a) the *de facto* prohibition of unitary protest-clothing in North Rhine-Westphalia (section 18 VersG NRW; (b) the possibility of preventive custody (for climate activists) in Bavaria; (c) the broad application of section 240 of the German Criminal Code and the legal uncertainty involved with the reprehensibility-test, and (d) the danger of crushing liabilities for single climate protesters under German tort law (the constitutional and ECHR requirements, especially that of a 'certain degree of tolerance' should be considered when interpreting and applying German tort law to climate protests, especially since liability cases may have a threatening effect on other kinds of (legitimate) protest in a legal grey area).

[498] LTO,Erstmals Haftstrafen ohne Bewäh-rung für Kli-maaktivisten' (LTO, 7 March 2023) <https://www.lto.de/recht/nachrichten/n/klimaaktivisten-letzte-generation-verurteilt-haftstrafe/>.
[499] Ibid.

CONCLUSION

This Report has sought to address the current state of ECHR law, as set out in the Convention and as developed by the ECtHR, regarding climate protest, and to analyse how three Member States apply ECHR rights to situations of climate protest activities. It will hopefully be the start of many projects that will continue to address this growing area of the law as new cases emerge concerning climate protest across Europe.