

Criminal defenses in environmental civil disobedience cases: necessity defense *versus* freedom of expression

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INTRODUCTION

1. The current ecological emergency¹ — combining both the climate emergency² and the emergency of the collapse of biodiversity,³ also called “sixth mass extinction” — involves living beings in a broad sense, including ecosystems and human communities. It constitutes an especially serious threat to the survival of civilization, all the more so because it may have irreversible consequences. For decades, scientists have been stressing “the extreme urgency of taking much-expanded worldwide actions to save wild species and humanity’s crucial life-support systems from this existential threat”,⁴ whether through the Intergovernmental Panel on Climate Change,⁵ the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services,⁶ or other institutions and organizations.⁷

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¹ C. CHEVALIER and T. DE LA MOTTE, *Déclarons l'état d'urgence écologique*, Waterloo, Ed. Luc Pire, 2020.

² W. J. RIPPLE *et al.*, “The Climate Emergency: 2020 in Review”, *Scientific American*, January 6, 2021, <https://www.scientificamerican.com/article/the-climate-emergency-2020-in-review/>; M. FISCHETTI, “We are living in a climate emergency, and we’re going to say so”, *Scientific American*, April 12, 2021, <https://www.scientificamerican.com/article/we-are-living-in-a-climate-emergency-and-were-going-to-say-so/>.

³ G. CEBALLOS, P. R. EHRLICH and P. H. RAVEN, “Vertebrates on the brink as indicators of biological annihilation and the sixth mass extinction”, *Proceedings of the National Academy of Sciences*, June 2020, Vol. 117, No. 24, pp. 13596-13602, <https://www.pnas.org/content/pnas/117/24/13596.full.pdf>.

⁴ *Ibidem*, p. 13596.

⁵ See in particular the first part of the 6th IPCC assessment report, published on August 9, 2021, *Climate Change 2021. The Physical Science Basis*, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

⁶ Or the biodiversity equivalent of the IPCC.

⁷ W. J. RIPPLE *et al.* (11.258 scientists from 153 countries), “World scientists’ warning of a climate emergency”, *BioScience*, January 2020, Vol. 70, No. 1, pp. 8 and following.

2. The increasing concentration of greenhouse gases in the atmosphere since the pre-industrial period has resulted in the global warming of the Earth's climate. If the Earth's temperature were to rise by more than 1.5°C, this would have considerable deleterious effects on ecosystems and human communities, particularly on the most vulnerable categories of the population.⁸ In this context, only a mobilization of all sectors and all actors to reduce greenhouse gas emissions by several percent per year would allow us to reach carbon neutrality by 2050 and prevent us from reaching the 1.5°C threshold. Such previsions are based on a relatively optimistic hypothesis where States comply with their commitments announced in the Paris Agreement that was adopted on December 12, 2015 at the 21st Conference of the Parties of the United Nations.⁹ These commitments have been reiterated, though in an insufficient manner¹⁰ in the framework of the 26th Conference of the Parties which ended on November 13, 2021, in Glasgow. As recalled in the Paris Agreement, reaching carbon neutrality by 2050 is absolutely necessary to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".¹¹

3. Achieving carbon neutrality by 2050 on a global scale requires immediate action in the framework of an ecological transition led by a sustainable, inclusive and social vision.¹² This requirement is expressed in a plurality of challenges

⁸ See the first part of the 6th IPCC assessment report, published on August 9, 2021, *Climate Change 2021. The Physical Science Basis*, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

⁹ The United Nations Framework Convention on Climate Change (UNFCCC) was adopted at the Rio Summit in 1992 and came into effect on March 2, 1994. Since then, every year or so, a summit is organized and brings States together.

¹⁰ In the aftermath of COP 26, held in Glasgow at the beginning of November 2021, both scientists and civil society have emphasized that the commitments made by the States were insufficient to reduce greenhouse gas emissions and thus to keep global warming below 1.5°C. They also pointed out the demands made by vulnerable countries (those least responsible for global warming, yet most affected) that have not been considered by the wealthier countries, including Belgium (see "La COP 26, un pas dans la bonne direction, mais c'est très insuffisant pour Jean-Pascal van Ypersele" Belga Press Release, November 14, 2021, <http://www.rtf.be>. Jean-Pascal van Ypersele, PhD in physical sciences from UCLouvain, is a Belgian climatologist, full professor of climatology and environmental sciences at UCLouvain. He has been vice-president of the IPCC between 2008 and 2015 and has contributed to several reports drawn by the IPCC; A.-R. KOKABI, "COP 26 : le gâchis et la déception d'un accord minimal", *Reporterre*, November 13, 2021, <https://reporterre.net/COP26-le-gachis-et-la-deception-d-un-accord-a-minima>).

¹¹ UNFCCC, December 2015, Paris Agreement, art. 2.1, (a).

¹² The IPCC has finalized the second part of the Sixth Assessment Report in February 2022. The summary's report for policy makers highlights in particular that "there is here is increased evidence of maladaptation across many sectors and regions since the AR5 [precedent report]. Maladaptive responses to climate change can create lock-ins of vulnerability, exposure and risks that are difficult and expensive to change and exacerbate existing inequalities. Maladaptation can be avoided by flexible, multi-sectoral, inclusive and long-term planning and implementation of adaptation actions with benefits

and issues that are unprecedented for human communities. The main question at hand consists in finding a more respectful way of living on earth, by proposing “a new vision of progress that breaks with an economic model whose resilience is nil, because it assumes unbridled consumption of non-renewable resources and causes a destabilization of the climatic balance that will soon be uncontrollable”.¹³ Because human communities live on a planet with limited resources, they must review their models of consumption, production and living (including transport, industry, housing, agriculture, research, education, modes of governance, etc.¹⁴). To achieve this, they must be able to remove both material obstacles and those related to the exercise of democracy, with the objective of “moving towards a society where democracy would be renewed and extended, a society that is gentler for its members, less unequal, more attentive to the needs of each and every one”.¹⁵

4. To move toward such a society, mobilizations have happened throughout the globe, through various forms, strategies, and actors. In parallel to the legal means of protest in the public sphere,¹⁶ a repertoire of non-violent disobedient actions¹⁷ has been developed in recent decades. Lately, these actions have intensified in scope and frequency, both because of the current ecological emergency — *glaring, multiple, complex* — combined with a social, economic and political emergency,¹⁸ and because of the inaction of the States with regard to these climatic and environmental disturbances. I can mention *inter alia* the unauthorized occupation of private or public sites of pollution, the

to many sectors and systems” (see IPCC, *Climate change 2022, Impacts, Adaptation and Vulnerability, Summary for Policymakers*, https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf, p. 30).

¹³ P. FREMEAUX, “Le défi de la transition écologique”, in M. WIEVIORKA (ed.), *L’avenir*, Auxerre, Editions Sciences humaines, 2015, p. 109, personal translation.

¹⁴ See IPCC, *Climate change 2022, Impacts, Adaptation and Vulnerability, Summary for Policymakers*, https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf, as well as the previous Report established by the IPCC on that subject in 2014: <https://www.ipcc.ch/report/ar5/wg2/>.

¹⁵ P. FREMEAUX, *op. cit.*, at p. 109.

¹⁶ Legal means of protest in the public space include i.a. exercising the right to vote or abstain in elections, participation in demonstrations, marches, picketing, legal actions, petitions, parliamentary questions, manifestos, open letters, press debates, conferences, documentaries, boycotts, transition initiatives in a broad sense, etc.

¹⁷ G. HAYES and S. OLLITRAULT, “Désobéir, un mode d’action citoyen radical ?”, in *La désobéissance civile*, Paris, Les Presses de Science Po, 2012, pp. 95-139; I. SOMMIER, G. HAYES and S. OLLITRAULT, *Breaking Laws: Violence and Civil Disobedience in Protest*, Amsterdam, Amsterdam University Press, 2019, <https://doi.org/10.1515/9789048528271>, pp. 185-212.

¹⁸ The combination of crises — environmental (including the current pandemic), social, economic and political — requires a holistic and decompartmentalized approach between disciplines and actors, confronting us with “a need and responsibility to redesign institutions to be proactive, agile, and socially just when confronted with increasingly likely compound risks” (A. KRUCZKIEWICZA *et al.*, “Compound risks and complex emergencies require new approaches to preparedness”, *PNAS*, May 2021, Vol. 118, No. 19, p. 1, <http://doi.org/10.1073/pnas.2106795118>).

“dismantling” or the deterioration¹⁹ of material goods,²⁰ a specific form of “hacktivism”²¹ on the web (electronic blocking, saturation of servers, sending of massive mails), etc.

5. This paper²² aims to take stock of the latest developments concerning acts of civil disobedience realized in the context of the current ecological emergency and to highlight some important criminal court decisions on the continent (France, Switzerland) and the United States²³ in this specific context. It also aims to analyze the defenses frequently used by activists in front of criminal courts, namely the necessity defense (“*état de nécessité*”) and the right to freedom of expression. After introducing the philosophical roots of civil disobedience (I), I will briefly outline the concepts of necessity defense in criminal law (II.1) and of freedom of expression in human rights law (II.2), citing the content of several important criminal decisions. In conclusion, I will mention the delicate role of criminal attorneys and trial judges in relation to this issue (III).

¹⁹ The issue of (non)violence [against property] is a matter of debate within the associations and movements that support civil disobedience. Some believe that it should be excluded from the scope of civil disobedience and are therefore careful to adapt their actions and the term used by referring, for example, to the “dismantling” of material goods (by returning the dismantled goods to their owners) rather than to the destruction of material goods. Others, on the contrary, are in favor of including a form of violence [only against property] in their actions.

²⁰ See for example the actions of the “voluntary reapers” (reapers of genetically modified organisms) who made themselves known in France, Belgium and in the UK at the end of the 2000s, the action of “dismantling” a milking machine at the Farm of a Thousand Cows, in Normandy, in September 2013 and May 2014 (“Les militants de la CP invoquent la désobéissance civile”, 28 octobre 2014, <https://www.terre-net.fr/actualite-agricole/politique-syndicalisme/article/les-militants-de-la-cp-invoquent-la-desobeissance-civile-205-104915.html>), the action aimed at covering herbicide (glyphosate) cans with paint in stores in Ariège (France) in September 2016 (M. MARTIN, “Ariège : nouvelle action des faucheurs volontaires contre les glyphosates”, <https://france3-regions.francetvinfo.fr/occitanie/ariege/ariege-nouvelle-action-faucheurs-volontaires-contre-glyphosates-1096089.html>, accessed on April 26, 2022), etc.

²¹ It is controverted whether hacktivism is or not a form of civil disobedience. In this way, C. Delmas considers that hacktivism is not (and should not be considered) as the new civil disobedience. In her article, she proposes a matrix of electronic resistance with five clusters: vigilantism, whistleblowing, guerrilla communication, electronic humanitarianism, and electronic civil disobedience. See C. DELMAS, “Is Hacktivism the New Civil Disobedience?”, *Raisons politiques*, 2018/1 (No. 69), pp. 63-81, <https://www.cairn.info/revue-raisons-politiques-2018-1-page-63.htm>.

²² Some passages of this article are taken from an article published in June 2021, in French, by the *Revue de droit pénal et de criminologie* (Belgique). Passages of this previous article are reproduced with the explicit agreement of the Editor (la Charte). See M. JADOUL, “La désobéissance civile dans le contexte de l’urgence écologique : l’état de nécessité et la liberté d’expression ont le vent en poupe”, *Rev.dr.pén.crim.*, 2021, No. 6, pp. 634-662.

²³ These legal systems have been selected because they have already produced decisions on the issue. However, the difference between civil law and common law will not be discussed in this paper, as it goes beyond the scope of this contribution.

I. PHILOSOPHICAL ROOTS OF CIVIL DISOBEDIENCE

6. Civil disobedience raises the issue of contestation, at the intersection of political philosophy, sociology, political theory, and law.²⁴ This paper focuses on non-violent²⁵ forms of civil disobedience. In the field of political philosophy, various accounts of civil disobedience coexist. The American political philosopher John Rawls supports a liberal vision of civil disobedience.²⁶ He defines it as a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies.²⁷ According to his conception, fundamental rights (such as the right to freedom and the right to equal opportunities) are the ground for justification of civil disobedience. Indeed, those whose fundamental rights are (seriously) violated by the government in place (although it may be democratically elected), can protest against such a violation by disobeying the law. However, according to Rawls, civil disobedience must be restricted in the “cases of major and obvious injustice”.²⁸ While this conception may have represented the apogee of the liberal vision of civil disobedience with the birth of the civil rights movement in the United States in the 1960s and with the emergence of human rights, it does not allow the justification of other cases of civil disobedience. Indeed, the anti-nuclear movement that developed in Europe throughout the 1980s was based on the principle of prudence,²⁹ rather than on the protection of fundamental rights such as put forward by Rawls.³⁰

²⁴ See also C. DEMAY, “La désobéissance civile : un concept pour appréhender la nature politique des actes militants en droit ?”, in *Désobéir quoi qu’il en coûte*, Paris, L’Harmattan, 2021, Irascible n° 8, pp. 39-42; C. DEMAY, B. FAVRE, “De l’état de nécessité à la désobéissance civile environnementale, plaidoyer pour une réhabilitation macropolitique du droit”, in D. BOURG, C. DEMAY, B. FAVRE (dir.), *Désobéir pour la terre, défense de l’état de nécessité*, Paris, PUF, 2021, pp. 249 and following.

²⁵ The American philosopher Judith Butler defines nonviolence as a “social and political practice undertaken in concert, culminating in a form of resistance to systemic forms of destruction coupled with commitment to world building that honors global interdependency of the kind that embodies ideals of economic, social and political freedom and equality (...). Nonviolence does not necessarily emerge from a pacific or calm part of the soul. Very often it is an expression of rage, indignation, and aggression. Although some people confuse aggression with violence, it is central to the argument of this book to foreground the fact that nonviolent forms of resistance can and must be aggressively pursued (...) The practice of “going limp” before political power is, on the one hand, a passive posture, and is thought to belong to the tradition of passive resistance; at the same time, it is a deliberate way of exposing the body to police power, of entering the field of violence, and of exercising an adamant and embodied form of political agency. It requires suffering, yes, but for the purposes of transforming both oneself and social reality (...). Nonviolence is an ideal that cannot always be fully honored in the practice (...) “nonviolence” is not an absolute principle, but the name of an outgoing struggle” (J. BUTLER, *The force of nonviolence. An Ethico-Political Bind*, London-New York, Verso, 2020, pp. 21-22).

²⁶ Other defenders of a liberal version of civil disobedience are the American philosophers Ronald Dworkin and Hugo Adam Bedau.

²⁷ J. RAWLS, *Théorie de la justice*, 1987, trad. par C. Audard, Paris, Seuil, 2002, p. 405.

²⁸ *Ibidem.*, at p. 412.

²⁹ D. MARKOVITS, “Democratic Disobedience”, *Yale Law Journal*, Vol. 114, 2005, p. 1901.

³⁰ Many definitions and conceptions of civil disobedience coexist. Providing a complete and nuanced definition nevertheless goes beyond the scope of this contribution.

7. In the field of political sociology and sociology of mobilizations, the notion of protest (and action's registers used for example by Henry David Thoreau in 1866³¹) has evolved to a more complex sense of collective, transversal³² and horizontal social transformation, due mainly to the use of new technologies, the internet and social networks.³³ Translated into political theory, civil disobedience emerges as a way for citizens to regain power and reactivate a certain form of "popular sovereignty" in the face of the "democratic deficits"³⁴ inherent to representative democracy. It is also a way of continuing a public discussion even after the decision-makers seem to have closed the debate. For the philosopher Jürgen Habermas, such an action is legitimate and encouraged, and one that constitutes "the democratic act by excellence".³⁵

8. In the field of law, another definition of civil disobedience highlights the difference between "direct" and "indirect" forms of civil disobedience.³⁶ In the first case, it is the challenged law itself that is violated by the disobedient, while in the second case, the law violated by the citizen is different from the one that is being challenged. This definition is important because, in the United States, courts invoke a set of reasons for excluding the empanelment of a jury in cases of indirect civil disobedience and for refusing the necessity defense in such cases.³⁷

³¹ In 1866, David Henry Thoreau opposed the institution of slavery in the United States by refusing to pay his taxes. S. Laugier explains in her article that D.H. Thoreau acted in a singular or individual perspective. According to her, he (among others authors cited) is reinventing individualism: "the reflection on the individual passes by a redefinition of what is a right expression, a coherent voice; it is not enough to express oneself to have a voice. The voice is indissolubly individual and collective, and the more it expresses the singular, the more it is able to represent the collective" (S. LAUGIER, "La désobéissance comme principe de la démocratie", *Pouvoirs*, 2015/4, No. 155, §50, personal translation).

³² G. HAYES and S. OLLITRAULT mention it as a transversal tactic ("*tactique transversale*"), *op. cit.*, p. 101.

³³ See I.a. G. HAYES and S. OLLITRAULT, *op. cit.*, pp. 95-139.

³⁴ See i.a. D. MARKOVITS, *op. cit.*

³⁵ L. LEMASSON, "La démocratie radicale de Jürgen Habermas. Entre socialisme et anarchie", *Revue française de science politique*, 2008/1, Vol. 58, p. 59; J. HABERMAS, *L'intégration républicaine*, Fayard, 1998, p. 322; *Droit et Démocratie entre faits et normes* (trad. par R. Rochlitz et C. Bouchindhomme), Paris, Gallimard, 1997, pp. 410-411.

³⁶ D. MARKOVITS, *op. cit.*, p. 1898, note 1.

³⁷ Many courts are relying on the distinction between direct and indirect civil disobedience established in the case *United States v. Schoon* to refuse the defense based on necessity. In that specific case, on December 4, 1989, thirty people, including appellants, entered to the Internal Revenue Office in Tucson, Arizona. They sang "keep America's tax dollars out of El Salvador," splashed fake blood on the counters, walls, and carpeting, and obstructed the office's operation. After a police officer ordered the group to disperse or face arrest, appellants were arrested. During the trial, they gave testimony about conditions in El Salvador as the motivation for their conduct. They pleaded the necessity defense, essentially showing that their acts in protest of American involvement in El Salvador were necessary to avoid further bloodshed in that country. While finding appellants motivated solely by humanitarian concerns, the court however precluded the defense as a matter of law, relying on Ninth Circuit precedent. The court found out that three elements could not be satisfied in the appellants' defense: "a government policy is not a legally cognizable harm, and so defendants fail to choose a lesser evil; abating the harm requires too many intervening steps, failing the causation test; and there is always legal alternative in

9. Moreover, the issue concerning the link between civil disobedience and freedom of expression is fundamental to the field of law. In particular, the Supreme Court of the United States has applied to such acts the notion of “expressive conduct”³⁸ for several decades. Such a notion can be seen more recently in the case-law of the European Court of Human Rights.³⁹ A question surrounding this case-law is whether the behaviour of environmental activists, who express themselves in the public sphere and in relation to a public debate, is protected (or not) by freedom of expression.

II. NECESSITY DEFENSE AND FREEDOM OF EXPRESSION AS MEANS OF DEFENSE

10. As such, environmental civil disobedience transforms the powerlessness of citizens to influence the policies of States in terms of environmental protection into a strategy of action against them. By doing so, it makes the ecological emergency more visible and reactivates the public debate. Facing both an increase and a diversification of disobedient actions in environmental matters since 2018,⁴⁰ judicial authorities sometimes choose to prosecute the activists before the criminal courts. It then raises before the courts the question of the existence of a “climate necessity defense” (“*état de nécessité [écologique]*”) and/or freedom of expression as justifications (“*causes de justification*”) for excluding criminal liability, which would lead to the acquittal of the activist who establishes its existence before the criminal judge. Indeed, environmental activists seem to prioritize these two means of defense in front of criminal courts: if one of these two means is considered by the court, it has the effect of removing the illicit character from the behaviour of which activists are accused and, consequently, of acquitting them of the offences committed.

the form of congressional action” (See *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992) cited by L.-N. LONG, T. HAMILTON, “The climate necessity defense: proof and judicial error in climate protest cases”, *E.L.J.*, 2018, Vol. 38, pp. 104 and following, in particular notes 252 and 253).

³⁸ The term “expressive conducts” refers to behaviours expressing claims in the context of demonstrations and protests of a political nature.

³⁹ See below, at point II.2.

⁴⁰ Since 2018’s fall, the “climate movement” has been consolidating in Europe and all around the world. Initiatives are multiplying and acts of civil disobedience are increasing (see, for example, the operation to take down 148 portraits of Emmanuel Macron in French town halls [operation “*décrochons Macron*”, or the “unhook Macron” operation] organized in 2019 by ANV COP 21 and Alternatiba everywhere in France, the occupation of banks, of nuclear plants, of coal mines, the sabotage or blocking of pipelines, the critical masses, the multiplication of Z.A.D. (the acronym, in French, stands for “*zone d’aménagement différé*”, or “deferred development area”, diverging from the original sense of an “area to defend” (“*zone à défendre*”), which is then occupied by activists), the recent actions of activists in different art galleries in UK and Italy as to protest against oil investments (D. GAYLE, “Just Stop Oil campaigners glue themselves to Da Vinci copy in Royal Academy”, July 5, 2022, <https://www.theguardian.com/artanddesign/2022/jul/05/just-stop-oil-campaigners-glue-themselves-to-da-vinci-copy-in-royal-academy>; D. GAYLE, “Climate activists in Italy glue themselves to Botticelli painting”, July 22, 2022, <https://www.theguardian.com/environment/2022/jul/22/climate-activists-in-italy-glue-themselves-to-botticelli-painting>, etc.).

II.1. The necessity defense

11. In criminal law, the necessity defense (“*état de nécessité*”) constitutes a situation of serious and imminent danger that presents a conflict of interests: whether to respect the criminal law and the public order, or to commit one or several offense(s) in order to preserve another right or interest that is considered as superior, and submitting to a posterior control of the courts. The issue is important, because, if a defendant establishes that there is a necessity defense that justifies the offense, he must be acquitted by the judge.

12. In Belgium (and in most continental-law countries), for the necessity defense to be accepted by a criminal judge, the defendant must demonstrate a certain (and not hypothetical), serious, exceptional, present or imminent danger to himself or others, or to property (1). It must be proved that the interest to be safeguarded is more important than the interest sacrificed (principle of proportionality) and that the legislator has not provided any solution to arbitrate the conflict of interests involved (in which case the law should be respected) (2). It must further be shown that it was impossible to protect the interest sacrificed in any other way than by committing the offense (principle of subsidiarity) (3). It is also necessary to demonstrate the unforeseeable or involuntary nature of the situation (that is, the absence of prior fault on the part of the offender) (4).⁴¹

13. It is then up to the criminal courts to determine that these conditions were met. In doing so, they apply the proportionality criterion to each situation by comparing and weighing, on the one hand, the seriousness of the consequences of the danger that the defendant wanted to avoid and, on the other hand, the seriousness of the consequences of the offense. In terms of the balance to be made between the two interests in presence (one being sacrificed, the other being protected by the defendant), criminal law authors specify that “being likely to evolve, the hierarchy between the rights and interests in conflict must be assessed according to the values protected by the law as they are perceived at a given moment by the collective conscience”.⁴²

14. Thus, criminal judges are confronted with the question of determining whether the climatic and environmental disturbances that we are currently experiencing constitute a certain, serious, present and imminent danger under the meaning of criminal law. They must measure whether the environmental activists had no other alternative for protecting the planet and the humanity, its inhabitants hosts, than by committing the offense of which they are accused. The courts must

⁴¹ T. MOREAU et D. VANDERMEERSCH, *Éléments de droit pénal*, Bruxelles, la Charte, 2019, pp. 99-103.

⁴² F. KUTY, *Principes généraux du droit pénal belge*, t. 2, *L’infraction pénale*, Bruxelles, Larcier, 2020, pp. 536-537.

analyze whether the situation in which the activists have placed themselves does not result from a prior fault (in which case, they could not be acquitted based on the necessity defense).⁴³

15. The ecological emergency, coupled with civil disobedience and ecological activism, has recently revitalized a debate, begun twenty years ago, particularly in France, the United Kingdom, and Belgium, following the actions of the “volunteer reapers” of genetically modified organisms (GMO).⁴⁴ When cases were brought before the criminal courts, in which environmental activists had destroyed potato fields resulting from GMO crops, Belgian and French criminal judges rejected the defense based on necessity on the basis of two arguments: the danger linked to the use of GMOs had not been established and the principle of subsidiarity (the impossibility of using other means to defend the environment and public health) had not been met according to them.⁴⁵

16. More recently, however, several criminal jurisdictions in Europe⁴⁶ and the United States⁴⁷ have recognized a defense based on an “ecological” necessity,

⁴³ T. MOREAU et D. VANDERMEERSCH, *op. cit.*, pp. 99-103. These elements composing the defense based on necessity are very similar in France, Switzerland and in the United States, although there are slight nuances that will not be discussed in this paper, as it goes beyond the scope of it.

⁴⁴ For Belgium: F. KUTY, “La désobéissance civile peut-elle être constitutive d’une cause de justification déduite de l’état de nécessité?”, obs. sous Crim., 7 février 2007 and Gand (17^e ch.), 23 décembre 2014, *J.L.M.B.*, 2018, pp. 1414-1421. For France: F. G. TREBULLE, “OGM : le ‘fauchage’ n’est justifié ni par l’état de nécessité ni par le principe de précaution”, *La Semaine juridique*, 4 avril 2007, n° 14, pp. 41-44. For France and England: B. DOHERTY, G. HAYES, “Having Your day in Court: Judicial opportunity and tactical choice in Anti-GMO campaigns in France and the United Kingdom”, *Comparative Political Studies*, 2014, Vol. 47, pp. 3-29; L. BODIGUEL et M. CARDWELL, “Les juridictions pénales britanniques et françaises face aux anti-OGM : au-delà des différences, une communauté d’esprit”, *R.J.E.*, 2011, n° 2, pp. 267-279; J.-B. LIBOUTAN, “Les faucheurs volontaires”, *Revue écologie et politique*, 2005, n° 2, pp. 71-73.

⁴⁵ F. KUTY, “La désobéissance civile peut-elle être constitutive d’une cause de justification déduite de l’état de nécessité?”, *op. cit.*, p. 1411; F. KUTY, “L’interpellation démocratique pacifique peut-elle être constitutive d’une cause de justification déduite de l’état de nécessité?”, *J.L.M.B.*, 2019, p. 1894.

⁴⁶ For England, see I.a.: I. KAMINSKI, “Climate activists win necessity defense case in London”, 10 mai 2019, <https://www.climatedocket.com/2019/05/10/necessity-defense-climate-change-activists/>. For France: T.G.I. Lyon (7^e ch. corr.), 16 septembre 2019, *J.L.M.B.*, 2019/40, pp. 1890-1893. We can also mention that ANV.COP.21 — Alternatiba specifies on its website that some activists who have been participating in the “unhook Macron” action were acquitted in Valence by a criminal decision on November 13, 2020. For Switzerland: Trib. pol. Lausanne, 13 janvier 2020, *J.L.M.B.*, 2020/22, pp. 1051-1059; C.J. Gen. (ch. pén.), 14 octobre 2020, unpublished, P/24123/2018; AARP/339/2020 (some passages of this latest decision are available in M. JADOUL, *op. cit.*, see footnote 22 or in D. BOURG, C. DEMAY and B. FAVRE (dir.), *op. cit.*, pp. 8 and following).

⁴⁷ In recent years, there have been several advances in criminal judges’ acceptance of necessity defense in the United States. I can mention that, in September 2019, the Supreme Court of the State of Washington denied the request of the State to review a decision of the Court of Appeal which ruled that the trial judge had violated the defendant’s Sixth Amendment rights by refusing to allow him to present evidence of the necessity of his actions to a jury of his peers, including expert testimony (climate scientists and civil disobedience experts). By doing so, the Supreme Court of the State of Washington created a precedent, recognizing the necessity defense for direct action to prevent catastrophic climate change (*Valve turner Ken Ward* case). Also, in March 2020, for the first time in the

making it possible to justify the illicit character of the actions of environmental activists. However, such a recognition remains fragile: it is interpreted strictly by judges, sometimes reversed in the framework of a subsequent criminal trial, and deemed controversial in doctrine,⁴⁸ insofar as it raises the issue of the (de) penalization of ecological activism.

17. In France, in two cases⁴⁹ relating to acts of theft committed in organized band (the “unhook Macron” operation organized by ANV COP 21 — Alternatiba⁵⁰), the French Court of Cassation rejected the activists’ request based on necessity defense argument on the grounds that it was up to the judges of the court of appeal to assess whether or not the commission of the offense was the only way to avoid a present or imminent danger. One of these cases⁵¹ concerned two defendants who were prosecuted, in the first instance, for the theft of a painting representing the French President, Emmanuel Macron, in the Lyon City Hall, with the aggravating circumstance that the facts had been committed in a band. In a decision of September 1, 2019, Lyon’s Court of First Instance acquitted them by admitting the climate necessity defense. However, Lyon’s Court of Appeal reversed this decision on January 14, 2020, convicting the defendants for the offense committed and fining them €250 on the grounds that “the defendants are, in reality, artificially erecting a state of necessity which constitutes a motive”.⁵² In its decision of September 22, 2021, the French Court of Cassation upheld the Lyon Court of Appeal ruling in the following terms:

“7. In order to reject the justifying fact invoked by the defendants, based on the state of necessity [necessity defense], the judgment under appeal notes that, if the negative impact on the world environment of global warming, whose anthropic origin is recognized by the scientific community, can be

United States, the testimony of experts and of the defendants (Extinction Rebellion activists) could be considered in a criminal trial in Portland. In this trial, a jury was given the “choice of evils” based on climate necessity defense. Then, jurors ended their deliberation with a “hung jury” (5 out of 6 decided to acquit the climate defendants) after hearing testimonies from expert witnesses on climate science, policy, and the efficacy of direct action to make change, as well as the testimonies of the defendants themselves (Extinction Rebellion case in Portland). See information on the Civil Liberties Defense Center website (<https://cldc.org/>).

⁴⁸ I.a. G. BEAUSSONIE, “Décrochage du portrait du président de la République. Le vol appréhendé par le juge comme substitut légitime d’un dialogue impraticable”, *La Semaine juridique Édition Générale*, n° 42, 14 octobre 2019, 1042; C. HUGLO, “État de nécessité. Droit pénal climatique”, *La pensée écologique*, 9 avril 2020, <http://lapenseeecologique.com>, p. 10.

⁴⁹ Cass. fr., September 22, 2021, n° B 20-80.489 FS-B, n° 00956, unpublished and Cass. fr., September 22, 2021, n° T 20-80.895 FS — D, n° 00957, unpublished.

⁵⁰ On a general point of view, see A. LE DYLIO, P. MOUGEOLLE, “Affaires ‘des décrocheurs’”, in C. COUNIL (dir.), *Les grandes affaires climatiques, Confluence des droits* [en ligne], Aix-en-Provence, Droit International, Comparé et Européen, 2020, pp. 569-574, available online: <http://dice.univ-amu.fr/fr/dice/dice/publications/confluence-droits>.

⁵¹ Case No. 00957, *op. cit.*, footnote 49.

⁵² Cour app. Lyon (4^e ch. corr.), 14 janvier 2020, case No. 19/02101; decision No. 20/16, p. 8.

considered as a current danger or in any case an imminent danger for the human community and for its property within the meaning of article 122-7 of the penal code, it is not demonstrated in what way the theft of the portrait of the President of the Republic committed by them on March 2, 2019 (...), would constitute an act necessary to the safeguarding of persons and property within the meaning of this same article.

8. The judges add that the defendants do not demonstrate that this theft would constitute a means, not only adequate, but also indispensable, or the only one to be implemented to avoid the realization of the invoked danger and limit themselves to alleging that they had no other choice.

9. They conclude that nothing compelled the defendants, whose action was in fact part of a political and militant movement whose purpose was to challenge the policy of the Head of State, to inform and sensitize the public and the government on the urgency of acting on climate change, and to denounce what they described as inaction, to commit this assault, constituting the litigious offense, in order to achieve the stated goal.

10. In the state of these statements, the Court of Appeal, which sovereignly considered, by reasons free of contradiction and insufficiency, answering all the peremptory heads of the conclusions of the defendants, that it was not shown that the commission of an offense was the only means of avoiding a current or imminent danger, justified its decision.

11. Thus, the complaints must be dismissed.”⁵³

18. In Switzerland, on May 26, 2021, the Federal Court rejected the climate necessity defense in a case⁵⁴ where activists occupied a bank to protest against climate change and, more specifically, against the investments made in fossil fuels. The activists also wanted to draw the attention of public opinion to these issues, in particular by denouncing the participation of the tennis player Roger Federer in advertisements for this bank. The Federal Court considered that “the meaning to be given to the term ‘danger’ is not problematic. It is rather the imminent character of it which can leave room for discussion”.⁵⁵ It then ruled that “the natural phenomena likely to occur as a result of global warming cannot in this respect be assimilated to a lasting and imminent danger — within the meaning of the jurisprudence — because, contrary to the situations of domestic violence which justified the development of this concept, such perils can strike everyone

⁵³ Free translation.

⁵⁴ It is the “Lausanne Action Climat case”. On a general point of view about it, see R. MAHAÏM, M.-P. MOINAT and I. WETTSTEIN, “Activistes climatiques c. Crédit Suisse et le ministère public”, in C. CORNIL (dir.), *op. cit.*, pp. 575-586.

⁵⁵ Trib. Fed., May 26, 2021, 6B_1295/2020, point 2.3.2., <http://www.bger.ch>, free translation.

indiscriminately, in any place and at any time, without it being possible to identify a specifically threatened legal asset".⁵⁶

19. In another case, in which an activist was accused of damages to property after he had painted his hands in red and pasted the first page of the IPCC report on the wall of a bank,⁵⁷ the Federal Court also rejected the climate necessity defense on September 28, 2021.⁵⁸ In this case, the activist argued that the red hands symbolized the blood of victims of global warming; that the act of affixing his hands on a specific building made it possible to identify the culprits of the current environmental crisis; and that, following his action, several other collectives or ecological movements had mobilized and positioned themselves against the banks. In this particular case, the Geneva Court of Justice⁵⁹ had acquitted the activist on the basis of a climate necessity defense. However, the Swiss Federal Court reversed this decision for these two reasons:⁶⁰

"3.5.1. The Federal Court recently ruled that natural phenomena linked to global warming do not represent an imminent danger under Article 17 of the Swiss Criminal Code (...).

3.5.2. The cantonal court admitted that 'the acts undertaken were of a nature, if not to avoid, at least to contribute to reducing the danger presented by the carbon investments of the bank'. However, the Court stated: As explained in the various reports submitted to the proceedings and in the judgment under appeal, the factors that weigh in the climate equation are numerous and are not limited to the investments of financial institutions in fossil fuels. It is therefore not sufficient to show that the respondent's actions influenced the environmental policy of the appellant #2, which is only one step in a chain of events envisaged by the author to combat the 'imminent danger'. On the contrary, (...) it is clear that putting red paint on the wall of a building cannot stop global warming or reduce the risks associated with it."⁶¹

20. Thus, as for today, the defense based on ecological necessity has been excluded on the continent on the principal ground that the offence committed is not able to prevent the infringement of the interest that the activist intended to protect i.e. the global warming and the risks associated with it. Conversely, the defense based on the right of freedom of expression has been accepted by the French Supreme court, while the Swiss Supreme Court has refused it (see below, section II.2).

⁵⁶ Trib. Fed., May 26, 2021, 6B_1295/2020, point 2.5, al. 2, <http://www.bger.ch>, free translation.

⁵⁷ As a reminder, some passages of this case are available in M. JADOUL, *op. cit.*, see footnote 22 or in D. BOURG, C. DEMAY and B. FAVRE (dir.), *op. cit.*, Paris, PUF, 2021, pp. 8 and following.

⁵⁸ Trib. Fed., September 28, 2021, No. 6B_1298/2020, <http://www.bger.ch>.

⁵⁹ The Criminal Chamber of Appeal and Review of the Court of Justice in Geneva.

⁶⁰ Trib. Fed., September 28, 2021, No. 6B_1298/2020, <http://www.bger.ch>.

⁶¹ Free translation.

II.2. Freedom of expression

21. Freedom of expression, as a fundamental value of democracy, is protected by international,⁶² European,⁶³ national⁶⁴ and, sometimes, regional instruments.⁶⁵ In the United States, debates on freedom of expression and behaviours expressing claims in the context of demonstrations and protests of a political nature have, for several decades, led to an abundant case-law on the subject: that of “expressive conduct”⁶⁶ in the case-law of the Supreme Court of the United States.⁶⁷ From a European perspective, the European Court of Human Rights has historically offered a more limited protection of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR) to “direct action or any form of protest that causes more than merely incidental obstruction”.⁶⁸ However, its case-law on expressive conducts has been evolving.⁶⁹

22. Article 10 ECHR enshrines the protection of this right, which “shall include freedom to hold opinions and to receive and impart information and

⁶² I.a. Article 19 of the International Covenant on Civil and Political Rights, done in New York on December 19, 1966, approved by the law of May 15, 1981, *M.B.*, July 6, 1983.

⁶³ I.a. Article 11 of the Charter of Fundamental Rights of the European Union of December 12, 2007, *J.O. C.* 303, December 14, 2007. It must be precised that this source is not relevant for Switzerland.

⁶⁴ In Belgium, freedom of opinion and expression is enshrined in Article 19 of the Constitution. Articles 24 and 25 of the Constitution enshrine freedom of education and freedom of the press.

⁶⁵ I.a. see Article 9 of the African Charter on Human and Peoples’ Rights, Nairobi, Kenya, June 1981.

⁶⁶ I.a. K. LASALLE, “The other 99% of the Expressive Conduct Doctrine: The occupy Wall Street movement and the importance of recognizing the contribution of conduct to speech”, *Texas Journal on Civil Liberties & Civil Rights*, 2012, pp. 1-46; C. VERBITSKY, “The occupy Wall street movement and the Constitution: protestors preoccupied with the First Amendment”, *Touro Law Review*, Vol. 29, No. 4, pp. 1003-1024; C. CHUNG, “Baking a cake: how to draw the line between protected expressive conduct and something you do”, *Notre Dame Journal of law, Ethics & public policy*, 2018, pp. 377-406.

⁶⁷ The expressive conduct doctrine finds its genesis in the *United States v. O’Brien* case. In that case, the Supreme Court upheld a federal law prohibiting the destruction of draft cards, rejecting David Paul O’Brien s’ First Amendment arguments (D. P. O’Brien was prosecuted to have burned his draft cards on the steps of a courthouse in opposition to the military service). From that case, the Court created the O’Brien s’ test to determine whether expressive conduct or symbolic speech merits First Amendment protection or not (K. LASALLE, *op. cit.*, pp. 14-15). As a reminder, the First Amendment to the US Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”. The O’Brien s’ test is the following: “a government regulation is sufficiently justified [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial government interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest” (*United States v. O’Brien*, O’Brien II, 391 U.S. 367, 376 (1968) cited by K. LASALLE, *ibidem*, pp. 14-15).

⁶⁸ D. MEAD, *The New Law of Peaceful Protest*, Hart Publishing, 2010, 61, cited by R. Ó. FATHAIGH, D. VOORHOOF, “Article 10 ECHR and expressive conduct”, *Communications Law*, 2019, Vol. 24, <https://ssrn.com/abstract=3409701>, p. 3.

⁶⁹ See I.a. R. Ó. FATHAIGH, D. VOORHOOF, *ibidem*, <https://ssrn.com/abstract=3409701>, p. 4.

ideas without interference by public authority and regardless of borders frontiers”. However, freedom of expression is subject to exceptions or restrictions that 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” (art. 10, §2 ECHR).

23. In its jurisprudence, the European Court of Human Rights recalls that “freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man”.⁷⁰ It also states that, “Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broadmindedness, without which there can be no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued”.⁷¹

24. In *Murat Vural v. Turkey*,⁷² the Court held that “opinions as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols (...), can also be expressed through conduct. For example, in its judgment in *Steel and Others v. the United Kingdom*,⁷³ the Court held that taking part in a protest against a grouse shoot, during which attempts were made to obstruct and distract those taking part in the shoot, and breaking into a motorway construction site and climbing trees which were to be felled and onto some of the stationary machinery which was to be used in the construction, constituted expressions of opinion within the meaning of Article 10 of the Convention even though they had taken the form of physically impeding certain activities”.⁷⁴

25. In the context of its judicial review, the Court therefore examines whether: 1) there is an interference with the exercise of the right to freedom of expression; 2) it is lawful; 3) it is legitimate in the light of the aim pursued by the interference; and finally, 4) it is necessary in a democratic society. The Court considers that

⁷⁰ Landmark-case: ECHR, *Handyside v. The United Kingdom* (App No. 5493/72), December 7, 1976, §49, al. 2.

⁷¹ *Ibidem*.

⁷² ECHR, *Murat Vural v. Turkey* (App. No. 9540/07), October 21, 2014.

⁷³ ECHR, *Steel and Others v. the United Kingdom*, September 23, 1998, §§90 and 92, Reports of Judgments and Decisions 1998-VII.

⁷⁴ ECHR, *Murat Vural v. Turkey* (App. No. 9540/07), October 21, 2014, §47.

a criminal conviction,⁷⁵ possibly accompanied by a fine⁷⁶ or imprisonment,⁷⁷ constitutes an interference with the exercise of the right to freedom of expression (1.) and that the expression “prescribed by law” gives rise to a requirement of foreseeability (2.). In other words, a norm must be stated with sufficient precision to allow the citizen to adapt his or her conduct, and he or she must be able to foresee,⁷⁸ to a degree that is reasonable in the given circumstances, the consequences which a given action may entail.⁷⁹ The legitimate reasons invoked by the State to justify the interference are listed exhaustively in the second paragraph of article 10 ECHR (3.). As for the test of the “necessity” of the interference in a democratic society (4.), the Court has developed “an autonomous concept of whether an interference is proportionate to the legitimate aim pursued”,⁸⁰ which it determines in light of the circumstances of each case, on the basis of principles and criteria which it has defined and interpreted. For example, the interference must be based on a “pressing social need”.⁸¹ The Court also considers the nature and severity of the sanctions, the existence of relevant and sufficient reasons on the part of the national authorities, etc.⁸²

26. In this sense, the Court has recalled on several occasions that there is “little scope under Article 10, §2 of the Convention for restrictions on political speech or on debate of questions of public interest”,⁸³ and that “public interest ordinarily relates to matters which affect the public to such an extent that it may

⁷⁵ ECHR, *Lindon, Otchakovsky-Laurens and July v. France* [GC] (App. No. 21279/02 and 36448/02), October 22, 2007, §59.

⁷⁶ ECHR, *Kasabova v. Bulgaria* (App. No. 22385/03), April 19, 2011, §§69-73.

⁷⁷ ECHR, *Cumpănă and Mazăre v. Roumania* [GC] (App. No. 33348/96), December 17, 2004, §§115-116.

⁷⁸ ECHR, Guide on Article 10 of the European Court of Human Rights, Freedom of Expression, Strasbourg, updated on April 30, 2021, p. 19; see also Guide on the case-law of the European Convention on Human Rights, Mass protests, updated on December 30, 2021, pp. 20 and following.

⁷⁹ In the case *Perinçek v. Switzerland*, the Court points out, however, that “these consequences did not need to be foreseeable with absolute certainty, as experience showed that to be unattainable” (ECHR, *Perinçek v. Switzerland* (App. No. 27510/08), October 15, 2015, §131).

⁸⁰ ECHR, Guide on Article 10 of the European Court of Human Rights, *op. cit.*, pp. 22 and following.

⁸¹ I.a. in the case *Jecker v. Switzerland*, the question arose as to whether the requirement that the applicant, a journalist by profession, testify in a criminal investigation amounted to an unjustified interference with her right not to be compelled to reveal her journalistic sources, protected by article 10 of the Convention. In that case, the Court stated that the Swiss Supreme Court’s decision “does not allow for a finding that the obligation to testify imposed on the applicant was in the overriding public interest. In the Court’s view, the Federal Court therefore failed to provide sufficient reasons to justify that the measure at issue corresponded to a ‘pressing social need’”. The Court then concluded “that in the absence of sufficient reasons put forward by the domestic authorities, the interference with the applicant’s exercise of her freedom of expression cannot be regarded as ‘necessary in a democratic society’ within the meaning of Article 10 §2” (ECHR, *Jecker v. Switzerland* (App. No. 35449/14), January 6, 2021, §§42-43).

⁸² ECHR, Guide on Article 10 of the European Court of Human Rights, *op. cit.*, p. 22.

⁸³ I.a. ECHR, *Wingrove v. England* (App. No. 17419/90), November 25, 1996, §58; *Karatas v. Turquie* (App. No. 23168/94), July 8, 1999, §50.

legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about”.⁸⁴ In *Mariya Alekhina and others v. Russia*,⁸⁵ the Court also reiterated that, “in principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence, and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom, which is an element to be taken into account when assessing the proportionality of the interference in question”.

27. It is also to be noted that the Court now applies a simplified procedure⁸⁶ when “activists have been detained or imprisoned for engaging in ‘expressive conduct’ which was ‘peaceful and non-disruptive’”.⁸⁷ In these cases, the Court finds almost automatically that activists’ expressive conducts should be protected by Article 10 ECHR.⁸⁸ In light of this development and of its case-law referring to expressive conducts in constant evolution, R.Ó. Fathaigh and D. Voorhoof emphasize that, in principle, “it is expected that the Court will continue to afford expressive conduct on matters of public interest the full protection of Article 10. It is up to the Court to continue to signal to national police forces, prosecutors, and courts, that restrictions on such protests are compatible with Article 10 only in ‘exceptional circumstances’, and that peaceful demonstration should not, in principle, be made subject to the threat of a ‘penal sanction’”.⁸⁹

28. In European countries, jurisprudence concerning expressive conducts is also evolving. For example, in France, in a case concerning “portrait takers” during the “unhook Macron” action, in which the activists were convicted of criminal offenses, the French Court of Cassation overturned a decision of Bordeaux’s

⁸⁴ I.a. ECHR, *Satakunnan Markkinapörssi Oy et Satamedia Oy c. Finlande* [GC] (App. No. 931/13), June 27, 2017, §171.

⁸⁵ ECHR, *Mariya Alekhina and others v. Russia* (App. No. 38004/12), December 3, 2018, §227.

⁸⁶ Article 28(1)(b) of the ECHR provides that committees of three judges may, by a unanimous vote, declare an application admissible and give a joint judgment on the merits, if the question concerning the interpretation or application of the Convention or its Protocols which gives rise to the case is already the subject of well-established case-law of the Court.

⁸⁷ R. Ó. FATHAIGH, D. VOORHOOF, *op. cit.*, pp. 29-30.

⁸⁸ See *Muchnik and Mordovin v. Russia* (App. No. 23814/15 and 2707/16), February 12, 2019; *Grigoryev and Igamberdiyeva v. Russia* (App. No. 10970/12), February 12, 2019; *Belan and Sviderskaya v. Russia* (App. No. 42294/13 and 42585/13), February 12, 2019; *Nikolayev v. Russia* (App. No. 61443/13), February 12, 2019; and *Ryklin and Sharov v. Russia* (App. No. 37513/15 and 37528/15), February 12, 2019, all cited by R. Ó. FATHAIGH, D. VOORHOOF, *op. cit.*, p. 30.

⁸⁹ R. Ó. FATHAIGH, D. VOORHOOF, *ibidem*, p. 30.

Court of Appeal on September 22, 2021.⁹⁰ It deemed that the Court of Appeal had not conducted a proportionality review regarding the applicants' right to freedom of expression:⁹¹

"In so deciding, without investigating, as it was asked to do, whether the criminalization of the conduct in question did not constitute a disproportionate infringement of the defendants' freedom of expression, the Court of Appeal did not justify its decision."

Following this decision, the Court of Appeal of Toulouse decided on April 27, 2022 to acquitte the activists, considering that the criminal charge constituted a disproportionate interference in the exercise of the activists' freedom of expression, given the nature and context of their actions.⁹²

29. In Switzerland, in the aforementioned "red hands" case,⁹³ the Federal Court closed the door to the defendant's argument based on his right to freedom of expression, considering the following:⁹⁴

"The defendant caused damage to the appellant's property. The smearing of another person's property with spray paint constitutes an act of violence (...). The respondent's behaviour was therefore an act of vandalism that was incompatible with his freedom of expression and opinion. It would have been possible for him to take part in the climate march, like the other participants, without smearing the walls of the bank building with red paint."

30. Concerning the fact that the defendant cited several decisions of the ECHR⁹⁵ in which it has been accepted that opinions can be expressed not only through an artistic work, but also through conduct, the Swiss court states that, even if in *Murat Vural v. Turkey*, the European Court "held that pouring paint on statues of Atatürk as a protest against the political regime of the time constituted a form of expression protected by Art. 10 ECHR", it "differs from the present case in several respects (...)". First, "the respondent infringed the rights of individuals (damage to property), whereas in *Murat Vural*, the applicant had not been found guilty of vandalism, but only of insulting the memory of Atatürk". Second, "the sentence imposed on the respondent in the first instance and requested by the

⁹⁰ Cass. Fr., September 22, 2021, No. B20-85.434 FS-B, No. 00958, unpublished, §17.

⁹¹ Personal translation.

⁹² C. App. Toulouse (3^e ch. corr.), April 27, 2022, case No. 21/01622, unpublished, p. 11.

⁹³ Trib. Fed., September 28, 2021, No. 6B_1298/2020, <http://www.bger.ch>.

⁹⁴ Trib. Fed., September 28, 2021, No. 6B_1298/2020, <http://www.bger.ch>, point 4.3., personal translation.

⁹⁵ Namely, ECHR, *Tatar et Faber v. Hungary* (App. No. 26005/08 and 26160/08), September 12, 2012, §36; *Murat Vural v. Turkey* (App. No. 9540/07), October 21, 2014; *Shvydka v. Ukraine* (App. No. 17888/12), October 30, 2014, §§37-38; *Sinkova v. Ukraine* (App. No. 39496/11), February 27, 2018, §107; *Mariya Alekhina and others v. Russia* (App. No. 38004/12), December 3, 2018, §§204-206.

public prosecutor (a fine of ten days at 30 francs, suspended for three years) is not comparable to that imposed by the Turkish authorities on Murat Vural (thirteen years' imprisonment). In this regard, it should be noted that the ECHR has accepted that a criminal sanction, say, for throwing stones at law enforcement during a demonstration, could not be excluded, insofar as the sanction was proportionate to the public interests protected (...).⁹⁶ Concerning this latest case, it is to be noted that the defendant only recently appealed to the ECHR and that a new ruling is still pending.

III. CONCLUSION: DETERMINANT ROLE OF CRIMINAL JUDGES AND ATTORNEYS AND OF THE DOCTRINE

31. When faced with acts of civil disobedience committed in the context of an ecological emergency, criminal judges are, and will be, led to analyze the possibility that these are justified by the necessity defense or by freedom of expression, the two defenses that are currently privileged by environmental activists (or/and their attorneys⁹⁷). In addition, public prosecutors are, and will be, led to consider the prosecution, or the dismissal, of such cases on these same two bases.

32. As for today, the defense based on ecological necessity has been however excluded by the courts on the continent on the principal ground that the offence committed is not able to prevent the infringement of the interest that the activist intended to protect i.e. the global warming and the risks associated with it. Conversely, the defense based on freedom of expression has been accepted by the French Supreme court, taking into consideration the jurisprudence of the European Court of Human Rights.

33. The assessment of these concepts by judges is not without difficulties for them who, to use the typology elaborated by François Ost, might have to take on⁹⁸ the delicate role of "trainer-judges",⁹⁹ and to use a "dynamic instrumentalism"¹⁰⁰ regarding the application of necessity defense or freedom of expression. In such a

⁹⁶ Trib. Fed., September 28, 2021, No. 6B_1298/2020, <http://www.bger.ch>, point 4.3., personal translation.

⁹⁷ Three activists of Lausanne Action Climat s' case (the case where activists occupied a bank [Crédit Suisse] to protest against climate change, see above section II.1.18) give a testimony in the book *Désobéir pour la Terre*. They explain their difficulty, as a group, of coming together both physically and ideologically, around a common discourse for the trial. They relate that they delegated the discourse's elaboration to the attorneys's collective (D. SIMEUNOVIC, B. MENDEZ, T. RENARD, "L'action de Lausanne Action Climat à l'encontre du crédit Suisse, témoignages", in *Désobéir pour la terre*, op. cit., p. 32).

⁹⁸ When possible for them, regarding the circumstances and/or the regime in which they are acting.

⁹⁹ "Juges-entraîneurs" as used by F. OST, "Juge-pacificateur, Juge-arbitre, Juge-entraîneur. Trois modèles de justice", *Séminaire interdisciplinaire d'études juridiques, documents de travail*, 1982, Bruxelles, Facultés universitaires Saint Louis, p. 83 (personal translation).

¹⁰⁰ *Ibidem*.

model of justice, the judge is no longer “the passive applicator of pre-established principles and rules” but, rather, “collaborates to the implementation of social and political goals”.¹⁰¹ In this collaboration, “great attention is paid to the factual, material and psychological elements of the case. To this end, all the resources of empirical investigation are mobilized. A particular discussion is devoted to the qualification and interpretation of these facts, which are not only carried out in legal terms; the recourse to a multiplicity of other knowledge leads to a plurality of reconstructions and illuminations of the object in dispute. The solution to the problem is then elaborated as much with regard to the existing norms as with regard to the socio-political aims, duly updated, which found them. This will lead the judge, if necessary, to operate as an agent of social change (...)”.¹⁰²

34. Undeniably, the concepts of climate or ecological necessity defense and freedom of expression are evolving in cases concerning acts of civil disobedience under the current context of ecological emergency. As such, these concepts are constantly challenging criminal attorneys, who have a determinant role to play in developing new arguments to defend activists and, with them, the judges, who have to consider and respond to these arguments. At the very least, the defense in the above-mentioned trials highlights the imperative need to deploy legal arguments innovatively. It also demonstrates that the law, mobilized in a dynamic and creative way, can (and must) participate in social changes.

¹⁰¹ *Ibidem.*

¹⁰² *Ibidem.*