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ARTICLE

Reactive Climate Litigation: An Analytical Framework for the Criminal Prosecution of Climate Activists

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Abstract
Among the various types of legal activism, a distinction can be made between proactive and reactive litigation. This distinction hinges on who initiates the legal action: proactive litigation is initiated by plaintiffs, while reactive litigation occurs when the state starts a criminal prosecution in response to activism or dissent. While proactive strategic cases have been documented, reactive criminal trials involving activists remain understudied, especially in legal scholarship. In this article, an analytical framework that mobilizes the concepts of reactive litigation and judicial opportunity is created to systematically analyze 13 criminal prosecution cases relating to climate activism. The analysis will be based on four key elements to highlight the trends that can be observed: (i) the type and targets of the protest action, (ii) the charges brought against the defendant, (iii) the defences mobilized in court, and (iv) the outcomes of the criminal proceedings. This article finds that cross-analysis of the variables across four jurisdictions not only shows the relevance of studying the prosecution of activists as a growing and pressing phenomenon around the world but also provides insight into the trends observed in reactive climate litigation.

Keywords: Legal activism; Climate change; Criminal prosecution; Reactive litigation; Systematic content analysis

1. Introduction

The certainty, urgency, and extent of the climate crisis have been very clearly articulated in the numerous Intergovernmental Panel on Climate Change (IPCC) reports over the years.[1] More recently, the obligations of states to counter climate change were highlighted by the advisory opinion of the International Court of Justice (ICJ) issued in

[1] IPCC (H. Lee & J. Romero (eds)), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change I* (IPCC, 2023) available at: https://www.ipcc.ch/report/ar6/syr (AR6 WG1, WG2, WG3).

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July 2025.[2] The insufficient response of governments to the climate crisis has led to various reactions. As mentioned by Newell, 'we can expect the continued and expanded use by civil society groups of all tools and resources available to them: legal and non-legal, national, regional and international, liberal and critical, constructive and coercive'.[3] An example of such reaction is illustrated by the mass protests or direct actions frequently organized by the climate movement in Europe since 2018. This recurrence of activism and dissent has led to a state reaction with numerous occurrences of criminal prosecution following climate protest actions in Europe.[4] The 2020 report of the Grantham Research Institute on Climate Change and the Environment confirms an increase in criminal trials related to climate activism, notably in France, Switzerland, and the United Kingdom (UK).[5] In the UK, Extinction Rebellion and other environmental groups were categorized as a key threat by counterterror police in 2020,[6] and regulations were toughened in 2023 to allow for the criminalization of noisy protests.[7] Similar criminalization dynamics can be observed in France, Switzerland, and Germany, with mentions of ecoterrorism by politicians and the media,[8] serious charges brought

[2] *Obligations of States in respect of Climate Change*, International Court of Justice (ICJ), Advisory Opinion, 25 July 2025, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf.

[3] P. Newell, 'Civil Society, Corporate Accountability and the Politics of Climate Change' (2008) 8(3) *Global Environmental Politics*, pp. 122–53, at 150.

[4] J. Brehm & H. Gruhl, 'Increase in Concerns about Climate Change Following Climate Strikes and Civil Disobedience in Germany' (2024) 15 *Nature Communications*, article 2916; J.B. Juillard, 'Forme(s) de la Contestation Écologique: Désobéissance Civile, Incivile ou Violence Légitime?' (2024) 5(1) *Cahiers Tocqueville des Jeunes Chercheurs*, pp. 30–58; M. Bönnemann, 'Ziviler Ungehorsam in der Klimakrise', *Verfassungsblog*, 22 Sept. 2023, available at: https://verfassungsblog.de/ziviler-ungehorsam-in-der-klimakrise; S. Cammiss, G. Hayes & B. Doherty, 'Defending the Integrity Principle: Necessity, Remorse and Moral Consistency in the Protest Trial' (2025) 45(2) *Oxford Journal of Legal Studies*, pp. 329–57; C. Demay, *Le Droit Face à la Désobéissance Civile: Quelle Catégorisation pour un 'Objet Juridique Non Identifié'?* (Schulthess Juristische Medien, 2022); J. Bluwstein, C. Demay & L. Benoit, *Civil Disobedience and Climate Trials in Switzerland: What Are They Fighting for in the Swiss Courts?* (Humanrights.ch, 2023), pp. 1–13; M. Jadoul, 'La Désobéissance Civile Écologique Face au Système Répressif: De l'Espace Public aux Prétoires' (2024) 2611–2612 *Courrier Hebdomadaire du CRISP*, pp. 1–112; D. Gayle, M. Taylor & A. Niranjan, 'Human Rights Experts Warn against European Crackdown on Climate Protesters', *The Guardian*, 12 Oct. 2023, available at: https://www.theguardian.com/environment/2023/oct/12/human-rights-experts-warn-against-european-crackdown-on-climate-protesters.

[5] J. Setzer & R. Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot', Grantham Research Institute on Climate Change and the Environment, Policy Report, July 2020, pp. 13–4, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf.

[6] J. Grierson & R. Scott, 'Extinction Rebellion Listed as "Key Threat" by Counter-terror Police', *The Guardian*, 19 Jan. 2020, available at: https://www.theguardian.com/environment/2020/jan/19/extinction-rebellion-listed-as-key-threat-by-counter-terror-police; United Nations Environment Programme (UNEP), *Global Climate Litigation Report: 2020 Status Review* (UNEP & Sabin Center for Climate Change Law, 2020), available at: https://wedocs.unep.org/handle/20.500.11822/34818.

[7] Friends of the Earth UK, 'Understanding Key Laws related to Protest', 17 Apr. 2025, available at: https://groups.friendsoftheearth.uk/resources/understanding-key-laws-related-protest.

[8] J. Sorenson, 'Ecoterrorism and Expansionary Counterterrorism', in R. Jackson (ed.), *Routledge Handbook of Critical Terrorism Studies* (Routledge, 2016), pp. 263–76; D. Gayle, 'Alarm as German Climate Activists Charged with "Forming a Criminal Organisation"', *The Guardian*, 23 May 2024, available at: https://www.theguardian.com/environment/article/2024/may/23/alarm-as-german-climate-activists-charged-with-forming-a-criminal-organisation; Humanrights.ch, 'Les Activistes Pacifiques

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against climate activists with severe sanctions – elements that can create a chilling effect on the movements.[9]

In this context of criminalization of activism, it is relevant to study the internal dynamics of criminal courts, as there is a gap in research regarding the criminal justice process that involves activists. The gap is especially severe with regard to what happens following arrest, in the courtroom, and until a verdict is reached. This is why further research on the subject has been encouraged in several contributions.[10] For instance, Doherty and Hayes wished to 'stimulate further interest in the relationships between social movements and criminal justice, arguing that it is a vital area of collective action which has been curiously neglected in the literature until now', especially in the literature on climate change litigation.[11] Similarly, Barkan mentions that as protest movements have had a significant role throughout history, and criminal prosecution is often an unavoidable consequence of protest movements,[12] a better understanding of the 'dynamics and outcome of the prosecutions [and] their attempts at political, economic, and cultural change' needs to be studied.[13]

There are several explanations for the small number of studies about criminal prosecutions following protest action. Firstly, the subject lies at the intersection between legal studies, social movement studies, and criminology. Each discipline

Toujours Plus Criminalisé·e·x·s en Suisse', 30 Oct. 2023, available at: https://www.humanrights.ch/fr/pfi/droits-humains/police/dossier-police/focus; N. Mamère, 'The French Government's Use of the Term "Eco-terrorism" Comes Across as a Declaration of War Against Environmentalists', *Le Monde*, 11 Nov. 2022, available at: https://www.lemonde.fr/en/opinion/article/2022/11/11/the-french-government-s-use-of-the-term-eco-terrorism-comes-across-as-a-declaration-of-war-against-environmentalists_6003881_23.html.

9 A. Di Ronco, 'The Effects of Criminalisation on Activists: The Case of the NoTAP Environmental Movement' (2025) 33(1) *Critical Criminology*, pp. 139–54; B. Visser & B. Pali, '"We Feel that Warm Breath in Our Necks": Experiences and Impacts of Criminalisation of Environmental Activism in Belgium' (2025) 8(1) *Justice, Power and Resistance*, pp. 5–21.

10 All these contributions acknowledge the lack of research and call for further inquiry on the subjects: S. Cammiss & G. Hayes, 'The Masterplot of "Hoffmann's Bargain" in Protest Trials', in C. Bevan & D. Gurnham (eds), *Law, Narrative and Masterplot: New Research Perspectives* (Routledge, 2025), pp. 187–205; Cammiss, Hayes & Doherty, n. 4 above, p. 332; Bluwstein, Demay & Benoit, n. 4 above; B. Doherty & G. Hayes, 'The Courts: Criminal Trials as Strategic Arenas', in J.W. Duyvendak & J.M. Jasper (eds), *Breaking Down the State: Protestors Engaged* (Amsterdam University Press, 2015), pp. 27–52; R. Ellefsen, 'Judicial Opportunities and the Death of SHAC: Legal Repression along a Cycle of Contention' (2016) 15(5) *Social Movement Studies*, pp. 1–16; S. Cammiss, G. Hayes & B. Doherty, 'Necessity, Non-Violent Direct Activism, and the Stansted 15: Reasserting "Hoffmann's Bargain"' (2022) 85(6) *The Modern Law Review*, pp. 1515–33; S. Cammiss, B. Doherty & G. Hayes, 'Assemblies and the Courts', in T.A. El-Haj et al. (eds), *The Oxford Handbook of Peaceful Assembly* (Oxford University Press, 2024), pp. 607–24; M. Schwarz, 'The Drax 29 and the Kingsnorth 6: Different Defences, Different Outcomes' (2010) Spring/Summer *ELFLine*, p. 5; S.E. Barkan, 'Strategic, Tactical, and Organisational Dilemmas of the Protest Movement against Nuclear Power' (1979) 27(1) *Social Problems*, pp. 19–37; S.E. Barkan, 'Criminal Prosecution and the Legal Control of Protest' (2006) 11(2) *Mobilization: An International Quarterly*, pp. 181–94; C. Terwindt, *When Protest Becomes Crime: Politics and Law in Liberal Democracies* (Pluto Press, 2019); C. Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9(2) *Journal of European Public Policy*, pp. 238–55, at 238–9.

11 Doherty & Hayes, n. 10 above, p. 48.

12 Terwindt, n. 10 above.

13 Barkan (2006), n. 10 above, p. 183.

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focuses on a specific aspect (i.e., the legitimacy of unlawful actions for political expression, the repertoire of actions, their impact, and form of criminalization) but not necessarily on the entirety of the criminal justice process (from the act to arrest and to the criminal proceedings). Secondly, social movements and legal studies have not always been explored in conjunction, which has prevented a full understanding of the subject in the literature.[14] Thirdly, in social contestation studies, collective actions are separated between those of an institutionalized nature (i.e., litigation) and those considered at the 'margins' (i.e., street protest).[15] The prosecution of activists following a collective action is at the crossroads between the two. Finally, when addressing the subject of criminalizing activism, the notion of civil disobedience is frequently raised. It has been developed mainly by political scientists, philosophers, and social scientists,[16] but not so often in the legal literature.[17] However, confining the discussion to this literature can be restrictive as it often focuses on the conditions that create the legitimacy and/or justification for breaking the law as a political form of expression. The limitation can have an impact on the number and type of legal cases that are studied under this category,[18] creating a double-blind spot in research, as systematic and comparative analyses of the legal process are even rarer.[19]

The approach proposed in the following sections seeks to bring together the various strands of literature on the criminalization of activism and dissent.[20] With a legal angle, this article aims to fill the literature gap in socio-legal scholarship by undertaking a review of legal cases across four jurisdictions in which climate activists have been subjected to criminal prosecution. This allows the criminal prosecution of activism to be studied as an entire process, from the collective action to arrest, and through the subsequent criminal proceedings. I argue that the concept of 'reactive

[14] E.L. Rubin, 'Passing through the Door: Social Movement Literature and Legal Scholarship' (2001) 150(1) *University of Pennsylvania Law Review*, pp. 1–83.

[15] P. Burstein, 'Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity' (1991) 96(5) *American Journal of Sociology*, pp. 1201–25, at 1203.

[16] For a comprehensive literature review on classical and contemporary debate on civil disobedience see C. Delmas & K. Brownlee, 'Civil Disobedience', in E.N. Zalta & U. Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Fall 2024 edn, 2023), pp. 1–25.

[17] Ibid.; I. Coca-Vila, 'Punishing the Last Citizens? On the Climate Necessity Defence' (2023) 30 *Res Publica*, pp. 567–87; Demay, n. 4 above.

[18] J. Welchman, 'Is Ecosabotage Civil Disobedience?' (2001) 4(1) *Philosophy & Geography*, pp. 97–107; M.P. Wilt, 'Civil Disobedience and the Rule of Law: Punishing "Good" Lawbreaking in a New Era of Protest' (2017) 28(1) *Civil Rights Law Journal*, pp. 43–68.

[19] For some exceptions see Bluwstein, Demay & Benoit, n. 4 above; Demay, n. 4 above; B. Doherty & G. Hayes, 'Having Your Day in Court: Judicial Opportunity and Tactical Choice in Anti-GMO Campaigns in France and the United Kingdom' (2014) 47(1) *Comparative Political Studies*, pp. 3–29; B. Ohdedar & S. McNab, 'Climate Change Litigation in the United Kingdom', in W. Kahl & M.-P. Weller (eds), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos, 2021), pp. 304–23; 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', University of Cambridge, Mar. 2024, available at: https://www.cpp.law.cam.ac.uk/files/media/the_uptake_of_echr_case_law_concerning_climate_protest_final.pdf.

[20] Di Ronco, n. 9 above; V.V. Weis, *Criminalization of Activism: Historical, Present and Future Perspectives* (Routledge, 2021); Ellefsen, n. 10 above; Visser & Pali, n. 9 above.

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litigation' can encompass all kinds of criminal prosecution of activism, which broadens the number of cases that can be studied, and allows for a more comprehensive understanding of this form of criminalization and repression of activism. This 'expansive' formulation of reactive litigation also encompasses the use of the law by the state and by social movement actors to advance their cause in reaction to their prosecution.

The article offers a systematic content analysis of 13 climate reactive cases in four jurisdictions: France, Germany, Switzerland, and the UK.[21] Through the analysis of the different cases, the article aims at opening avenues for future research by highlighting several categorizations of reactive cases and trends. The study is based on four key elements: (i) the targets of the actions; (ii) the charges brought against activists; (iii) how activists seek to defend themselves; and (iv) the outcomes of the criminal proceedings.

This contribution is structured in five sections. Section 2 presents a review of the literature addressing the usefulness of adopting the reactive litigation terminology It then delves into the concept of judicial opportunity as a theoretical framework. Section 3 details the methods employed for the empirical analysis of the selected cases, outlining the systematic content analysis approach used to collect and process the data. Section 4 provides summaries of the 13 reactive litigation cases selected for this study, while Section 5 offers a critical commentary on the 13 cases analyzed.

2. Prosecution of Climate Activists as Reactive Climate Litigation

Over the years, there has been a growing trend in using the law as a strategic tool to prompt action from states and corporations towards mitigating climate change.[22] Climate legal activism is one manifestation of the *juridification*[23] of the climate cause, evidenced by the increase in climate litigation since the 2000s, as cases almost quadrupled over two decades.[24]

[21] See Section 3 for further details of the selection process.

[22] J. Setzer & C. Higham, 'Global Trends in Climate Change Litigation: 2025 Snapshot', Grantham Research Institute on Climate Change and the Environment (GRI), 2025, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2025/06/Global-Trends-in-Climate-Change-Litigation-2025-Snapshot.pdf; M. Nachmany et al., 'Global Trends in Climate Change Legislation and Litigation: 2017 Snapshot, GRI, 8 Nov. 2017, available at: https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-legislation-and-litigation-2017-snapshot.

[23] 'Juridification' can be defined as a process of reiterated and generalized recourse to the law to resolve conflicts and problems in society; see L.C. Blichner & A. Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal*, pp. 36–54; J. Eckert et al., 'Introduction: Law's Travels and Transformations', in J. Eckert et al. (eds), *Law against the State: Ethnographic Forays into Law's Transformations* (Cambridge University Press, 2012), pp. 1–22.

[24] Between 1986 and 2014 only 800 cases are accounted for globally, whereas in July 2025 a total of 3,113 litigation cases could be found in the major database: Sabin Center for Climate Change Law, Climate Litigation Database, available at: https://climatecasechart.com.

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A distinction among the various types of legal activism and litigation was presented by Harrow and Rawlings in 1992:

> [a] reactive group, by way of contrast [to proactive], is one which has litigation forced upon it, leaving the group to react by a variety of tactics which may range from orthodox legal defences to highly unorthodox courtroom drama or political speeches from the dock.[25]

In other words, proactive litigation is actively initiated by non-governmental organizations (NGOs) or individuals against states or corporations, while reactive litigation can be defined as a criminal legal action initiated by the state against activists who have allegedly broken the law.[26]

There has been a multiplication of studies on proactive climate litigation over the last 20 years, with systematic reviews, reports, and databases created on the subject.[27] Special attention has been given to the *strategic* element of climate litigation, which is brought to the court with the intention of 'exert[ing] bottom-up pressure' on governments or corporations.[28] These types of case aim to achieve social change outside the court and create an impact that goes beyond the claimants themselves.[29]

[25] C. Harlow & R. Rawlings, *Pressure Through Law* (Routledge, 1992), p. 8.

[26] Abel makes the same distinction but using the metaphor of the use of the law as 'a sword' or a 'a shield': R.L. Abel, 'Speaking Law to Power: Occasions for Cause Lawyering', in A. Sarat & S. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998), pp. 69–117, at 92–4. See also Harlow & Rawlings, n. 25 above; C. Hilson, 'Framing the Local and the Global in the Anti-Nuclear Movement: Law and the Politics of Place' (2009) 36(1) *Journal of Law and Society*, pp. 94–109, at 100; C. Hilson, 'Climate Change Litigation: An Explanatory Approach (Or Bringing Grievance Back In)', in F. Fracchia & M. Occhiena (eds), *Climate Change: La Risposta del Diritto* (Editoriale Scientifica, 2010), pp. 421–36, at 421–2; C. Hilson, 'Law, Courts and Populism: Climate Change Litigation and the Narrative Turn', in S.M. Sterett & L.D. Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar, 2019), pp. 81–94, at 82; L. Vanhala, 'Anti-Discrimination Policy Actors and their Use of Litigation Strategies: The Influence of Identity Politics' (2009) 16(5) *Journal of European Public Policy*, pp. 738–54, at 741; L. Vanhala, 'The Comparative Politics of Courts and Climate Change' (2013) 22(3) *Environmental Politics*, pp. 447–74, at 457.

[27] J. Peel & H.M. Osofsky, 'Climate Change Litigation' (2020) 16 *Annual Review of Law and Social Science*, pp. 21–38; J. Setzer & C. Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot', GRI, 2023, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf; J. Setzer & L. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *Wiley Interdisciplinary Reviews: Climate Change*, pp. 1–19; UNEP, *Global Climate Litigation Report: 2023 Status Review* (UNEP, 2023), available at : https://wedocs.unep.org/rest/api/core/bitstreams/ddef44f2-b566-4a07-94ad-95c006749fcd/content.

[28] G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841–68, at 843; J. Setzer & R. Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot', GRI, 2019, p. 2, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf; J. Setzer & C. Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot', GRI, Policy Report, June 2022, p. 25, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.

[29] B. Batros & T. Khan, 'Thinking Strategically about Climate Litigation', *Open Global Rights*, 28 June 2020, available at: https://www.openglobalrights.org/thinking-strategically-about-climate-litigation; J. Peel & R. Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the *Sharma*, *Neubauer*, and *Shell* Cases' (2021) 22(8) *German Law Journal*, pp. 1484–98, at 1486ff.

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The relevance and influence of proactive strategic litigation cases have been recognized multiple times by research institutes and international institutions.[30] For instance, the 2022 IPCC report dedicated a whole section on how climate change litigation is 'shaping climate governance'.[31]

However, as mentioned in the Introduction, there has been less focus in the literature on the prosecution of climate activists. The distinction between proactive and reactive litigation[32] allows us to single out the criminal prosecution of activists as a form of litigation. It is, therefore, a useful way to conceptualize the prosecution of activism as a self-standing phenomenon, which helps us to understand how both the state responds to activism and how activists react once they become defendants in criminal cases. In the following section I detail the theories around judicial opportunity to set out the research questions of this article (Section 2.1), before delving into the conceptualization of reactive litigation and mapping the different kinds of prosecution of activists (Section 2.2).

2.1. Judicial Opportunity as an Analytical Tool

This section will highlight how judicial opportunity has been built on literature on political and legal opportunity,[33] and notably in relation to the prosecution of environmental and climate activists.[34] Let us consider political opportunity first. This literature is considered an attempt to understand how social movements emerge, evolve, and the way in which they achieve their goals, as well as their relative 'successes' and the reasons behind their choices of tactics.[35] Building on political opportunity, legal opportunity was adapted to better fit the context of legal activism.[36] This literature is particularly interested in the claims or grievances that can be raised with regard to legal activism and its level of success, which depend on a number of structural conditions specific to the use of the law. For example, in this regard De Fazio highlighted three dimensions that emerge when looking at what 'legal opportunity'

[30] UNEP, *The Status of Climate Change Litigation: A Global Review* (UNEP, 2017), p. 8, available at: https://wedocs.unep.org/rest/api/core/bitstreams/ac8dcef7-db5f-4486-9010-2377741169bb/content; UNEP, n. 27 above.

[31] IPCC (P.R. Shukla et al. (eds)), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022), available at: https://www.ipcc.ch/report/ar6/wg3.

[32] Previous research using the term 'reactive litigation' notably resurfaces with the resurgence of direct-action tactics of the environmental movement in the UK in the 2010s; see Vanhala (2009), n. 26 above, p. 741; Vanhala (2013), n. 26 above, p. 457; Hilson (2009), n. 26 above, p. 100; Hilson (2010), n. 26 above, pp. 421–2.

[33] E.A. Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press, 2005), p. 12. While legal opportunity can be divided into three dimensions: (i) accessibility to courts, (ii) availability of justiciable rights, and (iii) receptivity of the judiciary towards a social movement's claims: G. de Fazio, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States' (2012) 53(1) *International Journal of Comparative Sociology*, pp. 3–22.

[34] Ellefsen, n. 10 above; Doherty & Hayes, n. 19 above.

[35] Andersen, n. 33 above, p. 12.

[36] Hilson, n. 10 above, p. 243.

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entails (i) accessibility to courts, (ii) availability of justiciable rights, and (iii) receptivity of the judiciary towards a social movement's claims, including 'both structural and procedural issues'.[37]

In 2009, Hilson used legal opportunity to discuss civil disobedience cases in the UK.[38] He highlights that international law arguments were not received in the same way in different types of court throughout the proceedings.[39] This fact hints at the relevance of judicial opportunity to analyze court-based opportunities. Indeed, judicial opportunity looks more closely at how specific judicial cultures, prosecution practices, and sentencing trends create opportunities or constraints for social movement actors. This is also revealed in research by Hayes and Doherty on social movement campaigns against genetically modified organisms (GMOs) in France and the UK, showing that while judicial opportunities matter for understanding prosecution outcomes, the actual tactical choices of movements are better explained by movement ideas, cultures, and traditions rather than judicial calculations solely.[40] This suggests that the judicial opportunity structure works together with other factors like political opportunity and internal movement dynamics, rather than being a determinative factor on its own. This finding has been confirmed in the UK context by Ellefsen's 2016 study regarding the repression of the organization Stop Huntingdon Animal Cruelty (UK),[41] which used judicial opportunity to show how opportunities change throughout the life of the movement. Such a view 'better captures the legal closure and level of threats',[42] and it shows that opportunity alone cannot explain the full extent of activists' choices, but it provides key elements to understand the decision of the activists in the judicial arena. These elements also include, as Ellefsen listed, the different facets encountered during the criminal proceedings, and notably '[t]he chances of being prosecuted, convicted and punished, as well as by the severity of those sanctions'.[43]

Drawing from this list, the following research questions will guide my analysis and help to identify key trends in criminal proceedings against climate activists:

1. What kinds of action are criminalized? Who are the targets of these actions?
2. Under which offences are the activists usually prosecuted?
3. Which defences are employed in the proceedings?
4. What sanctions are imposed by the courts?

The next section will present the different types of reactive litigation, a classification that helps in answering these questions and selecting relevant case law for analysis.

[37] De Fazio, n. 33 above.
[38] Hilson (2009), n. 26 above.
[39] Ibid., p. 100.
[40] Doherty & Hayes, n. 19 above.
[41] Ellefsen, n. 10 above.
[42] Ibid., p. 4.
[43] Ibid.

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2.2. Reactive Litigation: A Typology

Criminalization of social movements has been described 'as an inevitable consequence' of collective action.[44] This is why activists often react to their prosecution, and can sometimes even welcome it. From the civil rights movement in the United States (US) to the suffragette movement in the UK or the anti-nuclear power movement worldwide, prosecuted activists make use of their trial to speak about their cause.[45]

As mentioned above, in reactive litigation cases the state initiates the procedure in response to an allegedly unlawful act of protest, as the state holds the exclusive power to initiate and conduct criminal proceedings. However, this does not exclude the possibility that a third party can press charges, or that the activists can act with the intent to be arrested and prosecuted. As developed in the following paragraph, this means that in reactive litigation arrest can be anticipated or unanticipated, and prosecution wanted or unwanted by the activists. This distinction can be paralleled with the *strategic* categorization of its proactive counterpart.

In this context, 'anticipated reactive litigation' means that the activists knew that they might be arrested and prosecuted. However, two subcategories of anticipated reactive litigation are observable: the arrest and the prosecution might be wanted or unwanted. If the litigation is anticipated and wanted, activists will actively seek arrest and prosecution as ways to express their cause before a tribunal to call for changes beyond the case itself.[46] There are many reasons that can explain the decision of a movement to turn to anticipated reactive litigation. For instance, deliberate law-breaking with the aim of being prosecuted can be linked to a lack of financial resources available to social movement actors to pursue other means of contestation, including proactive litigation.[47] In such cases, the activist might plan their defence strategies before the protest action takes place or once they are arrested. In the UK, most prosecutions were anticipated, which naturally follows from the fact that collective actions are very unlikely to be spontaneous and, therefore, the possibility of an arrest must, at least, have been discussed before the action took place.[48]

In the case where an arrest is anticipated, in the sense that arrest is foreseeable although unwanted, activists can actively plan their action to avoid arrest and prosecution. For instance, they might try to avoid arrest based on the movement's ideology or strategy, and they will therefore undertake direct action during the night or favour forms of protest that are not likely to be criminalized.[49] If arrested, they might

[44] Cammiss, Doherty & Hayes, n. 10 above, p. 618; Barkan (1979), n. 10 above.
[45] Abel, n. 26 above; Barkan (1979), n. 10 above, p. 24.
[46] See sources in n. 29 above.
[47] Hilson (2009), n. 26 above, pp. 100–2; C. Hilson, 'Framing Time in Climate Change Litigation' (2018) *Oñati Socio-Legal Series*, pp. 1–19, at 15; Vanhala (2009), n. 26 above, p. 741; Vanhala (2013), n. 26 above, p. 457.
[48] Cammiss, Hayes & Doherty, n. 10 above, pp. 1526ff.
[49] Such cases exist in Switzerland; e.g., at the ZAD du Mormont, a common decision not to communicate on arrestee identity, or in other cases there was a decision to pay the fine without going to the trial stage. It was also the case of Earth First in the UK, who did not wish to be prosecuted. For more details see Doherty & Hayes, n. 19 above, p. 17; C. Hilson, 'The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature' (2022) 34(1) *Journal of Environmental Law*, pp. 1–24; C. Rootes,

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also have other strategies in place, such as fleeing before the police arrive or refusing to disclose their identity.

However, prosecution is not an outcome that is always anticipated. If that is the case, the prosecution process is unforeseeable, which can occur for several reasons. The first factor may be unclear boundaries around what is considered lawful in terms of protest action, boundaries that often change through time and across jurisdictions.[50] Indeed, sometimes the interpretation of the law is revised or extended to include new types of behaviour, and situations that were initially considered as admissible forms of protest might become criminalized.[51] In the UK, similar dynamics have been observed regarding the availability of defences, as detailed in Section 5. A further factor contributing to 'unforeseeable cases' is the lack of knowledge on the inner workings of the criminal system by members of the movements that resulted in the non-anticipation of reactive litigation cases. When a movement has little experience or does not know how the police and justice system will react to a new kind of activism, prosecution can also be unforeseeable.[52]

Unanticipated reactive litigation can become strategic after the arrest, for instance, when discussing defence strategies with lawyers or legal teams. In addition, depending on the experience of the movement, or its longevity, more knowledge about the criminal prosecution process is gained and, therefore, the collective action and reaction to prosecution might be adapted respectively. This is why sometimes unanticipated reactive litigation can become *strategic*, just like its proactive counterparts.

In sum, reactive litigation can be anticipated or unanticipated, which will have an impact on the strategy and decisions around the type of action and the defence strategies presented during the prosecution of activists following protest action (Table 1).

To conclude, I argue that using the concept of reactive litigation to study the prosecution of activists allows for the inclusion of all forms of criminal prosecution without filtering the cases based on the type of collective action. This view expands the object studied and focuses on the study of the legal action itself, and on the dynamics that take place during the criminal proceedings.

3. Methods

Building on the typology and on the research questions, the following section details the case sample selection process and the creation of the analytical grid for the analysis.

'Environmental Movements: From the Local to the Global' (1999) 8(1) *Environmental Politics*, pp. 1–12, at 6; C. Demay, '"ZAD Partout": Les Tribunaux comme Territoires de Lutte' (2023) 5 *Plaidoyer*, pp. 36–40.

[50] Schwarz, n. 10 above; Ellefsen, n. 10 above, p. 4; Cammiss, Hayes & Doherty, n. 10 above.

[51] For two examples of this extension practice in Switzerland: Demay, n. 4 above, pp. 272–3; A. Ajil & K. Lubishtani, 'Le Terrorisme Djihadiste devant le Tribunal Pénal Fédéral: Analyse des Procédures Pénales de 2004 à 2020' (2021) (1068) *Jusletter*, pp. 1–41, at 38.

[52] See, e.g., *Credit Suisse Protesters Trial*, n. 95 below (analyzed in the following sections).

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Table 1. Reactive Litigation Typology

Reactive litigation typology			
Arrest	Anticipated		Unanticipated
Prosecution	Wanted	Unwanted	Unforeseeable
Strategizing possibilities	Pre- and post-arrest		Post-arrest

3.1. Case Selection and Filtering

Following the typology proposed above, I collected data on reactive litigation cases to examine trends between the criminal process against climate activists across four jurisdictions.

To carry out the case selection, I used the Sabin Center Climate Change Litigation Database (Sabin Center Database), which records climate change litigation around the world.[53] In the database, climate litigation cases are classified according to the focus of the litigation. One of the branches of classification is entitled 'suits against protesters', which I used as it best corresponds with our proposed definition of reactive litigation cases.

In addition, as the database separates US case law from that of the rest of the world, I decided to include only cases inside the European continent, in order to build on the existing literature on the subject. This is also a way to limit the number of cases studied to test the typology presented above, and it enables the finding of trends across the selected cases. Therefore, I used the 'Global' litigation section of the database.

Among the 21 cases recorded in the database[54] (status as in July 2024), those that belong to these three categories were removed: (i) jurisdictions outside the European continent (n = 4): *Police* v. *Hanafin*;[55] *EH* v. *Queensland Police Service; GS* v. *Queensland Police Service*;[56] *Trans Mountain Pipeline ULC* v. *Mivasair*;[57] *Director of Public Prosecutions* v. *Fraser and O'Donnell*;[58] (ii) cases that are not directly against protesters (n = 3): *Attorney General* v. *Crosland*;[59] *Shell* v. *Greenpeace*;[60] *Heathrow*

[53] N. 24 above.

[54] Ibid.

[55] *Police* v. *Hanafin* (New Zealand, 2020), available at: https://www.climatecasechart.com/document/police-v-hanafin_d986.

[56] *EH* v. *Queensland Police Service*; *GS* v. *Queensland Police Service* (Australia, 2020), available at: https://www.climatecasechart.com/document/eh-v-queensland-police-service-gs-v-queensland-police-service_8909?q=EH+v.%2C+Queensland+Police+Service.

[57] *Trans Mountain Pipeline ULC* v. *Mivasair* (Canada, 2018), available at: https://www.climatecasechart.com/document/trans-mountain-pipeline-ulc-v-mivasair_647d?q=ULC+v.%2C+Mivasair.

[58] *Director of Public Prosecutions* v. *Fraser and O'Donnell* (Australia, 2008), available at: https://www.climatecasechart.com/document/director-of-public-prosecutions-v-fraser-and-odonnell_e350?q=Director+of+Public+Prosecutions+v.%2C+Fraser+and+O%E2%80%99Donnell.

[59] Barrister held in contempt of court for breaching an embargo: *Attorney General* v. *Crosland* (UK, 2021), available at: https://www.climatecasechart.com/document/attorney-general-v-crosland_3701?q=Attorney+General+v.%2C+Crosland.

[60] Concerning the liability of Greenpeace to pay damages to Shell but not the prosecution of the activists themselves: *Shell* v. *Greenpeace* (UK, 2023), available at: https://www.climatecasechart.com/document/shell-v-greenpeace_7ccc?q=Shell+v.%2C+Greenpeace.

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Airport Ltd. and Another v. *Garman and Others*;[61] (iii) duplicate entry of a series of 15 cases: *Take Down Macron Protester Cases*.[62] Thus, 13 cases remain for the analysis.

This approach encompasses limitations that need to be acknowledged. Firstly, because of the rapidly evolving number of cases in the database, this article represents a snapshot of cases from 2015 to 2022, based on the database status in July 2024. It is also important to acknowledge that cases in the database are recorded by national reporters, which means that their accounts are not always comprehensive.[63] This study, therefore, is a snapshot at a point in time that provides an exploratory study. Finally, and consequently, the results and discussion of this article are limited to the cases studied and cannot be generalized. However, they may uncover general dynamics that can be identified beyond the present cases[64] (Table 2).

3.2. Data Collection and Analysis

To study the 13 cases in a systematic manner, I processed relevant information into an analytical grid, inspired by the literature on proactive climate litigation.[65] The creation of the grid corresponds to a systematic content analysis approach, which aims to 'collect a set of documents, such as judicial opinions on a particular subject, and systematically read them, recording consistent features of each and drawing inferences about their use and meaning'.[66]

I created two sets of variables. The first is a set of identification variables, such as case name; name of the court and the country of jurisdiction; status of the case (pending/decided), and year of the collective action. The second set of variables reflects

[61] The request for an injunction against environmental activists attempting to disrupt the operations of an airport against which they had not yet protested: *Heathrow Airport Ltd and Another* v. *Garman and Others* (UK, 2007), available at: https://www.climatecasechart.com/document/heathrow-airport-ltd-and-another-v-garman-and-others_3605?q=Heathrow+Airport+Ltd.+and+Another+v.%2C+Garman+and+Others.

[62] Duplicate, which brought together a series of more than 15 actions around France (different convictions depending on the jurisdiction). Only the first action of the series, which took place in Lyon, is included in the analysis: *Take Down Macron Protester Cases* (France, 2019), available at: https://www.climatecasechart.com/document/take-down-macron-protester-cases_cb6d?q=Take+Down+Macron+Protester+Cases.

[63] National Report on the Criminal Prosecution of Climate Activists: Bluwstein, Demay & Benoit, n. 4 above; Cambridge Pro Bono Project, n. 19 above; A. Röckle, *Under Pressure: Repression of Environmental Activism in Denmark 2019-2024* (NOAHs Forlag, 2024); O. Berglund et al., *Criminalisation and Repression of Climate and Environmental Protest* (University of Bristol, 2024).

[64] B. Halkier, 'Methodological Practicalities in Analytical Generalization' (2011) 17(9) *Qualitative Inquiry*, pp. 787–9.

[65] Barkan (1979, 2006), n. 10 above; J. Setzer & M. Bangalore, 'Regulating Climate Change in the Courts', in A. Averchenkova, S. Fankhauser & M. Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017), pp. 175–92; Setzer & Higham, n. 27 above.

[66] M.A. Hall & R.F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review*, pp. 63–122, at 64; M. Salehijam, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23(1–2) *Tilburg Law Review*, pp. 34–42, at 34; J.B. Slapin & S.-O. Proksch, 'Words as Data: Content Analysis in Legislative Studies', in S. Martin, T. Saalfeld & K.W. Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press, 2014), pp. 126–44.

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Table 2. Case Selection

N°	Name	Jurisdiction	Year
1	*Bordeaux-Mérignac Airport* v. *Climate Activists*	France	2020
2	*ADP Group (Paris Airports)* v. *Climate Activists*	France	2020
3	*Take Down Macron Protester* (Décrochons Macron)	France	2019
4	District Court Mönchengladbach-Rheydt, Urt. v. 14.3.2022 – 21 Cs – 721 Js 44/22–69/22	Germany	2021
5	*Credit Suisse Protesters Trial*	Switzerland	2018
6	*The Kingsnorth Six Trial*	UK	2007
7	*R* v. *Basto and Others*	UK	2015
8	*R* v. *Roberts and Others*	UK	2017
9	*Trial of Angela Ditchfield*	UK	2018
10	*R* v. *Brown and Others* (Extinction Rebellion Protest, London City Airport)	UK	2019
11	*R* v. *Bramwell and Others* (The Shell Six case)	UK	2019
12	*R* v. *McKelvey and Others* (Doctors for XR Protest on Lambeth Bridge)	UK	2022
13	*R* v. *Brewer and Others* (Just Stop Oil Protest, Esso Terminal)	UK	2022

the research questions mentioned above: organizations or activist groups; summary of the collective action; number of defendants/arrests; offences charged; maximum sentence; presence of experts at the hearing; defence, reception by the judge the jury; verdict; date of verdict; sources.

The data collection process encompasses information from the database and information available online, including news reports, because the available data within the Sabin Center Database was not sufficient, and primary sources (i.e., court documents) were not always accessible. The data collected considered only the conviction and charges brought at the highest instance reached. Once the data was collected, it was recoded and reframed to consider not only the cases but also each defendant prosecuted.

The cases selected and presented in this contribution include cases from four jurisdictions: Germany, Switzerland, France, and the UK. As the aim of the articles is to identify trends across jurisdictions, generalizations might be made on the variables analyzed. Indeed, as mentioned above, the rest of the contribution will identify key trends in the actions criminalized, the targets of these actions, the offences with which they are charged, their defences, and the outcome of the proceedings. For instance, offences with different names but that prohibit the same behaviour are recorded together, similarly for the defences. Furthermore, the difference between common law and civil law will be acknowledged but is not at the centre of discussions in the article, as the aim was to focus on the criminal proceedings *per se*.

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4. Case Presentation

This section provides brief summaries of each case, organized chronologically within jurisdictions, which are then listed alphabetically.[67]

4.1. *Bordeaux-Mérignac Airport* v. *Climate Activists* (France, 2020)[68]

On 3 October 2020, in Bordeaux (France) seven activists entered an airport tarmac area, without causing any damage to the fence, and proceeded to stop air traffic by standing on the tarmac with a banner and a smoke flare. The action was part of a wider national campaign against aviation's greenhouse gas (GHG) emissions, targeting 18 airports led jointly by Alternatiba, Extinction Rebellion (XR), and ANV-COP21.[69] The activists were prosecuted for malicious activities (*actes de malveillance*) under Article L6372-4(4) of the French Transport Code,[70] which imposes a maximum sentence of five years' imprisonment and a €18,000 fine. During the trial in the Criminal Court of Bordeaux, in March 2020, the prosecutor requested a suspended fine of €500,[71] the defence of necessity was used,[72] and Didier Swingedouw, a geographer and IPCC expert, was invited to testify.[73] The judge rejected the necessity defence, notably because the defendants' action did not have a direct impact on climate change. However, he took into consideration for sentencing the defendants' characters and the brief nature of their action, ultimately imposing lenient sentences on the activists.[74] The final sentencing for the seven activists was a suspended fine of €500 pronounced on 29 March 2020.[75]

[67] Each summary includes: (a) context of the collective action; (b) number of arrests and prosecutions; (c) offences charged and their maximum sentences; (d) convictions; and (e) defence arguments presented by the accused. When available, the reception of these arguments by the judge or jury is also noted but this aspect will not be included in the discussion in Section 5.

[68] *Bordeaux-Mérignac Airport* v. *Climate Activists* (France, 2020), available at: https://www.climatecasechart.com/document/bordeaux-merignac-airport-v-climate-activists_c310.

[69] Ibid.

[70] Transport Code (France) (Code des Transports), 28 Oct. 2010, France, Art. L6372-4, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000023086525/2026-01-13.

[71] C. Olivari, 'Mérignac : Sept Militants Jugés pour Avoir Marché sur le Tarmac de l'Aéroport', *France 3 Nouvelle-Aquitaine*, 22 Feb. 2021, available at: https://france3-regions.franceinfo.fr/nouvelle-aquitaine/gironde/bordeaux/merignac-sept-militants-juges-pour-avoir-marche-sur-le-tarmac-de-l-aeroport-1967197.html; *Bordeaux-Mérignac Airport* v. *Climate Activists*, n. 68 above.

[72] The necessity defence is a legal justification in criminal law that is found in many jurisdictions. The idea behind this defence is that an unlawful action of the defendant becomes lawful if it was necessary to prevent (imminent) danger and there is no other lawful alternative to prevent the danger. For more on the subject: L. Delaloye, 'The "Climate Necessity Defence": Does the Noble End Justify the Criminal Means?' (2021) 2(2) *Neue Zeitschrift für Kriminologie und Kriminalpolitik* pp. 36–49; L.N. Long & T. Hamilton, 'The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases' (2018) 38(1) *Stanford Environmental Law Journal*, pp. 57–115; P. Mazzotti, 'The Necessity Defence in (the Swiss) Climate Protest Cases: Democratic Contestation in the Age of Climate Activism' (2024) 29(3–6) *European Law Journal*, pp. 393–421; G. Nosek, 'The Climate Necessity Defense: Protecting Public Participation in the US Climate Policy Debate in a World of Shrinking Options' (2019) 49 *Environmental Law*, pp. 249–61.

[73] D. Bizec, 'Bordeaux-Mérignac: Amendes avec Sursis pour l'Irruption sur le Tarmac de l'Aéroport', *Sud Ouest*, 29 Mar. 2021, available at: https://www.sudouest.fr/gironde/merignac/bordeaux-merignac-amendes-avec-sursis-pour-l-irruption-sur-le-tarmac-de-l-aeroport-1837564.php.

[74] Ibid.

[75] *Bordeaux-Mérignac Airport* v. *Climate Activists*, n. 68 above.

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4.2. *ADP Group (Paris Airports)* v. *Climate Activists* (France, 2020)[76]

This action was part of the same wider national French campaign against aviation GHG emissions (Section 4.1). On 3 October 2020, 84 activists stood on the tarmac in front of a parked plane, after cutting the fence to gain entry; they were arrested and convicted with an administrative fine of €750 imposed on each. On the criminal side, seven activists were prosecuted and tried in the Court of First Instance of Bobigny (Tribunal Correctionnel) in November 2021.[77] They were prosecuted under Article L6372-4(4) of the French Transport Code,[78] the maximum penalty for which is five years in prison and a fine of €18,000.[79] Furthermore, two activists were cumulatively charged under Article 322-1 of the French Criminal Code[80] for serious damage caused by cutting the fence. They also argued the necessity defence but mainly justified their act under freedom of expression. The seven activists were acquitted on 16 September 2021, as the judge recognized that their aim was to raise awareness of the effect of climate change and their actions were therefore covered by freedom of expression. The two activists prosecuted for property damage were convicted and fined €500 each, with their actions reclassified as light damage.[81]

4.3. *Take Down Macron Protester (Décrochons Macron)* (France, 2019)[82]

This action was part of a national coordinated campaign by ANV-COP21 across France – notably in Paris, Strasbourg, Bonneville, Auch, Lyon, and Bordeaux – with the aim of taking down the official photograph of President Emmanuel Macron from government buildings. This summary focuses on one of the actions of 2 February 2019 in Lyon. Ten to 15 activists entered the city hall, removed the photograph, and left with it.[83] Two activists were arrested and prosecuted for organized theft (*vol en réunion*) under Article 311-4 ch° 1 of the French Criminal Code,[84] which can incur a penalty of up to five years' imprisonment and a maximum fine of €75,000. The activists argued the defence of necessity in their first instance proceedings, and called upon a former French minister to testify to the

[76] *ADP Group (Paris Airports)* v. *Climate Activists* (France, 2020), available at: https://www.climatecasechart.com/document/adp-group-paris-airports-v-climate-activists_3ee4?q=ADP+Group+%28Paris+Airports%29.

[77] Ibid.

[78] Transport Code, n. 70 above.

[79] *Bordeaux-Mérignac Airport* v. *Climate Activists*, n. 68 above.

[80] French Criminal Code, 22 July 1992, Art. 322-1, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/2026-01-12.

[81] N. Revenu, 'Aéroport de Roissy : Relaxe Partielle pour les Militants Ecologistes qui Avaient Envahi le Tarmac', *Le Parisien*, 12 Nov. 2021, available at: https://www.leparisien.fr/seine-saint-denis-93/aeroport-de-roissy-relaxe-partielle-pour-les-militants-ecologistes-qui-avaient-envahi-le-tarmac-12-11-2021-YRW3JYZRZNGNVDS7PVBSUWDWTQ.php; *ADP Group (Paris Airports)* v. *Climate Activists*, n. 76 above.

[82] *Take Down Macron Protester* (*Décrochons Macron*) (France, 2019), available at: https://www.climatecasechart.com/document/decrochons-macron_2115?l=france&cpl=category%2FProtesters&cpl=category%2FSuits+against+corporations%2C+individuals.

[83] Ibid.

[84] French Criminal Code, n. 80 above, Art. 311-4.

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proportionality of their action. At first instance, the activists were acquitted,[85] but the appeal decision set aside the necessity defence, convicted the two activists and fined each €250.[86] The highest French criminal court (Cour de Cassation), on 22 September 2021, confirmed that the necessity defence was not available for climate activists, although the Court left the door open for such actions to be justified on grounds of freedom of expression.[87] In July 2025, the European Court of Human Rights (ECtHR) confirmed that the actions were within the scope of Article 10 of the European Convention of Human Rights (ECHR),[88] although the penalty of the suspended fine was considered to be proportionate.[89]

4.4. District Court Mönchengladbach-Rheydt, Urt. v. 14.3.2022 – 21 Cs – 721 Js 44/22–69/22 (Germany, 2021)[90]

This action was led by a group called Lebenslaute (Sound of life), who played a concert with 52 musicians inside a lignite mine in Germany in August 2021. The decision analyzed here concerns only one of the 52 defendants. The activist was charged with trespassing under Section 123(1) of the German Criminal Code,[91] the sentence for which is up to one year of imprisonment or a fine.[92] The defence relied on freedom of conscience, assembly, and expression.[93] The Court acquitted the defendant in March 2022, applying the following reasoning. Climate change is an issue of 'paramount importance' and lignite mining was recognized as an environmental problem, which creates a 'moral' dilemma; this allows for climate-related protest that targets climate-damaging action to be covered by freedom of conscience.[94]

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85 *Ministère Public* v. *D.F & G.P*, Court of Appeal of Lyon, 4th Chamber (Criminal Division), No. 19/02101, 14 Jan. 2020.

86 Ibid.

87 Ibid; M. Dominati, 'Épilogue de l'Affaire des Décrocheurs du Portrait du Président de la République', *Dalloz Actualité*, 1 June 2022, available at: https://www.dalloz-actualite.fr/flash/epilogue-de-l-affaire-des-decrocheurs-du-portrait-du-president-de-republique.

88 Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at https://www.echr.coe.int/documents/d/echr/convention_eng.

89 *Ludes and Others* v. *France*, ECtHR, Appl. Nos. 40899/22, 41621/22 & 42956/22, Judgment, 3 July. 2025; C. Demay, 'Sentencing Crimes of Civil Disobedience in Switzerland?', in J. Roberts, L. Zaibert & J. Ryberg (eds), *Sentencing the Ethically Motivated Offender: Mitigation for 'Ethical' Criminality?* (Oxford University Press, forthcoming Oct. 2026).

90 District Court Mönchengladbach-Rheydt, Urt. v. 14.3.2022 – 21 Cs – 721 Js 44/22–69/22 (Germany, 2021), available at: https://www.climatecasechart.com/document/district-court-monchengladbach-rheydt-urt-v-14-3-2022-21-cs-721-js-44-22-69-22_6ab4?q=District+Court+M%C3%B6nchengladbach-Rheydt.

91 German Criminal Code (Strafgesetzbuch – StGB), 13 Nov. 1998, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

92 Ibid., Art. 123(1).

93 District Court Mönchengladbach-Rheydt, n. 90 above, Climate Law Accelerator, CLX Database of Rights-Based Climate Cases, available at: https://clxtoolkit.com/map/district-court-monchengladbach-rheydt-urt-v-14-3-2022-21-cs-721-js-44-22-69-22.

94 Ibid.; District Court Mönchengladbach-Rheydt, n. 90 above.

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4.5. *Credit Suisse Protesters Trial* (Switzerland, 2018)[95]

In November 2018, around 30 activists from an activist group called Lausanne Action Climat, entered the lobby of the bank Credit Suisse in Lausanne (Switzerland) and mimicked a tennis game. The aim of the action was to denounce the investments of the bank in fossil fuels by calling upon Roger Federer's fame to mediatize their action further, as he was sponsored by the bank at the time. Of the 13 activists arrested for refusing to leave the premises once the police arrived,[96] 12 were charged with unlawful entry under article 186 of the Swiss Criminal Code.[97] The maximum sentence is a three-year prison term or a fine.[98] They were charged with additional offences of failing to request authorization for the protest, and refusing to obey the police when asked to leave.[99] In January 2020, the first instance court acquitted the activists of all charges after they invoked the necessity defence.[100] In September 2020, this decision was appealed against by the prosecutor, and the acquittal was overturned.[101] In November 2020, the case reached the Supreme Court of Switzerland, and the conviction was confirmed. The case was sent back to the cantonal court for sentencing,[102] which convicted the defendants to a monetary penalty of CHF (Swiss francs) 10 daily penalty units of CHF 20 per day, suspended for two years, and a CHF 100 fine.[103] An appeal to the ECtHR was filed in November 2021.[104]

4.6. *The Kingsnorth Six Trial* (UK, 2007)[105]

On 8 October 2007, in Kent (UK), six climate activists entered the premises of a coal-fired power station and climbed and painted the name of the Prime Minister on the chimney, shutting down the station for a day. The cost of rectifying the damage was

[95] *Credit Suisse Protesters Trial* (Switzerland, 2018), available at: https://www.climatecasechart.com/document/credit-suisse-protesters-trials_5735?cpl=category%2FProtesters&cpl=category%2FSuits+against+corporations%2C+individuals.

[96] P. Turuban & F. Boillat, 'Les 12 Activistes du Climat Ont Été Acquitté s lors du Procès à Renens', *RTS*, 14 Jan. 2020, available at: https://www.rts.ch/info/regions/vaud/11009104-les-12-activistes-du-climat-ont-ete-acquittes-lors-du-proces-a-renens.html.

[97] Swiss Criminal Code, 21 Dec. 1937, available at: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en.

[98] Ibid.

[99] These two offences are respectively Art. 29 (prevention of an official act) and Art. 41 (requirement of an authorization) of the Règlement Général de Police de la Commune de Lausanne. The maximum penalty is a fine.

[100] Lausanne District Court (Switzerland), 13 Jan. 2020, 0091 PE19.000742/PCL.

[101] Vaud Higher District Court (CAPE) (Switzerland), 22 Sept. 2020, 371 PE19.000742/PCL.

[102] Swiss Federal Court (Switzerland), 26 May 2021, ATF 147 IV 297.

[103] 10 out of the 12 defendants were released from the charge of prevention of an official act: Vaud Higher District Court (CAPE) (Switzerland), 6 Dec. 2021, 394 PE19.000742/PCL.

[104] The appeal is still pending (as at Aug. 2026): M. Scialom, 'Des Activistes de Credit Suisse à Strasbourg pour Défendre la Désobéissance Civile', *RTS*, 5 Nov. 2021, available at: https://www.rts.ch/info/suisse/12619601-des-activistes-de-credit-suisse-a-strasbourg-pour-defendre-la-desobeissance-civile.html.

[105] *The Kingsnorth Six Trial* (UK, 2007), available at: https://www.climatecasechart.com/document/the-kingsnorth-six-trial_4b33.

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estimated at £30,000.[106] They were charged with causing criminal damage under section 1(1) of the Criminal Damage Act 1971,[107] the maximum sentence for which is 10 years' imprisonment.[108] The activists and their lawyer presented lawful excuse,[109] arguing the prevention of property damage,[110] including nearby houses that would be swept away by sea-level rise.[111] They invited numerous expert witnesses, including Jim Hansen, Geoff Meaden, Zac Goldsmith, Jennifer Morgan, and Aqqaluk Lynge to support their claim.[112] On 8 September 2008, the activists were acquitted by a jury[113] and *The New York Times* ranked the use of this defence as one of the 'Ideas of the Year 2008'.[114]

4.7. R v. *Basto and Others* (UK, 2015)[115]

On 12 July 2015, 13 activists from Plane Stupid cut the perimeter fence surrounding Heathrow Airport in London (UK) and occupied the northern runway for a number of hours to oppose the proposal to build a third runway.[116] The 13 activists were charged with aggravated trespass under section 68(1)(3) of the Criminal Justice and Public Order Act 1994[117] and entering a security-restricted area of an aerodrome without permission under section 21C(1)(a) of the Aviation Security Act 1982.[118] The first offence carries a maximum sentence of three months' imprisonment and/or a fine, and the second a fine.[119] All defendants pleaded not guilty to both charges and described their action as necessary.[120] On 24 February 2016, the activists were

[106] A. Benjamin, 'Greenpeace Protesters Take Over Power Plant', *The Guardian*, 8 Oct. 2007, available at: https://www.theguardian.com/environment/2007/oct/08/climatechange.energy.

[107] Criminal Damage Act 1971, 26 July 1971 (UK), s. 1(1), available at: https://www.legislation.gov.uk/ukpga/1971/48/contents.

[108] Ibid.

[109] Ibid., s. 5(2b); J. Mingle, 'The Climate-Change Defense', *The New York Times*, 12 Dec. 2008, available at: https://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-A-t-004.html.

[110] This lawful excuse exists 'if at the time of the act or acts alleged to constitute the offence they believed: (1) that the property, right or interest was in immediate need of protection; and (2) that the means of protection adopted or proposed to be adopted are or would be reasonable having regard to all the circumstances': Criminal Damage Act 1971, n. 107 above, s. 5(2).

[111] M. Wolkind, 'How We Won Acquittal of Kingsnorth Six', *The Guardian*, 31 May 2009, available at: https://www.theguardian.com/environment/cif-green/2009/may/31/kingsnorth-defence-lawyer.

[112] Greenpeace UK, 'Climate Trial of Kingsnorth Six UK', 10 Sept. 2008, available at: https://media.greenpeace.org/archive/Climate-Trial-of-Kingsnorth-Six-UK-27MZIFL28P2K.html.

[113] Ohdedar & McNab, n. 19 above, pp. 319–20.

[114] Mingle, n. 109 above.

[115] *R* v. *Basto and Others* (UK, 2015), available at: https://www.climatecasechart.com/document/r-v-basto_a145?cpl=category%2FProtesters&cpl=category%2FSuits+against+corporations%2C+individuals&cpl=jurisdiction%2FUnited+https://www.climatecasechart.com/document/r-v-basto_a145?cpl=category%2FProtesters&cpl=category%2FSuits+against+corporations%2C+individuals&cpl=jurisdiction%2FUnited+Kingdom.

[116] Ibid.

[117] Criminal Justice and Public Order Act 1994 (UK), s. (1)(3), available at: https://www.legislation.gov.uk/ukpga/1994/33/contents.

[118] Aviation Security Act 1982 (UK), available at: https://www.legislation.gov.uk/ukpga/1982/36/contents.

[119] *R* v. *Basto and Others*, West London Magistrates' Court (UK), 24 Feb. 2016, Sentencing Remarks, p. 1.

[120] Staff and Agency, 'Plane Stupid Activists Plead Not Guilty over Heathrow Expansion Protest', *The Guardian*, 19 Aug. 2015, available at: https://www.theguardian.com/uk-news/2015/aug/19/plane-stupid-activists-plead-not-guilty-heathrow-expansion-protest.

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convicted and given a sentence of six weeks' imprisonment, suspended for 12 months, and between 120 and 180 hours of unpaid work (depending on the previous convictions of each defendant).[121] The judge wrote in the decision that '[t]he fact that you are principled and hold strong views about what is in the best interests of the public does not mean you are entitled to break the law',[122] and said their disruption was too important (delays and 25 flights cancelled) to fit the definition of an act of civil disobedience.[123] In addition, they had carefully planned their action; consequently, the judge considered that both the culpability and the financial harm were of a high level.[124]

4.8. *R* v. *Roberts and Others* (UK, 2017)[125]

In July 2017, while activists were protesting against the licence granted by the British Oil and Gas Authority to explore for shale gas by fracking in Lancashire (UK), four activists partially blocked a road for about three days after they climbed on trucks that were carrying drilling equipment.[126] The four activists were charged with the common law offence of public nuisance.[127] One activist pleaded guilty and was given a suspended sentence;[128] three others were convicted of imprisonment as the judge at first instance determined that they had crossed the 'custody threshold' necessary to pronounce imprisonment.[129] The defendants appealed against the decision, notably referring to the freedom of expression granted by Article 10 ECHR.[130] On 6 December 2018, the Court of Appeal accepted that an immediate custodial sentence was excessive and that the three defendants should have been sentenced to a community order with unpaid work; however, as they had already served three weeks in prison, they were given a conditional discharge for two years.[131] The reason advanced for this decision was that the ECtHR considered the importance of proportionality in sentencing when a crime is committed during a peaceful protest, especially when the defendants show remorse.[132]

[121] *R* v. *Basto and Others*, n. 119 above, paras 38, 40.
[122] Ibid., para. 31.
[123] Ibid., para. 21.
[124] Ibid., paras 33ff.
[125] *R* v. *Roberts and Others* (UK, 2017), available at: https://www.climatecasechart.com/document/r-v-roberts_f224?cpl=category%2FProtesters&cpl=category%2FSuits+against+corporations%2C+individuals&cpl=jurisdiction%2FUnited+Kingdom.
[126] Ibid.
[127] A project of simplification of UK criminal law led to the entry into force of the Police, Crime, Sentencing and Courts Act 2022 in June 2022 (available at: https://www.legislation.gov.uk/ukpga/2022/32/contents), which transformed public nuisance into a statutory offence with a maximum penalty of 10 years.
[128] *R* v. *Roberts and Others*, n. 125 above.
[129] Ibid.
[130] N 88 above.
[131] *R* v. *Roberts and Others*, n. 125 above.
[132] *R* v. *Roberts and Others*, Columbia Global Freedom of Expression, available at: https://globalfreedomofexpression.columbia.edu/cases/r-v-roberts.

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4.9. *Trial of Angela Ditchfield* (UK, 2018)[133]

The action took place on 15 December 2018 in the city centre of Cambridge (UK).[134] The defendant in the case walked through the city in a peaceful protest. She then spray-painted the council doors with the XR logo and the acronym 'RIP??' – the resulting damage was estimated at around £800. The defendant was charged with the statutory offence of destroying or damaging property under section 1(1) of the Criminal Damage Act 1971,[135] the maximum sentence for which is 10 years' imprisonment. The defendant pleaded not guilty and pleaded lawful excuse, arguing prevention of property damage under section 5(2b) of the Criminal Damage Act 1971.[136] Following acquittal at first and second instance,[137] the appellate court quashed the acquittal and the defendant was convicted and given a 12-month suspended prison sentence and ordered to pay £650 by way of compensation.[138]

4.10. *R* v. *Brown* (Extinction Rebellion Protest, London City Airport) (UK, 2019)[139]

The action took place on 10 October 2019, during a nationwide protest led by XR. Ten activists launched a protest at London City Airport (UK). One of the activists, who was paralympic champion James Brown, glued himself to a commercial passenger aircraft to draw attention to the climate crisis.[140] In the first instance judgment, he was charged with the common law offence of public nuisance.[141] He defended himself, saying he needed to do something spectacular to receive the attention of the media.[142] He was convicted and given an immediate custodial term of 12 months' imprisonment.[143] The decision was appealed against on several grounds. Firstly, abuse of process was claimed because the defence team considered that, instead of public nuisance, he could have been charged with aggravated trespass, which has a maximum sentence of three months, less than the twelve-month term given in the first instance judgment. It was also argued that his action was protected by the human right to freedom of thought, freedom of expression, and freedom of assembly and

[133] *DPP* v. *Angela Ditchfield* (UK, 2018), available at: https://www.climatecasechart.com/document/trial-of-angela-ditchfield_6d87?q=Trial+of+Angela+Ditchfield-.

[134] J. Elworthy, 'Climate Change Activist Gets her Day in Court after CPS Appeal Earlier Verdict', *Royston Crow*, 9 Mar. 2021, available at: https://www.royston-crow.co.uk/news/crime/22008054.climate-change-activist-gets-day-court-cps-appeal-earlier-verdict.

[135] Criminal Damage Act 1971, n. 107 above.

[136] Ibid.

[137] *DPP* v. *Angela Ditchfield*, n. 133 above.

[138] Elworthy, n. 134 above.

[139] *R* v. *Brown* (Extinction Rebellion Protest, London City Airport) (UK, 2019), available at: https://www.climatecasechart.com/document/r-v-brown-extinction-rebellion-protest-london-city-airport_7fee?q=R+v.%2C+McKelvey+et+al.

[140] Ibid.

[141] See n. 127 above.

[142] *R* v. *Brown*, England and Wales Court of Appeal (Criminal Division) (UK), 14 June 2022, [2022] EWCA Crim 6, p. 8.

[143] Ibid. para. 4.

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association.[144] On 14 February 2022, the appeal against conviction was dismissed, but allowed against sentencing, as the sentence was considered too severe.[145]

4.11. *R* v. *Bramwell and Others* (The Shell Six Case) (UK, 2019)[146]

During a two-week nationwide mobilization of XR in April 2019, several activists gathered in London (UK). On 15 April 2019, the Shell headquarters building was the target of an action when activists spray-painted slogans, broke windows, and climbed onto the roofs.[147] Seven activists were charged with causing criminal damage under section 1(1) of the Criminal Damage Act 1971,[148] the maximum sentence for which is imprisonment for a term not exceeding 10 years.[149] One activist pleaded guilty and received a conditional discharge before the trial, while the other activists represented themselves and used different approaches to their defence. Five defendants used the defence of necessity, accusing Shell of contributing directly to climate change, arguing that their action was proportionate and necessary; one activist mobilized lawful excuse, arguing consent[150] under the Criminal Damage Act 1971.[151] On 23 April 2021, all six activists were acquitted by a jury at Southwark Crown Court, even though the judge had warned the jury that only the activist who pleaded consent had a defence recognized by law.[152]

4.12. *R* v. *McKelvey and Others* (Doctors for XR Protest on Lambeth Bridge) (UK, 2022)[153]

On 10 April 2022, around 30 persons from the group Doctors for Extinction Rebellion blocked Lambeth Bridge in London (UK) and displayed a banner with the following sentence 'For Health's Sake. Stop Financing Fossil Fuels'.[154] A group of seven activists, all health professionals, remained on the bridge at the end of the protest

144 Ibid., paras 9ff.

145 However, even if the defence mobilized the right to peaceful protest, the sentence was considered excessive and reduced to 4 months' imprisonment because of the defendant's disability: *R* v. *Brown and Others*, n. 139 above, paras 3, 4, 67.

146 *R* v. *Bramwell and Others* (The Shell Six Case) (UK, 2019), available at: https://www.climatecasechart.com/document/r-v-bramwell-et-al-the-shell-six-case_2074?q=The+Shell+Six+case.

147 PA Media, 'Jury Acquits Extinction Rebellion Protesters Despite "No Defence in Law"', *The Guardian*, 23 Apr. 2021, available at: https://www.theguardian.com/environment/2021/apr/23/jury-acquits-extinction-rebellion-protesters-despite-no-defence-in-law.

148 Criminal Damage Act 1971, n. 107 above.

149 Ibid.

150 The belief of an owner's consent defence consists of believing that the consent of the injured party for the criminal damage was given. The activist argued that he was convinced that if the employees and shareholders of Shell were aware of their impact on climate change, they would have consented to the criminal damage: PA Media, n. 147 above.

151 Criminal Damage Act 1971, n. 107 above, s. 5(2a).

152 *R* v. *Bramwell and Others*, n. 146 above.

153 *R* v. *McKelvey and Others* (Doctors for XR Protest on Lambeth Bridge) (UK, 2022), available at: https://www.climatecasechart.com/document/r-v-mckelvey-and-others-doctors-for-xr-protest-on-lambeth-bridge_28f6?q=%E2%80%89Doctors+for+XR+protest+on+Lambeth+Bridge.

154 Ibid.

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and were arrested and charged with breach of section 14 of the Public Order Act 1986.[155] This offence allows the police to formulate conditions for a public assembly, and if the conditions are not complied with it becomes an offence to join the protest.[156] The seven defendants pleaded not guilty and presented evidence to the court, referring to the right to protest.[157] They were all acquitted on 15 November 2022 at the City of London Magistrates' Court. Judge Robinson found that the procedure to apply section 14 had not been respected and mentioned that he was 'impressed by the integrity and rationality of their beliefs' and 'their evidence was highly moving'.[158]

4.13. R v. Brewer and Others (Just Stop Oil Protest, Esso Terminal) (UK, 2022)[159]

The action took place on 3 April 2022, where seven protesters from Just Stop Oil prevented the operations at an Esso fuel terminal in Birmingham for 12 hours by blocking the access road. They demanded that the government stop its support of new fossil fuel licences and projects.[160] Nine activists were arrested and charged with aggravated trespass under section 68(1)(3)) of the Criminal Justice and Public Order Act 1994,[161] the maximum sentence for which is three months' imprisonment and/or a fine.[162] By way of defence, the activists explained their motives; however, in response District Judge Wilkinson said: 'You are good people with admirable aims. However, if good people with the right motivation do the wrong thing, it can never make that wrong thing right'.[163] On 16 February 2023, seven of the nine activists were convicted, given a 12-month conditional discharge and ordered to pay the procedural costs of the Crown Prosecution Service.[164]

5. Discussion: Trends in Reactive Climate Litigation

In this final section, I extract data and interpret it through the theoretical framework of reactive litigation and judicial opportunity presented above. To do so, I have analyzed the data collected for each defendant in the 13 cases. I created a typology, first for the targets of the action; then, for the actions themselves, the offences, the defences, the outcomes of the procedure, and established patterns between them.

[155] Public Order Act 1986 (UK), s. 14, available at: https://www.legislation.gov.uk/ukpga/1986/64/contents.
[156] This section has been extended to cover any noisy protest in 2023, but it was not yet in force during this action: Friends of the Earth UK, n. 7 above.
[157] Extinction Rebellion UK, 'Breaking: Court Finds Doctors for XR Not Guilty for Lambeth Bridge Blockade', 15 Nov. 2022, available at: https://extinctionrebellion.uk/2022/11/15/breaking-court-finds-doctors-for-xr-not-guilty-for-lambeth-bridge-blockade.
[158] Ibid.; *R* v. *McKelvey and Others*, n. 153 above.
[159] *R* v. *Brewer and Others* (Just Stop Oil Protest, Esso Terminal) (UK, 2022), available at: https://www.climatecasechart.com/document/r-v-brewer-and-others-just-stop-oil-protest-esso-terminal-birmingham_4885?q=%E2%80%89Just+Stop+Oil+protest%2C+Esso+terminal.
[160] BBC West Midlands, 'Judge Praises Birmingham Oil Protesters' "Admirable Aims"', *BBC*, 17 Feb. 2023, available at: https://www.bbc.com/news/uk-england-birmingham-64683048.
[161] Criminal Justice and Public Order Act 1994, n. 117 above.
[162] Ibid.
[163] BBC West Midlands, n. 160 above.
[164] *R* v. *Brewer and Others*, n. 159 above.

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5.1. Protest Action and Targets, and Types of Offence

The 13 actions could be grouped into three main categories based on the subject-matter targeted: fossil fuels-related, the aeronautic industry, and government buildings. Most of the cases analyzed are tied to fossil fuel activities; indeed, seven cases target fossil fuel-related industry such as a mine, a coal-fired power plant, an Esso terminal, and the Shell headquarters.[165] The occupation of the bank also falls in this category, as the main claim of the protestors revolved around the financial investment made by the bank in fossil energy.[166] Another important target is air traffic and airport expansion, with four actions[167] that took place on a runway. Finally, in the last two cases,[168] the city hall was taken as a target to highlight the inaction of the authorities and compel them to act. Similarly, the blockage of a bridge[169] aimed to call out the government and requested action to mitigate the impacts of the climate crisis with their banner. A consistent trend that can be observed across all cases is that they all appealed to governments for their inaction or to the accountability of private companies. Indeed, protestors were either directly calling upon the responsibility of the airport and fossil fuel companies, or highlighting the governments' (in)action in accepting an airport extension or granting licences to exploit land for extraction or energy production. This trend is similar to proactive litigation cases, as government and fossil fuel industries were the actors most often targeted in strategic proactive climate litigation. Finally, in our case sample, and looking at the different types of action, most cases can be classified as the anticipated reactive litigation type.[170]

Secondly, I regrouped the protest actions into three main types: (i) occupation (i.e., bank, airport),[171] (ii) roadblocks,[172] (iii) spray-painting[173] and theft.[174] Occupation is the most used mode of action in the cases analyzed across the four jurisdictions. This subdivision shows that similar collective actions are not always charged with the same offence. Actions based on occupation have been charged with an offence related to the disruption of the airport operation, public nuisance, and trespass. Roadblocks have been charged with public nuisance and trespass. Theft

[165] District Court Mönchengladbach-Rheydt, n. 90 above; *The Kingsnorth Six Trial*, n. 105 above; *R* v. *Roberts and Others*, n. 125 above; *R* v. *Bramwell and Others*, n. 146 above; *R* v. *Brewer and Others*, n. 159 above.

[166] *Credit Suisse Protesters Trial*, n. 95 above.

[167] *Bordeaux-Mérignac Airport* v. *Climate Activists*, n. 68 above; *ADP Group (Paris Airports)* v. *Climate Activists*, n. 76 above; *R* v. *Basto and Others*, n. 115 above; *R* v. *Brown and Others*, n. 139 above.

[168] *Take Down Macron Protester*, n. 82 above; *DPP* v. *Angela Ditchfield*, n. 133 above.

[169] *R* v. *McKelvey and Others*, n. 153 above.

[170] As seen in these two national reports on climate activism and criminal repression, a case can be both anticipated and unanticipated: Bluwstein, Demay & Benoit, n. 4 above; Röckle, n. 63 above.

[171] *Bordeaux-Mérignac Airport* v. *Climate Activists*, n. 68 above; *ADP Group (Paris Airports)* v. *Climate Activists*, n. 76 above; District Court Mönchengladbach-Rheydt, n. 90 above; *Credit Suisse Protesters Trial*, n. 95 above; *The Kingsnorth Six Trial*, n. 105 above; *R* v. *Basto and Others*, n. 115 above; *R* v. *Brown and Others*, n. 139 above.

[172] *R* v. *Roberts and Others*, n. 125 above; *R* v. *McKelvey and Others*, n. 153 above; *R* v. *Brewer and Others*, n. 159 above.

[173] *DPP* v. *Angela Ditchfield*, n. 133 above; *R* v. *Bramwell and Others*, n. 146 above.

[174] *Take Down Macron Protester*, n. 82 above.

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Table 3. Types of Action and Offences Charged

Type of offence and action	Defendant	Protest action
Occupation	**40**	5
Offence related to the disruption of the airport operation	14	
Property damage	26	
Roadblock	**21**	**4**
Public nuisance	12	
Trespass	9	
Spray-painting	**14**	**3**
Property damage	14	
Taking down official portrait	**2**	**1**
Theft	2	

(taking down the presidential portrait) and property damage (spray-painting) have been charged for the remaining cases.

Finally, looking now at the offences brought against the activists, it was possible to identify three main categories of offence across the four jurisdictions: (i) property damage, (ii) unlawful entry, and (iii) offences related to the disruption of airport operations.

Starting with the severity of the offence, UK property damage is the most serious offence with a maximum penalty of a ten-year prison sentence. Trespass, on the other hand, is the least serious offence in the UK, with a maximum prison sentence of three months. However, for similar offences the sentence can go up to three years in Switzerland, and a maximum of one year in Germany. The maximum penalty is an important feature as it will have an influence on the duration of the criminal record in France, Germany, and Switzerland, whereas in the UK the penalty depends on the conviction or the age of the defendant, which can affect the social movement mode of action.[175]

We saw above that an action such as occupation and roadblock is not always charged with the same type of offence, which can be an indication of the discretionary power of the prosecutor. It can lead to a lack of options in planning a defence before the arrest and therefore restrict judicial opportunities. The qualification of the offence charged by the prosecutor can sometimes be a point of contention. A concrete example of the discretionary power in such cases is that in the UK, if the damage exceeds £5,000, defendants can elect to be heard by a jury. This has led to situations in which activists would claim to have caused a higher level damage in terms of monetary value than the offence with which the prosecutor would otherwise have charged them.[176]

[175] For France, see Art. 769 of the French Criminal Procedural Code; for Switzerland, Art. 30 of the Swiss Law on Criminal Records; for Germany, Art. 46 of the German Law on Criminal Record.

[176] Doherty & Hayes, n. 19 above, p. 14.

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Furthermore, as developed in the next subsection, the charges can also restrict the availability of a defence, although there was no evidence of this pattern in our case selection.

5.2. Types of Defence

I regrouped the different defences into four categories: fundamental rights, lawful excuse, defence of necessity, and others. I will here discuss the various defences in terms of their efficiency and aim. Lawful excuse in the UK is linked to specific statutes, such as section 5(2b) of the Criminal Damage Act 1971,[177] which enables activists to develop their defence to justify their actions.[178] In contrast, the use of a public nuisance charge[179] for disruptive 'blockade'-style protests effectively deprives defendants of recourse to either lawful excuse or the defence of necessity, leaving them with little opportunity to present a legal defence to justify their action and explain their motives before the court.[180]

In the UK, one reason to explain this choice is that lawful excuse defences have a far wider scope, and include human rights-based defences. In addition, this distinction is important in the context of climate activism, as judges have consistently ruled out the necessity defence, which is the most used defence in our sample. The Court of Appeal has now systematically made it unavailable in all protest cases in the UK.[181] Similarly, in France and Switzerland, the necessity defence is not available for climate activists. Indeed, in the *Take Down Macron Protester Case* and *Credit Suisse Protesters Trial*,[182] the relevant Supreme Courts excluded the use of the necessity defence in the context of climate protest, which shows a restriction of judicial opportunities, in terms of defence, for reactive litigation in the four jurisdictions.

The highest acquittal rate occurred with the use of a fundamental rights-based defence, such as freedom of assembly or expression protected by domestic constitutions as well as the ECHR; as mentioned above, this type of defence is often drawn from lawful excuse in the UK. These defences are relatively successful in that they led to three acquittals[183] and, in two cases, the reduction of a prison sentence.[184] This is an interesting defence for protecting the fundamental right to protest, precisely because it is often restricted. As Demay argues, it is legal argumentation with clear and established criteria, which can make it easier for a judge to apply in cases related to protest action.[185]

[177] Criminal Damage Act 1971, n. 107 above.
[178] *The Kingsnorth Six Trial*, n. 105 above., *R* v. *Bramwell and Others*, n. 146 above; *DPP* v. *Angela Ditchfield*, n. 133 above.
[179] *R* v. *Roberts and Others*, n. 125 above, *R*. v. *Brown and Others*, n. 139 above.
[180] Cammiss, Doherty & Hayes, n. 10 above; Cammiss, Hayes & Doherty, n. 10 above; Cammiss & Hayes, n. 10 above.
[181] Ibid.
[182] *Take Down Macron Protester*, n. 82 above; *Credit Suisse Protesters Trial*, n. 95 above.
[183] *ADP Group (Paris Airports)* v. *Climate Activists*, n. 76 above; District Court Mönchengladbach-Rheydt, n. 90 above; *R* v. *McKelvey and Others*, n. 153 above.
[184] *R* v. *Roberts*, n. 125 above; *R* v. *Brown and Others*, n. 139 above.
[185] Demay, n. 89 above.

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Table 4. Type of Defence and Outcomes

Type of defence	Acquittal	Conviction
Fundamental rights	8	5
Lawful excuse	7	1
Necessity defence	12	36
Other	3	7
Total	30	49

Finally, some defences called upon experts to testify in court. Out of our 13 cases, I found that expert testimony was mobilized in only three cases,[186] notably because judges sometimes argued that the court was not a political forum and, therefore, testimony linked to climate change should not be presented to the court. The presence of experts has been recognized generally as significant in environmental and climate activist trials, as well as in all climate-related litigation. It plays an important role in the communication of the grievance, as well as disseminating the available science relating to the contested issue to the judge, jury, and wider public.[187]

5.3 Outcomes of the Procedures and Composition of the Court

In the 13 cases analysed, 79 defendants were prosecuted, with 30 acquittals and 49 convictions. This means that there is a 62% conviction rate in the criminal proceedings of the case sample (Table 4).

Regarding the type and the level of conviction of the 49 activists, most received a suspended fine (20 individuals), 11 received an immediate fine or financial penalty, 13 received a suspended prison sentence, and four had an immediate prison sentence imposed. Only four defendants were convicted with an immediate prison sentence of four months. Three defendants were released by the higher court on conditional discharge after three weeks in prison. Fines ranged from €250 to €500, and most suspended prison sentences were for a maximum of 12 months; 13 activists were also sentenced to 120 to 180 hours of unpaid work.

Finally, the analysis found that the composition of the court can play a vital role in the verdict, at least in the UK. Differentiating the acquittals handed down by a jury and a judge is interesting in addressing the receptiveness of judges or juries to the arguments presented before them.[188] In respect of jury trial, Barkan highlights that a hung jury or an acquittal will often as a consequence have strong and positive media

[186] *Bordeaux-Mérignac Airport* v. *Climate Activists*, n. 68 above; *Take Down Macron Protester*, n. 82 above; *Credit Suisse Protesters Trial*, n. 95 above; *The Kingsnorth Six Trial*, n. 105 above.

[187] G. Hayes, 'Negotiating Proximity: Expert Testimony and Collective Memory in the Trials of Environmental Activists in France and the United Kingdom' (2013) 35(3) *Law and Policy*, pp. 208–35, at 209–10.

[188] Doherty & Hayes, n. 19 above.

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coverage of the activists.[189] This, in turn, will also galvanize the members of the movements and can contribute to an increase in their financial and operational resources.[190] Furthermore, it has been highlighted that 'because of the unpredictability of juries, the authorities have often been keen to keep cases away from the Crown courts wherever possible'.[191] This is confirmed in the UK context as Hayes highlights that juries tend to be more sympathetic to defendants and may be more willing to deviate from strict legal interpretations, ultimately of benefit to activist defendants.[192]

6. Conclusion

The present study was designed to give an overview of 13 climate reactive litigation cases, involving 79 defendants across four European jurisdictions (France, Germany, Switzerland, the UK). The cases were cross-analyzed to determine the trends that can be established between them. Through the analytical lens of reactive litigation and judicial opportunity, the discovered trends reveal both how states respond to climate activism through the criminal justice system and how activists react to their prosecution.

Reactive climate litigation provided useful frameworks to analyze the phenomenon of the prosecution of protest actions and dissent across the four jurisdictions. Ultimately, the study offers insights into the conceptualization of reactive litigation and the types of action that are predominantly criminalized. It also further highlights the relevance of judicial opportunity to reveal how the criminal justice system (i.e., the selection of charges, defences, and court composition) creates varying opportunities and constraints for defendants. Future research might refine the typology with a broader sample of cases.

The research undertaken in this article has led to several findings. Firstly, the analysis demonstrates that most prosecutions can be categorized as anticipated and desired reactive litigation, where activists deliberately engage in actions that are likely to result in arrest and prosecution as a strategic tool for advancing their cause. These findings can be paralleled with the findings regarding proactive litigation, where the number of strategic cases is growing by the year. This means that defendants consistently transformed their courtroom appearances into opportunities to articulate their motivation and educate both judicial actors and the broader public on the urgency of the climate crisis. Secondly, in terms of the type of action, the predominant forms of protest that were criminalized include occupation, roadblock, spray-painting of buildings, and theft.

Thirdly, the use of the concept of judicial opportunity revealed several trends. To begin with, prosecutorial practices in terms of charge selection reveal a trend in the restriction of judicial opportunities for activists in the UK. Prosecutors increasingly select

[189] Barkan (2006) n. 10 above, p. 190.
[190] S.E. Barkan, 'Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation' (1980) 58(3) *Social Forces*, pp. 944–61, at 950.
[191] Hilson (2009), n. 26 above, pp. 100–1.
[192] Hayes, n. 187 above, p. 216.

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charges that limit available defences, where public nuisance charges (which have no possibility of mobilizing the lawful excuse defence) are preferred over charges relating to property damage. Furthermore, charges were sometimes considered to be too severe in relation to the defendant's action. This trend suggests a reduced tolerance of protest and dissent in the public space and can be seen as a broader restriction of the right to protest. Future research on this question with a larger case sample could focus on this question to explore whether a similar trend in fact exists in each jurisdiction. It could also be beneficial to bring a deeper analysis of different national contexts to gain a more comprehensive understanding of the phenomenon, both as a tool of repression for the state, as well as a tool used voluntarily by social movements to express their cause.

Defence strategies show that fundamental rights-based arguments (freedom of assembly and expression) achieve the highest success rates for acquittal, while the defence of necessity has been systematically excluded by the Supreme Court in France, Switzerland, and the UK. The limited use of expert testimony also indicates judicial reluctance to engage with climate science in criminal proceedings. In addition, jury trials in the UK demonstrate greater receptivity to the activist arguments compared with judge-only proceedings, suggesting that court composition significantly influences case outcomes. Indeed, in the UK, acquittals were more likely when cases reached jury trial compared with magistrates or judge-only proceedings. Fourthly, with regard to the conviction rate, 38% of the cases ended in an acquittal. With this number, it seems that the criminal process itself could also be seen as a punitive measure, as it is often lengthy and the activists are unaware of the outcome of the case in advance.

To conclude, even though the scope of this study is limited in terms of sample size, this article provides the conceptualization of reactive litigation as a valuable conceptual framework for a better understanding of the criminal prosecution of protest action and dissent. In addition, the systematic content analysis approach of the study provides a replicable methodology for comparative analysis of prosecutions for protest, opening several avenues for future inquiry, which could produce interesting findings that account for more cases and create an in-depth analysis of the dynamics present in the criminal system.

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