



Obergericht Zürich, 13.4.2023

© Morpork

17.5.2023

Civil disobedience and climate trials in Switzerland

What are they fighting for in the Swiss courts?

Jevgeniy Bluwstein, Clémence Demay, Lucie Benoit

Civil disobedience and climate trials in Switzerland - What are they fighting for in the Swiss courts?

Jevgeniy Bluwstein, Clémence Demay und Lucie Benoit

► **Dr. Jevgeniy Bluwstein** is a Senior Researcher at the Institute for Social Anthropology, University of Bern, where he leads the SNSF-funded project ► “Juridification of climate politics in the name of climate emergency: the case of climate activism and litigation in Switzerland”.

► **Dr lic. Iur. Clémence Demay** is a trainee lawyer and legal scholar. Clémence completed her doctoral thesis on civil disobedience at the Faculty of Law, University of Lausanne in 2022. Her thesis was also published in 2022 with Schulthess: “Le droit face à la désobéissance civile: quelle catégorisation pour un objet juridique non identifié?”

► **Lucie Benoit** is a PhD student at the Institute for Social Anthropology, University of Bern, where she writes her doctorate within the scope of the SNFS-funded project ► “Juridification of climate politics in the name of climate emergency: the case of climate activism and litigation in Switzerland”.

Contact: jevgeniy.bluwstein@unibe.ch

clemence.demay.reb@gmail.com

lucie.benoit@unibe.ch

URL: www.humanrights.ch/de/ipf/menschenrechte/klima/

Publisher: ► humanrights.ch

Editing: ► humanrights.ch

To cite: Bluwstein, J., Demay, C., Benoit, L (2023). *Civil disobedience and climate trials in Switzerland - What are they fighting for in the Swiss courts?* humanrights.ch. Online at www.humanrights.ch/de/ipf/menschenrechte/klima/

Bern, 17.05.2023

This report has benefitted from the financial support of the Swiss National Science Foundation (SNSF-Project Nr. 208679)

This version is based on a translation of the German report. A french translation is also available at the address provided above.

Climate actions in Switzerland since 2018 that have led to court cases (as far as known)

Date of action	Canton	Name and place of action	Type of action	Action organizers	Charges by the prosecution
2018.9.18	GE	Geneva: Hambli Soli-Demo	Demonstration	Breakfree	3, 10 LMDPu GE
2018.10.13	GE	Geneva: Credit Suisse "red hands"	Demonstration	Breakfree	144 CC
2018.11.22	VD	Lausanne: Credit Suisse "Tennis"	Occupation of a bank	Lausanne Action Climat	186, 286 StGB; 25 Lcontr VD (18, 29, 41 RGP VD)
2019.3.15	GE	Geneva: Promenade de la Treille	Demonstration/occupation of a street	XR, Climatestrike	10 LMDPu GE
2019.3.15	VD	Lausanne: Retraites Populaires	Occupation of a pension fund	XR, Climatestrike	286 CC; 25 Lcontr VD (26, 41 RGP VD)
2019.3.15	ZH	Zürich: Credit Suisse	Demonstration	Bewegung für den Sozialismus	286 CC
2019.7.8	BS	Basel: UBS	Occupation of a bank	Collective Climate Justice (CCJ) et al	144, 181, 186, 260, 286 CC; 16 ÜStG BS
2019.7.8	ZH	Zürich: Credit Suisse	Occupation of a bank	Collective Climate Justice (CCJ) et al	181, 186 CC
2019.9.20/9.27/12.14	VD	Lausanne: "Procès des 200"	Demonstration/occupation of a street	XR	239, 286 CC; 90 SVG (26, 49 SVG, 46 VRV), 25 Lcontr VD (26, 41 RGP VD)
2019.9.21	GE	Genf: "Tourisme du pire"	Occupation of a bank	Breakfree, Climatestrike	6 LMDPu GE
2019.9.25	GE	Genf: Credit Suisse	Occupation of a bank	Breakfree, Climatestrike	6, 10 LMDPu GE
2019.11.29	FR	Fribourg: "Block Friday"	Demonstration/blockade of a shopping mall entry	XR, Climatestrike	181 CC; 19, 60 LDP FR; 11, 12 LACP FR
2020.1.14	VD	Lausanne: UBS	Occupation of a bank	XR	144, 186 CC; 25 Lcontr VD (26, 41 RGP VD)
2020.3.5	NE	Neuchâtel: Rue Coulon	Demonstration/occupation of a street	XR	90 SVG (49 SVG, 46 VRV); 39, 85 RGP VD
2020.5.19-6.23	VD	Lausanne: "Ville Vivante"	Demonstration/occupation of a street	XR	239 CC; 90 SVG (26, 49 SVG); 25 Lcontr VD (41 RPG VD); Ord 2 Covid-19 (10, 6)
2020.6.20	ZH	Zürich: "No Going Back", Quaibrücke	Demonstration/occupation of a bridge	XR	181, 239 CC
2020.8.15	BE	Biel: H&M	Occupation of a store branch	XR	292 CC
2020.9.21	BE	Bern: "Rise Up For Change"	Demonstration/occupation of a public square	Climatestrike, XR, CCJ, Breakfree	286, 292 CC
2020.10.17	VD	ZAD "de la Colline"	Occupation of an opencast mine	ZAD	186, 286, 292 CC
2021.5.8	JU, GE, VD	several cities: "Rebellion Of One"	Demonstration/occupation of a street	XR	JU: 237 CC GE: 90 SVG (49 SVG, 46 VRV); 10 LMDPu GR VD: 181, 237, 239, 286 StGB; 90 SVG (49 SVG, 46 VRV); 25 Lcontr VD (29, 41, 82 RGP VD)
2021.8.2	ZH	Zürich: "Rise Up For Change"	Demonstration/blockade	Climatestrike, XR, CCJ, Breakfree	181 CC
2021.8.18/9.8	JU, VD	several cities: "IPCC"	IPCC report glued to buildings	XR	JU: 144 CC VD: 144 CC
2021.9.13	BE	Bern: Bundesplatz	Demonstration/occupation of a public square	XR	292 CC, 90 SVG (46 VRV)
2021.10.3-8	ZH	Zürich: "Rebellion against extinction", Uraniastrasse	Demonstration/occupation of a street	XR	181 CC
2021.10.22	GE	Genf: Place des Nations	Demonstration	Breakfree	37 LExpl, 52.6 OExpl GE; 7, 8, 12, 41, 43 RaLEopl GE; 11 LPG; 6 RSTP GE
2022.10.8	ZH	Zürich: "Renovate"	Blockade of a road	Renovate	181, 239 CC

1. Introduction: civil disobedience and climate trials in Switzerland

While Switzerland is looking expectantly to Strasbourg, where a judgment is due in the first climate lawsuit against Switzerland before the European Court of Human Rights (ECtHR) (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 53600/20, hearing held on March 29th, 2023), a large number of climate trials have already been taking place before Swiss courts for several years now. In these trials it is not the state but the climate activists themselves who are on trial. In contrast to the strategic climate lawsuit brought against the state by the association KlimaSeniorinnen (with the support of Greenpeace Switzerland), far more than 100 climate trials from at least 30 actions have been brought to the courts, involving allegations of breaking the law through various forms of non-violent protest and civil disobedience. The repertoire of different forms of action includes occupations and/or blockades of streets and public places, investment banks and pension funds, oil depots and refineries, shopping centers and shops, forests and opencast mines. Some of the legal procedures against the activists resulting from these actions are just beginning, while others are pending, have already been heard or decided by the Swiss Federal Supreme Court (BG/TF). What is more, in one of these procedures – the tennis action of the group *Lausanne Action Climate (LAC)* in a Credit Suisse bank branch in Lausanne an application has been submitted to the ECtHR in 2021, and it is expected that other activists will follow suit.

This report gives an overview of the status, the diversity and, where possible, the outcome of criminal proceedings in Swiss climate trials. Our focus is on climate-related actions since 2018¹. With the formation of Fridays For Future (known in Switzerland as Climatestrike) and Extinction Rebellion (XR), the period around late 2018-early 2019 can be seen as a starting and turning point for the Swiss (and global) climate movement. More actively than in the past, the movement is seeking media attention and has made this attention to one of its main goals, not only during actions, but also in the courts. At the same time, climate activists can use the courts to question the law.



¹Actions of civil disobedience often have an intersectional character and are not “just” limited to the climate crisis. Due to space limitations, this report is limited to actions and resulting court cases that have been launched explicitly in the name of the climate crisis since 2018.

2. Chronology of most known climate actions and trials from 2018 to date

2018

On November 22nd 2018, the bank branches of **Credit Suisse** in **Geneva, Basel and Lausanne** were occupied at the same time. Thus far, only the action of the group *Lausanne Action Climate (LAC)* in **Lausanne** has led to a trial. A surprising acquittal in the first instance (Tpol VD **PE19. 000742**, 13.1.2020) on the grounds of a “legitimate act in a situation of necessity” (Art. 17 CC) was overturned by the court of second instance, which found the 12 defendants guilty of “unlawful entry” (Art. 186 CC), “prevention of an official act” (Art. 286 CC), and violations of the cantonal police law (TC VD **PE19.000742**, 22.9.2020). The Federal Supreme Court upheld this second instance judgment for the defendants, with the exception of the guilty verdict under Art. 286 CC, which was overturned on procedural grounds. In a leading judgment that has since been frequently cited (► BG/TF **6B_1295/2020**, 26.5.2021), the Federal Supreme Court held that conditions for a state of necessity under Art. 17 CC were not met. To the judges, there was no short-term, immediate danger which could not have been averted in any other way. Moreover, no individual legal interests were affected. The court also found that the defendants could not rely on freedom of expression and assembly under Arts. 10 and 11 of the ECHR (European Convention on Human Rights), because the (unauthorized) assembly took place in the private space of a bank branch. Lausanne Action Climate filed an application before the ECtHR in November 2021. The case is still pending in **Geneva**, and no charges have been brought against the activists in **Basel**.

In September 2018, an unauthorised **demonstration in solidarity with the Hambach Forest** took place in front of the German embassy in **Geneva**. The protestors were fined, which was confirmed by the first and second instance courts, with the fines having become final (TC GE **AARP/325/2021**, 13.10.2021). Another action in Geneva in October 2018 as part of a Climatestrike demonstration led to criminal proceedings against an activist from Collectif Breakfree, who left **red-colored handprints** on the facade of a **Credit Suisse** branch in Geneva. The second instance overturned the conviction by the first instance under Article 144 of the Criminal Code (criminal damage to property). Similar to the LAC trial before the Cantonal Court in Lausanne, the Geneva Cantonal Court judges found that the Breakfree defendant had acted in a putative state of necessity under Article 13 or in a state of necessity under Article 17 of the Criminal Code. The Federal Supreme Court overturned this verdict (► BG/TF **6B_1298/2020** & **6B_1310/2020**, 28.9.2021), denying the state of necessity and considering the alleged “vandalism” to be outside of the protective scope of freedom of expression and assembly. In a new verdict in the second instance, the defendant was convicted of property damage under Article 144 CC (TC GE **AARP/77/2022**, 31.3.2022). The prosecution appealed against this decision, taking issue with the court’s justification to reduce the sentence to a small fine due to a “honorable motive” of the activist. The Federal Supreme Court accepted the appeal by the prosecution and returned the case back to the Cantonal Court for a new sentence (► BG/TF **6B_620/2022**, 30.3.2023). To the Federal judges, there can be no politically motivated justifications to commit acts of property damage, however honorable the motivations may be.

2019

Several actions led to arrests in **Lausanne, Geneva and Zürich** as part of authorized demonstrations for the global Climate Strike of March 15, 2019. In **Geneva**, several people were kettled by the police during a sit-in on the **Promenade de la Treille** and later charged with violations of cantonal law (participating in an unauthorized assembly, refusing to obey an official order). In the meantime, all 11 defendants have been acquitted by all three instances (►BG/TF **6B_246/2022**, 12.12.2022) on the basis of the ECHR case law on freedom of assembly (Art. 11 ECHR). In **Zürich**, two people were arrested while trying to enter a **Credit Suisse** branch, charged with obstructing an official act (Art. 286 CC), and acquitted in the first instance (BzG ZH **GG190252**, 22.6.2020). The chief public prosecutor withdrew his appeal (OG ZH **SB200361**, 23.9.2021). In **Lausanne**, around 50 people occupied the lobby of the **Retraites Populaires pension fund** to draw attention to the fund's investment policy in fossil fuels. After convictions of several activists for obstruction of an official act (Art. 286 CC) in the first two instances (Tpol VD **PE19.007671**, 24.11.2021; judgment of the cantonal court not yet available), an appeal to the Federal Supreme Court has been lodged. In the case of the only minor, the Federal Supreme Court has already confirmed the guilty verdict of the lower instances (also Art. 286 CC, and violations of the cantonal police law; TC VD **PM19.007667**, 28.9.2020; ►BG/TF **6B_145/2021**, 3.1.2022).

In addition to the *Climatestrike* demonstrations, the founding of the Swiss section of *Extinction Rebellion* in spring 2019 led to several actions in **Lausanne**. While the first two unauthorized blockades of Lausanne's city bridges on April 15th and 18th (with more than 200 participants each) had no legal consequences, the three unauthorized but announced demonstrations on September 20th and 27th (both as part of the global Climate Strike) and December 14th led to the so-called ►**Procès des 200** (*The trial of the 200*). In the wake of these 3 actions more than 300 people were arrested (including some who took part in several demonstrations and were arrested multiple times) and almost 200 of them received summary penalty orders (disruption of public transport services and prevention of an official act under Art. 239 and 286 CC, violation of the road traffic law under Art. 90 SVG and the traffic regulation ordinance, participation in unauthorized demonstrations under cantonal law). Approximately 150 people are currently being prosecuted in around 40 separate proceedings. Of these, about 20 proceedings have already been heard before the second instance. In the first instance, with the exception of one group (acquittal of 5 individuals for lack of evidence, Tpol VD **PE19.024262**, 20.01.2022), all other groups were convicted in accordance with the indictment (with some individuals acquitted for violations of the road traffic act and the traffic rules ordinance). In the second instance there were only two acquittals. These two criminal proceedings related to the December 14th action, in which the police removed protestors from the street after only a few minutes. The court found that this intervention by the police was too quick, and thus interfered with protestors' right to freedom of expression (TC VD **PE19.025171**, 17.11.2022; **PE19.025172**, 28.9.2022). A first judgment of the Federal Supreme Court has already confirmed a guilty verdict of the second instance (►BG/TF **6B_1061/2022**, 9.5.2022). Another judgment was referred back to the second instance because of unclear facts (and thus a violation of the "principle of substantive truth" under Art. 6 CPC; ►BG/TF **6B_655/2022**, 31.8.2022). Two judgments were also referred to the second instance, because the cantonal court had unlawfully conducted a written procedure only (►BG/TF **6B_370/2022**, 16.8.2022; ►BG/TF

6B_752/2022 & **6B_761/2022**, 21.7.2022). Several other cases are pending before the Federal Supreme Court. The activists are planning to go to the ECtHR in Strasbourg.

On July 8th 2019, *Collective Climate Justice* organized two occupations of bank branches in **Basel** and **Zürich**. The participants in the occupation of a **UBS** branch in Basel were acquitted in the first instance of the charges of rioting (Art. 260 CC, withdrawn by the public prosecutor), serious damage to property, coercion, unlawful entry, and obstruction of an official act (Arts. 181, 186, 286 CC). The public prosecutor did not appeal against the acquittal (SG BS **ES.2020.267**, 22.01.2021). Unlike in Basel, the participants in the occupation of a **Credit Suisse** branch in Zürich were convicted of coercion and unlawful entry (Arts. 181 and 186 CC) in the first two instances (OG ZH **SB210390**, 18.11.2022). The activists appealed to the Federal Supreme Court.

In September 2019, *Breakfree* and *Climatestrike* organized another action in **Geneva** in front of a branch of **Credit Suisse**. The Cantonal Court acquitted the defendants of the charges of disguise and participation in an unauthorized demonstration, based on the right to freedom of assembly under Art. 11 of the ECHR. The verdict is final (TC GE **AARP/410/2021**, 17.12.2021).

To date, the only case which has been heard in the canton of Fribourg was over a November 2019 action where *XR* activists blocked one of several entrances to the **Fribourg Shopping Center (“Block Friday”)**. The Cantonal Court allowed the appeal against the first instance conviction, and acquitted the defendants of the charges of coercion (Art. 181 CC, brought against those who chained themselves to shopping trolleys) and participation in an unauthorized demonstration (TC FR **501 2021 89 & 501 2021 90**, 30.11.2022). Here, the judges explicitly invoked the right to freedom of assembly and freedom of expression under Articles 11 and 10 of the ECHR. A final decision is yet to be handed down for those activists who chained themselves after the public prosecutor appealed to the Federal Supreme Court, maintaining the charge of coercion.

2020

In January 2020, a little more than 20 people demonstrated for about 2 hours against fossil fuel investments in a bank branch of **UBS in Lausanne**. In the trial against 7 people, the defendants were acquitted in the first and second instance of property damage and unlawful entry (Arts. 144 and 186 CC), but convicted for violating the police regulations of the city of Lausanne (participation in an unauthorized demonstration, TC VD **PE21.008856**, 22.11.2022). The Cantonal Court rejected the public prosecutor’s appeal against the acquittal on procedural grounds as the appeal lodged by the injured party (UBS) was formally incorrect.

During a street occupation in **Neuchâtel** in March 2020, several people were charged with taking part in an unauthorized demonstration and with violating the road traffic act and the traffic regulations ordinance. All were found guilty in the first and second instance (TC NE **CPEN.2021.62**, 30.6.2022).

In the summer of 2020, several *XR* actions in **Lausanne** (under the slogan “**Ville Vivante**”) took to the streets together with the *Critical Mass* movement to protest for more sustainable environmental policies in the city. Here, two people were prosecuted after having been identified through police media records *after* having participated in an unauthorized rally. Both individuals received a summary penalty

order for disrupting public transport services (Art. 239 CC). The Cantonal Court overturned their conviction in the District Court of first instance. The verdict is final (TC VD **PE21.008901**, 19.1.2023).

In June 2020, XR organized an unauthorized - but publicly announced - large demonstration in **Zürich** under the slogan "**No Going Back**". After about 20 minutes, the police issued a warning to all participants occupying the **Quaibrücke** to leave the bridge. After 40 minutes the remaining approximately 250 people were kettled and systematically arrested. The public prosecutor's office has issued summary penalty orders for coercion (Art. 181 CC) and disruption of public transport (Art. 239 CC). So far, out of a total of 13 proceedings brought against individuals who filed a rejection of the summary penalty order, there have been 3 acquittals in the first instance, which the public prosecutor has in turn appealed. Two of these acquittals in particular (BzG ZH **GB220099**, 30.8.2022; **GB220026**, 31.8.2022) have raised a lot of attention because District Judge Harris explicitly referred to the case law of the ECtHR and the freedoms of expression and assembly under Arts. 10 and 11 of the ECHR. What is more, Judge Harris announced to judge all future defendants in related climate cases on the basis of these ECHR freedoms. The chief prosecutor then filed a request for recusal of the judge, which was granted by the Cantonal Court (OG ZH **UA220042**, **UA220043**, 14.11.2022). Two activists who were affected by this recusal appealed against this decision by the Cantonal Court to the Federal Supreme Court. The Federal Supreme Court accepted the appeal of both activists, insofar as it revoked the decision of the Cantonal Court not to grant the accused party status in the recusal proceedings (►BG/TF **1B_10/2023**, 6.4.2023; ►BG/TF **1B_14/2023**, 6.4.2023). The Cantonal Court has thus to review its decision to recuse Judge Harris. Meanwhile, the Cantonal Court accepted the prosecution's appeals and overturned both of Judge Harris' acquittals (OG ZH **SB220594**, 11.4.2023; **SB220583**, 13.4.2023).

In August 2020, several people demonstrated in an **H&M store in Biel**, some of them chaining themselves to each other and to the pillars of the building inside the store. The Bern Jura-Seeland regional court acquitted all of them of the charge of contempt of official orders (Art. 292 CC). The verdict was not contested by the public prosecutor and is final (RG BE **PEN 21 759**, 17.11.2022).

In September 2020, several hundred people occupied the **Bundesplatz in Bern** as part of the **Rise Up For Change** action days. After two days, the police evacuated the remaining approximately 200 people, of whom approximately 90 were arrested for several hours. In a first ("pilot") trial (RG BE **PEN 21 1011**, 12.12.2022), one person was convicted in the first instance under Art. 286 and 292 CC (prevention of an official act, contempt of official orders). The verdict (and the "pilot" nature of the trial, see below) was appealed by the defendant's lawyer. Several of the 15-18 defendants are ready to take their cases to the ECtHR in Strasbourg.

In October 2020, activists organized the first ZAD (*Zone à Défendre*) in Switzerland (**ZAD de la Col-line du Mormont**) in the canton of Vaud. Several hundred people occupied a **Holcim** opencast mine. At the end of March 2021, the police evacuated all ZADists and arrested around 145 people. Of these, around 50 were allowed to leave the zone without identity checks and about 25 people could leave after identity checks. Around 70 people were arrested after having refused to reveal their identities. Approximately 70 people were finally sentenced to *unconditional* prison terms of two to three months for unlawful entry, prevention of an official act, and contempt of official orders (Arts. 186, 286, 292 CC). In the trials of the activists whose identities were known to the authorities all were acquitted in the first

instance of the charge of unlawful entry (the prosecution maintained the charge despite Holcim's withdrawal of the complaint). Most were also acquitted of the charge of contempt of official orders. Several people were convicted of preventing an official act. The public prosecutor's office has appealed against several acquittals and the Cantonal Court has already overturned some of them (e.g. TC VD **PE21.005961**, 25.01.2023; **PE21.013594**, 21.06.2022). At least one appeal against an acquittal was withdrawn by the public prosecutor (TC VD **PE21.005985**, 26.10.2022).

2021

On the same day in May 2021, *XR* organized several **Rebellion Of One** street occupations by individuals in different cities. Summary penalty orders were issued in several cantons. In **Geneva**, for example, a defendant was acquitted in the first instance of the charge of violating the road traffic act and the traffic regulations ordinance and of participating in an unauthorized protest (Tpol GE **P/17385/2020**, 3.6.2022, judgement is final). In **Jura**, one person was also acquitted in the first instance of the charge of disrupting public traffic under Art. 237 CC (Tribunal de première instance JU **TPI 171/2021**, 14.3.2023). In the canton of **Vaud**, however, two people were found guilty in separate trials at first instance of violating the road traffic act, the traffic regulation ordinance and participating in an unauthorized protest (Tpol VD **PE21.015676**, 9.3.2022; **PE22.001438**, 5.9.2022). The court dismissed the charge of coercion (Art. 181 CC) in one of the trials.

Another large-scale demonstration took place in **Zürich** in May 2021 (**Rise Up For Change 2021**) in front of the branches of **UBS** and **Credit Suisse**. Despite many arrests and summary penalty orders (approx. 80 people affected), there were no court trials, as the accused either accepted their penalty orders or their cases were transferred to other cantons and are still pending.

In August 2021, *XR* activists glued excerpts of the latest **IPCC** report to the facades of public buildings in several cities, using water and flour. Unlike in **Bern** where the activists were fined, several people were sentenced in **Lausanne** in the first instance to 60 daily penalty units for damage to property under Article 144 of the CC (Tpol VD **PE21.014535**, 29.9.2022). The case against the activists was dropped after the plaintiff (Direction générale des immeubles & patrimoine) withdrew the complaint in exchange for reimbursement of the cleaning costs.

In September 2021, *XR* organized an action on the **Bundesplatz in Bern**, where several people occupied a pedestrian crossing by gluing their hands to a table. The regional court sentenced one of the defendants (all others accepted the summary penalty order) to a fine for contempt of official orders (Art. 292 CC) and for violating the Road Traffic Act (RG BE **PEN 22 704**, 9.3.2023).

The two "warm-up" actions of *XR* in August (IPCC report on building facades) and September (drinking coffee on the Bundesplatz while occupying a road) culminated in the week of "rebellion against extinction" ("**Rebellion gegen das Aussterben**", **RGA**) in the center of **Zürich** in early October 2021. **About** 180 individuals were arrested, some for up to two days. Similar to the **Quaibrücke** action ("No Going Back") in 2020, the public prosecutor's office has charged all those arrested with coercion (Art. 181 CC). There have now been 20 RGA trials, including 6 trials in which individual defendants were charged for their participation in both the Quaibrücke and RGA actions. In 8 out of 20 RGA trials, the

defendants were acquitted in the first instance, either because of the very short duration of the disruption of traffic (a few minutes of sitting on the street) or because of lack of evidence. Only in one case there was an acquittal of the charge of coercion (Art. 181 CC) where it was established by the court that the defendant had occupied the street for more than an hour. This exceptional case was decided by a court in Bern, where the defendant was also facing charges in connection with the action on the Bundesplatz in September 2021 (RG BE **PEN 22 704**, 9.3.2023, the public prosecutor's office has appealed). Several proceedings of the Quaibrücke and RGA actions are now pending before the second instance and the Federal Supreme Court. A group of defendants plans to take their cases to the ECtHR in Strasbourg.

Also in October 2021, three *Breakfree* activists received a large fine (2300 CHF) for using emergency flares without permission and for polluting public space in the context of an authorized demonstration at the **Place des Nations in Geneva**. The court of first instance reduced the fine to CHF 200 and convicted the activists for the unauthorized use of fireworks (Tpol GE **P/1432/2022**, 9.12.2022). The sentence is final.

2022

In 2022 there were two blockades of petroleum facilities in Switzerland – a May action in the canton of **Zürich** at a **petroleum storage facility** and an October action in the canton of **Neuchâtel** at a **petroleum refinery**. In both cases summary penalty orders have already been issued for (amongst other charges) coercion. The cases have not yet gone to trial.

One of the many *Renovate* roadblocks across Switzerland (October 2022 action in Zürich) has already been heard before a **Zürich** district court. In this first *Renovate* court case in Switzerland, one person was convicted of coercion (Art. 181 CC) and disruption of public transport (Art. 239 CC) (BzG ZH **GB230004**, 27.2.2023). In the meantime, further summary penalty orders have been issued against *Renovate* participants for actions in Lausanne and Bern.

3. Police, prosecution and judicial measures during protest actions and criminal proceedings

Court trials in Swiss courts represent the end of a long chain of police, prosecution and judicial measures that climate activists face in the context of protest actions and criminal proceedings. In this section, we summarize the most important of these measures based on the actions that we presented in the last section.

Particularly during large actions in Lausanne, Bern or Zürich, the police repeatedly kettled the demonstrators in order to arrest anyone who remained on the scene and ignored police warnings. In the context of peaceful assemblies, this controversial police tactic has been condemned by the ► **Venice Commission of the Council of Europe** and the **United Nations Special Rapporteur on Human Rights** (freedom of assembly and association), Clément Nyaletsossi Voule (► UN **A/HCR/47/24**, 12.5.2021). Here, it does not matter if the assemblies have been authorized or not, as long as protests remain peaceful. **Kettling** results in the arrest of everyone involved, regardless of what the individual has done and

can extend the duration of an unauthorized assembly for several hours. This prolongation of the duration of an unauthorized action by the police can be used by the prosecution and the courts against the accused if the duration of the disruption is relevant in assessing its intensity.

After being **arrested**, individuals are sometimes subjected to **full body searches**, regardless of the type of action. Individuals subjected to strip searches find them humiliating, degrading, intimidating, unjustified and disproportionate. Considering a particular case of a full body search during the evacuation of the *ZAD de la Colline*, the Cantonal Court of Vaud in Lausanne made a decision on the police practice of systematic strip searches (TC VD **PE21.012544**, 14.3.2022). The court held that the arrested person neither posed a risk nor were they in danger, that they acted non-violently and had already been identified. The full body search thus violated their fundamental rights (see Art. 36 FC, Arts. 3 and 8 ECHR).

Once arrested, suspects often spend several hours at the police station, sometimes up to 48 hours. Arrest is usually justified on the grounds of identification and questioning by the prosecutor. However, the prosecutor often fails to appear for questioning, giving the impression of "arrest as harassment". At the police station, people are often pressured to accept **identification measures** (e.g. fingerprints) and sometimes to provide a **DNA sample** (Art. 255, Art. 260, CPC). Arrested persons may refuse both, although identification measures and DNA samples may be ordered and enforced by means of coercive measures, including the use of force if necessary (Art. 113, Art. 200, CPC). In the context of the UBS action in Basel, the Federal Supreme Court questioned the legality of the ordered identification and DNA sampling at peaceful assemblies and emphasized the protection of freedom of expression and assembly (► BG/TF **1B_286/2020** & **1B_294/2020**, ► BG/TF **1B_287/2020** & **1B_293/2020**, ► BG/TF **1B_285/2020**, 22.4.2021). The Cantonal Court of Vaud in Lausanne accepted complaints against identification measures taken after the eviction of the *ZAD de la Colline* against activists whose identity was known to the authorities (TC VD **PE21.005979**, 10.9.2021; **PE21.005989**, 14.12.2021), and rejected complaints for "unknown" persons (TC VD **PE21.005969**, 17.9.2021; **PE21.005993**, 2.9.2021).

The prosecution tends to issue identical and generally formulated **summary penalty orders** in the context of large actions. In such cases, individual defendants are often not accused of any specific facts, other than having participated in an unauthorized protest. Such penalty orders may thus violate the "principle of no judgment without a charge" under Art. 9 of the Criminal Procedure Code. Moreover, despite identical penalty orders, the prosecution and the courts may refuse to join the criminal proceedings for which they were handed down. The Zürich courts have repeatedly complained about the poor preparation of the indictment by the prosecution (Quaibrücke and RGA proceedings) and have had to acquit some of the defendants due to lack of evidence. In a general statement, not specific to Switzerland, the United Nations Special Rapporteur on Human Rights Clément Nyaletsossi Voule has also criticized the mass issuance of penalty orders for peaceful and non-violent protests (► UN **A/HCR/47/24**, May 12, 2021).

The accused have the right to file a **rejection** of a **summary penalty order**. The very short time limit of 10 days for filing a rejection poses practical challenges for the accused. In some cases, summary penalty orders are issued several months after the action and can easily be missed by the accused. People

may be travelling or have moved, they may have more than one place of residence, as is often the case for young people, or there may be other reasons. In addition, many summary penalty orders are accepted by the accused because they do not have the money, time and/or energy to pursue a lengthy and costly proceedings through the courts. For some, especially younger people and those in education and training, it is also important to get out of the probationary period and the statute of limitations – which is usually several years – quickly so that they can have an empty official criminal record when applying for a job. Overall, most climate activists are sentenced without ever seeing a prosecutor or a judge, which raises ► questions about the compatibility of the criminal proceedings with Article 6 of the ECHR (right to a public defense in court)².

In a landmark decision, the Federal Supreme Court recognized the validity of rejections to summary penalty orders from “unknown” persons as valid (► BG/TF **6B_1325/2021**, **6B_1348/2021**, 27.9.2022), thus rejecting the practice of the public prosecutor's office and the lower courts of the canton of Vaud in the context of the ZAD eviction. After the eviction of the ZAD, about 70 people refused to reveal their identity. Most were released after 24 to 48 hours, about 40 of them without identification. According to the public prosecutor's office, in order to avoid an unconditional prison sentence of up to 3 months for unlawful entry (Art. 186 CC), the defendants had to reject the summary penalty order by using their real names. At the suggestion of the public prosecutor's office, the anonymously filed rejections to the penalty orders were then declared invalid by the court of first instance. Accordingly, the court thus upheld the prison sentences. Contrary to the lower courts, the Federal Supreme Court granted these “unknown” suspects the right to anonymously file rejections to summary penalty orders and recognized the validity of their rejections to prison sentences (► TF **6B_1325/2021**, **6B_1348/2021**, 27.9.2022). In this decision, the Federal Supreme Court emphasized that a summary penalty order is only a proposal for an out-of-court settlement of a criminal case and is only compatible with the fundamental right of access to a judge as long as the accused person can freely and without obstacles reject the summary penalty order. To the Federal Supreme Court judges, the Cantonal Court made this rejection impossible for the “unknown” ZADists. In addition, the public prosecutor's office charged the ZAD lawyers of the “unknown” suspects with *falsus procurator* and imposed the costs on them. In the same ruling, the Federal Supreme Court granted the ZAD lawyers' appeal against the public prosecutor's rejection of the legal representation of the “unknown” accused as *falsus procurator*. Meanwhile, the second instance has implemented the decision of the Federal Supreme Court and recognized the validity of the lawyers' power of attorney for “unknown” suspects (TC VD, **PE21.005966**, 22.11.2022). We are aware of 17 other identical cases pending before the Federal Supreme Court, which will most likely also be referred back to the Cantonal Court.

After the eviction of the ZAD, the legal team³, with the support of ► **Amnesty International**, appealed to **United Nations Special Rapporteurs** to intervene with the Swiss authorities. In their appeal, the legal team denounced the actions of the police and prosecutors against the activists during and after the eviction of the ZAD. The legal team also asked for support in their fight against the prison sentences and for the right to a defense and a fair trial. ► Three Special Rapporteurs formally addressed Switzerland

²see also Donatsch, Andreas und Arnold, Irene 2015. Auswirkungen der EMRK auf das Schweizerische Strafprozessgericht. In Jaag, Tobias und Kaufmann, Christine 2015. *40 Jahre Beitritt der Schweiz zur EMRK*. Schulthess

³ These are mostly activists who, as lay people, support each other in their legal actions.

in November 2021, expressing concern about the excessive use of force by the police and the arrest of participants in a peaceful assembly. The rapporteurs also emphasized that the ZAD is a matter of peaceful civil disobedience, which should be protected under international law by the rights to freedom of conscience, expression and peaceful assembly, regardless of the respective domestic jurisdiction's legal position in this regard. In December 2021, the Swiss Mission to the United Nations rejected the ZAD legal team's allegations with a ► statement from the Vaud authorities.

After the rejection of the summary penalty order is filed, the defendant is summoned to a **court hearing**. Usually, prosecutors do not attend the first instance hearing, thus avoiding a confrontation with the accused and their lawyers. This deprives the accused of the opportunity to defend themselves against their accusers. In the context of larger actions with many rejections of summary penalty orders (in Zürich and Lausanne), prosecutors and judges have thus far refused to **join** all similar cases. For smaller actions, however, judges have accepted activists' requests to join their cases (in Fribourg, Geneva, Lausanne and Zürich). In the case of the *Rise Up For Change* proceedings in Bern, the District Court went against this practice by refusing to join all approximately 15 similar proceedings. More still, the court also declared the trial of the first defendant a "pilot trial", while suspending all other cases until further notice. The other suspects have appealed against the "pilot" nature of the first trial and thus against the suspension of their proceedings. To the activists, the "pilot trial" poses a risk of prejudicing their individual cases, thereby undermining their due process rights (Art. 29 FC, Art. 6 ECHR). The appeal was upheld by the second instance (OG BE **BK 22 396**, 15.3.2023). In a somewhat contradictory decision, the court declared the "pilot" nature of the first case void and overturned the suspension of the other cases, while still refusing to join the cases. At least one of the defendants is likely to appeal against this decision to the Federal Supreme Court and possibly to the ECtHR.

Denying motions to join several cases, the courts deprive activists of the opportunity to defend themselves collectively in court, thereby reducing the cost of defense and mediatizing a large case. Similarly, all motions by the defense to **recuse** judges are systematically denied. On the other hand, the only request for recusal by the prosecution in a climate trial known to us was granted. As mentioned above, a Zürich district judge had to recuse himself after the public prosecutor filed a motion which was upheld by the Cantonal Court (OG ZH **UA220042**, **UA220043**, 14.11.2022; the court has to decide again, see ► **BG/TF 1B_10/2023**, ► **BG/TF 1B_14/2023**, 6.4.2023).

Overall, the combination of police, prosecution and judicial measures during protest actions and criminal proceedings has a **chilling effect** on many climate activists in Switzerland. Peaceful, non-violent protest is criminalized, the activists may face an arrest for up to 48 hours, a strip search, identification measures, high fines and legal costs, and a criminal record. In addition, the refusal to join the cases denies the accused activists the opportunity to defend themselves collectively and the proceedings drag on for several years.

4. What are they fighting for in the courts in the context of climate trials?

After analyzing more than 150 available court decisions, it is clear that a significant proportion of peaceful actions are prosecuted as misdemeanors – that is, with an entry in the criminal record - instead of issuing fines for minor offences and without an entry in the criminal record. Especially in Zürich, Art. 181 CC (coercion) is systematically applied and not questioned by most judges. More generally, many judges in Switzerland are also reluctant to refer explicitly to the ECHR case law, although Switzerland ratified the ECHR in 1974. At least in Geneva, the courts have applied ECHR principles more systematically, in most cases acquitting the activists of charges of participation in unauthorized assemblies.

Similarly, most judges refuse to discuss the issue of climate change in court and reject virtually all defense requests for expert witnesses. Across all instances and cantons, Swiss courts present climate change and the climate crisis as a “well-known fact” that does not need to be discussed further in court. Trying to avoid the politicization of the courts, judges are - probably unintentionally - taking a particular political stance by refusing to discuss the relationship between law, politics and human rights (e.g. the right to a healthy environment, the right to life) in light of international agreements and conventions (e.g. the Paris Agreement) to which Switzerland is a signatory. In this context, it is also noteworthy that, with the exception of two court decisions in Lausanne and Geneva (both overturned by the Federal Supreme Court, ► BG/TF **6B_1298/2020 & 6B_1310/2020**, 28.9.2021; ► BG/TF **6B_1295/2020**, 26.5.2021) all judges have refused to apply Article 17 CC (state of necessity) in favor of the accused activists.

The more than 150 court trials also show that contradictory decisions, both between the two first instances and between and within the cantonal jurisdictions, are not uncommon. This illustrates that existing law is not simply “applied”, as it is often said, but rather shaped and revised. For many of the accused activists, it is only the decisions of the Federal Supreme Court that allow the activists to move on, unless the court sends the case back to the second instance, as has already happened several times in the *Procès des 200* trials. What is more, some are determined to take their case to Strasbourg to the ECtHR because they do not expect justice from the Swiss judiciary. Against this background, several complaints have already been lodged with the United Nations Special Rapporteurs against the practices of the Swiss judiciary. The *legal teams* (mostly affected activists who support each other as laypersons when going through the instances) and solidarity lawyers (some work *pro bono*, others for a lower hourly rate) play a decisive role here. As the United Nations Special Rapporteur on Freedom of Peaceful Assembly and of Association Clément Nyaletsossi Voule stressed in 2021, access to criminal defense lawyers and courts is crucial for the protection of the fundamental rights to freedom of peaceful assembly and of expression (► UN **A/HCR/47/24**, 12.5.2021). Judges can also help protecting these rights by contributing to a change in judicial practice and legal norms in the context of the climate crisis.

Likewise, many of the actions and procedures described above make it clear that the struggle for (climate) justice in the context of the Swiss climate trials is also a struggle *for* fundamental rights and *against* state repression. Climate activists feel that they are being treated fairly when they can demonstrate *peacefully* and *non-violently* without being persecuted or subjected to criminal investigations and proceedings, and when they can occupy public and private spaces for a certain period of time, if this

serves the purpose of climate protest. So far, this freedom to assemble and protest without authorization has not been granted by most courts.

And yet, despite the many convictions that restrict the right to protest in Switzerland, the activists can claim a number of "successes". Although climate trials have produced relatively few acquittals, they have provided important insights into the work of the courts, the police and the prosecution. A key finding is undoubtedly the struggle for the role of the law itself. While climate activists and their lawyers, for instance, repeatedly try to portray climate trials as part of climate politics and thus politicize them, many judges emphasize that climate politics is not and should not be made in the courtroom. It is precisely this positivist⁴ separation between law and politics that is called into question by the climate movement in Switzerland and around the world. Whether they like it or not, the courts play a genuinely political role by insisting on this rigid separation. In this way, climate trials serve an important social purpose by educating the public about the political role of law and the judiciary in a democracy like Switzerland. In this sense, the activists can also consider it a success that the *ZAD de la Colline* proceedings revealed how the chief public prosecutor of the canton of Vaud coordinated the police operations during the eviction of the ZAD by giving orders in advance of the eviction to arrest the activists (► Police Cantonale VD, Operation ZAD21). Contrary to the positivist legal doctrine ("applying the law") and the fiction of value neutrality, these two examples illustrate that judges and public prosecutors are also political actors who actively shape climate and criminal politics. And as already mentioned, it is also a success that the police in the canton of Vaud were forced by a court decision to revise their rules of engagement for arrests and body searches during peaceful protests.

After all, for the climate movement in Switzerland, the risk of a guilty verdict is only one aspect that can contribute to the *chilling effect* and discourage people from participating in political protest through various forms of civil disobedience. Police and prosecution measures such as identification, strip searches, arrest, summary penalty orders and criminal records - in other words, measures of state surveillance and repression - also have a chilling effect. All these measures discourage people from exercising their human rights to peaceful assembly and expression. Incidentally, this problem is not limited to the climate movement. In a very similar way, it affects many other social movements that engage in legal struggles with the state and entrenched power relations in society.

⁴ Legal positivism refers to a doctrine which, on the one hand, is primarily based on state-specified and recognized laws and legal norms (the law is what the law is) and excludes and ignores other ideas of law and justice. On the other hand, this doctrine presupposes that law and politics are to be separated by law, and that this work should be done by judges who "apply" the law in a value-neutral fashion. This doctrine tends to promote a politically conservative jurisprudence (preserving the *status quo*), which often stands in the way of changing legal norms.



Bezirksgericht Zürich, 30.8.2022

© Morpork