Civilly Disobedient or Legally Justified?
Reflecting on AG Flensburg's Recognition of a Climate Necessity Defence

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I. Introduction

"Our house is on fire",[1] and as scientists, politicians, economists and people worldwide must react to this fact, so too must the law adapt to this (new) reality of

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[1] Greta Thunberg, 'Adress to the participants' (*World Economic Forum in Davos*, January 2019) <https://www.theguardian.com/environment/2019/jan/25/our-house-is-on-fire-greta-thunberg16-urges-leaders-to-act-on-climate> accessed 30 August 2023.

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life-threatening Climate Crisis[2]. It is the challenge of the Anthropocene, caused by and only able to be prevented by human beings.

In law, there are different approaches to dealing with Climate Change: While some are based on the human legal subject (as is the case here), others are trying to establish legal rights of nature itself or the rights of at least parts of it.[3] The latter approach questions the anthropocentrism of law in modern Western societies *per se*. This paper is not dealing with this far-reaching question. By analysing one specific German criminal case, it is not leaving the conventional legal framework, but rather trying to find a new approach *inside* of it. From this perspective, it raises the general question of if and how current legal systems can provide tools for handling the Climate Crisis.

The huge amount of new climate lawsuits[4] brings up numerous judicial questions, one of which is discussed in this paper: Can climate activism be justified? More specifically, it is asking: Can Climate Change constitute the justificatory reason of a Necessity Defence in criminal law? If so, criminal conduct could be justified. In certain cases, climate activists could not be held liable for a criminal offence.

This paper's central object of study is a judgement of the district court of Flensburg from 7 November 2022,[5] which acquitted an activist of criminal trespass who had occupied a tree in a forest to stop its felling. This acquittal was based on conceding a viable Necessity Defence[6] because of the imminent danger of Climate Change. On 9 August 2023, the decision was overruled by the court of appeal (OLG Schleswig-

[2] Certain terms will be capitalised in this paper to emphasize their role as key terms with a specific meaning.

[3] Cf. other contribution to this VLR issue: Cornelia Tscheppe, 'River of Life – A Case Study' (2023) *VLR* Vol. 7 No 1.

[4] For an overview regarding primarily German-speaking countries: Daniel Ennöckl, 'Klimaklagen – Strukturen gerichtlicher Kontrolle im Klimaschutzrecht (Teil 1)' (2022) *RdU* 04, 137-143 and 'Klimaklagen – Strukturen gerichtlicher Kontrolle im Klimaschutzrecht (Teil 2)' (2022) *RdU* 05, 184-192, for a global overview s. The Sabin Center for Climate Change Law Columbia Law School, 'Climate Change Litigation Databases' <https://climatecasechart.com/non-us-climate-change-litigation/> accessed 11 September 2023, including 1655 US and 775 international cases at time of access.

[5] AG Flensburg 7 November 2022, 440 Cs 107 Js 7252/22, in the following simply quoted as 'AG', marginal numbers according to openJur publication.

[6] In German criminal law it is called "Rechtfertigender Notstand". It is a legal structure which is best compared to "Necessity" in English criminal law; for a detailed comparison between Necessity in German and in English criminal law s. Maria Tsilimpari, 'Die Regelung des Notstands im deutschen und im englischen Recht' Dissertation Freiburg 2020, available under <https://freidok.uni-freiburg.de/fedora/objects/freidok:166191/datastreams/FILE1/content> accessed 16 May 2024.

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Holstein).[7] At the time of this paper's publishing,[8] the district court of Flensburg is in the process of reviewing the case again.

This paper will first provide an evaluation of the decision and the most relevant questions arising from it (Chapter II.). This includes the questions of identifying a state of necessity and possibly qualifying Climate Change as a permanent one, of establishing what kind of act is adequate and suitable to protect the Climate, and of assessing under what circumstances there is a general priority of state measures. Chapter III. locates these questions in classical theoretical debates on the legitimacy of Civil Disobedience.[9] Finally, the paper gives a short overview of what insights were found (Chapter IV.).

II. The Case and Its (Legal) Questions

The following chapter will engage with the Flensburg decision. It will first point out the facts the court had to decide about and will then go on to illustrate the court's decision and argumentation. Finally, it will ask the most relevant legal questions raised by the court's decision.

A. The Decision

To analyse the decision, it is necessary to start with the facts delineated in it. The facts described here are those the court took into evidence in the main hearing (Sections 244 – 257 of the German Code of Criminal Procedure (GCCP))[10].[11] The event took place on a wooded plot of land close to the Flensburg railway station, which until then had laid unused by anyone besides local residents visiting the woods for recreation. A property development firm (J.I. GmbH) had acquired it and then applied for a construction permit to build a hotel on it. The construction required clearing the plot of land. In autumn 2020, after the company's construction plans went public,

[7] OLG Schleswig-Holstein 9 August 2023, 1 ORs 4 Ss 7/23, in the following simply quoted as 'OLG', marginal numbers according to juris publication. The OLG decision mostly agrees with the AG's results but, in the end, concludes that there was no adequate act of necessity due to the barrier effect of legally regulated proceedings.

[8] 15 March 2024.

[9] Mainly focusing on John Rawls, *A Theory of Justice* (Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press 2005) as a core text of "liberal" conceptions of Civil Disobedience.

[10] *§§ 244 – 257 Strafprozessordnung (StPO, BGBl.I 1074/1987, idF BGBl. I 149/2024).*

[11] Evidence is gathered with the goal of establishing the truth - according to Section 244 Subsection 2 GCCP - and is used to build the judgement's grounds *[Urteilsgrundlage]*; the judgement is then pronounced according to Section 260 GCCP.

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numerous demonstrations were held at the location to protest the planned forest clearance. At that time (1 October 2020), a group of activists entered the private area and started to permanently live on the forest grounds. Their intention was to stop the clearance by occupying the forest. The company gained a construction permit from the city of Flensburg in January 2021,[12] against which an environmental association[13] brought an administrative suit.[14] This association challenged the local zoning regulations – decreed by the city of Flensburg – as well.[15] Finally, on 19 February 2021, the entire plot of land was fenced in by private security, and forest clearance commenced. The group of activists continued to live in the woods and did not leave its treehouses despite the clearance works. The accused in the criminal case – one of the activists – remained on the property to protest the forest clearance until 22 February 2021, when local police cleared the plot of occupants. He did not leave one specific tree until the late evening and therefore made the clearance work partially impossible.

Such action could constitute criminal trespass under German Criminal Law. The property developer requested prosecution of the accused[16], which initially resulted in a summary judgement[17] on 9 June 2022, against which the accused lodged an appeal on the 23 of the same month. This ensured that the case went to trial.

The court considered just one criminal offence: criminal trespass[18] according to section 123 German Criminal Code [GCC]. This is regarded as a property offence and aims to protect the owner's possessory rights to certain types of real estate from another party's intrusion. The court qualified the plot of land as *enclosed property*[19]

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[12] The construction permit was issued by the city of Flensburg on 14 January 2021.

[13] The environmental association was entitled to sue according to Section 2 of the Environmental Legal Remedy Code *[Umwelt-Rechtsbehelfsgesetz (UmwRG BGBl. I 3290/2017 idF BGBl. I 405/2023).*

[14] An objection *[Widerspruch]* against the construction permit was filed on 22 February 2021 (already after the relevant action). The ruling on the objection *[Widerspruchsbescheid]* was handed down on 1 October 2021. The only possible remedy in time would have been an objection with suspensive effect, s. fn. 88.

[15] The zoning map was issued on 12 September 2020. A reproof *[Rüge]* was handed in by the environmental association one day later.

[16] *[Strafantrag]*, according to Section 123 Subsection 2 GCC.

[17] *[Strafbefehl].*

[18] *[Hausfriedensbruch].*

[19] *[Befriedetes Besitztum]*, in legal practice mostly defined as real estate that is visibly and continuously but not necessarily completely enclosed in a more than symbolic way, such as a building or a fenced-in plot of land, cf. Peter Rackow, '§ 123 StGB', in Bernd v. Heintschel-Heinegg (ed.), *BeckOK StGB*, 58th edn. (Munich: C.H.BECK, 2023), para. 8; Burkhard Feilcke, '§ 123 StGB', in Volker Erb, Jürgen

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from when it was fenced in completely on 19 February 2021. Thus, the defendant's action of remaining on the property after the fencing constituted a legally relevant behaviour in the form of *not leav[ing] when requested to do so by the authorised person*[20]. The occupation between 19 and 22 February 2021 was unauthorised. The objective requirements[21] of the criminal offence were met. The defendant had been aware of the relevant facts of the case, including the owner's request to leave, and therefore acted intentionally; the subjective requirements[22] were met as well. But the activist's remaining on the property could possibly be justified. The court considered one possible justificatory reason[23], namely a Necessity Defence[24] according to section 34 GCC:

> Section 34: Necessity as justification
>
> Whoever, when faced with a present danger to life, limb, liberty, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from themselves or another is not deemed to act unlawfully if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. However, this only applies to the extent that the act committed is an adequate means to avert the danger.[25]

Schäfer (eds.), *Münchener Kommentar zum StGB*, 4th edn., (Munich: C.H.BECK, 2020), para. 14; Martin Heger, '§ 123 StGB', in Karl Lackner, Kristian Kühl, Martin Heger (eds.), *Strafgesetzbuch-Kommentar*, 30th edn., (Munich: C.H. Beck, 2023), para. 3.

[20] Michael Bohlander, Ute Reutsch (trans.) 'Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906)' (*Federal Ministry of Justice* 2021) <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0197/> accessed 15 March 2024, Section 123 Subsection 1.

[21] *[Objektiver Tatbestand],* comparable to *actus reus*.

[22] *[Subjektiver Tatbestand],* comparable to *mens rea*.

[23] *[Rechtfertigungsgrund].*

[24] *[Rechtfertigender Notstand].* Cf. AG Mönchengladbach-Rheydt 14 March 2022, 21 Cs–721 Js 44/22-69/22, which instead argues for a justification based on fundamental rights themselves in a similar trespassing case. Moreover, in scholarship, but not in practice, there are discussions of a supra-legal state of emergency.

[25] Bohlander, Reutsch (trans.) GCC Section 34.

The justificatory reason of a Necessity Defence consists of a state of necessity[26] and an adequate act of necessity[27] to avert this state. A state of necessity requires a present danger to a relevant legal interest. An action is recognised as an adequate act of necessity if it is suitable to avert this danger, it is the least interfering action to do so, the protected interest substantially outweighs the interfered one and if the act is an adequate means to avert the danger.[28] The principle of overweighing interest[29] underlies this legal concept of a Necessity Defence.[30] Section 34 is also understood as an exceptional rule within the legal system for specific situations in which the law must be broken in order to prevent bigger harm or damage.[31] The decision of a Necessity Defence is one in which one interest outweighs[32] another.

The Flensburg court names the public legal interest of Climate Protection in the Federal Republic of Germany as the relevant legal interest.[33] It states that there is a present danger to this legal interest due to global warming and its negative consequences such as natural disasters.[34] This constitutes a state of necessity. The relevant act is that of the activist remaining in the tree. This action is suitable to avert the danger, as the tree contributes to Climate Protection – no matter how (irrelevantly) small this contribution is. The court expressed that there is no different action which could be considered an equally suitable act.[35] Weighing the protected interest against the interfered interest, the court ruled in favour of Climate Protection, basing its argumentation on the constitution (especially Art 20a Basic Law). It was also particularly due to this constitutional grounding that the court found the act to be adequate. Moreover, it stated that the specific and complex reality of Climate

[26] *[Notstandslage].*

[27] *[Notstandshandlung].*

[28] E.g. Volker Erb, '§ 34 StGB', in Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch*, 4th edn (Munich 2020), no. 103.

[29] *[Prinzip des überwiegenden Interesses].*

[30] Martin Heger, '§ 34 StGB', in Karl Lackner, Kristian Kühl, Martin Heger (eds.), *Strafgesetzbuch-Kommentar*, 30th edn., (Munich 2023), para. 1.

[31] Volker Erb, '§ 34 StGB', in Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch*, 4th edn (Munich 2020), no. 6 („[...] weil es Ausnahmesituationen gibt, in denen der Verstoß gegen ein Verbot die einzige Möglichkeit zur Abwendung drohender Schäden darstellt, deren Hinnahme für die Rechtsordnung im Einzelfall weitaus schwerer zu ertragen wäre.")

[32] *[Abwägung].*

[33] AG no. 25.

[34] AG no. 28, 29.

[35] AG no. 37, 38.

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Change, combined with this constitutional value of Climate Protection, *demands* that one disregard the very small (!) likelihood of averting the danger of Climate Change in general via this specific action. Furthermore, there were – according to the court – no prior state measures to reach the goal.[36] The subjective requirements of the justification[37] were met as well; the defendant acted particularly with the intention to avert the danger[38] of Climate Change by saving the forest.[39]

In conclusion, the court justified the defendant's conduct via a Necessity Defence.

B. Questions

Specific questions arise from the court's argumentations.

1. Is there a Permanent State of Necessity?

The justification of criminal behaviour due to a Necessity Defence requires a state of necessity, which, in the words of the GCC, is a *present danger to life, limb, liberty, honour, property, or another legal interest*[40]. *Danger* is defined as a situation in which the occurrence of damage seems likely[41] due to concrete circumstances.[42] Legal interests capable of Necessity Defence[43] are both those named in the legal norm and further – comparable – legal interests. According to the prevalent view in criminal law doctrine it covers not only individual legal interests but public ones as well.[44]

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[36] AG no. 45 and 54.

[37] *[Subjektiver Rechtfertigungswille].*

[38] *[Abwendungswille].*

[39] AG no. 55.

[40] Bohlander, Reutsch (trans.) GCC Section 34.

[41] It is debated how likely or probable the damage must be. For an overview s. Armin Engländer, '§ 34 StGB', in Holger Matt, Joachim Renzikowski (eds.), *StGB-Kommentar*, 2nd edn (Munich 2020), no. 11.

[42] S. e.g. Armin Engländer, '§ 34 StGB', in Holger Matt, Joachim Renzikowski (eds.), *StGB-Kommentar*, 2nd edn (Munich 2020), no. 10 („Unter einer Gefahr versteht man einen Zustand, in dem aufgrund besonderer Risikofaktoren der Eintritt oder die Intensivierung eines Schadens droht."); Martin Heger, '§ 34 StGB', in Karl Lackner, Kristian Kühl, Martin Heger (eds.), *Strafgesetzbuch-Kommentar*, 30th edn., (Munich 2023), para. 2 („Gefahr ist ein Zustand, in dem nach den konkreten Umständen der Eintritt eines Schadens naheliegt.").

[43] Legal interests that are protected by the justification of necessity *[notstandsfähig]*.

[44] Armin Engländer, '§ 34 StGB', in Holger Matt, Joachim Renzikowski (eds.), *StGB-Kommentar*, 2nd edn (Munich 2020), no. 17.

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The court identified Climate Protection as *another legal interest* which is relevant in section 34 GCC.[45] It stated that this is grounded in the constitutional rule of Art 20a[46] of the Basic Law which is one of several state obligations[47] in the German constitution. It obliges all state powers to protect the natural foundations of life and animals. According to the Climate Order[48] of the Federal Constitutional Court of Germany (FCC)[49] in March 2021, Art 20a binds all state authorities[50] to reduce greenhouse gas emissions with the ultimate target of achieving Climate Neutrality.[51] The court therefore sees itself obliged to interpret uncertain legal wordings – such as *another legal interest* – in the light of Art 20a Basic Law. Such a constitutional interpretation qualifies Climate Protection as a legal interest in the Federal Republic of Germany, realised inter alia by achieving Climate Neutrality.[52]

The Flensburg court ruled that there had been a present danger to the legal interest of Climate Protection at the time the offence was committed[53] by arguing that Climate Change caused and still causes natural disasters which constitute a danger for legal

[45] AG no. 25.

[46] Christian Tomuschat, David P. Currie, Donald P. Kommers, Raymond Ker (trans.) 'Basic Law for the Federal Republic of Germany' in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 19 December 2022 (Federal Law Gazette I p. 2478).' (*Federal Ministry of Justice* 2022) <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0011> last accessed 15 March 2024, Art 20a Basic Law: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

[47] *[Staatszielbestimmung]*, usually defined as a legally binding constitutional norm that sets certain state tasks or goals which must be met. State obligations are guiding rules for every state action. Compared to fundamental rights they only have an objective effect; they do not constitute individual rights.

[48] German BVerfG 24 March 2021, 1 BvR 2656/18 ia, in the following simply quoted as 'BVerfG'.

[49] *[Bundesverfassungsgericht (BVerfG)]*.

[50] *[Staatsorgane]*.

[51] AG no. 25.

[52] Whether such a legal interest makes sense or not s. Ellen Hagedorn, Lorenz Handstanger, 'Klima – was ist das eigentlich?: Eine Reflexion über Klima(schutz) als Rechtsgut' (2023) *juridikum* 4 (426) concerning the following questions: (1.) To which extent should Climate itself – rather than Climate Protection – be the protected legal interest? (2.) Are states obliged to guarantee a specific Climate Condition or rather (just) the compliance with certain regulations? (3.) Is Climate (Protection) an individual or a public legal interest? and (4.) Is such a legal interest determined nationally or internationally?.

[53] AG no. 28.

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interests protected in, e.g., Art 2 II 1[54] and Art 14 I[55] of the Basic Law.[56] This danger was considered to be present[57], as some of these natural disasters had already taken place and – more importantly – other even more drastic disasters would supposedly follow in the near future.[58]

The present danger must affect the previously examined specific legal interest. It is not quite clear how natural disasters can be a danger to the legal interest of Climate Protection; they are more likely the *consequences of dangers* to the Climate. However, the court is also referring to Climate Change itself. So, the court can possibly be understood as saying that there is a danger to the legal interest of Climate Protection due to Climate Change which is already realized in dangers to certain individual legal interests. The Climate is preserved *in order to* protect individual interests by preventing natural disasters; thus, it seems to be specifically important in the case of Climate Protection to connect the protection of the public legal interest with the protection of individual legal interests.

If the danger can be seen in Climate Change *per se*, it would constitute a general danger that exists permanently in every situation.[59] Nowadays, a state of necessity would thus be present due to Climate Change at any time in everyone's life (at least

[54] Art 2 II 1 Basic Law: "Every person shall have the right to life and physical integrity."

[55] Art 14 I Basic Law: "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws."

[56] AG no. 28. Again, the court refers to the Climate Order by arguing that the FCC had ruled that Climate Change is a present danger to life and physical integrity of the individual protected in Art 2 II 1 Basic Law.

[57] The legal term *present* is not only understood as the imminent *[unmittelbar bevorstehend]* occurrence of damage. It can also suffice when there is a situation in which the occurrence of damage can only be prevented by a timely – this means an immediate – action. S. e.g. AG no. 29; Volker Erb, '§ 34 StGB', in Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch*, 4th edn (Munich 2020), no. 94.

[58] AG no. 28f. Unfortunately, the AG's argument does not engage with scientific evidence to neatly establish the immediacy of these individual instances of danger. It merely states that the imminence is 'scientifically proven' *["wissenschaftlich erwiesen"]*.

[59] Cf. with a similar but still different consideration Frank Zieschang, 'Klimaschutz als rechtfertigender Notstand bei Hausfriedensbruch?: AG Flensburg, Urteil vom 7. November 2022, 440 Cs 107 Js 7252/22- juris; nicht rechtskräftig' (2023) *Juristische Rundschau* 136 (143): „Da ein sofortiges Handeln notwendig ist, um dieser Gefahr des Klimawandels noch wirksam begegnen zu können, liegt eine gegenwärtige Gefahr in Form einer Dauergefahr vor, die von § 34 StGB erfasst ist." [„Because of the necessity to act immediately in order to be able to still avert this danger of Climate Change effectively there is a present danger in the form of a permanent danger given which is covered by Section 34 GCC."].

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in Germany[60]): Climate Change would be a permanent danger to the legal interest of Climate (Protection) and thereby a **permanent state of necessity**[61]. Only the act of necessity would have to be tested then in any specific case; a state of necessity would exist completely independently of any concrete action or situation. This idea seems to be problematic given that criminal law decisions must be made on a case-by-case[62] basis. The *permanent state of necessity* would lose the specific correlation between a certain state of necessity and a certain act of necessity to this specific state. This is why it seems to make more sense to keep the requirement of a concrete state in which a concrete danger is present, which is contributing to the general danger of Climate Change in a specific way. However, it would be necessary to clarify in what situations that would be the case.

2. How is Saving the Tree Climate Protection?

Another important consideration concerns the legal interest's connection to the offence action in question. How is saving a tree linked to Climate Protection? When the decision treated "Climate Protection" as the relevant legal interest to the state of necessity, critiques were expressed that the court lost sight of the concrete action the defendant was taking, which was sitting in a tree.[63] It is necessary to figure out if and how cutting down a tree contributes to the danger of Climate Change and if and how saving the tree contributes to Climate Protection. Such interconnections become specifically relevant when evaluating the act of necessity. A clear reasoning in favour of an interconnection of the act and the protected interest is required.

The act of necessity[64] requires an action which is *suitable to avert the danger (a.)* but is still *the least interfering action (b.) The action must be one which protects an*

[60] If one only identifies the Climate Protection in the Federal Republic of Germany as the relevant legal interest.

[61] Could be translated into German as *permanenter Notstand* or *permanente Notstandslage*. Not to be equated with the idea of *permanent danger [Dauergefahr]* in German Criminal Law which softens the requirement of a present danger but at least requires some kind of concretization such as the person(s) being confronted with or causing the (permanent) danger.

[62] *[Einzelfallentscheidung]*.

[63] E.g. Rouven Diekjobst, 'Klimanotstand über Gewaltenteilung?: Zur Annahme eines rechtfertigenden Notstandes aufgrund der Klimakrise durch das Amtsgericht Flensburg' (*Verfassungsblog*, 11 December 2022) <https://verfassungsblog.de/klimanotstand-uber-gewaltenteilung/> accessed 12 September 2023, problematising the identification of saving a tree with the public interest of Climate Protection when stating that the first is not suitable to avert a danger to the latter.

[64] *[Notstandshandlung]*.

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interest that outweighs the interfered interest (c.) and which is *an adequate means to avert the danger (d.).*[65]

The action must be suitable[66] to avert the danger. How did sitting on the tree avert the danger of Climate Change? The court introduced a concept of **immediate interdependence**[67] to address this question, a concept which in some way should prove a contribution of the concrete action to the general goal of Climate Protection. However, the court neither really defined this concept nor decided whether it is necessary.[68] However, it referred to actions which would only increase the public awareness of Climate Change yet would not contribute *directly* to reducing greenhouse gas emissions. It argued that, in this case, there was an *immediate interdependence* between saving the tree and averting the danger of Climate Change, as saving the tree saved its natural process of photosynthesis, which in turn reduces carbon dioxide and increases oxygen in the Earth's atmosphere. Through the relevant action (saving the tree), the chance of averting the danger (preventing Climate Change) increased. Due to this, the action was qualified as being suitable.[69] The fact that the action only increased the probability of the danger's aversion insignificantly was considered to be irrelevant.[70] The court argued that the complex and ever-lasting challenge of Climate Change requires every small step, as each step on its own cannot lead to the end of Climate Change.[71]

The AG's consideration of *immediate interdependence* was criticised immensely.[72] The concrete action's contribution to Climate Protection is (almost) irrelevant – why would saving the tree matter, then?[73] How would one decide which actions are

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[65] Section 34 German Criminal Code; for the usual systematisation into state and act of necessity: Volker Erb, '§ 34 StGB', in Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum StGB*, 4th edn., (Munich: C.H.BECK, 2020).

[66] This is the requirement of the action to increase the chance of averting the danger, not necessarily to constitute a high probability of ending it. S. Cf. e.g. Volker Erb, '§ 34 StGB', paras. 109f.

[67] *[Unmittelbarer Wirkungszusammenhang]*, AG no. 33.

[68] AG no. 33.

[69] Ibid.

[70] AG no. 35.

[71] AG no. 36.

[72] E.g., Diekjobst, 'Klimanotstand' (*Verfassungsblog*, 11 December 2022); Zieschang, (2023) Juristische Rundschau 136; Armin Engländer, 'Der entgrenzte Notstand, - zur Anwendbarkeit des § 34 StGB bei sogenannten Klimaprotesten' (2023) *JZ* 6 255.

[73] Diekjobst, 'Klimanotstand' (*Verfassungsblog*, 11 December 2022), e.g., stated: One tree captures around ten kilos of carbon per year, the carbon emissions of the Federal Republic of Germany in the

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'immediately interdependent' to Climate Protection? This would have to be (legally) clarified to prevent losing the legal requirement of "suitability" completely. All actions reducing carbon dioxide should simultaneously be (possibly) justified by Necessity Defence.[74]

However, it was generally recognized as an inadequate solution to not value the tree at all, even among those who criticised the court's decision.[75] Since there will never be any single action suitable to avert the general danger of Climate Change, this could always only be realized by many actions in sum. The OLG Schleswig-Holstein affirmed the suitability of the action by arguing that, in criminal jurisprudence, a danger to a collective interest (such as Climate Protection) cannot be established by one individual activity alone.[76] This in turn implies that an individual act to protect a collective interest can equally only ever *be part* of saving it, and every small action counts.[77] Indeed, a similar argument can be made if one recognizes that parallel to the causation of Climate Change, which is caused by a myriad of independent small actions, the prevention equally can only take place in independent small steps.[78] This is clearly different to the common template for acts of necessity, which usually are conceptualized as preventing one specific danger through one specific action. Given these considerations of the specific traits of Climate Change, it makes sense to not apply the usual standard of suitability, but to modify it. Preventing Climate Change

year of 2021 were 765 billion kilos in total. Considering a contribution of such a dimension it can be questioned whether the chance of averting the danger increased measurably at all; the contribution is definitely insignificant and therefore unsuitable to protect the Climate in general.

[74] There were different proposals in order to do so. One solution to this could be the requirement of any kind of *measurable* increase in the probability of averting the danger. Another one was to require an increase to averting the danger from the ex-ante perspective. Zieschang, (2023) Juristische Rundschau 136 (145), e.g., states that, indeed, Climate Protection is a complex endeavour. However, any individual action still needs to increase the chance of averting the danger from an ex-ante prognosis.

[75] Wiedmann, (*Verfassungsblog* 13 December 2022), e.g., states that even though the tree *per se* may not be worth it, the forest might be. "By this it is not considered that the sum of all [*per se*] legally irrelevant trees indeed are a forest of climate relevance." *["Darüber gerät aber aus dem Blick, dass die Summe all der rechtlich irrelevanten Bäume eben doch ein Wald der Klimarelevanz ist"].*

[76] OLG no. 45 ff.

[77] „Jeder Beitrag zählt", OLG no. 45.

[78] A similar consideration can be found in Jan Louis Wiedmann, (*Verfassungsblog* 13 December 2022) <https://verfassungsblog.de/den-baum-vor-lauter-wald-nicht-sehen-oder-umgekehrt/> accessed 19 October 2023.

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requires unique and complex global action due to its inherent complexity[79].[80] There is nothing else like Climate Change. The legal requirement of "suitability" must thus be modified if there should be a chance to justify Climate Activism cases due to Necessity Defence at all.

The relevant kind of suitability could be understood as the suitability of the concrete action to:

a.) avert the specific *(short-term)* danger (= avoiding the tree's felling) and

b.) avert the "bigger" *(long-term)* danger of Climate Change by contributing (no matter how little) to Climate Protection *directly (immediate interdependence)*.

The term *directly* would indicate that the aversion of Climate Change must be measurable. A "*mediate interdependence*"[81] would not suffice. Therefore, one would differentiate between acts only raising public awareness for the danger of Climate Change and acts contributing to Climate Protection themselves. The first category of acts may change people's actions or move the government or parliament to introduce more drastic measures. A real contribution towards Climate Protection, however, would only be realised through other agents, either the people or the state. This type of action would be an *indirect* one. Acts of *direct* contribution instead would not rely on changes made by other agents; they would contribute directly by themselves.

All in all, the requirement of *immediate interdependence* could provide a compromise between approaches that deny any impact of individual actions on Climate Change at all and approaches that over-value generalised small contributions.

Such considerations also become relevant when one must *outweigh*[82] the protected interest in comparison to the interfered one. The court ruled in favour of Climate Protection, outweighing the company's domestic authority[83] interest.[84] In assessing

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[79] Wolf, (*Verfassungsblog*, 14 November 2022). *"Teil der komplexen globalen Handlung des Klimaschutzes".*

[80] See e.g. also Wolf, (*Verfassungsblog*, 16 December 2022).

[81] *[Mittelbarer Wirkungszusammenhang].*

[82] *[Abwägung]:* It is necessary that the first substantially outweighs the latter (substantial preponderance) *[wesentliches Überwiegen].*

[83] *[Hausrecht].*

[84] AG end of no. 47. It did so by mentioning three legal aspects in which the Climate Protection's high importance is grounded: First, in the constitutional rules of Art 20a and the fundamental rights of the Basic Law. Second, in Art 20a's specific position right after Art 20 of the Basic Law – which is the main norm in terms of state organisation law. Third, in the FCC's Climate Order having ruled in favour of the extremely high relevance of reaching Climate Neutrality (AG no. 48).

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this, one must look at the relevant interests' importance as well as at the danger's severity.[85] An act, however, will usually only contribute to Climate Protection to a very small degree. That's why, according to the court, this principle does not apply to Climate Change:[86] the complex reality of it requires that also small contributions must be valued highly in the weighing of interests.

3. Is there a Priority of State Measures?

Moreover, according to the court the action of remaining on the tree was the *least interfering action* capable of averting the danger.[87] There is a **priority of state measures**[88] when averting danger so that the integrity of the legal order is preserved. Indeed, the court mentioned a few other possible measures[89] such as the demonstrations, the administrative lawsuits against the construction permit, and the acceptance of the forest clearance because of the company's duty to plant a new one. But the court concluded that they were not or would not have been equally successful. That the court did not further engage with administrative options seems incomprehensible seeing that there is a high probability that an urgent preliminary ruling procedure[90] would have been successful.[91] The court was criticised several times[92] for disregarding the administrative options. Some perceived this approach to neglect the importance of the Rule of Law principle. In fact, the court stated the legal system's priority in averting the danger cannot be understood as absolute; this priority should only be given to the legal system if states' actions can be expected to be

[85] Carsten Momsen and Laura Savic, '§34 StGB', in Bernd v. Heintschel-Heinegg (ed.), *BeckOK StGB*, 58th edn. (Munich: C.H.BECK, 2023), para. 18.

[86] AG no. 51.

[87] AG no. 37.

[88] *[Vorrang staatlicher Gefahrenabwehr].*

[89] AG no. 41.

[90] *[Eilverfahren].*

[91] A mere objection *[Widerspruch]* against the construction permit would not have sufficed. Due to Section 212a of the Construction Law Code *[Baugesetzbuch (BauGB BGBl. I 3634/2017 idF BGBl. I 394/2023)]* its regularly existing suspensive effect would have been deemed to fail in its application. However, an urgent preliminary ruling procedure would most probably have been a successful remedy as the court's interim order did not decide the merits of the case *[keine Entscheidung in der Hauptsache]* from July 2022 shows (VG Schleswig 18 July 2022, Az. 8 B 54/22): it ordered the suspensive effect of the objection. A decision which was later confirmed by the Higher Administrative court of Schleswig (OVG Schleswig 26 May 2023, 127/2 E – 242).

[92] Diekjobst, 'Klimanotstand' (*Verfassungsblog*, 11 December 2022); Zieschang, (2023) Juristische Rundschau, raising the concern that this undercuts the priority of state measures in eliminating illegal situations.

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successful.[93] This is why the court finally argued that state measures would objectively not constitute equally suitable actions.[94] With the same argumentation, it disregarded the "barrier effect of legal-regulated procedures"[95] when testing the acts' *adequacy*[96].[97]

This reveals a tension: The Rule of Law principle – laid down in Art 20 Section 3 Basic Law – is a constitutionally guaranteed interest. It would be undermined if state measures would be suspected to be insufficient.[98] On the other side, there is the constitutional value of Climate Protection arising from Art. 20a Basic Law. It seems to be unreasonable to rely on the priority of state measures if state actions are simply insufficient to fight Climate Change.[99] In such a case, waiting for state measures (such as the administrative proceeding to intervene) would not be equally effective.[100] This points to a general problem of the Rule of Law principle:[101] What if a state breaches its own constitutional duties?[102]

Not surprisingly, this is also the tipping point where the higher court decided not to follow the AG's ruling. It affirmed that there was a way to fight the construction efforts in administrative procedure. Therefore, a justification of private (criminal) action to interfere with construction was precluded.[103] It emphasised that the constitutional weight of Climate Protection cannot outweigh the democratic principle of the

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[93] AG no. 44.

[94] AG no. 45.

[95] *[Sperrwirkung rechtlich geordneter Verfahren].* E.g. in '§ 123 StGB', in Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum StGB*, 4th edn., (Munich: C.H.BECK, 2020), para. 254.

[96] *[Angemessenheit]. Adequacy* of means is impossible if certain constitutional reasons require that a legal interest cannot be weighed against other legal interests, s. e.g. Carsten Momsen and Laura Savic, '§ 34 StGB', in Bernd v. Heintschel-Heinegg (ed.), *BeckOK StGB*, 58th edn. (Munich: C.H.BECK, 2023), para. 19. The court ruled that the action is an adequate means to avert the danger s. AG no. 53.

[97] AG no. 54.

[98] Diekjobst, 'Klimanotstand' (*Verfassungsblog*, 11 December 2022) points out that a general suspicion of state authorities would undermine the Rule of Law.

[99] Wolf, (*Verfassungsblog*, 14 November 2022) claims the priority of state measures to be questionable when they are insufficient.

[100] Wolf, (*Verfassungsblog*, 16 December 2022) remarks that the priority of state measures might be disregarded in case the state violates its duty to protect fundamental rights.

[101] See Diekjobst, 'Klimanotstand' (*Verfassungsblog*, 11 December 2022).

[102] Wolf, (*Verfassungsblog*, 16 December 2022).

[103] OLG no. 62 and 63.

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German Basic Law.[104] The legislator is still given precedence in deciding how to realise Climate Neutrality – and a court may not undermine the procedures for protecting the Climate that the legislature provides.[105]

C. Conclusion and New Legal Perspectives

To conclude, the court's application of Section 34 GCC was unusual. It justified the defendant's action due to Necessity Defence. Without explicitly stating so, it construed, in effect, a *permanent state of necessity* by referring to Climate Protection in the Federal Republic of Germany as a legal interest and Climate Change as a general danger to it. It can only be assumed that such a permanent state would end as soon as the state (Germany) would undertake sufficient Climate Protection measures. However, it remains unclear what these would be and whether they would be defined nationally or internationally. A legal concretisation of what to protect – and also subsequently how to understand the danger to that interest – will be necessary to avoid producing a generalised state of necessity.

Moreover, what the court held up as a state of necessity was not yet connected to a specific action. However, it established this missing connection via the argument of an *immediate interdependence* between saving the tree and Climate Protection. This is an idea which should prove the tree's relevance for fighting Climate Change and thereby the suitability of the action in the present case. The requirement of an *immediate interdependence* can, indeed, provide some guidelines for assessing acts of Climate Protection beyond established standards of causality, seeing that these would never prove any causality in the global and complex case of Climate Change. However, this figure seems to be unclear in its legal foundation and application. This constitutes a risk to the Rule of Law.

Finally, the court did engage with possible state measures but concluded that there was sufficient reason to expect the state would not act. Indeed, the activists' occupation of the tree was the only way left to save it. The court did not aim to neglect the *priority of state measures*. However, it seems the court did not intensively engage with other legal possibilities. Did the German state 'gamble' away the priority of state measures in the case of the Climate Crisis? If the priority of state measures is not

[104] OLG no. 65: „Even though Art 20a Basic Law provides certain limits to the democratic decision process. [...] This does not result in Art 20a Basic Law suspending the democratic principle of Article 20 Section 3 Basic Law". *[„Zwar gibt Art. 20a GG dem demokratischen Entscheidungsprozess inhaltliche Bindungen vor. [...] Dies hat jedoch nicht zur Folge, dass Art. 20a GG das Demokratieprinzip des Art. 20 Abs. 3 GG außer Kraft setzt."].*

[105] OLG no. 68.

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absolute, is the Climate Crisis the first case of relativizing it due to a breach of a constitutional duty (arising from Art 20a of the Basic Law)? This is a question that would, again, assume a clear understanding of the state's constitutional duty to protect Climate.

III. The Case and Its Interplay with Legal Theory

The judge said the following concerning the proceeding: "In earlier times, I would have said that the state pursues the Climate Protection goal by itself, but this is impossible to maintain in the year of 2021."[106]

This statement is interesting from several perspectives: First of all, it includes a certain kind of distrust in the state, led by the conviction that the state itself is not able to reach its Climate Protection goals. However, it understands these goals as *state* goals, saying that the state is not pursuing the "goals by itself". Secondly, it is especially interesting that this statement is coming from a judge, someone who represents the state. She herself questions if there can be legitimate resistance to a state authority that does not fulfil its promises. However, at the same time, she – as an agent of the state – delivers a judgement which (possibly) allows the state to realise its goals. And thirdly, it does not seem to be her *legal* decision which she would have reached – a few years ago – by applying the law regularly, but rather a conviction of *legitimate* action, which she tries to imply in the law by ruling for a Necessity Defence. This chapter will analyse the Flensburg case from the perspective of theories of Civil Disobedience. It does so by (A.) first applying the criteria to the case, (B.) then engaging with the legal questions of the first part (s. II.B.1.-3.) and connecting them to the theoretical approaches and thoughts, and (C.) presenting a short conclusion.

A. Criteria of Civil Disobedience

In legal theory, the problem of deliberate illegal actions claiming moral legitimacy has been engaged with mainly in the context of theories of Civil Disobedience. These usually do not go so far as to argue for legal justification of actions. Indeed, the idea is to describe under which conditions principled resistance against a generally legitimate state can still be morally legitimate, even if such resistance is illegal. In Jürgen Habermas' conception, the opposition between legitimacy and legality is a

[106] Judge concerning the proceeding, cited after: Esther Geisslinger, 'Urteil zur Baumbesetzung' (*Die Tageszeitung: taz*, 8 November 2022) <https://taz.de/Urteil-zu-Baumbesetzung/!5890379/> accessed 20 September 2023; [*„Früher hätte ich gesagt, dass der Staat das Klimaschutzziel von selbst verfolgt, aber im Jahr 2021 lässt sich das nicht halten"*].

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constitutive element of Civil Disobedience.[107] The problem of this moral justification comes from the way in which the law itself can claim strong moral legitimacy[108] within a democratic system. Thus, questions of Civil Disobedience are integral to the connection of Law and Morality and its consequences for legal validity. One of the classical definitions of Civil Disobedience which is widely accepted was provided by John Rawls. He defines Civil Disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[109] Thus, his generally-accepted elements of Civil Disobedience can be summarized as

a.) public communicativeness, b.) conscientiousness, c.) lawbreaking, d.) a standard of civility (such as through nonviolence) and *e.) the aim of bringing about a change in the law or politics.*[110]

Such a "liberal" understanding of Civil Disobedience as part of the political culture and communication holds a lot of sway in discussions of Civil Disobedience. How do these criteria fit to the present case of the activist remaining on the tree?

As to *a.) public communicativeness* in the Rawlsian understanding of Civil Disobedience, the act has the primary goal of entering communication with public authorities that could not be reached through legal means.[111] In the Flensburg case, this element is not entirely clear. On the one hand, the activist's occupation was part of a larger, very visible protest which (also) tried to draw attention to the construction plans within the forest and therefore did communicate with the public sphere. On the other hand, the occupation (sitting in the tree) itself was mostly about achieving a direct result, not communication with the public or authorities.[112] Some theories of Civil Disobedience reduce the requirement of public communicativeness to taking responsibility for the action[113] – which the activist in this case did. However,

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[107] Jürgen Habermas, 'Ziviler Ungehorsam – Testfall für den demokratischen Rechtsstaat', in Peter Glotz (ed.), *Ziviler Ungehorsam im Rechtsstaat* (Frankfurt am Main: Suhrkamp, 1983) 29 (42ff).

[108] S. for a justification from individual freedom e.g. Hans Kelsen, Brian Graf (trans.), *The Essence and Value of Democracy* (Lanham:Rowman & Littlefield Publishers, 2013) 27-34.

[109] Rawls, *A Theory of Justice* 364.

[110] For an in-depth systematisation of these features and their development in different theories: Candice Delmas, Kimberley Brownlee, 'Civil Disobedience' in Edward Zalta, Uri Nodelman (eds.) *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), 1. Features of Civil Disobedience.

[111] Rawls, *A Theory of Justice* 365f.

[112] The activist's reasoning described in AG no. 19.

[113] Candice Delmas, Kimberley Brownlee, 'Civil Disobedience', 1.2.2.

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preventing the tree's felling was the relevant goal in the judgement, which is especially obvious with regards to the action's *immediate interdependence.* Indeed, the court did not qualify the action as Civil Disobedience because it did not primarily aim to communicate with the public; the court thus followed a strict understanding of public communicativeness.[114] It did so by referring to the acts' connection to reaching a concrete goal beyond communication (the connection which the court calls *immediate interdependence),* which would disqualify it as "mere" Civil Disobedience.[115] Still, one can contrast the Flensburg activism with cases of "tree-spiking" [116], where activists prevent trees from being cut down via sabotage and generally leave the scene instead of facing authorities. These types of activism definitely fall outside the remit of classic or strict understandings of communicativeness. The Flensburg activism was not as extreme: it could be construed as being communicative within the larger context of the protest. However, the action of occupying the tree itself does not fit well with the Rawlsian understanding of communicativeness.

For the criterion of *b.) conscientiousness,* it is worth looking at the way in which the Flensburg Court established the defendant's motive: The court established that the defendant knew he was breaking the law, but found it proven that the defendant aimed not to personally resist or cause damage to the construction company, but saw himself forced for reasons of conscience to illegally interfere with the forest clearance to help protect the Climate.[117] Some theorists, such as John Rawls, require a certain *type* of conscientiousness: that is, a selfless conscientiousness that is guided by commonly agreed upon (constitutional) values, not by individual conscience.[118] Even according to this stricter standard, the activist can be seen as having been conscientious. As Climate Protection is a value guaranteed by the German Basic Law[119], it is not just an element of the activist's personal convictions, but part of the

[114] AG no. 34, *[[...] dass das Gericht die Tat des Angeklagten nicht als bloßen so genannten "zivilen Ungehorsam" einordnet.].*

[115] AG no. 34.

[116] A practice of ramming metal spikes into trees to sabotage the saws used to cut them down, described e.g. by Candice Delmas *A Duty to Resist: When Disobedience Should be Uncivil* (New York: Oxford University Press 2018) 44–45.

[117] AG no. 19.

[118] Instead, one invokes the commonly shared conception of justice that underlies the political order. It is assumed that in a reasonably just democratic regime there is a public conception of justice which citizens refer to, when they regulate their political affairs and interpret the constitution. John Rawls, *A Theory of Justice* 365.

[119] Basic Law, Art. 20a.

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positivised values agreed upon in the German constitution. However, it is important to note that there is a certain disconnect between these values – the activist did not directly aim for environmental protection according to German law, but rather for the global prevention of the Climate Crisis.

Concerning the criterion of *c.) lawbreaking,* it is interesting that the AG did in fact justify the action, which left the activist (for the present) unpunished. However, the factual requirements of criminal conduct were met and the justification by the AG happened after the fact. As to this justification, it is important to see that according to the OLG and most of the AG's critiques, the activist's trespassing cannot be legally justified, making a legal justification highly contentious. In either way, the possible legal justification does not set aside the intentional lawbreaking.

As to the questions of *d.) civility*, the main element Rawls requires is nonviolence.[120] As Rawls puts it: "Indeed, any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act."[121] Establishing the Flensburg protest as nonviolent is not as easy as it might look at first glance. While the occupation of the forest did not involve attacks directed at people or property it was, however, unauthorised by the owner and therefore (illegally) interfered with their property rights. The clearing work was interrupted. While not it was not "active" violence, sitting in the tree passively limited the scope of actions that were available to others. German criminal law doctrine has rich case law for distinguishing between cases where the coercion of a blockade does not meet the standards of "violence" and when it does, mostly developed from cases about blocking streets.[122] According to the Federal Constitutional Court, sit-ins and similar passive modes of protest do not construe coercive force in principle, as they do not involve the use of force on the side of the activist and do not physically restrain others. However, the court's case law does recognise certain types of sit-ins, such as those which block large amounts of vehicles, as sufficiently coercive to be called violent.[123]
For a theoretical understanding of Civil Disobedience, it might be more useful to know but not to strictly cling to the distinctions made in these legal cases. One could,

[120] Rawls, *A Theory of Justice* 366f.

[121] Ibid. 321.

[122] S. Arndt Sinn '§ 240 StGB' in Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch*, 4th edn (Munich 2020) para 31-52.

[123] The constitutional court's decision to work out the original distinction as the Federal Constitutional Court saw it was German BVerfG 10 January 1995, 1 BvR 718/89; one example of the decisions that established certain types of activism as violently coercive: German BVerfG 7 March 2011, 1 BvR 388/05.

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e.g. adopt the label of non-violence in the sense of neither directing force at people nor property. A sizeable portion of the historical examples that are agreed upon to fit the remit of Civil Disobedience – such as the American Civil Rights Movements – used types of protest that shied away from violence but involved passive resistance.[124] The most famous example would perhaps be Rosa Parks "occupying" a bus seat. Such an understanding of nonviolence means that Civil Disobedience may involve limiting others through the coercion of having the activists' bodies in a place where it is illegal for them to remain. In such an understanding, the Flensburg protester fulfilled these criteria. It is also questionable if the activist acted *e.) with the aim of bringing about a change in the law or politics.* It is not clear if the activist even expected to affect policy change, especially when considering the extent to which the occupation of the tree could provide a direct contribution to Climate Protection. This goes hand in hand with the understanding that saving the tree was the main goal of the protest: The idea of the protest was not primarily to change unjust policy, but to act in lieu of the state in an area which policy neglects.

To conclude, there are, indeed, some relevant distinctions between the activists' behaviour and "usual" understandings of Civil Disobedience. The occupation did not primarily aim to communicate with state authorities, it rather provided a direct contribution to the target of protecting the Climate by itself. Neither was it a clear non-violent act due to its interference with a third party's property rights. Moreover, it is questionable if the activist hoped for changing state regulations. He maybe even occupied the tree because he lost trust in the state's actions. Finally, his act can be understood as a contribution to the *global* goal of Climate Protection rather than to the constitutional value laid down in Art 20a Basic Law. The activism was not prima facie about upholding common values agreed upon in German society; it was rather about protecting Climate on a global level due to a personal conviction.

B. Theoretical Engagement

Besides this definition of Civil Disobedience, Rawls also concerned himself with a possible justification of civilly disobedient acts.[125] In parallel to a justification in law, his attempt tries to justify Civil Disobedience from a perspective of justice. To be justified, Civil Disobedience in the Rawlsian account needs to fulfil three criteria:

[124] Cf. Benjamin Kiesewetter ‚Klimaaktivismus als ziviler Ungehorsam' *Zeitschrift für Praktische Philosophie* 9, no. 1 (2022) 77 (84-86).

[125] Rawls, *A Theory of Justice* 371ff.

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1.) a major wrong should be present, 2.) Civil Disobedience should be more likely to succeed than (fruitless) legal alternatives, and *3.) Civil Disobedience must be exercised with enough restraint not to threaten the constitutional order*.[126]

These criteria in some ways mirror the criteria that a Necessity Defence generally requires, especially in the general sense of weighing the value of maintaining the Rule of Law against averting a specific, currently present wrong by breaking the law. This is perhaps why activists and theorists sometimes make a claim to a Necessity Defence for Civil Disobedience,[127] as was the case in the Flensburg decision. Irrespective of its legal merits, it is worthwhile to take the arguments the court used in the case of the justification of Climate Activism beyond the legal sphere and to engage with them in the sphere of theoretical reasoning about Civil Disobedience.

1. Finding a Wrong: The Permanent State of Necessity

Rawls puts his theory of Civil Disobedience within the context of "a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur."[128] The idea is that Civil Disobedience is justified if there is an ongoing case of serious violations of justice. They are described especially as wrongs, where either basic liberties are violated or there is an obstruction to the removal of further injustice.[129]

Thus, the *permanent state of necessity* (s. II.B.1.) could perhaps be the legal expression of finding such a wrong. In describing it, the court took a comprehensive approach to respecting the constitutional agreement to protect the Climate.[130] At first glance, the Rawlsian account of moral justification for a societal wrong and the court's argument fit together.

There are two problems to this: (1) the Rawlsian account argues for a moral and political justification. The conception of a generalised "state of emergency" on a legal level to justify Climate Activism runs into problems when confronted with the goals of Civil Disobedience in a liberal democracy. From its core idea, Civil Disobedience

[126] Ibid.

[127] For activist litigation: Cf. Piero Moraro *Civil Disobedience* (London, New York: Rowman & Littlefield International, 2019) 109ff.; Theory: Cf. E.g. Horst Schüler-Springorum 'Strafrechtliche Aspekte zivilen Ungehorsams' in Peter Glotz (ed.), *Ziviler Ungehorsam im Rechtsstaat* (Frankfurt am Main: Suhrkamp, 1983) 76 (87f.); Kimberley Brownlee *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012) 179–208.

[128] Rawls, *A Theory of Justice* 363.

[129] Ibid. 372.

[130] AG Flensburg notes 25-29, with repeated callbacks through the decision.

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aims to respect the law in principle and correct particular issues with a state's legitimacy. From such a perspective, it becomes a questionable victory to have the state recognise activism as legally justified by dissolving the expected legal evaluations and the principles of applying criminal law on a case-by-case basis.

The second issue is: (2) The legal state of necessity (usually) refers to a specific danger coming from a private agent and justifies infringing upon another private agents' legal interests. Rawls' theory is not about a private agents' behaviour but rather about the state's. Civil Disobedience points out a public policy failure which should be removed or changed.[131] This is a relevant distinction between a legal Necessity Defence and moral reasoning on Civil Disobedience. In the AG's understanding, the Federal Republic of Germany not meeting its Climate Targets is construing a *permanent state of necessity* towards all its citizens. This is an omission on the part of the state. It seems as if Section 34 GCC is not made for such a conception. However, its wording does not exclude an application to a state's action or omission.

Looking at (1) and (2), the Flensburg case does not entirely fit within the Rawlsian justification. The wrong which the Flensburg Court recognised was somewhat different to the kinds of wrongs that Rawls bases his theory on. However, it seems closer to them than to the typical application of a Necessity Defence in German Criminal Law.

2. Explaining the Effectiveness: Immediate Interdependence

As the second condition for justified Civil Disobedience, Rawls requires it to be "necessary, because legal activity to correct the injustice either have failed or are expected to fail."[132] This mention of "necessity" justifies Civil Disobedience through its effectiveness in cases where *legal* communicative acts have failed to be effective. For a justification by necessity in law, there is a more rigorous requirement of effectiveness. In an international comparison made by Piero Moraro, Necessity Defences for activists often fail because they cannot show that there was a causal relationship between the act of Civil Disobedience and avoiding an imminent harm, meaning that the act is not effective to a standard which is recognised by law.[133]

[131] Ivó Coca Vila, 'Punishing the Last Citizens? On the Climate Necessity Defence' (2023) *Res Publica* (forthcoming); develops this distinction of a Necessity Defence not being aimed at solving public policy failures.

[132] Rawls, *A Theory of Justice* 373.

[133] Moraro *Civil Disobedience* 109-112.

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In such cases, two kinds of problems are present: It is hard for activists to show that (1) their activism, especially if it is mostly communicative, is linked to averting harm and (2) even harder to show that it was *necessary* to avert that harm. The way in which the Flensburg decision engaged with these problems and developed its doctrine of *immediate interdependence* might be a sensible approach to adapt the traditional standard of causal links in Necessity Defences to cases of Climate Activism.

As explained in II.B.2, the idea behind *immediate interdependence* as used by the AG is that in cases of Climate Activism, the standard evaluation of the act's suitability to avert the danger is not useful.[134] Compared to usual examples of cases for a Necessity Defence, the Climate Crisis is global and neither caused nor able to be averted by a single act. Thus, the court adapts the standard of effectiveness and asks only for a material, causal connection between the lawbreaking and the interest it defends, even a small one.[135] This seems to reflect the fact that moral intuitions about Civil Disobedience are easier to justify if there is a link between the lawbreaking and the goal of the protest.[136] The court's direct mention of the activism not being "mere" Civil Disobedience reflected this[137] After all, there was a causal link between preserving a forest and fighting Climate Change.

This idea of immediate interdependence might fit within modern theories of Civil Disobedience, which argue for a Necessity Defence in cases where the lawbreaking is a reaction to threats to basic needs.[138] The idea of having a certain but very loose standard of a connection between the civilly disobedient act and its goal might be useful to include in such considerations. There is a good argument to be made in favour of immediate interdependence even for more traditional conceptions of a Necessity Defence, such as the one referred to by Moraro,[139] as long as the danger being averted is sufficiently large and multipolar.

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[134] See II.B.2.

[135] Ibid.

[136] This is often asked of activists by conservative commentators: see e.g. Erich Kocina, 'Liebe Klimaaktivisten, Sport ist nicht der richtige Gegner', *Die Presse* (24 April 2023) <https://www.diepresse.com/6279211/liebe-klimaaktivisten-sport-ist-nicht-der-richtige-gegner/> last accessed 12 September 2023.

[137] AG no. 34 *[[...] dass das Gericht die Tat des Angeklagten nicht als bloßen so genannten "zivilen Ungehorsam" einordnet.].*

[138] Brownlee, *Conscience and Conviction: The Case for Civil Disobedience*, chapter 6.

[139] Moraro, *Civil Disobedience*, 108-112.

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Nonetheless, one should not forget that principled lawbreaking happens within a context. Besides the activists and the state, there might be further parties involved whose interests are protected by the law. While it is plausible to argue that national law needs to adapt a lenient standard for necessity in "climate cases", it is harder to argue that this should decrease the protection of citizens whose interests are hurt. Such an intrusion does not take place in kinds of Civil Disobediences which *directly* address the state, for example, not paying taxes for conscientious reasons. After all, in the present case, the Flensburg activist did not engage with the state directly but rather interfered with the owner's property rights.

Some analyses of Climate Activism and Civil Disobedience point towards a growing split between activists who uphold principled, communicative Civil Disobedience and those whose activism is more individual and guided by ideas of direct action.[140] While some types of Climate Activism "rediscover" liberal theories of Civil Disobedience, others abandon the idea that such communicative protest is sufficiently effective and instead choose non-communicative routes of direct action. *Immediate interdependence* remains an interesting legal structure to differentiate between these two kinds of Civil Disobedience.

3. Restraining the Resistance: Priority of State Measures

The AG's decision was ultimately overturned because of its insufficient argument for why the activist was allowed to act on his own and not rely on state measures.[141] The issue of preserving the legitimacy of the state while accepting that there might be legitimate Civil Disobedience is one of the core goals of the liberal account of Civil Disobedience.[142]

In his criteria for a justification of Civil Disobedience, Rawls describes the third criterion as a criterion of restraint on the side of the activists. They ought to make sure that their disobedient behaviour does not put to question the efficacy of the constitutional system as a whole, even if they are justified in their grievances.[143] While Rawls cautions against perfectionism in moral requirements in general,[144] this does mean that for moral legitimacy, there is a duty on the activist to weigh their breach of

[140] See especially William E. Scheuermann, 'Political disobedience and the climate emergency' *Philosophy and Social Criticism* 2022, 48(6) 791–812, 792-798.

[141] OLG note 61.

[142] Delmas, Brownlee, 'Civil Disobedience', 3.3.

[143] Rawls *Theory of Justice* 373ff.

[144] Ibid. 328f.

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law against the value of keeping up the Rule of Law in a constitutional state. In the Flensburg Case, the activist did at first participate in demonstrations and complied with police and the justice system after his act of occupying the tree. This is at least a sign that there was a certain consideration on his part to keep up the Rule of Law. He could even be understood as aiming to "help" the state's system in the fulfilment of its Climate Protection goals.

However, *immediate interdependence* looks at the contribution of the action towards averting the *global* danger of Climate Change. By looking at the connection of the activism to alleviating a global wrong, this standard bears the potential to raise more fundamental questions about the importance of the legitimacy of the state. Perhaps, from the view of a global problem, activists ought to consider their actions in a global context, not within a certain national society.

C. Conclusion

Ultimately, the Flensburg activism is not a perfect fit for a liberal theory of Civil Disobedience. If one puts in some argumentative effort, one can analyse the Flensburg activism using the criteria that Rawls' conception proposes, arguing that, while not a perfect fit for all criteria, it still somewhat fits the criteria of *public communicativeness* and *civility*. The activist did not primarily *aim to change the law*, but he did recognise a lack of public policy and chose to fill it. Thus, the question of whether the Flensburg activist is civilly disobedient within Rawls' theory is dependent on how strictly one takes the criterion of *aiming to change the law or public policy*.

If one accepts the act as civilly disobedient, then the parallel lines of argument between the philosophical legitimation and justification in law become apparent. The Flensburg case can be seen within Rawls' justification lens for Civil Disobedience. Furthermore, the idea of *immediate interdependence* could be imported into the theoretical discourse.

However, one ought to keep in mind the discrepancies that arise when applying liberal ideas of Civil Disobedience to this kind of activism. One fundamental idea that the court put forward is that the efficacy of state climate protection can legitimately be doubted by citizens. The activist himself also did not necessarily want to change policy but acted in lieu of the state to enact effective protection of the environment and climate. What ultimately characterises this kind of activism is that is does not necessarily interact with the state itself but rather aims at alleviating a global problem. While liberal theories of Civil Disobedience are based on examining the relation of liberal (democratic) states to their citizens and vice versa, Climate Activism arises from a need to act internationally if not globally. Its communicativeness thus

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refers to the global state community and its governments – and what it communicates is often the activist's belief that nation states are no longer up to tackling this issue. Thus, while Civil Disobedience is an important theoretical lens, it is perhaps not the truly ideal one through which to view the Flensburg case's type of Climate Activism.

IV. Results

While the preceding section showed that there is an argument to be made that the Flensburg activism fulfils the Rawlsian criteria for legitimate Civil Disobedience from a theoretical perspective, it is not a close fit. Liberal theories of Civil Disobedience do not explain the Flensburg Climate Activism without argumentative effort. However, this liberal theory is worthwhile because it is a source of political legitimacy for environmentalists and because it fits well within a liberal democracy due to its focus on public discourse and its ability to uphold the state's legitimacy. It is worthwhile to adapt this conception to modern environmentalist activism at least to preserve these two elements.

At the same time, the court's development of *immediate interdependence* is a potential step into a different route of legitimising activism. Rather than requiring a communicative act aimed at the state's authorities, it is expected to contribute to a (constitutional) value by itself. Modern constitutional states promise to protect the fundamental interests of their citizens. In question is what action a citizen can legitimately undertake if these interests are not protected sufficiently and if it is doubtful that appealing to the state will alleviate an infringement on such interests. It is hard to argue for prioritising "mere" communicative activism compared to one contributing to this protection by itself. This is especially the case with regards to the Climate Crisis as a global phenomenon, in which the state itself is only a small actor. However, any such theory of legitimising activism runs the danger of delegitimising the state, including the capacity the state has to solve such problems. The tension between the Rule of Law and Climate Protection – both constitutional values – seems to be inevitable. A legislative solution would be to legally spell out what (national) Climate Protection consists of and to provide legal categories suitable to the reality of Climate Change.

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