

## THE MILITARY COMMANDER'S NECESSITY

The idea of military necessity lies at the centre of the law of armed conflict and yet it is less than fully understood. This book analyses which legal limits govern the commander's assessment of military necessity and it is argued that military necessity itself is not a limitation. Military necessity calls for a highly discretionary exercise: the assessment. Yet, there is little guidance as to how this discretionary process should be exercised, apart from the notions of 'a reasonable military commander'. A reasonable assessment of 'excessive' civilian losses are presumed to be almost intuitive. Objective standards for determining excessive civilian losses are difficult to identify, particularly when that 'excessiveness' will be understood in relative terms. The perpetual question arises: are civilian losses acceptable if the war can be won? The result is a heavy burden of assessment placed on the shoulders of the military commander.

Sigrid Redse Johansen is Judge Advocate General of Norway. In this capacity she is both the Director General of Military Prosecutions leading the military prosecutors and advisor to the Chief of Defence in cases and matters concerning criminal law, criminal procedure and summary punishment. She was previously an associate professor and lecturer in international and operational law at the Norwegian Defence Command and Staff College, where she was responsible for teaching programmes in the Law of Armed Conflict. She has also practised as an attorney at law, acting as defence counsel for the accused in criminal cases in the district courts, courts of appeal and before the Supreme Court of Norway.

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# The Military Commander's Necessity

THE LAW OF ARMED CONFLICT AND ITS LIMITS

**SIGRID REDSE JOHANSEN**

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## Preface

The picture on the cover page of this book shows the Norwegian Chief of Defence watching the hoisting of the flag at Akershus Fortress on the Norwegian liberation and veteran day. This book has been made possible thanks to my years in the Norwegian Armed Forces, at the University College located at Akershus Fortress. The topic of the military commander's necessity has matured while teaching staff officers for more than ten years. I have had the unique experience of the meeting between law and operational realities in these premises and I am sincerely grateful for the lessons taught to me by Norwegian officers. All armies probably have room for improvement, and mistakes occur, but my main sentiment after twelve years among tomorrow's commanding officers is genuine pride. To all of you in uniform out there on our behalf: you have impressed me by your ability to be pragmatic and fix things, to be brave and show concern – and to be true to our humane principles when that is required.

This book is based upon my PhD book *On military necessity: And the commander's assessment of military necessity under the international law of armed conflict during conduct of hostilities*, submitted at the University of Oslo in 2017. The road from undertaking this task, while I was working at the Norwegian Defence University College and up until today, has been a long journey.

I was at a stumbling, early stage, but with a clear interest for the topic chosen, when Professor Yoram Dinstein accepted my request to supervise the writing of my PhD. Writing a doctoral book under his supervision has been, to me, like attending an exclusive research academy. His tireless, precise, prompt and constructive comments for almost six years have been invaluable. Professor Dinstein's ability to see my desired aim and firmly, yet delicately, helping me to see the way forward in order to reach this aim the best I can, has

been impressive. Yoram, I am truly grateful for having been able to participate in such a privileged, but also demanding, venture.

Professor Kjetil Mujezinovic Larsen was my supervisor at the Norwegian Centre for Human Rights. Kjetil, I am grateful for your gentle, reasonable, patient and constructive part in this process.

My research would not have been possible without my generous previous employer the Norwegian Defence University College – and with my protective and encouraging superiors, and previous superiors, in the military chain of command: Arne Røksund, John Andreas Olsen, Henning Frantzen, Gjert Lage Dyndal and Atle Stai. Thank you for your immense patience and encouragement! A very particular thank you goes to my long-standing colleague and superior: Tom Staib. Tom, your loyalty, encouragement, protection, creativity, humour and care for me throughout eleven years has been priceless.

To live every day with a research project hanging over you requires a sense of humour in order not to turn insane. For this – and for combining scholarly discussion with discussions on life itself – I am ridiculously grateful for the help from my previous colleagues at the Norwegian Defence University College: Camilla Guldaahl Cooper, Bødvar Ingvarsson, Jo Sannem, Thomas Slensvik, Tor Arne Berntsen, Harald Høiback, Roar Wold – and my superior (after Tom) Andreas Wangberg.

Other colleagues have also shared their knowledge with me. I have been privileged with the advice and very constructive feedback with comments on parts of my work from William Boothby. Bill, thank you for your efficient, detailed and constructive comments! Rogier Bartels, thank you for your last minute valuable and friendly criminal advice. Jeroen van den Boogaard and Barbara Sonczyk, thank you for endless discussions and support.

In my present position at the Norwegian Military Prosecution Authority I am blessed with super colleagues and friends. A huge thank to each one of you for receiving me so well. Joachim Nordgreen, you persistently undermine your own priceless value. Thank you for coping with last minute good ideas and digressions from your superior. Reidar Bruusgaard, thank you for the friendly sharing of a proper prosecutor's thoughts on academic ideas.

To live around someone every day for many years who has an ongoing research project requires a portion of sane endurance. Olav, thank you for keeping up with my modes of passion – but most of all thank you for your endless guidance into the world of the military: whenever I throw my ideas at you at full speed, at any time of the day, you grab them and turn them, consistently, into the examples I want.

Needless to say, all errors in this book are mine alone.

Finally, my parents have been my invaluable back office for years. You have been babysitters, you have done homework, picked up from the kindergarten, driven to and from school, gone to numerous museums and cinemas and read endless goodnight stories. But most of all, you have raised me to believe that the most important thing when it comes to profession is to choose from one's desires and not pure reason. I have always felt that I could not have been provided with a better balance between sense and sensibility than what you have always offered me.

To you, my precious son, Axel: for laconically pointing out that 'she might have finished her book, but she will find something new to write'. I dedicate my book to you and hope you will be able to do everything you want in life.

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