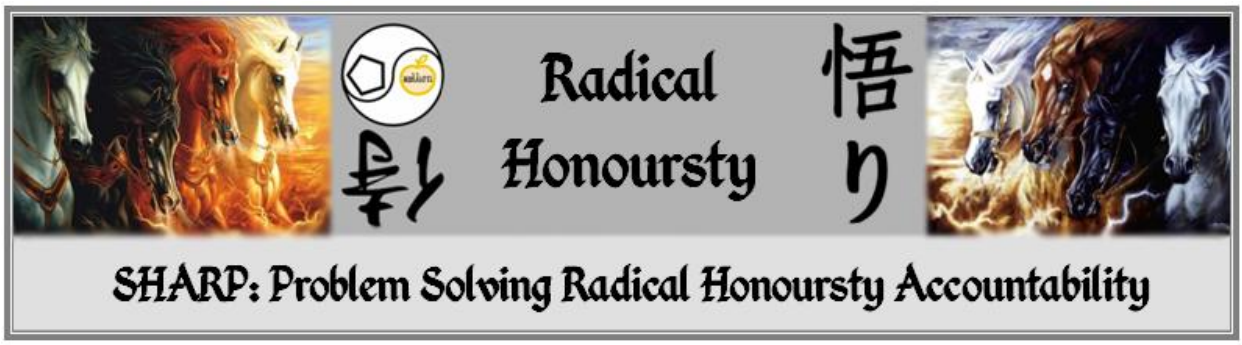

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12 August 2012

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Anders Breivik
PO Box 150
1332 Osteras, Norway

Dear Mr. Lippestad,

Request for Clarification regarding Defence Counsel's focus on 'sane/safety' issue, while seemingly ignoring the 'innocence/guilt' issue, thereby denying Breivik's right to Impartial trial to enquire into the evidence for and against his Necessity Defence.

Questions I have:

1. Why did Defence Counsel not demand Prosecutor Engh and Holden provide reasons for their refusal to address Breivik's claim of necessity?
2. Is it common for Norwegian Prosecutors to refuse to provide the court with the Prosecutor's Office assessment of an accused's evidence for their claim of necessity?
3. In Norwegian Law upon which party does the Onus of Proof lie in a claim of necessity?
4. Is there some political correct conformity conspiracy between Defence Counsel and Prosecution to ignore Breivik's claims of necessity?
5. Why did your Defence of Breivik state that the only issues before the court – as the media have been reporting and you said to the court – are the sane/safety issue?
6. How exactly can the only issue before the court be the 'sane/safety'; since when is the 'guilt/innocence' issue irrelevant in a political criminal trial?
7. If Lippestad attorney's are denying the court to be required to seriously examine the necessity evidence for Breivik's guilt or innocence; upon what grounds and authority did Lippestad Attorney's find Breivik to be guilty beyond reasonable doubt?
8. Or is it a matter of first ascertaining Breivik's sanity; and then if, or when Breivik is finally deemed sane, does he then get a new trial with a focus on 'guilty/innocence' issue; to determine his innocence or guilt, based upon the evidence for and against his necessity defence?

9. If not, when exactly is Breivik entitled to an impartial trial where the issue before the court is Breivik's 'guilt/innocence' and Prosecutors and Defence Counsel are required to seriously legally examine the evidence for and against his Necessity Defence?

As you are aware, I recently filed a Press complaint with PFU against News in English: Nina Berglund Erroneous Statement: 'Breivik Guilt Established Long Ago'.

In summary, according to my paralegsal understanding of the law: "The prosecutor's irregular decisions to 'refuse to touch Breivik's invocation of Necessity' does not: (a) have the power to nullify Breivik's invocation of necessity; (b) grant the court the authority to 'refuse to touch Breivik's invocation of necessity'; (c) grant the media the authority to find Mr. Breivik 'guilty' in a 'trial by media ignorance of the law'.

A Norwegian friend responded to my complaint to the PFU with:

> I would rather think this would be grounds for requesting a retrial due to gross neglect by his counsel. My thinking is that they all simply ignored his claim of necessity hoping that if all did the same no one would call out the bluff, the bluff being the absence of an imperative to discuss the claim of necessity. If both prosecution and defense behave as if it is simply so ridiculous that by ignoring it they "spared" Breivik of the humiliation of being confronted with how insane and ludicrous it is, then the court, the media and, more importantly, the public would by into that fraud as well.

My understanding of Norwegian and International/Foreign Law on Necessity

Norwegian Law and Precedence on Necessity

LAW-2005-05-20-28: Lov om straff (straffeloven). | Act on Punishment (Penal Code)[1], says:

§ 17. Nødrett	**§ 17 Necessity**
En handling som ellers ville være straffbar, er lovlig når	An action that would otherwise be criminal, is legal when
a) den blir foretatt for å redde liv, helse, eiendom eller en annen interesse fra en fare for skade som ikke kan avverges på annen rimelig måte, og	a) it is being undertaken to save lives, health, property or any interest from the danger of injury that can not be averted in any other reasonable manner, and
b) denne skaderisikoen er langt større enn skaderisikoen ved handlingen.	b) the risk of injury is far greater than the risk of injury by the action.

LAW-1998-03-20-10-§ 5: Forskrift om sikkerhetsadministrasjon | Regulations relating to security management[2] allows for "security breaches without criminal liability if the terms of the principle of necessity or self defence in criminal law law § 47 or § 48 is met."

§ 5-3. Sikkerhetsbrudd ved nødrett og nødverge	§ 5-3. Security breaches at the principle of necessity and self-defense
Sikkerhetsbrudd foretas uten straffansvar dersom vilkårene for nødrett eller nødverge i	Security breaches made without criminal liability if the terms of the principle of

[1] http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/ltavd1/filer/nl-20050520-028.html&emne=n%F8drett*&#17
[2] http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/ltavd1/filer/sf-20010629-0723.html&emne=n%F8drett*&

straffeloven § 47 eller § 48 er oppfylt. Forholdet skal rapporteres i samsvar med § 5-4 til § 5-6.

necessity or self-defense in criminal law § 47 or § 48 is met. The relationship must be reported in accordance with § § 5-4 to 5-6.

I could only find two cases on a Lovdata search for nødrett. This one was interesting though.

Norwegian Necessity Judgement: Subjective and Objective Test:

In **LE-2012-76983 Eidsivating Appeal - Judgment**[3] of 29 May 2012, an Eritrean man was accused of several Perjury related Immigration offences to help his sister to come to Norway. He admitted the facts, but claimed necessity. In court he was found guilty on all counts and sentenced to 90 days' imprisonment. The Court of Appeal suspended the appeal to test his conviction on one point (whether the court a quo had seriously enquired into his necessity defence).

The court agreed with the Defendant's argument that asserted that the court a quo had not considered the circumstances that were invoked as the basis for the existence of a principle of necessity situation. The judgement stated that it is clear that "the courts statement of reasons does not show that the court has considered this argument. Thus it is also clear that the Court's statement of reasons in so far are inadequate."

It would appear that Norwegian law has both a subjective and objective enquiry test into the necessity defence, which is similar to South African law; namely to test whether objectively there was a situation of necessity, and secondly whether subjectively the defendant sincerely believed there was a real situation of necessity thereby motivating his conduct.

Hovedforhandling i saken ble holdt 23. februar 2012. Tiltalte erkjente å ha opptrådt som beskrevet i tiltalen, men nektet straffeskyld. Han påberopte dels nødrett, dels – i forhold til tiltalens post I og III a – at hans handlinger falt inn under straffrihetsbestemmelsen i utlendingsloven § 108 fjerde ledd bokstav b annet punktum.

The main hearing in the matter was held on 23 February 2012. The defendant acknowledged having performed as described in the indictment, but denied culpability. He claimed partly necessity, partly - in relation to attractive's mail I and III - that his actions fell under straffrihetsbestemmelsen in the Immigration Act § 108 fourth paragraph, second sentence b.

[..] Når det gjaldt anførselen om nødrett, straffeloven § 47, fant tingretten ingen holdepunkter for at tiltaltes søster reelt sett hadde vært i noen nødrettssituasjon i Sudan, eller at tiltalte hadde oppfattet det slik.

[..] Regarding the argument about the principle of necessity, Penal Code, § 47, the court found no evidence that the defendant's sister in real terms had been in a situation of necessity in Sudan, or that the defendant had seen it that way.

[..] Slik lagmannsretten oppfatter støtteskrivet, gjøres det for det første gjeldende at tingretten ikke har oppfattet og tatt stilling til det som tiltalte gjorde gjeldende som nødrettssituasjon. Tingretten har vurdert om søsterens situasjon i Sudan var slik at hun var i en « paa anden Maade uafvændelig Fare ». Men det var ikke det tiltalte gjorde gjeldende. Han gjorde derimot gjeldende at søsterens plan om å flykte til Israel via Sinaiørkenen, noe hun truet ham med at hun ville utføre hvis han ikke hjalp henne til Norge, var jevngodt med å true med selvmord. Dermed var han i en nødrettssituasjon da han hjalp henne til Norge. I praksis var han også i en tilsvarende situasjon da han begikk de øvrige overtredelsene etter at hun hadde kommet inn i Norge. Grunnen var at han gikk ut fra at hvis han ikke fulgte opp

[..] As the appellate court consider supporting letter, made for the first claim that the court has considered and taken a position on what the accused did the current situation as a necessity. The court has considered whether the sister's situation in Sudan was such that she was in an "on the candidate Maada uafvændelig Danger." But it was not the defendant was valid. He did however claim that her sister's plan to flee to Israel via the Sinai desert, which she threatened him that she would perform if he helped her to Norway, was tantamount to threatening suicide. Thus, he is in a situation of necessity when he helped her to Norway. In practice, he was also in a similar situation when he committed the other offenses after she had come to Norway. The reason was that he assumed that if he did not follow up the story to

[3] http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/lr/lre/le-2012-076983.html&emne=n%F8drett*&

historien overfor norske myndigheter, ville søsteren bli sendt tilbake til Sudan. Og i så fall ville hun ta opp igjen planen om å flykte gjennom Sinai på nytt. [..]

Nødrettsanførselen
På bakgrunn av redegjørelsen i støtteskrivet oppfatter lagmannsretten det slik at denne delen av anken først og fremst reiser spørsmål om tingrettens saksbehandling, nærmere bestemt domsgrunnene. Det tiltalte i realiteten gjør gjeldende, er at tingretten ikke har vurdert de omstendighetene som ble påberopt som grunnlag for at det forelå en nødrettssituasjon.

Lagmannsretten oppfatter møtende aktors påtegning til statsadvokaten slik at aktor bekrefter at tiltaltes forklaring om nødrettssituasjonen var som anført av forsvareren i støtteskrivet. Det er på det rene at tingrettens domsgrunner ikke viser at tingretten har vurdert denne anførselen. Dermed er det også på det rene at tingrettens domsgrunner for så vidt er mangelfulle.

the Norwegian authorities, would his sister be sent back to Sudan. And so, she would take up the plan to escape through the Sinai again.
[..]

Nødrettsanførselen
On the basis of the statement in support letter perceive the Court of Appeal so that this part of the appeal primarily raises questions about the court proceedings, specifically judicial reasons. The defendant actually asserts is that the court has not considered the circumstances that were invoked as the basis for the existence of a principle of necessity situation.

The Court of Appeal consider attending prosecutor's endorsement of a public prosecutor that the prosecutor confirmed that the defendant's explanation of the principle of necessity situation was that led by the defense in the support letter. It is clear that the Court's statement of reasons does not show that the court has considered this argument. Thus, it is also clear that the Court's statement of reasons in so far are inadequate.

However since the both the Prosecution and the Defence counsel refused to enquire into the subjective and objective evidence for Breivik's necessity defence argument, focussing solely on the 'sane/safety' issue; when shall the court seriously and impartially enquire into Breivik's 'innocence/guilt' issue by examining the evidence for and against him in accordance to objectively and subjectively testing his necessity defence arguments evidence?

Oslo Court: Breivik Defence of Necessity:

On 17 April 2012, the Oslo Court tweeted[4] to Journalists attending the Breivik trial:

> Wrong translation in the 22-7 trial yesterday: Breivik said "nodrett", Correct translation: "Principle of Necessity", not "self defence".

The principle of Necessity is enshrined in Norwegian Law in Section 47 of the Penal Code[5]:

> "No person may be punished for any act that he has committed in order to save someone's person or property from an otherwise unavoidable danger when the circumstances justified him in regarding this danger as particularly significant in relation to the damage that might be caused by his act."

According to Lovdata.no: **22. juli-saken – flere ord og uttrykk | 22. July issue - several words and phrases**[6]:

Nødrett
Straffbefriende omstendighet som består i at en ellers straffbar handling foretas for å redde en person eller verdier fra en ellers uavvendelig fare, og omstendighetene berettiger den handlende til å anse denne faren som særlig betydelig i forhold til den skade som kan

Necessity
Penalties Liberating circumstance is that an otherwise criminal act carried out to rescue a person or values from an otherwise inevitable danger, and the circumstances warranting the traders to regard this danger as particularly significant in relation to the damage that could

[4] https://twitter.com/#!/Oslotingrett/status/192198581803945984
[5] http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf
[6] http://www.lovdata.no/nyhet/forside/20120423-soketips.html

forvoldes ved handlingen.

Under disse omstendigheter blir ikke bare handlingen straffri, men også rettmessig.

cause the action.

Under these circumstances is not only the action impunity, but also legitimate.

Prosecutor Engh and Holden 'Refuse to touch Breivik's Principle of Necessity':

The following reports indicate that Prosecutor Engh and Holden violated – what would in South African law be -- their duty of objectivity in terms of (a) impartially enquiring into and/or responding to the Accuseds' Defence; and (b) providing the court with the Prosecution's evaluation and conclusion of the evidence for and against Breivik's invocation of his Necessity Defence.

In her closing statement, Prosecutor Engh acknowledge's that:

(1) Norwegian prosecutors have a duty to conduct their investigation with objectivity;
(2) Norwegian law allows for an accused to plead to necessity and/or self defence,
(3) Where an accused does invoke necessity, it is the court and prosecutor's duty to investigate the accused's necessity defence arguments and evidence;
(4) If an accused successfully invokes a necessity defence, this can and must result in either mitigation of sentence and/or a verdict of innocence;
(5) Breivik invoked the defence of necessity;
(6) Despite the fact that Breivik invoked the necessity defence, both Prosecutor Engh and Holden 'refuse to touch the principle of necessity'.

Document.NO: **Inga Bejer Engh Procedure Part I (Inga Bejer Engh Procedure Part I)**[7]

I Norge har vi fire vilkår for at noen kan straffes

Det må foreligge en handling som rammes av et straffebestemmelse, det må ikke foreligge nødrett, det må foreligge subjektiv skyld og gjerningsmannen må ha vært tilregnelig.

Jeg vil i min prosedyre ta opp faktum, min kollega vil ta opp tilregnelighet. Ingen av oss vil berøre nødrett. Til tross for at det var det han påberopte seg.

In Norway, we have four conditions that someone can be punished

There must be an act within the scope of a criminal provision, there must be no necessity, there must be subjective guilt and the perpetrator must have been sane.

I want my procedure to record the fact, my colleague will address accountability. None of us will touch the principle of necessity. Despite the fact that it was what he claimed.

NRK: **Rettssaken - dag 42 (The trial - day 42)**[8]

kl. 12.15
Engh: - I Norge har vi fire vilkår som må foreligge for at noen kan straffes: det må foreligge objektiv sett en handling som rammmes av et straffebud i straffeloven, det må ikke foreligge nødverge eller nødrett, og det må forligge subjektiv skyld hos gjerningsmannen.

at. 12.15
Engh: - In Norway, we have four conditions that must exist that someone can be punished: it must be objectively seen an act rammmes of a penal provision in criminal law, there must be no self-defense or necessity, and it must forligge subjective guilt of the perpetrator.

VG: **Ord-for-ord - dag 42 prosedyren til aktoratet (Word-for-word - day 42 procedure for prosecutors)**[9]

Nå skal jeg gå over til å si litt om hvordan vi har

Now I'll go over to say something about how we

[7] http://www.document.no/2012/06/inga-bejer-engh-prosedyre-del-i/
[8] http://nrk.no/227/dag-for-dag/rettssaken---dag-42-1.8216159
[9] http://www.vg.no/nyheter/innenriks/22-juli/rettssaken/artikkel.php?artid=10066042

delt inn prosedyren, slik at det skal være lettere å følge I Norge har vi fire vilkår for at noen skal kunne straffes. Disse vilkårene vil danne grunnlaget for strafferammen. Fir det første må det foreligge en handling som rammes av et straffebud i straffeloven.

- For det andre må det ikke foreligge nødverge eller nødrett. For det tredje må det foreligge subjektiv skyld hos gjerningsmannen. Og sist, men ikke minst det vanskeligste: gjerningsmannen må ha vært tilregnelig når han begikk de straffbare handlingene. Jeg vil i min del av prosedyren går gjennom del én og tre. Og gå gjennom de lovbrudd som er gjenstand for vurderiung. Min kollega Holden vil ta for seg spørsmål om tiltalte er tilregnelig eller ikke, om vilkåret er tilstede.

- Når det gjelder villkår nummer 2, nødrett eller nødverge. Hverken jeg eller Holden vil berøre temaet nærmere. Dette til tross for at tiltalte påberopte seg dette for sin frifinnelse.

have divided the procedure, so it will be easier to follow Norway has four conditions for someone to be punished. These terms will form the basis for the penalty. Fir the first there must be an act within the scope of a penal provision in criminal law.

- Second, there must be no self-defense or necessity. Thirdly, there must be subjective guilt of the perpetrator. And last but not least, the most difficult: the perpetrator must have been sane when he committed the offenses. I want my part of the procedure goes through part one and three. And go through the offenses that are subject to vurderiung. My colleague Holden will address the question whether the defendant is sane or not, whether the condition is present.

- When it comes to Conditions No. 2, necessity or self-defense. Neither I nor Holden will touch the topic further. This despite the fact that the defendant claimed that for his acquittal.

NRK: **Rettssaken - dag 43 (The Trial – Day 43)**[10]

kl. 09.10
Lippestad: - Spørsmålet som tiltalte har reist, er om det finnes straffefrihetsgrunner. Han sa innledningsvis at han påberopte seg nødrett.

at. 09.10
Lippestad: - The question that the defendant has raised is whether there is impunity reasons. He said initially that he invoked the principle of necessity.

kl. 09.29
Lippestad: - Så kommer jeg til å se på metodebruk og drøfte litt av de andre sakkyndige som har vært inne i saken. Så kommer helt kort litt om nødrett og til slutt litt om forvaring.

at. 09.29
Lippestad: - So I'm going to look at the methodology and discuss some of the other experts who have been inside the case. Then comes the very short bit about the necessity and finally a little bit about detention.

kl. 10.21
Bistandsadvokat John Christian Elden til NRK i pausen: – Jeg synes prosedyren er god fordi den fokuserer på det som er interessant for retten. Lippestad har sagt han ikke vil bruke så mye tid på nødrett og frifinnelse, men argumenterer tilregnelighetsspørsmålet.

at. 10.21
Lawyer John Christian Elden to NRK during the break - I think the procedure is good because it focuses on what is of interest to the court. Lippestad has said he will not spend as much time on the principle of necessity and an acquittal, but argues sane safety issue.

kl. 11.28
Lippestad: - Helt kort til slutt, og av rent formalistiske grunner: Breivik sa selv at han skjønner at han blir starffet for disse handlingene, men han påberoper seg av formelle grunner nødrett.

at. 11.28
Lippestad: - Completely cards at the end, and of pure formalistic reasons: Breivik said that he realizes that he is starffet for these actions, but he invokes the principle of necessity formal reasons.

kl. 14.45
Breivik: - Dommerne som sitter her i dag, kan dømme meg som de selv føler for. Hvis dere velger å anerkjenne min påstand om nødrett, vil dere på en svært effektiv måte sende sjokkbølger til alle de legitime regimer i Europa.

at. 14.45
Breivik: - The judges who sit here today, you can judge me as they feel. If you choose to acknowledge my claim of necessity, you will in a very efficient way to send shock waves to all the legitimate regimes in Europe.

[10] http://nrk.no/227/dag-for-dag/rettssaken---dag-43-1.8218343

kl. 14.51
Breivik: - Jeg kan ikke anerkjenne straffeskyld. Jeg påberoper meg nødrett for å ha kjempet for mitt folk, min kultur og mitt land.

kl. 14.51
Breivik: - Angrepet 22. juli var et preventivt angrep til forsvar for det norske urfolk.

kl. 14.51
Breivik: - Jeg krever derfor at jeg blir frifunnet for de aktuelle anklager.

at. 14.51
Breivik: - I can not acknowledge guilt. I claim necessity for having fought for my people, my culture and my country.

at. 14.51
Breivik: - The attack on 22 July was a preventive attack in defense of the Norwegian Indigenous Peoples.

at. 14.51
Breivik: - I require that I be acquitted of the charges in question.

The Necessity Defence:

> The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.[11]

The principle of the necessity defence is rooted in common law[12] and any accused pleading to necessity argues that their actions were justified or an exculpation for breaking the law. Defendants who plead to necessity – whether common law necessity, political necessity (civil disobedience) or military necessity - argue that they should not be held liable for their actions as being criminal, because their conduct was necessary to prevent some greater harm.

Most common law and civil law jurisdictions recognize this defense, but only under limited circumstances. Generally, the defendant must affirmatively show (i.e., introduce some evidence) that (a) the harm he sought to avoid outweighs the danger of the prohibited conduct he is charged with; (b) he had no reasonable alternative; (c) he ceased to engage in the prohibited conduct as soon as the danger passed; and (d) he did not himself create the danger he sought to avoid.

> [..]The doctrine of necessity, with its inevitable weighing of choices of evil, holds that certain conduct, though it violates the law and produces harm, is justified because it averts a greater evil and hence produces a net social gain or benefit to society.[13] Glanville Williams expressed the necessity doctrine this way: "[S]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils."[14] He offers this example:
>
> > Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation, where there is an unhappy choice between the destruction of one life and the destruction of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.[15]

Military Necessity and International Humanitarian Law:

Crimes of War[16] and Diakona[17]:

[11] WAYNE R. LAFAVE, CRIMINAL LAW, § 5.4, at 477 (3d ed. 2000).
[12] http://en.wikipedia.org/wiki/Common_law
[13] See Joseph J. Simeone, "Survivors" of the Eternal Sea: A Short True Story, 45 ST. LOUIS U. L.J. 1123, 1141 (2001).
[14] GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 198 (1957).
[15] GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 198 (1957). At 199-200
[16] http://www.crimesofwar.org/a-z-guide/military-necessity/
[17] http://www.diakonia.se/sa/node.asp?node=888

> Military necessity is a legal concept used in international humanitarian law (IHL) as part of the legal justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and civilian objects. It means that military forces in planning military actions are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning. The concept of military necessity acknowledges that even under the laws of war, winning the war or battle is a legitimate consideration, though it must be put alongside other considerations of IHL.

Onus of Proof: Norwegian State or Breivik to Prove Necessity?

In South African law the Onus of Proof lies on the State in a defence of necessity, to rule out the reasonable possibility of an act of necessity.

> In ***S v Pretorius 1975*** (2) SA 85 (SWA) Judge AJ Le Grange found that 'Despite the accused's plea of guilty, it appears from all the evidence on the record that an offence was not committed. In the result, the conviction and sentence, must, be set aside.'
>
> [87] The accused who had no legal representation, referred, despite his plea of guilty, to circumstances which materially gave rise to the defence of necessity. This defence made it necessary for the magistrate to decide in the first instance not what the accused's frame of mind had been, but whether necessity was present and whether it justified the accused's conduct. .. The Judge 'could find no cases and the Court did not refer to any where the question had been finally decided whether the test for necessity relates to an objective emergency or to a subjective frame of mind (or fear)…..
>
> [88] There is, however, nothing in my humble opinion, in the cases referred to or in any other cases, which I could find, which could serve as authority for the proposition that necessity cannot also be viewed as "a ground of justification". The question whether the defence of justification amounts to a ground of justification or to a circumstance excluding fault, has been thoroughly canvassed by De Wet and Swanepoel in their said work as well as by Burchell & Hunt in their revised edition of S.A. Criminal Law and Procedure, Part 1….
>
> [89] The *onus* of proof in a defence of necessity as in self-defence rests on the State to rule out the reasonable possibility of an act of necessity. It is not for the accused to satisfy the court that she acted from necessity (p 293). **[**(proceed) by gathering an objective view of the circumstances from the evidence itself, and the magistrate's finding whether the prevailing circumstances were 'alarming' if viewed objectively…. Viewed objectively… was the accused confronted with a situation that …… lives were in danger….
>
> [90] [If the evidence gives a picture of threatening danger and fear, which gave rise to necessity and which would have justified the accused's conduct, provided the accused did not exceed the limits of necessity…. Proceed to consider whether the proven circumstances satisfy the tests for necessity set out by B & Hunt at p. 285 of their work: (a) the threatening disaster endangered the accused's legal interests. This in fact gave rise to a duty to act. (b) the danger was threatening and imminent. The fact that symptoms relating to the danger may only appear later does not detract from the situation… if it cannot immediately be ascertained whether or not the symptoms are dangerous, necessity arises… (d) the chances that harm would have resulted and it would have been of a serious nature.. the greater the harm, the greater the necessity…

If Norwegian law also places the Onus of Proof to lie on the State in a defence of necessity, to rule out the reasonable possibility of an act of necessity; it would appear that the Prosecutor's decision to 'refuse to touch the principle of necessity' should weigh heavily in Breivik's favour.

Even if Norwegian law places the Onus of Proof on Breivik in a defence of Necessity, to prove the reasonable possibility of an act of necessity, the Prosecutions decision to 'refuse to touch the principle of necessity' should again weigh heavily in Breivik's favour; unless the Prosecution could and did provide a reasonable argument for their failure to uphold their duty for impartial objectivity to enquire into the evidence for the Defendant's Necessity defence.

Common Law Necessity Defence Cases Resulting in Innocence Verdicts or Severe Mitigation of Sentencing:

In ***Regina v Dudley and Stephens*** (1884) 14 QBD 273, three crew members and a cabin boy escaped a shipwrech to spend eighteen days on a boat, over 1,000 miles from land, with no wanter and only two one pound tins of turnips. After four days, they caught and ate a small turtle. That was the only food that they had eaten prior to the twentieth day of being lost at sea. Ultimately, two of the crew members killed the ailing cabin boy and "fed upon the body and blood of the boy for four days." Four days later, they were rescued. Two of the men were charged with murder. The court found that the cabin boy would likely have died by the time they were rescued and that the crew members, but for their conduct, would probably have died as well. The Queen's Bench Division Judges held that the defendants were guilty of murder in killing the cabin boy and stated that their obvious necessity was no defence. The defendants were sentenced to death, but this was subsequently commuted to six months' imprisonment.

In ***Spakes v. State***, 913 S.W.2d 597 (Tex. Crim. App. 1996), the Texas Criminal Appeals Court allowed the jury to be instructed on the necessity defense before deliberating the verdict for an inmate whose three cellmates had planned an escape and threatened to slit his throat if he did not accompany them. The defendant inmate argued that because of the terribly violent crimes of which his cellmates had been convicted (one had bragged about chopping his girlfriend up with an ax), it was a necessity that he break the law, by accompanying them in their escape.

In ***United States v. Ashton***, 24 F. Cas. 873, 873-74 (C.C.D. Mass 1834) (No. 14,470), sailors prosecuted for mutiny were found not guilty, after arguing the necessity for their mutiny based upon the dangerously leaky ship and that this danger had been concealed from them until after they left port. Circuit Justice Story found them not guilty of mutiny.

In ***United States v. Holmes***, 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383), Holmes was involved in a shipwreck, where the crew were charged with manslaughter for throwing sixteen passengers overboard in a frantic attempt to lighten a sinking lifeboat. The Prosecutor argued the passengers should be protected at all costs, whereas the Defence placed the jurors in the sinking lifeboat with the defendant. The Defendant was found guilty, but the jurors requested leniency, to which the court complied by sentencing the defendant to six months in prison and a fine of twenty dollars.

In the 1919 Arizona decision of ***State v. Wooten***, commonly referred to as the Bisbee Deportation case, Professor Morris[18] describes the acquittal of a Sherrif based upon the 'necessity' for committing Kidnapping as follows:

> On April 26, 1917, soon after the United States entered World War I, the Industrial Workers of the World (IWW) called a strike of copper miners in Cochise County, Arizona. On July 12, 1917, the county sheriff led a posse that rounded up and deported over 1,000 members of the IWW. One of the posse was brought to trial on charges of kidnapping. He offered to prove that the strikers were trying to obstruct the war, had stored up a large amount of ammunition, and had threatened citizens; that help from federal troops had been sought to no avail; and that the leader of the local strike had told the sheriff he could no longer control his men. On these facts, he asserted the defense of necessity.
>
> The judge recognized the defense. He ruled that evidence of necessity could be excluded only if it were completely inadequate as a matter of law to establish the defense, and that the weight and sufficiency of the evidence were for the jury to decide—even in a case which "aroused great public interest."
>
> The jury heard the evidence, deliberated for fifteen minutes, and returned a verdict of "Not Guilty" on the first ballot.

[18] Norval Morris, The Verswami Story, 52 U. CHI. L. REV. 948, 989 (1985); see also The Law of Necessity as Applied in the Bisbee Deportation Case.

In ***Surocco v. Geary***, 3 Cal. 69 (1853), a large fire threatened the unburned half of the then small town of San Francisco. A public officer ordered the destruction of houses to create a firebreak and was subsequently sued by one of the owners. On appeal, the California Supreme Court held that the action was proper because:

> The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society and the civil government. "It is referred by moralists and jurists as the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of the vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura private*." [Necessity leads to privileges because of private justice].

Civil Disobedience Political Necessity Defence Cases Resulting in Innocence Verdicts or Severe Mitigation of Sentencing:

According to ***Civil Disobedience and the Necessity Defence***[19]:

> [If] the [necessity] defense is allowed, the jury is called upon to weigh controversial political issues and to function as the "conscience of the community." "Reflected in the jury's decision is a judgment of whether, under all the circumstances of the event and in the light of all known about the defendant, the prohibited act, if committed, deserves condemnation by the law."[20] In cases **where judges have been persuaded to allow the necessity defense, juries have, often enough, delivered not guilty verdicts**.
>
> [..] When **judges have allowed the necessity defense to go to a jury in civil disobedience cases, more often than not the defendants are acquitted**.[21] There are a number of cases in which **charges were dropped after the judge announced that the necessity defense would be permitted**.[22]

In ***State v. Mouer*** (Columbia Co. Dist. Ct., Dec. 12-16, 1977), dozens of protestors in Oregon who were conducting a civil disobedience sit-in at a nuclear power plant were arrested and charged with criminal trespass. At trial, the judge allowed the defendants to raise the state necessity defense (called the choice of evils defense) and the defendants were acquitted by the jury.

In ***People v. Brown*** (Lake County, Jan. 1979), protesters in Illinois blocked the entrance to a nuclear power plant and were charged with criminal trespass. Relying on the defense of necessity, they argued that they had not created the situation that they had sought to correct and had reasonably believed that their conduct was necessary to avoid the harm of a nuclear accident. A doctor testified for the defense about the damaging effects of low-level radiation. All of the defendants were subsequently acquitted.

In ***People v. Block*** (Galt Judicial Dist., Sacramento Co. Mun. Ct., Aug. 14, 1979), eleven California protestors were charged with trespass and resisting arrest in connection with a March 31, 1979 demonstration at the Rancho Seco Nuclear Power Plant. The defendants had climbed over a fence and staged a sit-in on the grounds of the plant. At trial, the judge allowed the necessity defense to be presented to the jury. "After seven weeks of trial, nine of the defendants received a split jury verdict and one was acquitted, apparently because he had a long history of activism and had convinced the jury that he had exhausted all legal means to

[19] http://www.scribd.com/doc/20520106/
[20] Everett v. United States, 336 F.2d 979, 985–86 (D.C. Cir. 1964) (Wright, J., dissenting).
[21] When the necessity defense is actually submitted to the trier of fact in civil disobedience cases, defendants have usually been acquitted. See Bernard D. Lambek, Necessity and International Law: Arguments for the Legality of Civil Disobedience, 5 YALE L. & POL'Y REV. 472, 475 (1986), note 7, at 473.
[22] People v. Gray, 571 N.Y.S.2d 851, 853 (N.Y. Crim. Ct. 1991).

stop the harm" posed by the power plant. The cases against those defendants who received a split jury verdict were eventually dropped.

In ***California v. Lemnitzer***, No. 27106E (Pleasanton-Livermore Mun. Ct. Feb. 1, 1982) the trial of a protestor who condemned the development of nuclear weapons at the Lawrence Livermore Lab in California ended in a hung jury after the court allowed the presentation of evidence supporting the necessity defense. On retrial, the protestor, John Lemnitzer, was acquitted.

In ***Vermont v. Keller***, No. 1372-4-84-CNCR (Vt. Dist. Ct. Nov. 17, 1984) protestors staged a sit-in at the Vermont office of United States Senator Robert Stafford in an effort to get a public meeting about American policy in Central America. These actions resulted in their arrest on trespass charges. At trial, the court allowed the defendants to raise the defenses of necessity, international law, including the Nuremberg principles, and the First and Fourteenth Amendments. The court allowed a number of impressive experts[23] to testify about human rights atrocities in El Salvador and Nicaragua, as well as the important role of protest in American foreign policy. The defendants further testified they had attempted "every reasonable manner to communicate" with the Senator.[24] The jury acquitted all of the defendants.

In ***Michigan v. Jones et al.***, Nos. 83-101194-101228 (Oakland County Dist. Ct. 1984) the State of Michigan held nine separate trials prosecuting fifty-one defendants who blocked access to a plant where cruise missile engines were being manufactured. The defendants were charged with trespass, disturbing the peace, blocking access, and conspiracy. In a trial where the necessity defense was allowed, the jury acquitted the defendants of all charges except failure to obey a traffic officer. In other cases where the necessity defense was allowed, the juries acquitted the defendants on all charges. In trials where the judge did not allow necessity defenses, the defendants were convicted on several counts.

In ***Michigan v. Largrou***, Nos. 85-000098, 99, 100, 102 (Oakland County Dist. Ct. 1985), three protestors at a Michigan cruise missile plant were charged in 1985 with trespass and criminal damage to a fence. The court found that although the defendants willfully violated the law, they did so without malice and for the public purpose of protest. All three were acquitted.

In ***People v. Jarka***, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Ill. Cir. Ct. Apr. 15, 1985), an Illinois jury acquitted twenty defendants who protested against the American military invasion of Central America by conducting a sit-in which blocked the road to the Great Lakes Naval Training Center. The protestors successfully invoked the doctrine of necessity and were allowed to put eight expert witnesses on the stand to offer evidence of the effect of nuclear weapons, American intervention in Central America, and international law. The trial judge gave the jury an instruction[25] that stated that the threat and use of nuclear weapons violated international law.

In ***Chicago v. Streeter***, Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct., Cook County Ill. May 1985), a jury was faced with eight protestors who were charged with trespass for refusing to leave the office of the South African consul. The jury was allowed to hear expert evidence about the defense of necessity and international crimes committed by the apartheid policies of South Africa. It took the jury two and a half hours to acquit the defendants.

In ***Washington v. Heller*** (Seattle Mun. Ct. 1985), eight doctors were charged with trespassing for protests staged on the porch of the home of the South African consul. They were allowed to

[23] The expert witnesses included: Sonya Hernández (political violence in El Salvador), Janet Shenk (human rights in El Salvador), Phil Bourgois (Salvadoran refugees), Shaila Sherwin (refugees), David Rosenberg (United States/contra war on Nicaragua), David McMichael (contra aid), Richard Garfield (health programs of Nicaraguan Government), John Stockwell (CIA activities), Howard Zinn (history of American protest movements), Matthew Countryman (American military aid to Central America), Gladys Sánchez (government repression of Salvadoran churches), Richard Falk, and Ramsey Clark (citizens' role in American foreign policy). See also National Lawyers Guild 1985 Convention Workshop, Creative Defenses in Civil Disobedience Cases, 42 GUILD PRAC. 97-98 (1985)

[24] People v. Gray, 571 N.Y.S.2d 851, 861 (N.Y. Crim. Ct.1991) quoting Keller, No. 1372-4-84-CNCR.

[25] The jury was instructed: "The use or threat of use of nuclear weapons is a war crime or an attempted war crime because such use would violate international law by causing unnecessary suffering, failing to distinguish between combatants and noncombatants and poisoning its targets by radiation." FRANCIS ANTHONY BOYLE, THE CRIMINALITY OF NUCLEAR DETERRENCE 41 (2002).

raise the defense of necessity and admit expert testimony about the medical and other effects of apartheid. The Seattle jury acquitted after little more than an hour and made a post-trial statement supporting anti-apartheid protests.[26]

In ***Colorado v. Bock*** (Denver County Ct. June 12, 1985), twenty-two Pledge of Resistance members were charged with trespass for occupying the office of a United States Senator from Colorado to protest American policy in Central America. The jurors, who were allowed to hear evidence of necessity, were instructed that the defendants could use civil disobedience only as an "emergency measure to avoid imminent public or private injury" but that the injury did not have to be directed against the defendants. The jury acquitted all of the defendants.

In ***Massachusetts v. Carter***, No. 86-45 CR 7475 (Hampshire Dist. Ct. 1987), the daughter of former President Jimmy Carter, Amy Carter, was arrested with fifty-nine others and charged with trespass and disorderly conduct at Central Intelligence Agency (CIA) recruitment activities on the campus of the University of Massachusetts at Amherst. The fifteen defendants were allowed to present evidence to support the necessity defense, international law, and the Nuremberg principles. The defendants argued that the crimes they committed were of far lesser harm than those being committed by the CIA in Central America and offered testimony by a former contra leader and former CIA and government officials. The judge instructed the jury that they could acquit the defendants if they concluded that the defendants acted out of a belief that their protest would help stop the clear and immediate threat of public harm. The jury acquitted them in three hours.

In ***Washington v. Bass***, Nos. 4750-038, -395 to -400 (Thurston County Dist. Ct. April 8, 1987), several dozen students of Evergreen State College sat in the Washington State Capitol in support of an anti-apartheid disinvestment bill. Seven students refused orders to leave and were arrested and charged with trespass and disorderly conduct. At their trial, the defendants were allowed to admit statistical and expert evidence of necessity, international law, and the Nuremberg defense about the situation in South Africa. The jury acquitted all of the defendants.

In ***Illinois v. Fish*** (Skokie Cir. Ct. Aug. 1987) twenty-six people were arrested for trespassing at the Arlington Heights Army Reserve Training Center. The trial court allowed the jury to hear evidence about the necessity defense. All of the defendants were acquitted.

In ***State v. McMillan***, No. D 00518 (San Luis Obispo Jud. Dist. Mun. Ct., Cal. Oct. 13, 1987), fourteen protestors blockaded Diablo Canyon Nuclear Power Plant to prevent the loading of fuel rods. The trial judge allowed fourteen expert witnesses to offer testimony about related potential harm for the area and allowed the defendants to testify about their own related fears. The judge applied the necessity defense and acquitted the defendants.

In 1988, a North Carolina court acquitted two Tuscarora Indians of charges in connection with their taking of twenty hostages at the office of a local newspaper to protest the alleged corruption of county officials.[27]

In ***Massachusetts v. Schaeffer-Duffy*** (Worcester Dist. Ct. 1989), five defendants tried to pass out leaflets to employees at a GTE nuclear weapons facility and prayed outside the building when they were denied entry. The judge denied the prosecutor's motion in limine to prevent evidence of necessity. The jury was allowed to hear the defendants' testimony about their personal efforts to stop nuclear weapons and their religious beliefs, and expert testimony about the threats of the MX missile, religious teachings against nuclear weapons, and the historical effectiveness of civil disobedience. The jury acquitted the defendants of trespass.

[26] In post-trial comments, the jury stated: "only when arrests made in protests against apartheid were efforts made to reform the system." Val Varney, Eight Apartheid Protestors Win Acquittal, SEATTLE TIMES, Aug. 8, 1985, at D2.
[27] Two Carolina Indians Acquitted in Hostage Taking, N.Y. TIMES, Oct. 15, 1988, at 9.

In 1990, in Omaha, Nebraska, a jury acquitted seventeen anti-abortion protestors because of the necessity defense. The trial judge relied on the defense to overturn the trespassing convictions of an additional eighteen defendants.[28]

IN ***West Valley City v. Hirshi***, No. 891003031-3 MC (Salt Lake County, Ut. Cir. Ct., W. Valley Dept. 1990), protestors were charged with criminal trespass after entering property on which Trident II nuclear missile engines were being manufactured in Salt Lake City. The trial judge permitted evidence and instructed the jury on defenses based on necessity, international law, the First Amendment, and the Nuremberg Principles. The jury acquitted the defendants.

In ***People v. Gray***, 571 N.Y.S.2d 851, 861-62 (N.Y. Crim. Ct.1991), a two-day bench trial resulted in the acquittal of six protestors for disorderly conduct because of the necessity defense. The protestors had blocked traffic in Manhattan to protest the opening of a bike and pedestrian lane to vehicular traffic. Judge Laura Safer-Espinoza issued a forty-two page decision reviewing dozens of decisions involving the necessity defense and provided the most extensive judicial overview of the necessity defense in state courts to date.

In 1991, a Chicago jury acquitted a Catholic priest of criminal charges for damage to the inner-city neighborhood where he was pastor after he admitted painting over three tobacco- and alcohol-related billboards. The defendant argued he should not be convicted because of the necessity defense. The jury deliberated ninety minutes before acquitting the defendant.[29]

In 1993, a jury acquitted a Chicago AIDS activist charged with illegally supplying clean needles because of the necessity defense.[30]

In ***California v. Halem***, No. 135842 (Berkeley Mun. Ct. 1991), the jury came to the same conclusion after hearing evidence that dispensing clean needles without a prescription, though illegal, was necessary to protect people from the spread of the AIDS virus.

In ***Washington v. Brown***, No. 85-1295N (Kitsap County Dist. Ct. N. 1985), twenty-four protestors held a vigil in Washington State in protest of a "white train" carrying nuclear weapons. The state arrested twenty of the protestors and charged them with criminal trespass and conspiracy. The defendants filed extensive briefs on the right to present particular defenses to the jury, in support of their motion to dismiss conspiracy charges, and in opposition to the government's motion in limine. The judge dismissed the conspiracy charges and did not admit evidence on the necessity defense, but it did allow Daniel Ellsberg to testify as an expert on why first-strike nuclear warheads on a train are a potential threat to peace. One defendant pled guilty to both charges. The jury acquitted the remaining nineteen defendants.

In ***Washington v. Karon***, No. J85-1136-39 (Benton County Dist. Ct. 1985), four defendants blockaded a federal Plutonium-Uranium extraction facility at Hanford Nuclear Reservation. They were arrested and charged with disorderly conduct and failure to disperse. The defendants filed motions in limine to raise necessity, Nuremberg principles, and the Geneva and Hague Conventions as defenses. The trial judge allowed Nuremberg and necessity defenses, permitted expert testimony regarding radiation contamination, and refused expert testimony regarding nuclear war. The court agreed to give international law instructions to the jury. Immediately after the court ruling permitting scientists to testify on radiation contamination, the prosecution moved to dismiss the case and the court granted the motion.

In ***United States v. Braden*** (W.D. Ky. 1985), twenty-nine demonstrators entered the office of a United States senator as part of the Pledge of Resistance. At their arraignment, the defendants announced their intent to use Nuremberg, necessity, and First Amendment defenses (freedom of

[28] Judge Says Actions of Anti-abortionists at Clinic Justified, OMAHA WORLD-HERALD, July 17, 1990. In a seventeen-page order discussing necessity and the priority of life over property rights, District Judge Robert Burkard reversed the convictions for trespassing. An additional seventeen abortion protestors were acquitted by a jury on similar grounds in June 2000.
[29] Terry Wilson, Acquittal Answers Pfleger's Prayers, CHI. TRIB., July 3, 1991, at 3.
[30] Andrew Fegelman, AIDS Activist Found Innocent of Charges in Needle Exchange, CHI. TRIB., Jan. 28, 1993, at 4.

speech includes freedom to be heard; today the only way to be heard is to act). The government dropped all charges prior to trial.

In ***California v. Jerome***, Nos. 5450895, 5451038, 5516177, 5516159 (Livermore-Pleasanton Mun. Ct., Alameda County, Traffic Div. 1987), more than thirty protestors blocked the main gate to the Lawrence Livermore Nuclear Weapons Lab in a nonviolent sit-in. They were arrested for traffic offenses of blocking and delaying traffic. The Traffic Commissioner agreed to consider expert testimony on the necessity defense and international law (including Nuremberg Principles, Geneva Protocols, and the Hague Convention) via affidavits. The defendants filed affidavits for Daniel Ellsberg (on the effectiveness of nonviolent protests in arousing citizen action), Frank Newman (on international law) and Charles Schwartz (on the role of Livermore Lab in promoting the arms race). Before trial, the judge granted the prosecution's request to drop all charges.

I would appreciate it if you could provide the answers to my questions:

1. Why did Defence Counsel not demand Prosecutor Engh and Holden provide reasons for their refusal to address Breivik's claim of necessity?
2. Is it common for Norwegian Prosecutors to refuse to provide the court with the Prosecutor's Office assessment of an accused's evidence for their claim of necessity?
3. In Norwegian Law upon which party does the Onus of Proof lie in a claim of necessity?
4. Is there some political correct conformity conspiracy between Defence Counsel and Prosecution to ignore Breivik's claims of necessity?
5. Why did your Defence of Breivik state that the only issues before the court – as the media have been reporting and you said to the court – are the sane/safety issue?
6. How exactly can the only issue before the court be the 'sane/safety'; since when is the 'guilt/innocence' issue irrelevant in a political criminal trial?
7. If Lippestad attorney's are denying the court to be required to seriously examine the necessity evidence for Breivik's guilt or innocence; upon what grounds and authority did Lippestad Attorney's find Breivik to be guilty beyond reasonable doubt?
8. Or is it a matter of first ascertaining Breivik's sanity; and then if, or when Breivik is finally deemed sane, does he then get a new trial with a focus on 'guilty/innocence' issue; to determine his innocence or guilt, based upon the evidence for and against his necessity defence?
9. If not, when exactly is Breivik entitled to an impartial trial where the issue before the court is Breivik's 'guilt/innocence' and Prosecutors and Defence Counsel are required to seriously legally examine the evidence for and against his Necessity Defence?

Respectfully Submitted

Lara Johnstone
Habeus Mentem: Right 2 Legal Sanity
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http://norway-v-breivik.blogspot.com/