

IN THE DISTRICT COURT OF ARGYLL AND BUTE AT HELENSBURGH

Between

Procurator Fiscal

and

Caroline Lucas

Defendant

SUBMISSIONS ON BEHALF OF THE DEFENDANT

Introduction

1. The Defendant is charged with breach of the peace. The charge against her is as follows:

“On 12 February 2001 at the A814 North entrance, HMNB Clyde, Faslane, District of Argyll and Bute you Caroline Lucas did conduct yourself in a disorderly manner, sit on the roadway, disrupt the free flow of traffic, refuse to desist when required to do so and commit a breach of the peace.”

2. The Defendant intends to plead not guilty and raise arguments as follows:
 - a) Her conduct did not amount to a breach of the peace on the current state of the authorities in Scots law; in particular, she did not conduct herself in a disorderly manner;
 - b) The offence of breach of the peace must be interpreted in such a way as to be compatible with her right to freedom of expression and freedom of assembly under Articles 10 and 11 respectively of the European Convention on Human Rights and, when it is so interpreted, the Defendant’s conduct did not amount to a breach of the peace;
 - c) The decision to prosecute her with the offence of breach of the peace constitutes a violation of her rights under Articles 10 and 11; and

- d) Insofar as she is found to have committed a breach of the peace, the Defendant's actions were justified under the rules of customary international law which form part of Scots law.

Breach of the Peace

Scots Law

3. In *Smith v Procurator Fiscal*¹ the High Court of Justiciary considered whether the offence of breach of the peace was sufficiently defined in Scots law as to fulfil the requirement of certainty in the European Convention. The court reviewed the numerous authorities on breach of the peace and concluded that the essential constituents of the offence were capable of being ascertained and so there was no violation of the appellant's Convention rights under Article 7.
4. The High Court set out its views as to the elements of the offence in paragraph 17 of its opinion as follows:

“The crime of breach of the peace can be committed in a wide variety of circumstances, and, in many cases, it is a relatively minor crime. It has therefore been said, more than once, that a comprehensive definition which would cover all possible circumstances is neither possible nor desirable. Equally, in our view, it is neither possible nor desirable to derive a comprehensive definition from a close analysis of the facts of individual cases in which it has been held that a breach of the peace had been committed ... [I]t is, in our view, clear that what is required to constitute the crime is conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community ... It is true that, as has been pointed out, Lord Maclaren [in a previous case] referred to breach of public order and decorum and to annoyance to the public ... On that basis it has been suggested that since a very wide range of types of conduct could be seen as an annoyance to someone or in some circumstances, there is no sufficient certainty as to what the essential element is. We have come to the conclusion that that criticism is not made out. If words like annoyance or upset or breach of decorum are taken in isolation they might, it is true, be taken as applicable to something minor in the way of conduct which could be considered inappropriate or irritating. If, however, the opinions in the leading cases are read as a whole, we think it sufficiently clear that something substantially greater than mere irritation is involved. Lord Maclaren himself does not speak of “annoyance” in isolation but of “alarm and annoyance” and says that a reasonable apprehension of disturbance to the public peace is necessary to the proof of the crime. What is required, therefore, it seems to us, is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person.

¹ (2001) 27 Scottish Law Times, 31st August 2001.

5. The court went on to point out, in paragraph 18 of its opinion, that where there is no evidence of actual alarm, the conduct of the defendant must have been “flagrant” in order to justify a conviction and that “the use of that word points to a standard of conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances.” The court then set out, in paragraph 20, some comments of general application, having rejected a suggestion that it should set out a restatement of the law in this area:

“[I]t may be of some assistance to comment on some recurrent themes. As we have observed, there are both old and recent authorities which support what might be called a robust approach to cases involving the use of bad language. Secondly, there have been repeated instances in which refusal to co-operate with police or other officials has led to a charge of breach of the peace: but such a refusal, even if forcefully or even truculently stated, is not likely to be sufficient in itself to justify a conviction. Thirdly, there have been cases in which actions done or words spoken in private have been held to amount to breach of the peace, or conduct likely to provoke such a breach, more because of some perceived unpleasant or disgusting character than because of any real risk of disturbance. In such cases, it is perhaps particularly necessary to bear in mind what the essential character of the crime is. Fourthly, there will be cases in which the court will require to bear in mind the importance of freedom of expression, an issue which now involves reference to Article 10 of the Convention. However, no argument was addressed to us in regard to Article 10, and we think it better not to attempt to discuss it in this case. We would add that it seems to us that, notwithstanding the decision in [a previous case], that a charge of breach of the peace in statutory form is sufficient to meet the requirements of notice it will normally be proper, now that regard must be had to the Convention, to specify the conduct said to form the breach of the peace in a charge, as indeed is common practice already.”

6. The decision accordingly makes it clear that the purpose of the offence in Scots law is to prevent serious disturbance to the public peace. If there is no evidence that any actual alarm or distress has been caused then it is necessary to show that the conduct complained of would be alarming or disturbing to a reasonable person.

The Relevance of Articles 10 and 11 of the European Convention

7. Of course, the High Court in *Smith* did not hear submissions on the impact of Article 10 and so did not discuss how it affects the definition of the offence.² There is no doubt that it is highly relevant.

² As was acknowledged in paragraph 20 of its opinion.

8. Article 10 follows the classic format of most Convention rights. It first sets out the nature of the right and then the circumstances in which interference with that right is permitted:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

9. Article 11 is in the same form and again highly relevant:

“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

10. The European Court has repeatedly stressed the importance which needs to be attached to freedom of speech and the wide range of activities which are covered by Article 10. In *Handyside v United Kingdom*³ the Court said this:

“[Freedom of expression] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of ... pluralism, tolerance and broadmindedness, without which there is no democratic society.”

11. It is plain that Article 10 covers not only the content of expression or ideas but also the means of transmitting those ideas, since if the means of expression is restricted then so are the ideas.⁴

³ (1979) 1 EHRR 737.

⁴ *Autronic AG v Switzerland* (1990) 12 EHRR 485.

12. The scope of Article 11 is similarly wide. Significantly, the European Court has consistently held that the right to freedom of assembly includes the right to use the highway as a forum for protest providing that there was a peaceful intention.⁵ In addition, where individuals are peacefully protesting and not likely to cause harm to others, arrest, detention and a criminalisation for alleged breach of the peace will constitute a violation of Article 10.⁶
13. The general principle is that restrictions with the rights under Articles 10 and 11 will require strict justification. It has to be shown that the interference with the relevant right was:⁷
 - a) Prescribed by law. In other words, it must have some legal basis and that legal basis must be accessible and precise;
 - b) Set out in the second paragraph of the relevant Article; and
 - c) Necessary in a democratic society. This means that it must fulfil a pressing social need, pursue a legitimate aim and that there must be a reasonable relationship of proportionality between the means employed and the aim pursued. Proportionality in turn requires the following:
 - i) The interference should impair as little as possible the right or freedom in question;
 - ii) Any measures adopted which may or will interfere with that right must be carefully designed to meet the objectives in question;
 - iii) Those measures must not be arbitrary, unfair or based on irrational considerations.
14. In *Zana v. Turkey*⁸ the European Court reiterated the fundamental principles which emerged from its Article 10 jurisprudence as follows:

⁵ *Chorherr v Austria* (1993) 17 EHRR 358.

⁶ *Steel v United Kingdom* (1998) 23 EHRR 603.

⁷ See, for example, *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

⁸ (1997) 27 EHRR 667.

- a) Freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and for each individual's self-fulfilment. Whilst this freedom is subject to exceptions, those exceptions must be construed strictly and the need for any restrictions must be established convincingly;
 - b) The adjective "necessary" in Article 10(2) implies the existence of a "pressing social need." Accordingly, whilst the contracting States have a certain margin of appreciation in assessing whether such a need exists, this goes hand in hand with European supervision;
 - c) In exercising its supervisory jurisdiction, the European Court will look at the impugned interference in the light of the case as a whole, including the nature of the conduct or remarks and the context in which that conduct occurred. The court will consider whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." The Court will have to be satisfied that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.
15. The European jurisprudence accordingly establishes that freedom of expression is a liberty which will be jealously guarded. The same applies to attempts to express opinion in conjunction with others, which is protected under Article 11.
16. The House of Lords has followed the spirit and reasoning of the European Court on issues of freedom of expression and the right to protest. In *R v. Secretary of State for the Home Department ex p Simms*⁹ Lord Steyn said this:¹⁰

⁹ [2000] 2 AC 115.

¹⁰ At 126F-G.

“Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Abraham v. United States 250 U.S. 616, at 630 (1919), per Holmes J. (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see Stone, Seidman, Sunstein and Tushnet, Constitutional Law, 3rd ed., (1996), 1078-1086.”

17. In *Director of Public Prosecutions v Jones*,¹¹ the defendants had been prosecuted for offences following peaceful demonstrations on a public highway. Lord Irvine made it plain that that the starting point, under Article 11 of the Convention, was that individuals has the right to assemble on the highway. He had this to say about the issue:¹²

*“[O]ur law will not comply with the Convention unless its **starting-point** is that assembly on the highway will not necessarily be unlawful. I reject an approach which entails that such an assembly will always be tortious and therefore unlawful. The fact that the letter of the law may not in practice always be invoked is irrelevant: mere toleration does not secure a fundamental right.”*

(emphasis as in original)

18. In *Redmond-Bate v DPP*¹³ the Divisional Court considered the conviction of a Christian fundamentalist for breach of the peace following her preaching in a public place. In allowing the appeal and quashing the conviction Sedley LJ pointed out that:

“[f]ree speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers’ Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power. We in this country continue to owe a debt to the jury which in 1670 refused to convict the

¹¹ [1998] 2 AC 240.

¹² At 259E-F.

¹³ 23rd July 1999.

Quakers William Penn and William Mead for preaching ideas which offended against state orthodoxy.”

19. These statements of principle are reflected across the Commonwealth where fundamental rights provisions relating to freedom of expression and freedom of assembly exist. In *Boucher v The King*¹⁴ the Supreme Court of Canada made this point in relation to freedom of expression:

*“To say that the advocacy of any belief becomes a seditious libel, if the publisher has reason to believe that he will be set upon by those with whom his views are unpopular, bears ... its own refutation upon its face and finds no support in principle of authority. Any such view would elevate mob violence to a place of supremacy ... the decision in *Beatty v Gillbanks* (1882) 9 QBD 308, establishes that the lawbreakers are those who resort to violence rather than those who exercise the right of free speech.”*

20. Of course, the definition of breach of the peace in Scots law is different to that in England and Wales and also to that in many Commonwealth countries. However, all Scottish courts are public authorities within the meaning of the Human Rights Act 1998. It is accordingly unlawful for them to act in a way which is incompatible with an individual’s Convention rights.¹⁵ This means applying domestic law so that it is compatible with the relevant Convention jurisprudence.
21. It is accordingly submitted that when the above discussed principles are applied, and in particular the European learning on Articles 10 and 11, the offence of breach of the peace must be strictly confined to those cases in which serious public disturbance is likely to imminently ensue as a result of the individual action of which complaint is made. Even then, it is necessary to examine the nature of the individual action and the response or anticipated response of the public to consider whether the interference in any particular case properly strikes a balance between the rights of the individual and the interests of the community.
22. In carrying out this balancing exercise, and considering the needs of the community, the potential vulnerability of the dissident voice must be respected. It cannot be right for an individual who is exercising her

¹⁴ [1951] 2 DLR 369 at 390.

¹⁵ Sections 6(1) and 6(3).

fundamental right of freedom of expression, whether alone or with others, to be criminalised for the inability of others to control their violent tendencies.

23. The above offered definition does of course still permit the state to control the exercise of the rights protected under Article 10 and 11. However, unlike the present definition, it restricts this permission to situations in which the disturbance to the public peace is likely to be serious and imminent. It further puts the onus on the state to satisfy the court that this requirement is fulfilled. It is quite proper that the state should be required to discharge this onus since it is the best position, normally through the evidence of police officers which will not be available to the individual, to show that there was a pressing need for the interference.
24. It is accordingly submitted that the above definition needs to be adopted so as to ensure that Scots law is Convention compliant. The definition is strongly grounded in principle and supported by human rights jurisprudence across the world. The court is invited to apply it for the purposes of adjudicating upon the present complaint.

The Defendant's Position Under the Human Rights Act

25. It is of course open to the Defendant in this case to rely upon her Convention rights. By virtue of section 6(1) of the *Human Rights Act 1998* it is unlawful for a public authority to act in a manner which is incompatible with a Convention right. A person who claims that a public authority has acted in a manner which is made unlawful under section 6(1) may, under section 7(1)(b), rely upon that unlawful act in any legal proceedings. The bringing of a prosecution plainly comes within the ambit of section 7(1)(b).¹⁶
26. Furthermore, the Crown is also a public authority and is therefore also under an obligation not to violate the Defendant's Convention rights. The court is bound to consider whether there has been such a violation and, if there has,

¹⁶ *R v DPP ex parte Kebilene* [1999] 3 WLR 972.

make any order within its jurisdiction to give effect to its finding.¹⁷ This will usually amount to a dismissal of the charge.

Applicability to the Present Case

27. The Procurator Fiscal relies upon four particulars of the Defendant's conduct which it is alleged amounted to a breach of the peace:
- a) Conducting herself in a disorderly manner;
 - b) Sitting on the roadway;
 - c) Disrupting the free flow of traffic; and
 - d) Refusing to desist when required to do so.
28. As to the first of these, it is submitted that such an allegation does not comply with the High Court's injunction in *Smith* that the charge should specify the behaviour of which complaint is made. However, and in any event, it is notable that the evidence of the police officers who arrested the Defendant, has made no reference to any conduct which could possibly be characterised as disorderly.
29. Turning next to the allegation of sitting on the roadway, this, in itself, cannot be conduct which amounts to breach of the peace. It is difficult to see how anybody could have been caused any alarm or distress by peaceful individuals in the roadway and the officers have not suggested that any such alarm or distress was caused to anyone.
30. The third allegation refers to the alleged disruption caused to free flow of traffic. If this was indeed caused or contributed to by the Defendant, there can be no question of it having been done through violent or aggressive means. Rather, it would have been a result of the peaceful protest. Again, the officers have not suggested that there was anything in the manner in which the traffic was disrupted that caused alarm or distress.

¹⁷ *Human Rights Act 1998*, section 8.

31. Finally, the High Court made it plain that a refusal to comply with a request from the police or authorities is unlikely to be sufficient to found a charge of breach of the peace. The last of the four aspects of the Defendant's alleged behaviour is accordingly irrelevant to the offence with which she has charged and incapable of supporting that charge.
32. The above analysis is predicated on the assumption that Scots law does not require any adjustment in order to take account of the Defendant's rights under Articles 10 and 11. It can be seen that, even on this assumption, the Defendant cannot be guilty of breach of the peace. The position is, however, even plainer when the modified definition of breach of peace, as set out in paragraph 21 above, is applied.
33. The Procurator Fiscal cannot show that there was going to be any form of public disturbance in the present case. At best, it can possibly be inferred that some individuals could have been put to some inconvenience by the actions of the Defendant. This is not a disturbance, let alone a serious disturbance.
34. Nor can the Procurator Fiscal show that any threat to the public peace was imminent. Indeed, there is no evidence that anybody was complaining of the conduct of the Defendant or anticipated that a disturbance was about to occur.
35. The court is also invited to scrutinise the actions of the state in arresting the Defendant and the decision of the Procurator Fiscal in bringing this complaint against the Defendant. In the language of the European Court, there was no pressing need to arrest, detain or prosecute. Rather, the state has chosen to adopt a policy of arrest and charge in respect of a large number of people without consideration of individual circumstances. It has sought to invoke a law which is intended to safeguard the public peace, yet with no evidence that the public peace was actually being disturbed. There have been plain violations of Articles 10 and 11 and the court should dismiss the complaint.

International Law

Principles

36. The High Court, in *Lord Advocate's Reference No. 1 of 2000*¹⁸ ruled upon the question of the legality of nuclear weapons in Scots law. The defendants had been acquitted of offences of malicious damage and four questions were referred for the opinion of the High Court. The court was asked to consider, amongst other things, whether the deployment of the Trident missile system was legal under principles of international law. The court did not specifically address the issue of whether the use of Trident was illegal.

37. It is important to note, before dealing with the issue at hand, that the High Court was certain that rules of customary international law were also rules of Scots law.¹⁹

38. In paragraph 94 of its judgment, the High Court said that there were two fundamental flaws with the attempted reliance on international law and the opinion of the ICJ. First, it said that the submissions of the respondents ignored

“the fact that the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, are not concerned with regulating the conduct of States in time of peace. They specifically relate to warfare and times of armed conflict, and are designed to regulate the conduct of belligerents, against one another or against some neutral State.”

39. With respect to the High Court, this is plainly wrong. International humanitarian law does not come into operation simply when an armed conflict starts. This much is clear from the ICJ's discussion of whether the mere possession of nuclear weapons can be contrary to international law. On this, it stated as follows:²⁰

“In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory

¹⁸ [2001] ScotHC 15.

¹⁹ Paragraph 23.

²⁰ Paragraphs 47 and 48.

from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal (for whatever reason) the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State (whether or not it defended the policy of deterrence) suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.”

Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a “threat” contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.”

40. And in paragraph 51 of its opinion, the ICJ is even clearer in stating that it is considering the question of possession and use of weapons in all situations:

“Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons per se; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.”

41. It is accordingly submitted that any attempt by the High Court to limit the reasoning of the ICJ to situations of armed conflict was wrong. Rather, as illustrated above, the crucial issue as to possession of nuclear weapons was explicitly dealt with by the ICJ which made it plain that the principles of necessity and proportionality applied.
42. The second fundamental flaw identified by the High Court was the attempt by the respondents to equate, as a matter of international law, the threat of using nuclear weapons with their actual use.²¹ The court held that there was a

²¹ See paragraph 96 of the High Court’s decision.

fundamental difference between the two which operated to invalidate the arguments of the respondents.

43. Again, such an assertion is based on a misreading of the ICJ's decision. As paragraph 41 of its decision, quoted above, makes clear, the mere possession of nuclear weapons is capable of violating the principles of international law. In proceedings before the ICJ, the then Attorney-General of the United Kingdom stated as follows:²²

*“For a state such as my own, the reason – the **sole** reason, Mr President – for acquiring and possessing nuclear weapons is as a means of deterrence. I emphasize deterrence as something signalling both the will and the capacity to defend oneself, but there is a distinction between the concept of deterrence and that of self-defence. Self-defence is the right to resist and fight off an attacker. Deterrence warns a would-be aggressor not even to embark upon an attack.”*

(emphasis as in the original)

44. By its reasoning in paragraph 41 of its judgment, the ICJ must have rejected this attempted demarcation between self-defence and deterrence. The point is a simple one. Deterrence implies a willingness to use. A willingness to use is a threat. A threat is illegal unless it is proportionate. The question of whether the use of Trident is proportionate is a matter for this court on the evidence before it.

Impact on the Present Case

45. Evidence as to the destructive capability of Trident is provided by Paul Rogers, Professor of Peace Studies at the University of Bradford since 1992 and an acknowledged expert on international security and nuclear weapons. Professor Rogers makes the following points:

- a) There are four submarines based at RN Faslane, each of which is capable of carrying up to 16 Trident missiles, and each with a range of about 5000 miles;
- b) The present government has announced that each submarine on patrol will carry up to 48 warheads, with six of these likely to be deployed on

²² See page of the verbatim record of the proceedings on 15th November 1995.

a single warhead sub-strategic basis and the remainder on a multiple warhead strategic basis;

- c) Each strategic warhead is eight times as powerful as the bomb which was dropped on Hiroshima on 6th August 1945 and which killed between 80-100,000 people;
- d) The nuclear targeting posture of the United Kingdom includes the possibility of “first use” as well as a use which falls far short of all out nuclear war.

46. From the above evidence, it is a reasonable assumption that each submarine on patrol contains 42 strategic warheads. This means that even if only one submarine was deployed, and no tactical weapons were used, its nuclear capability would be 336 times more powerful than the bomb which was dropped on Hiroshima.

47. Furthermore, as Dr Lewis Moonie, Parliamentary Under-Secretary of State for Defence makes clear in his letter of 25th March 2001 to Mr Dennis Flaherty, the only sensible view of nuclear weapons is that they are “indiscriminate weapons of mass destruction specifically designed to incapacitate or kill large numbers of people.”

48. In the light of this admission and the evidence of Professor Rogers, there is no doubt that it would be impossible, in the event of a Trident missile attack being launched, to distinguish between military and civilian targets. If this is the case, then it cannot be said that the use of Trident could ever constitute a proportionate response. In the words of the ICJ, the use of Trident would “necessarily violate the principles of necessity and proportionality.” Accordingly, even if the United Kingdom only possesses Trident on a deterrence basis, such a policy must carry with it a threat of use. Both the threat and the actual use are illegal under international law.

49. If the current deployment of Trident is indeed illegal, as contended for above, it is submitted that the Defendant’s actions were justified. The Defendant does

not rely upon the narrow Scots law concept of “necessity” which requires a pressing danger to exist. Rather, the Defendant asserts that she was entitled, as a matter of international law, to take proportionate steps to exercise a “claim of right” defence. She was in fact seeking to enforce international law by protesting against the illegal deployment of Trident.

50. The Defendant further relies on paragraph E of the *dispositif* in the ICJ’s judgment:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

51. This obligation is not merely a moral obligation. The ICJ found that it was a legal obligation dating back to 1946 and, moreover, a legal obligation to achieve a precise result. The Defendant submits that she was taking part in actions which were contributing to the fulfilment of this obligation on the part of the United Kingdom. She adopted a method which was proportionate and which accordingly cannot be characterised as criminal.