IN THE HIGH COURT OF JUSTICE CO/663/00

QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Royal Courts of Justice
Strand
London WC2

Monday, 9th October 2000

B e f o r e:

LORD JUSTICE BUXTON

-and-

MR JUSTICE PENRY-DAVEY

- - - - - - -

HUTCHINSON

-v-

NEWBURY MAGISTRATES COURT

- - - - - -

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MR H MERCER (instructed by Birnberg, Peirce & Partners Solicitors, London NW1 7HJ) appeared on behalf of the Claimant.

MR J CAUSER and MS E BENSON (judgment only) (instructed by CPS, Reading) appeared on behalf of the Defendant.

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J U D G M E N T
(As approved by the Court)

1. LORD JUSTICE BUXTON: This is an appeal by way of Case Stated from a decision of the Crown Court at Reading, Her Honour Judge Mowat and Justices, which itself was an appeal against Mrs Hutchinson's conviction in the Newbury Magistrates' Court in respect of an offence of criminal damage, contrary to section 1(1) of the Criminal Damage Act 1971.

2. The facts are clearly stated in paragraph 8 of the Crown Court's case and were undisputed. They are as follows:

> "i)The Atomic Weapons Establishment at Aldermaston is engaged in production of Nuclear Warheads for missiles deployed onTrident Submarines.
>
> ii)Ms Hutchinson on 27th of June 1998 at about 8.00 a.m. acting on her own, made 22 deliberate cuts to the outer perimeter chainlink fence at the Atomic WeaponsEstablishment, Aldermaston, using boltcutters, before being stopped and arrested by Ministry of Defence Police.
>
> iii) She caused about £2,400 worth of damage.
>
> iv)She was aiming to cause more than £5,000 worth so as to gain access to Crown CourtTrial.
>
> v) Ms Hutchinson had held a long-standing commitment to promoting both multilateraland unilateral nuclear disarmament.
>
> vi)Her aim was to halt permanently the production of Trident Warheads at Aldermaston.
>
> vii) Her ultimate aim in cutting the fence and attempting to stop the production of Warheads was to end the UK Government's Nuclear Submarine Programme.
>
> viii) When the fence is breached production at AWE Aldermaston temporarily stops, until security is restored.
>
> ix)Trident Weapons are the UK Government's nuclear arsenal."

3. Before the Crown Court, Mrs Hutchinson represented herself. It is not a criticism of her to say that it is not always easy to categorise the submissions that she then made.

4. Before us, she has had the advantage of being represented by Mr Mercer who we understand to have been acting in this court pro bono. The Court is extremely grateful to him, as it is always grateful to members of the Bar who take that burden upon themselves in a pro bono capacity. However, that said, the basis of the case before us is the same essentially as it was before the court below and, indeed, so far as we know, as far as it was before the magistrates. That is to say, that the activity at Aldermaston, referred to in the Crown Court's case, is unlawful in customary

international law as demonstrated by an advisory opinion of the International Court of Justice in 1996 and, therefore, it is by the same token unlawful in English domestic law.

5. Mrs Hutchinson's case is that her acts, being designed to impede or prevent that activity, are thus excusable in English domestic criminal law and not a criminal act, even though, absent that factor, there would be a plain breach of the 1971 Act.

6. The general nature of these issues is, in my judgement, adequately summed up in the Crown Court's questions posed for the judgment of this court, though their actual formulation may need some attention in the light of Mr Mercer's refinement of the argument before us.

7. The questions on which the opinion of High Court is sought are as follows:

> "1. Whether the Court erred in determining that the applicant did not have a lawful excuse within the meaning of Section 1(1) of theCriminal Damage Act 1971 in its finding thatthe UK's possession of Trident nuclear weapons at AWE Aldermaston was not contrary to customary international law. In particular, that the Court did not fully and/or properlyconsider:
>
> a) the capability or envisaged use of Trident on the basis of the evidence presented tothe Crown Court as to whether such use orcapability is contrary to the opinion of the International Court of Justice on theLegality of the Threat or Use of Nuclear Weapons; or
>
> b) whether the possession or envisaged use of Trident is contrary to the obligation to pursue in good faith nuclear disarmament in all respects by adopting a particular courseof conduct contained in the Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons and in Article VI of the Treaty on the non-proliferation of Nuclear Weapons.
>
> 2. Whether the belief of the applicant, who lives 8 miles from AWE Aldermaston, that she was acting out of necessity, self-defence, in the public interest or in order to prevent a nuisance provided a lawful justification and excuse for her action."

8. Those are the questions we are asked. In addressing those questions and the appeal generally, it will however be necessary to divide the issues further for the purposes of clarity.

9. Lawfulness of the activity at Aldermaston

10. The Applicant contended that

(i) The opinion of the International Court of Justice recognised and enunciated a rule of customary international law;

(ii) That same rule in the same terms as extracted from the opinion of the International Court

of Justice was therefore a rule of English domestic law;

(iii) By English domestic law the conduct forbidden by the rule was not only unlawful in a general sense but also criminal.

11. These latter submissions must, in my view, cast light on both the precision that is required in formulating any alleged rule of customary law, and the degree of certainty with which it must be established. That is because the rules contended for are indeed rules: not merely principles or aspirations or general understandings, but statements that are sufficiently precise and mandatory to form part of the lex lata of an individual state.

12. When we turn to the opinion of the International Court of Justice, which we have been taken through in great detail and which, of course, we approach with great respect, it is in my view very difficult to identify any such rule that is agreed with sufficient certainty to form part of a system of mandatory rules. The Court examined a range of international treaties, including the Charter of the United Nations. It made plain in paragraph 67 of its opinion, not only in that connection but generally, that:

> "The Court does not intend to pronounce here upon the practice known as the 'policy of deterrence'."

13. In summing up that part of its opinion, the Court drew attention in paragraph 73 of the opinion to the adoption by the General Assembly each year of resolutions asking Member States to conclude conventions prohibiting the use of nuclear weapons in any circumstances. They draw attention to that as the expression of a desire on the part of a large section of the international community to prohibit the use of nuclear weapons.

14. The court then said, however, in the last sentence of paragraph 73:

> "The emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent opinio juris on the one hand, and the still strong adherence to the practice of deterrence on the other."

15. The Court then went on in paragraph 74 to say this:

> "The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons per se, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict of the law of neutrality."

16. In the course of that examination, there are strong statements, in paragraphs 78 and 79 of the Court's opinion, upon which Mrs Hutchinson understandably relied. In particular, in paragraph 78, the Court said, looking at the general principles of humanitarian law:

> "...States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets... it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have under unlimited freedom of choice of means in the weapons they use."

17. The Court then said at the end of paragraph 79 of its opinion:

> "Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."

18. Mr Mercer argues strongly, and the Court in some respects seems to have been of the view, that it was difficult to reconcile those principles with the use of nuclear weapons.

19. The Court, however, was more cautious than that when it came to formulate the actual rules of customary law. It said in paragraph 90 of its opinion:

> "Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial."

20. It drew attention in paragraphs 95 and 96 to the importance of overriding considerations of humanity and said this, in paragraph 95:

> "In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance."

21. In paragraph 97:

> "Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."

22. With that reasoning, the Court passed to the dispositif, or reply to the question put to it by the General Assembly. That is in paragraph 105 of the opinion. It reported as follows:

"A. Unanimously,

There is neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary or conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

F. Unanimously,

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."

23. I, for my part, have difficulty in seeing what rule and, in particular, what rule relevant to our present concerns emerges with sufficient precision from that report and those conclusions.

24. Mr Mercer formulated the rule for which he contended as follows:

"the threat or use of nuclear weapons for deterrent purposes is contrary to customary international law unless pursuant to a clearly-declared policy of envisaged use which is consistent with international law."

25. I have to say there are formidable difficulties about that formulation. First, the opinion of the International Court of Justice appears to say nothing about the need for transparency or

declaration of a state's policy. Certainly, Mr Causer's challenge on that point went unanswered.

26. Second, to state that the rule of international law is that the use of weapons must be consistent with international law hardly seems to be a rule rather than an aspiration or indeed a truism. It would give no guidance to a court if it had to apply Mr Mercer's formulation as a matter of mandatory domestic law.

27. It was further contended that the activity conducted at Aldermaston is unlawful because nuclear weapons are held and deployed there with no declared and limited policy as to their use. Here again, it is, in my view, difficult or impossible to extract from the International Court of Justice's opinion a statement sufficiently precise to justify that contention.

28. I therefore take the view that the rule of customary international law contended for by Mrs Hutchinson is not demonstrated by the International Court of Justice's opinion, which is the only material relied on in support of it.

29. There is a further difficulty about the content of the International Court of Justice's opinion. The only relevance of the present enquiry to Mrs Hutchinson's case is to establish the existence of a customary rule as part of English law. As authority for the process of transmission of the international law rule into a rule of domestic law reliance was placed on a statement in the 9th edition of Oppenheim at page 56:

> "As regards the UK, all such rules of customary international law as are either universally recognised or have at any rate received the assent of this country are per se part of the law of the land..."

30. I omit a passage; and then the quotation from Oppenheim continues:

> "...The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from rules of customary international law will be recognised and given effect by English courts without the need for any specific act adopting those rules into English law."

31. The second of those sentences, not the first, was cited with approval by Lord Lloyd in his speech in the first Pinochet case, [2000] 1 AC at page 90E.

32. If that first sentence extracted from Oppenheim is an accurate formulation of the rule of international law, then, first, the rule contended for in our case has not received the assent of this country: it is precisely that that Mrs Hutchinson complains of. Secondly, the material in the Opinion of the International Court of Justice falls far short of establishing the existence of any rule that is universally recognised. That latter point was not of course true of the rule that Lord Lloyd was

considering in Pinochet, that is to say the rule of head of state immunity, and therefore he did not address this point. This point was not raised in argument but only came to light after argument had closed. I do not therefore act on it. I do however say that this aspect of the relationship between customary international law and the domestic law of the state does nothing to undermine the conclusion that I had already reached as to the existence and availability of the rule of international law contended for in this case.

33. I would therefore answer the question posed in the first sentence of the first question in this case stated "no". The court below did not err. It will be seen that my reasoning is somewhat different from that adopted by the judge, and I do not address in terms her further particularisation of the first question. That course is partly attributable to the fact that, as I have already said, the judge only received submissions from Mrs Hutchinson, whereas this Court has had the benefit of the further analysis brought to bear on the case by Mr Mercer.

34. That conclusion suffices to dispose of most, if not all, of the defence mounted by Mrs Hutchinson to the criminal charge. I will, however, in deference to the strongly held views on this matter and to the detailed submissions that we have received, address the remainder of the argument on the assumption that I am wrong in the conclusion that I have just reached, and that there is indeed a rule of international customary law in the terms contended for by Mr Mercer.

35. The English rule

36. It is agreed that a rule of international customary law, if it is sufficiently agreed in international law to be such, is translated automatically into English domestic law. The question however is how it should be characterised once it arrives here?

37. Mr Mercer contended, after some hesitation, that the rule that he had formulated was in English law a rule of substantive criminal law, making conduct by the Crown or British Government in contravention of it a criminal act. That is a very striking submission in view of the contents of the rule and its terms. I say nothing in passing as to susceptibility of the Crown to criminal process. It is also in my view impossible to reconcile that contention with the debate in Pinochet (No 3) which concluded, illuminatingly subject to the specific dissent on this point of Lord Millett, that although state torture had long been an international crime in the highest sense (to adopt the formulation of Lord Browne-Wilkinson [2000] 1 AC page 198F) and therefore a crime universally in whatsoever territory it occurred, it was only with the passing of section 134 of the Criminal Justice Act 1998 that the English criminal courts acquired jurisdiction over "international", that is to say extra territorial, torture.

38. I hold, therefore, that Mr Mercer is wrong on this point, and that the unlawfulness of the United Kingdom Government's conduct that is established in English law by the transformation of the rule of international law is unlawfulness of a more elusive nature than is to be found in the substantive criminal law. What exactly that nature is was never satisfactorily explained to us, despite the court's efforts to seek elucidation.

39. The English rule as a defence to a criminal damage charge Here again we had difficulty in elucidating Mrs Hutchinson's case. It originally seemed to be contended, and was in effect so said in contention (6) in Mr Mercer's written skeleton argument, that the fact that Mrs Hutchinson was acting to impede, alternatively to protest about, activities that were unlawful under international law in itself provided her with a lawful excuse in English criminal law. No authority was cited for a claim as broad as that. That is because no authority supports it. It is clear that the claim, when scrutinised, is hopelessly wide. If D commits a crime only to stop X doing an unlawful but not criminal act, he cannot claim the latter unlawfulness alone as an excuse for his own criminal conduct. Quite apart from the lack of authority, the practical implications of such an argument, were it correct, are obvious. What D must do in such a situation is bring his conduct, if he can, under one of the recognised heads of public or private defence, such as the heads that were set out by the judge in the second of her two questions for the opinion of this Court. We therefore explored with Mr Mercer what such heads might apply in this case.

40. The judge approached the matter broadly at page 12A of her judgment, which it would be helpful to read. She said this:

> "That being so [I interpose, that is to say, that they would accept, for the purpose of argument, the factual case advanced by Mrs Hutchinson]
>
> we apply the principle of English criminal law which recognises that it is legitimate or lawful to use reasonable force, be it force towards persons or property, to protect yourself or others from the threat of injury or physical danger. That principle applies in our view whether injury is anticipated as a result of an attack by another person, as a result of another person's activities or as a result of some natural event or accident or circumstance. The one application of this principle is the doctrine of self-defence. If you are under attack or believe that you are under attack or about to be attacked by someone else you are entitled to use such force as is reasonably necessary to protect yourself. This principle can have applications outside strictly the situation of self-defence. It can apply when you, for example, see smoke emanating from your neighbour's house, believe there is a child in an upstairs room, and albeit you are mistaken, you break through their door or through their window in order to effect a rescue. Your belief as to the threat may be wrong but you are entitled to be judged in the light of the circumstances as you believe them to be. We totally accept that

> Mrs Hutchinson rightly or wrongly - we cannot say - passionately and totally believed in the dangers of Aldermaston's operations as described by her witnesses. But that is not the whole story. The law requires that your response to the dangers as you perceive them to be must be reasonable and to that an objective test must be applied. The test is not, did Mrs Hutchinson think that what she did was reasonable? The test is, was her response to the dangers as she perceived them reasonable by the standards of reasonable people generally given a set of circumstances as she believed them to be? To that extent it is substantive but the test of whether her response is reasonable must be an objective one. We conclude that to cause £2,000 worth of damage to a fence was not a reasonable response however laudable her ultimate aims may have been, however genuine and passionate her belief in her cause. So she cannot be said, therefore, to have had a lawful excuse for doing what she did."

41. Mr Mercer accepts that that formulation of the law is correct and, in particular, that the test generally in areas of this nature is whether the reaction was reasonable, objectively, in the circumstances that the actor subjectively believed them to be. He said, however, that the judge had failed to take the necessary considerations into account in judging the reasonableness of Mrs Hutchinson act. We will revert to that criticism.

42. We turn to the specific heads mentioned by the judge in her question and which must be scrutinised in determining whether Mrs Hutchinson has a defence in this case.

43. Firstly, reliance was placed upon section 3 of the Criminal Law Act 1967. That, however, is not applicable in this case, because Mrs Hutchinson did not act to prevent the commission of a crime, according to the finding that

44. I have already made. It is clear from the case in this court of Baker -v- Wilkins [1997] Crim LR 497, drawn to our attention by Mr Causer, that there must, to found a defence under section 3, objectively be a crime, whatever may be the belief of the accused. Here, for the reasons I have given, there was not.

45. There are two further reasons why section 3 does not apply in this case. The first is that, in my view, what Mrs Hutchinson did was not in terms of that section the use of force. Section 3 was introduced in order to deal with physical force to the person. It does not contemplate damage of the present type. Secondly, and in any event, under section 3, as in all other cases, she would have to establish that what she did was in all the circumstances reasonable. For reasons I will demonstrate shortly, she cannot do that.

46. Defence of herself and others against physical dangers from Aldermaston.

47. This, it should be emphasised, has nothing to do in Mrs Hutchinson's case with danger from the actual use of atomic weapons or from others who might responded to them, but relies on Mrs

Hutchinson's belief as to dangerous emission of radiation from the work at the plant. This formulation is miles away from a defence of self-defence in criminal law which depends upon a reactive or largely reactive defence against a direct physical attack. That essence is difficult to point to authority for that proposition because it is so firmly imbedded as black letter law in the criminal law. However, that is the essence of this defence and it is manifestly not supplied here. That essence is shown, as clearly as could be, in the classic speech of Lord Morris in the case of Palmer, conveniently set out in its relevant part in paragraph 19-41 of the current edition of Archbold.

48. DURESS

49. Clearly Mrs Hutchinson cannot claim duress by person. The only head she could bring herself under is the emerging case of duress of circumstance. For that to be established, however, it is necessary to show that, in acting as she did, the accused was in someway overborne or acted reactively or instinctively and under pressure that she could not resist. Quite apart from any question of reasonableness, it is plain that that is not this case. Mrs Hutchinson, we were told, has been protesting about Aldermaston and been aware of the danger that it allegedly presents for many years. The action that she took in this case was calculated, as the judge's findings demonstrate: indeed, calculated in an attempt to bring herself within the jurisdiction of the Crown Court rather than the magistrates court. Also as the judge pointed out, the occasion upon which this interference with someone else's property took place was not on any special day or on a day when danger particularly manifested itself. As the judge put it, it was a day on which it was convenient for Mrs Hutchinson to travel to Aldermaston.

50. NECESSITY

51. The only possible head that we could conceive that

52. Mrs Hutchinson could bring herself under was the defence of necessity briefly mentioned by the judge. We were not really addressed about this, despite attempts to seek submissions. There is no doubt that there is in English law a defence, albeit undeveloped, in cases of necessity. There the actor does not, in contrast to duress, rely upon any claim that circumstances placed an irresistible pressure on him. Rather the claim is that his or her conduct was not harmful even though falling within the definition of the offence, because it was in the circumstances justified. Examples that have been mentioned include that cited by Lord Goff in the case of In Re F [1990] 2 AC 1, in the case of medical treatment of people who are, for instance, mentally handicapped and unable to give a valid consent to it; or more straightforwardly an example given by Lord Goff in that judgment which is not unlike one of the examples given by Judge Mowat in her judgment:

> "Drags him from the path of an oncoming vehicle, thereby saving him from injury or even death commits no wrong."

53. This is found at [1990] 2 AC page 74D. However, the defence of necessity plainly requires a reasonable and proportionate reaction. That is illuminated, as I have said, by Judge Mowat's exposition. It must be something that is genuinely necessitous, and a reasonable reaction to the circumstances. In my judgement, Mrs Hutchinson necessarily fails as the judge found on all those considerations.

54. Mr Mercer argued that the judge, in judging reasonableness, did not take into account all factors, and in particular did not take into account the unlawfulness of the United Kingdom Government's conduct. That is no doubt so, because she found the conduct of the United Kingdom Government not to be unlawful. But even making the assumption that the conduct was unlawful, it cannot, in my view, be said that Mrs Hutchinson comes anywhere near to the requirements of this defence. This harks back to the argument that criminal conduct can be justified because it is intended to impede unlawful, although as I have found not criminal, activity on the part of others. For such an argument to be upheld there would have to be immediate need to prevent danger, and no other means of pursuing the end sought. As I have said, there was no immediate and instant need to act as Mrs Hutchinson acted, either by way of the time at which she acted nor at all: taking into account that there are other means available to her of pursuing the end sought, by drawing attention to the unlawfulness of the activities and if needs be taking legal action in respect of them. In those circumstances, self-help, particularly criminal self-help of the sort indulged in by Mrs Hutchinson, cannot be reasonable.

55. There is another aspect of this. Mr Mercer stated, on express instructions, that Mrs Hutchinson's objective was first to stop production, but second to bring the issue of the lawfulness of the government's policy before a court, preferably a Crown Court. Mr Causer objected to the introduction of this argument or explanation of her conduct since it had not been in the court below and had not been the subject of evidence. But in fact, in terms of the reasonableness of Mrs Hutchinson's acts, this assertion on her part is further fatal to her cause. I simply do not see how it can be reasonable to commit a crime in order to be able to pursue, in the subsequent prosecution, arguments about the lawfulness or otherwise of activities of the victim of that crime.

56. I therefore consider that this case makes out none of the potential defences that might be available. I would leave this part of the case only with this further reflection. The defence of necessity and the doing of criminal or unlawful acts in circumstances where it is claimed that another party is acting unlawfully has been considered on a number of occasions in a civil context,

in particular in the case of Southwark London Borough Council -v- William (1971) 1 CH 734. In that case, homeless persons trespassed on the council's property in order to house themselves. They were people whose plight was very sympathetically viewed by the judges in the Court of Appeal. Nonetheless, both Lord Denning at page 743F of the report and Lord Justice Edmund Davies at page 745G emphasised the importance of limiting, to a narrow sphere, any defence of necessity. They were dealing with a question of defence to tort, but their observations, in my judgement, apply a fortiori to crime. I do not set out everything that was said, but content myself with the short passage from a judgment of Edmund Davies LJ at page 745G. He said this:

> "But when and how far is the plea of necessity available to one who is prima facie guilty of tort? Well, one thing emerges with clarity from the decisions, and that is that the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear - necessity can very easily become simply a mask for anarchy. As far as my reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril."

57. He cites a number of cases, including criminal cases, and then says this:

> "Such cases illustrate the very narrow limits with which the plea of necessity may be invoked."

58. I would respectfully draw attention to the relevance of those observations to the arguments put before us.

59. It was further argued that, in view of the nature of the United Kingdom Government's unlawful activity as formulated by Mr Mercer, once Mrs Hutchinson had asserted that unlawfulness it was necessary to investigate at trial whether the policy was indeed limited in the way that international law required. At the very least, the matter should be remitted to the crown court for that to be investigated. Mr Causer expressed alarm at this prospect, which appeared to contemplate that the court should pass on the reasonableness or propriety of governmental policy.

60. He said that must be wrong, and contrary to the Court's proper role. There is much force in that contention, but in the event the point does not arise. For the reasons already given Mrs Hutchinson's assertion of the unlawfulness of Aldermaston's activities, and the acceptance solely for the purposes of this part of the judgment of the correctness of that assertion, does not provide her with a defence in any event. So, even on the assumption that the activity of Aldermaston is unlawful in international and domestic law, there is no defence to this charge. I have however held that that assumption is ill-founded. Mr Mercer recognised his difficulties in contending that Mrs

Hutchinson's acts were reasonable if Aldermaston's activities were not unlawful. The position in those circumstances, which I find to be the relevant circumstances in this case, are a fortiori of the argument that I have deployed above. This defence fails.

61. The European Convention

62. I turn to the argument based upon Article 10 of the European Convention on Human Rights. Mrs Hutchinson contended that her act in cutting the wire could be properly characterised in the jurisprudence of the European Convention as an expression of opinion, therefore bringing her potentially within the ambit of Article 10. I am content to accept that categorisation, for the purposes of this judgment, although I am bound to say that I would have had some difficulty in coming to that conclusion without the assistance of the judgment of the European Court of Human Rights in the case of Steele and Others -v- United Kingdom (1999) 28 EHRR 603.

63. The circumstances in this case are however rather different from those of Steele. In our case, there is no actual articulation of a view in the act of cutting. Mrs Hutchinson as I have already indicated seeks to express her view in and within the context of the subsequent legal process that will attend her criminal activity.

64. Article 10 requires that there should be a proportionate response to expressions of opinion; that is to say, proportionate in the context of the actual expression of opinion involved. There are plenty of other ways of expressing disapproval of nuclear weapons and Aldermaston's activities, other than committing a crime; which other ways Mrs Hutchinson has been adopting, as she told us through her counsel, over a substantial period of time. She has no right, and Article 10 gives her no right, to express herself in whatever mode she chooses, whatever the damage or inconvenience to others.

65. Even if it were the case that Aldermaston were unlawful in international law, that is only an element in considering whether the requirements of Article 10 are fulfilled. Mr Mercer emphasised in that connection the case of Iatridis -v- Greece (2000) 30 EHRR 97 at paragraph 58. The question there stated is whether the interference with the expression of opinion satisfied the requirements of lawfulness, was not arbitrary and was proportionate. But I have demonstrated that this conviction of Mrs Hutchinson does indeed satisfy the requirement of lawfulness within the national legal order, which is what the court means in Iatridis: even if it is assumed that Aldermaston's activities are unlawful in international law.

66. One also has to consider the question of balance and proportionality, as the case of Steele

graphically demonstrates. It is revealing that, as Penry-Davey J pointed out in the course of argument, Mrs Steele complained not just, or indeed not principally, of the interference with her expression of opinion, but of the articulation of that interference by the uncertain and, as she thought, oppressive response of the Member State by the imposition of a binding-over order leaving her in uncertainty as to what she was permitted to do, uncertainty that does not apply to this case. In my judgement, there is no prospect of the Strasbourg court finding that this conviction involved any breach of Article 10, nor would I do so.

67. I would therefore answer the second question posed by the judge "no".

68. I cannot leave this case without respectfully commending the handling of this case by Her Honour Judge Mowat and the judgment she gave. That judgment sympathetically, clearly and concisely deals with a case that must have been very far from the ordinary diet of a judge sitting in the crown court. I would dismiss this appeal.

69. MR JUSTICE PENRY-DAVEY: I agree.

70. MS BENSON: My Lord, there is an application for costs on behalf of the Crown. I am afraid I do not have any details about that, but I make the application.

71. LORD JUSTICE BUXTON: What do you have to say about that, Mr Mercer?

72. MR MERCER: My Lord, the only thing I can say is (a) this was a bona fide view taken of the ICA (?) opinion as representing universal law, although your Lordships held against that. Your Lordships also said it was insufficiently clear that she was not acting -- she was aware of that opinion when she acted and that was the basis of her lawfulness in acting, although, my Lords, you have gone on to hold that she would not have had a defence even so under English law, but she did believe in a risk of danger and she also believed in the view of the opinion. She did not act on her own behalf, that is all I can say, my Lord.

73. LORD JUSTICE BUXTON: What was the position about costs in the courts below?

74. MR MERCER: My Lord, there was an order for £1,300 in costs for both courts, the magistrates court and the crown court.

75. LORD JUSTICE BUXTON: Thank you. The Appellant will pay the Respondent's costs of this appeal, such costs to be taxed if not agreed. Thank you very much.