**Legal Briefing for TP Criminal Defendants**

 **(Draft of Full Text)**

*for those wishing to employ the TP-PICAT legal argument in their defence*

*in answer to charges arising from NVD actions taken at Trident Bases.*

**Introduction.**

Criminal Law Act, 1967 section 3(1)

*“A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.“*

Short, even terse and without typical legal elaboration, but please do not then think that this snappy statutory provision is therefore any the less important, significant and consequential in its impact on the criminal law applicable in this country. For in this short provision lies all the legal justification which, for example, has previously excused the brutal and horrific public murder of a migrant Brazilian electrician on his way to work on the under-ground **[[1]](#footnote-1),** or the gunning down of a mentally sub-normal farmboy in County Armargh, when shot in the back by a British Soldier on patrol, just because he ran away when challenged **[[2]](#footnote-2).** Of course, you would not be seeking to invoke the defence as an excuse for any kind of violent conduct whatever, properly so described, yet alone such extreme examples of lethal violence ; but the use of ‘direct action’ also includes the use of forcible action, and it is this for which we assert our legal rights to justification.

Also this statutory provision was not the origin of the defence of ‘justification’, as it is styled by criminal law jurists, for it previously existed under the common law for centuries, before the Criminal Law Review Committe recommended in its 7th Report [[3]](#footnote-3) that it be placed on a statutory footing instead.

It is of general application, applicable to anything capable of comprising in the “use of force” and to any “crime” existing in applicable domestic law. Obviously it is an example of what is termed a ‘proportionate defence’, meaning in this instance that the greater, as in the more serious or grave, the crime which the defendant believed he was seeking to prevent, the greater, as in more forcfeul, the degree of force it would be objectively ‘reasonable” for them to use in its prevention.

Before moving on to consider the elements of the “defence” in detail, I shouold first point out that, even in the magistrates’ courts, the “onus” of proving the applicability and benefit of this defence lies, almost certainly upon the defendant to prove in the circumstances, and not for the prosecutor to negate, because it will be regarded as a statutory “excuse” and thus subject to a so-called “reverse burden” rule [[4]](#footnote-4).

To be clear this means, despite your rights under art..6(2) of the European Convention and at the common law to the notorious “*presumption of innocence*”, a requirement on you to discharge a full probative or legal burden, not merely only an evidentiary burden[[5]](#footnote-5). That said, you will only have to ‘prove’ this defence to be valid, on the “*balance of probabilities”*, rather than to the higher criminal standard “*beyonad a resonable doubt*” [[6]](#footnote-6)

**1. “Use of Force”**

The first consideration on the application of the defence is to ask ourselves to what character or nature of acts (or possibly ommissions) does the expression “*use of force*” lend itself. In particular, does it refer only to the use of physical force against the person, such as would typically be the case where someone acted to arrest a suspected offender, which is the specific activity expressly refered to in the disjuncted second part of the subsection, or is it appicable also to other characters of action such as (a) obstruction, (b) criminal trespass and even (c) damage to property ?

(a) Obstruction.

In *R v Renouf* [[7]](#footnote-7) (1986) the defendant gave chase in his car to a group of men who he claimed had just violently assualted him. When he caught up with them, he manouvered his vehicle in the road. so as to block their escape. He was charged by the police with reckless driving. His defence, under s.3, was that he had used only such “force” as was reasonable in the circumstances “in effecting or assisting in the lawful arrest of offenders”. The Crown at trial asserted that because the relevent statute (Road Traffic Act 1972) made no reference to there being any “lawful excuse” or similarly worded defence, to the kinds of vehicular offences it created, it then followed that the s.3 ‘justification’ defence did not apply. Lawton LJ.speaking for the whole Court of Appeal when overturning the conviction pointed out that neither was there any such language in the Offences Against the Persons Act (1861) which criminalised, among other things, assaults occassioning grevious bodily harm; and yet there were numerous instances where the defence of ‘justification’ had been successfully upheld in relation to such a charge.

Although useful material by itself, what really matters, as of authoritative value to us here, is that additionally the Court held that in considering the facts of this case the appellant’s evidence had been capable of establishing that he had acted with a reasonable “use of force”, which was thereby “*capable of providing him with a defence*”. Accordingly, this is authority for the proposition that mere obstuction or blockade alone is a form of the ‘use of force’ captured by the section.

(b) Criminal or aggravated trespass.

In *DPP-v- Olaf Bayer (et al.)* [[8]](#footnote-8), a prosecutor’s appeal case stated against aquittal, the defendants were anti-GM crop protestors who had been charged with aggravated criminal trespass contrary to ss.68(1) and (3) of the Criminal Justice and Public Order Act 1994, as a result of their enterring onto private farm land and there chaining themselves to one or more tractors, so as to immobilise them. This case did not concern the application of the s.3 defence directly, because even the defendants’ themselves accepted that the growing of GM crops was not a crime under the law *per se*. Before the stipendary magistrate, however, they did successfully rely upon the common law defence of "private defence" or "protective force", which is available where a person again “uses reasonable force” to protect property belonging to himself or another. In this instance, the defendants asserted that the neighbouring or near-by wildlife environment would be biologically ‘damaged’ by the incidental escape of GM organisms.

Brooke LJ. in giving judgement in the Administrative Court held, at §25 as follows:

“Although no authority directly in point was quoted to us, we are prepared to assume for the purposes of this judgment that when the respondents tied themselves to the tractors in Horselynch Plantation they were using force within the meaning of this line of authority. If in the circumstances as they believed them to be they thought that unlawful damage was being inflicted or was about to be inflicted on the property of another, then it is hard to understand why the defence should not be available if they prevented the damage by tying themselves to the tractors rather than by attacking the tractor drivers.”

In the event the Court, however, further found (surprise, surprise!) that growing GM crops was not only not criminal, but further not even unlawful (in the civil sense) so that therefore even the common law defence was not available either.

None the less, what the above quoted passage does establish, is that the Court was prepared to accept that an aggravated trespass to land, albeit also then coupled with interference by way of chaining to tractors, was sufficient to again comprise in a ‘use of force’ for the purposes of the law of justification.

(c) Damage to property

Finally, on the topic of damage to property, as a further example of the use of force, there has been much academic debate, and more than a little judicial speculation, as to whether the expression “use of force” lends itself to the infliction of damage to property. Ironically, much if not most of the reasoning for this is because (in addition to the common law defence of ‘protective force’ (as dealt with in *Bayer* above) when it comes to charging someone for unlawfully damaging property in the criminal sense, unsurprisingly they are typically accused of criminal damage under the Criminal Damage Act 1971.

Furthermore, under section 5(2)(b) of that Act, there is a specific statutory defence set out, under the title “*without lawful excuse*”, which provides (in short) as follows :

"(2) A person charged with an offence to which this section applies . . . shall be treated as having a lawful excuse –

 **. . . .**

 (b) if he damaged … the property in question. … in order to protect property belonging to himself or another … and at the time of the … acts alleged to constitute the offence he believed –

(i) that the property … was in immediate need of protection, and

(ii) that the means of protection adopted … were … reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held "

The keen eyed reader will have observed already, nowhere under this specific “lawful excuse” provision, is it a requirement that the threat to the property, which the defendant asserts they were trying to protect (the ‘protected property’), has to be such as to constitute an unlawful (yet alone criminal) threat to, or unlawful damage to, that property. Accordingly, the excuse is available, irrespective as to whether or not the damage to the ‘protected’ property, if not prevented, would or would not have constituted a crime, and it is therefore much broader in application than the justification or crime prevention defence available under s.3 [[9]](#footnote-9). This type of defence is, for example, often refered to (esp. in North America) as a “fire-break” defence, meaning that under it one is entitled to bring down a neighbour’s house which he has chosen to abandon, even without his consent, where you honestly believe that doing so might create a “fire-break” in the face of an advancing town or forest fire which threatens your own house, though not then ‘unlawfully’.

That said, on the specific issue as to whether the defence of justification (ie crime prevention) is available so as to excuse ‘damage to property’, we have the benefit of the notable decision of the High Court, in an action on the case for damages for unlawful forcible entry onto premises, *Swales v Cox*(1981)[[10]](#footnote-10) wherein Donaldson LJ. (as he then was) though discussing the pre-existing common law position prior to 1967, said :

“ . . . it is conceded in this case that (the trial judge) correctly analysed the position at common law . . as follows: that there was power of entry into premises at common law and, if necessary, power to break doors to do so in four cases, but in four cases only; that is to say by a constable or a citizen in order to prevent murder; by a constable or a citizen if a felony had in fact been committed and the felon had been followed to a house; by a constable or a citizen if a felony was about to be committed, and would be committed, unless prevented; and by a constable following an offender running away from an affray. In any other circumstances there was no power to enter premises without a warrant, and, even in the four cases where there was power not only to enter but to break in order to do so, it was an essential pre-condition that there should have been a demand and refusal by the occupier to allow entry before the doors could be broken.”

Of course, the former common law distinction as between a felony and a mere misdemeanour, was taken away by s.1 of the very same Criminal Law Act of 1967, by s.3 of which the above cited distinctions were effectively mereged into a single statutory power to use force to either prevent any crime or indeed arrest, or assist in arresting, any offender, subject to the all important need for ‘reasonableness’.

Nevertheless, what matters for our purposes here is the Court’s confirmation that the “use of force” to prevent crime (or for that matter to arrest offenders) as a principle of the law of justification, includes also the case of breaking down doors, which is an obvious example of what would otherwise be, at the very least, an act of criminal damage.

There are, obviously, two principal legal elements to the defence itself, which I now go on to consider separately, (a) what is the “crime” which the defendant asserts they were attempting to prevent, and then (b) what are the factors which the law says can and ought to be taken into consideration when judging, as an issue of fact, whether or not the degree of force actually used to prevent it was “reasonable” in all the circumstances.

**2. The Crime**

This is the place where you are obviously able to benefit from all of the research and arguments which have gone into the preparation of the TP Public Interest Case Against Trident (PICAT). That seeks to support activist’s in bringing a citizen’s prosecution, in relation to the creation and maintenance of the UK Government’s Trident SLBM nuclear deterrence defence policy, in general ; accusing the office of the Secretary of State for Defence, in particular, with having thereunder perpetrated *a criminal conspiracy to commit a war crime*. Specifically, a plan to lauch a disproportionate attack, with respect to the contingent targetting options created and which would obliterate the city of Moscow, which we can prove exist.and which, if used, would cause massive incidental loss of life, and/or injury to civilians, and/or damage to civilian objects and/or widespread, long-term and severe damage to the natural environment, all of which would be clearly excessive in relation to any direct and overall military advantage which has, or could ever be, anticipated thereby.

The “Criminal Information” downloadable from the TP-PICAT website under the title “Doc 2” [[11]](#footnote-11) sets out for you succinctly but in technical legal language all the information, including all of the applicable statutory references and a page long statement of legal particulars, necessary to inform the court of the precise legal nature of the crime or offence alleged. However, needless to say, the full legal argument in support of the PICAT allegation is a far more involved and complex matter. Even just the formal legal advice prepared for the PICAT case comes in 2-parts, and stretches to 62 closesly argued pages containing 22,222 words ! In addition, we have the benefit of Expert Witness evidence from five separate eminent academics and researches, who support and elaborate upon the factual evidentiary basis for our case in detail.

 In the final part of this briefing I’ll address your options for presenting your case and also ways in which you might even seek helpful direction from the court, if you’re lucky enough to get it to agree to seriously consider the arguments.

Meanwhile, given that you are unlikely to be the first person to now be bringing this defence argument before the court, and given that in all likelihood the prosecution will be fully forewarned and forearmed, you also need to be informed about case-law authority which will be cited against you by the prosecution and how to deal with it.

Foremost among these will be claims regarding the effect of *R v Jones & Milling* (*et al*.) [2006] [[12]](#footnote-12). This was the decision of the Law Lords in the matter of the anti-Gulf War protesters who had taken NVD action, prinicpally at RAF Fairford, in the days prior to the launch of the second Gulf War in March 2003, in an attempt to interfere with the USAF bombers then readying themselves to perpetrate the notorious subsequent “shock & awe” bombardment of Baghdad. Firstly, it will be claimed that the specific effect of the decision in this case means that a s.3 justification defence cannot be run in relation to any attempt to prevent a crime, where the crime in issue is a crime under “international law”, rather than an ordinary domestic or national UK law crime instead. Accordingly, since the “war crime” of launching a disproprotionate attack, as you’ll be relying on, is an example of just such an international law crime it must follow, it will be said applying *Jones,* that the defence is not available.

Of course this is pure sophistry. The “crime” in issue in *Jones* was the international humantarian law crime of international “aggression” and that alone. The defendants wanted permission to argue to the jury at their trial that the allied US/UK attack on Iraq, without UN Security Council authorisation, was an act of naked criminal international aggression, then only disclosed under customary international law alone. A crime which, despite our prominent role as a world power in its most noteworthy inception at the International Military War Crimes Tribunal in Nuremburg at the end of the Second World War [[13]](#footnote-13), our Parliament has never since seen fit to transpose or incorporate into UK domestic law. The law lords held that the term “crime” in s.3 applied only to domestic UK law, and rejected the argument that “aggression” was now a part of that law by means of any claim to, as it were, its automatic adoption by our criminal common law.

However, the crime upon which you will here rely, whilst undoubtedly and admittedly again owing its origins to its inception in both customary and indeed now international treaty law[[14]](#footnote-14), is a crime which the Queen in Parliament has instead seen fit to fully incorproate into our domestic or national statutory criminal law, by reference to the provisions of Part V, and in particular s.52(1), of the International Criminal Court Act 2001. Accordingly, any reliance upon the reasoning in *Jones* to the effect that it is a crime outside the scope of a s.3 defence, is wholly misplaced and misconceived.

Secondly, it is conceivable that in the alternative, or even as well, the prosecution will chose to place reliance on a different part of the judgement in *Jones*, namely Lord Hoffman’s statist and indeed tendentious *obiter* polemic on the non-admissibility of defences based on ‘reasonableness’, in protest cases involving actions taken against state instituions and enterprises.I have completed a separate paper criticising the rationale behind this ill-conceived and thoroughly badly argued *obiter* observation [[15]](#footnote-15)

Alas, for the time being and given the present needs for brevity, I would simply refer the reader to the opinion of Lord Diplock, not I suspect known for his libertarian radicalism, given 30 years earlier in the House (1976), in the case to which I alluded in the present introduction of the gunning down of the simple farm-boy by the soldier in Northern Ireland[[16]](#footnote-16), and wherein the point at issue arose under the identical language of s.3(1) of the Criminal Law (Northern Ireland) Act 1967, in which he said (at p.947c) as follows:

*“ What amount of force is ‘reasonable in the circumstances’ for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a ‘point of law’ for the judge.”*

In concluding, on this segment about the defendant’s need to establish a ‘crime’ under the s.3 defence, it is I think most apposite to note the great advantage which the criminal defendant has in establishing the crime, over the would be criminal prosecutor who goes to court instead to lay a criminal information and thereby start his prosecution. The prosecutor, quite properly, ultimately has to prove all the elements of his criminal charge to be true, using admissible evidence of truth of the alleged facts, so as convince the judges of fact as to the guilt of the accused beyond a reasonable doubt. However, the criminal defendant instead has only to establish that they “honestly believed” the relevent facts to be true, they do not need to prove them objectively true at all, or to meet any standard of proof. The leading case authority on this point is that of *R v Baker & Wilkins*[[17]](#footnote-17)(1996). Brooke LJ. giving the judgement of the Court of Appeal began by being at pains to distinguish the defendant’s beliefs as to ‘the law’ on the crime which they sought to prevent, from ‘the facts’ of the case as they believed them to be, as follows:

“As was said in argument, if a defendant honestly believes that somebody is

eating fish and chips and that eating fish and chips is a crime, the law will not permit him to rely on section 3 as a defence to a charge of assaulting the person eating fish and chips because as a matter of law no crime is or is about to be committed.”

But then he shortly goes on to deal with the wholly subjective (honestly held) nature of the defendant’s beliefs, as to the facts of the case instead, being sufficient, as follows:

“This defence is available if a person's honest but mistaken belief (however

unreasonable) is that a factual situation exists or is apprehended which would in law constitute a crime. But it does not extend to a mistaken belief about the criminal law if those facts do not in law amount to a crime. “

So then, unlike as the case with the criminal prosecutor, you don’t need to prove that contingency war plans exist to use Trident in an unlawful indeed criminally disproportionate manner; you merely need to establish that, having read the materials and thought about the matter, you ‘honestly believe’ that they exist, and legally that is then sufficient to assert the s.3 defence.

**3. Reasonableness**

I now turn to consider the second aspect or element of the defence under s.3, namely ‘reasonableness’. As we have just seen Lord Diplock remind us, whether or not a defendant has acted reasonably in the circumstances is question of fact, and not of law, for the judges of fact to decide. In doing so, they should reach a view as to the objective ‘reasonableness’ of the force used, however based on the facts of the case and circumstances as the defendant honestly believed them to be at the time, whether or not they would themselves have shared those beliefs, or considered them objectively reasonable. That said, this is not the same as to say that there is not plenty of law, including especially case-law authority, to guide those judges on what matters are to be taken into account. I now set out under the following heads five such factors, which might well prove not to be exhaustive, but which certainly deal with the broad generality of issues which have been previously considered on the cases.

Proportionality

Meaning thereby that the degree of force used must be proportionate when judged against the gravity of the crime prevented, or sought to be thereby prevented.This is a fairly unexceptional proposition which applies equally in many other aspects of criminal law, such as for example in relation to the use of force in self-defence. Authority for its specific application here to a s.3 defence and the point that it is an issue of fact to be decided by the jury can be found at para.23 in the Criminal Law Revision Committee 7th Report as already mentioned (see above @ ftn3) and as cited in *Farrell v Secretary of State for Defence* [[18]](#footnote-18) itself cited again in *Pollard v the Chief Constable of West Yorkshire Police* (1998)[[19]](#footnote-19). Given the gravity of a conspiracy to commit a war crime, as compared with the relatively minuscule scale of any NVD action which you are likely to have taken, it is not anticipated that this issue should prove to be in the least contentious.

Immediacy

Meaning did the need for immediate action ruled out any practical and lawful alternative remedy, such as typically summoning the police or pursuing the matter in court instead?

In the Scottish TP case of the *Lord Advocate’s Ref. (No.1 of 2000*) [[20]](#footnote-20) obviously a s.3 defence was not directly in issue as there is no Scottish statutory equivalent. However, the court did concern itself with the application of the common law defence of “necessity”, in the course of which it specifically addressed this matter of “immediacy” as an aspect common to such generall defences. Lord Prosser, giving the opinion of the High Court on Appeal in Edinburgh, said (@ para. 37), as follows :

“ It is clear that timing is a crucial consideration. Immediacy of danger is an essential element in the defence of necessity. Unless the danger is immediate, in the ordinary sense of that word, there will at least be time to take a non-criminal course, as an alternative to destructive action. A danger which is threatened at a future time, as opposed to immediately impending, might be avoided by informing the owner of the property and so allowing that person to take action to avert the danger, or informing some responsible authority of the perceived need for intervention. That authority could then consider whether intervention was in its view necessary, and whether and how it could be carried out legally. If there is scope for legitimate intervention in the time scale set by the circumstances, it is difficult to see why the law should allow a third party to intervene by actions that would ordinarily be characterised as involving criminal conduct. One might not weigh the conduct of the rescuer or intervener in too fine a balance, and there may be marginal cases of difficulty. But making allowance for human judgment in the heat of the moment, the danger to which the individual claims to respond must have the character of immediacy. “

It is submitted that, when applied instead to the defence of crime prevention, the question here in issue obviously becomes one of “was there time available” for the defendant to prevent the crime by non-forcible means instead? If the answer is that there was, however, then this in turn merely raises further questions like, what measures (if any) did the defendant undertake to pursue such alternative remedies? If the time was there, and there were alternatives available, and yet they took no such measures, then they may be in an impossible position to satisfy a jury that their conduct, in using force instead, was “reasonable in the circumstances”.

However, it must in justice also then be open to a defendant, who has had time to pursue a non-forcible alternative, or knows specifically of others who have done so, to present evidence to show that they did indeed so pursue just those very alternatives, conscientiously and determinedly and repeatedly. If then they can further show, that all such reasonable efforts were frustrated and ignored at every turn, including by the official law enforcement authorities, then it should still be open to them, to have the opportunity to satisfy a jury of their peers, that all that was then “reasonably” left to them in the end, was a measured and proportionate use of force.

Here, of course, by the time that it is proposed to take action in 2016, we expect at least one, if not more, of the TP-PICAT Groups to be in possesion of a formal letter from the Attorney-General refusing his consent to permit a prosecution of the Secretary of State for Defence for conspiracy to comit war crimes, on the extraordinary premise that he does not consider it in “the public interest” to do so. To be clear this is no species of legal pardon or royal immunity granted to the Secretary, merely the Attorney-General’s view that it is not in the public interest to adjudicate the allegation in the public courts. What possible better cause for saying that I honestly believed there was no alternative non-forcible remedy left for me to pursue ?

Efficacy

Meaning the likely success of the preventative measures taken in stopping the crime occurring, or continuing, as the case may be.

Again, this was expressly affirmed in the *Lord Advocate’s Ref. (No.1 of 2000),* as already cited above,as a factor in principle which should be relevant to the application of the common law defence of “necessity” in Scotland (see para. 46) and logically it seems rational that the same should be true also of the defence of justification or crime prevention.

None the less, in considering its application to that defence instead, it has to be capable of adaptation to take account of the practicalities of crime prevention. It cannot be right, for example, that if a policeman, on the beat alone, comes across a large gang of youths damaging several cars in the street, he is prohibited from using proportionate force to try to prevent at least some of the gang from continuing to commit that crime, merely because he hasn’t by himself the capacity to prevent them all. It is submitted that, as a matter of public policy, the law will permit a person to use such reasonable force, to try to prevent crime, as their capacities and situation permits them to employ. It should not instead require that they submit passively, in the face of criminality, merely because they have not the capacity by themselves to prevent it entirely, if they are capable of and willing to try to prevent at least such part as they can.

Of course, if the situation is such that there is simply no possibility whatever of their preventing any part of it, then the question must inevitably arise, not so much as to whether their use of force was “reasonable in the circumstances”, but rather whether it was genuinely intended to “prevent” crime by employing it at all. But yet in answering that question it must also be only “reasonable”, taking into account “all of the relevant circumstances,” what the effect that someone leading by example may anticipate or indeed even merely hope to have on others – for as Frank Sinatra once said in song no single ant by himself can manage to move a rubber tree plant, but he has high hopes ! For my part I prefer the words of the 19th century American writer and slavery abolishionist Edward Hale, as follows:

“I am only one, but I am one. I cannot do everything, but I can do something. And because I cannot do everything, I will not refuse to do the something that I can do. What I can do, I should do. And what I should do, by the grace of God, I will do.”

— Edward Everett Hale (1822-1909)

Proximity (nexus)

Meaning that the relevant connection, as between the place where the crime would occur and the place where the preventative action takes place, is sufficiently proximate to have justified the action as reasonable in the circumstances.

This is a consideration which has been raised in several decisions given in the magistrates’ courts, in relation to a s.3 defence in so-called ‘protest’ cases, but in truth it seems doubtful that it is anything other than a particular further facet or practical feature of the efficacy test as above. Its merit as a separate head of consideration for instance, at least as respects the defence of “necessity”, was expressly doubted yet again in the *Lord Advocate’s Ref. (No.1 of 2000).* Lord Prosser again this time at para.47 as follows :

“There was considerable discussion whether the defence of necessity could be available where the place and person or persons under threat from the apprehended danger were remote from the locus of the allegedly malicious damage. We can see no reason in principle why the defence should not be so available. In the modern world many industrial processes have inherent in them the potential for mass destruction over a wide area surrounding a given plant. If a person damaged industrial plant to prevent a disaster which he reasonably believed to be imminent but which he could avoid by the actions taken, there is no compelling reason for excluding the defence of necessity solely on the grounds that persons at risk were remote from the plant provided that they were within the reasonably foreseeable area of risk. “

Inevitably an institutional government administered conspiracy to be prepared to launch criminally unlawful attacks on foreign cities, involves an apparatus of establishment and installation, with many physical localities to achieve. One who takes action outside the MoD Main Building in London can justifiably claim to be directing their preventative actions to the administrative controlling mind of the alleged conspiracy. Whereas, one who takes action at Aldermaston or Burghfield instead can justfiably claim to be directing their preventative efforts to the capacity of the criminal “bomb-maker”, whose involvement is specifically engineered to facilitate the said criminal conspiracy. Doubtless there will be many other locations, as well, where the Trident hydra raises its ugly heads, so as to permit reasonable preventative action to be taken !

Intent & Motive

Meaning that the force used must be directed, at least principally, to achieving the goal of a preventative purpose, i.e. no ulterior punitive, compensatory, restitutive, or retaliatory purpose.

This is a familiar rule, for instance, in the common law defence of “self-defence”. A person’s use of force will not be capable of amounting to the “reasonable use of force in self-defence” if their sole or main purpose in employing it, was in truth, retaliation or retribution instead. The same should, it is submitted, in principle be true of the defence of crime prevention as well. That is not the same as to say that a person may not posses or even merely be aware of other purposes in acting, such a political demonstration or campaigning symbology. Only that such purposes may not be such as to remove their primary purpose in intending to prevent crime.

These five heads then, I submit, reflect the current state of broad guidance or general direction, offered by the common law, on the application of the defence under s.3, going most especially to the factual question as to whether the use of force was “reasonable” in any given case. It will be noted that each is of general and indeed universal application. They do not seek, in any instance to remove the defence from being in the charge of the judges of fact ; but rather that they offer guidance and direction on its use, as applied to the facts raised in any particular case. That, it is submitted, is fully consistent with, not merely the appropriate and proper role for the common law, in relation to a statutory defence, but rather its only lawful role. Guidance as to application, never limitation on availability, which would instead amount to a non-legislative unlawful reduction in the scope of the defence.

**4. Representation**

Hopefully, the reader having reached thus far will not think me exaggerating when I say that the number and potential complexities involved in advancing a defence based on s.3, especially in the situation such as are contemplated in these circumstances, are to say the least myriad and intricate. Consequently, the professionally unrepresented defendant appearing by themselves before an unsympathetic, world weary bench, looking to bring down the metaphorical rubber-stamp marked guilty and get to the car in time for the “Archers” is going to have, as the saying has it, their work cut out for them.

You’ll doubtless have already heard of your ‘right ‘ to a so-called “McKenzie Friend”[[21]](#footnote-21) – a person to sit quietly beside you, take notes and offer hopefully sage advice from time to time, so long as this does not interfere with or unduly delay the proceedings. The general position in relation to, and role of, a McKenzie friends remains generally as set out by Lord Donaldson of Lymington MR in the well known poll-tax appeal case of *R v Leicester City Justices, ex parte Barrow[[22]](#footnote-22)*, in which he said as follows:

“A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thinks appropriate, subject to the right of the court to intervene. Thus he can bring books and papers with him, pens, pencils, spectacles, a hearing aid and any other form of material which he thinks appropriate. Subject to them not being of extraordinary volume and an unusual nature there is no need for the matter to be mentioned to the justices or the clerk. If he wishes to have an adviser, as contrasted with an advocate, it is convenient that he should mention this fact to the justices or to their clerk in order that he may know why the person concerned is sitting next to the defendant, rather than in the space reserved for the general public.

Furthermore, the justices or their clerk may reasonably wish to know whether this adviser is likely to be called as a witness and should not hear the evidence of other witnesses if exclusion from court whilst that evidence is being given is usual in that class of case. They may reasonably also wish to know that the adviser is not claiming rights of audience or proposing to exercise them on behalf of the party and that he is not a party to another case or a member of the public who has lost his way. But if a party arms himself with assistance in order the better himself to present his case, it is not a question of seeking the leave of the court. It is a question of the court objecting and restricting him in the use of this assistance, if it is clearly unreasonable in nature or degree or if it becomes apparent that the “assistance” is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice, for example, causing a party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions”.

So as far as it goes such is the so-called ‘McKenzie Friend’. In one’s experience Magistrates’ Courts today, especially since the experience of mass poll tax liability cases heard in the 1990s, are quite familiar with the ‘McKenzie’ friend role, and it is now a rarity for them to baulk at, let alone outright refuse, such assistance.

However, given the potential complexities and antipathies one might reasonably anticipate encounteing in relation to the running of a s.3 defence in the circumstances of the present type of cases, were you aware that quite separately you could seek the permission of the court for an “O’Toole Advocate” [[23]](#footnote-23) instead ? Which is to say a person, not a qualified professional legal advocate such as a barrister or solicitor who have automatic professional “rights of audience” to appear before law courts and represent parties to proceedings, but rather a person of your choosing to none the less represent your case on your behalf, even though not professionally qualified to do so as of right. Although originally an exercise of the court’s inherent powers at the common law to conduct its own proceedings, today the exercise of all such ‘rights of audience’ powers are governed by statute – the Legal Services Act, 2007. Yet this statute still preserves the right of the court to grant a ‘right of audience’ to an unqualified person, if they think it in the interests of justice to do so.

Experience, alas, tells me that many, if not most, Justice’s Legal Advisers (the modern term for what were called Justices Clerks’ or Assistant Justices Clerks’) quite incorrectly think that this power is only ever to be exercised in very exceptional circumstances, where the defendant, though unable to secure and pay for professional legal representation via legal aid, none the less in the view of the court is in a “special need” of separate representation because they are for example a legal minor, due to mental handicap, a poor grasp of English or due to some other form of vulnerability or physical or mental impediment. We have, therefore, produced a separate special advice[[24]](#footnote-24) that sets out, the alas, further complicated legal arguments you might reasoanly expect to have to successfully present to the court, in order to get its leave to be represented by an O’Toole advocate, if that’s the direction you want to take.

Finally, then there is the consideration as to how the Court agrees/permits you to present your arguments, as in the manner in which it deals with complex issues irrespective as to whether put to it by yourself alone, or with the assistance of a McKenzie Friend or via an O’Toole Advocate. Nowadays, much if not most of these matters have to be dealt according to prescribed rules (the Criminal Procedure Rules – “CrimPR”) and by using prescribed forms with tiny little boxes to fill in – but inevitably one ends up saying “please refer to attached sheet”. I would though thoroughly recommend that it is to your great advantage to aquiant yoursself with at least the follows bits of the latest CrimPR (2014) [[25]](#footnote-25) , assuming that is you are facing only a summary trial in the magistrates’ court (things inevitably get a great deal more complicated in a trial on indictment in the Crown Court), as follows :

**Part 3 – Court’s Management Powers[[26]](#footnote-26)**

**Part 37 – Trial and Sentence in a Magistrates’ Court [[27]](#footnote-27)**

**Crim Practice Direction (CPD) “VI Trial” 37A: Role of the Justices’ Clerk/Legal Adviser** [[28]](#footnote-28)

Inevitably, however, whether or not you get a decent hearing on your s.3 defence much will turn nowadays on what you put in your advance “defence statement”[[29]](#footnote-29) and how the court reacts to that. In the Magistrates’ Court (unlike as with Crown Court) you are not required to put in an advance defence statement, but if you don’t there may be serious and unfortunate consequences – (a) you lose any right to seek disclosure of materials from the prosecution, (b) you may well be denied any opportunity to cross-examine a prosecution witness (such as an arresting officer) about any matter which the prosecution could not have reasonably foreseen, (c) the prosecutor in his summation can ask the bench to draw an adverse inference from a failure to submit a statement where the defence at trial has sought to raise any novel or unusal defence arguments, (d) perhaps most tellingly the bench is simply not going to take your claims to have researched and prepared an important legal defence argument seriously, if you haven’t seen fit to disclose (at least the basis for it) in an advance defence statement, so as to give the prosecution time to prepare a rebuttal.

Given then the importance of this aspect I have prepared a ‘model’ TP defence statement setting out the bare-bones of the arguments as we have now seen them. I will attach it as an Appendix to this Briefing. It is, of course, up to you to tailor it to both the specific facts of your case and the features which you perceive as being most important.

And now I think you’ve read enough, but in concluding I’d like to leave you with the words of a British State Official, no less than our wartime Attorney-General Sir Hartley Shawcross, when he presented his closing remarks to the International War Crimes Tribunal in Nuremberg in 1946, to prove that even the most staid establishment figures in our government can be roused to see the light of peace and justice – even if it takes a world war to do it *!*

“ This trial must form a milestone in the history of civilisation, not only bringing retribution to these guilty men, not only marking that right shall in the end triumph over evil, but also that the ordinary people of the world (and I make no distinction now between friend and foe) are now determined that the individual must transcend the State. The State and the law are made for man, that through them he may achieve a fuller life, a higher purpose and a greater dignity. States may be great and powerful. Ultimately the rights of men, made as all men are made in the image of God, are fundamental. When the State, either because as here its leaders have lusted for power and place, or under some specious pretext that the end may justify the means, affronts these things, they may for a time become obscured and submerged. But they are immanent and ultimately they will assert themselves more strongly, still, their immanence more manifest. And so, after this ordeal to which mankind has been submitted, mankind itself - struggling now to re- establish in all the countries of the world the common, simple things - liberty, love, understanding - comes to this Court and cries: "*These are our laws - let them prevail*."

Robbie Manson

co-founder of the Institute for Law, Accountability and Peace.

*Fiat iustitia ruat cœlum*

1. The murder of Jean Charles de Menezes in Stockwell Tube Station when ‘anti-terrorist’ armed Met Police were falsely informed he was a jihadist terrorist, suspected of being about to detonate a suicide bomb. [↑](#footnote-ref-1)
2. See the facts in *Attorney-General for Northern Ireland’s Reference (No.1 of 1975)* [1976] 2 All ER 937 [↑](#footnote-ref-2)
3. (1965 :Cmnd 2659), [↑](#footnote-ref-3)
4. As to which see in particular the “reverse-burden” provision at s.101 of the Magistrates Courts’ Act, 1980, [↑](#footnote-ref-4)
5. as to which see now the leading authority *Sheldrake v. DPP* [2005] 1 AC 264, [2004] 3 WLR 976, distinguishing *R. v Lambert* [2001] 3 WLR 206, esp. per Lord Bingham of Cornhill at §§ 41 & 44. [↑](#footnote-ref-5)
6. *R v Edwards* [1975] QB 27; *R vHunt (Richard)* [1987] AC 352. [↑](#footnote-ref-6)
7. *R v Renouf* [1986] 2 All ER 449, [1986] 1 WLR 522 [↑](#footnote-ref-7)
8. *DPP-v- Olaf Bayer (et al.)* QBD ([2003] EWHC 2567 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2003/2567.html> [↑](#footnote-ref-8)
9. Anyone specifically facing charges of criminal damage (or a related offence) and wanting to assert a “lawful excuse” defence under s.5, should also aquaint themselves with the arguments set out in a separate specialist legal briefing (available on the TP website) and titled “*The ambit of the defence under s.5*” as certain very important distinctions exist as compared with the s.3 justification defence instead. [↑](#footnote-ref-9)
10. *Swales v Cox* [1981] QB 849 [↑](#footnote-ref-10)
11. <http://tridentploughshares.org/doc-2-a-criminal-information-for-the-magistrates-court/> [↑](#footnote-ref-11)
12. *R. v Jones & Milling* [2007] 1 A.C. 136 [↑](#footnote-ref-12)
13. At that time the crime was most commendably styled “*a crime against peace*” [↑](#footnote-ref-13)
14. As to which see of course esp. First Additional Protocol to the Geneva Conventions (1977) Part IV Chapter II Arts § 51 & 55 ; and Art 8(2)(b)(iv) of Part I of the Rome Statute for the Establishment of an International Criminal Court (1998). [↑](#footnote-ref-14)
15. Again to be made downloadable from TP website in due course under the title “*s.3 and Reasonableness”* [↑](#footnote-ref-15)
16. See ft. nt. #2 above for citation. [↑](#footnote-ref-16)
17. *R v Baker & Wilkins* 17 October 1996 (CA) [1997] Crim LR 497. Again hopefully a transcript to be made available on TP website for those who’d like to have a copy with them in court [↑](#footnote-ref-17)
18. *Farrell v Secretary of State for Defence* [1980] 1 WLR 172. [↑](#footnote-ref-18)
19. *Pollard v the Chief Constable of West Yorkshire Police* ( [[1998] EWCA Civ 732](http://www.bailii.org/ew/cases/EWCA/Civ/1998/732.html) [↑](#footnote-ref-19)
20. *Lord Advocate’s Ref. (No.1 of 2000)* [2001] JC 143, [↑](#footnote-ref-20)
21. *McKenzie -v- McKenzie* [1971] P 33, [1970] 3 WLR 472 [↑](#footnote-ref-21)
22. *R v Leicester City Justices, ex parte Barrow* [1991] 2 QB 260 [↑](#footnote-ref-22)
23. *O'Toole v Scott* [1965] 2 All ER 240 [↑](#footnote-ref-23)
24. “*The case for an O’Toole advocate under the 2007 Act”* [↑](#footnote-ref-24)
25. We will try to put up copies on the TP website [↑](#footnote-ref-25)
26. See for example at 3.5(2)(*h*) (ii) which allows the court to require that issues in the case should be determined separately, and decide in what order they will be determined [↑](#footnote-ref-26)
27. eg. “**Duty of justices’ legal adviser 37.14 (2)”**An adviser must—(a) before the hearing begins, by reference to any documents provided him, draw the court's attention to . . (iv) what the parties say about how each expects to present the case, especially where that may affect its duration and timetabling; [↑](#footnote-ref-27)
28. see esp. at paras**. 37A.11 - 37A.15** [↑](#footnote-ref-28)
29. As to which see s.6 of the Criminal Procedure and Investigations Act 1996 [↑](#footnote-ref-29)