JUDICIAL RESPONSES TO THE UNLAWFULNESS OF NUCLEAR WEAPONS: LESSONS AND (EMERGING) STRATEGIES FROM THE UK

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There is a dawning realisation amongst the public in the UK that the nuclear threat has not gone away despite the end of the cold war, the re-signing of the Non Proliferation Treaty in 1995, the much publicised decommissioning of nuclear warheads at Aldermaston, and the closure of US bases for the launch of cruise missiles.[1] This threat has been intensified recently by the commitment of President Bush to National Missile Defence ("NMD") following the successful test on 14 July.[2] If NMD is to proceed it will be dependent on US bases on UK soil at Menwith Hill and Fylingdales.[3] As Stephen Tindale, Head of Greenpeace UK has said, "Without Britain it [NMD] cannot happen, but the British Government has muzzled debate on the subject. Mr Blair is hiding behind the technicality that the US has not made a formal request to Britain".[4] As a measure not only of the public's opposition, but also political opposition, more than 250 MPs, mainly labour, have signed a Commons motion expressing "grave doubts" about NMD and urging the Government to explore other ways of reducing the perceived threat from "rogue States".

It is perhaps not surprising, therefore, that the last year or so has seen a proliferation of legal cases concerning nuclear weapons. Many of these involve protestors adhering to principles of non-violent direction action ("NVDA"),[5] who have caused criminal damage at UK bases such as Faslane in Scotland and Aldermaston in England, or have otherwise engaged in activities designed to disarm the UK nuclear deterrent. In subsequent criminal proceedings these protestors (or "global citizens") have pleaded criminal

[1] The famous women's Greenham Common campaign ended successfully in 1991 after the US agreed to close the base.

[2] The Guardian, Monday 16 July 2001, pp2 and 10. This paper reported that the Russian response is to threaten that its response to a unilateral US withdrawal from the Anti-Ballistic Missile Treaty may be to place multiple warheads on its intercontinental missiles. China's response was reported that NMD would "not only spark a new arms race,….but stimulate nuclear proliferation".

[3] On 3 July 2001 Greenpeace volunteers managed to break into and occupy Menwith Hill to highlight the public concern about NMD. See www.cnduk.org/briefing/nmd.hdm (CND briefing on NMD), www.fas.org/spp/starwars/programme/nmd (Federation of American Scientists NMD discussion), www.acq.osd.mil/bmdo (US Ballistic Missile Defence Organisation), www.defenselink.mil (US Department of Defense) and www.stopstarwars.org

[4] The Guardian, Wednesday 4 July 2001, p3.

[5] For example, Trident Ploughshares 2000 has 141 members and a transparent policy towards NVDA. See website at www.gn.apc.org/tp2001/

defences of necessity or justification. Many of these cases have featured arguments that Trident II is in breach of international law. Much reliance has been placed on the International Court of Justice's advisory opinion.[6] There have been some famous victories where Crown Court juries have refused to return guilty verdicts.[7] However with the exception of one of these criminal cases[8], the focus of this paper is not on the criminal law system where the illegality of Trident II in international law has been used as a shield in criminal defences. Instead, the focus is on the civil law and appeal court system where the judicial response of High Court Judges throws up some interesting lessons and questions as campaigners in the UK move to a new era where the law is part of a more strategic and proactive response to security and arms issues.

In exploring a new strategic response, this paper will focus on three cases: First, an appeal by way of case stated from Newbury Magistrates Court to the High Court by Jean Hutchinson, a campaigner convicted of causing criminal damage at Aldermaston;[9] second, a judicial review of a decision of the public body responsible for emissions from radioactive waste in the UK, the Environment Agency ("EA"), to permit AWE Plc[10] to discharge radioactive waste from Aldermaston and Burghfield;[11] third, the Lord Advocate's Reference ("LAR") in the Appeal Court in Scotland following the direction by a Sheriff at Greenock to the jury to return a not guilty verdict for three campaigners charged with criminal damage to a floating laboratory, Maytime, that services Trident submarines[12]. I also mention briefly a forthcoming judicial review of another decision by the EA (and the Secretary of State for the Environment, Transport and the Regions) concerning an application by Devonport Management Limited ("DML")[13] to increase radioactive discharges from Devonport Royal Dockyard ("DRD"), Plymouth. The increases are necessary because of a new project that includes the refitting and refuelling of Trident submarines at DRD. The claimant asks for a public inquiry before a decision is made.[14]

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[6] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of July 8), U.N. DOC. A/51/218 (1996) [hereinafter ICJ Advisory Opinion] reprinted in 35 I.L.M 809 and 1343 (1996).

[7] For example the Trident Ploughshares protestors found not guilty at Manchester Crown Court on 18 January 2001 of charges relating to conspiracy to commit criminal damages at Aldermaston. Details on Trident Ploughshares website at www.gn.apc.org/tp2000/

[8] The Lord Advocate's References in the case referred to below as Zelter et al.

[9] Hutchinson and Newbury Magistrates Court, QBD, Divisional Court, 9.10.2000 reported at [2000] All ER(D) 1309. The judgment can be obtained from the Trident Ploughshares website.

[10] AWE Plc is a private company running Aldermaston and Burghfield responsible for decommissioning nuclear warheads, and manufacturing new warheads. AWE Plc is a consortium of Lockheed-Martin, British Nuclear Fuels Limited and Serco.

[11] R v Environment Agency and Ministry of Defence ex parte Marchiori and Nuclear Awareness Group Limited, QBC, 29.3.2001. The judgment can be obtained from phil_shiner@publicinterestlawyers.co.uk

[12] Lord Advocates Reference No. 1 of 2000, Appeal Court, High Court of Justiciary (otherwise known as Zelter et al), 30.3.2001. The judgment can be obtained at http://www.gn.apc/org//tp2000/lar/laropin.html

[13] DML are owned by Brown Root from the US.

[14] R v Environment Agency and the Secretary of State for the Environment, Transport and the Regions. Ex parte Kelly. The hearing of an application for judicial review is scheduled for 17-19 September 2001.

This paper examines briefly the facts and issues in each of these three cases and then attempts to draw out the lessons, not just for lawyers and campaigners in the UK, but in other countries concerned with these issues. It concludes with a discussion of (emerging) strategies in the UK by lawyers and campaigners in the light of these lessons, to develop a more focused, strategic and proactive response to arms issues.

Before drawing out these lessons and discussing strategies for change it is necessary to put this discussion into context. There has been an intense debate amongst academics and practitioners both before and after the ICJ Advisory Opinion. This is not the place for a review of that material which is voluminous.[15] However, in view of the judicial response in the UK to arguments as to the illegality of nuclear weapons and specifically Trident II, it is necessary to review what was said about the ICJ Advisory Opinion after it was given, to look at the claims that were made by both protagonists for and against legality, and thus to put in context the paper's conclusions as to what might reasonably be expected from the opinion.

Given the "principal role" of IALANA[16] in bringing the question before the International Court of Justice, it is not surprising that those from IALANA writing immediately after the opinion had been delivered tended to claim much for it. Burroughs and Falk both described it as "historic".[17] Phon van den Biesen in the foreword to Burroughs book wrote it "decisively changed the global debate on nuclear weapons" and that:

> "……the Court placed an impossible burden of proof on the nuclear weapon states to justify any nuclear threat or use.
>
> It is clear that this opinion, which clarifies the precise meaning of binding rules of international law, in particular of the rules of humanitarian law, should lead the nuclear weapon states to an early review of their nuclear weapon policies."[18]

[15] That material includes: Bekker, Peter H.F. (1997) Legality of the Threat or Use of Nuclear Weapons, 91 Am Int'l L 126; Clark, Roger S, (1996) The Laws of Armed Conflict and the Use or Threat of Nuclear Weapons, 7 Crim.L.F. 265; Elkind, Jerome B, (1996) Nuclear Weapons: The World Court's Decision, 49 Rev. Hellenique De Droit International 401; Koskenniemo, Martti, (1997) Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons, 10 Leiden J. Int'l L 137; Matheson, Michael, (1997), The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons, 91 Am. J. Imt'l L. 417, 421; Moore, Mike, (1996), World Court Says Mostly No to Nuclear Weapons, 52 Bull. Atom. Scientists. 29; Stone, Jeremy J, (1996), Less than Meets the Eye, 52 Bull. Atom. Scientists. 43; Weiss, Peter (1996), And Now, Abolition, 52 Bull Atom. Scientists. 42; Ticehurst R, (1996), The Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, War Studies Journal, Autumn 2(1), pp107-118; Boyle, Francis A (1986), The Relevance of International Law to the "Paradox" of Nuclear Deterrence, 80 Nw. U.L.Rev. 1407; Brownlie, Ian, (1965) Some Legal Aspects of the use of Nuclear Weapons, 14 Int'l L.Q.437; Falk, Richard A. et al, (1980) , Nuclear Weapons and International Law, 20 Indian J. Int'l L 541.

[16] Burroughs, J (1997) The (Il)Legality of Threat or Use of Nuclear Weapons: a Guide to the Historic Opinion of the International Court of Justice, Lit Verlag, Munster, pxi

[17] Burroughs, supra, note 16, pxi; Falk, R.A. (1997) Nuclear Weapons, International Law and the World Court; A Historic Encounter, 91 Am. J. Int'l. L. 64.

[18] Burroughs, supra, note 16, pxi

Others shared these views. Ann Fagan Ginger wrote in 1997: "This opinion may be the most important opinion by a court in the history of the world".[19] Turning to more specific issues, on the legality of deterrence Burroughs wrote:

> "Rigorously applied, the holding that a threat of a use of force that violates humanitarian and other law or the requirement of proportionality is itself illegal fatally undermines the doctrine of deterrence with respect to such central and openly declared elements as threatened first use against conventional aggression by a nuclear weapon state, threatened first use in defence of 'vital interests' in confrontations with non-nuclear weapon States, and threatened massive retaliation against a nuclear attack".[20]

Still in the context of deterrence he wrote:

> "In realistic scenarios, no type of nuclear weapon now deployed can be used or threatened to be used in compliance with humanitarian and other applicable law".[21]

Whilst I agree with the moral basis of the conclusion Burroughs reaches, in the light of the UK experience it is necessary to address the question as to what conclusions now can be justified. What is gained from the relevant passages, analysed at some length below in the context of the LAR, is that deterrence is arguably a "threat". If the threat is to use a weapon that breaches humanitarian laws, violates the principles of necessity and proportionality, and is inappropriate for use "in an extreme circumstance of self-defence" then it will be illegal.

Weiss and Burroughs reach the same conclusions as to the importance of paragraph 105(2)E of the ICJ Advisory Opinion.[22] Weiss writes: "[t]he 'extreme circumstance' exception…..would not justify any of the instances of the past fifty years in which the nuclear powers have threatened to use nuclear weapons or, as has more frequently been the case, refused to rule out the option of using them."[23]
Burroughs went further looking to the future: "The importance of this conclusion [105(2)E] read in the light of the court's analysis, cannot be overstated: henceforth the illegality of any threat or use of nuclear weapons must be presumed."[24]
Generally, on illegality Weiss wrote: "[A] clear majority of the court came within a hair's breadth of adopting the proposition advanced by the great majority of

[19] Ginger, A.F. (1998), Nuclear Weapons are Illegal: The Historic Opinion of the World Court and how it will be enforced, Apex Press, New York., p1
[20] Burroughs, supra, note 16, p43.
[21] Burroughs, supra, note 16, p4.
[22] This famous paragraph reads: "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 facts 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".
[23] Weiss, supra, note 15, p43.
[24] Burroughs, supra, note 16, p32.

45 countries that took part in the case – that the threat or use of nuclear weapons is illegal in any circumstance."[25]

These claims are not easily justified in the light of the judicial response in the UK to the ICJ Advisory Opinion. As Weston notes on the above claim by Weiss at least six Judges of fourteen believed some threats and uses of nuclear weapons to be lawful and only three actually voted for their illegality "in any circumstance".[26] Weston warned that the "claims of victory could have the effect of lulling needed supporters into complacency".[27] Certainly I would want to emphasise the dangers of claiming too much from the ICJ Advisory Opinion. The analysis from the case of *Hutchinson* below is an abject warning on that point.

Weston argues that the Advisory Opinion delivers "ambiguity's consensus" and that "it may be fairly said that all the interested parties got all that they needed even if they did not get all that they wanted".[28] Thus, Michael Matheson, the Principal Deputy Legal Advisor in the US Department of State who participated in presenting the position of the United States before the court, wrote in 1997 that: "I do not believe that the court's opinions suggest a need for any change in the nuclear posture and policy of the United States or the North Atlantic Treaty Organisation (NATO) Alliance….".[29] Thus, the opinion can be used to justify positions on both sides of the argument. Other, more neutral observers have gone further. Luigi Condorelli writing in 1997 notes that it is "easy to heap scorn on the Advisory Opinion" and wrote in controversial terms:

> "In my view, the mere fact that, for whatever reason, the court did not decide that nuclear weapons are always forbidden implies that those who held them to be illegal have been totally defeated. They did not get what they wanted, that is, a ruling by the court that the nuclear powers are not in any circumstances entitled to use the weapons they possess. And vice versa: the very fact that the court did not rule that the threat or use of nuclear weapons is prohibited in all circumstances means that those who hold it to be legal – mainly the nuclear powers – in effect triumphed. Their dearest wish: that their policy of nuclear deterrence should not be labelled *hic* et *nunc* illegal was granted to the full".[30]

This is a stark warning and serves to underline the need for caution, not to claim too much from the opinion, and to avoid overstretching the opinion's conclusions so that adverse judicial comments are provoked.

In the UK, commentators have tended to sit more on the fence. Lord Murray said the opinion "offers what is perhaps the only credible starting point" to end

[25] Weiss, supra, note 15, p43.
[26] Weston, B.H. (1997), Nuclear Weapons and the World Court: Ambiguity's Consensus, Transnational Law and Contemporary Problems, a journal of the University of Iowa College of Law, Vol. 7, No. 7, pp371-399, at p398.
[27] Weston, supra, note 26, pp398.
[28] Weston, supra, note 26, pp371.
[29] Matheson, supra, note 15, pp417.
[30] Condorelli L (1997), Nuclear Weapons: A weighty matter for the International Court of Justice, International Review of the Red Cross, No. 316, pp9-20.

the deployment of nuclear weapons[31] and notes: "The ICJ's postulated exception [from 105(2)E] gives cold comfort to……protagonists of nuclear arms".[32] Others are even more cautious. Ticehurst wrote in 1998, "….It is disappointing but not altogether surprising that the court did not confront head on the issue of legality in the now famous paragraph 105(2)E".[33] In my view the ICJ Advisory Opinion is most helpful, if used in context, with caution, and to support international law and humanitarian law arguments. I explain below. The most recent and thorough analysis of these issues is that of Moxley (2000) which is to be recommended for its exhaustive research. Moxley's position on the ICJ Opinion is one I can endorse:

> "For proponents of nuclear weapons, there is the wide-open barn door of self-defense and the basis to argue that, in virtually the only area in which the use of armed force is lawful – self-defense – nuclear weapons, like any other weapon, may be used, and, indeed, that arguably they may be used in extreme circumstances of self-defense regardless of the dictates of other provisions of international law.
>
> For the opponents of nuclear weapons, there is the recognition of the 'general' unlawfulness of nuclear weapons and the suggestion that all uses of nuclear weapons would be unlawful if the contention of the nuclear powers is disproved that they can deliver modern precision low-yield nuclear weapons precisely at a target, discriminating between military and non-military targets and controlling collateral effects, particularly radiation.
>
> Thus, on the one hand, the decision takes the great stride of bringing nuclear weapons within the confines of international law, and on the other hand, it has language arguably taking it all back."[34]

To conclude, from my perspective as a practicing lawyer I can do no more than comment on experiences from UK cases concerned to try the legality of Trident II. That experience has led me to plead for caution in the use of the Advisory Opinion, but to be clear that it has its proper place, and has yet to be properly and fairly analysed in the UK. I do not believe that Trident II can ever fit within the narrow exception of 105(2)E and I make that clear below. I now turn to the UK experience of recent judicial responses.

[31] Murray R K. (1999), Nuclear Weapons and the Law, Medicine Conflict and Survival, Vol.15, pp126-137, at p126.
[32] Murray, supra, note 31, p137.
[33] Ticehurst R. (1998), Trident and Nuclear War, Medicine, Conflict and Survival, Vol.14, pp279-280 at p280.
[34] Moxley, C.J., JR, (2000), Nuclear Weapons and International Law in the Post Cold War World, Austin and Winfield, Maryland.

Lessons and Strategies in the Context of Hutchinson, Marchiori, Zelter et al and Kelly

This section analyses these three cases and discusses the lessons that now inform emerging strategies for action in the UK, where activists, practising and academic lawyers attempt to integrate legal action with political action, campaigning and NVDA.

Case 1 : Hutchinson[35]

This case has its origins in NVDA. It came before Lord Justices Buxton and Penry-Davy sitting as a Divisional Court in the High Court,[36] as an appeal by way of case stated from a decision of the Crown Court at Reading.[37] The facts which were not disputed in the High Court are set out in paragraph 2 of the judgment of Buxton LJ as follows:

> "(i) The Atomic Weapons Establishment at Aldermaston is engaged in production of Nuclear Warheads for missiles deployed on Trident Submarines.
> (ii) Ms Hutchinson on 27 June 1998 at about 8.00am acting on her own, made 22 deliberate cuts to the outer perimeter chain link fence at the Atomic Weapons Establishment, Aldermaston, using bolt cutters 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 Court trial.
> (v) Ms Hutchinson had held a long-standing commitment to promoting both multilateral and 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."

The questions on which the opinion of the High Court were 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 the Criminal Damage Act 1971 in its finding that the 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 properly consider:

[35] See note 8.
[36] A Divisional Court is a two Judge division of the High Court which sits in criminal cases.
[37] This was itself 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.

(a) the capability or envisaged use of Trident on the basis of the evidence presented to the Crown Court as to whether such use or capability is contrary to the opinion of the International Court of Justice on the Legality 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 course of 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 of the Non-Proliferation of Nuclear Weapons.

2. Whether the belief of the applicant, who lives eight 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." [38]

Buxton LJ saw the appellant's case as this:

> "That the activity at Aldermaston, ….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."[39]

Note the notion that the production of warheads is contrary to a rule of international law. Unfortunately, this erroneous argument reflects the formulation of the rule by Counsel for Mrs Hutchinson:

> "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."[40]

In my view this formulation is clearly wrong and led to the unhelpful judgment of Buxton LJ in this case. The main problem with this formulation is that it begs the question of what international law requires. It is not helpful to say that a nuclear deterrent is contrary to international law unless it is consistent with it. Nor does it address the question as to the consequences: for example, if there is established a clear breach of the humanitarian laws so that a policy of deterrence is unlawful within international law does that make the policy criminal? This formulation does not address that question. There are four other criticisms: first, it sets the threshold too high. As the judgment in *Hutchinson* makes plain the ICJ Advisory Opinion was the "only material relied upon in support of this rule".[41] It seems that there is consensus, even amongst those who seek to rely on the ICJ Advisory Opinion to advance the anti-nuclear

[38] See paragraph 7 of judgment.
[39] See paragraph 4 of judgment.
[40] See paragraph 24 of the judgment.
[41] See paragraph 28 of the judgment.

cause, that there is no such blanket ban within the ICJ Advisory Opinion. If it is to be argued that international law imposes such a blanket ban on all nuclear weapons in all circumstances of deterrence, in my view such argument must be supported by the rules of international law that support the contention, for example, the rules of necessity, proportionality, discrimination, moderation and civil immunity; second, there is no single rule of customary international law, within or without the ICJ Advisory Opinion, that supports such a contention; third, as Buxton LJ suggested it is a truism to argue that a policy of use of weapons must be consistent with international law. I do not understand the lawyers for the Nuclear Weapons States ("NWS") arguing differently before the International Court of Justice. What is important is that it must be shown how a particular weapon system such as Trident II is not consistent with international law. In this case Counsel for Mrs Hutchinson was required to show how Trident II was in breach of rules of customary international law (not all of which are identified and analysed in the ICJ Advisory Opinion); four, Counsel for Mrs Hutchinson had to tackle head on the ambivalent passages in the ICJ Advisory Opinion on deterrence. Buxton LJ highlighted two of these. The first of these is found in paragraph 67 where it said:

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

The second is to be found in 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."

Counsel for Mrs Hutchinson was required to engage with a detailed argument that a policy of deterrence is, in fact, a policy of threat to use weapons, and that a threat to use a weapon that is unlawful is contrary to international law. In the section below on *Zelter et al* I discuss why deterrence is a threat, as does Moxley in a recent paper on the case.[42]

Given the formulation of the rule for which Counsel contended it is perhaps a relief that *Hutchinson* did not do more damage. For example, it did not lead to a finding that the issue of whether Trident II was in breach of international law could not be justiciable. Buxton LJ ruled 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".[43] Thus, the court dismissed the international law argument. However, it did not have to engage with the real ambiguities of the ICJ Advisory Opinion in the way that the third of these judgments did, namely, the LAR. Thus the opportunity to present the arguments properly whilst impeded are not fatally damaged. I make clear below my opinions as to how these arguments should be put. For example, if one is to use the ICJ Advisory Opinion in these

[42] Unlawfulness and the United Kingdom's Policy of Nuclear Deterrence – Invalidity of the Scots High Court Decision in Zelter, Charles J Moxley JR, available from phil_shiner@publicinterestlawyers.co.uk.
[43] See paragraph 28 of judgment of Buxton LJ.

cases it has to be to emphasised that a nuclear weapon system must be tested against whether, given its size and thus effects in terms of blast, heat and radiation, it can possibly comply with the "cardinal principles" of humanitarian law[44] or fit within the narrow exception suggested by paragraph 105(2)E of the *dispositif*, that is, being used "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

The main findings then of Buxton LJ are as follows:

1. That "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…"[45] and that "the rule contended for…has not received the assent of this country and that 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" (paragraph 32).

2. 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" (paragraph 37). Counsel had argued that the Crown or British Government were acting in contravention of a rule of "substantive criminal law" and were therefore committing a "criminal act".

3. That, even if the court had found that there was a rule of international law as contended and that, therefore, Mrs Hutchinson was acting to impede, or alternatively to protest about, activities that were unlawful under international law there was no authority for the proposition that this provided her with a lawful excuse in criminal law (paragraph 39). In this finding, that there is no defence to criminal damage, based on the ICJ Advisory Opinion *Hutchinson* is similar to *Zelter et al*.

4. That, Mrs Hutchinson could not bring herself within the defence of necessity because, (1) the conduct was not intended to impede criminal activity (there being no rule of customary international law to support that contention); (2) there was no immediate or instant need to act as Mrs Hutchinson acted; (3) that taking into account "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….the criminal self-help of the sort indulged in by Mrs Hutchinson cannot be reasonable" (paragraph 54).

5. That arguments based on Article 10 of the European Convention on Human Rights ("ECHR") (the right to freedom of expression) fail because 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" and Mrs Hutchinson "has no right,

[44] See paragraph 78 of ICJ Advisory Opinion and paragraph 105(2)E of the dispositif.
[45] Oppenheim's International Law, 9th edition, Longman, London

and Article 10 gives her no right, to express herself in whatever mode she chooses, whatever the damage or inconvenience to others" (paragraph 64).

To summarise, Counsel for Mrs Hutchinson should not have contended for the rule of customary international law that he did, or that as Trident II was in breach of international law, it was a criminal activity, and that, therefore, Mrs Hutchinson had a lawful excuse in criminal law in acting as she did. These arguments were, I submit, misconceived and likely to cause damage to the anti-nuclear cause. The case demonstrates that the ICJ Advisory Opinion has distinct limitations in its usefulness, and can do no more than support self-standing arguments that are based on international law.

Case 2 : Marchiori[46]

This case was a challenge through judicial review[47] of the EA's decision of 9 March 2000 to vary an authorisation under the Radioactive Substances Act 1993[48] to permit a new consortium, AWE Plc, to discharge radioactive waste produced by the manufacture of Trident II warheads.[49] The EA's decision document noted: "Manufacturing and decommissioning operations produce solid, liquid and gaseous radioactive discharges which principally contain tritium, uranium or plutonium"[50]

The first applicant is an anti-nuclear campaigner living near to Aldermaston and the second applicant is a "public interest group".[51] It should be noted that although the defendant was the EA, the first interested party,[52] the Ministry of Defence, played an important role in the proceedings and led argument against the applicants on the main point in the case, that is, the applicability of Chapter III of the Euratom Treaty to military activities.

The judicial review had three aspects: justification and the applicability of the Euratom Treaty;[53] the international law arguments as to the illegality of Trident II and various procedural matters. I intend to concentrate on the first two as these are of general importance.

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[46] Supra, note 11.

[47] In the UK judicial review is "the means by which High Court Judges scrutinise public law functions, intervening as a matter of discretion, to quash, prevent, require or compensate…..so as to right a recognisable public law wrong, whether unlawfulness, unreasonableness, or unfairness". Fordham, M, (1997), Judicial Review Handbook, John Wiley & Sons Ltd, Chichester.

[48] Section 16 RSA 1993.

[49] The applicants did not challenge the environmental consequences of the decommissioning of Chevaline nuclear warheads. Grounds of challenge, paragraph 4.

[50] Paragraph 1.2.2 of the decision document.

[51] Acting on legal advice Nuclear Awareness Limited incorporated as a company limited by guarantee to protect individual members from the liability of an adverse costs order if this case were lost. It did so in reliance on R v Leicestershire County Council ex parte Blackfordby and Boothorpe Action Group Limited [2000] JPL 1266; [2001]Env LR 35. This case established that if a group incorporated for these reasons the appropriate remedy in judicial review proceedings was for the court to make a security for costs order.

[52] In proceedings for judicial review it is common for the developer or company that is the beneficiary of a consent or grant of permission that is challenged to be heard in the case.

[53] Treaty establishing the European Atomic Energy Community, signed on 25 March 1957.

Justification and the Euratom Treaty

The applicants argued that the "practice" of manufacturing nuclear warheads had to be justified before authorising the discharge of radioactive wastes. It argued a justification exercise should have addressed broad issues of the benefits and detriments of this practice so as to demonstrate it's necessity. The EA was required to satisfy itself that the benefits of manufacturing warheads, including from the point of view of society, outweigh detriments. It argued that relevant questions include:

- "What are the benefits and detriments associated with Trident production?
- What are the costs/employment/expertise implications of Trident production?
- What is the proliferation detriment of Trident production?
- Why do existing Trident warheads not constitute an adequate nuclear deterrent?
- Are there alternative means of obtaining new warheads?
- What is the risk associated with an accident at the site?
- What is the public perception of risks arising from Trident production?
- What is the impact on property values and land use?
- What social/ecological consequences are inherent in (threatened) use of Trident?
- What decommissioning detriments are consequential on Trident production (dismantling those warheads being replaced and the new ones to be made)?"[54]

The legal requirement of justification arises as follows:[55]

1. It derives from the system of radiological protection recommended by the International Commission on Radiological Protection ("ICRP"), which has provided that:

   > "No practice involving exposures to radiation should be adopted unless it produces sufficient benefit to the exposed individuals or to society to off-set the radiation detriment it causes".[56]

2. It is reflected in Article 6 (and 13) of European Council Directive 80/836/Euratom,[57] adopted pursuant to Articles 30 and 33 in Chapter III of the Euratom Treaty.[58] Article 6 of the Directive[59] requires that:

[54] Paragraph 17 of grounds.
[55] See R v Secretary of State for the Environment ex parte Greenpeace Limited [1994] 4 All ER 352 at 363h-e, 365j-368f.
[56] ICRP 60, 1990, Recommendations of the International Commission on Radiological Protection, International Commission on Radiological Protection, Pergamon Press, 1991.
[57] Council Directive 80/836/Euratom of 15 July 1980 amending the directive laying down the basic safety standards for the health protection of the general public and workers against the dangers of ionising radiation, OJ 1980 L 246/1.
[58] See Re Ionising Radiation Protection [1993] 2 CMLR 513, 524 (Jacobs A-G).
[59] Amended by 84/467/Euratom, OJ 1984 L 265/4.

> "The various types of activity resulting in an exposure to ionising radiation shall have been justified in advance by the advantages which they produce."[60]

The first question for the court was one of law: Does the legal requirement of justification apply to military activities. The EA recorded the view:

> "The UK Government considered that the Euratom Treaty does not apply to military activities."[61]

The applicant said that the UK Government was wrong and that Chapter III of the Treaty is of general application and does not exclude military activities. The applicant's case on this first question at the hearing included the following arguments:

(a) It did not argue that all of the Treaty applies to military activities. It said that Chapter III, which is the health and safety provisions, applies and that Chapter III that concerns public safety is engaged by all nuclear practices, whether civil or military. It said that Chapter III has a self-standing gateway which springs from its own recital.[62]

(b) It relied on the case of *Saarland v Minister for Industry* [1988] ECR 5013 referring to:

> "Chapter III of the [Euratom] Treaty, entitled 'Health and Safety', the provisions of which form a coherent whole conferring upon the commission powers of some considerable scope in order to protect the population and the environment against the risks of nuclear contamination".[63]

(c) It argued that it is nowhere to be found in the Treaty that there is any exemption for military purposes (at least not for Chapter III). It would be incompatible with the intention behind the Treaty and the Directive on basic health and safety which are concerned with issues of public safety in it's broader sense.

(d) That there is an emphasis on peaceful development of nuclear energy did not necessarily exclude military purposes. The applicants pointed to specific military exclusions, such as Article 24 which is concerned with dissemination of information and Article 84 which is concerned with safeguards. As Turner J in his judgment recorded:

> "If the [Ministry of Defence] argument was to be accepted there would have been no necessity for these express provisions for exclusion.

[60] The Directive was in force at the time of the decision: from 1 April 2000 justification is required by Article 6 of Directive 96/29/Euratom.
[61] Paragraph 4.10.2 at page 67 of decision document.
[62] The Fourth Recital to the Treaty states this purpose: "ANXIOUS to create the conditions of safety necessary to eliminate hazards to the life and health of the public."
[63] See paragraph 11 of judgment.

Reference was made to an article by Deimann and Betlam (1995) NLJ 1236 in which the authors commented
'During the drafting and negotiation process of the Euratom Treaty, this provision emerged as a compromise between States who sought a total exclusion of military use and those who advocated inclusion; Article 84 purports to enable France – the only nuclear power of the framers of Euratom – to continue its 'force de frappe' despite certain control by the newly established community" (paragraph 21 of judgment of Turner J).

(e) It argued that the European Commission, which is responsible for co-ordinating the arrangements in Chapter III, is of the clear view that it applies to military activities. In a note prepared by the Director General, Environment, Consumer Protection and Nuclear Safety, The Legal Services of the Commission, 12 September 1988, it is stated that:

> "Unlike Chapter VII which provides that 'safeguards may not extend to materials intended to meet defence requirements…' (see Article 84(3)), Chapter III does apply to military activities. The protection of health and safety in the field of radioprotection is an indivisible objective and extends to all 'dangers arising from ionising radiation' (Article 30), irrespective of their source." (Paragraph 24 of judgment of Turner J).

On 20 October 1995 the Director General of Legal Services confirmed that Article 34 of Chapter III applied to military activities stating that:

> "There should be no distinction between civil or military purposes." (Paragraph 25 of judgment of Turner J).

On 24 October 1995,the President told the European Parliament (in relation to French nuclear testing):

> "The Commission starts first of all on the principle that Article 34, like the rest of Chapter III of Euratom, applies to civil as well as military experiments." (Paragraph 26 of judgment of Turner J).

On 15 July 2000, the head of the Radiation Protection Unit of the Commission stated that:

> "It is our view and that of the Legal Services….that Chapter III of the Treaty applies to military activities. The radiation protection of workers should as a result be enshrined in national law so as to protect workers in the defence sector as much as civil establishments and all other aspects of Chapter III should apply to radiation whatever their source. This is a view that the Commission is defending vigorously."

(f) It referred to Articles 35 and 36 of the Treaty on monitoring and liaison. The monitoring duties are: "….monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards… ..[and] periodically [to] communicate [this] information…..to the Commission so that it is kept informed of the level of radioactivity levels", and the Applicants said it cannot sensibly have been the intention to ignore installations.[64] As the Commission communication to the Council (20.8.86) explained, regarding Articles 35 and 36:

> "The regional network of monitoring facilities to ensure compliance with Basic Standards was originally established in the 1950s to monitor the contamination resulting from the testing of nuclear weapons."

It might be added that the applicants drew the attention of the court to the article by Deimann and Betlam. That article references other developments that were of assistance to the applicants: first, that in the context of a number of nuclear weapons tests at the Polynesian island of Mururoa in 1995 the question arose as to whether France was required to notify these to the Commission and receive its consent pursuant to Article 34 of Euratom (part of Chapter III). The authors were of the view that "a breach of EC law would occur should France commence testing without the Commission's consent".[65] They were of the opinion that it "equally follows that the Mururoa tests which were conducted between 1966 and 1991 were unlawful".[66] They referenced a reply to a written question in which EC Commissioner Bjerregaard stated that the only time a notification under Article 34 was received by the Commission was in 1959.[67] This notification was for atmospheric nuclear weapons tests which took place in the Sahara Desert (then French Algeria) in February 1960. Why would France notify the 1960 tests under Article 34 and await the Commission's consent if it did not feel obliged to do so? Indeed so, and the answer is to be found in the travaux preparatoires of the Treaty. As Deimann and Betlam note "during the debate concerning the ratification of Euratom in the French Parliament, the Secretary of State for Foreign Affairs, M. Maurice Faure, has stated, as reported by the Parliamentary Committee: "Les dispositions de l'article 34

[64] See also the transboundary liaison requirement in Article 37, where what matters is there is a plan where the risk of "radioactive contamination in another Member State" needs addressing.
[65] p1238.
[66] Footnote 21 at p1238.
[67] Answer of June 28, 1995 to written question E-15 19/95 by Nuala Aharn.

s'appliquent a toutes les experiences particulierement dangereuses, civiles ou militaries".[68]

The French nuclear tests at Mururao led to the case of *Danielsson*.[69] Three residents of Tahiti, some twelve hundred kilometres to the west-north-west of Mururoa, applied for suspension of the operation of the Commission's decision permitting the test. The European Parliament asked the Commission to ensure that Articles 34 and 35 of the Treaty "would be scrupulously observed". (Paragraph 3 of ECJ judgment[70]). The French agreed to the sending of a Commission mission to the test site to monitor the tests. The Commission had concluded, following monitoring at the test site, that a scientific assessment showed that the basic standards would be met and that as the tests did not present a perceptible risk of significant exposure for workers or the general public Article 34 did not apply. The judgment of the European Court of Justice ("ECJ") is significant for two reasons. The first is because of the following passage:

> "The Commission's substantive position, as presented by Mr Santer, was that Article 34 applied to both civil and military experiments, and that an experiment was to be regarded as particularly dangerous for the purposes of that Article if it presented a perceptible risk of significant exposure of workers or the general public to ionising radiation. An experiment involving the explosion of a nuclear device might entail such a risk and could therefore be regarded, in certain circumstances, as 'particularly dangerous'" (paragraph 12). (My emphasis).

Thus, the Commission's position is formally recorded in these proceedings that Article 34 (and thus Chapter III at least) applies to military experiments. Whilst in these proceedings for interim measures the court noted that it was not appropriate to rule in advance as to whether Chapter III and Article 34 applied[71], it did analyse the role of the Commission and records the Commission's duty under Article 34. This is the second significant passage:

> "…..analysis of the relevant provisions of Chapter 3 of the Treaty shows clearly that, in the context of Article 34, the Commission is under an obligation to assess the effects capable of being caused by the nuclear tests in issue on all members of the general public and workers concerned. Interpreted within the scheme of Chapter 3, in particular in relation to Article 30, which concerns specifically 'the protection of the health of workers and the general public,' Article 34 requires the Commission to make its assessment of whether the experiments which a Member State intends to carry out are dangerous…"[72]

This and the earlier passage from paragraph 12 seem scarcely reconcilable with the French Government's position before the ECJ in *Danielsson*, and the

[68] pp1237-8.
[69] Marie-Therese Danielsson, Pierre Largenteau and Edwin Haoa v Commission of the European Communities, Case T-219/1995R.
[70] Europe No. 6532, 29 July 1995
[71] Paragraph 62 of the judgment.
[72] Paragraph 74 of the judgment.

UK Government's position in *Marchiori*, that Chapter III does not apply to military experiments and activities. If Chapter III did not apply why did the European Parliament ask the Commission to ensure it was scrupulously observed? Why did the Commission go to the expense of sending out scientists to the test site to monitor the tests? Why did the Commission say to the court that Article 34 applied to both civil and military experiments? Why did the court itself analyse the Commission's duties under Article III in respect of these nuclear tests?

I have dwelled on *Danielsson* as it later proved to be key in the Court of Appeal in *Marchiori* as I discuss below.

Turning now to the UK Government's position on the applicability of Chapter III. It began by emphasising that all defence activities involve the exercise of sovereign power by the State. Turner J recorded:

> "There would thus be a presumption against the provisions of any treaty encroaching on the freedom of States to exercise it free of international control, save to the extent that there are international treaties expressly dealing with matters of defence. The starting point for the argument was that Euratom can only have acquired such competence or authority as it had as had been attributed to it by its treaty signatories." (Paragraph 29 of judgment of Turner J).

The Government pointed to the historical documentation that gave the views of the six original signatories: Belgium, Germany, France, Italy, Luxemburg and The Netherlands. This showed that they had conceived that "the civil use of atomic energy was named as a field in which the joint efforts of the six nations might be promising".[73]

Historical analysis of the Treaty shows that at the time it was being negotiated France was in the process of developing its own deterrent and Germany had renounced the use of nuclear arms. By the time Britain acceded to the Treaty in 1973 it was already in possession of nuclear weapons. Thus, the UK Government relied on the following passage from *Goldschmidt*.[74]

> "Euratom was to have ownership of fissile materials other than natural uranium, ie, plutonium and all grades of enriched uranium. However, should such materials be needed for fabrication of a military device, this

[73] Turner J at paragraph 29 quoting from a memorandum from the Minister of Foreign Affairs in Belgium. The Government referred to a paper, known as the Spaak Report, prepared by a group of experts which form the basis of the negotiations for the preparation of the Euratom Treaty. The UK Government also referred to Chaser Y, "Euratom: The Treaty Establishing the European Atomic Energy Community", International Business Lawyer, May 1990, 227-231, although this contains a passage which is helpful to the applicants: "These [Articles 30-39 of Chapter III] deal with, inter alia, 'basic standards' and may have specific relevance as regards the existence and positioning of nuclear installation. It can be argued that Euratom generally, and these provisions particularly, can be used for extensive effect. Whereas, so far, in practice, however, and as noted, Euratom and developments from it have been concerned with promoting nuclear research primarily, the submission here is that its potential impact can be more far reaching". (p229); Polach J, "Euratom: Its Background, Issues and Economic Implications", Oceana Publications, New York, 1964.

[74] Goldschmidt, B, (1982) "The Atomic Complex: A World Wide Political History of Nuclear Energy, American Nuclear Society, Illinois.

(purely theoretical) ownership was to cease at the entrance to the military establishment concerned. The Euratom security control also stopped at this point."[75]

The Government noted that apart from Article 24 and 84, the Treaty was silent about defence matters, that the Recitals refer exclusively to peaceful uses of nuclear energy and that the structure of the Treaty was incompatible with a distinction between civil and military uses. It said there was no basis "upon which it would be proper to separate Chapter III of title II and give it a life independent from the remainder of the Treaty so that it, and it alone, should apply to both civil and military uses."[76] It pleaded the "special Treaty relationship with the United States which might be imperilled if this construction for which the applicants contended was to be accepted".[77]

Turner J's conclusions on the applicability of Euratom

Turner J found that the applicants were wrong but it is arguable that his approach was wrong.[78]

1. He characterised the applicants' case as an argument that the whole of Euratom applied to military activities. He concluded that: "It is not in any sensible manner properly to be accepted that Euratom applies to the military use of nuclear power".[79]

2. He was required to refer the question as to the applicability of Chapter III to the ECJ if he was in any doubt as to the answer. It is difficult to see how he could reasonably conclude that he entertained no such doubt (paragraph 42) when he had ample material before him to show that not only was this an arguable point, but that the Commission themselves

[75] It should be noted that the applicants had not argued that all of the Euratom Treaty applied to military activities, but that Chapter III did as its health and safety provisions formed a coherent whole, and sprang from its own separate recital. Further, the Government's own materials gave the context to the statement of the French Secretary of State for Foreign Affairs from the travaux preparatoires referred to at page 15 above. Why was this said? The answer might lie in the political controversy within the European community at the time as to whether Euratom was to apply to military activities, and how this might affect the independence of the French to press ahead with the development of their own deterrent. Polach records that the French Prime Minister Guy Mollet, signed a declaration in January 1956 for the (then) Action Committee for the United States of Europe which forbade "the Member States to employ atomic energy for military purposes" (p64). Although in the end M Mollet yielded to pressure and the French Parliament was persuaded to participate it is clear that whether or not Euratom was to apply to military activities was a hot political controversy. As Polach notes "A great struggle developed around the question whether….its members also should be obliged to give up using nuclear energy for nuclear purposes. The Spaak Report by-passed this dilemma" (p65). Germany was opposed to the French position. It asserted that Euratom ownership of nuclear materials was incompatible with the German free-market economy. Eventually the French prevailed. A conference of the heads of the six Governments was convened in February 1957 to attempt to reconcile these diverging positions and Polach notes that although the final communiqué is rather terse, "from other comments about the conference, however, it is amply evident that France's partners acquiesced in the French demand for Euratom's monopoly of supply and France's freedom to use atomic energy for military purposes" (p66).

[76] Paragraph 32 of judgment.

[77] Paragraph 33 of judgment.

[78] I do not plead objective assessment here as I was the instructing solicitor in this case.

[79] Paragraph 43 of judgment.

supported the applicants position. One might ask how many of the non-nuclear weapon states of the European Union would do the same.[80]

3. He said: "Little weight should be given to the casual statements upon which the applicants relied which amount to little more than political rhetoric".[81] Can it be right to dismiss the travaux preparatoires, the ECJ's judgment in *Danielsson*, the Commission's position in that case, statements made by the Director General of Legal Services and the Head of Radiation Protection as "political rhetoric"?

4. He ruled that: "It was inherently implausible" that France "would have been willing to apply the consequences of the Treaty to such a sensitive area. History indicates that France has always jealously preserved its independence in the field of military power, but particularly is this true in the nuclear aspects of its defence policy".[82] In fact a more careful analysis of France's position shows that it said at the time the Treaty was signed that Chapter III applied to military activities, and that it had notified the French Algeria test in 1960 under Article 37.

5. It gave weight to an irrelevancy, namely, the UK's (special) relationship with the United States noting that when "the United Kingdom acceded to the Treaty, there is no history of discord with the United States with which the United Kingdom has a number of nuclear treaties. These would surely have been called into question if Euratom covered defence related activities."[83] It is difficult to see how a reasonable analysis of the health and safety provisions of Chapter III leads to the conclusion that such discord would be inevitable if it applied to military activity. One can, of course, see that the US might well have been uneasy if the whole of Euratom applied as it would have given the European Community common ownership of fissile material in circumstances where it could have objected to such materials being used for UK nuclear testing or the construction of new warheads.

[80] In proceedings before the ECJ the Commission and all EU States are entitled to make representations to the court.
[81] Paragraph 41 of judgment.
[82] Paragraph 42 of judgment.
[83] Paragraph 41 of judgment. Note again the failure to distinguish between an argument that Chapter III alone applied, not all of the Treaty.

6. He gave six examples of internal problems of construction which arose if the applicants' suggested interpretation was to be accepted that "the Treaty applies to military uses of nuclear power". However, as that was manifestly not the applicants' case, the examples relating to Articles 24, 84, 86 and 98 (which are in different chapters) do not apply. An example of an apparent difficulty with Article 35 can be disposed of quite simply. Turner J found :

> "Article 35 also presents the applicants with a difficulty. The commission is empowered to access materials necessary to carry out the monitoring of the operation and efficiency of facilities for continuous monitoring of radioactivity in its various forms. Given the obvious requirement for respect for the defence of Member States, it is not easy to reconcile these provisions."[84]

Here Turner J refers to Article 35 as if it would allow the Commission access to all of the Aldermaston plant. It would not. It would allow access to installations for monitoring radioactivity in the environment, and there is no reason why access to those facilities alone, bearing in mind the spread of radioactive emissions in the environment, would cause the UK Government a problem. Article 37 becomes meaningless with its reference to "monitoring of the level of radioactivity in the air, water and soil" if it cannot take into account a reading of levels produced by civil as well as military installations. Both types of installation contribute to levels in the environment. How can the Member States, through their regulatory regimes, and the Commission know what appropriate action to take to protect public safety if there is no monitoring of levels from military installations? How can it be properly decided if a proposed new civil nuclear power station should be given consents to proceed if one does not know the ambient levels to which it will be contributing? Thus, it is arguable that not only does Article 35 not present a particular problem for the applicants, but that the rationale behind Chapter III supports their case.

7. He quoted from several passages in a case before the ECJ, Draft Convention of the International Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transport.[85] However, this was concerned with safeguards (Chapter VII) and referred to military facilities as "excluded from….the Treaty" because of Article 86, which is an express exclusion. The case certainly did not consider Chapter III, where there is no express exclusion.

[84] Paragraph 41 of judgment. Article 35 of the Treaty reads: "Any Member State in whose territories particularly dangerous experiments are to take place shall take additional health and safety measures, on which it shall first obtain the opinion of the Commission. The assent of the Commission shall be required where the effects of such experiments are liable to affect the territories of other Member States."
[85] [1978] 3 ECHR 2151.

I have dealt at length on the applicability of Chapter III to military activities because it is highly likely that this point, and related points arising from Chapter III, will now be referred to the ECJ by the Court of Appeal. I discuss the appeal to the Court of Appeal below.

Justification

The second question flowed from the first. If Chapter III applied, then so did the requirement to justify under the Council Directive 80/836/Euratom adopted pursuant to Articles 30 and 33 of the Treaty.[86] The applicants focused on three principles: the related practices point, the decision-maker point and the weighing point. Essentially, on the first point it argued that the EA had to justify (in the broad sense referred to above) the single practice of manufacturing warheads. This was important as, if the practice to be justified was the aggregated one of decommissioning redundant warheads as well as manufacturing new ones, the benefits to society were so obvious from decommissioning that the manufacturing practice was bound to be justified within that single practice. On the other hand, if the template of questions referred to at page 10 above had to be answered for manufacturing alone, it was far less likely that the practice would be justified and, if so, only on the basis of stricter controls to reduce detriments.

The applicants referred to various arguments not all of which are put here. Article 2 of the Directive lists, as <u>different</u> types of activity, practices which may well be interrelated. The ICRP recommendations make clear that where there are a combination of practices involving exposures to radiation, the fact remains that they remain a group of relevant practices, not a single practice:

> "The exposure of individuals resulting from the <u>combination of all the relevant practices</u> should be subject to dose limits…." (My emphasis).[87]

Reliance was placed on the EA's approach to the thermal oxide reprocessing plant (THORP) at Sellafield.[88] It was the carrying on of that activity at the Sellafield site that had to be justified, not Sellafield. Further, after the decision in the *Greenpeace* case[89] the EA also treated a new Solvent Treatment Plant at Sellafield as a separate practice.

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[86] Supra, notes 57-60.

[87] ICRP, supra, note 56, paragraph 112(c).

[88] This was the plant where it came to light that BNFL had been falsifying monitoring records and consequently the Japanese Government cancelled its contract for THORP to reprocess its spent fuel.

[89] See note 55. Potts J held: "In my view ICRP 60 and the Directive are concerned with justification of particular practices which affect particular individuals in particular circumstances. In this case the type of activity is thermal oxide processing at Sellafield. There has been no justification of this activity involving the decision-maker being satisfied that the benefits flowing from the activity outweigh the detriment." (p368a-b of judgment in All England Law Reports).

The applicants argued that making new nuclear warheads is plainly different from decommissioning redundant ones. If either such activity was introduced anew, it would be regarded as a separate "practice", so too when conducted together. It said that in disarmament and proliferation terms decommissioning is the reverse activity of manufacturing. It noted also that there is a proliferation benefit from weapons decommissioning but a proliferation detriment from manufacturing, but that only a benefit was listed by the EA.[90]

On the second point the applicants argued that it was not good enough for the EA to defer to Government policy on this matter as it did. As the statutory decision-maker entrusted with the statutory functions under the RSA 1993 and the Council Directive it must reach relevant conclusions for itself. The EA's approach was unlawful in that its reasoning was "that the practice of designing, constructing maintaining and dismantling nuclear warheads at AWE is justified in the light of the Government's defence policy.[91] It had also stated: "Government defence policy relies on having nuclear weapons. The Government affirmed its commitment to an independent nuclear deterrent in the Strategic Defence Review (1998)[92] noting that:

> "For as long as Britain has nuclear forces we will ensure that we have a robust capability at the Atomic Weapons Establishment to underwrite the safety and reliability of our nuclear warheads. The practice of designing, constructing, maintaining and dismantling nuclear warheads at AWE is a key part of the UK's defence capability".[93]

The EA's evidence in the case went further and made clear that it had simply deferred to Government policy: "The Agency approached justification in the light of the Government policy to retain an independent deterrent and did not seek to reassess it in the Agency's determinations…..[I]t is not for the Agency, even if it accepted that Euratom does apply, to seek to justify that policy. The Agency must accept that policy as it stands…"[94]

On the third point, the applicant said that all the EA did (in an attempt to cover their position if they were wrong in their argument that Chapter III did not apply) was to list (some but not all) benefits and detriments. Thereafter the EA concluded:

[90] The decision document, paragraph 4.10.4 notes, as principal benefits: "delivery of a UK defence requirement for an independent nuclear deterrent", "reducing safety risks by decommissioning redundant nuclear facilities" and "reducing proliferation risks by decommissioning old nuclear weapons".
[91] Decision document, paragraph 4.10.7.
[92] The Labour Party fought the 1997 general election on the basis of a manifesto commitment to maintain the UK's independent deterrent. Following election it produced the SDR as a white paper (a policy paper).
[93] Decision document, paragraph 4.10.2.
[94] Evidence of Ian Jackson at bundle 'A' p540, paragraph 54.

> "The Agency has carefully considered each consultee's view upon the Agency's approach to justification and has concluded that the practice of designing, constructing, maintaining and dismantling nuclear warheads at AWE is justified in the light of the Government's defence policy".[95]

They relied on Re Ionising Radiation[96] where the ECJ emphasise the "weighing up" exercise. What is needed is a balancing by the decision-maker. In *Greenpeace* the court endorsed the Ministers' approach because:

> "The Ministers carried out a careful process of weighing the benefits and detriments in reaching the conclusion that the balance came down on the side of justification".[97]

In answer to the applicants' case the EA said it was entitled to consider the three interrelated activities of the design, production and decommissioning of the warheads as a single practice. It said that the main source of radioactive discharges from Aldermaston arise from decommissioning from the legacy of operations at that site during the period of the cold war. It emphasised that:

> "Both warhead decommissioning and Trident production operations are concluded in the same facilities and often by the same groups of worker. For example at AWE Burghfield, Chevaline nuclear warheads are decommissioned within the same nuclear plant in which Trident nuclear warheads are assembled. The same management team is responsible for the control of these operations. Similarly at AWE Aldermaston, EW177 warheads are decommissioned and stored within the same nuclear plant in which components for Trident nuclear warheads are manufactured, again with common management arrangements. Operations at AWE are accordingly more properly viewed as a single practice, namely, the maintenance of the UK nuclear deterrent."[98]

In a further statement Mr Jackson for the EA added:

> "In fact the production and decommissioning of nuclear warheads are closely related and part of a continuous cycle. The process of manufacture of a nuclear weapon involves the melting of plutonium returned from redundant warheads, the casting and machining of a new warhead, assembly into a weapon, disassembly from a weapon, and return of plutonium for re-melting and casting into a new weapon. Each step is linked to the next in a continuous production cycle in pursuit of a single purpose, namely, the maintenance of a nuclear deterrent, and in my opinion was properly considered as a single practice by the Environment Agency".

[95] Decision document, paragraph 4.10.7.
[96] Supra, note 58.
[97] At 376d.
[98] Paragraph 59 of judgment.

Turner J's Conclusions on Justification

The Judge disposed of the applicants' arguments in a number of ways: first, he said that the applicants' contention that the words of the relevant ICRP recommendation (ICRP 60) are wide enough on their own to cover military uses of nuclear energy "introduces the same fallacy that the argument had in relation to the applicability of Euratom to military purposes. It must suffer the same fate, and for the same reasons" (paragraph 53 of judgment). Second, he said that Mr Jackson's evidence for the EA as to the single practice which fell to be justified was "unassailable" (paragraph 60 of judgment); third, that a proper understanding of the relevant passage from ICRP 60[99] is that justification is only to be applied in providing the list of options rather than selection of the option itself (paragraph 60 of judgment). In the context of the decision here it is difficult to see what he had in mind. Did he mean that the UK Government had previously justified the practice of the maintenance of the UK deterrent in its white paper the Strategic Defence Review? That justification exercise would have concluded, presumably, that there were a range of options to produce the same result, namely the maintenance of peace, and these options would have included traditional arms deterrence options. However, the UK Government had concluded that the UK nuclear deterrent option was justified; fourth, that a relevant passage from another publication of the ICRP entitled "History, Policies, Procedures"[100] allowed him to say that the EA were right to conclude that a practice can embrace a sub-activity (paragraph 61 of judgment). Here, the sub-activity of the single practice would be the manufacturing of warheads. Lastly, in terms of the law of judicial review, the decision of the EA, as regulator, "in these circumstances could only be successfully impugned on well known public law principles. The applicants were not in a position to, nor could they, demonstrate that the EA had erred by way of omission or inclusion of matter which was irrelevant any more than it could be shown that its decision was irrational". (Paragraph 63 of judgment).

The Judge failed to consider properly the applicants' case on Euratom that Chapter III not the whole of the Treaty applied. He failed to give proper weight to the evidence before him that the European Commission supported the applicants' position, and were prepared to argue strongly in support. He failed to wrestle properly with the applicants' case that the practice to be justified was that of manufacturing weapons, not all the activities at Aldermaston and Burghfield. As discussed below permission has now been granted for an appeal to the Court of Appeal on these points.

<u>International Law Arguments</u>

The applicants did not mount an argument that Trident II was in breach of international law and that, therefore, the EA as the domestic regulator could not authorise an activity which was unlawful within customary international law. The EA, responsible for the safe disposal of radioactive wastes, could not actually prevent the UK Government from maintaining its nuclear deterrent. Instead, the applicants' argument focused on the need for the EA to address

[99] Paragraph 4.3.1.
[100] ICRP, 1999.

properly material questions, and no more. A material question for it to address was whether Trident II was in breach of international law.

Unlike in *Hutchinson* the applicants argued for a relatively modest approach. It focused on the arguments that weapons as powerful as Trident II are in breach of humanitarian laws and, therefore, in breach of international law. It referred first to the ICJ Advisory Opinion and the rules of humanitarian law set out in paragraph 78, and particularly the rule of discrimination: "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"[101]. It quoted paragraph 74 which referred to these rules as "intransgressible principles of customary international law". It said that the humanitarian rules are reflected in Article 48 of the Additional Protocol 1 of 8 June 1977 to the Geneva Conventions of 1949[102], and the commentary of the International Committee of the Red Cross (1987)[103]. It said these sources have been recognised by the House of Lords[104]. Article 48 requires that parties to any conflict:

> "Shall at all times distinguish between the civilian population of combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". (My emphasis).

The ICRC commentary states:

> "The basic rule of protection and distinction is confirmed in this Article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva in 1864-1977 is founded on this rule of customary law". (My emphasis).[105]

[101] Paragraph 78 refers to two other humanitarian laws. The second is that "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. The third is the Martens Clause (first included in The Hague Convention II with Respect to the Laws and Customs of War on Land of 1899), now to be found in Article 1, Paragraph 2 of Additional Protocol I of 1977 which reads: "In cases not covered by the Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

[102] Article 48's basic rule is: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".

[103] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987.

[104] R v Minister of Defence ex parte Walker [2000] 1 WLR, 806, 812B

[105] Paragraph 1863.

The applicants then referred the court to paragraph 105D in the *dispositif* which ruled unanimously:

> "A threat or use of force by means of nuclear weapons should…..be compatible with the requirements of the international law applicable to armed conflict, particularly those of the principles and rules of international humanitarian law….." (My emphasis).

Having established the context of these humanitarian rules, the applicants argued that it is not that there is a blanket ban on all nuclear weapons or that they are prohibited as such (ICJ Advisory Opinion, paragraph 105(2)B). Nor, necessarily, that there can be no use of "smaller, low yield, tactical nuclear weapons",[106] or no "policy of deterrence"[107], or no reservation for use in an "extreme circumstance of self-defence, in which the very survival of the State would be at stake". (Paragraph 105(2)E). However, the point for the EA (and the court) to grasp is that the humanitarian laws governs any such weapons or uses. Any low yield weapon, or policy of deterrence or self-defence policy must comply with the humanitarian laws; any weapon or use which cannot is unlawful. The applicants stressed that these humanitarian rules have an overarching effect, because they are "cardinal" and "intransgressible". They govern self defence: "A use of force that is proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law". (Paragraph 42 of the ICJ Advisory Opinion). They said these rules also govern a policy of deterrence, prohibiting not only "use" but the "threat": "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage is such use would also be contrary to that law". (Paragraph 78 of ICJ Advisory Opinion).

Therefore, in accordance with the above, the applicants argued that any use or threat of use of any nuclear weapon needs, at minimum, to comply with the humanitarian laws. It emphasised that a policy of deterrence was a threat. It said that Trident II was inherently incapable of achieving compliance and particularly discrimination. It referred to an article by Ticehurst, "Trident and Nuclear War"[108]. The following passage is relevant to Trident II:

> "However, 100 kt nuclear warheads[109] are so powerful that the target is inevitably very large. For this reason, Trident falls foul of the requirement in humanitarian law to distinguish between civilian and military targets. To return to the air base scenario, a 100 kt warhead would be targeted to destroy an air base: the weapon is simply too powerful for that target.

[106] Paragraph 94 of ICJ Advisory Opinion.
[107] Paragraph 96 of ICJ Advisory Opinion.
[108] Ticehurst, R., (1998), Medicine, Conflict and Survival, vol 14, 279-289.
[109] The UK Government will not confirm or deny that Trident II warheads have such a yield. However, all the evidence suggests 100 kt and the judgment in the LAR made an assumption that the warheads are "a 100 to 120 kilotons each approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki". (LAR judgment, paragraph 63). In Moxley's book (supra, note, 34) he references Steven J Zaloga, "The Thunder Inside Russia's Typhoons", 8 Jane's Intelligence Rev., No. 12, 533 Dec. 1, 1996 and Robert S. Norris and William M. Akrin, US Strategic Nuclear Forces End of 1998, Abstract, Bull. of The Atomic Scientist, vol 55 No. 1, Jan.1999, that the yield of Trident II D5 is 100kt.

> The surrounding civilian targets, rather than being collateral, are inevitably a part of the actual target. A 100 kt warhead is therefore unable to make the distinction between civilian and military targets, and its use must therefore be unlawful regardless of the extremity of the scenario of self-defence involved….."[110]

The applicants pointed to a submission by the Nuclear Free Local Authorities that referred to the law requiring distinction between civilian and military targets:

> "A Trident warhead is incapable of making this distinction because of the impact in space and time of the explosive yield and its radiation release and its use would be consequently unlawful…[111]

The EA said that this argument was not within its scope and that it had passed the response to both the Secretary of State for the Environment and the Minister for Agriculture, Fisheries and Food (there was apparently no Government response).

Turner J's Conclusions on Illegality

First, the Judge observed that the ICJ "had had ample opportunity to declare that the threat or use of nuclear weapons is all circumstances would be illegal. It did not do so." (Paragraph 47). He said it was not for the court "to step in and make the declaration which the applicants would have wished". Again, it is noted that he failed to appreciate that this was not the applicants' case, only that Trident II was in breach of humanitarian laws. Second, he said that the "selective passages" of the ICJ opinion used by the applicants "did not begin to justify the attempt which was made to have the Trident programme declared to be illegal according to international law." (Paragraph 47). An unfair observation one might think given that the Judge nowhere addressed the actual, not perceived, argument of the applicants. Third, he said the EA would "plainly have been wrong….to have concluded that, the Advisory Opinion reached a concluded view, that the use and deployment of Trident was contrary to international law." (Paragraph 47). He said this conclusion was consistent with *Hutchinson*. Fourth, he said that the submissions as to illegality were beyond the scope of the EA "acting merely as the regulatory authority" and that the applicants had failed to identify the juridical basis of the supposed duty. (Paragraph 48). Fifth, he said that these arguments were consistent with Government policy set out in the Strategic Defence Review, "namely that the Government is committed to a policy of deterrence and multi-lateral disarmament and that it has assessed what is the minimum number of Trident warheads necessary to maintain the deterrent credibly." (Paragraph 49). Sixth, he said the issues were non-justiciable and that there were "no means available to it to proceed to a judgment." As with the LAR, it relied on *Chandler v Director of Public Prosecutions* [1964] AC 763. He referred to Lord Reid's leading speech in that case where he said:

[110] P284.
[111] Paragraph 4.11.1 of decision document.

> "It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no-one can seek a legal remedy on the ground that such discretion has been wrongly exercised…..Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no-one is entitled to challenge it in court." (Quoted at paragraph 49 of judgment of Turner J).

It is the issue of justiciability that will be of most concern to international lawyers concerned with these issues.[112] Can it be right that a Government can act in breach of international law (assuming that to be the case in any policy matter), and the courts cannot entertain or rule on the matter? What if the Government was exporting nuclear or other devices as instruments of torture that could never, in any circumstances, be justified according to the humanitarian laws and that was plainly beyond dispute? If the methods of arming the defence forces and the disposition of those forces (or the defence of the realm) is in all circumstances non-justiciable does this mean that no citizen can ever challenge in court the Government's defence policies, even if it has decided, for example, to use Trident II as a first strike weapon on a Russian or "rogue State" city? It is submitted that this cannot be right, that there can be no blanket rule that the "defence of the realm" cannot be justiciable. That submission would be emphasised if a particular policy was arguably in breach of international law. In these circumstances a court, on judicial review or otherwise, must surely address the illegality question before concluding whether or not the issue was justiciable. So, if an argument were made out, that Trident II (or any other weapon or threat or use of a weapon) was illegal under international law, a domestic court should be slow indeed to rule that, notwithstanding that illegality, as a matter of constitutional law the court had no jurisdiction to rule on the matter; not even to make a declaration as to the law leaving the relevant Secretary of State discretion as to how to act in the light of the court's judgment.

What next for Marchiori?

Marchiori proved to be a long and uphill battle, not least when the applicant, Ms Marchiori, sought permission to appeal to the Court of Appeal.[113] The applicant asked Turner J for permission to appeal. He refused although recognising the public interest of the issues in dispute but, said it was for the Court of Appeal to decide. Next followed an application for permission direct to the Court of Appeal which proceeded first on the papers. The application

[112] In another UK case in 2000 concerning the UK's policy of bombing raids into Iraq (R v the Secretary of State for Defence ex parte Thring, 2.7.2000) the court said: "In my judgment it is not appropriate for the court to intervene upon judicial review in the deployment of the armed forces abroad. Parliament has authorised a defence budget. The Secretary of State for Defence is answerable to Parliament and not to the courts for the conduct of military operations abroad. The court has no power to control how money is spent by the executive arm of government in overseas operations. Any remedy must be a political remedy." (Paragraph 20 of judgment of Lord Justice Pill). Judgment available from author at phil_shiner@publicinterestlawyers.co.uk

[113] Nuclear Awareness Group Ltd could not afford to proceed further faced with a costs orders against the company in the High Court.

came before Buxton LJ (he of *Hutchinson*). He gave three pages of reasons with robust arguments in refusing permission. The applicant's solicitor was obliged to refer these reasons to the Legal Services Commission ("LSC"). The LSC refused further funding. Ms Marchiori had one further chance, to go before Buxton LJ on an oral application for permission without funding cover. Her task was to persuade the Judge that he was wrong on Euratom, and on his approach in *Hutchinson*. It is remarkable that Buxton LJ was persuaded to grant permission on all grounds.

Essentially, the Judge was persuaded by the statement of M. Santer for the European Commission in *Danielsson* that Chapter III applied.[114] The Judge said in granting permission:

> It appears to be the view of the Commission of the European Communities that Chapter III of the Treaty and, more particularly, Article 34 does apply to civil as well as military experiments. The judge was told this by means of certain statements that he quotes in paragraphs 24 to 27 of his judgment. It was not, however, made clear to him that when Mr Santer (who is the president of the Commission and not simply the president of the Parliament) made the observation that he did, first of all, he was speaking on behalf of the Commission formally and, secondly, that in a case the report of which has only been put before me this morning. Danielsson v Commission of the European Communities [1995] ECR 3051, in paragraph 12 of that report it is made plain by the court that the Commission submitted to the court through Mr Santer, its chairman, and through legal advisers appearing before the court that Article 34 indeed applied both to civil and to military 'experiments'. That being so, and it now being apparent that the Commission's position is one that it is prepared to argue before the European Court, it seems to me that a judge in a domestic court such as myself, whatever may be his view as to the reach of the Treaty, should hesitate long before he says that it is unarguable that a position apparently adopted by the Commission of the European Communities is correct."[115]

It now looks likely that this point as to the applicability of Chapter III is to be referred to the ICJ. On the international law point Counsel for Ms Marchiori reformulated the proposition put to Buxton LJ in *Hutchinson* so it became:

> "The threat or use of nuclear weapons for deterrent purposes is contrary to customary international law if the weapon is incapable of distinguishing between civilian and military targets"

[114] Supra, note 69; see page 16 above.
[115] Transcript of judgment of Buxton LJ of hearing on 22.6.021, p1. Available from phil_shiner@publicinterestlawyers.co.uk

As far as the international law point in *Marchiori* goes the Judge gave leave on the point and said it would not be right to refuse the applicant an opportunity to challenge his view in *Hutchinson* in front of the Court of Appeal. He did make clear that he still thought he was right in *Hutchinson*. The Court of Appeal will hear the case in the next few months.

Case 3 : Zelter et al[116]

This case has already been the subject of detailed analysis by Moxley.[117] Further, it is the subject of Peter Weiss' paper to this conference. Therefore, I intend to focus only on three issues in the case: justiciability, deterrence as a threat, and the court's approach to the international law argument. I do not deal with those aspects which are concerned with criminal law, for example, the doctrine of necessity.[118]

Justiciability

In operation Dismantle v The Queen 1985 18 D.L.T. (4th) 487, a Canadian case, the Federal Court of Appeal had held that, in answer to the plaintiff's application for an injunction to prevent the testing of cruise missiles on the ground that it conflicted with the right to life assured by Section 7 of the Canadian Charter of Rights and Freedoms, the issues were non-justiciable. The Supreme Court rejected that proposition. The Scottish High Court noted that:

> "Wilson J discussed Chandler[119] at some length, putting a gloss on Lord Radcliffe's observations at several points. However she does not appear to have been referred to the C.C.S.U. case.[120] Her observations on Chandler are in our opinion incompatible with the consistent view in the United Kingdom that the disposition of the armed forces is non-justiciable". (Paragraph 58).

[116] Supra, note 12.
[117] Supra, note 42.
[118] This paper is concerned primarily with arguments used in civil proceedings of judicial review.
[119] See above at p27.
[120] This case, CCSU v Minister for the Civil Service [1985] 1 AC 374 had held that it was for the executive and not the courts to decide whether, in any particular case, the requirement of national security outweighed those of fairness. Lord Fraser of Tullybelton said: "As De Keyser's case shows, the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities to which I have briefly referred and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts". (Judgment in CCSU at p398E-F).

The court then discussed *R v Ministry of Defence ex parte Smith* [1994] QB 517, a case concerning the legality of a rule prohibiting homosexuals from the armed forces, and *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 and concluded:

> "Along with the case of Smith this shows a broadening of the circumstances in which the courts will hold questions relating to the exercise of the prerogative justiciable. But they have no direct bearing on the present case". (Paragraph 59).

Pausing there the court was referred to cases after *Chandler* which led it to conclude that there was no blanket rule of non-justiciability as to the defence of the realm. It might have been forgiven, as the issue was not directly before it, for leaving open the question of justiciability and at first sight the passage that followed the above appears to have done so:

> "In our view it is not at all clear that if this issue had been fully debated before us the incorporation of Trident II in the United Kingdom's defence strategy, in pursuance of a policy of global deterrence, would have been regarded as giving rise to issues which were properly justiciable. Chandler remains binding authority in this court. Such developments as have taken place seem to have left untouched the status of the prerogative in matters relating to the defence of the realm. However, we have not been asked to dispose of the case on this basis, and we see no alternative but to reserve the issue for another occasion." (Paragraph 60).

However, having apparently concluded that it should leave the issue open, it then proceeded at the end of the judgment, in a passage which appears to be unnecessary, to say the following:

> "……in concluding, we would reiterate that we have grave misgivings as to the justiciability of the issues which we have been asked to deal with, in relation to defence policy and the deployment of Trident". (Paragraph 113).

There seems no useful basis for the passage and I would put it in the same category as unnecessary remarks about the motives and integrity of the respondents.[121] No doubt these passages on justiciability in *Marchiori* and *Zelter et al* will be seized upon by the UK Government and others who seek to defend the threat or use of nuclear weapons. It is to be hoped that other courts

[121] "…..we would observe that we were not provided with any definition of 'citizen interveners'. In objective terms, it appears that they are simply citizens who intervene to damage public property. As such, they are apparently defined by their decision to intervene, and are thus self-selecting and, it seems to us, self-indulgent….What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others, for reasons which are not identified….. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy. It is one curiosity of the expression 'citizen intervenor' (as indeed it is of the words 'global citizen' used by the respondents) that citizenship is invoked by persons who apparently claim to be representing some unidentified category or number of fellow 'citizens' – but can point to nothing in any generally understood concept of citizenship which would give them any right to act in furtherance of their particular citizens' wishes, and against the wishes of other citizens." (Paragraph 51).

will take an approach to justiciability that more fairly reflects the seriousness of issues in international law, and the fact that the issues come before courts in the 21st century when the very integrity of the planet is under threat by nuclear weapons and NMD.

Deterrence

On the UK's policy of deploying Trident II as a deterrent it distinguished between deterrence and an actual threat to use such weapons. It began by focusing on the reference in paragraph 105(2)E of the dispositif to "the rules of international law 'applicable in armed conflict'".[122] It noted that, there is no reference to any rules of humanitarian law in situations where there is no armed conflict. It said it was not persuaded that the rules applicable to armed conflict could be applied to "times of peace". It said:

> "…….In time of peace, it does not appear to us that these rules are either applicable or capable of application. That remains true even where a particular State has a policy of deterrence, and deploys nuclear weaponry in execution of that policy. Application of the rules, and the resulting possibility of illegality, will arise only if and when some specific change turns the situation into one of armed conflict." (Paragraph 95).

It then distinguished between deterrence and a 'threat' of the kind which the rule (sic) [of international humanitarian law] equiparates with actual use".[123] It said "We are entirely satisfied that the general minatory element in the deployment of nuclear weapons in time of peace…..is utterly different from the kind of specific 'threat' which is equated with actual use in those rules of customary international law which make both use and threat illegal." (Paragraph 96).

Finally, on deterrence the court concluded:

> "But broadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practicable violence, made to a specific 'target', perhaps coupled with some specific demand or perhaps simply as the precursor of actual attack. The deployment of Trident II, however far one goes in adding hypotheses as to the immediacy with which it could be used against some potential and arguably identifiable target State, in our opinion in general lacks the links between the threat and use, and an immediate target, which are essential to a 'threat' of the kind dealt with by customary international law or in particular international humanitarian law." (Paragraph 97).

This approach to deterrence is arguably wrong for a number of reasons: First, because it fails to account for the evidence before it as to the times when the UK Government had signalled that it was prepared to use its deterrent, for example, during the war with Iraq when Saddam was arguably meant to

[122] Paragraph 95
[123] Paragraph 96

perceive that a threat to use nuclear weapons was being made[124]; second, because it ignores the requirement that a deterrence must be seen as a credible threat if it is to be effective, and that it is a false distinction in this context. On this the ICJ opinion says: "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". (Paragraph 48).

The third reason concerns the failure to refer to and analyse the ICJ's opinion on deterrence in paragraphs 47-48. The ICJ held that it was unlawful under international law to threaten to use force which it would be unlawful to use.[125] The court held

> "Whether [a policy of deterrence] is a 'threat' contrary to Article 2, paragraph 4,[126] 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 <u>any</u> of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the charter". (My emphasis). (Paragraph 48).

So the Scottish High Court, and any other court required to pronounce on a policy of deterrence using high yield weapons such as Trident II, needs to ask and answer a number of questions including the following:

1. Bearing in mind the overarching requirements of the "intransgressible" humanitarian laws, would the threat to use a weapon system such as Trident II breach those laws?

2. Would a weapon system such a Trident II used in defence violate the principles of necessity and proportionality?
3. Would the threat be contrary to the purposes of the United Nations?[127]

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[124] In the House of Commons debate on 17 February 1998, Foreign Secretary, Robin Cook said that Saddam "should be in no doubt" that if he were to use chemical weapons against joint British-US air strikes "there would be a proportionate response" (Hansard, Official Report, House of Commons). When the Defence Secretary, George Robertson, was interviewed on BBC Radio 4 the following day he was given an opportunity to deny the nuclear option and did not. As Zelter notes: "All these were signals suggesting that nuclear weapons could be considered. They were also meant to be understood as such". Zelter's skeleton argument to LAR available from Trident Ploughshares website.

[125] "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 [of the UN Charter]" – Paragraph 47.

[126] Article 2, paragraph 4 provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations" – quoted at paragraph 38 of the ICJ Advisory Opinion.

[127] Articles 1 and 2 of the United Nations Charter set forth such purposes of the United Nations as the following: maintaining international peace and security; prevention and removal of threats to the peace; adjustment or settlement of international disputes or situations which might lead to a breach of the peace; development of friendly relations among nations; achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character; promoting and

4. Would a threat be directed against the territorial integrity and in effect the political independence of the target State?

In *Zelter et al* the court had assumed a number of facts which included:

- That the warheads are "100 to 120 kt each, approximately 8 or 10 times larger that the weapons used at Hiroshima and Nagasaki";

- That the blast, heat and radioactive effects of detonation of such a warhead would be extreme, with "inevitably uncontainable radioactive effects, in terms of both space and time";

- "That the damage done, and the suffering caused, could not be other than indiscriminate";

- That the weapons would be "inevitably indiscriminate as between military personnel and civilians who could not be excluded from the uncontainable effects"[128].

It is difficult to reconcile the facts of Trident II with the humanitarian laws, and the doctrines of necessity and proportionality, and to see how given the inordinate and indiscriminate effects of Trident II a use could be other than contrary to the UN purposes or other than directed against the territorial integrity of a State. Moxley has concluded the same.[129] The Scottish High Court have failed to ask or answer these questions and, in so doing, have failed to give proper weight to a well understood legal principle that the need to avoid the appearance of bias is as important as the need to avoid bias itself.[130]

encouraging respect for human rights and for fundamental freedoms; and fostering of international peace, security and justice – UN Charter Articles 1 and 2.

[128] Paragraph 63 of the judgment. The court had said "We, regard it as appropriate to consider, as a hypothesis , the situation as the respondents see and describe it. We do not have material upon which we could accept or reject the factual picture which they present to us". (Paragraph 62).

[129] Supra, note 42, pp6-7

[130] Alan Wilkie, a peace worker from Edinburgh, present at the LAR hearing writes: "In their efforts to defend the establishment they have severely undermined the trust of many ordinary people in the protection provided by national and international humanitarian law", The Coracle, June 2001, issue 3/55, Iona Community, p22.

I submit that, as a matter of international law, the High Court's analysis is wrong. The humanitarian laws are intransgressible and govern all uses or threats to use nuclear weapons, even those in "an extreme circumstance of self-defence"[131]. There can be no lawful use of nuclear weapons if these laws are breached, or, according to the ICJ Opinion, if there is a violation of the doctrines of necessity and proportionality. As far as the doctrine of proportionality goes the ICJ Opinion held:

> "42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian laws".

On proportionality Moxley (2001) argues:

> "If any use would likely involve the multiple use of strategic nuclear weapons and subsequent escalation; or if even the most limited of nuclear strikes would likely precipitate escalation to broader use of nuclear, chemical and/or biological weapons; or if the effects, including particularly the radiation effects, of the weapon would be uncontrollable and would threaten ongoing injury potentially to millions of people unlimited in time or space, it would seem the potential risks would virtually always outweigh the potential military benefits."[132]

The High Court was required to engage with the questions as to whether these laws and principles would be violated by a threat or use of Trident II. It did not. Instead it ruled:

> "Even if Trident is to be seen as inevitably indiscriminate, head E does not in our opinion show that the court saw use or threat of such a weapon (as distinct from some small or tactical nuclear weapon) as always illegal. Indeed, the references to extreme circumstances and survival do not suggest that small or tactical weapons are envisaged". (Paragraph 86).

Given the facts of Trident II as assumed by the High Court, this passage seems extraordinary. How can an indiscriminate use of a high yield weapon (given all that is known about the likely effects of 100-120 kt weapons) such as Trident II be legal? On both the appearance of bias and thus the effects on the rule of law, and on the High Court's error I adopt Moxley's conclusions:

[131] "Nuclear deterrence could be legal only in scenarios in which the use of nuclear weapons for self-defence was not prohibited". Condorelli, supra, note 30.
[132] Supra, note 34, pp686-687.

> "The only real question is whether it is lawful to threaten to do that which it is unlawful to do. The ICJ answered in the affirmative. The Scots High Court…..is in error – and does damage to the rule of law – by its abnegation of this restraint".[133]

Illegality of Trident II

To an extent the above analysis of the court's approach to deterrence suffices to dispose of the court's flawed approach to the illegality question. Further, other commentators have addressed this question in depth.[134] Thus, in addition to the points made above regarding justiciability, humanitarian laws not applicable in time of peace, deterrence distinguished from a threat, and indiscriminate weapons capable of being lawful when used in an extreme circumstance of self-defence the following two additional points emerge.

Deterrence and Armed Conflict

Moxley's view is that the most interesting point of the High Court's decision is it's "ostensible recognition of the potential unlawfulness of the practice of deterrence in circumstances where it is directed at a particular situation".[135]

The High Court distinguished deterrence from a threat on the basis that it, having no "specific target and no immediate demands", is "quite different" from a particular threat of practicable violence made to a "specific 'target', perhaps coupled with some specific demand….". (Paragraph 97). It said also a "State which has a deployed deterrent plainly could and might take some step which had turned the situation into one of armed conflict, and involved a sufficiently specific threat to constitute a breach of customary international law". (Paragraph 97). What then of this distinction? The distinction has two parts according to this paragraph: there must be the "particular threat" made to a "specific target" as well as the turning of a "situation into one of armed conflict". Has such a two stage distinction been met on the facts of Trident as presented to the court? What if the evidence to the court had been that in a time of "armed conflict" there had been by the UK a "sufficiently specific threat" to use Trident II, that goes beyond a general policy of deployment. One has to bear in mind that this "threat" may have been made in the usual carefully coded diplomatic language rather than the type of overt threat made by a youngster brandishing a knife (the example used by the High Court). The interesting conclusion from a careful analysis of the evidence to the Sheriff of Greenock and Ms Zelter's evidence to the High Court, is that such a situation might well have prevailed particularly during the Iraqi conflict. In "Trident on Trial[136] Zelter refers to the coded signals given by the US and UK Governments during the Iraqi Crisis in February 1998.[137] She writes:

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[133] Supra, note 42, p17.
[134] Supra, note 42, and Weiss, P, paper to this conference.
[135] Supra, note 42, p13.
[136] Zelter, A. (2001) Luath Press, Edinburgh
[137] Supra, note 122, and footnotes 55 and 70 in Moxley (2001), supra, note 42

> "The whole purpose of nuclear deterrence is to create uncertainty about intentions. This means that the British Government has to persuade its 'enemies' that it might be willing to break international law without actually saying it this clearly. For instance, in the 1991 NATO Strategic Concept Document, Article 38 asserted that nuclear weapons are essential and permanent because they 'make a unique contribution to rendering the risks of any aggression incalculable and unacceptable'" (pp111-112).

There was evidence before the High Court that the UK Government had made coded threats to Saddam, and generally, and enough before it to require it to rule on whether this, given the distinctions they had drawn, was enough to require that the "threat" be judged against principles of international law.

Trident and Humanitarian Law: the road ahead?

We have already seen, from paragraph 63, that the High Court proceeded on the basis of certain facts as to Trident II concerning its size, its blast, heat and radioactive effects, and the indiscriminate damage and suffering likely to be caused. The question for the High Court, and for any other court faced with the same issues, is whether on the facts of a particular nuclear weapon system it could squeeze into the very narrow exception left open by paragraph 105(2)E[138]. To be lawful the weapon must comply with humanitarian laws, meet the principles of necessity and proportionality, and with the UN purposes and lastly, and crucially, be a threat or use "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". Thus, if a nuclear weapon is too powerful to meet the requirements of humanitarian law, or if it is not of an appropriate yield in terms of proportionality, it can never be lawful. The United Kingdom's Government has for some time used a hypothetical scenario of the type referred to in paragraph 91 of the ICJ Opinion to demonstrate that a weapon might be used in a wide variety of circumstances with different results in terms of likely civilian casualties:

> "In some cases, such as the use of a low yield nuclear weapon against a warship on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties…..(United Kingdom Written Statement, p53, para 3.70……)" (Paragraph 91).

[138] There is support from protagonists for nuclear weapons that the exception is limited. John H. McNeil, the advocate in the nuclear weapons case for the US and senior deputy general counsel at the US Department of Defence, acknowledges that the formulation of 105(2)E is "more limited than what the United States and other States had argued….for a more pragmatic perspective, legality of the employment of nuclear weapons would have to be considered in view of the specific target, and whether their use against that specific target would be consistent with the rules of international humanitarian law, particularly the principles of proportionality, distinction, and prevention of unnecessary suffering", in "The International Court of Justice Advisory Opinion in the nuclear weapons case – a first appraisal," (1997) International Review of the Red Cross, No. 316, pp103-117.

It is inconceivable that a nuclear weapon as powerful as Trident II could possible be proportionate to the examples of military objectives above. Neither is it a low yield weapon. It is worth emphasising that the High Court proceeded on the basis of it being 8 to 10 times larger than Hiroshima and Nagasaki . Given the hypothesis before the High Court the following passage is remarkable:

> "In any particular case of threat or use, the facts will have to be compared with rules which are not expressed in black and white objective terms, but involve a range of qualitative considerations, covering such matters as the purposes, nature and consequences of the threat or use in question. We are not persuaded that even upon the respondents' description of, or hypothesis as to, the characteristics of Trident it would be possible to say a priori that a threat to use it, or its use, could never be seen as compatible with the requirements of international humanitarian law". (Paragraph 93).

It is remarkable for a number of reasons: first, because it did not need to rule on paragraphs 78 and 105(2)E at all as it went on to find that these rules applied only to situations of armed conflict not to deterrence in a time of peace; second, one is not sure what "qualitative considerations" could blur the precise questions any court, and this court, had to ask as to legality; third, that even given the ingenious use of the double negative the court was saying that it was not possible to say that Trident could not comply with humanitarian law. This, of course, is tantamount to saying as regards a threat that the UK Government can proceed on the basis that it may comply, and that given the qualitative considerations which would have to be compared with the rules, compliance would have to be judged after the event.

In looking at the road ahead from an activist's view point *Hutchinson* and *Zelter et al* are unhelpful in terms of giving a defence to criminal charges, such as criminal damage, based on a rule of customary international law (and certainly not the ICJ Advisory Opinion on its own). Even if an activist can establish a clear breach of a rule, for example, as to humanitarian law it does not follow from either *Hutchinson* or *Zelter et al* that either of the next two hurdles can be successfully passed. The next is to show that a policy or activity that is in breach of international law is a domestic crime. That argument does not get off the ground and nor does the third, that is, to show that accordingly, as the policy or activity is a domestic crime, this gives the activist a criminal defence. It is suggested that peace activists in the UK, and elsewhere, need to rethink their arguments in the light of these two cases.

The forthcoming judicial review about Devonport[139]

This case concerns the relationship between Vanguard nuclear-powered submarines and the maintenance of the UK's deterrence through Trident II, which would be launched from those submarines. DML, who run DRD, wish to extend the scope of their activities to include the refitting/refuelling of Vanguard submarines. Mr Kelly, who lives close by, objects on the basis that given the recent death of his brother who worked at DRD, and that his daughter had

[139] Supra, note 14.

cancer and chemotherapy and radiotherapy treatment for seven years from the age of 8, he is rightly concerned by the increases in radiation levels due to the extension of the project. He says also that the project must be justified under Chapter III of the Euratom Treaty, that it is in breach of international law, and that the European Waste Framework Directive applies.[140]

At this stage, Mr Kelly takes a procedural point on the right to a fair hearing. On 2 October 2000 the Human Rights Act 1998 came into effect in the UK giving effect to the European Convention on Human Rights. Article 6 ECHR reads:

> "Article 6
> Right to a Fair Trial
>
> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the party so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.
> ……."

The EA's usual procedures in this type of case are to consult with the public (as here) and then issue an authorisation and a decision document. Mr Kelly wants the opportunity to test the evidence for DML on the radiation effects of the project. He wants to present his own evidence and that of his experts to an independent and impartial tribunal at a public hearing and he wants to cross examine DML's experts. Thus, he has asked for and been refused a public inquiry that complies with Article 6. The case on whether Article 6 applies and if so what compliance requires is due to be heard on 18 and 19 September 2001.

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[140] Directive 75/442/EEC as amended by 91/156/EEC. Mr Kelly will argue that radioactive waste is covered by the WFD because it is not covered by other European legislation. This would make a difference because of the duty arising under Article 4 which reads:

> "Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:
> - without risk to water, air, soil and plants and animals
> - without causing a nuisance through noise or odours
> - without adversely affecting the countryside or places of special interest." (My emphasis).

Kelly is mentioned here because it is an example of a new approach by lawyers to these issues in the UK. First, it is part of an emerging, proactive strategy and second, it uses human rights arguments in a constructive way. It is evident that a strategic approach is required which is now discussed.

Peacerights: A Strategy for the Future?

The recent judicial activity reflects a growing public awareness but also, amongst activists, an awareness of the potential of international and human rights law to defend their actions, and raise the consciousness of the public. These cases have brought together activists, academic and practicing lawyers and leading NGOs in the UK such as the World Court Project and the World Disarmament Campaign. Discussions have taken place about the need for a more co-ordinated and strategic approach to the law. The legal issues raised are complex and involve international, European, administrative, human rights, environmental and planning law. There is the real possibility of cases doing harm if not taken in a strategic way, and the case of *Hutchinson* has done much to focus minds. It is recognised that there is much to be done including a direct challenge to the Secretary of State for Defence as to the legality of Trident; a challenge to the legality of bye-laws concerning Menwith Hill (central to NMD); a complaint to the European Court of Human Rights from a UK citizen that given the potential violation of human rights consequent upon the maintenance of Trident II the project must be justified and shown to be proportionate in human rights terms.

There is then a new urgency amongst the antinuclear and peace movement. The discussions have led to the formation of a new law centre for the peace movements called Peacerights. I am here today as its representative. We have funding and we open for business on 1 September 2001. The focus is on those legal issues brought to us by peace activists and whilst it is certain that nuclear weapons and NMD occupy centre ground there are other peace issues that are of concern, for example, the use of fuel-air explosives[141] and international human rights issues such as the war crimes of Jonas Savimbi in Angola.

Peacerights is concerned to provide a legal service to activists that is both reactive to the issues brought to us and strategic and proactive. Thus, whilst we will assist activists in the preparation of their own defences we will also try to encourage a better strategic use of the law. Thus we expect to engage in the following activities in the next 12 months or so:

- Bringing test cases, for example, a direct challenge to the Secretary of State for Defence.

- Publishing guides on judicial review and peace law, or the doctrine of necessity.

- Operating a telephone advice line.

[141] See Thermobaric Warfare, CND Briefing Paper, at http://www.cnduk.org/briefing/therm/.htm (July 16, 2001).

- Analysing the last 50 years of cases around the world on nuclear weapons.

- Building a network of practicing and academic lawyers available on civil and criminal law.

- Operating an interactive website which will enable activists to obtain advice, briefing papers, access to new cases and links to other groups and lawyers around the world.

Peacerights is to be officially launched in late September at the time that Angie Zelter makes a complaint to the European Court of Human Rights, following LAR, that there is a potential violation of her human rights protected by ECHR, Articles 2 (the right to life), 8 (the right to private and family life), and the First Article, First Protocol (the right to enjoy possessions). She will complain also of the lack of an effective remedy under Article 13 given her efforts in having these issues ventilated properly and adjudicated upon in full by the UK courts.

Conclusions

The cases I have discussed have enabled UK lawyers and activists to learn important lessons: how important it is to analyse what damage might be done if a case is unsuccessful, the need to have a strategic and proactive legal service, and the limitations of the ICJ Advisory Opinion. The last is important. In the UK it is clear that the ICJ Opinion cannot be relied upon alone to support arguments that Trident II is illegal. It can do no more than support international law arguments. It can be used to make a strong argument that the facts of Trident II must be analysed to see whether it can comply with humanitarian laws, not violate the doctrines of necessity and proportionality, and ever be lawful when used in an extreme circumstance of self-defence. It cannot support an argument that all nuclear weapons are unlawful. Those in the anti nuclear movement know that in effect the vote of clause 1 of paragraph 105(2)E was 10:4 in its favour "because the three Judges who wanted an absolute statement of illegality and wanted to leave out the word 'generally' supported this first clause and opposed the second clause".[142] However, the LAR judgment shows that the court will not even analyse properly whether Trident II will breach intransgressible humanitarian laws, and *Marchiori* shows that the Judge was not prepared to confront the applicant's actual arguments on Euratom or illegality. Given these judicial limitations it seems pointless expecting a Judge to engage in this type of complexity. The ICJ Opinion must be used to support international law arguments that should be strong enough in any event to justify the case being brought or the argument that is being made. We have learned that the judicial response to the wrong case or argument might set back the antinuclear movement considerably, and we intend to use our utmost to avoid these pitfalls and thus to use international, European and human rights arguments in a constructive way.

[142] Ginger, A.F. [1998], supra, note 19.