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TAKEN BEFORE

DEFENCE COMMITTEE

THE FUTURE OF THE UK'S STRATEGIC NUCLEAR DETERRENT:
THE WHITE PAPER

Tuesday 30 January 2007

PROFESSOR CHRISTOPHER GREENWOOD QC, PROFESSOR NICK GRIEF,
PROFESSOR STEVEN HAINES and PROFESSOR PHILIPPE SANDS

Evidence heard in Public Questions 209 - 311

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Oral Evidence

Taken before the Defence Committee

on Tuesday 30 January 2007

Members present

Mr James Arbuthnot, in the Chair

Mr David S Borrow

Linda Gilroy

Mr David Hamilton

Mr Dai Havard

Mr Adam Holloway

Mr Bernard Jenkin

Mr Brian Jenkins

Mr Kevan Jones

Robert Key

John Smith

Witnesses: **Professor Christopher Greenwood QC**, Professor of International Law, London School of Economics, **Professor Nick Grief**, University of Bournemouth, **Professor Steven Haines**, Professor of Strategy and the Law of Military Operations, Royal Holloway College, University of London, and **Professor Philippe Sands QC**, University College London, gave evidence.

Q209 Chairman: Good morning. Welcome to this session on the Strategic Nuclear Deterrent. We are going to be concentrating on the legal and Treaty aspects of the decision to renew the deterrent that is proposed to us by the Government's White Paper. The intention of this inquiry is to help the public debate. To our witnesses this morning, could I ask you to pitch your answers, please, in the knowledge that you will be speaking not to lawyers but to the public and also Members of Parliament who will not have your legal expertise. If you would bear that in mind I should be most grateful. Could I ask you to begin by introducing yourselves, saying what your background is very briefly and giving just two sentences on what your reaction is to the Government's White Paper. Could I begin with Professor Greenwood.

Professor Greenwood: Thank you very much, Chairman. I am Christopher Greenwood. I am Professor of International Law at the London School of Economics and I am a barrister practising international law in both the English courts and international tribunals. I have specialised in relation to matters relating to the laws of war for most of my academic career. My two line reaction to the Government's proposal is that looked at purely in terms of international law there is no obstacle whatever to the Government doing what it has proposed to do. I do not think that either the Non-Proliferation Treaty or the laws of armed conflict would preclude updating Trident in the way that is suggested.

Professor Grief: Thank you, Chairman. I am Nick Grief, Steel Raymond Professor of Law at Bournemouth University. I have been at

Bournemouth for about nine years. I specialise in public international law and human rights. I also practise as a barrister from Doughty Street Chambers here in London. My reaction to the White Paper is almost diametrically opposed to Christopher's. I do see issues under the Non-Proliferation Treaty and also under international humanitarian law.

Professor Haines: Thank you, Chairman. My name is Steven Haines. I am Professor of Strategy and Military Operations at the Royal Holloway College, one of the University of London Colleges. Until three years ago I was a serving naval officer working in the Central Policy Staff in the Ministry of Defence. As well as being an academic lawyer specialising in military operational law, I also wrote the UK Government's current strategic doctrine and worked as a legal adviser in my last appointment in the MoD until September 2003. My reaction to the White Paper is exactly the same as Christopher's. I do not believe there is any problem with the proposal in the White Paper of a legal nature and, indeed, I think the proposal is both appropriate and expected given the history of Trident.

Professor Sands: My name is Philippe Sands. I am Professor of Law at University College London and, like some of my other colleagues, a practising barrister at Matrix Chambers. My area of expertise is general international law and, with at least one other member of this panel, I participated in the proceedings before the International Court of Justice on the Advisory Opinion on the legality of the use of nuclear weapons. My reaction to the White Paper is perhaps slightly more nuanced. It has certain positive elements but there is one aspect that I think is of concern and that is the apparent extension of deterrence theory into areas related to terrorism which may be of a non-nuclear character and that does raise to my mind issues in relation to the Treaty on Non-Proliferation of Nuclear Weapons.

Chairman: Thank you. We will start with Brian Jenkins.

Q210 Mr Jenkins: It could be argued given the differences of legal aspects, and we have got differences from the start this morning obviously, the legal aspects should not be decisive in any parliamentary debate at all. How would you respond to that?

Professor Greenwood: I agree with you entirely, the legal aspects should not be decisive in the sense that all I am saying is there is no legal obstacle to updating Trident in the way the Government suggests. The question of whether this country should do so is a political question which is obviously for you and your colleagues to decide. In a different environment if we were saying that a proposed course of conduct was plainly illegal I would hope that is something that would be decisive, but that is very much not what I am saying here.

Professor Grief: My reaction to the question is to recall what I think the Director of Public Prosecutions said recently about the response to the so-called "war on terror". I think he said words to the effect that "a fear-driven and inappropriate response to

the war on terror could lead to our abandoning values which are critical to the maintenance of the rule of law". I see direct parallels between that context and the present one. I am very concerned that we might indeed abandon some of those essential values.

Professor Haines: My reaction is that given I do not believe the proposal in the White Paper is in any way unlawful, the issue of whether or not we should go down the route that the Government is suggesting is entirely a policy decision.

Professor Sands: You cannot separate out legal and political considerations, they are closely interrelated to all things but here in particular. My concern here is to the extent that the White Paper signals an extension of nuclear deterrent into what it calls "unforeseeable future circumstances concerning terrorism, state-sponsored terrorism and other related issues", you open a door to the argument of illegality and that will be seized on by others who may themselves be engaged in activities which are not consistent with their obligations under the Treaty on Non-Proliferation of Nuclear Weapons. What I am thinking of in particular is the situation right now in Iran where those concerned will be looking very closely at the position of governments like the United Kingdom in order to perhaps assist themselves find wiggle-room out of their own commitments. That is the area where I think I have some concern.

Q211 Mr Jenkins: The difficulty we have got is if we had four engineers they might come up with the same answer but four lawyers come up with different answers and you particularly, Professor Sands, extended that. I would like to ask you do you believe Iran will stop their programme of nuclear development if next month we said "We will abandon our nuclear deterrent". Do you believe that to be true? You extended it into the area of politics and I did not ask you that, I asked you from a legal point of view.

Professor Sands: No, of course I do not for a moment believe that what the United Kingdom does next month will have that type of decisive effect but to the extent that we allow wiggle-room it will allow others with different views to open the door. My concern here is that by taking this decision at this moment in this particular way you send a signal out to others who may also want to adopt a different approach to their obligations under the Treaty.

Q212 John Smith: What do you mean by "in this particular way"?

Professor Sands: What I am concerned about in the White Paper is that there appears to be a move away from the traditional doctrine of using the nuclear deterrent to respond to wholly and exclusively nuclear threats and there is language in the White Paper which does open the door to the possibility that terrorism in other parts of the world could justify the renewal or the extension of Trident. That is the particular concern that I have, that right at this moment using the very real terrorist threat that we now face as a justification for extending the nuclear

deterrent could be seized on by others in a particular way.

Mr Jenkin: I want to ask a general question about whether we all agree about the role of international law. Does it have the same status as domestic law or does international law tend to get corroded by events, if I can put it that way? Does the difference of opinion on the particular matters we are discussing reflect the difference of interpretation of the role of international law?

Q213 Chairman: That is a huge question. Who would like to begin?

Professor Greenwood: First of all, no, international law is not the same as domestic law, in particular in the sense that you cannot go to a court in this country to enforce most rules of international law in the same way you can rules of English law. I do not think there would be any difference between the four of us that international law is law, that it is legally binding on states and that the Non-Proliferation Treaty and the rules of international law relating to the use of weapons are binding on this country. The Government accepted that proposition unequivocally in the nuclear weapons proceedings in the ICJ ten years ago.

Q214 Chairman: Any difference of opinion there?

Professor Haines: None at all.

Q215 Chairman: The US Government would not accept it.

Professor Greenwood: The US Government accepted exactly the same proposition I have just put in terms in nuclear weapons proceedings in 1995-96.

Q216 Mr Jones: In a previous life I read umpteen, hundreds of barristers' opinions and I know if you ask four barristers what colour a red car is you will get four different answers; if you pay enough you will get someone to tell you it is white. Professor Sands, you gave the example in terms of Iran, to what extent is that moving away from the legal side of it into the realms of politics, the point that Brian Jenkins was making?

Professor Sands: The answer that I gave to the previous question was I do not think you can separate out the two. We have a situation right now in Iran which we are all extremely attentive to that here you have a country that is a party to the Treaty that appears to be in the process of, or on the verge of, violating its obligations. We need to be able to go to that country with our allies and other members of the international community and say, "You cannot act in this way". In order to be able to do that we need to be absolutely certain that we are fully meeting our own obligations. It is a simple point that I make and I do not take it any further than that but I do not believe you can separate out the legal and the political and right at this moment those connections are important.

Q217 Mr Jones: Does that not depend on you using the same legal framework to judge what they are doing and what we are doing and every time you interpret this piece of law using that same framework all the time otherwise you are going to get different

answers to different questions, ie that the red car might be white?

Professor Sands: Ultimately it turns on the point that Professor Greenwood made, that it depends who the decision-maker is. These issues are not going to come before the English courts, they may or may not come before an international court, but at some point they may reach a particular decision-making body. The International Atomic Energy Agency has a particular role to play in these issues and we know, for example, that the former Director General of the IAEA, Dr Blix, has taken the view that Britain's decision in relation to the renewal of Trident appears not to be consistent with Article VI of the 1968 Treaty. When you get someone of his authority expressing that view ---

Mr Jones: I have met Dr Blix on a couple of occasions and he is into the realm of now selling books more than trying to give legal opinions.

Q218 Chairman: Selling books is an honourable thing to do. Professor Greenwood, you were shaking your head at what Professor Sands was saying.

Professor Greenwood: I was also wondering whether I could make a bid for selling a book! I do actually disagree quite profoundly with Philippe about this and it is a disagreement that goes much wider than the nuclear weapons issue. I think it is vitally important that as an international lawyer you explain to a client, or in this case to a parliamentary committee, what you think the international law on the subject is. We are not the best qualified people, frankly, to speculate about whether Iran would react in one way or another, that is a judgment where if you need expert evidence you will take it from a strategist, but the decision is a political one. I do not think it is right to allow one's approach to political questions to colour one's answers about the law.

Chairman: Thank you. I want to move on to a slightly different question now.

Q219 Linda Gilroy: The White Paper proposes to replace the Vanguard-class submarines, not the Trident missiles, and so arguably merely maintains, rather than replaces, the deterrent. Philippe Sands has outlined one concern from the White Paper which goes beyond that. Do any of the rest of you have any issues which would take us into realms beyond that statement I have just made?

Professor Grief: I have concerns that even to maintain the deterrent raises issues under Article VI of the Non-Proliferation Treaty which requires the United Kingdom to negotiate in good faith towards nuclear disarmament. That obligation to negotiate in good faith was emphasised by the International Court in its Advisory Opinion in 1996. The Article VI obligation is elaborated upon by agreements reached at the end of the 2000 NPT Review Conference that states parties agreed on a number of practical steps and one of those would commit them to a decreasing reliance upon nuclear weapons in their security policies.

Q220 Chairman: Would you agree, Professor Grief, that the

replacement of the submarines as such would not be an illegal act?

Professor Grief: I think I could probably agree that replacement as such but ----

Q221 Chairman: It is the maintenance of the deterrent that is causing you concern?

Professor Grief: My problem is the maintenance of the deterrent and the fact that I do not see sufficient evidence in the White Paper of movement on the part of the Government in the direction of nuclear disarmament and, therefore, in the direction of fulfilling the obligations of Article VI.

Q222 Mr Hamilton: I listened to that answer and to many people outside they would be rather concerned that there are people who actually oppose the continuation of the nuclear deterrent. There is a compromise in many people's eyes and that would be to go ahead with Vanguard which would allow the lifetime of the nuclear deterrent to continue, but what you are saying is even that would be wrong. That does not conflict with Article VI, as I understand it. Article VI talks about the extension of nuclear deterrence, indeed the renewal of nuclear deterrence would not be wrong. If you extend nuclear submarines, which allows you to maintain what you have already got, there is a conflict.

Professor Grief: With respect, I would disagree because Article VI does require the states' parties to pursue negotiations in good faith towards nuclear disarmament. The practical steps that I mentioned earlier that were agreed by the states' parties in 2000 are not simply political commitments, they are in themselves legal undertakings and they are part of the context in which we must interpret Article VI of the Treaty. In my opinion they constitute a subsequent agreement by the parties to the Treaty regarding the interpretation and application of Article VI of the Treaty and, therefore, the Article VI obligation to pursue and conclude negotiations in good faith is elaborated upon by these practical steps, which include reducing your reliance on ----

Chairman: We will come on to that.

Q223 John Smith: Is a substantial reduction in the number of warheads an indication of good faith? The White Paper pointed in the direction of the possibility of the reduction of platforms from four to three.

Professor Grief: I think those things are steps in the right direction, particularly if they were to happen within a reasonably short period of time. I would like to see as a matter of good faith in compliance with Article VI more concrete steps, one suggestion being ----

Q224 John Smith: I am not really asking that. I am asking whether you think those proposals in the White Paper do comply with our obligations in terms of good faith, not what additional ones there should be.

Professor Grief: They are steps in the right direction.

Q225 Mr Borrow: Could I ask, just following up on that, would you say that the other four major nuclear powers are also in breach of Article VI or are there any signs that any of the four are taking material steps to disarm or enter into reasonable negotiations?

Professor Grief: I think I would have to say that I do not know enough about their policies except rather superficially and, therefore, I am reluctant to comment in this context on their compliance or non-compliance.

Q226 Mr Borrow: Presumably if the UK, in your judgment, is not complying by not negotiating you would need to know whether the other parties were serious about negotiating before you made a judgment on the good faith of the UK Government.

Professor Grief: Yes, I think that is a fair comment.

Q227 Mr Borrow: You do not know that so you cannot give us that judgment.

Professor Grief: I do not know enough.

Q228 Chairman: If you had the feeling that the UK was actually doing better than other countries but was still in breach of its own obligation then it would have to follow, would it not, that the other countries were in breach of their obligations?

Professor Grief: Yes, I think that would follow.

Q229 Linda Gilroy: In that respect can you reference for us any discussion about what a minimum deterrent consists of? Would you agree that of all the parties to the NPT and the Permanent Members on the Security Council Britain has done more than most and in the White Paper it says that we have something like one per cent or two per cent of the world's nuclear arsenal? Is there a debate legally about that? Is there not a case to be made that having established that as a benchmark it would be our duty to retain a minimum deterrent, to stay on the Security Council and to try and draw others to that benchmark?

Professor Grief: I think there is everything to be said for setting an example for others to follow. My query, I suppose, is whether we are yet setting the example. I would prefer to see in terms of fulfilling the obligation a decommissioning of the submarines, a dismantling of the warheads and the fissile material could then be kept under lock and key ready to be reconstituted into a rudimentary deterrent.

Linda Gilroy: Forgive me, but what example can you quote of any country which has disarmed as a consequence of other countries giving up their nuclear weapons. There is not an example of one that is on the Security Council.

Chairman: I do not think that is a legal issue. I do not think that is a question of legality.

Linda Gilroy: No, but, as we said at the beginning, this is likely to be a political argument and, therefore, it is a question of weighing up whether we maintain our position with a credible seat on the Security Council to try and draw others to the benchmark

which we have established by progressive steps to reduce our nuclear arsenal. There is an argument to that effect in my mind and what I am asking you as lawyers is, is there any legal debate on what a minimum deterrent consists of?

Q230 Chairman: Can you answer that question?

Professor Haines: I do not think that is a legal question, frankly. A minimum deterrent is so wrapped up in strategic considerations that it cannot simply be reduced to a legal question and I cannot give you a pure legal answer to it. I said earlier on that the legal issues are not going to be decisive in this because I felt that the proposals in the White Paper were perfectly lawful as I read them, therefore it was a political decision to be made. You cannot extract in many ways the legal issue from the strategic backdrop.

Chairman: I think there was a difference of opinion between those who felt that the White Paper was correct who felt that the law was not decisive and it was a political issue and those who felt that it was incorrect, who felt that law was and should be a decisive matter. Kevan Jones.

Q231 Mr Jones: Can I pull us back on to the legal issues. Can you just explain what the current legal restrictions are around the UK's possession of nuclear weapons? Is there any difference between the possession of strategic nuclear weapons and tactical nuclear weapons from a legal point of view?

Professor Haines: Legally they are weapons whether they are strategic or tactical. Clearly there are a number of legal rules that weapons systems need to be deployed within the parameters of those rules. The difference between strategic and tactical is, for a start we do not have any tactical weapons these days but when we did have them, of course, they were likely to be used in very different circumstances from the use of strategic systems. For example, a nuclear depth bomb in the east Atlantic would not have the same impact on civilian populations as a weapon released on land.

Q232 Chairman: Can I stop you there, Professor Haines. We are distinguishing between possession of nuclear weapons and the use of them.

Professor Haines: Indeed.

Q233 Chairman: Is the possession of strategic or ----

Professor Haines: No, not at all. Indeed, if you go to the Non-Proliferation Treaty, which others are referring to, of course, it states quite clearly in there that there are nuclear weapon states recognised and they are the states that have tested a nuclear device before 1967. Possession of nuclear weapons is recognised as lawful and legitimate in Treaty law in any case. On the question about Article VI of the NPT which Professor Grief has been going on about, I take a completely different view on that and I think what the Government is proposing is entirely consistent with the Article VI obligation to in good faith move in that general

direction and, as he admitted, that is a move in the right direction but there is nothing in the NPT that says we have to give them up in a unilateral sense.

Q234 Mr Jones: In terms of the current restrictions, what are they? "Good faith" has been bandied about but what is the legal definition of "good faith"? I have no doubt I am going to get umpteen different answers on that. What is your understanding of it in terms of this?

Professor Haines: It does seem to me that if you are talking about the reduction of nuclear systems, which I would be very, very happy to see, I think there are far too many of them around, one thing one has to recognise is that this is a very sensitive area and you cannot go into this business adopting a unilateral position, it has to be through the process of negotiation. I see in the White Paper proposals for the extension of the Trident programme but a reduction in the Trident programme as sending out a reasonable signal that the Government is prepared to reduce and move in that direction. I think it would be useful if perhaps a wee bit more effort was put into encouraging the development of some sort of international negotiation over levels of possession, and I have said as much to people in Government, that I think they should follow this up with some effort of a diplomatic nature to encourage negotiations also consistent with Article VI of the NPT. The current position in the White Paper itself is not, as far as I am concerned, in any way in contravention of Article VI of the NPT.

Professor Grief: Could I just come in on the definition of "good faith". I think one generally acceptable definition would be doing nothing which would render fulfilment of the Treaty obligation remote, ie unlikely, or impossible; more remote or impossible.

Q235 Chairman: That is an example rather than a definition.

Professor Grief: I would go back to my earlier remarks about ----

Q236 Chairman: Could you describe in legal terms what "in good faith" means?

Professor Grief: In terms of Article VI and the duty to negotiate in good faith I think it means not negotiating from an entrenched position, negotiating sincerely towards the objective that is enshrined within the Treaty, namely nuclear disarmament, and doing nothing which would be likely to render fulfilment of that obligation remote or impossible.

Q237 Mr Jones: Is this not meeting that in the sense that you will have a reduction in the number of submarines and the number of boats and, therefore, rather than contrary to that good faith this is a move in that direction?

Professor Grief: I agree, it is a step in that direction, yes.

Professor Greenwood: Might I just offer one comment about good faith. The duty under Article VI is to negotiate in good faith, it is a duty on all parties to the Treaty and it is a duty to negotiate to try and achieve three results and we have only

focused on one: early cessation of the nuclear arms race, nuclear disarmament, and general and complete disarmament under strict and effective international control. It is very much built around the idea of a negotiating process to achieve a comprehensive agreed result. I cannot see any obligation in that that comes anywhere near unilateral disarmament. It is worth just mentioning, if I may, that the International Court two years after its opinion on nuclear weapons said about the principle of good faith that while it was immensely important it went on to say: "It is not in itself a source of obligation where none would otherwise exist". I think there is a danger of losing sight of that in the way in which people recite that particular extract from Article VI as though it is the answer to everything.

Linda Gilroy: On that point, which I was going to raise, that there is more to Article VI than just nuclear disarmament, it is about cessation of the nuclear arms race, it is about the Treaty on general and complete disarmament under strict and effective control. To come back to the point I made about the minimum deterrent and the definition on it, an observation I would put into the melting pot is that I find it surprising that is not a part of the legal debate about this issue because if you can begin to structure a debate around that then you can facilitate those processes that Christopher Greenwood has just described in a way that we have not got the language and the framework to do at the moment.

Q238 Mr Holloway: Professor Grief, if one argues that it is illegal for us to have a next generation could you therefore argue that the Treaty was dead and that people like Iran are perfectly justified in producing their own weapons?

Professor Grief: The Nuclear Non-Proliferation Treaty was dead?

Chairman: I think I would prefer to get on to the NPT later during the course of the hearing. Could you join in then with your questions? Dai Havard.

Q239 Mr Havard: I am sorry I was late. My understanding of what has been said is that there is no international law which prohibits the possession of nuclear weapons. There are certain states that have themselves combined together in a Treaty form to decide what to do about proliferation and possible disarmament, Britain is one of those and, therefore, may have obligations in that debate, but as far as international law is concerned there is no law that stops possession. So all those people that are not signatories to the Treaty have no obligations to negotiate about anything. We are a bit like China and Iran with nuclear power here, are we?

Professor Haines: Strictly speaking that is correct. North Korea, I suppose, is the obvious example of a state that is outside the NPT regime and it is not banned by that regime, therefore, from possessing nuclear weapons.

Q240 Chairman: Can you give us some examples of those states which are outside the NPT regime?

Professor Haines: North Korea is outside the NPT regime, Pakistan is outside the NPT regime, as indeed are India and Israel.

Q241 Chairman: Professor Grief, you were disagreeing.

Professor Grief: Yes. I wanted to come in, if permitted, on this question of possession because I have to disagree with Steven that the NPT somehow allows the United Kingdom to have nuclear weapons. It is quite true, as Steven has said, that the NPT in Article IX defines a nuclear weapon state as a state which exploded a nuclear weapon or other nuclear device before 1 January 1967 but Article IX actually says that is a definition for the purposes of the Treaty and only for the purposes of the Treaty. I am sorry to use this word again but it seems to me that it is not good faith interpretation of the Treaty to suggest that it somehow authorises states to have nuclear weapons. The other point I wish to make is that we do not simply possess nuclear weapons in any event.

Q242 Chairman: No, of course that is true. In a moment we will get on to the threat of use.

Professor Grief: I was simply going to say that, therefore, the rules regarding use of force and the conduct of hostilities are relevant here. I would disagree with the White Paper when it says ----

Q243 Mr Jones: Can I just turn that back round a little and ask you where does it say, therefore, that it is illegal for the UK to have nuclear weapons?

Professor Grief: Where does it say that it is lawful for the UK?

Q244 Mr Jones: No, that it is illegal.

Professor Grief: It does not, I have to admit. It does not in so many words but there are cardinal principles of international humanitarian law, I think, about which we would all agree in terms of their existence at least, perhaps not about their interpretation and application. By applying those principles to what we know about these weapons and realistic military scenarios of use then I think it is possible to conclude that ----

Chairman: We are perhaps making an artificial distinction here between possession and use. We need to move on to the issue of use.

Robert Key: Chairman, can we see if we can get our witnesses to agree on this: under what circumstances is the use of nuclear weapons lawful?

Q245 Chairman: Professor Sands, would you like to begin?

Professor Sands: Perhaps the easiest place to start is with the Advisory Opinion of the International Court of Justice which gave an Advisory Opinion in 1996. It plainly left open the possibility that certain uses of nuclear weapons could indeed be lawful. It did not clearly specify the circumstances in which such use would be lawful but it indicated, at least a majority indicated, that the use could be lawful in circumstances in which the very survival of a state was at stake. That is one view of what the

Advisory Opinion actually says. In my view it is clear that the use of a nuclear weapon which does not affect the global environment or civilians, is able to distinguish between combatants and non-combatants, would not raise difficulties in international law but, of course, the very nature of nuclear weapons makes those criteria very difficult to be fulfilled. I do not think I can give greater clarity than the International Court of Justice gave on the issue.

Q246 Robert Key: Are we all agreed on what the ICJ said?

Professor Grief: Probably not.

Professor Haines: Agreed in the sense that the words on the paper were clearly agreed to.

Professor Greenwood: It was a seven votes each way Advisory Opinion given on the casting vote of the President. Of the seven who wrote dissenting opinions three thought that the Court should have said that nuclear weapons could not lawfully be used in any circumstances; three said that the Court should have decided that there were circumstances, although unspecified, in which they could lawfully be used; and the seventh thought the Court should not have answered the question put to it in the first place. One might perhaps have some sympathy with that view. Yes, the Court's opinion plainly leaves open the possibility that nuclear weapons can lawfully be used in extreme cases of self-defence where the survival of a state is at stake.

Q247 Robert Key: Thank you. Let us try this one: is there a legal difference between the threat of use of nuclear weapons and their actual use?

Professor Haines: Can I answer this in a sort of roundabout way which will involve some mention of strategic thinking. My answer to your question about use, and something I wrote earlier about this, is that nuclear weapons are used in different ways. There is the actual physical use, which is essentially what you have been talking about, but I see them as having been used very effectively over a number of years to maintain strategic balance and to maintain a situation in which we have for 60 years or so not had great power war. The importance of deterrence is absolutely central to this. The use of those weapons, their use as a deployed system that is capable of maintaining that arrangement, seems to me to be a perfectly lawful use. Indeed, one could argue that in self-defence terms it is the only way of ensuring your own defence if you face the possibility of a threat from another power with weapons of that type.

Q248 Robert Key: So you are saying that to deploy nuclear weapons is to use them but not necessarily to explode them?

Professor Haines: Absolutely right. That is my belief. My feeling is that these weapons are currently being used this very day. There is a debate now as a result of the end of the Cold War as to exactly what it is that they are deterring, and we can get into a discussion about that that is probably not appropriate at this session. The use of those systems over many, many years has been

to maintain that balance between states that hold those weapons. I am perfectly happy that that is a perfectly lawful use of the systems.

Q249 Chairman: Professor Haines, would you say that the threat of firing an illegal weapon is a legal thing to do?

Professor Haines: No, but I am not saying that nuclear weapons are illegal.

Q250 Chairman: You are not. You are avoiding that question, are you not?

Professor Haines: No, I am not avoiding it, I am saying in certain circumstances they are lawful, that the actual physical use of weapons of that nature would be lawful.

Professor Greenwood: Chairman, might I add something about threat. There is a danger that the use of terms here is becoming rather loose. To me the use of a nuclear weapon is exploding it, and that is certainly the way in which the term is used in the Advisory Opinion and in international law. A threat to use a nuclear weapon, however, has to be distinguished rather carefully from a deterrent. It is not a threat to use a nuclear weapon to say, "We have these weapons, if we were attacked in extreme circumstances of self-defence we would use them", but the point was put in almost exactly these terms to the International Court by leading counsel who worked with Professor Sands for one of the anti-nuclear groups of states. As he said to the President of the Court: "If I say, Mr President, that if you attack me I will punch you on the nose and I have got big enough fists to do it, that is not a threat to use force." A threat would be, for example, what happened in 1939 when the Czech Government was told by Germany, "Place your country under our protection or Prague will be in ruins by tomorrow". That is an example of a threat. A threat of that kind would be plainly illegal in international law. A deterrent posture, in my view, is not addressed by international law at all.

Professor Sands: Just taking it a step forward, I think we would probably all agree that mere possession does not constitute threat and in assessing the legality of a threat you need to look precisely at the fact or circumstance in which the threat is made.

Q251 Robert Key: So is the deployment on our current submarine fleet of warheads a threat?

Professor Sands: No.

Professor Haines: No.

Professor Grief: I would disagree with that. I am sorry to do this. To me, deployment on the submarine is a threat because, to use the words of the Court of Justice, there is a "signalled intention" to use the things if certain events occur, and that is a threat.

Professor Greenwood: Chairman, I disagree radically with that. If the weapons are not targeted on any state or told that quite

clearly, to possess a weapon is not a threat to use it because if that were true of nuclear weapons on a Vanguard submarine it would be equally true of any weapon possessed by any state at any time. Obviously you have them with a view to using them if you have to but the possession of them is completely different from the threat to use them.

Q252 Robert Key: Since you have mentioned it, could I just ask you this: does it make any difference that since 1998 in the *Strategic Defence Review* we have not targeted our warheads? Does it make any difference legally whether the weapons are pre-targeted?

Professor Greenwood: I think the fact that they are not pre-targeted makes it even more difficult to argue that they are a threat. In the particular circumstances of the Cold War even the fact that they were pre-targeted did not amount to a threat.

Q253 Robert Key: Do we agree about that?

Professor Sands: Not necessarily. The fact that they are not pre-targeted does not of itself mean that there is no threat. For example, when the Secretary of Defence tells the Government of Iraq, "If you use certain types of non-nuclear weapons of mass destruction we reserve our right", some will construe that as a threat even though there was not pre-targeting.

Q254 Chairman: Professor Grief, if you are walking around with a rifle, is that a threat to use it?

Professor Grief: It could be according to the context, depending upon the circumstances, on what I might have said or what somebody does.

Q255 Chairman: But not as such, would you agree?

Professor Grief: Not necessarily as such, I agree.

Q256 Robert Key: Can I ask now does the United Nations Charter forbid either the use, or the threat of use, of nuclear weapons?

Professor Sands: No.

Professor Greenwood: It does not deal with any particular weapons system. It prohibits the threat or use of force with any weapons whatever save in certain rather narrowly defined categories.

Q257 Robert Key: Do we all agree?

Professor Haines: Yes.

Professor Sands: Professor Greenwood has stated absolutely correctly that there is no explicit reference to any form of weapon in the UN Charter, it addresses general rules that are applicable to nuclear and non-nuclear weapons alike.

Robert Key: Okay. I think I will quit while I am ahead, Chairman!

Q258 Linda Gilroy: In relation to that set of questions can I ask one about Continuous-at-Sea deterrence, which is the current way in which the deterrent operates. In the debate there is mention that we do not need to maintain that. If it changed so that it was not Continuous-at-Sea, would that in any of your views raise

issues about the debate we have just had about use of the weapons, ie in order to use them you would need to threaten somebody specific presumably.

Professor Haines: There is one issue, of course, and it has always been the argument used to maintain Continuous-at-Sea deterrence, and that is the sailing of a boat in a time of crisis would send out a signal. That is a very valid comment for those in favour of Continuous-at-Sea deterrence to make. Personally I think that in the current circumstances it is not necessary to maintain a deterrent at sea at all times. Obviously I would differ from my erstwhile colleagues in the Ministry of Defence by saying that. In legal terms it does not seem to me to make any difference whatsoever, it is not a legal question, it is a policy question.

Q259 Mr Holloway: The Government has said that the UK's nuclear weapons will only ever be used in self-defence but they have never said that they would not go for first use. What difference does it make to the legal position if nuclear weapons are used in self-defence?

Professor Greenwood: To be lawful the use of any weapon has got to comply with two different bodies of law. It has got to comply with the UN Charter rules on whether it is lawful to use force and it has got to comply with the law of armed conflict which governs the way in which hostilities are conducted. If it were not used in self-defence and it were not used in one of the other rather narrow categories in which force is lawful under the UN Charter then it would be a breach of the Charter.

Professor Grief: I agree entirely with what Christopher has said.

Q260 Mr Jones: Hooray! That is a first.

Professor Grief: For the time being! In order to exercise the right of self-defence one has to comply with the conditions of necessity and proportionality and I focus in on proportionality and simply ask the question, could a nuclear weapon ever be a proportionate response. It possibly could, I am not ruling that out, but I think it is a question that needs to be asked given the question that has been put.

Q261 Mr Holloway: Could it extend to defence of our vital interests as opposed to our territorial survival?

Professor Grief: "Vital interests" is far too vague an expression. That is one of my concerns about the White Paper, that it talks about "vital interests" several times and "extreme circumstances" several times. To me those expressions are not sufficiently precise. I would go back to the Advisory Opinion where it seems to me the Court accepts that the only conceivable exception to the prohibition of use under international law is the in extremis scenario that it paints where the very survival of the state is at stake, but the President of the Court was at pains to stress that the Court was not thereby saying "it is therefore lawful to use nuclear weapons in extremis".

Professor Greenwood: The President of the Court was one amongst

the 14 judges and they had very different interpretations of what they had agreed and that was why it was such a finely balanced Advisory Opinion. They did expressly reject the argument that the use of nuclear weapons could never be proportionate for Charter purposes, so I think that is quite a useful starting point. I am beginning to sound as though I want to disagree with Professor Grief on principle about everything, and that is not the case, but one has to be rather cautious in reading that Advisory Opinion. It is also not confined to the survival of the state that has the nuclear weapon, the language is broad. For example, the use of nuclear weapons to prevent the destruction of an allied state or a state that we were seeking to protect, for example in 1991 the survival of Kuwait, that would come within the ambit of the Advisory Opinion as well.

Q262 Mr Holloway: You could argue that was a vital interest, could you not?

Professor Greenwood: Yes, but there are other British vital interests which would fall short of that, I accept that point.

Professor Sands: Mr Holloway's question is a vital question that has been asked because it puts its finger right on an issue that is of concern and that is the apparent extension of the circumstances in which nuclear weapons could be used. If the Committee has a role to play it is in pushing the government on precisely what it means on that issue. That would be a very useful function for the Committee to play.

Q263 Chairman: Why do you say it is an extension?

Professor Sands: Because the door appears to be being opened to circumstances in which nuclear weapons could be used other than in that extreme situation. That is why I have got some hesitation with this White Paper. That is the matter of concern for me. Taking that a little bit further, one can see a scenario where quite understandably the mere replacement with a new class of submarines is not in itself problematic unless it is part of an implicit or not explicit programme of extending use in other directions. It is the language of the White Paper that does not squarely address that issue but hints in that direction that is giving me pause for thought about the White Paper.

Q264 Mr Holloway: In that legal context where would you put Hiroshima and Nagasaki?

Professor Sands: In my view the use of nuclear weapons in those circumstances would not conform under today's legal rules to the rules on international law allowing the use of that type of weaponry in self-defence but, of course, at the time they were used the United Nations Charter had not been adopted so the rules may have been different.

Q265 Mr Holloway: Is it self-defence if you go for first use?

Professor Greenwood: I think it could be self-defence. I do not think the fact that the weapon was used before any other nuclear weapon was used against you would necessarily take it outside the

scope of self-defence. To fall within the limits of self-defence you would have to be the victim of the armed target, actual or threatened. Secondly, your response would have to be proportionate. Obviously it is easier to show proportionality in a nuclear response to a nuclear attack but the NATO strategy for two decades was if we were losing a conventional war in Europe and Warsaw Pact forces were over-running us then we would rely on our nuclear deterrent. In my view that would have been unlawful within the terms of the UN Charter.

Professor Haines: I would agree entirely with that. The idea that nuclear weapons are just there to deter other nuclear weapons is profoundly false.

Q266 Chairman: In your memorandum you say: "It is not unreasonable to argue that the threat of the use of nuclear weapons should not be employed to counter a mere conventional threat for reasons of proportionality".

Professor Haines: No, it is not unreasonable to make that statement, that is true.

Q267 Chairman: You do not agree with it?

Professor Haines: If there was a conventional threat of sufficient size and magnitude, as there was indeed in the context of the balance of forces in Europe, as far as I am concerned that would be perfectly acceptable. We were dealing then with a staged hierarchy of different systems. There were systems on the Central Front that could have been brought into play that would have taken us through the nuclear threshold which were very different from the sorts of weapons we are talking about in the context of the Trident debate. There was a process of escalation there and I was perfectly content with that. I put in that written submission that I do not think it is unreasonable in current circumstances to say generally speaking nuclear weapons should be there to deter other nuclear weapons. For example, I do not believe that it would have been appropriate to use nuclear weapons against Iraq if they deployed chemical weapons if they had them three or four years ago. It is a question of judgment in the precise circumstances.

Q268 Mr Jenkin: This question of judgment in the precise circumstances is, I think, what becomes the most problematic question about this whole discussion - I compliment you on what is a fascinating discussion - but in the end you are wrestling with moral problems which any prime minister contemplating the use of weapons would have to wrestle with. Can I put it to you that if the prime minister of the day was satisfied that morally he had no alternative but to use a nuclear weapon and it was unquestionably in the national interest to use a nuclear weapon, difficult as these circumstances are to envisage, the questions of international legality become relegated. This is what I mean by the question that in the end international legality is too malleable a concept for us to set absolute store by because in the end the national interest of our country comes above any question of international legality. That is actually what the international

law says in effect.

Professor Sands: I think there are a number of ways of addressing that issue. Firstly, contrary to the view expressed by a member of the other House, I do not believe there are circumstances in which the national interest outweighs the rule of law, including the rule of international law, so you need to be guided by the rules of international law. As you have rightly said, there is always some malleability in the rules, they are open to interpretation and application, and a reasonable prime minister acting in good faith has a range of options. In the second part of your scenario unquestionably the national interest needs to be put one side because there will always be debate on that, but on the main thrust of your issue if we have a situation in which prime ministers or anyone else start taking decisions of this kind on moral grounds you get yourself into precisely the kind of difficulty we are in now on another story.

Q269 Mr Jenkin: Except that the UN Charter was drafted by people trying to frame morality. The judges who contributed to the ICJ opinion are themselves human beings trying to frame a moral answer to a moral question, based on texts, agreed, but ultimately to elevate one group of people, ie lawyers, over the people who actually have the responsibility to Parliament, which is after all a sovereign institution, is more malleable than you might be comfortable with, but that is just an historical fact.

Professor Sands: I would simply say you have the rule of law or you do not.

Q270 Mr Havard: Can I just pick up a point you were making, Professor Sands, about the possible extension, implicit or explicit, in the White Paper. Can I understand that a little bit better? Currently the nuclear deterrent we have is deployed on these boats in the North Atlantic or in the Atlantic. Are you saying that the White Paper then opens this up? What is your worry, that they are going to be sent out to the Pacific somewhere, that their extension of use is allowed in it? What are you saying there?

Professor Sands: I am very grateful for that question because, with great regret, I have learned with this Government to treat words on a paper or words in Parliament with very great caution. I turn to paragraph 3.5 with the heading entitled "Ensuring against an uncertain future". Sections 3.11 and 3.12 are state-sponsored terrorism. Just pause there and ask yourself the question, what has that got to do with the narrow constraints of the use of nuclear weapons in circumstances in which traditionally the context in which they were going to be used has been very narrow. I am not saying that is what is being said will be done but my pause and my request to the Committee, in a sense, pushes the Government on precisely why it has put these issues in here and why it appears to be opening the door with these paragraphs to circumstances not in which deployment may occur in other means but in which the use or the threatened use in the narrow way we talked about could be envisaged in circumstances that fall very

significantly short of the in extremis circumstances we have been discussing.

Q271 Mr Havard: As part of a collaborative arrangement, a coalition of the willing?

Professor Sands: To cut to the chase, what I am talking about is the circumstance in which you have an alleged terrorist organisation present in a particular part of the world thought to be meddling with weapons of mass destruction, nuclear or non-nuclear, are we saying here that those are now circumstances in which we would threaten or use nuclear weapons. It is a question I am posing; I do not know what the answer is.

Q272 Mr Holloway: We are in a completely different world now. We are now in a position where we have terrorists who certainly have the intention, if not the capability, to use weapons of mass destruction. It pains me to defend the Government here but in a sense the terrorists could merely be the delivery system in the same way that the D5 is the delivery system for our warheads, they could be the people who transport it from other countries.

Professor Sands: I am not disagreeing with you. What I am suggesting is that it should be a function of the Committee to wheedle out of the Government precisely what its thinking is on these issues. This language is too vague, it is too ambiguous and open to too many different possibilities to provide comfort.

Q273 Mr Holloway: So are you saying that this is a potential policy shift which, because it is a policy shift, might actually shift the Government from a position where it could have been argued to be not acting unlawfully, illegally or whatever the definition is, into a position where it could well now be outside its treaty obligations or outside some other legal construct? Is that what you are saying?

Professor Sands: Precisely, possibly. I am not saying that is the case but I would like comfort that it is not the case.

Mr Holloway: Is that view shared, Chairman, by -----

Q274 Chairman: Professor Grief, you nod, so do you share that view?

Professor Grief: I am in agreement with that.

Q275 Chairman: Professor Haines?

Professor Haines: I have not read it, I must say, in quite the same way, and I certainly do not believe that the nuclear weapons systems we are expecting to see running on over several years are appropriate weapons systems for use in the broad range of circumstances alluded to by Professor Sands, and I do not think that is what the White Paper says. One of the dilemmas you have when you are dealing with these sorts of systems is that you have to be deliberately vague in some senses in order to ensure that the whole policy has some sort of enduring credibility.

Q276 Chairman: Yes, it says "intentionally ambiguous".

Professor Haines: Absolutely right, and it is interesting, is it not, that often it is the case that Geoff Hoon's words are quoted against him in the context of the situation relating to Iraq? I did not read those words in that way. Perhaps that is because I came from an MoD background. This is the intentional ambiguity within certain statements of that sort. I disagree with Professor Sands that this Committee should spend a large amount of time drilling into precisely what the Government means here because I think that would be counter-productive. I really do not believe that that is what the Committee should be doing. For a start, you will never get a straight answer, so you will be wasting your time, and I have spent time myself drafting such things in the MoD. You will not get a straight answer, and quite rightly you will not get a straight answer because if they do give a straight answer they will be revealing their hand. This is one of the problems you are going to be faced with.

Q277 Chairman: Professor Greenwood?

Professor Greenwood: Chairman, I also disagree with Philippe about this, with great respect. There is obviously a political or policy issue here about the relationship between this Committee and the Government and Philippe Sands says that he is very sceptical about some of the things the Government says but that is not a debate I wish to engage in; I do not think it is any of my business. You have asked me here to give evidence about the law. If one looks at the legal issue I do not see that there is anything in this White Paper, and I have read it quite carefully, which in itself means that the decision that the country is being asked to take puts it in breach of any of its international legal obligations. It is necessarily vague about what might be happening in the future because this is a decision to upgrade nuclear weapons in such a way as to maintain a nuclear deterrent for up to 40 years from now. I do not have a crystal ball that enables me to see -----

Q278 Mr Havard: Can I ask you that question again? If the policy were to change and we were to deploy these submarines in the Far East, in the Pacific, would that policy change have serious implications because we had?

Professor Greenwood: I do not think that where the submarines are sent would make the slightest difference. The reach of the weapons is such that they could reach targets in many continents anyway. It would be more a question of whether there was a threat of using the weapon in a particular set of circumstances, whether there was an actual explosion of the weapon in certain circumstances. That is a matter that would have to be looked at very carefully in legal terms but, as for where the submarines are located, I do not think there is any legal issue in that, nor do I think there is any legal issue in how many submarines we have.

Q279 Chairman: I want to suggest that there is no policy that the submarines currently should not be deployed anywhere in the world. I think they can be.

Professor Greenwood: That is right.

Q280 Chairman: I think they are legally deployable anywhere. Can I get back briefly to self-defence? Leaving aside the issue of whether these weapons are legally usable or not, if they are legally usable for self-defence does that legally include the defence of allies? Professor Greenwood, you nod. It does?

Professor Greenwood: Yes, definitely.

Q281 Chairman: Professor Grief?

Professor Grief: I think yes, it does. The ICJ expressed itself in different ways, but yes.

Q282 Chairman: And Professor Sands? Where does that consent end and who is an ally?

Professor Sands: I nodded precisely subject to that caveat. It would depend on the pattern of the treaty relationships that are in force and it would not be an automatically open-ended demolition of what constitutes an ally. NATO, for example, is a treaty arrangement in which the parties to the North Atlantic Treaty Organisation undertake to protect each other against various forms of attack, so plainly in those circumstances that would be the allied justification.

Q283 Chairman: So an agreement between prime ministers but not a signed treaty would not be sufficient to justify the use of nuclear weapons, you would say, Professor Sands?

Professor Sands: I do not think one could say that. I think one would need again to look precisely at the factual set of circumstances.

Q284 Chairman: In all this uncertainty does it not lead us to wonder what on earth the real meaning of international law is in these circumstances with the ICJ finding seven for, seven against and the President casting his vote? It is quite difficult to work out exactly what the concept of that is but with different interpretations of what international law is and what the international law on this point is and with different meanings of words, is this actually a legal issue at all?

Professor Greenwood: Chairman, I think in the end, as I said in my first answer, it is primarily a political question, not a legal one. Some areas of the law are quite clear and one thing that is clear is that the right of self-defence is individual and collective and there is no requirement of a prior treaty of alliance between the two states in question.

Professor Sands: I go back to what I said at the outset. You cannot separate out the policy and the legal. They are so closely intertwined as to be inseparable but I would invite the Committee to proceed with caution in suggesting that there are not rules of international law to be applied here, if only because to do that would cause other countries to seize on those words in circumstances that I certainly would find very difficult. Again I am thinking of the Iran situation. There is a very difficult negotiation on the way right now on precisely what the 1968 treaty does and does not impose upon Iran and upon other countries.

Chairman: You are causing a lot of trouble here, Professor Sands.

Q285 Mr Jones: So those organisations that have been before us arguing that the reason why Trident should not be replaced is a legal one you would disagree with?

Professor Sands: I come back to what I have said, I hope, consistently. It is a legal and political issue in which the two sets of issues are very closely intertwined. You have heard: we cannot as lawyers give you a clear black and white answer as to what the law requires. In that situation it is often no different from the English criminal law on murder and manslaughter.

Q286 Mr Jones: No, but I know in a few weeks' time or when we are having debates in Parliament some colleagues will stand up and argue that there is a legal definition. We have had a campaigner here before who has actually argued that this policy is illegal, so what you are saying is that you do not agree with that, that you can boil it down to a for and against legal position on it?

Professor Sands: No. I think it is much more complex.

Q287 Linda Gilroy: Would you agree, and I would appreciate Steven Haines' observations on it as well, that ambiguity is really inherent to the nature of a deterrent and posturing, and as soon as you start entering into hypothetical circumstances you just run into difficulties which means that you end up with the lawyerly equivalent of angels dancing on the head of a pin?

Professor Haines: One of the problems with talking about hypothetical situations is that in my experience you can talk about as many hypothetical situations as you like; what we will eventually be faced with will be something quite different, and if you base everything on your range of hypothetical situations that you are teasing through you will probably get it wrong.

Professor Grief: On this question of law versus policy I think it is a mix, but even a body like the UN Security Council has to act within what has been described as a circumscribing boundary in legal norms and it is no different for the Prime Minister, or any prime minister. Perhaps another question is, after the event would there be anything in the way of enforcement, criminal proceedings perhaps, brought against a particular individual?

Chairman: We have got quite enough questions ourselves. Once you get into the issue of nuclear reprisal then arguments about international law become somewhat academic, do they not?

Mr Jones: You are not suggesting, Chairman, an Armageddon? There is no role for the lawyers?

Robert Key: Don't you believe it, Chairman!

Q288 Mr Jenkins: I want to probe a little bit on legal restraints. We have moved into an area now which has been in the back of my mind, listening to what you have been saying and your interpretation of agreements. Is there any legal restraint upon the development of a new generation of nuclear warheads?

Professor Haines: I do not think there is a general legal

restraint on the development of a new warhead. It seems to me that if you accept, as I do, but I appreciate one or two of my colleagues do not, that the possession and deployment of these systems is lawful, then, of course, one of the responsibilities you have as a nation possessing them is to have the safest, the most tested (in the general sense) system available so that you can be certain that it is a reliable, credible system that you can deploy with confidence, and the Trident system consists of a variety of different components. The submarines have got one, the missile system itself has got one, the warhead is another, and the development of warhead technology and the way that that will advance over the next 30 or 40 years may well result in a different warhead arrangement being required for the system. It is hardly surprising in many ways because, if you take yourself back 20 or 30 years to the point when we were deciding to replace Polaris with Trident and going for D5 and the warhead potential that that had, it was a decision that was made in the context of the Cold War and the warhead arrangement was designed with that particularly in mind. The circumstances are very different today, obviously, and that may require, it may allow, a lower capability in warhead terms and so on, so the development of different warhead arrangements, it seems to me, is an inevitable part of the process of maintaining this sort of deterrent capability on into the future, and it would be irresponsible not to continue to look at warhead technology.

Professor Sands: I would approach the question in a slightly different way. I do not think I can give you a straight black and white answer because it would depend again on the factual circumstances, but I would ask myself a couple of questions: would the development of these new warheads make the ultimate objective of disarmament more or less remote or impossible, and, secondly, would it make the use of nuclear weapons more or less likely? If the answer to those question is that it would make it both more likely that they were used and less likely or impossible that there could be disarmament then I think some serious legal questions would arise. For example, if we were sitting here today with a White Paper in front of us announcing a move to a whole new family of tactical nuclear weapons, I think our debate and discussion would not be very different.

Q289 Chairman: You would take a much stronger view, would you not. Professor Grief?

Professor Grief: No, I am happy to associate myself with those remarks. The only thing I would add is that I would emphasise the fact that if a smaller, lower yield weapon were deployed I do think it makes it more likely that the thing will be used, and it would probably be exploded at or near ground level. As I understand the science, the radioactivity on such an explosion would be that much greater.

Mr Jenkins: That is where you lose me a lot of the time because some of your evidence and your opinion has been that if I have got a gun and I have a smaller gun I am more likely to use it. Believe

me, I am not more likely to use it because I will never use a gun in the circumstances. You are projecting things forward. If you consider that some of these warheads are under development, and Professor Haines is right when he says, if we can make a safer warhead will we have an obligation to make a safer warhead? If we can make a more accurate warhead we have an obligation to make a more accurate warhead. That does not imply that we will use it. It is just that what we have got at present, which is legal now, we have redesigned to make it safer. If that is the case with a warhead what is the difference between a warhead and this system? If we have got an existing system which we legally own and we are trying to make it safer, smaller, more accurate, more accountable, what is the legal difficulty, and do not give me that we have a propensity then, if it is smaller, to use it more often? I do not think that will wash.

Q290 Chairman: I think that was addressed to you, Professor Grief.

Professor Grief: I feared that. My answer reflected what I have read. I am no expert on military scenarios and nuclear technology but I understand that if a weapon is lower yield --- let me start the other way round. I think strategic nuclear weapons were unlikely ever to be used. They might have gone off accidentally but they were unlikely ever to be used. There is something in the argument that a strategic nuclear deterrent is not a particularly credible deterrent at all because you are never going to use it because of the devastating effects of using it. If you develop a nuclear weapon which is smaller with a lower yield, for use perhaps in a battlefield type scenario, then it becomes conceivable that you could use the thing and the world would still turn. That is really what was behind my remark, and I cannot claim any expertise on that.

Q291 Mr Havard: But developing that capacity now would not necessarily alter the legal imperatives on us?

Professor Grief: Not as such.

Q292 Mr Havard: Use would maybe?

Professor Grief: Use would, not as such, but I agree with Professor Sands that there could be issues under Article VI if it renders fulfilment of the NPT obligation more remote.

Q293 Chairman: Professor Greenwood, you were shaking your head there.

Professor Greenwood: With respect, I do not agree with that. I do not think there is any point in my speculating about whether a weapon would be more or less likely to be used if you had more of them. I find it counter-intuitive to suggest that a weapon which is capable of more precise targeting is more difficult to reconcile with your legal requirement not to use with indiscriminate force the weapons which cannot be targeted so precisely. I have never seen the logic of that argument, but I think it is also worth keeping in mind that to the extent that the only treaty provision, indeed the only international provision at all which bears on the question of possession of nuclear weapons

as opposed to their use is Article VI of the NPT. Article VI was drafted nearly 40 years ago. There have been enormous changes to nuclear weapons technology introduced and implemented during the 30-something years that that provision has been in force. One of the best guides in international law to what the treaty means is how the parties apply it in practice. You are actually directed to take account of that under the rules of international treaty interpretation., and so the fact that there have been these enormous updatings of weapons systems during the 37 years now that this provision has been in force makes me find the argument that it impliedly prohibits any alteration to warheads, any change to them, very difficult to credit.

Professor Grief: Could I just come back on the element of Professor Greenwood's answer about the indiscriminate nature of small weapons? Small nuclear weapons would still be indiscriminate weapons and still in my view be incapable of being used consistently with the principle of distinction.

Q294 Chairman: Can I come on to that because, Professor Grief, in your memorandum you say, "The cardinal principles of international humanitarian law are (i) States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian objects and military objectives", and (ii) it is prohibited to cause unnecessary suffering to combatants", so we know what you think about. We know what Professor Haines thinks about that because in your memorandum you say that there are two exceptions to that. The first is if the civilian casualties are of a proportionate scale to the expected military advantage and the second is the case of reprisals. Professor Sands, do you agree that nuclear weapons are incapable of distinguishing between civilian objects and military objectives and are therefore illegal?

Professor Sands: I do not agree with that blanket statement because this was an issue that was argued over before the International Court of Justice and the Court came to a different view, and my function here is to report to you what the International Court of Justice said. One can envisage scenarios in which the use of a nuclear weapon would possibly not affect civilian targets in that way, but to the extent that that would not happen, ie, civilian targets would be disproportionately affected, it is very hard to see how they could be justified to be used in law.

Q295 Chairman: So you agree Professor with Haines's two exceptions to that rule about disproportionate and reprisals?

Professor Sands: I am certainly much closer to that line of thinking. One certainly cannot say that nuclear weapons are inherently unlawful. That view was put to the International Court of Justice. It was rejected by the International Court of Justice and therefore an alternative analysis is to be applied.

Professor Grief: Chairman, I simply wish to observe that in the memorandum you cited I think I do say that the use "in any

realistic military scenario would be unlawful".

Q296 Chairman: Inherently unlawful because of the discrimination point?

Professor Grief: Yes, but I agree with Professor Sands that you could conceive of a situation where a weapon were exploded in the middle of a desert perhaps without causing any civilian casualties whatsoever. That to me is not a realistic military scenario.

Q297 Chairman: Professor Greenwood?

Professor Greenwood: I think, with respect, the way in which professor Grief has framed the question is not quite right either in terms of military science or in terms of law. No weapon is capable of distinguishing between a civilian and a combatant. Weapons are themselves inherently capable of being used against anyone. More people have been killed by the use of machetes and primitive weaponry of that kind since the Second World War than died in Hiroshima or Nagasaki. The question is rather what legal test does international law apply in the use of weapons? It applies to: you must not deliberately target the civilian population as such save - and this is controversial - in the case of belligerent reprisals. Secondly, if you do target a military objective you must not do so if you are likely to cause civilian casualties which are wholly out of proportion to the military objective you are seeking to achieve. That is not quite the same test and I can envisage circumstances where it would be lawful to use a nuclear weapon against a military objective even though that was going to kill large numbers of civilians if the military gain which you were seeking to achieve was so important. It would only be in an extreme case but I think it is possible that it could happen.

Q298 Linda Gilroy: What is the legal significance of the UK's recognition as a nuclear weapon state under the Non-Proliferation Treaty? Is this a legal justification in its own right for the UK's possession of nuclear weapons? We have already raised that earlier but if any of you have any further points to make, particularly on that latter point, we would be grateful. Feel free to say no if you have not.

Professor Grief: I have made my remarks.

Professor Greenwood: To ask whether the NPT authorises the possession of nuclear weapons, which is the way it is put in some of the literature, is the wrong question. Before the NPT there was no rule in international law that prohibited any state from possessing nuclear weapons. On ratifying the NPT most of the parties ratified it or acceded to it as Non-Nuclear Weapon States. They therefore assumed an obligation under the NPT not to acquire nuclear weapons. The five states that became parties as Nuclear Weapon States became parties subject to a different obligation, the obligation in Article VI, so the critical question is not, "Is our status as a Non-Nuclear Weapon state something that authorises the possession of nuclear weapons?". It is rather, "Is our ratification of the treaty as a Nuclear Weapon State something

which leaves us where we were before in terms of our right to possess nuclear weapons?", and I think it does, subject only to our duty under Article VI to negotiate a comprehensive nuclear disarmament.

Professor Sands: I agree with that subject to a modest caveat. I think it is important, and we have not focused on it, to look at what happened, and Chris Greenwood has alluded to one aspect of that, since 1968 when the treaty was adopted, and in particular developments in the extension because originally the treaty was only to apply for 30 years. The Non-Nuclear Weapon States that joined did so for that limited period of time. The question then arose as to what would happen at the end of that period of time and a deal was struck in which it was extended indefinitely in return for a greater commitment on the part of the Nuclear Weapon States to their Article VI obligations, and again, and I know others at this table will say it is not for us to deal with those issues, I think it is ridiculous not to recognise the interplay of the legal and the policy. One has to ask oneself what is the consequence of a continued failure, if that is to occur, on Article VI for those states that have indefinitely extended their non-nuclear aspirations. The steps that were agreed, in particular in 2000, on Article VI, which I have set out in my opinion, are important at keeping at the forefront of our minds the future wellbeing of this treaty.

Q299 Linda Gilroy: We went into that before but I would like to pursue that to the extent that it has been suggested to us in an earlier inquiry that our seat at the Security Council does not depend upon us having a nuclear weapon, but I wonder if any of you could give us the benefit of your experience. If we did that, in the unlikely circumstances of that happening, would it bring with it any legal limitations on our role as a member of the Security Council?

Professor Grief: No.

Professor Haines: No, none whatsoever.

Professor Sands: There is nothing in the UN Charter which requires Permanent Members of the Security Council to possess a nuclear weapon.

Q300 Mr Havard: Professor Greenwood, you said there were the states that did not possess the weapons and the ones that did and they combine together in the treaty. The obligation on the ones that did not have them was that they would not acquire them; those that had them would try to negotiate them away, in some indefinable process. There is another group of people who were not signatories at all.

Professor Greenwood: Yes.

Q301 Mr Havard: My understanding would be, just as a typical boy from the valleys, is that I would suspect that the people who were signatories to the treaty should not then collaborate with people who were never signatories to the treaty at all to acquire them.

Professor Greenwood: That is right. The treaty does not, of course, bind the states that are not parties to it, but it does bind the states that are parties not to transfer nuclear technology to states that do not accept the assurances -----

Q302 Mr Havard: The United States know this, do they?

Professor Greenwood: I am sorry?

Mr Havard: The United States know this, do they?

Q303 Chairman: We will come on to the issue of India in a second. Let us come on to it now. What is your view of the United States' agreement with India? Do you regard that as a legal or an illegal agreement under the NPT?

Professor Greenwood: I am sorry, Chairman. I would have to go and have a look at the text of the agreement and think a lot harder before I could answer that.

Q304 Mr Havard: I wish we had a fly half with a sidestep like that!

Professor Sands: Can I come back on this point because the other thing that we have not yet put on the table is that states are free to leave the NPT. One state recently has, much to many people's regret. We need to keep in mind also that possibility. Can I refer you in that context to a very interesting opinion piece that appeared in the *Wall Street Journal* on 4 January 2007. The authors were George Schultz, William Perry, Henry Kissinger and Sam Nunn, an interesting group of characters, to say the least. It is entitled *A World Free of Nuclear Weapons* and it alludes expressly to this concern about the future wellbeing of the Treaty on Non-Proliferation of Nuclear Weapons. The concern that I am expressing about the wellbeing of that treaty is shared also by these four individuals and I can leave a copy of the piece with the Clerk.

Q305 Chairman: Professor Grief, did you want to answer?

Professor Grief: The point about the MDA, yes. In my memorandum, which you have, I speculate about that and I suggest tentatively that the MDA might be unlawful because it conflicts with Article VI, but that is predicated on Article VI enshrining a superior obligation in international law, an obligation of *jus cogens*, and even I would possibly find myself arguing against myself in some respects on that issue.

Chairman: And we could not have that.

Mr Jenkins: A simple thing sprang to mind when you referred to the fact that we would like a world without nuclear weapons. We would all like a world without nuclear weapons but unfortunately it is not going to happen with this team development concept. To do that you would not only have to get rid of the nuclear weapons; you would also have to get rid of all the people who have the knowledge to construct new nuclear weapons, so I am not arguing about proposing that, that we have to get rid of all these individuals.

Chairman: Is this a legal question?

Mr Jenkins: I am asking is it legal to do it, whether it is a right and a duty under the NPT to eradicate from the civilian population all those people with the knowledge to develop these ideas so we can stay in the real world.

Chairman: I think we may take that as a rhetorical question.

Q306 Robert Key: Can I just pursue the question of the Mutual Defence Agreement of 1958 between the US and the UK? What is the legal basis of the Mutual Defence Agreement and how does it relate to the Nuclear Proliferation Treaty?

Professor Grief: I do not know precisely the legal basis. I assume it is a bilateral treaty between the two countries and the crucial provision in the MDA is renewed from time to time, I think most recently about a couple of years ago until 2014. I have seen, as you may have, an opinion by Professor Christine Chinkin and Rabinder Singh QC that suggests that the MDA does not raise any issues under Article I of the NPT, but that there could be issues under Article VI. Indeed, it would constitute a material breach of Article VI of the NPT because the MDA envisages and provides for the enhancement of the UK's nuclear weapon programme, not its diminution, which arguably is what Article VI envisages and requires.

Q307 Robert Key: You do not agree?

Professor Greenwood: No, I do not agree with that at all. I agree with the first part of the premise that there is no violation of Article I because it does not involve the transfer of nuclear weapons. Article VI - let us just think it through for a minute. If under Article VI Britain is entitled to maintain nuclear weapons of its own, but the agreement with the United States about co-operation as to maintaining a British nuclear deterrent is unlawful, then the logical conclusion to that would be that the NPT would require Britain to set up a nuclear weapons production programme of its own. That seems to me to be wholly contrary to common sense and to the policy lying behind Article VI.

Q308 Robert Key: The NPT was actually updated last month. In his letter dated 7 December 2006 to the President of the United States the Prime Minister said that they would like these submarines to continue to carry Trident II D5 missiles, and in addition he says, "I believe that this programme has the potential to open up new opportunities for future co-operation and collaboration on other aspects of future submarine platforms", and that remark was agreed with by the President in his response, also of 7 December 2006 - Royal Mail were working very well - and he concurred with that proposal. Are there any legal restrictions on such new co-operation or apparent extension of the agreement?

Professor Greenwood: I do not see any difficulty with that at all. Also, the particular reference was to the submarine platform rather than to the nuclear weapon itself, which I think would fall wholly outside the scope of the treaty.

Professor Haines: This goes back to the point I made earlier about the whole Trident package consisting of a variety of different elements. I do not see the MDA causing a problem in relation to that.

Robert Key: Professor Sands, do you agree with that?

Q309 Chairman: Hold on. Professor Greenwood, you said the reference was to the platform rather than to the submarine itself. What the President said on 7 December 2006 was, "In this context the United States fully supports and welcomes the intention of the United Kingdom to participate in the life extension programme for the Trident II D5 missile", so that is more than just the platform, is it not?

Professor Greenwood: Yes. The MDA renewal is more than just the platform. It was the particular passage that Mr Key quoted just now that I was referring to. I understood the question to me to be, "Does this statement by the Prime Minister and its acceptance by the President raise legal implications under the NPT?", and I think the answer to that is plainly no.

Professor Sands: I had not seen this until right now. I would simply like to know what do the words "on other aspects of future submarine platforms" mean. I come back to the point I made earlier. It is a matter of considerable regret but words used by the Prime Minister may not necessarily have the meaning which the reasonable person in the street would come to and it would be nice to know what he meant.

Q310 Mr Havard: Can I ask a question that might seem a bit odd? It is essentially about vicarious liability. Say, for example, that we have got Britain and the US as signatories to all of these things and there is a level of collaboration and co-operation, extended or otherwise. The United States goes off and does something independently. It seems we as the UK are not culpable in any sense of having stepped outside our obligations in relation to the treaty or anything else in helping someone else acquire nuclear weapons. It is a debate, for example, that the United States may well be. Where does that leave us in relation to our collaboration with the processes of nuclear development? If we have got a direct relationship with them and they strike a relationship which is not allowed do we have any vicarious liability, other than morally, politically or otherwise? Do we legally have any liability?

Professor Greenwood: It is not termed "vicarious liability" in international law but there are circumstances in which one state may be liable for a wrongful act by another. In my view you would have to have a much greater degree of proximity to the wrongful act than we are talking about here. Co-operation in the development of a weapon does not in my view make one liable for the subsequent use of that weapon. An example of where a state would perhaps be liable for a wrongful act by another state is if it allowed a base on its territory to be used for a specific operation, such as American planes flying from a British air base

to attack a particular target. That is capable of making the United Kingdom liable. The fact that the United Kingdom enters into a basis agreement in my view would not be.

Q311 Chairman: Professor Grief, would you agree with that?

Professor Grief: I agree.

Chairman: On that note of harmony and agreement I think we ought to draw this session to a close unless there are any further questions.

Mr Hamilton: Chairman, this is an observation more than anything else. Listening to the evidence session this morning, when it comes to weighing up the arguments as politicians there will be some for and some against, and I will probably be in a minority in this company but hopefully a majority in our place. At the end of the day, listening to legal opinion, surely we should just weigh that as one other option we have to think about in the process we are going through about Trident. If we sit down and listen to legal opinion it is divided and therefore as we make up our minds as politicians it should only be seen as one aspect of the whole argument and the moral aspect as well.

Chairman: I think we would all agree with that.

Linda Gilroy: We are all agreed on that.

Chairman: Further harmony then, and I declare this meeting closed.