

**Peacerights**  
**BASIC**  
**and**  
**the Acronym Institute for Disarmament Diplomacy**

**Mutual Defence Agreement and the Nuclear Non-Proliferation Treaty**

**JOINT ADVICE**

**Introduction and Summary of Advice**

1. We are asked to advise BASIC (the British American Security Information Council), the Acronym Institute for Disarmament Diplomacy and Peacerights. The question on which our advice is sought is whether the UK is in breach of the Nuclear Non-Proliferation Treaty (NPT) by its renewal of the Mutual Defence Agreement (MDA) with the USA. This raises a number of interlocking questions of treaty law including the relationship between the two treaties; interpretation of their terms; the status of the documents of the Review Conferences; and the meaning of breach of international obligations.
2. In our view, for the reasons set out below, it is strongly arguable that the renewal of the Mutual Defence Agreement is in breach of the nuclear Non-Proliferation Treaty.

**Applicable Treaty Law**

3. The principles relating to the law of treaties are largely codified in the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS (VCLT). The United Kingdom is a party to the VCLT (ratified 25 June 1971), which came into force 27 January 1980. The VCLT does not have retroactive effect (article 4) and therefore does not apply to the original MDA, 1958, although it does so with respect to renewals subsequent to the coming into force of the VCLT. The VCLT does not apply to the NPT, which came into force on 5 March 1970.
4. However some provisions of the VCLT have been explicitly accepted as constituting customary international law, including those on material breach and interpretation. (E.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970)* 1971 ICJ Rep. 16, 47; *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* 1974 ICJ Rep. 3, para. 36). Whether the provisions on successive treaties constitute customary international law has not been explicitly addressed, for example by the International Court of Justice but it is widely accepted that the Convention '*constitutes the basic framework for any discussion of the nature and characteristics of treaties.*' (Shaw, *International Law*, 5th ed. 2003, 811). Brownlie states that '*certainly those provisions which are not [declaratory of existing law] constitute presumptive evidence of emergent rules of general international law.*' (Brownlie, *General Principles of*

*International Law*, 5th ed. 1998, 608). The United States is not a party to the VCLT but does accept the position that it restates much existing law.

### Successive Treaties

5. It is first necessary to determine the temporal relationship between two possibly inconsistent treaties. The MDA was agreed in 1958, prior to the NPT, which was adopted by the General Assembly (GA), on 12 June 1968 and came into force on 5 March 1970. However the MDA has been subject to renewal, most recently in 1994. Renewal of the MDA constitutes a new treaty for the purposes of domestic law procedures for its adoption. (Senior Research Clerk, International Affairs and Defence Section, House of Commons Library: *'The Amendment was a treaty itself, and hence it was subject to normal treaty law and practices.'* (Bundle, Tab 1, p. 8). It is accordingly also to be regarded as a new treaty for the purposes of international law.
6. The NPT was indefinitely and unconditionally extended by the Review and Extension Conference on 11 May 1995. This was not a renewal of the Treaty (thereby implying a new Treaty) but rather an extension of the existing Treaty in accordance with its own terms: Article X (2).
7. Thus, originally, the NPT succeeded the MDA. However, after renewal of the MDA it succeeded the NPT.
8. The VCLT has provisions on the relationship between successive treaties on the same subject matter, which are, however, complex and difficult to apply. Article 30 is the first relevant provision. This states that
  1. *... the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.*
  2. *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*
  3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*
9. The first question is whether the MDA and the NPT are on the same subject matter. This is not clear. The expression *'relating to the same subject matter'* *'must be construed strictly.'* (I. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, 98). In particular Sinclair states that it *'will not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.'*
10. The MDA rests upon bilateral defence and security through *'cooperation on the uses of atomic energy for mutual defense purposes'*. Its preamble notes that both countries have made substantial progress in the development of atomic weapons and its provisions relate to nuclear materials, atomic weapons and atomic energy. It is based upon the maintenance of nuclear weapons for security purposes. The NPT is a non-proliferation and disarmament treaty. It accepts the existence of nuclear weapon states but ultimately sees disarmament as the goal, with again the focus on security. It seems that although the approaches are different the subject matter could be argued to be essentially the same. This appeared to be the view of certain states, for example Mexico, at the 1995 Review and Extension Conference (Bundle, Tab 1, p. 26).

11. The NPT makes no reference to the MDA (or other bilateral agreements) so VCLT, article 30 (2) is not applicable. VCLT, article 30 (3) applies where all the parties to the earlier treaty are parties to the later treaty, which is the case of the MDA and the NPT. In such circumstances, unless the first treaty is terminated (which is not the case in light of its continued operation and renewal), the earlier treaty remains in force and is applicable *to the extent* that its provisions are compatible with the earlier treaty. Article 30 (3) does not draw any distinctions between bilateral and multilateral treaties. It is clear that the parties to a bilateral treaty are bound by their obligations to the other parties to that multilateral treaty by the terms of that multilateral treaty.
12. After the renewal of the MDA it became the treaty later in time. The VCLT, article 41 applies to agreements between some but not all parties to a multilateral treaty that modify the terms of the multilateral treaty. It states that
  1. *Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:*
    - (a) *the possibility of such a modification is provided for by the treaty; or*
    - (b) *the modification in question is not prohibited by the treaty and:*
      - (i) *does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;*
      - (ii) *does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.*
13. Such agreements *inter se* are therefore permissible only if they do not affect the enjoyment by other treaty parties of their rights under the multilateral treaty, or it does not relate to a provision essential to the effective execution of the object and purposes of the treaty.

## **Breach of Treaties**

### **Law of State Responsibility**

14. Questions of breach of a treaty are determined both by treaty law and by the principles on state responsibility. The International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (GA Res. 56/83, 12 December 2001), article 12, defines the existence of a breach of an international obligation as occurring '*when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*' The International Court of Justice has asserted that such breach includes '*failure to comply with treaty obligations.*' (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, para. 57). Whether there has been such failure is determined by asking whether the behaviour in question '*was in conformity*' with the treaty requirements (J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, 2002) 125).
15. It is therefore necessary to determine what action is required by the NPT and whether the actions of the UK are in conformity with it. In order to determine this it is necessary to interpret both the NPT and the MDA, in its latest version.

### **Principles of Treaty Interpretation**

16. The VCLT provides the basic principles of treaty interpretation that are widely accepted as constituting customary international law (*Indonesia/Malaysia case*, 2002

ICJ Reports 3, para 37; *Libya/Chad* case, 1994 ICJ Reports, 6, 21-2; *Qatar/Bahrain* case, 1995 ICJ Reports 6, 18). VCLT, article 31 (1) provides that '*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*'

17. There are two events that may be relevant to interpreting the requirements of the NPT: the initial negotiation history and the subsequent Review Conferences. The two of course reflect very different moments in time. The former evidence the intentions of the original treaty parties and reflect the cold war politics of the time while the latter reflect the ongoing concerns of the parties. An important question is what weight should be given to each of these.
18. The Review Conferences take place in accordance with the terms of the NPT itself. The NPT, Article VIII (2) provides for the holding of a Conference of Parties to the Treaty 'to review the operation of this treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised.' The provision for a Review Conference is separate from both the articles for amendment (article VIII (1)) and for extension. The objective of the Review Conference is thus to determine whether the purposes of the Treaty (as expressed in the preamble) and its provisions are being complied with.
19. A Declaration of the Review Conference thus does not have formally legally binding effect (it is not a formal amendment to the Treaty in the terms of article 8 (1)) but it may have juridical significance '*especially as a source of authoritative interpretation of the treaty.*' (B. Carnahan, 'Treaty Review Conferences', 81 *American Journal of International Law* (1987) 226, 229). The VCLT requires that the words of a treaty are interpreted in their context and in the light of its object and purpose. The NPT, article VIII (2), makes explicit that the purposes of the Treaty are to be found in the preamble ('*assuring that the purposes of the preamble...*'), in effect bringing the preamble into the text.
20. The preamble of a treaty is in any case part of the treaty's context for the purpose of interpretation. The VCLT, article 31 (2) states that '*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...*' Further VCLT, article 31 (3), specifies that: '*There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...*' A Declaration of a Review Conference such as that adopted by consensus would fall within the wording of article 31 (3) (a) and is thus an appropriate source of interpretation of the obligations of the NPT.
21. Reference to the use that can be made of a treaty's *travaux préparatoires* (preparatory work) is made in VCLT, article 32. Article 32 states that '*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*'
22. Article 32 makes preparatory work relevant only as a secondary source of interpretation, to be referred to when there is ambiguity, or where the approach under article 31 leads to a manifestly absurd or unreasonable result. This is a lesser status than that accorded to the preamble and any subsequent agreement between the parties by article 31. This is confirmed by the heading given to each of the two articles. Article 31 is headed '*General rule of interpretation*' while article 32 is headed '*Supplementary means of interpretation.*'

23. Accordingly, greater weight should be given to the Declarations of the Review Conference than to the preparatory work of the NPT in determining the scope of obligations under the Treaty text today.

### Determination of Breach

24. The relevant part of NPT, article 1 provides that: *'Each nuclear weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices indirectly or indirectly...'*
25. A number of commentators have argued that the MDA does not violate the NPT, article 1. The MDA, article V (B), is on its face in conformity with article 1 in that it states that 'there will be no transfer by either party of atomic weapons' (but makes no mention of nuclear explosive devices). The NPT has no definition section so neither *'nuclear weapons'* nor *'nuclear explosive devices'* are defined. The article may be seen as permissive rather than prohibitive in that it lists only what is not allowed. In the words of Dean Rusk: *'The treaty deals only with what is prohibited, not what is permitted.'*
26. Dean Rusk asserted that the NPT *'does not deal with, and therefore does not prohibit, transfer of nuclear delivery vehicles, or delivery systems, ... so long as such transfer does not involve bombs or warheads. It does not deal with allied consultations and planning on nuclear defense so long as no transfer of nuclear weapons or control over them results.'* (Senate Foreign Relations Committee, Hearings on the Treaty on the non-Proliferation of Nuclear Weapons' 90th Cong. 2nd Session, 5-6 (1968)).
27. The drafters *'intended to exclude nuclear delivery and military propulsion systems' and to limit the term 'nuclear weapon' to 'only one aspect of nuclear weapons capability, namely the warhead or bomb.'* (M. Willrich, 'The Treaty on Non-proliferation of Nuclear Weapons: Nuclear Technology Confronts World politics', 77 *Yale Law Journal* (1968) 1447, 1464). Article 1 does not prohibit the transfer of delivery systems such as missiles or aircraft that are merely capable of being equipped with nuclear warheads, nor the transfer of a nuclear reactor intended to provide the propulsion system for a submarine. This interpretation adopted by the US *'has not been challenged, at least publicly by other parties to the NPT.'* (J. Woodliffe, 'Nuclear Weapons and Non-Proliferation: The Legal Aspects', in I. Pogany (ed.), *Nuclear Weapons and International Law*, 1987, 84, 89). This comment was made in 1987 before the Review and Extension Conference 1995 and the Review Conference 2000. It raises the question whether other states parties are bound by this interpretation through their acquiescence and failure to protest. The failure to get any final document agreed in 1995 that incorporated objections to the interpretation of article 1 raised in the draft report from Main Committee 1 (Bundle, Tab 1, p. 25) is consistent with that view.
28. Assistance that does not amount to actual direct or indirect transfer of nuclear weapons or nuclear explosive devices (depending upon the interpretation given to those words) does not therefore contravene the wording of article 1. The prohibition in article 1 on nuclear weapons states assisting, encouraging or inducing the manufacture or acquisition of nuclear weapons or other nuclear explosive devices applies only to non-nuclear states. *'This leaves open the possibility that nuclear-weapon states could "assist" each other in ways that do not amount to transfer, again leading commentators to suggest that article 1 is not breached by the MDA.'* (M. Willrich, 'The Treaty on Non-proliferation of Nuclear Weapons: Nuclear Technology Confronts World politics', 77 *Yale Law Journal* (1968) 1447, 1477).
29. However, obligations under the NPT, article VI, need also to be considered. Article VI states: *'Each of the parties to the Treaty undertakes to pursue negotiations in good*

*faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective control.'*

30. Article VI is the '*only treaty provision in which NWS have undertaken a legal obligation to negotiate nuclear disarmament agreements.*' (M. Marin Bosch, 'The Non-Proliferation Treaty and its Future', in L. Boisson de Chazournes and P. Sands, eds, *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 375, 388). '*It is important to note that the NPT is the only existing international treaty under which the major nuclear powers are legally committed to disarmament.*' (T. Rauf, 'Nuclear Disarmament: Review of Article VI', in J. Simpson and D. Howlett (eds), *The Future of the Non-Proliferation Treaty*, 1995, 66,67). It is '*the single most important provision of the treaty, however, from the standpoint of long-term success or failure of its goal of proliferation prevention.*' (E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 *American Journal of International Law* (1969) 711, 732).
31. India, Brazil, Scandinavian states, Canada, the then UAR and Germany '*brought strong pressure upon the Co-chairmen to obtain some statement within the treaty concerning nuclear disarmament.*' (E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 *American Journal of International Law* (1969) 711, 733). The August 1967 draft included reference to 'cessation of the arms race' in its preamble. An earlier version of Article VI was included within the body of the Revised Draft Treaty on Nonproliferation of Nuclear Weapons, 18 January 1968. Sweden in particular insisted on strengthening Article VI by broadening the commitment of the nuclear weapon states (NWS) to seek disarmament agreements. In the GA debate on the draft treaty further objections were made to the lack of 'tangible commitment to nuclear disarmament by NWS (for example by Brazil, India). Article VI was further revised before its inclusion in the adopted Treaty. (E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 *American Journal of International Law* (1969) 711, 716-721).
32. The drafting history is important as it shows the linkage between the commitment of non-nuclear states to non-proliferation and the obligations on nuclear weapon states to nuclear disarmament. Article VI was an integral part of the NPT package, not just an 'add-on'. Its importance to the objectives of the treaty is indicated by the Preamble, paras 8-12. These include the '*intention to achieve at the earliest possible date the cessation of the nuclear arms race*' and '*to undertake effective measures in the direction of nuclear disarmament.*'
33. The 1995 Review and Extension Conference did not lead to the '*specific commitments towards genuine nuclear disarmament within a concrete time frame*' sought by a number of non-nuclear states leading to the conclusion from one commentator that in 1995 '*it ceased to be a tool for nuclear disarmament.*' (M. Marin Bosch, 'The Non-Proliferation Treaty and its Future', in L. Boisson de Chazournes and P. Sands, eds, *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 379, 383).
34. However the Final Document of the Review Conference 2000 (without the leverage of non-nuclear weapon states in threatening non-extension) reiterated the importance of the commitment to disarmament in a number of its statements. For example in its Review of the operation of the treaty the Conference noted the overwhelming majority of States entered into their legally binding commitments not to acquire nuclear weapons 'in the context, *inter alia* of the corresponding legally binding commitments by the nuclear weapon states to nuclear disarmament in accordance with the Treaty.' (Bundle, Tab 6, p. 3). Further the Conference reaffirmed that the 'strict observance' of the provisions of the Treaty remains central to achieving the shared objectives of preventing under any circumstances, the further proliferation of nuclear weapons and preserving the Treaty's vital contribution to peace and security.

35. The Review Conference also agreed practical steps for systematic and progressive efforts to implement NPT, Article VI: Step 6 'An unequivocal undertaking by the NWS to accomplish total elimination of their nuclear arsenals leading to nuclear disarmament under article VI'. Step 9: Steps by all NWS 'leading to nuclear disarmament in a way that promotes international stability ... increased transparency by the NWS with regard to the nuclear weapons capabilities ... concrete agreed measures to further reduce the operational status of nuclear weapons systems.' (Bundle tab 6, p. 18).
36. Thus the importance of Article VI to the objects and purposes of the NPT is shown both by the negotiation history of the NPT and by the reaffirmation of its significance by the 2000 Review Conference. The Review Conference also emphasised that strict observance of the NPT is required, that is observance with both the letter and spirit of its articles.
37. In addition in 1996 the ICJ in an Advisory Opinion unanimously asserted that:
- There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control.*  
(*Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Rep. Para. 105 (2) (F)).
38. In the view of one commentator the Court has broadened the scope of Article VI from being just a 'code of conduct'. Marin Bosch states that '*The Court recognises that the provisions of Article VI... go beyond mere obligations of conduct - to pursue nuclear disarmament negotiations in good faith - and actually involve an obligation of result, i.e., to conclude those negotiations.*' (M. Marin Bosch, *The Non-Proliferation Treaty and its Future*, in L. Boisson de Chazournes and P. Sands, eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 375).
39. Assertions about the importance of renewal of the MDA are not in conformity with the obligations of Article VI and the commitments made in the 2000 Review Conference. The MDA itself, as amended 1994, article 3 *bis* is directed towards '*improving the UK's state of training and operational readiness*' (article 3 (1) (2)) and '*improving the UK's atomic weapon design, development or fabrication capability.*' (article 3 (3) *bis*). These both imply continuation and indeed enhancement of the nuclear programme, not progress towards its discontinuation.
40. Similarly, in his Message to Congress on the renewal of the MDA, President Bush wrote '*that the United Kingdom intends to continue to maintain viable nuclear forces... I have concluded that it is in our interest to continue to assist them in maintaining a credible nuclear force.*' (Bundle, Tab 3). It is noticeable that the only reference to compliance with the law in this statement is to statutory, not treaty, law.
41. This statement for the partner in the MDA is indicative of the UK's position that is supported by statements from the UK. For example the Strategic Defence Review, New Chapter July 2002 states that '*The UK's nuclear weapons have a continuing use as a means of deterring major strategic military threats.*' (Bundle tab 1, p. 18). The vital importance of the MDA for the advancement of the UK's nuclear weapons programme and has been recognised in the UK. Statements referring to how it has enabled '*significant advances in several areas of research*' and how joint activity under the Agreement is to the '*benefit of the nuclear weapons programme on both sides of the Atlantic*' are on the AWE website. (Bundle tab 1, p. 15). Another conclusion states that '*Together with the support of data and technical exchanges under the US/UK 1958 Mutual Defence Agreement ... the United Kingdom was able to put warhead systems into service with far fewer nuclear tests than any other Nuclear Weapon States.*' (Experimental Hydrodynamics, Discovery Issue 5, AWE July 2002, bundle tab 1, p. 16).

42. These statements make it clear that the MDA is important to the UK's ongoing nuclear programme. It is strongly arguable that this is not in accordance with the obligations under Article VI or the assertion of the 2000 Review Conference to take steps leading to nuclear disarmament.

### **Breach of Treaty under the VCLT**

43. The analysis has proceeded under the definition of breach provided by the International Law Commission's Articles on State Responsibility. The issue of breach is also included in the VCLT. However the VCLT deals only with 'material' breach. The Articles on State Responsibility provisions are not limited to material breach and are applicable to any lesser breach of a treaty.
44. Thus in addition to determining whether the UK is in breach of the obligations of the NPT, we should also consider whether such behaviour amounts to material breach.
45. The VCLT, article 60 (3) defines a material breach as occurring in one of two ways: '*A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.*'
46. The UK has not repudiated the NPT and has indeed reaffirmed it. For example the Foreign Secretary, stated on 3 February, 2004 that '*The UK remains committed to the NPT which we regard as the cornerstone of the global non-proliferation and disarmament regime.*' (Bundle tab 1, p. 18).
47. Therefore, if there is any material breach it must be under VCLT, article 60 (3) (b), that is whether there is behaviour that violates a provision '*essential to the accomplishment of the object or purpose of the treaty.*' The objects of the NPT as spelled out in the preamble include the '*prevention of the wider dissemination of nuclear weapons*' and '*to undertake effective measures in the direction of nuclear disarmament*'. Both articles I and VI are essential to the accomplishment of these objects and, as discussed above, are integrally linked. The non-nuclear weapon states required commitments from the nuclear weapon states as part of their willingness to accept non-nuclear status.

### **Consequences of Breach**

48. Under the International Law Commission's Articles on State Responsibility. Article 1, '*[a]n internationally wrongful act of a State [including breach of a treaty] entails the international responsibility of that State.*' Article 30 spells out the consequences of violation:

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

49. The following articles spell out requirements for compensation. The VCLT provides further consequences of material breach. Under VCLT, article 60 (2) determination of material breach of a multilateral treaty '*entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties.*' However performance and compliance are what is required,

not termination of the Treaty either as between all parties or between other parties and the UK.

### **Effect of non-renewal of the MDA**

50. The MDA does not provide for renewal but rather article XII states that it will remain in force until '*terminated by Agreement of both parties*' (with particular provisions for article II). Article III *bis* has time limits written into it (31 December 2004). Accordingly if this provision is not terminated it will automatically lapse. The new (renewed treaty) would not come into force until ratified by both parties and accordingly the existing treaty would remain in force until then but without the various transfers provided for in article III *bis* '*prior to 31 December 2004.*' Article II may be terminated unilaterally on one year's notice to the other party.

### **Use of the Royal Prerogative**

51. The use of the royal prerogative for the renewal of the MDA is appropriate. This is because the power to make treaties, including their renewal, is vested in the Crown as part of the Royal Prerogative and is exercised, according to constitutional convention, on the advice of ministers. '*The Crown retains its hitherto undoubted powers to make and ratify treaties.*' (A. McNair, *The Law of Treaties*, 1961, 68; *Oppenheim's International Law*, 1992, vol 1, 1226-8).
52. The Crown cannot change domestic law without the consent of Parliament. This is why treaties do not create rights and obligations within the domestic legal system unless and until they are introduced into it by Act of Parliament: *R v Lyons* [2003] 1 AC 976. However, the consent of Parliament is not required to make or ratify treaties so as to render them binding at the level of international law.
53. With respect to the application of the Ponsonby Rule, which has since the 1920s established a practice of laying a draft treaty before Parliament for 21 days before it is ratified by the Crown, this is not binding as a matter of law but is of obvious importance to Parliament itself. It provides a sound basis for members of Parliament to call for debate on the renewal of the MDA, especially since, in accordance with our advice, it is strongly arguable that renewal would breach the UK's obligations under the NPT.
54. If we can be of further assistance, those instructing us should not hesitate to contact us again.

**Rabinder Singh QC Professor Christine Chinkin**

**Matrix  
20 July 2004**