Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2001

Part Three. Judicial decisions on questions relating the United Nations and related intergovernmental organizations

Chapter VII. Decisions and advisory opinions of international tribunals

Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

Arbitration Tribunal constituted by the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization to consider the question of the tax regime governing pensions paid to retired UNESCO officials residing in France

AWARD

The Arbitration Tribunal composed of:

Mr. Kéba Mbaye, *Presiding Arbitrator*

Mr. Jean-Pierre Quéneudec, *Arbitrator*

Mr. Nicolas Valticos, *Arbitrator*

After deliberation, *makes the following award:*

1. On 2 July 1954, the French Republic and the United Nations Educational, Scientific and Cultural Organization (UNESCO) signed an agreement regarding the headquarters of UNESCO and its privileges and immunities on French territory (hereinafter "Headquarters Agreement" or the "Agreement"). Article 22 of that Agreement, entitled "Officials and experts", states:

> "Officials governed by the provisions of the Staff Regulations of the Organization
>
> "(*a*) Shall be immune from legal process in respect of all activities performed by them in their official capacity (including words spoken or written);
>
> "(*b*) Shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization;
>
> "(*c*) Subject to the provisions of article 23, shall be exempt from all military service and from all other compulsory service in France;
>
> "(*d*) Shall, together with their spouses and the dependent members of their families, be exempt from immigration restrictions and registration provisions relating to foreigners;
>
> "(*e*) Shall, with regard to foreign exchange, be granted the same facilities as are granted to members of diplomatic missions accredited to the Government of the French Republic;
>
> "(*f*) Shall, together with their spouses and dependent members of their families, be accorded the same facilities for repatriation as are granted to members of diplomatic missions accredited to the Government of the French Republic in time of international crisis;

"(*g*) Shall, provided they formerly resided abroad, be granted the right to import free of duty their furniture and personal effects at the time of their installation in France;

"(*h*) May temporarily import motor cars free of duty, under customs certificates without deposits."

2. The Agreement was thus signed following the decision to establish the headquarters of UNESCO, a specialized agency of the United Nations, in Paris.

3. A number of UNESCO officials subsequently decided to reside in Paris after retirement. It appears that 1,867 retired UNESCO officials have a mailing address in France, and in addition 1,877 beneficiaries of retired UNESCO officials reside in France.

4. UNESCO does not have its own staff pension fund. It is affiliated with the United Nations Joint Staff Pension Fund, along with a number of other organizations in the United Nations system.

The Joint Staff Pension Fund provides for a retirement benefit, early retirement benefit, deferred retirement benefit, disability benefit, child's benefit, widow's or widower's benefit, secondary dependant's benefit, withdrawal settlement or residual settlement.

Enrolment in the Fund is not mandatory, although it is rare that staff members do not participate. However, at the time of recruitment a staff member may opt out. This provision is mentioned in the UNESCO Staff Regulations and Staff Rules.

5. The full title of the 1954 Agreement is the "Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory".

The third preambular paragraph of the Agreement reads as follows:

"*Desiring* to regulate, by this Agreement, all questions relating to the establishment of the permanent headquarters of the United Nations Educational, Scientific and Cultural Organization in Paris and consequently to define its privileges and immunities in France".

6. Prima facie, therefore, it would seem that the purpose of the Agreement with respect to privileges and immunities was to define those accorded to UNESCO in France. However, the Agreement could not deal only with headquarters questions. At that time, France had not acceded to the Convention on the Privileges and Immunities of the Specialized Agencies of 1947. It was therefore necessary, as France notes, for the two Parties to include provisions in the Headquarters Agreement relating to the privileges and immunities to be enjoyed by officials of UNESCO.

7. Relations between France and UNESCO have been generally trouble-free. Nevertheless, it appears that differences between the Parties emerged between 1975 and 1980 concerning the interpretation and application of article 22(*b*) of the Agreement. Its deliberations up to now do not enable the Tribunal to ascribe the emergence of the dispute either to a reversal of French practice or, on the contrary, to the implementation of a stated policy by the authorities. However, it seems to the Tribunal that there was a period during which circumstances were such that a difference on the question now at issue between UNESCO and France arose between the Parties to the 1954 Agreement.

* * *

8. Be that as it may, a dispute did definitely arise in the 1980s and 1990s over the application of article 22(*b*) of the 1954 Agreement. The subparagraph reads as follows:

> "Officials governed by the provisions of the Staff Regulations of the Organization
>
> "(*a*) . . .
>
> "(*b*) Shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization".

The dispute concerns the interpretation of the above-cited provisions.

9. The view of UNESCO is that ". . . article 22(*b*) of the 1954 Headquarters Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

10. The Tribunal will deal later with the subsidiary claim of UNESCO and what divides the parties on that issue.

11. According to France, the Headquarters Agreement governs the obligations of the host State, not the obligations of the State of residence of former officials. In that regard, it states in its counter-memorial that:

> "[A]rticle 22(*b*) of the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory . . . does not apply to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

12. In agreeing to submit their dispute to arbitration, the Parties had reference to article 29 of the Headquarters Agreement.

Article 29 of the Agreement reads as follows:

> "1. Any dispute between the Organization and the Government of the French Republic concerning the interpretation or application of this Agreement, or any supplementary agreement, if it is not settled by negotiation or any other appropriate method agreed to by the parties, shall be submitted for final decision to an arbitration tribunal composed of three members; one shall be appointed by the Director-General of the Organization, another by the Minister of Foreign Affairs of the Government of the French Republic and the third chosen by those two. If the two arbitrators cannot agree on the choice of the third, the appointment shall be made by the President of the International Court of Justice.
>
> "2. The Director-General or the Minister of Foreign Affairs may request the General Conference to ask an advisory opinion of the International Court of Justice on any legal question raised in the course of such proceedings. Pending an opinion of the Court, the two parties shall abide by a provisional decision of the arbitration tribunal. Thereafter, this tribunal shall give a final decision, taking into account the advisory opinion of the Court."

In accordance with that article, the Parties set up an Arbitration Tribunal ("the Tribunal") composed of three members. UNESCO appointed Mr. Nicolas Valticos and France appointed Mr. Jean-Pierre Quéneudec. These two arbitrators chose a third, Mr. Kéba Mbaye, to serve as presiding arbitrator.

13. The Parties then signed an agreement to arbitrate the dispute ("Arbitration Agreement") on 19 April 2001 in Paris. Article II of the Arbitration Agreement defined the mandate of the Tribunal as follows:

> "Ruling in accordance with international law and in particular with international civil service law, the Tribunal is asked to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund."

14. With the approval of the parties, the Tribunal adopted a mission statement, part III of which summarizes the matter in these terms:

> "The Parties, being unable to agree as to the application of the Agreement between France and UNESCO regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory signed in Paris on 2 July 1954 (the 'Agreement'), decided to establish an arbitration tribunal to resolve the dispute. The Arbitration Agreement signed on 19 April 2001 in Paris by the Parties stipulates in article II that, '[r]uling in accordance with international law and in particular with international civil service law, the Tribunal is asked to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund'."

15. Each Party appointed an agent. UNESCO appointed Mr. Stany Kol and France appointed Mr. Ronny Abraham.

The place of arbitration is Paris.

The language of arbitration is French.

The Tribunal appointed Mr. Ousmane Diallo, Clerk, to assist it.

16. In accordance with the provisions of article VI of the Arbitration Agreement and part V(*c*) of the mission statement, the following pleadings were submitted during the written phase:

(*a*) Memorial by UNESCO on 16 August 2001;

(*b*) Counter-memorial by France on 12 December 2001;

(*c*) Reply by UNESCO on 12 March 2002;

(*d*) Rejoinder by France on 10 June 2002.

17. The written proceedings were declared closed by the Tribunal on 30 August 2002.

The oral proceedings were conducted in hearings in camera on 30 August 2002 in Paris.

During the hearings the following persons presented oral arguments and replies:

- On behalf of UNESCO, Mr. Stany Kol, Mr. Christian Dominice and Mr. Witold Zyss;
- On behalf of France, Mr. Ronny Abraham and Mr. Jean-Pierre Cot.

The Tribunal then commenced its deliberations on 31 August 2002.

* * *

18. The following submissions were put forward during the written proceedings and reiterated at the conclusion of the oral proceedings:

19. On behalf of UNESCO

In its memorial

- As its principal submissions:

(1) That article 22(*b*) of the Headquarters Agreement of 2 July 1954 is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) That, in consequence, retired officials are exempt from any direct tax on the said pension;

(3) That the amount of the said pension should not be considered in determining the tax rate on the income subject to direct tax;

(4) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

- As its subsidiary submissions, in the event that complete exemption is not recognized:

(1) That by application of article 22(*b*) retired officials are exempt from any direct tax on a portion of their pension which shall not be less than 70 per cent;

(2) That only the taxable portion of the pension shall be considered in determining the tax rate on the income subject to direct tax;

(3) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

In its reply

- As its principal submissions:

(1) That article 22(*b*) of the Headquarters Agreement of 2 July 1954 is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) That, in consequence, retired officials are exempt from any direct tax on the said pension;

(3) That the amount of the said pension should not be considered in determining the tax rate on the income subject to direct tax;

(4) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

- As its subsidiary submissions, in the event that complete exemption is not recognized:

(1) That by application of article 22(*b*) retired officials are exempt from any direct tax on a portion of their pension, which shall not be less than 70 per cent;

(2) That only the taxable portion of the pension shall be considered in determining the tax rate on the income subject to direct tax;

(3) That the withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

20. On behalf of France

In its counter-memorial [it asked the Tribunal]:

(1) To find that article 22(*b*) of the Agreement of 2 July 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) To hold that it is not a matter for the Tribunal to decide whether there exists a general rule of international law exempting from tax the pensions paid to former international civil servants;

(3) Subsidiarily, to find that in any event there is no general rule of international law requiring France to exempt from tax the retirement pensions paid to former UNESCO officials residing in its territory;

(4) To reject the subsidiary submissions of UNESCO regarding the exemption of a portion of the retirement pension.

In its rejoinder [it asked the Tribunal]:

(1) To find that article 22(*b*) of the Agreement of 2 July 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund, whether that pension is paid periodically or in the form of a withdrawal settlement in lieu of all or part of the pension;

(2) To reject the subsidiary submissions regarding the exemption of a portion of the retirement pension as having no basis in law.

* * *

21. During the oral proceedings, each of the Parties reiterated its final written submissions and developed them.

After closure of the hearings, France distributed the notes of the oral arguments of Mr. Ronny Abraham and Mr. Jean-Pierre Cot.

On the instructions of the Tribunal, the Clerk advised UNESCO that it too was allowed to transmit to the Tribunal the notes of its oral arguments. That was done. UNESCO transmitted its notes by letter dated 3 September 2002. Previously, it had furnished the Tribunal and the other Party with a document containing its submissions as set out in its reply.

* * *

22. The Tribunal, having been authorized by the Parties to determine its own procedure, subject to the provisions of the Arbitration Agreement, and to decide any question concerning the conduct of the arbitration, indicated that "it would, if necessary, to determine a question of procedure, resort mutatis mutandis to the rules applicable to the International Court of Justice". The Tribunal takes "rules" to mean not only the Statute of the International Court of Justice and its Rules of Court but also the Resolution concerning the Internal Judicial Practice of the Court, the Tribunal being empowered to interpret the phrase "mutatis mutandis".

* * *

23. The question submitted to the Tribunal is as follows: the Parties have asked it:

> ". . . to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

24. Although the Parties agree on the definition of the point in dispute and the general jurisdiction of the Tribunal, their positions nevertheless diverge on some points.

25. In the view of UNESCO, the Tribunal should arrive at its interpretation according to the rules and principles now prevailing, as it would in interpreting agreements that in one way or another concern international civil servants; and if two different interpretations are possible, it should choose the one that is consistent with the rules and principles that apply in the legal realm of international organizations and that govern their agents.

26. France declares itself in agreement with that statement.

27. In the view of UNESCO, the Tribunal should carry out its mandate within the limits of article II of the Arbitration Agreement, but taking into consideration everything it mentions. There is an important component of the definition of its mandate that the Tribunal may not neglect. It must decide what is meant by the phrase in the Arbitration Agreement, "ruling in accordance with international law and in particular with international civil service law".

UNESCO adds, with reference to the scope of application of the Headquarters Agreement, that article 22(*b*) should be understood in the light of the state of the economy and the content of the Agreement.

28. In the view of France, the question at hand is the applicability of article 22(*b*) to a specific situation, and the Headquarters Agreement sets forth the obligations of the host State of UNESCO, not those of the State of residence of former UNESCO officials.

France stresses that the object and purpose of the Agreement, as a headquarters agreement, is to specify the conditions under which UNESCO is to operate in French territory, rather than to regulate the tax position of former UNESCO officials.

France, then, draws a distinction between the host State and the State of residence and their different obligations, a point that UNESCO notes but argues is irrelevant to the case in hand. In the view of France, it is not the task of the Tribunal to determine whether there exists a general rule of international law requiring any State in which a former international civil servant resides to exempt such a person from tax on his or her retirement pension.

29. UNESCO is in agreement on the latter point.

30. In short, France considers it sufficient to decide whether article 22(*b*) is meant to apply only to active officials or to former officials as well.

France thus urges the Tribunal to consider the issue of its jurisdiction and to speak solely to the question of the applicability of article 22(*b*) of the 1954 Agreement to former UNESCO officials.

31. The positions of the Parties have therefore moved closer together but are not identical on every point.

UNESCO objects that France would limit the Tribunal's reliance on international law and in particular international civil service law merely to the rules of treaty interpretation. Recalling a recent judgment of the International Court of Justice in

the case concerning *Kasikili/Sedudu Island* (*Botswana/Namibia*) (Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1045), UNESCO cites article I of the arbitration agreement in that case and points out that the Court, responding to Botswana's argument that the reference to the "rules and principles of international law" covered only the "rules and principles of treaty interpretation", notes:

> "Even if there had been no reference to the 'rules and principles of international law', the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty. It can therefore be assumed that the reference expressly made, in this provision, to the 'rules and principles of international law', if it is to be meaningful, signifies something else. In fact, the Court observes that the expression in question is very general and, if interpreted in its normal sense, could not refer solely to the rules and principles of treaty interpretation." (*I.C.J. Reports 1999*, p. 1102).

On that basis, UNESCO argues that the Tribunal should ascribe the proper meaning to the opening phrase of article II of the Arbitration Agreement, following the principle that the terms used by the Parties in a treaty provision should be interpreted in accordance with their ordinary meaning.

However, in the present dispute, "UNESCO acknowledges that the expression appearing in article II of the Arbitration Agreement has a special meaning". According to UNESCO, the article is structured somewhat differently from article I of the arbitration agreement between Botswana and Namibia.

Lastly, UNESCO merely maintains that the expression used in article II of the Arbitration Agreement in the present case "sheds light on the interpretation to be given to article 22(*b*) of the Headquarters Agreement". UNESCO does not claim that there is a legal basis other than article 22(*b*) of the Headquarters Agreement on which the Tribunal could formulate the answer to the question put to it. Moreover, UNESCO denies that it has invoked an alleged custom regarding former officials.

Therefore, on the point discussed above, the Parties are in agreement.

France for its part concludes its arguments by maintaining that "nothing prevents a host State from assuming obligations in the headquarters agreement that are not connected with the functioning of the organization". Moreover, it acknowledges that international agreements may create subjective rights for former officials. It points out, however, that, the organization may be bound by certain obligations (such as reimbursement by the United Nations of the tax collected on pensions of former officials) without there being a parallel obligation on the member States, since the "internal rules of the international organization are not ipso facto binding on member States".

* * *

32. It is not disputed that the Tribunal should interpret article 22(*b*) "in accordance with international law and in particular with international civil service law".

33. To do so raises a series of questions, which the Tribunal will examine one at a time.

First of all, the Tribunal must examine its mandate and determine the limits of its jurisdiction, as the Parties have asked it to do.

34. In its memorial, speaking of the Tribunal's mandate, UNESCO argues:

> "[A]rticle 22(*b*) of the Headquarters Agreement, the scope of application and effects of which the Tribunal is asked to determine in article II of

the Arbitration Agreement, stipulates that the salaries and emoluments paid to UNESCO officials shall be exempt from taxation. The appropriate interpretation to be given to this provision will later be thoroughly examined. What should be emphasized here is that the reference to article 22(*b*) definitely covers the tax regime on retirement pensions in all its aspects. The Tribunal thus has full powers to assess the matter."

35. In its counter-memorial France states:

"The Tribunal does not have a mandate to rule definitively on the tax regime on retirement pensions in all its aspects, and its power to make an assessment is not unlimited."

It goes on to clarify:

"It is not its task to determine whether there exists a general rule of international law requiring any State in which a former international civil servant resides to exempt such a person from tax on his or her retirement pension."

36. In its reply UNESCO, reverting to the topic of the Tribunal's mandate, says:

"[T]he Tribunal's jurisdiction and the limits placed on it are determined by the Arbitration Agreement between the Parties and in particular by article II of that Agreement."

Hence, UNESCO, like France, considers that the Arbitration Tribunal should not exceed the jurisdiction conferred upon it by the Parties but should exercise that jurisdiction to its full extent.

* * *

37. The Tribunal notes that the Parties are ultimately in agreement that, as UNESCO puts it in its reply:

"The issue is thus the tax regime applicable to such a pension; it must be determined whether the pension should enter into the calculation of the tax that must be paid by a former official who continues to reside in the host State of the organization."

38. The question before the Tribunal, therefore, is to decide whether article 22(*b*) of the Headquarters Agreement is or is not applicable to retirement pensions. The Tribunal will focus on this question. In that regard, it observes that article 22(*b*) does not elaborate on the nature of the "salaries and emoluments" that it exempts from tax, except to state that they pertain to officials.

* * *

39. The interpretation the Tribunal is called upon to make of article 22(*b*) of the Agreement in the light of international law and in particular international civil service law is to decide whether it applies to former officials of the organization residing in France and drawing a pension.

It should be recalled that, when the parties to a dispute have signed an arbitration agreement, the scope and limits of the jurisdiction of the arbitration tribunal called upon to settle the dispute must be looked for in that agreement. The International Court of Justice recalls the principle, notably in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1985*, p. 23, para. 19).

In the present case, the Arbitration Agreement signed by the Parties has not been amended, so that the Tribunal has only to apply it as it was signed.

40. The jurisdiction of the Tribunal is clearly defined. With regard to the significance it should give to the words "ruling in accordance with international law and in particular with international civil service law", it considers that the definition of its jurisdiction, while specific, includes the obligation to apply (and thus to respect) international law and in particular international civil service law. This means that in arriving at its interpretation it cannot ignore or violate a principle or law of international law that applies to its mission. But that obligation also has limits, in that the answer to the question submitted to the Tribunal in the Arbitration Agreement is to be sought in article 22(*b*) and only there. The task of the Tribunal is not, therefore, on the basis of some principle or rule of general international law, to alter what the Parties have decided. Such an approach, reminiscent of an annulment proceeding, would clearly exceed the power that the Parties have conferred on the Tribunal in the Arbitration Agreement. That power is limited to determining, in the light of international law, what the Parties have decided and to spell it out. In other words, the power of the Tribunal does not authorize it to say that the Parties could not have taken such and such a decision because it would have been contrary to this or that principle or rule of international law, but merely to elucidate what the Parties really decided, clarifying it in the light of international law and in particular international civil service law. These are two different approaches, which the Tribunal understands that it should not confuse.

More specifically, the Tribunal wishes to clarify at the outset that it does not see its task as one of seeking and applying a principle or rule of international law that would allow it to confirm (or deny) that the retirement pension paid by the United Nations Joint Staff Pension Fund to former UNESCO officials residing in France is taxable. This is what the Parties meant by saying that they are not maintaining that there exists a legal basis for exempting retirement pensions from taxation other than article 22(*b*) of the Headquarters Agreement.

The jurisdiction of the Tribunal thus focuses on a limited aim, which is, once again, to interpret article 22(*b*). It involves determining whether the term "officials" is meant to include "retired officials" and whether the phrase "salaries and emoluments" is meant to include "retirement pensions". The answer to one of these two questions will, as we shall see below, largely determine the interpretation the Tribunal is called upon to make.

41. To answer these questions, the Tribunal must first take into account that it is interpreting a treaty. In its task of interpretation it will therefore have to apply the rule set forth in article 31 of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. That article applies in this case, as the Tribunal will explain below, despite article 4 of the 1969 Convention, which limits its scope "to treaties which are concluded by States after the entry into force of the present Convention with regard to such States".

As the International Court of Justice has had occasion to recall (*Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1059), article 31 expresses a rule of customary law. According to article 31, paragraph 1, "[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". The first thing to consider, then, is the ordinary meaning to be given to the word "officials" (*fonctionnaires*), first of all, and then to the words "salaries" (*traitements*) and "emoluments" (*émoluments*).

42. Next, in an effort to determine the intent of the Parties, the Tribunal will try to discover what they mutually intended when they framed the wording of article 22(*b*). With the same aim, it will research the subsequent practice of the Parties or any other legal element that can be taken to be an amendment of the provisions of article 22(*b*) or a mutual interpretation of its scope.

43. As indicated earlier, the claim of UNESCO is in two parts, a principal part and a subsidiary part. The Tribunal will consider the parts in that order.

44. First, the Tribunal will recall the positions of the Parties, which it summarizes as follows:

UNESCO maintains that the exemption of officials from taxation as provided in article 22(*b*) extends to retired officials residing in France.

France considers that article 22(*b*) applies only to officials in active service.

45. Article 31 of the Vienna Convention on the Law of Treaties recommends that, in interpreting a treaty, the terms of the treaty should be given their ordinary meaning "in their context and in the light of its object and purpose".

The 1954 Agreement is the UNESCO Headquarters Agreement. It should also be recalled (as mentioned earlier) that the entire text of article 22 of the Headquarters Agreement relates to "officials governed by the provisions of the Staff Regulations of the Organization".

46. The Tribunal's first step should be to determine the "ordinary meaning" of the terms employed in article 22(*b*) of the Agreement.

47. The Tribunal must first consider the meaning of the word "official". In that regard, one can say that in its current and commonly accepted meaning, the word "officials" (in the plural) does not include officials who are no longer in active service. In the Arbitration Agreement, the Parties themselves speak of "former officials". That expression does not seem, even for them, to be synonymous with "officials".

The Tribunal considers that the ordinary meaning of the word "officials" does not include former officials.

The *Petit Larousse* defines an "international official" [or "international civil servant"] as an "agent of an international organization under a statutory or specific contractual regime". According to this definition, when the agent is no longer an agent of the organization, he or she ceases to be an official. In effect, the link that endows the individual with the status of an official is broken upon retirement. It can no longer be said that the former official is governed "by a statutory or specific contractual regime". The fact that the individual may maintain certain ties to the organization, or that the staff regulations may make reference to former officials, is not sufficient reason to conclude that the person retains the status of official (or contractual staff member).

According to the *Dictionnaire de la terminologie du droit international* (edited by Jules Basdevant), Sirey, 1960, "international official" [or "international civil servant"] is a "term introduced in the modern era to designate a person who is entrusted with carrying out on a regular basis certain functions of international significance by virtue of an intergovernmental agreement on behalf and under the supervision of several States or an international organization".

The *Dictionnaire de droit international public* (edited by Jean Salmon), Bruylant, 2001, states that an "international official" [or "international civil serv-

ant"] is a "person entrusted, on the basis of an agreement among States or by an international organization, with carrying out functions of international significance on their behalf and under their supervision, on a statutory basis, for a fixed or indefinite term".

It is also useful to consider the notion of retirement. In that regard, the explanation cited below shows that the position of the official and that of the retiree (or former official) are so different as to be incompatible.

As it happens, *Le vocabulaire juridique* published by the Association Henri Capitant (edited by Gérard Cornu), Presses Universitaires de France, 1987, after defining "retirement", goes on to say that, "for military officers, *unlike civilian officials*, retirement is a statutory position characterized by the continuance of their status beyond their separation from service with the armed forces" (italics added by the Tribunal).

It therefore appears to the Tribunal that the term "officials" used in article 22(*b*) does not extend to former officials. That is its first conclusion.

48. Second, the Tribunal must consider how the words "salaries and emoluments" (*traitements et émoluments*) are to be understood.

"*Traitement*" [rendered in English as "salary"] is the word that has traditionally been used in French to refer to the remuneration associated with the performance of a civil service function, either in government or in an international organization.

The Tribunal should not make too much of the fact that in the internal rules of some organizations, including UNESCO, and in French administrative law the retirement pension is often presented as an extension of the salary. In that very line of thought, in any case, it is clear that the terms, in their ordinary meaning, are not synonymous. Moreover, even on the assumption that the modern notion of "salary benefits" includes not only the pay received during active service but also the retirement benefits, for purposes of weighing the attractiveness of the job, the Tribunal has been presented with no evidence that that would alter the ordinary meaning that should be given to the words "salaries" and "emoluments" in article 22(*b*) of the 1954 Agreement. The Tribunal is obliged to adhere to the ordinary meaning of the words, which does not include the notion of retirement pension in the context and in the light of the purpose of the Agreement. That purpose, as the Tribunal has already noted, was to set forth the privileges and immunities of UNESCO.

In the view of the Tribunal, the problem at hand does not hinge on whether the retirement pension is or is not in reality an extension of the salary. All the Tribunal has to decide is whether, in the application of the provisions of article 22(*b*) and in the light of international civil service law, the retirement pension is a salary. Its answer to that question is no.

49. The term "emoluments" (*émoluments*) is less precise than the word "salaries". In the singular, "*émolument*" [in French] is any sum paid by way of benefit, profit, interest or gain. In the plural [and in English usage], as it appears in article 22(*b*) of the Agreement, it is generally understood to mean income resulting from an employment or office and any sum paid by way or in lieu of a benefit. According to the *Dictionnaire de l'Academie*, "*émoluments*" means "all sums received by an official when, in addition to his or her fixed salary, subject to the withholding of a pension contribution, are added compensation and allowances not subject to such withholding". A straightforward reading of this definition shows that the recipient of the emoluments in question already receives a "fixed salary, subject to the with-

holding of a pension contribution"; the reference is to an "official" and reinforces the meaning that the Tribunal has attributed to the word "official". A pension is clearly not included among the examples of emoluments. Therefore, it is difficult to conclude that the word "emoluments" used in the 1954 Headquarters Agreement covers anything other than the various forms of compensation and allowances that constitute supplementary elements of remuneration and may be granted in addition to the official's salary in the strict sense.

In the Tribunal's view, the term "emoluments" used in the Agreement comprises only the various forms of compensation and allowances paid to officials as reflected in the phrase in Article 32, paragraph 8, of the Statute of the International Court of Justice, which provides that the "salaries, allowances and compensation" of the judges and the Registrar shall be free of all taxation.

Moreover, a look at the context of the disputed provision shows that all the other provisions of article 22 of the Agreement are applicable only to officials in active service. Since the chapeau of the article heads subparagraphs (*a*) to (*h*), all those provisions should apply to former officials as well if they were intended to be included in the term "officials". It appears that that is not the case.

It is important to note that an agreement concluded between the same parties, which was signed in Paris on 14 November 1974 and entered into force on 21 January 1976 (*Journal officiel de la République française*, 1 March 1976, p. 1398), concerning the establishment and operation of the International Centre for the Registration of Serial Publications, in article 15, paragraph 1, expressly stipulates:

> "Staff members of the Centre with permanent appointments in categories I, II and III, as defined in annex II to this Agreement [the Director, officials of the Centre, administrative and technical personnel] shall be exempt from all direct taxation on salaries and emoluments paid to them for their activities at the Centre, excluding retirement pensions or survivors' benefits."

50. It could be argued that the fact that retirement pensions and survivors' benefits are expressly excluded in the above provision and not in the 1954 Agreement means that the Parties intended to include them in the latter case.

The Tribunal does not share that view. It could also be argued that the 1974 agreement shows that the use of the term "staff members of the Centre" leaves a doubt as to the status of such staff members that must be clarified, whereas when the Parties use the term "officials", as in the 1954 Agreement, there is not a shadow of a doubt in their minds what they mean by the word.

In the provision cited above, the terms "salaries and emoluments" are juxtaposed with the terms "retirement pensions" and "survivors' benefits". This confirms that UNESCO and France are not confusing the words in quotation marks with one another.

Thus, by excluding retirement pensions from the notion of "salaries and emoluments" in another agreement, the Parties show that retirement pensions are not salaries or emoluments.

The example of other headquarters agreements that do include retirement pensions in the exemption from taxation, such as the Agreement between the Republic of Austria and the United Nations regarding the Seat of the United Nations in Vienna of 29 November 1995, which superseded the Agreement regarding the Headquarters of the United Nations Industrial Development Organization (UNIDO) of 13 April 1967, are instructive in this regard. In those cases, the parties are exercising the

freedom allowed them by the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (hereinafter "the General Convention") to decide what provision they wish to make regarding exemption of retirement pensions from taxation. In relation to Austria, moreover, UNESCO expresses that idea when it states that "exemption of the pensions of retired international officials is a matter of political will".

The same reasoning applies to the European Union regulations exempting retirement pensions from tax. An express provision is required to institute the exemption.

51. In the light of the above, the Tribunal concludes that, based on the ordinary meaning of the terms of the Agreement and their context, the word "officials" does not include retired officials and the words "salaries and emoluments" do not cover retirement pensions.

* * *

52. Notwithstanding the above conclusion, the Tribunal must now consider whether the Parties nevertheless intended retired officials to be covered by the term "officials" and their pensions to be covered by the terms "salaries and emoluments" as used in article 22(*b*) of the Agreement.

The Tribunal will now address this question.

53. In other words, even though the Tribunal has arrived at the conclusion that the word "officials" does not apply to retired officials and the words "salaries and emoluments" do not apply to pensions drawn by retired officials residing in France, it is possible that the Parties, at the time they signed the 1954 Agreement, meant for the benefits of the provisions of article 22(*b*) to extend to retired officials.

The Tribunal has to consider whether that is the case and must determine whether the Parties intended to give a special meaning, in the sense of article 31, paragraph 4, of the Vienna Convention on the Law of Treaties, to the terms "officials" and "salaries and emoluments".

54. The Parties are in agreement that article 22(*b*) is modelled on article V, section 18 (*b*), of the General Convention of 1946. They do not dispute the fact that the latter provision does not exempt retirement pensions. They admit that the Subcommission on Privileges and Immunities established by the Sixth Committee of the United Nations, after considering the question of exempting retirement pensions from taxation, reserved the right to revert to the issue, if necessary, and decided that provisions to that effect should not be included in the General Convention.

55. Clarifying the situation, the Secretary-General of the United Nations, in a report on the proposal concerning staff pension and provident funds and related benefits, said that every agreement concerning tax exemption should include a clause exempting from taxation the allowances payable by way of pensions or family allowances, even if domestic laws did not exempt them.

He concluded that it was advisable to include in agreements on tax immunity an article providing for such immunity for payments made under the regulations and rules of the pension fund, family allowances and education grants.

In other words, he left it to the parties to an agreement on privileges and immunities to decide what provision to make in that regard. This is the path followed by the parties to an agreement of that type, particularly with regard to the exemption of retirement pensions from taxation.

56. During the negotiations leading to the 1954 Agreement, did France and UNESCO discuss the question of exempting pensions from taxation?

57. According to UNESCO, it was hardly aware of the problem of the eventual taxation of retirement pensions by the host State. Its records offer no evidence on that point, although they reveal that the wording of other aspects of the Agreement received careful scrutiny. The question, according to UNESCO, never seems to have held the attention of the negotiators.

UNESCO explains that that fact is readily understandable given the context. When UNESCO was established in 1946, it was decided that a provisional agreement should be concluded pending the adoption of a convention on privileges and immunities that would be applicable to France and UNESCO. With the adoption of the Convention on the Privileges and Immunities of the Specialized Agencies in 1947, the General Conference authorized the Director-General to negotiate a definitive agreement, in the event the 1954 Agreement, envisaged as complementary to that Convention, which, it was believed at the time, France would quickly ratify.

According to UNESCO, another reason was that the number of retired officials was still negligible when the 1954 Agreement was concluded, and no one dreamed at the time how much the retirement system would grow. The expansion has been great, to the point that today there are 68,935 participants in the United Nations Joint Staff Pension Fund and the benefits paid out amount to US$ 1,997,654,590.

UNESCO acknowledges that the explicit inclusion of a provision in the Convention on the Privileges and Immunities of the United Nations to exempt retirement pensions from taxation, although originally contemplated, was deferred. But it explains that, at the time that France and UNESCO concluded their provisional agreement and later their definitive agreement, the question did not appear to have assumed any importance in the elaboration of the texts and there did not seem to be any intention of dealing with it.

UNESCO deduces from this that it would be surprising if the negotiators of the 1954 Agreement did in fact have a clear idea, whether for or against exemption, about the tax status of the pensions that future retired officials of UNESCO would be drawing.

It notes, moreover, that other aspects of international civil service regulations were still in the process of being worked out and would be defined only little by little.

58. According to France, on the other hand, in 1954 the two Parties could have included a provision in the Headquarters Agreement exempting retirement pensions, if that had been their intention. By way of example, France cites the headquarters agreement between Austria and UNIDO, which did provide for such an exemption. It adds that most headquarters agreements adopt the formula of the General Convention of 13 February 1946 and do not make retirement pensions tax-exempt.

In France's view, derogations from the norm are always made explicit, and the negotiators of the 1954 Agreement were well aware of what was at stake. Yet they opted to adhere to the formula taken from the General Convention.

* * *

59. The two views sketched out above bear on the question of whether the Parties, at the time they negotiated the Headquarters Agreement, did or did not de-

liberately decide that pensions would not be included in the exemption from taxation stipulated in article 22(*b*).

Posed in this way, the question cannot be answered yes or no, although UNESCO argues that the negotiators of the Agreement ignored the question of the retirement pensions, since it did not seem important at the time. In any event, it is a fact that at the time the 1954 Headquarters Agreement was being negotiated, the General Convention had been adopted, and the *travaux préparatoires* that had preceded it were in existence.

60. In this matter, the problem as the Tribunal sees it is the following: Is it reasonable to assume that in 1954 the negotiators of an agreement as important as the Headquarters Agreement between France and UNESCO were unaware of the events surrounding the negotiations that led to the General Convention of 1946?

61. The Tribunal can answer this question easily. It cannot accept the hypothesis that the Parties in 1954 were unaware that in 1946 the issue of exempting pensions from taxation had been raised, that it had not been resolved in the General Convention and that, in the light of subsequent developments, the issue had been referred to individual future agreements. That would be tantamount to accusing the negotiators and the Parties they represented of a degree of negligence inconceivable at that level of responsibility. Parties to a treaty are presumed to know the rules of international law that are current at the time they are negotiating and making decisions and in particular to know the rules likely to affect their future obligations. To reject such a principle would be to leave the door open to an unacceptable level of legal uncertainty. The Tribunal, therefore, is not asking whether the Parties in fact, when negotiating the Headquarters Agreement, did or did not discuss the state of international civil service law at the time with particular reference to the issue of retirement pensions. What matters to the Tribunal is that such law existed and that they were aware of it. The Parties are presumed to have been aware of the state of international civil service law at the time they negotiated and to have taken it into account. That presumption is one of the keys to illuminating the meaning of article 22(*b*), as the Parties have asked. The Tribunal is forced to the conclusion that, if the Parties had wished article 22(*b*) to apply to retired officials and their retirement pensions, they would specifically have said so, in accordance with the rules applicable to the matter that they were regulating by mutual agreement. Therefore, the Tribunal believes that France and UNESCO were fully aware of what they were doing when they framed the wording of article 22(*b*) as it stands.

The Tribunal deduces that in 1954 France and UNESCO, which could not have been unaware that the issue of exemption of retirement pensions from taxation had been raised during the elaboration of the General Convention of 1946 and yet had not been resolved in that Convention, chose not to address it. That is sufficient reason for the Tribunal to conclude that article 22(*b*) does not cover the issue. Hence, the Tribunal finds that the Parties did not intend to give the terms "officials" and "salaries and emoluments" a special meaning different from the ordinary meaning it identified above.

62. Having thus resolved the problem of the intention of the Parties at the time the Agreement was concluded, the Tribunal must consider that the Parties, in their subsequent practice, might have given the terms in question a different interpretation. It now has to examine whether they altered the meaning they had given to the terms originally through a decision or through their behaviour. Such a modifica-

tion could have resulted from a subsequent agreement between the parties or from mutual practice.

There has been no agreement of a kind just described between the Parties. It should be recalled, however, that in the agreement mentioned earlier concerning the establishment and operation of the International Centre for the Registration of Serial Publications, concluded between the same Parties at Paris on 14 November 1974, the "staff members of the Centre with permanent appointments in categories I, II and III, as defined in annex II" are identified as being "the Director, officials of the Centre, administrative and technical personnel". According to the same provision, these staff members are "exempt from all direct taxation on salaries and emoluments paid to them for their activities at the Centre, excluding retirement pensions and survivors' benefits." It appears from these provisions, as the Tribunal has already noted, that as between the Parties retirement pensions and survivors' benefits are excluded from salaries and emoluments.

What has been the subsequent practice of the Parties?

This is the question that the Tribunal will now consider.

63. If a practice has been established in the application of the 1954 Agreement involving an interpretation which tends to extend the provisions of article 22(*b*) to retired UNESCO officials resident in France, the Tribunal must take due account of it.

64. Before verifying that hypothesis, it should be noted that the Parties are in disagreement regarding the nature of the practice subsequent to the Agreement, which must be taken into account.

65. UNESCO argues that the practice of a State consists of the acts, attitudes and conduct of all its organs, including the administration. It maintains that in this case, the important issue is the day-to-day attitude of the administration, whether or not it was strictly applying a particular directive. In fact, retired UNESCO officials did benefit from a liberal attitude for some 40 years, and they could in good faith consider that attitude as being, if not the rule, which was the position of UNESCO as such, at least so solidly established that it had a bearing on the choice of residence made by many of them on reaching retirement age.

UNESCO does not deny that the French authorities neither recommended nor supported or confirmed that practice of the tax administration. It therefore sees a difference between the stated position and the observed practice. It argues that, when France recalls that its tax system is declaration-based (so that there may be de facto non-taxation, even where the person concerned would normally be subject to taxation), it is essentially imputing the long-standing practice of the tax administration to the actions of UNESCO or to the conduct of some of its retired officials. UNESCO further states that the real situation is totally different from that described by France and that one might wonder why, if the French administration merely lacked the necessary information to tax the retirement pensions, it waited so long before taking action aimed at taking them.

UNESCO observes that there is a coincidence between the steps that have been taken and the changes in position towards the retired officials. UNESCO further points out that article 170 of the General Tax Code, which states that only taxable income is to be declared, is the reason why many retirees did not indicate the amount of their pension on their tax declarations, especially since, under the long-standing practice of the tax administration, those pensions were not taxed.

66. The position of France, on the contrary, is that the practice followed by the tax administration was at most a form of tolerance or courtesy and that, in relation to the concept of "subsequent practice" (since an international obligation is involved), only the positions of authorities competent to enter into commitments on behalf of the State should be taken into account when seeking to determine whether the Parties have made a treaty interpretation. As France sees it, the authorities have officially taken a position in that regard on a number of occasions. France points out that in 1956 the Secretary of State for the Budget, replying to a parliamentary question, stated that the pensions of former UNESCO officials were indeed subject to national taxation. Furthermore, the same position was stated before the Senate in 1994. In explanation of the attitude of the tax administration, France recalls that the French tax system is declaration-based and that as a result taxation cannot take place if no declaration is forthcoming. If the relevant information is received subsequently from other sources, a tax adjustment takes place.

France argues that the obligation to provide details of the payees and the amounts paid lies with the "paying party". However, on two occasions, in 1988 and 1991, UNESCO rejected requests from the French administration to inform it of the amounts paid to its former officials. France goes on to argue that this is the reason why for many years many retired officials could not be charged income tax in France.

67. The Tribunal therefore has to decide a preliminary issue: it must determine who should be the originators of a practice that, if the two Parties agree, can be considered as an interpretation of the Agreement. This problem clearly has two aspects. The first relates to the status of the originators of the relevant practice; the second concerns the agreement of the Parties upon the practice in question.

68. The Tribunal sees the situation as follows: in explanation of the period during which, and the cases in which, the pensions of the retired officials were not taxed, France adduces its taxation system and the negative attitude of UNESCO towards the tax administration. As to the authorities competent to enter into commitments on behalf of the State, its position has not changed.

69. UNESCO considers that the tax administration, by not taxing the retired officials, established a practice, which UNESCO itself has tacitly accepted, so that it does not have to provide information to enable the taxation of its former officials.

70. The Tribunal holds that the supposed interpretation of a provision of a treaty by the parties to that treaty, and which may result from "subsequent practice", must be based on an unequivocal common position of the parties. The purpose of recourse to subsequent practice as a means of interpretation of an agreement is to establish the unequivocal agreement of the parties regarding the interpretation of a clause of that treaty. The Tribunal resorts to subsequent practice only to verify the correctness of the conclusion it has reached as to the intentions of the Parties. This observation might prima facie give the impression that the Tribunal is inclined to favour the opinion whereby such an interpretation can be revealed only by the authorities competent to bind the State internationally.

That is not the case.

71. The Tribunal considers that the solution to the aforementioned problem is less clear-cut. This is demonstrated by analysis of the jurisprudence of the International Court of Justice and of its predecessor, the Permanent Court of International Justice, and by an examination of legal doctrine.

Recourse to "subsequent practice" as a means of interpretation was solidly established in the practice of treaty interpretation prior to the 1969 Vienna Convention on the Law of Treaties, with just a few reservations. This can be seen, for example, in the advisory opinion of the Permanent Court of International Justice on the *Competence of the International Labour Organization to Regulate Agricultural Labour* (*P.C.I.J., 1922*, Series B, No. 2, p. 39) or the judgment of the International Court of Justice in the *Corfu Channel* case (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 25). This is why the International Law Commission included subsequent practice in article 3, paragraph 3, of the 1969 Vienna Convention as an "authentic element of interpretation" to be taken into account together with any agreement regarding the interpretation of the treaty (*Yearbook of the International Law Commission, 1966*, vol. II, p. 221). In its commentary, the Commission states that "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation" (ibid., para. 14). It goes on to state: "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." However, the Commission stated no explicit opinion as to who could be the originator of the practice in question.

72. The question under consideration by the Tribunal has been dealt with by the International Court of Justice in a number of decisions, such as the case concerning *Sovereignty over Certain Frontier Land* (*I.C.J. Reports 1959*, pp. 227-230) and the case concerning the *Temple of Preah Vihear* (*I.C.J. Reports 1952*, pp. 32-33). The same is true of the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (*I.C.J. Reports 1999*, pp. 1075-1092).

73. Thus, the Court has had to consider the conduct of organs other than those competent to bind the State internationally, in looking for practice having the effect of an interpretation of a treaty.

74. The Tribunal holds that the determining factor is the unequivocal expression of the position of the State. This position can arise equally out of declarations or acts of the authorities invested with treaty-making power or those of administrative organs responsible for applying the agreement. In either case, however, the position of the contracting State must be unequivocal, particularly in the case of a treaty which entails an obligation. For a State to be under an obligation as a result of an agreement, it must be possible to deduce that obligation clearly from the terms of the agreement as originally drafted or as amended or interpreted by the parties concerned.

In the present case there is a sharp discrepancy, which UNESCO itself has pointed out, between the declarations of authorities competent to express the position of the French State, on the one hand, and, on the other, the attitudes of the French tax administration. Moreover, in the case of the latter, it is not possible to deduce from its conduct an unequivocal position which would indicate its belief that article 22(*b*) of the 1954 Headquarters Agreement applies to retired UNESCO officials resident in France. Its stance has been anything but consistent from one place to another and has also varied over time.

It is therefore of little importance that UNESCO was not called upon to state its position one way or the other. The Tribunal holds that, where there is a difference between the conduct of the administration and that of the authorities competent to express the position of a State, precedence should be given to the latter.

Furthermore, for a practice as defined in article 31, paragraph 3(*b*), of the Vienna Convention on the Law of Treaties to be deemed to exist, there must be an indisputable concordance between the positions of the parties, and those positions must be such as to establish the meaning of a provision of the treaty.

75. UNESCO recognizes that there has been no such concordance; indeed, it states that the agreement of the Parties regarding interpretations of article 22(*b*) is not to be sought in subsequent practice.

UNESCO adds that the fact that the French tax authorities refrained from taxing the pensions, a situation which continued until recently, is the reason why UNESCO took no action, that it is self-sufficient and that there is no need for UNESCO to agree to it "in one way or another".

In any case, since the Tribunal has chosen to give greater weight to the conduct of the authorities competent to speak for France, the fact that UNESCO chose to express its position by remaining silent in response to the practice of non-taxation of retirement pensions by the tax administration would, in the case in hand, have no legal consequence for the Agreement.

76. The Tribunal is forced to the conclusion that, since the French authorities have always maintained that retired UNESCO officials do not benefit from the provisions of article 22(*b*) of the 1954 Agreement (although there have been lapses in the tax administration, on the one hand, and although UNESCO for its part has, as it were, remained silent until relatively recently), there has been no "subsequent practice" which can be considered as constituting an interpretation of the Agreement in a sense other than that which clearly derives from its terms and which coincides with the intentions of the Parties at the time of the negotiations.

77. Thus, the Tribunal concludes that, in relation to the application of article 22(*b*) of the 1954 Agreement, there has been no practice between France and UNESCO from which it could be deduced that an agreement has existed regarding an interpretation whereby the provisions of that article would apply to retired UNESCO officials residing in France. This conclusion is in conformity with the object and purpose of the Agreement and with the rule according to which tax exemption is functional and is justified by the desire to ensure the independence of the international civil service.

78. In this regard, the Tribunal emphasizes that the letter of 28 September 1987, in which the Minister-Delegate to the Minister of State for the Budget wrote that "the lump-sum settlement which some retired United Nations officials are entitled to request at the time of their retirement is not subject to income tax", does not change the conclusion it has reached. The Minister-Delegate's statement falls outside the scope of the question submitted to the Tribunal.

It should be recalled that the Tribunal has not been asked to determine whether the sums paid to retired UNESCO officials residing in France are wholly or partially subject to income tax. All the Tribunal has to do is to determine whether the exemption provided for under article 22(*b*) of the 1954 Agreement between France and UNESCO for the benefit of officials in active service is also applicable to officials who have retired from UNESCO and are residing in France.

79. The Parties have put forward several other arguments based on certain principles. Although it does not think that these principles are capable of altering the conclusions it has reached, the Tribunal nevertheless believes that it should consider them briefly, since the Parties have invoked them in support of their positions.

Specifically, the principles invoked are the following:

80. Equality of States.

This principle is invoked by UNESCO. The argument runs that, since the public funds available to international organizations consist of the contributions of States members of the organizations, it would be contrary to the principle of equality of States for one of them to take a portion of the funds in the form of taxes and so enrich itself to the detriment of the other States.

The Tribunal considers that the principle of equality of States, while incontestable, has no direct bearing on the question it is called upon to answer. The Tribunal is asked to determine what the Parties decided and expressed, with no subsequent amendment, in article 22(*b*) of the 1954 Agreement.

81. The principle of non-taxation of foreign public funds.

This principle, if indeed it is one, derives directly from the principle of equality of States. It was invoked by counsel for UNESCO.

The Tribunal holds that such a principle has no bearing on the mandate conferred by the Parties, the limits of which, as already emphasized, are relatively narrow.

82. The rule whereby the provisions of a treaty may create subjective rights for individuals.

Both Parties recognize the existence of this rule.

The rule is found in modern international law. It has often been applied by the International Court of Justice. In itself, however, it does not resolve the problem submitted to the Tribunal; nor can it substitute for one of the Parties to the 1954 Agreement a different natural or legal person, in this case the former officials of UNESCO residing in France. The problem submitted to the Tribunal, to repeat, is to decide whether the Agreement signed between France and UNESCO in 1954 did or did not give former UNESCO officials residing in France the right to be exempted from tax on their retirement pensions. Even if we follow the reasoning of UNESCO, the conclusion reached does not change the fact that the Parties to the 1954 Agreement are France and UNESCO, and that it is their mutual intention that the Tribunal must seek to determine in interpreting article 22(*b*).

83. The Noblemaire principle.

This principle is invoked by UNESCO.

According to the Noblemaire principle, conceived by the League of Nations and taken up by the United Nations, international officials (civil servants) should receive salaries equal to those offered in the highest-paid national civil service. The principle concerns both the States that establish an organization and the organization itself. Prospective international civil servants certainly take it into consideration when they choose their careers. However, it has no specific bearing on the line of reasoning the Tribunal is following in order to answer the question posed in article II of the Arbitration Agreement.

84. The continued existence of ties between the international organization and its officials even after their retirement.

UNESCO cited this rule or practice.

Although it is not contested that certain ties are maintained, notably the duty of discretion (as set forth in regulation 1.5 of the Staff Regulations and Staff Rules

of UNESCO), that finding has no bearing on the Tribunal's determination of the limits of the scope of article 22(*b*) of the 1954 Headquarters Agreement, which deals with the exemption from taxation of the salaries and emoluments of officials of UNESCO.

85. The principle of equal treatment.

This principle was invoked by UNESCO as applicable to its former officials.

The Tribunal finds that, although some States exempt all or part of the retirement pensions from income tax, in France that is not the case. In the view of UNESCO, that situation violates the principle of equal treatment that should protect international officials.

In the present case, bearing in mind the Tribunal's observation that each State undertakes such commitments with respect to former officials as it agrees upon with the particular organization for which it is the host country, the principle of equal treatment in this case applies only to the treatment France metes out to the various former UNESCO officials residing in its territory. And, in fact, it does not discriminate among them. Moreover, since the Tribunal holds that it is a matter for the parties to an agreement that deals with the exemption of the salaries and emoluments of officials to decide whether or not to extend the benefit to retired officials, the argument based on the principle of equal treatment has no bearing on the Tribunal's reasoning.

86. The Parties have stressed that the arbitration question entrusted to the Tribunal is of considerable importance and will have an impact on basic questions affecting the situation of international civil servants.

The Tribunal does recognize the importance of the present arbitration proceedings. It cannot be persuaded, however, to rule on matters outside the scope of what the Parties have asked it to do, or to base its decision on principles that have no bearing on its mandate. In any case, its award will have only the relative effect of any arbitral award.

* * *

87. Although the arguments set forth above, together with the principles or rules on which they are based, as well as some of the other arguments advanced by the Parties (including the sharp drop in the standard of living of retirees, the restriction of the freedom of retirees to settle where they choose, the creation of disparities among retired international civil servants or the measures taken by the United Nations or UNESCO by way of compensation, particularly the reimbursement of staff members for tax collected by States and the increase in the base for calculating the pension), are of considerable interest, the Tribunal nonetheless does not deem that they have any real bearing, one way or the other, on the answer to the specific question put to it, which it has answered. For that reason, it judges it unnecessary to present a detailed analysis that would be irrelevant in this case to the accomplishment of its task.

* * *

88. The Tribunal will now consider the subsidiary claim of UNESCO.

It will be recalled that in its subsidiary submissions UNESCO asks the Tribunal to find that, by application of article 22(*b*), retired UNESCO officials residing in France are exempt from any direct tax on a portion of their pension which shall not be less than 70 per cent. UNESCO explains that the reason for the percentage is that the Joint Staff Pension Fund, in its management of the retirement funds, brings in interest on them equivalent to approximately 30 per cent of the amount of the pension. UNESCO maintains, furthermore, that only the taxable portion of the pension should be considered in determining the tax rate on the income subject to direct tax

and that the withdrawal settlement paid in lieu of all or part of a pension should be exempt from any direct tax.

The Tribunal will now examine this subsidiary claim.

89. As UNESCO sees it, a portion of the pension is principal. The principal portion can be estimated at approximately 70 per cent, for the reasons stated above (in paragraph 88). In consequence, it should not be subject to income tax.

The deduction applies with even greater force, according to UNESCO, to a withdrawal settlement. In that case, it believes, the entire amount received by the retired official should escape taxation.

90. As France sees it, if the principal paid out to former officials is a pension, it should be subject to the normal regime for pensions: that is, it should be taxable. If, on the other hand, it is not a pension, the problem that UNESCO raises is outside the jurisdiction of the Tribunal, since the latter's mandate is limited to deciding whether article 22(*b*) of the 1954 Agreement is applicable to pensions of former UNESCO officials residing in France.

91. The Tribunal has already determined that article 22(*b*) of the Headquarters Agreement is not applicable to the retirement pensions of former UNESCO officials residing in France. With that conclusion it has fulfilled its mandated task.

92. The Tribunal reiterates that the question submitted to it is very specific. The Tribunal is asked to say whether article 22(*b*) of the 1954 Agreement between France and UNESCO is applicable to pensions paid to former UNESCO officials residing in France.

Therefore, it cannot follow UNESCO into a debate about whether a portion of the pension is principal and constitutes an emolument of the official or about what happens when the retiring official receives a lump-sum payment upon retirement in lieu of a pension. It is obliged to refrain from considering these questions for fear of straying outside the bounds of its jurisdiction. Moreover, UNESCO says (and France did not contest it prior to these arbitration proceedings, at least insofar as the withdrawal settlement is concerned) that "despite the reversal of position with regard to pensions, that so far has not been called into question". The aim of UNESCO, therefore, is simply to have the exemption confirmed, but that task would exceed the Tribunal's mandate.

93. The conclusion to be drawn from the foregoing is that the Tribunal is unable to consider the subsidiary claim of UNESCO because it is not competent to do so.

* * *

94. The Tribunal believes that the answer it has given to the question submitted to it is not contrary to the practices of international organizations or the decisions of international administrative courts.

For these reasons,

THE TRIBUNAL

1. Finds that article 22(*b*) of the Headquarters Agreement of 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

2. Declares that it is not competent to rule on the subsidiary submissions of UNESCO;

3. Rejects all other submissions of the Parties;

4. Decides that the costs, expenses, fees and compensation of the present arbitration proceedings shall be shared equally by UNESCO and the Government of the French Republic and that each of the Parties shall bear all its other expenses;

5. Orders the Clerk to make the final disbursements, close the accounts of the Tribunal and divide the balance equally between the two Parties.

DONE in French at Paris in the Palais de la Sorbonne on 14 January 2003 in three copies, one to be placed in the archives of the Tribunal and the other two to be given to the Parties.

(*Signed*) Kéba MBAYE
Presiding Arbitrator

(*Signed*) Jean-Pierre QUÉNEUDEC
Arbitrator

(*Signed*) Nicolas VALTICOS
Arbitrator

Mr. Nicolas Valticos, availing himself of the right conferred by article VII, paragraph 2, of the Arbitration Agreement, has appended to the award a separate opinion.

SEPARATE OPINION OF NICOLAS VALTICOS ON THE ARBITRAL AWARD

I concur at the legal level with the opinion of the other members of the Arbitral Tribunal and do not deny that it is well founded in law. There is, however, a point on which I wish to add an observation, namely, the considerable length of time that elapsed in some cases between the start of retirement of UNESCO officials now residing in France and the point at which they were contacted by the tax administration of the French Government. While we may make allowances for the French tax system and the circumstances cited by the Government, it is nonetheless striking that the period during which, despite its well-known efficiency, the French tax administration failed to tax the retirement pensions was often very long, although this certainly should not lead us to go so far as to postulate a point of tacit agreement constituting "subsequent practice" of the Parties. Such long delays, however, may for some time have given the impression that the French Government had tacitly consented to the idea of non-taxation of the pensions of retiring UNESCO officials and may have created expectations which subsequently proved to be unfounded.

That being the case, now that the issue has clearly been resolved by the Arbitral Tribunal on the strictly legal level, the Parties might perhaps consider consulting together in order to draw the appropriate conclusions from the situation. The solution might reasonably, indeed legitimately—in order to compensate for the delays, misunderstandings and disappointed expectations, and more generally to bind up the wounds—entail adopting one or more formulas which would grant certain relief to retired officials who have clearly suffered from the dashing of their optimistic expectations as a result of the sometimes lengthy delays before the tax administration took action. Even allowing for the French tax system, it is difficult to deny that those delays in some respects entailed a degree of negligence. Such a formula could to some extent compensate the retired officials concerned or at any rate alleviate their situation, and encourage those still in service to continue to fulfil their tasks efficiently at UNESCO headquarters.

(*Signed*) Nicolas VALTICOS

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. The Netherlands

THE HAGUE DISTRICT COURT
Civil Law Division—President

Judgement in interlocutory injunction proceedings of 31 August 2001

Plea of Slobodan Milošević for release from detention by the International Criminal Tribunal for the Former Yugoslavia and returned to the territory of the Federal Republic of Yugoslavia

Slobodan Milošević
domiciled in Belgrade, Federal Republic of Yugoslavia,
currently residing in Scheveningen in the municipality of The Hague,
plaintiff,
procurator litis A. B. B. Beelaard,
advocates N. M. P. Steijnen, E. T. Hummels and E. Olof, all of Zeist,

The State of the Netherlands (Ministries of General Affairs and Foreign Affairs)
with its seat in The Hague
defendant,
procurator litis Cécile M. Bitter,
advocate G. J. H. Houtzagers.

1. *The facts*

On the basis of the documents and the oral proceedings of 23 August 2001, the following facts will be deemed to have been established in this case.

—By resolution 827 (1993) of 25 May 1993 (*Netherlands Treaty Series* 1993, 168), the United Nations Security Council, "acting under Chapter VII of the Charter of the United Nations", decided to establish an international tribunal "for the sole purpose of prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The annex to the resolution includes the Statute ("Statute of the International Tribunal; hereafter, "the Statute") of the aforementioned tribunal (hereafter, "the Tribunal"). Article 31 of the Statute provides that the Tribunal shall have its seat in The Hague.

—Article 9, paragraph 2, of the Statute reads as follows:

"The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request na-

tional courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

—Article 29, paragraph 1, of the Statute includes the following sentence: "States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."

—The relationship between the Netherlands—as host country—and the Tribunal is laid down in the Agreement of 29 July 1994 between the Netherlands and the United Nations (*Netherlands Treaty Series* 1994, No. 189), also referred to as "the Headquarters Agreement". This Agreement also provides for the practical implementation of certain of the Statute's provisions. The Netherlands implemented resolution 827 (1993) and the Statute by Act of Parliament of 21 April 1994 (*Bulletin of Acts and Decrees* 1994, 308).

—The plaintiff is the former President of the Federal Republic of Yugoslavia.

—After the plaintiff's detention in Belgrade on 1 April 2001 to answer criminal charges, he was transferred to the Tribunal on 29 June 2001 in compliance with the arrest warrant issued by the Tribunal on 22 January 2001. He was flown to Welschap aerodrome near Eindhoven and from there taken to the United Nations Detention Unit, a section of the Scheveningen prison complex reserved exclusively for the detention of persons being prosecuted before the Tribunal, where he has been held since then.

2. *The claims, the grounds on which they are based and the defence*

The plaintiff has asked the court—in essence—to order the defendant as follows:

—*Principally*: to release him unconditionally within 8 hours of the notice of service of this judgement;

Or

—To return the plaintiff or order his return to the territory of the Federal Republic of Yugoslavia within 24 hours of the notice of service of this judgement;

Or

—To plead forthwith before the so-called Tribunal and all international bodies and institutions of relevance in this connection for his immediate and unconditional release;

Or

—To plead forthwith before the so-called Tribunal and all international bodies and institutions of relevance in this connection for his immediate return to the territory of the Federal Republic of Yugoslavia.

In support of his claims, the plaintiff contends as follows:

—The so-called Tribunal, elements in the Serbian Government and the defendant blatantly kidnapped and abducted him in a coordinated action, which must be regarded as a flagrant breach of his human rights. At the time the Federal Constitutional Court of Yugoslavia had suspended his extradition

to the so-called Tribunal pending the Court's ruling, which it had not yet given, on the lawfulness of this extradition. He was therefore still under the protection of the domestic courts. Even so, the defendant permitted his transfer to the territory of the Netherlands and handed him over to the so-called Tribunal. The defendant's actions should be deemed unlawful in respect of the plaintiff.

—The so-called Tribunal has no basis in law and possesses no democratic legitimacy. The Security Council is not competent to establish an international tribunal, as only a few United Nations Member States are involved in it. The Tribunal has not been established by treaty. Neither the Charter of the United Nations nor international law provides any legal basis for the so-called Tribunal. Not a single rule of law exists that would entitle the Security Council to limit the sovereign rights of States. The establishment of the so-called Tribunal is a flagrant violation of the principle of the sovereign equality of all United Nations Member States, as enshrined in Article 2, paragraph 1, of the Charter of the United Nations. The Security Council has no jurisdiction over the individual citizens of States. That the so-called Tribunal can and should sit in judgement over its own lawfulness is neither credible nor acceptable.

—The so-called Tribunal cannot, therefore, be regarded as an independent and impartial tribunal within the meaning of article 6 of the European Convention on Human Rights, particularly since it maintains close and friendly relations with the North Atlantic Treaty Organization (NATO) and is indeed dependent on NATO. Its prosecutors and judges are not appointed in an impartial procedure.

—The defendant is acting unlawfully towards the plaintiff by cooperating in the Security Council's decision to establish the so-called Tribunal, which is self-evidently incompatible with fundamental human rights. The defendant may therefore be regarded, in a sense, as a co-perpetrator of human rights violations. Furthermore, the Security Council makes arbitrary and unlawful distinctions between countries. The Security Council and/or the United Nations do not implement resolutions adopted against countries that harbour ill-will against the Western States [sic].

—As a former head of State, the plaintiff can claim immunity from prosecution. No conceivable rule of law can be invoked on the basis of which this immunity could be declared to have lost its validity, as asserted in the Statute of the so-called Tribunal. At no time in history has immunity ever been declared null and void before. Immunity is an instrument to safeguard the sovereignty of States and should therefore be respected above all else. Whatever crimes may have been committed, the plaintiff, as head of State, cannot be held to account for them.

—The Dutch courts are pre-eminently competent to rule on the legal protection of persons who are within the territory of the Netherlands. This applies to the plaintiff in the same way as to anyone else. Not a single valid rule of law can be found that would exclude such an appeal. The plaintiff cannot ask the so-called Tribunal to release him provisionally.

The defendant presented its defence, furnished with arguments. Where necessary this defence will be discussed below.

3. *Assessment of the dispute*

3.1 The defendant's primary line of defence is that the Tribunal possesses exclusive competence to hear the principal application for release. It holds that it has been expressly acknowledged, both in domestic and in international law, that the Tribunal possesses exclusive competence within the Dutch legal order to decide on the deprivation of liberty of persons facing charges before the Tribunal, and that this is not a matter for the Netherlands. Whatever cooperation there may have been between the defendant and the Tribunal has been limited to the transport of individuals, including the transit of persons being transferred from another country to the Netherlands, who must be transported across the territory of the Netherlands, and to the security of these persons.

3.2 To answer the question of competence, however, it is first necessary to address the plaintiff's contentions regarding the Tribunal's legal basis or legal validity, which he challenges. After all, were it to be ruled at law that the Tribunal possesses no legal validity, this would necessarily lead to the conclusion that the President is competent to hear the principal application for release in interlocutory injunction proceedings.

3.3 The essence of the plaintiff's challenge to the Tribunal's legal validity is that in his view the Tribunal should have been established by an international convention or that its establishment should at least have been based on a motion adopted by the United Nations General Assembly.

This may be answered as follows. The issue of the Security Council's competence has already been dealt with at length by Trial Chamber II (Decision of 10 August 1995) and the Appeals Chamber of the Tribunal (*Prosecutor v. D. Tadić*). The latter eventually ruled on appeal, by judgement of 2 October 1995 ("Decision on the defence motion for interlocutory appeal on jurisdiction") that the Security Council's competence can be based on Chapter VII of the Charter of the United Nations. Compelling considerations supporting this conclusion were that there was nothing in the Charter to militate against the inauguration and establishment of a tribunal for the prosecution and trial of persons suspected of serious violations of international humanitarian law, that the inauguration and establishment of the Tribunal can be considered to fall within the scope of Article 41 of the Charter, and that an international organization such as the United Nations, in which it is simply impossible to observe the traditional separation of legislative, executive and judicial powers, and where indeed no such separation exists, is perfectly entitled to establish a tribunal by way of a measure.

Contrary to what the plaintiff apparently believes, it has by no means been established that the decision of 2 October 1995 is incorrect or that the grounds on which it was reached were unsound. Given the lengthy and detailed arguments furnished in support of the decision of 2 October 1995, the plaintiff's contentions in this regard do not place the matter in a new light. Since the above leads to the conclusion that the said decision and the grounds upon which it was based are upheld in these proceedings, the plaintiff no longer has an interest in his proposition that the Tribunal cannot and must not decide on its own jurisdiction. This proposition need not, therefore, be addressed.

3.4 The plaintiff also maintains that the Tribunal is not an independent and impartial tribunal within the meaning of article 6 of the European Convention on Human Rights. This contention too is dismissed by the court. Leaving aside the

fact that the Tribunal's actions are constrained by numerous regulations, including lengthy and detailed rules for the protection of the rights of the accused, it must be noted that the European Court of Human Rights has also now ruled that the Tribunal fulfils all the criteria necessary for the protection of the accused, including those of impartiality and independence (European Court of Human Rights, judgement of 4 May 2000 in the case of *Naletilić v. Croatia* (Application No. 51891/99)). Accordingly, this argument cannot prevail with the court.

3.5 Since the above leads to the conclusion that the Tribunal may be assumed to possess legal validity, the court must now assess the defence adduced by the defendant in point 3.1 above.

In this regard the court considers as follows.

It has been established that pursuant to the Headquarters Agreement and the implementation act based on it, the Netherlands has transferred its jurisdiction to hear an application for release from detention to the Tribunal. Since article 9, paragraph 2, of the Statute provides, in respect of jurisdiction, that the Tribunal has primacy over national courts, and Article 103 of the Charter of the United Nations asserts that rules [sic] pursuant to the Charter and hence those pursuant to Security Council resolutions take precedence over all other rules, it must be concluded that the Dutch courts have no jurisdiction to decide on the plaintiff's application for release. Everything that the plaintiff has advanced in this connection fails in this light.

3.6 The above therefore leads to the conclusion that the President must declare that he has no jurisdiction to hear the plaintiff's principal claim. A direct or indirect return to the territory of the Federal Republic of Yugoslavia, as urged in the alternative claims, would in effect mean that the plaintiff would no longer be detained to answer the charges brought by the Prosecutor of the Tribunal. Viewed in this light, these claims too are essentially applications for release from detention. Moreover, these alternative claims raise all sorts of other matters (e.g. regarding the plaintiff's departure from the Federal Republic of Yugoslavia, his transfer to the Tribunal and a possible invocation of immunity from prosecution) which, having regard to the substance of the previous consideration, likewise fall within the exclusive competence of the Tribunal. In these circumstances, the President considers that he has no jurisdiction to hear the alternative claims.

3.7 As the court finds against the plaintiff, the latter will be ordered to pay the costs of these proceedings.

4. *Decision*

The President:

Declares that he has no jurisdiction to hear the plaintiff's claims;

Orders the plaintiff to pay the costs of these proceedings, amounting thus far to NLG 3,500 for the defendant, NLG 400 of which is for court fees.

Judgement given by R. J. Paris and pronounced at a public hearing on 31 August 2001 in the presence of the clerk of the court.

EVL

[*two signatures*]

2. United Kingdom of Great Britain and Northern Ireland

(*a*) HIGH COURT OF JUSTICIARY
30 March 2001

Opinion of High Court involving the International Court of Justice advisory opinion on the legality of the threat or use of nuclear weapons under international law

Three persons were charged on indictment with malicious mischief by damaging a submarine and equipment belonging to the Ministry of Defence and used in the deployment of the Trident nuclear missile. The accused admitted having caused the damage, but pleaded in defence that their conduct was justified by the necessity of preventing the Government from continuing to commit an offence against customary international law, in terms of which, they contended, the deployment of the missiles as part of the Government's policy of nuclear deterrence was unlawful. In the course of their trial the accused led evidence as to customary international law from a number of experts. The presiding sheriff sustained the plea of necessity and directed the jury to acquit the accused.

The Lord Advocate referred the following questions of law to the High Court under s 123 (1) of the Criminal Procedure (Scotland) Act 1995:

> "(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?
>
> "(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?
>
> "(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?
>
> "(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?"

The accused appeared in the hearing as respondents. The first respondent suggested that question 2 should be reformulated as follows:

> "Does international law and/or Scots law justify an individual in Scotland in damaging or destroying property which is being used for criminal purposes, in order to prevent those criminal actions being carried out by the United Kingdom—namely the United Kingdom's deployment, within and without Scotland, of Trident nuclear warheads and its threat to use such warheads in accordance with HM Government's current defence policy?"

In the course of the hearing an additional submission was made on behalf of one of the respondents to the effect that the normal criteria of the defence of necessity did not apply in the case of acts of malicious mischief carried out by groups such as that to which the respondents belonged, which were known in the United States as "citizen interveners".

Held (1) that a rule of customary international law is a rule of Scots law and as such is a matter for the judge and not the jury, and that there can be no question

of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is (para. 23);

(2) (i) That the defence of necessity is available only where there is so pressing a need for action that the actor has no alternative but to do what would otherwise be a criminal act under the compulsion of the circumstances in which he finds himself (para. 39);

(ii) That the general requirements of the defence of necessity included that the actor must have good cause to fear that death or serious injury would result unless he acted, that that cause for fear must have resulted from a reasonable belief as to the circumstances, that the actor must have been impelled to act as he did by those considerations, and that the defence would only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did (para. 42);

(iii) That there was no acceptable basis for restricting rescue to the protection of persons already known to and having a relationship with the rescuer at the moment of response to the other's danger, although proportionality of response might be a function of relationship (para. 44);

(iv) That there was no compelling reason for excluding the defence of necessity solely on the ground that persons at risk were remote from the locus of the alleged malicious damage, provided that they were within the reasonably foreseeable area of risk (para. 45);

(v) That the actor must, at the material time, have reason to think that the acts carried out had some prospect of removing the perceived danger, and that, if the action could achieve no more than, say, a postponement or interruption of danger (so that it was only averted for a time) or some lessening of its likelihood (without removing the danger even temporarily) the assessment of any necessity would be less simple and issues of proportionality would arise, and merely making a danger less likely might not be regarded as justified by necessity at all (para. 46); and that as a matter of general principle it appeared clear that the conduct carried out must be broadly proportional to the risk, that being always a question of fact to be determined in the circumstances of the particular case (para. 47);

(vi) That there was no substance in the submission that there was a class of citizen interveners in relation to whose actions (*a*) there might be situations in which a delay between the perception of harm and action in response was acceptable, (*b*) the question of other available legal means should not be confined to ascertaining whether there were in fact such means but should include a consideration of whether the accused reasonably believed that there were other effective means of responding to the situation and (*c*) the court in considering the effectiveness of the action taken should have regard to the accused's reasonable belief that the action would lessen the harm rather than to the true likelihood that the action would avert danger (paras. 53-55); and

(vii) That there was no substance in the suggestion that what the respondents did was justified by necessity, that their actions were planned over months, that what they did was not a natural or instinctive or indeed any kind of reaction to some immediate perception of danger or perception of immediate danger, that the circumstances were not even remotely analo-

gous to those which provide a justification for intervention to prevent immediate danger, that there was not the slightest indication that the damage which the respondents did, and which they apparently claimed was necessary as a means of averting or perhaps reducing danger or harm, had or could have had any conceivable impact upon the supposedly immediate risk, and that whatever drove them or compelled them to do so as they did bore no resemblance to necessity in Scots law (para. 100);

(3) (i) That it was not possible to say a priori that a threat to use Trident or its use could never be seen as compatible with the requirements of international humanitarian law (para. 93);

(ii) That the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, were not concerned with regulating the conduct of States in time of peace (para. 95);

(iii) That the general minatory element in the deployment of nuclear weapons in time of peace was utterly different from the kind of specific "threat" which was equated with actual use in those rules of customary international law which make both use and threat illegal (para. 96);

(iv) That there was no basis for a contention that the general deployment of Trident in pursuit of a policy of deterrence constituted a continuous or continuing "threat" of the kind that might be illegal as equivalent to use, and that the conduct of the United Kingdom Government with which the respondents sought to interfere was in no sense illegal (para. 98); and

(v) That the contention that the respondents' conduct was justified as a matter of customary international law was without foundation, that the general deployment of Trident was not illegal as a matter of customary international law, and that in any event, even on the hypothesis of armed conflict and actual threat, customary international law did not entitle persons such as the respondents to intervene as self-appointed substitute law-enforcers with a right to commit what would otherwise be criminal offences in order to stop or inhibit, the criminal acts of others (para. 99);

(4) That the expression "a point of law which has arisen in relation to that charge" in s 123 (1) must be read as referring not merely to points of law which are in some general ways inherent in the charge itself, but also to points of law which have actually arisen in the proceedings which led to acquittal or conviction on the charge in question, including points of law which arise from any defence which is advanced against the charge, that the points of law relied upon by the respondents at the trial would be points of law within the scope of s 123 (1), that questions 2, 3 and 4 did not as stated express those particular points of law, but that they were not incompetent and the court was not restricted to answering the questions posed, that the questions as stated provided a useful broad starting point within the scope of the section and provided boundaries beyond which the court should not go, but that within these boundaries it was appropriate to deal with the more specific points of law which arose from the defence advanced (para. 101); and

(5) (i) Question 2 as stated answered in the negative (para. 104);

(ii) Question 2 as reformulated by the first respondent answered in the negative in relation to international law (para. 105) and in relation to any justification based on the Scots law of necessity (para. 106);

(6) Question 3 answered in the negative (para. 107), the mere fact that a person carried out acts which constituted a crime under a misconception of his legal rights not being a defence (para. 109); and

(7) Question 4 answered in the negative (paras. 110 and 111).

Opinion reserved as to the status of the prerogative in matters relating to the defence of the realm (para. 60).

Observed (1) that the court had grave misgivings as to the justiciability of the issues it had been asked to deal with in relation to defence policy and the deployment of Trident (para. 113);

(2) That the formulation of the defence of necessity in the American Law Institute's Model Penal Code suggesting that it was available where the actor believed that the evil sought to be avoided was greater than that sought to be prevented by the law defining the offence charged appeared to suffer from a number of defects, produced an element of personal belief rather than objective reasonableness, defined the test in terms of comparative evil without apparent regard to the quality of the conduct threatened, appeared to justify a crime carried out to prevent another crime whenever the threatened crime involved a greater harm, and did not seem to require immediacy in any way, and that American codifications of the criminal law were unlikely to provide a reliable basis for ascertaining Scots law (para. 55).

Advisory Opinion of International Court of Justice, 8 July 1996, considered (paras. 67-86).

CASES-REF-TO: Advisory Opinion of International Court of Justice, 8 July 1996; General List No. 95

CCSU v Minister for the Civil Service [1985] 1 AC 374; [1984] 1 WLR 1174; [1984] 3 All ER 935

Chandler v Director of Public Prosecutions [1964] AC 763; [1962] 3 WLR 694; [1962] 3 All ER 142; 46 Cr App R 347 Clark v Syme 1957 JC 1; 1957 SLT 32

Commonwealth v Berrigan, 509Pa 112; 472 A.2d 1099 (Pa Super 1984); 501 A.2d 226 (Pa 1985)

Commonwealth v Capitolo, 471 A.2d 462 (Pa Super 1984)

Hutchinson v Newbury Magistrates' Court [2000] EWHC 24 (9 October 2000)

John v Donnely, 1999 SCCR 802; 1999 JC 336; 2000 SLT 11

Moss v Howdle, 1997 SCCR 215; 1997 JC 123; 1997 SLT 782

Operation Dismantle v The Queen [1985] (SCR 414; 18 DLR (4th) 481

Palazzo v Copeland, 1976 JC 52

People v Gray, 571 NY Supp 2d 850

Perka v The Queen [1984] 2 SCR 232; 13 DLR (4th) 1

R v Howe [1987] 1 AC 417; [1987] 2 WLR 568; [1987] 1 All ER 771; 85 Cr App R 32

R v Martin [1989] 1 All ER 652; [1989] RTR 63; 88 Cr App R 88

R v Ministry of Defence, ex parte Smith [1996] QB 517; [1996] 2 WLR 35; [1996] 4 All ER 257

R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513; [1995] 2 WLR 464; [1995] 2 All ER 244

Southwark London Borough Council v Williams [1971] 1 Ch 734; [1971] 2 WLR 467; [1971] 2 All ER 175

United States v Bailey, 444 US 394; 62 L Ed 2d 575 (1980)

Ward v Robertson, 1938 JC 32; 1938 SLT 165.

INTRODUCTION: On 21 January 2000, the Lord Advocate presented a petition in the following terms to the High Court under s 123 of the Criminal Procedure (Scotland) Act 1995.

"1. (The) material facts which give rise to this reference are as follows.

(*a*) Three persons (hereinafter referred to as 'the panels') were indicted for trial in the sheriff court at Greenock on an indictment containing four charges, a copy of the indictment is annexed hereto. Evidence was led by the Crown in support of said charges and no submission was made that there was no case to answer.

(*b*) The evidence established, inter alia, that the acts alleged against the panels had been motivated by and carried out in furtherance of their opposition to nuclear weapons and in particular the Trident weapons system.

(*c*) On behalf of the panels there was tendered the evidence of Professor Francis A. Boyle, Professor Paul Rodger and Ms. Rebecca Johnston, all of whom were held out as experts on aspects of the development and current content of international law in relation to nuclear weapons. The procurator fiscal objected to the admissibility of the evidence which it was sought to lead from said witnesses, inter alia, on the ground that it is incompetent to lead evidence as to a question of law. The sheriff repelled said objections and allowed the evidence to be led. The evidence given by said witnesses referred, inter alia, to the advisory opinion of the International Court of Justice of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*.

(*d*) At the conclusion of the defence case it was submitted on behalf of the panels that the sheriff should direct the jury to acquit the panels. As understood and summarized by the sheriff, that submission was as follows: '. . . the three accused considered that Trident was being used illegally based on an understanding of what was international law and on advice given to them. And if they were right that the use and threat of nuclear weapons is illegal . . . they had a right particularly given the enormity or [sic] the risks of nuclear weapons to try to do something to stop that illegality'. It was also submitted on behalf of the panels that esto Trident was not being illegally used, the panels were nevertheless under the necessity of trying to do something to stop the United Kingdom from continuing to implement its policies in relation to nuclear weapons.

(*e*) The sheriff, on the basis of said submissions, held that the accused had acted without the criminal intent required for the constitution of the crime of malicious mischief and directed the jury to acquit the panels of the charges of malicious mischief.

"2. The petitioner according refers the following questions of law to your Lordships for opinion.

(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?

(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?

"May it therefore please your Lordships to order service of the foregoing petition upon the persons designed in the schedule appended hereto and thereafter to fix a date for the hearing of the reference herein and to order intimation of said date to said persons; and upon consideration of these presents to answer the questions of laws submitted for the opinions, of your Lordships in the premises as to your Lordships shall seem proper."

The indictment against the panels was in the following terms.

"(1) [On] 8 June 1999 on board the vessel *Maytime* then moored in the waters of Loch Goil, near Lochgoilhead, Argyll, you . . . did wilfully and maliciously damage said vessel and did score two windows on board said vessel with a glass cutter or other similar object and did attempt to drill a hole in one of said windows;

". . .

"(3) on date and place above libelled you, did maliciously and wilfully damage equipment, fixtures and fittings on board said vessel *Maytime* and in particular did cut a hole in a metal wire fence in the laboratory of said vessel, did smash the contents of electronic equipment cabinet and rip out electrical cables in said cabinet, did cut off the main control switch for the winch on said vessel, did damage a padlock on the door to the control room of said vessel by attempting to saw through same with a hacksaw and thereafter covering said padlock in glue or a similar substance rendering said padlock inoperative, did pour glue or a similar substance on to the wires and controls of a crane on the upper deck of said vessel, on the controls of the winch aforesaid and on to the cleats securing the hatch on said vessel, did place a chain around the crane on the upper deck of said vessel thereby preventing said crane from operating, and did smash a computer monitor on said vessel, did damage a wall clock in the laboratory of said vessel and did damage a cabinet containing a power supply to an adjacent platform, by forcing said cabinet open and damaging same;

"(4) on date and place above libelled you . . . did maliciously and wilfully damage a quantity of computer equipment, electrical and office equipment, acoustic equipment and amplifier, recording equipment, fax machines, telephone, tools, documents, records, electronic components, a briefcase, radio equipment, rangefinder, books and a case and contents, and did deposit said items in the waters of Loch Goil, whereby said items became waterlogged, useless and inoperable; OR ALTERNATIVELY

"date and place above libelled, you, did steal said quantity of computer equipment, electrical and office equipment, acoustic equipment and amplifier, recording equipment, fax machines, telephone, tools, documents, records, electronic components, a briefcase, radio equipment, rangefinder, books and a case and contents, and did remove said items from said vessel and did deposit said items in the waters of Loch Goil and did thus steal same."

Their trial took place between 27 September and 21 October 1999 in the sheriff court at Dunoon before Sheriff Gimblett and a jury.

COUNSEL: For the Lord Advocate: Menzies, QC, Di Rollo, A-D; For the Advocate General: Murphy, QC; For the first respondent: Party: amicus curiae: Moynihan, QC; For the second respondent: L Anderson, Mayer; For the third respondent: O'Neill, QC, McLaughlin.

JUDGEMENT-READ: On 30 March 2001, the following opinion of the court was delivered.

PANEL:

Lord Prosser, Lord Kirkwood, Lord Penrose.

JUDGEMENTS: OPINION OF THE COURT:

Introductory

[1] Angela Zelter, Bodil Roder and Ellen Moxley stood trial on indictment at Greenock Sheriff Court on 27 September 1999 and subsequent dates. The indictment contained four charges, all of which were directed against all three accused, and all of which related to events alleged to have occurred on 8 June 1999, on board the vessel *Maytime*, then moored in the waters of Loch Goil. *Maytime* had a role in relation to submarines carrying Trident missiles. Charge (2) (a charge of attempted theft) was not insisted in by the Crown and need not be referred to further. Charges (1) and (3), and the first alternative under charge (4), were all charges of malicious damage. Charge (1) related to some minor damage to the vessel itself. Charge (3) related to damage to equipment, fixtures and fittings on board the vessel. And charge (4) related to damage to a quantity of computer equipment and other moveables said to have been deposited in the waters of Loch Goil and thereby to have become waterlogged, useless and inoperable. The alternative to this fourth charge was that the accused removed these items from the vessel, deposited them in Loch Goil and thus stole them.

[2] At the conclusion of the trial on 21 October 1999, the sheriff directed the jury to return a verdict of not guilty in respect of each of the accused, on charges (1) and (3) and on both of the alternatives contained in charge (4). In accordance with this direction, the jury unanimously found all three accused not guilty on these three remaining charges.

Lord Advocate's Reference

[3] Section 123 (1) of the Criminal Procedure (Scotland) Act 1995 provides inter alia as follows:

> "Where a person tried on indictment is acquitted or convicted of a charge, the Lord Advocate may refer a point of law which has arisen in relation to that charge to the High Court for their opinion . . ."

[4] This petition is presented by the Lord Advocate in terms of section 123 (1) of the 1995 Act. He refers four questions of law to the court for our opinion. In accordance with procedures set out in section 123, the first respondent, Angela Zelter, elected to appear personally (as she had done at the trial) and each of the second and third respondents elected to be represented by counsel (as they had been at the trial). On 4 April 2000, the court appointed a hearing to be fixed in respect of the reference, and also inter alia, in respect that Ms. Zelter had not elected to be represented by counsel, appointed GJB Moynihan, QC, to act as amicus curiae. The court did not require formal answers, but appointed all parties to lodge skeletal arguments.

Written statements of argument were subsequently lodged by all parties, although not all could be described as skeletal.

Subsidiary issues

[5] Various matters have been raised by the parties by motions made at various stages in the proceedings. In addition, however, certain other applications require to be mentioned.

[6] On behalf of the second respondent, a petition was presented to the nobile officium of the court as a means of raising certain preliminary points in connection with the Lord Advocate's Reference. That petition proceeded upon certain fundamental misconceptions as to the history and nature of the proceedings. So far as insisted in, the points in question could be and were raised in the course of the proceedings. That having become evident, no further argument was advanced on behalf of the second respondent to show that the petition to the nobile officium was necessary or indeed competent. It was not however abandoned. At the end of the proceedings, the advocate-député moved us inter alia to dismiss that petition. That is plainly appropriate.

[7] At various dates prior to the hearing fixed in relation to the Lord Advocate's Reference, minutes were lodged on behalf of each of the three respondents, giving notice of an intention to raise devolution issues in connection with the Reference. In addition to the issues raised in these minutes, their presentation naturally gave rise to questions of procedure, and in particular the question of whether the issues raised in these minutes, or any of them, required to be considered and disposed of before any hearing on the Lord Advocate's Reference and the questions upon which he sought the court's opinion. Hearings to resolve the matters contained in these minutes were fixed to coincide with the hearing in relation to the Reference itself. We considered it more appropriate to hear the submissions of parties in relation to the questions set out in the Reference before hearing the submissions of parties on the matters raised by these minutes. In the event, many of these latter issues were thus rendered academic and were not insisted in. The lodging of these minutes resulted in the Advocate General being represented at the hearing, but in the event nothing remained upon which counsel for the Advocate General wished to make any submissions. We consider such issues as did remain, briefly, at the end of this opinion.

Competency

[8] In various ways and at various stages, points have been raised on behalf of each of the respondents, and by the amicus curiae, as to whether one or more of the questions set out in the Lord Advocate's petition might be incompetent, in terms of section 123 (1) of the 1995 Act. It did not appear to us that the issues regarding the competency of any of these questions could be resolved satisfactorily before we had heard the submissions of parties on the substantive issues. In particular, we did not see it as possible to decide a priori in relation to any question whether it could be said to express a point of law which had "arisen" in relation to any of the charges, or to determine in advance the nature, scope or indeed number of any points of law which we might consider to be raised by any particular question. In these circumstances, we reserved the issue of competency, indicating to the parties that in their submissions they would be permitted, and indeed expected, to cover issues which they considered had arisen in relation to the charges but which they saw the questions as framed as failing to identify, or indeed evading. In the event, this procedure

did not appear to us to produce any difficulty, and we touch upon questions of competency along with the substantive issues.

The questions

[9] The questions set out in the petition are these.

"(1) In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

"(2) Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

"(3) Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?

"(4) Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?"

Procedure at the trial

[10] Before coming to other matters, we think it useful to mention certain matters in relation to procedural aspects of the trial. The Crown led a number of witnesses, and the sheriff tells us that none of the Crown evidence was really in dispute. In addition, six joint minutes were lodged, relating to such matters as the recovery of property from the loch, the cost of replacement or repair, and evidence linking the accused with presence on the vessel. All three accused gave evidence, and it is worth noting that in relation to the events of 8 June 1999, and indeed the background to these events, they admitted much of what the Crown wished to establish in support of the charges. However, the evidence which the accused sought to put before the jury, either personally in their evidence or by evidence from other witnesses, included evidence as to a wide range of matters relating to the United Kingdom's Trident missiles, and also evidence as to customary international law. This gave rise to numerous objections, and argument upon matters of competency, admissibility and relevancy. Apart from the three accused, four defence witnesses were called: Professor Paul Rogers, Professor Francis Boyle, Rebecca Johnston and Judge Ulf Panzer. At this stage we merely note that the sheriff allowed evidence from these witnesses, although with certain restrictions.

[11] At the conclusion of the defence evidence on 19 October 1999, the sheriff allowed the first accused and counsel for the other accused to make submissions outwith the presence of the jury. These submissions were concluded the next day, when the procurator fiscal responded. Further submissions were then advanced by counsel for both the second and third accused. The submissions had covered quite a range of matters. After an adjournment, the sheriff stated certain conclusions which she had reached, and the reasons for reaching them. Overall, she concluded that it fell to her formally to instruct the jury that they should acquit all three accused of the charges relating to wilful and malicious damage. Thereafter, and on the following day, further submissions were heard outwith the presence of the jury in relation to the alternative charge under charge (4) of theft. The sheriff concluded that the jury should be instructed to acquit in respect of that matter also. The jury returned, and as we have indicated, they acquitted on all the remaining charges, on the sheriff's direction.

Issues and non-issues

[12] It is worth emphasizing that the issues for this court are those raised by the four questions in the reference. Answering these questions naturally makes it necessary to consider and resolve certain more specific or subsidiary issues. But before coming to the issues which we think we have to resolve, we think it is worth identifying certain matters which it is not for us to consider, or which we need not consider because the parties are at one.

[13] As was emphasized on behalf of the respondents, this is not an appeal and quite apart from the provision in section 123 (5) of the 1995 Act that our opinion "shall not affect the acquittal", it is not for us to consider the rightness of the acquittal, as such. On the other hand, the very fact that points of law referred to this court for its opinion must have arisen in relation to charges upon which a person has been acquitted or convicted makes it plain that the answers which are given by the court may show or suggest that in the court's opinion the acquittal or conviction was, or was not, sound. The extent to which that will happen will depend in any particular case upon the questions posed, but also upon the nature of the submissions made by any of the parties to the court, which the court will have to consider. On behalf of the respondents, it was suggested that, having regard to section 123 (5) in particular, we should avoid saying anything that would cast doubt on the rightness of their acquittal. We think that it is quite wrong. The acquittal will stand, whatever we say. And what we should say depends on what we consider has to be said in relation to the points of law referred to us for our opinion and the submissions made by the parties—including the respondents. The nature of the submissions made by the respondents was such that they relate closely to the soundness of the acquittal. But this is not of the essence of these proceedings. The questions are general, and not particular.

[14] In these circumstances, consideration of the sheriff's reasoning is likewise not of the essence. The arguments with which she was faced in the course of the trial, and the submissions made to her, were in our opinion both confusing and often confused. And they appear at times to have differed substantially from any argument advanced in this court. In the circumstances, we do not find it necessary to consider these arguments and submissions, or the sheriff's reasoning, in any detail.

[15] In factual terms, there was no real dispute at the trial as to what the accused had done. Moreover, at least in this court there was no dispute that what they did was criminal if one ignored certain exculpatory issues raised in their defence. As a foundation for that defence, the respondents sought to show, and in this court contend, that the deployment of Trident missiles by the United Kingdom Government is a breach of customary international law, and as such, illegal and indeed criminal in Scots law. Having regard to what happened at the trial, and to the submissions made in this court, certain questions arise as to the factual basis, or the appropriate hypothesis, upon which we should proceed in considering the characteristics and implications of the deployment of Trident. But the respondents' basic contention is that the actions of the United Kingdom Government are criminal in Scots law. Subject to one qualification which we shall mention in due course, it is upon that hypothesis alone that they approach the particular question which arose at trial (whether the otherwise criminal acts of the accused were in some way justified and thus non-criminal) and the more general questions which arise in this court, as to whether there is a justification or defence in relation to otherwise criminal acts of malicious damage or theft, in the ways described in questions 2, 3 and 4.

[16] It is to be noted that the respondents do not contend that mere bona fide belief that the Government's actions were criminal would provide any basis for the further contention that their actions were justified: they proceed upon the basis that the Government must actually be acting contrary to Scots law, for such a further contention to be open to the respondents. It is also to be emphasized that we are not asked, by either the Crown or the respondents, to consider or resolve any questions as to demonstration or protest, or the lawful boundaries of positive action as an expression of opinion. The respondents' position is that their otherwise criminal intervention was of a character and purpose quite different from protest or the like. It was action designed to prevent or obstruct a crime, in circumstances where that intervention was justified and non-criminal—either in terms of customary international law or in terms of the law of Scotland in relation to the defence of necessity. That was as they submitted, and indeed is, a wholly different matter from the expression of opinion through demonstrative action, or merely symbolic obstruction or civil disobedience in an attempt to bring influence to bear upon Government.

[17] This brings us to a matter which we think we should mention before coming to deal with the questions upon which our opinion is sought. Demonstration and protest and civil disobedience have a long and indeed proud history. Those who involve themselves in action of that kind will often be willing, or indeed intend, to step over the limits of legality, in order to make their point as forcibly as they can. And correspondingly they may be willing, or intend, to undergo punishment for any breach of the law—such minor martyrdom perhaps helping to reinforce and publicize the point which they are making. In distinguishing their own position from that world of action, and insisting that their own otherwise criminal conduct was non-criminal because it was justified, the respondents could be seen as moving into a relatively familiar area of legal and jurisprudential discussion: what are the circumstances which our law recognizes as entitling a person to do things which would otherwise be criminal? And that is indeed a substantial part of what was put in issue at the trial, and what was the subject of submissions to us.

[18] But three points are to be noted. First, it would be unrealistic to think that the issue arose at trial merely as a legal point which should result in acquittal: it is clear that in doing what they did, the respondents were effectively inviting prosecution, with a view, inter alia, to raising the issue of justification in court, and perhaps inducing some members of the public to see the trial as some kind of "test" case in relation to positive intervention and interference in defence matters. It has thus not only been the Crown who, by their questions, have raised general issues: the respondents themselves appear to us to have wished to do so, ever since they first planned what they eventually did on 8 June 1999.

[19] Secondly, while issues of justification and necessity may turn upon the prior question of whether an accused was faced with, and in some way trying to prevent, acts by another which were themselves criminal, the criminality of the events which the accused thus tries to avert is not always of the essence. And in taking the alleged criminality of the Government's actions in relation to Trident as a cornerstone of their argument the respondents appeared to us, particularly in much that was said by Ms. Zelter, to be treating the Government's alleged criminality in this respect not merely as something which had to be established in order to succeed in the defence of necessity and justification, but as itself the primary issue, with the respondents' actions at Loch Goil, and their subsequent trial, amounting to no more than a slightly complicated mechanism for bringing the Crown's conduct in relation

to Trident indirectly before a court, for scrutiny and, if possible, condemnation as criminal. As we mention later, Ms. Zelter emphasized that her inability to induce others to take action, in relation to what she perceived as criminal action on the part of the Government, was one of the foundations for arguing that she and the other respondents had no choice but to do what they did. But we think that it is worth noting, before coming to that particular question, that in addition to their claimed aim of physical prevention of what was being done by the Government in relation to Trident, the respondents appear also to have had, and still to have, the quite different aim of obtaining from a British court a finding that the Government's conduct was criminal.

[20] Thirdly, we should record that some emphasis was placed upon the respondents' membership of an organization which apparently takes an interest in questions of nuclear weapons and disarmament. That organization apparently has a number of principles or rules by which members such as the respondents abide when taking action in furtherance of the organization's aims. (One such principle is apparently non-violence—familiar enough in the context of protest and civil disobedience, but harder to understand when one is responding to necessity.) This is one of a number of background facts which help to explain how these three respondents came together for their Loch Goil exploit, with a significant degree of planning and a substantial body of information or belief as to defence matters and indeed international law. In many ways their action appears to have been a carefully chosen element in a widely based political campaign. The sheriff, having referred to the various sources of the respondents' knowledge and understanding of such matters, says that the respondents had formed "an unchallenged, sincere, unshakeable view" upon various matters, and contrasts them with "ordinary" peace protesters. We are not sure what is meant by "unchallenged" in this context. And one might suggest that holding "unshakeable" views is not always helpful when their soundness is in issue. The point which we think requires comment relates to the respondents' sincerity. Sincerity is significant, inasmuch as any kind of bad faith could be destructive of the types of defence which the respondents relied upon, and which underlies questions 2, 3 and 4. Sincerity is, however, quite common. And at least in the proceedings before this court (apart from a point discussed at paras. 49-55 below) we did not understand it to be suggested on behalf of any of the respondents that either in relation to themselves or upon the more general questions before us, the sincerity of a person's beliefs was in any way relevant except as negating any suggestion of mala fides which might be made.

[21] Against this background of matters which are not really in issue, we come to the questions referred for our opinion.

Question 1: In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

[22] At the respondents' trial, evidence was led as to the content of customary international law as it applies to the United Kingdom. The sheriff says that it seemed to her that in addition to the "non-legal" experts, "It was absolutely necessary for expert evidence to be led from an expert in international law, and whether or not it has ever been done in Scotland before seemed not to matter if I considered it essential." She goes on to say that "It did not seem appropriate that counsel, not necessarily skilled in international law, should address me on such a vital part of the defence". Thereafter she observes that it would not have been difficult for the Crown

Office to bring in "counter-experts". It is to be noted that the evidence in question was led before the jury and not merely before the sheriff (outwith the presence of the jury) as some kind of alternative or substitute for legal submissions. (It is also to be noted that at the trial, the respondents' understanding of what the law was—as distinct from the fundamental question of what the law was—was apparently seen as having potential significance. And the reasonableness of their understanding seems to have been regarded by the sheriff as also having a potential significance. But these peculiarities do not appear to us to have any bearing upon this question.)

[23] We are in no doubt that in relation to evidence in the trial itself this question must be answered in the negative. A rule of customary international law is a rule of Scots law. As such, in solemn proceedings it is a matter for the judge and not for the jury. The jury must be directed by the judge upon such a matter, and must accept any such direction. There can thus be no question of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is.

[24] It was pointed out to us that evidence as to foreign law may competently be led in Scottish proceedings. That is because the law in question is foreign, and in Scottish proceedings is a question of fact and not of law. Any analogy between such foreign law and customary international law is false. It was also pointed out that it may be necessary, in some circumstances, to lead evidence as to what a particular person believed the law to be. But that is an entirely different question from the question of what the law is. In such a situation it would still be the responsibility of the court to direct the jury as to the actual law, which would not be a matter for evidence.

[25] The sheriff's comments afford no reason for leading evidence before the jury upon questions of law. If anything, what they suggest is that it might be desirable for a judge in solemn proceedings to be helped in coming to a correct understanding of the law (which could then be incorporated in directions to the jury) by hearing the evidence of experts or specialists in a particular field of law.

[26] Just as it is for the judge to direct the jury upon a point of law, it is important to remember that it is for the solicitor or counsel appearing on behalf of any party to present to the court any submission which is thought appropriate upon any issue of law. If there is an authoritative basis for any such submission, it may of course be referred to. And we of course acknowledge that a court may find it convenient to be referred to textbooks, articles or other written material which a party's legal representative may put forward in his submissions as providing a succinct or illuminating formulation of some proposition which he wishes to put forward as part of his submissions. A court would not nowadays, in our opinion, reject such a procedure merely because the material was not technically authoritative.

[27] We can see some initial attraction in the suggestion that if a court is willing to read what a particular expert has written in a general context, it might on occasion be sensible to hear what he has to say, in the particular context of the case in hand. We do not feel it appropriate to rule out that possibility, as a matter of law. Such argument as was addressed to us in relation to question 1 was of course directed primarily to the question of evidence *in causa*, before the jury; and while the possible usefulness of such material to a judge was touched upon, having regard to what the sheriff had said, the point was not fully argued. At that level, we are inclined to think that the matter would be one for the judge's discretion, although we would wish to reserve our opinion on that point. We would, however, add that if in any particular situation it were thought necessary by those representing a party to have recourse to some specialist source of advice, the appropriate course would of course

normally be to seek that advice, whether in writing or by consultation or both, so that the appropriate submissions could be made, by that party's representative, at the appropriate time. In matters of customary international law, we can appreciate that the question of whether an *opinio juris* has emerged, and won the general acceptance which is necessary to constitute a rule of customary international law, might well make recourse to expertise appropriate. But having regard to the different skills and expertise of an advocate on the one hand, and some other kind of specialist on the other hand, we find it very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party. We note the sheriff's views. In the present case, the matter was regrettably complicated by the evidence being led in front of the jury, by its becoming entangled in questions as to the respondents' beliefs as to the law, and by the fact that the Crown (quite rightly in our opinion) did not seek to have the issue of law determined by evidence and counter-evidence. But on any analysis, the history of the matter at trial serves as a dire reminder and warning of how issues of law, however recondite or complex, must be carefully identified and formulated both for and by the presiding judge.

Fundamental principles

[28] Questions 2, 3 and 4 depend on a consideration of a number of fundamental principles of Scots law, as well as questions of customary international law. It is convenient to consider these issues generally, in order to provide a context in which these three questions can be answered.

Malicious damage

[29] It is not disputed that what the respondents did amounted in law to malicious damage, if (*a*) they had the relevant mens rea and (*b*) there was no exculpatory defence whereby the law would see what they did as justified. The second, third and fourth questions relate not to the general nature of malicious damage or the mens rea which it requires, but to issues of justification. But some of the propositions which were advanced, in particular on behalf of the second respondent, make it appropriate for us to say something about malicious damage and the mens rea which it requires before turning to issues of justification.

[30] The context for a discussion of the scope of possible defences to a charge of malicious damage is a proper understanding of the components of the crime itself. The modern crime of malicious damage has been defined as the intentional or reckless destruction or damage of the property of another whether by destroying crops, killing or injuring animals, knocking down walls or fences or in any other way. The mens rea of the crime in the case of intentional damage, which is the only relevant head in the present case, consists in the knowledge that the destructive conduct complained of was carried out with complete disregard for or indifference to, the property or possessory rights of another. The case of *Ward v Robertson* illustrates the boundary between innocent and guilty destructive conduct for present purposes. There was nothing in the facts found in that case to show that the appellant knew or must have known that walking across permanent pasture would render the grass useless or unsuitable for grazing purposes. Had the field been sown with an ordinary commercial crop, the inference of the necessary knowledge would have been drawn. The immediate destructive purpose of the conduct would have been inferred, without regard to underlying motive, from facts and circumstances showing that the appellant knew or must have known that trampling down the crop would have destroyed or damaged it.

[31] The traditional formulation of the *nomen juris* may be potentially misleading. But there is no room for doubt as to the formal requirements of proof of the offence. "Malice" does not require proof of spite or any other form of motive. The constituent parts of the crime are few. The property in question must have belonged to or have been in the possession of another. That property must have been damaged intentionally or recklessly. There must have been knowledge, or facts from which knowledge can be inferred, that the conduct complained of would cause damage to a third party's patrimonial rights in the property in question. In our opinion the admitted facts in the present case show that the respondents set out deliberately to cause damage, including the damage which they did inflict, and there is no substance whatsoever in the argument that they lacked the mens rea required for proof of malicious damage. The only substantial issue relates to the contention that they were justified in inflicting that damage.

Basis for claiming justification

[32] Apart from certain rather confusing submissions as to the nature of malicious damage, and the mens rea which it would normally require, the respondents' submissions at trial, and in this court, may be expressed broadly as a contention that what they did should not merely be regarded as a course of action, in isolation, but must be assessed as a reaction or response to what the Government was doing with Trident. And the submission that their reaction or response was justified (in the legal sense of providing a full defence to the charges which they faced) took two distinct forms. First it was contended that what the Government was doing with Trident was itself illegal or criminal, and that that fact made it lawful to take action which would otherwise be criminal to prevent or inhibit the Government's illegal or criminal acts. And as a separate argument, it was contended that what the respondents did was done out of necessity, which in Scots law provides a complete defence. The first of these arguments depended upon customary international law in two different ways. First, it was not suggested that what the Government was doing with Trident would be illegal or criminal apart from customary international law; but it was contended that these actions were illegal or criminal as a matter of customary international law, and thus became so as a matter of Scots law. Secondly, and quite separately, it was argued that again as a matter of customary international law the illegality or criminality of what the Government was doing with Trident constituted a justification (not otherwise to be found in Scots law, and quite apart from any justification by necessity) for what the respondents had done. This aspect of the submissions advanced on behalf of the respondents can thus be seen as entirely separate from their submissions in relation to necessity. But in some cases where a defence of necessity is advanced, as a justification for acts intended to avert or inhibit danger, it will be necessary to consider whether the alleged danger flows from an act which in some way breaches the civil or criminal law or from what is an entirely lawful act, notwithstanding any danger that it may create for others. We think that the respondents see the first argument, depending not on necessity but upon customary international law, as the more "important" (perhaps because of a somewhat extraneous wish to have the Government's actions condemned as illegal or criminal, rather than for reasons directly connected with the issue of their own possible guilt). But we find it appropriate to consider the law relating to necessity first, before coming to questions of customary international law and the lawfulness of the Government's conduct in relation to Trident.

Necessity

[33] We do not propose to attempt any definition of the defence of necessity. And we would add that in our opinion any clarification or refinement of the concept of necessity is far more likely to emerge from a particular set of facts in a given case than from consideration of a general question. However, we would agree with what is said in Glanville Williams: *Criminal Law*, p. 728:

> "The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision . . . It is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value. Sir William Scott said in The Gratitudine [(1801) 3 Ch Rob 240 at p. 246; 165 ER 459]:
>
> "'The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal. It is not to be considered a matter of surprise, therefore, if much instituted rule is not to be found on such subjects.'"

There are none the less certain factors which have been authoritatively recognized as contributing to the type of necessity which constitutes a defence, and others which in principle can be seen as having to be taken into account. In any particular case it will be necessary to consider whether the defence is established having regard to such factors.

[34] It was common ground that necessity may be a relevant defence in the case of malicious damage as in other crimes. In appropriate circumstances the property of another might present the kind of immediate danger to the life or health of an individual or that individual's companion described by Lord Justice-General Rodger in *Moss v Howdle* that would justify destruction or material damage. In that case the court held that it made no difference whether the danger relied on arose from a contingency such as a natural disaster or illness rather than from deliberate threats. In the context of damage to property the danger may arise from accident or carelessness which may cause some physical thing to become dangerous. A vehicle rolling out of control towards a crowd might be intercepted by someone other than the owner or driver as the only way of preventing death or injury, even if the actions carried out caused damage to the vehicle. The contingency giving rise to the danger again appears to be immaterial.

[35] If a danger arises from natural causes, as opposed to some kind of human action, the justification for destroying or damaging the property of another obviously does not depend upon any claim to be preventing something unlawful or criminal. But where the danger arises from some human act or omission, which might be in breach of the criminal law or of some civil duty or obligation, the question arises as to what bearing, if any, such considerations might have in judging whether the defence of necessity is established. In the present case, there is no question of the alleged danger arising from contingencies such as natural disaster. The alleged danger is said to be created by the Government's actions. Moreover, there is no question of the danger arising from actions which are delictual or in breach of contract or otherwise in breach of known civil obligations. What is said is simply that the Government's actions are in breach of customary international law, and consequently in breach of domestic law. In these circumstances, it is unnecessary and inappropriate for us to consider whether any other type of breach of the law could ever be a factor having a bearing upon whether the defence of necessity was estab-

lished. Furthermore, in the absence of any such other breaches, it is apparent that the Government's actions in relation to Trident must be regarded as entirely lawful unless the breach of customary international law is established. If the Government's actions were thus entirely lawful, notwithstanding any danger that they might create, it is difficult to see how the defence of necessity could be invoked in relation to the otherwise criminal acts of a third party, done in order to prevent such entirely lawful actions. At all events, in the present case it was not submitted that if the Government's acts were lawful the defence of necessity would be available. It is thus an essential element of the respondents' argument in relation to necessity that they must show that the Government is in breach of customary international law. Such a breach is thus essential to the contention founded upon necessity, just as it is essential to the separate contention which is based not upon necessity but upon customary international law alone.

[36] It must, of course, be remembered that while such a breach of law is thus a necessary part of the defence of necessity in the circumstances of this case, that fact in no way diminishes the need to establish necessity according to Scots law, taking all appropriate factors into account. Subject to what we say later in relation to the respondents' argument based upon customary international law, it is not a defence to a charge of malicious damage to contend that the damage was done to prevent the commission of another offence: *Palazzo v Copeland*, the Lord Justice-General, at p. 54. The principles of our domestic law are general and clear. A person may not take the law into his or her own hands. A person may not commit an offence in an attempt to stop another. In relation to the defence of necessity, it may of course be the case that criminal conduct is the source of the danger, perhaps in the direct sense of criminal acts which are embarked upon or threatened and are themselves dangerous, or more indirectly as having created or contributed to some circumstances in which an accused claims that it was necessary for him to intervene. But even if such criminality were relevant, as showing that the creation of the danger was not itself lawful, the factors demonstrating necessity are circumstantial factors, concerning the danger itself, and require to be established regardless of whether what gave rise to the danger was a criminal act or, for example, a natural disaster. We turn to consider these factors.

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

[38] A related factor is the range of choice presented by the circumstances. In *Perka v The Queen* Dickson J analysed the defence of necessity in considerable

detail. At p. 249 he commented on the concept of necessity as an excuse for conduct which would otherwise be criminal. On his analysis the defence arose where, realistically, the individual had no choice, where the action was "remorselessly compelled by normal human instincts" [at p. 249e]. He adopted the views expressed in George Fletcher: *Rethinking Criminal Law*, that involuntary conduct should be excused in the context of criminal law, and observed [at p. 250a-b]:

> "I agree with this formulation of the rationale for excuses in the criminal law. In my view this rationale extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable."

[39] In *Moss v Howdle* the Lord Justice-General, at p. 223, referred to the discussion of the juridical basis of the defence of necessity, and declined to add to it. He referred to Dickson J's opinion among other authorities, and said [at p. 223D and F]:

> "It follows that the defence cannot apply where the circumstances did not in fact constrain the accused to act in breach of the law . . .
>
> "Miss Scott did not dispute that the availability of the defence had to be tested in this way, nor that, if Mr. Moss had had an alternative course of action which was lawful, the defence could not apply."

So far, then, one can say that the defence is available only where there is so pressing a need for action that the actor has no alternative but to do what would otherwise be a criminal act under the compulsion of the circumstances in which he finds himself.

[40] The next issue, which arises directly from the above, relates to the circumstances justifying action, and is whether it is enough that the actor is driven by considerations personal to him. It appears plain that for action to meet the test there must be reasonable grounds for the view that it is necessary. The test has been expressed in different ways. On one view, the circumstances compelling action must be so extreme that no ordinary human being confronted by them would think that there was an alternative to the criminal conduct if the emergency were to be averted. For the Crown it was contended that the threat leading to action must be so compelling that any normal person would carry out the action in the circumstances confronting the accused. There is a risk that each of these propositions fails to have regard to the reality that there are normal people who may not react to an emergency. Not all normal people are equally brave or of equal resolve. Nor do all normal people perceive emergency or urgency, or danger itself, in the same way. (It is worth emphasizing that questions as to "personal" response are very different from questions as to prior personal beliefs or preconceptions.)

[41] We were referred to the English law of duress as discussed in *R v Howe*. The appellants in that case had contended that they had killed their victim under duress. The third question referred to the House of Lords in that case was: "Does the defence of duress fail if the prosecution prove that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?" At p. 426[D-E], the Lord Chancellor, Lord Hailsham, said:

"(The) definition of duress . . . was correctly stated by both trial judges to contain an objective element . . . and this must involve a threat of such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist. No doubt there are subjective elements as well, but, unless the test is purely subjective to the defendant which, in my view, it is not, the answer to the third certified question . . . must be 'yes'."

In *R v Martin* Simon Brown J restated the English rule as follows [at pp. 653H-654A]:

"(First), English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.

"Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

"Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both these questions was Yes, then the . . . defence of necessity would have been established."

[42] The Lord Chancellor in *R v Howe* emphasized that duress of circumstances was an aspect of necessity. In *Moss v Howdle* that approach was adopted by the Lord Justice-General. Leaving aside the English terminology, these observations provide considerable assistance in understanding some of the requirements of the general defence of necessity. The actor must have good cause to fear that death or serious injury would result unless he acted; that cause for fear must have resulted from a reasonable belief as to the circumstances; the actor must have been impelled to act as he did by those considerations; and the defence will only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did.

[43] These tests acknowledge that different people respond to danger in different ways. The test applies to what a "sober person of reasonable firmness, sharing the characteristics of the accused" would do. It would not be enough to exclude a defence of necessity, which in all other respects was appropriate, to show that a person with different characteristics from the actor would have lacked the resolve to take effective action. Taking the simple example of a runaway vehicle, one can readily imagine circumstances in which an attempt to interfere with a moving vehicle would expose the actor to personal danger. Some individuals might find that risk unacceptable. In *Perka* Dickson J included in his preliminary conclusions that the involuntariness of the actor's conduct "is measured on the basis of society's expectation of appropriate and normal resistance to pressure" [p. 259d]. Society would, in normal course, recognize that there must be a range of acceptable responses to any given danger or other form of pressure. There may be certain dangers that only the most resolute would respond to by intervention.

[44] For the Crown it was contended that for a response to danger to be justified by the defence of necessity the person or persons exposed to risk must be positively identified and have some relation to the actor. On that approach the person who intercepted the runaway vehicle mentioned above would have a defence of necessity if he had a "companion" in the vulnerable crowd, but not if they were all strangers. In our opinion there is no acceptable basis for restricting rescue to the protection of persons already known to and having a relationship with the rescuer at the moment of response to the other's danger. No doubt a close relationship may enter into the issue of necessity in some respects. Proportionality of response may be a function of relationship, for example. A parent's reaction to apprehended danger to a child might reasonably be more extreme than that of an unrelated bystander. But the existence of a prior relationship as a precondition of necessity has nothing to commend it, in our view. In this respect we consider that the submissions of the amicus curiae were sound. If one had to define "companion" it would be anyone who could reasonably be foreseen to be in danger of harm if action were not taken to prevent the harmful event.

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

[46] It was also contended by the Crown that the actor must, at the material time, have reason to think that the acts carried out had some prospect of removing the perceived danger. In our view that proposition is sound. What the defence is concerned with is conduct directly related to the avoidance of a particular danger which would cause harm if the acts of intervention were not carried out. If there were no prospect that the conduct complained of would affect the danger anticipated the relationship between the danger and the conduct would not be established. In the context of the destruction of or damage to another person's property to avert danger, having regard to its condition or what was being done to it or with it or the threat presented by it, the connection might ordinarily be easy to establish, as in the case of the runaway vehicle. In other circumstances, if the action could achieve no more than, say, a postponement or interruption of danger (so that it is only averted for a time) or some lessening of its likelihood (without removing the danger even temporarily) the assessment of any necessity would be less simple. In particular, issues of proportionality would arise; and merely making a danger less likely might not be regarded as justified by necessity at all.

[47] As a matter of general principle it appears clear that the conduct carried out must be broadly proportional to the risk. That will always be a question of fact to be determined in the circumstances of the particular case.

[48] There was of course a major dispute between the parties as to whether and how the defence of necessity might be said to be available in the present case. But leaving aside for the moment questions as to the application of the appropriate

principles, it appears to us that there was little or no dispute among the parties as to what those principles were—with one exception. It is convenient to consider that exception at this stage.

[49] In the final stages of the hearing, in the second speech for the second respondent, Mr. Anderson introduced an argument which had not been advanced either in the first speech for the second respondent or on behalf of either of the other respondents. It was not adopted on behalf of either of the other respondents.

[50] Put shortly, the argument was to the effect that the criteria for necessity identified in *Moss v Howdle* or indeed anywhere else in Scottish authority, did not represent the law of necessity in relation to a particular category of what would otherwise be malicious damage. This was said to be damage done by what were called "citizen interveners". The argument was based on certain American decisions, and, as we understood it, was to the effect that these decisions revealed principles which we could and should incorporate into Scots law despite the absence of previous Scottish authority for doing so, presumably as a way of applying old principles to a new kind of situation.

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

[52] As Edmund Davies LJ said in *Southwark London Borough Council v Williams* at p. 745H, the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. "The reason for such circumspection is clear—necessity can very easily become simply a mask for anarchy." (One may note in passing that he went on to observe that it appeared that all the cases where a plea of necessity had succeeded were cases which deal with "an urgent situation of imminent peril".) These observations were quoted with approval *in Hutchinson v Newbury Magistrates Court*. It is hard to see how such a variety of possible saints and sinners as "citizen interveners" could be regarded as acting out of some special kind of necessity as a matter of law, without introducing anarchy in a particularly shapeless and indeed dangerous form. The phrase is evidently intended to suggest legitimacy of conduct in the public interest. But it seems to have no objective basis justifying any such implication.

[53] Mr. Anderson contended that the general defence of justification was much wider than the Scottish cases and writings suggested, and that American cases, especially *Commonwealth v Berrigan*; *People v Gray*; and *Commonwealth*

v Capitolo contained valuable observations that the court might rely on. Three propositions were said to be established by these authorities. (1) The question of immediacy should not be restricted to reacting immediately; there could be situations in which a delay between the perception of harm and action in response was acceptable. (2) The question whether there were other available legal means of acting should not be confined to ascertaining whether there were in fact such means but should include a consideration of whether the accused reasonably believed that there were other effective means of responding to the situation. (3) In considering the effectiveness of the action taken the court should have regard to the accused's reasonable belief that the action taken would lessen the harm rather than to the true likelihood that the action would avert danger. It seemed to be acknowledged that in terms of Scots law these propositions are novel.

[54] The American cases are not persuasive. Berrigan was concerned with two provisions of the Pennsylvania criminal code. In the Superior Court Judge Brosky at paragraph [4] quoted observations of Justice Rehnquist in *United States v Bailey* on the American common law of necessity, and distinguished them on the basis that "in Pennsylvania, however, the justification defence enacted by our General Assembly . . . is an expanded, modern variant on the common law defence of necessity". Justice Rehnquist's comments on the defences of duress and necessity, as a measure of the American common law, are totally destructive of Mr. Anderson's first and second propositions. He said:

> "Under any definition of these defences one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm', the defenses will fail."

The adoption by Pennsylvania of a statutory defence which is inconsistent with American common law is an unlikely basis for an amendment to Scots common law. Capitolo was decided on the basis of the same code and similar comments apply. *People v Gray* was a decision of a first instance criminal court in New York. Mr. Anderson accepted that many of the propositions found in Justice Safer-Espinoza's opinion were not vouched by other authority. However, he informed us that similar views were held in other first-instance criminal courts in America. In citing American authority he reminded us that in *Moss v Howdle* the Lord Justice-General had cited the views of Cardozo J for the proposition that "Danger invites rescue". There may perhaps be a developing or changing jurisprudence in the criminal courts of the United States. Safer-Espinoza J may in time achieve the eminence of Cardozo J. But it would be premature to accept her judgement as having as yet achieved the status of an authoritative statement of the modern law of necessity in America, much less as having persuasive authority on what the components of that defence should be in other countries.

[55] Mr. Anderson's submissions were wholly lacking in substance. The amicus curiae in his submissions suggested that the formulation of the law of necessity in the American Law Institute's Model Penal Code might assist. That code suggests that the defence is available where the actor believes the conduct to be necessary to avoid an evil, to himself or to another, where, inter alia, the evil sought to be avoided by his conduct is greater that that sought to be prevented by the law defining the offence charged. That formulation may require more precise scrutiny. But it appears to suffer from a number of defects for present purposes. It introduces an element of personal belief rather than objective reasonableness. It defines the test in terms of

comparative evil without apparent regard to the quality of the conduct threatened. It appears to justify a crime carried out to prevent another crime whenever the threatened crime involved a greater harm. It does not seem to require immediacy in any way. In our view American codifications of the criminal law are unlikely to provide a reliable basis for ascertaining Scots law. The law of Scotland is as declared in *Moss v Howdie*. Reform is not for us, but for Parliament. It is against the background of the factors identified in Moss that the defences available to people in the position of the respondents have to be considered.

Legality of Government action: justiciability

[56] Turning from the principles governing necessity to the issue of the legality of the Government's actings, we consider first the justiciability of such an issue. The advocate-député did not argue that the legality of the deployment of Trident II was not justiciable in this court. Having initiated the present proceedings the Crown were not best placed to do so. But it has to be observed that there may be an important issue which is not disposed of as a result. The position in 1964 is illustrated by *Chandler v Director of Public Prosecutions*, which involved the activities of the Committee of 100. At p. 791, Lord Reid said:

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

The best interests of the State in matters of defence were a matter for the prerogative.

[57] For the third respondent, Ms. Moxley, Mr. O'Neill argued that the law had developed since 1964. There was a growing acceptance that exercise of prerogative powers was open to judicial review. But even upon that basis, the first case he relied on scarcely assisted his position in the present context. In *CCSU v Minister for the Civil Service*, the House of Lords discussed the progressive relaxation of the rule that exercise of the prerogative was not justiciable. But there were important qualifications. At p. 398[E-F], Lord Fraser of Tullybelton said:

> "As De Keyser's case [[1920] AC 508; [1920] All ER 80] shows, the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities . . . and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts."

Lord Diplock, at p. 412F, said that national security, the defence of the realm against enemies, is the responsibility of the executive, and not the courts of justice: "It is par excellence a non-justiciable question." Lord Roskill, at p. 418C, included the disposal of the armed forces among the prerogative powers which were not subject to judicial review.

[58] Mr. O'Neill next discussed the Canadian case of *Operation Dismantle v The Queen*. The plaintiffs sought an injunction to prevent the testing of the Cruise missile on the ground that it conflicted with the right to life assured by section 7 of the Canadian Charter of Rights and Freedoms. The Federal Court of Appeal held that the issues were non-justiciable. The Supreme Court rejected that proposition. Wilson J discussed Chandler at some length, putting a gloss on Lord Radcliffe's observations at several points. However, she does not appear to have been referred to the *CCSU* case. Her observations on Chandler are in our opinion incompatible with the consistent view in the United Kingdom that the disposition of the armed forces is non-justiciable. The case cannot assist the respondents in this court.

[59] We were next referred to *R v Ministry of Defence*, ex parte Smith. The case related to the legality of a rule prohibiting homosexuals from the armed forces. It was held that the prerogative did not preclude the court's jurisdiction. But the terms of the decision are important. The relevant question was discussed only by the Divisional Court. At p. 539 [E], Simon Brown LJ said:

> "I have no hesitation in holding this challenge justiciable. To my mind only the rarest cases will today be ruled strictly beyond the court's purview—only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue."

In that case no operational considerations were involved. Finally in this chapter we were referred to *R v Secretary of State for the Home Department*, ex parte Fire Brigades Union. Along with the case of Smith this shows a broadening of the circumstances in which the courts will hold questions relating to the exercise of the prerogative justiciable. But they have no direct bearing on the present case.

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

Trident and danger

[61] Question 2 refers to "the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons". We shall return to the terms of the question. We were not asked by the respondents or the Crown to consider the characteristics of any nuclear weapon other than Trident II, although contrasts were drawn between the characteristics of that weapon and others. It is convenient at this stage to note certain undisputed facts about Trident, and to indicate briefly the established facts or suggested hypotheses which it might be necessary to take into account in answering question 2.

[62] It is not disputed that the United Kingdom possesses Trident II. And while question 2 takes such mere possession as the starting point in the phrase which we have quoted, no issue arises in relation to such mere possession: an hypothesis of mere possession without any kind of placement or deployment is perhaps somewhat unreal in any event but it is undisputed that Trident II is not thus merely possessed,

or in some sense merely held, in Scotland. It is in fact deployed. The respondents are content to proceed upon the basis that mere possession would not entail any illegality on the part of the Government. The decision in *John v Donnelly* was not questioned. It is not for this court to make factual findings. In particular, it is not for us to make findings as to the characteristics or destructive potential of Trident. Nor is it for us to make findings as to the manner in which Trident is deployed, or any implications derived from its deployment as to the purpose of the deployment, the circumstances, if any, in which it might be used or the form which the damage which it would cause would take. Nor is it for us to make factual findings as to Government policies or intentions in relation to Trident. It is also to be emphasized that while the sheriff clearly took account of factual evidence in reaching her decision, the trial does not provide us, and the questions do not deal, with any set of facts specific to or established in this case. But having regard to the nature of the questions we do not think that it is necessary or indeed desirable, to proceed upon any single or established view of the facts. The generality of question 2, in particular, seems to us inevitably to require a broader approach, considering hypothetical rather than actual situations. And in particular, we regard it as appropriate to consider, as a hypothesis, the situation as the respondents see and describe it. We do not have material upon which we could accept or reject the factual picture which they present to us. But within the ambit of question 2, we think it necessary to consider what the legal position would be, upon this as well as other hypotheses.

[63] It is said that the Trident nuclear warheads are 100 to 120 kilotons each, approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki. Emphasis was placed upon the blast, heat and radioactive effects of the detonation of such a warhead, and what were described as the inevitably uncontainable radioactive effects, in terms of both space and time. All these asserted characteristics were relied upon as showing that the damage done, and the suffering caused, could not be other than indiscriminate. Suggestions that the weapons deployed by the United Kingdom could be used in restricted ways, defensively or tactically or being directed only against specific types of target, were said not to be possible, or if possible not to remove this element of being indiscriminate in the suffering and damage which they would cause. In particular, it was said that they would be inevitably indiscriminate as between military personnel and civilians who could not be excluded from the uncontainable effects which we have mentioned. Even if much smaller warheads were used (and the possibility of this was not accepted in the context of the United Kingdom's deployment of Trident) one was still dealing with weapons of mass destruction, with uncontainable consequences.

[64] In addition to relying upon the characteristics of the weapons deployed by the United Kingdom and the inevitable and indiscriminate consequences which they attributed to them, the respondents relied also upon material which they saw as demonstrating Government intentions and policy, and thus the circumstances in which there was a risk that the weapons would actually be used. In its most general form, the proposition is said to be based upon logic. Deterrent will not deter unless it is credible. It will be credible only if those sought to be deterred are convinced that the weapons would be used (or, one might think, fear that they might). There must therefore, it is said, be an actual willingness and intention to use the weapons, at least in some circumstances. One may doubt the logical perfection of such arguments; but in contending that there was a real risk of actual use, at least in some circumstances, the respondents were able to rely both upon the familiar facts of deterrence (round-the-clock deployment, permanent preparedness to fire at a few min-

utes' notice, long-term targeting and deployments related to particular trouble spots and the like) and also statements in various forms from high Government sources indicating a willingness and intention to use these weapons in response not only to nuclear attack but in certain other circumstances. The respondents of course went into greater detail. We do not find it necessary to do so. But the argument moves from a claim that if certain circumstances were to emerge there would be a risk of threat and actual use, to a portrayal of the risk as already present: there is said to be, inherent in deployment, a continuing and continuous risk of actual use of Trident, and the continuing and continuous "threat" to use it, with its inevitably indiscriminate consequences. The respondents contend both that the United Kingdom's deployment of these weapons is illegal in terms of customary international law, and that recourse to what would otherwise constitute the offence of malicious damage is justified, as a matter of necessity and in order to prevent an illegal act, where the continuity of this risk and threat can be interrupted or reduced by inflicting damage on equipment of the kind found on board *Maytime*. The respondents' picture of the deployment of Trident and the policies of Government was not accepted by the advocate-député on behalf of the Crown; but we are satisfied that, as hypothesis, it makes it possible to consider question 2 in a reasonably specific context, and to regard it as arising from the charges upon which the respondents were acquitted. We shall have to return to the concept of deterrence, and to the particular word "threat" in our consideration of customary international law, to which we now turn.

The legality of the deployment of Trident

[65] The foundation of the respondents' contention that the United Kingdom's deployment of Trident is illegal as a matter of customary international law is the Advisory Opinion given by the International Court of Justice, as requested by the General Assembly of the United Nations by resolution 49/75 K adopted on 15 December 1994, on the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" We were informed by the amicus curiae that one of the issues which led to this reference arose from the distinction drawn in debate, by the nuclear States, between deterrence on the one hand and threat of use or use of nuclear weapons on the other hand. The General Assembly clearly hoped that the advisory opinion would provide authoritative guidance on that and other issues. It is of course to be noted that the question related to nuclear weapons in general, and not to Trident, and that the Court was thus not concerned with or considering the particular characteristics of Trident, as distinct from other nuclear weapons which might be less inevitably or uncontainably indiscriminate than Trident is seen as being by the respondents.

[66] Before turning to consider the International Court's advisory opinion, we think it worth emphasizing that that is what it is: it is an advisory opinion, not a judicial determination of customary international law. For the purposes of giving an advisory opinion, upon the question before it, the Court had to consider what was or was not permitted under international law in relation to the threat or use of nuclear weapons. Similarly, this court, in relation to the questions before us and having regard to the contentions of the respondents, must in our opinion consider what is and is not permitted by customary international law in relation to the United Kingdom's deployment and policies in relation to Trident, upon the hypothesis which the respondents say is appropriate. But it is worth emphasizing that although the advisory opinion may be regarded as confirmatory of the then rules of customary international law, it is not in itself to be regarded as having changed them. We do not understand

the Court itself to have taken any other view of its function. And correspondingly, it is this court's function to reach its own conclusions as to the rules of customary international law, taking full account of, but not being bound by, the conclusions reached by the International Court of Justice.

The advisory opinion

[67] The Court delivered its opinion on 8 July 1996. The Court stated at paragraph 20 of its opinion that the real objective of the question was clear: "[To] determine the legality or illegality of the threat or use of nuclear weapons." That view reflected an approach identifiable in the submissions of certain States appearing before the court that the question posed offered an opportunity to express an unqualified view of the legality of the threat or use of nuclear weapons whatever the circumstances. For example, one finds in the submissions made on behalf of Australia an invitation to set aside the past and to accept the submission that "the use or threat of nuclear weapons would now be contrary to fundamental principles of humanity, and hence, contrary to customary international law". It is clear that the Court was asked by certain States to consider the question in the widest context.

[68] The Court resolved, after discussion, that it had jurisdiction to answer such a general question, but noted, at paragraph 19, that there was an entirely different question which arose, namely whether the Court, under the constraints placed on it as a judicial organ, would be able to give a complete answer to the question asked. At paragraph 18 the majority opinion notes that the Court's function is to state existing law. It does not legislate. As a matter of language, the advocate-député was correct in argument before us in saying that the question might have been answered in the positive or negative without qualification, as indeed the court was invited to do by Australia among other States. However one reads the opinion, and the *dispositif* in particular, the Court was clearly unable to dispose of the question in a universal and unqualified way. In order to understand the limits within which the Court did consider that it could express an opinion, the starting point has to be an examination of the sources of international law considered by the Court which might bear upon the question of the legality of Trident.

[69] In paragraphs 24 to 32 of its advisory opinion, the Court rejected a number of submissions by several States. The inherent right to life, and the prohibition on arbitrary deprivation of life, under article 6 of the International Covenant on Civil and Political Rights, were distinguished in paragraph 25. The law against genocide was distinguished in paragraph 26. The possible relevance of laws for the protection of the environment was considered in paragraphs 27 to 33. Those laws indicated important environmental factors to be taken into account, but did not specifically prohibit the use of nuclear weapons. Against that background, in paragraph 34, the Court identified the most directly relevant applicable law governing the question as (*a*) that relating to the use of force enshrined in the Charter of the United Nations; and (*b*) the law applicable in armed conflict which regulates the conduct of hostilities; together with (*c*) relevant specific treaties on nuclear weapons.

[70] The observations in paragraph 25 on article 6 of the International Covenant on Civil and Political Rights, taken along with the identification of the relevant sources in paragraph 34, are of some possible relevance in the present case in the context of an argument that the Court's opinion has a bearing on the policy of deterrence in time of peace.

[71] Before turning to the sources identified and the rules of international law that can be deduced from them, it is relevant to note what the Court understood it

was dealing with in considering "nuclear weapons". Paragraphs 35 and 36 make it clear that what the Court had in mind were weapons of mass destruction, potentially catastrophic in their destructive potential, with the capacity to cause untold human suffering and the ability to cause damage, including genetic defects and illness, to generations to come. It was the legality of the threat or use of weapons of this kind that the Court proceeded to consider. If the Court had considered that there was an identifiable and distinct class of small-scale or tactical nuclear weapons which could be regarded as different, and could be set aside in their advice, it would no doubt have made that clear. The question of whether weapons capable of mass destruction can be used on a small scale, or tactically, or in some other limited way, is another matter, and is recognized by the Court.

[72] At paragraph 37 of its opinion, the Court states that it will now address the question of legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter of the United Nations relating to the threat or use of force, and in the succeeding paragraphs gives consideration to a number of provisions of that kind. The general provision of Article 2, paragraph 4, is noted:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations."

Reference is also made to Articles 51 and 42. At paragraph 39 it is observed that these provisions do not refer to specific weapons, but apply to any use of "force", regardless of the weapons employed.

> "The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for legitimate purpose under the Charter."

At paragraph 42 it is acknowledged that the use of nuclear weapons in self-defence cannot be excluded in all circumstances, and after reference to certain other matters the Court, at paragraph 47, comes to questions which are more directly relevant for present purposes. The Court observes that whether a "signalled intention to use force if certain events occur" is or is not a "threat within Article 2, paragraph 4, of the Charter" depends upon various factors. It is not suggested that the general Purposes of the Charter throw any particular light upon the legality of nuclear as opposed to other weapons. In relation to the concepts of "threat" and "use", for the purposes of Article 2, paragraph 4, the Court records that no State (whether or not it defended the policy of deterrence) suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal. But in paragraph 48 the Court comes to the question of whether a policy of deterrence (with a credible intention to use nuclear weapons) is a "threat" contrary to Article 2, paragraph 4. What it says is that this depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State or upon certain other considerations, whereby the use or threat of force would be unlawful. In the absence of these other considerations, therefore, it is directing a particular use of force against a particular "target" State's integrity or independence which is seen as possibly amounting to a "threat" in the sense of Article 2, paragraph 4. If that is inherent in the concept of "threat", it is apparent that the Court sees deployment as a deterrent as not necessarily involving this crucial element of "threat".

[73] Turning from the Charter, the Court considered the law applicable in situations of armed conflict. Noting at paragraph 57 that the pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments, the court does not find any specific prohibition of recourse to nuclear weapons. At paragraph 58 it goes on to say that in the last two decades a great many negotiations have been conducted regarding nuclear weapons, but notes that they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. It refers to a number of specific treaties which limit such matters as acquisition, manufacture and possession of nuclear weapons, or their deployment in particular areas, or their testing. And at paragraph 60 it notes the view of certain States that these treaties "bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all use of nuclear weapons". On the other hand, at paragraph 61, it notes that other States see a logical contradiction in reaching such a conclusion. At paragraph 62 the Court itself notes that such treaties, which do not specifically address threat or use, "certainly point to an increasing concern in the international community with these weapons". The Court concludes from this that these treaties could therefore be seen "as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves". At paragraph 63, referring specifically to the Tlatelolco and Rarotonga treaties, the Court says that they "testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons", and it refers to certain more recent treaties. But it concludes by saying: "It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition, on the use, or the threat of use, of those weapons as such." That is, as we have indicated, accepted in the present case: the contention is not that there is a conventional prohibition, but that these weapons are illegal as a matter of customary international law. None the less, in judging whether there is a settled *opinio juris* as a matter of customary law, it appears to us that the history and nature of conventional provisions may be of substantial significance.

[74] At paragraph 64, the Court turned to an examination of customary international law, noting that the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States". After noting opposing arguments, it says this at paragraph 67:

> "The Court does not intend to pronounce here upon the practice known as the 'policy of deterrence'. It notes that it is a fact that a number of States adhered to that practice during the greater part of the cold war and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*."

We find that passage unequivocal.

[75] Going on to consider certain General Assembly resolutions, the Court notes, inter alia, that they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. And it acknowledges that a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule. However, it observes that several of the resolutions under consideration were adopted with substantial numbers of negative votes and abstentions and says that "thus, although those resolutions are

a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons". At paragraph 73, noting the adoption each year by the General Assembly of resolutions requesting the Member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, the Court says that this reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, "a significant step forward along the road to complete nuclear disarmament". And it concludes by saying that the emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such "is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other". Again, we find that unequivocal.

[76] At paragraph 74 of the opinion the Court turned to the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of what is now known as "international humanitarian law", applicable in armed conflict. After noting the varied sources of international humanitarian law, and some of its history, the Court comments at paragraph 77 that the conduct of military operations is governed by a body of legal prescriptions, because "the right of belligerents to adopt means of injuring the enemy is not unlimited". In particular, reference is made to the prohibition of the use of "arms, projectiles or material calculated to cause unnecessary suffering" contained in article 23 of the 1907 Hague Regulations. At paragraph 78 the Court identified the cardinal principles constituting the fabric of humanitarian law:

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

After referring to the Martens Clause, the Court notes that humanitarian law, at a very early stage, prohibited certain types of weapons, either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. And it adds that if an envisaged use of weapons would not meet the requirements of humanitarian law, a "threat" to engage in such use would also be contrary to that law. At paragraph 79, it says that these fundamental rules are to be observed by all States, whether or not they have ratified the conventions that contain them, "because they constitute intransgressible principles of international customary law". Proceeding upon its view that there could be no doubt as to the applicability of humanitarian law to nuclear weapons, and recording [at para. 86] inter alia the United Kingdom's explicit statement that "[so] far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*", the Court goes on at paragraph 89 to say that it finds that, as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality is also applicable to all international armed conflict, whatever type of weapons might be used.

[77] At paragraph 90 the Court observes that the conclusions to be drawn from the applicability of these principles to nuclear weapons are "controversial". Passages from the United Kingdom's Written Statement are quoted, referring to the requirements of self-defence and the "wide variety of circumstances with very different results in terms of likely civilian casualties 'in which nuclear weapons might be used'". It also records at paragraph 92 the different view, that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law on the basis that they would in all the circumstances be unable to draw any distinction between the civilian population and combatants, and that their effects, largely uncontrollable, could not be restricted, either in time or in [space,] to lawful military targets. They would kill space, [*sic*] and destroy in a necessarily indiscriminate manner, and the number of casualties would be enormous. On that view, the use of nuclear weapons would be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. Faced with this conflict of views, the Court says [at para. 95] that it did not consider that it had a sufficient basis for a determination on the validity of either view: "[The] Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." At paragraph 96 the Court mentions the fundamental right of every State to survival, and thus its right to resort to self-defence when its survival is at stake. And it refers again to the "policy of deterrence" in terms similar to those already mentioned at paragraph 67 of its opinion. This section of the opinion concludes by the Court observing [at para. 97] that it "cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".

[78] In the concluding section of its opinion, paragraphs 98 to 103, the Court refers to "the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons" [para. 98] and [at para. 99] to article VI of the Treaty on the Non-Proliferation of Nuclear Weapons:

> "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 international control."

It points out that this goes beyond a mere obligation of conduct: the obligation is an obligation to achieve a precise result (nuclear disarmament in all its aspects) by adopting a particular course of conduct (the pursuit of negotiations in good faith). The fulfilment of these obligations is described [at para. 104] as "without any doubt an objective of vital importance to the whole of the international community today".

[79] We have thought it appropriate to set out the relevant views and conclusions expressed in the course of the Court's opinion at some length before turning to the Court's replies to the question, as set out in paragraph 2 of the *dispositif*. It is necessary to set out the material parts of the *dispositif* in full. The Court replied to the question as follows:

> "A. Unanimously,
>
> There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously,

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

D. Unanimously,

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

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

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

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

[80] The expression "threat or use of nuclear weapons", which is used in the question upon which the advisory opinion was sought, is also used at heads A, B, D and E of paragraph 2 of the *dispositif*. It seems clear that it must have the same meaning in all four heads. What that meaning is, in our opinion, is clarified by the terms of head C, which refers to threat or use "of force" by means of nuclear weapons "that is contrary to Article 2, paragraph 4, of the Charter of the United Nations". That provision of the Charter, along with Article 51, is discussed as we have indicated at paragraphs 38 to 50 of the Court's opinion. And while those provisions are concerned with a threat or use of nuclear weapons, the expression "threat or use" must have the same meaning as it has in connection with the general concept of force in Article 2, paragraph 4. Apart from making that particular observation, we find it more convenient to discuss the terms and apparent meaning of the various heads of paragraph 2 of the *dispositif* after a consideration of the minority opinions.

Minority opinions

[81] Our attention was drawn to some of the minority opinions. These do not, of course, express the opinion of the Court as to the requirements of customary international law. In some respects they appear to be expressions of views as to what the law ought to be rather than what it is. But they cast some light on the advisory opinion itself and the scope of the material considered by the Court.

[82] Judge Ranjeva delivered a separate opinion from the majority, explaining the basis on which he supported the decision. He put a gloss on the first clause of paragraph 2E, and proceeded to analyse the second part in a highly destructive way. His ultimate conclusion is difficult to reconcile with his support of the whole

clause except on a basis which we cannot reconcile with the reasoning underlying the decision. It is illuminating of his difficulties that he concluded his opinion with the hope that no court would ever have to rule on the basis of the second clause of paragraph 2E of the *dispositif*. We find no help in his individual views in relation to the issues before this court.

[83] Some of the dissenting opinions reflect clearly the divergence of views on matters which are relevant in the present case. Vice-President Schwebel's analysis of the law followed the same lines as the majority opinion. His conclusion on conventional and customary sources was consistent with the majority: the threat or use of nuclear weapons was not, certainly not yet, prohibited in all circumstances. He dismissed the resolutions of the General Assembly as lacking legal authority. His discussion of the principles of international humanitarian law followed. He identified the extremes which in his view allowed of easy answer. It could not be accepted that the use of nuclear weapons on a scale which would, or could, result in millions of deaths in indiscriminate inferno and by far-reaching fallout, which would have profoundly pernicious effects in space and time, and would render uninhabitable much or all of the earth could be lawful. At the other extreme tactical nuclear weapons used in submarine warfare easily could. He figured intermediate cases. He interpreted paragraph 2E as acknowledging that while the use of nuclear weapons might "generally" be in conflict with international law, in specific cases it might not. He proceeded to strong criticism of the second part of paragraph 2E, and developed an argument based on contemporary events in support of the legality of the threat or use of nuclear weapons in certain circumstances.

[84] Judge Weeramantry reflected the opposite opinion. He thought that the Court should have declared that the use or threat of use of nuclear weapons was unlawful in all circumstances without exception. Ms. Zelter relied strongly on passages in his opinion. It is clear, however, that his dissenting opinion does not reflect either the opinion of the Court or the existing law. The terms in which he expresses his own views are recognized by him to be at odds with the majority. He says that in certain respects the majority view is "clearly wrong". In section VII, part 2, of his opinion Judge Weeramantry dealt with his views on deterrence. One can entertain no doubt that he considered that even at the level of minimum deterrence a policy of holding nuclear weapons for deterrence was contrary to law.

[85] These two extremes of opinion illustrate the kind of discussion which took place, not only as to threat and use, but also to deterrence. They show the degree of divergence of opinion on the legality of deterrence among members of the Court. Perhaps because of this divergence of opinion, paragraph E of the *dispositif* is not persuasive of the proposition that in the present state of international law deployment of nuclear weapons in pursuance of a policy of deterrence is per se illegal. The observations of Judge Shahbuddeen in his dissenting opinion are of some importance. He considered that the Court could have answered the question put to it in the only context which he thought relevant, the use of nuclear weapons in self-defence where the use envisaged threatened the survival of the species. He dissented because the Court did not answer the question one way or the other.

Interpretation of the dispositif

[86] We shall come back to the meaning of "threat" when dealing with the submissions of parties. We have no comment otherwise in relation to heads A or C of paragraph 2 of the *dispositif* at this stage. Some comment is, however, appropriate in relation to heads D and E. In relation to head D, we find the use of the words

"should" and "particularly" somewhat surprising and confusing. But we think this head must be read broadly as confirming the applicability to nuclear weapons of the general requirements of international law applicable in armed conflict and indicating (consistently with heads A and B) that apart from specific obligations under treaties and other undertakings, the threat or use of nuclear weapons may be compatible with these requirements, but will not be so if the circumstances are such that the particular threat or use breaches any of the principles and rules of international humanitarian law. Head D is not in our opinion capable of being read as suggesting that deployment of nuclear weapons in pursuance of a general policy of deterrence is per se a "threat". Nor does head D suggest that whatever does amount to a threat of nuclear weapons, or actual use of such weapons, will necessarily be in breach of the principles and rules of international humanitarian law. Indeed, it envisages that they may not be. Head E was plainly regarded as problematic by certain members of the Court. Since head D leaves entirely open the question of when and in what circumstances the threat or use of nuclear weapons might be in breach of customary international law, it is perhaps understandable that the Court might be reluctant to conclude the replies without reflecting in any way the observations which they had made at paragraph 95 of their opinion to the effect that the use of such weapons seems "scarcely reconcilable" with respect for the requirements of international humanitarian law, and at paragraph 97, which suggests an unwillingness to leave the circumstantial questions unanswered, and expresses the idea that their use by a State might always be illegal, except "in extreme circumstance of self-defence, in which its very survival would be at stake". Head E, with its use of the word "generally" and its repetition of what has been said in paragraph 97, is perhaps intended as an indication of where the boundaries of legality and illegality are likely to be found. Even if Trident is to be seen as inevitably indiscriminate, head E does not in our opinion show that the Court saw use or threat of such a weapon (as distinct from some small or tactical nuclear weapon) as always illegal. Indeed, the references to extreme circumstances and survival do not suggest that small or tactical weapons are envisaged. Despite the divided views on head E and indeed the trenchant criticism expressed by Judge Higgins, we would not wish to comment on the propriety of including this type of non-determinative material in what was, after all, an advisory rather than determinative opinion. For us the point is that head E identifies no rule, expressly or by implication.

Intervention to prevent crime

[87] As we have indicated at paragraph 32 above, the respondents rely upon customary international law not merely as showing that what the Government was doing was illegal, but as providing a justification (not otherwise to be found in Scots law, and quite apart from any justification by necessity) for what they did. We come now to that question.

[88] The respondents claim to have "acted in the knowledge that the only effective remedy open to us to prevent a nuclear holocaust was to join with other 'global citizens' in an effort to enforce the law ourselves as the Government, judiciary, police and other institutions of the State were not willing to do it themselves, despite high-level delegations asking them to do so". Leaving aside the question of whether what they did could seriously be seen as helping to prevent a nuclear holocaust, and stripping this claim of some of its vaguer and more tendentious implications, the underlying proposition appears to be that if the law is being broken, and is not being enforced by public institutions empowered to enforce it, individuals have the legal

right to enforce it, or to take steps contributing to its enforcement, notwithstanding that what they do would otherwise itself be criminal. As we have indicated, the law in relation to necessity confers no such general right. What is contended is that customary international law confers such a general right. Indeed it is that contention which appears, even more than alleged necessity, to underlie the respondents' claim to be justified in what they did. Its basis is much less clear.

[89] The argument advanced in support of this proposition, in particular on behalf of the second respondent, was at one stage founded upon the Nuremberg Principles. But these clearly have nothing to do with this matter, and the argument based on them was not insisted in. Counsel for the second respondent, and Ms. Zelter, submitted however that the proposition had a basis in principles revealed at the Nuremberg trials themselves. It was not explained how or why any rule or principle applied in the conduct of those trials, but not incorporated in the Nuremberg Principles, should be regarded as established customary international law. The cases relied upon, both by Ms. Zelter and by counsel for the second respondent, were cases where an accused person pled justification by extreme necessity, arising from the plight of Germany at certain stages in the war or by superior orders at times of grave emergency. Those defences were rejected, and the argument here appeared to be on the lines that as some kind of corollary or implication, deriving from the fact that neither orders nor necessity excused an individual's participation in actions alleged to be criminal at international law, the individual in question should be seen as having had a right to take action (itself otherwise criminal) designed to prevent the military or civilian authorities from committing the crimes in which the accused had in fact implicated himself.

[90] That does not appear to us to have been an issue at the Nuremberg trials in question. And while interesting questions of law might no doubt arise, in relation, say, to a German citizen during the war who in breach of German law chose to kill his officer rather than obey him in committing a crime against humanity, the cases to which we were referred do not appear to us to have determined any such issue.

[91] Particular emphasis was laid upon the case of a Swiss national, Paul Grueninger, who had been dismissed from office and convicted in a local court on the ground of disregard of Swiss federal directives and laws in allowing refugees from Nazi persecution to enter Switzerland. We were told by Ms. Zelter that his trial was reopened in 1995 and that he was acquitted posthumously. The facts of the case appeared clearly from Ms. Zelter's narrative, but the grounds of judgement did not. On the material available his actions appear to have had the character of rescue. There is nothing to support the notion that the case demonstrates some right, as a matter of customary international law, to prevent crime by committing what would otherwise be a criminal act. We see no real analogy between any of these cases and the situation in which the respondents find themselves. What we have referred to as a "notion" is in our opinion no more than that. It has no foundation in law. Unless the respondents' actions are justified by the law of necessity, they cannot be seen as justified.

Submissions as to the illegality of deploying Trident

[92] The arguments advanced to us were essentially those considered by the International Court of Justice for the purposes of giving its advisory opinion, but with one crucial difference. That Court was considering nuclear weapons in general. We were considering Trident in particular. The possibilities which the International Court considered included some in which it had not felt able to say that the in-

evitable consequences would be so indiscriminate as always to entail breach of international humanitarian law. It was submitted that these possibilities related only to small tactical weapons. The Court was unable to hold that the threat or use of nuclear weapons would always and inevitably entail such a breach. It was submitted that for such small weapons, the Court's reluctance to reach an absolute conclusion might be understandable, but that for a weapon such as Trident, the possibility of use compatible with the requirements of international humanitarian law simply did not exist, and the International Court had not suggested that it did. In relation to Trident, therefore, this court should hold that any threat or use would inevitably entail breach of those requirements, and would be illegal as a matter of customary international law. And while that conclusion was said to flow from the rules of international humanitarian law, which had been considered by the International Court of Justice, rather than from the advisory opinion itself, it was submitted that head of paragraph 2 of the *dispositif* demonstrated the Court's reasons for stopping short of a declaration of universal illegality in threatening or using nuclear weapons, and identified the limited category of situations in which such threat or use might be legal—situations in which Trident could not be used.

[93] In our opinion, this submission misconstrues the position adopted by the International Court of Justice. On a correct reading of the *dispositif*, and in particular head E, we understand the Court as stopping short not merely of a declaration that the threat or use of nuclear weapons will always and inevitably be illegal. It also, as we understand, stops short of drawing any line between those threats or uses which will or may be legal and those which will or may be illegal. [The Court] appears to us to consider, as we do, that any breach of international humanitarian law will depend upon circumstances. In any particular case of threat or use, the facts will have to be compared with rules which are not expressed in black and white objective terms, but involve a range of qualitative considerations, covering such matters as the purposes, nature and consequences of the threat or use in question. We are not persuaded that even upon the respondents' description of, or hypothesis as to, the characteristics of Trident it would be possible to say a priori that a threat to use it, or its use, could never be seen as compatible with the requirements of international humanitarian law.

[94] In our opinion there are two fundamental flaws in the respondents' contention that the United Kingdom's deployment of Trident is in breach of customary international law. These two flaws can perhaps be seen as one; but they merge from different considerations, and it is convenient to approach them separately.

[95] First, the submissions advanced on behalf of the respondents appear to us to ignore the fact that the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, are not concerned with regulating the conduct of States in time of peace. They specifically relate to warfare and times of armed conflict, and are designed to regulate the conduct of belligerents, against one another or against some neutral State. The International Court of Justice appears to us to have made this plain. In particular, at head E of paragraph 2 of the *dispositif*, the Court was in our opinion expressly concerned with the application of international humanitarian law where a state of belligerence exists. That is what the Court says in the first part of paragraph E. It refers to the rules of international law "applicable in armed conflict", and the principles and rules of humanitarian law are mentioned only in that context, without reference to any rules of humanitarian law in situations where there is no armed conflict. Attempts were

made in argument to apply paragraph E, and the rules generally applicable to armed conflict, to times of peace. We are not persuaded that that can be done. In an alternative approach, it appeared to be suggested that the deployment of Trident was of its nature of such a kind as to create "armed conflict". We can see that that expression may be used to describe situations in which, despite actual use of lethal weaponry, a State or States may deny that there is a state of "war". We are not concerned with such nice distinctions or definitions, when arms are used by one State against another. But it is quite another matter to try to extend the meaning of "armed conflict" to deployment of forces or weaponry in time of peace. The respondents' enthusiasm for their cause may lead them to think along those lines. But enthusiasm is an untrustworthy dictionary. If one considers a case of actual use of nuclear weapons, the situation can no doubt be seen as one in which there is either an invasion of neutrality or ipso facto a state of war. At all events, it is hard to see how such an event would fall outside the expression "armed conflict". Moreover, where there is already armed conflict, with identifiable belligerents, one can readily envisage threats of illegal use of nuclear weapons which, as a matter of international humanitarian law, are to be equiparated with that illegal use, and are thus themselves illegal. In the context of armed conflict between such known belligerents or opponents, such an equiparation is understandable. But in time of peace, it does not appear to us that these rules are either applicable or capable of application. That remains true even where a particular State has a policy of deterrence, and deploys nuclear weaponry in execution of that policy. Application of the rules, and the resultant possibility of illegality, will arise only if and when some specific change turns the situation into one of armed conflict. But that aspect of the matter lies at the heart of the second flaw in the respondents' argument, and is more conveniently dealt within that context.

[96] Quite apart from the fact that the relevant rules of international humanitarian law appear to be restricted to situations of armed conflict, a question arises in relation to any rule which is concerned with the "threat or use" of force or of nuclear weapons, as to whether there is indeed a "threat" of the kind which the rule equiparates with actual use. On behalf of the respondents, the argument appeared to be that deterrence quite simply is a threat. We have no difficulty in acknowledging that in certain contexts the words may be virtually interchangeable. But to adopt another word, the minatory element in one action or set of actions may be very different from the minatory element in another act or set of actions. And we are entirely satisfied that the general minatory element in the deployment of nuclear weapons in time of peace, even upon the respondents' hypothesis as to the United Kingdom Government's policies and intentions, is utterly different from the kind of specific "threat" which is equated with actual use in those rules of customary international law which make both use and threat illegal.

[97] No one familiar with either the streets or the courts of this country could fail to see that a distinction can be drawn between a youngster brandishing a knife at another a foot away from him, and perhaps indicating by word and action that he intends to stab him there and then, and all multifarious situations in which a person may say or show, perhaps very convincingly, that in some circumstances, specified or not, he would have recourse to violence against another or others. One can play with language: the latter may be said to constitute a threat, or perhaps to issue a threat, or to be guilty of threatening behaviour. *Nemo me impune lacessit*. But broadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practicable violence, made to a specific "target", perhaps coupled with some specific demand

or perhaps simply as the precursor of actual attack. The deployment of Trident II, however far one goes in adding hypotheses as to the immediacy with which it could be used against some potential and arguably identifiable target State, in our opinion in general lacks the links between threat and use and an immediate target, which are essential to a "threat" of the kind dealt with by customary international law or in particular international humanitarian law. A State which has a deployed deterrent plainly could and might take some step which turned the situation into one of armed conflict, and involved a sufficiently specific threat to constitute a breach of customary international law. But that is another matter.

[98] The respondents relied in various ways upon a paper entitled "Nuclear Weapons and the Law" by Lord Murray, based upon a speech given by him in Oxford in October 1998, and published in *Medicine, Conflict and Survival*, vol. 15 (1999) at pp. 126 to 137. Considerable emphasis was laid upon Lord Murray's observations, and while we do not feel the need to refer to his very thoughtful discussion of the International Court of Justice's advisory opinion, it is right to draw attention to one particular passage, which counsel for the respondents did not rely upon but which appears to us to be in point. At p. 132, Lord Murray says this:

> "The Court, I think rightly, proceeded on the basis that threat is equivalent to use. In this context threat means a practical warning directed against a specific opponent. So a general display of military might, such as a Red Square parade in Soviet days or a routine Trident submarine patrol, would not alone constitute a threat at law."

In relation to ordinary deployment, and routine patrols, that appears to us to be plainly right. Insofar as they have a minatory element, it is so general and conditional that it is quite simply not a threat of the kind which is "equivalent to use". Whether that general position would be transformed into such a "threat" in some particular circumstances depends entirely upon those circumstances. According to the respondents, there have been occasions when specific circumstances would alter the general position, and give rise to a specific argument that what the United Kingdom was doing had on that occasion moved beyond general deterrence to specific "threat". These would be questions of fact; but one can have regard to this as an hypothesis. Even so, we see no basis for a contention that the general deployment of Trident in pursuit of a policy of deterrence constitutes a continuous or continuing "threat" of the kind that might be illegal as equivalent to use. In both of these respects, it appears to us that the respondents' contention is baseless, and that the conduct of the United Kingdom Government, with which they sought to interfere, was in no sense illegal.

Necessity in the present case

[99] The contention that the respondents' conduct was justified as a matter of customary international law is thus without foundation. The general deployment of Trident was not illegal as a matter of customary international law. In any event, and even on the hypothesis of armed conflict and actual threat, customary international law does not entitle persons such as the respondents to intervene as self-appointed substitute law-enforcers with a right to commit what would otherwise be criminal offences in order to stop or inhibit, the criminal acts of others. Any justification for what would otherwise be criminal malicious damage must therefore be found in the ordinary domestic law of necessity. Leaving aside the point that the actions of the United Kingdom Government in deploying Trident cannot be said to be illegal, and that any risk or danger which they create is correspondingly not apparently illegal,

it is appropriate to consider whether such risk or danger as it may create could be seen as presenting the respondents with circumstances in which, according to the ordinary requirements for a defence of necessity, they would be justified in doing what they did on board *Maytime*.

[100] We have already observed that clarification or refinement of the concept of necessity is more likely to come from a particular set of facts in a given case than from consideration of a general question. But the facts of the present case are in our opinion of no value as a foundation for any analysis of the defence of necessity. Our conclusion upon that matter cannot sensibly be elaborated. We cannot see any substance at all in the suggestion that what the respondents did was justified by necessity. The actions of the respondents were planned over months. What they did on board *Maytime* was not a natural or instinctive or indeed any kind of reaction to some immediate perception of danger, or perception of immediate danger. Deployment of Trident shows that the United Kingdom had the capacity to threaten use of the weapon, or to use it. One might say that there is a chance or possibility that this might be done, in some situation that might emerge. But there is no apparent basis for saying that such a situation seemed likely to emerge. Even if such a situation had seemed imminent, the risk of its emerging must still be distinguished from the risk that in that situation there would be an actual threat or use. And even if the respondents were well founded in regarding the deployment of Trident as some kind of standing or abiding threat, that possibility must be distinguished from any likelihood that Trident was about to be used. The circumstances are not in our opinion even remotely analogous to those which provide a justification for intervention to prevent imminent danger. Moreover, there is not the slightest indication that the damage which the respondents did, and which they apparently claim was necessary as a means of averting or perhaps reducing danger or harm, had or could have had any conceivable impact upon the supposedly immediate risk. If the respondents said that they were acting as political protesters, willing to carry their protest beyond demonstration into crime, for the sake of publicity for their cause, their reasoning would be comprehensible. But they repudiate any such explanation for what they did. They insist that they were engaged in altering the course of events. If that is how they sincerely see their actions, so be it. But whatever drove them or compelled them to do as they did bears no resemblance to necessity in Scots law.

Questions 2, 3 and 4

[101] Before answering these questions we would refer to paragraphs 3 and 8 above. Section 123 (1) of the 1995 Act is in very broad terms. We are satisfied that the expression "a point of law which has arisen in relation to that charge" must be read as referring not merely to points of law which are in some general way inherent in the charge itself, but also to points of law which have actually arisen in the proceedings which led to acquittal or conviction on the charge in question, including points of law which arise from any defence which is advanced against the charge. In the present case, where it appears that conviction would have been appropriate unless the defence of justification, in one form or another, was established or gave rise to reasonable doubt, we are satisfied that the respondents are well founded in contending that the points of law relied upon by them at trial, in support of their defence of justification, would be points of law within the scope of section 123 (1). Questions 2, 3 and 4 clearly do not, as stated, express those particular points of law. And it can be said, most obviously in relation to question 2, that the points of law which they raise were not points which were put in issue by the respondents, in that

form. But we are not persuaded that that means that the questions are incompetent or that we should restrict ourselves to answering the precise questions posed. As stated, the questions put matters broadly. But on any sensible reading of the section, it appears to us that the charges laid against the respondents, together with the nature of the defence, were such that these broad questions raise points of law which are to be seen as having arisen in relation to the charges. In our opinion the questions as stated provide a useful broad starting point, within the scope of the section, although within the broad boundaries of these questions there arise the more specific issues raised by the respondents, which must be dealt with if any useful or meaningful answer is to be given to the broad questions stated. It was upon that view, in principle, that we acceded to the respondents' wish that we should hear argument upon the points of law which they saw as the "real" issues in the case. And in answering the questions, correspondingly, we do not think that it would be appropriate to restrict ourselves to simple answers to the broad questions stated. These questions provide boundaries beyond which we should not go. But within those boundaries, we think it appropriate to deal with the more specific points of law which arose from the defence advanced at trial, and upon which the respondents made submissions to us.

Question 2

[102] Ms. Zelter urged the court to refuse to answer question 2. Alternatively she proposed that it should be reformulated as follows:

> "Does international law and/or Scots law justify an individual in Scotland in damaging or destroying property which is being used for criminal purposes, in order to prevent those criminal actions being carried out by the United Kingdom namely the United Kingdom's deployment, within and without Scotland, of Trident nuclear warheads and its threat to use such warheads in accordance with HM Government's current defence policy?"

[103] Both formulations might be criticized as tendentious. But it is clear that this question can be addressed within the general scope of the question referred to the court. There is no substance in the contention that the court should decline to answer the Lord Advocate's question.

[104] We answer the question as stated in the negative: as we have indicated, customary international law contains no rule justifying damage or destruction of property. That is the case not only when the damage or destruction is in pursuit of a personal objection of the kind suggested in the question. It is the case even if the United Kingdom's possession of nuclear weapons, or its deployment of these weapons, or its policies in relations to such weapons, are illegal as a matter of customary international law or in particular international humanitarian law.

[105] We also answer this question as reformulated by Ms. Zelter in the negative. The United Kingdom's deployment, within and outwith Scotland, of Trident nuclear warheads, and the Government's current defence policy, do not in our opinion include any "threat" to use such warheads in the sense in which a threat is equiparated to use, so as to be illegal as a matter of customary international law, or international humanitarian law. In any event, even if the deployment of these warheads, and current defence policy, were at present, or were to become, not merely a general deterrent but a "threat" in that sense, international law provides no justification for an individual damaging or destroying property used for those purposes, in order to prevent the actions of the United Kingdom in that respect. As regards Scots law, it likewise provides no justification for such damage or destruction unless such damage or destruction is justified by the Scots law of necessity.

[106] In relation to any justification based upon the Scots law of necessity, the question as reformulated by Ms. Zelter must again be answered unequivocally in the negative. If particular circumstances arose, so that it could be said that the United Kingdom was not merely deploying Trident in execution of a general policy of deterrence, but was making a specific "threat" to use Trident against a target State, then questions as to the legality of its actions could arise as a matter of customary international law. But even leaving aside questions as to justiciability, which we do not feel it appropriate to deal with, any issue of justification would depend not upon the mere fact of any such illegality, but upon the Scots law of necessity, with the requirements inter alia of immediacy of danger and prospects of prevention which we have discussed. In the context of what was done by the respondents, and said to be justified by necessity, the damage or destruction of property has no foundation at all in anything analogous to necessity in Scots law. More generally, the circumstances described in this formulation of question 2 do not in our opinion involve the crucial requirements for a defence of necessity, either in terms of immediacy and response to danger, or in terms of the prospects of prevention of the supposed danger.

Question 3

[107] We answer this question in the negative.

[108] Ms. Zelter objected to the formulation of question 3 on a number of grounds. She contended that reference to "belief" that the actions complained of were justified in law missed the point. The three accused "knew objectively" that Trident was unlawful on the basis of factual analysis and legal argument. The argument became somewhat circular. At certain stages, it relied on the beliefs of the accused being well-founded beliefs, and thus not merely beliefs but facts. But obviously they could not conclusively determine the issues of fact and law involved, and then act on the basis of their own views. No matter how firmly convinced a person might be of his or her conclusions on an issue of fact and law, the validity of those views would be a matter for a properly constituted court to determine so far as the issue was justiciable. At other stages it was simply argued that the respondents had never suggested that mere belief could constitute a defence.

[109] The unequivocal answer to the question posed by the Lord Advocate is provided in the opinion of Lord Justice-General Clyde in *Clark v Syme* at p. 5. The mere fact that a person carried out acts which constituted a crime under a misconception of his legal rights is not a defence. The Crown accepted that there were some offences where honest belief was a factor, for example in cases of bigamy or rape, where the honest belief of the man that the woman consented to intercourse was relevant. But these related to the requisites for proof of the criminal conduct and had no bearing on the present case.

Question 4

[110] We answer this question in the negative.

[111] For the respondents it was argued that the question did not properly focus the issues which arose at the trial, and which ought properly to be addressed at this stage if the court were to deal with them rather than simply refuse to answer the questions posed. However, the answer is straightforward. Apart from the defence of necessity it is not a defence to a criminal charge that the actions complained of were carried out to prevent another person committing a crime.

Devolution minutes

[112] In the event the devolution minutes do not seem to us to require any specific comment beyond what we have said in other contexts.

Summary

[113] In answering the questions, we have tried to deal with the broad issues which they raise, as well as the specific issues which have been seen by the respondents as "real". But in concluding, we would reiterate that we have grave misgivings as to the justiciability of the issues which we have been asked to deal with, in relation to defence policy and the deployment of Trident. And we feel obliged to add that even ignoring the issue of justiciability, we are not persuaded that the facts of what the respondents did, or anything in the nature or purposes of the deployment of Trident, indicate any foundation at all, in Scots or international law, for a defence of justification.

DISPOSITION: Judgement accordingly.

SOLICITORS: Livingstone Brown, Glasgow; McCourts, Edinburgh.

APPENDIX: COMMENTARY

1. This case provides a useful summary of the requirements of law of necessity, making it even clearer than it already was that the court has no sympathy with the suggestion that the defence of necessity arises whenever the positive value preserved by the commission of a crime outweighs the negative value involved in its commission. The defence of necessity is available only where what is involved is an immediate threat to life or of serious injury. Any other situations in which a crime is committed in order to prevent some harm are left, presumably, to prosecutorial discretion.

2. The statement that customary international law is part of the law of Scotland may derive from the passage at p. 56 of the ninth edition of *Oppenheim's International Law*, where it is said that in the United Kingdom "all such rules of customary international law as are either universally recognized or have at any rate received the assent of this country are per se part of the law of the land", which means, the learned author goes on to say, at p. 57, "that international law is part of the lex fori and does not have to be proved as a fact . . . in the same way as a foreign law, although evidence of state practice and of received international opinion is permitted, in order to establish the existence or content of a rule of international law".

Just when a rule of international law becomes part of the law of Scotland is thus not altogether clear, and there is also a lack of clarity about just what evidence can be led before the judge on the matter. It may also be worth bearing in mind the remarks of Buxton LJ in *Hutchinson*, where he said at para. 38 that "the unlawfulness of [a] Government's conduct that is established in English law by the transformation of the rule of international law is unlawfulness of a more elusive nature than is to be found in the substantive criminal law".

(*b*) HOUSE OF LORDS

Shanning International Ltd v. Lloyds TSB Bank plc; Lloyds TSB Bank plc v. Rasheed Bank (28 June 2001)

An appeal from the Court of Appeal concerning United Nations Security Council resolution condemning Iraq's invasion of Kuwait

In September 1989, S agreed to sell medical and hospital equipment to a buyer in Iraq, who agreed to make an advance payment to S of 20 per cent of the purchase price. The payment was to be made against a bank demand guarantee, confirmed by

an Iraqi bank. In January 1990 R, an Iraqi bank, issued the guarantee in reliance on a counter-guarantee by L, an English bank, in favour of R. L's counter-guarantee was secured by a counter-indemnity in L's favour from S, and the deposit by S in a deposit account at L of an amount equal to the whole of the advance payment. On 2 August 1990 S had almost completed the supply when Iraq invaded Kuwait. On 6 August 1990, the Security Council of the United Nations adopted resolution 661 (1990) requiring all States to prevent the supply by their nationals of any products to any person in Iraq or to make funds available to them. Consequently S was unable to complete the contract. After Iraq had been expelled from Kuwait, the Security Council adopted resolution 687 (1991) in April 1991 stating, inter alia, that in accordance with resolution 661 (1990), until a further decision had been taken, the existing embargo on trade to Iraq should continue, and that Iraq should be prevented from obtaining compensation for the negative effects of the embargo. In December 1992, European Council regulation (EEC) No. 3541/92 (Council regulation (EEC) No. 3541/92, art. 2: see post, pp. 1469G-1470A) which, by article 2, prohibited the satisfying of any claim "under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part by the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions". S went into liquidation, and its deposit with L was its only substantial asset. S claimed repayment from L of the principal sum of the deposit together with interest. L refused on the ground that R maintained that L was under potential liability to R under the counter-guarantee. L made a Part 20 claim against R seeking declarations. The judge declared that, by virtue of article 2 of Council regulation (EEC) No. 3541/92, R was permanently prohibited from making any claim against L under the guarantee and that L was permanently prohibited from making any claim against S under the counter-indemnity. The Court of Appeal upheld the judge's decision.

On appeal by R and S:

Held, dismissing the appeals, that although the prohibition in article 2 of the regulation was not expressly stated to be permanent, it was clear from all the circumstances which led to the adoption of the regulation and from the preparatory documents, that the purpose of the regulation was to protect non-Iraqi parties who had been unable to perform their contractual obligations due to the United Nations embargo on trade and financial dealings with Iraq from the risk of future claims against them; that in order to achieve that purpose article 2 imposed a permanent prohibition on claims made in connection with commercial transactions which had been affected by the United Nations resolutions; that since S's performance of its contract with an Iraqi buyer had been prevented by the resolutions, any claim which R or L might make under the counter-guarantee and counter-indemnity respectively fell within the prohibition in article 2; and that, accordingly, R and L were permanently prohibited from pursuing those claims (post pp. 1471E-1471F, 1474F, G-1475C, 1477A-1478D).

Decision of the Court of Appeal [2000] 3 CMLR 450 affirmed.

CASES referred to:

Dowling v Ireland (Case C-85/90) [1992] ECR1-5305, ECJ

European Parliament v Council of the European Union (Case C-392/95) [1997] ECR I-3213, ECJ

Garcia v Mutuelle de Prevoyance Sociale d'Acquitaine (Case C-238/94) [1996] ECR I-1673, ECJ

Litster v Forth Dry Dock and Engineering Co Ltd [1990] 1 AC 546; [1989] 2 WLR 634; [1989] 1 All ER 1134, HL(Sc)

INTRODUCTION

APPEAL from the Court of Appeal

These were appeals by leave of the House of Lords (Lord Steyn, Lord Hoffmann and Lord Millett) granted on 8 February 2001 by the appellants, Rasheed Bank and by Shanning International Ltd, from a decision of the Court of Appeal (Simon Brown, Judge and Tuckey LJJ) on 25 May 2000 dismissing the appellants' appeals from a decision of Langley J who on 17 December 1999, on an originating summons issued by Shanning International Ltd, and a Part 20 claim made by Lloyds TSB Bank plc against Rasheed Bank, made declarations that Shanning was permanently prohibited from satisfying any and all claims made or to be made by Lloyds TSB Bank plc under a counter-indemnity dated 5 January 1990 and that Lloyds TSB Bank plc was permanently prohibited from satisfying any and all claims made or to be made by Rasheed Bank under a guarantee dated on or around 22 December 1989.

The facts are stated in the opinion of Lord Bingham of Cornhill.

COUNSEL:

Bernard Eder QC and John Davies for Rasheed Bank; Mark Hapgood QC and Alec Haydon for Lloyds TSB Bank plc; Iain Milligan QC and Stephen Morris for Shanning International Ltd

PANEL:

Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote

JUDGEMENT BY-1: LORD BINGHAM OF CORNHILL

JUDGEMENT-1:

LORD BINGHAM OF CORNHILL: 1 My Lords, there are effectively three parties to these appeals, to whom it is convenient to refer as Shanning, Lloyds and Rasheed. By an order of 17 December 1999, Langley J made two declarations:

> "(1) . . . that by virtue of article 2(1)(*e*) of regulation (EEC) No. 3541/92 [Shanning] is permanently prohibited from satisfying any and all claims made or to be made by [Lloyds] for payment under a counter-indemnity in writing dated 5 January 1990 given by [Shanning] to [Lloyds].
>
> "(2) . . . that by virtue of article 2(1)(*a*) of regulation (EEC) No. 3541/92 [Lloyds] is permanently prohibited from satisfying any and all claims made or to be made by [Rasheed] for payment under Guarantee No. G89/60047T dated on or around 22 December 1989 issued by [Lloyds] to [Rasheed]."

The judge based these declarations on a construction of Council regulation (EEC) No. 3541/92 which was later upheld by the Court of Appeal [2000] 3 CMLR 450. In these appeals to the House Rasheed challenges the correctness of that construction.

2. The relevant facts may be briefly summarized. By a contract in writing dated 16 September 1989 Shanning agreed with Al-Mansour Contracting Co of Baghdad to supply 10 operating theatres and medical equipment related to those theatres according to technical specifications and bills of quantities identified in the contract. Under the contract Al-Mansour agreed to make an advance payment to Shanning of 20 per cent of the total price, a sum of £907,141.32. The payment was

to be made against a bank demand guarantee, confirmed by an Iraqi bank, which was to be released after presentation of the shipping documents for the last shipment of equipment, under the contract. The contract was governed by the law of Iraq. Rasheed is an Iraqi bank, and issued a guarantee dated 27 January 1990 to Al-Mansour, in the amount of the advance payment. Rasheed issued its guarantee in reliance on a counter-guarantee (No. G89/60047T) dated 22 December 1989 issued by Lloyds in favour of Rasheed. Both these guarantees are governed by Iraqi law. Lloyds in its turn issued its counter-guarantee at the request of Shanning, secured by a counter-indemnity in its favour dated 5 January 1990 issued by Shanning and the deposit by Shanning with Lloyds of an amount equal to the advance payment, £907,141.32. The counter-indemnity issued by Shanning is governed by English law and is expressed to indemnify Lloyds "against all claims demands liabilities costs charges and expenses" which Lloyds might incur "arising out of or in connection with" the counter-guarantee issued by Lloyds in favour of Rasheed. On 2 August 1990, Shanning had almost completed the supply contract. Of the total contract value (in excess of £4.5 m), one shipment only (valued at £270,000) remained to be made.

3. On 2 August 1990, Iraq invaded Kuwait. The international response of the Security Council of the United Nations, the European Community and the United Kingdom was very prompt. On the same date the Security Council adopted resolution 660 (1990) condemning the invasion and demanding an immediate withdrawal by Iraq. The United Kingdom, on 2 and 4 August, made statutory instruments restricting the making of payments or the parting with gold or securities on the orders of any party in Kuwait or Iraq (the Control of Gold, Securities, Payments and Credits (Kuwait) Directions 1990 (SI 1990/1591), the Control of Gold, Securities, Payments and Credits (Republic of Iraq) Directions 1990 (SI 1990/1616)). By resolution 661 (1990) adopted on 6 August, the Security Council decided that all States should (subject to some limited exceptions) prevent the supply of goods or the remission of funds to Iraq or Kuwait. Over the following months the Security Council adopted 11 further resolutions directed to this subject.

4. On 8 August 1990, having regard to resolutions 660 (1990) and 661 (1990), and in order that trade between States members of the Community and Iraq and Kuwait should be prevented, the Council of the European Communities adopted Council regulation (EEC) No. 2340/90, which provided in article 2:

> "As from the date referred to in article 1"—7 August 1990—"the following shall be prohibited in the territory of the Community or by means of aircraft and vessels flying the flag of a member State, and when carried out by any Council national . . . 2. the sale or supply of any commodity or product, wherever it originates or comes from:—to any natural or legal person in Iraq or Kuwait,—to any other natural or legal person for the purposes of any commercial activity carried out in or from the territory of Iraq or Kuwait; 3. any activity the object or effect of which is to promote such sales or supplies."

5. On the same date, 8 August 1990, and also with reference to resolution 661 (1990), the United Kingdom made the Iraq and Kuwait (United Nations Sanctions) Order 1990 (SI 1990/1651) which provided in article 3:

> "Except under the authority of a licence granted by the Secretary of State under this Order or under the Export of Goods (Control) (Iraq and Kuwait Sanctions) Order 1990 no person shall—(*a*) supply or deliver or agree to supply or deliver to or to the order of any person in either Iraq or Kuwait any goods

that are not in either country; (*b*) supply or deliver or agree to supply or deliver any such goods to any person, knowing or having reasonable cause to believe that they will be supplied or delivered to or to the order of a person in either Iraq or Kuwait or that they will be used for the purposes of any business carried on in or operated from Iraq or Kuwait; or (*c*) do any act calculated to promote the supply or delivery of any goods to any person in Iraq or Kuwait or for the purpose of any business carried on in Iraq or Kuwait in contravention of the foregoing provisions of this paragraph."

6. By the Iraq and Kuwait (United Nations Sanctions) (Amendment) Order 1990 (SI 1990/1768), made on 29 August 1990, article 3 of this Statutory Instrument was slightly amended and a new article was inserted which had the effect of prohibiting payment to any person in Iraq or Kuwait under any agreement by which a party ("the obligor") agreed that, if called upon or if a third party failed to fulfil a contractual obligation owed to another, the obligor would make payment to or to the order of the other party to the agreement. On 29 October 1990 the Council, by Council regulation (EEC) No. 3155/90, extended the effect of the embargo imposed by the Community.

7. The liberation of Kuwait from Iraqi occupation led to the adoption by the Security Council on 3 April 1991 of resolution 687 (1991), a wide-ranging instrument directed to the new international situation. The resolution set out a detailed list of conditions to be met by Iraq. It was decided (in para. 24) that in accordance with resolution 661 (1990) and until a further decision had been taken the existing embargo on trade to Iraq should continue. The Secretary-General was requested by paragraph 26 to develop guidelines to facilitate full international implementation of the embargo, and by paragraph 27 international organizations and States were called upon to take such steps as might be necessary to ensure full compliance with the guidelines. Then, in paragraph 29, the Security Council decided that:

"all States, including Iraq, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government of Iraq, or of any person or body in Iraq, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 661 (1990) and related resolutions."

The Community adopted a regulation on 7 May 1991 to give immediate effect to resolution 687 (1991), but then embarked on consideration of a further measure.

8. On 12 July 1991, the Commission promulgated the draft of a proposed Council regulation which in due course was (subject to some changes) adopted as regulation (EEC) No. 3541/92, the regulation which the House is asked to construe in these appeals. In accordance with the admirable practice of the Commission this proposed regulation was accompanied by an explanatory memorandum, setting out in broad and untechnical terms the object of the proposed instrument. In this memorandum reference was made to resolution 687 (1991), which was said to foresee the lifting of the embargo after the fulfilment of the necessary conditions by Iraq. Paragraph 29 of resolution 687 (1991) was quoted in full and the memorandum then continued:

"2. Paragraph 29 thus provides for protection of economic operators against unjustified claims by Iraqi individuals, companies or organizations. In doing so, it prevents Iraq from obtaining compensation retroactively for the

negative effects of the embargo. Regarding exposure to claims from Iraq, the banking sector as well as European international contractors, have pointed to the fact that a lifting of the embargo could give rise to an avalanche of requests for payment of performance bonds, guarantees, stand-by credits or similar instruments under existing contracts and transactions for reasons of non-performance. The estimated amount of money involved exceeds 500m ECU. Already now exposure of such a dimension seriously reduces the financial room for manoeuvre of contractors. If the corresponding claims would effectively have to be honoured, the consequences on companies would be dramatic. As regards the position of Iraq, obtaining payment would mean an important financial advantage which would clearly be in contradiction with the very objective pursued by the embargo.

"3. Under these conditions, paragraph 29 gives a clear signal that both consequences of admitting claims (i.e., losses for non-Iraqi operators and compensation to Iraq) are unacceptable to the international community. It is important that in implementing the United Nations decision, the effect of this signal is not weakened. This is all the more true, as there is, for the time being, no indication that the embargo could effectively be lifted, given the apparent reluctance of Iraq to comply fully with all conditions set out in resolution 687 (1991). It also seems clear that the practical result intended by paragraph 29 can only be achieved if the principles contained therein are implemented in a uniform way. In a great number of cases, contracts or transactions concerned involve companies and banks in different countries. Different national approaches as regards the modalities of protection granted are therefore bound to weaken the efficiency of such protection altogether. Furthermore, such differences would give rise to distortion of competition between operators in different countries, thus affecting common commercial policy. This calls for implementation, at Community level, by a Community instrument. It also requires close consultation between the Community and third countries, in particular Organization for Economic Cooperation and Development (OECD) members."

Under the heading "Specific considerations" the memorandum continued:

"The measures proposed herewith in order to implement paragraph 29 of United Nations Security Council resolution 687 (1991) are based on the following specific considerations:

"(1) Non-enforceability of claims or prohibition to pay. Paragraph 29 can be interpreted either as making claims by Iraq non-enforceable, or as establishing a prohibition to honour such claims. The practical consequences of each interpretation are different. A system of NON-ENFORCEABILITY would protect banks and exporters against claims mentioned in paragraph 29 of United Nations Security Council resolution 687 (1991), by making it impossible for any Iraqi party to obtain a judgement in its favour unless it could prove that the contract or transaction was not affected by the embargo. However, such a system would allow claims being settled by agreement between the parties concerned. This would considerably weaken the protection granted, as it would expose non-Iraqi operators, in particular contractors, to pressure which might be exerted by the Iraqi side. It would also create uncertainty as to whether the contracts concerned would still have to be treated as valid obligations. Finally, this system would not permit the achievement of the other objective of paragraph 29, i.e. the prevention of retroactive compensation in favour of Iraq.

Therefore, the Commission proposes a system of PROHIBITION TO HONOUR CLAIMS, which would allow to meet both the objective of preventing such retroactive compensation as well as the objective of an effective protection of non-Iraqi parties, and would establish clarity as regards the treatment of the contractual obligations concerned. Furthermore, member States should take all steps required in order to ensure effectiveness of the prohibition, including the establishment of sanctions in case of non-respect.

"(2) Burden of proof. The protection granted to non-Iraqi parties would be imperfect if contractors or banks, when defending themselves against Iraqi claims, would have to prove that the conditions of paragraph 29 are met. Therefore, the burden of proof should be reversed. Consequently, contracts or transactions with regard to which claims are made are regarded as having been affected by the embargo, unless the claimant provides proof to the contrary.

"(3) Possible exceptions. Although the Commission recognizes that an unrestricted application might in some cases lead to hardship, it appears impossible to define in a general way, situations in which the performance of a contract has not been affected by the embargo. The Commission is therefore of the opinion that exceptions from the general rule should be limited to the case where payment has been ordered by a court or a comparable authority provided the legislation applied provides for an effective implementation of the principles contained in paragraph 29 of Security Council resolution 687 (1991)."

9. The Commission's proposed regulation was first considered by the Committee on Foreign Affairs and Security which on 6 November 1992 approved it. On 16 November 1992, the Committee on External Economic Relations also approved it. In a letter expressing its opinion, the Committee, having referred to paragraph 29 of resolution 687 (1991), expressly adopted passages in the Commission's explanatory memorandum. On 19 November 1992 the European Parliament approved the Commission's proposal, although calling for further consultation if the Council intended to make substantial modifications to the Commission's proposal.

10. On 7 December 1992, the Council adopted Council regulation (EEC) No. 3541/92 "prohibiting the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by United Nations Security Council resolution 661 (1990) and related resolutions". In the European manner the text of the regulation was preceded by a series of important recitals explaining its genesis and rationale:

"Whereas, under regulations (EEC) No. 2340/90 and (EEC) No. 3155/90, the Community has taken measures to prevent trade between the Community and Iraq; Whereas the United Nations Security Council has adopted resolution 687 (1991) of 3 April 1991 which, in its paragraph 29, deals with claims by Iraq in relation to contracts and transactions the performance of which was affected by measures taken by the Security Council pursuant to resolution 661 (1990) and related resolutions; Whereas the Community and its member States meeting in political cooperation have agreed that Iraq must comply in full with the provisions of paragraph 29 of United Nations Security Council resolution 687 (1991) and consider that, in deciding whether to reduce or lift measures taken against Iraq, pursuant to paragraph 21 of Security Council resolution 687 (1991), particular account must be taken of any failure by Iraq to comply with paragraph 29 of the same resolution; Whereas, as a consequence of the embargo against Iraq, economic operators in the Community and third coun-

tries are exposed to the risk of claims by the Iraqi side; Whereas it is necessary to protect operators permanently against such claims and to prevent Iraq from obtaining compensation for the negative effects of the embargo; Whereas the Community and its member States meeting in political cooperation have agreed to resort to a Community instrument in order to ensure uniform implementation, throughout the Community, of paragraph 29 of United Nations Security Council resolution 687 (1991); Whereas such uniform implementation is essential for achieving the aims of the Treaty establishing the European Economic Community and in particular for avoiding distortion of competition; Whereas the Treaty does not provide, for the adoption of this regulation, powers other than those of article 235, Having regard to the Treaty establishing the European Economic Community, and in particular article 235 thereof, Having regard to the proposal from the Commission, Having regard to the opinion of the European Parliament".

In the Commission's proposed regulation there was no equivalent of the third of these recitals, and the recitals common to both versions were in a different order. There were some differences of language: the word "permanently" in the fifth of the recitals quoted did not appear in the proposed draft.

11. Article 1 of the regulation contains a series of comprehensive definitions:

"For the purposes of this regulation:

"1. 'contract or transaction' means any transaction of whatever form and whatever the applicable law, whether comprising one or more contracts or similar obligations made between the same or different parties; for this purpose 'contract' includes a bond, financial guarantee and indemnity or credit whether legally independent or not and any related provision arising under or in connection with the transaction;

"2. 'claim' means any claim, whether asserted by legal proceedings or not, made before or after the date of entry into force of this regulation, under or in connection with a contract or transaction, and in particular includes: (*a*) a claim for performance of any obligation arising under or in connection with a contract or transaction; (*b*) a claim for extension or payment of a bond, financial guarantee or indemnity of whatever form . . .

"3. 'measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions' means measures of the United Nations Security Council or measures introduced by the European Communities or any State, country or international organization in conformity with, as required by, or in connection with the implementation of relevant decisions of the United Nations Security Council, or any action, including any military action, authorized by the United Nations Security Council, in respect of the invasion or occupation of Kuwait by Iraq;

"4. 'person or body in Iraq' means . . . (*b*) any person in, or resident in, Iraq; (*c*) any body having its registered office or headquarters in Iraq; (*d*) any body controlled, directly or indirectly, by one or more of the abovementioned persons or bodies.

"Without prejudice to article 2, performance of a contract or transaction shall also be regarded as having been affected by the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related

resolutions where the existence or content of the claim results directly or indirectly from those measures."

12. Article 2, which lies at the heart of these appeals, provides (so far as relevant):

> "1. It shall be prohibited to satisfy or to take any step to satisfy a claim made by: (*a*) a person or body in Iraq or acting through a person or body in Iraq . . . (*e*) any person or body making a claim arising from or in connection with the payment of a bond or financial guarantee or indemnity to one or more of the above-mentioned persons or bodies, under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions.
>
> "2. This prohibition shall apply within the Community and to any national of a member State and any body which is incorporated or constituted under the law of a member State."

It is common ground that article 2 and, for that matter, the United Kingdom statutory instruments already referred to, which remain in force, are effective to prevent Lloyds paying Rasheed and also to prevent Lloyds reimbursing itself out of funds which it holds on behalf of Shanning.

13. Article 3 provides that, without prejudice to the embargo on trade with Iraq introduced pursuant to United Nations Security Council resolution 661 (1990), article 2 should not apply to certain transactions, for example to claims which had been accepted before the adoption of measures in response to resolution 661 (1990), claims for payment under insurance contracts in respect of events occurring before the adoption of such measures and

> "(*f*) claims for sums which the persons or bodies referred to in article 2 prove to a court in a member State are due under any loan made prior to the adoption of the measures decided on pursuant to United Nations Security Council resolution 661 (1990) and related resolutions and that those measures have had no effect on the existence or content of the claim, provided that the claim includes no amount, by way of interest, charge or otherwise, to compensate for the fact that performance was, as a result of those measures, not made in accordance with the terms of the relevant contract or transaction."

14. This issue of construction now arises because Shanning is in liquidation and the liquidators seek payment by Lloyds of the sum which Lloyds holds on deposit on behalf of Shanning. Lloyds for its part adopts a Janus-like position: it is content to pay to Shanning the sum which it holds on behalf of Shanning if on a proper construction of regulation (EEC) No. 3541/92 it can be assured that it cannot hereafter become liable to Rasheed; but if on such a construction any risk exists that it may hereafter be liable to Rasheed, it resists making payment to Shanning. Thus, quite understandably, it aligns itself with whichever of Shanning or Rasheed is to succeed in these appeals.

15. Before the judge the construction issue was whether regulation (EEC) No. 3541/91 imposed a permanent prohibition on Lloyds making any payment to Rasheed under its counter-guarantee against any claim Rasheed might at any time make in connection with this contract and a permanent prohibition on Lloyds reimbursing itself under Shanning's counter-indemnity out of funds held by Lloyds on behalf of Shanning. He rightly held that in construing the regulation a broad purpo-

sive approach was to be followed, giving due weight to the *travaux préparatoires* and recitals to which reference has already been made. Since Shanning sought a declaration on the legal effect of the regulation as it stood, he did not think it right to speculate on the possibility of future revocation or repeal, although he gave reasons for concluding that such possibility could be discounted. Basing himself on the *travaux préparatoires*, the recitals, the political considerations underlying the sanctions policy and common sense, he concluded that Shanning's submission was correct and that the effect of article 2 was to prohibit satisfaction by Shanning and Lloyds respectively of claims which might at any time be made against them by Lloyds or Rasheed respectively.

16. Giving the leading judgement in the Court of Appeal [2000] 3 CMLR 450, Tuckey LJ was of the same opinion. The prohibition in article 2 was to continue in effect even when the embargo was lifted. He did not attach significance to the fact relied on by Rasheed that article 2 did not provide for the discharge of affected contracts. There was no juridical objection to a permanent prohibition on satisfying claims, and that was the legislative technique which had been adopted.

17. Before the House Rasheed challenged the construction put on the regulation by the courts below on two main grounds. First, it was argued, there is nothing in article 2 of the regulation to suggest that the prohibition it imposed was intended to be permanent. Such terms as "permanently" or "for all time" were not to be found. Had the prohibition been intended to be permanent, the article would have provided for the obligations of non-Iraqi parties to be extinguished or discharged, but instead performance was subjected only to a prohibition, which could be temporary. Significance should not be attached to the term "permanently" in the fifth recital, which had not appeared in the Commission's original draft and could not therefore have been regarded as a substantial addition. But if, secondly, the expression "permanently" in the fifth recital was of significance, its effect was only to protect operators against "such claims", which meant claims referred to in the fourth recital, namely, claims which were a consequence of the embargo. That would not cover claims relating, for example, to the quality of goods supplied. So long as there was a possibility of such claims being validly made, Lloyds and Shanning could not be released from their counter-guarantee and counter-indemnity, and the judge was accordingly wrong to make the declarations he did.

18. In my opinion these submissions are at variance with the obvious intent and effect of the regulation. The embargo on trade and financial dealings with Iraq was imposed in the immediate aftermath of the Iraqi invasion of Kuwait in the hope that it would coerce Iraq to withdraw its forces within its own borders. This embargo had the inevitable and intended effect of halting the performance of current contracts. This prevented non-Iraqi contractors and suppliers from fulfilling their contractual obligations and so put them in breach of contract, subject to any defence of frustration or force majeure which might (or might not) be available to them under any relevant law or in any relevant court. The hope that imposition of an embargo would lead to peaceful withdrawal was not realized. Armed intervention was necessary to liberate Kuwait. But it was decided that the embargo on trade and financial dealings with Iraq should continue until Iraq met a series of clearly specified conditions, which it showed little willingness to do. The potential exposure of non-Iraqi contractors and suppliers therefore continued. Resolution 687 (1991) plainly looked forward to the end of the embargo, but it also expressed a very clear intention that no claim should lie at the instance of any Iraqi entity in connection with any transac-

tion where performance had been affected by the embargo. The Community *travaux préparatoires* and regulation (EEC) No. 3541/92 expressed the same clear intention. Were the ending of the embargo to be accompanied by removal of the prohibition on satisfaction of claims against non-Iraqi contractors and suppliers, it is obvious that those who had been involuntarily prevented from performing their contracts would or might become liable to their Iraqi opposite numbers, with the result that the ultimate losers as a result of Iraq's gross violation of international law would be the non-Iraqi contractors and suppliers and not the Iraqi entities (including the government) which the embargo was intended to injure.

19. The present case provides a good example. Shanning had performed a very substantial part of its contract. It had almost earned its contractual reward. It was prevented by the embargo from completing the contract and earning its reward. But for the embargo it seems fair to assume that it would have done so. It may be regarded as an innocent victim of the international community's response to Iraqi lawlessness. It would be extraordinary if, even when the embargo is lifted and normal commercial relations are restored, it were to be exposed even to the risk of claims (and it is "the risk of claims" to which the fourth recital refers) by the Iraqi side.

20. Any claim which Rasheed or Lloyds might make under the counter-guarantee and counter-indemnity would plainly be "under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part" by the embargo. As such it would fall squarely within the prohibition in article 2(1), whatever the nature of the claim. It is not suggested that article 3 would apply.

21. It is plain from the Community *travaux préparatoires* that careful thought was given to the best legislative means of protecting non-Iraqi contractors and suppliers against the risk of claims. It would no doubt have been possible to provide that affected contracts should be treated as discharged, or that rights and obligations arising thereunder should be extinguished. But this would have enabled an Iraqi party which had made an advance payment or deposit to seek a restitutionary remedy, and it was instead thought preferable to prohibit the satisfaction of any claim by any Iraqi entity under or in connection with any affected contract. This may very well have been a wise approach. It was certainly, in my opinion, an effective one.

22. The judge was right to make the declarations he did. If I entertained any real doubt about the construction of regulation (EEC) No. 3541/92 I should see force in Rasheed's submission that a ruling should be sought from the European Court of Justice, but I do not. For these reasons, and also those given by my noble and learned friends Lord Steyn and Lord Hope of Craighead, I would dismiss these appeals. Rasheed must pay the costs of both Shanning and Lloyds in this House.

JUDGEMENT BY-2: LORD STEYN

JUDGEMENT-2:

LORD STEYN: 23. My Lords, in the dispute between Shanning and Rasheed the only matter before the House is the correct construction of article 2 of Council regulation (EEC) No. 3541/92 of 7 December 1992 which prohibited the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by the trade embargo imposed on Iraq by United National Security Council resolution 661 (1990) and related resolutions.

24. There is an illuminating discussion in Cross, *Statutory Interpretation*, 3rd ed. (1995), pp. 105-112, of the correct approach to the construction of instruments

of the European community such as the regulation in question. The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by Cross, at p. 107:

> "You have to start with the wording (ordinary or special meaning). The court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration."

Cross points out that of the four methods of interpretation—literal, historical, schematic and teleological—the first is the least important and the last the most important. Cross makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with Bennion, *Statutory Interpretation*, 2nd ed. (1992), section 311, Cross states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, Cross points out that a purposive construction may yield either an expansive or restrictive interpretation. It follows that regulation No. 3541/92 ought to be interpreted in the light of the purpose of its provisions, read as a coherent whole, and viewed against the economic and commercial context in which the regulation was adopted.

25. In flagrant breach of international law Iraq invaded Kuwait in August 1990. Kuwait was liberated in February 1991. In the meantime the international community, acting pursuant to United Nations resolutions, imposed a trade embargo on Iraq. These primary sanctions affected the implementation of a large number of contracts between Iraqi and EEC Contracting Parties. The legal consequences of the trade embargo are not in issue. The fact is, however, that the primary sanctions were always intended to be a means of persuading Iraq to comply with international norms. It was contemplated that in due course the primary sanctions would have to be lifted. That left the problem of the large number of contracts between EEC and Iraqi parties affected by the trade embargo.

26. Unless drastic and Affective action was taken there was the spectre attested to by the contemporary EEC memorandum of an avalanche of claims by Iraqi parties, including claims by the Iraqi State, Iraqi state agencies and Iraqi corporations, against EEC parties. The prospect of Iraqi parties through successful lawsuits retrospectively transferring to EEC nationals and entities losses resulting from the trade embargo, which Iraq had entirely brought upon itself, was self evidently unacceptable. The obvious means of eliminating this risk to EEC parties was by an EEC Council regulation. The only real question was what legislative technique to adopt. There were two possibilities. The EEC could have chosen the route either of discharging the affected contracts or of prohibiting the satisfying of Iraqi claims on such contracts. Both methods would be directed at the same obvious end, namely the elimination of the risk of Iraqi contracting parties successfully pursuing claims against wholly innocent EEC parties. The first route involved conflict of law problems. It would not have been effective or not necessarily effective, in respect of a system of law other than that of a member State of the EEC. The chosen method was therefore the second. And it is important to note

that Council regulation (EEC) No. 3541/92 was put in place more than two years after the initial imposition of the trade embargo. It was plainly directed at claims already affected by primary sanctions.

27. Against this crystal-clear contextual scene Rasheed advances two implausible arguments. The first is that the prohibition contained in the regulation is not stated to be permanent in the operative part of the regulation and is therefore not permanent in character. The recital quoted by Lord Bingham of Cornhill plainly impresses the stamp of permanence on the entire regulation. Even without this recital the intrinsic nature of the regulation, in order to be effective, would have to be permanent. Unless the prohibition is permanent it cannot achieve its obvious aim. As Tuckey LJ observed in the Court of Appeal [2000] 3 CMLR 450, 481: "to leave open the possibility that claims could be made at some unspecified time in the future would make no sense and would cause great commercial uncertainty." The language of the regulation interpreted against the contextual scene rules out Rasheed's argument that the prohibition contained in the regulation is not permanent in character. Counsel for Rasheed suggested that it is curious, if the prohibition is permanent in character, that the underlying rights and obligations under the affected contracts are still in force. There is, however, no issue before the House as to whether or not the underlying contractual rights and obligations remain in being. And I express no view on the matter. In any event, Tuckey LJ gave the answer to this point. He observed, at p. 481:

> "the chosen method of prohibition is effective and the quest for some juridical basis to explain how claims can be permanently prohibited under contracts which remain in force, is entirely academic. If it is juridically acceptable to prohibit such claims temporarily it must be legislatively possible to prohibit them permanently. That is what the regulation has done in my judgement."

The position is therefore that the regulation validly, effectively and permanently bars Iraqi claims under affected contracts. Rasheed's argument to the contrary is misconceived.

28. The second argument of Rasheed is directed to the subject matter of the prohibition. Counsel for Rasheed argued that the regulation says nothing about prohibiting permanently the satisfaction of claims which are not the consequence of the embargo. He emphasized that the words in the recital aim to prevent Iraqi parties "from obtaining compensation for the negative effects of the embargo". This statement is substantially correct but establishes nothing that assists Rasheed. The prohibition in the operative part of the regulation extends to the satisfaction of any claim "under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by [primary sanctions]". It is moreover an agreed fact that the trade embargo made it unlawful "for Lloyds to pay Rasheed under the Lloyds counter-guarantee, and unlawful for Shanning both to complete the supply contract itself and to make payment to Lloyds under the Shanning counter-indemnity". In these circumstances the contractual instruments which Lord Bingham has described were plainly affected by primary sanctions. The argument under this heading must be rejected.

29. In my view the judge rightly made the declarations which have been challenged on this appeal. And the reasons of the Court of Appeal for dismissing the appeal were entirely convincing.

30. For these reasons, as well as the fuller reasons given by Lord Bingham, I would dismiss Rasheed's appeal and make the order which Lord Bingham proposes.

JUDGEMENT BY-3: LORD HOPE OF CRAIGHEAD

JUDGEMENT-3:

LORD HOPE OF CRAIGHEAD: 31. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Bingham of Cornhill. I agree with it, and for the reasons which he gives I too would dismiss the appeal. But our attention was drawn to the importance of this case to the appellants, and to the wider significance throughout the European Union of the issue which they have raised. So I should like to add these brief observations.

32. The critical question is whether the prohibition in article 2 of Council regulation (EEC) No. 3341/92 against the satisfying of Iraqi claims with regard to contracts and transactions the performance of which was affected by United Nations Security Council resolution 661 (1990) and related resolutions is or is not permanent. If the prohibition is permanent, Lloyds will have a complete answer to any and all claims which may be made by Rasheed for payment under the Lloyds counter-guarantee. In that event there will be no obstacle to the recovery by Shanning of the sum which Lloyds holds on deposit on its behalf. Rasheed accepts that the prohibition is in force for the time being. But its contention is that it is not a permanent prohibition, as the underlying obligations were not discharged by the regulation nor are they declared by it to be void. According to its argument, as there is nothing in the regulation to the contrary, the permanence of the prohibition cannot be assumed so it is possible that these claims may become enforceable again when the embargo is lifted.

33. The answer to the question whether or not the prohibition is permanent depends on the meaning of the words used in the regulation. It is a question of construction. In terms of article 189 of the EC Treaty (now article 249 EC) a regulation is binding in its entirety and directly applicable in all member States. The effect of regulation (EEC) No. 3341/92 is to be determined according to the rules of construction which are firmly established in Community law. As Lord Templeman said in *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, 558E, the courts of the United Kingdom are under a duty to follow the practice of the European Court of Justice when construing Community instruments. A purposive approach is to be adopted, and the *travaux préparatoires* may be referred to for guidance as to what was intended. Community legislation is to be interpreted, so far as possible, in such a way that it is in conformity with general principles of Community Law: *Dowling v Ireland* (Case C-83/90) [1992] ECR I-5305, 5319, para. 10 per Advocate General Jacobs.

34. The starting point is to examine the words used in the recitals and articles of the regulation itself. Mr. Eder for Rasheed devoted much of his argument to an examination of the wording of the Commission's proposal at the stage when the regulation was still in draft and it was being considered by the European Parliament. I agree that the proposal is available as an aid to construction. Article 190 of the EC Treaty (now article 253 EC) provides that regulations, directives and decisions adopted by the Council shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty. But I think that it is necessary to bear in mind that the instrument which is binding in its entirety in terms of the Treaty is the regulation which was adopted by the Council of the European Communities at the end of the legislative process which the Treaty has identified. Moreover, in *Garcia v Mutuelle de Prévoyance Sociale d'Aquitaine* (Case C-238/94) [1996] ECR I-1673, the court held that in view of the clear and precise

terms of the article it was not necessary to look even at the preamble to the directive in order to determine the purpose or the scope of the provision.

35. The Treaty base for regulation (EEC) No. 3541/92 is to be found in article 235 of the EC Treaty (now article 308 EC), as the eighth and ninth recitals of the regulation indicate. This article provides:

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

The regulation which the Council made on 7 December 1992 was based on a proposal presented by the Commission on 12 July 1991 on which an opinion was delivered by the European Parliament on 19 November 1992. But, as I have said, I think that the proper starting point is to examine the wording of the regulation which was adopted by the Council at the end of this process.

36. The fourth and fifth recitals of the regulation are in these terms:

> "Whereas, as a consequence of the embargo against Iraq, economic operators in the Community and third countries are exposed to the risk of claims by the Iraqi side; Whereas it is necessary to protect operators permanently against such claims and to prevent Iraq from obtaining compensation for the negative effects of the embargo".

The phrase "to protect operators permanently" in the fifth recital is an important indication as to the intended effect of the regulation. Mr. Eder did not suggest that these words were in themselves ambiguous. According to their plain meaning, the intention was to put in place a protection against the risk of claims by the Iraqi side which would indeed be permanent. Mr. Eder submitted that the words "such claims" in the fifth recital indicated that the protection was to be limited to claims of the kind described in the fourth recital and that a narrow interpretation ought to be placed on those words. For a proper understanding of the extent of the protection however it is necessary to turn to the articles.

37. The regulation contains six articles, of which the first and the last three are ancillary to its leading provisions. The leading provisions are set out in articles 2 and 3. Article 2 describes the prohibitions. Article 3 contains a list of claims to which the article 2 prohibitions do not apply. But it is subject to an important proviso which excludes from this exception any amount, by way of interest, charge or otherwise, to compensate for the fact that performance was, as a result of the embargo, not made in accordance with the terms of the relevant contract or transaction. The wording and structure of these two articles, when read together with the definition of the word "claim" in article 1 of the regulation, leave no room for doubt that the prohibition in article 2 extends to any and all claims for performance of any obligation arising under or in connection with a contract or transaction and for extension of payment of a bond, financial guarantee or indemnity of whatever form. The articles are carefully structured to leave open the possibility of the making of claims by the operators against the Iraqi side, as it is only the satisfying of claims by the Iraqi side that is prohibited.

38. As for the permanence of the prohibition, it is plain that anything less than a permanent prohibition would not relieve economic operators in the Community from the damaging effects of the embargo. The proviso to article 3 shows that the

Council was well aware of the risk of claims for failures in performance due to the embargo to which economic operators had been exposed by it, to which in any event attention had been drawn by paragraph 29 of the so-called "ceasefire" resolution by the United Nations Security Council (resolution 687 (1991)) which foresaw the lifting of the embargo after the fulfilment of the necessary conditions by Iraq. Unless they were protected against such claims the operators would have to make provision against them for a prolonged and indefinite period. This would be bound to impose a substantial financial burden upon them, to the detriment of their businesses. Nothing less than a permanent prohibition would give them the protection which they needed once the embargo was brought to an end and the sanctions against Iraq were lifted. The significance of the use of the word "permanently" in the fifth recital is that it serves to confirm what a purposive reading of the articles in their whole context would in any event indicate.

39. I see no need in these circumstances to refer back to the *travaux préparatoires* for further guidance. Mr. Eder's argument that we should do so was largely based upon the absence from the recital in the proposal by the Commission which corresponds to the fifth recital in the regulation of the word "permanently", the fact that the word does not appear in article 2 and the lack of any mention in the explanatory memorandum which accompanied it and in the draft resolution embodying the opinion on the proposal of the European Parliament that the prohibition was intended to be permanent. But the legislative history of the regulation simply shows that, as not infrequently happens, the wording of the regulation as adopted by the Council differs in various respects from that of the Commission's proposal. It is settled law that the requirement to consult the European Parliament in the legislative procedure in cases provided for in the Treaty means that it must be freshly consulted whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted*: European Parliament v Council of the European Union* (Case C-392/95) [1997] ECR I-3213, 3246, para. 15. The information which is before your Lordships indicates that the Parliament was not consulted about the changes in the wording of the preamble.

40. The inference which I would draw from the inclusion of the word "permanently" in the fifth recital is that it was introduced in order to explain more fully the purpose of the regulation, but to not change the essence of what had been proposed. It was intended to remove a possible but unintended ambiguity in the words used by the proposal. There was no need to include the word in article 2, as the intention of the regulation as a whole was made plain by the terms of the recital. I do not think that the plain meaning of the regulation can be contradicted by reference to the absence of this word from the proposal and the *travaux préparatoires*. Once this conclusion is reached the basis for Mr. Eder's argument on this point disappears.

JUDGEMENT BY-4: LORD HOBHOUSE OF WOODBOROUGH

JUDGEMENT-4:

LORD HOBHOUSE OF WOODBOROUGH: 41. My Lords, agree that the appeal should be dismissed with costs as proposed by my noble and learned friend, Lord Bingham of Cornhill, and for the reasons which he has given. I would also like to express my agreement with the speech of my noble and learned friend Lord Hope of Craighead and, in particular, what he has said concerning the approach to be adopted in construing a Council regulation.

JUDGEMENT BY-5: LORD SCOTT OF FOSCOTE

JUDGEMENT-5:

LORD SCOTT OF FOSCOTE: 42. My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead. For the reasons they give, I too would dismiss this appeal.

DISPOSITION:

Appeals dismissed. Costs to be paid by Rasheed Bank.

SOLICITORS:

CMS Cameron McKenna; Teacher Stern Selby; Norton Rose

(*c*) QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

R (on the application of Othman) v. Secretary of State for Work and Pensions (28 November 2001)

Judicial review of decision of the Secretary of State for Work and Pensions, involving United Nations Security Council sanctions in relation to the situation in Afghanistan and the Taliban

COUNSEL:

S Knafler for the Claimant; J Howell QC and G Clarke for the Respondent

PANEL: COLLINS J

JUDGEMENT BY-1: COLLINS J

JUDGEMENT-1:

COLLINS J: [1] Mr. Omar Mohammed Othman, the Claimant in this case, seeks judicial review of a decision of the Secretary of State for Work and Pensions, whereby he suspended payments of income support to the Claimant with effect from 9 October last. The decision in question was contained in a letter dated 25 October 2001.

[2] The matter has come on very quickly because the Claimant is, he says, as a result without any funds and he, his wife who is pregnant and four children are unable to maintain themselves. They are likely to lose their home and they do not have sufficient money to live on. So it is that the court was able to expedite the hearing of this claim.

[3] The Claimant himself is now some 41 years old. He came to this country in 1993 from Jordan. He claimed asylum. In 1994 his claim was accepted and he was granted leave to enter for a period of four years. That has now expired, but before its expiry he applied for indefinite leave to remain in this country; that application has still not been determined.

[4] The Secretary of State is considering whether he might be able to make use of article 1F of the Refugee Convention, on the basis that the Claimant is no longer entitled to the benefit of the Convention because of his conduct. Whether or not the Secretary of State will take the view that he is able to make use of that provision, or indeed in any other way to decide that the Claimant is not, after all, entitled to stay in this country, is a matter which will in due course be decided.

[5] But the result of that is that his leave is deemed to be extended by virtue of s 3(*c*) of the Immigration Act 1971 and, accordingly, he is lawfully in this country and is not subject to any restrictions upon his ability to work and, more importantly, upon his ability to receive Social Security payments, in particular income support.

[6] The reason why the decision was made to suspend payments was because in February 2001, the Claimant was arrested and detained for questioning under the Prevention of Terrorism (Temporary Provisions) Act 1989. When the police arrested him, they searched his home and found a substantial sum of money in cash in a number of different currencies. There was sterling, dollars, German marks and pesetas. The total was said by the police to amount to £180,000. There is an issue as to that. The Claimant in his statement asserts that it was not nearly as much as that and, somewhat curiously on the face of it, the police did not provide a receipt.

[7] There had been, until yesterday, complaint that the Police had not allowed the Claimant's solicitors or the Claimant, to inspect the money, but Mr. Knafler tells me that yesterday the Claimant's solicitors were able to go and see the money which is apparently bagged up in what are described as evidence bags. It has not been counted by them, but they accept that it appears to be a very substantial sum indeed.

[8] The police did not inform the Department for Work and Pensions of the discovery of this money until they wrote a letter on 23 October confirming an oral communication of 12 October. Quite why they delayed so long, I do not know; no explanation has been provided and there may be, for all I know, a good reason for it.

[9] When that letter was received the Department decided that they should act in accordance with regulation 16 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This provides, so far as material:

> "(1) Subject to paragraph (2), the Secretary of State . . . may suspend payment of a relevant benefit, in whole or in part, in the circumstances prescribed in paragraph (3).
>
> "(2) . . .
>
> "(3) The represcribed circumstances are that—
>
> (*a*) It appears to the Secretary of State . . . that—
>
> (i) an issue arises whe-ther the conditions for entitlement to a relevant benefit are or were fulfilled;
>
> (ii) an issue arises whether a decision as to an award of a relevant benefit should be revised under section 9 or superseded under section 10."

[10] The letter of 25 October was, in fact, in reply to a letter from the Claimant's solicitors of 18 October which followed the notification, I think orally originally, to the Claimant that his benefits, his income support, was suspended.

[11] That is not all that has happened, because the Claimant's bank accounts were frozen. That was in accordance with the relevant legislation following the United Nations sanctions decision in relation to the situation in Afghanistan and, more particularly, the Taliban. I shall come back to that in a moment because it is relevant to an issue, indeed, perhaps, the main issue now in these proceedings, based upon an EU regulation which concerns the Claimant specifically.

[12] His two bank accounts in which he had a total of some £1,900 were frozen. This was said to have been savings from the benefits that he had been receiving and put there for the benefit of himself and his family. But the result of the freezing

of his assets is that he has no other means of support than the benefits which he had been receiving and which were then suspended.

[13] Going back to the letter of 25 October, the author states that the suspension was:

> ". . . because it appears to the Secretary of State that an issue arises as to whether the conditions for entitlement to income support are and have been fulfilled, and further an issue arises as to whether a decision as to the award of income support should be revised or superseded."

[14] That is a direct reference to the provisions of regulation 16 which I have already cited.

[15] The letter continues:

> "The Secretary of State has received evidence that your client has capital of approximately £180,000 a sum which is greatly in excess of the prescribed amount. This evidence suggests not only that the conditions of entitlement to income support may not be fulfilled, but also that they may not have been fulfilled for some time. It also raises the question as to whether the award of income support should be revised or superseded . . .
>
> "An investigation is being conducted, but we would invite you to explain your client's position as to capital resources. In your letter you say, 'Of course, he has no access to any savings that he may have had'. We would ask you to clarify this statement. The possession of any substantial savings by a person in receipt of an income related benefit is something which needs to be explained, in view of the capital rule referred to above. Moreover, it is not self-evident that your client 'has no access to any savings that he may have had'. We look forward to receiving a full explanation as to when Mr. Othman came into possession of any capital since he was awarded income support and what has become of it.
>
> "You ask whether the decision to suspend benefit can be reconsidered whilst an investigation is under way, but in the absence of any satisfactory explanation by your client as to his capital position the suspension is justified."

[16] That decision triggered the application for judicial review which is now before me. The claim asserts that the money is in the possession of the police, and so it cannot conceivably be regarded as capital which is available to the Claimant and that, therefore, the suspension is not justified.

[17] The Claimant had not given any explanation to the police as to the ownership of or the reason why he was holding that large sum of money in cash in his home. He has, now in a witness statement which is before me, given an explanation. What he says is:

> "The money that [the police] took had been collected over a period of two years from donations. This money has never been for my personal use and has always been intended by those who gave it and by me to be used to purchase a meeting place for my informal community prayer-group. The money had been held at my house, as I am relevant and trusted leader of the weekly prayer meeting. The money belongs to the community prayer-group and was being held by me for its use. The money was not held in a bank as it would not be proper for such a sum of money to be held in a British Bank. This would not be in accordance with the principles of our Islamic faith. This money has never been returned to the community prayer-group by the police. The police still have this money."

[18] I make no comment as to the probability of that explanation. It is not necessary for me to do so because, as Mr. Howell has pointed out, regulation 16 does not require the Secretary of State to decide on questions of ownership. It applies if it appears to the Secretary of State that an issue arises. As it seems to me, it is perfectly clear that an issue did arise, certainly, whether the conditions for entitlement were fulfilled in the past. Any investigation will decide whether there has in the past been an overpayment and thus a possibility that the Secretary of State can reclaim what has been overpaid, as well as whether there is an ongoing entitlement.

[19] Furthermore, as it seems to me, although all this arose back in February, and that was when the police seized the money, the fact that there was £180,000 in cash in the house in February, and no explanation had been given, entitled the Secretary of State to consider that an issue arose whether now there might be a question as to entitlement. I should say that the amount of capital which affects the payment of income support stands at £8,000 and, of course, £180,000 is somewhat in excess of that.

[20] Mr. Howell also points out that a person has capital within the meaning of the regulations, even if he does not physically have it in his possession, if he has a right to that money. That results from the decision of the Court of Appeal in *Thomas v Chief Adjudication Officer*, a decision dated February 1987, published in report number R(SV) 17/87 from the Reports of the Commissioners.

[21] That was a case where the claimant in question had been awarded a sum of damages. It was not in his possession, but was in his solicitor's possession and the court decided that since he had a right to it (and of course that was an immediate right) it could be said to be in his possession because it was in the possession of his agents.

[22] That decision, in my view, would not apply on the facts of this case because the police hold the money and the only means whereby the claimant can obtain it is by making an application under the Police Property Act 1897. In that application he would have to establish that it was his, that he was entitled to it and the police could prevent him receiving that money if they could establish within the meaning of s 22 of the Police and Criminal Evidence Act 1984 that they were entitled to retain it because they were undertaking an investigation into whether an offence had been committed and the money was reasonably required to be retained for the purposes of that investigation. Accordingly on the facts, it seems to me that the Thomas case would not apply.

[23] But that is not the answer, because the question is whether the Secretary of State at the time he suspended was reasonably entitled to take the view that the Thomas approach might apply, because that of course was an issue which arose and an issue which he did not have to determine whilst he was investigating the matter and the suspension was properly made whilst he was so investigating the matter.

[24] Accordingly, as it seems to me, as a matter of straightforward domestic law and construing the regulations, the Secretary of State acted perfectly properly in suspending the payments in accordance with regulation16.

[25] Mr. Knafler has raised one other matter. He has submitted that the Secretary of State failed to have regard to the hardship that would result from such a suspension, in particular, that the Claimant had no other source of income and the Secretary of State knew that his bank accounts had been frozen so he was not able to make use of them for the purpose of any living expenses.

[26] Regulation 16 inevitably, if used, is bound to result in immediate hardship. It is obvious that if someone's income support is suspended, because an issue has arisen and, as a matter of fact, that person has no other source of income, as may well be the case, hardship will result. It is important then that any investigations are carried out speedily. I have no reason to believe that that would not have occurred in this case and, no doubt, the Secretary of State would quickly have appreciated that he could not rely on the *Thomas* approach and would have to consider whether now it was proper for the payments, or some payments, to continue and whether or not he might in due course be able to recover arrears which were being paid at the time when there was capital available which had not properly been declared.

[27] However, events were overtaken by the realization that there was an EC regulation which directly affected the position of this Claimant. There are in fact two regulations, regulation 467/2001, as amended by regulation 2062/2001. Council regulation 467/2001 is dated 6 March 2001 and article 16 provides:

> "This regulation shall enter into force on the day following that of its publication in the Official Journal of the European communities . . .
>
> "This regulation shall be binding in its entirety and directly applicable in all member States."

[28] The regulation in question is described as a regulation "Prohibiting the export of certain goods and services to Afghanistan, strengthen the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing [an earlier regulation]".

[29] Article 2 of the regulation provides as follows:

> "1. All funds and other financial resources belonging to any natural or legal person, entity or body designated by the Taliban Sanctions Committee and listed in annex I shall be frozen.
>
> "2. No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of persons, entities or bodies designated by the Taliban Sanctions Committee and listed in annex I.
>
> "3. Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained though the competent authorities of the Member States listed in annex II."

[30] In relation to freezing of assets the competent authority in the United Kingdom is the Treasury.

[31] "Funds" are given a wide definition in article 1 of the regulation. They mean:

> "Financial assets and economic benefits of any kind, including, but not necessarily limited to, cash, cheques, claims on money, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures, derivatives, contracts; interest, dividends or other income on or value accruing from or generated by assets; credit, right of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale; documents evidencing an interest in funds or financial resources, and any other instrument of export-financing."

[32] The Taliban Sanctions Committee means the committee established by the United Nations Security Council resolution 1267 (1999). Indeed the regulation in question is largely driven by United Nations resolutions, in particular resolution 1333 (2000), which was adopted in December 2000 and which reaffirmed the need for sanctions to avoid adverse humanitarian consequences on the people of Afghanistan and noted the indictment of Usama bin Laden and his associates by the United States for, inter alia, 7 August 1998 bombings of the embassies in Nairobi and Dar es Salaam. It also noted the request of the United States to the Taliban to surrender them for trial.

[33] Article 5 of the resolution stated that there should be prevention of any supplies to the territory under Taliban control and article 8(*c*) provided that "further measures" should be taken by all States:

> "To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization, and requests the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization".

[34] As I said, it was that provision which has driven the relevant parts of the EC regulation with which I am concerned in this case.

[35] It should be noted that article 9 of the regulation provides that no exceptions other than those specifically referred to in the regulation may be granted. The relevant one is that which I have already read contained in article 2.3.

[36] Furthermore, article 12 provides:

> "This regulation shall apply notwithstanding any rights conferred or obligations imposed by any international signed or any contract entered into or any licence or permit granted before the entry into force of this regulation."

[37] Article 13 requires that:

> "1. Each member State shall determine the sanctions to be imposed where the provisions of this regulation are infringed. Such sanctions shall be effective, proportionate and dissuasive.
>
> "Pending the adoption, where necessary, of any legislation to this end, the sanctions to be imposed where the provisions of this regulation are infringed, shall be those determined by the member States in accordance with article 10 of regulation (EC) 337/2000."

[38] That is in virtually identical terms. Article 13.2 reads:

> "2. Each member State shall be responsible for bringing proceedings against any natural or legal person, entity or body under its jurisdiction, in cases of violation of any of the prohibitions laid down in this regulation by any such person, entity or body."

[39] Now it is perfectly clear from the provisions that I have read that the regulation is, and is intended to be, what Mr. Howell has described as "Draconian" in its effect. It is designed, on the face of it, to ensure that any person or body named in the annex is not entitled to any economic benefit of any sort, and so would not be entitled to receive remuneration for working or to enter into any contract which provided any economic benefit to him. It must be foreseeable from that, that such a person would be deprived of any means of livelihood. We are after all living in a country where money is needed to provide for the necessities of life.

[40] Annex 1 to the regulation contains a lengthy list of bodies and individuals directly connected with the Taliban and a shorter list of individuals and bodies associated with Usama bin Laden. But there have been a number of amendments and additions to annex 1 and, in particular, the additions in regulation 2062/2001 of 19 October 2001, which entered into force on the day of its publication in the official journal, which was 20 October.

[41] There are 25 individuals added to annex 1. One of those individuals is this Claimant. He is described under a number of aliases and as living in London, having been born in December 1960. It is I suppose unusual for a European Community directive to be aimed at a named individual, but that is what has happened here. As I have already read, by virtue of article 16, the regulation is binding in its entirety and directly applicable, and so has an immediate, direct effect upon the Claimant.

[42] Mr. Knafler accepts that the result of article 2 is that the Claimant's bank accounts containing a total of some £1,900 will remain frozen. They are properly caught by article 2.1 of the regulation. Furthermore, he accepts that the Claimant will not be able to get possession of the £180,000, which is held by the police.

[43] It may be that in due course some other body or trust, if it really is prayer-meeting money, may be able to obtain it, but that is in the future and that will be for others to consider and determine. If, on the other hand, the money is not for any lawful use then, no doubt, it will, not be returned to the Claimant.

[44] Be that as it may, and this is accepted also by Mr. Howell, it is not money that can be said to be available to him as capital. But, submits Mr. Knafler, the payments of income support do not fall within the provisions of article 2. They are not, he submits, funds, however widely one defines that term, nor should they be regarded as financial resources. The reason for that is that it must have been recognized by those responsible for the regulation that the effect of it would be to deprive a person in the position of Mr. Othman of the means of living. It cannot, accordingly, have been contemplated that monies which were made available by the state to enable him to live would be caught by the regulation.

[45] He reminds me that if the Community wants to consider Social Security it has in other regulations and directives specifically identified Social Security. It can, of course, do that. But I have to look at the language and the purpose behind this provision. The language is exceedingly wide. It is designed to prevent the individual named in the annex from having available any assets which may enable him to assist in any way the aims of Usama bin Laden and his organization and his network. They are intended to be harsh because they are intended to be effective, and unless they are harsh and unless they cover all sorts of payments, they will not fulfil their clear and obvious purpose.

[46] However much I may adopt, as I should, a purposive approach to the construction of these regulations, I cannot, submits Mr. Howell, go behind the clear language of them. It cannot be suggested that the words "financial resources" do not

cover the payment of money such as income support. Indeed, submits Mr. Howell, if one looks at the definition of funds it is equally impossible to say that these are not funds because they are economic benefits which are provided in the form of cash or a payment instrument or direct payments into a bank account.

[47] Furthermore, Mr. Howell submits that there is no room for any exemption; article 9 says that in terms. The only way in which the Claimant can seek to avoid the prohibition upon the receipt of these monies is to apply, through the Treasury, to the Taliban Sanctions Committee. They will have to decide the extent to which any exemption, if any, can be applied.

[48] I should add that Mr. Howell of course accepts that the provisions of the regulation are not aimed at the Claimant's wife or his children, and so it is that child benefit continues to be paid, because that is paid to his wife for the benefit of his children. She is not entitled to claim in her own right because she is his dependant and thus does not qualify, for example, for income support, but of course she would be entitled to claim any benefit which she was able to establish could be paid to her, even though she is married to her husband. Equally, the children would be entitled to any benefit to which they would be entitled individually.

[49] I am not saying that there are any such benefits. I am simply indicating that the prohibitions under the regulations would not apply to any funds payable to her, subject, of course, to the requirement that she should not apply them to the benefit of her husband, because if she did she would be breaching article 2. Of course, there is going to be hardship to her and to the children if the construction, which Mr. Howell submits is the correct construction, should apply.

[50] All this, submits Mr. Knafler, is avoided if a construction of the regulation, in particular article 2, is adopted which excludes payments designed to enable the individual to have a means of livelihood. The problem is the level to which the livelihood has to be maintained. The Claimant has said that the sums in his bank accounts have been accumulated from the benefits which he has been receiving. I do not doubt that some part of that may well be needed for expenditures which arise from time to time, sometimes unexpected, sometimes expected, in amounts which are more than can be catered for by weekly payments, for example clothing, for example, I suppose, bills which fall due on a particular date, albeit the amounts paid have accumulated over a period of time.

[51] But this does suggest that the amounts being received by this Claimant were more than sufficient to maintain livelihood. It seems to me that the language of the regulation is clear. It is not possible to read any exemption or any resource which is not to be covered. The payments of income support directly fall within the description in article 2.2. Mr. Howell further submits that they would technically fall within article 2.1 the moment they were paid, because they would then represent a fund belonging to the Claimant. That again seems to me to be the only possible reading of the language of the article.

[52] However, that does not in my judgement necessarily mean that all that the Claimant can do is to apply to the Sanctions Committee for an exemption. There is what has been described as the "humanitarian safety net". I derive that from the judgement of the Court of Appeal in *R v Hammersmith & Fulham London Borough Council* ex parte M 30 HLR 10, *The Times* 19 February 1997. That was a decision of the Court of Appeal on appeal from a decision of mine concerning the possibility of the use of s 21 of the National Assistance Act 1948, in order to assist asylum seekers who were not entitled to any other form of assistance.

[53] Lord Woolf, MR, said in giving the judgement of the court, having referred to my use of the words "safety net", was this (p. 20):

> "the judge's comments should not be taken as indicating that s 21(1)(*a*) is a safety net provision on which anyone who is short of money and/or short of accommodation can rely and insofar as the judge intended them to be read literally he was error."

[54] May I interpolate in my defence that I did not so intend. Lord Woolf, MR, continued:

> "Section 21(1)(*a*) does not have this wide application. Asylum seekers are not entitled merely because they lack money and accommodation to claim they automatically qualify under section 21(1)(*a*). What they are entitled to claim (and this is the result of the 1996 Act) is that they can as a result of their predicament after they arrive in this country reach a state where they qualify under the subsection because of the effect upon them of the problems under which they are labouring. In addition to the lack of food and accommodation is to be added their inability to speak the language, their ignorance of this country and the fact they have been subject to the stress of coming to this country in circumstances which at least involve their contending to be refugees. Inevitably the combined effect of these factors with the passage of time will produce one or more of the conditions specifically referred to in s 21(1)(*a*). It is for the authority to decide whether they qualify."

[55] Of course, some of those considerations will not apply to this Claimant, but there is that provision which ensures, and is designed to ensure, that he will not suffer to the extent that he has no food or accommodation and so is unable to maintain himself at all.

[56] It seems to me that it does not need a request to the Taliban Sanctions Committee for the United Kingdom to avoid that happening. The law of humanity, as Lord Ellenborough said as long ago as 1803, applies to this sort of situation, and in my judgement the law of humanity applies as much to a European directive as it does to any other law which is applicable in this country.

[57] Accordingly, I would read this regulation subject only to the proviso that the member State is entitled, and indeed perhaps bound, to ensure that the effect of applying the regulation is not so as to mean that the individual in question, in this case the Claimant, has because of having no means of support, reached a situation where his health and perhaps his very life are at risk. That is the situation that, as I understand it, s 21 of the National Assistance Act is designed to avoid.

[58] There is the further point, of course, that the provision of accommodation under that Act is not caught because provision in kind, as opposed to the provision of financial resources, or economic benefits, is not caught by article 2. This has led Mr. Knafler to submit that one would reach the somewhat curious situation (curious is not the word he used, but it is certainly anomalous) that if, because of the prevention of payment of any housing benefit and income support the Claimant were unable to pay his rent and so was evicted from his home, he would be entitled, in all probability, to rely on Part VII of the Housing Act, because he would have become homeless, would be in priority need, because of the existence of his family and children, and would not have been homeless intentionally; it would have been because of the provisions of the regulation. Whether or not that is right, it is not necessary for me to decide. But it certainly gives rise to a potential anomaly.

[59] It seems to me that the Secretary of State is not obliged to provide any benefit under the regulations; indeed the article prohibits him from so doing. On the other hand it does not prohibit him from considering, if he has power to do so, whether any provision should be made to ensure that the Claimant's wife, family and himself are able to live. What that should be and the extent of it, is entirely a matter for him. It may be that he will decide that he need do no more than rely upon the existence of what I have described as the safety net provisions of s 21. There are also, of course, provisions in the Children Act which could be relied on by the children.

[60] In my judgement, for the reasons I have given and because of what I described as the law of humanity, it is not impossible, not prohibited by the regulation, for the authorities (I use that word to encompass all who might be responsible for ensuring that the Claimant has some means of livelihood and that his family do not suffer hardship in excess of any hardship that is reasonably necessary as a result of the provisions of the regulation) to ensure, as I say, that they do have the bare necessities of life. I use the expression "bare necessities of life" advisedly, because I fully recognize that the Claimant is not entitled to anything more than that.

[61] It seems to me that it would be quite absurd to think that that sort of matter would have to be determined by the United Nations through the Taliban Sanctions Committee. Quite apart from anything else, I very much doubt if a decision would be able to be obtained particularly speedily in that way. That is not intended as a criticism; it is merely a recognition of the realities of the situation.

[62] I am bound to say too that, notwithstanding the mandatory provisions of article 13, counsel was not able to put before me any provision of our law which has sought to comply with the obligations under article 13. There appear to be no sanctions for breach of the regulation.

[63] Mr. Knafler also raised the question whether there would be a breach of article 3 of the European Convention on Human Rights and of article 8. It seems to me that it is not necessary for me to determine whether article 3 would be breached. I note Mr. Howell's argument that the European Convention on Human Rights is concerned with civil and political rights, not with social and economic rights. Those are dealt with separately, and he submits that a failure to provide benefits, or indeed the wherewithal to live, cannot create a breach of article 3.

[64] There are, certainly, problems and it may be very difficult to draw the line. The fact is, article 3 prohibits, among other things, inhuman or degrading treatment and if in the knowledge that the result will be starvation, illness or possibly worse, the United Kingdom fails to provide the means whereby that suffering can be avoided and thus causes that suffering, it is at least arguable that article 3 could be breached. That was the view of Stanley Burnton J in the case of *The Queen on the Application of Hussain v Asylum Support Adjudicator*.

[65] However, I emphasize that I see the force of Mr. Howell's argument and there are certainly problems in knowing where one should draw the line in cases such as this. But the argument is unnecessary because of my conclusion that what I have described as the law of humanity comes to the aid of the Claimant and others who might be in the same situation as him. What are the minimum standards, what is necessary to avoid illness, to avoid starvation, to avoid the impossibility of maintaining a minimum standard of existence will be a matter to be considered as the circumstances develop. For example, it may be that the Claimant has friends

who are prepared to provide food for him. It may be that accommodation will have to be provided in some form for him and his family. But whether the situation arises whereby he is in such a state that he can properly say that he is falling below the minimum that humanity requires, then something will have to be done by whoever is at that stage responsible. That is for the future.

[66] I should add that article 8 seems to me not to be a relevant consideration here. Article 8 itself is subject to a derogation by virtue of article 8.2 and it would, in the circumstances, be in my judgement proportionate for the situation that I have indicated to exist in the way that I have submitted.

[67] In all the circumstances, therefore, the claim which has somewhat extended beyond whether the suspension was lawful to whether the regulation applies to prevent any further payments, must be dismissed.

DISPOSITION:

Claim dismissed.

SOLICITORS:

Brinberg Peirce Solicitors; The Treasury Solicitor

---

3. United States of America

(*a*) UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Franck Dujardin (Appellant) v. International Bank for Reconstruction and Development, et al. (Appellees) (September Term, 2000)

Immunization from defamation suit under International Organizations Immunities Act of 1945—Two sources of limitation to immunity

Before: HENDERSON, TATEL and GARLAND, *Circuit Judges*

JUDGEMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(*b*). The court concludes, specifically, that the appellees are immune from the appellant's defamation suit under the International Organizations Immunities Act of 1945 (IOIA), 22 U.S.C. § 288a(*b*).

Under the IOIA, 22 U.S.C. §§ 288 et seq., international organizations, such as the International Bank for Reconstruction and Development (IBRD or World Bank) and the International Development Agency (IDA), that have been recognized by the President through an "appropriate Executive order", 22 U.S.C. § 288, are afforded immunity from suit.[1] "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign Governments, except

to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. 288a(*b*). The court recently interpreted this language to grant international organizations absolute immunity from all lawsuits and claims. See *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341-42 (D.C. Cir. 1998). There are only two sources of limitation to the immunity: (1) the organization itself may waive its immunity and (2) the President may specifically limit the organization's immunities when he selects the organization as one entitled to enjoy the IOIA's privileges and immunities. *Mendaro v. World Bank*, 717 F.2d 610, 613 (D.C. Cir. 1983). The World Bank, of which the IDA is a sub-entity, has waived its immunity from suit brought by its debtors, creditors, bondholders and those other potential plaintiffs as to whom the Bank would have subjected itself to suit in order to achieve its chartered objectives. See id. at 615; see also *Atkinson*, 156 F.3d at 1338.

In determining whether the World Bank has waived its immunity here, we ask whether "the particular type of suit would *further* the Bank's objectives." *Atkinson*, 156 F.3d at 1338 (emphasis original). If it does not, "the Bank's immunity should be construed as *not waived*." Id. (emphasis original). The appellant's defamation suit neither furthers the World Bank's objectives nor enhances the Bank's ability to participate in commercial transactions. See id. That such a suit is brought by a former employee of a borrower of the World Bank, whom the Bank allegedly recruited to work for the borrower and to whom it promised employment benefits, does not affect the Bank's immunity. Accordingly, it is

ORDERED that the judgement from which this appeal has been taken be affirmed substantially for the reasons stated in the district court's memorandum opinion of July 27, 2000. See *Dujardin v. International Bank for Reconstruction and Development*, No. 99-3398 (D.D.C. July 27, 2000).[2]

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41 (*a*)(1).

FOR THE COURT:
[*Signed*] Mark J. Langer, Clerk

(*b*) UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Mohammed Faisal Rahman (Plaintiff) v. James D. Wolfensohn, The World Bank, World Bank Publications, and Unknown Parties A, B, C, D, E, F and G (Defendants) (28 August 2001)

Complaint of copyright infringement—Unfair trade practices and unfair competition claims

ORDER

This matter is before the court on Defendants' Motion to Dismiss Pursuant to Rule 12 (*b*) (6) [#5]. Upon consideration of Defendants' Motion, Plaintiff's Response to Defendants' Motion, Defendants' Reply, and Plaintiff's Response to Defendants' Reply, for the reasons stated in the accompanying Memorandum Opinion, it is this 28th day of August 2001

ORDERED, that Defendants' Motion to Dismiss [#5] is granted; and it is further
ORDERED, that Plaintiff's Complaint is dismissed.
This is a final appealable Order. See Fed. R. App. P. 4 (*a*).

[*Signed*] Gladys Kessler
United States District Judge

MEMORANDUM OPINION

Plaintiff Mohammed Faisal Rahman brings suit, *pro se*, alleging that Defendants[3] have infringed his copyright by using his book, *Revised National Economics*, as a model for their publication, *Monitoring Environmental Progress: A Report on Work in Progress*, and that they have engaged in unfair trade practices and unfair competition. Defendants have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12 (*b*) (6) for failure to state a claim. Upon consideration of Defendants' Motion, Plaintiff's Response, Defendants' Reply, and Plaintiff's Response to Defendants' Reply, Defendants' Motion [#5] is granted, and Plaintiff's Complaint is dismissed.

I. BACKGROUND[4]

Plaintiff, a resident of the Republic of Trinidad and Tobago, co-authored the book *Revised National Economics* with Dr. A. H. Rahman. The book was copyrighted in the Republic of Trinidad and Tobago and published there in February 1994.[5] The foreword to *Revised National Economics* states that the book is "intended to assist the layman in understanding some of the workings of the forces around him in government and society, and focuses on economic issues in Trinidad and Tobago." M. F. Rahman and Dr. A. H. Rahman, *Revised National Economics* ("Rahman" herein) at foreword (1994)[6]

In 1995, Defendants published *Monitoring Environmental Progress: A Report on Work in Progress* as part of their Environmentally Sustainable Development Series. The work "showcases improvements in [economically sustainable development] indicators that help to analyse policy-oriented issues" and discusses the "empirical processes" used in determining whether environmental conditions are improving or deteriorating. The World Bank, *Monitoring Environmental Progress: A Report on Work in Progress* ("The World Bank" herein) vii (1995). Plaintiff alleges that Defendants unlawfully copied his book and used the ideas expressed therein as a basis for *Monitoring Environmental Progress*.

II. STANDARD OF REVIEW

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See also *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1334 (D.C. Cir. 1985); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999). In addition, the court should liberally construe the Complaint's allegations in favour of the Plaintiff. See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984); *Shear v. Nat'l Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). When, as in this case, the Plaintiff appears *pro se*, the court should hold the Complaint to a less stringent standard than it would a pleading drafted by an attorney. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). See also *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999); *United States v. Sanchez*, 88 F.3d 1243, 1247 (D.C. Cir. 1996).

Ordinarily, when "matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss under Fed. R. Civ. P. 12 (*b*) (6)] shall be treated as one for summary judgement and disposed of as provided in rule 56." Fed. R. Civ. p. 12 (*b*). In this case, complete copies of the works in question were not included in the Complaint but were instead provided by the Defendants. Olson Decl. at 1. However, when a defendant attaches to its motion papers the document that forms the very basis for plaintiff's claim, the court may properly consider that document without converting the motion to dismiss into a motion for summary judgement. *Vanover v. Hantman*, 77 F. Supp. 2d at 98. See also *Greenberg v. Life Ins. Co.*, 177 F.3d 507, 514 (6th Cir. 1999); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (holding that "[w]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a rule 12 (*b*) (6) motion into one under rule 56 is largely dissipated."); *Lipton v. MCI Worldcom. Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001); *YWCA v. All State Ins. Co.*, 158 F.R.D. 6, 7 (D.D.C. 1994). Consequently, Defendants' Motion will be treated as a rule 12 (*b*) (6) motion.

III. ANALYSIS

A. *Applicable copyright law*

In order to prevail on his claim of copyright infringement, Plaintiff must prove both that he held the copyright to the work in question and that Defendants copied the work. *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Since actual copying is often difficult to prove, the court may infer copying when the plaintiff is able to show that the defendant had access to the plaintiff's work and that the two works are "substantially similar."[7] See *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284 (10th Cir. 1996); *Nelson v. Grisham*, 942 F. Supp. 649, 651 (D.D.C. 1996); *McCall v. Johnson Publ'g Co.*, 680 F. Supp. 46, 48 (D.D.C. 1988).

It is well established that, when a court has before it complete copies of the two works in question, the court may decide as a matter of law that the works are not substantially similar. *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143 (8th Cir. 1989); *Boyle v. Stephens, Inc.*, 97 Civ. 1351 (SAS), 1998 U.S. Dist. LEXIS 1968, at *9 (S.D.N.Y. Feb. 23, 1998). "Although the issue of substantial similarity may be an issue of fact for resolution by a jury, a court may determine non-infringement as a matter of law where (1) the similarity between the two works concerns only non-copyrightable elements of the plaintiff's work or (2) no reasonable jury could find that the two works are substantially similar." *Fisher v. United Feature Syndicate, Inc.*, 37 F. Supp. 2d 1213, 1224 (D. Colo. 1997) (citing *Warner Bros. v. ABC*, 720 F.2d 231, 240 (2d Cir. 1983)).

This court has before it complete copies of both *Revised National Economics* and *Monitoring Environmental Progress* and is therefore in a position to determine as a matter of law whether or not the works are substantially similar. See *Nelson v. Grisham*, 942 F. Supp. at 652; *Whitehead v. New Line Cinema*, No. 98-1231, 2000 U.S. Dist. LEXIS 19794, at *6 (D.D.C. June 14, 2000). If a comparison of the two works reveals that they are not substantially similar, then Plaintiff cannot possibly plead any set of facts that will afford him relief. See idem.

In considering whether Defendants' work is substantially similar to Plaintiff's, it is important to note a fundamental principle of copyright law: ideas are not copy-

rightable. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102 (*b*). Therefore, in order to find infringement, the Court must determine that both the ideas and the expressions of those ideas are substantially similar. *Sid & Mary Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *McCall v. Johnson Publ'g Co.*, 680 F. Supp. at 48.

Of course, this principle is more easily stated than applied. As Judge Learned Hand noted, "[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). Necessarily, the proper approach will vary depending on the type of work to be examined. The Eighth Circuit, in *Hartman v. Hallmark Cards., Inc.*, 833 F.2d 117, 120 (8th Cir. 1987), has adopted a useful two-step analysis for comparing two academic works such as Plaintiff's and Defendants'. The Court of Appeals for the Eighth Circuit explained that:

> "There must be similarity 'not only of the general ideas but of the expressions of those ideas as well.' First, similarity of ideas is analyzed extrinsically, focusing on objective similarities in the details of the works. Second, if there is substantial similarity in ideas, similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression."

Hartman v. Hallmark Cards, Inc., 833 F.2d at 120 (citations omitted). Under this analysis, if the similarity exists only on the level of ideas rather than expression of those ideas, no infringement has occurred. *Lapsley v. Am. Inst. of Certified Pub. Accountants*, 246 F. Supp. 389, 391 (D.D.C. 1965).

B. *Copyright infringement claim*

Appendix A to Plaintiff's Response contains what Plaintiff calls "A comparative study of two works". Plaintiff's Response to Defendants' Motion to Dismiss ("Pl.'s Resp."), App. A at 1.[8] After some introductory notes,[9] Plaintiff identifies five sets of passages ("items") in which Defendants have allegedly infringed his copyright. Pl.'s Resp. at App. A. The court will address each of these five items in turn.

Item 1

Plaintiff points first to Defendants' statement, "Governments make wide use of taxes and subsidies as tools to influence behavior and reach policy goals." The World Bank, supra, at p. 43. Plaintiff alleges that this is a direct paraphrase of his sentence, "Using systems of reliefs and penalties Government uses direct taxation to control further the lifestyle of the populace." Rahman, supra, at p. 100. While the ideas expressed are similar, that fact, as already noted, does not by itself prove infringement; the *Nelson v. PKN Prods.* test requires a second inquiry: whether an ordinary, reasonable person would find the expressions of the idea to be substantially similar. *Nelson v. PRN Prods., Inc.*, 873 F.2d at p. 1143.

In this instance, no reasonable jury could find substantial similarity. See *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp. 2d 38, 47 (D.D.C. 1999). First, the two sentences differ in both structure and word choice. The only important words

that both sentences contain are "Government(s)," "use/using," and "taxes/taxation." It would be practically impossible to convey this idea without using these words or at least their synonyms. See *Lapsley v. Am. Inst. of Certified Pub. Accountants*, 246 F. Supp. at 391 (finding no infringement because, "since all of these works deal with the same topic, it is only natural that such publications would contain similar words and phrases"). Also, the parties' descriptions of government's aims are quite different. Plaintiff's description suggests criticism of an overly controlling government, while Defendants' wording implies the legitimacy of taxing for such purposes. Though the line between an idea and its expression may be blurred, it is quite clear in this instance that the ordinary, reasonable person would find that any copying was solely of unprotected ideas. See *Nelson v. PNR Prods., Inc.*, 873 F.2d at p. 1143.

Item 2

(*a*) The passages that Plaintiff cites in this subsection do not even pass the first prong of the test: the ideas themselves are not substantially similar. Plaintiff's quoted passage appears within a discussion of the value of currency, in which he suggests that his Government should issue surplus currency using some sort of unexplained "National self-loan account," and that "the surplus currency could be officially withdrawn later as settlement, or offset by draw down on national resource product without the added burden of interest payments having to be made." Rahman, supra, at p. 38. Defendants' passage, on the other hand, pertains to the need for developing countries to save for the future and proposes that the depletion of natural resources be included in the calculation of wealth as a debt owed to the people of the country. The World Bank, supra, at p. 53. Defendants' passage does not address the issues of surplus currency or avoiding interest; therefore, it could not have been copied from Plaintiff's work. An objective assessment reveals that the ideas are not substantially similar.

(*b*) Next, Plaintiff alleges that Defendants copied his work in their statement, "[s]tudies of sustainable development should also consider the human resource savings realized through investment in education and health . . ." The World Bank, supra, at p. 53. The passages Plaintiff alleges formed the basis for this language, however, simply express the idea that education and health are basic human needs that governments are obligated to meet. Rahman, supra, at pp. 15-17. Defendants' work does not imply that Governments have such a duty; it merely names a factor to be included in the calculation of a country's savings. The ideas expressed in the passages cited by Plaintiff are clearly dissimilar.

Item 3

(*a*) The idea introduced in Defendants' statement, "To ensure that wealth is maintained, resource rents should be reinvested in either produced assets or human resources," the World Bank, supra, at p. 56, bears little resemblance to the idea Plaintiff sets forth in his cited passages. Defendants suggest investing in produced assets and human resources because those investments will in turn produce more wealth. Plaintiff, however, recommends exploiting all of his nation's natural resources and converting their value to gold bullion to be stored safely within his country—a quite different approach. Rahman, supra, at p. 50. Any similarity between the idea of converting assets into gold bullion and converting them into produced goods and human resources is insubstantial. The other brief segments Plaintiff cites in this item have nothing to do with reinvesting assets and therefore could not have formed the basis for Defendants' sentence.

(*b*) In Plaintiff's next example, Defendants again write on the general, theoretical level, while Plaintiff discusses what his particular country should do. Defendants write: "[t]he crude estimates of saving provided [in the graphs on page 55] . . . are just accurate enough to suggest that a policy issue is at stake—whether government policies are providing for the future." The World Bank, supra, at p. 56. Plaintiff, too, addresses the need to save for the future; however, he deals specifically with how he believes his country should prepare in light of the possible obsolescence of petroleum products. Rahman, supra, at p. 58, 66. There is a similarity of general topic in that both passages deal with government saving. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (noting that, at the most general level in a "series of abstractions," similarities will be easy to find). However, the actual ideas expressed in the two passages are not substantially similar. Defendants pose a general concern raised by their own research and do not refer at all to petroleum products or to the Republic of Trinidad and Tobago. Therefore, although both mention saving, the two works cannot be said to express substantially similar ideas.

Item 4

In this item, Plaintiff quotes numerous passages from his own and Defendants' work, alleging that Defendants copied his definition of the wealth of a nation. In particular, Plaintiff's allegations focus on the ideas of recognizing the importance of human resources, counting foreign investment as a negative factor, and considering the possible depletion of natural resources. The court will consider each of these allegations in turn.

First, Plaintiff claims that the most blatant example of copyright infringement occurs when Defendants list the factors to be included when calculating the wealth of nations. Pl.'s Resp., App. A at p. 9. Certainly, both works discuss the idea of finding an accurate method for measuring the wealth of a nation. The World Bank, supra, at p. 57; Rahman, supra, at p. 130. Of course, under 17 U.S.C. § 102, it is clear that a process or system (however it may be labelled) for determining the wealth of nations cannot be copyrighted. Therefore, the court must determine whether Defendants' expression of that method is substantially similar to Plaintiff's. See *Nelson v. PNR Prods., Inc.*, 873 F.2d at p. 1143.

Plaintiff's book states that his country's assets include "[the] combined natural reserves of [the] country, plus all [its] land, people, infra-structure, buildings, etc." Rahman, supra, at p. 130. Defendants' categories of national assets are: produced assets, natural capital, human resources, and social infrastructure. The World Bank, supra, at p. 65. Of course, "natural reserves" and "natural capital" mean essentially the same thing as "people" and "human resources". However, there is simply no better way to express the value of a country's natural resources and citizenry than by using terms such as these. See *Lapsley v. Am. Inst. of Certified Pub. Accountants*, 246 F. Supp. at p. 391. Therefore, even though the expressions may be similar, there has been no infringement of Plaintiff's copyright.[10] While buildings are included in Defendants' definition of produced assets, and land is included in their definition of natural capital, Defendants also list several assets that Plaintiff does not: social (as opposed to physical) infrastructure and produced assets in general. Therefore, the court finds that the overall expressions of methods to measure a country's assets are not substantially similar.

In his conclusion to this item, Plaintiff points particularly to the fact that both parties emphasize the value of human resources. Pl.'s Resp., App. A at p. 9. While

this is true, the ways in which the parties convey this idea are very different, such that an ordinary, reasonable person would not find them substantially similar. See *Nelson v. PNR Prods., Inc.*, 873 F.2d at p. 1143. The main points in the sections quoted from Plaintiff's book are: (1) that the government should provide free education and cultural events for the public because an ignorant populace will overthrow its society, Rahman, supra at p. 16; (2) that human beings have a right to food, shelter, and clothing, Rahman, supra, at pp. 88-89; and (3) that "[t]he value of labour must appreciate, and not depreciate to the point where its earnings are inadequate for its sustenance," Rahman, supra, at p. 62. The passages quoted from Defendants' book, however, mainly provide details regarding how to measure the value of human resources. Unlike Plaintiff's work, Defendants' book does not state or imply at any point that humans have an inherent right to have Governments meet their basic needs. Defendants' work does note as a factual matter that, as people learn, their value as resources increases over their lifetimes. The World Bank, supra, at p. 61. Plaintiff's comment on the appreciation of human labour seems instead to assert the need for the value of labour to increase for the sake of sustainability. An ordinary, reasonable person could not find Defendants' expression of the idea to be substantially similar to Plaintiff's.

Plaintiff also points to Defendants' inclusion of foreign investment in the list of national liabilities as evidence of copyright infringement. Once again, the ideas are similar, but the expressions are not. Plaintiff's discussion focuses mainly on his belief that foreign investment is not needed in his country and that it is a liability because the investors spend the returns in their home countries. Rahman, supra, at pp. 48-49. Defendants' book neither addresses the particular situation in Trinidad and Tobago, nor mentions the problem of foreign investors "repatriating" their earnings, as Plaintiff puts it. The only similarity between the two works on this point is that they both count foreign investment as a liability when calculating a nation's wealth, an idea to which Plaintiff can hold no copyright. See 17 U.S.C. § 102 (*b*).

Finally, Plaintiff alleges that Defendants' use of the concept of "intergenerational liability" infringes his copyrighted expression regarding the possibility that his country's natural resources, particularly petroleum products, will become obsolete.

In this instance, not even the underlying ideas are similar. Plaintiff writes that, because nuclear and solar energy may someday eliminate the need for fossil fuels, his country should extract all its petroleum now and convert it into tangible assets. Rahman, supra, at p. 50. Defendants, on the other hand, write that the environmental impact of wealth-increasing activities on non-saleable resources like air and water should be included in the calculation of national wealth because future generations will bear the burden of such pollution. The World Bank, supra, at p. 65. Plaintiff does not mention the environmental impact of development on future generations, nor does he address how to account for it when measuring national wealth. Likewise, Defendants' work does not encourage exploiting natural resources and does not express concern that fossil fuels will become obsolete. Defendants' idea bears virtually no resemblance to Plaintiff's.

Item 5

In this item, the passages cited are similar only at the broadest level of generality. See *Nichols v. Universal Pictures Corp.*, 45 F.2d at p. 121. Plaintiff's quotations focus on the responsibility of government to meet the basic needs of the poor,

Rahman, supra, at pp. 16, 72, and to create a system that rewards the poor with the fruits of their labour, Rahman, supra, at p. 62. Defendants mention that poverty, by definition, means in part a lack of basic human necessities and that overcoming poverty is a challenge for developing countries. The World Bank, supra, at pp. 67-68. However, they do not, unlike Plaintiff, assert that the principal duty of government is the eradication of poverty or explain the various ways in which Governments have failed to live up to this duty.

While both parties mention the poor's lack of access to the rewards of affluence, the similarity does not extend beyond the level of an idea. Plaintiff writes, "[o]ur citizens morally own the natural resources, yet are constantly denied the benefits through misguided economic policies." Rahman, supra, at p. 78. Quite differently, Defendants' observation appears within an explanation of a graph comparing the percentage of the population consuming less than one dollar per day with national wealth. The World Bank, supra, at p. 69, fig. 9.3. Defendants write, "[a]t low levels of wealth (less than $20,000 per capita), the relation between wealth and poverty is weak, reflecting both the degree of potential wealth that remains untapped and the poor's lack of access to the benefits generated by the wealth that is available." The World Bank, supra, at p. 69. Certainly, Plaintiff can hold no copyright to the idea that the poor have inadequate access to the benefits of a nation's wealth, see 17 U.S.C. § 102 (*b*) , and, even if he could, the parties' expressions of that idea are not remotely similar in context or wording.

Finally, in this item and in his conclusion, Plaintiff presents as evidence of infringement the fact that his work offers itself up as a "blueprint" for developing nations. Plaintiff cites passages of *Revised Rational Economics* that read, "[w]hile the economic philosophies propounded in this book had their genesis in the Trinbago experience of the post-Williams era, upon reflection, one may find their relevance universal to third world/developing nations," Rahman, supra, at p. 118, and, "[w]ith the overturn of conventional economics through the concepts of this work, perhaps this would be seen as a prototype blueprint for third world economic policy documents," Rahman, supra. at p. 120. As much as Plaintiff may hope his work is followed by other economists, it is substantial similarity, not the mere presentation of a "blueprint", that determines whether a copyright has been infringed.

C. *Unfair trade practices and unfair competition claims*

Plaintiff also seems to claim that Defendants have engaged in unfair trade practices and unfair competition. Following his allegations of copyright infringement, Plaintiff inserts one final sentence that states in conclusory fashion, "[a]fter, [sic] September 1995, Defendant has published, marketed and distributed the book entitled *Monitoring Environmental Progress, A Report on Work in Progress*, and has thereby engaged in unfair trade practices and unfair competition against Plaintiff to Plaintiff's irreparable damage." Complaint ("Compl.") at § 14 (emphasis in original). Neither the Complaint nor any of Plaintiff's motion papers offer a single fact in support of this claim.

Therefore, even if the Complaint is liberally construed, it fails to state a claim for unfair trade practices and unfair competition. While *pro se* plaintiffs are entitled to some leniency in construing their pleadings, see *Haines v. Kerner*, 404 U.S. at p. 520, the Complaint still must allege some supporting facts in order to survive a motion to dismiss. *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C. Cir. 1981)

(stating that "[a] court may dismiss as frivolous complaints reciting bare legal conclusions with no suggestion of supporting facts"). See also *Price v. Crestar Sec. Corp.*, 44 F. Supp. 2d 351, 353 (D.D.C. 1999) (holding that "although a court will read a *pro se* plaintiff's complaint liberally, a *pro se* plaintiff must at least meet a minimal standard of pleading in the complaint . . ."); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (holding that, even in a *pro se* complaint, "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based"). In this case, Plaintiff has failed to allege any facts whatsoever in support of his claims of unfair trade practices and unfair competition. Because Plaintiff has included no supporting factual allegations, he has failed to state a claim for unfair trade practices and unfair competition. Accordingly, those claims are dismissed.

IV. CONCLUSION

A comparison of *Revised National Economics* and *Monitoring Environmental Progress* reveals that the two works are not substantially similar except, in a very few instances, on the level of uncopyrightable ideas.[11] Therefore, the Court concludes that Plaintiff can plead no set of facts that would entitle him to relief on his copyright claim. Furthermore, because Plaintiff has offered no facts in support of his allegation of unfair trade practices and unfair competition, he has failed to state a claim. Accordingly, Defendants' Motion is granted and the Complaint is dismissed.

26 August 2001
(*Date*)

[*Signed*]
Gladys KESSLER
U.S. District Judge

NOTES

[1] The IBRD and the IDA have been designated "public international organizations" pursuant to Executive orders. See Exec. Order No. 9751, 11 Fed. Reg. 7713 (1946) (IBRD); Exec. Order No. 11966, 42 Fed. Reg. 4331 (1977) (IDA).

[2] Because the appellees are immune from suit, we have no occasion to determine the legal adequacies of the appellant's defamation claim. *Cf. Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 460-61 (D.C. Cir. 1967) (proceeding to merits only after concluding Bank had waived immunity).

[3] Defendant The World Bank is an organization of member States that provides loans and other assistance to nations in an effort to promote sustainable development. Defendant James D. Wolfensohn is president of the World Bank Group. Defendant World Bank Publications produces and makes available to the public copies of reports and information compiled by the World Bank.

[4] For purposes of a rule 12 (*b*) (6) motion, the court must presume that the factual allegations in the Complaint are true. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997). Therefore, the facts set forth in this section are taken from the Complaint.

[5] Plaintiff states that he brings his claim under 17 U.S.C. § 104. Complaint at § 6. The court presumes that Plaintiff is referring to § 104 (*b*), which states in pertinent part: "The works specified by sections 102 and 103 [including works of literature and the arts], when published, are subject to protection under this title if—(1) on the date of first publication, one or more of the authors . . . is a national, domiciliary or sovereign authority of a

treaty party . . .” 17 U.S.C. § 104 (*b*). Because Defendants do not raise any defences relating to § 104 and because their motion can be resolved on other grounds, the court need not address the issue of whether Plaintiff is covered under § 104 (*b*).

[6] For clarity and simplicity in this opinion, the court will cite directly to the two works in question rather than to the exhibits in which they are contained. The works are reproduced in Exhibits A (*Revised National Economics*) and B (*Monitoring Environmental Progress*), which are attached to the Declaration of Thomas P. Olson (“Olson Decl.”), filed with Defendants’ Motion to Dismiss.

[7] Plaintiff purports to claim actual copying, Compl. at § 12, but alleges no facts that would show that Defendants actually copied his book. Instead, he simply alleges that “Defendants, [sic] infringed said copyright by publishing and placing upon the market a book entitled *Monitoring Environmental Progress, A Report on Work in Progress*, which was edited, copied and rewritten largely from Plaintiff’s copyrighted book, entitled *Revised National Economics*.” Compl. at § 12 (emphasis in original). However, Plaintiff’s responses to the Motion indicate that he is bringing this action on a theory of access and substantial similarity. Because Plaintiff is appearing *pro se*, the court will proceed as if he had included the allegations of access and substantial similarity in his Complaint.

[8] Although the opinion cites to those comparisons, it quotes the two works directly rather than using Plaintiff’s (sometimes abbreviated) quotations of those works.

[9] In his introduction, Plaintiff seems to contend that Defendants’ claims about the innovative nature of their work help to prove his case. Pl.’s Resp., App. A at 1. He cites such assertions as “this publication is rich in ‘products’ such as new indicators and innovative concepts,” the World Bank, supra, at viii, and “perhaps the most profound suggestion of intellectual retooling is in the final chapters, which propose a change in the role of national accounting.” Idem, at ix. However, even if Defendants claim that their book contains new ideas, and even if Plaintiff was actually the first to conceive of those ideas, he would have no basis for relief since ideas may not be copyrighted. 17 U.S.C. § 102 (*b*).

[10] In instances such as this, the idea and the expression of the idea are said to merge, so that even the expression of the idea is not protected. See, e.g., *Kepner-Tregoe, Inc. v. Leadership Software*, 12 F.3d 527, 533 (5th Cir. 1994) (“[W]hen an idea can be expressed in very few ways, copyright law does not protect that expression, because doing so would confer a de facto monopoly over the idea. In such cases idea and expression are said to be merged.”); *Atari Games Corp. v. Oman*, 888 F.2d 878, 889 (D.C. Cir. 1989).

[11] Because the court finds that the works are not substantially similar, there is no need to address the issue of access. See *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp. 2d at p. 47 note 4; *McCall v. Johnson Publi’g Co.*, 680 F. Supp. at p. 48.