

Case No:C/2001/0828

Neutral Citation Number: [2002] EWCA Civ 03
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION) ADMINISTRATIVE COURT
(The Hon Mr Justice Turner)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 25 January 2002

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE LAWS
and
MR JUSTICE MORLAND

Emanuela Marchiori	<u>Appellant</u>
v	
The Environment Agency	<u>Respondent</u>
&	
The Secretary of State for Defence	<u>1st interested party</u>
&	
AWE plc	<u>2nd interested party</u>

(Transcript of the Handed Down Judgment of
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Dinah Rose and Nicholas Khan (instructed by The Environment Agency for the Respondent)
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party)
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Judgment
As Approved by the Court

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Lord Justice Laws:

Introductory

1. This is an appeal against the decision of Turner J, given in the Administrative Court on 29 March 2001, when he dismissed the appellant's application for judicial review in respect of certain authorisations granted by the respondent on 1st April 2000 which permit the discharge of radioactive waste by contractors to the Ministry of Defence from two nuclear sites respectively situated at Aldermaston and Burghfield. Permission to appeal was granted by Buxton LJ on 22 June 2001. The Secretary of State for Defence and the contractors AWE plc have appeared before us by counsel as interested parties, as they did before Turner J. Turner J's judgment is now reported at [2001] Env LR 840.
2. Both sites are military installations at which Trident nuclear warheads are manufactured (and other activities carried on). Together they constitute part of the United Kingdom's Atomic Weapons Establishment ("AWE"). The appellant's interest in the authorisations in question springs from her "longstanding and deeply held opposition to the manufacture of nuclear weapons, and the threat to use them. If ever used they would kill thousands of ordinary people indiscriminately and cause an ecological disaster of unimaginable proportions" (witness statement 10th April 2000, paragraph 5). Unsurprisingly she has no objection to the de-commissioning of nuclear weapons, which is also carried on at AWE. She has no objection to the process as such of discharging nuclear waste; obviously nuclear waste has to be dealt with. She has no objection to the approach taken by the respondent, in granting the authorisations, to considerations of safety. The proceedings are a vehicle to give effect to her objection to nuclear weapons. It is submitted by Mr Fordham on her behalf that the manufacture and maintenance of Trident nuclear warheads is contrary to international law. Save as regards a discrete and subsidiary part of the case, neither the respondent nor the interested parties have suggested, here or below, that the appellant should be denied standing.
3. Mr Fordham's primary case is that the authorisations would only be lawful if the respondent, in granting them, decided on legally permissible grounds that "every activity resulting in exposure to ionizing radiation [is] justified by the advantages which it produces": this is the "justification principle" stipulated in Article 6(a) of Council Directive 80/836/Euratom ("the Directive") made under Chapter III of Title 2 of the EURATOM Treaty. He says that the respondent wrongly treated the nuclear defence programme as a benefit or advantage for the purposes of the justification principle (indeed, they held themselves bound to treat it as such); whereas in fact they were required to treat it as a detriment, having regard to the "humanitarian" principles of international law as explained in the Advisory Opinion of the International Court of Justice ("ICJ") on the Legality of the Threat or Use of Nuclear Weapons given on 8th July 1996 ("the *Advisory Opinion*"). The respondent and the interested parties submit that the Directive is not engaged, since Chapter III of Title 2 of the EURATOM Treaty has no application to military installations. However, the respondent chose in any event to apply the justification principle as it was articulated by the International Commission on Radiological Protection ("ICRP") in ICRP Publication 60 adopted in November 1990 ("ICRP 60"): "no practice involving exposures to radiation should be adopted unless it produces sufficient benefit to the exposed individuals or to society to offset the radiation detriment it causes". It is common ground that there is no difference between the two formulations of the justification principle. Thus, says the respondent, the scope of Chapter III of Title 2 of the EURATOM Treaty is neither here nor there, though Mr Fleming QC for the Secretary of State was at pains to persuade us that in truth it has no application to military establishments. Then it is said against the appellant, in summary, that far from being required to regard the nuclear defence programme as a detriment, the respondent was bound to treat it as a benefit; the merits or demerits of government defence policy are not justiciable in the courts; in any event the *Advisory Opinion* is not authority for the propositions which Mr Fordham seeks to found upon it. The

subsidiary issue in the case (as regards which there is a question as to the appellant's standing) is whether, because the Commission had not earlier been notified of general data relating to the proposed authorisations pursuant to Article 37 of Chapter III of Title 2 of the EURATOM Treaty, the authorisations as given are unlawful. In reply Mr Fordham submitted that we should refer the question of the scope of Chapter III of Title 2 of the EURATOM Treaty to the Court of Justice – presumably under Article 150 of the EURATOM Treaty itself, which is in the same terms as Article 234 (ex-177) of the Treaty of Rome.

The Legislation

4. First, s.13(1) of the Radioactive Substances Act 1993 (“RSA”):

“... no person shall, except in accordance with an authorisation granted in that behalf under this subsection, dispose of any radioactive waste on or from any premises which are used for the purposes of any undertaking carried on by him, or cause or permit any radioactive waste to be so disposed of, if (in any such case) he knows or has reasonable grounds for believing it to be radioactive waste.”

By force of s.32 RSA, it is a criminal offence to contravene s.13(1). By s.16(2) RSA the power to grant authorisations under s.13(1) is now vested in the respondent, which was established by s.1 of the Environment Act 1995. S.23 RSA empowers the Secretary of State to give directions to the respondent, in effect, as to how to decide any application for an authorisation under s.13(1). S.24 enables the Secretary of State to call in applications. S.42 deals with the extent to which RSA binds the Crown. I need not set out its terms. RSA bites on the circumstances of this case because the contract for the management of these two sites has gone to the second interested party, AWE plc (as I shall explain in a little more detail in paragraph 13), rather than simply being retained within the Ministry of Defence.

5. I should next set out those provisions of the EURATOM Treaty which are material to the argument. Here is the preamble:

“[The Contracting Parties]

RECOGNISING that nuclear energy represents an essential resource for the development and invigoration of industry and will permit the advancement of the cause of peace,

CONVINCED that only a joint effort undertaken without delay can offer the prospect of achievements commensurate with the creative capacities of their countries,

RESOLVED to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples,

ANXIOUS to create the conditions of safety necessary to eliminate hazards to the life and health of the public,

DESIRING to associate other countries with their work and to co-operate with international organisations concerned with the peaceful development of atomic energy...”

Title 1 is headed “The Tasks of the Community”. Article 1 establishes the European Atomic Energy Community (EURATOM), whose task is “to contribute to the raising of the standard of living in the Member States and to the development of relations with other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries.” Article 2 lists seven modes by which EURATOM’s task is to be performed. These cross-refer to the Treaty’s detailed provisions which follow. Thus Article 2(a) requires EURATOM to “promote research and ensure the dissemination of technical information”. Title 2, Chapter I is headed “Promotion of Research” and contains (Articles 4 – 11) detailed provisions which promote that end. Likewise Chapter II, “Dissemination of Information”, sets out measures to advance that purpose. Article 2(b) is particularly relevant to the present debate. It enjoins EURATOM to “establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied”. Here the cross-reference is Title 2 Chapter III: “Health and Safety”. I must set out a number of the Chapter’s provisions, as follows.

“Article 30

Basic standards shall be laid down within the Community for the protection of the health of workers and the general public against the dangers arising from ionising radiations.

The expression ‘basic standards’ means:

- (a) maximum permissible doses compatible with adequate safety;
- (b) maximum permissible levels of exposure and contamination;
- (c) the fundamental principles governing the health surveillance of workers.

Article 34

Any Member State in whose territories particularly dangerous experiments are to take place shall take additional health and safety measures, on which it shall first obtain the opinion of the Commission.

The assent of the Commission shall be required where the effects of such experiments are liable to affect the territories of other Member States.

Article 35

Each Member State shall establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards.

The Commission shall have the right of access to such facilities; it may verify their operation and efficiency.

Article 36

The appropriate authorities shall periodically communicate information on the checks referred to in Article 35 to the Commission so that it is kept informed of the level of radioactivity to which the public is exposed.

Article 37

Each Member State shall provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State.

The Commission shall deliver its opinion within six months, after consulting the group of experts referred to in Article 31.

Article 38

The Commission shall make recommendations to the Member States with regard to the level of radioactivity in the air, water and soil.

In cases of urgency, the Commission shall issue a directive requiring the Member State concerned to take, within a period laid down by the Commission, all necessary measures to prevent infringement of the basic standards and to ensure compliance with regulations.

Should the State in question fail to comply with the Commission directive within the period laid down, the Commission or any Member State concerned may forthwith... bring the matter before the Court of Justice.

Article 39

The Commission shall set up within the framework of the Joint Nuclear Research Centre, as soon as the latter has been established, a health and safety documentation and study section.

This section shall in particular have the task of collecting the documentation and information referred to in Articles 33, 36 and 37 and of assisting the Commission in carrying out the tasks assigned to it by this Chapter.”

6. The remaining Chapters of Title 2, that is Chapters IV – X, respectively reflect and fill out the provisions of Article 2(c) - (h). I cite only the following.

“Article 45 [which is within Chapter V, ‘Joint Undertakings’]

Undertakings which are of fundamental importance to the development of the nuclear industry in the Community may be established as Joint Undertakings within the meaning of this Treaty...

Article 77 [within Chapter VII, ‘Safeguards’]

In accordance with the provisions of this Chapter, the Commission shall satisfy itself that, in the territories of Member States,

- (a) ores, source materials and special fissile materials are not diverted from their intended uses as declared by the users;
- (b) the provisions relating to supply and any particular safeguarding obligations assumed by the Community under an agreement with a third State or an international organisation are complied with.

Article 78

Anyone setting up or operating an installation for the production, separation or other use of source materials or special fissile materials or for the processing of irradiated nuclear fuels shall declare to the Commission the basic technical characteristics of the installations, to the extent that knowledge of these characteristics is necessary for the attainment of the objectives set out in Article 77...

Article 84 [also within Chapter VII]

...

The safeguards may not extend to materials intended to meet defence requirements which are in the course of being specially processed for this purpose or which, after being so processed, are, in accordance with an operational plan, placed or stored in a military establishment.”

7. The only other provision I need cite is Article 141, which falls within Title 3 Chapter I: “The Institutions of the Community”. It provides:

“If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”

I have already indicated that Article 150 is the equivalent of Article 234 of the Treaty of Rome.

8. Now I must turn to the Directive. It was made on 15th July 1980, as I have said pursuant to Chapter III of Title 2 of the EURATOM Treaty. (The opening words refer to Articles 31 and 32 of the Treaty, which I have not set out. They deal with the establishment of the basic standards by the Council, acting on a proposal from the Commission.) Mr Fordham referred to the fourth preamble:

“Whereas the protection of the health of workers and the general public requires that any activity involving danger arising from ionising radiation must be made subject to regulation”.

Article 2 (which is within Title II: “Scope, Reporting and Authorization”) provides:

“This Directive shall apply to the production, processing, handling, use, holding, storage, transport and disposal of natural and artificial radioactive substances and to any other activity which involves a hazard arising from ionising radiation.”

Article 3 (also within Title II):

Each Member State shall make the reporting of the activities referred to in Article 2 compulsory. Without prejudice to Article 5 [which deals with authorizations in certain specific cases] and in the light of possible dangers and other relevant considerations, these activities shall be subject to prior authorization in cases decided upon by each Member State.”

Article 6 (within Title III: “Limitation of Doses for Controllable Exposures”):

“The limitation of individual and collective doses resulting from controllable exposures shall be based on the following general principles:

- (a) [I have already set this out in paragraph 3, and repeat it for convenience] every activity resulting in exposure to ionizing radiation shall be justified by the advantages which it produces;
- (b) all exposures shall be kept as low as reasonably achievable;
- (c) without prejudice to Article 11 [which deals with what are called ‘planned special exposures’], the sum of the doses and committed doses received shall not exceed the dose limits laid down in this Title for exposed workers, apprentices and students and members of the public.

...”

These three principles are in effect replicated by the ICRP, to which I turn next. As I have foreshadowed in paragraph 3, the respondent drew upon ICRP materials in arriving at its impugned decision.

The ICRP

9. The ICRP was first established in 1928. It concerns itself with “the increasing uses of ionising radiation and of practices that involve the generation of radiation and radioactive materials” (ICRP 60, paragraph 1.1(3)). It consists of an independent body of experts, and works with other international bodies, including organs of the United Nations. It publishes recommendations from time to time. ICRP 60 was a report intended to provide “guidance on the fundamental principles on which appropriate radiological protection can be based... the Commission does not intend to provide a regulatory text” (1.3(10)). Section 3.3 of ICRP 60 is headed “The Concept of Detriment”. It is clear (3.3(47) ff) that only detriment to health is under consideration. At length the ICRP elaborate three general principles as the basis for a recommended system of radiological protection. These principles reflect the terms of Article 6(a) – (c) of the Directive. They are given at 4.2(112):

“(a) [I have already set this out in paragraph 3] No practice involving exposures to radiation should be adopted unless it produces sufficient benefit to the exposed individuals or to society to offset the radiation detriment it causes. (*The justification of a practice.*)

(b) In relation to any particular source within a practice, the magnitude of individual doses, the number of people exposed, and the likelihood of incurring exposures where these are not certain to be received should all be kept as low as reasonably achievable, economic and social factors being taken into account. This procedure should be constrained by restrictions on the doses to individuals (dose constraints), or the risks to individuals in the case of potential exposures (risk constraints), so as to limit the inequity likely to result from the inherent economic and social judgments. (*The optimisation of protection.*)

(c) The exposure of individuals resulting from the combination of all the relevant practices should be subject to dose limits, or to some control of risk in the case of potential exposures. These are aimed at ensuring that no individual is exposed to radiation risks that are judged to be unacceptable from these practices in any normal circumstances. Not all sources are susceptible of control by action at the source and it is necessary to specify the sources to be included as relevant before selecting a dose limit. (*Individual dose and risk limits.*)”

(The emphasis of the summary descriptions at the end of each sub-paragraph is mine.) I have already indicated (paragraph 3) that there is in effect no difference between the formulations of the justification principle ((a) above) respectively given by the ICRP and the Directive. The same is true of the optimisation and dose limits principles ((b) and (c)). For the relationship between the two formulations, the Opinion of Mr Advocate General Jacobs in *Re Ionising Radiation Protection* [1993] 2 CMLR 513 is instructive.

10. There is an issue (to which I shall have to return) as to what should properly be regarded as a “practice” for the purposes of the justification principle. It is therefore convenient to set out ICRP 60 paragraph 4.1(106):

“Some human activities increase the overall exposure to radiation, either by introducing whole new blocks of sources, pathways, and individuals, or by modifying the network of pathways from existing sources to man and thus increasing the exposure of individuals or the number of individuals exposed. The Commission calls these human activities ‘practices’. Other human activities can decrease the overall exposure by influencing the existing form of the network. These activities may remove existing sources, modify pathways, or reduce the number of exposed individuals. The Commission describes all these activities as ‘intervention’.”

In the same context reference was made to ICRP 60 paragraph 5.5.2(189):

“The Commission defines the scope of its dose limits for public exposure by confining it to the doses incurred as the result of practices. Doses incurred in situations where the only available protective action takes the form of intervention are excluded from the scope of the dose limits. Separate attention has to be paid to potential exposures... The intended emission of radionuclides from installations, including the emission of naturally occurring radionuclides from installations such as mines and waste disposal sites, should be treated as practices. The resulting doses should be subject to the dose limits...”

11. It is convenient at this stage also to notice ICRP 60 paragraph 4.3.1(115), which Miss Rose for the respondent submits shows that ICRP uses the term “justification” in a limited sense:

“Decisions concerning the adoption and continuation of any human activity involve a choice between possible options and are often carried out in two stages. The first stage is the examination of each option separately in order to identify those options which can be expected to more good than harm. This provides a ‘short list’ from which the preferred option can then be selected. The second stage, the final selection, will often involve the replacement of one existing practice by another. The net benefit of the change will then be the relevant feature rather than the net benefit of each option separately. The Commission recommends that, when practices involving exposure, or potential exposure, to radiation are being considered, the radiation detriment should be explicitly included in the process of choice. The detriment to be considered is not confined to that associated with the radiation – it includes other detriments and the costs of the practice. Often, the radiation detriment will be a small part of the total. The justification of a practice thus goes far beyond the scope of radiological protection. It is for these reasons that the Commission limits its use of the term justification to the first of the above stages, i.e. it requires only that the net benefit be positive. To search for the best of all the available options is usually a task beyond the responsibility of radiological protection agencies.”

In this connection Miss Rose also referred to certain passages in a later ICRP publication, ICRP 77 paragraphs 5.1(15), (16). I have had regard to these but need not set them out.

United Kingdom Defence Policy

12. In order to identify the focus of Mr Fordham’s challenge concretely, it is necessary to describe the United Kingdom’s nuclear deterrent policy and programme. This is readily to be had from published documents, most notably the Strategic Defence Review presented to Parliament in July 1998 (“SDR”). I give these following extracts.

Introduction, paragraph 8:

“We will retain our nuclear deterrent with fewer warheads to meet our twin challenges of minimum credible deterrence backed by a firm commitment to arms control.”

Chapter Four:

“60. Deterrence is about preventing war rather than fighting it. All our forces have an important deterrent role but nuclear deterrence raises particularly difficult issues because of the nature of nuclear war. The Government wishes to see a safer world in which there is no place for nuclear weapons. Progress on arms control is therefore an important objective of foreign and defence policy. Nevertheless, while large nuclear arsenals and risks of proliferation remain, our minimum deterrent remains a necessary element of our security.

61. The Strategic Defence Review has conducted a rigorous re-examination of our deterrence requirements... We have concluded that we can safely make further significant reductions from Cold War levels...

62. With the withdrawal of the last RAF WE177 bombs in March 1998, Trident is our only nuclear weapon. We need to ensure that it can remain an effective deterrent for up to 30 years. This is why we need a force of four Trident submarines...

...

64. ... taking into account Trident's greater accuracy than Polaris, the Review has concluded that we need a stockpile of less than 200 operationally available warheads. This is a reduction of a third from the maximum of 300 announced by the previous government and represents a reduction of more than 70% in the potential explosive power of the deterrent since the end of the Cold War.

...

70. On nuclear arms control, the Government hopes for further bilateral reductions in US and Russian strategic weapons through the Strategic Arms Reduction Treaty process. We also hope to see progress towards reducing the thousands of Russian shorter range weapons. Our own arsenal, following the further reductions described above, is the minimum necessary to provide for our security for the foreseeable future and very much smaller than those of the major nuclear powers. Considerable further reductions in the latter would be needed before further British reductions could become feasible."

13. The SDR was accompanied by a number of supporting essays. Essay Five is entitled "Deterrence, Arms Control and Proliferation". It underscores the emphasis placed on the twin policy aims of deterrence and arms control, manifest in the SDR itself. Paragraph 5 is in these terms:

"The Government's General Election Manifesto therefore promised to retain Trident as the ultimate guarantee of the United Kingdom's security while pressing for multilateral negotiations towards mutual, balanced and verifiable reductions in nuclear weapons. When we are satisfied with progress towards our goal of the global elimination of nuclear weapons, we will ensure that British nuclear weapons are included in negotiations."

Miss Rose placed some emphasis on paragraph 14:

"For as long as Britain has nuclear forces, we will ensure that we have a robust capability at the Atomic Weapons Establishment to underwrite the safety and reliability of our nuclear warheads, without recourse to nuclear testing. There are no current plans for any replacement for Trident, and no decision on any possible successor system would be needed for several years. But we have concluded that it would be premature to abandon a minimum capability to design and produce a successor to Trident should this prove necessary. However, the Government's aim is to take forward the process of nuclear disarmament to ensure that our security can in future be secured without nuclear weapons."

The Respondent's Decision Document

14. The authorisations were granted through the medium of a decision document ("DD") 140 pages long. It contains a good deal of history, as well as close and detailed reasoning as to the basis on which the authorisations were given. Paragraph 1.2 has this useful factual summary:

“1.2.1 The Atomic Weapons Establishments at Aldermaston and Burghfield in Berkshire undertake the design, manufacture and servicing of Trident nuclear warheads, conduct research and development into warhead technology and carry out decommissioning of redundant Chevaline nuclear warheads and associated process plants.

1.2.2 Manufacturing and decommissioning operations produce solid, liquid and gaseous radioactive wastes which principally contain tritium, uranium or plutonium. Small quantities of radioactive waste containing cobalt and caesium are also produced from maintenance of AWE Aldermaston’s HERALD nuclear research reactor which is not operational and has been shut down for several years awaiting decommissioning.”

Paragraph 1.3 shows that pursuant to the Atomic Weapons Establishment Act 1991 a Government-Owned Contractor-Operated (“GOCO”) seven-year fixed term contract was let to a company by name Hunting-BRAE Ltd, under which Hunting-BRAE was “responsible for management of all work activities at AWE” (1.3.3). This contract expired on 31st March 2000. Well before then the Secretary of State “decided that the sites would continue to operate in the private sector under GOCO arrangements... and in December 1999... announced that he had selected a new contractor, *AWE Management Limited*, to operate the sites” (1.4.3). In fact management control of the sites would be in the hands of AWE plc, the second interested party, from 1st April 2000; and it was to AWE plc that the respondent decided to grant the authorisations under s.13 RSA with effect from that date. The shares in AWE plc were to be owned by AWE Management Ltd and the Secretary of State (1.4.5, 1.4.6).

15. The DD then contains some discussion of risks to health (cancers and hereditary defects) arising from radiation exposure, and the approach taken to radiation protection in light of such risks:

“2.3.1 ...the approach taken in radiation protection errs on the side of caution by assuming that there is no dose so low that it cannot cause harm and there is no absolutely safe threshold of radiation dose below which the risk may approach zero. In the present state of knowledge, it is appropriate to assume an increasing risk with increasing dose.

2.3.2 ... [these assumptions] are accepted by international bodies such as the... ICRP... it is estimated that a radiation dose of 1 millisievert... results in a one in twenty thousand risk of contracting a fatal cancer, and that the dose from one microsievert... results in a one in twenty million risk.

2.3.3 For comparison the maximum radiation dose which could be received by a member of the public caused by radioactive discharges from AWE is 9 [microsieverts]... and so the risk of developing a fatal cancer would be one in two million.” (DD’s emphasis)

16. At 2.5.2 the DD quotes the text of the three ICRP principles given at ICRP 60 paragraph 4.2(112), which I have set out above at paragraph 9. At 2.5.3 it is said:

“These principles also form the basis of the... Directive... adopted under [the EURATOM Treaty].”

I may go next to 4.5.6:

“The [respondent] is satisfied that the ICRP internationally accepted dose/risk relationships are a sound basis for radiological protection and that the radiation doses predicted from discharges of radioactivity from AWE at the maximum limits set by the [respondent] could not result in significant radiation exposure of any member of the public...”

4.5.8:

“On balance the [respondent] considers that the limitations on discharges in the authorisation certificates will effectively protect human health, the safety of the food chain and the environment generally...” (cf. 4.6.8, which I need not set out)

17. I should turn next to 4.10.2:

“The UK Government considers that the EURATOM treaty does not apply to military activities. Government Defence policy relies on having nuclear weapons. The Government affirmed its commitment to an independent nuclear deterrent in the Strategic Defence Review (1998)... [there follows a quotation from paragraph 14 of the Fifth Supporting Essay, which I have already set out above at paragraph 12. Then:] The practice of designing, constructing, maintaining and dismantling nuclear warheads at AWE is a key part of the UK’s defence capability.

4.10.3 The [respondent] took the view that in consulting on AWE’s application for authorisation, it was appropriate under the ICRP system of protection to identify the benefits and detriments of practices at AWE...

4.10.4 The principal benefits associated with the operation of AWE are:-

- delivery of a UK defence requirement for an independent nuclear deterrent”.

Five further bullet points identify other “principal benefits”. Then paragraph 4.10.5 gives five bullet points showing “[t]he main detriments associated with the operation of AWE”. I do not need to set out any of these, since (as I have foreshadowed in paragraph 3) Mr Fordham’s argument engages only the respondent’s treatment of the Trident programme as a benefit within the context of the justification principle.

18. At 4.10.7:

“ ... The [respondent]... has concluded that the practice of designing, constructing, maintaining and dismantling nuclear warheads at AWE is justified in the light of the Government’s defence policy.”

So it is clear that the respondent treated these activities as a single practice for the purposes of applying the justification principle. Then 4.10.8:

“... In the next 10 years the majority of discharges of radioactivity will not arise from warhead production but from the decommissioning of both nuclear plants and nuclear weapons; over 80% of tritium discharges and 55% of plutonium discharges will arise from such decommissioning work. This legacy of radioactive waste would remain, irrespective of the status of Trident production operations...”

19. At 4.11 the DD records a number of submissions made to the respondent upon the “wider issue of the deployment and strategic use of the... Trident nuclear weapon system”, including at least two references to the *Advisory Opinion*. Then this appears at 4.11.2:

“The [respondent] considers that these responses are beyond the scope of determining AWE’s applications for disposal of radioactive wastes under RSA... and has instead passed the responses to both the Secretary of State for the Environment and also the Minister for Agriculture, Fisheries and Food.”

20. Miss Rose referred to certain other documents which help throw light on the respondent’s reasoning in the DD. I will refer only to some observations made by Mr Jackson, who at the material time was a Radioactive Substances Regulation Inspector with the respondent. It is clear from paragraph 50 of his first statement (so far as it is not anyway implicit in the way in which DD 4.10 and 4.11 are framed) that the respondent regarded itself as effectively bound to treat the Trident programme, being clear government policy, as a benefit for the purposes of the justification principle:

“The [respondent] did not consider that there was an obligation on the [respondent] (or indeed that the [respondent] had the power) to weigh the benefits and detriments of the UK having an independent nuclear deterrent.”

Paragraph 3 of Mr Jackson’s second statement contains some remarks relevant to the question whether the production of Trident warheads could sensibly be regarded as a distinct practice for the purposes of the justification principle. It is to be borne in mind (as I have made clear) that the appellant has no complaint of any decommissioning activity; she objects only to the manufacture and maintenance of current nuclear weapons. This is what Mr Jackson said:

“In my [first] statement I stated at paragraph 68 that operations at AWE are more properly viewed as a single practice, namely the maintenance of a UK nuclear deterrent. I pointed out that both warhead decommissioning and Trident production operations are conducted in the same facilities and often by the same teams of workers. In fact the production and decommissioning of nuclear warheads are closely related and part of a single continuous cycle. The process of manufacture of a nuclear weapon involves the melting of plutonium returned from redundant warheads, the casting and machining of a new warhead, assembly into a weapon, disassembly from a weapon, and return of the plutonium for re-melting and casting into a new weapon. Each step is linked to the next in a continuous production cycle in pursuit of a single purpose, namely the maintenance of a nuclear deterrent, and in my opinion was properly considered as a single practice by the [respondent].”

The Principal Issue in the Case Formulated

21. The principal issue is the correctness or otherwise of Mr Fordham’s submission that far from treating the Trident programme as a given or axiomatic benefit for the purpose of the justification principle, the respondent was in truth by law obliged to treat it as a given or axiomatic detriment. In addressing this it will, I hope, make for clarity if I first confront a number of points by way of preliminary.

Preliminary (1) - the Applicability of the EURATOM Treaty to AWE

22. I accept the submission advanced by Miss Rose that the question of the applicability of Chapter III of Title 2 to military installations does not have to be resolved in order to decide the appeal, since (a) there is no difference between the two formulations of the justification principle respectively found in the Directive and given by the ICRP, and (b) the respondent sought to apply the principle: whether or not it did so correctly does not engage Chapter III. I consider however that the court should express a view upon this issue, if only out of respect for the arguments to which we have listened, and the matter's plain importance. But for the reasons I have just indicated I would decline to refer any question concerning the scope of Chapter III to the Court of Justice under Article 150 of the EURATOM Treaty: no such question needs to be answered for the determination of the case. The issue arising on Article 37, for reasons which I will give in due course, can in my judgment make no difference. I will postpone my consideration of the scope of Chapter III until I have explained my conclusions on the issues which do have to be determined.

Preliminary (2) - the Appellant's Argument Petrifies the Justification Principle

23. Mr Fordham submitted that by regarding the Trident programme as a given or axiomatic benefit, the respondent foreclosed any debate which, as it were, it might conduct within itself as to whether the justification principle was met or not; effectively it held itself bound to conclude that the principle was satisfied. Conversely, as I understood him, Mr Fordham accepted that if his main argument were right and the manufacture and maintenance of Trident were repugnant to the humanitarian principles of international law, their treatment in consequence as a detriment would mean that the respondent was in effect bound to conclude that the justification principle was *not* satisfied.
24. But if this approach were right, the respondent would be left with nothing to decide in terms of justification. The answer to the justification question would be given to it. That seems an improbable result. Each of the three ICRP principles on the face of it calls for a judgment to be arrived at by the decision-maker. However Mr Fordham's approach would not for every case deprive the respondent of the function of judgment in relation to justification, since of course its task under s.13(1) RSA confronts it no less in the field of civilian, than in that of military applications of nuclear power; and in the former instance arguments of the kind adduced by Mr Fordham would plainly have no place.
25. In support of his position on this part of the case Mr Fordham relied on a passage in a consultation document put out by the respondent in relation to AWE plc's application for authorisations:

“2.5.8 [After referring to the SDR] “In the [respondent]'s view, the balancing of benefits and detriments is already taken into account in the Government's policy and so it does not propose to repeat this balancing exercise for AWE sites specifically.”

However this approach is not replicated in the DD (see paragraphs 4.10.3, 4.10.4, 4.10.5 and 4.10.7 to which I have already referred). Certainly, it is clear that the respondent took the Trident programme to be a given benefit whose moral or legal merits lay beyond its remit to determine (see 4.11.2). But the material passages in the DD do not suggest that the respondent went the further mile, so as to abandon any duty of judgment as regards justification. Nor is the observation in the consultation document mirrored in Mr Jackson's evidence about the decision-making process. At paragraph 49 of his first statement Mr Jackson said:

“... in making the decisions under challenge in this application, the [respondent] addressed the principle of justification, and sought to identify the benefits and detriments associated with the operation of the AWE.”

26. It is in my judgment important to recognise that there is no inconsistency between this statement and what Mr Jackson says at paragraph 50 (I have already set it out above at paragraph 20), to the effect that the Trident programme was treated as a given or axiomatic benefit. I refer also paragraph 67 of Mr Jackson’s first statement:

“For the reason set out above the [respondent] considered that it was entitled to rely on the Government’s commitment to an independent nuclear deterrent as a principal benefit. The [respondent] was also convinced that it had captured the principal benefits and main detriments of the practice. There were no further benefits or detriments raised in the consultation that I thought I should include. I therefore did not alter the balance of benefits and detriments...”

In light of all these considerations, Mr Fordham’s argument on this aspect is in my judgment mistaken to this extent: it does not follow from the respondent’s acceptance of Trident’s benefit as an axiom that the issue of justification was concluded in favour of the authorisations. But Mr Fordham’s acknowledgement of the *converse* position possesses much greater force: if Trident (that is, its production and maintenance) is condemned at the bar of international law, and the respondent is obliged to treat it as a detriment accordingly, then it is difficult to see how the respondent, as a body subject to the rule of law, could sanction an activity which it was required to treat as unlawful; and in that case, presumably it would be bound to conclude that the justification principle was not satisfied.

27. Plainly none of these observations refutes, without more, Mr Fordham’s essential case that the respondent was bound by humanitarian law to treat the Trident programme as a detriment. But I think they serve to cast the argument in a sharper focus, as I shall seek at once to show.

Preliminary (3) - the Respondent’s Own Judgment

28. As I have indicated Mr Fordham does not say that the respondent was obliged to judge *for itself* whether the Trident programme was on its merits a benefit or a detriment. On the contrary, his submission is that there was no choice in the matter. This is illuminating: it may be instructive to consider what the position would have been if Mr Fordham’s complaint had been that the respondent had arrived *at its own judgment* to the effect that Trident was a benefit, and that such a judgment was by law a bad one. It is difficult, I think, to see how the prospects of such a challenge would materially differ from those of a case brought against the government directly, in which it was asserted that the Crown had no business to adopt the Trident programme. If such a challenge would fail, essentially on the ground that the government’s discernment of policy regarding the national defence is in principle not justiciable in the courts (though plainly there would be other arguments also), a challenge to the respondent’s own discernment would surely likewise fail. Accordingly it seems to me that Mr Fordham has to demonstrate one of two things: either that (1) the merits of a particular defence policy would anyway be justiciable in the context of a challenge to its adoption by government, *and therefore* also justiciable in the context of a challenge to its approval by a body such as the respondent exercising its own judgment or (2) if not, that the fetters which the common law imposes on such a challenge are struck off and cast away upon its being said that the case is not against the decision-maker’s own

judgment, but rather that he has no judgment to make: because the law gives the decision for him.

29. We have heard argument both as to the justiciability of defence issues, and upon the substantive question whether the Trident programme offends humanitarian principles as they are explained in the *Advisory Opinion*. The considerations which I have just canvassed demonstrate that it will be much more convenient to address the issue of justiciability before going into the substantive question of international law, and that is what I shall do.

Preliminary (4) - "Practice"

30. As I have foreshadowed, there is an issue as to what should properly be regarded as a "practice" for the purposes of the justification principle. Mr Fordham's argument is that the ICRP recommendations (in particular ICRP 60, paragraph 106) required the respondent to treat the production, maintenance and decommissioning of warheads as separate practices, calling for separate justification. That is not what the respondent did: see in particular paragraph 3 of Mr Jackson's second statement, which I have set out above at paragraph 20. I propose to deal with this quite shortly as a preliminary matter, because I cannot see what difference it makes to the appeal's result. If the respondent was obliged to treat the production and maintenance of Trident as a given benefit, Mr Fordham has no case, whether those activities are treated as a separate practice or part of a compendious practice which includes decommissioning. Likewise if the respondent was obliged to treat Trident as a detriment, his appeal is just as good whether or not the practice in question is distinct or compendious.
31. In fact it seems to me, with respect to Mr Fordham, that his argument on this part of the case is plainly bad. I so conclude for these short reasons. The ICRP documentation does not offer anything like a precise definition of "practice". Accordingly it must be for the respondent to decide in the particular case what to take as the material "practice" for the purpose of the justification principle's application. Its decision in that behalf could only be faulted in judicial review proceedings on conventional public law grounds. Having regard not least to what is said in paragraph 3 of Mr Jackson's second statement (and there is other relevant evidence which I have not set out, to be found in the statements of Mr Gorringe and Mr George Wall), no such grounds exist. The learned judge below dealt with this issue at greater length. I need say no more than that I agree with his reasoning at paragraphs 54 – 60 of the judgment.
32. Now I will deal with the principal issue directly.

The Principal Issue (1) – National Defence and Justiciability

33. In *Chandler v DPP* [1964] AC 763 their Lordships' House was concerned with a case in which persons committed to the cause of nuclear disarmament planned a demonstration at an RAF station which was a prohibited place for the purposes of the Official Secrets Act 1911. They were charged with an offence of conspiracy to commit a breach of s.1 of that Act. At their trial the judge ruled that they were not entitled to call evidence as to the benefits to be had from nuclear disarmament. Their appeals against their conviction were dismissed. On their unsuccessful appeal to the House of Lords Lord Reid said this at 790:

"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. I need only refer to the numerous authorities gathered together in *China Navigation Co. Ltd. v. Attorney-General* [[1932] 2 KB 197]. 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.”

Then Lord Radcliffe at 798:

“The appellants' counsel said that he wanted to call evidence on such matters as the devastating effects and consequences of nuclear discharge, the dangers of accidental explosions, the technical difficulty of distinguishing approaching nuclear missiles from other harmless objects in the sky, the possibility and likelihood of retaliation to this country if we set ourselves up with nuclear armament. Now some of these arguments or considerations do, no doubt, rest on a basis of fact or expert knowledge and properly qualified persons could give evidence before a jury as to their views or opinions based on such facts or knowledge: some, on the other hand, are intrinsically no more than matters of political decision or judgment. But, even if all these matters were to be investigated in court, they would still constitute only various points of consideration on the ultimate general issue, is it prejudicial to the interests of the State to include nuclear armament in its apparatus of defence? I do not think that a court of law can try that issue or, accordingly, can admit evidence upon it. It is not debarred from doing so merely because the issue is what is ordinarily known as ‘political’. Such issues may present themselves in courts of law if they take a triable form. Nor, certainly, is it because Ministers of the State have any inherent general authority to prescribe to the courts what is or is not prejudicial to the interests of the State. But here we are dealing with a matter of the defence of the realm and with an Act designed to protect State secrets and the instruments of the State's defence. If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's Ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different. The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form... The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.”

34. The judge below referred also to this short passage from *de Smith, Woolf & Jowell, Judicial Review of Administrative Action* (5th edn.) at paragraph 6-045:

“There will be some questions of ‘high policy’ such as the making of treaties, the defence of the realm, the dissolution of Parliament and the appointment of Ministers where the courts as a matter of discretion do not intervene, because the matters are simply not justiciable.”

35. Miss Rose deployed this jurisprudence in order to support her submission that it was simply not for the respondent to enter upon any question of the merits of the Trident programme, in particular whether it should be regarded as benefit rather than a detriment. Mr Fordham cited authority of the Supreme Court of Canada in *Operation Dismantle* [1985] 1 SCR 441, in which the appellants had alleged that a decision of the Canadian government, taken by the Cabinet, to allow the United States to test cruise missiles in Canada, violated s.7 of the Canadian Charter of Rights and Freedoms. The Federal Court of Appeal had struck out the appellants' statement of claim. The Supreme Court dismissed their appeal, on the basis that the appellants could not prove the risk to life, liberty and security of the person with which s.7 was concerned. However it was held that the compatibility of the Cabinet's decision with s.7 of the Charter was in principle reviewable, notwithstanding that it was concerned with national defence: see in particular *per* Wilson J at 472 (after some discussion of the decision in *Chandler* which I will not set out), with whom Dickson J expressly agreed at 455. But with great respect it seems to me that that result flowed (as the learned Justices' reasoning demonstrates), from the terms of constitutional provisions in the law of Canada, namely ss.24 and 32(1)(a) of the Charter. Our law contains no relevant analogous provisions, and in my judgment – quite aside from any issue of *stare decisis* - *Operation Dismantle* cannot serve to undermine the effects of the decision of the House of Lords in *Chandler*.
36. It is instructive to notice that the High Court of Justiciary in *Lord Advocate's Reference (No 1 of 2000)* 2001 SCCR 296, referring to *Operation Dismantle*, said at 318D:

“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 reference to Wilson J's observations must I think be taken to cast back to her discussion of Lord Devlin's speech in *Chandler*, in which she picks up (470) his statement that “[i]t is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative”, and comments (471) “[i]t seem to me that the point being made by Lord Devlin... is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state.”

37. Other authority was cited which was said also to bear on the question of the justiciability of the Trident programme. *Greenpeace* [1994] 4 AER 352, to which Mr Fordham drew attention, advances nothing, being a case about the civilian application of nuclear energy (in fairness I conceive that he relied upon it principally for what the court had to say about “practice”, to which I have not found it necessary to refer). *Rehman* [2001] 3 WLR 877 concerned the Secretary of State's decision that the appellant's deportation would be “conducive to the public good” under s.3(5)(b) of the Immigration Act 1971. The decision was based on the Secretary of State's conclusions as to the appellant's association with a terrorist organisation operating in the Indian subcontinent. The appellant appealed to the Special Immigration Appeals Commission, as was his right. In the House of Lords Lord Hoffmann, after citing *Chandler*, said this at paragraph 53:

“Accordingly it seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the

promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interest of national security.”

In paragraph 54, however, Lord Hoffmann went on to explain that this “does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary”. In particular,

“an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question, which arose in *Chahal* itself, as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under article 3.”

In addition Mr Fordham pointed to the observation of Lord Steyn at paragraph 31 where he said:

“... not all the observations in *Chandler* can be regarded as authoritative in respect of the new statutory system” [viz. the regime of the Human Rights Act 1998, which had come into force before delivery of their Lordships’ speeches in *Rehman*, but after the relevant events in the case].

38. Taking all these materials together, it seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown’s first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise will sound in the ballot-box. There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government. The position is not unlike that taken by their Lordships’ House in relation to attempts to challenge government decisions of what is sometimes called “macro-economic” policy: see for example *Ex p. Nottinghamshire CC* [1986] AC 240 and *Ex p. Hammersmith and Fulham LBC* [1991] 1 AC 521; and this approach is, I conceive, consistent with recent observations in the House of Lords in cases such as *Kebilene* [2000] 2 AC 326 and *R v A* [2001] 2 WLR 1546 as to the deference owed by the court to the democratic decision-maker.
39. I recognize that the notion of so grave a matter of State lacks sharp edges. But it is now a commonplace that the intensity of judicial review depends upon the context (see for example *Daly* [2001] 2 WLR 1622 per Lord Steyn at paragraph 28). One context will shade into another; there is for instance a distinction between a deportation decision affecting a specific individual (as in *Rehman*) and a decision of defence policy (such as Trident), though both involve matters of national security.

40. Secondly, however, this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy. In the British State I assume that is overwhelmingly unlikely in practice. Closer to reality, perhaps, is the possibility that a statute might itself require the courts to review high policy decisions (or decisions involving judgment of deeply controversial social questions) upon which traditionally they would advisedly have had no voice. That I think was the position in *Operation Dismantle*. In this jurisdiction such a state of affairs may most obviously arise in the execution of the judges' duty under the Human Rights Act 1998.
41. But there is no point under the Act of 1998 in this case. And there is no other statute which requires (it would have to be a *mandatory* provision) that the respondent examine the merits of defence policy, specifically the Trident programme, however remotely. Certainly the RSA does not do so.
42. The RSA is at the centre of the case. We are concerned with a decision of a body established by statute, possessing functions conferred by statute. In the end the question is whether the respondent has, in granting the authorisations, acted lawfully within the terms of s.13(1) RSA. It is important that we should not be deflected from this question by grand constitutional arguments. If the respondent was not required to make any judgment for itself concerning the Trident programme, then (subject to the point on Article 37) the answer to the question is surely Yes. I would recall the formulation I offered at paragraph 28 of what it is that Mr Fordham has to demonstrate: either (1) the merits of Trident would anyway be justiciable in the context of a challenge to its adoption by government, and so also justiciable in the context of a challenge to its approval by the respondent exercising its own judgment; or (2) if not, the fetters which the common law imposes on such a challenge are nevertheless struck off and cast away upon its being said that the case is not against the decision-maker's own judgment, but rather that he has no judgment to make because the law provides the decision for him. On the face of it, for all the reasons I have given, Mr Fordham cannot demonstrate (1). And there would seem to be no discernible principled basis upon which (2) might be right if (1) is wrong. Moreover if the merits of Trident are not justiciable, being a matter of defence policy which is within the constitutional framework for the government alone to decide, the respondent cannot possibly be criticised for doing precisely what it did: treat the criticisms of Trident as outside its remit, and regard its status as a benefit as axiomatic for the purposes of the justification principle. So it seems clear that the respondent has, in granting the authorisations, acted lawfully within the terms of s.13(1) RSA.
43. That looks like the end of the case, save for Article 37 which I will deal with later. However, I have so far said nothing about humanitarian law and the *Advisory Opinion*. Mr Fordham submits that the production and maintenance of Trident violates humanitarian principles established in that case. And he would say that it is trite that the law of nations is part of the law of England, although there are nice conceptual questions as to what is precisely meant by this: see the judgments in this court in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529. We have not heard argument (I mean no criticism of counsel) as to the impact of the principle, whatever its precise reach, that the law of

nations is part of the law of England upon the relation between *Chandler* and the *Advisory Opinion*, in which the ICJ assessed the merits of the threat and use of nuclear weapons against a legal yardstick (I say nothing at this stage as to the nature of the assessment).

44. Mr Fordham's argument at this point has to be that the effect of the humanitarian rule, as in his submission it is expounded in the *Advisory Opinion* in relation to the use of nuclear weapons or the threat of it, produces an exception to the proposition that defence policy is generally not justiciable. He must claim that it is justiciable to the extent that it can be shown to be repugnant to the law of nations. That being so, a public body such as the respondent, which has to make a decision involving the subject-matter of such a policy, must owe a duty to take cognisance of any such repugnance. Specifically, the respondent must do so in the exercise of its functions under RSA s.13(1), on the simple basis that a condition of its *vires* is compliance with the relevant prevailing general law. Since the respondent did not do so, it acted *ultra vires*.
45. Before deciding in principle whether such an exception may in principle exist, with all that potentially follows if it may, it is convenient to see what the *Advisory Opinion* decides. But I will do this quite shortly.

The Principal Issue (2) - The Advisory Opinion and the Humanitarian Rule

46. The *Advisory Opinion* was given in response to a resolution of the General Assembly of the United Nations, seeking the opinion of the ICJ on the question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?" Mr Fordham founds largely on certain passages in the judgment in which the court considers the principles of humanitarian law:

"78... 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...

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.

79... these fundamental rules... constitute intransgressible principles of international customary law."

Mr Fordham sought also to build on earlier passages (paragraphs 47 – 48) as tending to show that the maintenance of nuclear weapons as a deterrent may amount to a threat to use them, and so fall to be condemned as contrary to the humanitarian rule. In my judgment these passages cannot be read in that way; but in any event it is clear that the ICJ itself took the view that no rule could be derived from these earlier sections of the judgment. Its consideration of the humanitarian rule begins at paragraph 74. At paragraph 95 it is made clear that the court cannot determine "the validity of the view that the recourse to nuclear weapons would be illegal in any circumstances..." Then this follows:

"96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence... when its survival is at stake. Nor can it ignore the practice referred to as 'policy of deterrence', to which an appreciable section of the international community adhered for many years...

97. Accordingly, in view of the present state of international law viewed as a whole... the Court is led to observe 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.”

Earlier the court had said 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*.”

The High Court of Justiciary, in the *Lord Advocate’s Reference* case, referring to paragraph 67 of the *Advisory Opinion*, stated at 324B: “We find that passage unequivocal”.

47. In my judgment nothing in the *Advisory Opinion* supports Mr Fordham’s contention that the UK’s policy on Trident, as explained in the SDR, is repugnant to humanitarian principles of international law. I conceive this view to be supported by the reasoning of Buxton LJ in the Divisional Court in *Hutchinson v Newbury Magistrates Court* (9th October 2000: unreported) at paragraphs 12 – 28, which with deference I will not set out.

The Principal Issue (3) – the Respondent’s Function

48. My view of the *Advisory Opinion* concludes the principal issue against the appellant. But even if I had considered that the *Advisory Opinion* opened a door to a potential assault on the Trident programme under international law, that would have given no fair wind to this appeal. I repeat: the RSA is at the centre of the case. The respondent’s relevant functions are given and limited by it. The respondent is neither the author nor the judge of any policy of national defence. If there were a question of that policy’s legality – and I think there is none – it would be far beyond the scope of the provision made by s.13(1) RSA for the respondent to embark upon the least consideration of it. It is no offence to the respondent’s very important tasks to observe that it has neither the democratic credentials of government nor the judicial credentials of the courts.

The Subsidiary Issue – Article 37

49. Mr Fordham submits that the authorisations are unlawful because it was a condition precedent to their legality that the Commission should have earlier been notified of general data relating to the authorisations as proposed, pursuant to Article 37 of the EURATOM Treaty. He relies on the decision of the Court of Justice in *Saarland* [1988] ECR 5013. In that case the Court had to deal with a question (referred by the tribunal administrative at Strasbourg) whether Article 37 required the Commission to be notified of the relevant general data before the disposal of radioactive waste was authorised. It answered the question affirmatively: judgment, paragraph 20. But in my view neither this result nor the Court’s reasoning implies the further proposition that if an authorisation is given without prior notification, the authorisation is thereby unlawful. I conceive that proposition to be false; and in my view the terms of paragraph 17 of the judgment in *Saarland*, which with respect I will not set out, seem to me to imply that it is false. It is to be noted also, as was pointed out by Turner J at paragraph 75 of his judgment, that the duty of notification under Article 37 rests on the State and not upon any regulatory body such as the respondent.

50. So I am against Mr Fordham on this point. I have disposed of the issue peremptorily because in my judgment the appellant has in any event no standing to raise it, and this for two reasons. First, Article 141 of the EURATOM Treaty entrusts the Commission with the responsibility of bringing Member States' alleged failures to fulfil their Treaty obligations before the Court of Justice. Thus if the Article 37 point were good – and in my view it is bad – still the Treaty does not contemplate that in the ordinary way legal action by an individual would be the appropriate remedy. It is to be noted that in *Saarland* the claimants in the municipal court were authorities, associations and individuals who or whose members or constituents would potentially be directly affected by the authorisations for disposal of radioactive waste there in question. Secondly, and perhaps more important, I consider for the reasons I have given that the appellant's case on what I have called the primary issue is comprehensively unmeritorious. That being so, I do not see why she should be accorded standing to advance what is at best a technical point (the Commission makes no complaint of breach of Article 37) in support of a case that has no substance. There is no public interest in allowing her to do so.

The Scope of Chapter III of Title 2 of the EURATOM Treaty

51. I understood Mr Fordham to accept that the EURATOM Treaty *generally* has no application to military installations. His position below, however, seems to have been that there was no distinction drawn anywhere in the Treaty between civilian and military applications: see Turner J's judgment, paragraphs 20 and 21. In this court he says that Chapter III applies to military sites and uses even though the balance of the Treaty does not. He submits that Chapter III possesses what he calls a "self-standing gateway" in the shape of the fourth preamble, which I repeat for convenience:

"ANXIOUS to create the conditions of safety necessary to eliminate hazards to the life and health of the public".

In my judgment this goes little distance on its own; but it foreshadows Mr Fordham's more substantial argument, which is that central provisions contained within Chapter III could not work sensibly and effectively unless radioactive emissions from military installations are included within their scope. The critical measure for the purpose of this argument is Article 35:

"Each Member State shall establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards.

The Commission shall have the right of access to such facilities; it may verify their operation and efficiency."

Mr Fordham says that no viable distinction can be drawn between levels of radioactivity generated by civilian and military uses, and as a matter of common sense, as well as language, the Article plainly applies to both.

52. Mr Fordham submitted that he gained some support on this point also from the *Saarland* case. At paragraph 11 of the judgment the Court of Justice referred to the provisions of Chapter III as forming "a coherent whole conferring upon the Commission powers of some considerable scope in order to protect the population and the environment against the risks of nuclear contamination". But the Court was not concerned with the issue now raised

before us, and this observation with respect takes Mr Fordham no further forward than the words of Chapter III itself.

53. Next, Mr Fordham referred to certain statements made at different times on behalf of the French government and by the Commission. He relies on what was said by the Secretary of State for Foreign Affairs (M. Faure) to the French Parliament during the debates concerning the ratification of EURATOM:

“Les dispositions de l’article 34 s’appliquent a toutes les experiences particulièrement dangereuses, civiles ou militaires.”

Mr Fordham says also that in 1960 the French government notified military nuclear tests in the Sahara under Article 34. As for the Commission, there are statements of 12th September 1988 (the Directorate General for Environment, Consumer Protection and Nuclear Safety), 20th October 1995 (the Director General of Legal Service), 24th October 1995 (the President of the Parliament), 15th July 2000 (the Head of Radiation Protection Unit), and most recently 3rd September 2001 (in answer to a written question in the European Parliament) to the effect that it is the Commission’s view that Chapter III applies to activities in the military as well as the civilian sphere.

55. Mr Fleming for the Secretary of State submits (for reasons he gives in his skeleton argument) that the basis on which the French tests were notified is equivocal; and that M. Faure’s statement is inconsistent with other statements made on behalf of the French government, notably an assurance given by PM Mollet to the French Parliament when the Treaty was debated, and what was submitted on France’s behalf to the Court of First Instance in *Danielsson* [1995] ECR 3051, recorded in paragraph 33 of the judgment in that case:

“For its part, the French Government submitted at the hearing that the provisions of Chapter 3 of the [EURATOM] Treaty do not apply to nuclear activities in the military sphere.”

Mr Fleming also submits that passages in the *Draft Convention of the International Atomic Energy Agency* case [1978] 3 ECR 2151, cited by the learned judge below at paragraph 12 of his judgment (which with respect I will not set out), assist the Secretary of State.

56. European legislative measures must be interpreted purposively; and a measure’s *travaux préparatoires* are to be taken into account, for they may greatly illuminate its purpose. So much is well known and well accepted. But I view with misgiving the citation of statements which form no part of the relevant *travaux préparatoires*, and are made by bodies or institutions whose word is not an authoritative source of the legislation’s true construction. With very great respect, I do not find the Commission’s statements to be of any assistance. And the French voice has not always been consistent.
57. Mr Fordham’s best point rests in his submission that Chapter III cannot be sensibly operated unless military uses are within its scope. Mr Fleming was constrained to recognise the difficulty, not least in the application of Article 35. But having carefully considered the whole of the Treaty, I conclude that the European legislature cannot have intended to embrace military installations within the scope of Chapter III. The whole thrust of the preamble is towards civilian nuclear uses. That is reflected in many references in the Treaty’s text, whose principal provisions I have set out. In particular, as I have shown (paragraph 5), there is a cross-reference between Article 2(b) (“... the Community shall...

establish uniform safety standards to protect the health of workers and of the general public...”) and Chapter III. The first words of Article 2 are “In order to perform its [the Community’s] task...” That is a cross-reference to Article 1, which establishes “the task of the Community” as being “to contribute to the raising of the standard of living in the Member States and to the development of relations with other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries.” So Article 2(b) and with it Chapter III are given for the better fulfilment of the task set out in Article 1; a task which lies only within the context of civilian and commercial nuclear power uses.

58. While I acknowledge that the operation of Chapter III, in particular Article 35, is partial rather than overall if military uses are excluded, it seems to me very difficult indeed to suppose that if the legislator had intended to apply Chapter III to military uses, that would not have been plain by express words. Such an application would have clear implications for the Member State’s sovereign power in defence matters, not least by force of the Commission’s functions allotted in Articles 34, 35, 36, 37 and 38. Mr Fleming referred (as did the judge: paragraph 36) to the principle of Treaty interpretation summarised in the Latin phrase *in dubio mitius*: where a Treaty provision is ambiguous, the interpretation which is less onerous to the State owing the Treaty obligation is to be preferred. In my judgment that applies here. Chapter III has no application to military uses.

I would dismiss the appeal.

Mr Justice Morland:

- 59 I agree that the appeal should be dismissed but feel constrained to express my personal view that Chapter III has within its scope military uses albeit not expressly so stated in the Euratom Treaty.
60. The purpose of Article 35 is to achieve or secure compliance with the “basic standards” laid down for the protections of the health of workers and of the general public against the dangers arising from ionizing radiation. The obligation of each member state is not only for the benefit of the health of its own workers and public but also for the benefit of those of other member states. Continuous monitoring excluding radioactive emissions from military installations, assuming the possibility that it was technically feasible, would be if not wholly valueless certainly misleading and the purpose of Chapter III defeated.

Lord Justice Thorpe:

61. I have had the advantage of reading in draft the judgment of my lord, Laws LJ. I also agree that the appeal be dismissed and for the reasons he gives. However, I am less certain than he in the conclusion that Chapter III has no application to military uses.

Order: Appeal dismissed with costs to be paid by the appellant.

The appellant’s costs to have a public funding assessment.

Permission to appeal to the House of Lords refused.

(Order not part of the approved judgment)