APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Prosser

Lord Kirkwood

Lord Penrose

Misc 11/00

OPINION OF THE COURT

in

LORD ADVOCATE'S REFERENCE NO. 1 OF 2000

by

HER MAJESTY'S ADVOCATE

in terms of

Section 123 of the Criminal Procedure (Scotland) Act 1995

Referring for

THE OPINION OF THE HIGH COURT

Points of law arising in relation to charges upon which, on trial on indictment in the Sheriff Court at Greenock there were acquitted

(FIRST) ANGELA ZELTER, (SECOND) BODIL ULLA RODER and (THIRD) ELLEN MOXLEY

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Appellant: Menzies, Q.C., Di Rollo, A.D. for the Lord Advocate; Crown Agent:

L. Murphy, Q.C. for the Advocate General

Respondents: Party: Moynihan, Q.C., *amicus curiae* for Ms A. Zelter: I. Anderson, Mayer; Livingstone Brown: A.M. O'Neill, Q.C.; J McLaughlin, McCourts

30 March 2001

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 G.J.B. Moynihan, Q.C. 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 depute 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 U.K'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 emphasising 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 emphasised 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 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 U.K. 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 emphasised 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 publicise 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 recognises 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 emphasised 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 organisation which apparently takes an interest in questions of nuclear weapons and disarmament. That organisation apparently has a number of principles or rules, by which members such as the respondents abide when taking action in furtherance of the organisation'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, in as much as any kind of bad faith could be destructive of the types of defence which the respondents relied upon, and which underlie 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 paragraphs 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 actually 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* 1938 J.C. 32 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 were 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 were 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 were 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 were 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*, page 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*: '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 nonetheless certain factors which have been authoritatively recognised 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* 1997 S.C.C.R. 215 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 established.

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* 1976 J.C. 52, the Lord Justice-General at page 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 characterised 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* [1984] 2 S.C.R. 232 Dickson J analysed the defence of necessity in considerable detail. At page 248, 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". 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:

> "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 page 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:

> "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 emphasising 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 *Reg.* v. *Howe* [1987] 1 A.C. 417. 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 page 426, 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 *Reg.* v. *Martin* (1989) 88 G. App. R. 343 Simon Brown J restated the English rule as follows:

> "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". Secondly, 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. Thirdly, 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 *Reg.* v. *Howe* emphasised 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 run-away 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". Society would, in normal course, recognise 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 run-away 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 pre-condition 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 run-away 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 L.J. said in *Southwark London Borough Council* v. *Williams* [1971] 1 Ch. 734 at page 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 *Hutchison* v. *Newbury Magistrates Court* 9 October 2000; [2000] E.W.H.C. 24. 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 of Pennsylvania* v. *Berrigan* 472 Atlantic Reporter, 2nd Series 1099; 501 Atlantic Reporter, 2nd Series 226; *People* v. *Gray* 571 New York Supplement, 2nd Series 850; and *Commonwealth of Pennsylvania* v. *Capitolo* 471 Atlantic Reporter, 2nd Series 462 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* 444 U.S. 394 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 defences 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 judgment 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 than 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. *Howdle*. 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 depute 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 was 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* [1964] A.C. 763, which involved the activities of the Committee of 100. At page 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 *C. C. S. U.* v. *Minister for the Civil Service* [1985] 1 A.C. 374, 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 page 398, Lord Fraser of Tullybelton said:

> "As *De Keyser's* case shows, the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities...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 page 412 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 page 418 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* (1985) 18 D.L.T. (4th) 481. 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 *C.C.S.U.* 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 *Reg.* v. *Ministry of Defence ex p. Smith* [1994] Q.B. 517. 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 page 539 Simon Brown L.J. 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 *Reg.* v. *Secretary of State for the Home Department ex p. Fire Brigades Union* [1995] 2 A.C. 513. 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* 2000 S.L.T. 11 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 emphasised 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. A 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 minutes 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 depute on behalf of the Crown; but we are satisfied that as an 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 49/75K 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 emphasising 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 them, 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 emphasising 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 depute 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 - 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 United Nations Charter; 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 recognised by the court.

[72] At paragraph 37 of its Opinion, the court states that it will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the United Nations Charter 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 a 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, they note 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. Nonetheless, 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 they add 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, they say 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 *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 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 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 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" and 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 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 United Nations Charter 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 a threat or use "of force" by means of nuclear weapons "that is contrary to Article 2, paragraph 4, of the United Nations Charter." 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 force", it appears to us to be clear that wherever reference is made to 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 they 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 recognised 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 Woolamantry 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 as to deterrence. They show the degree of divergence of opinion on the legality of deterrence among the 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, B 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 an 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 were 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 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 re-opened in 1995 and that he was acquitted posthumously. The facts of the case appeared clearly from Ms. Zelter's narrative, but the grounds of judgment 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 their 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 they had not felt able to say that the inevitable 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 E 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. They also, as we understand, stop short of drawing any line between those threats or uses which will or may be legal, and those which will or may be illegal. They appear 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 with in 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 the 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", volume 15 (1999) at pages 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 page 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. In so far 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 re-formulated 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 H.M. Government's current defence policy?"

[103] Both formulations might be criticised 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* 1957 J.C. 1 at page 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 in international law, for a defence of justification.