HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

# Standing Committee on Justice and Human Rights

JUST • NUMBER 059 • 1st SESSION • 41st PARLIAMENT

**EVIDENCE**

## Wednesday, February 13, 2013

## Chair

**Mr. Mike Wallace**

# Standing Committee on Justice and Human Rights

**Wednesday, February 13, 2013**

● (1530)

[*English*]

**The Chair (Mr. Mike Wallace (Burlington, CPC)):** Okay, ladies and gentlemen, I'm going to call this meeting to order. We'll use the BlackBerry time instead of the clock in the back. I know there will likely be bells at 5:30 for votes at 6:00, so I want to make sure we get this meeting completed by 5:30.

Welcome to the Standing Committee on Justice and Human Rights, meeting number 59. Pursuant to the order of reference of Friday, November 30, 2012, we're dealing today with Bill S-9, An Act to amend the Criminal Code.

For the first hour we have scheduled two sets of witnesses. I will introduce them in a moment. Then we are going to go to clause-by-clause on this bill. If we don't last the full hour with the witnesses we have, we'll move right to clause-by-clause. Then after that, I anticipate the motion that was deferred to this meeting from Monday's meeting will be reintroduced and we'll deal with it then. That's the schedule for today.

First, let me thank our witnesses for coming.

We have from the Department of Foreign Affairs and International Trade, Mr. Shawn Barber, the acting director general for the global partnership program. I'll allow him to introduce the guests with him.

Via video conference from Cambridge, Massachusetts, I want to welcome Professor Matthew Bunn, who's from the Belfer Center for Science and International Affairs at Harvard University. Welcome, Professor.

We will have opening statements. We'll start with the Department of Foreign Affairs, and then we'll move to Professor Bunn, and then we'll have questions.

The floor is yours, Mr. Barber.

**Mr. Shawn Barber (Acting Director General, Global Partnership Program, Department of Foreign Affairs and International Trade):** Thank you, Mr. Chairman, and good afternoon, everyone. My name is Shawn Barber, acting director general of the Non-Proliferation and Security Threat Reduction Bureau at the Department of Foreign Affairs and International Trade.

I am pleased to be here today to discuss with you what we are doing internationally to help reduce the threat of nuclear terrorism.

Joining me are two of my colleagues, Mr. Graeme Hamilton, who's the deputy director of the global partnership program, and Mr. Terry Wood, who's a senior coordinator for international nuclear cooperation, both of whom work with me in the Non-proliferation and Security Threat Reduction Bureau.

The proliferation of weapons of mass destruction, or WMDs, and related materials remains an ongoing security threat to Canada and the broader international community. Some terrorist organizations, including al Qaeda, have openly acknowledged they're interested in obtaining weapons-usable nuclear materials.

The illicit trafficking of nuclear and/or radiological materials, including by criminal organizations, was recently identified by the head of the International Atomic Energy Agency, the IAEA, as a growing concern. The IAEA has reported nearly 2,000 incidents of unauthorized use, transport, and possession of nuclear and other radioactive material between 1993 and 2011.

[*Translation*]

Responding to the threat of nuclear terrorism requires us to act across a number of fronts.

First, we must work with our like-minded partners to ensure better protection of nuclear facilities and stocks of nuclear materials around the world.

Second, where possible, Canada and its international partners must reduce domestic stocks of highly enriched uranium and weapons-usable radiological materials, so that there is simply less available supply that can find its way into the wrong hands.

[*English*]

I would add that in this regard the decision yesterday by North Korea to test a nuclear device and the ongoing efforts by Iran to increase its stockpile of weapons-grade uranium run precisely counter to this objective, and as such, represent a grave threat to international peace and security.

Third, we must work with others to enhance the ability of source countries to detect the cross-border movements of highly enriched uranium and dangerous radiological isotopes so we can disrupt the illicit flows of these materials.

Fourth, we need to ensure our domestic legislation and criminal sanctions are up to date and in compliance with our international treaty obligations in this area. That is what Bill S-9 intends to accomplish. It will allow Canada to ratify the amendment to the Convention on the Physical Protection of Nuclear Materials and the International Convention for the Suppression of Acts of Nuclear Terrorism.

Finally, the threat of nuclear terrorism must remain a focus of the international security agenda. That is what the recent Nuclear Security Summit process has been about.

[*Translation*]

There have been two nuclear security summits to date: in 2010 in Washington D.C. and in 2012 in Seoul, South Korea.

At last year's summit, Prime Minister Harper, along with 53 other world leaders, renewed the following commitments: strengthening the legal framework against the threat of nuclear terrorism and for the protection of nuclear materials; securing vulnerable nuclear materials globally; minimizing the civilian use of weapons-usable nuclear materials; enhancing transportation security; and preventing illicit trafficking.

● (1535)

[*English*]

The next nuclear security summit will be hosted by the Netherlands in The Hague in March 2014.

Canada is also a member of the global initiative to combat nuclear terrorism, GICNT, an international partnership of 83 nations working to improve capacity on a national and international level for prevention, detection, and response to a nuclear terrorist incident. As a GICNT partner, early last year Canada hosted an international tabletop exercise in Toronto, simulating a combined federal, provincial, and municipal response to a nuclear terrorist incident. The meeting was attended by more than 150 delegates from 45 countries and was an opportunity to share best practices in coordinating a response to these types of threats.

At the Seoul Nuclear Security Summit, Prime Minister Harper announced Canada's intention to repatriate additional stockpiles of highly enriched materials from Chalk River Laboratories to the United States prior to 2018, and a new $5 million Canadian voluntary contribution to the IAEA's nuclear security fund to secure nuclear facilities in regions where urgent needs have been identified. Canada is the third largest donor to the IAEA's nuclear security fund, after the U.S. and U.K., with donations totalling $17 million since 2004.

The Prime Minister has also announced the renewal and continued funding of DFAIT's global partnership program, which I am honoured to lead, for an additional five years with $367 million in funding. That translates into an annual budget of $73.4 million from 2013 to 2018. The global partnership program has a mandate to secure and, where possible, destroy weapons of mass destruction and related materials and to keep them from being acquired by terrorists and states of proliferation concern.

Through the program, which supports the 25-member global partnership against the spread of weapons of mass destruction, Canada is actively implementing concrete nuclear security projects globally, and has spent more than $485 million toward nuclear and radiological security to date. This includes $209 million toward nuclear submarine dismantlement in Russia, $194 million on physical security projects in the former Soviet Union, and $13 million to prevent illicit trafficking of nuclear and radiological materials. We have also made major contributions to the elimination of WMD-related material including a $9 million investment to shut down the last plutonium-producing reactor in Russia.

[*Translation*]

The program has since refocused its efforts to target new and emerging threats in the Middle East, North Africa, Asia and the Americas.

For example, the global partnership program has recently contributed $8 million to remove highly enriched uranium and to convert research reactors to run on non-weapons usable nuclear material—low-enriched uranium—in Mexico and Vietnam. A $1.5-million contribution was also made to secure radiological sources in Libya, in co-operation with the U.S. and the International Atomic Energy Agency. Numerous projects elsewhere in the world have also received contributions.

[*English*]

A significant portion of the program's budget over the next five years is also expected to be spent on nuclear and radiological security projects.

In conclusion, Bill S-9 is an integral part of a comprehensive Canadian strategy to combat nuclear terrorism, and a key component of Canada's promotion of nuclear security abroad. We have made progress in addressing this threat, but much remains to be done.

My colleagues and I would be pleased to respond to your questions.

Thank you.

**The Chair:** Thank you, Mr. Barber.

I extend a special welcome to Professor Bunn, who is joining us via video conference. Thank you, sir. I'm assuming you have an opening statement, and we would be very happy to hear it.

**Prof. Matthew Bunn (Associate Professor of Public Policy, Belfer Center for Science and International Affairs, Harvard University):** Thank you very much. It's an honour to be here to talk about a topic that I think is extraordinarily important to the security of Canada, the United States, and the world.

I agree with a great deal, essentially all, of what Mr. Barber had to say on these points. The potential consequences if terrorists did manage to detonate a nuclear bomb are so horrifying, both for the country attacked and for the world, that even a small probability is enough to demand urgent action to reduce that probability further. Canada and the United States have been leaders in that effort to secure nuclear material and prevent nuclear terror zones, as Mr. Barber described.

Since the September 11 attacks in the United States, both countries have improved security for their own nuclear materials, helped others to do the same, helped to strengthen the International Atomic Energy Agency's efforts, and worked to strengthen other elements of the global response. But if the United States and Canada are to succeed in convincing other countries to take a responsible approach to reducing the risks of nuclear theft and terrorism at the Nuclear Security Summit in the Netherlands in 2014 and beyond, then our two countries have to take the lead in taking responsible action ourselves.

Hence, it is important for both of our countries to ratify the main conventions in this area: the Convention on the Physical Protection of Nuclear Material, the amendment to that convention, and the International Convention for the Suppression of Acts of Nuclear Terrorism. This is what the 2012 Seoul Nuclear Security Summit called on countries to do. As you know, the leaders at the Seoul summit set a target of gaining enough ratifications to bring the amendment to the physical protection convention into force by the 2014 summit. The legislation before you would make it possible for Canada to ratify both of these conventions, and I urge you to approve that legislation.

Unfortunately, and embarrassingly, my own country, the United States, has not yet approved the comparable legislation. I regarded it as an embarrassment that we failed to do that before the 2010 summit, and it's a worse embarrassment that we failed to do it again before the 2012 summit. The process is still under way. I am at least somewhat optimistic that we will succeed in getting it done, if not this year, then before the 2014 Nuclear Security Summit. But I think we've got a good chance of doing it this year.

The danger of nuclear terrorism remains very real. Government studies in the United States and in other countries have concluded that if terrorists manage to get enough highly enriched uranium or plutonium, they might very well be able to make a crude nuclear bomb capable of incinerating the heart of a major city. In the case of highly enriched uranium, making such a bomb is basically a matter of slamming two pieces together at high speed. The amounts required are small, and smuggling them is frighteningly easy.

The core of al Qaeda is, as President Obama mentioned the other night, a shadow of its former self, but regional affiliates are metastasizing and some of the key nuclear operatives of al Qaeda remain free today. With at least two terrorist groups having pursued nuclear weapons seriously in the last 20 years, we cannot expect that they will be the last. Moreover, some terrorists have seriously considered sabotaging nuclear power plants, perhaps causing something like what we saw at Fukushima in Japan, or dispersing highly radioactive materials in a so-called “dirty bomb”.

Should terrorists succeed in detonating a nuclear bomb in a major city, the political, economic, and social effects would reverberate throughout the world. Kofi Annan, when he was secretary-general of the United Nations, warned that the economic effects would drive millions of people into poverty and create a second death toll in the developing world. Fears that terrorists might have another bomb that they might set off somewhere else would be acute. The world would be transformed, and not for the better.

Hence, insecure nuclear material anywhere is really a threat to everyone, everywhere. This is not just an American judgment. UN Secretary-General Ban Ki-moon has warned that nuclear terrorism is one of the most serious threats of our time. Mohamed ElBaradei, while he was head of the IAEA, called it the greatest threat to the world.

● (1540)

Russia's counterterrorism czar, Anatoly Safonov, has warned that they have “firm knowledge” that terrorists have been given specific tasks to acquire nuclear weapons and their components.

A little while ago my colleagues at the Belfer Center and I, working with Russian colleagues, produced a joint U.S.-Russian assessment of the threat of nuclear terrorism, which was then endorsed by a group of retired senior military and intelligence officers from both countries, which I would be happy to provide for the record.

Fortunately, since the collapse of the Soviet Union, we've made tremendous progress around the world in improving security for both nuclear weapons and the materials needed to make them. No longer are there sites where the essential ingredients of a nuclear bomb are sitting in what you and I would consider the equivalent of a high school gym locker with a padlock that could be snapped with a bolt cutter from any hardware store.

At scores of sites around the world, dramatically improved nuclear security has been put in place. At scores of other sites the weapons-usable nuclear material has been removed entirely, reducing the threat of nuclear theft from those sites to zero. More than 20 countries have eliminated all the weapons-usable nuclear material on their soil, and the nuclear security summits have provided new high-level political impetus, which has accelerated this progress.

Nonetheless, as Mr. Barber pointed out, there's a great deal still to be done. My colleagues and I at the Belfer Center, prior to last year's summit, produced a summary report that outlines what has been done and what remains to be done, and I would be happy to provide that for the record as well.

Let me mention a few of the more dangerous areas that still exist.

In Pakistan, a small but rapidly growing nuclear stockpile, which is under heavy security, I believe, faces more extreme threats than any other nuclear stockpile in the world, both from heavily armed extremists who might attack from outside and from potential insiders who might help them.

In Russia, which has the world's largest stockpiles of both nuclear weapons and weapons-usable nuclear material dispersed in the largest number of buildings and bunkers, the nuclear security measures have dramatically improved, but there are still important weaknesses that a sophisticated theft conspiracy might exploit. And sustainability remains a major concern, as Russia still has neither the strong nuclear security rules effectively enforced nor sufficient funds allocated from the federal government to sustain security for the long haul.

At more than a hundred research reactors around the world, you still have highly enriched uranium used as fuel or as targets for the production of medical isotopes, and in many of these reactors, security is very minimal. Some of them are on university campuses.

At the moment, unfortunately, the mechanisms for global governance of nuclear security remain weak. No global rules specify how secure a nuclear weapon or a chunk of plutonium or highly enriched uranium ought to be. There are no mechanisms in place to verify that every country that has these materials is securing them responsibly.

Fukushima made clear that action is needed to strengthen both the global safety regime and the global security regime, because some day terrorists might seek to do what a tsunami did in Fukushima.

A central goal leading up to the 2014 nuclear security summit must be to find ways to work together to strengthen this global framework and continue the high-level attention on this topic after nuclear security summits stop taking place.

Ratifying the conventions now is important, but it should be seen, as Mr. Barber said, as one part of an integrated strategy and really as the beginning of building and strengthening this global framework. I think there are very important roles Canada can play in that effort.

I am thrilled that Canada has taken action to begin reducing the highly enriched uranium left over from past medical isotope production and past research reactor operations in Canada. I think that's a major step forward. An even more important step forward is the efforts Mr. Barber described to help other countries. Also, there are the really dramatic steps, I think very effective and impressive steps, that Canada has taken to strengthen security for its own nuclear material within Canada.

● (1545)

One of the things that happened at the Seoul Nuclear Security Summit was a goal of each country making a statement about what it would do to minimize highly enriched uranium by the end of this year, by December 2013. It is my hope that at that time Canada will join with European and South African producers of medical isotopes in a firm commitment to eliminate the use of HEU in medical isotopes by a date certain, and that Canada will set a target for eliminating the civil HEU on its soil, which is no longer needed.

The passage of this legislation, both in your country and in my country, will be an important and useful step, and I hope that Canada's passage will help kick my own Senate and House of Representatives into action.

Thank you very much. I look forward to the opportunity to answer questions.

● (1550)

**The Chair:** Thank you, Professor. I appreciate your taking the time to join us by video link.

We are going to move to questions now. Our first questioner is Mr. Mai, from the New Democratic Party.

**Mr. Hoang Mai (Brossard—La Prairie, NDP):** Thank you, Mr. Chair.

Thank you, Professor Bunn. Thank you, Mr. Barber and all the officers, for very insightful presentations. It's really important for us to hear your expertise. Thank you very much for that.

[*Translation*]

My question is for Mr. Barber, and it has to do with the bill's extraterritorial aspect.

Clause 3 of Bill S-9 talks about extraterritorial jurisdiction that could apply in the case of certain actions.

The following offences are not covered: an offence committed abroad against a Canadian citizen; an offence committed against a state or a government facility of that state abroad, including an embassy or diplomatic or consular premises; an offence committed abroad by a permanent resident or a stateless person who habitually resides in that state. Can you explain to us why that is and tell us what consequences it could have?

[*English*]

**Mr. Shawn Barber:** I appreciate the question. It is an important one.

I'm not a lawyer, and the question perhaps is more properly addressed to my Justice colleagues, who I believe will be appearing in the second hour. That might be an appropriate time to ask that particular question.

Again, it's an important one, but I think it's more properly addressed to them.

[*Translation*]

**Mr. Hoang Mai:** When the Minister of Justice appeared before this committee, the bill's implementation was discussed. It was also said that it would be desirable for the bill to move along quickly. At that time, I made a comparison with Bill C-7, An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety.

Did you know that this piece of legislation has still not come into force? Can you tell us what is behind that delay and whether we will see a similar delay in this case?

[*English*]

**Mr. Shawn Barber:** Will Bill S-9 be delayed as Bill C-7—

**Mr. Hoang Mai:** Maybe it will for Bill C-7, so that we understand what happens in that case.

**Mr. Shawn Barber:** There are some legal technicalities with respect to Bill C-7, as it has been explained to me by my legal bureau. I'd prefer to undertake to provide you with their response on this. It's more of a legal technical nature, but I'm assured by them that Canada has in place all of the legislative provisions necessary to implement the Biological and Toxin Weapons Convention as it currently exists.

My understanding is that at the time Bill C-7 was being brought forward and passed, it contained provisions that foreshadowed the passage or amendment of the BTWC, which in fact never happened. There has been a long-standing attempt to implement within the BTWC a verification mechanism similar to what you have within the Chemical Weapons Convention. Of course, verifying the presence of chemicals is quite easy. Verifying the presence of dangerous biological pathogens is much more difficult. So it's related to the failure to amend the BTWC, which Bill C-7 foreshadowed, and therefore that's the reason it has not been enacted. But that's a layman's non-legal interpretation, and I will undertake to ask my legal bureau to provide you with a more technical legal interpretation of that.

**Mr. Hoang Mai:** Thank you for the information.

Maybe I'll move over to Professor Bunn.

Are you familiar with the provisions of Bill S-9, and can you compare it to what the U.S. will eventually put in place in terms of legislation?

**Prof. Matthew Bunn:** Both pieces of legislation are intended to make sure that this nation's laws are consistent with the obligations in the convention to prohibit certain acts related to nuclear terrorism, and to impose penalties that are consistent with the magnitude of those crimes.

Given the number of people who might be killed in the event of an act of nuclear terrorism, my view is that acts like nuclear smuggling should be considered as being like conspiracy to commit murder or something of that level of gravity.

In Bill S-9, for example, the penalties are up to life in prison for many of the acts enumerated.

In the United States, part of what has delayed our passage of the relevant legislation is an attempt both in the Bush administration and in the Obama administration to include death penalty provisions for some of these acts. Some of the people in Congress were resisting that.

A bipartisan compromise in the United States was negotiated in the house—practically the only bipartisan compromise I can think of that's been negotiated in the house in recent years—but a small number of senators managed to hold it up, wanting to go back to the original death penalty provision. That's part of politics in the United States.

I would say the biggest difference is that difference between life imprisonment and death as the potential penalty.

But the particular acts included in Bill S-9 and included in the U. S. legislation are the acts specified in the conventions, so they would allow each country to ratify the conventions.

My own view is that if you take a broad reading of U.S. law, the relevant acts are already prohibited and the United States should have ratified these conventions long ago without bothering to pass any implementing legislation. But the Department of Justice took the view that we needed to dot every *i* and cross every *t* by passing this legislation.

● (1555)

**The Chair:** Thank you, sir.

Thank you, Mr. Mai.

Our next questioner is from the Conservative Party, Ms. Findlay.

**Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC):** Thank you.

Thank you to all our witnesses for being here; and to you, Professor Bunn, thank you so much.

Professor Bunn, I note that you are an associate professor of public policy at the Belfer Center for Science and International Affairs, which I think is part of the John F. Kennedy School of Government, and that your research interests include nuclear theft and terrorism, nuclear proliferation and measures to control it, the future of nuclear energy and its fuel cycle, and policies to promote innovation in energy technology. I feel we're well placed having you here today to give us the value of your opinion, so I thank you very much.

Professor, you referred in your opening remarks to the Belfer Center's 2011 report, entitled “The U.S.-Russia Joint Threat Assessment of Nuclear Terrorism”. Your report states, “Of all varieties of terrorism, nuclear terrorism poses the gravest threat to the world.”

When you testified before the Senate special committee on this bill in June of last year, you said:

> In Pakistan, a small but rapidly growing nuclear stockpile that is under heavy security faces more extreme threats than any other nuclear stockpile in the world, both from heavily armed extremists and potential insiders who might help them.

You also stated:

> In Russia, which has the world's largest stockpiles of both nuclear weapons and weapons-usable nuclear materials disbursed in the largest number of buildings and bunkers of any country in the world, the nuclear security measures have dramatically improved.

That is good news. You went on to say:

> However, some weaknesses remain....

Your colleague, Simon Saradzhyan, drew particular attention to the actions and intent of the terrorist groups based in Russia's North Caucasus. During his testimony before the Senate committee the professor pointed out that these groups have already “acquired radioactive materials. They have threatened to attack Russian nuclear facilities. They have plotted to hijack a nuclear submarine using expertise acquired by a former naval officer who was part of these networks.”

In your testimony here today you talked about the concern of terrorism doing what the tsunami did—or could even have done worse, I suppose—in Japan recently.

In taking all of this together, I would like to hear a little more from you on how significant this threat of nuclear terrorism is in our world, and how vigilant you feel we need to be in terms of addressing it as best we can.

● (1600)

**Prof. Matthew Bunn:** I believe it's a major threat to international security, which is why I've devoted a good chunk of my career over the last 20 years to working on this problem.

I do think, however, that the probability is lower than it was, say, at the time of the September 11 attacks. Since then the capabilities of the core of al Qaeda, the part of al Qaeda that had the greatest nuclear ambitions, have been greatly reduced since the death of Bin Laden and the capture and killing of many others. There's a large quantity of nuclear material that is now much more secure than it used to be.

What is the probability? No one can really know, but I would argue that given the huge consequences, even a very small probability is enough to say the risk is too high and we need to take action to reduce it.

One analogy I often use is that no one in their right mind would operate a nuclear power plant upwind of a major city if it had one chance in a hundred every year of blowing sky-high. Everybody would understand that it was too big a risk. My view is that we may be taking a bigger risk than that in the way that the world manages nuclear materials around the world today.

**Ms. Kerry-Lynne D. Findlay:** Those quotes I had from you mention Pakistan and Russia. Of course, we're always hearing threats of potential concerns coming out of the Middle East, particularly Iran. What is the degree of cooperation we're seeing?

I suppose what I'm trying to say is if we can't necessarily be confident of international cooperation, do you feel we're doing the right thing by at least taking these domestic steps?

**Prof. Matthew Bunn:** I think the domestic steps, such as passing this legislation, are crucial to being able to build this global framework. The reality is that we won't get everybody participating in this global framework. You're not going to see North Korea ratifying these treaties any time soon.

On the other hand, I think that through the international cooperation that we have managed to achieve, through initiatives such as Mr. Barber mentioned, global initiatives to combat nuclear terrorism and global partnership against the spread of weapons and materials of mass destruction, we've managed to get many countries where radioactive materials or even nuclear materials were quite vulnerable to take action by improving the security of those items or by getting rid of them entirely from particular places. I think that has reduced the risk to all of us.

I think that even though international cooperation will never be perfect and we won't ever accomplish everything we would like to accomplish, we're accomplishing a lot. Part of accomplishing that is putting in place in our own countries, in the United States and in Canada, the legislation and the ratification of the relevant conventions that will help us lean on other countries to take those same actions themselves.

**The Chair:** Thank you, Ms. Findlay, for the questions.

The next questioner is from the Liberal Party. It's Mr. Casey.

**Mr. Sean Casey (Charlottetown, Lib.):** Thank you, Mr. Chairman.

I want to start by asking you about extraterritorial jurisdiction.

The actors that are involved in these types of crimes.... The world is a small place. One of the considerations or one of the possibilities in terms of prosecution is if a person is found to be in Canada after the commission of the offence, regardless of where the offence was committed.

My question relates to a situation in which you're in a tug-of-war with another jurisdiction. Is there any insight you can provide with respect to the exercise of prosecutorial discretion as to whether to prosecute or to extradite when you find yourself in that situation? Can you shed some light on that?

**Mr. Shawn Barber:** Mr. Casey, that's a very important question, but as I indicated earlier, I'm not a lawyer. I'm not qualified to comment in that regard.

My colleagues from Justice Canada are here behind me. I think you'll have an opportunity to ask them those specific questions when you go through clause-by-clause consideration later in the committee meeting.

**Mr. Sean Casey:** Let me come back to something that took place in the course of the Senate deliberations on this. It was suggested at the Senate committee that Canada's regulatory framework has been in place for years and is already sufficient to implement physical protection under a couple of treaties: ICSANT, the International Convention for the Suppression of Acts of Nuclear Terrorism, and the amendment to CPPNM, the Convention on the Physical Protection of Nuclear Material.

Is it correct that what we have in place now is sufficient to satisfy our obligations under these treaties, or is this bill actually necessary for us to be in a position to ratify either one?

● (1605)

**Mr. Shawn Barber:** My colleague, Terry Wood, was at the centre of negotiations on the amendment to that convention, so I'll let him answer that question.

**Mr. Terry Wood (Senior Co-ordinator, International Nuclear Cooperation, Department of Foreign Affairs and International Trade):** Thank you very much.

That's a very good question, Mr. Casey. Both conventions contain a number of binding obligations. We are able to implement virtually all of those obligations under existing law in Canada. However, both conventions put forward criminal offences. Those are detailed in a specific article in both conventions. I can give you the references if you wish.

Fortunately, for us at least, in those conventions the wording is relatively plain language. We are able to implement all of the obligations without implementing legislation, except for the provisions requiring criminalization. So to answer your question, yes, implementing legislation is needed, but it's of a fairly narrow scope with regard to the new criminal provisions that are introduced in both conventions. Fortunately, in these two conventions, those additional criminal provisions are sufficiently similar in each convention that we can address them through one piece of legislation.

In the Minister of Justice's news release and the backgrounder that was issued when the legislation was introduced, there's a very concise four-point summary as to the changes that are needed in this regard. But if you wish, I can draw your attention to the specific articles of each convention on which legislative action is required by Canada.

Thank you.

**Mr. Sean Casey:** I wasn't at the last meeting, but the note that had been provided by Mr. Cotler indicated that one of the things the minister said was that S-9 just particularizes offences that are already generally criminalized. I'm not asking you to get into a debate with the minister, of course, but I take it that that's exactly the point you're making, that it's....

Okay, thank you.

**The Chair:** Thank you, Mr. Casey.

Our next questioner, from the Conservative Party, is Mr. Albas.

**Mr. Dan Albas (Okanagan—Coquihalla, CPC):** Thank you, Mr. Chair. I want to thank all of our guests who are here today as witnesses. Your testimony and your experience and expertise are most welcome.

Professor, I'm going to pick up from my colleague, MP Findlay, in regard to some of the comments you made, both in previous testimony to the Senate and also in some of your academic work.

Last Monday we heard the case, Professor, of Mahmoud Yadegari, who was the first person in Canada convicted of supplying nuclear equipment to Iran. In the six months leading up to his April 2009 arrest, Mr. Yadegari had contacted 118 companies across North America and sent more than 2,000 e-mails to suppliers, in the hopes of getting his hands on parts used in the enrichment of uranium for nuclear fuel.

Professor, you referenced your 2011 report, “The U.S.-Russia Joint Threat Assessment of Nuclear Terrorism”, and I do appreciate your wanting to pass that on for the committee's consideration. In that report, Professor, I'm going to quote from page 44, where you say:

> ...there is some evidence that Teheran has been secretly acquiring technologies and materials important in the production of nuclear weapons on the black market. This and other evidence, such as the behavior of the Iranian leadership, strongly suggests that Iran aspires to eventually become a full-fledged nuclear power—or to have the option to build nuclear weapons at any time of its choosing.

Professor, do you think that Bill S-9 will facilitate international cooperation and make it more difficult for rogue states and terrorist groups to illegally obtain such nuclear materials?

● (1610)

**Prof. Matthew Bunn:** That's a great question, but I think we need to distinguish somewhat between two different and dangerous trades. One is the smuggling of materials that could be used directly to make a nuclear bomb, that is highly enriched uranium or plutonium, which so far—knock on wood—has mostly been not only a not-organized crime but what I like to call a comically disorganized crime. It's mostly sort of part-time hustlers and has been rare and not an organized operation.

Then the different situation is these technology supply networks that are mostly run by states, although one of the odd things about the A.Q. Khan network was, rather than it being driven by the demand of a state, it was driven in part by the available supply from the network looking for customers. These are sophisticated operations dealing with companies with sensitive technologies, well-to-do engineers. They are sophisticated in the use of front companies and various other means of hiding what they're doing. But they are really about acquiring the technology to make this kind of material, and then to make a weapon from it, rather than acquiring the highly enriched uranium, which is really more of the terrorist problem. Technology is really more of the state problem. I think it's implausible that terrorists, even if they could get relevant technologies, would be able to enrich uranium or produce plutonium on their own.

So I would argue that Bill S-9 would help us with the terrorist problem, in part because it makes illegal and imposes these very substantial penalties on acts such as smuggling or unauthorized possession of highly enriched uranium or plutonium. I think there are other things we need to do that will help us with the technology problem, including taking action, as Canada did, to arrest these kinds of players who are trying to get these kinds of technologies.

**Mr. Dan Albas:** I do appreciate your articulating the difference between the two. When we had representatives from the Canadian Nuclear Safety Commission—they testified before the committee as well—all affirmed that Canada operates under a world-class nuclear safety and security regime.

Now the amendments to the Criminal Code in Bill S-9 reflect obligations imposed under many of these agreements. We've already mentioned the International Convention for the Suppression of Acts of Nuclear Terrorism and the Convention on the Physical Protection of Nuclear Material.

My question, Professor, is this. Once Bill S-9 is enacted, Canada would be in a position to ratify these conventions. Do you think the enactment of domestic legislation to implement Canada's obligations would be effective in further establishing that safe network, that technology supply network, as well as our own state use of nuclear technology?

**Prof. Matthew Bunn:** I believe Canada already has, as you say, a good regime of safety and security rules and regulations to regulate its own use of nuclear energy and its exports of nuclear-related technologies.

Now, that's not to say things couldn't be made better. Certainly, I'm not as familiar with Canada's export control laws as I am with my own country's. My own country's could definitely use some improvement in a variety of ways. In fact, some colleagues of mine and I are organizing a major international meeting in a couple of months to talk about better ways to stop this kind of black market technology trafficking.

But I think what Bill S-9 would do is allow Canada to enhance further its leadership role in this international effort to get these treaties ratified across the world and in force. The International Convention for the Suppression of Acts of Nuclear Terrorism already has enough parties to enter into force. Obviously, it's not in force for countries that haven't ratified, like Canada and the United States. But the amendment hasn't even entered into force yet, and that was the goal at Seoul: to get enough countries to ratify to get it into force by the time of the next Nuclear Security Summit in the Netherlands. I think that's going to be difficult, but we've got a shot to do it, and it would be impossible if Canada and the United States don't ratify.

● (1615)

**The Chair:** Thank you, Professor.

And thank you, Mr. Albas.

Our next questioner, from the New Democratic Party, is Mr. Marston.

**Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP):** Thank you, Mr. Chair.

Professor, it's great to have you here, particularly in light of your centre's study and the assessment of the risk factor.

In your study you talked about the plausibility of a technically sophisticated group being able to make, deliver, and detonate a nuclear bomb if it had the right materials. I come from Hamilton. We have McMaster University with its own reactor. Are those reactors, in your view—I'm sure you have them in the U.S. as well—sufficiently safe, and are the materials in them weapons grade?

**Prof. Matthew Bunn:** In Canada, like the United States, many of these reactors used to use highly enriched uranium, and in many cases weapons-grade highly enriched uranium. Both of our countries are working to convert to low enriched uranium. I believe—I imagine Mr. Barber can correct me if I'm wrong—that McMaster has in fact already converted to this and is not using highly enriched uranium. However, down the street from me, at MIT, for example, our colleagues there have 12.5 kilos of weapons-grade highly enriched uranium in the core of their research reactor.

Unfortunately, you can imagine that a little research reactor, with not very much revenue at a university, is not the kind of place where you're going to have the kind of armed protection you would imagine would be suitable for the kind of material you can use to make a nuclear bomb. That's one of the reasons I've been one of the strongest advocates pushing for eliminating the civil use of highly enriched uranium.

The United States is now on record saying we as a government want to eliminate completely all civil uses of highly enriched uranium. They're not needed anymore and they pose a security risk. I would love it if Canada, in its statement for December 2013 about minimizing the use of highly enriched uranium, would join us in that goal. I think it's the right goal of complete elimination from the civil sector.

**Mr. Wayne Marston:** Thank you.

Mr. Barber, as I'm sure you're aware, we've recently had a report in the *Ottawa Citizen* regarding the transfer of bomb-grade liquefied uranium. Obviously that's raised some concerns, as it will any time there's a story of that nature out there.

I understand that is part of the program we're talking about here, where we're transferring back to the U.S. the weapons grade. Would you like to address the concerns we're hearing from our public in regard to the transportation, the security level of the products being transferred, and that type of thing? I'm sure there are many Canadians watching this particular committee today.

**Mr. Shawn Barber:** Yes, thank you, Mr. Marston. That is an excellent question, but probably more appropriately put to the Canadian Nuclear Safety Commission.

However, I will say this. This is part of a worldwide effort to repatriate to countries of origin highly enriched fissile material so this material can be down-blended, it can be reprocessed, it can be done away with.

Professor Bunn has correctly pointed out the critical issue here for us are the stocks of fissile material. We need to ensure that terrorist organizations and terrorists are not able to get enough of this material to create a weapon that will do calamitous things in our major urban areas.

Are there concerns? I understand the concern. We understand the concerns. As a citizen, I would have the same concern.

Other countries are doing this. In the last year we have helped Mexico to repatriate highly enriched uranium from a research reactor in Mexico City back to the United States. We are assisting Vietnam to repatriate highly enriched uranium from a research reactor back to Russia.

At Chalk River there is this material. It costs the Canadian taxpayer a lot of money to keep it there. We don't have the technology to reprocess it in place at the moment. That technology and the facility exist in Savannah, Georgia. As part of our Nuclear Security Summit obligations, our Prime Minister undertook to return this material, as other countries are doing around the world, as in fact many other countries are doing around the world.

The modalities for doing that, how it gets from Chalk River to Savannah, Georgia, is not an issue that's our responsibility, but it certainly raises citizens' issues. That's an issue for CNSC, Transport Canada, and ultimately—

● (1620)

**Mr. Wayne Marston:** I don't think we'd be appropriately talking about how the methodology of the transfer would take place.

Do I have any more time?

**The Chair:** Not really, no.

**Mr. Wayne Marston:** Ah, that's too bad.

**The Chair:** Thank you, Mr. Marston.

**Mr. Wayne Marston:** Thank you very much, Professor.

**The Chair:** Our next questioner is from the Conservative Party, Mr. Armstrong.

**Mr. Scott Armstrong (Cumberland—Colchester—Musquodoboit Valley, CPC):** Thank you, Mr. Chair, and thank you, Dr. Bunn, for being here. I hope you made it through last week's snowstorm unscathed. I'm from Nova Scotia myself. You handed it off to us. We really appreciate that. Again, welcome.

It says on page 18 of your 2011 report entitled "The U.S.-Russia Joint Threat Assessment on Nuclear Terrorism", and I think you presented some of that today:

> Counting assembled nuclear weapons is far easier than accounting for nuclear material in bulk form. Some weapons-usable nuclear material (particularly in the civilian sector) does not have the same level of security that nuclear weapons have. As a result, terrorists' best chance of achieving a WMD capability may be a long-term effort to construct an IND with weapons-usable material stolen or purchased on the nuclear black market.

How easy is it to construct a nuclear bomb using stolen or black market nuclear material, which can be purchased throughout the world really?

**Prof. Matthew Bunn:** That's a great question. I have a long article on that subject that appeared in the ANNALS of the American Academy of Political and Social Science some years ago. It's not easy but unfortunately it's not as hard as we would like. Mother Nature was both kind and cruel to us in setting the laws of physics; kind in the sense that highly enriched uranium and plutonium don't exist in nature and are quite difficult to make, I think well beyond the plausible capabilities of any plausible terrorist group. In fact, about 90-plus per cent of the work and the money in the Manhattan project went to making the nuclear material rather than to designing and fabricating the bomb.

So as I mentioned, repeated government studies of this question not only in the United States but in several other countries have concluded it is plausible that a terrorist group could make not a safe high-yield efficient bomb that a state would want to have in its arsenal, but a crude unsafe weapon of the kind you might put in the back of a pickup truck or a large van or something of that kind.

Such a thing would be unsafe. It probably wouldn't have the kind of yields you'd like to have, but it could be a devastating terrorist blow. It would take terrorism to a whole new level. It would take a well-organized terrorist group able to maintain a focused project over a substantial period of time. It would take some knowledge of physics, considerable knowledge of explosives, some ability to machine material.

There are certain scenarios whereby you might be able to sidestep some of those requirements that I won't talk about in this unclassified setting, but I will say that in the United States there are certain facilities where the security rules require that they prevent the terrorists from even getting to the material because of concern they might be able to set off an explosion while they are still in the building. So it's a serious concern if a sophisticated and well-organized group gets this material.

**Mr. Scott Armstrong:** It sounds as if there would almost have to be some sort of state actor behind whatever organization or some very advanced, well-financed group. Is that accurate?

**Prof. Matthew Bunn:** Unfortunately I don't think it's accurate. If you could tie it only to actors who had strong state support, I'd be a little less worried, because you can deter the state that is supporting many of those actors. With an actor like al Qaeda, deterrence is much more difficult because they don't have a return address you can attack that they really want to defend in the same way. That is not to say that deterrence is irrelevant. I think a variety of things like that are still relevant in al Qaeda's case, but are different than they are in the case of state-supported groups.

Al Qaeda's effort in particular was more significant than a lot of people realized. They made repeated attempts to get stolen nuclear material and recruit people with nuclear weapon expertise. They got to the point shortly before the 9/11 attacks of carrying out tests of conventional explosives for their nuclear weapon program in the desert in Afghanistan. The details are still classified, but I was surprised in an unpleasant way when I learned about them, because they're more sensible approaches than I would have expected for terrorists to take in a nuclear program.

● (1625)

**The Chair:** Thank you very much.

Thank you, Mr. Armstrong.

Our final questioner for this hour is Mr. Jacob, from the New Democratic Party.

[*Translation*]

**Mr. Pierre Jacob (Brome—Missisquoi, NDP):** Thank you, Mr. Chair.

I want to thank the witnesses for joining us.

Thank you, Professor Bunn.

My first question is for you, Mr. Barber. Regarding nuclear security, do the countries of the former Soviet Union pose any particular challenges to the country's security?

[*English*]

**Mr. Shawn Barber:** I think the work that we have done through the global partnership program in Canada, particularly in Russia but also in Ukraine, has really helped to address the sorry state of security that we found there 10 to 12 years ago, which Professor Bunn talked about earlier.

In the efforts of the United States, the Russians themselves, and Canada, Germany, and France, we've together spent literally billions of dollars to address that problem in the past 10 years. Much of the work that we did in Russia was under the leadership of my colleague, Mr. Hamilton. I'd like him to give you a few examples of the kind of work we've done.

We've made a lot of progress and come a long way. There's still work to be done, but I think we can be proud of what we've done there.

**Mr. Graeme Hamilton (Senior Program Manager / Deputy Director, Global Partnership Program, Department of Foreign Affairs and International Trade):** Thanks, Shawn, and thank you for the question.

Under the global partnership program, we've been working cooperatively with Russia over the past 10 years. This work has allowed us to provide significant financial and technical support to upgrade the physical protection systems at 10 Russian facilities housing weapons-usable nuclear material.

Our objective here was to bring these facilities up to the international standards and norms as indicated by the IAEA in its various standards documents.

For the most part, these upgrades included the bricks and mortar type of work, such as replacing aging wooden fences topped with rusty barbed wire with modern metal fences equipped with appropriate detection and monitoring systems, as well as providing sustainability assistance through the provision of spare parts and training.

As Professor Bunn described in his opening statement, 10 to 12 years ago a number of facilities in Russia were literally the equivalent of storing usable nuclear material in a gymnasium setting, sort of in a locker. Through our engagement in the global partnership program, we saw very similar examples, and we've worked over the past 10 years on upgrading those.

We've also worked on the recovery of radiological sources across Russia's vast northern and far eastern coastline as well. We worked cooperatively with Norway, the IAEA, and the U.S. in efforts to secure radiological sources that were being used in navigational beacons in the north, replacing them with solar-powered equivalents and taking those dangerous radiological materials and storing them in a secure facility in Russia.

**Mr. Shawn Barber:** To encapsulate that and answer your point specifically, we are secure. Canadians are more secure today as a result of the work we've been doing with the U.S., Germany, Norway, and other countries, including Russia. We're much more secure today than we were 10 years ago, precisely because of the kind of work we've been doing. The state we find ourselves in now with respect to nuclear security in Russia is far different from what it was 10 years ago.

Are there still problems there? There certainly are, and the Russians realize it themselves, but we are far better off and far more secure as Canadians because of the work that's happened over the last 10 years.

[*Translation*]

**Mr. Pierre Jacob:** Thank you, Mr. Barber and Mr. Hamilton.

My next question is for you, Mr. Bunn.

We know that the world has been going through an economic crisis over the past few years. Canada, the United States and Europe have not been spared. We know that the budget is a key aspect. What would be the minimal security threshold below which we should not fall? In other words, has this global financial crisis weakened nuclear security?

● (1630)

[*English*]

**Prof. Matthew Bunn:** It's a great question. I'm glad to say that I don't think so. I don't think that safety or security is being cut significantly below where it was, but on the other hand, I think there are countries that are more reluctant to make new investments than they would have been because of the economic crisis.

In particular, I, for one, have been somewhat disappointed in a couple of aspects of the international reaction to Fukushima. First, while I think most individual states have done an excellent job of reviewing the safety of their own nuclear facilities with respect to the lessons learned from Fukushima, if you compare the international reaction, in terms of putting in place tougher international standards and agreements, to what happened after Chernobyl, there's really no comparison. The international community has been much slower to commit to doing things jointly after Fukushima than they were after Chernobyl.

But I think on the security side, because it was a safety incident at Fukushima, people didn't think as much as they should have about the possibility that terrorists might look at that and say, “Hmm, there's an interesting way I could create some terror, by cutting off power and cooling to a nuclear power plant. How would I do that?” I think Fukushima really teaches us security lessons as well as safety lessons, and those have not been learned and implemented in as many countries as the safety lessons have.

Part of the reluctance may be related to the cost, given the financial situation that many countries and the nuclear industry itself find themselves in.

**The Chair:** Thank you, Professor.

And thank you, Mr. Jacob.

That's the end of our time for this panel.

I want to thank Professor Bunn for joining us from Harvard and contributing to our discussion of Bill S-9. We very much appreciate that.

I also want to thank all the members who are here from the Department of Foreign Affairs and International Trade for their input.

Mr. Barber, you made a commitment to one of the members of the committee for a response. I would ask that that go to the clerk and that response be circulated to all members of the committee.

Thank you.

We will suspend for about one minute until we get the Finance people at the table, and we'll start on the clause-by-clause.

**A voice:** Justice.

**The Chair:** Oh, my old days—until we get the Justice people at the table.

Thank you very much. We'll be suspended for one minute.

● (1630)

(Pause)

● (1635)

**The Chair:** Ladies and gentlemen, I'll ask you to take your seats. We're going to start here and see if we can get this completed.

I want to welcome, from the Justice department, Mr. Koster and Madame Morency.

We'll call you Carole and Greg. How does that sound?

You're here to answer questions, I'm assuming, as we go clause by clause. Is that correct?

**A voice:** That's correct.

**The Chair:** Okay. Thank you very much.

Just so you know, this is not a very large bill, ladies and gentlemen. It's nine clauses or so.

There have been amendments submitted by the Liberal Party, and those are related to clause 5. Just so you know in advance, if amendment Liberal-1 is defeated, that automatically defeats Liberal-2; Liberal-3 will be defeated, Liberal-4 will be defeated, and Liberal-5 stands on its own.

If you do have a question about a clause, please put up your hand so we can ask the appropriate staff to respond, and then we'll go to a vote.

Let's get started.

Pursuant to Standing Order 71(1), consideration of clause 1 is postponed, so I have to start with clause 2.

(Clause 2 agreed to)

(On clause 3)

**The Chair:** Mr. Mai has a question.

**Mr. Hoang Mai:** Yes, very quickly.

We raised the issue of

[*Translation*]

extraterritoriality. We have noticed that certain provisions of the convention have not been repeated in Bill S-9, including offences committed abroad against a Canadian citizen, offences committed against a state or a government facility of that state abroad, including an embassy or diplomatic or consular premises, and offences committed abroad by a permanent resident or a stateless person who habitually resides in that state.

Can you explain to us why that was not repeated in Bill S-9?

[*English*]

**The Chair:** Who would like to answer that question?

**Mr. Greg Koster (Counsel, Criminal Law Policy Section, Department of Justice):** Thank you for the question.

Regarding the proposed extraterritorial jurisdiction as set out in clause 3, you did mention the jurisdiction for an offence committed by a Canadian citizen. That is, in fact, covered under paragraph (c) of that provision.

I believe the other areas you mentioned fall under the permissive jurisdiction grounds. Treaties often have the mandatory and the permissive, and what we have done is gone with the mandatory jurisdiction grounds.

**The Chair:** Is it okay then?

**Mr. Hoang Mai:** Yes.

**The Chair:** We'll take the vote on clause 3.

(Clause 3 agreed to)

(Clause 4 agreed to)

(On clause 5)

**The Chair:** That brings us to clause 5, where we have amendments. We'll deal with the amendments one at a time.

On the table will be Liberal amendment 1.

**Mr. Sean Casey:** Can I speak to it, Chair?

**The Chair:** You can speak to it, sure.

**Mr. Sean Casey:** My comment with respect to the first four amendments will be one and the same, but I think you indicated that if number one is defeated, the rest will fall as well.

**The Chair:** If number one is defeated, number two is automatically defeated.

**Mr. Sean Casey:** Proposed section 82.3 starts out with a description of the *mens rea* required for the offence, the mental element.

It starts out with “Everyone who, with intent...”, and then it talks about the physical element of the offence. It describes the mental element, and then it describes the physical element. So the mental element is the intent to cause death, serious bodily harm, etc., so everyone with that mental element who makes a device or possesses, uses, transfers, exports, and so on.... That is an offence with the mental and the physical element enumerated.

What I'm seeking to clarify is that, after it describes the physical element of that first offence, it uses the word “or”. The question that raises in my mind is, for everything after the “or”, does it require that you have that same mental element that's described in the first three lines, or does it not?

These amendments would specify that the mental element that is prescribed in proposed section 82.3, for example, the intent to cause death, serious bodily harm, etc., is also required for the other components set out there.

Without having that enumerated, it could be interpreted that the mere commission of the physical act is sufficient to warrant a conviction. So you don't need a specific intent. If you commit the physical act, you're culpable.

The sole purpose of all of these first four proposed amendments is to specify that the mental element described applies to all of the other physical acts contained in it. That's the rationale for the amendment. It's to make that crystal clear.

● (1640)

**The Chair:** Before I go to you, would the staff like to respond at all to the clarification?

**Mr. Greg Koster:** Certainly. I'll just note two things.

The first is that during the Senate consideration of this bill, there was a government amendment that removed the word "who" from the proposed offence at both sections 82.3 and 82.4. That was stuck in the middle of the offence. That was in order to make it consistent with the French, but also to make it clear that the intent was to apply to both acts that are listed under both offences.

I can describe that the intent of the offence itself, as described by the minister both at the Senate and in the proceedings in this committee, was that it applies to both the acts as you describe them. That is the intent of the provision, that the intent to cause death, serious bodily harm, damage to property, and the environment in the first offence and the intent to compel do apply to all of the offence as described.

**The Chair:** I'm going to go to Ms. Findlay and then to Mr. Casey, if you want anything further.

Ms. Findlay, you have the floor.

**Ms. Kerry-Lynne D. Findlay:** Thank you, Mr. Chair.

This amendment would remove the *actus reus* of acts against a nuclear facility, or an act that causes serious interference with or serious disruption of its operation, from proposed section 82.3.

If, as Mr. Casey suggests, the amendment is being proposed to make it clear that the *mens rea* or "intent to cause death, serious bodily harm or substantial damage to property or the environment" applies to both the making, possession, use, transfer, etc., and the acts against nuclear facilities and operations, this legislative intent is already clear in the parliamentary record, as stated in both the Senate and the House of Commons.

In fact, as Mr. Koster has just explained, the government amendment in the Senate to remove an extra "who" in the English version of the offence was made to be consistent with the French version. In so doing, it makes certain that the *mens rea* applied to both actions.

Therefore, in my view, this amendment is simply not necessary.

Thank you.

**The Chair:** Madame Boivin is next.

[*Translation*]

**Ms. Françoise Boivin (Gatineau, NDP):** I don't have any specific issues with the amendment either. I thought it was useless because it did not add anything. All it does is cut the paragraph and continue from there, but I have already read that.

However, in going over the English version, I thought an "or" was missing. I think that's on line 9. It says

[*English*]

"of nuclear material, ", with a comma, and in my view it should be an "or" if we make it consistent with the French, where there is an *ou* in the French version. We say, "of nuclear material, a radioactive material, or a device", and it should be, "of nuclear material, or a radioactive material, or a device".

That's the only thing. When I was trying to see the intent behind the amendment—because I couldn't see it—I thought maybe he was just adding an "or", but I thought it was a pretty long amendment for just an "or". Anyway, I suggest that we should at least....

This doesn't change anything. I don't know if the specialists from the Justice department realize it, or maybe I'm not reading it well. I wouldn't want a bunch of lawyers starting a big debate on a comma versus *ou*.

Other than that, I don't have a problem with the amendment. I just think it's totally useless.

● (1645)

**The Chair:** Are you asking the staff from the Justice department to respond?

**Ms. Françoise Boivin:** If we can accept a friendly.... It's an "or", unless it creates a third world war within the government and the Justice department. I think the logic of it would make more sense. I don't know what their view is on it.

**Mr. Greg Koster:** The intent of those three things is that it is a class of three. It's nuclear material, radioactive material, or device. It's to be read as a class of three. The way it's dealt with is consistent throughout the bill.

**Ms. Françoise Boivin:** I think there was just an "or" forgotten in the English part.

**Mr. Greg Koster:** To be honest, as I read it here, I don't see that there would be an "or" after "nuclear material", if, Madame Boivin, that's where you're suggesting it might be missing. I think as it reads now, "nuclear material, radioactive material or a device", it reads correctly as a class of three.

**The Chair:** Mr. Casey, do you have anything further on your amendment?

**Mr. Sean Casey:** I take your point, Mr. Koster, that you feel that the clarification isn't required in that the statute as worded requires the intent that's specified in the first few lines.

The problem that I have is that while it may be the minister's intent and it may be your interpretation, when this is out there, it's for defence lawyers and judges to interpret. The goal of the amendment is simply to make that crystal clear and beyond dispute. It's offered for that purpose.

I do appreciate your interpretation.

**The Chair:** Are you moving the amendment, then, I'm assuming?

**Mr. Sean Casey:** Yes, please.

**The Chair:** Yes, okay. Amendment LIB-1 has been moved.

(Amendment negatived [See *Minutes of Proceedings*])

**The Chair:** That amendment fails, so amendment LIB-2 also fails.

We are on amendment LIB-3. Do you wish to move that, Mr. Casey?

**Mr. Sean Casey:** Given the vote on the first one, and the rationale for amendment LIB-3 being exactly the same, there's a definition people use if you keep doing the same thing and expect a different result.

**A voice:** It's called insanity.

**Mr. Sean Casey:** Okay, I'll plead insanity. I'll withdraw it.

**The Chair:** Okay, amendments LIB-3 and LIB-4 are withdrawn.

That brings us to Liberal amendment 5, which is different.

Would you like to move it and speak to it?

**Mr. Sean Casey:** Yes, please, Mr. Chair.

Amendment LIB-5 is solely to ensure that organizations that have been designated under the Criminal Code as terrorist organizations are not able to avail themselves of the exemption.

There's an exemption within proposed section 82.7 that affords a defence in an armed conflict under certain conditions, and this would be simply to make it crystal clear that any organization that has been listed under the Criminal Code as a terrorist organization would not be able to avail itself of that defence.

As members of the committee are probably aware, the Iranian Revolutionary Guard Corps was recently listed pursuant to this section. This would ensure that groups such as this would not be able to claim immunity, not be able to claim the protection that's afforded under proposed section 82.7.

**The Chair:** Ms. Findlay, would you like to speak to the amendment?

**Ms. Kerry-Lynne D. Findlay:** Yes. Thank you, Mr. Chair.

The military exclusion language under proposed section 82.7 is similar to that presently set out in section 431.2 and subsection 83.01 (1) of the Criminal Code. Adding such language to the military exclusion in this clause, while not adding it to existing law in both the military exclusions in section 431.2, relating to terrorist bombings, and subsection 83.01(1), relating to the definition of terrorist activity, may have unintended consequences for the interpretation of these two existing provisions.

The Supreme Court of Canada, in the unanimous December 2012 Khawaja decision, provided guidance on the application of the military exclusion clause used in the definition of "terrorist activity" in the Criminal Code. In rejecting the application of the military exclusion to the defendant, the court found that, one, the military exclusion clause functions as a defence, and therefore it is for the defence to raise an air of reality to the claim that it applies; and two, the conduct in question must otherwise be in accordance with applicable international law, such as the Geneva Conventions.

As the Khawaja court noted, "The Geneva Conventions prohibit acts aimed at spreading terror amongst civilian populations...". In order for the defence, under proposed section 82.7 to apply, the act must be lawful under international law.

In my view, it is unlikely that a terrorist entity would meet that threshold. So we do not support this amendment.

● (1650)

**The Chair:** Madame Boivin.

**Ms. Françoise Boivin:** I agree fundamentally with what the parliamentary secretary just said, but at the same time,

[*Translation*]

"can't be too careful", as the saying goes. Wouldn't it be better to add that even though it seems implied? When you read the exception set out in proposed section 82.7, it is clear that the conflict in question must be legal under the customary international law or conventional international law applicable to the conflict, or to activities undertaken by military forces of a state.

We see that this is already well-defined. However, legislation may contain things that appear to be totally useless but actually reaffirm a principle. Do you really have no reasonable doubt in your mind that this is covered by proposed section 82.7 and requires no amendment?

[*English*]

**The Chair:** Is that a question to the...?

**Ms. Françoise Boivin:** It's to the panel.

**The Chair:** Perhaps the Justice staff would like to answer.

**Mr. Greg Koster:** I would agree with everything the parliamentary secretary set out in her remarks. I would highlight that there are existing provisions that use that exact language in the code. Perhaps this may have unintended consequences for the interpretation of those provisions.

They haven't been used a lot. They were used in Khawaja, and they've set out the law in that area, but I don't believe the terrorist bombing one has yet to be used. So that is, really, an unintended consequence that could happen.

**The Chair:** Have you anything further to say on your amendment, Mr. Casey?

**Mr. Sean Casey:** Any debate about customary international law can be open to multiple interpretations. Again, the objective here is to be absolutely clear that an entity designated as a terrorist entity can't afford itself of this protection.

I take the point offered by the parliamentary secretary that including it in this statute may have an impact on other statutes because they compare one to the other when trying to interpret one or the other, but this is an opportunity for us to provide clarity, which I think we should take.

**The Chair:** Okay, thank you.

I will go to the question now on amendment LIB-5.

(Amendment negatived)

(Clauses 5 agreed to)

(Clauses 6 to 8 inclusive agreed to)

(On clause 9)

**The Chair:** There is a question on clause 9.

**Mr. Sean Casey:** I'm not proposing an amendment. It's a question for clarity. It again relates to the English and French versions in clause 9.

In proposed subsection 607(6), in line 4 of the English version, there are three subsections listed: "subsections 7(2) to (3.1)", and then the words "or (3.7)".

The French version, at lines 8 and 9, lists those three subsections, but it reads

● (1655)

[*Translation*]

"*des paragraphes 7(2) à (3.1) et (3.7)*".

[*English*]

In the English version we have the word "or" used, and in the French version we have the word "*et*" used.

Is that an oversight, or is my pedestrian handle on French the reason I can't understand why those two words are not a direct translation?

**The Chair:** Would the justice staff like to interpret it for us?

**Ms. Carole Morency (Acting Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice):** Thank you for the question.

We're not aware that it is a problem. As you will know, the French and English versions are co-drafted together. They have to convey the same idea, but they may not convey it through exactly the same words or expressions.

I read the two as being consistent. We hadn't seen it as a problem. I think there is consistency, though I note that they do read differently if you literally translate word by word. However, I think the essence is consistent between the two official languages.

**The Chair:** Thank you for that answer.

We'll move on.

(Clause 9 agreed to)

(Clause 10 agreed to)

**The Chair:** Shall the short title carry?

**Some hon. members:** Agreed.

**The Chair:** Shall the title carry?

**Some hon. members:** Agreed.

**The Chair:** Shall the bill carry?

**Some hon. members:** Agreed.

**The Chair:** Shall the chair report this bill to the House?

**Some hon. members:** Agreed.

**The Chair:** Thank you very much.

Just so you know, I will not be in the House tomorrow morning, so I will take this to the House on February 25 upon my return.

That deals with our study of Bill S-9.

Thank you very much, and thank you to the legislative clerks for joining me and for telling me that I would be okay today.

We'll move on to the next item on the agenda. We may have about half an hour, but probably not.

Madame Boivin, your motion had been deferred from the meeting on Monday until today, so I give you the floor to move your motion back onto the table, if you wish.

[*Translation*]

**Ms. Françoise Boivin:** Excellent. Thank you, Mr. Chair. And here I was thinking I would have only about 15 minutes to discuss this motion, when in fact I will have a half an hour on Monday and another half an hour today. I appreciate that.

I think I have basically covered the whole issue by now. Within the last hour, I received from the Parliamentary Secretary to the Minister of Justice a document on section 4.1 of the Department of Justice Act. I don't know whether this document has been distributed to all my committee colleagues. That would probably be useful to those who are interested in those operations. I have not had the time to study the document in order to figure out whether it truly meets the objective of my motion. I am not convinced that this is a real response.

I may instead wish to go over the point raised by my colleague Mr. Rathgeber.

[*English*]

We distributed some information to explain a bit of what was behind this. Again, I would just stress the point that it is not to have a huge inquiry. My colleague talked about the *sub judice* concept, which is not the case, because it's not about touching the case that is in front of the tribunal. Maybe not all of us, but a lot of us parliamentarians have been made aware because of that case of the obligation from

● (1700)

[*Translation*]

section 4.1 of the Department of Justice Act. That obligation is also set out in the Statutory Instruments Act and various other documents, and it is part of our role as legislators.

My intention here is simply to suggest that we hold a meeting. I understand that the agenda of the Standing Committee on Justice and Human Rights is very full, and it will become more so with the study of bills that will be introduced. That's why I have not set a deadline.

However, it would be a good idea to study the matter in subcommittee or standing committee, so that we can have the opportunity to talk to Department of Justice lawyers in order to understand—beyond the terminology of section 4.1—how that applies to real life. They could provide us with some examples—not necessarily discuss specific cases, but provide us with some idea. It's one thing to say that the minister must ensure that all the provisions of the bill are consistent with the Charter, but it's quite another to explain how the process works and what kind of verification takes place. There are experts on the topic.

I don't know whether it has to do with the fact that I'm interested in this issue, but I find that there are so many experts. Among other documents, I gave my colleague an article by Concordia University's Professor Kelly titled

[*English*]

"The Canadian Charter of Rights and the Minister of Justice: Weak-form Review within a Constitutional Charter of Rights".

[*Translation*]

Such statements worry me. I tell myself that I will at least be able to look people in the eye, tell them that, beyond politics, tests to ensure compliance with constitutional legislation and the Canadian Charter of Rights and Freedoms are carried out diligently, and explain to them what's involved in the process. So we can move on to the next topic.

[*English*]

**The Chair:** Merci.

Our next speaker is Ms. Findlay.

**Ms. Kerry-Lynne D. Findlay:** Thank you, Mr. Chair.

First, I'd like to say that of course this is taken very seriously by our government. I'm going to read into the record the document I have provided to Madame Boivin and Mr. Cotler, and then I will table it in both English and French.

**The Chair:** We have it in French, but we don't have it in English. Okay.

**Ms. Kerry-Lynne D. Findlay:** It reads as follows:

> Section 4.1 of the *Department of Justice Act* requires the Minister of Justice to examine government bills presented to the House of Commons and ascertain whether they are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and report any such inconsistency to the House of Commons.
>
> Proposed government legislation is reviewed for *Charter* and other legal risks throughout the policy and legislative development processes. Relevant risks are brought to the attention of senior officials and Ministers throughout the policy and legislative development processes and every effort is made to mitigate them.
>
> Once a government bill is introduced in the House of Commons, the Chief Legislative Counsel confirms (*i.e.*, certifies) that the requisite review of the legislation for consistency has taken place. If a Minister of Justice were to conclude that a given government bill was, at the time of introduction, inconsistent with the *Charter*, a report under section 4.1 would be issued. The absence of a section 4.1 report means that the Minister had concluded that the government bill was not inconsistent with the *Charter*.
>
> Section 4.1 sets out the specific obligation of the Minister: the Minister must ascertain *whether there is inconsistency* with the *Charter*. The long-standing approach of the Department of Justice is that the Minister ascertains that there is an inconsistency between a proposed legislative measure and the *Charter* only where there is no credible argument to support the proposed measure, that is, an argument that is reasonable, *bona fide* and capable of being raised before and accepted by the courts. The Minister exercises this responsibility based on the advice of Departmental officials.
>
> Under our constitutional system, all branches of government— Parliament, the executive and the courts—have responsibility for ensuring that *Charter* rights are respected, while permitting governments to act in the public interest. The system of *Charter* review put in place under section 4.1 ensures that each branch performs its appropriate role: 1) within the executive, proposed legislative initiatives are reviewed, taking into consideration any *Charter* risks that have been identified through the advisory process, and there is a certification that the necessary review has taken place upon introduction in the House of Commons; 2) it is for Parliament to debate the proposed law and to determine whether or not it will become law; and 3) finally, if a law is challenged, it is for the courts to review the laws passed by Parliament to determine whether they are constitutionally valid.
>
> The last 30 years of experience with the *Charter* shows that our system works well, and has produced a robust system of *Charter* rights review.

That is the document that with unanimous consent of the committee I would like to table in both English and French.

● (1705)

**The Chair:** Thank you, Ms. Findlay.

We have it in French. We don't have it in English. We will get it before the meeting is over, and it will be distributed to everyone. It is being copied right now.

**Ms. Françoise Boivin:** I just gave a copy in English.

**The Chair:** We are getting it, so everybody will have a copy.

Have you any further comment?

**Ms. Kerry-Lynne D. Findlay:** Just to finish up on that, I understand that it is a serious concern and I understand that it should be, but these processes have been in place for the many years since the act became law in 1985.

They have been followed by ministers of justice and ministry officials since that time. As I have pointed out, in what I've read, the whole point of review internally is to work throughout the legislative process so that when a piece of legislation is introduced, it should not trigger a 4.1 report, because it has already been fully vetted and fully considered.

When that analysis is done, it is a qualitative analysis; it is not based on any percentages or quotas. It's a qualitative analysis that is done, taking into account all our constitutional law, which would include section 1 considerations.

Thank you.

**The Chair:** Thank you very much.

Our next speaker to this motion is Mr. Rathgeber.

**Mr. Brent Rathgeber (Edmonton—St. Albert, CPC):** Thank you, Mr. Chair.

To my colleagues, first of all, thank you so much for your indulgence on Monday in setting this matter over for 48 hours to allow the committee to carefully consider it. I do consider it to be very serious, and I think we all should, with respect to legislation being charter compliant.

I also want to thank my colleague and my colleague's office for providing me with some wonderful bedtime reading, which she had referred to. It was 39 pages, and I got through it—

**Ms. Françoise Boivin:** I'm proud of you.

**Mr. Brent Rathgeber:** —plus the pleadings of the Federal Court decision in Schmidt v. the Attorney General of Canada.

Upon reflection in regard to all of that, and I remain very sympathetic to the motion, the reality is that I think it is improper for a legislative committee to undertake this study for a very simple reason. We are a legislative committee, and our response to any problem, perceived or real...and I don't know if this problem is perceived or real, but regardless, our solution is legislation. And the legislation is there.

If the allegation is that the legislation is not being complied with, I'm not sure what Parliament or a parliamentary committee can do about it. That's a matter for the courts, and this matter is before the court; it has been pled specifically in Schmidt v. the Attorney General of Canada. They will adjudicate it; they will hear evidence, and if there's a section not being complied with, they will do what they need to do.

I'm concerned on *sub judice*, although I do agree that it's only sort of tangential; it's pled, but it's not the centre of the lawsuit. My main opposition to this motion is that I don't believe that a parliamentary committee such as ours could factor a remedy even if we found that there was a problem. I hope that the documents tabled by the parliamentary secretary dispose of the motion, but if they don't, I will be forced to vote against it.

Thank you, Mr. Chair.

**The Chair:** Thank you very much.

Our next commentator is Mr. Marston.

**Mr. Wayne Marston:** Thank you, Mr. Chair.

I appreciate the comments as to what the committee can do. Committees are tasked with many tasks, but one of them is to make recommendations to government, not give directions to government.

The standards were what was being called into question, not the specific letter or the word of the legislation. From the standpoint of the standards, and whether or not this committee would look at studying whether the standards that are applied are to the level that they should be, there's some question on that.

Coming out of the discussions and the information that we could get in testimony with a study, we may well be able to make a reasoned explanation or recommendation to the government. I think that was worthy of consideration.

● (1710)

**The Chair:** Thank you, sir.

[*Translation*]

Ms. Boivin, go ahead.

**Ms. Françoise Boivin:** I will be brief.

I would like to respond to my Conservative colleague. I want to emphasize my appreciation for the fact that he took the time to read the motion. That's what we have to do when serious motions are put forward.

Here's how I have understood the parliamentary secretary's and Mr. Rathgeber's statements. They say that, in any case, the courts would be there to do their job if ever an error was made. That reminds me a bit of what would happen when I was working in labour law and a collective agreement was being drafted. Some people around this table may not agree with me, but I have always said that, when we produce something, we have to make sure it's as perfect as possible, even though perfection is unattainable.

Canada's legal system has rules. Jurisprudence and various other things provide us with tools, unless something totally new is created, in which case we have to go off the beaten track. I can understand that we may have a bit more difficulty in such cases. The best example is that of experts who talk to us about bills introduced by the government or the Senate and say that we have problems. You will tell me that this is their interpretation, but they say that we have problems when it comes to the charter, and that a given provision does not comply with the charter.

That's exactly the type of discussion or debate the Minister of Justice faced when section 4.1 was being studied and Department of Justice experts issued an opinion. I don't think it's appropriate to say that, in any case, the courts will do their job when we get to that stage. On the contrary, we should ensure, to the extent possible, that people subject to trial—those for whom we work, Canadians—do not have to go through the courts to find out whether or not the legislation complies with the charter.

There have been some challenges, and I don't think the fact that they were successful before the courts means that the courts are interfering in the wonderful world of legislative authority. All they are doing is restoring the right. The committee and House parliamentarians should have seen that. Section 4.1 was adopted so that people wouldn't have to go before the courts.

I will tell you the same thing I told my clients when we were drafting a collective agreement. I would tell them that, if I did my job properly, they wouldn't see me again, and if I didn't do my job properly, they would see me again, as all kinds of things would be unclear and there would be grievances arising from interpretation. If we do our job as legislators properly and ensure that our laws are consistent with charters and with the division of powers under the Canadian Constitution, in principle, there shouldn't be any problems.

I find our approach to be a bit casual, and I think we are trusting somewhat blindly if we think that, in any case, the courts will ultimately take care of things. As you and I know, anyone who has had to go before the courts knows how expensive that is. We are familiar with the issues in terms of access to justice. I am not sure I want to say to Canadians that, since the legislation may be illegal, all they have to do is go before the courts and challenge its legality under the charter.

The legal action taken by Mr. Schmidt may be sounding the alarm. That gave us all a bit of a jolt and made us wonder whether the tests are really being carried out properly or, as the parliamentary secretary said, whether the system has always worked well over the past 30 years.

We know that many appeals under the charter have been successful. I would like to say to the parliamentary secretary that all those appeals mean something. If I was the lawyer in charge of the case, I would be asked why I had said this matter made sense, yet our case was criticized by the Supreme Court of Canada. Don't tell me that, over the past 30 years, no appeals under the charter have been successful before the Supreme Court of Canada. On the contrary, we could come up with a whole list.

That doesn't mean that Department of Justice experts won't sometimes say so. I have prepared many such legal opinions, where we say that a given theory makes sense and state what we think is important, but where another argument is possible. At least, we know that the exercise is being carried out.

● (1715)

I'm worried about the fact that we are somewhat indifferent. That concern has made me suggest that the committee view the matter from another angle. I don't think it's enough to say that this is what the law stipulates, this is how things are done, and that, for an argument to pass the test, it must be bona fide and reasonable, likely to be heard and accepted by the courts. Usually, the courts will accept and hear just about anything submitted to them. However, that doesn't mean a careful analysis has really been carried out pursuant to the charter.

I think our obligation is not to rely on the courts in the future, as that does not necessarily contribute to Canadians' well-being. We have to do our work properly from the outset in order to avoid that kind of a situation.

[*English*]

**The Chair:** Merci.

Our next commenter is Mr. Mai.

[*Translation*]

**Mr. Hoang Mai:** Thank you very much, Mr. Chair.

[*English*]

I just want to support what my colleague Madame Boivin has been saying.

I'd like to thank the Parliamentary Secretary to the Minister of Justice for her answer regarding the motion. I listened to and I read the answer, and I got the feeling that this is the mechanism and this is how it works, but I'm still not sure what happens in practice. As Madame Boivin mentioned, there are a lot of cases where, with the system that is in place, things have not been checked, or there was something wrong. I think the purpose of this motion and this study is for us to really understand.

Perhaps to speak to what Mr. Rathgeber was saying, I might not have as much experience as a lot of people here, but I was sitting on the finance committee, and we looked at not necessarily just things, specifically, but at getting recommendations to actually find ways to make things easier.

I find that one of the problems with the way the system is right now is that it costs Canadian taxpayers a lot of money. Bringing legislation to court and having the whole issue in front of the court costs a lot of money. It costs taxpayers, whether it's from the federal government perspective or the provincial government or things like that.

There are a lot of issues with respect to that—

**The Chair:** Mr. Mai, I can help you out a little bit.

We did check to see if the motion was within the scope of this committee and its function, and it is. So the motion is in order to be debated and....

**Ms. Kerry-Lynne D. Findlay:** To be debated and voted upon.

**The Chair:** Yes.

**Mr. Hoang Mai:** I'd like to thank you, Mr. Chair. Hopefully that will answer Mr. Rathgeber.

**The Chair:** Okay.

Is there any further discussion on this item?

Mr. Casey.

**Mr. Sean Casey:** I won't take long. Mr. Cotler spoke last week, and there'd be nothing I would even be able to express that would hold a candle to the lucidity and completeness of his arguments, but there was one point he wished me to raise, which I simply want to get on the record, in the course of his presentation at the last meeting.

There was some question as to whether or not there was any sort of ceremony to mark the 20th anniversary of the charter. I can advise that on April 17, 2002, there was a special ceremony attended by 1,500 high school students, Prime Minister Chrétien, and Justice Minister Martin Cauchon at the National Arts Centre.

In specific response to a couple of the points raised by Mr. Rathgeber, there have been numerous instances of laws introduced by this government and others that have been found to be unconstitutional. I disagree with his interpretation that this committee can't do anything if the law isn't being followed. It is entirely open to this committee to change the law to some mechanism that is more workable.

Whether the section 4.1 review, as it's presently framed by the people who are doing the review, is the right way to go is something that we should be scrutinizing. Is there a role for the Library of Parliament in this? I think that is fair game for the committee to look at.

I applaud my colleague for the motion, and I'll be voting in support of it.

● (1720)

**The Chair:** Thank you very much.

Seeing no further discussion, I will call the vote.

[*Translation*]

**Ms. Françoise Boivin:** I call for a recorded vote.

[*English*]

**The Chair:** Oh, you want a recorded vote.

[*Translation*]

**Ms. Françoise Boivin:** Yes.

[*English*]

**The Chair:** A recorded vote has been called.

(Motion negatived: nays 6; yeas 5)

**The Chair:** That's the end of today's agenda.

Just so committee members know, when we return after our break we will be dealing with Bill C-273, the private member's bill from Ms. Fry.

**Mr. Brent Rathgeber:** Sorry, which one?

**The Chair:** It's Bill C-273 on cyberbullying.

If you have witnesses whose names have not been submitted, make sure you get them in so we can make those arrangements for that week. We'll be dealing with it that week.

Thank you very much, and the meeting is adjourned.