IN THE HIGH COURT OF JUSTICE **Claim No. CO/1567/2007**

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

B E T W E E N:

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH
(2) CAMPAIGN AGAINST ARMS TRADE

Claimants

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

-and-

BAE SYSTEMS PLC

Interested Party

CLAIMANTS' SKELETON ARGUMENT

For hearing: 14-15 February 2008

A. The decision

1. On 14 December 2006, the Director of the Serious Fraud Office ("the Director") announced that he was ending the SFO's investigation into bribery and corruption by BAE Systems Plc ("BAE") in relation to the Al-Yamamah military aircraft contracts with the Kingdom of Saudi Arabia.

2. The Director stated in a press release issued on that day that he had made his decision "following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international

security". He stated that he had "balance[d] the need to maintain the rule of law against the wider public interest" in reaching his decision, and that no weight had been given to commercial interests or to the national economic interest [77].

3. Further reasons for the decision were given by the Attorney General in a statement to Parliament on the same day [78]. The Attorney General stated that the Prime Minister and the Foreign and Defence Secretaries had:

> "expressed the clear view that continuation of the investigation would cause serious damage to the UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment.
>
> Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions precludes me and the Serious Fraud Office from taking into account considerations of the national economic interest or the potential effect upon relations with another state, and we have not done so. "

4. In its paper provided to the OECD on 12 January 2007, the Director and the Attorney General stated:

> "10. The SFO and the Attorney General at all time had regard to the requirements of the OECD Anti-Bribery Convention. In particular, as the Attorney General's statement makes clear, the considerations set out in Article 5 of the Convention played no part in the SFO's decision to discontinue the investigation …"

5. The decision to abandon the investigation was taken, it is claimed, following renewed threats made by members of the Saudi Arabian royal family that if the investigation was continued, Saudi Arabia would cancel a proposed order for Eurofighter Typhoon aircraft and would withdraw security and intelligence co-operation. These threats were apparently made following BAE's discovery that the SFO was about to obtain access to

details of various Swiss bank accounts[1]. It has been widely reported that the threats were made by Prince Bandar (and his agents), the alleged beneficiaries of corrupt payments under investigation by the SFO (Guardian, 7 June 2007).

B. The parties

6. Corner House Research is a not-for-profit company limited by guarantee. It engages in detailed research and campaigning on issues of bribery and corruption in international trade. Its long-standing interest and involvement in issues of bribery and corruption is well known and has been recognised by the Courts. See *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [91] [566].

7. Campaign Against Arms Trade is an unincorporated association. CAAT is a campaigning organisation, engaging in research, lobbying and peaceful protest against the arms trade.

8. The Director of the Serious Fraud Office ("the Director") is appointed by and subject to the superintendence of the Attorney General. He has power to commence and discontinue investigations into cases of serious fraud pursuant to Part I of the Criminal Justice Act 1987 [418].

9. The Interested Party, BAE, is a multinational arms company, based in the UK and listed on the London Stock Exchange. It is not participating in this claim for judicial review.

C. The claim

10. The Claimants have been granted permission to challenge the Director's decision on the following grounds:

[1] "I think it was perhaps more to do with the pursuit of the money trail, particularly through the accounts in Switzerland" [RW3/57 Q239] and "pursuing the investigation into the Swiss accounts, or indeed attempting to bring

a) *Article 5 of the Convention*: The Director took into account the effect which he was advised that continuing the investigation would have on relations with Saudi Arabia, and, in particular, advice that continuation of the investigation would cause serious damage to the UK/Saudi security, intelligence and diplomatic co-operation, which was likely to have an adverse effect on (1) national security and (2) the UK's highest priority foreign policy objectives in the Middle East. In so doing, the Director misdirected himself in law, and took into account irrelevant considerations. Article 5 of the OECD Convention properly interpreted precluded the Director from taking into account the potential effect of an investigation or prosecution on relations with another State, even where the prosecuting State is concerned that the damage caused to those relations will have an adverse effect on national security.

b) *Saudi Arabia's international law obligations*: The Director failed to take into account as a relevant consideration that if the threats made by Saudi Arabia were carried out, Saudi Arabia would commit an internationally wrongful act and violate binding international law obligations, including those established by the UN Security Council, and assurances repeatedly given by Saudi Arabia at the highest levels.

c) *Tainted advice*: The advice on the public interest given by Ministers was tainted by irrelevant considerations, including commercial matters and the effect of the investigation on the UK's relations with Saudi Arabia. Thus the advice could not form the basis of a lawful decision by the Director.

d) *Damage by discontinuance*: The Director failed to take into account the threat posed to the UK's national security, the integrity of its system of criminal justice and the rule of law if other countries came to know that the UK gives in to the type of threats made by Saudi Arabia in this case.

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any prosecution which involved naming the Saudi Princes…" Intelligence and Security Committee Annual Report 2006-2007, para. 107 quoting letter from Robert Wardle dated 16 October 2007.

e) *Shawcross*: The Shawcross exercise was conducted improperly in that Ministers expressed views as to what the Director's decision should be.

f) *Rule of law*: It was unlawful for the Director to permit threats or blackmail to influence the decision to discontinue the investigation.

11. The grounds overlap somewhat and the case as a whole raises important issues concerning the rule of law, the separation of powers, the proper role of the executive in prosecution decisions and the duties and functions of an independent prosecutor faced with threats akin to blackmail by those alleged to be involved in the criminal conduct under investigation. The Director's decision expressly seeks to balance "the need to maintain the rule of law against the wider public interest" [77]. The essential issue is whether such a balancing exercise was lawful and proper in the circumstances of this case, and whether an independent prosecutor should have allowed threats made by officials of a foreign state (particularly those allegedly complicit in the criminal conduct under investigation) to prevail over the interests of justice in the prosecution of serious crime. Ultimately, these issues are questions of law for the common law courts, exercising their important supervisory jurisdiction over the conduct of criminal investigations, with the aim of ensuring that the rule of law is upheld.

D. Facts

12. In July 2004 the SFO began its investigation into allegations of bribery and corruption by BAE in relation to the Al-Yamamah contracts [Wardle 1/4].

13. On 14 October 2005, the SFO issued a statutory notice to BAE requiring it to disclose details of payments to agents and consultants in respect of the Al-Yamamah contracts [Wardle 1/7].

14. In response to the notice, BAE's solicitors wrote to the Attorney General enclosing a memorandum and requesting that the investigation be halted on commercial and

diplomatic grounds. BAE expressed concern that the Saudis would view disclosure of documents to the SFO as a breach of confidentiality and trust (although the memorandum admits that similar information about "the names of consultants engaged by the Company and the amounts paid to them" had previously been provided to the Inland Revenue, apparently without any adverse commercial or diplomatic consequences [RW4/5]). The Attorney General's officials replied to BAE stating that it was inappropriate to make such representations on a "private and confidential" basis and forwarded the letter and memorandum to the SFO [RW4/3-7]. It was thus the company under investigation which made the original public interest representations seeking to have the investigation stopped. Even the representations subsequently made by departments of state to the SFO appear to have been made at the instigation of BAE: ("[BAE] would make further representations to the Ministry for them to make representations to us [the SFO]" [RW4/14]).

15. On 2 December 2005, the Director and the Attorney General met and agreed to commence a Shawcross exercise, under which Ministers would be invited to comment on the public interest considerations relevant to the investigation.

16. On 6 December 2005 the Attorney General's office wrote to Ministers commencing the Shawcross exercise. The letter drew attention to Article 5 of the Convention and informed recipients that "you will need to have regard to the Convention in any comments made in response to this letter" [Wardle 1/17, RW2/2].

17. On 16 December 2005, the Cabinet Office responded to the letter of 6 December. Despite the request to Ministers to comply with Article 5, the Cabinet Office response "assume[s] that it may be possible for considerations of the kind mentioned in Article 5 at least to be taken into account for the purpose of taking an early view on the viability of any investigation" [RW2/5]. Various concerns were raised, including commercial matters and the risk that anti-terrorism co-operation might be endangered if the investigation continued [Wardle 1/18]. The request that responses have regard to the limitations imposed by Article 5 was ignored.

18. In January 2006, the Attorney General decided that the investigation should continue. The Shawcross representations made by Ministers were rejected. The Director agreed with the decision made [Wardle 2/8, RW4/24].

19. In July 2006, the Prime Minister met Prince Bandar of Saudi Arabia:

> "Bandar went into No. 10 and said "Get it stopped"… "Bandar suggested to [Jonathan] Powell[2] he knew the SFO were looking at the Swiss accounts… if they didn't stop it the Typhoon contract was going to be stopped and the intelligence and diplomatic relations would be pulled" (Sunday Times, 10 June 2007).

20. In September 2006, the Attorney General received further Shawcross representations in the form of a letter from the Cabinet Secretary, sent on the instructions of the Prime Minister [Wardle 1/23]. This letter is very heavily redacted but refers to the "recent course of the investigation [REDACTION]" that "has taken us to the brink of such consequences" [RW2/12]. It appears that the redacted references are to the SFO being close to obtaining access to the Swiss bank accounts, and the representations by Saudi officials on this matter:

> "I think it was perhaps more to do with the pursuit of the money trail, particularly through the accounts in Switzerland" (Robert Wardle, RW3/57 Q239)

> "…pursuing the investigation into the Swiss accounts, or indeed attempting to bring any prosecution which involved naming the Saudi Princes…" (Intelligence and Security Committee Annual Report 2006-2007, para. 107 quoting letter from Robert Wardle dated 16 October 2007).

> "it was the Swiss stuff that sent the Saudis over the top. The threat to cut off diplomatic and intelligence ties was a very real one"… "The Saudi threat was made in September after the royal family became alarmed at the latest turn in the fraud inquiry. Sources close to the investigation say the Saudis "hit the roof" after discovering that SFO lawyers had persuaded a magistrate in Switzerland to force disclosure about a series of confidential Swiss bank accounts" (Sunday Times, 19 November 2006) [10/268]).

[2] Then the Prime Minister's Chief of Staff.

21. The Attorney General adopted a principled stance to the "representations made by the Saudi representatives as to the repercussions which they say will ensure if the SFO investigation proceeds". He rejected the further Shawcross representations in a letter dated 3 October 2006 [RW2/13]. The Attorney General:

> "… [was] of the firm view that, if the case is in fact soundly-based, it would not be right to discontinue it on the basis that the consequences threatened by the Saudi representatives may result."

22. At this stage, the Saudis were at the "brink" of withdrawing security and intelligence co-operation and the order for Eurofighter Typhoon aircraft. Nonetheless, the Attorney General concluded that "it would not be right" to discontinue the investigation because these consequences may result. The Director agreed with this decision.

23. On 27 October 2006, the Assistant Director of the SFO wrote to the Attorney General's office expressing considerable scepticism about the escalation of Saudi threats. It was pointed out that both BAE and the Saudis had been well aware of the SFO's investigation and where it was leading for a considerable time, and this had not dissuaded them from agreeing the next phase of the Al Yamamah contract in December 2005. Further, there should be "some caution exercised when considering the views of [REDACTION] – remainder of paragraph" [RW4/26]. It appears possible that this redacted passage refers to Prince Bandar, or his associates or agents.

24. In November 2006, the UK Ambassador to Saudi Arabia met with persons whose identity has been redacted in the disclosed documents [RW2/17] but whom the Daily Telegraph reported were "representatives of the Saudi royal family" [10/277]. It was "suggested… that all intelligence co-operation was under threat".

25. Meanwhile, on 29 November 2006, the Guardian reported that access to the Swiss bank accounts had been obtained and they had been linked to Wafic Said, reported to be Prince Bandar's business manager [10/274, 291].

26. The Ambassador then met with the Director three times in November and early December 2006. The Ambassador told the Director that the threats to security "were as represented by the Cabinet Secretary's letter of 29 September 2006" [Wardle 1/28]. However, as time passed "the representations on public interest [were] made with renewed and increasing force by HM Ambassador" [RW4/27].

27. By early December 2006, newspapers were reporting that the Saudis had told the government that the sale of Eurofighter Typhoon aircraft would be cancelled within 10 days, unless the investigation was brought to an immediate end. To emphasise the point, it was reported that Prince Bandar had spent the week in Paris negotiating an alternative purchase of Rafale fighter aircraft with President Chirac [10/276].

28. At the same time, the SFO contemplated approaching BAE and offering a plea bargain. If BAE would plead guilty to lesser charges, the wider investigation would be dropped. Such a course would have avoided any need to name members of the Saudi royal family in open court. On 5 December 2006, the Attorney General informed the Director that he had no objection to offering BAE a plea bargain on this basis [Wardle 1/29].

29. On the same day (5 December 2006), Prince Bandar visited London and met Foreign Office officials (Hansard 16 May 2007, Col 781W). No disclosure has been given of the representations he made during that meeting. The following day, the Prime Minister's office informed the Attorney General that the Prime Minister wished to make further representations before any offer of a plea bargain was made to BAE.

30. On 8 December 2006, the Prime Minister wrote a "Personal Minute" to the Attorney General, attaching assessments prepared by Cabinet Office and Foreign Office officials [RW2/14].

31. On 11 December 2006, the Prime Minister met with the Attorney General. A letter recording the meeting has been disclosed at [RW2/30] in redacted form. It is clear from

this carefully drafted letter that the Prime Minister expressed his view as to what the Director's decision should be:

> Summing up, the Prime Minister said… This was the clearest case for intervention in the public interest he had seen [RW2/31].

32. Following further meetings, the Director informed the Attorney General at a meeting on 13 December 2006 that he had concluded that it would not be in the public interest to continue the investigation, but would reflect on the issue overnight [Wardle 1/41, RW4/27-28]. At that meeting, the Attorney General said:

> "… whilst he had wished to test the SFO case, he was committed to supporting it provided it was viable, whatever the outcome might be. He was extremely unhappy at the implications of dropping it now" [RW4/28].

33. The following morning, the Director confirmed his decision [Wardle 1/43] and the decision was announced by press release and parliamentary statement by the Attorney General on the same day [Wardle 1/52-53].

34. Subsequently, and as predicted by the SFO, the US Department of Justice and the Swiss authorities have commenced investigations [RW4/28].

E. Submissions

E1. Ground 2.1: Breach of the OECD Convention

a. Jurisdiction of the Court to interpret the OECD Convention

35. It is a well-established principle of English public law that where a public body announces that it will comply with an international law obligation when making a decision, or that it has taken into account such obligations when taking its decision, the Court will review the decision for compliance with that obligation (see *R v SSHD, ex*

*parte Launde*r [1997] 1 WLR 839 per Lord Hope at 867F; *R v DPP, ex parte Kebilene* [2000] 2 AC 326 at 367D – H, 375F – 376A, 340 – 341, 352 and 355). The Court will consider whether the public authority has misinterpreted the obligation in question when taking its decision. If it did so, then it will have failed to take into account relevant considerations when reaching its decision, and should reconsider it on the correct legal basis.

36. The Attorney General has stated to Parliament and the OECD that this decision was taken in accordance with the OECD Convention and that considerations which the Director was precluded from taking into account under Article 5 were not taken into account by him:

> "Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions precludes me and the Serious Fraud Office from taking into account considerations of the national economic interest or the potential effect upon relations with another sate, and we have not done so" [5/78].

37. Further, the UK government has publicly stated that the UK will comply with the Convention, including Article 5, when making prosecution decisions. Pursuant to Article 12 of the OECD Convention, the OECD Working Group has visited the UK and reported on its implementation of the Convention. Amongst other matters, the OECD has expressed concern that the involvement of the Attorney General in giving consent for a prosecution "involves the possible consideration of UK interests that the Convention expressly prohibits in the context of decisions about foreign bribery cases" [1266/170]. However, to allay the OECD's concerns, the Attorney General:

> … specifically confirmed that <u>none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute</u>. Moreover, the Attorney-General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution (OECD UK Phase 2 Report on the Implementation of the Convention, 2005) [1266/171].

The same assurance must equally apply to decisions to discontinue an investigation before a formal decision to prosecute is taken. Indeed, when commencing the Shawcross exercise in this case, the Attorney General reminded Ministers that he had given this assurance [RW2/2].

38. In these circumstances, it is clear that the Court has jurisdiction to interpret Article 5 of the OECD in this case.

39. The Director has sought to argue that the *Launder* principle does not apply in this case. He makes this assertion on the basis that his view *at the time the decision was made* was that he would have taken the same decision, even if he was acting in breach of the Convention. In their grounds at paras 41 – 44, the Claimants contended that this was an impermissible attempt at *ex post facto* justification of a decision. This was expressly denied at paragraph 20 of the amended summary grounds [25/1611]:

> The Claimants' assertion that this is inadmissible retrospective reasoning is misconceived… The fact that he would have made the same decision, even if he had taken a different view of the scope of Art. 5, is a further point that there was no reason for him to explain at the time of the decision… This point is consistent with the reasons he gave and there is absolutely no reason to doubt his evidence.

That denial is not supported by the witness statement of the Director. At paragraph 51 of that statement, the Director candidly admits that he "did not specifically consider the question at the time". In these circumstances, it is difficult to understand why the non-justiciability point is maintained in the detailed grounds at paras. 22 – 23. The point is inconsistent with the Director's admission in his witness statement that he did not consider the issue at the time. A request for an explanation of the inconsistency in correspondence has been rebuffed with a wholly unsatisfactory response (letters of 19 and 20 December at Tab 2).

40. The Director's attempt to rely on *ex post facto* reasoning should be rejected: *Wing Kew Leung v Imperial College* [2002] EWHC 1358 (Admin), at paragraphs 28 – 30 and *R v Westminster CC, ex parte Ermakov* [1996] 2 All ER 302. In this regard it is particularly

important that Parliament and the OECD have both been assured by the Attorney General that the Director's decision was taken on the basis that considerations precluded by Article 5 were not taken into account.

41. In any event, even if the Director's new reasons were to be admitted, and were accepted as accurate, they are not sufficient to take this case outside the *Launder* principle. The case now advanced by the Director does not cure the flaws in the reasoning of the decision. The Director does not suggest that his understanding of the proper construction of Article 5 of the OECD Convention was not relevant to his decision. In the light of (a) the Attorney General's statements to Parliament and the OECD set out above; and (b) the Assistant Director's confirmation that "at all times we had regard to the terms of Article 5 of the OECD Convention" [Garlick 5] no such argument could properly be advanced. In such circumstances, the Claimants' case that the Director misdirected himself in law, and accordingly took into account an irrelevant consideration remains good, and it remains necessary and appropriate for the Court to consider and rule upon the proper interpretation and scope of Article 5 of the OECD Convention.

42. The Director accepts, in particular, that he made his decision in the belief that the considerations he took into account were not precluded from being considered under Article 5. He was thus able to make his decision without having to face the political consequences, and the consequences before the OECD, of admitting publicly to a breach of the OECD Convention. Regardless of the assertion in the Detailed Grounds, if he erred in law in believing that his actual decision complied with the Convention, it cannot be said with certainty that the same decision would have been taken in any event had he correctly understood it to be a breach of the Convention: compare, for example, *R (Bradley) v Secretary of State for Work and Pensions* [2007] EHWC 242 (Admin) at paragraphs 85 - 86. As in *Launder*, the Director should be given an opportunity to reconsider his position on the correct legal basis.

b. The Convention

43. The United Kingdom, along with all other OECD member states, has ratified the Convention [348]. The purpose of the Convention is to remove barriers to the prosecution of international bribery and corruption. The Convention is a multilateral treaty, to which 37 parties are now signatories, under which the parties all agree not to accede to diplomatic threats and other forms of blackmail commonly used to frustrate embarrassing international bribery prosecutions in exchange for a similar promise by other states. All states thereby benefit and the rule of law is promoted and upheld.

44. The preamble to the Convention states:

> *The Parties*
>
> *Considering* that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions…
>
> *Recognising* that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up.
>
> *Recognising* that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence.

45. Article 1 of the Convention requires parties to create a criminal offence of the bribery of a foreign public official.

46. Article 5 of the Convention provides for enforcement provisions:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

47. The Claimants submit that Article 5 of the Convention prohibits a prosecutor from abandoning an investigation on the basis of threats to withdraw security and intelligence co-operation. In particular:

a) The Convention is a multilateral treaty. Its purpose was to ensure that all OECD countries present a combined and united front against bribery and corruption of foreign public officials. Bribery has serious consequences:

> We recognise that corrupt practices contribute to the spread of organised crime and terrorism, undermine public trust in government, and destabilise economies (G8, Fighting High Level Corruption, July 2006) [874].

b) Cross-border corruption is particularly difficult to eliminate because the bribed foreign public official will often be senior and able to use the machinery of his state to impose adverse consequences on the state that exposes his conduct. The foreign official or his associates or agents may be in a position to make threats and apply blackmail to ensure that his conduct is not exposed, or to protect the interests of the company which has purchased his cooperation. When faced with such threats, the demands of *realpolitik* mean that bribery prosecutions will often come a poor second. This is a central element of the mischief that Article 5 was intended to prevent or correct.

c) If states capitulate to such threats, the end result is that bribery flourishes. Equally, if all the developed democratic countries that make up the OECD maintain the same common high standard of refusing to abandon bribery investigations on the basis of diplomatic threats (real or bluffed), everyone ultimately benefits. Each state agrees to limit its freedom of action in individual cases in order to secure long term benefits for all. The Convention must be construed with these purposes in mind, which are common to much international law. The classic example is the four 1949 Geneva Conventions. Under the Geneva Conventions, each party agrees to forego many methods or means of warfare that might permit it to defend itself more effectively and with

lower casualties amongst its citizens against an unlawful and unprovoked attack, or to win a lawful war. As in the case of the OECD Convention, each party agrees that considerations of national security cannot be permitted to override the fundamental protections guaranteed by the Geneva Conventions. By following the terms of the 1949 Geneva Conventions, all states (and their citizens) benefit in the long run.

d) The same considerations apply to the OECD Convention. Its purpose is to deny parties the freedom of action they would otherwise enjoy in order to develop a long term collective benefit for all parties. Unilateral determinations of national security are inconsistent with that collective benefit under the treaty, in circumstances where the drafters have not expressly provided for a national security exception.

e) The Convention has no provision allowing a national security exception, and Article 5 provides that the effect on relations with another state may not be taken into account when making investigation and prosecution decisions. This phrase must be construed in accordance with the object and purpose of the Convention, so as to ensure that the Convention has real and practical effect. The kinds of effects on relations that might occur if a bribery investigation is continued can easily be identified. They include a withdrawal of diplomatic co-operation, ending of co-operation on intelligence sharing, and other similar matters. These are precisely the matters relied upon by the Director in this case.

f) However, Article 5 requires that these effects should be ignored because they are effects on the relationship between states. The Convention cannot properly be interpreted to allow one state to make diplomatic threats to another to achieve the aim of ending a bribery investigation. Such conduct is squarely prohibited by the object and purpose of the Convention and the wording and spirit of Article 5: it would defeat the purpose of the multilateral Convention under which states

each agree not to submit to pressure or blackmail in individual cases to advance the common good for all states.

g) If Article 5 were to be read so as to permit the SFO to take into account the alleged national security effects of damaged relations with Saudi Arabia, this would frustrate the purpose of Article 5 and undermine the entire Convention. A system of multilateral commitments would be replaced by unilateral actions. There will always be such "effect[s]" if relations with another state are damaged. Article 5 requires that these effects must be ignored because of the importance of preventing bribery and corruption in international business transactions. As the SFO Case Controller put it in a memorandum to the Director:

> "Article 5 OECD… envisage[s] an independent role for law enforcement outside of economic or political considerations. To have any meaningful effect they must have application, regardless of the seriousness of the consequences stated. There [are] always likely to be economic and political consequences of any major enquiry into defence contracts. That is why such considerations must ultimately be irrelevant to the independent conduct of such enquiries" [RW4/21].

h) There is no express national security exception in the treaty. Nor should one be implied:

i) Where a national security exception is intended, treaties make express provision. For example:

a) In *Sirdar v Army Board* [2000] ICR 130 at [16] (women in Royal Marines), the ECJ rejected the submissions of the United Kingdom that there was:

> "inherent in the [EC] Treaty a general exception covering all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might

impair the binding nature of Community law and its uniform application".

The same principles apply in the present case. A general national security exception should not be implied into a multinational treaty where to do so would impair its effectiveness.

b) The United Kingdom is a party to a significant number of bilateral treaties that include express provisions allowing for a national security exception, indicating that where the drafters intended to allow for a national security exception they opted to do so explicitly. Such treaties have been negotiated and adopted contemporaneously with the OECD Convention. See, for example:

(1) The 1994 *Treaty between the USA and the United Kingdom on Mutual Legal Assistance in Criminal Matters*, at Article 3(1): "The Central Authority or the Requested Party may refuse assistance if: (a) the Requested Party is of the opinion that the request, if granted, would impair its sovereignty, security or other essential interests, or would be contrary to important public policy".

(2) The 1992 *Agreement between India and the United Kingdom concerning the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds and instruments of crime and terrorist funds*, at Article 6(1): "Assistance may be refused if: (a) the Requested Party is of the opinion that the request, if granted, would seriously impair its sovereignty, security, national interest or other essential interest."

(3) The 1994 *Agreement between the United Kingdom and Paraguay concerning mutual assistance in relation to drug trafficking*, Article 6 (identical language as above)

(4) The 1988 *Treaty between Australia and the United Kingdom of Great concerning the Investigation of Drug Trafficking and Confiscation of the Proceeds of Drug Trafficking*, at Article 6(2)(a) (identical language).

Where the UK government wishes to be able to avoid an international law obligation on national security grounds, it makes that clear by using express language. Reading a national security exception into the OECD Convention would make the language of these other instruments superfluous or redundant.

c) The same situation pertains in relation to numerous multilateral treaties to which the UK is party:

(1) The 1949 *Geneva Convention Relative to the Treatment of Prisoners of War* provides for a national security exception to be invoked in specified circumstances (see Article 103: "A prisoner of war shall not be confined while awaiting trial unless … it is essential to do so in the interests of national security") whereas on matters on which it is silent no national security exception is allowed.

(2) The 1966 *International Covenant on Civil and Political Rights* includes a number of provisions which explicitly permit a national security exception (Articles 12(3) (free movement), 13 (expulsion of aliens), 14(1) (public hearings in court), 19(3)(b) (freedom of expression), 21 (freedom of assembly)

and 22(2) (freedom of association), whereas for all other rights there is no national security exception.

(3) The *General Agreement on Tariffs and Trade 1994* provides a general "essential security" exception in Article XIV.[3]

(4) The 1998 *Statute of the International Criminal Court* also recognises exceptional circumstances in which a national security exception will limit an obligation under the Statute: the Article 93 obligation to cooperate includes a limitation "if the request concerns the production of any documents or disclosure of evidence which relates to its national security" (Article 93(4)).

d) The practice in relation to OECD conventions also indicates that where the OECD recognises a place for "essential interests" (including national security) to limit the obligations under a convention, it has made explicit provision. See, for example, the 1988 Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, at Article 21(2).[4]

e) The UK is a party to each of the treaties referred to above. These examples indicate that where the UK and other States have sought to introduce a national security exception into a bilateral or multilateral treaty they have done so explicitly. In the absence of

[3] "Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations;"

[4] "Except in the case of Article 14, the provisions of this Convention shall not be construed so as to impose on the requested state the obligation: … b. to carry out measures which it considers contrary to public policy (*ordre public*) or to its essential interests".

any such provision in the OECD Convention, the UK and other parties are not entitled – as a matter of treaty law – to invoke a national security exception to justify actions under the Convention.

ii) In *Treaties and National Security Exceptions* (2007), Professor Rose-Ackerman of Yale University, a leading academic legal authority on corruption law, considers whether, in the absence of any express provision, there is an implicit national security exception in relation to the obligations under the OECD Convention, including Article 5 [1415]. She concludes that there is not. There is no general or inherent right in treaty law to invoke a national security exception to excuse compliance with a treaty.

iii) Similarly, in *The OECD Convention on Bribery: A Commentary*, Ed. Pieth et al, Cambridge University Press (2007), Peter Cullen distinguishes between national security arguments based on considerations of international relations, and free-standing national security arguments, such as those where a prosecution would lead to the revelation of defence secrets [413]. In relation to the former, Cullen has no doubt that such arguments cannot be sustained in light of Article 5: "National security arguments based on considerations of international relations would also, clearly, fall foul of the Article 5 prohibition". The threats made by Saudi officials in this case fall into the prohibited category.

iv) The absence of an express or implied security exception is confirmed by the interpretation of the Convention in accordance with the customary rules of treaty interpretation reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (see ICJ, *Advisory Opinion of 9 July 2004 on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Reports, para. 94). Article 31(3)(c) provides

that in interpreting the Convention there shall be taken into account "any relevant rules of international law applicable in the relations between the parties". These rules include in particular the binding obligations imposed by relevant Security Council resolutions, including Resolution 1373, which commits all UN member states, including Saudi Arabia, to cooperate and share information on terrorist activities. That Security Council obligation removes any freedom that Saudi Arabia might claim to be able to threaten the UK with the withdrawal of cooperation in the circumstances of this case. Putting it another way, the UK should have been aware that if Saudi Arabia had given effect to its threat it would have committed an international wrongful act, violating SC 1373. By acceding to the threat of an internationally wrongful act the UK has, in effect, colluded with Saudi Arabia in undermining the requirements of SC 1373. Article 16 of the ILC Articles on State Responsibility is here relevant. It provides:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> > (*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> >
> > (*b*) The act would be internationally wrongful if committed by that State."

By acceding to a threat from Saudi Arabia the UK has brought itself within the terms of Article 16.

v) Further, the Director has adopted an argument which seeks to allow him to go beyond that which would be permitted if the OECD Convention had an express national security exception. International case law recognises the limited scope of national security exceptions even when they are explicitly provided for. In particular, it is established that the State invoking the exception has no right to self-judge its application: that is a matter for objective determination and a matter in which the courts

are competent. The Director seeks to determine unilaterally a right to invoke a national security in the context of a treaty which is silent on that subject when it could not adopt that approach if the treaty had an express provision:

a) In the *Oil Platforms* case the ICJ recently had to interpret and apply Article XX(1)(d) of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran and the US ("The present Treaty shall not preclude the application of measures… (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.") The Court held that such provisions were not self-judging, had to meet objective criteria, and were to be assessed by the Court:

> "As the Court emphasized, in relation to the comparable provision of the 1956 United States - Nicaragua Treaty in the case concerning Military and Paramilitary Activities in and against Nicaragua, "the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose"; and whether a given measure is "necessary" is "not purely a question for the subjective judgment of the party" (ICJ Reports 1986, p. 141, para. 282), and may thus be assessed by the Court." (2003 ICJ Reports, p. 183, para. 43).

b) The same approach has recently been adopted in the context of bilateral investment treaties: see *LG&E v Argentina*, Decision on Liability, 3 October 2006, at para 212 (interpreting Article XI of the 1991 Argentina/US bilateral investment treaty ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of

international peace or security, or the protection of its own essential security interests") as not self-judging).

vi) The absence of a national security exception in the Convention means the Director cannot claim a treaty right to invoke considerations of national security to justify his actions. That does not mean, however, that in general international law there may not be exceptional circumstances in which a State could invoke a national security requirement as a necessary measure. This is envisaged by the law of state responsibility, as reflected in the International Law Commission's Articles on State Responsibility.

a) Article 25 of the ILC Articles (Necessity) provides that:

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> > (*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> >
> > (*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> > (*a*) The international obligation in question excludes the possibility of invoking necessity; or
> >
> > (*b*) The State has contributed to the situation of necessity."

b) The International Court of Justice has confirmed that ILC Article 25 reflects a rule of general international law. In the *Case Concerning the Gabcikovo-Nagymaros Project,* the International Court of Justice confirmed that:

> "the state of necessity is a ground recognised by customary

> international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis." (1997 ICJ Reports, p. 40, at para. 51)

The Court added:

> "the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met." (Ibid.)

c) The Commentary to the ILC Articles also emphasises the narrow and exceptional scope of Article 25:

> "The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognised as a circumstance precluding wrongfulness."[5]

d) In the *Gabcikovo-Nagymaros Case* the Court identified the basic conditions that have to be met if a State is to be entitled to invoke necessity:

(1) the act must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations;

(2) that interest must have been threatened by a "grave and imminent peril";

[5] Report of the ILC, 53rd Session, 2001, at p. 80.

(3) the act being challenged must have been the "only means" of safeguarding that interest;

(4) that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and

(5) the State which is the author of that act must not have "contributed to the occurrence of the state of necessity".

The ICJ confirmed that "those conditions reflect customary international law" (ibid., para. 52). As such, these conditions are part of English law. See *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 and Fatima, *Using International Law in Domestic Courts* (2005) para. 13.1-8.

e) The Director has not sought to justify his actions by reference to these conditions, and could not properly do so. On the evidence that is available it cannot plausibly be asserted that conditions (2) and (3), amongst others, have been met. There is no indication of any assessment by the UK of whether there were other means available to safeguard the UK's essential interest, even assuming it to have been threatened. In any event, the approach taken by the ICJ in the *Advisory Opinion of 9 July 2004 on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* makes such a claim wholly implausible: the ICJ rejected Israel's claim of necessity ("the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction", 2004 ICJ Reports, p. 195 at para. 140)).

f) It follows that the UK is not able to rely on a claim of necessity under the law of state responsibility to preclude wrongfulness in respect of it violations of the OECD Convention.

i) In light of the above, even if, contrary to the Claimants' case, there is a narrow and unwritten national security exception, that exception could only be limited to matters outside the scope of Article 5 and unrelated to relations between states. For example, if a bribery prosecution would cause damage to national security which flowed from, for example, the disclosure of the identity of an agent, it could be said that this would not offend against Article 5. No such free-standing reason has been identified here.

j) The Director's case is encapsulated in his reliance on Pufendorf's *Law of Nature and Nations* (1688) in the Detailed Grounds: ("For since every prince is obligated first of all to protect his own subjects, in all promises which he makes to outsiders he understands this condition: in so far as the safety of the state permits"). It is respectfully submitted that this learned commentary reflects a pre-modern approach to the international legal order and can provide no assistance to the Defendant. It certainly cannot be used as an aid to interpret a treaty adopted in 1997.

48. In the circumstances, the Defendant erred in taking into account the threats made by the Saudis to withdraw diplomatic cooperation if the investigation was not stopped, even having regard to the potential adverse effects on national security of such a withdrawal of cooperation. Such threats plainly fell within the ambit of Article 5 of the Convention, as they directly concerned the potential effect of the investigation upon relations with another State. The Director therefore erred when he took his decision in the belief that he was not precluded by Article 5 from taking them into account.

49. In any event, as appears from the Attorney General's statement to Parliament [78], the Defendant did not rely exclusively on national security in making his decision, but also

took into account the "seriously negative consequences" of the withdrawal of Saudi diplomatic cooperation "for … our highest priority foreign policy objectives in the Middle East". This appears to refer to the Israel/Palestine question in particular. It was plainly contrary to Article 5 of the Convention to permit this consideration to influence the decision to stop the investigation.

E2. Ground 2.2: Saudi Arabia's international law obligations

50. If Saudi Arabia were to carry out its threats to withdraw diplomatic co-operation on intelligence and security matters, it would be in breach of its own international law obligations. This was:

a) a relevant consideration that the Director failed to take into account; and

b) is relevant to the interpretation of Article 5 of the Convention.

51. Security Council Resolution 1373/2001, adopted in the aftermath of the terrorist attacks on 11 September 2001 required all states to co-operate to prevent any repetition. Article 2 of the Resolution required states to:

> "take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information"… and "afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings" [1393].

52. Article 3 called upon states to "co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts". Article 6 created a monitoring committee and a reporting mechanism.

53. On 19 September 2002, the Minister of Foreign Affairs of Saudi Arabia, Prince Saud al Faisal gave a speech to the General Assembly of the United Nations in which he reaffirmed the Kingdom of Saudi Arabia's support for Resolution 1373:

> The Kingdom of Saudi Arabia reaffirms its support for all Security Council Resolutions related to the question of terrorism, and has cooperated with the international community in implementing these resolutions with the aim of combating it… [1398]

54. Pursuant to the reporting mechanism in Resolution 1373, Saudi Arabia has been asked numerous questions about its counter-terrorist co-operation procedures, and has given assurances to the Security Council about them. For example, on 29 May 2003, the Saudi Ambassador to the UN provided a response to various queries raised by the Security Council about Saudi Arabia's implementation of Resolution 1373:

> 1.13 The CTC would be grateful to know the institutional mechanism by which Saudi Arabia provides early warning of any anticipated terrorist activity to another Member State, whether or not the States are parties to bilateral or multilateral treaties with Saudi Arabia.
>
> Response
>
> In the event that the competent authorities in the Kingdom of Saudi Arabia come into possession of information on the possibility that a terrorist offence might occur within the territory of a State or States, against their nationals or persons resident within their territory or against their interests, the Kingdom communicates to that State or States the information in its possession through notification of a possible terrorist offence, transmitted through the embassy of the targeted State or States in Saudi Arabia if such State or States have no bilateral or multilateral treaties with the Kingdom. If, however, security arrangements or treaties exist between Saudi Arabia and a particular State or States, the notification is addressed to the competent counter-terrorism authority in the State or States whose interests, nationals or residents are targeted [1412].

55. The Director did not take Saudi Arabia's obligations under Resolution 1373 into account when reaching his conclusion that the Saudi threats were real. Nor it seems did Ministers, who also apparently failed to consider the possibility that by acceding to the threat the UK could itself be aiding or assisting in the commission of an internationally

wrongful act (within the meaning of Article 16 of the ILC Articles on State Responsibility). Nor did the Director consider the important assurances about Saudi Arabia's approach to anti-terrorist co-operation set out above. As such, he failed to take into account a relevant consideration and his decision should be quashed.

E3. Ground 2.3: Tainted advice

56. The SFO's decision was based on advice received from Ministers at the highest levels. Their advice on the public interest took into account the effect on the UK's relations with Saudi Arabia:

a) Despite being informed by the Attorney General's office on 6 December 2005 that responses to the Shawcross exercise should have regard to the restrictions imposed by Article 5 of the Bribery Convention, all the representations made expressly took into account prohibited commercial, economic and diplomatic matters.

b) In particular, the Prime Minister's representations made in a 'Personal Minute' dated 8 December 2006 stated "While this letter is not primarily concerned with the serious damage being done to our bilateral relationship because of the investigation, it is of course of concern to me, not least because of the critical difficulty presented to the negotiations over the [Eurofighter] Typhoon contract" [RW2/15].

c) The Attorney General told Parliament that the view of the Prime Minister and the Foreign and Defence Secretaries of State was that "continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation…" [78].

d) On 15 December, the Prime Minister expressed similar views:

> "Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East and in terms of helping in respect of Israel-Palestine - and that strategic interest comes first.
>
> If this prosecution had gone forward all that would have happened is we would have had months, perhaps years, of ill-feeling between us and a key ally" ("*Blair: I pushed for end to Saudi arms inquiry*", The Times, 15 Dec 2006) [82-5].

57. Commercial and diplomatic matters (such as the "critical difficulty" in persuading Saudi Arabia to buy BAE's aircraft if the investigation continued, and the Israel/Palestine conflict) were irrelevant considerations, pursuant to Article 5 of the Convention. Despite requests by the Attorney General's office that they take account of the Convention when making their representations, Ministers repeatedly relied on and took into account of such irrelevant commercial, economic and diplomatic matters.

58. As a result, it is plain that the risk of not being able to sell Typhoon aircraft, and other commercial, economic and diplomatic matters were indeed taken into account by those giving advice to the Director of the SFO. As such this advice must be viewed as tainted and not a proper basis for his conclusion that proceeding with the investigation would not be in the public interest. The tainted advice given is of particular concern given that the Director has no independent expertise in the assessment of alleged risks to diplomatic co-operation or to national security and is inevitably heavily reliant on the assessments of others ("on questions of security, we had to take the advice of others" [RW4/27]).

E4. Ground 2.5: Damage to national security from discontinuance

59. On 27 June 2007, the Director appeared before the Constitutional Affairs Committee of the House of Lords:

> Q269 David Howarth: Does that also apply to the obvious problem which would flow from Mr Tyrie's question, which is that if other countries get to know that

> Britain gives in to this sort of pressure, that in itself could be a threat to our national security? Was that risk taken into account in the decision?
>
> Robert Wardle: No, it was not expressed in the risk, and I am not sure how much of a risk it really is. I think this was an exceptional case. We are continuing other investigations, both into BAE Systems Plc and into other the areas, where we are doing our best to pursue them. I think that the risk of people thinking we can get away with it, which is effectively, I think, what you are saying, will be lessened if we are able to pursue those investigations, which we are, indeed, doing [3/1564].

60. This issue was plainly a relevant consideration. However, it was not weighed in the balance when the decision was taken. Only the narrow consequences of a Saudi withdrawal of co-operation were taken into account at the time. In particular, the risk of it becoming known that Britain easily caves into national security threats from other states was not considered as part of the national security analysis.

61. Paragraph 68 – 69 of the Director's Summary Grounds deal with the threat to national security if other countries know UK gives in to pressure:

> As to (1), in fact this was taken into account as part of the national security analysis. In particular, on 11 December 2006, in a meeting with the (then) Attorney General, the (then) Prime Minister expressly acknowledged that "it was important that the Government did not give people reason to believe that threatening the British system resulted in parties getting their way". The possibility that discontinuing the investigation would lead to such a perception was taken into account by those who provided the advice on national security which informed the Director's decision, but it was assessed that the position in relation to Saudi Arabia was clearly exceptional and it was not considered that any such perception would in itself harm national security.

62. The evidence on this point is at [Wardle 1/58]. The Director makes clear what was not clear from the summary grounds: he as decision maker had no knowledge of the way, if at all, this matter was assessed and taken into account at the time he made his decision:

> Now that I have had a chance to look back at the papers, it is clear to me that, in fact, this consideration was taken into account as part of the national security analysis. In particular, I note that on 11 December 2006, in a meeting with the Attorney, the Prime Minister expressly acknowledged that "it was important that the Government did not give people reason to believe that threatening the British system resulted in parties getting their way" (see the note of the meeting, at

> RW2/30-31)… I did not see the note of the meeting between the Attorney and the Prime Minister at the time I took my decision. However, as set out above, I was briefed about the overall national security assessment made by the Prime Minister and others, and based my decision upon that assessment".

63. The document referred to at [RW2/30-31] has been partially redacted. The passage relied on does not actually assess any threat to national security arising from perception that the UK gives in to threats. The central assertion in para. 68 of the Summary Grounds is in any event unsupported by evidence. The then Attorney General or the then Prime Minister could give evidence on this point but they have chosen not to do so.

64. It is therefore apparent that the Director did not take the harm to national security of discontinuing the investigation into account and in any event, this important consideration was not assessed or taken into account by Ministers. The decision should now be reconsidered taking these important matters into account.

E5. Ground 2.6: Shawcross

65. The decision to end an investigation in the public interest is solely a matter for the Defendant, the independent prosecutor. The proper role of the executive in prosecution decisions was stated by Sir Hartley Shawcross in Parliament on 29 January 1951:

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.
>
> In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what the decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter [RW3/50].

66. The role of Ministers in a Shawcross exercise is narrow and confined to "informing [the prosecutor] of particular considerations which might affect his own decision". The proper role of Ministers does not extend to telling the independent prosecutor what his decision should be.

67. The history of the Shawcross statement of principle is a series of incidents in which the proper role of an independent prosecutor was neither recognised nor accepted by Ministers.

68. In 1924, John Ross Campbell, the editor of the Communist newspaper "Workers Weekly" was charged with incitement to mutiny following the publication of a letter exhorting the armed forces not to turn their guns on workers in any industrial dispute or workers uprising. The Attorney General in the first Labour government, Sir Patrick Hastings, authorised the prosecution, but later withdrew the authorisation following discussions in Cabinet. The Cabinet minutes show that Sir Patrick Hastings "was a compliant Attorney General anxious to do the bidding of his political colleagues assembled in Cabinet". The Attorney General informed the Cabinet that "there is a possible way out of it if you desire it as against this man", an offer which the Cabinet accepted. The Cabinet then passed a resolution (with the Attorney General's assent) requiring that any future prosecution of a "political nature" be approved by Cabinet in advance (Edwards, *The Attorney General, Politics and the Public Interest* (1984), p. 314). As a result of this incident, and an attempt to mislead Parliament about the true facts, a motion of no-confidence was passed by the House of Commons and the government fell.

69. The immediate genesis of the Shawcross doctrine was a series of illegal strikes during the third Labour government. Sir Hartley Shawcross was concerned that there was still "some misunderstanding… as to the constitutional position of the Attorney General in relation to his political colleagues in such matters" (Edwards, p. 320) because there were "wide-ranging discussions [in Cabinet] in which, it is understood, some ministers

exhibited an eagerness to express their views on the wisdom of instituting criminal proceedings" (Edwards p. 323).

70. "Dissatisfied with this state of affairs, as he might well be" (Edwards, p. 323), Sir Hartley prepared a memorandum to the Cabinet setting out his concerns:

> "Cabinet discussion of these matters [prosecution decisions]… may be as embarrassing for my colleagues as indeed it is for me. For whilst my colleagues are scrupulously careful to remind me that they do not share any responsibility for the decision which is constitutionally placed upon me they do not fail to make clear what they consider my decision should be!"(Edwards, p. 321)

71. It was because Ministers were improperly expressing their views on prosecution decisions that Sir Hartley Shawcross' statement was drafted and consulted upon:

> This carefully phrased exposition of the proper approach to be followed by the Attorney General, when faced with a situation in which questions of national or international public policy may surround the exercise of his prosecutorial discretion, was the result of a major collaborative effort that serves to further underline the major importance which has been accorded to Shawcross's statement in the intervening years. For, as the files in the Law Officers' Department reveal, the Attorney General went to infinite pains to ensure, as he put it "that the integrity of the office should be very fully maintained since its position is, I am afraid, often widely misunderstood". Among the individuals to whom draft copies of Shawcross's proposed statement had previously been circulated for comment were Viscount Simon, Viscount Jowitt and Lord Kilmuir, each of them a former Law Officer of the Crown who subsequently rose to become Lord Chancellor. In addition, Shawcross sought the views of Sir Theobald Mathew, the Director of Public Prosecutions, and Mr Herbert Morison… Viscount Simon, whose statements when he was the Attorney General were incorporated into the proposed text, responded at length to Shawcross's invitation for his observations, explaining his zeal as being prompted by the realisation that Sir Hartley Shawcross would be "making a classical pronouncement which ought to stand for the future"… All the correspondents were in total agreement with the principles enshrined in the Attorney General's speech… (Edwards, p. 319-320).

72. The effect of the Shawcross doctrine is clear. Ministers may not express their view as to what the prosecutor's decision should be. Their role is confined to the provision of information as to the effect of a prosecution on the public interest:

> What is not permissible and would be treated as constitutionally improper is the expression by the Prime Minister, another minister or the government of their individual or collective view on the question whether or not the Attorney General should prosecute. The same position must surely apply to the solicitation of such views by the Attorney General or anyone acting on his behalf (Edwards, p. 323) (see also Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (1984), p. 114).

73. In his witness statement, Jonathan Jones, the Director General of the Attorney General's office suggests that it *is* constitutionally proper for Ministers to express a view, including in very strong terms, as to what the prosecutor's decision should be:

> There is nothing to prevent Ministers from providing any information or views which they think relevant more generally, including their views on the merits or otherwise of a prosecution (or investigation). In my experience Ministers will frequently give such views, either expressly (and sometimes very strongly) or by implication, since it will often be clear from the Minister's advice as to the public interest whether he or she considers that an investigation/prosecution ought to proceed. In no sense is this or has it been regarded as constitutionally improper (Jones 6).

74. Mr Jones does not provide any explanation as to why he claims that such conduct is proper, beyond citing the recent practice of Ministers. No attempt is made to answer Edwards' careful analysis of the genesis and basis of the Shawcross doctrine. Sir Hartley Shawcross felt it necessary to make his statement to Parliament precisely because his Ministerial colleagues were expressing their views as to the "merits or otherwise of a prosecution". It is unfortunate that the mischief that the Shawcross statement was directed at has apparently become the common practice of Ministers.

75. On 8 December 2006, the Prime Minister made representations in his "Personal Minute" of the same date [RW2/14]. These representations were followed up with by a meeting between the Prime Minister and the Attorney General on 12 December 2006, apparently at the Prime Minister's request. The meeting took place the day before the decision to discontinue was taken. The only record of this meeting is a letter from the Prime Minister's office to the Attorney General's office. It is apparent from that letter that the Prime Minister expressed his view as to whether the investigation should continue. The

letter records that the Prime Minister said that "this was the clearest case for intervention in the public interest he had seen".

76. The above breach of the Shawcross doctrine renders the decision of the Director unlawful:

a) The classic statement of the relationship between a constitutional convention and the law was made by Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 in the Privy Council, referring to the "convention that the Parliament of the United Kingdom does not legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly" (722):

> "It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid. It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament."[6]

b) However, it is well established that a breach of a constitutional convention not authorised by an Act of Parliament can form a basis for the grant of relief in legal proceedings. In *Attorney General v Jonathan Cape* [1976] QB 752 (the Crossman diaries case), Lord Widgery CJ took into account the constitutional conventions of collective responsibility and the secrecy of cabinet discussions and held that the action of breach of confidence could be used to restrain a breach of the constitutional convention ("the maintenance of the doctrine of joint responsibility within the cabinet is in the public interest, and the application of that doctrine

[6] In so far as Lord Reid was suggesting that the sovereign powers of Parliament admit of no qualification or limitation, he was in any event at least arguably wrong (see the references to *Jackson* below).

might be prejudiced by the premature disclosure of the views of individual ministers" (771)). Where the public interest so requires, the common law will apply or adapt existing judicial remedies to enforce important constitutional conventions. See Allen, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993), p. 245.[7]

c) Accordingly, the breach of the Shawcross doctrine by the Prime Minister is justiciable:

> "Despite its uncertain origins, it now seems to be a well-established convention that the Attorney General's decision to prosecute must be taken independently of ministerial or cabinet opinion. A decision to instigate legal proceedings taken for reasons of party advantage, or even of ideological conviction, would today be widely considered improper. If the uncertainty of convention requirements – or their limits – be thought a barrier to legal enforcement (as is often suggested), the speech of Sir Hartley Shawcross to the House of Commons in 1951 serves as sufficient response.
>
> … Even if the proper limits of ministerial influence are not always perfectly clear, the essential principle of independent judgment is firmly established and understood…
>
> In practice, of course, it is likely to be difficult to prove that a decision to authorise prosecution was taken for improper or ulterior reasons; but that is a standard feature of cases of suspected bad faith or abuse of executive power. It is also true that the issue may sometimes provoke fierce public controversy. <u>It is none the less wrong to deny the possibility, in principle, of a judicial remedy – as in other cases where statutory or prerogative power affects the interests of individuals"</u> (Allen, p. 256).

d) The Prime Minister's statement was an abuse of power because it was in breach of an important constitutional convention which is directed at maintaining the

[7] There is an academic debate between those academics such as Allen who believe that in cases such as *Jonathan Cape*, the Courts are in substance directly enforcing a convention and those such as who consider that enforcement must be "parasitic on the ascription of rights and duties of hitherto uncertain extent" and do not "furnish a free-standing cause of action". See Jaconelli, *Do Constitutional Conventions Bind?* [2005] CLJ 149 at 160. For present purposes, the debate is of little relevance as the Claimants put their case on the basis that the breach of the

independence of prosecutors and the rule of law. The statement thus also taints the decision to discontinue the investigation.

E6. Ground 2.7: Blackmail, threats and the rule of law

77. It was unlawful for the Director to permit the Saudi threats to influence his decision to discontinue the investigation.

78. The rule of law is an integral part of the constitution of England and Wales, part of the common law, and is protected and upheld by the common law courts. In *R (Jackson) v Attorney General* [2006] 1 AC 262 Lord Hope said at [107] "the rule of law enforced by the courts in the ultimate controlling factor on which our constitution is based". Similarly, Lord Woolf (writing extra-judicially) has said that both Parliament and the courts "derive their authority from the rule of law… both are subject to it and cannot act in a manner which involves its repudiation" (*Droit Public* – English Style [1995] PL 57 at 68). The rule of law has statutory recognition in section 1 of the Constitutional Reform Act 2005:

> "This Act does not adversely affect… the existing constitutional principle of the rule of law".

79. It is also clear that "the judges, in their role as journeyman judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so" (Lord Bingham, *The Rule of Law* [2007] CLJ 67 at 69).

80. The SFO's published aims and objectives reflect these important principles:

> "The Serious Fraud Office aims to contribute to: …

Shawcross doctrine was a public law abuse of power and tainted the Director's decision, applying established principles of judicial review.

b. the delivery of justice and the rule of law."

81. Further, the Director, a solicitor and officer of the Court, has a basic professional duty to uphold the justice system and the rule of law. Rule 1.01 of the Code of Conduct for Solicitors provides:

> "You must uphold the rule of law and the proper administration of justice."

82. Accordingly, it is necessary to consider the scope of this constitutional principle, and its application to the present case.

83. It is well established that respect for the rule of law may require steps to be taken which increase the difficulties of preventing and detecting terrorism. See, for example, *SSHD v MB (FC)* [2007] UHKL at [91] per Lord Brown:

> "I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing."[8]

84. The similar view of the then Attorney General, Lord Goldsmith, as set out in a speech to the French Cour de Cassation, is that the preservation of the rule of law is of overriding importance:

> "I do not believe [there] can be a simple utilitarian calculation of balancing the right to security of the many against the legal rights of the few. That would be to ignore the values on which our democratic society is built…

[8] Cf. older cases such as *R v Home Secretary, ex parte Hosenball* [1977] 1 WLR 766 at [777] per Lord Denning MR, a high water mark of deference to executive decision making on national security grounds.

> The rule of law is the heart of our democratic systems. As President Barak of the Israeli Supreme Court put it: "… the war against terrorism is a war of a law abiding nation and law abiding citizens against law breakers. It is, therefore, not merely a war of the State against its enemies; it is also a war of the law against its enemies".
>
> There will always be measures which are not open to governments. Certain rights – for example the right to life, the prohibition on torture, on slavery – are simply non-negotiable.
>
> There are others such as the presumption of innocence or the right to a fair trial by an independent and impartial tribunal established by law, where we cannot compromise on long-standing principles of justice and liberty, even if we may recognise that there may sometimes be a need to guarantee these principles in new or different ways.
>
> This has consequences for the manner in which the State is required to respond to the most extreme provocation… The result may be to put limits on actions which would be in the interests of the many. Again to quote President Barak of the Israeli Supreme Court: "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties"."[9]

85. In the context of criminal proceedings, the rule of law assumes particular importance. In *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 Lord Griffiths at [62] explained the duty of the courts in the extradition context:

> "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.
>
> My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and

[9] Speech by Lord Goldsmith to the French Cour de Cassation, June 2004

> Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."

86. Accordingly, when the Secret Intelligence Service arranged for the unlawful arrest, *incommunicado* detention and rendition of an Irishman in Zimbabwe to the United Kingdom this amounted to "a blatant and extremely serious failure to adhere to the rule of law" (*R v Mullen* [2000] QB 520 at 535G). Mullen's conviction was quashed by the Court of Appeal, even though it led to the release of a dangerous terrorist who had been rightly convicted on the evidence.

87. A further aspect of the rule of law is the duty on citizens to co-operate with the criminal justice system and the prosecution of offenders. For example, a witness summonsed to attend court must do so, and tell the truth, even if he would have to risk his life by so doing. In *R v Yusuf* (2003) 2 Cr App R 32, Rose LJ commented at [17]:

> In the present case, the appellant was an important prosecution witness in a murder trial. It may be that he was fearful of the personal consequences to him of the malign behaviour of others, if he attended court. It is a sad reflection on our society that, in many cases, up and down the land, almost every day, witnesses, commonly prosecution witnesses, are fearful of the consequences if they do attend court. But, in most cases, they do their duty and come to court; if they did not, the alternative would be anarchy.

A juror and a judge is under a similar duty to serve, regardless of the personal risk involved in so doing. Maintenance of the rule of law requires that alleged offenders are subject to investigation and prosecuted, even (indeed, especially) when they or others make serious threats to life or limb.

88. Equally, the rule of law requires that no prosecutor has an unconstrained discretion as to what matters he may take into account when deciding whether to prosecute. In *R v Commissioner of the Metropolitan Police, ex p Blackburn* [1968] 2 QB 118 the Court of Appeal

considered whether the Commissioner's policy of not prosecuting gambling operators was lawful.

89. Lord Denning MR held that the Commissioner (who at the time had both investigatory and prosecutorial functions, as the SFO does now) "is not the servant of anyone, save of the law itself" [136] but there were "some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law". Lord Denning concluded his judgment with a demand that "the rule of law must prevail" [138].

90. Similarly, Salmon LJ held at [139-140]:

> In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn.

91. Edmund Davies LJ agreed at [148-149]:

> [Counsel for the Commissioner] has addressed to the court an elaborate and learned argument in support of the bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law…
>
> The very idea is as repugnant as it is startling, and I consider it regrettable that it was ever advanced. How ill it accords with the seventeenth-century assertion of Thomas Fuller that, "Be you never so high, the law is above you." The applicant is right in his assertion that its effect would be to place the police above the law. I should indeed regret to have to assent to the proposition thus advanced on behalf of the respondent, and, for the reasons already given by my Lords, I do not regard it as well founded. On the contrary, I agree with them in holding that

> the law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the *raison d'etre* of their existence.

92. *Blackburn* was cited with approval by the House of Lords in *Hill v CC West Yorkshire* [1989] 1 AC 53 at [59] and by the Divisional Court in *R (Bermingham) v SFO* [2007] 1 QB 727 at [63-64] per Laws LJ.

93. A prosecutor is an officer of the Court and is carrying out a quasi-judicial function when deciding whether to investigate or prosecute. Accordingly, he must carry out his task without fear or favour. In 2001 the then Attorney General, Lord Goldsmith, identified the relevant principles:

> "A fundamental safeguard to fairness is the independence of the prosecutor. National and international standards recognise the importance of the independence of the prosecutor; the ability to exercise the prosecutor's discretion independently and free from political interference; to perform their duties without fear, favour or prejudice...
>
> I cannot stress too much how important this is. You simply cannot maintain a free and democratic society without the checks and balances that over the centuries we have evolved as part of our constitution. The independence of prosecutors is crucial to this."[10]

94. A prosecutor that accedes to blackmail or threats made by or on behalf of persons said to be involved in the criminal conduct under investigation is not acting without fear or favour, and such conduct is contrary to the constitutional principle of the rule of law. A deliberate attempt to interfere with the course of justice to frustrate an investigation or prosecution cannot be taken into account when making a prosecution decision, because it is so inimical to the proper function of a prosecutor and the rule of law.

95. No prosecutor has an unconstrained discretion as to what matters he may take into account when deciding whether to prosecute. Threats and blackmail by persons allegedly involved in the criminal conduct are not a relevant consideration when

deciding whether to investigate or prosecute a bribery offence. Succumbing to such threats or blackmail is extraneous to the objects and purpose of the legislation that it is the duty of an independent prosecutor to enforce. That is particularly so where the allegation under investigation is a criminal "conspiracy to avoid the provisions of the 2001 Act" making the bribery of foreign public officials unlawful [RW4/24]. If it were otherwise, the more severe the threat that a person is able to make, the less likely it will be that the alleged criminal conduct would be investigated or prosecuted. Such a consequence cannot be compatible with the rule of law.

F. Conclusion

96. For the reasons set out above, the Court is respectfully invited to quash the decision of the Director and remit it for reconsideration.

PHILIPPE SANDS QC

DINAH ROSE QC

BEN JAFFEY

Matrix

Blackstone Chambers

4 February 2008

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[10] "Politics, Public Interest and Prosecutions – A view by the Attorney General", 13th Annual Tom Sargent Memorial Lecture, 20 November 2001

Claim No. CO/1567/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

B E T W E E N:

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH

(2) CAMPAIGN AGAINST ARMS TRADE
Claimants

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE
Defendant

-and-

BAE SYSTEMS PLC
Interested Party

CLAIMANTS'
SKELETON ARGUMENT

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Ref: RS/JB

Solicitors for the Claimants