

International Development Committee Inquiry into Financial Crime and Development

Summary of The Corner House submission

1. Financial crime is increasingly a transnational phenomenon; the Bribery Act 2010 allows for its investigation and prosecution, regardless of where the crime occurred. Mutual cooperation between prosecuting authorities and independent investigation without political interference is essential when more than one jurisdiction is involved in the same issue; without it, national efforts to tackle bribery and corruption can be undermined. The extra-territorial reach of the Bribery Act 2010 is likely to entail the UK's authorities investigating and prosecuting more financial crime in which other jurisdictions are involved. Clearer procedures need to be identified and followed as to how authorities will cooperate with each other so that the broader goal of tackling such crime effectively is achieved.
2. Fines and sentences should be set sufficiently high to act as a deterrent. Fines and payments must not create the perception that defendants can simply pay their way out of trouble. The ultimate deterrent for a company, debarment from public contracts, should not be undermined.
3. If the UK is to continue its plea bargain approach to financial crime, existing safeguards must be tightened and additional measures introduced to prevent defendants "settlement shopping" across jurisdictions. The ability of companies, particularly larger ones, to negotiate their crime and punishment is in need of attention if those most impacted by financial crimes are to receive redress.
4. Loopholes created by the Guidance accompanying the Bribery Act 2010 may allow some companies to bribe. Parliament should address this immediately.
5. Article 5 of the OECD Anti-Bribery Convention, designed to support bribery investigators and prosecutors, still cannot be enforced in the UK.
6. Those found guilty of financial crimes in developing countries should be required by the court to make reparations, which are more than simply financial payments. Reparations, including payments, must be completely separated from fines, confiscation orders, sentences and other penalties for

financial crimes. If UK public institutions are connected in any way with convictions for financial crimes, consideration should be given to their making reparations as well. Further thought must be given to how reparations are to be achieved so that they do not contribute to the problems that triggered the crime in the first place.

Introduction

7. The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development. Over the past eight years, it has addressed corruption-related issues involving the activities of UK companies overseas, especially large multinationals, and of UK institutions that support such activities, particularly institutions financed by taxpayers.
8. Together with Campaign Against Arms Trade (CAAT), The Corner House brought a judicial review in 2008 of the decision by the Serious Fraud Office (SFO) Director in December 2006 to abandon the SFO's investigation into alleged bribery and false accounting by BAE Systems (hereafter BAE) in relation to its Saudi Arabian deals.¹
9. The Corner House welcomes the International Development Committee's current inquiry into Financial Crime and Development and is grateful for the opportunity to provide evidence and to answer the questions the Committee has chosen to explore.
10. The Corner House would like to make a few preliminary reminders about the severe impacts of bribery and corruption on development, particularly in poorer countries (while being aware that financial crime also encompasses fraud, embezzlement and money laundering), so as to put its evidence in context. When the UN adopted its Convention Against Corruption on 31 October 2003, (then) UN Secretary-General Kofi Annan said:

“Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish . . . [C]orruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development.”²
11. Corruption compromises the effectiveness of aid. An estimated \$100 billion of World Bank loans have been lost to corruption since the Bank's foundation in December 1945; when other multilateral development banks are included, the figure rises to \$200 billion.³ Such “leakage” leads to aid “disappearing” before it reaches the poor.

12. Corruption deprives countries of finance for development. It diverts expenditure away from health, education and the maintenance of infrastructure to high “kickback” areas such as new construction and defence. The World Bank points out that “while this corruption hurts society in general, it hurts the poor most since they are more vulnerable and dependent on the quality of governance and state support.”⁴ The OECD has stressed that “bribery and corruption . . . impede the efforts to reduce poverty. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare.”⁵ Corruption creates incentives for investment in capital-intensive projects at the expense of labour-intensive industries, which traditionally employ poorer people. Corruption reduces a government’s tax revenue by as much as half, thereby reducing income available for reducing poverty.
13. Overpriced and poorly planned projects increase unsustainable national debt. When countries cannot keep up with the debt repayments, cuts in public services fall disproportionately on poorer people.
14. The World Bank states that “corruption . . . distorts poor peoples’ relationships with and trust for public officials, the police and people in authority.”⁶
15. The arms trade is considered to be one of the most corrupt businesses in the world. Every year, some \$40 billion worth of tanks, artillery, bombs, grenades, rocket launchers, attack helicopters, fighters and other weapons are traded around the world. Of that total, an estimated \$3 billion is thought to consist of bribes, generally paid through agents in the form of commissions. Without these bribes, many contracts would simply not be signed.
16. And as the Serious Fraud Office points out, corruption and bribery are not victimless crimes. Former Secretary of State for International Development Hilary Benn is direct: in poor countries, corruption “can kill”.⁷

Committee question: Whether the UK prosecuting authorities have the resources and powers they need to prosecute transnational financial crimes, particularly when there are also criminal proceedings in another jurisdiction in respect of the same issue?

17. Many difficulties may arise when criminal investigations and proceedings take place in more than one jurisdiction. However well-resourced the Serious Fraud Office (SFO) and other prosecuting authorities are, difficulties are bound to occur when there are conflicts of political interest. The history of how the UK and the United States came to be investigating at the same time alleged bribery and corruption in BAE’s contracts in several countries makes some of these difficulties clearer, and may suggest general principles for addressing them in future.
18. *The US took proceedings against BAE because the UK was forced to drop its investigation. Prosecuting authorities do not have sufficient resources, powers or support to prevent this happening again.*

19. The Department of Justice (DoJ) in the United States began its investigation into BAE's compliance with US anti-corruption laws in its contracts with Saudi Arabia on 26 June 2007 because the Serious Fraud Office had been forced to drop its own investigation in December 2006. Gary di Bianco, coordinator of corporate investigations for the City of London law firm Skadden, Arps has said:
- “It was really the stopping of the [UK] investigation that brought a focus on the enforcement here [US] . . . The perception in the US was that the SFO was not exercising a sufficiently independent level of pursuit in this investigation.”⁸
20. In July 2007, the Department made an official request to the UK Government for Mutual Legal Assistance, asking for information that the SFO had gathered during its investigation. By February 2009, the Home Office had not responded to it or forwarded it to the SFO.
21. Alexandra Wrage of TRACE, an organisation that assists multinational companies and their commercial intermediaries comply with anti-bribery laws, has said: “. . . the answer to the question, Why are the Americans doing it all? is: no body else is.”⁹ The United States is perceived internationally as having the resources (in terms of money, people and legislation) *and* the political will to tackle grand corporate corruption. It also has substantial experience, given that its Foreign and Corrupt Practices Act dates back to 1977. (One of the poorest countries in the world, Lesotho, has demonstrated the most political will to tackle multinational corporate corruption and has set international legal precedents in doing so, even though it has the least amount of money to do so.¹⁰) In contrast, the *Financial Times* recently described the UK as follows:
- “For all its self-image as the home of fair play, the UK has been too lenient on graft, as was demonstrated when the Serious Fraud Office scrapped, on Downing Street's say-so, a probe into BAE Systems.”¹¹
22. If the SFO's BAE-Saudi Arabia investigation had been allowed to continue, the US DoJ might well not have started its own investigation into allegations of corrupt activities emanating from the UK of a UK-headquartered company, and some of the difficulties that have occurred subsequently because of multi-jurisdictions would not have occurred.
23. It could also be argued that, were an SFO Director to be put under similar pressure today to stop an investigation, s/he would not have the resources, powers or support to resist it even after the Bribery Act 2010 comes into force in July this year and even though the Act will be tougher than US legislation in many respects, because Article 5 of the OECD Anti-Bribery Convention cannot be enforced in the UK (*see below*).
- 24. *Proceedings in multi jurisdictions require mutual cooperation between investigating and prosecuting authorities, mindful of differences in their power and experience. Wider consensus needs to be achieved on the application of “double jeopardy”.***

25. Despite dropping its Saudi Arabia investigation, the UK did continue investigating alleged bribery by BAE in relation to its deals in several other countries, particularly in Eastern Europe and Africa.¹² On 29 January 2010, however, the SFO was abruptly informed by the US authorities that they were about to reach a settlement with BAE involving not only the company's Saudi Arabian contracts but also those in the Czech Republic and Hungary¹³ (which the SFO was still investigating and had announced its intention to prosecute¹⁴). As far as the SFO had been aware, plea bargain discussions with the company had come to nothing in the US (as well as in the UK).¹⁵
26. The US settlement scuppered the UK proceedings, given that the SFO was advised that the principle of double jeopardy would apply.¹⁶ UK law would not have allowed BAE to be prosecuted here on the same set of facts for which it had been convicted in the US, even if the charges were different – an October 2009 SFO press release suggested that it would prosecute for bribery whereas the offence under the US settlement was conspiracy to make false statements to the US government between 2000 and 2002.¹⁷ US double jeopardy law, however, applies to the same offence only and not the same set of facts. (This would suggest that the UK could have prosecuted BAE followed by the US, but not vice versa.)
27. Parliament should address the lack of consensus concerning double jeopardy when multiple jurisdictions are involved. An individual or company could end up not being prosecuted or “getting away with” a lighter conviction and penalty – or alternatively could end up being prosecuted on the same facts but for different offences in different jurisdictions (*see below* on “settlement shopping”).
28. Although the 5 February 2010 agreement with BAE was presented as a coordinated global settlement resulting from close cooperation between the authorities in the two countries, this would seem not to have been the case. The SFO Director quickly had to put something together out of the crumbs left from the SFO's six-year investigations into BAE's contracts. He commenced discussions with the company only on 29 January, concluding them on 4 February when BAE indicated it was prepared to plead guilty to the minor accounting offence in its Tanzanian transaction.¹⁸ The author of a European Anti-Bribery Blog, an experienced forensic accountant, summarises the process as “a distinct lack of co-ordination with the DOJ” and the SFO. Publicly-available information “gives the impression that the SFO has again been railroaded by the DOJ into agreeing something at the last minute, and on terms that were less favourable to the prosecutors than they might have otherwise been.”¹⁹
29. When another trans-Atlantic plea bargain came before the UK courts in March 2010 (in which chemical firm Innospec pleaded guilty to paying bribes to Indonesian government officials), senior criminal judge Lord Justice Thomas concluded “the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again”. Lord Justice Thomas called for full judicial oversight over plea bargains, including

over the basis of the plea and whether it reflects the extent of criminal conduct. He also called for sole judicial control over sentencing. Concerning financial penalties, Lord Justice Thomas pointed out that “if the penalties in one state are lower than in another, businesses in that state . . . will not be deterred so effectively from engaging in corruption in foreign states”.

30. The comments of Innospec’s defence counsel are also relevant to considering criminal proceedings in respect of the same issue in other jurisdictions where prosecutors have more power:

“the risk is that . . . in cases of cross border investigations, the Department of Justice wields the conductor’s baton by reason of the length of its experience and the certainty – however draconian – of its plea bargaining structures. It would be a matter of great regret should the brave new world heralded for UK investigations . . . become at risk to unintended institutional abuses by dominant authorities.”²⁰

31. (Incidentally, the UK investigation into BAE’s sales to Saudi Arabia was stopped on the grounds that continuing would threaten the UK’s national security. Yet as the US settlement involved these sales, one must assume that the United States was either not threatened or that it did not yield to such threats.)

- 32. *UK plea bargaining process needs to prevent “settlement shopping” by a defendant, pleading guilty where punishments are least stringent or there are opportunities to settle out of court, or to settle on lesser offences that avoid debarment from public contracts.***

33. Connected with the double jeopardy issue is that of “settlement shopping” across different jurisdictions, a practice that is heightened when plea bargaining is involved. Plea bargaining is broadly understood as individuals and companies pleading guilty to lesser or fewer charges in return for an agreed, potentially more lenient, penalty or sentence. The US Department of Justice has a long history and experience of using plea bargains; the UK has not. The Serious Fraud Office announced it would copy the US plea bargain practices to deal with fraud and economic crime only in September 2008.

34. The SFO began plea bargain discussions with BAE in March 2009, but they were discontinued after the SFO-imposed deadline of September 2009 passed without agreement, at which time US plea discussions had also come to nothing and ended. In October 2009, the SFO announced its intention to prosecute BAE for offences relating to overseas corruption in Africa and Eastern Europe.²¹

35. A conviction for bribery or corruption should debar a company from being eligible for public procurement contracts in the United States and EU countries and for contracts financed by the World Bank.²² It is the ultimate deterrent to a company considering bribery or corruption; governments, prosecuting authorities and public bodies should take measures to ensure that it is enforced.²³ Most of BAE’s sales are to governments; over half its revenue comes from the United States. Although the US settlement involved a far

higher fine (\$400 million) than the UK would have been able to levy, it did not lead to the company being sentenced under the US Foreign and Corrupt Practices Act, and thus it could continue bidding for public sector contracts (and under the UK's practice of double jeopardy, could not be prosecuted on the same facts).²⁴

36. At present, UK prosecuting authorities do not have the financial or legal resources or powers to prevent a company from going "settlement shopping" across jurisdictions to obtain the best deal for themselves. This practice again highlights the need for mutual cooperation across jurisdictions. (*See below* for further comments on the UK's practice of plea bargains.)

37. *The Serious Fraud Office should provide Mutual Legal Assistance to other countries when requested.*

38. It is clear that tackling transnational crime successfully involves cooperation between the investigation and prosecuting authorities in different jurisdictions. The SFO is believed not to have been able to proceed further with its investigations of BAE sales in South Africa because of a lack of cooperation from the authorities there, particularly the disbanding of the agency tasked with investigating serious crimes.²⁵

39. By the same token, it is essential for the UK to provide assistance to other countries when requested and for its actions not to undermine the pursuit of justice elsewhere. In connection with BAE allegations, it has been reported that prosecutors in European countries have complained that the UK has not responded to their requests for Mutual Legal Assistance to continue their own investigations and potential prosecutions of relating to alleged bribery and corruption in BAE sales to their countries. While the SFO agreed in its plea bargain settlement to end all its own BAE investigations, it did not, as far as is known, undertake to refuse to assist other countries with theirs.²⁶

40. In a separate case in 2009, bridge builder Mabe & Johnson pleaded guilty to bribery and corruption in Ghana, Jamaica and Iraq. In Ghana, the company paid commissions to agents involved in corrupt relationships with public officials who had influence over bridge contracts. As part of its case, the SFO named seven Ghanaian public officials. The Ghanaian Commission on Human Rights and Administrative Justice, which serves as the country's anti-corruption agency under Ghana's constitution, took up investigation of these officials. In February 2010, it said it was "deeply concerned" about its inability to obtain from the SFO the documents that formed the basis for the bribery allegations made against the Ghanaian officials: "To date, the Commission has not received the relevant documents regarding its request for Mutual Legal Assistance from the SFO through the [Ghanaian] Attorney-General."²⁷

41. *The SFO's approach to tackling financial crime through plea bargains should not undermine the efforts of authorities in other countries to tackle bribery and corruption.*

42. The SFO agreed in its settlement with BAE (among other wide-ranging undertakings) not to prosecute individuals in future in connection with its BAE investigations. This concession has undermined attempts in other countries to learn the truth about the allegations and to bring those allegedly involved to account. The case involving a Tanzanian official provides an example.
43. On 29 January 2010, before the SFO was aware that BAE was arranging a settlement with the US authorities, it charged an Austrian citizen, Alfons Mensdorff-Pouilly, with conspiracy to corrupt in connection with BAE's deals with eastern and central European governments including the Czech Republic, Hungary and Austria. In the course of preliminary hearings, the SFO told the courts that "From 2002 onwards, BAE adopted and deployed corrupt practices to obtain lucrative contracts for jet fighters in central Europe" in a "sophisticated and meticulously planned operation involving very senior BAE executives."²⁸ Mensdorff-Pouilly was granted bail of £1 million on 4 February 2010. One day later, the SFO inexplicably withdrew proceedings against him.
44. The sudden turnaround was explained only when the SFO Director stated in subsequent legal proceedings that, as part of its settlement with BAE, the SFO had given an undertaking to the company, *at its request*, never to prosecute any individual in future if doing so involves alleging that BAE Systems was guilty of corruption.²⁹ The plea bargains made with Mabey & Johnson and Innospec did not include similar exemptions from subsequent prosecutions of the individuals involved.³⁰
45. In sentencing BAE in December 2010, Mr Justice Bean expressed surprise that, although the accounting "mistake" to which the company pleaded guilty was "the result of a deliberate decision by one or more officers" of BAE and the appointment of the marketing advisor, to whom huge payments were made, "was approved personally by the chairman of BAE" (Sir Richard Evans), no individual was charged.³¹ He described the SFO's overall undertakings not to investigate or prosecute BAE further, or to name or make allegations against the company in future as granting BAE "a blanket indemnity",³² but concluded that he had "no power to vary or set aside the Settlement Agreement".³³
46. A senior public official in Tanzania, Andrew Chenge, has used the SFO's undertakings to claim his innocence. The SFO has agreed to close its investigations and will not issue a final report on its findings in the country, which were not released or heard in court as part of the settlement. The Tanzanian anti-corruption authorities, therefore, may find it more difficult to get to the bottom of the allegations.
47. To recap, BAE pleaded guilty to not accounting accurately for \$12.4 million of payments made between 1999 and 2005 to a Tanzania-based businessman holding a British passport, Shailesh Vithlani, for his work as a marketing agent in helping to secure a £28 million radar contract from the Government of Tanzania. Mr Justice Bean sentenced BAE on 21 December 2010 on the basis that, by describing the payments in its accounts as provision of technical services, BAE was "concealing from the auditors and ultimately the public the fact that they were making payments to Mr Vithlani . . . with the intention that

he should have free rein to make such payments to such people as he thought fit to secure the radar contract” for BAE. Mr Justice Bean noted that it was clear that the company “did not want to know the details”.

48. What was not mentioned in court in December 2010 was other information the SFO had obtained. In a leaked 21 March 2008 request from the SFO to the Tanzanian authorities for Mutual Legal Assistance (MLA), the SFO states that it has reasonable grounds to believe that a recipient of payments made by Vithlani was the Tanzanian Attorney General at the time, Andrew Chenge.³⁴ The Attorney General’s office was required to approve the financing package and loan from Barclays Bank to purchase the radar system. The SFO MLA request stated that it believed Chenge had \$1.5 million in an offshore bank account in Jersey suspected to have been obtained from Vithlani. (The information presented in the MLA request has been described as “a fully developed case file, brimming with detailed evidence”.³⁵) Chenge resigned as Minister for Infrastructure Development in April 2008, and the Tanzanian anti-corruption authorities, the Prevention and Prevention of Corruption Bureau (PCCB), began to investigate.
49. Moreover, because as part of the settlement, the SFO agreed to close all its BAE investigations, including those relating to the company’s deals in Tanzania, and has undertaken never to reopen them, Chenge has been able to assert publicly in Tanzania that the UK courts have vindicated him and his innocence.³⁶ Because the plea bargain settlement did not mention any Tanzanian individuals, Chenge and the Tanzanian media are reporting that there is “no evidence available to show that individuals were bribed”.³⁷
50. The Prevention and Prevention of Corruption Bureau in Tanzania has had to stop its own proceedings. Because the SFO has closed its BAE investigations without issuing any final report, the people of Tanzania may never learn the truth behind the allegations made against their representatives, while the credibility of the Prevention and Prevention of Corruption Bureau has been undermined. It remains difficult to fathom, however, how a public officer earning a small salary in Tanzania could have \$1.5 million in a foreign bank account that he claims to have earned legally. He was confident of remaining uncompromised that he launched a bid in November 2010 to become the Speaker of the National Assembly (although he was not successful).³⁸
51. It should be noted that since March 2008 the Department for International Development (DfID) has provided £6 million to a “Tackling Corruption Project” in Tanzania, which has the goal of strengthening “the ability of Government of Tanzania Institutions related to investigating and prosecuting grand corruption to fulfil their mandate”. The project ends at the end of 2012, but DfID already assesses the “risk of not achieving project goals” as “High”.³⁹ The practical effect of the SFO’s BAE settlement is to add to this risk by further undermining anti-corruption efforts in Tanzania. Corruption has been described as “a cancer to the Tanzania society”; tackling it requires investigating and, if warranted, charging and prosecuting those involved, particularly “the big sharks”.⁴⁰ The SFO’s agreement with BAE not to

investigate or prosecute individuals further has set a dangerous precedent for Tanzania, The Corner House has been told by Tanzanian colleagues.

52. The chair of the group that oversees the OECD Anti-Bribery Convention, Mark Pieth, said of the SFO's settlement with BAE, "We expect South Africa, Hungary, the Czech Republic and other countries to investigate and prosecute the bribe takers [in the BAE deals] but it is hard to make that case when those who led them into temptation will not be brought to justice."⁴¹ A South African MP said of the SFO's deal with BAE that the UK had lost the moral authority to talk about good governance and fighting corruption to other world leaders. "They are no better than any of the rogue leaders in Africa who have used funds from bribes in arms deal to stay in power."⁴²
53. The extra-territorial reach of the Bribery Act 2010 is likely to entail the UK's authorities investigating and prosecuting more financial crime in which other jurisdictions are involved. To be effective, clearer procedures need to be identified as to how authorities will cooperate with each other so that the broader goal of tackling such crime effectively is achieved.

Committee question: Whether further changes to the Bribery Act 2010 or other legislation are required?

54. *Loopholes created by the Ministry of Justice Guidance accompanying the Bribery Act 2010 must be closed.*

55. The Bribery Act 2010 is a vast improvement on existing legislation and should enable the UK courts and prosecutors to tackle bribery of all kinds more effectively, wherever it occurs. It essentially replaces existing UK bribery and corruption law. It creates two general offences (an individual bribing someone and an individual being bribed), the offence of an individual bribing a foreign public official and the corporate offence of failing to prevent bribery on a company's behalf. It extends to bribery of both governmental (public) officials and commercial (private) officials. It provides for unlimited fines. It remains to be seen whether a conviction for *failing to prevent bribery* would be regarded as an offence *for* bribery or corruption offence, as far as the legal requirement upon UK and other EU, and US public authorities not to select contractors convicted of bribery or corruption offences is concerned.

56. The corporate offence of failing to prevent bribery brings "legal persons" specifically within the ambit of anti-bribery legislation. Although the Law Commission is still working on proposals for corporate criminal liability more broadly,⁴³ this is a significant step forward, given that bribes are invariably paid by an individual for company benefit and advantage, not solely for personal gain. The Serious Fraud Office itself has noted that "individuals do the bribing, corporations benefit."⁴⁴ If the Bribery Act 2010 had been in force while the SFO was investigating BAE, its counsel could have had more confidence that corporate liability for the principal alleged offences could be proved according to the law. (Under previous legislation, it was necessary to prove a "controlling mind": that a senior executive had authorised the corruption.)

57. But although the Act was passed in April last year, its implementation has been delayed by business lobbying on the Guidance accompanying the Act, so that it comes into effect only in July 2011. The Ministry of Justice issued Guidance on 30 March 2011 on the procedures for commercial organisations can put in place to prevent bribing.⁴⁵ But The Corner House argues that the Secretary of State for Justice has exceeded his powers in issuing this Guidance, which circumscribes and undermines the Bribery Act (and thus Parliament's intention) by creating several loopholes that could allow companies to pay bribes.

58. The Act allows for the prosecution of an individual or company with links to the UK, regardless of where the crime occurred, recognising that bribery and corruption is increasingly a transnational phenomenon in a globalised economy. The Guidance, however, exempts foreign companies listed on UK stock exchanges that are not carrying out business in the UK (other than raising capital). And while the Act makes clear that companies are liable when their subsidiaries pay bribes, the Guidance would appear to contradict this, effectively licensing UK companies to bribe by using their offshore subsidiaries.⁴⁶

59. If the Guidance remains as it is, most of the world's mining companies, big and small, would appear to be exempt from the Act. London is the world's biggest centre for investment in the minerals industry. Its single biggest source of finance is the London Stock Exchange. In January 2011, four of the world's top five mining companies (by market capitalisation) were listed on it. Mining companies listed in London deliver two-thirds of global iron ore output and the majority of the world's diamonds, platinum and titanium – production they do not carry out in the UK. Mining is one of the most polluting industries in the world; has a disproportionately negative impact on land-based communities, especially Indigenous Peoples, and is frequently associated with forced evictions, militarisation, conflict and human rights abuses.⁴⁷ Bribery and corruption only reinforce such negative impacts.

60. In addition, the loopholes in the Guidance undermine existing initiatives to tackle bribery and corruption in the extractive industries by pressing them to be more transparent. Stephen Msechu of Agenda Participation 2000 in Dar es Salaam has pointed out that mineral exports in Tanzania accounted for 44.2 per cent of all exports in 2007, but their contribution to the GDP was 3.5 per cent only. The country is ranked fourth in gold production in Africa in 2009, but has still been losing revenue from the sector. Some mining contracts “were entered into under dubious circumstances”. Msechu concludes:

“It is high time countries like Canada, UK, Australia and major stock exchanges called for transparency to enable third world countries to benefit from the extractive industry. Such efforts should not only cover the monitoring of home companies abroad but also denounce the laundering of money by developed countries.”⁴⁸

61. MPs should ensure as a matter of urgency, therefore, that the loopholes in the Bribery Act 2010 created by the Guidance are closed.

62. *Article 5 of the OECD Anti-Bribery Convention cannot be enforced in the UK, meaning that prosecuting authorities may still be forced to stop politically – embarrassing investigations and prosecutions.*

63. The SFO Director at the time of the 2006 decision to stop the SFO's BAE-Saudi Arabia investigation has described the threats he received if the investigation continued as "blackmail".⁴⁹ The 2010 Bribery Act would not help an SFO Director withstand similar threats in future, because Article 5 of the OECD Anti-Bribery Convention, which is designed to support bribery investigators and prosecutors in such circumstances, cannot be enforced in the UK. In addition, this means the UK is still in breach of its international law obligations under the Convention.

64. Article 5 holds that "investigation and prosecution of the bribery of a foreign public official . . . 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."⁵⁰ Some context explains why this is important.

65. Cross-border corruption is notoriously difficult to tackle. This is particularly so if the bribed foreign public official is senior in status and is in a position to blackmail or otherwise threaten adverse consequences if his/her conduct is exposed through an investigation or prosecution. Tackling cross-border corruption is particularly difficult if the bribing company, or individual acting on a company's behalf, is able to exert undue or improper influence over those investigating and prosecuting bribery, or is able to persuade others to exert such influence, such as other public officials, whether domestic or foreign. Larger companies are more likely to be in a position to exert such influence than are small and medium enterprises (SMEs).

66. Investigators, prosecutors and the Courts need to have legislative, Parliamentary and Executive support and backing to resist such threats, blackmail or other undue or improper influence. Without such backing, the demands of *realpolitik* often mean that bribery investigations and prosecutions do not take place or are terminated. If investigators, prosecutors and the courts capitulate to such threats, blackmail or influence, the end result is that bribery flourishes. Article 5 of the OECD Anti-Bribery Convention is intended to address this mischief.

67. Thus while the Bribery Act 2010 creates the new discrete offence of bribery of foreign public officials, which The Corner House welcomes, if it is to be effective, well-founded allegations of bribing a such an official must be investigated properly and, if the evidence so warrants, prosecuted. Those investigating and prosecuting such bribery must not be influenced by considerations of national economic interest or the potential effect upon relations with another state or the identity of those involved, whether individuals or companies – the requirements of Article 5.⁵¹

68. On 30 March 2011, the Director of the Serious Fraud office and the Director of Public Prosecutions issued *Joint Prosecution Guidance* on the Bribery Act 2010.⁵² This reminds (page 5) prosecutors dealing with bribery of the UK's commitment to abide by Article 5, an inclusion that is welcomed by The Corner House. Nonetheless, a prosecutor is still not legally-bound to abide by Article 5, and thus may not have sufficient support to investigate and prosecute all transnational financial crimes and withstand threats against their continuation.

69. *Current safeguards to ensure plea bargains are not abused need to be expanded, strengthened and enforced.*

70. Plea bargaining can reduce the time and expense incurred by a criminal investigation and prosecution, but enforceable safeguards are essential to prevent abuse. The Attorney General's Office and the Serious Fraud Office have drawn up *Guidance on Plea Discussions* and *Dealing with Overseas Corruption* respectively, but these safeguards do not appear to have been followed in the BAE settlement. If the UK is to continue along the plea bargain route, further measures are needed to ensure that safeguards are adhered to and additional ones drawn up to ensure public confidence that justice is done and seen to be done.

71. During plea bargaining, individuals or companies plead guilty to lesser or fewer charges in return for an agreed, potentially more lenient, penalty or sentence. It can be advantageous to the prosecutor because it can reduce the time and expense of an investigation, particularly in cases of financial crime. This can be an important consideration in cases of bribery and corruption, because they are invariably complex and secret. Payments are not usually written up in the account books; if they are, they are disguised, as the Tanzanian transactions illustrate.⁵³ They usually come to light through whistleblowers, who risk their jobs and potentially their lives in coming forward. It can be a long and difficult process to obtain evidence that will stand up in court.

72. But a plea bargain in these types or cases is also about the rule of law and democracy and is a "matter of seriousness which is unimaginable", according to senior criminal judge Lord Justice Thomas in March 2010. A plea bargain process can easily reduce justice to dubious haggling – "You know, if you plead to the lesser account of false accounting, you get off the bribery charge", is how a *Law in Action* journalist describes it⁵⁴ – the outcome of which depends on whoever gives in first, wants the deal more, has the upper hand, digs their heels in harder or can outmanoeuvre the other. It is a negotiation process, as criminal prosecutions often are, but one that has appeared at times to be reduced to a game of poker. It is critical, therefore, that if the plea bargain approach is adopted, abuses are protected against.

73. When the Serious Fraud Office decided in 2008 to adopt a plea bargain approach to fraud and economic crime, the Attorney General's office issued its *Guidance on Plea Discussions in Cases of Serious or Complex Fraud*, which came into force 5 May 2009.⁵⁵ The Guidance states that the charge(s) agreed in the plea bargain should reflect the seriousness and extent of the offences that are being investigated; the plea bargain process must not be applied simply to reduce the charges. The court must have adequate sentencing powers – the penalty must fit the offence.

74. In July 2009, the Serious Fraud Office issued its own *Approach . . . to Dealing with Overseas Corruption*,⁵⁶ which deals explicitly and exclusively with "self-referral" or "self-reporting". A company hires a legal firm to go through its books and records. If anything untoward emerges, the company comes forward and confesses. Monty Raphael, described as the doyen of UK fraud lawyers,⁵⁷ puts it like this: "Go in, 'fess up and face the consequences of it".⁵⁸ By doing so, the company increases its chances of a plea bargain. The prosecutor gets a conviction, albeit on a lesser charge, but much of the investigating has already been done, cutting down on expensive legwork. The SFO's *Approach* states that a company's failure to self-report, moreover,

should be regarded as a “negative factor” making “the prospects of a criminal investigation followed by prosecution and a confiscation order . . . much greater.”

75. The SFO’s Tanzania settlement would not appear to have followed these guidelines from the information that is publicly available, suggesting that these safeguards are not sufficient to withstand a defendant’s hard bargaining. Pleading guilty to an accounting mistake in one transaction does not reflect the seriousness and extent of the alleged bribery offences in several countries that the SFO was investigating. Mr Justice Bean stressed that he could not “sentence for an offence which the prosecution has chosen not to charge. There is no charge of conspiracy to corrupt, nor of false accounting,”⁵⁹ something he was “astonished to find”, given that “BAE has accepted that there was a high probability that the payments to Vithlani were intended to compensate him for work done in seeking to persuade relevant persons to favour BAEDS in respect of the radar project”.⁶⁰ BAE has not self-reported any of its alleged offending (as far as is known from publicly available information), suggesting that the plea bargain route should not have been embarked upon in the first place.

76. In contrast to the Innospec and Mabey & Johnson settlements, BAE has not made a full confession or provided evidence (again as far as publicly available information indicates), nor admitted to a serious offence reflecting the full criminality of their alleged conduct. In sentencing BAE, Mr Justice Bean said:

“It is relatively common for a prosecuting authority to agree not to prosecute a defendant in respect of specified crimes which are admitted and listed in the agreement: this is done, for example, where the defendant is an informer who will give important evidence against co-defendants. But I am surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise. The US Department of Justice did not do so in this case: it agreed not to prosecute further for past offences which had been disclosed to it.”⁶¹

77. This experience suggests that the terms of the plea bargaining negotiation should be clearly set out at the beginning, taking into account which party has requested the negotiation: the defendant or the prosecutor. A company or individual may self-report and ask for a plea bargain in return for the authority’s recommending a lesser penalty. When a prosecuting authority suggests a plea bargain, however, the company or individual may be aware that the prosecutor is uncertain as to whether the evidence will stand up in court, depending on how the law is worded, or may not have sufficient resources for a potentially lengthy and expensive investigation. If a company enters into plea bargain discussion and does not follow through, it should not be able to come back to the discussion table and dictate the terms as it wishes.

78. Several of those closer to the plea bargaining process have raised similar concerns that need to be followed up. Fraud lawyer Monty Raphael, for example, has said the UK does not have “an entirely coherent plea bargaining system” and that it might need to “receive some judicial attention”.⁶² A former SFO case controller has highlighted the lack of transparency around the settlements that the SFO comes to and the reasons behind them: “There is a clear need when the Serious Fraud Office reaches a resolution with a party, that the thought process behind that resolution is made

public”, he says.⁶³ SFO Director Richard Alderman says that the current UK system for dealing with parallel criminal investigations “does not work effectively” and has shortcomings. What is needed is “something that is far more transparent and that commands public confidence, together with a much stronger role for the judiciary.”⁶⁴

79. If the UK is to continue along its plea bargain approach in tackling financial crime, Parliament needs to ensure that more stringent safeguards are in place and followed.

Committee question:

Whether the law needs to be changed to ensure that British companies and individuals found guilty of financial crimes in developing countries are always required by the court to make reparations to the developing country concerned?

80. *Reparations are essential and should be required by the court.*

Those found guilty of financial crimes in developing countries should be required by the court to make reparations.

81. Reparations are not simply financial payments. The United Nations has proposed classifying reparations as a combination of compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Repairing, making amends and compensating for harm caused should encompass acknowledging the damage caused and offering measures of redress and some form of compensation. To be effective, reparations should be accompanied by other justice measures such as prosecutions or other means of holding those responsible to account, revealing the truth, and institutional reform to ensure that the reparations are not perceived as attempts to silence or buy off those negatively affected or public relations gestures. Steps to prevent any recurrence should also be taken. It has also been argued that in contexts where the courts and other bodies have become corrupted by political interference, “broad policy measures to benefit victims are often the most effective way to accomplish reparation.”⁶⁵ In terms of transnational financial crime, this should include measures in all the countries involved.

82. *BAE’s payment is not reparations, compensation or damages, but a refund.*

83. The BAE payment cannot be considered as a reparation at all, but simply a refund a decade later of money paid for goods that were not fit for purpose: Tanzania needed a radar system for civil purposes rather than military ones. BAE’s counsel said in court that BAE’s payment offer was made “to restore the company’s reputation” as well as being an attempt to benefit the people of Tanzania.⁶⁶ As outlined above, it will be difficult, if not impossible, to find out the truth behind all the corruption allegations and to hold any of those responsible to account because of the agreements the SFO has made with BAE and because the details of the SFO’s investigations will not be released. As far as is known publicly, BAE has not provided information that would answer many outstanding questions.

84. It should also be noted, moreover, that the court did not require BAE to any make reparations, compensation or payments; the agreement to do so is solely between the SFO and the company (*see* below).

85. Although BAE pleaded guilty only to accounting mistakes in its Tanzania contract, the plea was part of a settlement involving bribery investigations in other countries as well. Mark Pieth, chair of the group that oversees the OECD Anti-Bribery Convention, pointed out that “the amount that Britain settled for is very small compared to the sums that are reportedly involved in each of the seven to eight cases [that the SFO was also investigating].”⁶⁷ £30 million represents about 2.5 per cent of all the alleged bribes the SFO was investigating, and 0.065 per cent of the value of the contracts obtained for which bribes were allegedly paid.⁶⁸

86. BAE has argued that the bribery and corruption allegations against it refer to transactions that took place many years ago and are thus “historical”. The impacts of these transactions, however, are ongoing, which is why reparations are essential. Oxford University economics professor Paul Collier gives an example from the Mabey & Johnson prosecution:

“That money was paid to a guy who was initially just a sort of middle level official [in Jamaica]. But a lot of money was paid to him. Now, he didn’t use that money just for buying champagne. He used it to launch himself on a political career. By the time this case came to court, he was the minister responsible for a multi-million dollar budget. Now, if you’re asking: Does it matter? My God, it matters. Think of the huge amounts of money the infrastructure projects for which he had power of decision in that position. He can do huge damage.”⁶⁹

87. *Reparations and payments must be completely separated from fines, confiscation orders and other penalties for financial crimes.*

88. Under the plea bargain made between the SFO and BAE, the company agreed to make “an ex gratia payment for the benefit of the people of Tanzania . . . the amount of the payment shall be £30 million less any financial orders imposed by the Court.”⁷⁰ In sentencing BAE, Mr Justice Bean said “The structure of this Settlement Agreement places moral pressure on the Court to keep the fine to a minimum so that the reparation is kept at a maximum.”⁷¹ Steps should be taken to ensure that a judge is never placed in that position again.

89. Whether fines are smaller than those that can be levied in other jurisdictions, such as the United States, or unlimited, as the Bribery Act 2010 provides for (although BAE was being sentenced under the Companies Act 1985), they will be far less of a deterrent if they are linked to reparation payments and judges feel fettered as to what they can impose. The goal of fines should be to ensure that companies do not bribe in future or turn a blind eye to bribery and corruption. (BAE was sentenced on the basis that its Tanzanian agent had free rein to make payments to secure the radar contract for BAE, but the company “did not want to know the details”.⁷²)

90. The US BAE settlement involved a fine of \$400 million that by law goes into US Treasury coffers. Because of this and substantial fines imposed by the

Department of Justice in recent corruption cases, comments have been made that the United States pursues corrupt offenders so as to enrich itself while the needs of victims are not addressed. Although £30 million is much less, it would nonetheless have been unprecedented in the UK, and could have led to similar criticisms of the SFO and the UK judicial system, accentuated all the more when Tanzania's status as a Heavily Indebted Poor Country (HIPC) is taken into account. By requesting only a fraction of its costs (and being awarded £225,000 by the courts), the SFO appears more altruistic compared to the United States.

91. These considerations only add to the argument that reparations and payments must be completely separated from fines and other penalties for financial crimes. Reparations need to be assessed so as to achieve the goals outlined above. Fines and penalties, including potential sentencing of senior executives, need to be set at a level that they serve as a deterrent rather than being regarded as a parking fine that can be absorbed as part of the cost of doing business. In sentencing Innospec, Lord Justice Thomas said: "To mark the gravity of corruption of a foreign government, massive fines seem to me to be absolutely essential."

92. If other UK public institutions are connected in any way with individual or corporate convictions for financial crimes, consideration should be given to their making reparations as well. Any debt incurred should be cancelled. Public institutions involved in any way, albeit indirectly, with convictions for financial crimes should be required to carry out an audit to ensure that taxpayers' money has not supported financial crimes in any way.

93. The UK government facilitated BAE's sale of a military radar system to Tanzania by granting the company an export licence. The sale had the backing of Prime Minister Tony Blair but was opposed by Chancellor of the Exchequer Gordon Brown, Foreign Secretary Robin Cook and Secretary of State for International Development Clare Short. In addition, Barclays Bank provided the Tanzanian government with a loan to buy the radar system, even though the country at the time was classified as a Heavily Indebted Poor Country (HIPC). Without the export licence or loan, the sale would not have gone ahead. It is not clear what reparations to Tanzania the UK government and this UK bank are making for their roles in the deal. If Tanzania is still making loan repayments to Barclays, it would appear to be within its rights to stop them.

94. More generally, any debts associated with a corruptly obtained project should be automatically cancelled, particularly if the debt is with a public institution. The debt owed to public agencies such as the UK's export credits guarantee department (ECGD) should be regularly audited, and any "odious debt" written off. If a company is convicted of a financial crime, it should be debarred, according to US and EU law, from being eligible for public procurement contracts and from obtaining public funds for a period of time.

95. ECGD has taken steps in recent years to ensure it does not underwrite bribes. It now asks information from prospective client companies about their agents' commissions. It is generally accepted in international business transactions that a commission fee paid to an agent amounting to 2-5% of a contract's value is probably legitimate, whereas one that amounts to 10-20% of the contract value strongly

suggests that bribes are involved. (BAE's agent in Tanzania, Vithalani, was paid 30% of the £28 million radar contract price.) ECGD should not reverse or undermine this progress in any way.

96. If a company or individual is convicted of a financial crime, a public institution such as ECGD should be required to carry out an audit of any contracts it may have not only with the company but also with financial intermediaries such as banks involved in the overall transaction or contract to ensure that taxpayers' money has not supported bribery or fraud in any way.

97. As far as The Corner House is aware, ECGD has not acted on evidence, for instance, presented to it by the Serious Fraud Office in 2006 that BAE had fraudulently obtained its insurance cover from ECGD for its contracts with Saudi Arabia, which ECGD had underwritten for more than two decades. A working group of the OECD Anti-Bribery Convention raised questions in October 2008 (in what *Newsnight* called a "blistering report") as to why ECGD had extended further insurance to BAE in September 2007 at a time when the recipient of the underwritten exports, Saudi Arabia, was known to have interfered with the UK's criminal law proceedings (the Serious Fraud Office's BAE-Saudi investigation). ECGD's total liability for BAE's Saudi Arabian exports was £750 million as of 31 March 2008 – the Department's largest by far and accounting for nearly half its portfolio. But BAE cancelled its insurance cover for all its Saudi Arabian deals with effect from 1 September 2008, meaning that, in the words of *Newsnight*, "both sides averted any audit of the Saudi deal".⁷³

98. The SFO was also investigating alleged corruption in BAE sales of aircraft to South Africa in 1999; as part of the BAE settlement, this investigation has been closed. ECGD underwrote this sale for nearly £1,680 million, details of which were listed in the SFO's application for Mutual Legal Assistance from South Africa.⁷⁴ The purchase of Hawk jets in particular raised questions because the planes cost more than double the price of an Italian equivalent that the South African military preferred.

99. The Corner House is opposed to ECGD support for arms deals. Should such support be requested by BAE, however, ECGD should satisfy itself (and the public) that any warranties made by the company can be relied upon in the light of the allegations of fraudulent misrepresentation in past contracts. The premiums ECGD charges should adequately reflect the risk of such potential fraud.⁷⁵

Committee question: How BAE will ensure that its payment to Tanzania is used effectively for development purposes?

100. *BAE should have no say over its payment, but simply pay it immediately into a holding account.*

101. The fifth clause of the settlement agreement between the SFO and BAE states:

"The Company shall make an ex gratia payment for the benefit of the people of Tanzania in a manner to be agreed between the SFO and the Company. The

amount of the payment shall be £30 million less any financial orders imposed by the Court”.⁷⁶

102. A BAE press release states that the £30 million (minus the fine) will be “a *charitable payment* for the benefit of Tanzania” (emphasis added).⁷⁷

103. No details or requirements have been provided about who will receive the money, nor any information as to the timing. Nothing is said about conditions that might be put on the payment other than it should be for the benefit of the people of Tanzania. There is no requirement on either the SFO or BAE to make public any details concerning the payment.

104. BAE now calls itself a global defence and security company, but is usually described as one of the world’s top arms or weapons producers that sells fighter aircraft, warships, tanks, armoured vehicles, artillery systems, missiles and munitions. Because of the nature of its business and because it has been convicted, it is not desirable or appropriate that it should have any say whatsoever in the payment, other than to pay the money immediately into a holding account. Any convicted individual or corporation should not be involved in such payments, but simply pay them forthwith. It should be ensured that BAE does not claim tax relief on its payment as a donation to charity.

105. To ensure that the payment is used for the benefit of the people of Tanzania, many questions need to be asked and wider advice sought in a transparent decision-making process.

106. Although both BAE and the SFO may gain public relations credit for a payment to benefit the people of Tanzania, there are high risks that it will not be used effectively for development and may even exacerbate the very problems that contributed to the crime in the first place. Many questions need to be asked first to ensure that the payment is used to benefit the people of Tanzania (which may not be the same as pursuing the development objectives identified by DfID). Who should ensure that the payment to Tanzania is used for the benefit of the people of Tanzania? To whom should the payment be made? What should it be spent on? Should conditions be imposed? Who will decide? There are no clear answers to questions such as these, but they are critical to ask, particularly if reparations are ordered by courts or prosecuting authorities that have little development knowledge or experience. This submission will make just a few general observations.

107. If reparations go to NGOs, the process of deciding which ones are to receive them and how the money is divided up must be transparent and accountable.

108. To ensure that the payment is used effectively for development purposes, it might at first seem advisable to channel it to NGOs on the assumption that they are often better at ensuring and facilitating development than governments, particularly to poorer people at the grassroots, and tend to be considered more trustworthy and independent. In terms of governance, they can be critical in working to strengthen domestic accountability of their governments and public officials.

109. Because of the systematic erosion of publicly-provided and publicly-funded services such as health and education over the past two decades or so around the world, many governments, with the support of international financial institutions and aid agencies, now rely more on NGOs to deliver such services. Indeed, NGOs today deliver more official development assistance than the entire UN system (excluding the World Bank and IMF). Nonetheless, NGOs rarely have the capacity to undertake broad comprehensive projects or policies, such as infrastructure.

110. At the same time, some NGOs have become more accountable to foreign donors than to the people they are meant to serve. Some have become the conduits through which such donors establish themselves in a country outside the realm of government control. In many cases, donors, whether foreign governments or private foundations, in practice determine priorities and policies rather than the governments or people of the countries concerned. The process can divide NGOs among themselves, as larger, more established organisations tend to receive such funding and gain influence while smaller, grassroots groups, particularly if they are critical of government or donor policies, are marginalised. As NGOs in many developing countries have taken on more and more provision of services, they have been able to spend fewer resources on advocacy and strengthening domestic accountability.

111. Resources, including finance, are essential if development NGOs are to continue their activities, and many are deeply concerned in these austere economic times that donors will cut back their support. But when NGOs operate with (relatively) little money, large sums can in themselves be destabilising, particularly if they come with conditions and deadlines. A website mapping official development support to civil society in Tanzania (from Western governments and from EU and UN programmes) indicates that DfID's support for various NGO projects totalled £7.6 million over the past decade.⁷⁸ The payment from BAE is about four times this amount.

112. None of the above is to argue that reparations should not go to NGOs, but is intended to illustrate some of the issues that need to be considered, especially if reparations are ordered by courts or prosecuting authorities that have little development knowledge or experience. If reparations do go to NGOs, the process of deciding which ones are to receive them and how the money is divided up must be transparent and accountable.

113. If the same individuals or political parties are in power that are implicated in the financial crimes, payments or reparations could be appropriated for private benefit and exacerbate some of the root causes of the crimes they are repairing. Reparations need to be well-designed and transparent.

114. In cases where a government paid for a corruptly-obtained contract, it would seem appropriate that it should be reimbursed. But if the same individuals or political parties are in power that (allegedly) received bribes in the first place and approved the contracts, any payments or reparations could wind up being appropriated for private benefit. The former chief of the fraud division at the US Department of Justice, Mark Mendelsohn, has said "There is a grave danger that you're returning money to the very people that took bribes in the first place. The last thing one wants to do is fuel

corruption in the name of fighting it.”⁷⁹ As some Tanzanians have pointed out, “Given the cancerous nature of corruption in Tanzania, it is very difficult to entrust the very government implicated in the corruption with wise use of the payment, particularly when that payment is intended ‘for the benefit of the people of Tanzania’.”⁸⁰

115. In some cases, a government may refuse to accept payment as doing so could be interpreted as an admission of culpability on its part. Mabey & Johnson, for instance, was ordered in September 2009 to pay £658,000 as payment to Ghana (along with a fine of £750,000 to the SFO).⁸¹ If the government refused to accept the money, it would go to the SFO. The Ghanaian government reportedly did refuse to accept the money. A Deputy Minister of Information said: “Let me state unequivocally that we are not accepting any reparation.”⁸² Several Ghanaians blogged that the government should accept it because it belonged to Ghana rather than the SFO. Others said that it should be used to investigate those in Ghana who were allegedly involved.

116. These dilemmas illustrate that a payment “for the benefit of the people of Tanzania” sounds good on paper, but can be difficult to achieve in practice. Given that it would obviously have been far better that any offence had not occurred in the first place, it seems essential to ensure that they do not happen again, not only within BAE but also within UK public and financial institutions as well as within Tanzanian ones.

117. The Tanzanian press reported in June last year (after the SFO and BAE had announced their settlement but before the UK courts had agreed it and passed sentence) that the UK government had said “it intended to channel the compensation through charities”,⁸³ although in August, the British High Commissioner in the country was quoted as saying that reports of the payment being channelled through NGOs were distorted.⁸⁴ When the Tanzanian government heard that the payment might go to NGOs, it dispatched three officials to London to protest against any such plans and to lobby for the payment to go to the government, because it was the government (using its Barclays loan) that had paid for the radar system in the first place. The Tanzanian press reports that, following the officials’ visit to London, the BAE payment will go to the Government of Tanzania. The Tanzanian media has since stated that the UK and Tanzanian governments have agreed the payment will go towards education, but no public information is available detailing how that decision was reached or any further details. In August 2010, the British High Commissioner confirmed that officials of the British and Tanzanian governments were engaged in discussions on how the fine should be disbursed, but said they were confidential. The Corner House has received suggestions from Tanzanian citizens that it could be directed at repairing and renovating the physical infrastructure of the University of Dar es Salaam as an independent institution.⁸⁵

118. It would seem advisable for the SFO to brief the Foreign & Commonwealth Office thoroughly and accurately to reduce the chances of the latter’s representatives making inaccurate and misleading statements that could undermine the pursuit of justice and good governance within a country.

Committee question: What advice DfID has given to BAE and other bodies about how this money might be used?

119. Although DfID might seem to be obvious partner in making decisions over payments or reparations to developing countries, some of its policies and priorities, particularly privatisation and encouraging the growth in financial services, could be regarded as having encouraged and enabled petty and grand corruption. Advice should be sought more broadly than from DfID alone.

120. As noted above, it is to be hoped that BAE has not been involved in determining how this money might be used, and consequently that DfID has not given it any advice.

121. The UK's Department for International Development (DfID) has been the largest bilateral donor in Tanzania. DfID will spend an average of £161 million per year in the country until 2015. In 2009/10, 30% of its bilateral aid went to "governance", 28% to "growth" (in the private sector), 18% to "education", 12% to health, 7% to other social services, 4% to "other" and 1% to "humanitarian assistance".⁸⁶ It lists three "top priorities" (it is not clear whether these priorities are DfID's or those of the Tanzanian government or others): building on the progress made in education; improving reproductive and maternal health; and accelerating private sector development and job creation.⁸⁷

122. A joint website of bilateral and multilateral aid donors to Tanzania states that the Government of Tanzania prefers aid to go straight into the national budget so that it decides how to spend the money, thereby increasing national ownership of the development process.⁸⁸ "An active citizenry and Parliament can ensure that the Government promotes Tanzania's development goals effectively. The media has a crucial role to play in terms of informing the public about achievements and shortcomings."⁸⁹ Nonetheless, a 2004 ActionAid report on donor conditionality and water privatisation in the country (a process to which DfID contributed) stated that little had changed on the ground:

"Today, donors argue that they have changed their approach and that 'conditionality' has been replaced by 'ownership'. They say that a dogmatic insistence on neoliberal policies, such as privatisation, has been replaced by poverty reduction strategies and pro-poor growth . . . [But] Donors are still using their influence to push poor countries into privatising basic services such as water, with little concern for the views of the public or poor people's needs."⁹⁰

123. More generally, ActionAid states that for the past 20 years, "aid donors have been pushing poor countries to privatise their basic services and liberalise their economies. Conditions attached to aid and debt relief have been combined . . . to ensure that recipient countries comply with donor demands." Such privatisation of public services and utilities and the cutting back of state spending and responsibilities has encouraged petty corruption and enabled corruption on a grand scale.⁹¹

124. DfID has also been involved in supporting the growth of private sector finance in Tanzania. It is a founder and contributor to the Financial Sector Deepening Trust, whose aim is to provide greater access for more people to engage with the financial system throughout Tanzania.⁹² It seeks to help smaller financial firms develop so that they are credible and creditworthy partners for commercial banks and

larger financial institutions. (It is not known whether this project has been reevaluated since the Financial Crisis.)

125. As noted already, a commercial bank, Barclays, provided the loan to the Government of Tanzania with which it bought BAE's radar system. When Norman Lamb MP provided information to Parliament on 25 June 2002 on the "extraordinary story of how a British arms manufacturer came to sell a totally inappropriate military air traffic control system to Tanzania", he included information on "the role of Barclays bank in facilitating the deal". Because it made no sense as to why a commercial organisation would subsidise the purchase of military equipment by a heavily indebted poor country, Lamb summarised various theories put forward in the absence of a proper explanation from Barclays as to why it had become involved in the deal. "Perhaps it had something to do with the fact that, on 11 October 2000, Barclays secured a banking licence to operate in Tanzania. Was that the payback for subsidising the deal?" he asks.⁹³

126. Finally, bribery, corruption, fraud and money-laundering not only have impacts on a country's development and poverty, but can also have destabilising consequences and are linked in various ways to violence and conflict. Arms sales provide the ideal conditions for bribery to flourish because individual deals are usually extremely large in financial terms; it is a buyers' market; prices are not easily compared because each contract has its own special requirements; and, vitally, they are often cloaked in secrecy under the rhetoric of "national security".⁹⁴ The anti-corruption organisation Transparency International has estimated that the official arms trade accounts for 50% of all corrupt international transactions. When overseas development assistance is directed not only to poorer countries but also to those experiencing insecurity, it is important to consider how the securitisation of aid might simply be bringing the intertwined processes of privatisation, arms sales, bribery and corruption full circle.

127. DfID should consider all the issues raised by the SFO-BAE settlement in assessing whether its support may, albeit unwittingly, be exacerbating the enabling conditions for bribery, corruption and insecurity. As the SFO is the only other party to the payment agreement besides BAE and does not have aid or development expertise, it is to be hoped that it has sought the advice not only of DfID but also of other aid and development organisations and particularly of Tanzanians, groups and individuals, based in Tanzania and abroad, in government and part of civil society.

The Corner House

4 April 2011

Notes and References

¹ For more information, *see* the website set up by Campaign Against Arms Trade and The Corner House dedicated to the judicial review: <http://www.controlbae.org/>

² <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>

United Nations Convention against Corruption:
<http://www.unodc.org/unodc/en/treaties/CAC/index.html>

³ World Bank, “Costs & Consequences of Corruption”,
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,contentMDK:20221941~menuPK:1165474~pagePK:148956~piPK:216618~theSitePK:384455,00.html>

⁴ World Bank, “Costs & Consequences of Corruption”,
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,contentMDK:20221941~menuPK:1165474~pagePK:148956~piPK:216618~theSitePK:384455,00.html>

⁵ OECD Directorate for Financial, Fiscal and Enterprise Affairs, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD, 31 October 2001.
<http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=daffe/ime/wpg%282000%2915/final&doclanguage=en>

⁶ World Bank, “Costs & Consequences of Corruption”,
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⁷ Hilary Benn, Secretary of State for International Development, speech on “Governance and Development” at Holyrood, Edinburgh, 22 June 2006.
<http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/Media-Room/Speeches-and-articles/2006-to-do/Governance-and-Development/>

⁸ Gary di Bianco, speaking on *Law in Action*, “Is the law getting to grips with bribery?”, BBC Radio 4, 9 March 2010, <http://www.bbc.co.uk/iplayer/console/b00r6611>

⁹ Quoted in “Suspensions over BAE termination of government contract”
Newsnight, 28 May 2009, <http://news.bbc.co.uk/1/hi/programmes/newsnight/8073797.stm>.
Transcript available at
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/NewsnightBAE-ECGD.pdf>, page 4.

¹⁰ In August 1999, ten companies and two consortia were being prosecuted in the Lesotho courts, accused of paying in total nearly \$2 million in bribes to a top official in the Lesotho Highlands Water Project, one of Africa's largest civil engineering projects involving the construction of five dams intended to divert water from Lesotho to South Africa. A decade later, three individuals and four multinational companies had been found or pleaded guilty before Lesotho ran out of money. The companies were Acres (Canada), Lahmeyer (Germany), Spie Batignolles (France) and Impregilo (Italy). Many institutions and governments promised Lesotho financial support for its prosecutions, but did not provide it.

See:

--Odious Debts: Essays and reports – Lesotho:

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=titles&SubID=526>

--“Lesotho: Anti-Corruption Actions”, *AfricaFocus Bulletin*, 12 November 2006.
<http://www.africafocus.org/docs06/les0611.php>

See also: Nicholas Hildyard, “The Lesotho Highland Water Development Project - What Went Wrong? (Or, rather: What went Right? For Whom?)” 10 July 2002,
<http://www.thecornerhouse.org.uk/resource/lesotho-highland-water-development-project-what-went-wrong>

¹¹ “Defining the UK’s war against bribery”, *Financial Times*, 30 March 2011, p.10

¹² The SFO has investigated alleged bribery and corruption in BAE contracts with at least nine countries: Chile, Czech Republic, Hungary, Austria, Qatar, Romania, Saudi Arabia, South Africa and Tanzania.
http://www.caat.org.uk/issues/bae/country_overviews.php

See also BAE files, *The Guardian*,
<http://www.guardian.co.uk/world/2007/jun/07/bae.baesystemsbusiness>

¹³ “. . . on 29 January, the DOJ contacted the SFO and indicated that a plea agreement with BAe was imminent. The agreement involved BAe entering pleas of guilty in respect of offences connected to the investigations concerning Eastern Europe and Saudi Arabia, and a payment of £400 million”.

Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, p.4.
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

¹⁴ On 1 October 2009, SFO stated that “it intends to seek the Attorney General’s consent to prosecute BAe Systems for offences relating to overseas corruption . . . This follows the investigation carried out by the SFO into business activities of BAe Systems in Africa and Eastern Europe”.
“BAE SYSTEMS plc”, Serious Fraud Office press release, 1 October 2009.
<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/bae-systems-plc.aspx>

The SFO Director subsequently admitted in legal proceedings that “with hindsight”, the ordinary language of the press release conveyed the impression that a decision to prosecute had been taken, which in reality overstated the stage the SFO had reached. It expected to assess its Eastern Europe case in mid-February 2010, and Tanzania case in mid-late March.

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, p.4.
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

¹⁵ “From the beginning of March 2009, the SFO had been involved in plea discussions with BAe. The position of the SFO was that it would be satisfied with pleas of guilty to charges in respect of some, but not necessarily all, the strands of its investigation . . . In the event, however, the SFO imposed deadline of 30 September 2009 was reached without agreement,

and the discussions in England were discontinued. By that time, it was known that plea discussions between the DOJ and BAe in the US had also failed to produce any agreement.”

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, pp.3-4.
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

¹⁶ The SFO Director received legal advice that “the Eastern Europe aspect of the proposed US agreement was highly likely to have the effect of preventing prosecution for the offences under consideration in respect of the Eastern Europe investigation in England, on the basis of the application of the principle of double jeopardy.”

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, p.5.
Available at:
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

¹⁷ BAE falsely assured the US government that it had complied with US anti-corruption legislation (the Foreign and Corrupt Practices Act 1977) and the OECD Anti-Bribery Convention and failed to disclose, in its applications for export licenses, whether it had paid or offered to pay fees or commissions of more than \$100,000.

Para 4.5 of the US basis of plea states that BAE “paid payments to certain advisors through offshore shell companies, even though in certain situations there was a high probability that part of the payment would be used in order to ensure that BAES was favored in the foreign government decision regarding the sales of defense articles”.

See: Department of Justice, Office of Public Affairs, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine”, Washington, DC, 1 March 2010.
<http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>

The US State Department immediately placed a "temporary administrative hold" on export licences for products containing BAE parts that has not yet been lifted. The Department is reported to be considering debaring BAE and imposing another fine. See Stephanie Kirchgaessner, “BAE braced for tough US curbs”, *Financial Times*, 6 March 2011.

¹⁸ “. . . on 4 February 2010, in discussions which had commenced on 29 January, BAe indicated that it was prepared to plead guilty to the section 221 offence [of Companies Act 1985] in respect of the Tanzanian transaction, and pay a sum of £30 million.”

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, p.5.
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

¹⁹ “BAE Settlement, Judicial Review Dropped but Court Sanction Still Pending”, 15 April 2010, <http://www.antibriberyglbe.eu/2010/04/bae-judicial-review/>

²⁰ Sentencing remarks of Lord Justice Thomas in the case of R -v- Innospec Limited, 26 March 2010.
<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>

²¹ On 1 October 2009, SFO stated that “it intends to seek the Attorney General’s consent to prosecute BAe Systems for offences relating to overseas corruption . . . This follows the investigation carried out by the SFO into business activities of BAe Systems in Africa and Eastern Europe”.

“BAE SYSTEMS plc”, Serious Fraud Office press release, 1 October 2009.

<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/bae-systems-plc.aspx>

The SFO Director subsequently admitted in legal proceedings that “with hindsight”, the ordinary language of the press release conveyed the impression that a decision to prosecute had been taken, which in reality overstated the stage the SFO had reached. It expected to assess its Eastern Europe case in mid-February 2010, and Tanzania case in mid-late March.

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, p.4.

<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

²² World Bank Listing of Ineligible Firms & Individuals: Fraud and Corruption,

<http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>

²³ *The Guidance on Corporate Prosecutions*, issued jointly by the Serious Fraud Office, Director of Public Prosecutions and the Director of the Revenue and Customs Prosecutions Office, expressly draws attention to the EU Directive excluding those convicted of corruption from participation in public contracts within the EU. It states “The Directive is intended to be draconian in its effect” and warns prosecutors that deciding *not* to prosecute because of the Directive “will tend to undermine its deterrent effect”. (para. 32, p.9)

<http://www.sfo.gov.uk/media/65228/com1%20joint%20guidance%20on%20corporate%20prosecutions%20for%20publication%20v1.pdf>

After he had made the settlement with BAE, the SFO Director acknowledged in legal proceedings that “a conviction for an offence of corruption would have had the effect of debaring BAe for tendering for public contracts in the EU” under Article 45 of the European Union Public Sector Procurement Directive 2004. Yet he also stated that this would have been “a disproportionate outcome”, which would seem to contradict the *Guidance* above.

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, para 14.5.

<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

²⁴ Gary di Bianco, coordinator of corporate investigations for the City of London law firm Skadden, Arps explains:

“In the United States, the company pled guilty to one count of making false statements to the US Department of Defense and Department of State, and in particular BAE had represented to the US government in the year 2000 that it was implementing a rigorous anti-bribery programme. The US settlement papers then describe that BAE did not in fact implement the anti-corruption programme with the level of rigorousness that it had represented that it would, and the papers charged that this was an important factor in awarding contracts in the United States to BAE. So . . . BAE paid a significant fine, but they were able to negotiate a resolution that did not involve a charge of bribery.”

Gary di Bianco, speaking on *Law in Action*, “Is the law getting to grips with bribery?”, BBC Radio 4, 9 March 2010, <http://www.bbc.co.uk/1/player/console/b00r6611>

See also: Department of Justice, Office of Public Affairs, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine”, Washington, DC, 1 March 2010. <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>

²⁵ Details about the SFO investigation were leaked to the South African press. *See*: <http://hawleyfeinstein.files.wordpress.com/2010/03/south-africa-bae-allegations.pdf>

Under a 2008 law, the independent crime investigating group (known as the Scorpions) was disbanded. The Scorpions had been investigating charges of corruption, racketeering, fraud, money laundering and tax evasion against Jacob Zuma, who became President in April 2009. In March 2011, South Africa’s highest court ruled that the law was “constitutionally invalid”.

²⁶ SFO agreed the following in the plea agreement:

- 6) The SFO shall not prosecute any person in relation to conduct other than conduct connected with the Czech Republic or Hungary.
- 7) The SFO shall forthwith terminate all its investigations into the BAE Systems Group.
- 8) There shall be no further investigation or prosecutions of any member of the BAE Systems Group for any conduct preceding 5 February 2010.
- 9) There shall be no civil proceedings against any member of the BAE Systems Group in relation to any matters investigated by the SFO.
- 10) No member of the BAE Systems Group shall be named as, or alleged to be, an unindicted co-conspirator or in any other capacity in any prosecution the SFO may bring against any other party.

See “BAE Sentencing statement”, 21 December 2010, para 2, p.2. http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf

²⁷ It proposed to begin a formal hearing once the SFO-requested documents had been received. The Commission made its request for Mutual Legal Assistance to the SFO through the country’s Attorney General to the UK’s designated Central Authority (the Home Office) on 7 December 2009. On 10 December 2009, the Commission also wrote directly to Mabey & Johnson’s solicitors requesting the documentary evidence, but “to date the Commission has received no response from the company or its solicitors.”

See: “CHRAJ concerned about lack of documents from UK SFO on alleged M&J bribery case”, 8 February 2010. <http://www.modernghana.com/news/263194/1/chraj-concerned-about-lack-of-documents-from-uk-sf.html>, accessed 31 March 2011.

The named officials obtained a High Court Order in June 2010 prohibiting the Commission from investigating the Mabey and Johnson bribery allegations, which was overturned on appeal in March 2011.

See: “Appeals Court quashes ruling over M&J bribery probe”, 24 Mar 2011, <http://www.modernghana.com/news/321750/1/appeals-court-quashes-ruling-over-mj-bribery-probe.html>, accessed 31 March 2011.

²⁸ David Leigh and Rob Evans, “BAE chiefs 'linked to bribes conspiracy’”, *The Observer*, 7 February 2010.
<http://www.guardian.co.uk/world/2010/feb/07/bae-chiefs-linked-bribes-conspiracy>

²⁹ In the course of legal proceedings, the Director of the SFO disclosed in March 2010 that: “BAe requested an undertaking form [sic] the SFO that in any future proceedings (to which BAe was not a party) the prosecution would not allege that the company was guilty of corruption” (emphasis added)

See: Director of the Serious Fraud Office, “Defendant’s Summary Grounds for Contesting the Claim” [brought by Campaign Against Arms Trade and Corner House Research against SFO’s plea agreement with BAe Systems], 12 March 2010, p.7, paragraph 18.
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SFOGroundsResist.pdf>

Despite repeated requests, the SFO did not release further details of this undertaking. It became public only when Mr Justice Bean sentenced BAE on 21 December 2010. The tenth clause of the agreement states that:

“No member of the BAE Systems Group shall be named as, or alleged to be, an unindicted co-conspirator or in any other capacity in any prosecution the SFO may bring against any other party”.

In addition, the sixth clause of the agreement states: “The SFO shall not prosecute any person in relation to conduct other than conduct connected with the Czech Republic or Hungary”, although this would appear to be constrained or contradicted by clause 10.

“Settlement Agreement between the Serious Fraud Office and BAE Systems plc”, February 2010.
<http://www.sfo.gov.uk/media/133535/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf>

Also available at:
<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf>

³⁰ – Jonathan Russell, “Mabey & Johnson director David Mabey jailed over Iraq bribes”, *The Daily Telegraph*, 24 Feb 2011.
<http://www.telegraph.co.uk/finance/newsbysector/industry/engineering/8343965/Mabey-and-Johnson-director-David-Mabey-jailed-over-Iraq-bribes.html>

– Rob Evans, “Innospec executive fined over bribes to boost sales of toxic fuel additives”, *The Guardian*, 9 August 2010
<http://www.guardian.co.uk/business/2010/aug/09/innospec-executive-fined-lead-fuel-additive-bribes>

– “SEC sues ex-CEO of Innospec Paul W Jennings in Bribery Scheme”, Bloomberg, 24 Jan. 2011.
<http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=IOSP:US&sid=aYCiRiyJTFhM>

³¹ Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, para. 7, p.4.

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf

³² Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, para 5. p.4.

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf

Lawyers acting for Campaign Against Arms Trade and The Corner House following this up, as a result of which BAE and the SFO have both accepted that they understand their agreement to be much narrower than it actually says. Lawyers have also indicated that it is common practice for the scope of a defendant’s admissions and a prosecutor’s investigations to be kept confidential.

³³ R. and BAE Systems plc, Sentencing remarks, 22 December 2010, p.4, para 6.

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf

³⁴ Supplemental Request for Mutual Legal Assistance, 21 March 2008.

<http://hawleyfeinstein.files.wordpress.com/2010/02/sfo-tanzania-request.pdf>

³⁵ David Leigh, “WikiLeaks cables: Tanzania official investigating BAE ‘fears for his life’”, *The Guardian*, 19 December 2010. 19 December 2010

³⁶ UK-based solicitors DLA Piper instructed a UK barrister to attend and observe the SFO’s BAE court proceedings in December 2010 on behalf of Andrew Cheng. Noting that the SFO has closed its investigations in relation to BAE’s deals in Tanzania and had undertaken never to reopen them, he concluded that the investigations undertaken by the UK and Tanzanian authorities “have vindicated Mr Cheng”

<http://www.9goughsquare.co.uk/newsArticle.asp?ID=250>

Mr Justice Bean sentenced BAE on the basis that, by describing the payments in its accounts as provision of technical services, BAE was “concealing from the auditors and ultimately the public the fact that they were making payments to Mr Vithlani . . . with the intention that he should have free rein to make such payments to such people as he thought fit to secure the radar contract” for BAE, but that the company “did not want to know the details”.

Mr Justice Bean said he accepted “there is no evidence that BAE was party to an agreement to corrupt” – but pointed out that they “did not need to be” because the company had deliberately structured the payments to the agent via offshore companies so that they were placed “at two or three removes from any shady activity”. (Sentencing remarks, paragraph 11)

BAE admitted the following in its plea agreement:

“Although it is not alleged that BAE plc was party to an agreement to corrupt, there was a high probability that part of the \$12.4 million [paid to the Tanzania agent] would be used in the negotiation process to favour British Aerospace Defence Systems Ltd.”

Mr Justice Bean said of this high probability:

“indeed there was. Otherwise it is inexplicable . . . why the payments . . . exceeded \$12m; and even more inexplicable why 97% of that money should have been channelled via . . . an offshore company.” (Sentencing remarks, para.8)

See:

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf

³⁷Finnigan Wa Simbeye, “Chenge says Crown Court has cleared him”, *Daily News*, 13 February 2011. <http://www.dailynews.co.tz/home/?n=17253&cat=home>

³⁸ Personal communication with Tanzanian citizens, 4 April 2011.

³⁹ <http://projects.dfid.gov.uk/project.aspx?Project=113703>

⁴⁰ Personal communication with Tanzanian citizens, 4 April 2011.

⁴¹ Mark Pieth, quoted in Siri Schubert, “BAE: How Good a Plea Deal Was It?”, *Frontline*, 9 February 2010
<http://www.pbs.org/frontlineworld/stories/bribe/2010/02/bae-too-good-a-deal-says-chair-of-anti-bribery-group.html#react>

⁴²Hopewell Radebe, “Arms deal details consigned to dark”, *Business Day* (South Africa), 8 February 2010
<http://www.businessday.co.za/articles/Content.aspx?id=93100>

⁴³ The Law Commission, *Criminal Liability in Regulatory Contexts*, Consultation Paper No 195
http://www.lawcom.gov.uk/docs/cp195_web.pdf

⁴⁴ On the importance of corporate liability to meaningful enforcement of anti-bribery law, the SFO wrote the following:

[I]t is in the pursuit of corporate objectives that individual employees use bribes. Individuals do the bribing, corporations benefit. Thus to sideline the key player/offender is to ignore the essence of the problem. This is not a case of an offence which *sometimes corporations also commit*, such as for example fraud or even manslaughter. The mischief at which the bribery offences are directed is almost entirely confined within business activity (or organisational activity if public authorities [are] included). [...]

Response of the Serious Fraud Office to the Law Commission Consultation paper Number 185 *Reforming Bribery* at pp.1, 14 (emphasis in original), quoted in OECD Working Group on Bribery, *United Kingdom Phase 2bis: Report on Application of the [OECD Anti-Bribery] Convention*, 16 October 2008, paragraph 75, p. 21.
<http://www.oecd.org/dataoecd/23/20/41515077.pdf>

⁴⁵ <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>

⁴⁶ According to the Guidance, a non-UK company listed on the London Stock Exchange that does not have “a demonstrable business presence in the United Kingdom” would not come

under the Bribery Act, meaning that it could use capital raised in the UK to pay bribes overseas [para 36]

A non-UK parent company A with a large UK subsidiary B could pay bribes through subsidiary C based in a third country. If UK subsidiary B did not directly benefit from the bribes, the non-UK parent company A would not come under the Bribery Act, even if subsidiary C was paying bribes. [paras 36 & 42]

A UK company would be able to outsource bribery by building a chain of subcontractors sufficiently long to distance itself from the bribe paying [para 39] It should be noted that in sentencing BAE in December 2010, Mr Justice Bean pointed out that BAE did not need to be party to any agreement to corrupt, because it had deliberately structured the payments to its Tanzanian agent via an offshore company controlled by BAE to another tax-haven based company controlled by the agent Vithlani so that the company itself was placed “at two or three removes from any shady activity”. (Sentencing remarks, para. 11)

See: Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statemnt%2021.12.10.pdf

⁴⁷ *See:* London Mining Network, <http://londonminingnetwork.org/mining-and-london/>

⁴⁸ Stephen Msechu, “US stand on dirty money laudable”, *The Citizen*, 22 November 2010. <http://www.thecitizen.co.tz/editorial-analysis/20-analysis-opinions/5753-us-stand-on-dirty-money-laudable.html>

⁴⁹ Robert Wardle, quoted in “Black Money”, *Frontline*, 7 April 2009. <http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/script.html>.

See also:

<http://www.thecornerhouse.org.uk/resource/black-money>

⁵⁰ <http://www.oecd.org/dataoecd/4/18/38028044.pdf>

⁵¹ The Corner House, “Submission to the Joint Committee on the draft Bribery Bill”, 9 June 2009, http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/DraftBriberyBill1stMemo_0.pdf

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<http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>

⁵³ In its accounts, BAE described the payments to its agent Vithlani as payments for provision of technical services. Mr Justice Bean said BAE was “concealing from the auditors and ultimately the public the fact that they were making payments to Mr Vithlani . . . with the intention that he should have free rein to make such payments to such people as he thought fit to secure the radar contract” for BAE, but that the company “did not want to know the details”. (para. 15)

See: Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statemnt%2021.12.10.pdf

When SFO Counsel argued that the disguise was describing public relations as marketing services, including lobbying, as technical services, Mr Justice Bean said “I would have thought a normal fine for that would be about £500 . . . if in fact a company was prosecuted at all.” (*see* Computerised transcript of R v BAE Systems plc, hearing, 20 December 2010, p.31)

⁵⁴ Clive Coleman, speaking in *Law in Action*, “Is the law getting to grips with bribery?”, BBC Radio 4, 9 March 2010, <http://www.bbc.co.uk/iplayer/console/b00r6611>

55

http://www.sfo.gov.uk/media/111905/ag_s_guidelines_on_plea_discussions_in_cases_of_serious_or_complex_fraud.pdf

⁵⁶ “Approach of the Serious Fraud Office to Dealing with Overseas Corruption”, 21 July 2009.

<http://www.sfo.gov.uk/media/97903/37987-sfo5thfeb2010.wma>

⁵⁷ “Monty Raphael Special Counsel”, description on website of Peters & Peters, a law firm specialising in Fraud and Regulatory Litigation, Commercial Fraud Litigation and Compliance

<http://www.petersandpeters.com/people/biogs/monty-raphael.php>

⁵⁸ Speaking on “Bribery reforms” *Law in Action*, BBC Radio 4, 9 March 2010, <http://www.bbc.co.uk/programmes/b00r6611>

⁵⁹ *See*: Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, para. 7.

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf

⁶⁰ *See*: Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, para.9.

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf.

⁶¹ *See*: Mr Justice Bean, “R. and BAE Systems plc: Sentencing remarks”, 22 December 2010, para.5.

http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf.

⁶² “Is the law getting to grips with bribery?” *Law in Action*, BBC Radio 4, 9 March 2010, <http://www.bbc.co.uk/iplayer/console/b00r6611>

⁶³ Bill Waite, former SFO case controller, speaking in *Law in Action*, BBC Radio 4, 9 March 2010,

<http://www.bbc.co.uk/iplayer/console/b00r6611>

⁶⁴ “A Conversation With Richard Alderman Regarding BAE”, questions submitted by Mike Koehler, Assistant Professor of Business Law, Butler University (USA), 23 February 2011. <http://www.scribd.com/doc/50759481/A-Conversation-With-Richard-Alderman-Regarding-BAE>

⁶⁵ Lisa Magarrell, “Reparation in Theory and Practice”, International Center for Transitional Justice, New York, October 2007.

<http://www.ictj.org/static/Reparations/0710.Reparations.pdf>

⁶⁶ Computerised transcript of R v BAE Systems plc, hearing, 20 December 2010, pp.101-102.

See also: Judith Richter, "Engineering of Consent: Uncovering Corporate PR Strategies", *Corner House Briefing 6*, Corner House Research, Sturminster Newton, 31 March 1998. <http://www.thecornerhouse.org.uk/resource/engineering-consent>

⁶⁷ Mark Pieth, quoted in Siri Schubert, "BAE: How Good a Plea Deal Was It?" *Frontline*, 9 February 2010
<http://www.pbs.org/frontlineworld/stories/bribe/2010/02/bae-too-good-a-deal-says-chair-of-anti-bribery-group.html#react>

⁶⁸ Figures calculated from the figures below, compiled by Campaign Against Arms Trade from press reports, parliamentary questions and BAE's information.
http://www.caat.org.uk/issues/bae/country_overviews.php

Alleged bribes in Saudi Arabia of £1,060 million and elsewhere of £132.85 million, totalling £1,192.85 million

Value of contracts for which bribes allegedly paid was £43 billion in Saudi Arabia and £2,805 million elsewhere:

Saudi Arabia	£43 billion
Austria	\$2.24 billion (£1.441 billion)
South Africa	£1 billion
Qatar	£500 million
Czech Republic	£400 million
Hungary	\$500million (£320 million)
Romania	£116 million
Tanzania	£ 28 million

⁶⁹ Paul Collier, speaking in *Law in Action*, "Is the law getting to grips with bribery?" BBC Radio 4, 9 March 2010, <http://www.bbc.co.uk/iplayer/console/b00r6611>

⁷⁰ Clause 5 of plea agreement. See: Mr Justice Bean, "R. and BAE Systems plc: Sentencing remarks", 22 December 2010, para.2.
http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdfSentencing remarks.

⁷¹ Mr Justice Bean, "R. and BAE Systems plc: Sentencing remarks", 22 December 2010, para.16.
http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf.

⁷² Mr Justice Bean, "R. and BAE Systems plc: Sentencing remarks", 22 December 2010, para.15.
http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/BAE_sentencing_statement%2021.12.10.pdf.

⁷³ Peter Marshall, "Suspensions over BAE termination of government contract", *Newsnight*, BBC 1, 29 May 2009
<http://www.thecornerhouse.org.uk/resource/suspensions-over-bae-termination-government-contract>

See also:
<http://www.thecornerhouse.org.uk/resource/bae-terminates-government-insurance-controversial-saudi-arms-deals>

⁷⁴ Sam Sole and Nick Dawes, “BAE’s web of influence in South Africa”, *Mail & Guardian*, 12 January 2007.

<http://www.mg.co.za/article/2007-01-12-baes-web-of-influence-in-south-africa>

⁷⁵ On 29 July 2010, at a meeting with Business, Innovation and Skills (BIS) Minister Ed Davey MP, a BAE representative said that ECGD support would be “critical” to achieving the current Government’s policy of increasing military exports. BAE’s Head of Government Relations reiterated this on 1 February 2011 when he told a BIS Committee that ECGD support was “absolutely essential”.

See: Submission from Campaign Against Arms Trade to this Inquiry, April 2011.

⁷⁶ “Settlement Agreement between the Serious Fraud Office and BAE Systems plc”, February 2010.

<http://www.sfo.gov.uk/media/133535/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf>

Also available at:

<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf>

⁷⁷ “BAE SYSTEMS PLC ANNOUNCES GLOBAL SETTLEMENT WITH UNITED STATES DEPARTMENT OF JUSTICE AND UNITED KINGDOM SERIOUS FRAUD OFFICE” News Release, 5 Feb 2010.

http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html

⁷⁸ http://www.civilsocietysupport.net/fpdf/dp_project.php?id=24

⁷⁹ Lindsay Fortado “U.K. Plan to Return \$45.7 Million to Bribery Victims May Fuel Corruption”, *Bloomberg*, 15 July 2010.

<http://www.bloomberg.com/news/2010-07-14/u-k-plan-to-return-cash-to-tanzania-bribery-victims-may-fuel-corruption.html>

⁸⁰ Personal communication, 4 April 2011.

⁸¹ “Mabey & Johnson Ltd sentencing”, SFO press release, 25 September 2009, <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx>

⁸² quoted in Adwoa Ayamba, “M&J saga: Government won’t accept reparation”, 10 October 2009

<http://www.modernghana.com/news/242848/1/mj-saga-government-wont-accept-reparation.html>

⁸³ Devotha John, “Three leave for UK to negotiate radar deal”, *The Citizen*, 3 June 2010, <http://www.thecitizen.co.tz/news/4-national-news/2233-three-leave-for-uk-to-negotiate-radar-deal.html>

⁸⁴ Gabriel Nderumaki, “UK: No decision yet on radar money”, *Daily News*, 18 August 2010. <http://dailynews.co.tz/home/?n=12542>

⁸⁵ Personal communication with Tanzanian citizens, 4 April 2011.

⁸⁶ <http://www.dfid.gov.uk/Where-we-work/Africa-Eastern--Southern/Tanzania/Key-facts/>

⁸⁷ <http://www.dfid.gov.uk/Where-we-work/Africa-Eastern--Southern/Tanzania/>

⁸⁸ Other advantages cited are strengthening the parliamentary role for decision-making, shifting accountability from donors to citizens, making aid contributions more predictable and thus easier for the Government to implement poverty reduction strategies, saving time and money.

<http://www.tzdpd.or.tz/external/aid-modalities/budget-support/general-budget-support.html>

⁸⁹

<http://www.tzdpd.or.tz/external/aid-modalities/budget-support/general-budget-support.html>

⁹⁰ Romilly Greenhill and Irene Wekiya, *Turning off the taps: Donor conditionality and water privatisation in Dar es Salaam, Tanzania*, ActionAid UK, London.

http://www.actionaid.org.uk/_content/documents/TurningofftheTaps.pdf

⁹¹ See: Joseph Hanlon, "How Northern Donors Promote Corruption: Tales From the New Mozambique", *Corner House Briefing* 33, October 2004,

<http://www.thecornerhouse.org.uk/resource/how-northern-donors-promote-corruption>

Susan Hawley, "Exporting Corruption: Privatisation, Multinationals and Bribery", *Corner House Briefing* 19, June 2000. <http://www.thecornerhouse.org.uk/resource/exporting-corruption-0>

⁹² <http://www.fsd.tz/>

⁹³ http://hansard.millbanksystems.com/westminster_hall/2002/jun/25/export-controls-tanzania

Another explanation hypothesised is that the contract price was artificially inflated so that it looked as if Barclays was providing a concessional loan rather than one at commercial rates, which was necessary if the IMF was not to change Tanzania's HIPC status.

⁹⁴ Joe Roeber, *Parallel Markets: Corruption in the International Arms Trade*, Campaign Against Arms Trade, London, June 2005.

http://www.controlbae.org/background/parallel_markets.pdf