

“Sustaining corruption legal challenges in a hostile political environment  
when corruption investigations have not been sustained:  
Insights from ‘the BAE case’”

presentation by Sarah Sexton and Nicholas Hildyard  
The Corner House, UK  
at

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*Global Transparency: Fighting corruption for a sustainable future*

Workshop 5.1, Stream 1, Peace & Security:  
“Sustaining Corruption Investigations in a hostile political environment”

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*(Sarah Sexton)*

Thank you for the invitation to speak on this panel.

Over the years, I’ve learnt that, before I start a presentation, I should say a few words in anticipation of a question that will otherwise undoubtedly come from the floor afterwards. That question is: What is The Corner House?

Four of us set up The Corner House 11 years ago now, although we have been working together for longer than that. Three of those founders are here at this conference in Athens: myself, Nicholas Hildyard, and Larry Lohmann, who was addressing issues related to carbon trading in a workshop this morning.<sup>1</sup> My other colleague, Susan Hawley, would undoubtedly be here as well if she were not on maternity leave.

The answer to who we are and what we do is usually something along the lines of: “a small, UK-based social and environmental justice research and solidarity group” – and that’s the short answer.<sup>2</sup> I’ve learnt in the 24 hours since I’ve been here at this 13th International Anti-Corruption Conference, however, that I can now make that answer even shorter and say simply: one of the groups that brought ‘the BAE case’.

Bringing the legal challenge – the judicial review – as The Corner House and another UK-based group, Campaign Against Arms Trade,<sup>3</sup> did of the decision by the Serious Fraud Office (SFO) in December 2006 to “discontinue its investigation into the affairs of BAE SYSTEMS Plc as far as they relate to the Al Yamamah defence contract with the government of Saudi Arabia”<sup>4</sup> did not happen because we were simply looking around for a good corruption legal case to bring.

The decision to bring the judicial review came out of several years of Corner House work, including that with various communities around the world negatively affected by the financial support that the UK’s export credit agency gives to UK companies wishing to do business abroad;<sup>5</sup> and of work on the intersection between contracts underwritten by that publicly-funded agency and corruption;<sup>6</sup> and of working with

many other groups and individuals around the world – you have to if you’re just four people – including Campaign Against Arms Trade.<sup>7</sup>

So when the SFO’s BAE-Saudi investigation was stopped on 14 December 2006, instigating the judicial review process of the decision four days later<sup>8</sup> was simply a continuation of our existing work.

The title of this workshop is “sustaining corruption investigations in a hostile political environment”. Others are far better placed to talk on this than us, such as the staff at the UK’s Serious Fraud Office who sustained the BAE-Saudi investigation from July 2004 until December 2006, since when the Director, Deputy Director, at least four senior prosecutors and other staff have left the Office.

We could, however, make several points drawing on the process of the judicial review and the many documents and important matters of public interest that would not otherwise have seen the light of day (to borrow the words of the High Court judge<sup>9</sup>) – we could mention BAE’s spying on Campaign Against Arms Trade to obtain our legal advice;<sup>10</sup> the UK government’s attempt to keep secret several documents related to judicial review;<sup>11</sup> or the extent of political interference to get the investigation stopped.<sup>12</sup>

But I think you either know much of this already or can read about it on our websites<sup>13</sup> or indeed in the recent OECD Working Group on Bribery’s *Phase2bis* report on the UK.<sup>14</sup>

Today, we will restrict ourselves to a few points related to Article 5 of the OECD Anti-Bribery Convention<sup>15</sup> – we argued in the judicial review that stopping the SFO investigation contravened Article 5 – and conclude with some comments related to the ‘Stream’ of this workshop: Peace and Security.

*(Nicholas Hildyard)*

On the face of it, the United Kingdom has one of the most favourable environments for prosecuting bribery and corruption. It is a democracy. Its prosecutors are sworn to uphold the rule of law. It has a government minister designated an “Anti-corruption Champion”.<sup>16</sup> And it has a government that repeatedly reaffirms its commitment to fighting bribery. Here’s one Ministerial quote – I have many but one will suffice – that is particularly relevant to the theme of today’s workshop:

“The UK is committed to tackling corruption, bribery and money laundering. This includes making sure that we rigorously enforce relevant UK laws so that people who pay bribes are prosecuted . . .”<sup>17</sup>

The reality, however, is very different.

There is no question that the staff of the Serious Fraud Office (SFO) and the City of London police – the two agencies in the UK charged with investigating corruption – are dedicated individuals. The SFO staff are reported to have been “gutted” when the BAE case was dropped. On the day the announcement was made, its press department downed tools and left the office. We’ve been told that SFO staff cheered when they

heard the High Court ruling in April 2008 that the SFO Director had acted unlawfully in terminating the investigation.

Far from encouraging a political environment that encourages anti-corruption efforts, successive governments have actively tolerated (and even allowed to flourish) an environment that is hostile to such efforts.

To stand up to powerful economic actors – which bribers often are – an investigator and prosecutor needs both the support of other departments of state and independence from political interference. Yet in the UK, a revolving door between powerful industries – such as arms companies – and the civil service has been encouraged, providing companies with immense lobbying power. Former UK Foreign Secretary Robin Cook described BAE as having the key to No. 10's back door.<sup>18</sup> When the UK's export credit agency introduced stronger anti-bribery measures a few years ago, BAE, Rolls Royce and Airbus met with the Secretary of State – and the new measures were scrapped. It took another judicial review to get them reinstated.<sup>19</sup>

The lobbying power of multinationals is not a problem unique to prosecutors and regulators in the UK. And prosecutors could resist such power if they were assured of judicial independence and legal clarity on which to build a successful prosecution. But, as the OECD's Working Group has repeatedly highlighted, the UK government has failed to introduce clear-cut anti-bribery legislation that enforces the OECD Anti-Bribery Convention. Ten years after the UK ratified it, key elements of the Convention have not been transposed into UK law. Uncertainty abounds over whether or not "the agent/principal" defence holds in the UK.<sup>20</sup> And the Serious Fraud Office has described the law on corporate liability as "ineffective".<sup>21</sup>

The generous interpretation of the UK's failure to implement the OECD Anti-Bribery Convention is that it reflects, in the OECD's own words, a "lack of political will".<sup>22</sup>

A more accurate view is that, far from lacking political will, the UK government has devoted immense political will over the years to the task of protecting a few powerful companies from prosecution for bribery. And the extent of such political will is reflected in the UK's willingness to jeopardise, if not fatally sabotage, the OECD Anti-Bribery Convention itself.

We don't have time to go into the legal details of "the BAE case", but we will highlight a few salient features emerging from the judicial review that illustrate the hostile environment in which the prosecutor was operating.

It was BAE, the very company under investigation, acting on the prompting of the Ministry of Defence, that first intervened to call a halt to the SFO's investigation – evidence of the hand-in-glove relationship between the two entities.<sup>23</sup>

Although, under the UK's (unwritten) constitutional arrangements, government Ministers are not supposed to intervene in judicial investigations and prosecutions, they and other public officials routinely advised the SFO and the Attorney General (the UK's chief law officer<sup>24</sup>) to stop the investigation. This eventually went right to the top with then Prime Minister Tony Blair himself intervening directly to argue for the investigation to be stopped.<sup>25</sup> No mention of national security concerns was made

initially. Instead the focus was on the threat posed by the investigation to jobs and to diplomatic relations.

For over a year, the Serious Fraud Office and the Attorney General successfully resisted attempts to close the inquiry, relying on Article 5 of the OECD Anti-Bribery Convention.<sup>26</sup>

Saudi officials – including the person to whom BAE had allegedly made payments – then made a direct threat to break off intelligence cooperation with the UK.<sup>27</sup> The UK Ambassador told the SFO Director that “British lives on British Streets” would be at risk.<sup>28</sup>

No more hostile environment exists for a prosecutor than the threat that continuing with an investigation might endanger lives.

But, as we argued in our judicial review, a proper construction of Article 5 would have provided the SFO with the means to resist improper use of national security arguments. The UK government chose not to follow such an interpretation. Instead it shut down the investigation.

We should stress: It was never our case that national security is not a legitimate reason for terminating an investigation and that concerns about national security can override the rule of law. National security may well be a legitimate reason for doing so. In this instance, however, independent security sources have rubbished the idea that “British lives on British Streets” were at risk.<sup>29</sup> We would also point out that the SFO itself only heard the security advice second hand – and never subjected it to scrutiny. Nor was the security advice ever tested in court.<sup>30</sup>

Our argument was that the UK’s international law obligations under Article 5 of the Anti-Bribery Convention could be overridden by national security only under conditions of “strict necessity”: namely when there was a “grave and imminent peril”, and when abandoning the investigation was the “only means” of safeguarding national security.<sup>31</sup>

Neither condition had been met in the BAE case. The government acknowledged in court that the threat was not imminent. And it is clear from the documents released as a result of the judicial review that no serious attempt was made to consider alternatives<sup>32</sup> – a point stressed also in the OECD Working Group’s recent *Phase 2bis* report.<sup>33</sup>

We also maintained, using essentially the same arguments, that the termination of the inquiry was unlawful because it undermined the Rule of Law<sup>34</sup> – and in particular the prosecutors’ duty to apply the law “without fear or favour”.<sup>35</sup> The consequences of violating the rule of law had not been properly recognised, considered or weighed in the balance. As a result, we argued that the decision was unlawful.

The High Court agreed. And in a judgment that was very much written for the Serious Fraud Office, the Court offered the Director a lifeline that could be used to resist pressures on him and to sustain the investigation. The Court identified the

circumstances in which national security could be invoked and the accompanying tests.<sup>36</sup>

That lifeline has not been taken. Instead, the UK government challenged the High Court ruling and insisted that Article 5 was not applicable in the UK.<sup>37</sup> The government also argued, as it had previously, that even if Article 5 did apply, the Director would have ignored it in light of the threat to national security.<sup>38</sup>

The Law Lords, the UK's highest court, upheld the government's view.<sup>39</sup> But their ruling, though regrettable, is to be welcomed. It clarifies the law. We now know that the OECD Anti Bribery Convention is not enforceable in the UK – and that the courts are unwilling to enforce it. It is also clear that “extortion rules OK!” Anyone who has powerful friends in high places and who is able to make a threat that can be interpreted, however loosely, as a national security threat has an effective “Get out of jail free” card. And there is nothing that the courts can do to challenge this, the assessment of national security being off limits to judicial scrutiny.

The UK government has thus driven a coach and horses through the Anti-Bribery Convention. And although the OECD Working Group's recent *2bis* report does something to redress the balance, that runaway coach will not be stopped unless the OECD acts quickly to rule once and for all on the interpretation of Article 5 in cases involving national security (or claimed national security). This represents an urgent challenge for civil society – to press for a strong interpretation. Without it, more BAE-type cases can be expected and the Convention will be dead.

The case also throws into question the UK's assurances to the OECD on other areas where UK anti-bribery law lacks clarity.<sup>40</sup> Quite simply, the UK cannot be trusted. It will say one thing to smooth the OECD's feathers – and argue another in the UK courts, the only forum that matters in terms of enforcement of the UK's anti-bribery obligations.<sup>41</sup>

And there is yet further evidence of the political will now being exerted by the UK to undermine anti-bribery efforts that might threaten powerful UK interests.

*(Sarah Sexton)*

This evidence came in March 2008, *before* the first High Court ruling, when the UK government introduced draft legislation that would effectively enshrine on the statute books what turned out to be the Lords decision– and make sure that a judicial review such as ours never happens again.

The draft Constitutional Renewal Bill proposes to create general broad statutory powers for the government, through the Attorney General – the government's chief legal adviser appointed by the Prime Minister – to direct a prosecutor to stop any criminal prosecution or a Serious Fraud Office investigation on the grounds of national security.<sup>42</sup>

Additional clauses would ensure that no meaningful explanation or accountability need be given to Parliament, the Courts or international bodies if the government were to use the new powers. One clause would ensure that the Courts could not scrutinise

any decision to stop a prosecution or fraud investigation on these grounds<sup>43</sup> – thus no judicial review, and no more important documents or facts to see the light of day.

Another clause would allow the Attorney General to leave out of her or his report to Parliament on the decision any information that could prejudice national security *or* international relations. “Prejudice to international relations” is defined widely,<sup>44</sup> and includes the promotion or protection by the UK of its interests abroad. “The interests of the UK” are not defined, but we’ve been advised by a legal expert that this could even encompass the UK’s image abroad.<sup>45</sup> The draft Bill does not define or limit “national security”, and there is no requirement that the peril be grave or imminent.<sup>46</sup>

These clauses may have been introduced to make sure the government has a permanent get-out clause from Article 5,<sup>47</sup> but legislation can always be used in future in other contexts than those for which it is intended.<sup>48</sup>

Moreover, in the same month that the government published this draft Bill, the Cabinet Office (the government department supporting the Prime Minister) issued the UK’s first national security strategy.<sup>49</sup> This broadens the understanding of national security to encompass a wide range of threats and risks beyond those made by another state to the UK’s territory. The threats and risks identified include not only the obvious ones of terrorism, nuclear weapons and other weapons of mass destruction, and global instability and conflict, but also other less obvious ones that are the subject of several workshops at this conference: infectious diseases; extreme weather and coastal flooding; climate change; competition for energy; poverty, inequality and poor governance; transnational organised crime; migration and demographic changes, particularly large numbers of teenagers.<sup>50</sup>

A broader understanding of what constitutes national security<sup>51</sup> combined with opportunistic use of whatever legislation is at hand could mean that, in future, as far as the UK is concerned, many people at this conference could be considered as threats to the UK’s national security.

In this sense, the implications of the UK’s undermining of Article 5 of the OECD Anti-Bribery Convention go far beyond corruption. If this state of affairs continues in the UK without deeper changes in the structures of power, those prosecuting would enjoy an environment that, *unlike* with anti-bribery cases, actively enjoys government support. And that poses a challenge for all of us and a challenge for mobilisation.<sup>52</sup>

Thank you.

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<sup>1</sup> Larry Lohmann, "Governance as Corruption: Carbon Trading and Financial Derivatives", <http://www.thecornerhouse.org.uk/pdf/document/GovasCorr.pdf>

<sup>2</sup> For more information, *see*:  
[http://www.thecornerhouse.org.uk/about/item.shtml?cmd\[402\]=x-402-49653](http://www.thecornerhouse.org.uk/about/item.shtml?cmd[402]=x-402-49653).

<sup>3</sup> Campaign Against Arms Trade: <http://www.caat.org.uk>.

*See in particular* Tim Webb, *Bribing for Britain: government collusion in arms sales corruption*, CAAT, October 2007,  
<http://www.caat.org.uk/publications/corruption/BribingForBritain.php>

<sup>4</sup> *Statement*, Serious Fraud Office Press Release, 14 December 2006,  
[http://www.sfo.gov.uk/news/prout/pr\\_497.asp?id=497](http://www.sfo.gov.uk/news/prout/pr_497.asp?id=497), accessed 21 October 2008.  
*See also* "Statement by Lord Goldsmith, Attorney General, to House of Lords concerning BAE Systems: Al Yamamah contract", 14 December 2006,  
<http://www.theyworkforyou.com/lords/?id=2006-12-14d.1711.2>

<sup>5</sup> *See* Nicholas Hildyard, "Snouts in the Trough: Export Credit Agencies, Corporate Welfare and Policy Incoherence", *Corner House Briefing 14*, June 1999,  
<http://www.thecornerhouse.org.uk/item.shtml?x=51970>,

For related documents on export credit agencies, *see*:  
<http://www.thecornerhouse.org.uk/subject/aid/>  
<http://www.eca-watch.org/>

<sup>6</sup> *See*, for example:

--The Corner House, "Underwriting Corruption: Britain's Role in Promoting Corruption, Cronyism and Graft", submission to The International Development Committee's Inquiry into Corruption, December 2000,  
<http://www.thecornerhouse.org.uk/item.shtml?x=51990>;

--Susan Hawley, *Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department*, The Corner House, June 2003,  
<http://www.thecornerhouse.org.uk/pdf/document/correcgd.pdf>;

--other documents: <http://www.thecornerhouse.org.uk/subject/corruption/>

<sup>7</sup> *See*, for example:

--Ann Feltham, CAAT, "The Case for Removing Arms from the ECGD's Portfolio",  
<http://www.thecornerhouse.org.uk/item.shtml?x=51999>;

--The Corner House and others, *Listen to the Refugee's Story: How UK Foreign Investment Creates Refugees and Asylum Seekers*, November 2003,  
<http://www.thecornerhouse.org.uk/item.shtml?x=52207>

<sup>8</sup> Letter sent by solicitors Leigh Day & Co. to Robert Wardle, Director of Serious Fraud Office, 18 December 2006,  
<http://www.thecornerhouse.org.uk/pdf/document/BeforeClaim18Dec06.pdf>.

The judicial review was heard on 14-15 February 2008 on six overlapping grounds:

1) *OECD Anti-Bribery Convention*

The decision to discontinue the BAE-Saudi corruption investigation was based on considerations of potential damage to the UK's relations with Saudi Arabia, in particular, damage to UK/Saudi security, intelligence and diplomatic cooperation. This is unlawful because it contravenes Article 5 of the OECD's Anti-Bribery Convention, which prevents signatories from terminating an investigation because of "the potential effect [of an investigation] upon relations with another State".

2) *Saudi Arabia's international legal obligations to combat terrorism*

The UK effectively colluded with Saudi Arabia in breaching Saudi Arabia's international legal obligations to cooperate and share information on terrorist activities, and thereby colluded in committing an internationally wrongful act.

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3) *Acting on tainted advice from government ministers*

Government ministers (including the Prime Minister) took into account the risk of the UK not being able to sell Typhoon aircraft, and other commercial, economic and diplomatic matters when they gave advice to the SFO Director on the public interest aspects of the investigation. This was despite being told by the Attorney General that Article 5 of the OECD Anti-Bribery Convention forbids such considerations from being taken into account. The ministerial advice was therefore “tainted”.

4) *Damaging national security by discontinuing the investigation*

The SFO Director is under a legal obligation to take a balanced view of the public interest issues arising from an investigation. But neither the Director nor government ministers assessed or took into account the harm to the UK’s national security of discontinuing the investigation.

5) *Government ministers expressed a view on what decision an independent prosecutor (the Director of the Serious Fraud Office) should take*

The SFO Director and Attorney General requested views from government Ministers on the public interest aspects of pursuing the investigation. The rules for these consultations between the judiciary and the executive forbid Ministers from giving a view on whether a prosecution should proceed or not. But the Prime Minister expressed a clear view that the public interest would best be served by intervening to halt the investigation. This is unlawful.

6) *Blackmail, threats and the rule of law*

It is unlawful for an independent prosecutor to permit threats or blackmail to influence his/her decision to discontinue a criminal investigation or prosecution. To do so is to surrender the rule of law.

<sup>9</sup> “High Court reopens BAE-Saudi corruption investigation”, press release, The Corner House and CAAT, 24 April 2008,  
<http://www.thecornerhouse.org.uk/pdf/document/PressReleaseAppeal.pdf>

<sup>10</sup> For more information, *see*:  
<http://www.controlbae.org/jr/bringingjr.php#spying>

<sup>11</sup> For more information, *see*:  
-- “9 July 2007: UK government is prepared to break international law”,  
<http://www.controlbae.org/jr/bringingjr.php#international>;

-- “4 February 2008: Another key ruling over public access to judicial review documents”,  
<http://www.controlbae.org/jr/jrhearing.php#access>

<sup>12</sup> “Documents reveal that Blair urged end to BAE-Saudi corruption investigation”, 21 December 2007,  
<http://www.thecornerhouse.org.uk/item.shtml?x=559591>

<sup>13</sup> For documents related to the judicial review, *see*  
<http://www.thecornerhouse.org.uk/subject/corruption/>

For a chronology of the judicial review with links to key documents and background, *see*  
<http://www.controlbae.org/jr>

For further information about the Al Yamamah defence contract, *see The Guardian* newspaper’s “BAE files”:  
<http://www.guardian.co.uk/world/bae>

<sup>14</sup> OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2bis*, 16 October 2008,  
<http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

The OECD’s Working Group on Bribery comprises public servants from the 37 signatories to the OECD Anti-Bribery Convention (*see* note 15 below). It monitors parties’ performance in implementing the Convention through a peer review process to which parties agree when they sign and ratify the Convention. The monitoring process usually comprises two stages: Phase 1 assesses legislation, while Phase 2 examines overall implementation. In rare cases when countries fail to meet their commitments, a follow-up evaluation of key weaknesses, Phase 2*bis*, is carried out.



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The Working Group instigated the Phase 2bis review for the United Kingdom in March 2007 because of its “serious concerns” over the SFO decision to halt its BAE-Saudi investigation.

For a basic chronology of events leading up to the SFO decision to stop its BAE-Saudi investigation, see Divisional Court judgment, paras 2-5 and 8-38:

<http://www.thecornerhouse.org.uk/pdf/document/JR-Judgment.pdf>

and/or

House of Lords judgment, paras 2-22.

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner.pdf>.

<sup>15</sup> In 1998, the UK signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (known as the OECD Anti-Bribery Convention). The Convention is a multilateral treaty aiming to ensure that all 30 OECD (Organisation for Economic Cooperation and Development) countries, as well as 7 other non-member signatory countries, present a combined and united front against bribery and corruption of foreign public officials.

Article 1 of the Convention requires parties to make it a criminal offence to bribe a foreign public official. The UK did so in its 2001 Anti-Terrorism Crime and Security Act.

Article 5 makes provisions to enforce Article 1:

“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.”

<sup>16</sup> “Anti-corruption Champion”, 15 October 2008, <http://www.justice.gov.uk/news/announcement151008a.htm>

<sup>17</sup> para 3.12, Chapter 3, “Supporting good governance internationally”, *Eliminating World Poverty: Making Governance Work for the Poor*, A White Paper on International Development, July 2006, p.37, <http://www.dfid.gov.uk/pubs/files/whitepaper2006/wp2006section2.pdf>

<sup>18</sup> Number 10 Downing Street is the residence and office of the UK Prime Minister and the headquarters of the UK government.

“The former foreign secretary, Robin Cook, alleges in his memoirs [*The Point of Departure: Diaries from the Front Bench*]: ‘In my time I came to learn that the chairman of British Aerospace [Sir Richard Evans] appeared to have the key to the garden door to No 10. Certainly I never once knew No 10 come up with any decision that would be incommoding to British Aerospace.’”

See David Leigh and Rob Evans, “BAE chief linked to slush fund”, *The Guardian*, 5 October 2004, <http://www.guardian.co.uk/uk/2004/oct/05/saudi-arabia.armstrade>

<sup>19</sup> See “Corner House Double Victory on UK government Department’s Anti-Bribery Rules and Public Interest Litigation”, 25 January 2005, <http://www.thecornerhouse.org.uk/item.shtml?x=107362>.

<sup>20</sup> The agent/principal concept is the basis of one of the UK’s two statutory bribery offences as provided for in the 1906 Prevention of Corruption Act. This Act makes it an offence to give any consideration to any agent as an inducement for doing any act to show favour or disfavour to any person, in relation to his/her principal’s affairs or business. If someone accepts a bribe with the informed consent of their superior or “principal”, however, the bribe-taker (the agent) can cite such consent as a defence of their actions. Article 1 of the OECD Anti-Bribery Convention, however, does not contemplate an exception to the offence of foreign bribery where the person bribed acts with the consent of his/her principal. The question thus arises whether principal consent is a defence to foreign bribery in the UK. (The other statutory bribery offence is contained in the 1889 Public Bodies Corrupt Practices Act under which it is a crime to corruptly give, promise or offer any gift or advantage to officials of a public body.)

<sup>21</sup> “During the [OECD Working Group’s] on-site visit [to the UK], SFO representatives made clear that the SFO considers that current law on corporate liability for bribery is ineffective and unsatisfactory.” (para 75, p.21, OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2bis*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>)

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<sup>22</sup> “The examining team . . . consider that there is a lack of political will to achieve compliance with the Convention.” (OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2bis*, 16 October 2008, para 79, p.22.  
<http://www.oecd.org/dataoecd/23/20/41515077.pdf>)

<sup>23</sup> BAE Systems wrote a “Memorandum for Attorney General”, dated 7 November 2005, which was sent to the Attorney General on a “strictly private and confidential” basis. The Memorandum set out “the reasons why the Company considers it not to be in the public interest for the SFO investigation . . . to continue.” The company argued that the investigation should be dropped on commercial and diplomatic grounds and did not mention “national security”.  
(See “Item 3, Exhibit RW4”,  
<http://www.thecornerhouse.org.uk/pdf/document/SecondRedactDocsRW4.pdf>)

The Memorandum and other letters from BAE were written in response to an SFO order that BAE disclose its payments to agents and consultants involved in the Saudi arms deals.

This Memorandum triggered a consultation within government departments on the “public interest” aspects of the criminal investigation, even though the Memorandum had been sent by the subject of that investigation.

Some of the representations made by government departments during this consultation appear to have been made at BAE’s instigation. According to the notes that SFO Director Robert Wardle made of his telephone conversation on 7 November 2005 with BAE’s Legal Director, Michael Lester, BAE said it “would make further representations to the Ministry [of Defence] for them to make representations to us [the Serious Fraud Office]” as to why the investigation should be halted.  
(See “Item 7, Exhibit RW4”,  
<http://www.thecornerhouse.org.uk/pdf/document/SecondRedactDocsRW4.pdf>.)

The day before this conversation, 6 December 2005, the legal secretary to the Attorney General wrote to the Secretary of the Cabinet:

“BAe have submitted that it is not in the public interest for the investigation to continue. They argue that provision by them of the information sought by the SFO would be regarded by the Saudi Arabia government as a serious breach of confidentiality by BAe and the UK government. They argue that this would have a serious adverse effect on relations between the UK and Saudi Arabia governments; and would almost inevitably prevent the UK security a large export contract of some £40 billion.

“The MoD [Minister of Defence] has indicated that it considers the BAe concerns well-founded.”  
(“Item 1, Exhibit RW2”,  
<http://www.thecornerhouse.org.uk/pdf/document/RedactedDocsRW2.pdf>)

<sup>24</sup> The Attorney General is responsible for all crown or state litigation and superintends the Director of the Serious Fraud Office. The Attorney General’s consent is needed for an SFO prosecution to proceed. The Attorney General is also the government’s chief legal adviser, a member of the government and a political appointee. The OECD Anti-Bribery Convention states that those with political functions should not make decisions on investigations and prosecutions.

<sup>25</sup> On 16 December 2005, the secretary to the Cabinet sent a note to the legal secretary to the Attorney General setting out “the public interest conditions as the government sees them” of continuing with the BAE-Saudi investigation. The note highlights further contracts with Saudi Arabia to purchase aircraft from the UK, and concludes with the sentence: “This note has been seen by the Prime Minister, the Foreign Secretary and the Defence Secretary, and has their support.”  
(See Item 2, Exhibit RW2, <http://www.thecornerhouse.org.uk/pdf/document/RedactedDocsRW2.pdf>)

A year later, on 8 December 2006, then Prime Minister Tony Blair sent the Attorney General, Lord Goldsmith, a “personal minute” about the “real and immediate risk of a collapse in UK/Saudi security, intelligence and diplomatic cooperation”. Blair stressed in this “personal minute” his concern about “the critical difficulty presented to the negotiations over the Typhoon contract”, (a further proposed but

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then unsigned deal for the sale of 72 Eurofighter Typhoon aircraft from BAE to Saudi Arabia).  
(See “Item 6, Exhibit RW2”, <http://www.thecornerhouse.org.uk/pdf/document/RedactedDocsRW2.pdf>)

Tony Blair subsequently stated that he took full responsibility for the decision (although during the judicial review process, it was repeatedly claimed that the Serious Fraud Office Director alone took the decision). He said:

“If this prosecution had gone forward all that would have happened is we would have had months, perhaps years, of ill-feeling between us and a key ally.

“I’m afraid, in the end, my role as Prime Minister, is to advise on what’s in the best interests of our country. I have absolutely no doubt at all that the right decision was taken in this regard and I take full responsibility.

“I have no doubt at all that had we allowed this to go forward it would have done immense damage to the true interests of this country. And leaving that aside that fact that it would have lost thousands of highly-skilled British jobs and very important business for British industry.”

(quoted in David Charter, “Blair: I pushed for end to Saudi arms inquiry”, *The Times*, 15 December 2006, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article755310.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article755310.ece), accessed 13 November 2008)

<sup>26</sup> The *First Witness Statement of Robert Wardle* indicates that the Director of the Serious Fraud Office repeatedly rejected requests to terminate the SFO investigation, insisting that, on balance, “the public interest in investigating possible corruption by a major arms company” (para. 43) was best served by continuing the investigation.  
(<http://www.thecornerhouse.org.uk/pdf/document/WardleWitState.pdf>)

<sup>27</sup> The House of Lords judgment describes “the facts” as follows:

“ . . . in the autumn of 2006 the SFO intended to investigate certain bank accounts in Switzerland to ascertain whether payments had been made to an agent or public official of Saudi Arabia. The SFO had obtained the co-operation of the Swiss authorities. This attempt to gain access to Swiss bank information provoked an explicit threat by the Saudi authorities that if the Al Yamamah investigation were continued Saudi Arabia would withdraw from the existing bilateral counter-terrorism co-operation arrangements with the UK, withdraw co-operation from the UK in relation to its strategic objectives in the Middle East and end the negotiations then in train for the procurement of Typhoon aircraft.” (para. 11)

“ . . . on 5 December [2006] . . . Prince Bandar, National Security Adviser to the Kingdom of Saudi Arabia, met officials of the Foreign and Commonwealth Office in Riyadh.” (para. 15)

See <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner.pdf>

<sup>28</sup> See “Item 12, Exhibit RW4”,  
<http://www.thecornerhouse.org.uk/pdf/document/SecondRedactDocsRW4.pdf>

<sup>29</sup> The UK’s intelligence service was not the author of the assessment of the national security risks posed by the Saudi threats to withdraw intelligence co-operation upon which the SFO Director based his decision. Sources told *The Guardian* that MI5 and MI6 possessed no intelligence that Saudi Arabia intended to sever security links.

(David Leigh, Richard Norton-Taylor and Rob Evans, “MI6 and Blair at odds over Saudi deals: No national security issue says agency”, *The Guardian*, 16 January 2007,  
<http://www.guardian.co.uk/politics/2007/jan/16/uk.topstories3>, accessed 13 November 2008)

One security consultant told news agency Reuters: “It’s just nonsense . . . It’s actually worse than nonsense, it’s an extremely cynical use of security justifications for another purpose”. The consultant said that the Saudi intelligence service was one of the weakest in the region, and that Saudi Arabia relies on the US and UK to “tell them what’s going on” and is “very dependent on British intelligence in relation to Iran, which is clearly their major geo-strategic threat.”

(quoted in David Brunnstrom and Mark Trevelyan, “Blair defends scrapping of probe into Saudi deal”, Reuters, 15 December 2006,  
<http://www.reuters.com/article/sphereNews/idUSL1578135620061215?sp=true&view=sphere>, accessed 13 November 2008)

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The SFO Director states himself that he never saw any of the national security assessments. Documents released during the judicial review proceedings clearly indicate that national security concerns were raised only after the SFO had turned down commercial and diplomatic arguments for stopping the investigation into the BAE-Saudi arms deals.

The OECD Working Group's *Phase2bis* report makes the following observation of the three meetings that the SFO had with the UK's ambassador to Saudi Arabia:

“ . . . the original BAE submission to the SFO on the public interest had highlighted the apparent role of the UK Ambassador in the commercial negotiations with the Saudi government concerning the government-to-government Typhoon contract;<sup>\*</sup> such direct involvement in negotiating an immensely important export contract could give rise to concerns about unconscious bias or perceptions of partiality, and should have led to broader consultations.”

(para 139, OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2bis*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>)

<sup>\*</sup> See “Memorandum for Director of Serious Fraud Office from BAE Systems plc”, dated 8 December 2005, referring to 25 November 2005 meeting between Saudi government and UK Ambassador that made arrangements for a December 2005 visit by the UK Secretary of State for Defence to Saudi Arabia to meet with a view to signing a memorandum of understanding for sale of 72 Typhoons. (“Item 8, RW4, <http://www.thecornerhouse.org.uk/pdf/document/SecondRedactDocsRW4.pdf>)

<sup>30</sup> All the judges involved in the judicial review stressed that they would not review the national security advice that was given directly and indirectly to the SFO Director, assess whether the Saudi threat to withdraw intelligence co-operation would have been carried out, and if so whether it would have jeopardised the UK's national security. Mr Justice Collins, the High Court judge who initially refused to grant permission for a full judicial review hearing, wrote:

“The courts attitude to national security is that if there is evidence – which usually will be found in a statement by a Minister or a suitably senior official – that a particular decision was based on national security grounds, the court will not intervene unless it can be shown that the reliance on national security was irrational.”

(para 1. “Refusal for judicial review application”, 29 May 2007, <http://www.thecornerhouse.org.uk/pdf/document/CollinsRefusal.pdf>)

The High Court's ruling in April 2008 that the decision to stop the SFO investigation was unlawful still emphasised that:

“The separation of power between the executive and the courts requires the courts not to trespass on . . . a decision affecting foreign policy. In a case touching foreign relations and national security, the duty of decision on the merits is assigned to the elected arm of government. Even when the court ensures that the government complies with formal requirements and acts rationally, the law accords to the executive an especially wide margin of discretion.”

(para 56, <http://www.thecornerhouse.org.uk/pdf/document/JR-Judgment.pdf>)

The BAE case, however, illustrates the need to modernise current constitutional arrangements between the government, the judiciary and parliament in order to give the courts greater scope to hold the government to account if it misuses its power in the name of national security, and in order to strengthen parliamentary scrutiny of decisions invoking national security.

While the government has a duty to protect the public from threats to national security, it is also critical that the public has absolute confidence and trust that the government is not abusing national security arguments in order to avoid embarrassment (in this instance, offending Saudi Arabia) or to pursue the commercial interests of favoured companies, such as BAE, or to get out of its obligations under international law. Such confidence and trust is especially important at a time of heightened concern about international terrorism.

<sup>31</sup> A test to assess whether there is a “strict necessity” to stop an investigation comprises three elements:

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1. There is an imminent threat of loss of life or serious injury to identifiable persons or groups of persons.
  2. All reasonable alternatives to violating the rule of law have been tried and failed.
  3. The consequences of violating the rule of law have been properly recognised and considered (in particular the encouragement given to others to make similar threats in the future), and weighed in the balance.

See “CAAT and The Corner House response” during the House of Lords Appeal, “24 April 2008: Serious Fraud Office granted leave to appeal, <http://www.controlbae.org/jr/sfoappeal.php#lordsappeal>.

See also “Corner House-CAAT Response in House of Lords Appeal”, July 2008, para 78ff, <http://www.thecornerhouse.org.uk/pdf/document/CH-CAATReponseAppeal.pdf>.

<sup>32</sup> For a critique of the government’s assertions that it did consider alternatives, *see*:

--“CAAT and The Corner House response”, <http://www.controlbae.org/jr/sfoappeal.php#lordsappeal>

--“Corner House-CAAT Response in House of Lords Appeal”, July 2008, paras 92-98, <http://www.thecornerhouse.org.uk/pdf/document/CH-CAATReponseAppeal.pdf>.

<sup>33</sup> “There was practically no consideration given to alternative responses to the Saudi threats other than discontinuing the case.” The Attorney General and/or SFO Director “could have asked searching questions on the assessment of the risk in this area of the security services as well as Ministers and others before deciding to terminate a major case. . . . The government, and not just the prosecutorial authorities, should have been involved in the search for alternatives.” (para 137)

“Article 5 encompasses the role of the broader government [not just the SFO] in searching for alternatives to dropping a case.” (para 162)

See OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2bis*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

<sup>34</sup> The “rule of law” holds that the best way of protecting people’s rights from the arbitrary exercise of power is to apply and uphold legal rules impartially. Any action that undermines the impartial application and upholding of the law – such as interference with the courts, judges, prosecutors, juries or witnesses; decisions that courts cannot review; placing individuals or entities above the law – undermines the rule of law. Applying the rule of law means that a government’s authority is legitimately exercised only in accordance with written, publicly disclosed laws that are adopted and enforced according to established procedural steps (or due process).

According to the SFO’s published aims and objectives for 2007-2008: “The Serious Fraud Office aims to contribute to . . . the delivery of justice and *the rule of law*” (<http://www.sfo.gov.uk/publications/2007-2008/aimsobjectives.asp?seltxt=>, accessed 13 November 2008, emphasis added)

As a solicitor and officer of the Court, the Director of the Serious Fraud Office has a basic professional duty to uphold the rule of law. Rule 1.01 of the Code of Conduct for Solicitors provides: “You must uphold the *rule of law* and the proper administration of justice” (emphasis added).

<sup>35</sup> In November 2001, the Attorney General had stated:

“A fundamental safeguard to fairness is the independence of the prosecutor. National and international standards recognise the importance of the independence of the prosecutor; the ability to exercise the prosecutor’s discretion independently and free from political interference; to perform their duties *without fear, favour or prejudice*” (emphasis added).

(Lord Goldsmith, “Politics, Public Interest and Prosecutions –  
A view by the Attorney General”,

13<sup>th</sup> Annual Tom Sargent Memorial Lecture, 20 November 2001,

<http://www.attorneygeneral.gov.uk/attachments/TOM%20SARGENT.doc>)

<sup>36</sup> See Lord Justice Moses and Mr Justice Sullivan, “Judgment”, 10 April 2008.

<http://www.thecornerhouse.org.uk/pdf/document/JR-Judgment.pdf>.

“. . . submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker.” (para. 99)

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“there may be circumstances so extreme that the necessity to save lives compels a decision not . . . to prosecute.” (para 82)

A state may invoke the doctrine of necessity if it “is the only way for the State to safeguard an essential interest against a grave and imminent peril.” (para 144)

“The doctrine of necessity provides a clear basis for distinguishing between those decisions which are influenced by the potential effect upon relations with a foreign state and those decisions which, while they are influenced by those considerations, are nevertheless justified by national security. A prosecutor would only be able to discontinue an investigation or prosecution in circumstances where that was the only means of protecting the security of its citizens.” (para 147)

The OECD Phase2*bis* report stressed that “Article 5 does not leave any room for discretion with regard to its prohibited considerations” (para 97). But it went on to stress the importance of such tests in cases such as the BAE-Saudi case:

“. . . assuming *solely for purposes of analysis* that national security could constitute an exception under Article 5, the Al Yamamah case would then conceivably present a situation in which a prosecutor was being advised to drop a major case based on both Article 5 [economic, relations with another state, identity of persons] and non-Article 5 factors. In such cases . . . prosecutors must subject the non-Article 5 factors to strict scrutiny in order to dispel doubts that the Article 5 factors are in fact influencing the decision. The strength of the Article 5 interests and arguments will be a factor in reviewing how prosecutors have acted with regard to the case: generally the stronger the interests and arguments relating to Article 5 factors, the more intensively prosecutors should review proffered non-Article 5 justifications for dropping a case.”

(para 133, emphasis in original, OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2bis*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>)

<sup>37</sup> An international treaty usually has to be incorporated by an Act of Parliament to give it domestic legal effect within the UK. The OECD Anti-Bribery Convention has not been so incorporated (although the UK has made it a criminal offence to bribe a foreign public official, which is the requirement of the Convention’s Article 1) The Corner House and CAAT lawyers argued, however, that it is a well-established principle of UK public law that, where a public body states that it has complied with, or taken into account, an international law obligation when making a decision, the courts have jurisdiction to review the decision so as to assess compliance with that obligation. The Director of the Serious Fraud Office and the Attorney General repeatedly informed the public, Parliament and the OECD that the decision to halt the BAE-Saudi investigation was taken in accordance and compliance with the OECD Anti-Bribery Convention. They stated that the Director had not taken into account the forbidden considerations in Article 5.

*See:*

--“Serious Fraud Office Appeal in House of Lords”,  
<http://www.thecornerhouse.org.uk/pdf/document/SFOAppellants.pdf>

--“24 April 2008: Serious Fraud Office granted leave to appeal”,  
<http://www.controlbae.org/jr/sfoappeal.php#lordsappeal>.

<sup>38</sup> In his First Witness Statement, the SFO Director, Robert Wardle, stated that he would have taken the same decision regardless of the UK’s obligations under the Convention and that Article 5 “was not a critical or decisive matter for me” (para. 50).  
<http://www.thecornerhouse.org.uk/pdf/document/WardleWitState.pdf>.

The OECD Working Group’s *Phase 2bis* report on the UK points out that the Director could give the same reasoning for economic considerations:

“The same argument could be made [to take the same decision to discontinue the case even if the SFO Director thought it was contrary to Article 5] if the Director considered Article 5, but decided that in his/her view the national economic interest nonetheless prevailed”. (para 98)

<sup>39</sup> <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner.pdf>.

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<sup>40</sup> Since the UK signed the OECD Anti-Bribery Convention in 1998, the OECD Working Group has repeatedly highlighted deficiencies in UK laws on the bribery of foreign public officials and on effective corporate liability for foreign bribery. It recommended in 2003, 2005, 2007 and 2008 that the UK “enact effective and modern foreign bribery legislation at the earliest possible date and as a matter of high priority” and that it “ensure . . . that such legislation does not permit principal consent as a defence to foreign bribery” (*see* footnote 20 above on ‘principal consent’).

In December 2007, the government committed itself to bringing in a new anti-bribery bill before Parliament in 2008. On 18 December 2007, the Secretary of State for Business Enterprise and Regulatory Reform, John Hutton MP, whom the Prime Minister had appointed as “international anti-corruption champion”, announced a UK Anti-Corruption Plan that included this 2008 date.

Just two days before the OECD Working Group’s *Phase 2bis* report was published, the UK government announced another new “UK Strategy on Tackling Foreign Bribery” in which it pushed the date for new legislation back to 2009. (“UK Note on the new UK Government strategy on tackling foreign bribery”, Ministry of Justice, undated, but deposited with House of Commons and House of Lords on 15 October 2008, <http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-2382.doc>).

In November 2007, the Law Commission (a statutory independent body that reviews the law and recommends reform where needed) announced a public consultation on reforming the UK’s corruption laws, and said it would publish a final report and draft Bill before the end of 2008. *See* The Corner House submission to this consultation: <http://www.thecornerhouse.org.uk/pdf/document/LawComCHSub.pdf>.

<sup>41</sup> Back in 2004-2005:

“the Attorney General . . . specifically confirmed [to the OECD Working Group] that none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute.”  
(para 171, p.54, OECD Working Group on Bribery in International Business Transactions, *United Kingdom: Phase 2*, 17 March 2005, <http://www.oecd.org/dataoecd/62/32/34599062.pdf>.)

In its note provided to the OECD on 12 January 2007, the Serious Fraud Office and the Attorney General stated that:

“10. The SFO and the Attorney General at all time had regard to the requirements of the OECD Anti-Bribery Convention.”  
(<http://www.attorneygeneral.gov.uk/attachments/SFO%20-%20OECD%20Note.pdf>)

Yet in its initial response to our judicial review, dated 11 May 2007, the Serious Fraud Office Director declared that he would have taken the decision to terminate the SFO investigation anyway regardless of any violation of international law.

(*See* [http://www.controlbae.org/background/summary\\_grounds\\_of\\_resistance.pdf](http://www.controlbae.org/background/summary_grounds_of_resistance.pdf))

Moreover, in another public submission to the OECD during 2007, the SFO Director assured the OECD that the UK’s domestic courts (via our judicial review) would determine whether the decision to halt the BAE-Saudi investigation was compatible with Article 5 of the Anti-Bribery Convention. He stated:

“the SFO’s decision to discontinue the investigation is now the subject of legal challenge by way of judicial review. This is the process by which the legality of a decision by a public authority, such as the SFO, can be challenged in court. That case raises the very issue of whether the SFO’s decision was compatible with Article 5 of the Convention. That question is therefore now likely to be determined by the English High Court. The SFO will vigorously defend the legality of its decision and its compatibility with the Convention.”

Yet in the SFO appeal at the House of Lords, SFO lawyers argued that because the Convention had not been incorporated into UK domestic law and therefore the SFO Director had no legal duty to abide by it. Our lawyers pointed this out to the Lords:

“The Director cannot have it both ways. He cannot simultaneously assure the OECD that it need not be concerned because the English courts will rule on the compatibility of his decision with Article 5 *and* also argue before those English courts that the matter is non-justiciable.”

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(para. 134, emphasis in original, “Corner House-CAAT Response in House of Lords Appeal”, July 2008, <http://www.thecornerhouse.org.uk/pdf/document/CH-CAATReponseAppeal.pdf>)

<sup>42</sup> Part 2, Clause 12, <http://www.justice.gov.uk/docs/draft-constitutional-renewal-bill.pdf>

<sup>43</sup> Part 2, Clause 13 would make a direction from the Attorney General to stop a corruption investigation or any prosecution binding on the prosecuting authorities. If the necessity of the direction is questioned, a certificate signed by a government Minister certifying that the direction was necessary would be considered as conclusive evidence of that fact – or a document “purporting” to be such a certificate.

<sup>44</sup> Part 2, Clause 17 defines “prejudice to international relations” as encompassing:

- relations between the UK and another other state, or international organization or court;
- the interests of the UK abroad;
- the promotion or protection by the UK of its interests abroad.

<sup>45</sup> A Legal Opinion on the draft Constitutional Renewal Bill concludes that enabling the Attorney General to halt a prosecution or fraud investigation on grounds of national security without judicial scrutiny or parliamentary accountability would violate the fundamental constitutional principle of the rule of law, and could be challenged under the UK’s 1998 Human Rights Act. See Jeffrey Jowell QC, “Legal Opinion on the ‘constitutionality’ of draft Constitutional Renewal Bill”, 12 June 2008, <http://www.thecornerhouse.org.uk/pdf/document/JeffreyJowellLegOp.pdf>.

<sup>46</sup> Since its publication on 25 March 2008, two parliamentary committees have scrutinised the draft Constitutional Renewal Bill and issued reports on their findings. It remains to be seen whether and when the government will issue a revised Bill.

i) The Justice Committee issued its report on 24 June 2008. The Committee stated that there is no justification for giving the Attorney General the formal power to halt investigations by the Serious Fraud Office, a power the Attorney General does not have in relation to police investigations into other offences. Its report concludes that the draft Bill does not resolve the problem of Attorney General being chief legal adviser to the government and being a government minister. The Committee stated that, despite the difficulties of drawing the line clearly between legal and political considerations, transparency and public confidence require the legal and political functions of the Attorney General’s role to be split. It concluded that:

“The Bill has been called more of a ‘constitutional retreat bill’ than a constitutional renewal bill . . . It gives greater power to the Executive and it does not add to transparency.”

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/69802.htm>.

ii) A Joint Committee on the Draft Constitutional Renewal Bill ([http://www.parliament.uk/parliamentary\\_committees/jcdcrb.cfm](http://www.parliament.uk/parliamentary_committees/jcdcrb.cfm)) comprising members of both the House of Commons and the House of Lords was established in April 2008 specifically to assess and scrutinise the draft legislation. It issued its report on 31 July 2008

(<http://www.publications.parliament.uk/pa/jt/jtconren.htm>) and published all the evidence it had gathered on 12 August 2008

(<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/166ii.pdf>)

This report recommended keeping the existing non-statutory (but uncertain and unclear) powers of the Attorney General to intervene in prosecutions and did not address the issue of what checks and balances should be applied when prosecutions are halted on national security grounds.

<sup>47</sup> Although the BAE-Saudi investigation was stopped for reasons of national security, the inclusion of not only “national security” but also “international relations” and “national interest” in this draft legislation lays the legal groundwork for the UK government not to abide by Article 5 on several grounds.

For more information on issues raised by the draft Constitutional Renewal Bill, see:

-- Dinah Rose QC, Ben Jaffey, Richard Stein and Jamie Beagent “Note on draft Constitutional Renewal Bill for OECD”, 31st March 2008,

<http://www.thecornerhouse.org.uk/pdf/document/ConstRenBillOECD.pdf>;



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--The Corner House, "Submission to the Joint Committee on the Draft Constitutional Renewal Bill," May-June 2008, <http://www.thecornerhouse.org.uk/pdf/document/ConRenBillSubJointCom.pdf>

<sup>48</sup> The following are some examples illustrating how legislation designed for one set of circumstances has easily been used for another:

i) Section 44 (2) of the Terrorism Act 2000 provides the power to stop and search pedestrians within a designated area for items that could be used in connection with terrorism without first forming a reasonable suspicion. In October 2005, Sally Cameron was arrested under the Act for walking along a cycle path in the harbour area of Dundee in Scotland and held for four hours. The port and harbour area had been designated a secure area by the government in which people are forbidden from walking – but not cycling.

(David Lister, "Two wheels: good. Two legs: terrorist suspect", *The Times*, 17 October 2005, <http://www.timesonline.co.uk/tol/news/uk/article579334.ece>)

ii) In October 2005, Walter Wolfgang was forcibly removed from the Labour Party's annual conference and his conference accreditation revoked. When he later tried to go back into the conference to get his personal possessions, he was detained because he was attempting to gain access to a restricted area without accreditation. The police officer used powers under Section 44 of the Terrorism Act to confirm Mr Wolfgang's details.

iii) The Regulation of Investigatory Powers Act 2000 was passed to allow police and other security agencies carry out surveillance on serious organised crime and terrorists. In April 2008, Poole borough council in the south west of England admitted that it had legitimately used the Act to monitor for two weeks the movements of a family of two adults and three children. It did so in order to establish whether or not the family had given a false address within the catchment area of a much sought-after local primary school so as to secure a place for their three-year-old at the school.

iv) The Extradition Act 2003 was designed to modernise and speed up the UK's extradition to other countries of those suspected of cross-border offences such as terrorism and organised crime. It enshrined in UK domestic law a treaty drawn up by the US and the UK. The law was used in 2006 to extradite to the US three British "NatWest" bankers on charges linked to fraud at bankrupt energy trader Enron.

v) The Anti-Terrorism Crime and Security Act 2001 created a new power enabling the UK Treasury to freeze the assets of "overseas governments or residents who have taken, or are likely to take, action to the detriment of the UK's economy or action constituting a threat to the life or property of a national or resident of the UK". Its aim was to "cut off terrorist funding".

On 8 October 2008, the British government invoked the Act to freeze the estimated £7 billion of assets held in the UK by a collapsed Icelandic bank, Landsbanki, which had been nationalised by the Icelandic government. Many UK individuals and organisations had invested in Landsbanki's internet bank, Icesave.

<sup>49</sup> Cabinet Office, *The national security strategy of the United Kingdom: security in an interdependent world*, March 2008, [http://interactive.cabinetoffice.gov.uk/documents/security/national\\_security\\_strategy.pdf](http://interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf)

<sup>50</sup> "The largest-ever generation of teenagers is reaching working age in poor countries where unemployment is already high. When this development is combined with factors such as rapid urbanisation, political exclusion, and a lack of basic services and economic opportunity, they present risks of increased political instability, disorder, violent conflict and extremism." (p.22, Cabinet Office, *The national security strategy of the United Kingdom: security in an interdependent world*, March 2008, [http://interactive.cabinetoffice.gov.uk/documents/security/national\\_security\\_strategy.pdf](http://interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf))

<sup>51</sup> The UK's *national security strategy* document picks up on arguments within academic and policy circles that "national security" is an outdated and irrelevant concept and that a more elastic definition of "security" is needed to encompass environmental, economic, human rights and other factors. Several studies propose that the concept of "human security" should replace that of "national security". Little critical work appears to have been done, however, on considering the implications of a state's national security apparatus appropriating the language and ideas of human security. The UK's *national security strategy* does contain the proviso that "The wider scope of issues to be addressed within this strategy is not to be taken as affecting the legally understood meaning of national security"(endnote 1, p.61).

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<sup>52</sup> Since the Law Lords ruling, The Corner House and Campaign Against Arms Trade have called for “all those who are alarmed at the gaping holes in the law revealed by the judgments today to join us in:

- Pressing for changes to the law to ensure that our prosecutors can remain independent and are empowered to resist threats from abroad.
- Ensuring that national security advice can be scrutinised by the courts and by parliament so that the government cannot arbitrarily invoke national security – without effective checks and balances – to trump the rule of law.
- Opposing the clauses in the draft Constitutional Renewal Bill that would prevent a judicial review like ours from ever being taken in the future and that would give the government ‘carte blanche’ to invoke national security to stop a fraud investigation or criminal prosecution without effective checks and balances.
- Insisting that the government fulfil its international obligations to cooperate with requests for assistance from the US and Swiss authorities in their investigations into BAE’s dealings with Saudi Arabia.
- Pressing the OECD to clarify the circumstances under which national security concerns can legitimately be invoked to exempt signatories from fulfilling their obligations under the OECD Anti-Bribery Convention.
- Pressing the Serious Fraud Office to re-open its investigation into BAE’s dealings with Saudi Arabia given that circumstances have changed since the investigation was dropped in December 2006. Much of the information that Saudi Arabia was apparently concerned to keep out of the public domain is now public knowledge.
- Exposing the preferential access of arms companies, such as BAE, to the government, and campaigning to end public subsidies to the arms industry.”