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UNITED KINGDOM COMPLIANCE WITH INTERNATIONAL LAW: BRIBERY AND CORRUPTION

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18/11/2009

INTRODUCTION

A number of questions have been raised over the United Kingdom's compliance with its international obligations in the area of bribery and corruption. These generally have arisen following national and international developments in the area. In the United Kingdom the most recent have been the inclusion of the Bribery Bill¹ in the Queen's Speech and the decision of the Serious Fraud Office to seek permission to prosecute BAE Systems. Prior germane developments include the decision of House of Lords in the BAE Systems litigation concerning arms sales to Saudi Arabia² and the publication of the Law Commission for England and Wales' Draft Bribery Bill and accompanying Report.³ There has also been the first conviction for foreign bribery in United Kingdom law.⁴ Internationally, recent developments include the OECD's Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁵ More generally, the first anti-corruption treaty of global application was adopted by the United Nations General Assembly in October 2003, the United Nations Convention Against Corruption 2003.⁶ A number of regional conventions, resolutions and recommendations of an international nature have also been concluded. These developments are of course related - United Kingdom law does not develop in a vacuum. The Anti-terrorism, Crime and Security Act 2001, for example, extended the English and Scottish common law offences of bribery to acts occurring outside the United Kingdom - ostensibly to comply with the OECD Convention.⁷ Clearly there have been a number of important developments nationally and internationally.

The specific issues arising from national and international developments in the area coalesce into one basic question – whether the United Kingdom is in overall compliance with its international obligations. Examination of this requires firstly a definition of the relevant terms and a statement of the international law and principles. These provide the standards against which United Kingdom law and practice is measured. Of course an iteration of the germane United Kingdom law is required, and this follows the description of international law. Subsequently, an analysis of United Kingdom law against international law takes place under two heads; substantive law and enforcement. Under the head of substantive law three areas are examined; preventative rules and policies, substantive criminal prescription and procedural co-operation. Under the head of enforcement an overall general analysis is followed by an examination of the proceedings

¹ The Draft Bribery Bill is cited at <http://www.justice.gov.uk/docs/draft-bribery-bill.pdf>.

² The House of Lords case is *R (Corner House Research and another) v Director of the Serious Fraud Office (Justice Intervening)*, [1008] UKHL 60. The Divisional Court's decision is *The Queen on the Application of Corner House Research and Campaign Against Arms Trade v The Director of the Serious Fraud Office*, [2008] EWHC 714 (Admin). See also Williams, S., *The BAE/Saudi Al Yamamah Contracts: Implications in Law and Public Procurement*, (2008) 57 ICLQ 200.

³ Cited at <http://www.lawcom.gov.uk/bribery.htm>.

⁴ *Ibid* at para 11.

⁵ OECD Working Group of Bribery in International Business Transactions, *Report of the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Recommendation on Combating Bribery in International Business Transactions*, Phase 2bis, 16 October 2008, cited at <http://www.oecd.org/dataoecd/23/20/41515077.pdf>. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 itself is cited at < <http://www.oecd.org/>>, hereinafter the OECD Convention.

⁶ Cited at <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. It entered into force 14 Dec. 2005 following the ratification by 30 states. Hereinafter the UN Convention.

⁷ Section 108(1), for example, states “For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.”

surrounding the attempts to prosecute BAE Systems. A conclusion will then be drawn stating that whilst the United Kingdom appears to comply with the letter of international law it fails to give effect to its spirit.

TERMS DEFINED

The two central terms are “bribery” and “corruption”, with the former normally being conceived as a type of the latter. Bribery, being more specific, has been defined in various ways. There are however relatively few definitions of corruption. The UN Convention, for example, defines “bribery” but not “corruption”. Bribery here is defined in three contexts; national public sector, international or foreign public sector and private sector. Article 15 covers the first, it states:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties”.

This definition covers both the giving and promise of an inducement to act (called active bribery) and the acceptance or solicitation of one (passive bribery).⁸ The Council of Europe Criminal Law Convention on Corruption classifies bribery according to the sector in which it takes place as well through the identification of certain recipients – such as judges – in ten separate articles.⁹ These specifically mention active and passive bribery and apply to both the public and private sectors. In regard to “corruption” the Explanatory Report of the Council of Europe Criminal Law Convention on Corruption states:

“... it seemed difficult to arrive at a common definition and it was rightly said, ‘no definition of corruption will be equally accepted in every nation’. Possible definitions have been discussed for a number of years in different fora but it has not been possible for the international community to agree to on a common definition. Instead international fora have preferred to concentrate on the definition of certain forms of corruption, e.g. “illicit payments” (UN), “bribery of foreign public officials in international business transactions” (OECD), “corruption involving officials of the European Communities or officials of Member States of the European Union” (EU).¹⁰

One of the few internationally pronounced definitions of corruption is found in the Council of Europe Civil Law Convention on Corruption 1999. It states “For the purpose of this Convention, “*corruption*” means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof”.¹¹ Corruption here is conceived as largely synonymous with bribery.¹² The UN Convention, in contrast, conceives of corruption in a much wider sense. It covers in addition to bribery embezzlement and misappropriation, trading in influence, abuse of functions, illicit enrichment and laundering the proceeds of crime.¹³ Within United Kingdom law the Anti-

⁸ The OECD Convention, in contrast and as its full title indicates, is limited to the active bribery of public officials. Article 1(1) *inter alia* provides that state parties make an offence for any person to intentionally “... offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”.

⁹ Cited at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>. Hereinafter the Council of Europe Convention. The article relating to the bribery of judges is article 11.

¹⁰ At para 2, cited at <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>.

¹¹ Cited at <http://www.conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

¹² Bribery has been said to be “... one form of corruption, a loss of purity and purpose, a social decomposition” in Johnson’s Dictionary (1775), cited in Johnstone, P. and Brown, G., International controls of corruption: recent responses from the USA and the UK, (2004) 11 *Journal of Financial Crime* 217.

¹³ In articles 17, 18, 19, 20 and 23 respectively. “Corruption” is defined by *Black’s Law Dictionary* as “An

terrorism, Crime and Security Act 2001 denotes as “corruption offences” the common law crime of bribery and the central offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906, discussed below. The approach that will be adopted presently is in accordance with this practice – with corruption being the broad term that includes bribery and other related acts.

INTERNATIONAL LAW AND LEGAL PRINCIPLES

The United Kingdom is party to three treaties in the area of corruption and bribery. These are the OECD Convention, Council of Europe Convention and the UN Convention¹⁴ - each of these place obligations upon the United Kingdom. Also perhaps placing obligations upon the United Kingdom in the area is customary international law. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed by OECD members and five other states, Argentina, Brazil, Bulgaria, Chile and the Slovak Republic on 17 December 1997.¹⁵ There are presently 37 state parties. The Convention entered into force 15 February 1999. The United Kingdom ratified the convention on 14 December 1998. The particular membership of the Convention, including the leading industrial states, arguably enhances its significance. As noted the “... importance of the OECD Convention is instilled by its potent membership, which encompasses all of the world’s major economic powers and binds all companies doing business out of those countries”.¹⁶ The preamble to the Convention indicates its focus. It *inter alia* provides that the parties “... consider that bribery is a widespread phenomenon in international business transactions, including trade and investment which raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive condition”. The central obligation in the Convention is found in article 1(1). It provides that each party “... shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pressure or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”. In other words the Convention centres on, and is limited to, the active bribery of public officials. As will be seen below, this obligation is less than that required by the other two conventions.

Befitting its comparatively limited ambitions the OECD Convention is relatively short - comprised of 17 articles. Article 1 is noted above. Article 2 requires state parties to establish the liability of legal persons - if possible within their legal system. Article 3 covers sanctions and requires state parties to attach effective penalties to the crime of bribery of foreign officials. Article 4 mandates state parties to establish jurisdiction where the offence is committed in whole or part within its territory, and where that party applies its jurisdiction on the basis of nationality, to extend that jurisdiction to the crime. Article 5 is particularly relevant – in light of its place in the BAE proceedings. It relates to prosecution and the inapplicability of possible bars thereto:

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

As will be discussed below, the nature and applicability of this provision was the focus of certain criticisms arising from the attempted prosecution of BAE. Further relevant provisions are article 8

act done with an intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others”. *Black’s Law Dictionary*, Sixth Edition, West Publishing, St Paul, 1990.

¹⁴ Noteworthy but not directly relevant, is the Council of Europe Civil Law Convention on Corruption 1999, *supra* note 11.

¹⁵ See generally Corr, C. F., and Lawler, J., Damned If You Do. Damned If You Don't? The OECD Convention and the Globalisation of Anti-Bribery Measures, (1999) 32 Vand. J. Transnat'l Law 1249.

¹⁶ *Ibid* at p 1296.

restricting *inter alia* “off-the-book” accounts, article 9 concerning mutual legal assistance and article 10 pertaining to extradition. Finally, article 11 requires a responsible authority to be nominated to the Secretary-General of the OECD and article 12 stipulates that the OECD Working Group on Bribery in International Business Transactions is charged with monitoring and following-up the Convention.¹⁷ This Committee has been one of the main sources of criticism of United Kingdom practice, mentioned below.

The second treaty to which the United Kingdom is party containing obligations in the area of bribery and corruption is the UN Convention. It contrasts sharply with the OECD Convention on account of its coverage and detail and its geographical scope. The wide subject-matter of the treaty leads to a greater number and variety of obligations being placed upon the United Kingdom. Geographically, the UN Convention is the only bribery and corruption-specific legal instrument with universal application.¹⁸ It has 140 signatories and 122 state parties, and entered into force 15 December 2005. The United Kingdom ratified the treaty 14 February 2006. The intentions of the parties are found in its preamble, which *inter alia* states that they are convinced “... that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential”. Further, it provides that states bear in mind that “... the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective”. Clearly the framers of the UN Convention thought a comprehensive and global approach was required. As seen below, the treaty extends beyond requiring the criminalisation and includes preventative and procedural co-operation obligations as well.

The breadth of UN Convention is illustrated by it comprising eight separate parts and 71 articles. The six core parts cover preventative measures, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information exchange and mechanisms for enforcement.¹⁹ For our present purposes several provisions are particularly relevant. These relate to criminalisation, prosecution and specialised authorities. Article 15 mandates the criminalisation of the bribery of public officials. Article 30 governs prosecution. It provides, in article 30(3), that “Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences”. Further, article 30(9) states “Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law”. Article 34 provides for the creation of an independent anti-corruption authority. It in part provides “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence”. As will be seen below, each of these provisions relate to an area that demands examination when adjudging United Kingdom compliance with the Convention.

¹⁷ The specifics of relevant articles in this and the other treaties will be mentioned below when tested against law and practice in the United Kingdom.

¹⁸ See generally Carr, I., Fighting Corruption Through the United Nations Convention on Corruption 2003: A Global Solution to a Global Problem?, 2005 International Trade Law and Regulation 24, and Webb, P., The United Nations Convention Against Corruption: global achievement or missed opportunity?, (2005) 8 Journal of International Economic Law 191.

¹⁹ In Parts II to VII respectively.

The third corruption-specific treaty to which the United Kingdom is party is the Council of Europe Criminal Law Convention on Corruption. Its content is narrow and limited – especially in contrast with the UN Convention. It has 53 state parties, including six states who are not members of the Council of Europe. The United Kingdom deposited its instrument of ratification 9 December 2003.²⁰ The preamble of the Council of Europe Convention emphasises the urgency of the problem of corruption. It *inter alia* provides “Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures”. The Council of Europe Convention is interesting in part because, unlike the OECD and UN Conventions, there is no explicit stipulation regarding prosecution. In line with the UN Convention though, it requires the creation of an independent specialised agency to investigate cases of corruption. In regard to which article 20 states “Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks”.²¹ Clearly, there is an overlap here with the other conventions. Cumulatively, the three instruments comprise a relatively wide range of obligations incumbent upon the United Kingdom. They may not, however, be the only form of international law in the area.

Norms of customary international law relating to bribery and corruption may add to the body of international law against which United Kingdom law and practice must be measured. Clearly there are a number of instances of “soft-law” in the area. Amongst these are the International Chamber of Commerce’s Rules of Conduct on Extortion and Bribery in International Business Transactions²², the United Nations’ Declaration against Corruption and Bribery in International Commercial Transactions²³, the Council of Europe’s Twenty Guiding Principles for the Fight Against Corruption²⁴ and the OECD’s Recommendation on Bribery in International Business Transactions.²⁵ The question that arises from the existence of these (and other) statements is what, if any, obligatory effect they have upon the United Kingdom. In other words, it is possible to construct the argument that the crime of bribery has attained the stature of international crime – one prescribed by customary international law itself. If this is the case the crime would attract universal jurisdiction and international law would allow all states having custody of person alleged to have committed the act to exercise jurisdiction. Further, one could argue that customary international law has developed to not only allow states to try and punish those involved in bribery but to require it (or extradite the individual to a jurisdiction that is willing – the *aut dedere aut judicare* principle). A proponent of this view is Bantekas, who writes “From an international law point of view it is important to comprehend that the recognition by the 1997 Convention of bribery as a transnational offence means that the offender incurs criminal responsibility not only under national law but also international law”.²⁶ With respect, it is submitted that bribery remains an offence within the municipal law of states alone, albeit one affected by international regulation. There is simply not sufficient state practice to justify the view that it is a crime by customary international law. This is not to suggest that numerous states have not criminalised the crime within their domestic law, indeed many states have done just that. It is because states largely fail to provide that the crime of

²⁰ At which time the United Kingdom made a reservation, discussed below.

²¹ See further Lord Woolf, Business Ethics, Global Companies and the Defence Industry – Ethical Business Conduct in BAE Systems plc – The Way Forward, May 2008, cited at <http://production.investis.com/investors/woolf/>, Appendix I, paras 17-18. Additional non-United Kingdom provision in the area of corruption emanates from the EU, which has adopted several instruments in the area. As this largely relates to corruption within and against EU institutions it is excluded from this analysis.

²² Cited at <http://www.iccwbo.org>.

²³ UN Doc GA A/Res/51/191, cited at <http://www.un.org>.

²⁴ Cited at <http://www.coe.int>.

²⁵ Cited at <http://www.oecd.org>.

²⁶ Bantekas, I., Corruption as an International Crime and Crime Against Humanity: an Outline of Supplementary Criminal Justice Policies, (2006) 4 Journal of International Criminal Justice 466 at p 470.

bribery is to subject to universal jurisdiction – as they have, for example, in regard to torture and genocide. It is correct to conclude, then, that the full extent of international legal obligations upon the United Kingdom in the area of bribery and corruption emanate from, and only from, the treaties to which it is a party.²⁷ They provide the yardstick against which United Kingdom law and practice must be measured.

UNITED KINGDOM LAW

It is interesting and telling that the crime of bribery in the United Kingdom²⁸ pre-dates international proscription by some considerable time – the law has therefore developed organically and in the absence of international context. The crime exists both at common law and in statute. At common law in England and Wales bribery is generally accepted to be “... the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity”.²⁹ In Scotland the crime is more limited, entailing a bribe and attempt to bribe a judicial officer and for the officer himself to take a bribe.³⁰ In regard to Scotland it has been noted that the crime “... is always prosecuted nowadays under statute, as are all other aspects of corrupt behaviour”.³¹ The common law offences have been given explicit extraterritorial affect – as a result of international law - under ss 109(2) and 108(1) of the Anti-terrorism, Crime and Security Act 2001 in regard to England and Wales and ss 69(2) and 68(1) of the Criminal Justice (Scotland) Act 2003 in Scotland.³² These sections make it immaterial for the purposes of the common law crimes of bribery the fact that the acts occur outside the United Kingdom and that the persons who receive or are offered a reward have no connection with the United Kingdom. Interestingly, in light of the putative deficiencies in the area of corporate liability, discussed below, ss 109 of the 2001 Act and 69 of the 2003 Act allow for this, with s 69 also including a Scottish partnership.³³

The applicable statutory provision in both England and Wales and Scotland again pre-dates international law. It generally comprises the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916.³⁴ Section 1(1) of the Public Bodies Corrupt Practices Act 1889 *inter alia* prescribes passive bribery, providing:

“Every person who shall by himself or by or in conjunction with any other person corruptly solicit or receive, or agree to receive, for himself or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of [an offence]”.

Active bribery, the giving or promising of a bribe, is covered by s 1(2) of the 1889 Act. It provides:

“Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an

²⁷ Of course it is possible to argue that bribery as a crime is in the process of becoming a crime within customary international law.

²⁸ The criminal law of England and Wales and Scotland are, of course, distinct. The germane statutory crimes are generally applicable in both jurisdictions whilst there are differences in the common law definitions of the crime of bribery, see below.

²⁹ *Russell On Crime*, 12th Edition, Stevens, London, 1964, p 381.

³⁰ *Hume Commentaries* 1, 407, 408. See further Arnell, P. The Crime of Bribery in Scotland, (2009) 1 SLT 1.

³¹ *Stair Memorial Encyclopaedia*, Vol 15 Reissue, para 400.

³² This was done to give effect to the OECD Convention, see the Woolf Report, *supra* note 20, Appendix 1, para 4. The only other explicit substantive change to United Kingdom law pursuant to the three conventions was made in regard to the seizure of property connected with offences of corruption by the Proceeds of Crime Act 2002 to comply with the UN Convention, see below note 45.

³³ See below for discussion of the liability of legal persons.

³⁴ Mentioned below are prescriptions covering specific categories of offenders or situations.

inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of [an offence].”

The definition of “public body” was firstly extended from its original meaning of local public bodies in the United Kingdom to “local and public authorities of all descriptions” by s 4(2) of the Prevention of Corruption Act 1916. Then, as with the common law crimes of bribery, the Anti-terrorism, Crime and Security Act 2001 extended the application of this crime outside the United Kingdom, to all equivalent public bodies by s 108(3).

The Prevention of Corruption Act 1906 was a reaction to a domestic call to extend the law of corruption to the private sector.³⁵ Section 1(1) *inter alia* provides:

“If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or regard for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principals affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business... he shall be guilty of an offence”.³⁶

Section 108(2) of the Anti-terrorism, Crime and Security Act 2001 inserts a new section 1(4) into the 1906 Act which provides it is immaterial for the purposes of this Act that “... the principal's affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom and (b) the agent's functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom”. In regard to prescriptions in both the 1889 Act and 1906 Act the Prevention of Corruption Act 1916 creates a presumption of corruption. This is to the effect of shifting the burden of proof where there is an allegation of corruption onto the defence to prove, on the balance of probabilities, that a given payment was not corrupt.³⁷ This presumption is limited to payments to employees of public bodies involving contracts.³⁸

It has been seen above that the international bribery and corruption-related obligations upon the United Kingdom extend beyond the criminalisation of bribery itself. Proscription of various tangential acts and specifics of investigation and prosecution in England and Wales and Scotland are also required by international law.³⁹ Amongst the domestic offences that putatively satisfy international obligation are offences under Proceeds of Crime Act 2002 relating to the concealment or transfer criminal property. The definition of criminal property by s 340(3) and (9) of the Act includes that property which arises from criminal conduct, which includes a bribe.⁴⁰ Also relevant under the same Act are the offences relating to money laundering found in ss 327 – 329 as amended - mentioned below. Further, there are the corruption-related offences in regard to the sale of honours and offices, the conduct of elections and false accounting.⁴¹ Whilst not directed at general bribery *per se*, these offences are relevant in that they satisfy certain other bribery-related international obligations. An example being the obligation in article 4 of the Council of Europe Convention, requiring the criminalisation of bribery of members of domestic public assemblies. A

³⁵ See Fennell, P., and Thomas, P.A., Corruption in England and Wales: An Historical Analysis, (1983) 11 International Journal of Sociology and Law, 167 at p 174.

³⁶ The giving and offering of a gift, consideration, inducement and reward is prescribed by the same section.

³⁷ By s 2.

³⁸ Carr-Briant, [1943] KB 607. The presumption of corruption does not apply to cases of extended jurisdiction under the Anti-terrorism, Crime and Security Act 2001, by s 110. Interestingly it is not excluded by the corresponding provision relating to Scotland, the Criminal Justice (Scotland) Act 2003. See generally the Law Commission for England and Wales November 2007 Report, supra note 3, paras 2.7 – 2.25.

³⁹ Interestingly, certain civil rules are also relevant. The Woolf Report refers to certain contractual and agency rules affecting cases of bribery and corruption, supra note 20 at paras 35-36.

⁴⁰ See further Woolf Report, supra note 20, Appendix 1 at paras 28-29.

⁴¹ Including under the Sale of Offices Act 1809, the Honours (Prevention of Abuses) Act 1925 and the Representation of the People Act 1983. See the Woolf Report, supra note 20 at para 34.

relevant non-criminal provision is s 577A of the Income and Corporation Taxes Act 1988, as inserted by the Finance Act 1993. This provides that all expenditure which constitutes a criminal offence is not tax-deductible in the computation of taxable profits, with a conviction not necessary to exclude deductibility. This is in line with the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials 1996.⁴²

United Kingdom enforcement and international criminal co-operation law and practice are as important as the substantive criminal law in reaching a conclusion on United Kingdom compliance with international law. All three of the treaties described above require more than the criminalisation of bribery. They oblige parties to investigate and prosecute acts of bribery and to co-operate internationally. In regard to investigation and prosecution all three conventions stipulate that a specialised agency be created or nominated to carry out the task. In England, Wales and Northern Ireland it is the Serious Fraud Office that is charged with investigating and prosecuting cases of alleged bribery and corruption.⁴³ It was established by s 1(1) Criminal Justice Act 1987, and commenced its operation in April 1988. The remit of the SFO is provided by s 1(3) – 1(5), which provide:

“(3) The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.

(4) The Director may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.

(5) The Director may—

(a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and

(b) take over the conduct of any such proceedings at any stage.”

In Scotland, the Crown Office and Procurator Fiscal’s Service, headed by the Lord Advocate, undertakes criminal prosecutions. Whilst there is not a dedicated prosecutorial authority, s. 27 of the Criminal Law (Consolidation) (Scotland) Act 1995 provides that where it appears to the Lord Advocate that a suspected offence may involve serious or complex fraud she may nominate any person either generally or in regard to a specific case to investigate the situation. In regard to international co-operation, there are two central statutes, the Criminal Justice (International Co-operation) Act 1990 and the Crime (International Co-operation) Act 2003.⁴⁴ These will be mentioned below in adjudging United Kingdom compliance.

UNITED KINGDOM COMPLIANCE WITH INTERNATIONAL LAW: SUBSTANTIVE LAW

Analysis of United Kingdom compliance with international law in the area of bribery and corruption must examine the germane substantive law and the enforcement practices pursuant thereto. These are distinct but related examinations, and they need not result in similar conclusions. For example, the United Kingdom may well satisfy international law by containing appropriate substantive law yet be in contravention of it by failing to meet investigative and prosecutorial obligations. Indeed, this is *prima facie* the case. United Kingdom law appears to generally meet the requirements of international law substantively (or there have been reservations made)⁴⁵ with criticisms have focusing upon the enforcement of that law. In regard to the former point and referring to the UN Convention, Jack Straw has stated that United Kingdom law “... became fully compliant with the convention when the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005

⁴² Cited at <http://www.oecd.org/>.

⁴³ Its website is found at <http://www.sfo.gov.uk/>.

⁴⁴ These will be discussed below. They exist in addition to specific provision in regard to international co-operation, for example found in the Proceeds of Crime Act 2002 s 141 relating to the enforcement of the Act where there is relevant property outwith the United Kingdom.

⁴⁵ Although perhaps trite to note, the United Kingdom is bound to abide by its international obligations under the general *pacta sunt servanda* rule of international law. Additionally, however, the UN Convention, in article 65, provides that state parties shall take the necessary measures, including legislative and administrative measures... to ensure the implementation of its obligations...”.

came into force on the 31 December, and the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 came into effect on 1 January 2006”.⁴⁶ More generally in regard to substantive compliance, in all jurisdictions of the United Kingdom bribery and corruption are unlawful and authorities have been charged with investigating and prosecuting them. On the other hand, there have been a number of criticisms surrounding enforcement of the law. What is necessary, therefore, is a compartmentalisation of analysis. A division firstly into the two broad heads of the substantive law and enforcement is required. Under the head of substantive law analysis takes place according to the three areas in which the United Kingdom is obligated to act; prevention, criminalisation and co-operation.⁴⁷ In regard to enforcement, firstly takes place in the abstract and then is aided by examination of the facts and law surrounding the attempts to prosecute BAE Systems.

PREVENTATIVE RULES AND POLICIES

The UN Convention is the most comprehensive corruption-related agreement to which the United Kingdom is party, containing provision in the area of the prevention of corruption and bribery. This is found in Chapter II, containing ten articles, entitled “Preventative Measures”. The OECD Convention and Council of Europe Convention, in contrast, contain no specific and direct prevention-related provision. The articles relating to prevention in the UN Convention begin with a general obligation in article 5(1). It *inter alia* provides: “Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, co-ordinated anti-corruption policies...”. Significantly, in terms of measuring compliance, it is important to note that a number of the preventative obligations (and indeed others) are couched in non-obligatory terms. “In accordance with the fundamental principles of its legal system” qualifies the obligation and permits variation and exception. Further, for example, article 5(3) states “Each state party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption”. Here “shall endeavour” materially qualifies the obligation. Similarly, articles 7 and 8 require state parties to endeavour to prevent corruption in the public sector. Overall, the United Kingdom appears to comply with these obligations. In addition to generally attempting to address bribery and corruption it *inter alia* has adopted and applies the Civil Service Code, published June 2006. The Civil Service Code *inter alia* provides that civil servants must not “... misuse your official position, for example by using information acquired in the course of your official duties to further your private interests or those of others [and] accept gifts or hospitality or receive other benefits from anyone which might reasonably be seen to compromise your personal judgement or integrity”.⁴⁸

The UN Convention contains further preventative measures in regard to public procurement, transparency, freedom of information and judicial independence. The obligation in regard to public procurement, in article 9, *inter alia* provides that state parties “... shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement... that are effective, *inter alia*, in preventing corruption”. The United Kingdom complies with this article in part through the presence within its law of the Public Contracts Regulations 2006, and the Public Contracts (Scotland) Regulations 2006, which govern public procurement. These implement the relevant European Union rules on public procurement. These specific rules, and the general European Union Treaty obligations

⁴⁶ Foreign and Commonwealth Office Press Release upon United Kingdom ratification 14 February 2006, http://www.fco.gov.uk/resources/en/press-release/2006/02/fco_npr_140206_uncac. This legislation followed the Government’s understanding that the only primary legislation that was required following ratification was in order to comply with article 31(1)(b) of the UN Convention See Explanatory Memorandum on the UN Convention against Corruption, Command Paper No. 6854, Nov. 2005, cited at <http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2005/corruption>. Article 31(1)(b) requires each state party to take, to the greatest extent possible within its legal system, such measures to enable confiscation of “(b) Property, equipment, or other instrumentalities used in or destined for use in offences established in accordance with this Convention”.

⁴⁷ These three heads mirrors those used in Carr’s analysis of the UN Convention, *supra* note 17.

⁴⁸ Cited at <http://www.civilservice.gov.uk/iam/codes/cscode/index.asp>.

in regard to procurement are said to be based on the fundamental principles of transparency, equal treatment and non-discrimination and proportionality.⁴⁹ Articles 10 and 13 of the UN Convention relate to the freedom of information and the enhancement of transparency in public administration. In regard to the former, the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002 satisfy the requirements of article 10. Article 11 requires state parties to take measures to *inter alia* strengthen judicial integrity and independence. Again this obligation is couched in non-obligatory terms. However, even were it not, the United Kingdom appears to comply in part by formalising the judicial appointment process, creating a United Kingdom Supreme Court and explicitly protecting the rule of law. In Scotland, for example, the Judicial Appointments Board for Scotland, governed by the Judiciary and Courts (Scotland) Act 2008, plays a role in appointments. That Act, by s 1, guarantees the continuation of judicial independence. The rule of law has been protected by statute to the extent that s 1 of the Constitutional Reform Act 2005 provides that that Act does not adversely affect the rule of law.

The final preventative provisions in the UN Convention relate to corruption in the private sector, money laundering and publicity and training. It is Article 12 that addresses corruption in the private sector. As above, the obligation is qualified with it *inter alia* being provided that parties shall "... where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties...". Article 12(4) further requires parties to disallow the tax deductibility of corrupt payments required which, as noted above, the United Kingdom has done. Preventative provision in regard to money laundering is found in article 14 of the UN Convention. This is preventative in that requires financial institutions to adopt policies that may deter the practice. Article 14 requires the institution of a "comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions...". Whilst the recent financial crisis suggests otherwise, the United Kingdom does contain a detailed regulatory regime. The Financial Action Task Force stated in June 2007:

"The UK has a comprehensive legal structure to combat money laundering and terrorist financing. The money laundering offence is broad, fully covering the elements of the Vienna and Palermo Conventions, and the number of prosecutions and convictions is increasing. The terrorist financing offence is also broad. The introduction of the Proceeds of Crime Act 2002 (POCA) has had a significant and positive impact on the UK's ability to restrain, confiscate and recover proceeds of crime. The UK has also established an effective terrorist asset freezing regime. Overall, the UK FIU appears to be a generally effective FIU. The UK has designated a number of competent authorities to investigate and prosecute money laundering offences. Measures for domestic and international cooperation are generally comprehensive as well.⁵⁰

The Financial Services Authority is one of these authorities. Established under the Financial Services and Markets Act 2000, it has, under s 2(2)(d) a regulatory objective the reduction of financial crime. The Financial Services Authority *inter alia* implements the European Union's Third Money Laundering Directive.⁵¹ Additional to the Financial Services Authority are HM

⁴⁹ *The Scottish Procurement Policy Handbook*, December 2008, section 4.1, cited at <http://www.scotland.gov.uk/Publications/2008/12/23151017/0>. In regard to public procurement more generally, the lawful ability of the United Kingdom to affect a change in the law is restricted by the matter coming under the competence of the EU.

⁵⁰ Summary of the Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, United Kingdom and Northern Ireland, June 2007, para 2, cited at <http://www.fatf-gafi.org/dataoecd/33/20/38917272.pdf>. FIU being an abbreviation of Financial Intelligence Unit.

⁵¹ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, cited at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:01:EN:HTML>. The Regulations require various concerns to register with HM Revenue and Customs, to have anti-money laundering policies in place and to report activity regarded as suspicious. See further, Powles, E., *All That Glistens is not Gold: Laundering the UK Money Laundering Regime*, (2006) 65 Cambridge Law Journal 40.

Revenue and Customs and the Serious Organised Crime Agency.⁵² The Financial Services Authority together with the National Policing Improvement Agency appear to meet the obligations in the areas of publicity and training within, *inter alia*, articles 13 and 60. In regard to the former, the Financial Services and Markets Act 2000 provides as objectives of the Financial Services Authority public awareness and the reduction of financial crime.⁵³ In regard to the latter, the obligation to train persons fighting financial crime in article 60 is met by the National Policing Improvement Agency. The Serious Crime Act 2007 transferred to it the mandate of the now defunct Asset Recovery Agency on 1 April 2008. Overall, then, the United Kingdom appears to meet the international obligations that require the adoption of preventative policies and practices. It does so generally by containing rules, policies and institutions working towards the goal of preventing corruption and bribery but also through the fact that the obligations themselves in the UN Convention are largely open to qualification and restriction.

SUBSTANTIVE CRIMINAL LAW

The United Kingdom's criminalisation of bribery, together with its attempt to enforce it, has generated the most comment and criticism. What should be made clear, though, is that law that is opaque and incongruent (if that is what the law is – mentioned presently) is not necessarily at odds with international obligation.⁵⁴ Indeed, the United Kingdom appears to be in general compliance with international law in regard to the criminalisation of relevant acts. The UN Convention's bribery-specific proscriptive obligations are found in Chapter III entitled Criminalisation and Law Enforcement. Central here are articles 15 and 16 covering the bribery of and by national and foreign public officials. Article 15 has been noted above. It appears clear that that obligation and the others within the UN Convention in regard to the substantive criminal law are met. Admittedly, the various definitions of "bribe" within United Kingdom law are inconsistent and do not correlate with the international terminology. As seen above, the essence of bribery is an "undue reward" under common law, an inducement taking the form of a corrupt gift, loan, fee, reward or advantage under the 1889 Act, and an inducement being a gift or consideration under the 1916 Act. Within the UN Convention the core term is "undue advantage". It is submitted this variation in terminology does not lead to United Kingdom non-compliance. The obligation in regard to the bribery of foreign public officials in article 16(1) is met through the extension of the law under the Anti-terrorism, Crime and Security Act 2001 and the Criminal Justice (Scotland) Act 2003, mentioned above. This extension also met the general obligation in the OECD Convention, within article 1, to prescribe the offering, promising or giving an "undue pecuniary or other advantage" of foreign officials.⁵⁵ As the House of Lords noted in the BAE litigation, the enactment of ss 108 – 110 of the 2001 Act "... gave effect to the United Kingdom's obligation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)".⁵⁶

The question of United Kingdom compliance with the prescriptive obligations under the Council of Europe Convention is slightly more complex. Here it appears that the obligations have been met or reservations have been made. The general obligations, in Chapter II, require prescription of active and passive bribery in both the public and private sectors (articles 2, 3 7 and 8 respectively). As noted above, ss 1(1) and 1(2) of the Public Bodies Corrupt Practices Act 1889, as amended, prescribe active and passive bribery in the public sector within and outwith

⁵² The Proceeds of Crime Act 2002 creates an onus on persons to disclose to the Serious and Organised Crime Agency certain information in regard to money laundering and the proceeds of crime, under ss 327-334.

⁵³ By sections 4 and 6 respectively.

⁵⁴ The Law Commission for England and Wales has suggested that compliance with international law itself need not result in good law, stating "The mere fact that the United Kingdom currently complies with its international obligations in relation to extra-territorial acts of bribery does not mean that the current domestic law is satisfactory" Law Commission for England and Wales, Nov 2007 Report, at para 11.43.

⁵⁵ A lacuna in United Kingdom law is its failure to prescribe situations where a bribe is given to a third party, as required by article 1(1) of the OECD Convention, not the person whom it is sought to influence. See Williams, *supra* note 2 at p 204-205.

⁵⁶ At para 2. See in regard to Scotland, Arnell, P. The Crime of Bribery in Scotland, *supra* note 30.

the United Kingdom. The Prevention of Corruption Act 1906, as amended, makes it a crime for an agent to accept or obtain a bribe, with an agent being anybody employed by or acting for another, whether in the public or private sector. This, in general terms, can be seen to meet the requirement of prescribing bribery in the private sector although its formulation is not ideal. Indeed the usage of the agent/principal concept has given rise to a number of criticisms. The most common relates to the applicability of the defense of principal consent under the Act. There are conflicting views on this point.⁵⁷ However, the United Kingdom entered a reservation in regard to the active bribery private sector obligation in article 7 because the 1906 Act does not prescribe the situation where benefit or advantage is given not to an agent acting on behalf of a principal but to a third party – which is required by article 7.⁵⁸ In general terms, then, the obligations in the Council of Europe Convention in regard to bribery-specific offences can be said to be met, albeit in a rather unsatisfactory fashion.

United Kingdom law appears to comply with the requirements to prescribe various other acts related or tangential to bribery itself. Articles 17, 23 and 25 of the UN Convention cover embezzlement, money laundering and obstruction of justice respectively. The obligation in regard to embezzlement by a public official is met through by the law relating to theft generally. The criminalisation of money laundering is covered by all three conventions. In addition to article 23 of the UN Convention are articles 7 of the OECD Convention and 13 of the Council of Europe Convention. As mentioned above, the Proceeds of Crime Act 2002, ss 327 – 329 criminalise money laundering. Through this Act the United Kingdom appears to meet the obligations upon it in this area. The obligation to criminalise the obstruction of justice is met, in English law, under common law and by statute. The common law crime of contempt of court covers the interference with those who have duties to discharge in court⁵⁹ and it is also an offence at common law to attempt to pervert the course of justice.⁶⁰ Section s 51 of the Criminal Justice and Public Order Act 1994 prescribes the intimidation of witnesses, jurors etcetera. Articles 18-20 of the UN Convention cover trading in influence, abuse of functions and illicit enrichment. As with certain of the preventative obligations mentioned above, these are non-compulsory. Here the obligation upon state parties is to “consider” adopting relevant legislation.⁶¹ This type of non-compulsory obligation also exists generally in regard to the private sector-related provisions within the UN Convention covering bribery and embezzlement and “concealment” in regard to both public and private sectors, in articles 21, 22 and 24.⁶²

The obligation to act in regard to crimes apart from bribery itself in the OECD Convention is limited to money laundering, discussed above. In the Council of Europe Convention there are further obligations. These include that in article 12 requiring state parties to criminalise trading in influence - the UN Convention also contains an obligation in this regard. As this crime is not found in United Kingdom law a reservation to the Council of Europe Convention has been made. The Explanatory Notes to the Council of Europe Convention state the reservation was made to because “... not all of the behaviour which falls under the definition of 'trading in influence' in Article 12 is criminal” under the 1906 Act.⁶³ The Council of Europe Convention also mandates the criminalisation of the bribery of discreet groups of people including, under article 6, members of foreign public assemblies. The Public Bodies Corrupt Practices Act 1889 as amended, mentioned above, covers the bribery of foreign public bodies. The existing extended law also covers the obligations in articles 9 and 10 of the Council of Europe Convention in regard to the bribery of officials of international

⁵⁷ See OECD Report, *supra* note 4, at pp 12-14.

⁵⁸ Reservations to the Council of Europe Convention are permitted under article 37.

⁵⁹ *Re Johnson* (1887) 20 Q.B.D. 68.

⁶⁰ See *R v Vreones* [1891] 1 QB 360.

⁶¹ The crime of “trading in influence” is addressed below.

⁶² As seen above, however, the crime of bribery in United Kingdom law does extend to some extent to the private sector, as indeed does embezzlement through the law of theft. Section 327(1)(a) of the Proceeds of Crime Act 2002 prescribes concealing of criminal property.

⁶³ Explanatory Memorandum on the Council of Europe Criminal Law Convention on Corruption and the Additional Protocol, cited at <http://www.fco.gov.uk>. The obligation in the UN Convention is conditioned with “shall consider”.

organisations and members of international parliamentary assemblies.

The final two subjects to be mentioned under the heading substantive criminal law do not, in fact, concern the criminalisation of bribery or corruption or tangential activity. Rather, they concern the question of to whom or what that law is applied. The first point notes the limitation of criminal jurisdiction. The second matter relates to the extension of criminal liability to legal persons. In regard to the extension of jurisdiction, and similar to trading in influence in that the United Kingdom qualified its ratification, are two declarations under article 17 of the Council of Europe Convention, the jurisdictional article. Here the United Kingdom made a declaration under article 17(2) whereby it stated that the obligations within article 17 were not met. These were in article 17 paragraphs (b) and (c). Article 17b requires the extension of jurisdiction over officials and elected representatives, who are not necessarily United Kingdom nationals. Article 17c *inter alia* provides that jurisdiction is established where “the offence involves one of its public officials or members of its domestic public assemblies...”. The declaration was made in regard to the former provision because the law was extended to apply only to United Kingdom nationals, not non-nationals who may hold those roles. In regard to the latter “Article 17c provides for jurisdiction over cases 'involving' (not necessarily committed by) nationals etc. It is not UK practice to exercise this type of jurisdiction and we do not intend to apply Article 17c”.⁶⁴

The liability of legal persons is the final subject to be mentioned under this head. It is provided for in all three treaties; by article 26 of the UN Convention, article 2 of the OECD Convention and article 18 of the Council of Europe Convention. The OECD Working Group has stated in regard to corporate criminal liability “Overall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK. The Working Group is particularly concerned that the UK’s continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations.⁶⁵ Indeed the OECD Working group has on more than one occasion criticised the United Kingdom position in regard to corporate criminal liability, highlighting in 2007 the “deficiencies” in the law on the liability of legal persons for foreign bribery.⁶⁶ More specifically the Law Commission in its 2007 Report highlighted the fact that corporate liability does not extend to legal persons incorporated under the law of a Crown Dependency or Overseas Territory, to the situation where a British company assists or encourages to commit bribery a foreign national who is not employed by that company and where a United Kingdom incorporated company assist a foreign company including a foreign subsidiary company to commit extraterritorial bribery even where the assistance or encouragement occurs in England and Wales.⁶⁷ Clearly have been, and remain, legitimate concerns in regard to corporate criminality. These, of course, transcend bribery and corruption and apply more generally.⁶⁸ However, it should be noted that these concerns relate to putative deficiencies in the criminal law *per se*, and not its non-compliance with international legal obligation. An examination of the specific obligations within the treaties reveals that they are either non-obligatory or non-criminal specific. Within the UN Convention the obligation is conditioned with the phrase that state parties “... shall adopt such

⁶⁴ Ibid. The reservations have been extended apply until December 2010.

⁶⁵ OECD Phase 2 bis Report, October 2008, *supra* note 3 at page 1. The other criticisms referred to include those relating to the general opacity of the law and the principal consent defence.

⁶⁶ (OECD Working Group on Bribery Annual Report 2007, <http://www.oecd.org>, [Accessed on 23.06.2008] p. 24)

⁶⁷ Ibid at para 11.43. Further, the House of Commons Select Committee on International Development Fourth Report, entitled “Corruption” published March 2001 criticised the fact that the Government had yet to introduce legislation to implement the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions after current legislation was found to be inadequate by the OECD. It stated “simple and clear legislation should be brought forward as a matter of urgency”, Executive Summary, cited at <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmintdev/39/3902.htm>.

⁶⁸ There is a wealth of writing here, see generally Wells, C., *Corporations and Criminal Responsibility*, 2nd edn, Oxford University Press, Oxford, 2001. The Corporate Homicide and Corporate Manslaughter Act 2007 addresses the issue in a crime-specific way, see in regard to it Ormerod, D., and Taylor, R., *Legislative Comment*, 2008 *Criminal Law Review* 589.

measures that may be necessary, consistent with its legal principles...”. The OECD Convention provides somewhat similarly, “Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”. As United Kingdom “legal principles” stand, there are difficulties with the notion of the liability of companies. The Council of Europe Convention, on the other hand, does require the imposition of liability but does not explicitly state that this be criminal.⁶⁹ Overall, then, the position of the United Kingdom in regard to substantive criminal law and jurisdiction and liability of legal persons appears to be in compliance with the international obligations upon it.

PROCEDURAL CO-OPERATION

In regard to international procedural co-operation, as with preventative and substantive provision, the UN Convention is the most detailed of the treaties imposing obligations upon the United Kingdom. Articles 43-50, within Chapter IV entitled International Cooperation, cover a general obligation to co-operate, extradition, mutual legal assistance, transfer of sentenced persons and criminal proceedings, law enforcement co-operation, joint investigations and special investigative techniques. Also relevant under this head are Chapters V and VI, entitled Asset Recovery and Technical Assistance and Information Exchange.⁷⁰ As above, it must be noted that a number of these provisions are couched in non-obligatory terms. For example article 48 *inter alia* provides “States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Conventions...”. This is not true, however, in regard to the general obligation to co-operate in article 43. It provides “States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention”. Similarly state parties are bound to provide mutual legal assistance by article 46(1), it providing “States Parties shall afford one another the widest measure of legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this convention”. Whilst less thorough, Chapter IV of the Council of Europe Convention, entitled International Co-operation mirrors the UN Convention, providing a general obligation to co-operate, for mutual assistance, extradition, and communication. There are two relevant articles in this area in the OECD Convention, articles 9 and 10, covering mutual legal assistance and extradition respectively.

The obligation in regard to mutual assistance in the UN Convention in article 46 is detailed, containing thirty paragraphs. The United Kingdom law governing mutual legal assistance is found in a number of statutes – central of which are the Crime (International Co-operation) Act 2003 and Criminal Justice (International Co-operation) Act 1990. Comparison of international obligation and this provision leads to the conclusion that United Kingdom law is in compliance with the obligations upon it. Further, it is material to note the existence of a large number of bilateral and multilateral agreements to which the United Kingdom is party in the area of mutual legal assistance generally. A bilateral example being the Treaty between the Government of Great Britain and Northern Ireland and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters 1994.⁷¹ Multilaterally there are a number of international and European treaties, decisions and agreements in the area of mutual assistance in criminal matters generally and specifically in regard to drugs and organised crime. Amongst these are the Convention on Mutual Assistance in Criminal Matters 2000 and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Of course the existence of agreements and provision akin to that in the UN Convention and Council of Europe Convention in the area of mutual assistance does not in itself support compliance. It does, though, indicate the United Kingdom’s position. Regardless, the existence of an agreement is not a condition precedent for United Kingdom co-operation with a judicial authority abroad, with it being noted “The UK can provide most

⁶⁹ See Council of Europe, *Criminal Law Convention on Corruption and Explanatory Report*, 2000, Council of Europe, p 55.

⁷⁰ As certain of these subjects relate more directly to enforcement and investigation they will be discussed in the subsequent section.

⁷¹ UKTS 0661/1997 Cmnd 3783. For a list of current bilateral mutual assistance treaties see <http://www.fco.gov.uk/en/about-the-fco/publications/treaties/lists-treaties/bilateral-mutual-legal>.

forms of legal assistance without bilateral or international agreements - but assistance in the restraint and confiscation of proceeds of crime is dependent upon a bilateral agreement or other international agreement".⁷² Where agreement is requisite, the Crime (International Co-operation) Act 2003 provides the legislative framework and underpinning. In large part it replaced the Criminal Justice (International Co-operation) Act 1990, and was *inter alia* enacted to meet the requirements of the mutual legal assistance provisions of the Schengen Implementing Convention 1985 and the Convention on Mutual Assistance in Criminal Matters 2000 and the Protocol to the Convention on Mutual Assistance in Criminal Matters 2001.⁷³

In regard to mutual assistance specifically, a number of statutory instruments have supplemented the Crime (International Co-operation) Act 2003 including, in regard to Scotland generally, the Act of Adjournment (Criminal Procedure Rules Amendment) (Miscellaneous) 2004⁷⁴ and, in regard to restraining orders on dealing with property specified in overseas requests in Scotland, the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders)(Scotland) Order 2005.⁷⁵ In England and Wales the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005⁷⁶ provides similarly to the latter. The United Kingdom law in the area of asset recovery is found in the Proceeds of Crime Act 2002 and the Serious Crime Act 2007. Exercising the powers created by the Acts is the Serious Organised Crime Agency, under s 4 and Schedule 8 of the Serious Crime Act 2007. This provision exists in addition to that in regard to international restraint and recovery, mentioned above. It is Part 11 of the Proceeds of Crime Act 2002 that governs international requests in the area of asset recovery.⁷⁷

The law of extradition in the United Kingdom law has relatively recently been reformed and is now governed by the Extradition Act 2003.⁷⁸ It creates two main schemes, one in regard to those states in which a relatively high degree of trust is placed, called Category 1 states, and another with which it has an extradition treaty, called Category 2. The obligation upon the United Kingdom under the treaties to make the crimes of bribery and corruption extraditable is clearly met. To be so, in general terms, they must be included in the European Framework List of offences in regard to Category 1 states or attract a sufficient possible punishment in regard to Category 2. The European Framework List, found in Schedule 2 to the 2003 Act, lists "corruption" in section 7. "Swindling" and money laundering are also found on the List. In regard to Category 2 states section 137(2)(b) provides that an offence is an extradition offence if "... the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom". Again, this is met in United Kingdom law – the penalties for an offence under the 1889 Act, for example, include imprisonment for a period not exceeding seven years.⁷⁹ The Bribery Bill introduced in March 2009 stipulates a maximum period of ten years imprisonment where a person is tried on indictment, under clause 11(1).

In regard to the transfer of sentenced persons the Repatriation of Prisoners Act 1984, as amended

⁷² The Mutual Legal Assistance Guidelines for the United Kingdom, Sixth Edition, 16 June 2008, cited at http://police.homeoffice.gov.uk/publications/operational-policing/MLA_Guidelines_6th_edition.pdf at p 19. More generally the Government itself states "The United Kingdom Government attaches great importance to assisting investigative, prosecuting and judicial authorities in combating international crime" and "the UK is able to provide a full range of legal assistance in criminal matters", at p 3.

⁷³ See generally the Explanatory Notes to the 2003 Act, cited at http://www.opsi.gov.uk/acts/acts2003/en/ukpgaen_20030032_en_1.htm.

⁷⁴ SSI 2004/195.

⁷⁵ SSI 2005/581.

⁷⁶ SI 2005/3180.

⁷⁷ Article 53 of the UN Convention *inter alia* provides "Each State Party shall, in accordance with its domestic law... [t]ake such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property".

⁷⁸ See Arnell, P., *Scots Extradited*, [2008] Juridical Review 241.

⁷⁹ See generally The Crown Prosecution Service, *Legal Guidance, Bribery and Corruption*, 17 January 2008, cited at http://www.cps.gov.uk/legal/a_to_c/bribery_and_corruption/#P95_9614.

by the Police and Justice Act 2006 and the Criminal Justice and Immigration Act 2008, applies.⁸⁰ The Repatriation of Prisoners Act 1984 enables prisoners to serve their sentences in their own country where there is an international agreement in place allowing for such a transfer. As with mutual assistance, illustrating the general approach of the United Kingdom is the fact it is party to a number of multilateral and bilateral agreements in the area. The United Kingdom is party to two multilateral prisoner transfer agreements, the Council of Europe Convention on the Transfer of Sentenced Persons 1983 and its Protocol and the Commonwealth Scheme for the Transfer of Convicted Offenders 1990. An example of a bilateral agreement is the Agreement between the Government of Great Britain and Northern Ireland and the Government of the Republic of Cuba on the Transfer of Prisoners 2002.⁸¹ The precise terms on which a prisoner's sentence is administered following such a transfer are governed by the specific international arrangements in place between the United Kingdom and the country with whom any transfer is taking place. The Criminal Justice and Immigration Act 2008 introduced further amendments which provide the legislative framework for the enforcement of sentences where prisoners have fled to or from the United Kingdom. Overall, it is clear that the United Kingdom meets its international obligations in this area.

The situation in regard to the transference of criminal proceedings is different to that of the transference of prisoners. Three points should be made here. Firstly, that where it is thought by United Kingdom prosecuting authorities that a greater connection exists between a criminal act and a foreign state, and that state seeks the person through extradition, he/she will normally be subjected to extradition proceedings – even if a United Kingdom national – barring statutory restrictions such as those based on double jeopardy, human rights and the death penalty. Indeed there have been several cases in recent times where this has happened – in the face of the opposition of the persons involved.⁸² Secondly, the obligation in regard to the transfer of criminal proceedings in article 47 of the UN Convention is non-obligatory. It *inter alia* provides “States Parties shall consider the possibility of transferring...”. Thirdly, there has been prosecutorial agreement between the United States and the United Kingdom in regard to the assumption of judicial jurisdiction. This is the Attorney General and Lord Advocate’s Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America.⁸³ This is an attempt to enhance prosecutorial co-operation between the two states.⁸⁴ It is clear that the United Kingdom is in compliance with its international obligations in regard to the transference of criminal proceedings.

UNITED KINGDOM LAW COMPLIANCE WITH INTERNATIONAL LAW: ENFORCEMENT

Enforcement issues, as much as the substantive law itself, has been behind many of the criticisms of the United Kingdom. These have generally related to the low number of investigations and, in particular, successful prosecutions of bribery cases having a foreign element. Indeed it was only on 22 August 2008 that the first conviction for foreign bribery occurred. Here a director of a UK-based company pleaded guilty to making corrupt payments to foreign officials and was convicted under section 1 of the Prevention of Corruption Act 1906.⁸⁵ The case involved the

⁸⁰ The 2006 Act amended the 1984 Act by removing the need for prisoners to consent to transfer in each case; consent to transfer is only necessary where required by the relevant international arrangement.

⁸¹ UKTS 36/2003 Cmnd 5970. For a list of in-force agreements see <http://www.fco.gov.uk/en/about-the-fco/publications/treaties/treaty-texts/prisoner-transfer-agreements>.

⁸² The most high profile case here is that of the NatWest Three, *Birmingham and others v Director of the Serious Fraud Office* [2007] QB 727. See Arnell, P., *The Long Arm of United States Law*, (2008) 21 Scots Law Times 142.

⁸³ Cited at http://www.attorneygeneral.gov.uk/attachments/AG_Guidance-Criminal_Cases_with_the_USA_2007.pdf.

⁸⁴ See Brookson-Morris, K., *Conflicts of Criminal Jurisdiction*, (2007) 56 ICLQ 659 and more generally Arnell, P., *The Proper Law of the Crime in International Law Revisited*, (2000) 9(1) Nottingham Law Journal 39.

⁸⁵ See Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – United Kingdom Sept. 2008, cited at

managing director of CBRN Team, a United Kingdom security company, who paid £83,000 in bribes in 2007-2008 to two Ugandan officials in relation to a £210,000 contract. He received a five-month jail sentence suspended for one year.⁸⁶ Also relatively recently, in October 2008 the Serious Fraud Office obtained its first ever Civil Recovery Order against Balfour Beatty relating to irregular payments and questionable accounting practices made by a subsidiary of the company in Egypt with the company agreeing to surrender £2.25 million.⁸⁷ Whilst notable, this record of successful enforcement pales in comparison to that of the United States – which has been active for some considerable time in applying its Foreign Corrupt Practices Act 1974. United Kingdom enforcement efforts have engendered criticism from a number of quarters including non-governmental organisations, the OECD and the Select Committee on International Development. Nicholas Hildyard from the Corner House, an anti-corruption non-governmental organisation, stated in November 2008 “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”.⁸⁸ The same organisation has identified a number of United Kingdom-based companies operating abroad where corruption allegations have been made. They include PowerGen in regard to the Paiton II Power Project in Indonesia, AES Ltd in regard to the Bujagli Hydroelectric Project in Uganda and Keir International in regard to the Lesotho Highlands Water Project in Lesotho.⁸⁹

The OECD has also been critical of the United Kingdom’s enforcement efforts. In a Report following the ending of the BAE investigation it stated:

“The Working Group is particularly concerned that the UK’s continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations... The Group also strongly regrets the uncertainty about the UK’s commitment to establish an effective corporate liability regime in accordance with the Convention, as recommended in 2005, and urges the UK to adopt appropriate legislation as a matter of high priority. The Report finds that the unsatisfactory treatment of certain cases since the 2005 Phase 2 report has revealed systemic deficiencies, including the uncertainty over the application of Article 5 to all stages of the investigation and prosecution of foreign bribery cases, and the hurdle created by the special Attorney General consent requirement for foreign bribery prosecutions. The Report finds that these issues should be addressed and that the independence of the Serious Fraud Office should be strengthened. The Working Group also recommends that the UK ensure that the SFO attributes a high priority to foreign bribery cases and has sufficient resources to address such cases effectively”.⁹⁰

Finally, the House of Commons Select Committee on International Development Fourth Report 22 March 2001 stated “The Committee criticises the fact that the Government has yet to introduce legislation to implement the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions after current legislation was found to be inadequate by the OECD. Simple and clear legislation should be brought forward as a matter of urgency. Legislation exists to control money laundering but it is unclear who enforces it and in what circumstances it is enforced. Corruption and money laundering cannot be tackled effectively without better coordination across Government”.⁹¹

The point to note here in adjudging United Kingdom compliance in regard to enforcement of the law in cases where there is a foreign element is firstly that non-existence, ineffective or otherwise deficient attempts at enforcement are not necessarily unlawful in international law.

<http://www.oecd.org/dataoecd/18/7/42103697.pdf>.

⁸⁶ OECD Report, supra note 4, at page 7.

⁸⁷ See http://www.sfo.gov.uk/news/prout/pr_582.asp?id=582.

⁸⁸ Sexton, S., and Hildyard, N., Sustaining corruption legal challenges in a hostile political environment when corruption investigations have not been sustained: Insights from ‘the BAE case, cited at <http://www.thecornerhouse.org.uk/pdf/document/IACC.pdf>.

⁸⁹ Hawley, S., Underwriting Corruption: Britain’s Role in Promoting Corruption, Cronyism and Graft, The Corner House, Dec 2000, cited at <http://www.thecornerhouse.org.uk/item.shtml?x=51990>.

⁹⁰ Supra note 4 at p 4.

⁹¹ Cited at <http://www.parliament.the-stationery-office.com/pa/cm200001/cmselect/cmintdev/39/3904.htm>.

Non-compliance will only arise where there are mandatory obligations upon the United Kingdom to legislate or act in a certain way and it has failed to do so. The obligations upon the United Kingdom in regard to the enforcement of laws in the area of bribery are relatively succinct. The pre-eminent obligation is found in article 5 of the OECD Convention, noted above. It in essence provides that investigation and prosecution of bribery of a foreign public official shall not be affected by considerations of national economic interest, relations with other States or the identity of persons involved. Also noted above, a further somewhat similar provision is found in article 30(3) of the UN Convention. It provides that state parties endeavour to ensure that discretionary prosecutorial powers are exercised to maximise law enforcement. In a related vein are the obligations upon the United Kingdom to contain or otherwise establish enforcement bodies. Article 36 of the UN Convention, for example, provides “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks”.⁹² Of course one is not able to make definitive comment upon decisions not to prosecute on specific occasions. Clearly one would need to weigh the relevant evidence in all the circumstances. The relatively few prosecutions militates in favour of the arguments made by non-governmental organisations that the United Kingdom has been tolerant, or turned a blind-eye, to overseas corruption. To state that it has been acting in violation of its international obligations generally however, is a conclusion too-far. What is reasonable however, is to focus on the issues raised in article 36 of the UN Convention, – prosecutorial independence (political non-interference) and resourcing. As will be seen, both these issues to a greater or lesser extent affect United Kingdom enforcement in the BAE case as well as more generally.

BAE LITIGATION

The origins of the BAE litigation are found in “Al-Yamamah”, the biggest arms deal in United Kingdom history which dates to 1985. It is a contract between the United Kingdom and Saudi Arabia where BAE Systems is the main contractor. The value of Al-Yamamah exceeded £43 billion and *inter alia* involved the sale of 72 Tornado fighters and 50 Hawk jet trainers and the construction of two airbases.⁹³ The agreement was renewed in 1993 and 2005 despite allegations of corruption.⁹⁴ The allegations led to the commencement of an investigation by the SFO under the Criminal Justice Act 1987 on 29 July 2004. Underlying the investigation were possible breaches the law proscribing corrupt payments to public officials outside the United Kingdom. When the SFO investigation attempted to access certain banking information from Swiss authorities there followed an explicit threat from Saudi Arabia to withdraw from counter-terrorist and strategic objective co-operation and end negotiations for the purchase of Typhoon aircraft. The response to this threat culminated in a “personal minute” to the Attorney General from Tony Blair dated 8 December 2006 asking him to reconsider the public interest issues raised by the ongoing investigation. On 14 December 2006 the Director’s decision to discontinue the investigation was announced. It *inter alia* stated that the decision had been taken “... following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security. It has been necessary to balance the need to maintain the rule of law against the wider public interest. No weight has been given to commercial interests or to the national economic interest”. The Attorney General stated the same day in Parliament that the Prime Minister and the Foreign and Defence Secretaries had:

“... expressed the clear view that continuation of the investigation would cause serious

⁹² Of course the United Kingdom is under an obligation under article 26 of the Vienna Convention on the Law of Treaties 1969 to carry out its international obligations in good faith.

⁹³ The arms deal they called the dove: how Britain grasped the biggest prize, The Guardian, 15 December 2006, cited at <http://www.guardian.co.uk>.

⁹⁴ In October 2006, The Guardian published documents showing how price of Tornado warplanes was inflated by £600m. See The secrets of Britain's arms trade, <http://www.guardian.co.uk>.

damage to the UK/Saudi security, intelligence and diplomatic cooperation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment.⁹⁵

He noted that article 5 of the OECD Convention precluded him and the SFO from taking into account considerations of the national economic interest or the potential effect upon relations with another state and that this had not happened.

The decision to discontinue the investigation was challenged by way of judicial review by two non-governmental organisations, the Corner House Research and the Campaign Against Arms Trade in the High Court. Two core arguments can be identified. That submission to the threat made by Saudi Arabia was itself unlawful and that article 5 of the OECD Convention was misinterpreted and misapplied by the Director. On 10 April 2008 the Divisional Court granted judicial review and quashed the decision of the Director. Lord Justice Moses and Justice Sullivan upheld the first argument made by the claimants. The bases of their decision were the principles of the rule of law and separation of powers. In regard to the former the Court stated:

“The courts protect the rule of law by upholding the principle that when making decisions in the exercise of his statutory power an independent prosecutor is not entitled to surrender to the threat of a third party, even when that third party is a foreign state. The courts are entitled to exercise their own judgement as to how best they may protect the rule of law, even in cases where it is threatened from abroad. In the exercise of that judgment we are of the view that a resolute refusal to buckle to such a threat is the only way the law can resist”.⁹⁶

In regard to the separation of powers the High Court stated it “... requires the courts to resist encroachment on the territory for which they are responsible. In the instant application, the Government's response has failed to recognise that the threat uttered was not simply directed at this country's commercial, diplomatic and security interests; it was aimed at its legal system”.⁹⁷ The High Court ruled in needn't make judgement on article 5 of the OECD Convention because “... under conventional domestic law principles” the Director's decision was unlawful it was not necessary.⁹⁸

On 30 July 2008 the House of Lords overturned the High Court's decision. Two points of law of general public interest had been certified - whether the Director had acted lawfully in surrendering to the threat and whether he had been correct in believing he was acting consistently with article 5. In regard to the first question the House of Lords took the orthodox approach to the exercise of discretion. It held that the question the Divisional Court should have addressed was “... whether, in deciding that the public interest in pursuing an important investigation into alleged bribery was outweighed by the public interest in protecting the lives of British citizens, the Director made a decision outside the lawful bounds of the discretion entrusted to him by Parliament”.⁹⁹ The House of Lords disagreed with the approach taken by the High Court, stating:

“The issue in these proceedings is not whether his decision is right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect. In the opinion of the House the Director's decision was one he was lawfully entitled to make. It may indeed be doubted whether a responsible decision-maker would, on the facts before the Director, have decided otherwise”.¹⁰⁰

In accordance with the High Court the House of Lords did not address the effect of the OECD Convention. In the leading judgment Lord Bingham held that it was “unnecessary and undesirable” to address the issue of whether article 5 of the OECD Convention prohibits the

⁹⁵ House of Lords judgement, supra note 2 at para 22.

⁹⁶ High Court judgement, supra note 2, at para 78.

⁹⁷ Ibid.

⁹⁸ Ibid at paras 153-154.

⁹⁹ House of Lords judgement, supra note 2, at para 38.

¹⁰⁰ Ibid paras 41-42.

inclusion of “multiple loss of life” within the definition of “relations with another state” and so is a factor which must not influence investigation and prosecution of corruption and bribery. Lord Bingham noted “The extreme difficulty of resolving this problem on a principled basis...”, and said that this was a factor in favour of deferring to the mechanism within the Convention itself providing for its interpretation.¹⁰¹ He said it was clear that the Director thought that article 5 did allow him to take into account threats to human life as a relevant consideration and that the Director unequivocally stated that he would have made the same decision even if he had believed that it was incompatible with article 5.¹⁰²

Clearly the attempted prosecution of BAE Systems and subsequent litigation raise in sharp relief the difficult issues faced by courts and governments in prosecuting certain cases of bribery and corruption with an international and governmental dimension. It is through prosecution, rather than prescription itself, that “hard cases” will arise and in this case have arisen. The question to be answered presently is whether the United Kingdom was complying with its international obligations in the case. As seen, both the High Court and the House of Lords did not address the issue. For the OECD’s part, the Working Group on Bribery in its 2007 Annual Report states “At its first meeting after the announcement of the United Kingdom’s discontinuance of the BAE Al Yamamah investigation, the Working Group expressed serious concerns about whether the decision was consistent with the OECD Anti-Bribery Convention”.¹⁰³ In its March 2008 Report the OECD Working Group discussed the BAE Systems case in some detail. In it it refuted suggestions made by United Kingdom authorities in the High Court and House of Lords that it has interpreted article 5 in broad and general terms to either include or exclude national security as a factor that can not affect prosecutorial decisions.¹⁰⁴ It then noted that the decision making process leading to the termination of the investigation did not take sufficient cognisance of article 5:

“In light of Article 5 and the proper role of the government, prosecutors should resist dropping a case, unless, after strict scrutiny, they are satisfied that, under the circumstances, sufficient efforts have been made to explore and use other options or there are compelling reasons why efforts should not be made. While the House of Lords found that the Director’s reliance on the Ambassador was acceptable in the context of the requirements of domestic law, which provides the Director with broad discretion, the examiners consider that Article 5 requires a more searching approach in foreign bribery cases where Article 5 factors are strongly present”.¹⁰⁵

It concluded, although without stating explicitly, that the discontinuance of the investigation and prosecution were in contravention with the OECD Convention’s obligations:

“The lead examiners recall that the Working Group expressed serious concerns in January and March 2007 about whether the Al Yamamah discontinuance was consistent with the Convention. They consider that the new developments since then, including the additional information gathered in the context of the on-site visit and provided in connection with the judicial review proceeding, have reinforced and intensified the serious concerns with regard to its consistency with the Convention. They do not believe that the decision of the House of Lords in the Al Yamamah case allays these concerns”.¹⁰⁶

In holding that the cessation of the prosecution of BAE Systems was in violation of the Convention the Working Group fails to specifically address the question of whether national

¹⁰¹ Ibid at para 46. Lord Brown held similarly stating “... there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the contracting parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge”, at para 65.

¹⁰² See further Spencer, J.R., *Fiat Justicia, Ruataque Concordia Cum Arabe?*, (2008) 67 Cambridge Law Journal 456.

¹⁰³ <http://www.oecd.org/dataoecd/21/15/40896091.pdf>, at p 24.

¹⁰⁴ OECD Report, supra note 4, at para 132.

¹⁰⁵ Ibid at para 167.

¹⁰⁶ Ibid.

security is encompassed by article 5 and the term “relations with another State”.¹⁰⁷ Rather, being relatively muted in its criticism, it focuses on the failure to explore alternatives to prosecution and the manner and nature of ministerial input into the decision through the use of a Shawcross Exercise.¹⁰⁸

The view of the Working Group on Bribery, whilst authoritative, is not determinative of the legality of the United Kingdom’s actions. Its terms of reference are set out in Section VIII of the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions. This provides *inter alia* that the Working Group “reviews” steps to implementation and examines “specific issues relating to bribery in international business transactions”. It does not pronounce on the nature of the conclusions of these examinations or reviews. The academic commentary on the decision is mixed. Williams writes “In relation to the SFO investigation into the Al-Yamamah contracts, it is not clear whether the termination of the investigation on the grounds of ‘national and international security’ was in compliance with the UK’s obligations under the OECD Convention”.¹⁰⁹ In regard to the question of national security and article 5 more generally Williams says academic opinion is largely opposed to allowing national security to be an exception to article 5.¹¹⁰ Rodmell appears to agree stating “The decision in December 2006 of the Director of the SFO to terminate the investigation into the affairs of British Aerospace Systems plc (BAeS) as far as they relate to the Al Yamamah defence contract on grounds of national and international security seems to put at risk a fundamental principle of the OECD 1997 Convention”.¹¹¹ On the other hand, again as Williams notes, the first sentence of article 5 suggests some latitude, providing “... that the investigation and prosecution of an offence should be subject to the laws of a State Party, which in the UK permit the taking into account of ‘ public interest’ considerations, including international relations”.¹¹² Of course the above analysis assumes that the decision to stop the prosecution was indeed on the basis of national security. This is put into question by a comment by the former Prime Minister, Tony Blair, in defending the Government’s decision to terminate the investigation. He stated that the investigation was dropped to prevent the “wreckage of a vital strategic relationship with Saudi Arabia and the loss of British jobs”.¹¹³ Clearly if the decision was taken for economic reasons then the United Kingdom would have acted in direct contravention of article 5. On the assumption that national security was indeed a material factor behind the decision, and in light of the absence of an authoritative or detailed interpretation of the meaning of article 5 by the Working Group or elsewhere, it is submitted that the decision was not clearly unlawful.¹¹⁴

CONCLUSION

United Kingdom compliance with international law in the area of bribery and corruption requires examination of many and diverse facets of its law and procedure. It is clearly not as simple as testing narrow substantive criminal prescriptions against a specific treaty obligation. The existence of three treaties covering a wide range of areas makes overall judgement difficult. As seen, the United Kingdom has a range of preventative, substantive and procedural

¹⁰⁷ At para 133 the OECD Report states “However, assuming solely for purposes of analysis that national security could constitute an exception under Article 5 as the UK suggests, 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 and non-Article 5 factors”, supra note 4, emphasis theirs.

¹⁰⁸ Ibid at para 167. A Shawcross Exercise entails the taking of views from relevant Ministers in order to come to a decision of whether or not it is in the public interest to continue with a prosecution.

¹⁰⁹ Williams, S., supra note 2 at para 205.

¹¹⁰ Ibid, citing P Cullen, Article 5: Enforcement, in M Pieth, L Low and P Cullen (eds), *The OECD Convention on Bribery: A Commentary*, Cambridge University Press, Cambridge, 2007 at 322.

¹¹¹ Rodmell, G., Corruption - economic crime or economic reality?, (2007) 28 *Company Lawyer* 259 at 260.

¹¹² Williams, S., supra note 2 at p 206.

¹¹³ Quoted by Williams, ibid, and cited at <http://www.number10.gov.uk/Page11882>.

¹¹⁴ Williams notes the existence of a national security exception in the application of international obligations is far from uncommon, but that in most cases where present it is explicitly provided for, ibid at p 206.

rules and practices and it has prosecuted and attempted to prosecute persons or companies thought to have infringed the law. As noted, the OECD and others are of the view that United Kingdom substantive law is lacking. This is undoubtedly a reflection of the piecemeal and anachronistic nature of the law. The crimes "... certainly do not represent a coherent statutory regime: the terminology is inconsistent, they contain overlapping offences and core issues such as the elements of "corruptly" and "agency" remain ill-defined".¹¹⁵ Indeed the general opacity of the law has been subjected to criticism for more than a decade, with the Law Commission for England and Wales, in 1997 stating that it "... found the law on corruption uncertain and inconsistent and proposed in a Consultation Paper issued in 1997 that it be comprehensively restated and updated by the enactment of a new statutory bribery offence".¹¹⁶ However, imperfect law is not necessarily at odds with international obligation. It may be in contrast to the spirit of international regulation but it is not materially non-compliant with it. This is the correct view – United Kingdom law and practice is not in breach of international law, it is, however, far from ideal.

As important as the substantive criminal law in meeting international obligations are concerted, well-resourced investigative and prosecutorial activities. Indeed, in the context of fraud generally Scanlan suggests that new legislation may not be needed, but rather what is required are adequate resources to apply existing law. He writes of the "legislative obsession" of recent governments, "This obsession has led to a plethora of statutory provisions which has been indifferently or unsuccessfully enforced on the part of the relevant enforcement authorities".¹¹⁷ Sufficient resources, increased political independence¹¹⁸ and renewed vigour on the part of the prosecutorial authorities is what is required to address the poor record of successful prosecutions for bribery and corruption with an international element. Indeed, the recent enhancement of the activity of the Serious Fraud Office appears to meet many criticisms of the United Kingdom. Generally it has been the weak and inconsistent enforcement of extant law that has led to the most stringent criticisms of the United Kingdom - not its substantive law. Of course the two are related, it being easier for the prosecutorial authorities to apply clear and simple provisions. Even so, a fully resourced, supported, dedicated and independent prosecutorial authority would go some considerable way towards the United Kingdom satisfying its critics. Indeed, the recent decision to seek to again prosecute BAE Systems for bribery may start the process of repairing the reputation of the United Kingdom and moving it to a position where not only is the letter of international law complied with but also its spirit.

¹¹⁵ Ormerod, D., Editorial 2008 Criminal Law Review 251.

¹¹⁶ Law Commission for England and Wales, (*Legislating the Criminal Code: Corruption*), March 1998, No. 248.

¹¹⁷ Scanlan, G., Offences concerning directors and officers of a company - fraud and corruption in the United Kingdom - the future, (2008) 29 *Company Lawyer* 264 at p 264

¹¹⁸ The central aspect here is the requirement for Attorney General consent prior to a prosecution for the statutory offences. A statement criticising the lack of independence is the press release following the issuance of the OECD's Report, which *inter alia* focuses on the independence of the SFO and states that "Recent cases have also highlighted systemic deficiencies that make clear the need to safeguard the independence of the Serious Fraud Office and eliminate unnecessary obstacles and prosecution", cited at <http://www.oecd.org/>.