

1 IN THE HIGH COURT OF JUSTICE No: CO/1567/2007
2 QUEEN'S BENCH DIVISION
3 ADMINISTRATIVE COURT
4 Royal Courts of Justice
5 Strand, London, WC2A 2LL
6
7 Friday, 15th February 2008

8 Before:
9 LORD JUSTICE MOSES
10 MR. JUSTICE SULLIVAN

11 - - - - -
12 THE QUEEN ON THE APPLICATION OF
13 (1) CORNER HOUSE RESEARCH
14 (2) CAMPAIGN AGAINST ARMS TRADE
15 Claimants

16 - and -
17 THE DIRECTOR OF THE SERIOUS FRAUD OFFICE
18 Defendant

19 -and-
20 BAE SYSTEMS PLC
21 Interested Party

22 - - - - -
23 MS DINAH ROSE QC, PROFESSOR PHILIPPE SANDS and MR. BEN JAFFEY
24 (instructed by Leigh Day & Co) appeared on behalf of the
25 Claimants.

MR. PHILIP SALES QC, MR. KEITH and MR. STEYN appeared on behalf of
the Defendant.

MS CLAIRE MONTGOMERY QC appeared on behalf of the Interested
Party.

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32 P R O C E E D I N G S
33 THIS TRANSCRIPT WAS PREPARED WITHOUT
34 ANY OF THE CASE DOCUMENTATION
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Transcript prepared without access to case documentation.

1 LORD JUSTICE MOSES: Yes, Mr. Sales.

2 MR. SALES: My Lords, I was on the domestic law point and
3 yesterday afternoon I was responding to a question from my
4 Lord, Sullivan J, which was to the effect, could Parliament be
5 taken to have intended that the Director could take into
6 account an unlawful threat, that was the question that my Lord
7 put to me.

8 My submission is that the width of the discretion
9 afforded a prosecutor most certainly does permit this and
10 moreover, that ----

11 LORD JUSTICE MOSES: Permit what, sorry?

12 MR. SALES: That the Director can take into account an unlawful
13 threat when assessing the public interest, that is the general
14 usual proposition. Moreover, there are special reasons why
15 Parliament could not be taken to have intended the Director to
16 make judgments about the lawfulness or otherwise of the
17 position adopted by Saudi Arabia. In other words, there are
18 special circumstances that apply in the context of this
19 particular situation.

20 LORD JUSTICE MOSES: I am not following that at all. Somebody
21 threatens the prosecution with consequences if they make a
22 decision. What do you mean by take into account?

23 MR. SALES: Take into account in assessing whether the public
24 interest requires that there should be a prosecution or not.

25 MR. JUSTICE SULLIVAN: If I could help to clarify, there were two

1 aspects to the unlawfulness -- it is my fault for not making
2 them clear -- it seems to me there is a domestic unlawfulness
3 in that if anyone else, as it were, comes into the Director's
4 office and says "you drop this investigation or else" and they
5 threaten something that may be perfectly lawful for them to do
6 but would be thoroughly obstructive and so forth, it seems to
7 me that the Director would immediately grab them by the collar
8 and say, "right, perverting the course of justice. There is
9 no question of me listening to that sort of stuff."

10 There is the further aspect of unlawfulness, that is to
11 say whether in terms of international law that which was being
12 threatened, i.e. non-cooperation on terrorist issues, was or
13 was not in accordance with the provision cited in the
14 claimants' skeleton. So there are two aspects of the
15 unlawfulness both domestic and international law. Whilst, it
16 seems to me, there might be problem about the latter, query
17 are there any problems about the former?

18 MR. SALES: My Lord, in my respectful submission, yes, there are.
19 Before I make that point I would make the submission that in
20 the context of this case there is in substance no difference
21 between the two sorts of situation that my Lord has put to me.
22 I have already made the submission that what the Director had
23 to deal with was a stance adopted by Saudi Arabia as a state,
24 not specific threat and by anyone walking into his room ----

25 LORD JUSTICE MOSES: I think you have to be very careful about

1 saying that. It was not quite the situation if you look in
2 detail at it, was it? It was if you go on, "This is the
3 threat that will be made by the state" which is slightly
4 different.

5 MR. SALES: I respectfully agree it is slightly different, none
6 the less what the position was was that the Saudi Arabian
7 Government was adopting a stance as to the position that it
8 would adopt, that was a stance that it itself was adopting as
9 a matter of policy in relation to its relations with the
10 United Kingdom.

11 I go back to the point that I was making in response to
12 my Lord, Sullivan J, that in the circumstances of this case we
13 are dealing in substance with a matter which falls into the
14 second of the examples that my Lord puts to me. My Lord, to
15 be completely clear about it, even if one was dealing with a
16 case within the first example it would not, in my submission,
17 be completely out the question for the Director to take into
18 account a threat that had been made in relation to the public
19 interest test.

20 What would be relevant for him to assess is whether the
21 state and the mechanisms available to the state would be
22 sufficient to enable that threat properly to be contained in
23 the ordinary way, such that he should put the threatening
24 matters to one side when making his assessment.

25 Even just taking the case at that level, I emphasize not

1 the facts of this case but other cases, we have the example of
2 the Leyla Khaled situation which was an example of clearly
3 unlawful threats being made where the Attorney General of the
4 day did take those into account in making the public interest
5 assessment.

6 LORD JUSTICE MOSES: He had no choice.

7 MR. SALES: My Lord says that but my Lord was putting to me
8 yesterday it was, in effect, a case of duress "he had no
9 choice". With respect, in my submission, the Attorney General
10 in that case did have a choice to make. He was not himself
11 directly being subjected to threats which meant that for fear
12 of his own life he had to take action of a particular kind.
13 He was not deprived of the ability to choose; it was simply a
14 difficult choice with which he was confronted, in relation to
15 which he was entitled to take into account the unlawful
16 threats which had been made.

17 My Lords, in my submission a fortiori in the present
18 case Parliament could not have intended the Director to ignore
19 the position adopted by Saudi Arabia, nor could it have
20 intended him to discount it as unlawful.

21 LORD JUSTICE MOSES: I think again this is all, I mean nobody is
22 saying he should not listen as far as I really understand the
23 claimants' case. The point is that the one thing, as you have
24 stressed over and over again both interlocutory and here, is
25 the importance of an independent judgment by a prosecutor.

Transcript prepared without access to case documentation.

1 Once you give in to threats you cease to make an independent
2 judgment.

3 MR. SALES: In my respectful submission that is not so.

4 LORD JUSTICE MOSES: You are allowing somebody else to influence
5 for improper reasons your judgment. It is not black and
6 white, it is not completely independent but you are yielding,
7 you are ceding the independence of your decision to somebody
8 else saying you can for improper purposes influence me.

9 MR. SALES: My Lord, in my respectful submission, that is not a
10 correct analysis of the position which applies. What a
11 prosecutor in any of these situations has to do is to make an
12 overall judgment of the public interest as to what is the best
13 thing to do, all things considered, in the situation with
14 which he is confronted. That is no less an independent
15 judgment than the sorts of judgments that he makes in other
16 respects. My Lord, just, if I may, to ----

17 LORD JUSTICE MOSES: Can you at some stage explain is there any
18 mechanism within the law by which you can stand up to the
19 threat from a powerful antagonist? Is there any legal system
20 within our law which can be deployed?

21 MR. SALES: In relation to Saudi Arabia?

22 LORD JUSTICE MOSES: In relation to anybody making a threat.

23 MR. SALES: Well, my Lord, I go back to the point that I have been
24 making ----

25 LORD JUSTICE MOSES: Well, if it is a foreigner the answer is no,

1 there is nothing you can do?

2 MR. SALES: It may depend upon what resources the state has in
3 relation to the threat that has been made, even in relation to
4 the Leyla Khaled case, although that was clearly private,
5 criminal unlawfulness which was being threatened the state did
6 not have the resources available to meet that threat in the
7 ordinary way and it was legitimate for the risk then to be
8 taken into account.

9 In my respectful submission, it simply goes too far to
10 express the position in the blanket terms that my Lord was
11 just putting to me, that that is to succumb to a threat and
12 not to exercise an independent judgment; my submission is that
13 even in the Leyla Khaled case the Attorney General was
14 exercising an independent judgment in very difficult
15 circumstances.

16 LORD JUSTICE MOSES: Again, I need not, when it comes to it, I
17 would just like to feel the confidence, if you are right, that
18 there is something within the law that can be deployed, it may
19 fail, it may not be effective, but something that can be
20 deployed to resist the sort of thing that happened in this
21 case. It may be that the answer is, no, there is not, which
22 is interesting. If one takes at face value your submissions
23 of yesterday and today, effectively you are saying, "nothing
24 can be done. It is out of our control. It is not like a
25 Phoenix case within our control. It is a foreign powerful

1 state and there is nothing we could do".

2 MR. SALES: Correct.

3 LORD JUSTICE MOSES: That is the position, is it?

4 MR. SALES: We, the United Kingdom cannot compel the Saudi Arabian
5 Government to adopt a different stance and so that most
6 certainly is the position.

7 LORD JUSTICE MOSES: So as long as it is publicly known, the
8 position is that the United Kingdom is powerless as a matter
9 of deploying legal systems to resist the threats from foreign
10 states; that is the legal position.

11 MR. JUSTICE SULLIVAN: Provided they are a big powerful foreign
12 states.

13 LORD JUSTICE MOSES: Sorry, yes.

14 MR. JUSTICE SULLIVAN: If they are little foreign states,
15 presumably we could resist; is that right?

16 MR. SALES: Well, my Lord, the position is that the prosecutor
17 and, indeed, United Kingdom authorities that have to assess
18 the risk have to make judgments about what can be done. It
19 may be a matter for regret that the United Kingdom does not
20 have the power to ensure that other states, big, small,
21 medium-sized do not do precisely what we want them to do but
22 it is a fact of life. An independent prosecutor is not in a
23 position to magic these considerations away. The world does
24 not work in that way any more than the Attorney General ----

25 LORD JUSTICE MOSES: I just want to note all this down because we

1 might have heard it in other regimes historically. Sorry,
2 what was that about the world? The world does not work that
3 way, yes. Thank you.

4 MR. SALES: My Lord, moving on to address then the specific
5 circumstances of this case, where, as I have said, even at the
6 level of the Leyla Khaled-type case, it is legitimate for a
7 prosecutor to take into account that threatened action that
8 has been put forward. There are other constitutional
9 principles, apart from the rule of law, against the background
10 of which Parliament must be taken to have legislated when
11 passing Section 1 of the Criminal Justice Act and two are
12 relevant here.

13 First of all, the domestic courts, still less state
14 officials like the Director, are not in a position to give
15 authoritative rulings on the meaning and effect of
16 international instruments. My Lords, I am going to take a
17 moment to show you the authorities because this is going to be
18 relevant to other submissions ----

19 LORD JUSTICE MOSES: Article 5.

20 MR. SALES: ---- that I am going to make later on as well. If my
21 Lords could bear in mind that it is going to be relevant to
22 that as well I will deal with them now. The first is
23 J.H. Rayner, which is volume D, tab 59. If my Lords would go
24 to page 499 in the judgment of Lord Oliver under the heading
25 the Principle of Non-Justiciability just below letter E:

1 "There is, indeed there can be, little contest between
2 the parties as to the general principles upon which that which
3 had been referred to as the doctrine of non-justiciability
4 rests although they approach it in rather different ways. The
5 contest lies not so much as to the principle as to the area of
6 its operation. It is axiomatic that the municipal courts have
7 not and cannot have the competence to adjudicate upon or to
8 enforce the rights arising out of transactions entered into by
9 independent sovereign states between themselves on the plane
10 of international law.

11 That was firmly established by this House in *Cook v.*
12 *Sprigg* and was succinctly and convincingly expressed in the
13 opinion of the Privy Council in *Secretary of State in Council*
14 *of India v. Kamachee Boye Sahaba*. The transactions of
15 independent states between each other are governed by other
16 laws than those which municipal courts administer, such courts
17 have neither the means of deciding what is right nor the power
18 of enforcing any decision which they may make.

19 On the domestic plane the power of the Crown to conclude
20 treaties with or sovereign states is an exercise of the Royal
21 prerogative, the validity of which" ----

22 LORD JUSTICE MOSES: Where do you want us to read to?

23 MR. SALES: My Lord, if you would read through to 500 at B that
24 would be helpful.

25 LORD JUSTICE MOSES: What about F, I was going to go down to F?

1 MR. SALES: Yes, very good my Lord.

2 LORD JUSTICE MOSES: You will sit down whenever you like, I did
3 not mean to stop, I mean to rest while we are reading.

4 (Pause)

5 MR. SALES: Three points from that: (1) 499 at F to G is directly
6 relevant support for the response that I have just given to my
7 Lord, Sullivan J, on his questions; (2) 500 at B to D will be
8 relevant in relation to the submissions on the Launder point
9 when I come back to it and 500 at D to F is relevant as the
10 point of distinction between the present situation and a case
11 such as Adnan where international obligations are introduced
12 by incorporation into our domestic law.

13 My Lords, in the next authority which I will go to we
14 will see Lord Hoffmann saying that the notion of incorporation
15 is in fact a misnomer analytically, such obligations then
16 become part of our law. My Lords, perhaps one should go to
17 Lyons next at volume D at tab 50 in the same bundle. The
18 background to this case was a series of defendants in relation
19 to the Guinness prosecutions, of whom Sir Jack Lyons was one,
20 sought to challenge the validity of their conviction under
21 domestic law against the background of having been to
22 Strasbourg and obtained a reading from Strasbourg that there
23 had been a breach of Article 6 in relation to their criminal
24 trials arising out of the fact that the prosecution had relied
25 upon material compelled from them by inspectors.

1 My Lord, one goes to the speech Lord Hoffmann first at
2 paragraph 27, page 992, picking it up at paragraph 26:

3 "What then is the effect of the ECHR rulings upon the
4 question of whether the appellant's convictions are safe? The
5 Convention is an International Treaty made between Member
6 States of the Council of Europe by which the high contracting
7 parties undertake to" ----

8 LORD JUSTICE MOSES: Again, where do you want us to read to?

9 MR. SALES: Down to the end of 27, my Lord.

10 LORD JUSTICE MOSES: Thank you. (Pause) Yes.

11 MR. SALES: My Lords, particularly emphasizing the sentence in
12 paragraph 27:

13 "It is firmly established that international treaties do
14 not form part of English law and that English courts have no
15 jurisdiction to interpret or apply them."

16 If my Lords would then go forward to paragraph 40, if I
17 could invite my Lord to read that to themselves.

18 LORD JUSTICE MOSES: (Pause) Yes, it is rather useful, that is
19 reference to the fact that domestic constitution is based upon
20 the separation of powers. One must all the time remember that
21 the reason why Parliament conferred a power on the Director of
22 the Serious Fraud Office and not on Prime Minister to decide
23 whether to prosecute for bribery is because of the separation
24 of powers.

25 MR. SALES: Yes, my Lord, I entirely ----

1 LORD JUSTICE MOSES: But it is rather curious that although the
2 government of the United Kingdom is not allowed to put
3 pressure on the independence of the prosecution, there is
4 nothing the law can do when it is the government of
5 Saudi Arabia undermining separation of powers.

6 MR. SALES: My Lord, the separation of powers a doctrine of
7 domestic law; Saudi Arabia is not subject to our domestic law.

8 My Lords, at paragraphs 69 Lord Hobhouse expresses his
9 entire agreement with the speech of Lord Hoffmann. Then there
10 is Lord Millett's speech as paragraphs 104 ----

11 LORD JUSTICE MOSES: Sorry, I missed the Hobhouse reference.

12 MR. SALES: Hobhouse, entire agreement, paragraph 79. Then, my
13 Lords, if you go forward to pages 10 and 11, paragraphs 104 to
14 109 and the speech of Lord Millett.

15 LORD JUSTICE MOSES: You want us to read that?

16 MR. SALES: My Lord, if you could.

17 LORD JUSTICE MOSES: Of course. (Pause) Yes.

18 MR. SALES: My Lord, just saving the reading, it is really 104,
19 the second sentence, and then 109 just picking up his
20 agreement with Lord Bingham and Lord Hoffmann.

21 LORD JUSTICE MOSES: Yes.

22 MR. SALES: In my submission on the first of the constitutional
23 principles, which is, in my submission, relevant as background
24 to the construction of Section 1 of the Criminal Justice Act,
25 we say it was not for the Director to form a judgment about

1 the lawfulness or otherwise of the behaviour of Saudi Arabia.

2 My Lords, secondly, over and above that legal principle,
3 there is the established principle of the non-justiciability
4 of foreign acts of state which one takes from the decision of
5 the House of Lords in *Buttes Gas*. My Lord, that is in volume
6 D, tab 71.

7 LORD JUSTICE MOSES: Because we have not got to Article 5, how are
8 these relevant to the first issue you are dealing with?

9 MR. SALES: Yes, domestic law.

10 LORD JUSTICE MOSES: Yes.

11 MR. SALES: The point that I have been making is that when
12 Parliament enacted Section 1 of the Criminal Justice Act, and
13 this is still my response to my Lord's, Sullivan J's, question
14 to me, it most definitely would not have thought that it was
15 necessary or appropriate for the Director to form a view as to
16 the lawfulness of threats made by another state, such as
17 Saudi Arabia, and that the general wide discretion available
18 to a prosecutor would simply apply in that situation.

19 LORD JUSTICE MOSES: I follow. When you say the threats of a
20 foreign state, what analytically is the position if an
21 individual who is not the foreign state makes a threat within
22 the jurisdiction of the criminal law of this country? Is he
23 guilty but he has immunity if he has diplomatic immunity or is
24 he just not guilty? Which way round is it?

25 MR. SALES: My Lord, if a threat was made by someone with

1 diplomatic immunity, is that what my Lord is putting to me?

2 LORD JUSTICE MOSES: Yes.

3 MR. SALES: Then he would have diplomatic immunity.

4 LORD JUSTICE MOSES: Is he then guilty but has immunity or he is
5 just not guilty of an offence? Which way round is it?

6 MR. SALES: Well, since people are innocent until proven guilty,
7 presumably he is innocent because he cannot be proved guilty.

8 LORD JUSTICE MOSES: How do you determine whether someone has
9 diplomatic immunity?

10 MR. SALES: Well, there is a whole body of law in relation to that
11 but, my Lord, I emphasize again that what was being dealt with
12 on this occasion was a settled policy of Saudi Arabia as a
13 state. It is not individuals coming forwards and making
14 threats, it is Saudi Arabia adopting a particular stance.

15 LORD JUSTICE MOSES: I am afraid I do not know how you can say
16 that. That is how it developed. It is not how it was
17 triggered in September, was it?

18 MR. SALES: My Lord, what the United Kingdom authorities had to do
19 was to cope with a situation where ----

20 LORD JUSTICE MOSES: Consequential upon it, yes.

21 MR. SALES: ---- it was the settled stance of Saudi Arabia taken
22 as a matter of governmental policy that they would react in
23 this particular way. It was not in the gift of particular
24 individuals to make threats of the kind which were being made
25 about withdrawal of state co-operation on a broad basis. It

1 had to be a matter that the Saudi Arabian Government
2 specifically adopted for itself, otherwise there would not
3 have been an issue as to whether there was a threat.

4 LORD JUSTICE MOSES: What happens, I am speaking purely
5 hypothetically, if the threat was unless you give in someone
6 else will, what is only in draft will become reality?

7 MR. SALES: If that were the position an assessment would have to
8 be made as to whether it would become the reality and that
9 would be a settled stance.

10 LORD JUSTICE MOSES: The position, yes, I see.

11 MR. SALES: My Lord, my submission is that it was the settled
12 stance of the Saudi Arabian Government in relation to
13 withdrawal of co-operation if this matter proceeded.

14 My Lords, the second constitutional principle which I
15 was referring to and just to remind my Lords going back to the
16 question that my Lord, Moses LJ, put to me, what is the
17 relevance of this? The relevance of this on the domestic law
18 point is that one has, on the face of it, a wide statutory
19 discretion. The question is whether that is to be cut down,
20 that is the burden, as I understood it, of the question that
21 my Lord, Sullivan J, put to me, a possible basis on which it
22 should be cut down.

23 I have already given my response in relation to private
24 individuals, that is the Leyla Khaled case, even in that
25 situation it is not cut down so you do not take account of it,

1 but I am now on the wider proposition which actually applied
2 in this case. There are additional reasons over and above the
3 reasons that apply in the private case why Parliament would
4 not have intended the discretion to be cut down. This is the
5 second of the constitutional reasons.

6 Buttes Gas v. Hammer, my Lords, may recall if one just
7 picks it up from the first paragraph of the headnote. Two oil
8 exploration corporations granted oil concessions in the
9 protocol, one was granted Corporation O, the other Corporation
10 B by the ruler of Sharjah. Dispute arose over a rich oil
11 area. Litigation followed which included an action begun in
12 the English court by the plaintiffs against the defendants and
13 their chairman for alleged slander uttered in London about the
14 disputed area and consequential events.

15 I think that the chairman came out of his hotel and made
16 some public statement that unlawful action was being taken by
17 the other company to deprive him of his oil concession. The
18 pleaded defences were justification and fair comment. The
19 particulars of those defences included as facts a decree by
20 the ruler of Sharjah said to have been issued in March 1970
21 but on its face dated September 1969 which extended the limits
22 of his territorial waters. There was a subsequent claim to
23 sovereignty of the disputed area by the Government of Iran,
24 instructions to the ruler of Umm Al Quwain by the
25 United Kingdom political agent and an intervention by

1 Her Majesty's naval, air and military forces, then operating
2 the relevant areas under treaty arrangements, further
3 intervention by the Government of Iran.

4 The pleading of justification was going to go into the
5 matters of which state under international law was the proper
6 owner of this oil field?

7 My Lords, if you go forward to page 931 and the speech
8 Lord Wilberforce, picking it up just below letter A:

9 "Second version of Act of State consists of those cases
10 which are concerned with the applicability" sorry I should
11 have picked it up at 930 just below letter F.

12 LORD JUSTICE MOSES: Do you want us to read from there down to
13 where?

14 MR. SALES: Down to, my Lord, first of all 932 at A.

15 LORD JUSTICE MOSES: Yes. (Pause) Yes.

16 MR. SALES: Then, my Lords, again picking it up on 932 at E,
17 reference to Duke of Brunswick and King of Hanover, Lord
18 Wilberforce is saying "There are two elements in the case not
19 always clearly separated" (reads to the words) "....
20 effected by virtue of the sovereign authority abroad."

21 LORD JUSTICE MOSES: Yes.

22 MR. SALES: Then if you turn to page 933 at C:

23 "These qualifications are accepted. The case must never
24 the less support, no doubt by reference to the issue in
25 dispute, a principle of non-justiciability by the English

1 Courts of a certain class of sovereign acts."

2 Then if one goes forward to 937 just to get the
3 determination of the case, 937 at A: "Proceedings if they are
4 to go on inevitably would involve the termination of the
5 following issues" and there he sets out a range of issues
6 concerning ----

7 LORD JUSTICE MOSES: All of which really would require judgment on
8 acts of a foreign state.

9 MR. SALES: Yes,. Then at 938 at D: "For the reasons I have
10 given this counterclaim cannot succeed without bringing to
11 trial non-justiciable issues, the court cannot entertain it".

12 My Lords, in my submission generally the courts could
13 not properly rule upon the lawfulness of the stance adopted by
14 Saudi Arabia and nor could Parliament have expected the
15 Director to make judgments in that regard. The stance adopted
16 by Saudi Arabia ----

17 LORD JUSTICE MOSES: Sorry, you spoke rather fast.

18 MR. SALES: I am sorry, my Lord. The court, emphasizing the
19 court, could not properly rule upon the lawfulness of the
20 stance adopted by Saudi Arabia and nor could Parliament have
21 expected the Director to do so, i.e. to form judgments and
22 base his decision upon consideration ----

23 LORD JUSTICE MOSES: So the principle that a court cannot sit in
24 judgment upon the act of a sovereign, effected by virtue of
25 his sovereignty abroad, covers an act which affects the

1 domestic criminal law of this country.

2 MR. SALES: Yes, my Lord, if it is based upon action taken by a
3 sovereign state in exercise of its sovereignty, that is the
4 position, so ----

5 LORD JUSTICE MOSES: So, I am so sorry.

6 MR. SALES: I am so sorry, my Lord, I was interrupting you.

7 LORD JUSTICE MOSES: No, no, go on.

8 MR. SALES: What is so important about Buttes Gas is that even if
9 one has matters which are relevant to the legal process within
10 the United Kingdom, plainly on the facts of the case the
11 answers to all these questions would have been relevant to the
12 defence of justification in the libel action, even though
13 there are matters which are relevant to the legal process,
14 none the less the principle of non-justiciability applies.

15 LORD JUSTICE MOSES: I mean it is not just a question of relevant,
16 what you are saying is the law is powerless to protect our own
17 sovereignty. The law cannot be deployed as a weapon to
18 protect the sovereignty of this country.

19 MR. SALES: My Lord, it goes back to the answers I have already
20 given, I think, more than once that Saudi Arabian is not
21 subject to our domestic law and so ----

22 LORD JUSTICE MOSES: I think your answer to my question is, yes,
23 it is powerless. There is nothing any lawyer or court can do
24 to protect one of the essential features of sovereignty, which
25 is control over one's own domestic criminal law system.

1 MR. SALES: There is nothing that a court or lawyer can do to
2 achieve that in the circumstances of this case.

3 LORD JUSTICE MOSES: Thank you.

4 MR. SALES: My Lords, in my submission the stance adopted by
5 Saudi Arabia was simply a factor affecting the public interest
6 in the assessment of that matter which the Director had to
7 make in the exercise of his wide discretion.

8 My Lords, as to the width of the discretion to be
9 exercised may I turn to paragraphs 42 and following of our
10 skeleton argument. Again, just to conclude on the relevant
11 content of the principle of the rule of law in this context, I
12 have made my submissions by reference to Lord Bingham's
13 lecture.

14 My Lords, at paragraph 42, we make the point by
15 reference to the judgment of Lord Hoffmann in the Alconbury
16 case, my Lords, that is volume B, tab 29, we have set it out
17 here so I do not invite you to turn it up. The rule of law
18 ----

19 LORD JUSTICE MOSES: Generally all of these, I mean, we are very
20 well familiar with, used to go along and (unclear) prosecuting
21 for manslaughter.

22 MR. SALES: My Lords, when one comes back to the constitutional
23 principle against which one construed Section 1 of the
24 Criminal Justice Act we say the relevant content of the rule
25 of law principle is that given in this part of our

1 submissions, both by Lord Bingham and Lord Hoffmann and
2 summarized by us at paragraph 43.

3 LORD JUSTICE MOSES: The only content one can say, is well, there
4 are extreme circumstances in which the court can intervene but
5 they are very rare.

6 MR. SALES: My Lord, they are very rare, I am going to come on to
7 the specific authorities on the prosecutorial discretion. I
8 am still, if I may, just on the background against which one
9 construed Section 1. Then, on the other side of the balance,
10 weighing strongly in favour of the maintenance of the wide
11 discretion are the J.H. Rayner and Lyons principle which I
12 have drawn attention to and the Buttes Gas which I have drawn
13 attention to.

14 My Lords, in our submission, any argument based upon the
15 principle of legality of the equivalent of trying to cut down
16 what on the face of it is the wide discretion should be
17 rejected by the court. My Lord, at paragraph 45 we accept of
18 course the decision not to prosecute may be susceptible to
19 judicial review but the case law all establishes that the
20 discretion for the prosecutor is a wide one, it is not to be
21 cut down.

22 My Lord, because this is so important I will not go to
23 all these cases but may I just emphasize a few of them. First
24 of all Mannie(?) which was the leading authority in this
25 jurisdiction, that is at volume B, tab 32. It is just for the

1 statement of principle at paragraph 23, page 343 of the
2 report:

3 "Authority makes clear that a decision by the Director
4 not to prosecute is susceptible to judicial review but as the
5 decided cases also make clear the power of review is one to be
6 sparingly the exercised. The reasons for this are clear. A
7 primary decision to prosecute or not to prosecute is entrusted
8 by Parliament to the Director as head of an independent
9 professional prosecuting service answerable to the Attorney
10 General in his role as guardian of the public interest and to
11 no one else. It makes no difference (unclear) the CPS" ----

12 LORD JUSTICE MOSES: We will read that paragraph.

13 MR. SALES: I am grateful.

14 LORD JUSTICE MOSES: I mean, there may be just reasons of
15 deployment of resources not to prosecute, nothing to do with
16 criminal law at all, see the Mickey Mouse case.

17 MR. SALES: My Lord, precisely so. The point that I am making
18 here is that the ambit of the discretion is very wide to take
19 account of all sorts of factors such as the one that my Lord
20 has just mentioned, but most certainly not excluding the
21 factor that was taken into account in ----

22 LORD JUSTICE MOSES: But this is a very different type of factor
23 from all of these and all the cases, because this is a factor
24 and I have taken on board all your points about it being
25 outside the control of a foreign state and there is no power

1 in the court let alone the Director to pass judgments on the
2 acts of another sovereign power, taking all that it is a
3 wholly different context because what is being said is "do
4 this, make a decision one way or else". All I am putting to
5 you is that however wide the discretion is the one thing that
6 can be said, this is a wholly different situation from the
7 ones that we have normally been considering like all the
8 different factors like it is not worth it or that it is a
9 lottery, see ex parte Napier(?) another case about prosecution
10 that you choose to prosecute one person and not another purely
11 at a flick of a coin because it acts as a powerful deterrent.

12 MR. SALES: Yes. My Lord, I am making my submission in response
13 to what my Lord is putting to me, that there is no proper
14 basis for distinguishing the factor that applies in this case
15 from all those other factors. One goes back again, I am
16 afraid, to the matter of construction of Section 1 of the
17 Criminal Justice Act, as to which my basic points are, on the
18 face of it it is a wide discretion, all the authorities
19 confirm it is a wide discretion, there is no proper basis in
20 legal principle for cutting down that discretion on the basis
21 that my Lord has been putting to me.

22 LORD JUSTICE MOSES: Yes.

23 MR. SALES: My Lord, I do not take up time with De Silva which my
24 learned friend went to, it in no way cuts down on the width of
25 the discretion and the Mannie principle.

1 I do go to Bermingham if I may, which is at volume A,
2 tab 18, paragraphs 63 and 64 in the judgment of Laws LJ if I
3 could perhaps invite the court to read those.

4 LORD JUSTICE MOSES: Yes. (Pause) It is agreed this is a wholly
5 exceptional case, well, I hope it is ----

6 MR. SALES: Wholly exceptional case on its ----

7 LORD JUSTICE MOSES: Although perhaps it has become less
8 exceptional now everybody knows there is nothing that the law
9 of the United Kingdom can do to prevent ----

10 MR. SALES: My Lord, I most certainly do not accept that it is a
11 wholly exceptional case on its legal merits. In my submission
12 there ----

13 LORD JUSTICE MOSES: What, this sort of thing goes on quite often,
14 does it, threats from foreign states?

15 MR. SALES: My Lord, no. With respect, my Lord, my submission is
16 the proper construction of Section 1 of the Criminal Justice
17 Act. I do not accept that this is a wholly exceptional case
18 on the legal merits so far as that is concerned. Indeed, the
19 whole burden of my submission is to say that it is not
20 exceptional in that respect because there is not a proper
21 basis for distinguishing factors of the kind which arose in
22 this case from other general factors of the widest variety
23 which can properly be brought into account when a prosecutor
24 is exercising his discretion or an investigator is exercising
25 his discretion, the width of which is vouchsafed, to use words

1 much beloved by Laws LJ, by this particular decision.

2 My Lords, the next ----

3 LORD JUSTICE MOSES: Yes, it lacks muscularity.

4 MR. SALES: My Lords, the next authority that I need to go to is
5 Mohit(?)

6 LORD JUSTICE MOSES: May we pause, I mean the interesting thing
7 about Bermingham from your point of view is it is talking
8 about investigation where, as it were, the discretion as to
9 whether to investigate may be deployed or not, a decision to
10 investigate or not to investigate for an even why the range of
11 reasons says Laws LJ than the decision to prosecute or not is
12 what he seems to be saying. I am wondering whether he is
13 right about that because when one looks at, I do not mean the
14 Farquharson report but when one looks at the code of
15 prosecutors what is generally envisaged is that the decision
16 whether to prosecute or not comes after you have investigated
17 and you then decide, "now I have all the facts I will now
18 decide to prosecute or not to prosecute" and that is the
19 normal position.

20 Of course, there will be cases where you decide not even
21 to investigate for the sorts of reasons, (unclear) so trivial,
22 doomed to failure, not worth the resources, but in general
23 surely what is envisaged amongst the (unclear) prosecutor is
24 to get all the evidence in and then form a view because, as
25 one can see in this case, weighing up the evidence and public

1 interest requirements, I mean, one is relevant to the other.
2 In other words, if the consequences of a failure are more
3 disastrous how much more important it is to make sure the
4 evidence is watertight.

5 MR. SALES: Of course, in this case it was the steps in the course
6 of investigation which were giving rise to the particular
7 difficulties of the public interest as assessed by the
8 Director. So, my Lord, I do stand upon the Bermingham case in
9 so far as I need it to say that, if anything, the width of the
10 discretion is wider at that stage than in relation to
11 prosecution.

12 So that I am absolutely clear about it, my submission is
13 that prosecutorial discretion is that wide, that is why I have
14 made reference to the Leyla Khaled case and why I am now going
15 to the Mohit judgment which is part of the leading cases now
16 recently on the ambit the prosecutorial discretion. So Mohit
17 is volume C, tab 34. For factual context if my Lords will be
18 kind enough to read the first paragraph in the headnote.

19 Then my Lords, if you would be good enough to go forward
20 to paragraph 17, page 3352 where one sees a full citation from
21 a decision of the Supreme Court of Fiji in Matalulu given by
22 Von Doussa, Keith and French. The reason that I am going to
23 this is because the Privy Council at page 3354 at H states
24 that the board respectfully endorses the cited passage from
25 the Supreme Court of Fiji judgment.

1 LORD JUSTICE MOSES: Yes.

2 MR. SALES: If one goes back ----

3 LORD JUSTICE MOSES: We will read that.

4 MR. SALES: I would be grateful.

5 LORD JUSTICE MOSES: (Pause) Yes.

6 MR. SALES: What I particularly emphasize in that citation is at D
7 that:

8 "The principles of judicial review would have proper
9 regard to the great width of the DPP's discretion and the
10 polycentric character of official decision-making of such
11 matters, including policy and public interest considerations,
12 which are not susceptible of judicial review because it is
13 within neither the constitutional function nor the practical
14 competence of the courts to assess their merits."

15 Then at the end of the citation: "There may be other
16 circumstances not precisely covered but contentions that the
17 power to be exercised for improper purposes not amounting to
18 bad faith by reference to irrelevant considerations or without
19 regard to relevant considerations or otherwise unreasonably
20 are unlikely to be vindicated because of the width of the
21 considerations to which the DPP may properly have regard in
22 instituting or discontinuing proceedings."

23 LORD JUSTICE MOSES: Yes. What was he alleged to have done? He
24 has entered a (unclear) in relation to harbouring a criminal.

25 MR. SALES: Yes, when you say what he is alleged to have done.

1 LORD JUSTICE MOSES: What was alleged to be unlawful about it?

2 MR. SALES: It was alleged, I think, to have been taken on
3 political grounds.

4 LORD JUSTICE MOSES: The widow was alleging against ----

5 MR. SALES: It was a private prosecution against a senior
6 politician.

7 LORD JUSTICE MOSES: Saying he had harboured a murderer and the
8 DPP constantly saying, "well, I am not going to prosecute".
9 Yes.

10 MR. SALES: My Lords, in the judgment of the Privy Council itself,
11 paragraph 18, if I can invite you to cast your eyes over that.

12 LORD JUSTICE MOSES: Yes. (Pause) Yes.

13 MR. SALES: There are two points in particular from that. First,
14 that the relevant content of the rule of law in relation to
15 the DPP in that case is given by what is said in the first
16 part of that paragraph, the usual principles of judicial
17 review which is precisely our case in these proceedings.
18 Secondly, the committee itself emphasizing in the middle of
19 the paragraph at E the wide range of factors relating to
20 available evidence, the public interest and perhaps other
21 matters which he may properly take into account, these factors
22 necessarily mean the threshold of successful challenge is a
23 high one, courts must be very sparing.

24 It is true that this was a decision on the constitution
25 of Mauritius.

Transcript prepared without access to case documentation.

1 LORD JUSTICE MOSES: Well, it is a useful assertion to make ----

2 MR. SALES: My Lord, the point I was going to make is, if one
3 looks back through the judgment, there is a general review of
4 decisions from a range of other cases. That point is fully
5 borne out in the next case in the next tab Chalmers v. Brown
6 Antoine. My Lord, if one goes forward to page 786 one sees
7 there the heading at H Governing Principles. This is the
8 Privy Council this time in the context of Trinidad and Tobago
9 laying out governing principles in relation to the exercise of
10 a prosecutorial discretion. At 1:

11 "The rule of law requires that subject to any immunity
12 or exemption provided by the criminal law of the land should
13 apply to all alike "----

14 LORD JUSTICE MOSES: Tell us what you would like us to read. Is
15 it all the sideline passages?

16 MR. SALES: Yes, my Lord, it is.

17 LORD JUSTICE MOSES: Right. (Pause) Meade(?) was the case I was
18 thinking of, one only remembers the cases one was in!

19 MR. SALES: I was going to say that my Lord's your memory is
20 better than mine.

21 LORD JUSTICE MOSES: (Pause) I am slightly, at 789 at B I have the
22 verb.

23 MR. SALES: Yes.

24 LORD JUSTICE MOSES: They include, ah, it is because there is a
25 capital letter, it should be a small "t" for "the", should it

1 not?

2 MR. SALES: I think it should, my Lord, yes.

3 LORD JUSTICE MOSES: It is saying that there is a blurring.

4 MR. SALES: Yes, so the two points I was going to emphasize upon
5 in this passage are first of all that the Privy Council is
6 treating all the decisions on prosecutorial discretion from
7 whichever jurisdiction as being relevant. In effect there is
8 no distinction to be drawn depending upon which specific
9 jurisdiction the court is looking at. They refer here to
10 Mohit, they refer to English authority and, in my submission,
11 quite clearly they take these principles to be a general
12 application and they would be applied in English law.

13 Secondly, is to emphasize at 788 at B the language of
14 the case shows a uniform approach ----

15 LORD JUSTICE MOSES: Ms Rose likes the first bit of that
16 paragraph, the surrendering of independent prosecutorial
17 discretion to political instruction or, the board would add,
18 persuasion or pressure.

19 MR. SALES: Yes, of course.

20 LORD JUSTICE MOSES: The distinction in this case is that the
21 pressure was exercised by a foreign state over whom the courts
22 and the prosecutor had no control, contrast the position if it
23 had been someone within the jurisdiction.

24 MR. SALES: My Lord, that is essentially right. It goes back to
25 the point that I have already made that the doctrine of

1 separation of powers is a doctrine internal to our legal
2 system and, therefore, binding upon the courts, politicians,
3 independent prosecutors. It does not bind foreign states in
4 relation to what they do.

5 My Lord, I also wanted to emphasize in this passage the
6 emphasis upon the width of the range of circumstances which
7 the prosecutor is entitled to take into account and it is in
8 particular, my Lords, at 788 E to F, the courts give a number
9 of reasons, starting at 1 and then we are back to Matalulu, so
10 specifically adopted and applied again.

11 My Lord, I think with an eye on the clock.

12 LORD JUSTICE MOSES: We have lots of time.

13 MR. SALES: It might be worth going then to Everson(?) as well, so
14 I am now at paragraph 46 in my skeleton argument, the Irish
15 Supreme Court case of Everson v. DPP, volume D, tab 69.

16 LORD JUSTICE MOSES: Is that another one on the width of
17 discretion?

18 MR. SALES: Yes.

19 LORD JUSTICE MOSES: Shall we read that and then we will ----

20 MR. SALES: Very good, my Lord.

21 LORD JUSTICE MOSES: Or is it very particularly well expressed?

22 MR. SALES: I would not say that it is going to add very much to
23 what has gone before other than to show that ----

24 LORD JUSTICE MOSES: I think your point is very clear now.

25 MR. SALES: Yes, just for my Lord's notes that is at volume D,

1 tab 69.

2 LORD JUSTICE MOSES: We will read it.

3 MR. SALES: We say at paragraph 47 that these authorities are all
4 incompatible with the proposed limitation upon the Director's
5 investigatorial and prosecutorial discretion for which the
6 claimants contend.

7 My Lord, I think that I have already sufficiently made
8 my point on blackmail and the critical distinction between
9 threats to the public interest as distinct from threats to an
10 individual prosecutor in his personal capacity. If one goes
11 forward to paragraph 52 ----

12 LORD JUSTICE MOSES: I mean, if he was threatened in his personal
13 capacity it would be entirely lawful if he had no choice for
14 him to say, "well, I am not going to do anything if it means
15 some robber is going to shoot my child".

16 MR. SALES: My Lord, particular issues will arise. Of course, his
17 child has a right to life the same as anyone else's child.
18 There might be issues in relation as to who should take the
19 decision in a particular situation, if it was an identified
20 individual.

21 LORD JUSTICE MOSES: Because the Director faced with that position
22 would be able to say, "well, there is no good threatening me
23 because I will not be in the position to make the decision".

24 MR. SALES: Well, I think, my Lord, the reason for why it would go
25 to someone else would be more that the Director, if he was

Transcript prepared without access to case documentation.

1 personally threatened, would be in a situation where it will
2 be difficult for him to disentangle ----

3 LORD JUSTICE MOSES: He could not make any independent ----

4 MR. SALES: ---- properly his personal interests.

5 LORD JUSTICE MOSES: Exactly, he could not make any independent
6 judgment.

7 MR. SALES: Because his own personal interests were engaged.

8 Contrast this case, in my submission, where what is in issue
9 is a threat to the national interest which is properly
10 assessed by those in a position to make the assessment who
11 then provide representations to the director for him to
12 consider, his personal interests are not engaged. He is able
13 to bring an independent and professional judgment to bear upon
14 the materials which are put before him.

15 LORD JUSTICE MOSES: Is able to bring an independent judgment on
16 the threat but the effect of the threat, what I have already
17 put to you, is to cut down the independence of the decision,
18 that is the effect of it.

19 MR. SALES: My Lord puts it to me, I respond in precisely the same
20 way as I have already done, that it in no way cuts down the
21 independence of the assessment which the Director has to make.
22 It is a difficult decision that he has to make but there is a
23 choice to be made and he brings an independent judgment to
24 bear on making that choice.

25 LORD JUSTICE MOSES: Yes.

1 MR. SALES: My Lord, at paragraph 55 of our skeleton we make
2 reference -- this is pages 19 to 20 -- to the code for Crown
3 prosecutors. Page 21 has the familiar evidential test but
4 then the public interest test.

5 LORD JUSTICE MOSES: It is all slightly "airy fairy", there is
6 nobody drafting this, not Farquharson, not anybody reviewing
7 the CPS ever envisaged circumstances arising as they arose in
8 this case.

9 MR. SALES: No, my Lord, I am not going to this document for some
10 sort of legislative text.

11 LORD JUSTICE MOSES: It is interesting, I mean nobody discussed
12 Leyla Khaled during the discussions in September/October 2006
13 as far as we can see.

14 MR. SALES: My Lord, the basis for the legal submission is
15 essentially Mohit and the wide statements of what matters may
16 be taken into account as specific authority, although I have
17 my general submissions as to the language of Section 1 of the
18 Act in the absence of any countervailing principle to cut that
19 language down. However, I do say that the width of the public
20 interest factors are underwritten by the code. One sees on
21 page 20 following some of the common public interest factors
22 both for and against but they are not exhaustive stuff.

23 One sees, over now at page 22, 5.10(i) "details may be
24 made public if it harms (unclear) international relations or
25 national security". In my submission, the code is drawn up on

1 the basis that the discretion available to prosecute is a very
2 wide one and again is inconsistent with there being a second
3 recognition of any principle of legality which could be
4 applied to cut down that wide discretion based upon assertions
5 of the importance of the rule of law. I am repeating myself
6 but I do so just for the last time, the rule of law in this
7 context applies ----

8 LORD JUSTICE MOSES: It cannot be the last time you repeat
9 yourself.

10 MR. SALES: Well, it will not be the last time I will repeat
11 myself, it is the last time I repeat this point I hope,
12 probably not! The relevant principle of rule of law is
13 safeguarded in this case by the application of the ordinary
14 principles of judicial review in relation to the Director
15 making his decision.

16 My Lord, again, in support of that basic submission and
17 the submission that so far from Parliament recognizing that
18 there must be implied restrictions Parliament, in my
19 submission, would have positively made the assumption that
20 there were not implied restrictions and would positively have
21 intended the Director to have the widest discretion. We set
22 out ----

23 LORD JUSTICE MOSES: What is intended by Section 1, the purpose is
24 absolutely plain; that there should a person with statutory
25 authority to exercise a professional, independent judgment --

1 that is the purpose of the section.

2 MR. SALES: On a wide basis as to the discretion to be employed.

3 My Lords, at page 23 we refer to the statement of

4 Sir Hartley Shawcross, perhaps I could invite my Lords to cast

5 their eyes over that extract we have set out there. For my

6 Lords' note it is volume F, tab 22.

7 LORD JUSTICE MOSES: Yes. (Pause) Yes.

8 MR. SALES: In particular I emphasize obviously the paragraph in

9 the middle there, "sometimes the court's considerations may be

10 wider, still may involve a question of public policy or

11 national, sometimes international concern" and Sir Hartley

12 Shawcross is positively saying the Attorney General has to

13 make up his mind in those situations what is to be done.

14 Past practice I have already dealt with.

15 LORD JUSTICE MOSES: Here we are talking about the Director, not

16 the Attorney.

17 MR. SALES: Yes, my Lord, we are but then we go back to cases such

18 as Mohit and Mannie I think which says it does not matter ----

19 LORD JUSTICE MOSES: Absolutely, of course it does not, no. It is

20 just interesting -- but I think it probably does not matter in

21 this case -- what is meant by supervisory. I do not think it

22 arises in this case.

23 MR. SALES: The word is superintendence.

24 LORD JUSTICE MOSES: Superintendence.

25 MR. SALES: A word used in various contexts. There is a debate to

1 be had on another occasion as to precisely what it does mean.

2 LORD JUSTICE MOSES: I only raised it because I do not think it
3 matters what it means in this case.

4 MR. SALES: I respectfully agree, it does not matter what it means
5 in this case. It is relevant to be borne in mind that it
6 explains factually why the Attorney General was involved in
7 the factual history, albeit that the decision was that of the
8 Director himself at the end of the day.

9 LORD JUSTICE MOSES: Helen Garlick is recorded as saying that
10 neither of them were in a position to exercise any independent
11 assessment of the strength of the risk they were depending on
12 on others and one does not record, there is nothing recorded
13 in that minute of the Attorney disagreeing with that
14 proposition because he turns to her and says, "well, what do
15 you think?" She says that and I do not know whether that is
16 the position. I was slightly surprised, I should have thought
17 he would know more but perhaps ----

18 MR. SALES: My Lord, I am going to come on to submissions about
19 ----

20 LORD JUSTICE MOSES: What happened.

21 MR. SALES: Yes, what happened and what is the proper approach for
22 both the Director and, indeed, the Attorney General who is not
23 himself an expert in assessing the likely reaction of
24 Saudi Arabia and the impact on the national security interest.
25 Just to foreshadow it now, in my submission, indeed the whole

1 point of the Shawcross exercise is designed to ensure that
2 representations are made from people who are in a position to
3 put forward relevant information to the independent
4 decision-maker for them to take into account. One then goes,
5 again just foreshadowing, to the judgment of Lord Bingham in
6 the Huang(?) case for example, where in relation to matters
7 which courts, i.e. other independent bodies, had to take into
8 account, where the court does not have expertise of its own to
9 bring to bear it will properly give great weight to
10 representations made by others including on behalf of the
11 Government where such people are in a position to bring
12 expertise to bear to make valid judgments for themselves.

13 LORD JUSTICE MOSES: The one thing that courts are expert in is
14 their responsibility of protecting the rule of law, that is
15 where they have an expertise that nobody else has.

16 MR. SALES: Yes, my Lord, I do not dissent from any of that. In
17 the circumstances of this case, in my respectful submission,
18 it takes us back to what is the specific content of the
19 principle of the rule of law in the circumstances of the ----

20 LORD JUSTICE MOSES: It really goes back to the central submission
21 on behalf of your client that there is nothing that can be
22 done in a case like this.

23 MR. SALES: My Lord, so far as the domestic law point is
24 concerned, those are my submissions.

25 I move on to address the legal position in relation to

1 Article 5 of the OECD Convention. My Lords, I do say that it
2 is relevant when moving on to consider what is the proper
3 legal approach in our proceedings when taking into account the
4 Launder case that one keeps in mind my submissions as to the
5 width of the discretion available to the Director arising from
6 the first part of my argument. My Lord, as my learned friend
7 logically correctly went to consideration of the Launder
8 principle first before going to the interpretation of
9 Article 5 of the OECD Convention I will follow that course as
10 well.

11 I am now turning to paragraphs 89 and following in my
12 skeleton argument to address the circumstances in which there
13 may be reliance on an international treaty before the domestic
14 courts. My Lords, I have already shown you the relevant
15 passage from Lyons and indeed from J.H. Rayner. My Lords, my
16 learned friend's argument as to the legitimacy for this court
17 to rule upon the meaning of Article 5 of the OECD Convention
18 turns upon application of the principle that derives from
19 Launder and the speech of Lord Hope in that case. Launder is
20 in volume A at tab 2.

21 My Lord, this case concerns the possible expedition to
22 Hong Kong of an individual who is within the United Kingdom
23 jurisdiction where his argument was that now that Hong Kong
24 had been returned to the People's Republic of China that he
25 feared for the protection of his human rights if he was

1 returned. My Lords, the case was considered essentially on
2 the basis of an argument revolving around rationality.
3 Launder had also raised with the Home Secretary an argument
4 based upon the European Convention on human rights. Lord Hope
5 considered whether in a pre Human Rights Act case it was
6 proper for the courts to examine that complaint as well.

7 My Lords, it is page 866 in the report just below letter
8 F, you get the heading European Convention on Human Rights
9 which is the passage where Lord Hope considers this. If we go
10 to 867 at C perhaps I could invite my Lords to read that
11 paragraph.

12 LORD JUSTICE MOSES: Yes. (Pause) Yes.

13 MR. SALES: My Lords, two points I emphasize on that page, first
14 of all at D that the context of the dialogue was the risk of
15 an interference with the applicant's human rights. This in
16 itself was ground for subjecting decisions to the most anxious
17 scrutiny. So point 1 and the basis on which Lord Hope is
18 considering that it is relevant to go to the ECHR, is that it
19 is an anxious scrutiny case in English domestic law.

20 Point 2 ----

21 LORD JUSTICE MOSES: It is subject to remedy.

22 MR. SALES: Then there is the question whether there is an
23 effective remedy as Article 13 requires. Article 13, of
24 course, not incorporated into domestic law but capable of
25 influencing the common law, one sees from the top at C. So

1 the two ----

2 LORD JUSTICE MOSES: Article 13 gets in. Does Article 13 get in
3 because of that, that the decision-maker has misdirected
4 himself on the Convention?

5 MR. SALES: No, my Lord, I do not think it was because of what the
6 ----

7 LORD JUSTICE MOSES: How does Article 13 get into it?

8 MR. SALES: In my submission Article 13 gets into it, but the
9 substance of the case was in relation to Article 3 in
10 particular, a (unclear) type case.

11 LORD JUSTICE MOSES: Yes, risk to life.

12 MR. SALES: What Lord Hope is doing is identifying an obligation
13 which arises under the Convention in international law, that
14 the domestic courts should themselves provide an effective
15 remedy.

16 LORD JUSTICE MOSES: Yes, why?

17 MR. SALES: My Lord, in my submission the why is given by what he
18 said at C, that the Convention may influence the common law,
19 it does not bind the ----

20 LORD JUSTICE MOSES: There is no point in worrying about his human
21 rights if you cannot actually do something about it.

22 MR. SALES: There are two things to vouchsafe why the court should
23 proceed to examine what at this stage was a purely
24 international obligation of the United Kingdom. One is that
25 it is an anxious scrutiny case involving the applicant's own

1 human rights and, secondly, that there is an international law
2 obligation under Article 13 that the state itself provide in
3 its domestic legal order an effective remedy.

4 LORD JUSTICE MOSES: So it is nothing to do with the fact that the
5 decision-maker himself said he took it into account.

6 MR. SALES: Well, that is necessary, that is a necessary condition
7 ----

8 LORD JUSTICE MOSES: Not sufficient.

9 MR. SALES: But not sufficient. My Lord, the burden of my
10 argument on this part of the case is to draw attention to the
11 fact that the Launder principle involves a derogation, if I
12 can put it that way, from the J.H. Rayner and Lyons principle.
13 What is important is to identify the conditions under which
14 the derogation from that more general principle may take
15 place.

16 MR. JUSTICE SULLIVAN: It is interesting to deal with that in a
17 level of abstraction but I am bound to say it does seem a
18 little odd to me that where this country publicly says "in our
19 prosecution decisions we comply with Article 5", the Director
20 says, "I took Article 5 into account and I was jolly sure I
21 was complying with it". The Attorney General says to
22 Parliament and to the wider world "of course we took into
23 account Article 5, we did not contravene Article 5, we tell
24 that to Parliament. We tell that to the OECD" and as soon as
25 anyone comes along and says, "excuse me, is that right? Have

1 you got it interpreted right?" Immediately, "ooh, no, I mean
2 the court cannot possibly look at Article 5 to say whether
3 they are right or wrong". Does it really mean we just have to
4 leave this in a limbo?

5 MR. SALES: My Lord, my submission is that it is not left in a
6 limbo, it is left to the enforcing mechanisms of the OECD
7 itself and that is a point to which I am going to come. So
8 far as I am dealing with this submission at the moment it is a
9 submission of English constitutional law. We do have the
10 wider principle affirmed repeatedly by the House of Lords in
11 J.H. Rayner and Lyons in particular.

12 MR. JUSTICE SULLIVAN: It is a question whether they had this type
13 of circumstance remotely in mind where the repeated public
14 assurances by public officials in this country, that as part
15 of the exercise of their discretion and decision-making
16 process they took account of a particular convention or
17 treaty, whatever, and they maintain that they complied with
18 it, one just has to back off.

19 MR. SALES: That is the case that my learned friend presents.

20 MR. JUSTICE SULLIVAN: Yes.

21 MR. SALES: What I am concerned to do is to make submissions that
22 that is not in itself enough. The mere fact that the
23 executive says we have taken something into account does not
24 clothe the domestic courts with jurisdiction on the
25 international plane to deliver binding and authoritative

1 judgments about the meaning of international instruments. It
2 clearly does involve a derogation from the J.H. Rayner
3 principle that the courts proceed to do precisely that. The
4 question is under what conditions is the court permitted to do
5 that?

6 LORD JUSTICE MOSES: Again there is no policing method by way of
7 judicial review in which this court can interfere if someone
8 says "do not worry about my decision to the public because it
9 is in compliance with our international obligations and it is
10 just completely wrong"; your submission is, well, that may be
11 so, but it is nothing that the courts can do anything about.

12 MR. SALES: Nothing that the domestic courts can do anything
13 about. In fact my Lord my submission, as I hope my Lords will
14 have seen from my skeleton argument, is presented at various
15 levels. My primary submission is as my Lord as summarised it,
16 that the J.H. Rayner principle and the Lyons principle
17 applies.

18 One then examines the authority on which my learned
19 friend seeks to rely to say that this court does, in fact
20 contrary to the principles in those cases, have jurisdiction
21 to decide the point and we look at what Lord Hope actually
22 says. He does not say it is sufficient in and of itself that
23 the executive has directed itself by reference to the
24 United Kingdom's international obligations. If that is what
25 he meant I respectfully submit that is what he would have

1 said. Instead he is careful to elaborate argument as to why
2 it is legitimate for the courts in that case to examine the
3 application of the international obligation.

4 He gives two reasons, which I have already emphasized,
5 one is that it is an anxious scrutiny case as a matter of
6 English domestic law. I say contrast this case, which is the
7 very opposite of an anxious scrutiny case, see Mohit and the
8 other authorities that I have referred to this morning.
9 Secondly, he refers to the fact that Article 13 of the
10 Convention itself required there to be a remedy in the English
11 domestic courts.

12 I say, contrast this case, there is nothing in the OECD
13 Convention which corresponds with that international law
14 obligation which could then, going to 867 at C, influence the
15 approach to be adopted by the common law in a case of this
16 kind.

17 LORD JUSTICE MOSES: It is slightly uncomfortable intellectually,
18 is it not, to say, well, you cannot, save under very strict
19 conditions, apply international law, but since Article 13
20 requires on an international plane an obligation to provide a
21 domestic remedy then somehow it comes into domestic law. I
22 mean that is why I raise this, I still have not quite followed
23 where Article 13 comes into it, why is it not just a question
24 of anxious scrutiny?

25 MR. SALES: My Lord, in my submission Article 13 comes in when one

1 goes back to 867 at C that Lord Hope is accepting as a base
2 line the proposition that the Convention may influence the
3 common law. Then he is saying that the two features then
4 apply anxious scrutiny, which is a doctrine of domestic law,
5 if you like backed up by Article 13 which is itself creates
6 its own impetus for the development of common law doctrine in
7 a case of this kind.

8 My Lord, that is my submission as to what Lord Hope was
9 saying and it is clear that his judgment does not support the
10 case being presented by the claimants from this application.

11 LORD JUSTICE MOSES: Mere choice is not enough.

12 MR. SALES: Mere choice is not enough. Now, my learned friend
13 suggested that *Kebilene*, the other authority on which she
14 seeks to rely, represented clear authority in her favour. My
15 Lord, it does not; it simply applies the *Lauder* approach as
16 is abundantly clear from the judgment which is in the next
17 tab. My Lords, *Kebilene* was the case, again pre Human Rights
18 Act coming into effect, involving the possibility of someone
19 being prosecuted under criminal law provisions involving
20 reverse onuses of various kinds and the question was whether
21 there could be a fair prosecution in those circumstances.

22 My Lords, at page 367 in the speech of Lord Steyn, which
23 is the leading speech on this part of the case, if I could
24 invite you to read from D down to just above letter H I would
25 be grateful.

1 LORD JUSTICE MOSES: (Pause) Yes.

2 MR. SALES: My Lords, what I say about that is that it is in
3 Kebilene an application of the Launder principle with the
4 specific passage from Lord Hope being cited as authority, that
5 is at F. Then specific reference again to the effective
6 remedy point, which we have already seen from Lord Hope's
7 judgment. In my submission Kebilene, both on its facts and in
8 its statement of principle does not take the matter beyond
9 what was said by the House of Lords in Launder.

10 My Lords, there are two features of the Launder
11 principle which I wish to emphasize. First of all a point
12 that I have already made, it operates as a derogation from the
13 J.H. Rayner and Lyons principle. Just emphasize the point, my
14 Lords, central government, putting the Director to one side
15 for the moment, central government will often have regard to
16 the United Kingdom's international obligations in doing
17 various things.

18 If it were simply enough that some minister had directed
19 himself by reference to some international law obligation,
20 that that then allows the domestic judicial review courts to
21 review the compatibility of what is done with those
22 international law obligations and to pronounce upon the
23 meaning of those international law obligations, that would
24 represent a very big inroad upon the J.H. Rayner principle.
25 In my submission one would expect the House of Lords to have

1 spelled out any such inroads if it was intended. To the
2 contrary in the House of Lords one sees an emphasis upon very
3 specific features of specific cases.

4 My Lord, just on that point, may I draw attention also
5 to CND case which is in volume D at tab 51. If I could go to
6 paragraph 37 in the judgment of Simon Brown LJ where
7 Simon Brown LJ refers to the Lyons principle. Now, my Lords,
8 it is true that on the particular facts in the CND case the
9 government had at that stage declined to indicate what
10 particular position it was taking on the construction of UN
11 Security Council Resolution 1441. Just for the point that I
12 am on at the moment to emphasize that what one is dealing with
13 with the Launder principle is an inroad upon the J.H. Rayner
14 principle. If I can invite my Lords to read paragraph 37 I
15 would be grateful.

16 LORD JUSTICE MOSES: (Pause) Yes.

17 MR. SALES: My Lords, in my submission what Simon Brown LJ is
18 doing there is referring back to the underlying rationale for
19 the Lyons principle that the domestic courts simply do not
20 have jurisdiction authoritatively to pronounce upon matters of
21 international law.

22 The first point that I make is since it is an inroad
23 upon such an important constitutional principle as that laid
24 down in J.H. Rayner one would expect to find it confined
25 within narrow limits and that is what one sees in the

1 judgments of the House of Lords in *Launder* and *Kebilene*. The
2 particular conditions which applied in those cases as the
3 warrant for authorizing the domestic court to venture upon
4 interpretation of international obligations do not apply in
5 this case.

6 The second point that I make about the *Launder* principle
7 is that it clearly is not absolute. Suppose the court were
8 against me on the first point that I have made, that it
9 applies only within specific limitations not satisfied in this
10 case, it clearly is a principle which is not absolute. Again,
11 I can make that point from the *CND* case because ----

12 LORD JUSTICE MOSES: There may be cases even if you get within
13 *Launder* which come out again.

14 MR. SALES: Yes, absolutely. Just to make that point, admittedly
15 in an extreme way but to demonstrate the principle, the
16 Divisional Court in *CND* made it quite clear that although it
17 was examining a situation that arose at a time before the
18 government had taken military action and before it had
19 announced its state of the interpretation of Security Council
20 Resolution 1441, the position "no judicial review" would have
21 been the same if one had been addressing the situation later
22 on where it had announced its position and was now taking
23 military action.

24 One gets that from paragraph 15 in the judgment of
25 Simon Brown LJ. If my Lords would read that, it is the words

1 in parenthesis in the middle of the paragraph.

2 LORD JUSTICE MOSES: (Pause) I am not quite sure -- we read it
3 before -- what he is saying there. Is he saying because it is
4 premature and advisory or is it because of the subject matter
5 that future decisions to take military action is something in
6 which the courts would not, a steer into which they would not
7 step?

8 MR. SALES: My Lord, in my submission, at that point he is
9 emphasizing the latter. What he is saying is, when you move
10 forward, suppose the best case in terms of an attempt to rely
11 upon the Launder principle by the claimants CND in that case,
12 that you do have an announced view of what the legal
13 obligations are in international law, an action actually being
14 taken on the basis of that announced view, he is indicating
15 that you would not get judicial review in that situation and
16 that that in itself is then to be taken as an indicator that
17 you should not get judicial review in this earlier situation.
18 My Lord, if one then goes ----

19 LORD JUSTICE MOSES: What is the answer to that? He then cites
20 Mr. Rabinder Singh's argument that there are no no go areas
21 and where does he answer that? At 23 I think, is it not?

22 MR. SALES: Yes, well ----

23 LORD JUSTICE MOSES: 22?

24 MR. SALES: 23 is where he says "scoffing resourcefully, though
25 this argument was advanced clearly not without its

1 difficulties".

2 LORD JUSTICE MOSES: Is it 22, "feels which courts unequipped to
3 judge merits or demerits"?

4 MR. SALES: Well, at 22 he is still dealing with the applicant's
5 argument so he is setting out all reasons being advanced by
6 Mr. Singh.

7 LORD JUSTICE MOSES: Yes, quite.

8 MR. SALES: At 23 he then starts to analyze the difficulties with
9 that argument. I emphasize the last sentence of 23 but that
10 is going back to the Lyons point which I have already drawn
11 attention to elsewhere in his judgment.

12 Then at 33 he touches upon the Launder judgment and the
13 Kebilene judgment and an attempt by Mr. Singh (paragraph 34)
14 to reply upon them. My Lords, that is the background to
15 paragraph 37 which I have just shown my Lords about the
16 applicability of the Lyons point.

17 LORD JUSTICE MOSES: It is the two reasons he gives at 35, is it
18 not?

19 MR. SALES: Yes, well, those are the essence of the reasons why
20 the claim could not succeed. My Lords, he then does ----

21 LORD JUSTICE MOSES: Is it 47?

22 MR. SALES: Well, 47 is his conclusion. I was going to draw
23 attention to 42, "a better place in the court to make
24 assessments of the national interest with regard to conduct
25 and foreign relations", then "national security and defence",

1 I draw your attention to that, I will come back to that as a
2 distinct point. I have already emphasized that my arguments
3 on Launder operate at a number of levels which I am concerned
4 to draw to my Lord's attention.

5 Then at 43 is a declaration by the court which as a
6 matter of practical reality embarrassed the government no less
7 than (unclear) interview itself. Then, as my Lord indicates,
8 at 47 he summarizes his conclusions. So at 1 "the court has
9 no jurisdiction to declare the true interpretation". So that
10 is going back to the Lyons principle which Simon Brown LJ was
11 treating as the general ----

12 LORD JUSTICE MOSES: You will be coming back to the 43 point, in
13 the sense you have already touched been upon it ----

14 MR. SALES: I did, yes.

15 LORD JUSTICE MOSES: That it is the court itself causing damage in
16 international relations by making declarations.

17 MR. SALES: I did already refer to that, my Lord.

18 LORD JUSTICE MOSES: Yes.

19 MR. SALES: Then 47 at (2) ----

20 LORD JUSTICE MOSES: Will we be coming back to 43 because I think
21 there is a really important debate to be had about that? It
22 is not really on a Launder point; it is on a slightly
23 different point.

24 MR. SALES: I can indicate that I am going to come back to a
25 separate argument from the legal issues that I am raising at

1 the moment as to why, in my submission, even if I fail on
2 these submissions of law still there is a principle that the
3 court should take into account that action is being taken by
4 the United Kingdom government on an international plane which
5 I will have to explain, but essentially it relates seeking to
6 justify its position with the OECD and to seek support for its
7 interpretation of Article 5 with the OECD. That, in my
8 submission, is going to operate as a quite distinct reason so
9 I will come back to it.

10 LORD JUSTICE MOSES: There is the third reason I thought you were
11 invoking in paragraph 43, which was here we have the difficult
12 situation of the international relations between Saudi Arabia
13 and the United Kingdom fore the court to comment upon how the
14 government should have reacted to what the Saudi Arabians
15 would do would itself be damaging or entering in a sphere
16 where there is potential damage in international relations.

17 MR. SALES: Yes.

18 LORD JUSTICE MOSES: And, as he says, placed the government in an
19 impossible position.

20 MR. SALES: Yes, my Lord, I ----

21 LORD JUSTICE MOSES: That is a distinct argument in a sense.

22 MR. SALES: My Lords, yes, it is. I suppose it goes back to my
23 opening comments yesterday as to what was in issue in this
24 case. We say that the assessment of the national security
25 risk has already taken into account what the government thinks

1 it can and cannot do viz-a-viz Saudi Arabia and that is not an
2 issue for this court.

3 My Lords, I would add to that, if it were an issue for
4 this court -- I did give reasons yesterday why even if it were
5 an issue for the court the court should not enter upon it -- I
6 would add at that point paragraph 43. My primary submission I
7 want to remind the court is that it is not an issue for the
8 court on these proceedings.

9 My Lords, at paragraph 47(i) again emphasis upon the
10 Lyons, J.H. Rayner principle as being the primary governing
11 principle that applies; (ii) the court will in any event
12 decline to embark upon the determination of an issue, to do so
13 would be damaging to the public interest in the field of
14 international relations, national security, so that is the
15 separate principle to which I am going come in due course;
16 then (iii) distinctly he moves then onto the discretion in
17 relation to advisory declarations.

18 LORD JUSTICE MOSES: What you are saying is even if it was a

19 Lauder case in that case he would not have ----

20 MR. SALES: The court would still have a separate judgment to
21 exercise depending upon its assessment of the public interest
22 and, my Lords, it is emphasizing that the court exercises ----

23 LORD JUSTICE MOSES: When you say its, do you mean the
24 government's or the court's?

25 MR. SALES: The court's and that is what I wanted to emphasize,

1 going back just to compare the position with the exercise of
2 discretion by the Director as an independent body. My Lords
3 had all my submissions on that but I do just draw attention to
4 the fact that at 47(iii) Simon Brown LJ is contemplating a
5 situation where the court might think it germane to a matter
6 before it to enter upon ----

7 LORD JUSTICE MOSES: 47(ii) do you mean?

8 MR. SALES: No, 47(iii), my Lord, because 47(iii) is a separate
9 principle being identified by Simon Brown LJ.

10 LORD JUSTICE MOSES: Yes.

11 MR. SALES: Even if (i) and (ii) did not apply so for some reason
12 it was germane for the court to enter upon a decision as to
13 the meaning of an international instrument, there will be a
14 separate ----

15 LORD JUSTICE MOSES: Advisory declaration.

16 MR. SALES: The points I was seeking to make is that that is a
17 matter of the court exercising a discretion as to how it
18 should proceed in a particular case and I was just indicating
19 that what Simon Brown LJ is saying there is to indicate that
20 the court itself in exercising a discretion, even though it is
21 guardian of the rule of law and so on, to take account of a
22 range of wider considerations including international
23 relations, national security or defence, so that is going back
24 to ----

25 LORD JUSTICE MOSES: That works both ways, I mean, if we are to

1 make some independent judgment about the best way of standing
2 up to this sort of behaviour ----

3 MR. SALES: My Lord, the point that I was making on (iii) read
4 with (ii) was it is certainly consistent with and, I say,
5 supports my earlier submissions, I am sorry to have gone back
6 to a domestic law point just in a tangential way it supports
7 my earlier submissions about the width of the matters that can
8 be taken into account by the Director.

9 My Lord, still on the point that I was seeking to
10 emphasize that Launder, even when it applies is not absolute,
11 one sees then Maurice Kay J's judgment at paragraph 49
12 agreement with Simon Brown LJ. Then at 50, my Lords perhaps I
13 could invite you to read paragraph 50.

14 LORD JUSTICE MOSES: Yes (Pause) Yes.

15 MR. SALES: In my submission Maurice Kay J, as he then was,
16 indicating that there is a fundamental objection to the whole
17 basis of claim being put forward by CND in that case, namely
18 that foreign policy in the deployment of the armed forces
19 remained non-justiciable, that is matters for the ----

20 LORD JUSTICE MOSES: We must always remember, here we are talking
21 about people seeking to contend in advance that the war in
22 Iraq was unlawful.

23 MR. SALES: Yes.

24 LORD JUSTICE MOSES: Here we are talking about something very
25 different; we are talking about how this country and its

1 courts protect its own domestic criminal law system. It is a
2 different sphere and of course there is a clash.

3 MR. JUSTICE SULLIVAN: In due course we may come to Richards J
4 judgment as he was then, as he seems to put it very neatly to
5 me, further exception can arise where a decision-maker has
6 expressly taken into account an international treaty and the
7 court thinks it appropriate to examine the correctness of the
8 self-direction or advice on which the decision is based. He
9 cites Launder and so forth.

10 LORD JUSTICE MOSES: I have understood you to say that is wrong.

11 MR. SALES: No, my Lord, I focus upon "if appropriate" and the
12 citation of Launder so Richards J, as he then was, in my
13 respectful submission was not purporting to state any wider
14 principle than Launder stood as authority.

15 LORD JUSTICE MOSES: It is the danger that we all do if we are not
16 giving the lead judgment you just add on a bit to show that
17 you can put a nice concise exegesis of what the principles are
18 because you have had greater time to do it.

19 MR. SALES: My Lord, there is nothing inconsistent with what
20 Richards J said on that occasion and the submissions that I
21 have been making. He has made reference to Launder and said
22 in appropriate cases the Launder principle will apply. I have
23 already made my submissions as to what are the appropriate
24 cases.

25 MR. JUSTICE SULLIVAN: They are limited by Launder, effectively,

1 its a closed exception as opposed to Richards J view that
2 there might actually be other exceptional cases where the
3 court could properly rule but it had not actually been shown
4 in that case.

5 MR. SALES: Forgive me, my Lord, I am not sure where ----

6 LORD JUSTICE MOSES: Where did you get that from?

7 MR. JUSTICE SULLIVAN: 61(v).

8 MR. SALES: My Lord, I have to say it is a little bit unclear what
9 Richards J is ----

10 LORD JUSTICE MOSES: He cites no authority for that proposition.

11 MR. SALES: What I rather took him to be referring to are those
12 cases where English domestic law does incorporate other
13 international instruments. Now, I appreciate that is slightly
14 at odds with the submission that I have already made by
15 reference to ----

16 LORD JUSTICE MOSES: He has already said it, 61(iii), it cannot
17 mean that.

18 MR. SALES: Yes.

19 LORD JUSTICE MOSES: He is talking about something else. Anyway,
20 you will have to ask him. Anyway, he was not a Lord Justice
21 then, was he?

22 MR. SALES: I am not sure that I can take it very much further on
23 (v), but he is saying never say never in relation ----

24 MR. JUSTICE SULLIVAN: Yes, never say never.

25 LORD JUSTICE MOSES: Very well, we have your point. It is no good

1 just trying to erect some principle based merely on the choice
2 of the decision-maker.

3 MR. SALES: Yes, because it runs against a more fundamental
4 principle which is emphasized elsewhere in the judgments in
5 this case. My Lords, forgive me, I keep being diverted on to
6 a point which I have already made, i.e. the inroad on
7 J.H. Rayner. What I was seeking to do was to emphasize that
8 even where the Launder principle can apply it is not absolute.

9 What I had been seeking to do was to indicate that it
10 was the unanimous view of the Divisional Court in this case
11 that suppose a situation where the government has moved
12 forward, has announced its interpretation of the relevant
13 international instrument and is actually taking military
14 action on the basis of that interpretation, so on the face of
15 it taking action so it is not premature in the sense that
16 nothing has happened yet, something is now happening, self
17 direction, clear on the face of the record, on my learned
18 friend's argument one would say that the logic would be that
19 the court could then judiciously review what the Government
20 was doing and whether it had the international law right or
21 not, but the judgments all indicating that that would be out
22 of the question.

23 Brown LJ at paragraph 15, Maurice Kay J at paragraph 50
24 and then Richards J also in a passage we have not looked at I
25 think yet at paragraph 59, in particular (ii):

1 "The plain purpose of the present claim is to discourage
2 or inhibit the government from using armed forced against Iraq
3 without a further security council resolution. It is the
4 claimants, in an attempt to limit the government's freedom of
5 movement in relation to the actually use of military force"

6 ----

7 LORD JUSTICE MOSES: Squarely in the fields of foreign affairs.

8 MR. SALES: Then the next point in particular.

9 LORD JUSTICE MOSES: Yes. We will have to see what the House of
10 Lords says about the mothers of Iraq.

11 MR. SALES: Yes.

12 LORD JUSTICE MOSES: I am taking bets!

13 MR. SALES: My Lord is taking bets; I might ask what the odds
14 were!

15 LORD JUSTICE MOSES: Very poor.

16 MR. SALES: I have to say, although some of these matters were
17 touched upon briefly in the argument in that case I could not
18 stand here and say that I would have any expectation that the
19 House of Lords will go into these matters, they may do but it
20 is unlikely I think.

21 LORD JUSTICE MOSES: Well, they will go into that matter, I mean
22 in part, the question of what on earth the court thinks it is
23 doing in considering it, anyway.

24 MR. SALES: Yes, they may do but the burden of the government's
25 argument in the case was a matter of interpretation of

1 Article 2 of the Convention. If the judgment of the House of
2 Lords is focused upon that they may say little of interest but
3 they could go wider.

4 My Lords, just to summarize then our position in
5 relation to the Launder principle. In my submission
6 conditions for the Launder principle to apply where you have,
7 first of all, a self-direction on international law, are first
8 that it needs to be in relation to an individual human right
9 where the domestic law principle of actual(?) scrutiny
10 applies, it is not a principle which relates to the
11 United Kingdom Government's interpretation of general
12 obligations as between it and other states.

13 Secondly, on the face of the Launder judgment and the
14 Kebilene judgment as well, it has to be a self-direction in
15 relation to a treaty obligation where there is also a
16 corresponding treaty obligation for the domestic legal order
17 to provide a remedy, that is the Article 13 point.

18 Third, my Lords, a point that I would emphasize coming
19 out of the analysis that I put forward contrasting the
20 position under J.H. Rayner an Lyons with what happens when the
21 Launder principle is invoked. For observation, it is in both
22 Launder and Kebilene. The domestic courts felt able to apply
23 the European Convention on Human Rights, in relation to which
24 there is a clear and highly developed jurisprudence from the
25 body which can authoritatively determine the meaning and

1 construction of the European Convention on Human Rights,
2 namely the Strasbourg Court and the Commission.

3 LORD JUSTICE MOSES: Ms Rose said, where is your authority for
4 that but I mean it seems obvious that if the principle is that
5 one of the reasons you do not interpret treaties because it is
6 not for the court of one of the high contracting parties to
7 tell the other high contracting parties what it means, it
8 necessarily follows that that principle is going to be less
9 infringed in cases where you do have a settled jurisprudence
10 or at least an identifiable jurisprudence.

11 MR. SALES: From the authoritative body. My Lord, that is the
12 point that I seek to make. I am just reminding my Lord of
13 what Simon Brown LJ said in the CND case that if the domestic
14 courts simply take it upon themselves to rule upon
15 international instruments that by not just this country but
16 other countries as well, that will be perceived elsewhere as
17 an unjustified arrogation of judicial power by the UK and its
18 courts.

19 My Lord, the fourth point that I make, and this is, in
20 effect, the additional countervailing interest point as my
21 Lord, Moses LJ, was putting it to me, you could have a case
22 which on the face of it might fall within the Launder
23 principle but then is taken out of it by other countervailing
24 factors and so ----

25 LORD JUSTICE MOSES: Well CND is a paradigm.

1 MR. SALES: There has to be no countervailing public policy
2 interest to take the case outside the situation where it is
3 appropriate for the courts to rule upon the international
4 instrument and, yes, CND is an example of that. It is a
5 paradigm example, I would accept. If one looks at
6 paragraph 15, for example, where you are looking at an actual
7 decision to take military action that is obviously at one end
8 of the spectrum. I rely upon it as demonstrating the fact
9 that there is a limit to the Launder principle of this
10 character. It then becomes a question of how far the limit on
11 the application of the principle, if it applies at all,
12 extends.

13 My Lords, in my submission what arises under the
14 countervailing public policy interest is a respect by the
15 courts this time for proper separation of powers ideas in
16 terms of the management by the executive of this country's
17 national security interest and its foreign relations.

18 My Lords, if I can then, having made these general
19 points, go back to page 36 of my skeleton argument to try to
20 draw out the different levels in which these submissions are
21 made. My primary submission is that the necessary relevant
22 conditions for the application of ----

23 LORD JUSTICE MOSES: Which paragraph?

24 MR. SALES: Page 36, my Lord.

25 LORD JUSTICE MOSES: Yes, I have it.

1 MR. SALES: Just before I move on to paragraph 93. My primary
2 submission is that there is no proper application of the
3 Launder principle in this case.

4 My alternative submission, which I make at paragraph 93,
5 is that even if some variant of the Launder approach might
6 apply the Launder approach should be adapted to take account
7 of the fact that the court is now moving away from the
8 paradigm situation addressed in Launder as to why it is
9 appropriate for the domestic court to venture upon an
10 interpretation of international law and that the proper
11 approach should be whether the executive has adopted what is a
12 tenable view or plausible view, that being the language used
13 by the Strasbourg Courts.

14 Then my Lord, again just mapping out where my
15 submissions are going on this. Thirdly, even if I lose on
16 both of those arguments, we say that this is a case where the
17 fourth of my general points applies. There are countervailing
18 public policy reasons why the courts should not venture upon
19 interpretation of Article 5 of the Convention, so that is
20 where I am going to. My Lords, I have made sufficiently ----

21 LORD JUSTICE MOSES: I thought you had been there actually.

22 MR. SALES: I have been there, I was just going to say I have made
23 sufficiently my arguments on the first primary argument. What
24 I now move towards is argument, if my Lords are against me on
25 this, as to why if the court moves to have an expanded

1 application of the Launder principle why one would expect out
2 of recognition of other legal principles coming in more
3 acutely into play the more one expands the field of
4 application of the Launder principle, one would expect that
5 principle to be subject to modification the further one moves
6 away from the paradigm case addressed in Launder itself.

7 My Lords, at 93 we say:

8 "Even if the court considers that some version of the
9 Launder approach may be applied in the context of this case
10 the defendant submits that in the present context the court
11 should go no further than to ask itself that whether the
12 Director's view as to the meaning of Article 5 was a tenable
13 or plausible one. This is because of the difference in the
14 treaty context" my Lords, the cross referencing fell out, that
15 should be 92 above "and because the UK authorities are
16 currently engaged in diplomatic negotiations to establish
17 acceptance within the OECD that its national security
18 interests may be protected. In the exercise of prosecutorial
19 discretion compatibly with Article 5 and on separation of
20 powers grounds the court should be astute not to undermine the
21 UK stance in those negotiations."

22 Then, my Lords, I have dealt with the submission at
23 paragraph 94 and I pick it up again at paragraph 95. Sorry,
24 just at the end of 94, picking it up:

25 "The clear implication of the firm statement" this is

1 the indications from the Divisional Court in *CND* that the
2 *Lauder* principle has its limits "is that the rule in *Lauder*
3 is to be treated as limited by reference to more general
4 principles of domestic constitutional law, such as the
5 non-justiciability principle referred to in *J.H. Rayner*, the
6 principle of comity and the principle that the court should be
7 careful not to interfere with the conduct of international
8 relations and diplomacy."

9 Then we say: "In recognition of the limits of its
10 competence to provide a fully authoritative ruling on the
11 interpretation of the OECD Convention and the dangers posed to
12 the national interest by the domestic courts seeking to rule
13 definitively on the point, the court should decline to rule on
14 its meaning or allow the executive a margin of appreciation on
15 the legal question and so examine only whether a tenable view
16 has been adopted on the points of international law rather
17 than the court itself ruling on it as if it were a hard-edged
18 point of domestic law."

19 We say the latter approach is adopted by the Strasbourg
20 Court when it has to examine questions of international law
21 which it does not have jurisdiction to determine
22 authoritatively.

23 My Lords, may I should you what the Strasbourg Court
24 does because, in essence, it is facing the same problem that
25 the domestic courts do when it has to consider other

1 international law obligations in relation to which it does not
2 have jurisdiction to give an authoritative judgment. It
3 adopts the plausible view approach.

4 First, if one goes to Brannigan v. McBride, this is
5 volume D, tab 61. This was a case involving a derogation from
6 the Convention under Article 15 in relation to
7 Northern Ireland. Under Article 15 a derogation has to be
8 compatible, not just with principles under the Convention but
9 also with other obligations of the state under international
10 law. If my Lords would go through to paragraph 72 I pick it
11 up, sorry, page 576, half way down the page you get the
12 heading "4. Other Obligations Under International Law". This
13 is where at 67:

14 "The court recalls that under Article 15(1) measures
15 taken by the state derogating from convention obligations must
16 not be inconsistent with its other obligations under
17 international law."

18 This was a question then at 68, perhaps, my Lords, I can
19 invite you to read down to the end of 727.

20 LORD JUSTICE MOSES: Yes (Pause) Yes.

21 MR. SALES: That is put in terms of cause or basis for the
22 applicant's argument but on the footing that the
23 Strasbourg Court recognizes the limits of its own competence
24 to rule upon the matter. That approach ----

25 LORD JUSTICE MOSES: What do you mean by the applicant? That was

1 the government saying a tenable meaning of officially
2 (unclear) is what we did and they were saying, yes, it is.

3 MR. SALES: Yes, and that was sufficient. If one then goes to
4 tab 60 in this bundle one sees the Strasbourg Grand Chamber
5 this time applying that principle on a wider basis. The cases
6 of Behrami and Saramati was concerned with the application of
7 the Strasbourg Convention in relation actions taken by states
8 under UN Security Council Resolutions. My Lords may care to
9 note that there is a detailed consideration of the Behrami
10 case in the judgment of the House of Lords in a case called
11 Al-Jedda which we do not need to take up ----

12 LORD JUSTICE MOSES: Al-Jedda was my case.

13 MR. SALES: It was your case and there was an additional argument
14 in the House of Lords on Behrami. I just mention that there
15 is discussion of the case generally, but I am going to it for
16 a very specific point. The outcome of the reasoning of the
17 Grand Chamber in Behrami was that the Convention did not
18 itself have proper application or could not be applied in
19 relation to European contracting states such as France, Norway
20 in relation to actions taken by them under UN Security Council
21 Resolutions.

22 In order to arrive at the conclusion that there was no
23 proper basis for consideration of the actions of those states
24 under the Convention the Grand Chamber had to consider on some
25 basis whether those actions were indeed covered by the UN

1 Security Council Resolutions.

2 My Lord, the approach that they adopt to that question,
3 again out of consciousness, in my submission, that the
4 Strasbourg Court is not the court which has competence or
5 jurisdiction to decide authoritatively upon the meaning and
6 effect of UN Security Council Resolutions, one sees at page 35
7 of the report, my Lord, if I can invite you to look at
8 paragraph 121 and the first subparagraph of 122.

9 LORD JUSTICE MOSES: Yes (Pause) Yes.

10 MR. SALES: One sees from 121 that the structure of the court's
11 reasoning is going to turn critically upon its interpretation
12 of the effect of the UN Security Council Resolution. At 122
13 it indicates that because it itself is not in a position to
14 rule authoritatively upon that the approach is to examine
15 whether there is a plausible basis in such instruments for the
16 matters before it, i.e. is there a plausible basis on which it
17 can be said that the UN Security Council Resolutions cover the
18 matters which are complained of?

19 My Lord, that, in my submission, is useful guidance
20 which this court should have regard to as to what is the
21 appropriate approach for a domestic court to adopt in a
22 situation such as the present. Out of recognition of the fact
23 that it, the domestic court, does not have jurisdiction to
24 rule definitively and authoritatively upon the meaning of the
25 relevant international instrument. At paragraph 96 of our

1 skeleton argument we say that ----

2 LORD JUSTICE MOSES: If the Launder principle properly identified,
3 as you have, applies, does this still come into play, a
4 tenable meaning?

5 MR. SALES: Yes, my Lord, what ----

6 LORD JUSTICE MOSES: Was that the approach of Lord Hope?

7 MR. SALES: No, my submission has been first of all Launder does
8 not operate outside of the situations ----

9 LORD JUSTICE MOSES: But if it does.

10 MR. SALES: If it does but where there is less pressure in terms
11 of legal principle for the domestic court to move to a
12 full-bloodied interpretation of the relevant international
13 instrument and by that I mean one is dealing with a situation
14 where the court is against me that the Launder principle is
15 confined within the two preconditions that Lord Hope
16 identified and is saying well, no, it may apply more widely
17 than that, the submission I am then making is, well, when the
18 Launder principle applies within those two preconditions the
19 House of Lords has moved to directly interpret ----

20 LORD JUSTICE MOSES: The meaning.

21 MR. SALES: The meaning, I would say ----

22 LORD JUSTICE MOSES: But if you are into Richards (v) or whatever
23 it is, then at the very least bear in mind it is not
24 authoritative.

25 MR. SALES: Yes, and other factors come into play. So the nature

1 of the argument is if the court is against me on confining
2 Launder just to those cases the court is saying, no, Launder
3 extends more widely. I say, well, if it is extending more
4 widely other factors come into play as to what the precise
5 content of the Launder principle is. It is when it applies,
6 if the court decides it applies more widely, I say that the
7 appropriate approach outside the immediate context of a true
8 Launder situation is to adopt a plausible or tenable view
9 basis.

10 My Lord, there are a number of reasons for this which I
11 seek to set out in paragraph 96 and obviously I have referred
12 to the Strasbourg authority only by way of analogy. It is not
13 binding on you but I say it is highly instructive but that is
14 an international court actually charged with having to decide
15 its own cases by reference to international law. We saw that
16 in both cases under Article 15 there is express reference to
17 international law and by the court's own analytical approach
18 in Behrami, it had to decide upon at some level the meaning of
19 the UN Security Council Resolutions.

20 If an international court having to confront those
21 matters still adopts a plausible view approach, how much more,
22 in my submission, should a domestic court, operating against
23 the background of the J.H. Rayner principle, adopt the same
24 approach?

25 At paragraph 96 of our skeleton argument we say:

1 "Adoption of a tenable view approach would be an
2 appropriate way under circumstances where the proper
3 interpretation of international law may be uncertain" that is
4 one factor "where there is no guidance from the jurisprudence
5 of an international court with competence to decide the issue"
6 another factor "the domestic courts have no authority under
7 international law to resolve the issue" and "the executive has
8 responsibility within the domestic legal order for a
9 management of the UK's international affairs including the
10 adoption of positions to promote particular outcomes on
11 (unclear) of international law".

12 When you take all these things together, and, my Lords,
13 I would emphasize, the width of the discretion on my argument
14 on the domestic law point that the prosecutorial authorities
15 have, then, in my submission, in order to allow space to the
16 executive to seek to press for legal interpretations on the
17 international plane that favour(?) the UK's national
18 interests, while also providing a degree of judicial control
19 to ensure that the positions adopted are not beyond what is
20 reasonable.

21 My Lord, if I fail on my first submission in relation to
22 the Launder principle. This is my second submission and I say
23 that the rule of law is properly in this context recognized
24 because there is a degree of judicial review control but it is
25 at a higher level than actually the courts seeking to

1 determine the meaning of the international instrument for
2 itself. We go on:

3 "Whereas here the relevant issue of international law
4 affects many states, adoption of such an approach will also
5 provide a method for domestic courts to afford respect to the
6 principle of comity while retaining a power of review over
7 domestic public authorities."

8 My Lords, on this point my learned friend went to the
9 Adnan case but the Adnan case was very precisely a situation
10 where an English domestic statute essentially said the
11 Home Secretary has to apply as a matter of domestic law ----

12 LORD JUSTICE MOSES: Yes, it is part of our law.

13 MR. SALES: Part of our law and, therefore, it is, in my
14 submission, completely unsurprising that in that context the
15 domestic court did rule upon the meaning of the international
16 instrument but it does not follow that the same approach must
17 be applied here.

18 My Lords, as far as the approach being taken by ----

19 LORD JUSTICE MOSES: Why did it apply in Adnan, merely because the
20 domestic statute says that the decision had to be in
21 accordance with international (unclear), that is then
22 analogous to the Behrami situation where the court had to take
23 a view about the treaty under which (unclear) was operating
24 but still did not have the authority to rule internationally
25 on the meaning nor did the domestic court in Adnan.

1 MR. SALES: Yes, in my submission the position in Adnan went
2 rather beyond the position that the Grand Chamber placed in
3 Behrami.

4 LORD JUSTICE MOSES: Because?

5 MR. SALES: Because in Behrami the Grand Chamber was still seeking
6 to rule upon the proper interpretation of the European
7 Convention. The issue for it was whether it was right for it
8 to proceed to apply the European Convention against a
9 background of international law where there was a UN Security
10 Council Resolution.

11 It was not the case that the UN Security Council
12 Resolution had in itself been incorporated into the law of the
13 European Convention.

14 LORD JUSTICE MOSES: It is a different situation, it is a more
15 removed situation.

16 MR. SALES: In my submission ----

17 LORD JUSTICE MOSES: It is to do with context.

18 MR. SALES: It is a more removed situation and it is that removal
19 of the situation that makes it more directly analogous to the
20 expanded Launder principle if that is what the court decides.

21 So far as the issue of the United Kingdom taking
22 positions now on the international plane in the exercise of
23 diplomacy with other states parties to the OECD Convention,
24 that is dealt with in the witness statement of Mr. Dickerson.

25 LORD JUSTICE MOSES: One has to take this slightly with a pinch of

1 salt because the parti pris that they are being accused of
2 flouting the treaty and of course they are going to press for
3 an interpretation that defends them against that accusation so
4 that one has to be slightly careful about that, has one not?

5 MR. SALES: My Lord, states will always be parti pris in the sense
6 this my Lord uses the term.

7 LORD JUSTICE MOSES: They will have their own interest.

8 MR. SALES: Yes, I mean it is of the essence of international
9 relations that states do seek through diplomacy to
10 promote ----

11 LORD JUSTICE MOSES: Self interest.

12 MR. SALES: Promote their state's interest. The two points that I
13 seek to make are first of all that the court can see that the
14 government is at the moment in the middle of a process
15 operated by the relevant treaty organization, the OECD, of
16 being called to account for what it has done and arising out
17 of that in my submission. I think it is the fourth principle
18 that I identified from *Launder* and *CND*, namely that there are
19 reasons of public policy and the national interest why the
20 court should abstain, even if the *Launder* principle applies,
21 should abstain from giving a ruling are applicable here.

22 My Lords, I would add in parenthesis and I appreciate
23 there are layers of the argument so I apologize for that, but
24 in so far as the court were persuaded that *Launder* applies on
25 a wider basis but in the more attenuated way by reference to a

1 tenable view or plausible view, obviously, the more the courts
2 just deal with matters on the basis of a plausible view the
3 less impact there may be upon international relations. I just
4 in parenthesis draw that to my Lord's attention.

5 LORD JUSTICE MOSES: To adapt Brown LJ's words, it is not going to
6 place you in an impossible possible, it places you in a
7 difficult position if they are arguing for an interpretation
8 which their own courts have said is untenable.

9 MR. SALES: Yes, so even at that level ----

10 LORD JUSTICE MOSES: So judicial restraint.

11 MR. SALES: Even at that level my submission is that the
12 appropriate course for the court is judicial restraint.

13 My Lords, if one goes to ----

14 LORD JUSTICE MOSES: I will try and restrain my Lord then!

15 (Laughter) Yes.

16 MR. SALES: Tab 13 of the core bundle where we have
17 Mr. Dickerson's evidence, my Lords, I do not think we have
18 look at this at before.

19 LORD JUSTICE MOSES: Except that we have read it, I mean we have
20 read all this in advance.

21 MR. SALES: Yes, but if I can just remind my Lords then of the
22 main points. Paragraph 3, OECD Convention provides for peer
23 review of the state party's compliance with the Convention,
24 working group on bribery with WGB, the principal tool for
25 monitoring and evaluating state party's compliance with the

1 Convention.

2 My Lords, the points there are that far from there being
3 an Article 13 situation where the Convention requires the
4 domestic legal order to recognize and protect human rights,
5 what we have in the OECD Convention is a straightforward
6 treaty between states with its own enforcement mechanism which
7 operates on an interstate basis:

8 "4. Periodically each state party to the Convention
9 undergoes a detailed evaluation of its compliance with the
10 Convention and each state party to the Convention must have
11 also take an active role in evaluating other states party's
12 compliance. The peer review of a state party is conducted by
13 experts with two other states parties and the OECD
14 Secretariat. They act as leave(?) reviewers and produce a
15 report on the basis of their review."

16 This is a mechanism to which the United Kingdom is
17 subject at the moment and it is ongoing at the moment:

18 "In January 2007 the Director of the SFO's decision to
19 discontinue the Al Yamamah investigation was raised by the
20 chair. It is part of a tour de table discussion which forms
21 part of regular WGB meeting agenda. At the meeting in March
22 2007 the Director's decision formed part of the post Phase 2
23 discussion, Phase 2 with a review having taken place" ----

24 LORD JUSTICE MOSES: We have read that.

25 MR. SALES: Yes, my Lord. Then there is a discussion of the

1 ongoing process of accounting by the United Kingdom to the
2 relevant body which is the WGB and through them the states
3 party to the OECD.

4 MR. JUSTICE MOSES: It was (6) bullet point 4 that I was intrigued
5 by. Is there any room in these judicial review proceedings,
6 suppose you are right as a matter of law and we agree, we
7 cannot interpret with Article 5, the fact remains that the
8 decision was taken on the basis that the reasons to
9 discontinue the investigation were not, whatever the wording
10 might be, economic and were not diplomatic relations. Forget
11 about treaty. Is it open then for this court to say, well, it
12 is, whatever the polite words are, irrational being the
13 impolite word but outwith the range of reasonable decisions to
14 say that this was not made on diplomatic relations grounds.
15 Do you see what I mean? I am not asking for a response to the
16 right answer. I am saying in a sense is Article 5 merely a
17 mechanism by which you look at the lawfulness and public law
18 terms of the decision that was made, understanding all your
19 points about the width of discretion. Do you see what I mean?

20 MR. SALES: I think so, my Lord. My answer to it is that it goes
21 back to the Launder analysis because if the court is going to
22 use the interpretation of Article 5, which I understand my
23 Lord still to be putting to me as the test for the lawfulness
24 in domestic law of the decision that has been made, one is in
25 the fields governed by the Launder approach.

1 LORD JUSTICE MOSES: One may be, but in a way does it help you?
2 Forget all about the treaty. Here we have the Director saying
3 I made this decision on ex grounds, namely national security
4 grounds, but I did not make this decision, for whatever reason
5 I am telling you the court I did not make this decision on
6 economic grounds or because I feared they might damage
7 diplomatic relations with Saudi Arabia, that is what he swears
8 to in his witness statement. It does not matter why he took
9 that view. In fact we know it is because of Article 5, but
10 setting that aside, have we not still got to analyze whether
11 it is a tenable point of view to say that you can draw
12 distinction between the grounds in which he did make the
13 decision and the grounds which expressly say he did not make
14 it?

15 MR. SALES: In my submission, the answer to that question is no,
16 as my Lord puts it to me, because the only reason the
17 distinction is being drawn is for the purposes of forming
18 views about the application of Article 5.

19 LORD JUSTICE MOSES: That is forbidden territory. What is not
20 forbidden territory is to apply what you call the ordinary
21 principles of public law in determining the lawfulness of the
22 director's decision.

23 MR. JUSTICE SULLIVAN: If someone says "I did not take account of
24 the potential effect upon relations with another state" then
25 all the documents make it absolutely clear that that is indeed

1 what was being considered. No sensible person, I mean you do
2 not need, if I may say so with great respect to international
3 lawyers, a room full of international lawyers to tell you, you
4 just need a basic command of English and reading the documents
5 and anyone can see that that is what they were taking into
6 account yet there is this bland statement "we did not take
7 that into account". Now, can that be rational ----

8 MR. SALES: My Lord, it is rationale.

9 MR. JUSTICE SULLIVAN: It is someone just refusing to admit
10 reality.

11 MR. SALES: It is rational and I am going to move on to
12 submissions that it was right but my submissions will
13 precisely be upon the proper interpretation of the
14 OECD Convention and the statements that are made by the
15 Director that he did not have regard to matters which were
16 ruled out of court by the OECD Convention.

17 LORD JUSTICE MOSES: This is where we get into the Launder
18 argument. In a sense it becomes dancing on a pin. Let us
19 assume that you are absolutely right about the interpretation
20 of Launder and the importance of not derogating, save under
21 very clearly defined circumstances, principle in Rayner and
22 Lyons and such. At the end of the day, forgetting whatever
23 motivated him, here is the Director under challenge,
24 permission has been given and he, on Wednesbury principles, is
25 being accused of reaching an unlawful decision. If, as my

1 Lord puts to you -- again I do not want an answer to the
2 question at this stage -- but if in fact it is untenable, it
3 is impossible to say that it was not for the reasons he said
4 it was not -- sorry, about that -- then surely the court could
5 intervene and it does not matter whether you are right or
6 wrong about Launder. That is the question. I mean, why does
7 this matter so much?

8 MR. SALES: My Lord, in my submission, it matters both as to the
9 way the case is put against us ----

10 LORD JUSTICE MOSES: Of course, yes.

11 MR. SALES: Because it has never been put in the way that my Lord
12 is putting it to me, but more profoundly it is because of the
13 way in which the reasoning was structured in relation to this
14 decision.

15 In so far as it is being said that regard is not had to
16 diplomatic relations, that is in the context of the Director's
17 understanding of Article 5 of the Convention.

18 LORD JUSTICE MOSES: Now, and that ----

19 MR. SALES: Now, it ----

20 LORD JUSTICE MOSES: I am so sorry.

21 MR. SALES: I am sorry, my Lord.

22 LORD JUSTICE MOSES: No, I must let you finish. It is just what
23 makes me so uncomfortable about this, why I am asking these
24 questions, is whether your careful analysis, which certainly
25 at first blush sounds absolutely right, actually breaks down

1 at this point, because at the end you are always going to be
2 faced with the argument and perhaps that is what Richards LJ
3 had in mind with the argument, well, here under domestic
4 public law principles are reasons given for a decision and we
5 say they may make no sense, they just do not stack up.

6 MR. JUSTICE SULLIVAN: Yes, someone saying I did not take account
7 of the potential effect on relations with another state and I
8 have a file full of documents that make it absolutely clear
9 beyond any doubt that that is exactly what was done.

10 MR. SALES: But, my Lord, the statement is made in the context of
11 explaining that what has been done is in accordance with
12 Article 5. If we are correct in our submissions as to the
13 proper interpretation of Article 5 then a rational decision
14 will have been made. It will not be irrational.

15 LORD JUSTICE MOSES: Absolutely, yes.

16 MR. SALES: What one is debating, if I may respectfully make the
17 submission, is the characterization of matters which are taken
18 into account. The Director has always been completely clear
19 as to the nature of the matters which have been taken into
20 account, namely, in relation the threats that arose out of the
21 stance adopted by Saudi Arabia. What then has occurred is a
22 debate about the proper characterisation of the matters which
23 were taken into account.

24 First of all looking at the matter as a pure matter of
25 domestic law, assume that Article 5 did not exist at all.

1 LORD JUSTICE MOSES: Yes.

2 MR. SALES: My submission, this is going back to the domestic law
3 point, is that the matters in fact taken into account were
4 legitimate matters to be taken into account. In my submission
5 it would not matter how the Director happened to characterize
6 those matters because the substance of the point would be
7 clear for all to see from his evidence as to what he did and
8 did not take into account.

9 MR. JUSTICE SULLIVAN: I am sorry to interrupt, there is the
10 assertion they were legitimate matters to take into account
11 when, I mean, I can read Article 5, the words are not terribly
12 complicated and nor are the words in the file. I am trying to
13 understand what the submission is. Is the submission that you
14 can take into account potential effect on relations with
15 another state in so far as they relate to national security or
16 if they relate to national security? I mean, is that the
17 submission?

18 MR. SALES: My Lord, the submission is going to be and I was not
19 seeking to deal with Article 5 at this point but I understood
20 my Lord first to be putting to me a point on domestic judicial
21 review law ----

22 MR. JUSTICE SULLIVAN: Domestic rationality.

23 MR. SALES: ---- which I was seeking to answer. I am going to
24 come on, I will seek to do it now if my Lord really wants me
25 to.

1 LORD JUSTICE MOSES: No.

2 MR. SALES: I was going to come on to deal with my submissions on
3 Article 5 distinctly. I was at this stage simply trying to
4 respond to the points that have been put to me by the court as
5 to whether in fact the Launder point drops out of the equation
6 and it all boils down to irrationality. My submission is, no,
7 it does not. The Launder point is the necessary foundation
8 for my learned friend's case.

9 In giving that answer, my Lords, I was then seeking to
10 back it up by argument, which was the particular point that I
11 was making which proceeded my Lord, I probably did not make it
12 clear enough. First of all, let us assume that there is no
13 Article 5. Let us assume that there just is no international
14 law obligation. It is clear what matters the Director has
15 taken into account and on my argument under the domestic law
16 point he was entitled to take those matters into account and
17 it could not be said that he has done anything irrational in
18 relation to the decision he took.

19 What becomes important potentially is the very point my
20 Lord, Sullivan J, then takes me to, which is Article 5. To
21 bring Article 5 into the analysis is, in my respectful
22 submission, precisely to go back to the Launder analysis,
23 because it raises the question, is it appropriate to bring
24 Article 5 into the analysis. I do not seek to go over all my
25 submissions again but I do say that ----

Transcript prepared without access to case documentation.

1 LORD JUSTICE MOSES: You are saying absent Article 5 there was no
2 reason why the Director should not have stopped this because
3 he was worried about the Typhoon contracts.

4 MR. SALES: Potentially that may have been so.

5 LORD JUSTICE MOSES: It must be right, well, why not, if he has
6 this width of discretion, all sorts of considerations, he can
7 take into account diplomatic relations, economic
8 considerations, but what forbids it is Article 5.

9 MR. SALES: Yes.

10 LORD JUSTICE MOSES: So he thought.

11 MR. SALES: Yes. What then happens is that the Director, when he
12 is making points about not taking into account these matters,
13 is specifically making reference to the characterization of
14 particular events in light of what Article 5 decides.

15 Now, if the court moves to apply so that it can review
16 the application of Article 5, this process of characterisation
17 by the Director will become legally relevant to the lawfulness
18 of his decision ----

19 LORD JUSTICE MOSES: I am sorry to keep on but it is so important.
20 His characterisation depends upon, in his mind, a distinction
21 between international relations and national security.

22 MR. SALES: Yes.

23 LORD JUSTICE MOSES: You are saying, even if he has drawn the line
24 wrongly this court cannot interfere because in interfering it
25 would itself be interpreting Article 5.

Transcript prepared without access to case documentation.

1 MR. SALES: My Lord, that is right, because ----

2 LORD JUSTICE MOSES: It does not, in effect, matter whether he is
3 right or wrong about it.

4 MR. SALES: Well, as a matter of international law it does not
5 matter whether he is right or wrong about it.

6 LORD JUSTICE MOSES: As a matter of domestic law ----

7 MR. SALES: And as a matter of domestic law it does not matter
8 whether he is right or wrong about it. We know that he acted
9 upon particular reasons which have been explained and if
10 Article 5 drops out of the picture -- I am repeating myself
11 but it is important that I make it clear -- if Article 5 is
12 not in the picture at all, then, in my submission, we know
13 that he has acted on the basis of lawfully relevant grounds
14 under English domestic law.

15 Now the context of this debate is my Lord's question to
16 me, whether Launder drops out of the picture and whether the
17 court needs to worry about Launder. In my submission Launder
18 does not drop out of the picture and on this part of the case
19 what precisely is in issue is whether Launder applies and if
20 it does apply in what way it applies.

21 LORD JUSTICE MOSES: You say if Launder drops out of the picture
22 it is the end of the case for the claimants anyway.

23 MR. SALES: Yes.

24 LORD JUSTICE MOSES: Leaving aside the rule of law point.

25 MR. SALES: Yes, there is the domestic law point and then ----

1 LORD JUSTICE MOSES: It is the end of this part of the case.

2 MR. SALES: It is the end of this part of this case, yes. There
3 is no space for the claimants now to step around a Launder
4 analysis by trying to say, well, if Launder drops out of the
5 picture, that is why my learned friends relied upon Launder
6 fair and square and why I have taken some little time to try
7 to explain my reasons to the court why we say, respectfully,
8 that it does not ----

9 LORD JUSTICE MOSES: I was just merely using it to test your
10 propositions on Launder, whether one can really confine the
11 conditions when interpreting this narrowly but we have been
12 through that.

13 MR. SALES: Yes. My Lords, going back to Mr. Dickerson's
14 statement, the two points that I seek to draw from it are,
15 first of all, to emphasize this the United Kingdom is subject
16 to this process of enforcement but at the international level,
17 which is the appropriate level.

18 Second, to emphasize that this process of accounting and
19 enforcement is continuing at the present time.

20 Third, to pick up at paragraph 9, perhaps I could invite
21 my Lords to remind themselves of paragraphs 9 and 10.

22 LORD JUSTICE MOSES: Yes (Pause) Yes, I do not know why the last
23 bullet point, just before 7 is put in there in a statement to
24 the court.

25 MR. SALES: Well, my Lord.

1 LORD JUSTICE MOSES: What is it there for? It does perturb me.
2 What is the relevance of what it is going to do next time in
3 relation to the legality of what it did this time? I raise it
4 because we will be coming to it when we actually come to the
5 facts of this case. It is no answer to the points made by the
6 claimant about, "how do you protect national security if you
7 behave like this" to say, "oh, well it does not indicate any
8 weakening", I mean it is just rhetoric. Of course it
9 indicates a weakening if you give way to the threat, an
10 impermissible threat from another state. It may be that your
11 submissions in law are entirely right, there is nothing you
12 can do about it, but you cannot meet that just by saying, "We
13 are still committed". That is what you put in political
14 documents. You do not make it in statements to the court.
15 MR. SALES: My Lord, I think that at paragraph 6 what is being
16 given is an account of the position adopted by the UK ----
17 LORD JUSTICE MOSES: I see, yes. That is inevitable.
18 MR. SALES: That is inevitably a position which has a political
19 dimension to it.
20 LORD JUSTICE MOSES: I see, yes.
21 MR. SALES: The relevance of the position being adopted by the
22 United Kingdom Government is that it is legitimate in the
23 sense that it is legitimate for states to press other states
24 to international instruments to recognize that an
25 interpretation which protects the national security of the

1 state pressing for that recognition, for a particular
2 interpretation of an international instrument. Secondly, to
3 emphasize that it is also relevant to the ultimate proper
4 construction of Article 5.

5 My Lords, to do that, may I invite you to go to the
6 Vienna Convention on the law of treaties which we have in
7 volume E, tab 14. My Lords, this is also obviously going to
8 be relevant to my submissions on the interpretation of
9 Article 5 when I move onto to it. It is tab 14 and the
10 reasons I am going for it is to ----

11 LORD JUSTICE MOSES: Sorry, my volume E starts at tab 33.

12 MR. SALES: I am being told that my Lord might have a second E,
13 why, I do not know.

14 LORD JUSTICE MOSES: I have indeed. No, I think it is the way, it
15 is a C which has got smeared because somebody has done it in
16 fibre tip.

17 MR. SALES: I am sorry, I apologize.

18 LORD JUSTICE MOSES: Normally the office just stick labels over so
19 you cannot read it!

20 MR. SALES: Tab 14, Vienna Convention. My Lords, I will take you
21 through this. It is relevant to two points so that my Lords
22 know. First of all it is to support the submissions I have
23 been making by reference to Mr. Dickerson's statement as to
24 why the United Kingdom has a legitimate interest in pressing
25 for its interpretation to be accepted generally by the OECD

1 states and why the interpretation of the Convention is not in
2 fact on the international plane completely settled law at the
3 moment.

4 That is part of my argument why the court should not
5 proceed on a Launder-type basis to give a ruling itself but,
6 secondly, this will be a prelude to the submissions that I
7 move on to make then about the interpretation of Article 5. If
8 one goes to page 12 in the documents, section 3,
9 Interpretation of the Treaties:

10 "Article 31, General Rule of Interpretation.

11 (1) a treaty shall be interpreted in good faith in
12 accordance with the ordinary meaning to be given to the terms
13 of the treaty and their context and in the light of its object
14 and purpose. The context and purposes of the interpretation
15 of the treaty shall comprise in addition to the text including
16 its preamble and annexes, any agreement relating to the treaty
17 which is made between all of the parties in connection with
18 the conclusion of the treaty.

19 (2) any instrument which was made by one or more of the
20 parties in connection with the conclusion of the treaty and
21 accepted by the other parties as an instrument related to the
22 treaty.

23 (3) there shall be taken into account together with the
24 context:

25 (a) any subsequent agreement between the parties

1 regarding the interpretation of the treaty or of the
2 application of its provisions,

3 (b) any subsequent practice in the application of the
4 treaty which establishes the agreement of the parties
5 regarding its interpretation,

6 (c) any relevant rules of international law applicable
7 to the relations between the parties."

8 Then at Article 32, one moves to supplementary
9 interpretation.

10 LORD JUSTICE MOSES: Yes.

11 MR. SALES: You get the preparatory travaux preparatoires.

12 My Lords, so far as the steps being taken by the
13 United Kingdom Government are concerned in relation to the
14 interpretation of the treaty, they are with the relevant body
15 and are seeking to secure support for the United Kingdom's
16 interpretation of the treaty which would then, under
17 Article 31(3), become relevant matters relating to the
18 construction of the treaty itself.

19 My Lord, against this background if I can go back to my
20 skeleton argument at paragraph 98 we make the respectful
21 submission that this is not before the domestic court in the
22 present context:

23 "There is a wide discretion afforded to the Director's
24 decision where considerations of national security and the
25 international relations to other parties to the Convention are

1 in issue to attempt to decide definitively the proper meaning
2 and effect of Article 5 even if the court is entitled to
3 consider the construction of Article 5 (unclear) that the
4 Director's decision was lawful, provided that the view he took
5 the risk means there was a tenable view", which it clearly was
6 for reasons that I am about to come to.

7 My Lords, finally under this head, that is the Launder
8 head and in any event the defendant submits that the Launder
9 exception is inapplicable on the facts:

10 "The Director considered and remains of the view that
11 his decision to discontinue the investigation did not put the
12 United Kingdom in breach of its international obligations
13 under Article 5, but he has also explained that even if he had
14 thought of discontinuing the investigation was not compatible
15 with Article 5, he is in no doubt whatever that he would still
16 have decided the threat to national and international security
17 was so compelling" ----

18 LORD JUSTICE MOSES: What is the relevance of all of this? That
19 is just do not give any relief, is it?

20 MR. SALES: My Lord, it is relevant to two levels, one is the
21 point to which I am moving towards on Fininvest, which is that
22 if the relevant decision-maker makes it clear that the
23 relevant considerations were, in his view, so compelling
24 regardless of the international obligation, again that is a
25 reason why the court does not venture upon interpretation of

1 the international convention. That is the first point. The
2 second point is the discretionary point.

3 LORD JUSTICE MOSES: Yes.

4 MR. SALES: My Lord, by way of background to the Fininvest
5 approach, of course, that needs to be taken against the
6 background of the general J.H. Rayner principle and Lyons
7 principle. It operates as another reason why the courts
8 should not in those circumstances move to seek to interpret
9 the international instrument. My Lord, if one goes to
10 Mr. Wardle's first witness statement in the core bundle at
11 tab 5, my Lords, if I could invite you to remind yourselves, I
12 know you have read it already, at 50 and 51, at page 100.

13 LORD JUSTICE MOSES: Yes. (Pause) It is the note, yes.

14 MR. SALES: My Lord, going back to my skeleton argument at 99:

15 "The Director did not specifically consider this
16 question at the time because it did not arise. He was in no
17 doubt that his decision was compatible with Article 5. He
18 expressed his view on this point as soon as it became
19 relevant" and then we give the reference to the letter in
20 which he does that.

21 My Lords, at paragraph 100 the claimants complain that
22 it is retrospective reasoning and allege that it is
23 inadmissible. You remember that my learned friend ----

24 LORD JUSTICE MOSES: Well, ex post facto ratiocination ----

25 MR. SALES: Yes. My Lords, we say that that is not a proper

1 characterisation of the situation that has arisen here. The
2 Director has made clear how compelling he thought the national
3 security considerations were in relation to his decision at
4 the relevant point in time.

5 My Lords, one then goes to the Fininvest case.

6 LORD JUSTICE MOSES: I mean the accurate way of putting it is that
7 he accepted what he was advised was the imminence of the
8 threat.

9 MR. SALES: Yes, my Lord, just to go further it could not be
10 suggested that he was acting irrationally in accepting that
11 advice.

12 LORD JUSTICE MOSES: There was nothing he could do. I mean he
13 knows nothing about it. He is entirely dependent on the good
14 faith of those who advise him and there is nothing the court
15 can do to second guess that.

16 MR. SALES: My Lord, his reliance upon what he was being told is
17 fully in accordance with general principles of law, in
18 particular the approach of the House of Lords indicated in
19 Huang.

20 LORD JUSTICE MOSES: Yes.

21 MR. SALES: My Lord, one then goes to the Fininvest case at
22 volume D, tab 52, if I can ask you to cast your eyes over the
23 factual part of the headnote and then holding (3) for context.

24 LORD JUSTICE MOSES: (Pause) Yes.

25 MR. SALES: If my Lords could go forward to page 758. I invite

1 you to read 758 E through to 759 C.

2 LORD JUSTICE MOSES: (Pause) Yes.

3 MR. SALES: My Lords, it is fair to say that this case arises in a
4 slightly different context from Launder.

5 LORD JUSTICE MOSES: Bribery and corruption, yes.

6 MR. SALES: My Lord, it arises in a context where, in effect, the
7 legislative provision requires regard to be had to the
8 international obligation unless the Secretary of State
9 specifically chose not to, so it is a sort of opt out
10 situation rather than an opt in situation.

11 None the less what is said at 758 G to H is, in my
12 submission, germane to the situation we are dealing with
13 because, in my submission, what Simon Brown LJ is having
14 regard to in that passage is the fundamental principle that
15 one takes from the J.H. Rayner case, that the international
16 obligation is not part of English domestic law and that it
17 was, therefore, available to the Secretary of State to decide
18 not to ----

19 LORD JUSTICE MOSES: That is because of the wording of Article 2,
20 is it not?

21 MR. SALES: Well ----

22 LORD JUSTICE MOSES: Permissive, assistance may be refused if.

23 MR. SALES: My Lord ----

24 LORD JUSTICE MOSES: You can decide that he does not have to and
25 so Brown LJ is saying, well, since he does not have to the

1 fact that he may have misconstrued it is neither here nor
2 there; is that not the point?

3 MR. SALES: No, my Lord, it is going further than in my respectful
4 submission.

5 LORD JUSTICE MOSES: Well, you had better show me that.

6 MR. SALES: Picking it up at G, "not saying that the Secretary of
7 State was bound to reach a decision as to whether or not these
8 offences were themselves all connected with political
9 offences". The prima facie position is that he should reach a
10 decision on that question.

11 LORD JUSTICE MOSES: Yes.

12 MR. SALES: Which is governed by the international convention.

13 LORD JUSTICE MOSES: Yes.

14 MR. SALES: "But he could instead, had he wished, have decided
15 that whether or not they were, whether or not in other words
16 a discretion arose under Article 2(a) he would not in any
17 event exercise it to refuse co-operation with the Italian
18 authorities in the particular circumstances of this case. Had
19 he followed that course or indeed had he deposed in the
20 present proceedings that even had he reached a contrary view
21 on the political offence question he would still have decided
22 to comply with the request, his decision would, in my
23 judgment, be proof against this particular ground of
24 challenge, irrespective of whether or not he directed himself
25 correctly on the substantive issue".

1 LORD JUSTICE MOSES: It is words whether or not, in other words, a
2 discretion arose under Article 2(a) is actually the words you
3 need.

4 MR. SALES: Yes, but also the words at the end "whether or not he
5 directed himself correctly on the substantive issue". Plainly
6 Simon Brown LJ is contemplating that he may have given himself
7 a direction as to the meaning of political offence.

8 LORD JUSTICE MOSES: Yes, thank you.

9 MR. SALES: My Lords, we say that that same reasoning applies in
10 this case.

11 At paragraph 100 of our skeleton argument we say, "as
12 was held in Fininvest, if the decision-maker had to
13 (unclear)". My Lords the underlying point again goes back to
14 the way in which the court manages the interaction between
15 circumstances where it is being invited to rule upon an
16 international instrument but against the background of the
17 J.H. Rayner principles. We say that my learned friend's
18 appeal to Ermakov is simply misplaced in relation to the legal
19 analysis which operates in relation to this.

20 LORD JUSTICE MOSES: I cannot remember what the plea to Ermakov
21 was.

22 MR. SALES: It is the ex post facto ratiocination.

23 LORD JUSTICE MOSES: Oh yes.

24 MR. SALES: The two points that I make are, it is not, on proper
25 characterisation, an ex post facto explanation of his

1 decision. He has always said "my decision is because I felt I
2 was compelled to this particular result by considerations of
3 national interest". There is then the debate about whether
4 that complies or does not comply with the analysis which the
5 claimants say is required under Article 5. In terms of
6 explaining his decision there is no ex post facto explanation.

7 The second point is having regard to Fininvest which, in
8 my submission, is to be understood again as a way that the
9 court manages the tension in this area between J.H. Rayner and
10 circumstances in which it is invited to rule upon
11 international instruments, that again the court faced with
12 such evidence should not seek then to go on and deliver for
13 itself a ruling upon the proper interpretation of the domestic
14 instrument, sorry international instrument.

15 LORD JUSTICE MOSES: Yes.

16 MR. SALES: Then, my Lords, the very last point on Launder is
17 indeed a relief point which we make at paragraph 101.

18 LORD JUSTICE MOSES: That is the point you have made, yes.

19 MR. SALES: I think I have probably sufficiently made that point,
20 but as I emphasize our prior point is the Fininvest.

21 LORD JUSTICE MOSES: Which is a distinct point.

22 MR. SALES: Which is a distinct point.

23 LORD JUSTICE MOSES: Yes, 2 o'clock.

24 MR. SALES: Yes.

25 LORD JUSTICE MOSES: How are we doing?

1 MR. SALES: My Lord, that is the end of Launder and now Article 5
2 OECD, so I think that we are running to time.

3 LORD JUSTICE MOSES: You are now?

4 MR. SALES: Sorry, I have finished now my submissions on the
5 application of the Launder principle, I have nothing more to
6 say on that. The next topic is interpretation of Article 5 of
7 the OECD treaty.

8 LORD JUSTICE MOSES: Yes.

9 (Adjourned for a short time)

10 LORD JUSTICE MOSES: Yes.

11 MR. SALES: My Lords, I was moving to my submissions on the
12 construction of Article 5 of the Convention. Article 5 is in
13 volume E, tab 1, page 351, Article 5:

14 "Enforcement. Investigation and prosecution of the
15 bribery of a foreign public official shall be subject to the
16 applicable rules and principles of each party." Then it goes
17 on "they shall not be influenced by considerations of national
18 economic interest, the potential effect upon relations with
19 another state or the identity of the natural or legal persons
20 involved."

21 In my submission the relevant points of construction
22 turn upon the inter-relationship between the words "shall be
23 subject to the applicable rules and principles of each party"
24 which means the exercise of the ordinary principles of
25 prosecutorial discretion within the state party with the words

1 "the potential effect on relations with another state".

2 The reference to the "subject to the applicable rules
3 and principles of each party" is commented on in the
4 commentaries on convention which I will come to in a moment.
5 My Lords may care to note that is at volume E, tab 14 where
6 the fundamental nature of national regime of prosecutorial
7 discretion is referred to. These commentaries were adopted at
8 the same time as the Convention was introduced and adopted.

9 My Lords, our submission is that in international law
10 construing the terms of a treaty, a strongly purposive
11 approach is adopted. I am now, I should say, at page 24 of
12 our skeleton argument, paragraph 60 and following. I have
13 already shown my Lords, Article 31(1) of the Vienna
14 Convention. Paragraph 62:

15 "The object and purpose of the OECD Convention was not
16 directed to limiting in anyway the ability of a contracting
17 state to take steps it judged necessary for protection of
18 national security or the right to life. The Convention was
19 not negotiated with any limitation on national security in
20 mind. No reference is made to this in the Convention, nor
21 does it appear that any reference was made to this in the
22 negotiations leading up to it. It is relevant in this regard
23 that the Convention contains no derogation provision in light
24 of threats to national security."

25 Then, my Lords, we contrast other treaties of which the

1 most prominent examples familiar to the court will be
2 Article 15 of the ECHR and Article 4 of the ICCPR. My Lords,
3 we say that this absence of any power of derogation on the
4 face of the treaty is directly relevant to the interpretation
5 to be given to Article 5 and, in particular, the first
6 sentence of Article 5. In our submission the significance of
7 any reference to a power of derogation is that the contracting
8 parties cannot be taken to have considered that Article 5 of
9 the Convention would have the effect of conflicting with such
10 interests including national security and right to life and
11 that, therefore, no provision was required to regulate any
12 such conflict.

13 LORD JUSTICE MOSES: It is so odd that, is it not? It is most
14 curious.

15 MR. SALES: In my submission, it is not curious when one
16 appreciates what the parties intended by the first sentence in
17 Article 5. My learned friend seeks in answer to this to point
18 to Article 25 of the draft articles on state responsibility.
19 In my submission that is no answer at all to this point on the
20 construction of a treaty. Article 25 is a question of a
21 doctrine of customary international law applying separately
22 from the interpretation of treaties.

23 LORD JUSTICE MOSES: Yes, it is not to do with whether there is a
24 breach, it is whether if there is a breach it is excusable.

25 MR. SALES: Precisely so, as indeed ----

1 LORD JUSTICE MOSES: We are both ad idem on that.

2 MR. SALES: Yes, precisely so, but our argument is directed to the
3 interpretation of the treaty which is a prior question. My
4 Lords, I was just going to make the point that in Article 25
5 the fact that it is separate from questions of interpretation
6 is made abundantly clear by both the Hungarian dam case, I
7 will not try to pronounce it, it is volume B, tab 21, and the
8 Palestinian war case, volume B, tab 20. The issue for the
9 court is not the interpretation of Article 25; it is the
10 interpretation of Article 5 of the OECD Convention.

11 LORD JUSTICE MOSES: I repeat what I put to you, and we will no
12 doubt come to, is it makes Article 5 so curious that
13 inevitably any state that is of any strategic significance in
14 the world at all, one of the potential effects on the
15 relations with that state of investigating the prosecutor for
16 bribery will be that there will be a lack of co-operation in
17 relation to important national security and strategic
18 considerations. I mean it is as plain as a pikestaff. That
19 is one of the reasons why we have diplomatic relations with
20 other countries, so that we can, in our own self-interest,
21 protect ourselves. It may be what one can carve out of that
22 but that is the very essence of diplomatic relations.

23 MR. SALES: My Lord, in my submission it is the interpretation put
24 forward by the claimants which leads to the curious result for
25 this reason. The opening sentence of Article 5 plainly

1 incorporates as a fundamental matter the reservation to each
2 contracting party of its ordinary rules and principles
3 governing the exercise of prosecutorial discretion. Those
4 ordinary principles will include protection of national
5 security and protection of the right to life.

6 What would be curious, in my submission, is an
7 interpretation of the second sentence in Article 5 which
8 carves out from the usual ability of the prosecuting
9 authorities of a contracting state to rely upon such matters
10 going to national security and protection of life which are
11 fundamental matters, would carve out the ability of the state
12 to do so where the mechanism, purely the mechanism by which a
13 risk to those interests arises, relates to action taken in the
14 international relations between the two states.

15 LORD JUSTICE MOSES: That is the point you make in your skeleton.

16 MR. SALES: My Lord, it is but it is of the absolute essence of
17 the difference between the parties on the argument here.

18 LORD JUSTICE MOSES: I do not know what it is doing, that second
19 sentence. I understand the economic interest. What sort of
20 relations are we talking about?

21 MR. SALES: We are talking about general international ----

22 LORD JUSTICE MOSES: What does that mean, general international?

23 I do not know what it means.

24 MR. SALES: My Lord, it is international ----

25 LORD JUSTICE MOSES: Or whether you have nice cocktail parties in

1 the embassy and it will not be quite so lavish, I mean what
2 does it mean?

3 MR. SALES: What it means, in my submission, having regard to the
4 commentaries and the other materials that we referred to are
5 the general diplomatic relations with another country which is
6 a matter, in my submission, distinct from the particular
7 matter which was in issue in this case where there was a
8 stance adopted by Saudi Arabia which gave rise to a direct
9 threat to national security and the security of the British
10 population.

11 LORD JUSTICE MOSES: I do not really like the word stance giving
12 rise to a threat.

13 MR. SALES: I am sorry, my Lord.

14 LORD JUSTICE MOSES: I do not really like the expression in the
15 light of the true facts of this case, stance giving rise to a
16 threat. It was a positive threat, was it not?

17 MR. SALES: Very good, my Lord, yes.

18 MR. JUSTICE SULLIVAN: Sorry, Mr. Sales, just to take you up on
19 it. It seems to be perfectly obvious that the second sentence
20 is qualifying the generality of the first sentence.

21 MR. SALES: Yes.

22 MR. JUSTICE SULLIVAN: That although of course they can have their
23 applicable rules and principles which would enable the
24 prosecutors perhaps in some places to take account of national
25 economic interest and effect on relations in other states and

1 so on, the general prosecutor's discretion, everyone agrees,
2 is going to be constrained, so the prosecutors must not be
3 influenced by the potential effect on relations with another
4 state.

5 What I am bound to say concerns me is if there is some
6 sort of imaginary "(unless those relations have some sort of
7 impact on national security)", it effectively drives a coach
8 and horses through Article 5 because given the broad breadth
9 of prosecutorial discretion, whilst the Director says in this
10 case the considerations are very grave, it would mean that any
11 issue of national security is outwith Article 5 as far as I
12 can see it on your submission, so any of these national
13 prosecutors could say, "well, this is a national security
14 issue, the threat might not be too bad. It is a medium sort
15 of threat but we think in the public interest threat to
16 national security, it means we should stop prosecution". Does
17 this not, effectively, drive a coach and horses through it for
18 the very reason my Lord has indicated that part and parcel of
19 relations with other states, we are not just concerned with
20 cocktail parties, we are concerned with matters of security in
21 today's world.

22 MR. SALES: My Lord, in relation to with other states we are
23 concerned many things, we are concerned with reciprocal good
24 relations in relation to support for states for instance in
25 negotiating treaties.

1 MR. JUSTICE SULLIVAN: Yes.

2 MR. SALES: Support for stances adopted by states in relation to
3 matters of international concern, fostering good relations in
4 the sense of seeking to ensure that states support stances
5 adopted by one state in relation to matters which are of
6 direct concern to them on the international stage. There is a
7 range of matters which potentially fall within the management
8 of relations between states.

9 What, in my submission, is important in the context of
10 Article 5 is first of all that there is the preservation
11 specifically of the prosecutorial discretion for individual
12 states identified, as I say, as a fundamental matter in the
13 commentaries and then as a constraint upon that the general
14 language which is used including potential ----

15 LORD JUSTICE MOSES: It is a general something which is used ----

16 MR. SALES: A general language which is used, my Lord.

17 LORD JUSTICE MOSES: Yes.

18 MR. SALES: The question is whether that general language is
19 sufficient on the purposive interpretation of this provision
20 which we say is correct under international law to deprive a
21 state prosecutorial authorities from being able to exercise in
22 the ordinary way their judgment upon a matter as fundamental
23 as national security and the protection of the lives and the
24 population of the country.

25 LORD JUSTICE MOSES: In one sense the very question has such an

1 obvious answer it barely needs asking. Of course the state is
2 entitled to protect its citizens despite Article 5. It is
3 merely a question of at what stage it is proper for it to do
4 so which is where the Article 25 argument, for myself I mean I
5 quite see you may be right that it is a question of
6 interpretation not a question of breach, and it is absurd to
7 think, as you have so well submitted, that a state would be
8 giving up its right to protect its citizen. It is rather like
9 in English law nowadays, it is no good just waiving the flag
10 of national security for the very reasons my Lord identifies,
11 it is so wide that it is open to abuse and if it is open to
12 abuse then it fundamentally undermines the purpose of this
13 treaty. That is the problem, in other words to put it
14 crudely, where do you draw the line?

15 MR. SALES: Yes. My Lord, three points in relation to that.
16 First of all on Article 25. If Article 25 were the answer to
17 questions of this kind in the sphere we are dealing with there
18 would be no need for Article 15 of the ECHR and Article 4 of
19 the International Covenant which are specifically introduced
20 as matters in the text of a treaty enabling account to be
21 taken of national security matters.

22 Secondly, my Lords, so far as abuse is concerned I have
23 already drawn attention to the enforcement mechanism which is
24 available on the international plane, whereby states parties
25 have to account for decisions taken by them and justify their

1 action to the other parties to the Convention through the WGB.

2 Thirdly, my Lords, we do say that there is a qualitative
3 difference between the nature of the effects produced by what
4 Saudi Arabia has threatened to do and the sort of matters to
5 which the second sentence of Article 5 is directed.

6 I come back to what we have submitted in paragraph 62 as
7 to the object and purpose of the Convention, it was not
8 directed to restricting the ability of member states to rely
9 upon ordinary matters that they would take into account in
10 exercising prosecutorial discretion, including fundamental
11 matters of the protection of national security and the right
12 to life of its citizens.

13 There may be a boundary which is difficult to draw as so
14 often in international law as to where one has moved outside
15 that territory and into the territory which is covered by the
16 second sentence of Article 2, but, my Lords, that goes back to
17 the point that I have already made about the enforcement
18 mechanisms whereby the other states are in a position to
19 review what has been done and make judgments in the light of
20 their understanding of the treaty and the particular facts of
21 the case and that is the process that is going on at the
22 moment.

23 My Lords, if I may pursue my argument, at paragraph 63
24 we say, having made the point that the OECD Convention did not
25 address directly matters of national security other than by

1 inference, we say, in the first sentence of Article 5, the
2 parallel may be drawn with the advisory opinion of the
3 international court of justice in legality, the threat of use
4 of nuclear weapons. My Lords, that is at volume C, tab 38.
5 My Lords, picking it up at page 238 there is, I am afraid,
6 quite a long side-line passage, I do not suggest that you read
7 that all now. If I may, picking up paragraph 21, use of the
8 word permitted in the question put by the general assembly.
9 Then reference to states making submissions based on the Lotus
10 case which we come to.

11 Then, my Lord, one sees at page 239 in the middle of the
12 page there is the argument concerning legal conclusions to be
13 drawn from the use of the word permitted are germane
14 ultimately to the decision.

15 Then one sees at paragraph 24 the next argument coming
16 forward:

17 "Some of the proponents of the illegality of the use of
18 nuclear weapons have argued that such use would violate the
19 right to life as guaranteed in Article 6 of the ICCPR as well
20 as in certain regional instruments for the protection of human
21 rights."

22 My Lords, one goes over on that at page 240, last two
23 sentences of paragraph 25:

24 "In principle the right not arbitrarily to be deprived
25 of one's life applies also in hostilities. The test of what

1 is an arbitrary deprivation of life however and falls to be
2 determined by the applicable *lex specialis*, namely the law
3 applicable in armed conflict, which is designed to regulate
4 the conduct of hostilities as to whether particular loss of
5 life through the use of certain weapons in warfare is to be
6 considered an arbitrary deprivation of life contrary to
7 Article 6 of the covenant can only be decided by reference to
8 the law applicable in armed conflict and not deduced from the
9 terms of the covenant itself."

10 My Lords, that is a significant piece of legal analysis
11 because what the court is doing is taking general language
12 used in the treaties and then reading it as subject to *lex*
13 *specialis*, that part of the detailed law of humanitarian
14 international law which specifically governs what states may
15 and should do in relation to those particular matters.

16 Then, my Lords, if you go over the page to 241 at
17 paragraph 27:

18 "In both their written and oral statements some states
19 furthermore argue that the use of nuclear weapons would be
20 unlawful by reference to existing norms relating to the
21 safeguarding and protection of the environment in view of
22 their essential importance."

23 In this part of the court's reasoning what it is doing
24 is facing an argument based upon various environmental
25 treaties.

1 LORD JUSTICE MOSES: Is not the point you want at paragraph 30,
2 second paragraph?

3 MR. SALES: My Lord, yes, it is the first and second paragraphs
4 but the context in which arises is states saying "here are
5 some environmental treaties, if you look at the words of those
6 environmental treaties clearly you would be doing things
7 contrary to the environment if you use nuclear weapons" but
8 then the court taking the view that the issue, as my Lord has
9 pointed out, paragraph 30, "the court does not consider that
10 the treaties in question could have intended to deprive a
11 state of the exercise of its right of self defence under
12 international law because of its obligations to protect the
13 environment".

14 This mode of reasoning of the international court is
15 commented on by Dame Rosalind Higgins in her ----

16 LORD JUSTICE MOSES: I did not understand that extract, I do not
17 know what thickening of context means.

18 MR. SALES: My Lord, if we go to F11 which is where ----

19 LORD JUSTICE MOSES: We really have to, do we? When people write
20 like that I cannot understand it.

21 MR. SALES: Well, she is the president of the International Court
22 of Justice.

23 LORD JUSTICE MOSES: You write about thickening of contexts -- I
24 only say it because she is a fellow bencher.

25 MR. SALES: I think, my Lord, what she means by thickening of

1 context is the extended scope, as time goes by you get more
2 and more norms of international law for them to overlap and
3 potentially to apply in the same context. If you go back to
4 the 19th Century where you have one or two norms of
5 international law, the scope for them to conflict is very much
6 less than it becomes under modern conditions. So it is F11.
7 My Lords, her lecture is very specifically --

8 LORD JUSTICE MOSES: You have to find what is relevant and it may
9 be more difficult nowadays.

10 MR. SALES: Yes, she is addressing the sort of situation that in
11 my submission we are addressing here where you have, on the
12 face of it, two norms, in our case expressed in the first
13 sentence of Article 5 and in the second sentence of Article 5,
14 which on their terms lead to a situation where one has to
15 choose which prevails in a given context. She points to the
16 ICJ's decision in the nuclear test case as pointing the way
17 forward that you have to make, essentially, a value judgment
18 as to which of the particular rules most directly addresses
19 the particular question which arises for determination on
20 given facts of a particular case and it is at that norm which
21 is the norm which prevails.

22 At page 792 one sees that in the international context,
23 this is just above half way down, it is a particular issue
24 since you may get a question of not only who decides but whose
25 view prevails so the paragraph is:

1 "Really the issue is not only who decides and if they
2 are overlapping subject matter jurisdictions whose view
3 prevails, also how does any given court decide which of the
4 many norms now developed are applicable. What happens if
5 different tribunals see things differently? Can those bodies
6 function in isolation from each other? A good solution to
7 (unclear) problem may be engendered by the multiplying of
8 institutions and the deepening of international law. Tried to
9 offer a few thoughts.

10 Point 1 the widening and thickening of the context of
11 international law has meant that even within a given court or
12 tribunal there is often an issue as to the choice of
13 applicable law. It is not the entirely a matter of *lex*
14 *specialis*, rather it is a matter of locating the corpus of law
15 at the heart of a difficult issue. Thus, the court in its
16 advisory opinion, declining the suggestion that the legality
17 of nuclear weapons could be answered by reference to the right
18 to life provision" ----

19 LORD JUSTICE MOSES: Well, we have read to the end of the
20 quotation "by two recent examples".

21 MR. SALES: I am grateful, my Lord. Then at page 800 ----

22 MR. JUSTICE SULLIVAN: I am not too sure it is too difficult to
23 locate the corpus of law at the heart of this difficult issue,
24 it is Article 5, and what it says you should not take into
25 account.

1 MR. SALES: My Lord ----

2 MR. JUSTICE SULLIVAN: I am bound to say it is a very interesting
3 disposition on abstract, I mean I quite understand (unclear)
4 environmental treaty to consider issues of the right to life
5 necessarily, but it seems to me to be so far removed from the
6 issue before us.

7 MR. SALES: In my respectful submission it is not, because what
8 one is dealing with in the present context is first of all a
9 fundamental interest of the state, the national security and
10 the protection of its population and, secondly, a series of
11 international obligations upon the state to take steps to
12 protect its population from the risk of terrorism which I will
13 come on to. It is against that background that one has to ask
14 the question, is the language used in the second sentence of
15 Article 5 directed at controlling the ability of the state to
16 respond to those particular matters?

17 In my submission, that is why we start off at
18 paragraph 62. There is no indication, either in the
19 Convention itself or in the work leading up to it, that the
20 Convention was intended to apply in a way that would constrain
21 the contracting states from taking account of those
22 fundamental matters and complying with their general
23 obligations in relation to protection of its population
24 against the risk of terrorism.

25 My Lords, the other passage in the Dame Rosalind Higgins

1 article to which we drew attention is page 800.

2 LORD JUSTICE MOSES: Yes, I have read that as has my Lord read
3 that. He knows all about the costs of (unclear) approach
4 anyway.

5 MR. SALES: My Lord, it is against that background that we say
6 the general guidance given by the international court of
7 justice and by Dame Rosalind Higgins in her article does
8 become relevant and at paragraph 64 of our skeleton argument
9 we say:

10 "Against that background it would require the use of
11 very clear language in the treaty to indicate that the
12 contracting state intended to overwrite interest as
13 fundamental as the right to life and national security."

14 Our point is that Article 5 simply does not do that.
15 What it does is use general words in the second sentence, but
16 not general words directed specifically at the matter which is
17 under issue in this case, what happens where you have a direct
18 threat to national security and the right to life of the
19 British population? What may the prosecutorial authorities do
20 in the exercise of their prosecutorial discretion which has
21 been preserved ostensibly in the first sentence of Article 5
22 and which is described as being of a fundamental nature in the
23 commentaries upon Article 5.

24 My Lords, just on the text of Article 5, paragraph 65 of
25 our skeleton, we say on its ordinary meaning Article 5

1 recognizes that national authorities should continue to have
2 their usual wide investigative and prosecutorial discretion,
3 subject only to the three limitations set out. That means
4 that in the ordinary case a wide range of factors relevant to
5 prosecutorial decisions, (unclear) many factors of
6 considerably less weight than national security and the right
7 to life may, according to the ordinary meaning of Article 5,
8 legitimately be taken into account as the basis for a decision
9 to discontinue an investigation.

10 My Lords, we say a fortiori it is clear that, leaving
11 aside for one moment the question of relations with another
12 state, considerations of the right to life, witnesses,
13 performance and the general population, all national security
14 are permissible matters to be taken into account by a
15 contracting state's investigative and prosecutorial
16 authorities when deciding whether to continue or discontinue
17 an investigation or prosecution as they were taken into
18 account in the usual way.

19 In our submission, given this, it would be extraordinary
20 if they became impermissible considerations by what, in my
21 submission, is correctly described as a side-wind simply
22 because the mechanism by which the threat to the right to life
23 or national security might arise includes as one element the
24 reaction of another state to the decision taken.

25 In terms a point of substance, that is, is there a risk

1 to right to life or to national security, the precise cause or
2 mechanism by which it might arise is adventitious and it
3 cannot plausibly be supposed that the contracting states
4 intended that the causal mechanism shall be taken to govern
5 the ability as a matter of substance under the Convention for
6 a contracting state to base its decisions on these factors.

7 My Lords, in the context of that submission may I go to
8 the case of *Brown v. Stott* which is at volume C, tab 44 where
9 Lord Bingham gives general guidance as to the approach to be
10 adopted in relation the construction of international
11 instruments.

12 LORD JUSTICE MOSES: What is the proposition?

13 MR. SALES: My Lord, the proposition is at page 703 D to F where
14 it states: "The language of the Convention" so he is talking
15 about the ECHR this is at 703 F:

16 "The language of the Convention is for the most part so
17 general that some implication of terms is necessary and the
18 case law of the European court shows that the court has been
19 willing to imply terms into the Convention when it was judged
20 necessary or plainly right to do so, but the process of
21 implication is one to be carried out with caution if the risk
22 is to be averted."

23 LORD JUSTICE MOSES: It is a treaty, it is a result often of hard
24 bargaining.

25 MR. SALES: Yes, but, my Lord, the point being made here is that

1 in a treaty often, as my Lord says as a result of hard
2 bargaining, general formulae because ----

3 LORD JUSTICE MOSES: Yes, because you must not impose on them
4 something they have not agreed.

5 MR. SALES: The general formulae which are used in Article 5 are
6 both in the first sentence the general preservation of
7 prosecutorial discretion and a general formula in the second
8 sentence.

9 Now, the question, as I have already submitted, is as to
10 the relationship between those two. The particular passage
11 that we rely upon is where Lord Bingham says:

12 "But the process of implication is one to be carried out
13 with caution. If the risk is to be averted that the
14 contracting parties may, by judicial interpretation become
15 bound by obligations which they did not expressly accept and
16 might" ----

17 LORD JUSTICE MOSES: That is the point I just made.

18 MR. SALES: And might not have been willing to accept. I
19 emphasize how strongly the point is put, it is both did not
20 expressly accept and might not have been willing to accept.
21 In my submission, that is the situation that we are dealing
22 with here where we are trying to construe the first sentence
23 of Article 5 along with the second sentence in order to see
24 whether the contracting states genuinely intended by the
25 second sentence so to cut down the fundamental retention or

1 prosecutorial discretion in the first sentence.

2 MR. JUSTICE SULLIVAN: I just do not understand why you say it is
3 impermissible consideration by a side-wind. It is not a
4 side-wind. It is precisely because it is recognized that if
5 you started to investigate or prosecute bribery other states
6 might threaten to do nasty things to you, that people were
7 told that they should not have regard to the potential effect
8 on relations with another state.

9 Now, that is apt to include all sorts of nasty things,
10 including nasty things that may, to a greater or lesser
11 degree, threaten your national security. There is no need to
12 imply anything into it. I mean the words are general,
13 relations with another state, they include, as I say, it is
14 not a side-wind it is the central problem that is being
15 addressed that people will threaten to do nasty things to try
16 to stop you prosecuting.

17 MR. SALES: In my submission the central problem being addressed
18 by the second sentence of Article 5 is not a risk to national
19 security and the right to life of a contracting state's
20 population.

21 MR. JUSTICE SULLIVAN: It is a threat to do other nasty things but
22 not national security.

23 MR. SALES: Yes, that is right. The reason for adopting that
24 construction is because of the purposive approach to
25 construction which applies under international law and the

1 absence of any specific indicators that the contracting states
2 intended to bind themselves in the fundamental way that that
3 construction of Article 5, second sentence, would achieve.

4 LORD JUSTICE MOSES: The essential vice to adopt the purposive
5 interpretation of Article 5 that they are trying to avoid is
6 the very one identified by my Lord, namely, it will be highly
7 uncomfortable if you seek to investigate bribery which affects
8 another state. In those circumstances there must be some way
9 of preventing signatories from making such threats. I mean
10 that is the whole thing, that is the whole purpose of it.

11 MR. SALES: My Lord, preventing the signatories from making such
12 threats.

13 LORD JUSTICE MOSES: Yes. No, preventing the signatories from
14 taking into account such threats.

15 MR. SALES: Yes.

16 LORD JUSTICE MOSES: I mean otherwise what is the point of it? I
17 do not understand what Article 5 is getting at at all if it is
18 not that. It is getting at someone saying "if you investigate
19 or prosecute a foreign official associated with my state I
20 will threaten the following sanctions: (1) economic sanctions;
21 (2) to break off diplomatic relations or to reduce them".
22 That is what it is about, is it not?

23 MR. SALES: Yes, but not about removal of threats to proceed in
24 such a way as to jeopardize the national security interests of
25 the other state.

1 LORD JUSTICE MOSES: So that what it really is doing is saying we
2 will not act in the face of some threats but we can act in the
3 face of others.

4 MR. SALES: If the other threats go to a fundamental interest of
5 the state in the form of a national security interest and ----

6 LORD JUSTICE MOSES: So the really important thing, the state that
7 wishes to protect itself from the ignominy of bribery is to
8 make sure the threat relates to national security. So
9 Article 5 is telling every state that wishes to protect itself
10 or those with whom it is associated from such charges, make
11 sure your threat is confined to something that somewhere an
12 independent prosecutor with an enormously wide discretion may
13 regard as exposing it to a risk of national security. That is
14 the lesson to be learnt from Article 5.

15 MR. SALES: My Lord, in my submission Article 5 does not deprive a
16 state which has its national security threatened and the right
17 of its population threatened even through the
18 mechanism of a threat to remove security co-operation from
19 basing decisions as to the prosecutorial discretion upon that
20 matter. Putting it another way, Article 5 does not commit the
21 contracting parties to jeopardize their national security and
22 right to life of their populations in relation to the ----

23 LORD JUSTICE MOSES: How does it help Article 5? It is pretty
24 pointless, is it not?

25 MR. SALES: No, my Lord, it is not. In my submission it is not.

1 LORD JUSTICE MOSES: Why is it not pointless?

2 MR. SALES: Because the point at which it does not operate is a
3 point with a high threshold that there has to be a threat to
4 national security and/or the right of ----

5 LORD JUSTICE MOSES: That is a high threshold, is it?

6 MR. SALES: In my submission, yes, it is. My Lords, this is the
7 nub of the argument in relation to the interpretation of
8 Article 5. Should Article 5 be interpreted as having taken
9 away from states the right to protect themselves in point of
10 their national security and right to life of their population.

11 LORD JUSTICE MOSES: Of course, I mean I am quite ----

12 MR. SALES: My Lord, says of course ----

13 LORD JUSTICE MOSES: Of course it does not and I do not understand
14 why it is you say that the claimants' argument does take away
15 that right, perhaps that is the better way of putting the
16 question. What is it about what the claimants say that you
17 say is depriving the United Kingdom of protecting its citizens
18 from the right to life?

19 MR. SALES: The fact that if the investigation and prosecution had
20 proceeded the United Kingdom would have been deprived of what
21 it regarded as vital support for its national security to be
22 received from Saudi Arabia.

23 LORD JUSTICE MOSES: Support for its national security, so it is
24 not an actual threat to life; it is support that may be the
25 means by which in due course it can protect itself. It is

1 something further down the line.

2 MR. SALES: My Lord, the basic pattern is that threats to life
3 come from international terrorists and support from
4 Saudi Arabia is considered to be extremely important in
5 enabling the United Kingdom to meet those threats to
6 international security and right to life of its population.

7 MR. JUSTICE SULLIVAN: It does seem to me at the end of the day
8 that we are told that we must not take account of, as it were,
9 unpleasant consequences threatened by the other state but if
10 and in so far as any of those consequences touch on national
11 security then we can take them into account. You say it is a
12 high threshold and refer to a threat to national security, but
13 I mean, as it were, removing any co-operation, say, in the
14 intelligence field might impair national security.

15 I mean, is that outwith Article 5 as well? Any
16 impairment in terms of national security, i.e. if we can call
17 it national security related can we say we take it into
18 account?

19 MR. SALES: My Lord, as I already indicated there will not be a
20 bright line governing the point at which the matter becomes a
21 matter engaging what I would characterise as the fundamental
22 interest of the state.

23 LORD JUSTICE MOSES: It is a matter for the judgment of the
24 individual prosecutor.

25 MR. SALES: Under this legal regime. In the first instance it is

1 a matter for the national authorities to make their judgment,
2 but then they have to account for it through the enforcement
3 mechanisms under the OEC treaty. There is a point at which,
4 in my submission, the interests at stake become so fundamental
5 that it simply is not plausible to suppose that the
6 contracting parties intended to disable themselves by the
7 second sentence of Article 5 from having regard to their
8 national security interests in a particularly directly
9 compelling way and the right to life of its population and
10 that borderline precisely what can be policed through the
11 enforcement mechanisms of the Convention itself.

12 My Lords, paragraphs 69 and 70 of our skeleton we simply
13 draw attention to a range of materials on international law
14 which emphasize essentially the point that we are seeking to
15 make, that where a state is to be taken to have disabled
16 itself from protecting its own fundamental interest one does
17 expect especially clear language to be used. Although my
18 Lords put to me, "well, look at the words of the second
19 sentence of Article 5, they cover international relations and
20 this is a subset of international relations", in my submission
21 on a proper purposive approach as it applies under
22 international law, that is the sort of argument that was
23 rejected in the nuclear testing case where precisely the same
24 form of argument was put forward.

25 Here are treaties, environmental treaties in wide terms

1 that on the face of it would appear to be incompatible with
2 use of nuclear weapons, but ICJ (unclear) that the interests
3 of states in relation to the use of nuclear weapons are so
4 fundamental that these environmental treaties cannot be
5 treated even though on the face of the language used they
6 appear to cover use of nuclear weapons as a subset of things
7 which can jeopardize the environment, they cannot be taken to
8 cover such matters and to exclude the use of nuclear weapons
9 by such states. In my submission, it is that same process of
10 reasoning which is applicable in this case.

11 My Lords, at paragraph 71 we say that this principle of
12 interpretation applies most strongly when a party seeks to
13 interpret a treaty in such a way as to limit a state's power
14 to ensure its own security. Now, partly I have cited
15 Samuel Pufendorf because of his name but he is one of the
16 leading writers on international law. The basic position set
17 out by him long ago remains the case so far as the
18 interpretation of international instruments is concerned. My
19 Lords, if you forgive the old fashioned nature of the
20 language.

21 "Since every Prince is obligated first of all to protect
22 his own subjects in all promises which he makes to outsiders
23 he (unclear) this condition in so far as the safety of the
24 state permits."

25 Now, in our submission this approach is not outdated.

1 Far from it. As the Consultative Council of European Judges
2 observed in their opinion ----

3 LORD JUSTICE MOSES: That is before there was separation of
4 powers, I mean every prince is obligated first of all,
5 precedes on the basis that the only one responsible for
6 running a state is the prince. We now have separation of
7 powers where there are different elements and strands to the
8 way we are governed ----

9 MR. SALES: So far as international ----

10 LORD JUSTICE MOSES: So the Government will say, our first duty is
11 to protect its own subjects. The courts will say our first
12 obligation is to protect the rule of law.

13 MR. SALES: Yes, but what we are concerned with, my Lord, at this
14 stage of the argument is the interpretation of an
15 international treaty. In international law it is states which
16 are parties to the treaties and international law does not
17 regard states as being broken down into different component
18 parts.

19 LORD JUSTICE MOSES: But international law may appreciate that one
20 of the primary weapons to be used for protection of their own
21 subjects is the rule of law, the protection requires that
22 obligation to be ----

23 MR. SALES: We are dealing with a situation where for the
24 United Kingdom to proceed in the way in which the claimants
25 say that it should have proceeded would, on the assessment of

1 the United Kingdom Government, have directly jeopardized the
2 national security and the right to life of its people.

3 LORD JUSTICE MOSES: Depending on whether those who had imposed
4 upon them that obligation fully understood the way democracy
5 works in this country, which is not protection of own subjects
6 at all costs because otherwise it will be just as I said, pull
7 off every dodgy person off the street.

8 MR. SALES: My Lord, I have already made my submissions in
9 relation to that both as to the assessment of the risk which
10 is not under challenge and, secondly, as to the degree of risk
11 which existed in this case.

12 My Lords, I was on the continuing importance of the
13 sentiment expressed by Samuel Pufendorf. I was going to go to
14 volume E, tab 20. This is an opinion of the Consultative
15 Council of European Judges for the attention of the Committee
16 of Ministers of Council of Europe specifically on the role of
17 judges in the protection of the rule of law in human rights in
18 the context of terrorism. My Lord, it is paragraphs 8 and 11
19 which I draw to your attention.

20 Over the page, 7 first: "Council for Europe has already
21 underlined on several occasions that the fight against
22 terrorism is possible while respecting human rights. They are
23 saying in July 2002 a committee of ministers adopted the
24 guidelines. These guidelines affirmed the obligation of the
25 state to protect everyone against terrorism while reiterating

1 the need to avoid arbitrary measures and to ensure that all
2 measures" ----

3 LORD JUSTICE MOSES: Yes.

4 MR. SALES: Then at 11: "Every day experience and current events
5 show that while terrorism is not a new problem it has recently
6 taken on an unprecedented international ----

7 LORD JUSTICE MOSES: Just remind me why we are looking at this.

8 MR. SALES: We are looking at this for material in support of the
9 proposition that it remains accepted in international law that
10 states have a particular obligation to take action to protect
11 ----

12 LORD JUSTICE MOSES: Provided the measures they use are lawful.
13 It all goes round in a sense (unclear) what this case is
14 about.

15 MR. SALES: Yes, but my Lord we are precisely debating whether the
16 measures used are lawful and on this ----

17 LORD JUSTICE MOSES: You do not establish that by showing that the
18 state is entitled to protect its citizens.

19 MR. SALES: No, what I do seek to establish is that in construing
20 the relevant instruments that on this part of the argument we
21 are seeking to construe, namely Article 5 of the Convention,
22 part of the background against which it has to be construed
23 are these general understandings of the fundamental nature of
24 the obligation of a state itself to protect its population.

25 LORD JUSTICE MOSES: The International Community recognizes you

1 must use lawful means to protect yourself against terrorism.

2 MR. SALES: Yes, and my submission is, construing Article 5
3 against the background of these understandings of the role of
4 states and the fundamental nature of their obligation to
5 protect the right to life of its population, Article 5 of the
6 Convention cannot be construed as excluding the ability of the
7 state in the current situation to have regard to national
8 security, the national security interest which was in play.

9 My Lords, the other authority that I would draw
10 attention to on this particular point is the Palestinian War
11 case at volume B, tab 20, paragraph 141. This is at page 195
12 at the top and 63 at the bottom.

13 MR. JUSTICE SULLIVAN: I am so sorry what was the reference?

14 MR. SALES: Volume B, tab 20, ----

15 MR. JUSTICE SULLIVAN: Just the page.

16 MR. SALES: Page 63 at the bottom, my Lord there are two
17 page numbers.

18 MR. JUSTICE SULLIVAN: Yes, I have that.

19 MR. SALES: Paragraph 141: "The fact remains that Israel has to
20 face numerous indiscriminate and deadly acts of violence
21 against its civilian population, has the right and indeed the
22 duty to respond in order to protect the life of its citizens.
23 Measures taken are bound none the less to remain in conformity
24 with applicable international law". So, my Lords, the two
25 points on that are emphasizing that it is accepted under

1 international law and understanding of the international
2 responsibility of states that they have a duty to protect the
3 life of their citizens and accepting also that it has to be
4 done in conformity with applicable international law. What we
5 are debating at the moment is the proper interpretation of the
6 relevant rule of international law.

7 My Lords, we say that that approach is also reflected in
8 the jurisprudence of the permanent Court of International
9 Justice. My learned friend made reference to the Wimbledon
10 case and I will just deal with that if I may. That is at
11 volume C, tab 40. My Lords, in our argument we pointed to a
12 passage at pages 36 to 37 and in particular page 37 at the end
13 of the first full paragraph on the page. This is in the
14 dissenting opinion of Judges Anceloti and Huber, but we say
15 not dissenting on this statement of principle:

16 "A right of a state to adopt the course which it
17 considers best suited to the exigencies of its security until
18 the maintenance of its integrity are essential a right that in
19 case of doubt treaty stipulations cannot be interpreted as
20 limiting, even though these stipulations do not conflict with
21 such an interpretation".

22 Then at pages 24 to 25 in a majority judgment one sees
23 just above half way:

24 "In order to dispute in this case the right of the
25 Wimbledon to free passage the argument has been urged upon the

1 court that this really amounts to a servitude by international
2 law resting upon Germany and like all restrictions or
3 limitations upon the exercise of sovereignty this servitude
4 must be construed as restrictively as possible and confined
5 within its narrowest limits, more especially in the sense that
6 it should not be allowed to effect the rights consequent upon
7 neutrality and armed conflict. What is not called upon to
8 take a definite attitude with regard to the question which is
9 moreover of a very controversial nature, whether in the domain
10 of international law, there really exists servitudes. Where
11 the German Government is bound by virtue of servitude or by
12 virtue of contractual obligation to allow free access ----

13 LORD JUSTICE MOSES: Well, we have read this before.

14 MR. SALES: Yes, my Lord, they say: "This fact constitutes a
15 sufficient reason for the restrictive interpretation in case
16 of doubt of the clues which produces such a limitation. The
17 court feels obliged to stop at the point where the so-called
18 restrictive interpretation would be contrary to the plain
19 terms of the article and would destroy what has been clearly
20 granted."

21 Again, what I emphasize is that it has to be contrary to
22 the plain terms and destroy what has been clearly granted.
23 Our submission is that one does not get that from the second
24 sentence of Article 5.

25 My Lords, paragraph 74, I think I have made my point on

1 that.

2 At paragraph 75 we say that the fundamental importance
3 of protecting the security of the state has also been
4 recognized by the domestic courts. My Lords, I hope you will
5 forgive me if I just go through this rather than turning up
6 the cases. In A No. 1, the Bellam v. Marsh(?), Lord Hope at
7 paragraph 99: "The first responsibility of government in a
8 democratic society" ----

9 LORD JUSTICE MOSES: As long as we get the references, we will get
10 this from the index.

11 MR. SALES: Yes, C/46, my Lord, A number 1. In the previous
12 paragraph Pinochet No. 3, C/43; Brown v. Stott, C/44,
13 (unclear) C/45. The Oppenheimer Footnote 10 is F/12.
14 Lord Hope states:

15 "It is the first responsibility of government in a
16 democratic society to protect and safeguard the lives of its
17 citizens. This is where the public interest lies. It is
18 essential to the preservation of democracy and the duty of the
19 court to do all it can to respect and uphold" ----

20 LORD JUSTICE MOSES: He also said that democracy itself depends on
21 rule of law.

22 MR. SALES: And the ----

23 LORD JUSTICE MOSES: So that you can find dicta, I mean when the
24 judges talk about these sorts of issues they use the words of
25 advocacy, for example, "this is not the British way" and that

1 is why in these cases one can find authority for almost every
2 proposition one wants depending on the way the judge wants to
3 decide.

4 MR. SALES: My Lords, I am concerned to emphasize that there are
5 fundamental interests both of the state and its population and
6 that the construction of Article 5 has to take place against
7 the background of those interests. We say at 76:

8 "Fundamental nature of the right to life is also obvious
9 and has been recognized. In our submission the principle of
10 restrictive interpretation clearly advised in this instance,
11 Article 5 does not expressly limit the prosecutorial
12 discretion by reference to national security or by reference
13 to the protection of the right to life. In view of the
14 primary importance that is universally accorded to protecting
15 the security of the state and the lives of its citizens, such
16 a limitation will involve a very substantial erosion of state
17 sovereignty and, in our submission, (unclear) in very clear
18 language in a treaty provision which does not appear in
19 Article 5, it cannot plausibly be inferred that the
20 contracting states intended to abandon their usual ability to
21 have regard to such matters when taking decisions how to
22 proceed."

23 My Lords, that is the first general point we make which
24 goes to the object and purpose of Article 5 and our submission
25 that it is not intended to address questions of national

1 security.

2 Secondly, we say the Convention should be interpreted in
3 context and I have shown you Article 31 of the Vienna
4 Convention. The commentaries adopted by the negotiating
5 conference on the same day as the Convention form part of the
6 context -- my Lord, you can put it in a number of different
7 ways -- or constitute supplementary means of interpretation as
8 part of the circumstances of the conclusion of the Convention
9 whether (unclear) Article 32 or a declaration as constituting
10 state practice relevant under Article 31(3)(b). By whatever
11 method they should be taking into account in interpreting
12 Article 5 and in respect of Article 5, my Lord the reference
13 here is E/1 for the commentaries, the commentaries state at
14 paragraph 27: "Article 5 recognizes the fundamental nature of
15 national regimes of prosecutorial discretion".

16 My Lord, that is where I have been picking up the
17 language of the fundamental nature of the national regimes of
18 prosecutorial discretion from. It is part of the commentary
19 on Article 5 itself adopted at the same time as the state
20 entered in it:

21 "It recognizes as well that in order to protect the
22 independence of prosecution such discretion is to be exercised
23 on the basis of professional motives and is not to be subject
24 to improper influence by concerns of a political nature.
25 Article 5 is complimented by Article 6 which recommends inter

1 alia that complaints of bribery of foreign public officials
2 should be seriously investigated by competent authorities and
3 that adequate resources" ----

4 LORD JUSTICE MOSES: You need not read all this out.

5 MR. SALES: Right. My Lord, paragraph 6 of the Annex to the OECD
6 revised recommendations, which is referred to in the
7 commentaries as complimenting Article 5, states that, if we
8 could just look this up, it is volume E, tab 1, page 371 I
9 think of the bundle. Yes, just picking it up, at 370 you have
10 the Annex, agreed common elements of criminal legislation and
11 related action. Over the page at D:

12 "Enforcement. In view of the seriousness of the offence
13 of bribery of foreign public officials public prosecutors
14 should exercise their discretion independently based on
15 professional motives. They should not be influenced by
16 considerations of national economic interest fostering good
17 political relations or the identity of the victim."

18 So, my Lords, we say that that most definitely does give
19 a particular flavour to the language used in the second
20 sentence of Article 5, that it is pitched at the level of the
21 sort of matters that I have mentioned in answer to my Lord,
22 Sullivan J, earlier on, in seeking to promote good political
23 relationships so that states will support each other in
24 relation to instances they take on the international plane.

25 At paragraph 80 we state:

1 "Reading Article 5 in the light of the commentaries and
2 the Annex it is clear that the parties recognize the
3 importance of prosecutorial discretion and emphasise the need
4 for it to be exercised on the basis of professional motives,
5 that is independent purely political concerns, the injunction
6 against taking into account the potential effect upon
7 relations with another state was intended to ensure that the
8 investigating prosecuting authority would not be influenced by
9 improper concerns of a political nature or the wish to foster
10 good political relations. It is well recognized that
11 questions of national security and protection of the right to
12 life are factors which may be and regularly are taken into
13 account by profession independent prosecutors. In context,
14 therefore, the reference in Article 5 to the potential effect
15 on relations with another estate not apt to cover
16 considerations of national security and protection of the
17 right to life since such considerations are normal
18 prosecutorial factors which go beyond any question of a purely
19 political concern."

20 We say in the present case the Director exercised his
21 discretion on the basis of professional motives.

22 LORD JUSTICE MOSES: The importance of all this, which I do not
23 think we need read out all over again, is that you reject the
24 idea, whether it is a question of breach or of interpretation,
25 if there is any concept of necessity or any concept of going

1 on with an investigation unless you are driven to the
2 conclusion that compels the conclusion that there is no
3 alternative.

4 MR. SALES: My Lord, in our submission it is most definitely a
5 question of interpretation not of the application of
6 Article 25.

7 LORD JUSTICE MOSES: No, no, you are not quite answering my
8 question. There is no question, the way officials in this
9 country should approach the problem of saying, well, we must
10 continue with prosecution or continue with investigation
11 unless we are driven, compelled not to do so by circumstances
12 outside our control. It is not such an extreme position, it
13 is much wider than that.

14 MR. SALES: My Lord, I have already sought to give my answer to
15 that in saying that there was not a bright line rule and there
16 could not be one between the sort of concerns which are
17 national security, right to life concerns of a sufficiently
18 compelling nature that they fall outside the issue of
19 fostering good political relations which is the flavour given
20 to the second sentence of Article 5 by the commentaries and
21 annex upon it.

22 MR. JUSTICE SULLIVAN: Is not the whole thrust of the documents we
23 have seen a desire to maintain rather than foster good
24 political relations with Saudi Arabia or the antithesis, a
25 desire to avoid having bad political relations with

1 Saudi Arabia? I mean the documents we have had read out, I
2 mean they go through how our political relations with
3 Saudi Arabia will be affected adversely. You draw a
4 distinction somehow, you seem to carve out an area of national
5 security but accepting that there are, as I understand it,
6 this area of national security comes in at some indeterminate
7 point when the state, which is deciding whether or not to
8 prosecute, decides that it is sufficiently important to be of
9 overriding national importance, i.e. all of the prosecutors
10 and all of the states who signed up to Article 5 they have
11 that prosecutorial discretion. So as soon as national
12 security is flagged up they will have to decide, "well, now,
13 is this sufficiently important to take us out of Article 5 so
14 we are no longer talking about the political relations".

15 MR. SALES: Correct and then the state will have to account for
16 that and face the music.

17 LORD JUSTICE MOSES: To the OECD.

18 MR. SALES: The OECD. It will be the OECD member states that are
19 best placed to judge whether the particular intensity of the
20 threat to fundamental interests of the state was so great, so
21 it could not plausibly be said that by the second sentence of
22 Article 5 the contracting states had intended to disable
23 themselves from reacting to a threat to those interests.

24 LORD JUSTICE MOSES: So that is not just the view of the
25 Government at the time of these proceedings, that was at the

1 time they were taking these decisions?

2 MR. SALES: These decisions, my Lord?

3 LORD JUSTICE MOSES: Well, the decision not to go ahead with the
4 investigation.

5 MR. SALES: Yes.

6 LORD JUSTICE MOSES: So they never felt under any compulsion to
7 look for alternative means of avoiding the threat?

8 MR. SALES: My Lord, ----

9 LORD JUSTICE MOSES: There was no need under the law as they
10 understood it for them to do so.

11 MR. SALES: No, my Lord, they considered that there was a
12 compelling threat to the national security interests. As part
13 of that assessment the assessment had been made whether the
14 Saudi Arabian Government meant what they had said. So the
15 assessment had already been made, that this was a genuine
16 threat of a compelling nature and it is against that
17 background that the relevant legal judgment had to be met. It
18 is that legal judgment which is being defended by the
19 United Kingdom in the WGB.

20 My Lords, I feel that I should press on because although
21 this point is important there are other points that I need to
22 deal with.

23 LORD JUSTICE MOSES: Take your time, we have got all evening, you
24 can go on on Monday if necessary.

25 MR. SALES: Yes, regrettably not with me I am afraid.

1 LORD JUSTICE MOSES: Well, we will look forward to hearing
2 somebody else.

3 MR. SALES: Yes. The third point that we make in relation to the
4 construction of Article 5 is at paragraph 82:

5 "The court should have regard to any subsequent practice
6 in the application of the Convention which establishes the
7 agreement of the parties regarding its interpretation. The
8 Convention provides for peer review. None of the states
9 reviewed have specific provisions governing prosecutions of
10 the bribery of foreign public officials. So what is reviewed
11 is their general national code. Three of the countries which
12 have been reviewed expressly include a reference to
13 consideration" ----

14 LORD JUSTICE MOSES: I did not understand that sentence, none of
15 the states reviewed have specific provisions governing the
16 prosecutions of the bribery of foreign public officials".

17 MR. SALES: In other words therefore not, consequent upon entering
18 into the treaty, then created a special code for the exercise
19 of prosecutorial discretion specifically directed to ----

20 LORD JUSTICE MOSES: I see, they have brought in the 2001 Act.

21 MR. SALES: No, my Lord, sorry.

22 LORD JUSTICE MOSES: That is what we did. You have a different
23 point, yes.

24 MR. SALES: I am now addressing the codes which govern the
25 exercise of discretion by the national prosecuting

1 authorities.

2 LORD JUSTICE MOSES: I understand it, yes.

3 MR. SALES: The point is no state has gone out and fashioned a
4 separate prosecutorial discretion code for itself specifically
5 for bribery. What they have done is to say that bribery
6 matters are covered by their usual general code governing such
7 matters. My Lords, my learned friend went to the German code
8 to make a point on it. May I meet this point by going to
9 volume 4, page 1795. My Lords, it is the third and fourth
10 paragraphs on that page, it may be fastest if I invite the
11 court to read those.

12 MR. JUSTICE SULLIVAN: 1795?

13 LORD JUSTICE MOSES: We have read one of them before.

14 MR. SALES: Yes. It is the third and fourth paragraphs. (Pause)
15 What I emphasize in the first of those paragraphs:

16 "It is possible to refrain from prosecuting criminal
17 offences if otherwise there would be the risk of a serious
18 disadvantage for the federal republic of Germany or other
19 important public interests are against prosecution."

20 Then in the second: "Only possible to discontinue in
21 exceptional narrowly defined circumstances requiring risk, a
22 serious disadvantage for Germany or overriding public
23 interests against prosecution."

24 The point that we make is that in each case, this is one
25 example, there is the Canadian example and the United Kingdom

1 example. In each case the OECD peer review reports make clear
2 that both that the exercise of prosecutorial discretion should
3 not take into account the elements prohibited by Article 5 but
4 make no criticism of any of the states codes of prosecutorial
5 discretion where they say that national security may be taken
6 into account in this particularly profound way. My Lords,
7 that is the state practice.

8 The fourth point is we say that Article 5 should be
9 construed in the light of the right to life as expressed in
10 Article 3, Article 6 of the ICCPR and Article 2 of the ECHR.
11 My Lords, we say: "There is no general order of precedence
12 between international legal rules. In practice international
13 law" ----

14 LORD JUSTICE MOSES: You need not read this bit out.

15 MR. SALES: I am grateful, my Lord.

16 LORD JUSTICE MOSES: We have had your skeleton argument.

17 MR. SALES: Very good. My Lords, in due course I will invite your
18 attention to Koskenniemi.

19 LORD JUSTICE MOSES: Page 800 it was, was it not? We looked at
20 it, did we not?

21 MR. SALES: No, that was Dame Rosalind Higgins.

22 LORD JUSTICE MOSES: That is what you quoted, yes.

23 MR. SALES: Upon the approach, that is Higgins. The Koskenniemi,
24 which is what we are citing here, is volume F, tab 14. My
25 Lords we state:

1 "The importance of norms protecting human rights and in
2 particular the right to life is clear from international
3 instruments" and we set those out, for instance recital F in
4 the guidelines on the fight against terrorism, that is volume
5 E, tab 25, issued by the Council of Europe referring to "the
6 imperative duty of states to protect their populations against
7 possible terrorist acts".

8 Then, my Lords, we also refer to security council
9 resolution 1373, that is E/13. We say clearly the norm
10 protecting the right to life is fundamental and has a higher
11 importance and obligation such as Article 5 regulating
12 discretionary decisions concerning investigations and
13 prosecutions. Further, we say, one of the means by which
14 international law recognizes that some norms are more
15 important than others and that in cases of conflict effect
16 should be given to the more important ones, is the application
17 of the maxim generalia specialibus non derogant.

18 My Lord, then we go back again to the report of the
19 study group of the International Law Commission, that is the
20 study group that was headed by Koskenniemi, the reference for
21 that is F/14. My Lords we say, going back to the general
22 approach adopted in the nuclear tests case, that it is the
23 human rights provisions referred to which are the provisions
24 in international law which most directly address the
25 substantive issue where a risk to life may arise by contrast

1 with Article 5 of the OECD Convention which does not directly
2 address that question.

3 It is the human rights provisions which impose an
4 obligation on the state to seek to take effective action to
5 preserve life or not to take action which will create an
6 unnecessary threat to life. My Lords, we cite Osmon(?), that
7 is D, tab 48 and it is at paragraph 115, that is the paragraph
8 that deals with the general obligation on a state to take
9 general measures to protect the right to life. That is
10 distinct from the obligation in paragraph 116 where an
11 individual identified person is at risk.

12 In the Lord Saville case, paragraph 12, that is D/49,
13 same point applies. Guideline 1 in the guidelines from the
14 Counsel of Ministers, "states are under the obligation to take
15 the measures needed to protect the fundamental rights of
16 everyone within their jurisdiction against terrorist acts
17 especially the right to life".

18 My Lords, the reason I have gone to all these materials
19 is to say that when one is construing Article 5 Article 5 does
20 not spring to existence in a legal vacuum. It has to be
21 interpreted against the background of these principles of
22 international law and of the fundamental nature of the
23 interest, both of the state in defending its national security
24 but also of the state in protecting specifically the lives of
25 its population.

1 My Lords, finally on this part of the case, at
2 paragraphs 86 through to 88 we have our commentary upon the
3 Rose-Ackerman and Biller commentary and then on the Cullen
4 commentary. My Lords, I think I am content just to leave
5 those for my Lords to read.

6 My Lords, those are my submissions on the construction
7 of Article 5 of the Convention. What remains for me to do
8 then is to pick up the other points that the claimants rely
9 upon in support of their application.

10 The first of these we dealt with at page 40 of our
11 skeleton argument. It is the matter of Saudi Arabia's
12 international law obligations. The decision is affected by
13 reason of the Director's failure to take into account that
14 Saudi Arabia would, they allege, have been in breach ----

15 LORD JUSTICE MOSES: It is not really put like that now. It is
16 really put, well, why were not these drawn to Saudi Arabia's
17 attention which had been put in a much sort of milder way,
18 that this was one of the legitimate weapons that might have
19 been used to resist the unlawful threat from Saudi Arabia.

20 MR. SALES: Yes, my Lord, I have already made my submissions so
21 far as that way of putting the case is concerned.

22 LORD JUSTICE MOSES: Which is?

23 MR. SALES: Which is that that is not a ground that has been
24 pleaded against us. We do not have evidence directed to the

25 ----

1 LORD JUSTICE MOSES: You say that it is not a ground but you said
2 that yesterday. The Director has not sought to justify his
3 actions by reference to these conditions and could not
4 properly do so. On the evidence that is available it cannot
5 plausibly be asserted, condition (2), that the interest must
6 have been threatened by a grave and imminent peril and (3)
7 that the act challenged must have been the only means of
8 safeguarding that interests have been met. There is no
9 indication of any assessment by the UK whether there were
10 other means available to safeguard the United Kingdom's
11 essential interest even assuming it to have been threatened,
12 see page 26E.

13 So there was a clear challenge to the government to say
14 "have you considered alternative means" in the context of the
15 arguments about necessity and the challenge which we note has
16 been met with complete silence about the point.

17 MR. SALES: No, in my respectful submission it has not been met by
18 silence. What it has been met by is the evidence that an
19 assessment was made about the seriousness of the risk to
20 national security which was properly made by those authorities
21 in a position to make that assessment. There has been no
22 challenge to the rationality of that assessment and that
23 assessment in itself includes the question whether the threat
24 could have been obviated by any other means. When one comes
25 to the relevant decision-maker, who is the Director, he is

Transcript prepared without access to case documentation.

1 confronted with a situation, it is not in his gift to take any
2 steps on the international plane he has to rely upon ----

3 LORD JUSTICE MOSES: Is it not? He can say to the Ambassador,
4 "have you explained the following points to your opposite
5 number and friends in Riyadh?" or wherever it is. "Have you
6 spoken to them about this? Have you spoken to the sanctions
7 that we might feel compelled to adopt if you go on with
8 allowing this threat to be pursued?" Although there is a
9 reference to meetings with the Ambassador, three I think
10 between your client and the Ambassador, the evidence that has
11 been put forward is all one way. It is all about what the
12 Ambassador told him would happen.

13 What one would like to have seen is Mr. Wardle saying to
14 him, "but from my point of view I have to exercise an
15 independent professional judgment and I have to satisfy myself
16 as a lawyer that you have taken all the steps, not as to
17 whether the threat will be carried out, about which I bow to
18 your judgment, but as to whether it will be diverted or
19 withdrawn". That is what one would expect the lawyer to say,
20 "What have you done?" Mr. Wardle does not tell us that, nor
21 is there any note of whether that was done and we will come to
22 it shortly. When one does see the point being raised "what
23 about the damage to national security by giving in?" one will
24 then see that it was not dealt with in that way at all. That
25 is why I raise the point and that is what is of some concern,

1 there is complete silence about it.

2 MR. SALES: Yes, my Lord, I have already explained that the reason
3 that there is silence in the evidence about it is because the
4 government and the Director did not understand that an attack
5 was being made on the ----

6 LORD JUSTICE MOSES: What did it think when it read the passage
7 that I have just read out, page 29? Gosh, they are saying
8 that we could have done more. Answer: As a matter of law we
9 did not have to because Mr. Sales has advised us that the
10 discretion is so wide and the question of risk so much a
11 matter for us that we do not have to and international
12 relations are a matter for us and not the court or we did,
13 they have challenged us to say when we have done, let us put
14 in another affidavit and it is their fault if it comes at the
15 last minute or something. What you are requiring us to do is
16 just to assume that this happened.

17 MR. SALES: My Lord, I do not think I am going to take matters
18 further than I have done by making the submission that I have
19 made already. The point that we understood to be being made
20 against us, and my learned friend made it orally, was in
21 relation to steps which could have been taken in going to the
22 United Nations in order to say ----

23 LORD JUSTICE MOSES: That is one of them, yes.

24 MR. SALES: My Lord, that is the specific one that has been
25 referred to. My Lord, it is in that context that we have

1 sought to address this part of the case, that is why our
2 argument goes to that, not to the point that my Lord has just
3 been putting to me. My Lord, so far as that case against us
4 is concerned we say that there has absolutely nothing in it.
5 If I can just add to what we have set out in writing here,
6 reference to Buttes Gas because Buttes Gas again would be a
7 distinct answer apart from all the points that are made here,
8 to the point which is taken. My Lord, as was indicated by us
9 right at the outset, the answer we give is that it was nothing
10 which the Director could take into account.

11 LORD JUSTICE MOSES: Paragraph 105 really, second sentence.

12 MR. SALES: Yes, what I would draw attention to there, again by
13 way of supplementing what we have in writing is again
14 reference to basic constitutional principle J.H. Rayner,
15 Buttes Gas at this point in the argument as background to the
16 interpretation of Section 1 of the Criminal Justice Act.

17 Over the page, paragraph 107, in any event this is where
18 I would simply remind my Lords of J.H. Rayner and Buttes Gas
19 that this time applied to the court in what approach the court
20 should take in relation to these matters. Then there are the
21 points, were it appropriate to go into them, but we would not
22 accept that Saudi Arabia would be in breach of their
23 obligations and that the UN Security Council Resolution only
24 sets out legal obligations. What is in issue is something
25 which goes beyond legal obligations and is a positive set of

1 co-operative arrangements which are vital to the
2 United Kingdom national security.

3 My Lords, point 4 then on page 43 is what my learned
4 friends call the tainted advice point. We say more accurately
5 characterized as unlimited representations.

6 LORD JUSTICE MOSES: Un?

7 MR. SALES: Unlimited representations, my Lord. It is the point
8 that the Prime Minister drew attention to other matters as
9 well as the national security matters.

10 My Lords, just on this I think in essence my learned
11 friend had two points, one was, well, national security is one
12 thing but highest priority foreign policy objectives in the
13 Middle East is another, something to be treated as distinct
14 from national security.

15 May I give my Lord our response to that which is
16 essentially as a matter of law the approach to national
17 security adopted by the House of Lords in the Rehman case,
18 that is volume B, tab 24, paragraphs 15 to 16 in particular in
19 the speech of Lord Slynn and my Lord so far as the ----

20 LORD JUSTICE MOSES: Which case?

21 MR. SALES: Rehman Secretary of State.

22 LORD JUSTICE MOSES: Rehman?

23 MR. SALES: R-E-H-M-A-N, my Lord.

24 LORD JUSTICE MOSES: Rehman, yes, I am sorry I did not hear.

25 MR. SALES: Sorry, so far as evidence is concerned just a

1 reference to the core bundle, page 161, the last paragraph
2 where the Prime Minister himself makes the point about the
3 interconnectiveness between highest priority foreign policy
4 objectives and national security.

5 My Lords, the second point that I understood my learned
6 friend to be making was in relation to reference to commercial
7 matters in the representations which the Prime Minister had
8 made. In my submission the Prime Minister did not do anything
9 unlawful in making reference to those matters. He clearly put
10 them in a box separate from national security.

11 LORD JUSTICE MOSES: This is what is so perturbing really about
12 this case, is it not? This concept of putting things in a
13 box. Clearly you can have a number of reasons for taking an
14 action, well (unclear) public law, one of them good, some of
15 them bad and the way judicial review works there is a limit to
16 which a court can probe into the bona fides of the one rather
17 than the other. So far as public justification is concerned
18 for action taken which amounts to succumbing to a threat is
19 concerned, you have very compelling reasons for taking action
20 like you will not get the Typhoon contract so on and so forth.
21 You are told that, you do not take any action partly because
22 the source of the concern is the very people you are
23 investigating, namely BAE, that does not work. The next thing
24 that happens there is silence. The next thing that happens is
25 that someone, X, apparently who has interests of his own to

1 protect, issues a threat following on the inadequacies of the
2 previous concerns expressed by BAE.

3 Any state, and I am quite confident, the United Kingdom
4 plus Mr. Wardle, will be most concerned that what in fact is
5 not happening is that one good reason is being used to protect
6 the state from an accusation that the other reason is the real
7 reason. How does the system, how does the government rebut
8 that suspicion? How do you resist the very obvious suspicion
9 that has arisen, that the people being investigated do not
10 like it so they put their friends up to making the threat or
11 that there are reasons that the Government does not want to
12 admit for taking a course of action so they jack up the other?

13 I mean is there any process by which that can be tested
14 unless it be the process advanced by Ms Rose, namely you go on
15 unless you are driven by necessity not to do so, which would
16 protect and everybody would know then that it is a genuine
17 reason for not prosecuting, you are compelled to do so. If it
18 is all a general width of discretion and just "trust us, lean
19 on me Guv, don't you worry, it is all all right", how can
20 there be any assurance?

21 That is the value, it may not be the law. Maybe there
22 is nothing we can do about it, as you have submitted so well
23 this morning, but unless that happens how can there ever be
24 any confidence that the one reason has not shaded into the
25 other, that the person making the threat has not been put up

1 to it by someone whose earlier threats did not succeed and so
2 on and so forth. We will never know.

3 MR. SALES: My Lords, on this part of the argument our submission
4 is the Prime Minister did nothing wrong, unlawful, in any way
5 at all by making reference to the matters that he made
6 reference to. He clearly identified for the Director the
7 national security matters which he wished the Director to have
8 to his mind when he took his decision. The Prime Minister
9 recognized throughout that the decisions would be for
10 Attorney General and the Director.

11 LORD JUSTICE MOSES: Well, he wrote that specifically.

12 MR. SALES: Not for him. My Lord, at paragraphs 116 and 117 the
13 Director has made it clear in his evidence that he
14 specifically did not take into account the representations
15 that had been made about the national economic interest.

16 LORD JUSTICE MOSES: Now, he did not but how does he know someone
17 else did not?

18 MR. SALES: My Lord, he knows the representations which are being
19 made to him on behalf of the Prime Minister and other
20 ministers because he has given the text by reference to which
21 to take those matters into account. The court has that
22 and ----

23 LORD JUSTICE MOSES: He has to trust, and I readily understand
24 that, the bona fides of the good faith of the people writing
25 to him and to the Attorney. That is the system, that is what

1 we have to do.

2 MR. SALES: My Lords, obviously if there is a legitimate case to
3 attack the bona fides of those persons it can be made but
4 there is none.

5 LORD JUSTICE MOSES: What about the sequence of events? A year
6 goes by when what BAE wrote did not have any effect and then
7 you have the visits of the gentlemen to Paris and so on. Then
8 he comes to London and then this all blows up. Is there no
9 account to be taken of that? Ms Rose started with the factual
10 sequence of events.

11 MR. SALES: Yes, my Lord, in my submission there is not the
12 beginnings of a case of bad faith on the part of those making
13 representations of the public interest to the Director, that
14 is my submission.

15 LORD JUSTICE MOSES: Yes.

16 MR. SALES: My Lords, the next point that I deal with are relevant
17 considerations, national security, that is page 47. My Lords,
18 this is the suggestion that those assessing the national
19 security did so in an irrational way because it is said that
20 they left out of account something. My Lords, our position on
21 that is essentially set out here. What we say is that so far
22 as Mr. Wardle was concerned he was looking to the assessments
23 made by ministers and those advising them who were in a
24 position to judge. It was for those people to make the
25 assessment what were the key factors in relation to the

1 national security interests which should be taken into
2 account. There is no obvious point, statutory table of
3 mandatory considerations which were to be taken into account.

4 My Lords, it happens that the matter was checked
5 subsequently, but we say relevant to this part of the case,
6 this is Wardle 1, paragraph 60, core bundle, page 103. The
7 second check was made as to whether there was thought to be
8 any difficulty with this aspect of the national security in
9 the course of the MLA exercise and the answer was that it was
10 not.

11 LORD JUSTICE MOSES: That is because it would not have been a
12 breach of trust. Is that the point?

13 MR. SALES: No, my Lord. The point being made, this is page ----

14 LORD JUSTICE MOSES: I am looking at a different point. Right,
15 103.

16 MR. SALES: It is 103, paragraph 60, perhaps if I invite my Lords
17 to cast your eyes over that.

18 LORD JUSTICE MOSES: Yes (Pause) Yes.

19 MR. SALES: My Lord, what is being said there is that there has
20 been a double check on this particular point and the
21 assessment is that this is not a dimension of the case which
22 does give rise to concerns about national security.

23 LORD JUSTICE MOSES: What was the difference? The difference was,
24 surely, that the government had been threatened if they did X,
25 then Y would happen, whereas nobody had issued a threat in

1 relation to response to the mutual legal assistance. I mean,
2 that is the point.

3 MR. SALES: Well, nothing is said specifically about threats in
4 relation to mutual legal assistance.

5 LORD JUSTICE MOSES: No, exactly.

6 MR. SALES: What is being said is that in assessing what
7 representations should be made in relation to that specific
8 consideration was given to whether if threats were made and
9 concessions were made in relation to that matter as well.
10 That, in light of what had happened in respect of the SFO
11 investigation, could be taken to indicate that there was any
12 problem with national security in the particular, we say,
13 speculative and hypothetical way that the claimants have put
14 forward. Answer, no.

15 My Lords, lastly on this point, we say that the answer
16 given by the Prime Minister at the meeting with
17 Attorney General which we have looked at already, does cover
18 this particular dimension of the case. Will we be making our
19 position worse if Britain is seen to cave into threats.

20 LORD JUSTICE MOSES: Can we look at where that is?

21 MR. SALES: That is ----

22 LORD JUSTICE MOSES: 176/177.

23 MR. SALES: 177, my Lord. It is the third bullet point on the
24 page:

25 "It is important the government did not give people

1 reason to believe that threatening the British system resulted
2 in parties getting their way. The government also needs to
3 consider damage done to the credibility of law in this area,
4 (unclear) unfair trial. Its good reputation on bribery and
5 corruption (unclear) compared with many of its international
6 partners" ----

7 MR. JUSTICE SULLIVAN: We do not need to worry about whether it
8 was a mandatory consideration to take into account or an
9 optional one. It was taken into account and the question is
10 whether the reasons given for discounting it make any sense
11 given the Director's view that this was indeed a case worth
12 pursuing through investigation anyway. It was an
13 investigation worth pursuing, it was not something that was so
14 hopeless it ought to be given up now.

15 MR. SALES: Yes.

16 MR. JUSTICE SULLIVAN: The second point, I am not quite sure how
17 far that goes, "we have a better reputation on bribery than
18 others".

19 MR. SALES: The point that was to be taken into account was the
20 national security concern. The point that is taken against us
21 is that the national security concern was not properly
22 considered.

23 LORD JUSTICE MOSES: Yes.

24 MR. SALES: My submissions in relation to that are that it was for
25 those making the assessment about national security to decide

1 how to assess it. What are the big points ----

2 LORD JUSTICE MOSES: Of course it was, but here we see how they
3 were assessed. Someone has pointed out that it would itself
4 be damaging to national security to give into threats. Now,
5 that is so trite it hardly needs saying, every time a hostage
6 is taken or a ransom is demanded the answer of government is
7 we do not yield to threats. I suspect that is in Pufendorf in
8 1688. Here it is raised and yet what is the answer to it?
9 What is the answer to the question: What is the damage to
10 national security going to be if we give in to this threat?
11 What is the answer given? Where do we find the answer to that
12 in pages 176 and 177.

13 MR. SALES: My Lord, the answer to it is given in the general
14 assessment of the ministers who made representations to the
15 Director on the topic, that taking all things together the
16 national security concern was in favour of dropping the
17 investigation for the reasons that they emphasize and set out.

18 LORD JUSTICE MOSES: The Director himself did not even ask that
19 question. Is that not the question that he left, he relied on
20 the others as it turns out. That is the one where he was
21 asked, I think, by Mr. Tyrie or whoever it was at committee
22 stage and he said "well, that was not a consideration I took
23 into account but it now emerges and the answer to it is that
24 it was taken out, the evidence" ----

25 MR. SALES: Yes.

1 LORD JUSTICE MOSES: But where is it taken into account? Here the
2 points are specifically raised and the only answer is "well,
3 perhaps the evidence is not good enough and anyway we have
4 done jolly better than others".

5 MR. SALES: My Lord, in my submission it is taken into account in
6 the compendious assessment of the national security threat
7 which the United Kingdom faces which was the subject of
8 detailed representations. It is in that context that I invite
9 your attention to paragraph 60 of Mr. Wardle 1, where the
10 point had been checked again in the course of the MLA exercise
11 and again the assessment was that when you weigh matters
12 together there is nothing to suggest that the national
13 security assessment that was made at the time when
14 representations were made to the Director, is invalidated in
15 any way.

16 My Lords, the last point that I need to deal with is
17 that arising out of the Shawcross exercise, this is at page 50
18 of our skeleton argument.

19 LORD JUSTICE MOSES: Yes.

20 MR. SALES: My Lord, at paragraph 137 we say the claimants contend
21 it was constitutionally improper and they seek to suggest an
22 abuse of power for the Prime Minister to say to the
23 Attorney General at their meetings, this was the clearest case
24 for intervention in the public interest he had seen. They
25 allege that this expression of opinion taints the decision to

1 discontinue the investigation. I remind my Lords that
2 although the claimants seek to put this ground in terms of
3 abuse of power, they were not in fact granted permission to
4 pursue the allegation but ministers pressured the
5 Attorney General and the Director. The claim for which
6 permission was granted was that there was a breach of
7 convention.

8 My Lords, what we do is address the point as a claim
9 based on breach of convention. In that regard we say in
10 paragraph 139 that there are a series of questions which need
11 to be gone through before it could be concluded that this was
12 a matter either for the court to go into or which could
13 possibly affect the legality of the decision taken by the
14 Director.

15 First of all, there are the questions whether a
16 constitutional convention exists and, secondly, whether it has
17 been breached. Are those questions justiciable such as to
18 give rise to any legal remedy? If they are, is there in fact
19 a constitutional convention obliging ministers to refrain when
20 giving advice in the course of a Shawcross exercise from
21 expressing their view to where the public interest balance
22 lies? Was such a convention breached? Did the
23 Prime Minister's expression of view to the Attorney have an
24 impact on the Director's decision?

25 The first point is a point of major legal significance

1 in terms of the justiciability of questions arising in respect
2 of conventions.

3 LORD JUSTICE MOSES: I wonder because we have already got ample
4 authority for the proposition that where a prosecutor is under
5 a legal obligation to exercise independent professional
6 judgment he must not do so acting under pressure. That is the
7 legal case. He says he did not, which may be the end of the
8 matter. I cannot remember which case it is that said it over
9 and over again, Mohit probably, so that if he acted under
10 pressure, designed to take away his independence, well that
11 would be unlawful but he says he did not.

12 MR. SALES: My Lord, the point that I am on at the moment is a
13 more fundamental one: What is to be regarded as pressure in
14 these circumstances and does the court have regard to what is
15 asserted to be a convention ----

16 LORD JUSTICE MOSES: Yes, quite.

17 MR. SALES: ---- in order to say that pressure has been applied.
18 My first submission is that the court ought not to seek to
19 identify ----

20 LORD JUSTICE MOSES: There is no identifiable rule that the court
21 can make a ruling about.

22 MR. SALES: The first point, my Lord, is even if there were an
23 identifiable rule in the form of a convention it is not, in
24 the light of all these commentaries and authorities, a matter
25 which the court should venture trying to rule upon or to which

1 legal consequences would attach.

2 MR. JUSTICE SULLIVAN: Again, we look at this in a high level of
3 abstraction, but there are conventions and there are
4 conventions. This just happens to be something, there is a
5 former Attorney General, having consulted 100 odd other, a
6 host of other former Attorneys General, publicly said to
7 Parliament and we have his words, there is no need to mess
8 about deciding whether or not there is a, he told us, the
9 Attorney told us, and we have the words in front of us. Why
10 do we need to go through these cases arguing about can we have
11 regard to it. Of course we have the words there. It is just
12 a question of looking at them and seeing whether actually
13 ministers advised by what the Attorney said they ought to do
14 and apparently without any criticism at the time or
15 subsequently and we are not allowed to do that apparently. We
16 ought to worry about, is there really a convention here.

17 MR. SALES: My Lord, precisely so, that is my submission. My
18 Lord, with an eye on the clock I have set out my submissions
19 on this part of the case fairly fully. We say that there is
20 absolutely nothing this point but the court would be erring in
21 law in trying to venture upon it ----

22 LORD JUSTICE MOSES: In a sense that once the other side have not
23 been allowed to argue that he made his decision under pressure
24 from other members of the government, in a sense that is
25 probably the end of the matter, is it not, because then there

1 is nothing on which, even if it was a justiciable question,
2 (unclear)? At the end of the day, it does not actually matter
3 in relation to this decision.

4 MR. SALES: Yes, well, it certainly is my submission that it does
5 not matter in relation to this submission.

6 LORD JUSTICE MOSES: It is very unfortunate if the Attorney
7 General's department now take a different view of the
8 Convention than that which has been publicly announced in
9 Parliament by Sir Hartley. It ought to be now made clear that
10 we no longer regard ourselves as inhibited from telling the
11 Attorney what we think the decision should be, now we regard
12 ourselves in the spirit of forcefully expressing our views of
13 putting ourselves much more forcibly than back in 1951. If
14 that is the position, it may be nothing to do with this case
15 but one would hope that that would be made clear.

16 MR. SALES: In my submission on true understanding of the
17 Convention it was always directed against ministers
18 instructing the Attorney or prosecutor to take particular
19 decision ----

20 LORD JUSTICE MOSES: It is a pity Sir Hartley did not say that.

21 MR. SALES: My Lord, in my submission when one goes back to the
22 Parliamentary debates and into the context in which
23 Sir Hartley made his statement responding to what Lord Simon
24 had said, that is the proper construction of the Convention.
25 It is precisely these matters which again, in my submission,

1 it is not for the court to go into and rule upon.

2 I do not think I can improve matters beyond what I have
3 just submitted and what I have said in writing and I sit down.

4 LORD JUSTICE MOSES: Thank you very much indeed. Sorry you have
5 had such an interesting ----

6 MR. SALES: It goes with the job, my Lord.

7 LORD JUSTICE MOSES: Is goes with mine too! Yes, Ms Rose.

8 MS ROSE: My Lords, may I deal firstly with the rule of law.

9 Mr. Sales made submissions on the question whether there was
10 any constitutional principle that might trigger the principle
11 of legality so as to permit the reading down of Section 1 of
12 the Act. Our submission is that he is wrong to suggest that
13 there is no constitutional principle and that that is clear
14 from Section 1 of the 2005 Constitutional Reform Act. The
15 point is made very clearly by Lord Bingham in his article. If
16 we look very quickly at that at volume F, tab 8, there is one
17 specific passage. This is the point that was being made by
18 Lord Bingham. He starts off in the second paragraph by
19 referring to the Constitutional Reform Act and then he goes on
20 at page 69 at the top of the page to say:

21 "But the statutory affirmation of the rule of law as an
22 existing constitutional principle and the Lord Chancellor's
23 existing role in relation to it does have an important
24 consequence, that the judges in their role as journey man and
25 judgment makers are not free to dismiss the rule of law as

1 meaningless verbiage, the Jewish prudential equivalent
2 motherhood and apple pie, even if they were inclined to do so
3 they would be bound to construe a statute so that it did not
4 infringe an existing constitutional principle if it were
5 reasonable possible to do so."

6 Your Lordship's will see that the footnote there refers
7 to Pearson v. Simms(?). We submit, of course this is an extra
8 judicial comment coming from a source and we submit that that
9 is an absolutely, with respect, correct analysis of the
10 position. If it were necessary to rely on the principle of
11 legality in Simms to read down the general prosecutorial
12 discretion to accommodate the need to uphold the rule of law
13 we submit that it is clear from the 2005 ----

14 LORD JUSTICE MOSES: I do not think Mr. Sales would necessary
15 quarrel with any of that. He just says, but there is no
16 content. It is so wide it is just like motherhood and apple
17 pie in the context of this case because unless you can say
18 what the content is of the rule, what sense, in other words,
19 it has been breached, it does not actually get you anywhere.

20 MS ROSE: My Lord, the simple answer to that is when a prosecutor
21 is exercising the discretion whether to prosecute, it is,
22 however one puts it, improper, contrary to the purpose of the
23 statute, unlawful for him to take into account a consideration
24 which undermines the upholding of the rule of law. That would
25 include and extraneous threat.

1 LORD JUSTICE MOSES: Any threat, even in a Khaled case, I mean
2 that is another thing that ----

3 MS ROSE: My Lords, everything I say about this is subject to
4 necessity, so if we can put the words subject to necessity in
5 brackets. Leaving that exception aside, in our submission,
6 the principle is that which is set out in the Phoenix case
7 that an extraneous threat is an improper and irrelevant
8 consideration. It is an improper and irrelevant consideration
9 because it defeats the rule of law. It prevents the
10 prosecutor from making a decision whether or not to prosecute
11 without fear or favour. He operates with fear and with favour
12 and the more powerful the associates or protectors of the
13 alleged criminal the less likely he is to be prosecuted and
14 that undermines the basis of the rule of law. We do submit
15 there is a constitutional principle engaged here.

16 We also submit that we do not need to go so far and that
17 may simply be an over technical way of putting the case
18 because, with respect, we adopt the approach of my Lord
19 Sullivan J, that Padfield and Wednesbury take us to the same
20 result. When you look at the purpose of a statute giving a
21 power to ----

22 LORD JUSTICE MOSES: The power is conferred so (unclear) exercise
23 independent professional judgment and the antithesis of that
24 is responding to a threat because then you are responding to
25 the will of somebody else.

1 MS ROSE: Yes, whose motives are inimical to the public interest.
2 Mr. Sales sought to argue in relation to the question of
3 responding to threats in the Phoenix authority and the other
4 authorities on the rule of law, that these apply only to
5 domestic unlawful threats because he said the United Kingdom
6 authorities are not in a position to determine whether the
7 acts of the Saudi government or its officials are unlawful.

8 With great respect that wholly misses the point. It
9 does not matter whether the threats that were made were or
10 were not a criminal offence. It does not matter whether the
11 threats were or were not a breach of international law, for
12 this purpose. The point is simply that the threat was on its
13 face nakedly and no one has suggested otherwise, an attempt to
14 stop a prosecution for improper purposes.

15 As such it is not a matter that can properly or lawfully
16 be taken into account. Whether the threat amounts to a
17 criminal offence or to a breach of international law is beside
18 the point. It is an extraneous and illegitimate
19 consideration.

20 To take again the quotation from the Singh case that was
21 referred to in Phoenix where it was said that if the minister
22 was influenced by industrial action he will be taking into
23 account an extraneous and irrelevant factor. It does not
24 matter if the industrial action was a criminal offence or was
25 lawful industrial action; the point is it is irrelevant to the

1 nature of the statutory discretion that the minister is
2 exercising which must be exercised on the basis of factors
3 relevant to that discretion, not on the basis of pressure
4 applied by third parties who have their own private interests.

5 That is the same whether the third party is a criminal
6 or an official of the state or the state itself. The
7 principle comes back to that set out in the Brown Antoine case
8 which your Lordship's will recall slightly expanded the
9 principle in the earlier case, that it is improper for a
10 prosecutor to be stopped because of political pressure or
11 persuasion. That is exactly, with respect, what happened in
12 this case.

13 That brings me to the only exception that we say exists
14 to that principle which is the necessity/duress exception.
15 Any attempt, we submit, to bring these facts within that
16 exception whether as a matter of domestic rule of law or
17 international law is plainly doomed, having heard the
18 submissions of Mr. Sales. Mr. Sales has expressly conceded
19 that the government does not seek to rely upon the necessity
20 defence as set out in Article 25. If the government cannot
21 meet this test in international law, we submit they cannot
22 meet it under the common law either because the conditions for
23 necessity to be established are no less stringent under the
24 common law than under international law. That brings us back
25 to the fundamental principle that customary international law

1 is a part of the common law.

2 Your Lordships will recall this again is a point
3 summarized by Lord Bingham. We do not need to turn it up but
4 it is at pages 81 to 82 at F8. Your Lordships have seen some
5 authorities today which also address the same point.

6 Thirdly, we say that on facts of this case it is
7 inevitable that the government have failed to meet any
8 necessity test because they never understood or appreciated
9 that that was the applicable test or sought to address it.
10 Both the Attorney General and the Director proceeded on the
11 basis that it was enough that a threat to national security
12 had been raised and that it was a credible threat. Their
13 understanding was that that took them outside the scope of
14 Article 5. It took them outside the scope of the rule of law
15 and it entitled them to stop the prosecution.

16 That error is apparent in the original press release
17 where it was said that the need to uphold the rule of law had
18 been balanced against a national interest. Now, as I said at
19 the beginning they both sought to pull back from that
20 formulation but we submit that it is telling that those were
21 the terms in which the decision was initially expressed on
22 behalf of the decision-maker in his public statement and we
23 submit that that statement does demonstrate the fundamental
24 error of approach that was taken to the rule of law.

25 Of course, the approach they should have been taking was

1 not seeking to balance the rule of law against the national
2 interests as if the two were opposing factors that could be
3 set off against each other. The right approach would have
4 been: Is this a threat that is so grave and so imminent and a
5 threat in relation to which there is no possible alternative
6 conduct but to give way? That is the question that should
7 have been addressed and it never was.

8 It is clear from Mr. Wardle's evidence and in particular
9 his second statement that he does not seek to meet this test.
10 At paragraphs 20 to 23 of his second statement he explains why
11 he felt that he had to stop the prosecution and there is no
12 suggestion there of any consideration being given to
13 alternative means of mitigating the threat.

14 To make the obvious point this was not a Leyla
15 Khaled-type situation, there were no hostages, there was no
16 plane, there was no bomb. This was a situation in which what
17 the Saudis were threatening was to withdraw their co-operation
18 on diplomatic and intelligence matters. That was a matter
19 that was likely over time to make it more difficult for the
20 United Kingdom to meet threats from international terrorism
21 because their intelligence collecting would be impaired.

22 This is a longer term problem that would be caused if
23 the Saudis were to act. That, we do submit, was a matter that
24 the United Kingdom could have dealt with through normal
25 international channels.

1 LORD JUSTICE MOSES: This is where I find, speaking for myself,
2 that you are almost at your weakest, I mean we just do not
3 know, I am perfectly prepared to accept that it was a much
4 more pressing problem than you say and that you will have to
5 sit down (unclear) judicial review just is not capable of
6 undermining what is said about that. It does not meet your
7 earlier point as to was there some way of getting them to
8 withdraw the threat? All we are told about that is that we
9 must assume that that was done.

10 MS ROSE: I am not sure in fact whether Mr. Sales has even gone as
11 far to say that we must assume that that was done. He simply
12 said there was an overall assessment made. He has been rather
13 careful not to say ----

14 LORD JUSTICE MOSES: I thought he did because he said he did not
15 realize that was the point made against him.

16 MS ROSE: He has not made any positive assertion that that was
17 done.

18 LORD JUSTICE MOSES: No.

19 MS ROSE: My Lord, I do make the point here because if you
20 were talking about a situation in which a British national had
21 gone to the Attorney General or the DPP and made a threat to
22 set off a bomb or whatever if the prosecution was not stopped,
23 you would expect that threat to be dealt with not by giving in
24 to it but by the normal processes of domestic law. You would
25 expect the person to be arrested and charged and perhaps they

1 would be difficult to find, perhaps they will be powerfully
2 protected but there are institutions nationally that would
3 deal with the threat.

4 We say that the same is true on the international level.
5 That states are not entitled to go around making this type of
6 threat and that if that type of threat is made there are
7 international mechanisms for calling them to account. Now, I
8 do want to refer your Lordships again to the points in
9 relation to resolution 1373. We looked at the resolution
10 itself but, my Lords, if we can go back to volume E, tab 13.
11 This, you will recall, is the resolution which obliges states
12 to co-operate in relation to international terrorism including
13 in relation to information sharing and intelligence sharing.

14 Looking at Article 6, which is on page 3, your Lordships
15 will see that it is this resolution under which it is decided
16 to establish a committee of the security council to monitor
17 implementation of this resolution with the assistance of
18 appropriate expertise. That is the counter terrorism
19 committee, so that was set up specifically to monitor a
20 co-operation with this resolution and states, as you can see,
21 were called on to report to the committee and, thereafter,
22 according to a timetable, on the steps they have taken to
23 implement this resolution.

24 In fact the counsellor terrorism committee set up under
25 this resolution had called Saudi Arabia to account in relation

1 to the implementation of its obligations to co-operate with
2 other states. If your Lordships turn up volume 2 of the
3 documents volume, page 1398, first of all here we can see a
4 statement by Prince Khalid Al-Faisal(?) of Saudi Arabia on
5 19th September 2002. On page 1398 between the two hole
6 punches:

7 "Saudi Arabia reaffirms its support to all security
8 council resolutions related to the question of terrorism, has
9 co-operated with the international community in implementing
10 these resolutions with the aim of combatting it, has taken the
11 necessary steps to close any gaps in regulations pertaining to
12 the nation as a charitable organization that may be exploited
13 for illegal purposes" and then "the appropriate authorities in
14 Saudi Arabia have taken action to implement Security Council
15 Resolution 1373. The Government of Saudi Arabia has lent its
16 support to every international effort within the framework of
17 the security council to crack down on terrorism by all means
18 approved by other states."

19 That was the statement made by Saudi Arabia as to their
20 position. Going to 1402 this is a report dated 2nd June 2003,
21 a report received by the Counter Terrorism Committee as your
22 Lordship's can see, from Saudi Arabia concerning its
23 compliance with the resolution. Going through the report your
24 Lordships can see that various questions were asked of
25 Saudi Arabia as to how they were complying with the

1 resolution. In particular at 1412, 1.13:

2 "The CTC will be grateful to know the institutional
3 mechanism by which Saudi Arabia provides early warning of any
4 anticipated terrorist activity to another member state whether
5 or not the states are parties to bilateral or multilateral
6 treaties."

7 The reply: "In the event that the competent authorities
8 in the Kingdom of Saudi Arabia come into possession of
9 information on the possibility a terrorist offence might
10 occur" if your Lordships read to the end of the paragraph.

11 LORD JUSTICE MOSES: (Pause) Yes.

12 MS ROSE: Your Lordships can see that the resolution is not simply
13 a hopeful piece of paper. It has its own monitoring and
14 reporting mechanisms which are operated and which Saudi Arabia
15 has complied with. Therefore, if Saudi Arabia were suddenly
16 to announce that it was no longer going to co-operate with the
17 United Kingdom in relation to intelligence of potential
18 terrorist attacks, the obvious response of the United Kingdom
19 would be to call Saudi Arabia to account before the Counter
20 Terrorism Committee. At the very least the possibility of
21 that course of conduct and, of course, the very great
22 political problems that that would cause to Saudi Arabia,
23 particularly in relation to its relationship with the
24 United States, if Saudi Arabia were being asked to explain why
25 it had withdrawn co-operation from the United Kingdom in

1 relation to terrorism because the UK was seeking to enforce
2 the OECD Anti-Bribery Convention, your Lordships can see that
3 there are legal mechanisms available which at least should
4 have been considered before any decision was taken that there
5 was no option but to give in to the threat.

6 The evidence that your Lordships have seen is that this
7 was not a matter that was even considered. We submit that
8 before any defence of necessity could be upheld that would
9 have had to have been considered as an option.

10 Finally, on this point my Lords in relation to outcome
11 Mr. Sales submitted yesterday that if we were right on our
12 submission on the rule of law the matter would have to be
13 quashed and there would be no possibly of reconsideration. Of
14 course that is not correct because our submission in relation
15 to the rule of law does permit the necessity exception. If
16 the UK government really are saying or would really wish to
17 say on reconsideration there is no alternative, it is that
18 grave, it is that serious, they would have the possibility of
19 doing that. But so far ----

20 LORD JUSTICE MOSES: Your answer is, "my submissions have never
21 been as extreme as he suggests".

22 MS ROSE: That is correct.

23 LORD JUSTICE MOSES: And there is a respectable legally-principled
24 way of carving out the exception which would allow for this
25 country to comply with its obligation to protect its citizens.

1 MS ROSE: The common law, we say here, is entirely in accordance
2 with international law because the principle of necessity
3 coincides with the principle under Article 25. In any event
4 either way the United Kingdom is not in breach of its
5 international obligations or it would not be held responsible
6 for failing to uphold the convention in that situation and
7 there will be no failure to uphold the rule of law in that
8 situation. That is the result that you would expect, of
9 course, given that international law is part of our common
10 law. You would expect that result and that is the result you
11 do get.

12 That then brings me to *Laundry*. My Lords, our amended
13 grounds set out how we took this point. If we turn up in the
14 core bundle, tab 1.

15 LORD JUSTICE MOSES: Long forgotten grounds, yes.

16 MS ROSE: It is page 12 with the felt tip marking, paragraph 20
17 where we refer to *Laundry*. Then in the final sentence of
18 paragraph 20 we say:

19 "If the decision-maker has misdirected himself from the
20 convention which he claims to have applied the decision will
21 be legally flawed on normal domestic public law grounds."

22 My Lords, that is the point. *Laundry* is not some
23 special principle which permits you to override the
24 *J.H. Rayner* case or the *Lyons* case and therefore needs to be
25 narrowly construed; it is not any derogation from any basic

1 constitutional principle, it is just an application of an
2 absolutely normal principle of public law which is that if a
3 decision-maker directs himself that he will take his decision
4 in accordance with a particular legal instrument or document
5 or policy but he misunderstands the document or instrument
6 with which he purports to be making his decision then he has
7 failed to take into account relevant considerations.

8 LORD JUSTICE MOSES: I would just like to say in this case our
9 policy is not to give up bribery of prosecutions because we
10 fear damage to international relations or our economic
11 well-being. If he has that policy and then does not apply it
12 it is the same thing.

13 MS ROSE: It is no different. My Lords, it is the basic principle
14 that is often referred to as the Gransden principle derived
15 from the case of Gransden v. Secretary of State for the
16 Environment(?) May I give your Lordships the reference, it is
17 [1985] 54 P&CR 86. It is also summarized in Michael Fordham's
18 book paragraph 6.2.8.

19 MR. JUSTICE SULLIVAN: If you want to take a policy into account
20 you have to properly understand the policy.

21 MS ROSE: You have to properly understand the policy. It is
22 absolutely a basic principle of public law and, in my
23 submission, it makes no difference whether the policy you are
24 taking into account was one that you drafted yourself ----

25 LORD JUSTICE MOSES: It does not matter the source of the policy.

1 MS ROSE: It does not matter what the source of the policy is.
2 The one thing that is absolutely clear in this case is that at
3 all stages the Director and the Attorney General acted on the
4 basis that they were going to act in accordance with
5 Article 5. That was spelt out in the Shawcross letter. It
6 was spelt out in subsequent documents. It was positively
7 asserted in the decision in the statement of Parliament and
8 has been positively asserted on multiple occasions to the
9 OECD. We say really that is the beginning and end of my
10 learned friend's sophisticated but ultimately pointless
11 attempt to limit ----

12 LORD JUSTICE MOSES: Ultimately?

13 MS ROSE: Ultimately pointless, my Lord.

14 LORD JUSTICE MOSES: I thought you said something different!

15 MS ROSE: Just to go through the bases on which he attempted to
16 confine the order. He said it only applies in relation to an
17 individual human right where anxious scrutiny applies. It
18 only applies where the treaty obligation includes an
19 obligation on the legal order to provide a remedy. It only
20 applies where there is clear jurisprudence and that it only
21 applies if there is no overriding public interest.

22 Well, to deal with those four points, but, really this
23 is subsidiary to my basic point. We say, therefore, there is
24 no basis to confine Launder to individual human rights. The
25 principle has always been expressed in general terms in

1 relation to circumstances where a domestic decision-maker
2 purports to be taking into account an international law
3 obligation. In any event, of course, in this case we say
4 there is strict scrutiny obligation on the Phoenix basis.

5 The Article 13 point, with great respect, makes no sense
6 conceptually as a limit on the scope of the Launder principle
7 because, of course, Article 13 itself was not a part of
8 English law at the time of the decision in Launder, so it is
9 very difficult to see how the existence of such an
10 international law obligation could affect the scope of the
11 jurisdiction of the national court.

12 The next point about only applying where there is a
13 clear jurisprudence, it is wholly unprincipled, in my
14 submission. At what point do you decide that there are enough
15 cases on a particular international law point ----

16 LORD JUSTICE MOSES: I do not think, I do not want a great debate
17 about it but I think his point is that at least with the ECHR
18 you had an obvious authoritative source of what it meant that
19 did have power to bind on an international plane the high
20 contracting parties, which is different. You finesse the
21 point, you say this is not a case of the court telling other
22 signatories how they ought to apply their international
23 obligations. This is merely making sure that the
24 decision-maker has properly directed himself as to approach
25 which he has expressly stated he adopted.

1 MS ROSE: My Lord, that is the principle in *Lauder*, that is what
2 it is. The final point he makes is about overriding public
3 interests and he use the *CND* case as an example, but my Lords,
4 again that is not anything special to the *Lauder* situation.
5 It is another standard principle of public law that there may
6 be particular areas of decision-making where the court will
7 not tread. The decision to make war is classically one of
8 those. It does not matter whether the ground for review was
9 *Lauder* ----

10 LORD JUSTICE MOSES: It could be and might well have been a
11 decision based on considerations of diplomatic international
12 policy. You might well in such circumstances say to the court
13 "do not tread on this area" and the court might well say, "no,
14 we will not". The trouble is the past has been pulled because
15 he said, "well, we did not take that into account. We did not
16 regard this decision as trespassing upon international
17 relations" says Mr. Wardle.

18 MS ROSE: In any event, my Lords, the nature of the decision in
19 this case is a decision not to prosecute, a decision not to
20 investigate which my learned friend concedes is a judicially
21 reviewable decision.

22 LORD JUSTICE MOSES: What the argument really came down to was,
23 "no you should not succumb to pressure if it is someone within
24 the United Kingdom but there is nothing you can do about it if
25 it comes from abroad".

1 MS ROSE: Yes.

2 LORD JUSTICE MOSES: Which is absolutely realpolitik, I mean that
3 is ----

4 MS ROSE: My Lords, in my submission, there is no support for that
5 in any of the authorities that my learned friend has shown to
6 your Lordships, an extraneous threat ----

7 LORD JUSTICE MOSES: I thought there was the opposite in Phoenix,
8 the one thing that you must not do is allow the court merely
9 to say there is nothing we can do.

10 MS ROSE: My Lords, we do submit that Richards J in the CND case
11 did get the principle absolutely right, hardly surprisingly
12 given the source of who he is.

13 LORD JUSTICE MOSES: Well, you would say that because he is on
14 your side.

15 MS ROSE: My Lords, may I now turn to the tenable view argument,
16 the notion that there is a margin of discretion in the
17 interpretation of Article 5? My Lords, we submit that this is
18 contrary to *Launder*, *Kebilene* and *Adnan* and contrary to the
19 normal public law principle that if a decision-maker purports
20 to direct himself by reference to an instrument the court
21 looks at the instrument and decides whether he has it right or
22 wrong. The court does not say this was a *Wednesbury*
23 reasonable interpretation of this policy. The court says you
24 have or have not correctly interpreted the policy. A document
25 has only one meaning.

1 My Lords, there is one further authority on this point.
2 As your Lordship's can see looking at the first page, this was
3 a dispute arising out of the building of channel tunnel.
4 There had been a treaty entered into and then the Secretary of
5 State had made some statutory directions, as your Lordships
6 can see at paragraph 1, in relation to installing a new x-ray
7 system and increasing the proportion of vehicles to be
8 searched. It was argued that he had no power to give those
9 directions and it was said that the directions were ultra
10 vires because the Secretary of State had no power unilaterally
11 to impose requirements for the defence and security of the
12 channel tunnel except in the circumstances set out in Article
13 6 of the treaty.

14 If your Lordships turn over the page, second page,
15 unfortunately, I do not have numbers, at paragraph 7, articles
16 of the treaty are set out. Your Lordships can see it
17 Article 6 relates to exceptional circumstances.

18 LORD JUSTICE MOSES: Yes.

19 MS ROSE: Then Article 19 at the bottom of the page there is an
20 arbitration provision so there was a mechanism in the treaty
21 for the resolution of disputes.

22 If we turn on to paragraphs 35 and 36, Peter Gibson LJ
23 identifies the issues. The second issue at paragraph 36 was
24 whether the courts should on the exercise of its discretion
25 refused to grant relief on the ground that it was

1 inappropriate for the court to decide questions as to the
2 proper interpretation of the treaty and the concession.
3 Mr. Crow argued for the Secretary of State that because
4 Article 19 was an arbitration clause governing the resolution
5 of a dispute the correct way of the concession was to raise
6 the issue of interpretation by reference to arbitration and
7 that it was inappropriate for an English court to resolve
8 disputes as to meaning of the treaty and the concession.

9 The judge rejected that argument too but it was a
10 question of domestic law whether the two directions were ultra
11 vires the act which is part of English law although it
12 involved the true interpretation of international instruments.
13 It was then said that he had been wrong to make that decision.

14 Of course, looking at it in the context of our case we
15 say that the decision to stop the investigation was ultra
16 vires Section 1 of the CJA, so again the question arises
17 whether this is an ultra vires decision as a matter of
18 domestic law.

19 The court held that it was appropriate for the English
20 court to interpret the treaty. Your Lordships can see how
21 Peter Gibson LJ deals with it at paragraphs 38 and 39. It is
22 a citation of Adnan at paragraph 39. The matter was most
23 clearly put by Laws LJ who gives a short judgment starting at
24 paragraph 56. He states:

25 "Initially I felt there was a good deal in the

1 respondents' case for two reasons".

2 LORD JUSTICE MOSES: Sorry, where are you now?

3 MS ROSE: Sorry, paragraph 56, Laws LJ.

4 LORD JUSTICE MOSES: Yes.

5 MS ROSE: He is obviously concerned about the court intervening.

6 He states:

7 "This court could not foresee the consequences of any
8 significant disturbance to those arrangements which it might
9 generate by insisting on positive (unclear) states. Against
10 that background, if the respondents' proper construction of
11 Article 5 of the treaty and clause 23(2) of the concession was
12 a reasonable one which could be conformed to the instrument's
13 language, we should accept it rather than push out a boat into
14 waters unknown to us and in which we would certainly be in no
15 position to set its course. This would have been a wrong
16 approach. The correct construction of Article 5, clause 23(2)
17 is of course a matter of law."

18 He then states at 58: "My initial view was, I think,
19 wrongly influenced by the principles our courts applied in
20 view of the exercise of discretion. The case is a salutary
21 reminder of the truth, obvious on reflection but the rule of
22 law in relation to public bodies depends as well on the proper
23 construction of the (unclear) and instruments by which the
24 public body binds itself as it does on the reasonableness of
25 fairness of any action which the public body takes."

1 We submit again yet further authority that it is wrong
2 in principle to adopt an approach, a Wednesbury or tenable
3 view approach to the construction of Article 5. The question
4 is whether the Director got it right or got it wrong. That
5 again, as your Lordships can see, is a situation in which
6 there was no international jurisprudence on the proper
7 construction of those provisions.

8 My Lords, without going to it in detail the third
9 Pinochet case is another striking example of the English
10 courts construing and international instrument in the absence
11 of any international jurisdiction. It was the English House
12 of Lords which for the first time decided the question whether
13 there was state immunity for acts of torture under the 1984
14 Torture Convention. Professor Sands tells me that that
15 decision of the House of Lords has now been referred to in
16 other jurisdictions as an authoritative interpretation of the
17 Torture Convention.

18 LORD JUSTICE MOSES: Where are we putting channel tunnel?

19 MS ROSE: My Lords, I suggest that it goes at the back of file D.

20 LORD JUSTICE MOSES: So it is D?

21 MS ROSE: D72.

22 LORD JUSTICE MOSES: I am just thinking of the index.

23 MS ROSE: Yes. My learned friend sought to limit the principle of
24 Adnan to a situation where there is statutory provision that
25 requires the Secretary of State to take into account

1 construction of an international instrument but, with respect,
2 that will not no. If your Lordships look again at the whole
3 of the judgment in Adnan your Lordships will see that the
4 arguments made by the Secretary of State in Adnan mirror those
5 which are put forward by Mr. Sales in this case as to why the
6 court should not have made an authoritative determination of
7 the construction of the Refugee Convention. Those were
8 resoundingly rejected not just because it was part of an
9 English statute but as was a free-standing basis of decision
10 on the grounds that there can only be one meaning for an
11 instrument of international law and it is the duty of the
12 court to ascertain what that meaning is.

13 My learned friend relies on Brannigan and Behrami, with
14 great respect the reasoning in those cases is difficult to
15 discern and in any event clearly they are not binding on this
16 court. The Strasbourg Court appears to have been very
17 concerned by the fact that it had no jurisdiction over other
18 international instruments. You might say that those cases are
19 closer to the J.H. Rayner-type of case than they are with the
20 types your Lordships are dealing with, the Launder case.

21 Finally, if your Lordships are against me on that
22 submission we do make the submission that the Director's
23 interpretation of Article 5 is not a tenable view in any
24 event.

25 The next point that my learned friend made was that your

1 Lordships should not rule on Article 5 because it would
2 prejudice the United Kingdom in its effort to obtain a more
3 favourable interpretation of Article 5 from the OECD. My
4 learned friend relied on Mr. Dickerson's statement, if we can
5 turn that up in the core bundle.

6 LORD JUSTICE MOSES: In a moment. I cannot remember where it was.

7 MS ROSE: It is tab 13. Mr. Dickerson at paragraph 6 refers to
8 lengthy discussions that took place between the United Kingdom
9 and the WGB in January and March 2007. He sets out in a
10 series of bullet points the case that he says was put forward
11 by the United Kingdom delegation.

12 My Lords, there is something very odd about this
13 explanation and that is that when one crosses to tab 14 we
14 actually have in the bundle the writing summaries of
15 submissions that were made by the United Kingdom in January
16 and March 2007. As your Lordships know, if we can go to
17 page 259 in the March submission, paragraph 18, we have the
18 point that the United Kingdom was positively putting forward
19 to the OECD on the question of the interpretation of Article 5
20 that this was a matter that was likely to be determined by the
21 English High Court and that in that forum the SFO would
22 vigorously defend the comparability of its decision with the
23 Convention.

24 If your Lordships go back to Mr. Dickerson's bullet
25 points your Lordships will see that the other arguments

1 mounted by the United Kingdom to the WGB are summarizing his
2 bullet points but that he makes no reference to this point.
3 My Lords, in my submission, this wholly defeats Mr. Sales'
4 submission because the UK cannot take the position where it
5 says on the international plane to the OECD "you do not need
6 to worry about the interpretation of Article 5 because the
7 English High Court is seized of this question and will
8 determine it" and then say to the English High Court "you
9 cannot make a determination on Article 5 because that will
10 prejudice us in our negotiations with the OECD".

11 LORD JUSTICE MOSES: They are ongoing, those negotiations.

12 MS ROSE: The OECD's delegation is due to come to the
13 United Kingdom in March.

14 LORD JUSTICE MOSES: Why should not the delegates say to the OECD
15 whatever we say, suppose we were with you, that the court got
16 it wrong?

17 MS ROSE: My Lord, the point is made that these are not
18 negotiations. What is happening is that the OECD is
19 investigating the United Kingdom because the OECD is not
20 satisfied that the United Kingdom is complying with its
21 obligations. What the OECD is here to do is to ask the
22 United Kingdom to explain itself.

23 The next point my learned friend made on this was that
24 he sought to rely on Article 31 of the Vienna Convention on
25 the law of treaty and to argue that in some way the

1 United Kingdom is able now, by an agreement now with the other
2 parties to the OECD, retrospectively to affect what its
3 meaning was in December 2006. We submit that is wholly wrong
4 in principle. Of course it is right, and this is all that
5 Article 31 of the Vienna Convention is saying, that if parties
6 to a convention subsequently agree on the interpretation of
7 one of its clauses then in relation to events after that
8 agreement that agreement is to be taken into account. My
9 Lords, it will be quite bizarre to suggest that a party could
10 by subsequent agreement affect the interpretation of an
11 article in a period before that agreement.

12 The question is whether the United Kingdom was in breach
13 as at December 2006 and there is no negotiation or diplomatic
14 effort that the United Kingdom can make now that will affect
15 the resolution of that question. It is a question of law.

16 The same, of course, applies to subsequent factors, if
17 states subsequently adopt a different practice that cannot
18 affect what the position was as at December 2006.

19 My Lords, next the Fininvest point. If we can turn it
20 up, it is at bundle D, tab 52. If you turn to page 758 it is
21 very important to understand what were the circumstances here.
22 Looking at D where the relevant part of Article 2 are set out:

23 "Assistance may be refused if the request concerns an
24 offence which the requested party considers a political
25 offence."

1 In other words if it is not a political offence you must
2 assist; if it is a political offence you have a discretion
3 whether to assist or not. If you then go down to 758 H, the
4 point is being made that the Secretary of State was not bound
5 to reach a decision as to whether or not these offences were
6 or were not connected with political offences. He could, had
7 he wished, have decided that whether or not they were he would
8 not in any event refuse co-operation.

9 Now, the point is, if he is going to say, "I will
10 co-operate, whether or not it is a political offence" then it
11 does not matter that the discretion to refuse co-operation has
12 not arisen because his decision is whether or not it is a
13 political offence I will co-operate so there is no breach.

14 The second point is, had you followed that course or
15 indeed had deposed that even had he reached a contrary view he
16 would still have decided to comply with the request, his
17 decision will be proved against this particular ground. The
18 reason is that there would have been no breach of the
19 Convention whether or not it was a political offence. That is
20 in no way comparable with this situation where, if we are
21 right, the Director took a decision in the belief that it was
22 compatible with Article 5 and was not in breach of the
23 Convention when in fact it was in breach of the Convention.

24 Your Lordships have seen from the documents the
25 centrality of Article 5 and the concern that both the Director

1 and the Attorney General had throughout that Article 5 should
2 not be breached. In my submission, it is unsustainable to
3 suggest that it can be said with any degree of certainty on
4 the basis of a subsequent witness statement that the decision
5 would have been the same had the decision-maker fully
6 appreciated ----

7 LORD JUSTICE MOSES: They went through the whole of this exercise.

8 MS ROSE: For that purpose.

9 LORD JUSTICE MOSES: Saying this is compatible with Article 5.

10 MS ROSE: Yes.

11 LORD JUSTICE MOSES: Partly because the Attorney was doing the
12 thing, his primary task, upholding the rule of law. He did
13 that by saying, "we will make our decision compliant with
14 Article 5". That was his public justification for what he
15 did.

16 MS ROSE: The Attorney had, as he said in his Shawcross letter,
17 the Attorney had publicly assured the OECD after consultation
18 with every cabinet minister that the United Kingdom would
19 comply with Article 5. That was the point he made in his
20 Shawcross letter.

21 My Lords, in my submission, Fininvest goes absolutely
22 nowhere to let the defendant off the hook in this case.

23 My Lords, if I can now turn to the construction of
24 Article 5 itself. Strikingly absent from my learned friend's
25 today submission has been any consideration of the positive

1 purpose of the OECD Convention. My learned friend is
2 completely silent on that. He has said, "oh, well, it is not
3 the purpose of the OECD Convention to interfere with state's
4 abilities to protect their citizens or to uphold national
5 security" but he has not addressed the question: What is the
6 purpose of the OECD Convention?

7 Your Lordships have our submissions on that and our
8 submission is that that purpose will be fundamentally
9 undermined by the interpretation which my learned friend seeks
10 to give to Article 5. He says that it is significant that
11 there is no national security exemption. My Lords, what is
12 significant is that this is a treaty which says expressly in
13 its preamble that states cannot derogate from its provisions
14 because if they do its purpose will be thwarted. Your
15 Lordships have our submissions about why that is so. States
16 are being asked in this treaty to act against short-term
17 national economic interest in overall common good, not just
18 the overall economic common good, but also as part of the
19 fight against international terrorism because terrorism is
20 fostered by corruption.

21 My Lord, in those circumstances we submit that it is
22 perfectly obvious and must have been obvious to states, the
23 considerations of the type that are prohibited under Article 5
24 might have an impact on national security and that if states
25 had intended to exempt members from complying with Article 5

1 where national security was in play they would certainly have
2 said so. Your Lordships have a plethora of other treaties
3 where they have said so.

4 LORD JUSTICE MOSES: I think what is so interesting about the
5 arguments advanced by the government or at least rather by the
6 Director, as he would not have said anything (unclear)
7 government policy, is, apart from protecting against economic
8 interest, the words "diplomatic relations" are pretty evil.

9 MS ROSE: It is impossible to understand what they are for because
10 we know, of course, that they do not relate to economic
11 considerations because economic considerations are separately
12 identified. What you are asking about is relation to the
13 foreign state excluding economic implications and the obvious
14 one is national security.

15 LORD JUSTICE MOSES: Defence.

16 MS ROSE: Yes. I mean we have relations with other states, partly
17 because we like to be friendly.

18 LORD JUSTICE MOSES: I suppose artistic (Laughter) Well, it is not
19 to be sneared at.

20 MS ROSE: It is not to be sneared at, my Lord. In my submission
21 it is an absolutely impossible construction, impossible.

22 LORD JUSTICE MOSES: It is not impossible, it just makes it pretty
23 feeble.

24 MS ROSE: Yes, it defeats the purpose of the convention. Of
25 course my learned friend says, well, I cannot say where the

1 borderline is but the OECD has reporting and ----

2 LORD JUSTICE MOSES: He is right in a sense that even on your
3 formulation there will be grey areas.

4 MS ROSE: Of course.

5 LORD JUSTICE MOSES: But at least everybody will, with much
6 greater certainty, know where they stand.

7 MS ROSE: On his formulation any state in relation to any
8 significant allegation of bribery would be able to invoke
9 national security and actually there will be very little the
10 OECD could do about it. It could send in a delegation and
11 make complaints.

12 LORD JUSTICE MOSES: Then when the United Nations then investigate
13 the state that did, they will say, well, "we did not mean it,
14 it was just hot air, we were just trying it on".

15 MS ROSE: It deprives the Convention of any real effectivity. Of
16 course in doing that in itself has an adverse effect on our
17 national security because it helps to promote terrorism if
18 bribery is not effectively restrained.

19 My learned friend did not address at all the Sirdar
20 case. That is a case in which the treaty in question, the
21 EC Treaty, is primarily concerned economic relations and with
22 social policies as between the member states and competition
23 between the member states and where it was argued in very
24 similar terms to those that have been put forward before your
25 Lordships that the parties did not intend to give up their

1 sovereignty over national security issues and certainly not in
2 relation to matter like sex discrimination. It was said how
3 on earth could we be expected to be bound by this
4 international treaty ----

5 LORD JUSTICE MOSES: Well, you made your Sirdar points, yes.

6 MS ROSE: Yes, my Lord. We submit that it is very clear from that
7 that the ECJ says there is no implicit national security
8 exception. My learned friend has cited no authority which
9 suggests that there is any such implicit exceptions in
10 treaties that do not have explicit exception.

11 The nuclear weapons case with respect to my learned
12 friend is wholly irrelevant because the point that is made
13 there is that where you are dealing with self defence in
14 warfare the relevant corpus of international law is the
15 special law dealing with warfare. My learned friend does not
16 point to any *lex specialis* of national security. The *lex*
17 *specialis* here is Article 5 and Article 5 is absolutely clear
18 in its terms.

19 My learned friend seeks to get around that obvious
20 problem by saying that the first and second sentences in
21 Article 5 in some way represent competing overlapping or
22 inconsistent international law norms. With great respect they
23 do not do any such thing. It is the usual very normal piece
24 of legislative instrument in which you have a general
25 principle with careful limitations and the question is normal

1 ----

2 LORD JUSTICE MOSES: Well, it preserves the wide discretion and
3 then says but not in these cases.

4 MS ROSE: It is sets specifically a limit.

5 My learned friend seeks then to rely on what he calls
6 the breadth of the domestic prosecutorial expression to argue
7 that national security is something that prosecutors can take
8 into account normally, so why cannot they in this case?
9 Again, of course, he does so wholly ignoring the purpose of
10 the Convention. What has happened in this case is precisely
11 what was envisaged as being the mischief which Article 5 was
12 designed to prevent. It is exactly the reason why bribery has
13 not been effectively prosecuted in the past.

14 LORD JUSTICE MOSES: I am not sure, I am afraid, that that is
15 quite right. There is another very good evidential reason why
16 bribery has not been, but that is not ----

17 MS ROSE: Of course, the economic interest. That is why Article 5
18 identifies those considerations as the ones that must not be
19 taken into account. It is addressing precisely the situation
20 that arose in this case because in this case we saw intense
21 questions of economic interest and questions in relation to a
22 foreign statement. You could say this is a classic Article 5
23 case.

24 MR. JUSTICE SULLIVAN: On the face of it, subject to Mr. Sales'
25 submissions, the representations were exclusively concerned

1 ----

2 MS ROSE: Yes, with Article 5.

3 MR. JUSTICE SULLIVAN: Extensively concerned with the two matters,
4 vis national economic interest and potential effect on
5 relations with Saudi Arabia.

6 MS ROSE: As you would expect in any instance where you have a
7 significant allegation of bribery against a foreign official
8 in a senior position in a foreign state. You would expect
9 those to be the two considerations and that is why Article 5
10 is in the terms that it is.

11 Briefly to do with Pufendorf, the problem with that is
12 of course that states have on many occasions made promises
13 which require them to expose their citizens to greater danger
14 because states make an equation which is the short term
15 greater danger of my citizens is worth sacrificing in the
16 long-term interest not only of our citizens but of the world
17 and the Geneva Convention ----

18 LORD JUSTICE MOSES: We are doing it at the moment.

19 MS ROSE: Yes, my Lord, it is done all the time, it is done all
20 the time, so it simply takes him nowhere.

21 My learned friend relied on the Consultative Council
22 Opinion, without turning it up my Lords it is at E20. If I
23 refer your Lordships to paragraphs 75 and 85 your Lordship's
24 will see there the familiar concern with the rule of law.

25 LORD JUSTICE MOSES: Sorry, where are we now?

1 MS ROSE: The Consultative Council.

2 LORD JUSTICE MOSES: Yes, just give me the reference again.

3 MS ROSE: It is E20 paragraphs 75 and 85.

4 LORD JUSTICE MOSES: I thought that was a rather good document. I
5 mean that set out your case really.

6 MS ROSE: It does, my Lord, paragraphs 75 and 85 in particular.

7 LORD JUSTICE MOSES: If you fight terrorism by lawful means.

8 MS ROSE: Yes, precisely.

9 My Lords, finally on the right to life, that again takes
10 my learned friend nowhere because simply to assert that
11 international law recognizes the importance of right to life
12 and recognizes positive obligations on states to protect life,
13 takes you nowhere when you are considering how that is to
14 interact with the specific obligations that states have
15 accepted under Article 5 of the OECD Convention. The war case
16 again is an obvious example.

17 Leaving Article 5 and coming very briefly to the
18 remaining grounds, in relation to tainted advice, my Lords it
19 is not simply that the Prime Minister refers to the Typhoon
20 contract in his 8th December memo. It goes deeper than that
21 because we know that at the beginning of December the
22 ultimatum was given to the Prime Minister saying, pull the
23 investigation now or we will cancel the Typhoon contract.
24 That the visit was made by Prince Bandar to the French. In
25 that week ostentatiously negotiating with President Chirac,

1 then Bandar arrives in London on 5th December, the following
2 day the Prime Minister is agitating about this.

3 The question is not just that it is obvious that the
4 Typhoon contract is on his mind because he mentions it, the
5 question goes deeper which is: How can we be sure that the
6 Prime Minister's obvious concern that he was about to lose the
7 Typhoon contract did not affect the language and the strength
8 with which he expressed the national security concern and the
9 strength with which he advocated the national security
10 concern? That is the difficulty. It touches on the point
11 that your Lordship was making, that unless you have a clear
12 standard of necessity that suspicions remains.

13 That is not an allegation of bad faith because it may
14 well have been a subconscious elevation of the seriousness of
15 the national security concern, but the problem is when you
16 have such a compelling and illegitimate concern, pressure
17 being placed on the Prime Minister by Prince Bandar, it is
18 impossible to tell to what extent that affects the assessment
19 of the national security concern which then is passed on to
20 the Director and causes him to crumble.

21 On the point about the failure to take into account
22 Saudi Arabia's international obligations your Lordships have
23 my submissions.

24 On the failure to take into account the threat to
25 national security of it being seen that the United Kingdom

1 give way to threats, well, my Lords, it is plain that this was
2 not considered. My learned friend relies on paragraph 60 of
3 Mr. Wardle's first statement where the point is made that in
4 considering the request for mutual assistance from the
5 Americans there is no evidence that this threat has yet
6 materialized.

7 It will be quite surprising if there was because only a
8 few months have passed since this decision was taken. It will
9 be quite shocking and startling if already another state had
10 made a threat to the United Kingdom. It is not something that
11 you would expect evidence of within a few months. The problem
12 is the damage that has been done to the United Kingdom's
13 reputation internationally, not just its reputation.

14 LORD JUSTICE MOSES: It is not just the reputation, it is
15 something much more fundamental. If people feel they can get
16 away with it it is the most obvious thing, "we have now heard
17 how the United Kingdom government interprets Article 5" and
18 they know where the pressure point will be (unclear).

19 MS ROSE: My Lord, yes. The fact that there is no evidence that
20 has come to pass within the last few months is, with respect,
21 irrelevant. This was a matter that needed proper
22 consideration at the time ----

23 LORD JUSTICE MOSES: If you want to bribe a state you choose a
24 state of importance strategically who will feel free to issue
25 threats against national security if it is exposed and that is

1 the way you now do it.

2 MS ROSE: My Lord, if you then choose to bribe a person who is in
3 a position personally to make a threat you make your position
4 even greater because you can ask that person as part of the
5 services for which you are bribing him to make the threat.

6 LORD JUSTICE MOSES: That is a factor that I just do not know how
7 it is suggested you should deal with it. There is no
8 evidence here, I should make absolutely clear, that BAE did
9 ask somebody in Saudi Arabia to protect them by asking a
10 threat, but we do not have to look for evidence. As a matter
11 of hypothesis X is bribing somebody high up in another state.
12 He says, "look you are going to upset diplomatic relations and
13 future contracts" and the governments say or the prosecutor
14 says, "well, I cannot take this into account, it is monstrous,
15 do not write to me in those terms", so what is the obvious
16 thing to do next?

17 MS ROSE: Yes, indeed.

18 LORD JUSTICE MOSES: The point is nobody will ever know.

19 MS ROSE: No.

20 LORD JUSTICE MOSES: Nobody will ever know that that is not what
21 happened.

22 MS ROSE: My Lords, finally very briefly on the Shawcross point.

23 We submit there is plainly an identifiable rule, it is set out
24 in the Shawcross statement and that the purpose of that ----

25 LORD JUSTICE MOSES: I am so surprised that anybody, I mean I can

1 quite see the justiciable point, I am slightly surprised,
2 well, I must not adopt my normal sort of language (Laughter)
3 but it is so odd that they stood up and said that is not, it
4 is all much more vague and difficult and that, it is so odd
5 they did not say, "that is right, that is what we do. If we
6 went over the edge this time I am sorry but actually there is
7 nothing you the court can do about it because look at the
8 evidence of Mr. Wardle and you know him and you must trust him
9 and I, for one, am very happy to do so".

10 It is very odd, if they are going to, if the policy or
11 however it is going Shawcross exercises are not being
12 carried out in the way that Edwards thinks they should be, it
13 would be jolly nice, it ought to be announced and set out so
14 that everybody can see, "this is our amendment to what
15 Sir Hartley said in 1951", it a very odd part of the case now.

16 MS ROSE: Will your Lordship's give me a moment. Unless I can be
17 of any further assistance.

18 LORD JUSTICE MOSES: No, thank you very much. Is somebody keeping
19 the run of authorities? Is somebody going to e-mail it? How
20 do you want to play it? Whatever is convenient.

21 PROFESSOR SANDS(?): My Lord, if I prepare a list and show it to
22 Mr. Steyn by topic of all the authorities that have been
23 cited.

24 LORD JUSTICE MOSES: Would you also be able to do it in
25 alphabetical order as well?

Transcript prepared without access to case documentation.

1 PROFESSOR SANDS: Of course.

2 LORD JUSTICE MOSES: Sometime next week when convenient, because
3 unless Sullivan J is itching to give judgment now.

4 MR. JUSTICE SULLIVAN: No, in view of the lateness of the hour I
5 think we will defer it.

6 LORD JUSTICE MOSES: The other thing that I would like, what else
7 is on e-mail? The skeletons are; is there any of the raw
8 material, is the core bundle something that was on disk, do
9 you see what I mean? I do not want you to have to transfer it
10 to that but if it is already there, as it were, on a computer
11 it will help them with quotations, do you follow?

12 MS ROSE: I will make enquiries.

13 LORD JUSTICE MOSES: Can you find out? If there is stuff that you
14 can ----

15 MS ROSE: I would have thought the witness statements could be
16 provided in electronic form.

17 LORD JUSTICE MOSES: Not too bothered about the witness
18 statements, no, it would be being able to extract documents.

19 MS ROSE: We will enquire, but certainly the skeleton arguments.

20 LORD JUSTICE MOSES: You will enquire. The skeleton argument will
21 be. I have a question for Mr. Sales, sorry.

22 MR. SALES: Yes.

23 LORD JUSTICE MOSES: Do you want to reply on any of the new
24 material?

25 MR. SALES: My Lord, I was just having a very quick look through

1 the channel tunnel case.

2 LORD JUSTICE MOSES: Do you want five minutes to think about that
3 because I have one other question for you that you might want
4 time. It is something I posed yesterday and forgot to ask you
5 again now. If you would be good enough to look at the final
6 meeting with the Attorney General before the announcement
7 which is page 179. The Attorney General is recorded as saying
8 he is extremely unhappy at the implications of dropping it
9 now. What do you, by way of submission, think those
10 implications are? What did he mean?

11 MR. SALES: My Lord, I am not sure that I can do more than infer
12 from the circumstances in which the words are said that the
13 Attorney was unhappy at the implications of dropping a live
14 investigation but felt that he had been driven to that
15 conclusion because of the strength of the public interest
16 matters that had been put forward. Also, as one bears in
17 mind, that he has himself formed a separate view that there
18 was not a proper evidential basis. The Attorney General's
19 position was based on both points. The Director's decision
20 was based on a single point.

21 The inference that I draw from these words is that the
22 Attorney General, having regard to both points, has
23 reluctantly concluded that the investigation should not
24 continue, he recognized that there would be criticism made in
25 relation to that decision but still he thought it was the

1 right decision to make.

2 LORD JUSTICE MOSES: Yes, do you want time to think about the
3 other cases or are you happy?

4 MR. SALES: No. My Lord, the short point on it is if you read
5 through it Section 11 of the relevant Act specifically says
6 that ----

7 LORD JUSTICE MOSES: It is an Adnan case.

8 MR. SALES: Sorry?

9 LORD JUSTICE MOSES: You say it is an Adnan case.

10 MR. SALES: I say it is an Adnan case, but Section 11,
11 paragraph 16, is the order making power, a minister may by
12 order make such provision as appears to be necessary or
13 expedient for the purpose of implementing the international
14 arrangements. So the international arrangements were
15 therefore part of domestic law qualifying the ambit of that
16 power, so, yes, that is right.

17 LORD JUSTICE MOSES: Yes. Thank you all very much. Subject to
18 getting that material and anything else you can indicate to my
19 clerk is available, as it were, on the net, that will be
20 useful. I thank everybody very much. I do not know when we
21 will give judgment but as soon as possible.

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