Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the “Organisational” Component

Original Article

Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the “Organisational” Component

Nicholas Lord* and Rose Broad **

Abstract: This article analyses a recent policy shift in the UK towards criminalising corporate failures to prevent serious and organised crimes that occur within their organisational structures and business operations. More specifically, through legal and normative compulsion (variously persuasive), the state has sought to change the behaviour of otherwise non-criminal, commercial enterprises by requiring the implementation of internal procedures and systems considered adequate, or reasonable, enough to prevent serious crimes. In this article we focus on the three phenomena that have emerged most prominently in relation to this policy shift: (i) corporate bribery in international business, (ii) the facilitation of (transnational) tax noncompliance and (iii) modern slavery in supply networks. In relation to these three major social issues, we foreground the failures of corporations, their policies, procedures, cultures and structures, to prevent their employees, subsidiaries and associated persons engaging in or facilitating such serious criminal behaviours i.e. the “organisational component”. We conclude by arguing in favour of holding corporations to account for failures to prevent serious crimes within their organisational structure but identify issues in the conceptualisation and operationalisation of such offences.

Keywords: serious and organised crime; corporate crime; corporate failure; organisational fault; corporate bribery; tax noncompliance; modern slavery.

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Introduction

This article analyses a recent policy shift in the UK towards criminalising corporate failures to prevent serious and organised crimes that occur within their organisational structures and business operations. More specifically, through legal and normative compulsion (variously persuasive), the state has sought to change the behaviour of otherwise non-criminal, commercial enterprises by requiring the implementation of internal procedures and systems considered adequate, or reasonable, enough to prevent serious crimes. In this article we focus on the three phenomena that have emerged most prominently in relation to this policy shift: (i) corporate bribery in international business, (ii) the facilitation of (transnational) tax noncompliance and (iii) modern slavery in supply networks; and corresponding legal frameworks in the form of the UK's Bribery Act 2010, Criminal Finances Act 2017 and Modern Slavery Act 2015.

Corporate bribery, tax noncompliance by wealthy elites and modern slavery in business are three social issues that we consider to be "serious" and "organized" crimes. These concepts are contentious; continually in a process of grappling within and between the scientific and policy/practitioner communities and in many ways represent "floating signifiers", given they have been applied to a diverse array of behaviours, actors and relations. But it is important for social scientists to engage with the constructs of policy to ensure meaningful dialogue and it was the UN Convention against Transnational Organized Crime 2000 (UNTOC) that set the global policy response, defining "serious crime" in terms of the severity of the penalties attached to offences (e.g. punishable by a maximum deprivation of liberty of at least four years). The "organized criminal group" was defined as "a structured group of three or more persons [not random, not informal], existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit" (Article 2(a))[1]. These definitions have been central at the European policy level and across law enforcement authorities in the European region, with the phenomenon of “organised crime” (and the “fight” against “it”) being integral to the EU’s pursuit of an “Area of Freedom, Security and Justice” as projected through the “Tampere”, “Hague” and “Stockholm” multi-annual programmes and the current “European Agenda on Security”.

Though we now see a discursive shift at the EU level, with the vocabulary of “organised crime” being superseded by a concern with “serious crime”, the former concerned with attributing qualities to criminality, and the latter concerned with impacts and harms falling on individual and collective victims (Dorn, 2009). Seeking to categorise harmful behaviours as “organised crime” or not, or remaining preoccupied with explaining what “it” or “they” look like, raises less useful analytical questions (Edwards and Levi, 2008). We see this sentiment in much academic literature that has questioned the ill-defined construct of organised crime (see for instance Paoli, 2002; Felson, 2006; Edwards and Levi, 2008; Hobbs, 2013). A focus on “serious crimes” broadens out the scope of inquiry to enable use to think in terms of harmful activities and their frequency (see Greenfield and Paoli, 2013). But if we think in terms of seriousness and harm, we must also incorporate harmful behaviours more commonly associated with concepts of whitecollar and corporate crime, but which are also well “organised”. Are recent corporate and white-collar scandals involving European-based institutions, such as the VW Emissions fraud, the pervasive FIFA corruption, state-sponsored Russian athletics doping, and so on, not also “serious and organised crimes”?

As Sutherland (1983: 229-230) himself argued, white-collar crimes are also organised crime, not in terms of contemporary constructs where we see organised crime discourse concerned with illegitimate, external criminal gangs and criminal enterprise, but in the need to recognise the formal and informal “organisation” of white-collar crime activities and their incentivisation and collusive enterprise through legitimate business structures (Levi and Lord, 2017). To avoid the temptation of categorising a diverse array of criminal behaviours as “organised crime” or “corporate crime”, a more useful approach is to think in terms of the organisation of serious crimes and organise our analysis in terms of the factors and conditions that shape why serious crimes are organised in the ways they are, and who gets involved in them over time (see Edwards and Levi, 2008). Such modes of thinking are now also evident with policy frameworks: Europol (2015) rather than focusing on specific features associated with organised crime groups (OCGs) instead identified a series of technological and socio-economic drivers of future organised and serious crime behaviours, and in doing so, explicitly integrates organisational and corporate crime into the “organised crime” discourse, recognising the economic damage caused by corporate scandals since 2000 and the interdependencies and intersections between criminal and non-criminal commercial enterprise within legal and “grey” markets.

We might also add that traditional “organised crimes” do of course intersect with legitimate business environments and markets, with related collusive practices and relations embedded in the functionality of legitimate business markets, so we must understand how organisational, corporate settings, cultures and environments facilitate how such relations are organised. The designation of the three case studies in this article as “serious” and “organised” is common in the *content* definitions within domestic and supranational policy and scientific discourse. For instance, the UK’s Serious and Organised Crime Strategy 2013 placed emphasis on human trafficking and serious financial crimes. Similarly, EU policy documents since 1995 have correspondingly identified corruption, fraud and human trafficking as three of the most cited examples of serious crime (Paoli et al., 2016). We argue that considering the “organisational component” is central to understanding the interplay of the complex, antecedent factors that generate such criminality. That is, viewing serious and organised crimes through the lens of organisational dynamics provides concrete insights into how and why these crimes can take place. Thus, the “organisation” provides a symbolic and practically important unit of analysis through which to understand certain crimes.

In these terms, we focus here on the failures of corporations, their policies, procedures, cultures and structures, to prevent their employees, subsidiaries and associated persons engaging in or facilitating serious criminal behaviours (i.e., the organisational component). First, we examine the dynamics of corporations and serious crimes, thinking about corporations as offenders, agents and facilitators of organised, criminal enterprise. Here we consider how the non-prosecution of corporations historically has left a contemporary legacy where corporations are generally not held to account for criminal behaviours within their organisation. Second, we introduce the concept of “corporate failure”, illuminating how and when corporations and organisations are “at fault”. Third, we examine our three case studies—bribery, tax noncompliance and modern slavery—and provide insight into the transition towards these new models of liability and accountability. Comparing the “failures” of business in three offences that incorporate intrinsically different forms of deviance (i.e., corruption, deception/dishonesty, exploitation) is useful for demonstrating how the key arguments here do not reflect the idiosyncrasies of each case, but have wider significance. We analyse legislative developments and publicly available data on implementation and enforcement, in addition to drawing on our empirical research into these social issues[2]. Finally, we conclude by arguing that despite its haphazard and inconsistent implementation, holding corporations to account for failures to prevent serious crimes within their organisational structure has symbolic importance but that gaps in the conceptualisation and operationalisation of such offences remain.

Corporations and Serious Crimes: Offenders, Agents and Facilitators

That ostensibly “respectable” global corporate elites are regularly implicated in engaging in or facilitating criminal behaviour is not new. We focus here on the UK case, where the “corporation” has existed in various forms since at least the 13th Century, and in its “modern” form since the mid-19th century, alongside anecdotal and robust evidence of deviance and unfair practice on “its” behalf throughout this time (Tombs and Whyte, 2015). Corporations exist as distinct entities with independent legal (and social) realities and personalities, and since 1855, the limited liability available for registered companies has reduced the personal risk of shareholders. The nature and operating conditions of corporations continues to develop into the 21st century as business becomes ever more transnational, increasing organisational complexity and making corporate operations, both legal and illegal, more esoteric and clandestine. Under these conditions, opportunities for organising corporate criminality multi-jurisdictionally are created, enabling corporates to externalise the risks of prosecution (Gibbs et al., 2010) and exploit criminogenic asymmetries (Passas, 1999) in the context of inconsistent global regulation and restrictive jurisdictional boundaries for national authorities (Lord, 2014a).

When we think of “corporate crime”, we foreground offences (criminal, civil and administrative) committed by corporate officials for their corporation and the offences of the corporation itself (Clinard and Yeager, 1980), or as Hartung (1950: 25) put it, offences “for a firm by the firm or its agents in the conduct of its business”. The inherent duplicity from what appear, superficially, to be otherwise legitimate businesses and the concealment of their transgressions behind a pretence of decorum has long been recognised (Ross, 1907: 47-8). It was the pioneering work of Sutherland (1983) that redirected criminological attention to crimes committed by elite individuals and corporations of “status” and “respectability” in the course of their *occupational* and *organisational* settings. His ultimate insight was that “[c]orporations break the law; and they get away with it” (Gobert and Punch, 2003: 1) and that their crimes were not merely “discrete and inadvertent violations of technical regulations”, but “deliberate” and with “consistent unity” (Sutherland, 1983: 227). Their criminality is recidivist and persistent (Sutherland, 1983: 227; Clinard and Yeager, 1980), and “widespread and pervasive” (Slapper and Tombs, 1999: 36), with the “biggest and best companies…widely involved in criminality” (Braithwaite, 1985: 6).

Corporations, their structures, environments, policies and procedures, facilitate criminal, deviant and transgressive behaviours, internally by their employees, and externally by others (e.g. clients, associated partners), across “glocalised” spaces and over extended periods of time. These behaviours include an array of crimes against social and economic regulation (Slapper and Tombs, 1999: 196), that represent not only one-off exceptional acts of criminality, but also routine, everyday harms, such as fraud, theft, and crime against workers, consumers and environments (Tombs and Whyte, 2015: 37-50). Thus, the corporation can be a) a primary offender, b) an agent, weapon, conduit, tool or location for offending, and also c) a conducive environment providing opportunities for criminal enterprise[3]. But how can we hold corporations to account for failures to prevent serious crimes within their business?

The relationship between corporations and criminal liability, responsibility and accountability raises several interesting questions. For instance, Fisse and Braithwaite (1994) argued individual accountability of corporate executives was, until the 1990s being undermined, as corporations, rather than individual personnel were the “prime target” of prosecution in cases of corporate crime. Furthermore, when sanctioned, corporations failed to sufficiently react internally in dealing with those individuals who should be accountable (i.e., “private justice”). By the late 1990s, the non-prosecution and apparent immunity of corporations implicated in crimes became more prominent (see Slapper and Tombs, 1999). That said, individuals can be complicit in, and accessories to, the offences of their corporations, and vice versa, rendering the criminal liability of corporations and individuals interdependent (Gobert, 2011). However, understanding how and why corporations could be “criminally liable” as well as why the state was reluctant to respond to corporations under the criminal law, rather than regulatory law, is a major issue Wells (2001).

The key point here is that while the nature and organisation (transnational) corporate criminality has evolved into the 21st century, a major challenge remains in terms of the ability of the state to prosecute implicated businesses: “the criminal law has never quite adapted to the rise of modern business corporations some two centuries ago and is still somewhat at a loss in coping with complex multinationals with dispersed subsidiaries in diverse jurisdictions within the contemporary global and post-Fordist economy” (Punch, 2011: 102; Wells, 2011: 27). It is perhaps unsurprising, therefore, that criminal law models preoccupied with the control of individual guilt and liability are “doomed to fail” in contemporary, dynamic corporate economies (Fisse and Braithwaite, 1994: 218). This is compounded by the varying regulatory obstacles (e.g. of legal, evidential, structural, procedural and financial nature) and ideological/normative considerations (e.g. preferences for negotiation and cooperation of investigators, or state intervention on economic/political grounds) that nation states have historically faced alongside challenges of absent state knowledge and power when seeking to prosecute “big business” (Lord, 2014a). This has left a contemporary legacy predominantly characterised by the non-prosecution of corporations for substantive criminal behaviours within their organisations, a seemingly unchanging scenario in the current global political context.

In Pursuit of Organisational Fault: The Transition to Criminalising Corporate Failures

Recent years have seen many examples of corporations failing to prevent varying forms of criminality, deviance, unfair practice and harm across their transnational supply networks and organisational structures (e.g. child labour, waste dumping, carbon emissions, sales of conflict minerals). But should corporations be responsible for the serious crimes and harmful behaviours that occur as a consequence of their institutional policies (or lack thereof)? The answer is increasingly becoming “yes”, as evidenced in the creation of laws and standards to require corporations to prevent such abuses and misconduct. We focus on three offences within the criminalised sphere here though it is arguable that *harmful* corporate behaviours ought to be integrated into this discussion. But how do we conceptualise what “corporate failure” and “organisational fault” looks like? Wells (2001: 81) notes “[t]he criminal responsibility of corporations requires the development of notions of accountability which take account of their organizational and functional complexities”. A company is at fault when four conditions are present (Gobert, 2011: 144-145):

1. The company is, or should have been, aware of the risk.
2. The company has a legal duty to prevent the offence.

3. The company has the capacity to prevent the offence.
4. The company fails to prevent the offence.

However, in those cases where the company had reasonably undertaken sufficient measures to recognise and prevent risks, and conducted their business in a non-culpable manner, then the company should not be subject to criminal liability (Gobert, 2011: 154). To explore such features, we analyse three specific offences: corporate bribery in international business; transnational tax noncompliance and its facilitation; and, modern slavery in (global) supply chains. Table 1 provides an overview of key dynamics.

Table 1. Corporate Failures and Legal Responses

Source: authors' own.

Corporates Failures and Transnational Bribery

When corporations are implicated in the bribery of foreign public officials, it means the company or its employees, intermediaries, subsidiaries or agents, have engaged in an illicit relation of exchange for the company's benefit. That is, the company or its associated persons offer, promise or give an advantage (usually financial, but not always) with the explicit intention to win or maintain business (Lord, 2014a; Lord and Doig, 2014). Transnational bribery is now a priority concern for nation-states, particularly OECD countries with large shares of world exports, as international conventions (e.g. OECD Anti-Bribery Convention 1998; UN Convention against Corruption 2003) have sought to harmonise legal and normative anti-bribery standards, rules and enforcement (Lord, 2014b; Lord, 2015). This international policy shift was induced by the US in the form of the Foreign Corrupt Practices Act 1977 following political scandal (e.g. Watergate). However, other countries did not follow suit, leaving the US at a business disadvantage (though perhaps with moral superiority). Enforcement of the Act only increased in the early 2000s following the introduction of the OECD Convention, and consequently the mainstream anti-bribery discourse has now harmonised "corruption" as an inherent, global bad. Though some key economic payers such as China and India, remain absent from the requirements of OECD Convention, in part due to *realpolitik*, as they protect their national economic interests.

In the UK, bribing foreign public officials became a criminal offence in 2002 and is now covered by the Bribery Act 2010 (Section 6). As of April 2017, 14 cases have been concluded (Lord and Levi, 2018). While the UK enforcement of the OECD Convention is now considered "active" (Transparency International, 2015), the first case was only concluded in 2008, and most cases since then involved the negotiation of noncriminal/civil sanctions. The current Serious Fraud Office (SFO) director, David Green, has sought to reframe the agency as a "prosecutor", rather than a "regulator", and has spoken in favour of modernising corporate criminal liability laws for all economic crime in line with Section 7 of the Bribery Act 2010: the "failure of commercial organisations to prevent bribery". This provision is of most significance for this analysis, but how can it be applied to multi-national corporations (MNCs)?

One example is that of Rolls Royce, the UK's leading manufacturing MNC. In January 2017 the company negotiated a Deferred Prosecution Agreement (DPA) with the SFO (and US authorities) regarding 12 counts of conspiracy to corrupt, failing to prevent bribery, and false accounting.[4] DPAs were introduced in the UK in response to the inadequacies of the justice system for effectively dealing with commercial organisations involved in serious economic crime (Ministry of Justice, 2012: para. 23). The decision to introduce DPAs was based on their perceived "success" in the US where they are now widely used by the DOJ and SEC as a means of restoring equilibrium in the prosecution of corporations (Ridge and Baird, 2008: 197; Spivack and Raman 2008). DPAs emerged in the US following the disastrous prosecution and initial conviction of accountancy firm Arthur Andersen for obstructing justice in the Enron case that led to the firm going out of business, despite the conviction later being overturned. DPAs offered a way of deferring prosecution in exchange for the fulfilment of certain "terms" (e.g. financial penalties, regime/culture change, monitorships etc.). There are several purported advantages (e.g., enable full reparations without collateral damages of conviction, avoid costly and time-consuming trials, foreground structural/cultural reform, etc.) and disadvantages (e.g. limit punitive and deterrent value of enforcement efforts, extinguish societal condemnation, hinder development of case law, etc.) of DPAs in the US and the UK (see Lord and King, 2018, for analysis) but it is clear that a more cohesive, certain and consistent response to corporations is enabled through their introduction, and this is important for enforcement legitimacy (see Lord, 2015).

In the case of Rolls Royce, the company had used a network of agents to bribe officials in at least seven different countries to win lucrative contracts over several decades, making an estimated £258.2m in profit[5]. As part of the DPA terms, Rolls Royce agreed to a pay total financial settlement of £497.25m (part financial penalty, part disgorgement of profit) plus £13m prosecution costs in addition to agreeing to assist with the prosecution of individuals and the implementation of a suitable compliance programme. The range of offences involved raised questions over the company's primary role in instigating the corruption, or whether employees and third-parties were acting outside of company policy. In either case, the bribery occurred within the organisational structure and this represents a failure to prevent the bribery; an "organisational fault" offence. The SFO determined that Rolls Royce should have been aware of the bribery risk and had the capacity to prevent it but failed to do so in line with their legal duty. All the Rolls Royce offences that took place post the Bribery Act were dealt with through the Section 7 "corporate failure" offence.

But is this an appropriate response to criminality where there may be no provable criminal intent or negligence on behalf of the company? The rationale for this corporate failure offence emerged to counter the problems associated with other models of corporate criminal liability (see table 1). A Law Commission review into reforming bribery stated that "we believe…that it is such failures that are a key factor in the perpetuation of the practice of bribery. This is especially (but not solely) the case when bribery takes place in environments where there is, or is believed to be, a "culture" of bribe-taking" (Law Commission, 2008: 97). This is important as it foregrounds the *culture* of the corporation and shifts focus onto the "organisational component" that makes the bribery possible. This has symbolic importance, and reflects criminological literature focusing on the situated nature of human actions in particular organisational cultures (Vaughan, 2007).

Corporate failure offences reverse UK corporate criminal liability by introducing a form of "strict liability", making the corporations criminally liable even if nobody within the corporation was complicit or even aware of the bribery occurring (outside of those directly involved). The offence enables companies to be criminally prosecuted for the actions of its "associated persons" (i.e. any person, legal or natural, that performs a service on its behalf, including employees, subsidiaries, intermediaries and other third parties).

However, a legal defence is provided if a company can demonstrate that it had "adequate procedures" in place to prevent the bribery—unlike the pure vicarious liability model, this allows those otherwise ethical businesses with clear policies and practices to avoid prosecution. If Rolls Royce can demonstrate that its internal compliance systems and controls were in fact adequate and robust enough, it will not be liable for criminal prosecution for failing to prevent bribery.

The question of what constitutes “adequate procedures”, and how this is evidenced, remains ambiguous. Governmental guidance covering proportionate procedures; toplevel commitment; risk assessment; due diligence; communication (including training); and, monitoring and review aims to assist companies with this but it remains uncontested in the courts (see Ministry of Justice, 2011). The “tone from the top” is often assumed to be integral to these principles, but the significance of the “tone from the middle” and failings at the lower and middle management level is a continuing problem (KPMG International, 2015: 15). However, companies based in jurisdictions with extensive anticorruption requirements and the highest levels of enforcement, such as the US, UK and Germany, “feel emboldened by the robust compliance programmes they have been forced to implement” (Control Risks, 2016: 5). (Though only 53% of SMEs are aware of the corporate failure offence (HM Government, 2015)). This has made these companies more willing to take risks but there are concerns this is based on a false sense of security as companies may misperceive the protection offered by their compliance programmes in contrast to the actual protection received (Control Risks, 2016: 5). MNCs must simultaneously implement compliance that is global, reflecting the extra-territorial reach of US and UK law (and aggressive enforcement), and local/regional, reflecting the expectations and demands of national differences in regulation (KPMG International, 2015).

At the time of writing, in addition to Rolls Royce, three other corporations have been sanctioned for a failure to prevent bribery: Standard Bank; Sweett Group; and, an anonymised SME. In November 2015 Standard Bank[6] negotiated the first Deferred Prosecution Agreement (DPA) in the UK for “failing to prevent bribery”—this was also the first use of the offence. Standard Bank’s sister company, Stanbic Bank Tanzania (the “associated person”), made a US$6m payment to a local partner in Tanzania in order to induce governmental officials to favour their proposal for a US$600m private placement. Standard Bank instructed its solicitors to investigate it and then “self-report” findings to the SFO, demonstrating early engagement, cooperation and a willingness to reform. The Bank received financial penalties of US$25.2m including compensation to the victim country. In February 2016, the SFO obtained its first conviction for a failure to prevent offence against Sweet Group PLC[7], whose subsidiary Cyril Sweett International Limited made corrupt payments in the United Arab Emirates to secure a hotel building contract in Abu Dhabi. Sweett Group received financial penalties totalling £2.25m. The SFO Director stated the prosecution “sends a strong message that UK companies must take full responsibility for the actions of their employees” while Judge Beddoe recognised the case as a “system failure” and “*a failure properly to supervise*”. Finally, in July 2016 the SFO received approval for a second DPA[8] with an anonymous SME with a US parent company for a failure to prevent the systematic offer and/or payment of bribes in foreign jurisdictions by its agents/employees. The bribery was considered to be “grave” by the presiding judge[9]. The company has agreed to pay over £6.5m in financial penalties.

An analysis of the court judgments[10] indicates there was a failure in due diligence of third parties in addition to insufficient systems, controls and procedures to prevent bribery or supervise those involved. The management of third parties poses the greatest challenge as companies further globalise their operations and an estimated one-third of businesses do not formally identify high-risk third parties, intermediaries and associated persons (KPMG International, 2015: 3).

How frequent, pervasive and organised the bribery arrangements were in the three cases notably varies. For instance, the Standard Bank case involved just one incident of bribery, while in the case of the anonymous SME, 28 contracts and seven agents over a period of eight years were implicated (though only the final year of this falls under the Bribery Act). Is a corporate failure offence sufficient when the levels of substantive criminality vary so greatly? Ensuring consistency and proportionality is a difficult question for the courts. However, in each there was no allegation of “knowing participation” in substantive bribery, but that the companies could not demonstrate they had adequate prevention procedures in place. This raises concerns over the substitutive, rather than complementary, use of “failure to prevent” offences and the move away from the prosecutorial pursuit of substantive criminal behaviour. This appears an incoherent policy and raises questions over the practical adequacy of the model.

In each case there is a legal requirement of structural and cultural reform and recognition of corporate failings. An underlying objective must be to ensure changes in the cognitive, affective, and behavioural responses of corporate actors to opportunities for criminality within their operating contexts: by doing so, leverage can be gained in the pursuit of more ethical and socially responsible business. This must involve addressing the cultural drivers of pro-corruption narratives, such as how associated values, norms and assumptions are institutionalised, socialised and rationalised (Campbell and Göritz, 2014). Understanding the gaps between the myth system (i.e., the official and expected way of behaving in line with public normative standards) and the operational code (i.e. the shadow norms, values and rules that tolerate bribery) should be a key line of criminological inquiry (Reisman, 1979).

Corporate Failures and Transnational Tax Noncompliance

Tax noncompliance incorporates a range of behaviours such as evasion, avoidance, aggressive planning and fraud with those at the “serious” end of most interest here. In this regard, serious tax noncompliance is a “behavioural and administrative label, not a legal one” (Levi, 2010: 494), and the analysis here concerns mainly tax evasion, but also tax avoidance. Evasion specifically is characterised as the non- or under-payment of taxes and usually involves dishonest and deceptive acts or omissions in interactions with the tax authorities. Such offences do not just victimise governments, but also represent an improper transfer of money to tax cheats from the public (Leighton, 2010: 526) as well as reducing tax collection, reducing tax performance and leading to externalities in the form of alternative taxes thus increasing the tax burden for those who comply (Torgler, 2010: 535).

In 2015, HSBC, headquartered in the City of London, was at the centre of a tax “scandal”. The bank, labelled by BBC Panorama as the “Bank of Tax Cheats”[10], was implicated in the active facilitation of tax evasion (Illegal) and avoidance (legal, but aggressive and non-compliant) by wealthy clients. HSBC's Swiss banking arm assisted customers in dodging taxes and concealing millions of dollars of assets by providing untraceable cash and advising clients how to sidestep domestic tax authorities, such as

HMRC, and in this sense the bank was a primary offender in the collusion. While the nature of the activities may be "criminal", HSBC has not been and is unlikely to be *criminally* convicted in the UK. Yet there was strong evidence that these practices were institutionalised within the bank with the organisation providing a conducive environment for such criminality (e.g. inadequate internal systems and controls). Should HSBC have been aware of these risks? Did it have the capacity (or desire, given associated profitability) to prevent the evasion and avoidance? Normatively and ethically we might argue yes, and while we could consider HSBC to be aiding or abetting the crimes, the state pursuing criminal liability for this is unlikely. At the time there was no "failure to prevent" offence.

Alongside the facilitation of tax evasion, the creation of offshore corporate vehicles through which to conceal, convert and control illicit finances was common. Here we see the use of corporate entities as conduits for offending and understanding who the "beneficial owners" of such entities are is difficult for enforcement authorities. HSBC is certainly not the only bank to be implicated in the active facilitation of tax noncompliance. However, such cases, in addition to pressure and scrutiny from non-governmental organisations such as Transparency International, Global Financial Integrity and Global Witness, have focused "analytical and political attention on the hollowing out of state resources and the role of "secrecy havens" in enabling (a) rich individuals and corporations to pay small amounts of tax and (b) white-collar and organized criminals to conceal both their schemes and the proceeds" (Levi, 2010: 495).

As with foreign bribery, in relation to tax noncompliance we have seen the emergence of an international and intergovernmental policy movement and associated critical discourse aimed at those wealthy elites that conceal, convert and control illicit finances transnationally. For instance, in 2015 the OECD in conjunction with the G20 produced an *Action Plan on Base Erosion and Profit Shifting (BEPS)* to aid the "fight" against tax fraud and evasion. In January 2016, 31 nations signed a Multilateral Competent Authority Agreement produced by the OECD/G20 in order to share Country-By-Country reports on tax issues in support of the BEPS project. Specifically targeted are large MNCs, such as Google, Amazon, Apple and Facebook. Similarly, the G7 meetings in London in 2013 and in Ise-Shima in 2016 called for collective action against tax evasion and noncompliance. Pronouncements from these Groups have been forthright, but the enforcement response to criminal tax offences has not been forthcoming. For instance, the Panama Papers leak in 2016 illuminated the large figure of dark finance controlled and concealed by wealthy elites and corporations generated through their criminal, unethical and legal behaviours. However, in the UK, as of November 2016, only 22 investigations are underway with a further 43 under review. Following the HSBC scandal, only one individual out of 1100 cases was prosecuted, with most settled through part-repayment. The politics and rhetoric of publicly condemning tax noncompliance is not followed by punitive enforcement action.

Prior to the HSBC scandal, the SFO Director had made a case for shifting corporate criminal liability away from the identification principle and towards “embracing something closer to vicarious liability”, and in particular extending the corporate “failure to prevent” offence of the Bribery Act to all forms of corporate economic crimes. He further stated that “if the public interest…demands more prosecutions of corporates, then such change is surely necessary”.[12] However, there was no desire within government to support this, and following consultation, “Ministers…decided not to carry out further work at this stage as there have been no prosecutions under the model Bribery Act offence and there is little evidence of corporate economic wrongdoing going unpunished” (Selous, 2015[13]). At that time, as there had been no “failure to prevent” prosecutions under the Bribery Act, the government interpreted this as equating to there being an absence of evidence that corporate economic crime was a problem.

This political sentiment changed following the HSBC tax scandal and subsequent Panama Papers leak. Consequently, Part 3 of the Criminal Finances Act 2017 introduces “corporate offences of failure to prevent facilitation of [UK and foreign] tax evasion”. The new corporate offence coincides with the new offshore tax evasion offences by individuals. As with the Bribery Act, a legal defence is provided for corporations that can show they had in place *reasonable* “prevention procedures” or if in the circumstances it was not reasonable to have any prevention procedures in place. Guidance on the meaning of “reasonable prevention procedures” was published by HRMC in October 2016 to assist corporations in this regard with principles similar to the Bribery Act recommended[14]—it remains unclear how we differentiate between the Bribery Act’s “adequate procedures” and the Criminal Finances Act’s “reasonable procedures”. For the corporate to be prosecuted an underlying criminal tax evasion offence is required, along with its facilitation, though the person evading tax does not need to have been convicted (i.e. two predicate offences). Of course, the focus here is on tax evasion, omitting aggressive tax avoidance, though governments are also attempting to pursue global corporations

12. https://www.sfo.gov.uk/2015/09/07/cambridge-symposium-2015/

13. Selous’ answer was in response to the question of what progress had been made on Action 36 of the Anti-

Corruption Plan: http://www.parliament.uk/written-questions-answers-statements/writtenquestion/commons/2015-09-09/9735

14. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-

_Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax _evasion.pdf

utilising complex arrangements to avoid corporation tax. HMRC is currently investigating tax avoidance cases with value of up to £1.9bn (National Audit Office, 2016). It is expected that such corporate failure to prevent offences will be extended to a wider array of economic crimes such as fraud and money laundering and thus offer alternatives to leveraging changes in corporate behaviours[11].

Corporate Failures and Modern Slavery

Attention to human trafficking and modern slavery in criminological literature began in the mid-1990s and has since grown although there remains little knowledge of those responsible (Campana, 2016; Broad, 2015). Traffickers have been found to act as intermediaries between vulnerable workers in exploitative conditions and employers within the context of competitive industry (Eurofound, 2016; Wheaton et al*.,* 2010) where accountability is difficult to unravel (Geddes et al., 2013). The role that corporations play in both the proliferation of and the potential to address behaviour that may facilitate modern slavery has been similarly neglected (Crane, 2013; New, 2015). Should corporations be legally responsible to prevent these crimes? Which corporations have sufficient capacity to do so? We now see transitions in policy towards increasing corporate accountability for failing to prevent modern slavery within their organisational structure and supply chain, though these developments are at a nascent stage.

Reports uncovering the use of exploitative labour in MNCs including Nike and Gap brought global supply chains under scrutiny. The parallel development of corporate social responsibility (CSR) and business and human rights has embodied a movement from voluntarism towards accountability and increased state regulation but it remains an iterative process. Nonetheless, the centrality of corporations in preventing, and being responsible for, modern slavery is now on the national agenda, reflecting harmonising international discourse such as that of the 2011 UN Guiding Principles on Business and Human Rights (UNGPs) and the Protocol of 2014 to the Forced Labour Convention, 1930[12]. The principles maintain state responsibility for human rights, consistent with restrictions under international human rights law whilst simultaneously recognising the responsibility of corporations to both respect and avoid infringing human rights although on a voluntary basis, resulting in the UNGPs being regarded as soft law and failing to translate into mandatory provisions (Sarfaty, 2015). The state duty within the UNGPs “calls for governments to use a smart mix of incentives, regulation and other voluntary initiatives” to ensure that corporations respect human rights (Ramasastry, 2015: 245) although there have been “daunting practical and legal obstacles” in achieving the access to (non)judicial remedies for victims through Pillar III of the UNGPs (Ramasastry, 2015; Zerk, 2014). In sum, desiring corporate responsibility is different from criminalising failures to prevent, it remains to be seen whether the former can leverage behaviour change.

The Transparency in the Supply Chain (TISC) provisions introduced in the UK Modern Slavery Act 2015 (MSA) represent the first of this type of legislation in Europe, mirroring similar frameworks in the USA. Section 54 requires any corporate body or partnership that conducts its business (or part thereof) in the UK with a global annual turnover of £36 million or more to publish a statement containing whether it has taken steps and if so, the steps taken during the financial year to ensure that modern slavery is not taking place in its business or supply chains. Statements must be approved by the board and signed by a senior employee as mechanisms to increase accountability. As of December 2016, 1000 statements have been published from an estimated 12,000-15,000 companies required to make such statements[13]. It might be expected that any steps taken would reflect the "adequate" or "reasonable" procedures formalised in relation to bribery and tax evasion. However, there are no penalties for non-compliance, with the guidance instead relying on reputational and moral drivers for change in working practices despite the ineffectiveness of consumer shame as a driver for corporate change (New, 2015; Phillips, 2015). Despite their "ground-breaking" nature (HM Government, 2015b), the TISC provisions do not represent the first attempt in the UK to create such legislation. The Transparency in UK Company Supply Chains (Eradication of Slavery) bill was brought before Parliament in 2012 but was not passed, partly on the basis of concerns regarding intrusion into corporate self-regulation illustrating the perceived difficulties for policymakers in achieving a balance between "fair trade and free trade"[14].

Corporations can be subject to criminal liability for any *direct* use of or *direct* involvement in forced or human trafficking under the MSA. However, "direct corporate liability…is limited; rather the trend internationally is very much towards companies reporting risks and steps required to mitigate risks of violations occurring down the chain" (Institute for Human Rights and Business, 2016: 5). Regarding accountability for human rights infringements more widely, in addition to other substantive offences, such as bribery, direct liability is difficult to establish. For instance, establishing identification and knowledge (in the contracting company) of exploitative practice is difficult within complex labour supply systems using networks of intermediaries; "cascade systems of labour subcontracting provide an opening for unscrupulous labour intermediaries…providing workers to more reputable companies" (Barrientos, 2013: 1063). Furthermore, the phenomenon of phoenix companies illustrates the difficulties of effectively regulating these areas, where gangmasters, having had their licences revoked, continue to operate exploitatively under a different name (Wilkinson et al., 2010; Lalani and Metcalfe, 2012). MNCs are well placed to recognise the risks of modern slavery in their supply chain and have the capacity, if not the will to respond, but the creation of appropriate systems and controls remains underdeveloped.

TISC provisions are part of a wider move to introduce corporate liability for a range of human rights issues in the context of increasing global outsourcing. Whilst the guidance provided by the UK Government (HM Government, 2015b) is thorough, "it does not ask questions about the social or political conditions that give rise to vulnerable, precarious labour" (New, 2015: 701). Addressing corporate behaviours must therefore be approached and understood in the context of underlying commercial pressures generating the use of exploitative labour. For instance, the freedom advocated in anti-trafficking policy (and exemplified in the failure of the 2012 transparency provisions) has historically embraced market principles that have contributed to conditions facilitative of modern slavery (for example, "hard negotiation" on trade, complex subcontracting arrangements[15]) and located the harms of trafficking outside of corporate institutions, reconfiguring "big business, the state and the police…as allies and saviours, rather than enemies of unskilled migrant workers, and the responsibility for slavery is shifted from structural factors and dominant institutions onto individual deviant men" (Bernstein, 2007: 144). Ostensibly, TISC provisions bring business into the frame, encouraging action and improvement. However, the freedom granted to corporations in the current provision can result in poorly specified, vague and inconsistent statements (New, 2015). These frameworks are not sufficiently robust to drive corporate behaviour change in the context of existing market dynamics.

The DJ Houghton Chicken Catching Services[16] case presents a unique illustration of the operation of company liability for similar offences. The case represented a legal landmark in the UK whereby victims of trafficking successfully sued their exploiters through civil proceedings for compensation for unpaid earnings, mistreatment and abuse. The case involved six Lithuanian men who were exploited in a chicken catching plant having been recruited and transported to the UK. The men were identified as victims during a law enforcement raid in 2012 and through the National Referral Mechanism (NRM). In June 2016, a High Court judge found in favour of the men having quashed an appeal by DJ Houghton that the individual carrying out the actions leading to the victims' exploitation was unconnected to the company. However, that individual *was* found to have an active and integral role in the company and the company was order to compensate the victims. No criminal prosecution has been pursued, with the legal representatives of the claimants commenting that it is difficult to understand why[17]. The civil action in this case has been viewed as an important step for victim justice. However, larger organisations to which DJ Houghton supplied free-range eggs (including McDonalds, Tesco and Marks and Spencer), other than associated media reporting, remain untouched, with responsibility pushed to the lower end of the supply chain, a common characteristic of self-regulatory provisions (Phillips, 2015). By criminalising failures to prevent modern slavery by larger corporations with the capacity to do so, the risks of such criminal behaviours may be reduced. But this requires not only a criminal imposition, but also a shift in the ethical and normative reasoning of "big business".

We now see a normative shift towards explicit legislative frameworks responsibilising corporations to prevent slavery. It is not clear whether such requirements will be formalised through criminalisation, along the lines of bribery and tax evasion. However, the Joint Select Committee on Human Rights has made recommendations for such action; for a "failure to take reasonable steps to prevent human rights harms" (which would include modern slavery) in order to redress the balance between the corporation and the individual (JSCHR, 2017) and there is support for this amongst NGOs and civil society (CORE, 2017). State responses to crimes against social regulation have often been less punitive than the responses to crimes against economic regulation, despite the public indignation more readily associated with the former. More generally, it is clear that criminal law alone does not impact on the decision-making of companies in anti-modern slavery initiatives (Mehra and Shay, 2016) with evidence suggesting a need for a combination of public and private governance strategies (Phillips, 2015). The tensions between robustly implementing TISC requirements and current frameworks of self-regulation mean that the current arrangements are unlikely to have significant impact (Phillips, 2015). In addition, the nature of the market produces its own challenges in terms of the size and concentration of supply chains, the traceability, price sensitivity, level of skill and the static/dynamic nature of supply (Phillips, 2015; UN Global Compact and BSR, 2014) and this raises questions over how to create proportional, reasonable and adequate prevention procedures.

Addressing the potential for forced labour requires an engagement with accountability that has previously been viewed as incongruent with the traditional administrative processes of supply chain management. As New (2015: 704) states, "[i]n many cases, it suits firms to promote a story about modern slavery in which it is seen as a minor aberration generated by the criminal fringe at the edges of the industrial system" rather than a feature of economic systems which is partially constituted by firms themselves. The on-going role of the state is crucial here in the balance between voluntarism and obligation. In this context, "the UNGPs are an important…because they underscore the role of the state as a regulator and enforcer of law" (Ramasastry, 2015: 245) although state-level interpretation of this guidance is currently nascent and, as discussed, is beset by legal barriers. Irrespective of the nature of problem, leverage can be gained by imposing a normative (and legal) requirement on corporations to do all they can to prevent such criminality, and to be held accountable should they fail do so when they could have reasonably done more.

Conclusion

It is hard to disagree that the difficulties and rarity of criminal prosecution of corporate crimes "leaves one with the feeling that the criminal law and criminal justice mechanisms…simply do not deliver justice" (Punch, 2011: 111). The nature of *legal* corporate behaviours in "late" or "liquid modern" societies are much more complex and difficult to understand—understanding the nature of *criminal* corporate behaviours is therefore even more problematic. This has been exacerbated by the slow adaptation of corporate criminal liability laws in response to corporates that engage in and facilitate criminal behaviours within their 21st Century organisational structures and particularly in relation to behaviours that facilitate human rights abuses. However, there are transitions emerging and the dynamics of such social and legal changes need to be fully understood. This necessitates a rethinking of how corporations implicated in serious crimes, whether directly as perpetrators or knowing facilitators, or more unwittingly through negligence, can and should be held to account.

It is here we see a transition in policy and practice towards pursuing corporate failures and organisational fault as an attempt to gain leverage against such criminality within the corporate structure. There is also a strong normative, not just instrumental, argument in favour of focusing on the organisational component. We have seen how corporate failure offences have been used in the case of international bribery, how they are being introduced in the case of tax evasion, and how they are developing in relation to modern slavery. These offences involve qualitatively different behaviours yet it is clear to see that by introducing corporate failure offences, corporations can be responsibilised to prevent them—this should not be burdensome to corporations but facilitative of their business. This type of liability could also be extended to a further array of crimes against economic and social regulation, although it is interesting, and perhaps concerning, to note that the transition towards "corporate failure" for modern slavery offences, that are arguably more harmful, is some way behind that of the economic offences of bribery and tax noncompliance. A step-change of corporate liability policy would also apply such failure offences to potential, and not just actual, criminality. However, as seen in the above analysis, there remain major questions over the conceptualisation and operationalisation of the approach.

For instance, are corporate failures recognised as "real" criminal offences? Does the foregrounding of strict liability result in the conventionalisation of these crimes as something different to "real" crime? Will SMEs receive different treatment as direct liability is more easily established? Similarly, there is evidence of a likely shift towards the use of DPAs for corporate offences, but the transparency and consistency of this approach, in addition to public scrutiny, must be forthcoming. If DPAs become the "default" outcome of corporate failures, does this communicate a message of affordable risk and acceptable criminality? More critically, does this form of liability reproduce unequal capitalist dynamics, permitting corporate power to dictate the terms of business operations in their own interests, rather than the wider publics'? In the absence of political-economic revolution and/or alternative models of commerce, these latter questions remain overly abstract. Such issues demand further empirical and normative inquiry.

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Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

[1]
http
://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf

[2] See Lord (2014) for empirical analysis of corporate bribery in international business and Broad (2015) for empirical analysis of modern slavery.

[3] The corporation and its employees can also be victims. For instance, in cases of bribery in international business, non-corrupt companies may lose out on contracts or employees may be victims of extortion by foreign public officials.

[4] DPAs became available to the Director of the SFO following their legal establishment through the Crime and Courts Act 2013, Schedule 17. For further analysis of the use of DPAs see Lord and King (2018).

[5]
https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/

[6] https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/

[7] SFO press release:
https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3 million-after-bribery-act-conviction/

[8] SFO press release: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

[9] Para. 21, preliminary judgment. 10

See the following judgments: https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standardbank_Final_1.pdf ,
https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standardbank_Preliminary_1.pdf
and the terms of the DPA and associated Statement of Facts:
https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/

[10] http://www.bbc.co.uk/news/business-31248913

[11] https://www.gov.uk/government/news/new-plans-to-tackle-corporate-fraud

[12] The Protocol entered into force in November 2016:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

[13] Business and Human Rights Registry: https://business-humanrights.org/en/modern-slavery

[14] th

HCDeb 19 October 2012 c668

[15] See New (2015) for a detailed discussion of this context

[16] [2016] All ER (D) 84

[17] Shanta Martin, Leigh Day solicitors
https://www.leighday.co.uk/News/News-2016/February-2016/Welcomejail-sentence-for-first-modern-slavery-off