RESPONSE TO THE UK LAW COMMISSION CONSULTATION ON CORPORATE CRIMINAL LIABILITY

TRAIDCRAFT EXCHANGE & CORPORATE JUSTICE COALITION

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A. Submitting parties

Traidcraft Exchange

Traidcraft Exchange is the UK's only development charity specialising in making trade work for the poor. Its work spans capacity building amongst producers in developing countries, promoting market access for small producers (including into the UK market), policy development and advocacy. Through its policy work, Traidcraft Exchange seeks to influence government policy and business practice in the North and the South to the enable fair treatment of vulnerable people in the global South. Traidcraft Exchange uses the experiences of its sister fair trade company, Traidcraft plc, to improve wider trade practices and to inform our campaigns for trade justice and corporate accountability. Traidcraft Exchange's Justice campaign[1] petition was signed by more than 20,000 signatures and handed into 10 Downing Street in November 2016 calling for people in developing countries who have been harmed by the actions or decisions of British companies as they trade internationally to be able to get justice, and for the companies to be held to account in the UK.

Corporate Justice Coalition

The Corporate Justice Coalition formerly known as the CORE Coalition, is the UK's long-standing civil society network with a wide membership spanning NGOs, trade unions and law firms. We work to ensure greater corporate accountability in the UK, and access to justice for people and communities around the world who suffer from corporate abuses of human rights and the environment. Corporate Justice Coalition currently sits on the Home Office Modern Slavery Strategic Implementation Group, Defra's stakeholder group for developing a UK consumption indicator and a Department for International Trade Thematic Working Group on Sustainability.

Other endorsing organisations

Amnesty International UK

Labour Behind the Label

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1 https://traidcraftexchange.org/justice-campaign.

B. Summary of submissions

The thrust of this submission is that there is currently a failure to hold to account criminally UK companies (and companies which operate in the UK and/or have UK listings) which are complicit in human rights abuses abroad, including abuses constituting all of the elements of the domestic criminal offences murder, assault, sexual offences, theft, modern slavery, or of offences designed to protect workers and the environment.

It is our submission that:

(a) Where the operation of the identification principle contributes to that failure it should be reformed or supplemented.

(b) No reassessment of corporate criminal liability can properly be undertaken without a review of extraterritoriality in the criminal law because it is necessary to recognise and accommodate the trans-frontier nature of modern commerce as well as the global impact of crimes committed in jurisdictions with inadequate protections.

(c) It is right, and there is ample precedent for the principle, that companies operating in the UK should take action here (i.e. at the highest decision making level) to prevent what is recognisable as criminal activity abroad (whether or not that conduct is classified as criminal in the foreign state) and that the failure to do so or the positive decision to act so as to promote such activity is the UK crime, with an *actus reus* (the omission to take action to prevent or the putting into place of arrangements that assist/encourage) that occurs within the jurisdiction.

C. Examples

Traidcraft Exchange and the Corporate Justice Coalition can provide numerous examples to illustrate the difficulties in holding UK corporations to account for conduct which by our domestic standards is immediately identifiable as criminal, and ought to be censured accordingly. We set out here a selection of these examples:

Petra Diamonds Ltd and the Williamson Mine

Petra is a Bermuda-registered, UK-domiciled and listed, diamond mining company. In 2009, it acquired the Williamson Mine in Tanzania, which it operates through a Tanzanian subsidiary, Williamson Diamonds Ltd (WDL); Petra owns 75% of WDL, with the Tanzanian government holding the remaining 25%.

The mine’s security operations were provided through a combination of WDL employees, guards from the Tanzanian private security company Zenith Security, and Tanzanian police, some of whom were stationed on the mine concession and, according to Petra, provided services pursuant to a memorandum of understanding. Security at the mine was under the supervision and direction of WDL’s Chief Security Officer; Petra’s own statements indicate that it had oversight of security and human rights related issues at the Williamson Mine.

Predictably, there were confrontations between security operatives and local people. There is clear evidence that the response of security staff was grossly disproportionate and systematically criminal. UK NGO RAID (Rights and Accountability in Development) documented, *inter alia*, killings, assaults, torture, and other serious abuses, including incarceration in squalid conditions in an onsite holding cell, of local residents by security personnel at and around the mine. Most involved Zenith guards operating under the supervision/direction of WDL employees; several implicated the police employed at the mine. Such killings and abuses occurred throughout the period since Petra acquired the Williamson Mine.

In May 2021, Petra settled (without admitting liability) a civil action brought in the English courts by law firm Leigh Day on behalf of 71 Tanzanian nationals, with provision for a framework to address a further 25 cases. Petra also published a statement on the findings of an internal investigation, which acknowledged that "details of many of the incidents, including relating to some of the fatalities as well as the allegations made in the early to mid 2010s, were known at reasonably senior levels within [Petra] and WDL but were not escalated to the [Petra’s] Board."

RAID’s The Deadly Cost of ‘Ethical Diamonds’ report may be found here.

RAID’s most recent statement following the settlement (with links to more recent research and Leigh Day and Petra statements) may be found here.

We submit that it would have been appropriate in these circumstances for UK prosecutors to consider prosecution of the UK corporate and senior UK executives either for complicity in systematic criminality and/or for failure to prevent predictable crimes carried out in the course of their overseas operations.

Acacia Mining and the North Mara gold mine

Acacia Mining was a company incorporated in the UK and listed on the London Stock Exchange. It had been a wholly owned subsidiary of the Canadian company Barrick Gold until it was taken public in 2010 (it was then known as African Barrick Gold, renamed Acacia in 2014). Barrick maintained a majority shareholding and took Acacia back into private ownership in 2019.

From 2010 to 2019, Acacia Mining owned and operated the North Mara gold mine in Tanzania through a Tanzanian wholly owned subsidiary, North Mara Gold Mine Ltd (NMGML). Security at the North Mara mine was (and still is) provided through a combination of in-house personnel, private security contractors, and Tanzanian police, who provided services pursuant to a memorandum of understanding (MOU). Amongst other things, the mine paid, provided accommodation for, and equipped the police stationed at the mine, who conducted joint patrols with mine personnel and accessed the same radio frequency.

Throughout the period that Acacia Mining/African Barrick Gold owned and operated the North Mara mine, police employed at the mine were implicated in dozens of killings and far more assaults: between 2014 and 2016 alone, the NGOs RAID and MiningWatch Canada documented 22 killings and 69 assaults, while a 2016 Tanzanian parliamentary inquiry received reports of 65 killings and 270 assaults. Acacia Mining had a Mine Investigation Policy and other policies stipulating, inter alia, that its management would be informed of any human rights abuses.

In 2015, Acacia Mining settled an action filed in the English courts in 2013 by law firm Leigh Day for killings and assaults at North Mara. In 2020, law firm Hugh James commenced legal action against Barrick in the English courts on behalf of 10 Tanzanian claimants, also for killings and assaults. The latter proceedings are ongoing. UK management of Acacia would have been made aware of the allegations at the latest in 2013 when the first civil claim was brought, if not before. Nonetheless further deaths and injuries have occurred in the period since 2013. It appears therefore that the threat of civil sanction was insufficient deterrent to bring about reform of practices.

RAID's 2019 report on the North Mara mine's grievance mechanism (which provides an overview of the killings, assaults and mine's security operations) may be found here.

BHP and the Mariana dam disaster

BHP is an Australian mining company that is currently listed on the London Stock Exchange. BHP and another company, Vale, jointly owned a Brazilian company, Samarco, that operated the Samarco Mariana Mining Complex in Brazil. A catastrophic tailings dam failure took place at the Samarco iron ore mine in November 2015. Nineteen people were killed; a pregnant woman lost her baby after being thrown around in the flood; villages were rendered uninhabitable; hundreds of miles of river valley were severely polluted; riverine livelihoods were destroyed; and Atlantic coastal waters were contaminated in what was the worst environmental disaster in Brazilian history.

It is alleged that the disaster could have been foreseen and prevented by the companies involved. The Brazilian justice system has not provided a satisfactory response thus-far. In March 2016, after disagreement over judicial jurisdiction, the criminal investigation conducted by the Civil Police was suspended, which delayed the investigation into management responsibility for the dam breach. Compensation is being administered by a foundation set up by the mining companies. State and federal prosecutors and public defenders allege collusion between the foundation and the judge overseeing the process; they also call the compensation being offered “ridiculously low.” Claimants in a civil class action against BHP who number more than 200,000 and were unsuccessful at first instance, have recently been granted permission to appeal by the UK Court of Appeal.

London Mining Network's 2017 report on the impacts of the disaster may be found here.

Vedanta Resources and pollution in Zambia

This case concerns a copper mine in Zambia that is run by Konkola Copper Mines (KCM), the Zambian subsidiary of Vedanta Resources Plc, an India-listed but London based mining company. Farming and fishing communities downstream of KCM’s Nchanga copper mine claim to have suffered continual pollution since Vedanta Resources bought KCM in 2004, including a major incident in 2006 which turned the River Kafue bright blue with copper sulphate and acid, and poisoned water sources for 40,000 people. The communities allege that the contaminated water is causing them illness, damaging their crops and affecting fishing. 2,001 claimants took KCM to court in Zambia in 2007. The courts found KCM guilty but denied the communities compensation after a nine-year legal battle. The judge in another case - *Nyansulu v KCM* - suggested that KCM – the largest private employer in Zambia – had previously been “shielded from criminal prosecution by political connections and financial influence”.

As a result, the victims took their case to UK lawyers, Leigh Day, who sued Vedanta on behalf of 1826 claimants, alleging personal injury, damage to property, loss of income and loss of amenity and enjoyment of land arising out of the operation of the Nchanga mine. The claimants alleged that Vedanta breached the duty of care it owed them to ensure that KCM’s mining operations did not cause harm to the environment or local communities. English courts accepted jurisdiction over the case, and, following unsuccessful appeals to the Court of Appeal and the Supreme Court, the company settled the litigation.

Equatorial Palm Oil and land grabbing in Liberia

This case concerns the UK company Equatorial Palm Oil, which has established huge plantations of oil palm in Liberia, in order to export palm oil for use in processed foods and toiletries around the world. The villages affected by the plantations allege that the land belongs to them and was taken without their consent, leaving them without a means of earning a living. Community members who protested were beaten and the promised benefits – from compensation payments to employment opportunities to a health clinic – have not materialised. According to an interviewee, Garomondeh Banwun, "They came, they started flogging us. One of the EPO security…he kicked me, I couldn't wake up. They beat on me, they injured me."

Traidcraft Exchange's 2020 report on the company may be found here.

The garment sector and serious human rights violations in supply chains

UK companies have been linked to egregious examples of human rights violations in supply chains including those that occurred when the Rana Plaza building in Bangladesh collapsed on workers in April 2013. Benetton, Primark, Monsoon Accessorize, Matalan, and Walmart (Asda George) are some of the UK brands that sourced from the factories within Rana Plaza. The building collapse killed more than 1,000 people, and injured thousands more. It was not an isolated occurrence of a catastrophic health and safety failing causing death and serious injury to supply chain workers, but rather one event in a sequence of several.

UK retailers recognize that they would have no products to sell if it was not for the work of their suppliers. The retailers and brands recognise their responsibilities in relation to how they select and purchase from their suppliers, and the consequential effects their decisions can have on working conditions. It is for these reasons that they join voluntary initiatives like Ethical Trading Initiative or Sedex. Many retailers and brands have been gathering data for years on the safety of factories supplying them, but it is clear that they have not acted sufficiently on this information to deter fatal outcomes despite the predictability of these outcomes.

Human Rights Watch's 2019 report on the industry may be found here and Traidcraft's timeline of major health and safety failings in garment factories in South Asia can be found in its Submission to the Ministry of Justice's "Corporate liability for economic crime: call for evidence" (2017) pages 6-7 may be found here.

Glencore

The example we take from the activities of Anglo-Swiss group Glencore is set out in the discussion below. We note that in relation to unrelated matters Glencore PLC is currently the subject of SFO investigation for corruption: see here.

D. Discussion and proposals

D1 Difficulties of cross-border investigations

There are a number of difficulties in obtaining material from abroad and in particular from some of the jurisdictions with which our organisations are most concerned. These challenges to effective and productive investigation of overseas activities will often exacerbate the evidential challenges presented by the identification principle. Recognition of this situation strengthens the case for there to be another way to hold companies to account within the criminal law. The difficulties include:

(a) Corruption within foreign law investigations and enforcement;

(b) Political interference with foreign law investigations and enforcement. This problem is particularly apparent in cases where there is involvement of the host state authorities in the underlying conduct;

(c) Lack of resources to fund foreign law investigations and enforcement;

(d) Physical danger to law enforcement and/or other investigators operating in some countries;

(e) Challenges to admissibility of evidence obtained abroad by local law enforcement or other investigators without regard to UK standards of evidence gathering;

(f) The variety of arrangement for mutual legal assistance and the variance as to levels of cooperation; and

(g) Foreign blocking statutes such as that used in China to prevent any non-state investigation.

D2 Decentralisation

Decentralised decision-making in large companies over operational matters, including those that have the potential to impact on human rights, means that where corporate culpability occurs, it is likely to be "*dispersed*" throughout the organisation. It is vital that the criminal law recognises this phenomenon and is amended and/or augmented so that evasion of responsibility and the neutering of deterrence is neither the intended nor unintended result of decentralisation. It is necessary for UK companies to be held to account by UK criminal standards in the UK howsoever they arrange their corporate structures, whether that be for active complicity or for failures of oversight. The same is true for senior executives, who must be required to have oversight over globally dispersed decision-making/operations that have the potential to impact on human rights, in particular where the catalyst for human rights abuses is pressure applied from the top of the corporate structure for overseas divisions, subsidiaries or contractors to meet expectations as to turnover or profit margin.

D3 The deficiencies and inconsistencies of the current law and the case for reform

There is currently a failure to hold to account criminally UK companies (and companies which operate in the UK and/or have UK listings) which are complicit in human rights abuses abroad. In this section we identify the deficiencies and inconsistences of the current law that contribute to this situation and build the case for reform. We make the following overarching observation: the deficiencies and inconsistences of the current law discussed here are exacerbated by the underfunding of state prosecutors and investigation agencies with the result that the total number of UK prosecutions for corporate crime is low. Prosecutors are encouraged implicitly to pass over potentially complex cases, particularly those with an international element.

The law currently criminalises an individual or corporation who/which plots, encourages, or assists the commission of a foreign offence. However, recourse to the law of conspiracy is clumsy and inefficient in relation to corporations and the law of accessory liability, under the common law or Part II of the Serious Crime Act 2007, presents challenges in the application of the identification principle.

An example illustrates this. Glencore is an Anglo-Swiss multinational commodity trading and mining company, which has its oil and gas head office in London. In the Glencore Katanga copper and cobalt mine in the Democratic Republic of Congo, security operatives working for the mine shot and killed local people. Let it be accepted for the purpose of this argument that there is evidence to support the allegation that Glencore had deployed and armed those operatives in circumstances in which it would have been appreciated that serious harm and/or death would follow.

If the deaths occurred in the UK, Glencore might be tried for the offence under s.1 of the Corporate Manslaughter and Corporate Homicide Act 2007 ("CMCHA") because the way in which its activities were managed or organised caused a person's death and amounted to a gross breach of a relevant duty of care owed by the organisation to the deceased arising from the carrying on of its commercial activity. However, s.28 of CMCHA restricts liability to situations where the harm resulting in death is *sustained* in this jurisdiction, so there is no criminal liability under CMCHA even when the operative decisions and orders were given from the UK. This restriction is not appropriate and is also inconsistent because under s.9 of the Offences Against the Person Act 1861 a UK subject (i.e., an individual) may be tried here for murder or manslaughter committed anywhere in the world. We call for reform of s.28 CMCHA.

Turning back then as one must under the present law, to the Serious Crime Act 2007 and/or to common law principles of accessory liability or joint enterprise, the identification principle is applicable (murder and manslaughter not being offences with any special rule of attribution to establish what the directing mind of Glencore knew, believed, or foresaw). It is necessary as part of the difficult exercise of applying the identification principle to consider to where and to what extent ultimate decision making was delegated within the corporation or indeed the corporate group. That is a daunting task, especially in large corporations, and is one which in the domestic context the CMCHA, with its focus on the substance of operations, acknowledges should not be necessary.

There is further problem with the law as it currently stands if one replaces the homicide offence with the offence of forced labour or servitude. Many countries where there is particular cause for concern will not have a domestic law that criminalises all forms of what is recognised in the UK as modern slavery. The extraterritorial provisions of the Serious Crime Act 2007 do not assist where the act is not a crime in the foreign location unless the offence is one in respect of which there is a separate basis for extraterritoriality.[2] Therefore, as the law stands, the company which takes action in the UK to facilitate the deployment of forced labour by its foreign subsidiary, contractor, partner in a joint venture, or other affiliate, does not commit an offence. This requires urgent reform.

An additional problem is that of UK offences which are structured with a reliance upon UK systems. We set out below examples.

(a) Environmental offences such as dumping and water pollution interact with UK permit regimes and so cannot be applied to countries with no such systems because there is no objective means by which to assess what constitutes polluting - It should be a criminal offence for a UK company (to include any company operating in the UK) to be able to arrange its organisation and operations by taking decisions in the UK so that pollution, defined by reference to environmental impact, occurs in countries with inadequate environmental legislation and/or enforcement.

2 The extraterritoriality provisions in Schedule 4 of the Serious Crime Act 2007 provide, in summary, that where the primary offence occurs abroad a person may only be liable for the encouraging or facilitating that offence if the offence is one in respect of which there is a separate basis for asserting extraterritorial jurisdiction (for example in respect of murder committed abroad by a British subject; or where the conduct amounts to an offence both in the UK *and* in the foreign state).

(b) Property Offences which interact with UK property rights (i.e. rights to interests in land and restrictions on state interference with property rights) - It should be a criminal offence for a UK company (etc) to collude with foreign states in the confiscation of property in breach of human rights. An example would be where a foreign state authorises the confiscation of land to enable mining, palm oil or other agricultural commodities to take place.

(c) Health and Safety at Work – A UK company (etc) should be criminalised if it arranges its affairs so that production takes place in a country with inadequate recognition of standards and duties of care in circumstances where a worker dies or is seriously injured through the operation of unsafe systems of work.

(d) Offences Governing Pay and Conditions – whilst we recognise difficulties in seeking to give effective extraterritorial effect to minimum wage legislation for UK companies, it would be possible to set minimum standards and, as discussed above in Part D3, there is a clear need to extend the scope of the Modern Slavery legislation.

In each of the subcategories we have identified, the conduct to be criminalised within the UK is not what occurs abroad per se, but rather the operation and organisation of the company within the UK which leads to breaches of human rights and to what are recognisable UK criminal offences. An example of the operation of the principles engaged can be seen in the criminalisation of UK individuals and corporations who arrange the export of arms from one third country to another: see by way of illustration the case of Gary Hyde - *R v. H* [2012] EWCA Crim 1113. The law in respect of arms dealing recognises that UK companies should not profit from contributing to devastation abroad. It censures UK companies with metaphorical blood on their hands where there is no direct harm here. Moreover, such an approach recognises the reality that in the modern world, environmental and human devastation abroad will ultimately have consequences here. Other current examples are in the anti-terrorism laws such as the s.59 Terrorism Act 2000 offence of inciting terrorism overseas, which relates to the encouragement of foreign acts that would be murder, s.18 assault, endangering life by damaging property, etc, were they to take place here.

A further example of recognition in existing legislation of the principles involved is in the breath of s.340 of the Proceeds of Crime Act 2002 which states:

> (2) Criminal conduct is conduct which—
> (a) constitutes an offence in any part of the United Kingdom, or
> (b) would constitute an offence in any part of the United Kingdom if it occurred there.

and thereby, via the s.327-329 offences from the same Act, criminalises the receipt etc in the UK of the proceeds of activity that was lawful where it took place but would have been criminal had it taken place here. A further example is s.2(1A) of the Criminal Justice Act 1993 which recognises that although gain is not an element of the offence of fraud, the fact of a gain in the UK should be sufficient to justify jurisdiction of the English courts in respect of a fraud offence committed abroad.

A further example is the s.46 Criminal Finances Act 2017 Offence failure to prevent facilitation of foreign tax evasion offences, in the sense that the focus is on the UK failure, albeit that in that offence there is a reliance on foreign criminalisation.

The approach of the Bribery Act 2010 is to go further as by combination of sections 7 and 12 where a person commits an offence of bribery abroad, a company carrying out business in the UK with whom that person is associated and for whose benefit the person was acting, may be convicted of the s.7 offence of failing to prevent bribery regardless of where its own relevant acts or omissions took place.

We submit therefore that there is no difficulty in principle and ample precedent for an extension of the criminal law to remedy the current deficiencies we have outlined. Of the foreign models and proposals, we are attracted to Proposal B of the Australian Law Commission in its report of April 2020. Australia may it seems be moving away from the approach based upon identification of a corporate culture, which we understand has proved difficult to translate into actual prosecutions.

We would support the following approach: where a criminal act has been done by an employee or agent of a UK corporate, with apparent authority to act for that corporate, there is criminal liability for the company unless it can show (a reverse burden on the balance of probabilities) that it took reasonable precautions to prevent the conduct.

This appears to us to be a development of the s.45 Criminal Finances Act 2017 offence:

> **45 Failure to prevent facilitation of UK tax evasion offences**
>
> (1) A relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B.
>
> (2) It is a defence for B to prove that, when the UK tax evasion facilitation offence was committed—
>
> (a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or
>
> (b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

(3) In subsection (2) “prevention procedures” means procedures designed to prevent persons acting in the capacity of a person associated with B from committing UK tax evasion facilitation offences.

Unlike the s.7 Bribery Act 2010 offence, the tax evasion offence *expressly* recognises that some fraud may be too unpredictable for it to be reasonable to have a procedure in place to meet it. The attraction of the Australian model is that it applies no greater burden on SMEs than large corporations and the test of having taken reasonable precautions is flexible to meet many situations because it has no particular requirement to have in place procedures designed to address particular risks. It therefore works across offences and across a multitude of situations. If an employee or agent acts in a way that is unpredictable, unprecedented, or particularly ingenious and/or well disguised, there will be no particular precautions that it will have been reasonable to take beyond those of general good corporate governance. If, however, a company has operations in a territory where there are particular risks and/or if it has had potential (a fortiori evidenced) issues brought to its attention by say NGOs, and/or if there is something irregular about an increase in profit or turnover or say the requirement for increased security services, then there may be further precautions which a jury will readily see apply.

The model lends itself well therefore to the expanded approach to extraterritoriality that we advocate as being appropriate to the realities of the modern world and the trans-frontier nature of modern commerce.

The principle of fair labelling (i.e., that crimes should be sub-divided and labelled according to types and degrees of wrongdoing) lends support to a proposal that the criminal act of failure to prevent should be distinguished from that of participation in the substantive offences. The substantive offence is not then watered down and carries its full and appropriate stigma whilst the failure to prevent offence is recognised as a serious matter in its own right.

As the examples set out in Part C, above, demonstrate, it is necessary to have a definition of “associated person” for the failure to prevent offence that is sufficiently broad to encompass contractors such as security providers.

D4 Failure to Prevent Human Rights Abuses – a new offence

We commend the introduction of an offence of failure to prevent human rights abuses as an alternative or supplement to those measures discussed above.

If there is not to be a general failure-to-prevent-type offence across the whole criminal law, as suggested in the Australian Law Commission's Option B, a specific offence of failing to prevent human rights abuses could be drafted, drawing upon precedent from the Bribery Act 2010, the Criminal Finances Act 2017, the Terrorism Act 2000, and the Serious Crime Act 2007. The following proposal for a new corporate criminal liability offence provides a starting point for Law Commission to evolve and incorporate in recommendations to Government in Dec 2021.

Failure of commercial organisations to prevent abuse of human rights

(1) A relevant commercial organisation ("B") is guilty of an offence under this section if a person ("A") associated with B does an act within or outside the United Kingdom

(a) to obtain or retain business for B, or

(b) to obtain or retain an advantage in the conduct of business for B

and that act would, if committed in England and Wales, constitute one of the offences listed in subsection (2).

(2) Those offences are –

(a) murder,

(b) an offence under s.1 of the Sexual Offences Act 2003 (rape),

(c) an offence under s.1 of the Modern Slavery Act 2015,

(d) kidnap,

(e) false imprisonment,

(f) an offence under s.1 of the Corporate Manslaughter and Corporate Homicide Act 2007,

(g) an offence under s.18 of the Offences Against the Person Act 1861 (grievous bodily harm or wounding with intent),

(h) an offence under section 23 or 24 of that Act (poison),

(i) an offence under section 28 or 29 of that Act (explosions), and

(j) An offence under section 1(2) of the Criminal Damage Act 1971 (endangering life by damaging property).

(3) B is also guilty of the offence in subsection (1) if A's act was carried out

(a) to obtain or retain business for B, or

(b) to obtain or retain an advantage in the conduct of business for B and was capable of encouraging or assisting a third party to do an act which would, if committed in England and Wales, constitute one of the offences listed in subsection (2).

(4) It is a defence for B to prove that at the time of A's act,

(a) it had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or

(b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

(5) For the purposes of this section an act includes an omission.

(6) For the purposes of this section, a person ("A") is associated with B if (disregarding the act in question) A is a person who performs services for or on behalf of B.

(7) The capacity in which A performs services for or on behalf of B does not matter. Accordingly A may (for example) be B's employee, agent or subsidiary. Whether or not A is a person who performs services for or on behalf of B is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and B. But if A is an employee of B, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of B.

(8) In this section "relevant commercial organisation" means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

D5 The residual role for the substantive/primary offence

Albeit that we advocate for a new "failure to prevent" offence, we stress the importance of recognising and appropriately labelling dishonest conduct at the heart of companies. We believe that when there is evidence, it is appropriate that the company be pursued not for failure to prevent but directly for the substantive offence, whether that be by application of the current identification principle or, as we advocate, in some amended form that recognises and seeks to address the difficulties we have outlined above. This does not mean we should not recognise separately criminally bad governance, as we do in the failure to prevent offence, but reflecting our understanding from CJC members' monitoring of implementation of the Bribery Act, we observe that a failure to prevent offence is regarded by the courts as a lesser offence, incurring lower fine levels than substantive offending, and we therefore submit that this cannot be the only offence targeting certain forms of corporate misconduct.

We also suggest that consideration be given to whether the identification principle might be broadened in respect of companies over a particular size and/or turnover, recognising the above challenges to prosecution and the fact that there is no concomitant threat to liberty in the prosecution of a company (companies only being sentenced to financial penalties) and so not the same objection to a broader basis for imposing criminal responsibility as there might be in respect of an individual.

D6 Consequential liability for senior executives

Whichever model is adopted, we submit that it is appropriate for senior executives to be held personally criminally liable where their personal conduct (including, in particular, their omission) has caused or contributed to the company's offence. This liability must extend to former executives who have stepped down. An offence for senior executives can be labelled fairly and the sentence appropriately gauged, so that it is clearly criminal censure for a failure of corporate management that has had serious criminal consequences. The approach recognises that responsibility accompanies the benefits of executive office.

A relevant comparison is the provision in the Private Security Industry Act 2001, which renders executives liable where a company that provides guarding/door staff services has committed a regulatory offence.

> 23 Criminal liability of directors etc
>
> Where an offence under any provision of this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
>
> (a) a director, manager, secretary or other similar officer of the body corporate, or
>
> (b) any person who was purporting to act in any such capacity,
>
> he (as well as the partnership) shall be guilty of that offence and liable to be proceeded against and punished accordingly.

A further example of the same approach is seen in relation to offences under the Financial Services and Markets Act 2000 (FSMA) and the Financial Services Act 2012, albeit with a more sophisticated approach to identification of those with executive power. S. 400 of FSMA provides:

> 400.— Offences by bodies corporate etc.
>
> (1) If an offence under this Act committed by a body corporate is shown–
>
> (a) to have been committed with the consent or connivance of an officer, or
>
> (b) to be attributable to any neglect on his part,
>
> the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
>
> (2) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body.
>
> (3) If an offence under this Act committed by a partnership is shown–
>
> (a) to have been committed with the consent or connivance of a partner, or
>
> (b) to be attributable to any neglect on his part,
>
> the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.
>
> (4) In subsection (3) "partner" includes a person purporting to act as a partner.
>
> (5) "Officer", in relation to a body corporate, means–
>
> (a) a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity; and
>
> (b) an individual who is a controller of the body.
>
> (6) If an offence under this Act committed by an unincorporated association (other than a partnership) is shown–
>
> (a) to have been committed with the consent or connivance of an officer of the association or a member of its governing body, or
>
> (b) to be attributable to any neglect on the part of such an officer or member,
>
> that officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly.

(6A) References in this section to an offence under this Act include a reference to an offence under Part 7 of the Financial Services Act 2012 (offences relating to financial services).

(7) Regulations may provide for the application of any provision of this section, with such modifications as the Treasury consider appropriate, to a body corporate or unincorporated association formed or recognised under the law of a territory outside the United Kingdom.

The inclusion of "neglect" is appropriate provided the offence is fairly labelled and the degree of culpability is reflected in the particular sentence given. It is particularly appropriate where the underlying corporate offence is one of failing to prevent an offence.

As in the above examples, it is possible to structure the offence so as to catch within its ambit the appropriate office holders including shadow directors and former office holders. This is a tried and tested approach and, for example, the Company Directors Disqualification Act 1986 and attendant caselaw successfully addresses the task of identifying those who have been concerned in the management of a company.

Lastly, we observe that in addition to being prosecuted for their neglect in contributing to the company's offence, as just outlined, senior executives should also, as appropriate, be prosecuted for the relevant primary offence. Further, we would support consideration of a failure to prevent offence for individuals if and in so far as it adds anything to the consequential offence (i.e. to conviction on the basis that the company's offence was attributable to the officer's neglect) or is practically more straightforward.

E. The Law Commission's questions

We have provided a submission in this longer format so as to present our suggestions within the fuller terms of reference of the Law Commission's project. Our responses to the specific questions asked will to a great extent be evident from the above but for completeness we address those questions in this final section. The answers should be read in conjunction with and by reference to Parts A to G of this document.

Questions for discussion

(1) What principles should govern the attribution of criminal liability to non-natural persons?

A good system for corporate criminal prosecutions would have the following characteristics:[3]

a) It must be readily apparent that it is possible and realistic to successfully prosecute companies;

b) similarly, that it is possible and realistic that key individuals will be prosecuted where complicit or criminally negligent;

c) Sanctions must be effective and extend beyond fines to include restrictions on future operations;

d) The penalties/sanctions applied to senior individuals of a company act must as a deterrent;

e) A robust understanding of the reality of decision-making and responsibility within modern corporate structures and in particular the cross-border nature of global business operations is reflected in the law;

f) A robust approach to extraterritoriality should ensure liability for cross-border corporate crimes (to include crimes encouraged or facilitated abroad by corporate decisions and/or choices made in the UK);

(g) It must ensure that companies, including in particular large companies, and executives (at the appropriate level of seniority) can effectively and realistically be prosecuted for offences that fully reflect the gravity of their responsibility for harms caused abroad;

(h) It should encourage companies to establish robust compliance and monitoring regimes in order to prevent criminality~~.~~

(2) Does the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?

3 See also Amnesty International and International Corporate Accountability Roundtable, The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases (2016) and the Office of the UN High Commissioner for Human Rights, The OHCHR Accountability and Remedy Project: Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.pdf (2016).

There needs to be a much wider basis for criminal censure where corporates facilitate and fail to prevent the commission of offences carried out for their benefit. Subject to this proviso, we consider that there is a residual role for a reformed identification principle in cases where corporates can be demonstrated to have committed substantive offences. The need for a broader basis for corporate criminal liability is particularly acute where corporates operate across national frontiers and in geographical areas and sectors in which there are tragic traditions of human rights abuses, such as the company examples listed above in Part C.

(3) In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?

We are cautious about the use the terminology such as senior management, because of the ability of corporates to morph and alter their structures to evade such provisions. As above, we advocate an alternative approach. We are particularly impressed by option B advanced by the Australian Law Commission and note the concerns reported there as to the effectiveness of the current Australian model.

(4) In Australia, Commonwealth statute modifies the common law identification principle so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?

We are cautious about the challenge to prosecutors of proving to the criminal standard the fact of a corporate culture and repeat our answer to Q3.

(5) In the United States, through the principle of respondeat superior, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England and Wales? If so, in what circumstances would it be appropriate to hold a company responsible for its employee's conduct?

There is some replication of this approach in respect of regulatory offences in the UK. As noted above, more generally we would advocate a different approach.

(6) If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

Although we advocate a different approach than a simple expansion of the identification principle, we do endorse the concept of a due diligence or preventive precautions approach, as set out in Part D4 of our submissions.

(7) What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions (3) to (5)?

As noted above, we advocate for the reform of the identification doctrine and the introduction of a failure to prevent offence. This model would have the positive consequences of changing corporate culture and the behaviour of senior managers to ensure their better understanding of and oversight over important operational matters that have human rights impacts. Where the criminal law requires the taking of positive steps and thereby brings about improved reporting of such impacts within the corporate group to enable senior management oversight, that has the positive consequence of enabling companies and senior executives to be held to account for the consequences of their decisions. It has clear potential to bring about the further positive consequence that those executives come to better understand their own organisations - their impact and their inefficiencies - and to anticipate and avoid long-term costs that may flow from human rights abuses. Economic consequences such as the cost of compliance would not be onerous for companies that are operated responsibly and are in any event, entirely appropriate whilst the status quo is that human rights abuses are going uncensored. The model we suggest is responsive to the requirements of particular businesses and sectors and creates a level playing field for businesses that use their best endeavours to avoid human rights violations in their global operations and are undercut by less scrupulous operators.

(8) Should there be "failure to prevent" offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic crimes? If so, which offences should be covered and what defences should be available to companies?

As noted in Part D above, we advocate a wider approach, influenced by the Australian Law Commission, which recognises that corporates contribute to physical as well as economic harm.

(9) What would be the economic and other consequences for companies of introducing new "failure to prevent" offences along the lines discussed in question (8)?

We repeat our answer to Q7.

(10) In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

Yes, but not as a substitute for recognition and censure of what are properly labelled as criminal offences. We advocate for the introduction of a regulator to oversee and enforce the law we propose which comprises a failure to prevent human rights violations offence and a corporate human rights due diligence obligation.[4]

(11) What principles should govern the sentencing of non-natural persons?

In sentencing corporates, the principle of deterrence is obviously particularly important and should be at the fore. There should also be greater regard to rehabilitation of corporates by the introduction of corporate financial reporting orders and compliance orders so that the ongoing requirements placed upon companies that sign up to Deferred Prosecution Agreements may also be imposed upon convicted corporates. Consequential debarment from public contracts and, separately, consequential disqualification of directors, should be

[4] The regulator proposal is outlined in: Rachel Chambers, Sophie Kemp and Katherine Tyler, "Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence Law", August 2020, available at https://media.business-humanrights.org/media/documents/Researchreport11.pdf.

developed. Disqualification of directors might be fast-tracked in circumstances where the company has been convicted of an offence with appropriate safeguards. Lastly, there should be a bolder and more pragmatic approach to Crown Court assessment of compensation for victims as part of sentencing.

(12) What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory "consent or connivance" or "consent, connivance or neglect" provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body's criminal conduct?

We endorse the use of specific provisions which provide greater clarity than simple reliance on the general law of accessory liability and submit that consideration should be given to the creation of a failure to prevent offence for individual officers. Please see our submissions at Part D6 above.

(13) Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?

We submit that there is a clear need for an offence which criminalises corporate complicity (actively and through poor corporate governance) in human rights abuses throughout corporate global operations. We urge the Law Commission to consider our full submission on the deficiencies of the current law in this regard and to recognise this within its existing terms of reference as a central plank in any reform of the law in respect of corporate crime.