

PROBLEMS FACED BY THE CRIMINAL JUSTICE SYSTEM IN ADDRESSING FRAUD COMMITTED BY MULTINATIONAL CORPORATIONS

By Mohd Kassim Bin Noor Mohamed¹

ABSTRACT

This dissertation examines the problems faced by the criminal justice system when addressing fraud committed by multinational corporations (MNCs). As the recent scandals at Enron, Worldcom et al demonstrate, when MNCs commit fraud their offences eclipse every other form of crime in terms of the money drained from and harm done to national economies. Using a library-based, documentary review, as a basis for critical research, this work attempts to investigate and analyse the size and scope of the fraud problem, the difficulties faced by the enforcement agencies and the legislative challenges that hamper prosecution. There is an effort to present and discuss the socio-legal and criminological debates around the deviance of elites and the cost to social justice if these issues are not faced.

¹ Division of Criminology, The Nottingham Trent University.
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1. Introduction

The general research aim of this dissertation is to investigate the problems faced by the criminal justice system (CJS) in addressing fraud committed by multinational corporations (MNCs). MNCs are able to strategise and take advantage of all the opportunities that globalisation offers. They can escape the legal boundaries of many of their host nations, can afford the best legal and financial brains and routinely buy political influence to protect their operations. However, as the recent scandals at Enron, Worldcom et al demonstrate, when they commit fraud their offences eclipse every other form of crime in terms of the money drained from and harm done to national economies. As MNCs are more powerful and wealthy than many governments, it is imperative that they be subject to enforceable regulation. There is little value in philosophies that stress moral authoritarianism if those at the bottom of the economic ladder feel that the rich and powerful have no moral authority because they are immoral themselves.

After a brief description of the approach taken to the gathering and analysis of relevant literature in Chapter 2, Chapter 3 begins the substantive discussion by trying to establish the size of the problem through an examination of the available statistical data. Chapter 4 asks which investigators and enforcers (if any) are competent, willing and able to deal with the problem and whether the CJS is demonstrating a commitment to the fight against MNC fraud as shown by its allocation of resources, training and personnel. Chapter 5 examines important questions for our legal system and the difficulties that prosecutors experience when bringing a fraud case to trial. Chapter 6 introduces some of the background socio-legal, criminological debate.

In the conclusion, there are some brief recommendations about possible improvements to the statistical information base, the possibility of a dedicated national anti-fraud squad, the need for a simpler, better defined law of fraud and a call for a better international perspective.

2. Methodology

It seemed, initially, that the task of researching the difficulties faced by the criminal justice system in tackling multinational fraud would be relatively straightforward. It was an important question, of especially topical concern, that contained within it the identification of the groups of people and organisations to be studied and a specific offence category to help narrow the focus. A mixed strategy, using both narrative and textual accounts, seemed to be the best approach (Noaks and Wincup, 2004; Jupp, 2000). Here, the first task would be to consult the official crime figures for an assessment of the incidence and prevalence of the problem and the efficiency of the authorities through arrest and prosecution rates, followed by a critical analysis of the strengths and weaknesses of the various agencies as evidenced by their success in reducing that incidence and prevalence.

It would, of course, have been naïve to expect the official statistics to contain the unvarnished, empirical truth, but even a cursory examination revealed that, as a quantitative measure of the size of the problem and as a longitudinal measure of the effectiveness of the various regimes and initiatives, the data was almost worthless. All the indications were that the official statistics, as a socially constructed product, had more qualitative than quantitative value and were more a measure of policy and attitude (Noaks and Wincup, 2004; Tombs, 2000).

In an ideal world, attempts to directly approach enforcement and regulatory agency personnel, corporate fraudsters and victims of corporate fraud might have been made, through questionnaire or interview. Unfortunately, this field is notorious for its access problems: offenders are secretive; the enforcement and regulatory agencies are impenetrable; victims are hard to identify and all are publicity-shy (Whyte, 2000).

The confidential nature of business activities and fraud investigation are a major consideration, as great harm can easily be committed by a clumsy researcher and access would need to be negotiated with delicacy and diplomacy. It was decided that, with the time and resources available, the only possible method would be a library-based, documentary review, which included academic texts, journal articles, news reports, legal texts, case law and any other relevant materials. Although no new data would be produced, examination, evaluation and integration of the existing material would be a worthwhile objective (Noaks and Wincup, 2004; Bryman, 2001).

This would be 'critical research' as described by Jupp (2000, p.18), drawing 'upon abstract concepts such as ideology, power and discourse, and also on bodies of ideas which are expressed in terms of these'. In addition to the texts listed above, as source of current information, the Internet was invaluable, as it gave access to authoritative web-sites from all sides of the debate. The Home Office and regional police webpages were of particular interest, but several well-known and reputable accountancy and law firms, and a number of respected NGOs also gave information and briefings which were immensely useful, as were the many academic on-line journals sourced through NTU Libraries Electronic resources, Google Scholar, Ingenta etc.

The main steps of qualitative research outlined by Bryman (2001), where collection of relevant data is followed by interpretation and conceptual analysis leading to a refinement of the research question and a reflexive, iterative collection of further data, are a fair description of the method finally adopted.

It was felt that, in order to ensure Bryman's (2001, p.272) criteria for evaluating qualitative research, of '*trustworthiness* and *authenticity*', sources should be carefully

assessed for their credibility. There are numerous competing points of view on corporate accountability, including those of the corporations themselves, the regulators, states, human rights activists, anti-globalists, shareholders, consumers, victims and many others. These (where they existed) were critically assessed and the pros and cons of each position evaluated for credibility. Although the overall critical analysis had to be presented from an academic, criminological point of view, to ensure fairness, it would be necessary to include the perspectives of all the major actors. These perspectives were identified as: political; business/economic; legal; enforcement and academic. Each would have their own particular concerns and would naturally emphasise different aspects.

For every perspective, a further range of opinion was identified. For instance, UK political perspectives could be sub-classified as Marxist, socialist, liberal, centre, or conservative. It became clear that the further to the left a commentator was, the more in favour of strong government oversight and control he or she would tend to be, whereas those further to the right would be more censorious of an interfering and over-regulatory government. But this 'left to right' spectrum could also be applied to the other perspectives. The views of the business community ranged from a left-leaning belief in corporate social responsibility to a right-leaning conviction that markets should be entirely free. Legal theorists could be divided into those who thought that corporate fraud was *mala prohibita*² and more properly a regulatory issue (right tendency) and those who felt it was *mala in se*³ and should remain criminal (left tendency). It should be noted that grading from left to right was only intended as a convenience, to ensure the selection of as wide-ranging a sample of material as

² please see Appendix I – Glossary of Terms and Acronyms

³ as above

possible, and that the danger of assigning an unconscious value judgement along with classification was recognised and, hopefully, avoided.

For all the many complaints about the underprioritisation of corporate crime, one of the main problems was the sheer volume of source material. Although there was very little specifically about MNC fraud, there was an abundance of legal, political, economic, commercial and sociological commentary from which to extrapolate. It was simply not possible, within the time available, to achieve a theoretical saturation point. In fact, the desire to accumulate as wide a range of opinion as possible soon came into conflict with the need to focus in and uncover key underlying themes. Eventually, it was the time element rather than the conviction that enough material had been discovered that forced the information collection stage to close and the final critical analysis to commence.

3. The Size of the Corporate Fraud Problem

One of the aims of this dissertation is to assess the levels of fraud committed by multinational corporations (MNCs), at least in the context of the UK. This may seem like a relatively straightforward task at first glance but, in fact, it is fraught with difficulty.

3.1 The Difficulty of Defining Fraud

One of the problems in counting fraud is that there is no single definition and ‘contrary to popular belief, there is in English law no criminal offence called fraud’ (Arlidge, Parry and Gatt, 1996, p.1). The Benefits Fraud Inspectorate say that it is ‘the deliberate misrepresentation of circumstances or the deliberate failure to notify changes of circumstances with the intent of gaining some advantage’, while the Treasury says that fraud is the ‘use of deception with the intention of obtaining advantage, avoiding an obligation or causing loss to a third party’ (NERA, 2000, p.4).

It would be difficult to meaningfully apply either of these definitions to frauds committed by MNCs, where deliberately misrepresenting circumstances or using deception to obtain advantage may be construed as normal business strategy.

Landmark cases (*Dodge v. Ford Motor Company* 170 N.W. 668 (Mich. 1919); *Hutton v West Cork Railway Co* (1883) 23 Ch D 654) have determined that the ruling business ethic is that profits be maximised for the benefit of shareholders; if deception helps to maximise profits it is justified unless the deception is specifically prohibited by the law (Bakan, 2004). It seems, therefore, just as benefit fraud is defined by what constitutes illegally deceptive behaviour for claimants, corporate

fraud must be defined by what constitutes illegally deceptive behaviour for corporations (and their agents).

The Home Office recorded crime statistics appear to contain only two sub-definitions of fraud that may reliably be ascribed to corporations: fraud by company directors and false accounting. 'Other frauds', as defined by the Home Office Counting Rules for Recorded Crime (Home Office, 2004b), may cover some corporate crime as the category includes obtaining property or pecuniary advantage by deception; conspiracy to defraud; suppression of documents; cartel offences or insider dealing. However, as the same category embraces acting as a spiritualistic medium for reward, cheating at play and various types of benefits fraud, it is very difficult to disentangle the corporate element from the rest. It is also not possible to ascertain the ratio of 'bankruptcy and insolvency frauds' that have been committed by private individuals as opposed to corporate agents. Only a small amount of information can be deduced about offenders or victims from such 'offence-based' definitions.

The Serious Fraud Office (SFO) categorises fraud according to the type of victims involved: fraud on investors; fraud on creditors of companies; fraud on banks and other financial institutions; fraud on central or local government; and fraud involving the manipulation of financial markets (Serious Fraud Office, 2002). Victim-based definitions are more helpful when trying to assess the impact of fraud, but still present problems for a researcher trying to gauge the levels of fraud committed by particular types of offender (in this case, MNCs).

Even after a cursory investigation, it seems clear that, for statistics to be of any use in quantifying levels and impact of MNC fraud, a great deal more thought needs to be given to the ways in which fraud is defined, by offence categorisation, by victim or by

offender. As the Fraud Advisory Panel (1999, p.3) states: 'Problems in drawing conclusions were ... caused by the lack of a comprehensive or universally accepted definition of fraud and by the way in which organisations collect and present data and categorise fraud'. In 2002, it seemed as though the Home Office agreed and was 'considering how to improve and rationalise the police recording of fraud' (Home Office, 2003, p.69) but they do not seem, so far, to have made much progress.

3.2 Fraud Statistics and Their Problems

Official crime statistics are produced for several apparently practical reasons: to make comparisons and reveal trends; to gauge the efficiency of the criminal justice system; to identify problem areas; to provide information to the public and to explore crime causation. A commonly held view amongst criminologists is, however, that the statistics reveal more about those collecting, reporting and recording than they do about crime itself (Reiner, 1996; Tombs, 2000).

Following on from the idea that the data is more interesting as a reflection of police activity, the statistics concerning the numbers of fraud cases by police area confirmed some natural assumptions. In areas with a large commercial sector, high volumes of fraud and forgery cases could be expected. As predicted, the total volume of cases in 2001/2 was highest for the Metropolitan Police at 87,873, followed by West Midlands at 26,119 and Greater Manchester at 15,705 (Home Office, 2003, p.72). There did seem to be some correlation between volume of cases and the numbers of staff dedicated to the investigation of fraud and forgery. In 2000-1, Metropolitan Police had the highest number of dedicated staff at 70, followed by West Midlands with 38 and Greater Manchester with 35 (The United Kingdom Parliament, 2001, p.1-2). The top three in terms of volume were also the top three in terms of staffing. Similarly,

visits to the webpages of some of the police authorities suggested that those with high levels of staffing and high numbers of cases also appeared to give fraud a higher profile, both in their public advice and in their policing priorities.

Returning to the Recorded Crime Statistics 1989-2002/03 (Home Office, 2005a, p.1) we can see that fraud and forgery offences account for six per cent of all recorded crime offences in 2001/02, at 330,128 cases. The two largest categories are 'cheque and credit card fraud' at 142,514 and 'other fraud' at 168,958. 'False accounting' cases are much lower at 861, with 'frauds by company directors' at 28. The total of the two strictly corporate categories represents 0.015% of total crime recorded for the year. This level of fraud sounds almost negligible. Even when the volume of serious revenue and customs fraud (private and public sector) is added, at 1,750 cases, the numbers appear very low (Home Office, 2003, p.74). This does not mesh well with the widespread conviction that the volume and value of corporate fraud is massive.

The difference between the recorded number of crimes and the undiscovered or unreported number is referred to as the 'dark figure' of crime (Coleman and Moynihan, 1996). The dark figure seems to haunt corporate crime to an extraordinary degree. Levi (1987, p.21) claims that estimating 'the extent of commercial fraud is a task that presents far greater problems than is the case in other types of crime' and comments upon '*official* statistics on fraud, whose very patchiness tells us something about the priority with which fraud – both by and against business – has traditionally been regarded'. The National Economic Research Associates (NERA) say that '[f]raud is unusual in that there is significant potential for it to be undiscovered, either for a period of time or permanently' (NERA, 2000, p.2). The first sentence of the 'Fraud and Forgery' section of the Home Office Crime Statistics also acknowledges

that the 'nature of fraud [and] forgery means that the number of offences recorded by the police is significantly lower than the number actually committed' (Home Office, 2004a, p.1). Although most commentators agree that the actual fraud figures must be many times higher than official statistics suggest, any estimate of a realistic figure must remain a 'guesstimate'.

There are many explanations of the disparity between the recorded crime figures and the suspected levels of corporate fraud. The most obvious is that a large proportion of fraud may not be immediately discovered and some may never come to light.

Corporate victims may be disinclined to report frauds that they have discovered because there are few advantages. In a study of auditors/accountants conducted by Higson (1998, p.6), a respondent stated that: 'In our experience ... clients only want to actively prosecute in 1 in 30 cases'. Managers tend to prefer civil asset recovery to the criminal route as this is perceived to be more successful. Civil proceedings rarely get underway until the criminal process has been exhausted and, especially in complex cases, there is no guarantee that a police investigation will lead to a successful prosecution. Other reasons for non-reporting are the potential length and cost of proceedings, bad publicity and embarrassment or shame over appearing incompetent (Higson, 1998). The finding that the majority of corporate fraud is committed internally, by management (55%) or other employees (30%), adds a personal element that other corporate officers might find difficult to deal with (Ernst and Young, 2002, p.11). During a study into the long-term effects of fraud on private investors, the researchers noted that the victims displayed a peculiar sense of self-blame. One interviewee was 'disgusted with me, that I could have been such a dope' and another said 'we've never even told our kids that it happened. We would hate for them to know that we were that dumb' (Shover, Fox and Mills, 1994, p.92).

Although victimisation studies, such as The British Crime Survey (BCS) have helped to uncover the extent of some hidden crime, such as assault or burglary, it does not offer any measurements for fraud and cannot, thus, help in making a more accurate assessment. There are industry victimisation' fraud surveys conducted by, for example, Ernst and Young, KPMG and the Association of British Insurers (Fraud Advisory Panel, 1999). These are valuable in terms of assessing the impact of corporate fraud, but are flawed by their reliance upon respondents' willingness to admit to losses.

3.3 The Cost of Fraud

The recorded crime statistics tend to look more closely at the incidence of fraud (the numbers of cases per recording period) than the value involved. For an impact analysis, the cost of fraud may be more important – for example, plastic card fraud figures are high in volume but typically low in value, in comparison with false accounting, where each case might incur losses of millions of pounds.

The problem is that the opinions regarding losses vary wildly. In 1999, the Association of British Insurers estimated the annual cost of major fraud as £16 billion, Ernst and Young claimed it was £4-5 billion, the SFO set it at £5 billion, while KPMG said it was £400-700 million (Fraud Advisory Panel, 1999, p.6). RSM Robson Rhodes gave a 2004 estimate for the cost to business of all economic crime at £40 billion, although they added that this 'could just be just the tip of the iceberg' (RSM Robson Rhodes, 2004). The sense that these figures are being drawn out of a hat is intensified when a popular formula that they may be based upon is examined. According to US audit executive and author, Howard Davia, 20% of fraud is 'exposed and in the public domain', a further 40% is '[k]nown by a few & not made

public' while the remaining 40% is 'undetected' (Ernst and Young, 2002, p.5). This begs the question of how the figure of 40% for undetected fraud has been arrived at – if it is undetected, by definition no-one can know the true amount or the true percentage.

What we do know about is the cost of policing and prosecution. NERA tells us that the cost to the criminal justice system for 1997/8 was over £260 million (£75 million on Legal Aid alone) (NERA, 2000, p.13). Prior to charging, the cost of police investigation and prevention activities was £270 million (NERA, 2000, p.14). SFO costs were set at over £16 million (NERA, 2000, p.16). The sheer cost to the state of fraud prosecution might hold a clue to the lowly priority accorded to it in government policy.

Cost, however, is not something that can always be measured objectively. Even a small-value fraud could impact upon a victim company's reputation and affect its performance and the wellbeing of all its stakeholders – employees, investors, customers, suppliers and the community around it.

It seems that none of the desired aims of crime reporting, mentioned earlier, are being met with regard to corporate fraud. Everyone apparently understands that the corporate fraud problem is big, but nobody knows how big and few people seem to be in a hurry to find out for sure.

4. Investigating Fraud

As previously discussed, the majority of corporate fraud may never come to the attention of authorities but, even when a fraud is uncovered and investigated there are still many barriers to a successful prosecution. This chapter will discuss some of the agencies responsible for investigating and prosecuting corporate fraud and where their powers and procedures, obligations and limitations, policies and priorities might affect the successful conclusion of a case.

There are many official agencies in the UK and internationally, who have an interest in the regulation and investigation of fraud. Amongst these are the Financial Services Authority (FSA), the National Criminal Intelligence Service (NCIS), the European Anti-Fraud Office (OLAF), Department of Trade and Industry-Companies Investigations Branch (DTI-CIB) and HM Revenue and Customs (HMRC). The most important anti-fraud investigators within the UK are the local police fraud squads, the Metropolitan Police Fraud Squad (MPFS), the SFO and HMRC. Many of the 'regulatory' agencies may conduct initial inquiries, if fraud is reported to or discovered by them, but they will generally refer cases to the police or the SFO if criminal proceedings appear to be warranted (Levi, 1993).

The MPFS and the SFO act mainly upon referral, taking only those cases that match their criteria of seriousness. For example the MPFS will normally only take fraud cases valued in excess of £750,000 (Metropolitan Police, 2005c, p.1), while the SFO threshold is £1 million (Serious Fraud Office, 2005, p.1). The investigative and preventive activities of HMRC will be directed towards frauds that fall within their special remit - tax or duty evasion (HM Customs and Excise, 2003). There is a new move to expand the role of the City of London Police fraud squad, extending their

investigative area to London and the South East, and acting as a police resource for the SFO (Home Office, 2005b). The remainder will largely fall to the regional police fraud squads to deal with.

4.1 Serious Fraud Office

The SFO came into being in April 1988, as the result of a long process of consultation that started with the Roskill Committee 1986 and which led to the Criminal Justice Act 1987. Initially, it 'was to be responsible for all the functions of detection, investigation and prosecution of serious fraud' but 'detection was dropped from its remit' (Widlake, 1995, p.xi). It is 'statutorily required to concern itself only with "serious or complex fraud"' (Law Commission, 1997, p.143).

Since its inception, there have been many criticisms levelled at the SFO. Widlake (1995) has portrayed them, at least in their early days, as being a gung-ho, grandstanding organisation. He points to several impressive failures, including County NatWest/Blue Arrow, which at the time was one of the most expensive fraud trials in Britain, collapsing at a cost to the taxpayer of £40 million. This has since been eclipsed by the collapse of their Jubilee Line case at £60million (Clough, 2005).

This specialist organisation, intended to be the most efficient and cost effective way of tackling the most serious and complex frauds, is not living up to the high expectations of its founders. There is no doubt that fraud is a very expensive crime to investigate and prosecute. The budget for SFO in 2005/6 was expected to be £37.7 million (Serious Fraud Office, 2004b, p.1). However, the Home Office (2003, p.80) acknowledges that the 'activities of the SFO are constrained by its budget'. In April 2004, there were 244 permanent and 61 non-permanent staff and, in addition, they

‘employed consultants, external accountants and counsel for individual cases...augmented by a variable number of police officers allocated by their respective chief constables to work on SFO investigations on a case-by-case basis’ (Serious Fraud Office, 2004a, p.1). The implication is that, with a larger budget and more personnel, the workload of 71 cases in progress (Serious Fraud Office, 2004b, p.1), could be expanded. However, the caseload seems to have stayed stable even though the budget has increased by more than the rate of inflation year-on-year. Levi (1987) comments that, unless salaries are comparable with the private sector, the SFO might still have difficulty in attracting the best calibre employees.

In their ability to draw upon and develop specialist knowledge, the SFO should be at an advantage over, say, the police; although their own perceived elite status and the differences between them and the police over their powers and lines of accountability may actually hamper performance. For example, the SFO is directly accountable to the Attorney General, whereas police officers are accountable to their own Chief Police Officers. (Levi, 1987). The powers of interview and information gathering, granted to the SFO under section 2 of the Criminal Justice Act 1987 (CJA 1987), are not compatible with the Police and Criminal Evidence Act 1984 (PACE) governing police investigations. Although witnesses can be forced to give information to the SFO, this information is not admissible in court except in certain explicitly defined circumstances (Law Commission, 1997). However expert the SFO officers might be in the investigation of complex fraud, Levi (1993, p.46) explains that police who have been seconded to the SFO ‘express disappointment at the underutilisation of what they saw as being their particular professional skill: the interviewing of suspects and...witnesses’. Not only do the police see their interviewing skills as superior but

suspects would also fall under the protection of PACE, rendering their statements admissible in court (Levi, 1993).

4.2 Metropolitan and City of London Police Fraud Teams

In 2000, there was a reorganisation at the Metropolitan Police and the original MPFS, which was first established in 1946, was brought under the Economic and Specialist Crime branch of the Specialist Crime Directorate (Metropolitan Police, 2005a). The MPFS is now comprised of four teams 'responsible for combating serious and complex fraud cases (except cheque and credit card fraud), public sector fraud and corruption' (Metropolitan Police, 2005b, p.1). In 2001, staffing levels were reported at 68 police officers and 2 civilian staff (United Kingdom Parliament, 2001, p.2). The MPFS website also says that these teams can call upon the assistance of 'five 'volunteer' and four 'special constable' accountants' (Metropolitan Police, 2005b, p.1). The MPFS frankly admits to 'being under-strength in both police and civilian support staff' (Metropolitan Police, 2005a, p.1). There is co-operation with the SFO and some cases may be initially investigated by the MPFS but then transferred over to the SFO as the more appropriate agency. The implementation of new legislation is a freely acknowledged problem: 'The Regulation of Investigatory Powers Act, the Human Rights Act and the Crime and Disorder Act have all had significant impact on police investigations and subsequent court proceedings' (Metropolitan Police, 2005a, p.1).

The City of London Police (CLP) Economic Crime Unit is, they maintain, the UKs largest fraud squad (City of London Police, 2005a). The famed 'square mile' of the City is the hub of British finance and a magnet for those intent upon economic mayhem. The CLP proudly claims to dedicate a higher percentage of its workforce

(7%) to combating fraud than any other police authority (City of London Police, 2005b, p.1). In 2004, it raised levels to 113 police officers and 14 civilian staff (Luder, 2004, p.5). Refreshingly, it boasts one of the few police recruitment pages to emphasise the job satisfaction of economic crime-busting (City of London Police, 2005c).

In 2003, the Economic Crime Unit formed ‘a strategic alliance’ with the SFO which expanded their fraud investigation role well beyond the bounds of the City.

Partnership is the order of the day, and they have joined with the Metropolitan Police and the Cass Business School, to found a teaching and research centre for fraud detection and prevention (City of London Police, 2005d). Despite the allocation of extra funding, including a £1 million contribution from the Corporation of London (Luder, 2004, p.5) this is unlikely to satisfy the CLP fraud squad head, Ken Farrow, who has previously voiced concern that: ‘Budgets are so small that we need to be exceedingly careful of how much we can spend on each case... Ultimately, we have to ask whether it is economically viable’ (Smith, 2002b)

4.3 HM Revenue and Customs

HMRC, responsible as they are for collecting duties and taxes incurred by corporations by virtue of their cross border activities, are highly likely to come into contact with MNC fraud. Remarkably, a visit to their website shows the prioritisation of a particular type of VAT offence, catchily dubbed Missing Trader Intra Community Fraud (HM Customs and Excise, 2003) which is more associated with criminal organisations than with legitimate companies. The most common types of tax and excise fraud that authentic MNCs are likely to engage in are false declaration or

‘double-invoicing’ or abuses of the so-called ‘transfer pricing’ system⁴, of which there is no mention. Unfortunately, there is very little literature indeed about the investigative function of HMRC in relation to both fraud and MNCs.

4.4 The Regional Police Fraud Squads

There is no UK national police force. In England and Wales there are, instead, 43 regional police forces, most of which have their own fraud squads (Transparency International, 2004). The regional areas, however, are notorious for the underprioritisation of fraud, except of the common cheque and credit card variety: a visit to many of the regional websites is remarkable for what is missing rather than what is mentioned. The FAP is particularly critical of this underprioritisation, ‘despite the Home Secretary’s previous acknowledgement that fraud and economic crime are a key priority for policing in this country’ (Fraud Advisory Panel, 2004b, p.1). They point to a reduction of the number of suitably trained police officers over the last 10 years, the diversion of trained and experienced officers to other duties or to the private sector and the failure to recruit and train replacements. Nearly 20 years ago, Levi pointed to similar problems, explaining that there were few opportunities for promotion within fraud squads and that, until there were better career prospects, few competent police officers would wish to specialise in fraud over the long-term (Levi, 1987). Although the FAP praises the work of the Northumbria Police in sponsoring the North East Fraud Forum, it complains that there ‘are very few police forces in this country which give priority to fraud ... and the number is falling’ (Fraud Advisory Panel, 2004b, p.2).

⁴ please see Appendix I – Glossary of Terms and Acronyms

4.5 A National Fraud Squad

There are many criticisms about the nature of UK provision for anti-fraud and anti-corruption policing. For instance, with regard to bribery and corruption by MNCs, Organisation for Economic Co-operation and Development (OECD) examiners ‘consider that the very large number of investigative bodies has resulted in excessive fragmentation of efforts, lack of specialised expertise, lack of transparency for the public and for investigative authorities, and problems in achieving coherent action’, adding that police ‘resources for investigating economic crime in general have been falling – handicapping the SFO too, since it has no police officers of its own’ (BBC News, 2005, p.2). In 2002, hopes were raised that a National Fraud Squad might be established, at a cost of £85 million, with 1200 full time investigative officers (BBC News, 2002a, p.1). Despite enthusiastic support in several quarters, this proposal has not yet won Home Office approval (Fraud Advisory Panel, 2003; BBC News, 2002a).

4.6 The International Dimension

The discussion above has looked at some of the common difficulties faced by investigative agencies in dealing with any serious or complex fraud, however, MNC fraud raises the game to another level. The SFO reports that ‘approximately 65% of our cases have an international dimension’ (Serious Fraud Office, 2005a, p.1).

Investigation at the international level requires an even higher set of skills and larger operational budgets.

The main anti-fraud agencies have forged links with their overseas counterparts, assisted by Mutual Legal Assistance Treaties, and with supranational agencies such as the US Federal Bureau of Investigation (FBI), Interpol, Europol and OLAF (Serious

Fraud Office, 2005a). Of course, this is all very well in principle, but there are bound to be conflicts when the interests, cultures and legal systems of different states collide. This problem is well recognised by the European Council, which has been working towards a EU-wide system of investigatory powers – the 1997 Amsterdam Treaty and Tampere Conclusions paving the way for a ‘European legal space’ (Fair Trials Abroad, 2001, p.1). Even if the EU becomes a more accommodating place for international fraud investigators, the rest of the world will continue to operate according to the ‘request principle’, where ‘one sovereign state makes a request to another sovereign state, which then decides whether or not to comply with it’ (Europa, 2002, p.1).

This is not an exhaustive introduction to the problems faced by investigators. There has been no space to consider political, institutional or ideological pressures, alongside the more prosaic issues of staffing, funding, skills, training and jurisdiction. Issues of culture, class and psychology, where cops are pitted against ‘upperclass’ robbers, have also been neglected. It is clear, though, that investigating fraud is frequently an unglamorous, frustrating, unrewarding and underappreciated arm of law enforcement.

5. Prosecution and Legislative Issues

Fraudulent behaviour by corporations is grounds for both criminal and civil sanction and there is an increasing volume of legislation and regulation granting powers to or limiting the actions of investigators, regulators, enforcers and prosecutors. The majority of fraud offences that might be committed by agents of MNCs are covered by criminal law and this, rather than regulatory law, will be the focus of the following discussion.

5.1 The Criminal Status of Fraud

As mentioned before, there is no single general offence of fraud (Arlidge, Parry and Gatt, 1996) although the Law Commission (2002), enthusiastically seconded by the Fraud Advisory Panel (2004a), has recommended that there should be. The new Fraud Bill is currently making slow progress through Parliament. The existing offences that can be classified as fraud are defined in a wide variety of statutes, as are the available sanctions and powers of investigation. The legislation includes: the Theft Act 1968, the Criminal Law Act 1977, the Theft Act 1978, the Customs and Excise Management Act 1979, the Magistrate's Courts Act 1980, the Criminal Justice Act 1980, the Forgery and Counterfeiting Act 1981, the Criminal Attempts Act 1981, the Companies Act 1985, the Insolvency Act 1986, the Financial Services Act 1986; the Criminal Justice Act 1987, the Banking Act 1987, the Criminal Justice Act 1993, the Financial Services and Markets Act 2000 – this is by no means an exhaustive list (Arlidge, Parry and Gatt, 1996; Crown Prosecution Service, 2005).

The new law has been proposed precisely because the patchwork nature and development of fraud law presents, in itself, a major problem. As the Law Commission comments:

At present, juries cannot be given a single straightforward definition of fraud. The current statutory offences are too specific to offer a comprehensive definition, while the common law offence of conspiracy to defraud is so wide that it offers little guidance on the difference between fraudulent and lawful conduct. At present, serious fraud indictments may need to employ a number of different offences before the alleged fraudulent behaviour is fully covered, thus leading to long, confusing trials. (Law Commission, 2002, p.1)

Although generally welcoming the recommendations of the Law Commission, the Fraud Advisory Panel (2004a) warns against a careless drafting of the proposed new law, especially if it seeks to repeal the inchoate offence of conspiracy to commit fraud which is needed to tackle the larger, more serious and complex cases.

5.2 Criminal Liability

There are two main schools of thought, that some of the criminal liability for frauds committed by its agents on behalf of and for the benefit of a corporation should be borne by the corporation itself, whereas others would prefer to maintain the current status quo, with full responsibility falling upon the individuals (directors, managers, employees and agents) only (Slapper and Tombs, 1999; Wells, 2001). There are no known cases in UK law, so far, where a corporation has been found criminally liable for fraud although, arguably, it ought to be possible. However desirable it might be to assign criminal responsibility to the corporation, as a means of condemning the role of

organisational goals in promoting the crime or the organisational failure to provide sufficient safeguards, there are some major legal issues that need to be resolved.

Criminal law usually requires that there be *mens rea* and *actus reus* (a guilty mind and a guilty act) and that the commission of the offence was voluntary. '[A]n accused must not only have behaved in a particular way, but must also usually have had a particular mental attitude to that behaviour' (Elliott and Quinn, 2004, p.8).

Regulatory offences, on the other hand, usually involve the contravention of a prohibition or neglect of a duty set out by statute and have less stigma or less severe penalties attached. Sometimes referred to as 'no-fault' offences, or 'offences of strict liability', it may not be necessary to establish *mens rea* for regulatory offences (Elliott and Quinn, 2004; Smith, 2002a; Arlidge, Parry and Gatt, 1996).

The lower burden of proof is often cited by writers on corporate responsibility as a reason why it might be preferable to attack offending corporations using the civil law. Furthermore, civil sanctions are likely to involve greater sums of money than are criminal fines. It is argued, thus, that the civil route is easier to pursue and, by hitting corporations in the profit margin where it hurts most, more deterrent (Simpson, 2002; Khanna, 2003). However, others point to the facilitating effect a criminal conviction might have upon a subsequent civil case: 'the counter argument...may be that a criminal prosecution is required in order to prove that someone has committed a fraud and thus have a stronger chance of recovering the missing assets' (Higson, 1998, p.11). The other arguments relate to the economic value of a company's reputation, which would suffer greater damage and stigma through criminal conviction and that 'death sentences' for egregious or recidivist offences would only be appropriate for criminally convicted corporations (Spencer, 2004).

If corporations were to be charged with fraud, there are two concepts that would need to be invoked – vicarious liability and the doctrine of identification. Vicarious liability simply means that one legal person can be liable for the acts of another. Elliott and Quinn (2004) give the example that, when a shop assistant is selling food, the owner of the shop can also be said to be selling the food. This is a way of saying that a company's representative is acting as the company for all intents and purposes, so the company should be liable. Where vicarious liability does not apply, doctrine of identification 'allows certain senior people within a company to be recognised for legal purposes as being the company, so that any criminal liability they incur while going about the company's business can be assigned to the company' (Elliott and Quinn, 2004, p.246). It is notoriously difficult to show an incriminating link between the person who committed the act and a senior corporate officer. The problems are magnified as the size of a corporation, the number of its operational locations and the complexity of its structure increases. It is interesting to consider these possibilities, however, much of the discussion is academic as there are no immediate plans to hold corporations criminally responsible for fraud in the UK.

5.3 Jurisdiction

The next area of contention, which is of particular relevance to MNCs and fraud, is that of legal jurisdiction. Formerly, it was a general principle that no-one could be tried in England and Wales for an offence committed abroad unless there was a statutory provision that permitted it. It was not thought possible to prosecute criminal acts committed abroad in English and Welsh courts unless the perpetrators were British subjects and foreign subjects could not be tried in the UK for offences committed overseas (Kirk and Woodcock, 2003). These rules arise from the

territorial nature of criminal law which presumed that a crime could only be committed in one place and where attempts to interfere in the jurisdiction of other states would almost certainly have been construed as an attack upon their sovereignty (Kirk and Woodcock, 2003). However, there is now an increasing understanding that the international nature of MNC operations make it necessary to look beyond state borders. In 1986, the chairman of the Fraud Trials Committee, Lord Roskill, addressed the problems arising from frauds committed across national boundaries since the introduction of modern methods of communication and transfer of money (Law Commission, 1989). The recommendation of the Fraud Trials Committee, that 'such offences should be triable in this country if any part of the conduct or any of the results forbidden by such crimes takes place here' (Law Commission, 1989, p.2) has since been adopted into law through the Criminal Justice Act 1993.

The Extradition Act 2003 was originally designed to relax the rules and ease the extradition of terrorist suspects to 'category one' countries (EU member states) and 'category two' countries (e.g. the USA) (Herbert Smith, Gleiss Lutz, Stibbe, 2004, p.14). The US has already taken advantage of the legislation to request the extradition of three British bankers implicated in the Enron scandal (BBC News, 2004). It is hard, as yet, to know how to respond to this development. The one-sided nature of this arrangement, where the US retains its stricter criteria for extradition, is a cause for concern with regard to fairness. The bankers are, for example, complaining that what they did was not illegal, but that they (contradictorily) should be tried in the UK and that they would not receive a fair trial in the US. They appealed against the decision 'not just for ourselves, but on the basis of the fact that many, many other people are likely in the near future to suffer the kind of iniquity and injustice that is today being perpetrated on us by the US government' (BBC News, 2004, p.2). There

have been other criticisms, particularly over the legal systems of the newest EU member states and their compatibility with legal standards in the UK but, on the whole, it is hard not to approve of a situation where ‘businesses must ensure that not only are their businesses compatible with UK law, but also that in carrying out their various activities they do not breach the criminal law in other jurisdictions’ (Herbert Smith, Gleiss Lutz, Stibbe, 2004, p.15).

Thankfully, the situation with regard to criminal jurisdiction is much simpler than that in civil tort cases, where complicated legal conventions for deciding jurisdiction such as the ‘*Spiliada Doctrine*’ and ‘*forum non conveniens*’⁵ may be invoked. However, with governments rather than civil claimants driving criminal prosecutions for MNC fraud, there is a possibility that (with the high cost of prosecution) jurisdiction might be decided on domestic or international political grounds rather than in the interests of justice.

5.4 Powers of Investigation

The next set of problems concern the legal powers that the enforcement agencies have to investigate MNC fraud, and the limits to those powers imposed by PACE and the Human Rights Act 1998 (HRA).⁶

One of the first things that need to be understood are the different organisational structures of the various enforcement agencies. For instance, police officers are accountable to their respective Chief Officers, whereas the agents of the SFO are directly answerable to their own Director. The SFO Director is given extensive

⁵ please see Appendix I – Glossary of Terms and Acronyms

⁶ For reasons of space, this section will focus upon the SFO and the police, whilst recognising that other enforcement agencies such as HM Revenue and Customs are bound by specific legislation drafted with their circumstances and roles in mind.

powers under Section 2 of the CJA 1987 to investigate serious or complex fraud and these may be devolved to SFO officers and to any other professionals aiding an SFO investigation, with the specific exemption of the police (Fraud Advisory Panel, 1998). This exclusion relates directly to the constitutional differences between the two bodies, where SFO staff are classified as civil servants and the police are officers of the Crown. Problems inevitably arise during joint investigations, not least because the police are additionally bound by PACE.

To give just one example of these problems, in joint investigations SFO officers and police officers are not able to interview or interrogate suspects on the same basis.

Section 2 of CJA 1987 gives SFO staff the power to require bank, financial institution, accountancy or other professional personnel to answer questions, provide information or produce documents for the purposes of an investigation, but answers may not be used in evidence against them at their trial (with certain rigidly delineated exceptions) (Law Commission, 1997). PACE provides safeguards for suspects, which the police must adhere to, but information gathered during police interview is admissible in court (Levi, 1993).

A more recent development affecting investigation is HRA. Because of the fiction that corporations are legal persons, they are given full rights of privacy under Article 8 of the European Convention for Human Rights (ECHR), as the 'freedom from search of home or business premises is protected by the right to respect for private [and family] life' (Cheney, Dickson, Skilbeck, Uglow and Fitzpatrick, 2001, p.61). Comer (2003) advises companies wishing to investigate corporate frauds committed against them to think very carefully before involving the police (or private investigators who might have any connection to or identification with the state) in

order to evade the negative effects that ECHR Article 8 might have upon civil proceedings and upon the recovery of assets. It is still too early to tell if Comer's fears are justified.

The detection of fraud is problematical, partly because of the low priority given to it by regional police forces, but also because the SFO (as the dedicated fraud agency) depends largely upon referral. This means that the role of inside informants, colloquially known as 'whistleblowers', is extremely important. Insiders may be deterred from raising the alarm about fraudulent activity, especially if it is being conducted by someone senior to themselves or by a client important to their business because of unpleasant consequences, including dismissal for breach of confidence. In cases of serious illegality, the Public Information Disclosure Act 1998 (PIDA) promises protection to whistleblowers (PCaW, 2005). However, there are tests that need to be met, to ensure that informants are acting disinterestedly, in the public good, not out of malice or for personal gain. The first test is one of 'good faith'. This is the only test that must be passed for 'internal disclosure', disclosure to Ministers, or disclosure to 'prescribed bodies', even though it begs the question of who defines 'good faith'. Interestingly, however, another raft of tests is brought into play when 'wider disclosure' is made: giving information to both the police and the general media is classed as 'wider disclosure' and, as the SFO does not feature on the list of prescribed bodies, it must be assumed that they also are on the same footing with newspapers and TV stations (PCaW, 2005). It must be said that each level of tests represent a barrier to whistleblowers and the PIDA has not been in effect long enough to assess the effectiveness of the promised safeguards.

5.5 Problems at Trial

In 1999, Lord Justice Auld was appointed to conduct a review into the working of the Criminal Courts. He echoed the findings of the Roskill Committee in 1986, by making a firm recommendation that, because of the lengthy, complex and costly nature of fraud trials, they should no longer be put before a jury but should be transferred out of the criminal justice process and be treated instead as regulatory offences. Lord Justice Auld gave one of the most persuasive reasons as follows: ‘although the issue of dishonesty is essentially a matter for a jury, the volume and complexities of the issues and the evidence, especially in specialist market frauds, may be too difficult for them to understand or analyse so as to enable them to determine whether there has been dishonesty’ (Auld, 2001, p.1). Lord Justice Auld noted the opinion of the ‘Director of the Serious Fraud Office [who] has recently said that the average length of a serious fraud prosecuted by it is six months, which would come largely before a jury of "the unemployed or unemployable”’ (Auld, 2001, p.1).

The FAP disagreed strongly with this suggested change as they did not believe that:

[T]he regulation of the financial markets is morally neutral ... The Panel would not welcome a return to the characterisation of certain financial delinquency as “victimless crimes” and, therefore, not deserving of the stigma and punishment resulting from criminal conviction. (Fraud Advisory Panel, 2002, p.5)

Instead, the FAP welcomed suggested procedural reforms which might include ‘suitable training as well as secretarial, administrative and technological assistance’ for trial judges (Fraud Advisory Panel, 2002, p.2).

It appears that the Auld report has been accepted by Parliament, if not by many others. The Guardian (2005, p.1) reports that: 'The 2003 Criminal Justice Act provided for jury-less fraud trials, but it is so controversial it has been agreed not to bring it into force until further debate'. Another news story, concerning the collapse of the London Underground Jubilee Line fraud case (at an estimated cost of £60 million to the taxpayer), reports added pressure for jury-less trials, but gives the Bar Council response, that it would be 'wrong to hold such trials without juries' and that '[j]uries are perfectly capable of trying fraud cases if proper systems are put in place' (Clough, 2005, p.1).

In this review of legislative and prosecution issues, it is clear that fraud is making itself felt upon the criminal justice agenda and arouses very strong feelings on all sides. There are many complex issues involved, and this chapter has merely skimmed the surface. The argument that follows from this section must concern not just the procedural and legal quarrels but also the social impact of decisions currently being taken about the criminal versus the regulatory status of fraud.

6. The Background Debates

A full understanding of MNC fraud requires many different levels of discussion, from basic questions about crime and criminality, through more complex issues related to white collar crime and 'elite deviance' and, at the most rarefied level, embracing global economics, political systems and social justice. This is a massive field to cover and there is a danger that, by trying to address the whole picture, the benefits of a tighter focus using the chosen filters - of internationality, corporate crime and CJS problems - might be lost. The best starting point for this debate is to look at the current political, ideological, legal and academic battles being waged around the issue of multinational corporate fraud and to beg indulgence for those areas that deserve mention but must be neglected.

This is a particularly interesting time, in the run-up to a general election. As usual, two of the biggest campaigning themes are 'law and order' and the economy. Michael Howard, for the Conservative Party, believes in: 'free enterprise, free markets, free trade' and feels that:

There is no better system for spreading the fruits of man's labour to the many than free enterprise. No better system for lifting people out of poverty. No better system for raising people's living standards. (Howard, 2004, p.1).

The Conservative Party fears that Britain may be losing out economically to other countries and that, in order to remain competitive, there should be low taxation and 'light touch regulation' of business (Howard, 2004, p.1). Labour must also be anxious, as despite their stated intention 'to deregulate where desirable and regulate with as light a touch as possible' (Cabinet Office, 2005, p.1) 'only a tiny proportion of

UK finance directors think the government's regulatory environment encourages companies to expand' (Financial Times, 2005, p.1). Both parties agree that 'responsibility from the family outward to the community is at the core of tackling disrespect, thuggery and criminality' (Labour Party, 2004, p.1). This is not a party political broadcast but merely an attempt to demonstrate some political realities. In the UK, in the year 2005, both of the main political parties feel that there is only negative political capital to be gained from the firm regulation of corporations, whereas the firm regulation of 'jobs' is thought to be essential. This bias needs explaining.

When Sutherland first described white-collar crime, he was trying to correct the misapprehension that crime was concentrated in the lower socioeconomic class and that, in fact, crime could 'be committed by a person of respectability and high social status in the course of his occupation' (Sutherland, 1983, p.7). The term white-collar crime contains a reference to the social standing of the offender, whereas the concept of corporate crime positions the 'white-collar' perpetrator within an organisational context. Kramer (1984, p.18, cited in Slapper and Tombs, 1999, p.16) describes corporate crime as 'criminal acts (of omission or commission) which are the result of deliberate decision making (or culpable negligence) of those who occupy structural positions within the organization as corporate executives or managers'.

Corporate crime doesn't fit the traditional notion that crime is about evil people committing evil deeds. Offences are not always committed for the immediate financial benefit of the offender, but often in pursuit of corporate goals, such as profit maximisation (Russell and Gilbert, 2002). In the recent corporate crime spree at Enron, for instance, corporate executives made false statements of earnings and

disguised trading losses in an effort to keep share prices high (Bryce, 2002).

Although the actions are classified as crimes, both in the US and in the UK, at first they do not sound so very terrible. No-one was physically hurt, no harm was intended and, in this case, it is difficult to assert that money has actually been stolen from anyone. This raises the question of whether offences like these are really crime at all and wrong in themselves (*mala in se*) or wrong simply because they contravene a set of regulations (*mala prohibita*) which not everyone in the business world is in agreement with (Slapper and Tombs, 1999). In the event, the consequences were dire and could have been predicted, with many people losing their livelihoods, investments and pension plans (Bryce, 2002).

The wider social effect of the Enrons and the Worldcoms has yet to be researched fully, but it is thought that the unveiling of this 'higher immorality' could undermine the public's confidence not only in big business but also in governments, major institutions and, for the 'socially excluded', in the whole social contract (Simon, 1996; Young, 1999). Merton's strain theory of deviance describes a social structure that encourages all members of society to strive for certain goals, but doesn't provide equal means to achieve them (Downes and Rock, 2003). If the elite are observed to take more than their fair share of resources through cheating and dishonesty, the less fortunate are more likely to feel alienated and reject the norms that seem to support this inequity. As Jock Young explains: 'Crime and intolerance occur when citizenship is thwarted; their causes lie in injustice, yet their effect is, inevitably, further injustice and violation of citizenship' (Young, 1999, p.198). There may be closer links between street yobbery and suite yobbery than Howard and Blair are willing to admit.

Conflict theories of criminality seem quite appropriate to an understanding of corporate crime and reactions to it. They describe a social order where the law protects vested interests and enforcement is directed at the underdog, not the powerful (Hopkins Burke, 2001). Those with economic and political power are able to influence 'the social process of naming *crime*' (Kramer, Michalowski and Kauzlarich, 2002, p.266). According to Box (1996, p.248): 'The process of law enforcement, in its broadest possible interpretation, operates in such a way as to *conceal* crimes of the powerful against the powerless, but to *reveal* and *exaggerate* crimes of the powerless against 'everyone'. Reiman (1984, p.2) asks us to: 'Imagine that instead of designing a correctional system to reduce and prevent crime, we had to design one that would maintain and encourage the existence of a stable and visible "class" of criminals'. Perhaps Reiman should be asked if there is only one such class, or two. It seems that there may be a second, corporate class of criminals, equally stable but only intermittently visible.

Despite this, the political and legal consensus is moving away from criminalisation of corporate offending, towards an increasingly regulatory approach. The majority of frauds are covered under criminal law, which means that a perpetrator must be identified, charged with the crime and prosecuted and the person found criminally responsible may be fined or sent to jail. However, peer or management pressures, or a negligent lack of safeguards may have contributed towards the crime, in which case it might be desirable to hold the corporation accountable. There is a vigorous debate about whether certain types of corporate fraud, e.g., insider trading, might be best dealt with as regulatory rather than criminal offences.

Khanna points to the recent explosion of corporate crime legislation in the US, including the Sarbanes-Oxley Act of 2002 and asks how this is possible if corporations are so good at lobbying and wield so much political power. His explanation is that 'corporate criminal liability imposes relatively low costs on corporate interests, may help to avoid legislative and judicial responses that are more harmful to their interests, and may at times help to deflect criminal liability away from managers and executives and on to corporations' (Khanna, 2003, p.1). He would prefer to reduce corporate criminal liability and focus more on corporate civil and managerial liability, in the interests of deterrence. There are several problems with this, especially in the UK context. There are quite different regulatory styles in the UK and US; the US tends to be more adversarial and litigious, whereas the UK style is based upon negotiation and non-confrontation and civil sanctions tend to be lower and thus less painful (Sakurai, 2002). But such sanctions, if set at anything less than a crippling level, can be fairly easily recouped by laying off workers or raising prices – a classic example of the externalisation of costs by which corporations evade responsibility (Russell and Gilbert, 2002; Stiglitz, 2002).

The notion of deterrence is, in any case, as problematical for corporate malfeasance as it is for individual wrongdoing. Cavadino and Dignan (2002, p.36) state that the deterrent position is improved not by severity of penalty, but by the 'potential offenders' *perceived likelihood of detection*' and that there is 'little to suggest that severer punishments deter any better than more lenient ones' (Cavadino and Dignan, 2002, p.36). The assertion that the best way to prevent an offender from offending repeatedly is not to catch him in the first place does not seem to ring true for corporate criminals but, taking the example of Enron, the perpetrators are more likely to have

spent the best part of their lives being told how great they are, so 'labelling effects' are probably absent.

Another reason for taking a regulatory stance is the workload and strain on criminal enforcement resources (Benson, 2001, p.381). The nature of corporate crime and enforcement resources mean that the CJS response is reactive and highly discretionary. As Slapper and Tombs (1999) point out, direct regulatory enforcement through the threat of prosecution, licence suspension or adverse publicity, does put pressure on companies to improve their systems of internal regulation. This transfers the major cost of regulation to the company itself. Nelken (1997, p.920) is also partly referring to enforcement agency workload and budget when he says that 'the choice may lie between stigmatization without effective regulation or regulation without stigmatization'.

Wells (2001, p.19) gives one of the best arguments for the retention of criminal sanctions when she says: 'What is often seen as at stake is the justness versus the social usefulness of punishment'. Punishment contains an expression of censure or condemnation and removing the criminal label from corporate crime risks sending an even stronger message that such behaviour is merely *mala prohibita*. Wells (2001) considers that the regulatory/criminal dichotomy may be unnecessary. Some offences can be considered as hybrids and, even now, criminal proceedings do not rule out civil proceedings and vice versa.

Moving on, the final area for consideration involves the international sphere. The rights and wrongs of the global market have added a special sense of urgency to the debate, as anti-globalists protest that the inequities of the capitalist system are being exported to the developing and undeveloped world (BBC News, 2002b; Bakan, 2004).

There are deep concerns that multinational corporations are escaping the control of states. Maurice Punch best expresses the problem:

Traditional regulation is geared to the formal organization working within national boundaries. Clearly, it experiences considerable difficulty in tackling the transnationals, who can export their dirty tricks, dirty products, and ‘clean’ investments with impunity...and now it will have to face diffuse, amorphous, shifting networks of companies and sub-units that can rapidly switch location, personnel, data, composition, task, and contractual basis of employment. (Punch, 1996, p.270)

Even arch-capitalist, George Soros, has warned that ‘capital can simply go away to the environment where it is least harassed’ and that there is, therefore, an urgent need to establish ‘basic international law’ in order to ensure global social justice (Shapiro, 2000, p.1-2, cited in Russell and Gilbert, 2002, p.40). This brings us full circle to our starting point – the pending general election and the lack of public awareness about multinational fraud as a political/electoral issue: ‘Countries have to take a long-term and multinational approach to global crime fighting. Unfortunately, electoral shifts and domestic political pressure will make that difficult’ (Gros, 2003, p.79).

This has been something of a whirlwind tour of issues that span the parochial to the global, encountering a great deal of fatalism, resignation, optimism, idealism and pragmatism on the way. This is the stuff that makes social science and criminology so absorbing, exciting and relevant.

7. Summary and Recommendations

After the collapse of BCCI, then Barings, then Enron, then Worldcom, then Parmalat, the tendency was to wail that the corporate sky was falling. It clearly has not. This is the problem with MNC fraud. It is an incredibly serious issue and contains within it so many fundamental matters that deserve urgent attention, not just for the business fraternity, but for everyone – the cake-eating rich and the crumb-seeking poor alike. But it is difficult to convey this importance to the average person.

The extent to which the prevalence and cost of fraud is unknown is astonishing. This means that fraud statistics can be bent to suit a wide range of different agenda. Fraud investigators may use the statistics in an alarmist fashion to keep themselves in work, whilst business interests and politicians may use lower-end estimates to buttress faith in their institutions. The truth is that no-one knows the full extent, begging questions of how seriousness is to be estimated and how budgets and resources are to be fairly targeted. Keeping in mind that there will always be a certain amount of undetected fraud, as victims are unaware of their victimisation, it must be a priority to discover the true picture, as far as is possible. For truly meaningful and helpful data, the current official crime statistics need to be reformulated, so that corporate fraud is represented in the victimisation studies and greater attention is given to a system of categorisation, which includes information about the corporate status of offenders.

The fragmented nature of the enforcement response to serious and complex fraud, especially where there is an international element, is a major stumbling block. Acting upon the proposal to set up a dedicated national fraud squad would solve many problems. It could give a clear career structure, with good promotion prospects, which would help with the training and retention of skilled, specialist staff who could

enjoy job satisfaction, decent remuneration, prestige and appreciation at the same time binding them to a common code of practice and ethical conduct and a clear chain of command and responsibility.

The proposal for a fraud law, which simplifies and carefully codifies the many disparate elements that prosecution and defence teams now have to negotiate, and which gives a clear legal definition, must be welcomed. However, the legal theorists must give more consideration to the jurisdictional problems that help MNCs to escape state control. The developed, wealthy nations need also to consider the activities of their corporate citizens throughout the globe and legislate for social justice beyond their national borders.

The sky may not have fallen yet, but the anti-globalist demonstrations in Seattle, Davos, Genoa and beyond are causing it to shake and tremble. It seems important to answer the big questions, involving the deviance of elites compared with that of the underclass, to see which is the most demoralising to our society.

Appendix I – Glossary of Terms and Acronyms

<i>Actus reus</i>	From the Latin, a guilty act. The essential element of a crime that must be proved to secure a conviction, as opposed to the mental state (<i>mens rea</i>) of the accused. In most cases, the <i>actus reus</i> , accompanied by specified circumstances. Sometimes, however, it may be an omission to act or it may include a specified consequence. In certain cases <i>actus reus</i> may simply be a state of affairs rather than an act. (Martin, 1997)
BCS	British Crime Survey
CJA 1987	Criminal Justice Act 1987
CJA 1993	Criminal Justice Act 1993
CJS	Criminal justice system
CLP	City of London Police
Doctrine of Identification	The necessity to identify an individual who represents the ‘controlling mind’ of a company and who is culpable of gross negligence before a conviction can be brought. (International Peace Academy/FAFO-AIS, 2004)
Double Invoicing	A method used to evade duties and taxes, using false documentation which underestimates the value of goods being transferred across national borders.
DTI-CIB	Department of Trade and Industry – Companies Investigation Branch
Europol	The European Police Office located in The Hague,

	Netherlands. Its task is to improve the effectiveness of, and cooperation between, the competent authorities in the European Member States.
FAP	Fraud Advisory Panel
FBI	Federal Bureau of Investigation – the national security and law enforcement agency of the USA
<i>Forum non conveniens</i>	In civil procedure, the principle that for the convenience of litigents and witnesses there might be a more appropriate forum than the one which would normally have jurisdiction (Magaisa, 2001).
FSA	Financial Services Authority
HMRC	Her Majesty's Revenue and Customs - the newly combined Inland Revenue and HM Customs and Excise, which officially joined forces on 1 April 2005.
HRA	Human Rights Act 1998
Interpol	The International Criminal Police Organisation, based in Lyon, France, which provides a global police communication system, a range of criminal databases and analytical services and proactive support for police operations throughout the world.
<i>Mala in se</i>	Evil in itself - behavior that is universally regarded as criminal, such as murder (American Bar Association, 2005)
<i>Mala prohibita</i>	Wrong because prohibited - behavior that is criminal

	only because a society defines it as such. An example is the manufacture of alcoholic beverages during Prohibition (American Bar Association, 2005)
<i>Mens rea</i>	The "guilty mind" necessary to establish criminal responsibility (Martin, 1997)
MNC	Multinational corporation – an enterprise irrespective of country of origin and ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others
MPFS	Metropolitan Police Fraud Squad
NCIS	National Criminal Intelligence System
NERA	National Economic Research Associates – an international economic consultancy
OECD	Organisation for Economic Co-operation and Development – international forum to address the economic, social, environmental and governance challenges of the globalising world economy

OLAF	Office Européen de Lutte Anti-Fraude – The European Commission Anti-Fraud Office
PACE	Police and Criminal Evidence Act 1984
SFO	Serious Fraud Office
Spiliada doctrine	In civil proceedings, a test which helps a court to decide whether it may hear a case even though there is another, more natural forum (Magaisa, 2001).
Strict liability	Liability that might be imposed without the necessity of proving <i>mens rea</i> (Martin, 1997)
Transfer pricing	The internal price at which a company of a multinational group undertakes transactions of tangible goods, intangible property, and services with its associated companies across national borders (intra-group foreign trade). The system is commonly used to evade duties and taxes by understating the value of goods, etc.
Vicarious liability	Legal liability imposed on one person for torts or crimes committed by another (usually an employee but sometimes an independent contractor or agent), although the person made vicariously liable is not personally at fault (Martin, 1997).

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