

**CREATIVE COMPLIANCE, CONSTRUCTIVE COMPLIANCE:  
CORPORATE ENVIRONMENTAL CRIME AND THE CRIMINAL  
ENTREPRENEUR**

DR ANGUS NURSE  
*Senior Lecturer in Criminology*  
*Middlesex University, School of Law*

**ABSTRACT:**

**Purpose:** While corporations may embrace the *concepts* of social and environmental responsibility, numerous examples exist to show corporations claiming to act sustainably and responsibly, while simultaneously showing disregard for the communities in which they operate and causing considerable environmental damage. This chapter argues that such activities illustrate a particular notion of Baumol's (1990) criminal entrepreneurialism where both creative and constructive compliance combine to subvert environmental regulation and its enforcement.

**Design/methodology/approach:** This chapter employs a case study approach assessing the current corporate environmental responsibility landscape against the reality of corporate environmental offending. Its case study shows seemingly repeated environmental offending by Shell Oil against a backdrop of the company claiming to have integrated environmental monitoring and scrutiny into its operating procedures.

**Findings:** The chapter concludes that corporate assertion of environmental credentials is itself often a form of criminal entrepreneurship where corporations embrace voluntary codes of practice and self-regulation while internally promoting the drive for success and profitability and/or avoidance of the costs of true environmental compliance deemed too high. As a result this chapter argues that responsibility for environmental damage requires regulation to ensure corporate responsibility for environmental damage.

**Originality/value:** The chapter employs a green criminological perspective to its analysis of corporate social responsibility and entrepreneurship. Thus it considers not just strict legal definitions of crime and criminal behaviour but also the overlap between the legal and the illegal and the preference of Governments to use administrative or civil penalties as tools to deal with corporate environmental offending.

**Keywords – CSR/CER – environmental crime – pollution – ethical standards – social justice – Polluter pays**

**Category – Viewpoint/Case Study**

## INTRODUCTION

Baumol identifies a distinction between productive corporate innovation and unproductive activities such as organized crime (1990: 893). However, within corporate environmental crime discourse, this distinction is not absolute. Corporate compliance with environmental regulations operates along a continuum from absolute compliance to total non-compliance consistent with Hobsbawm's view that private enterprise has a bias only towards profit (1969: 40). Accordingly, non-compliance with environmental regulations and entrepreneurship which actively subverts or minimizes the costly impact of regulatory compliance can represent a form of innovation. Corporations exploit business opportunities cognisant with the goal of maximising profit. Embracing green credentials, reassuring consumers and governments that they take their social and environmental responsibilities seriously are legitimate means through which corporations demonstrate alertness to opportunity, creativity and respond to consumer demand for ethical corporate practice.

Yet while many corporations may embrace the *concepts* of social and environmental responsibility there are numerous examples of corporations who claim to act in a sustainable and responsible way, while at the same time showing disregard for the communities in which they operate and causing considerable environmental damage. Green criminology identifies that corporate environmental crimes are widespread and 'often eclipse the scope and reach of the criminal law' (Sollund, 2012: 3). The global operations of Multi National (business) Entities (MNEs) can have significant negative consequences for the communities in which they operate and the wider environment yet are often legal given the relative lack of regulation for corporate practice in relation to environmental harm (White & Heckenberg, 2014).

While business' may in principle embrace the concept of ethical operations and human rights compliance claiming to implement these in their Corporate Social Responsibility (CSR) policies, the extent to which they do so, the content of these policies and their applicability to the concept of environmental compliance varies considerably. There has been widespread adoption of CSR policies by businesses in developed countries in the last 20 years, yet business activities are often not subject to international law or human rights norms. As a result CSR is largely voluntary and while CSR and Corporate Environmental Responsibility (CER) are routinely embraced by business, the question remains as to what extent this is just business proclaiming what people expect it to do while at the same time continuing to act either unethically or unlawfully. In some cases CSR becomes integrated into public relations (PR) discourse solely to downplay the harm caused by business practices.

This chapter argues that such activities illustrate a particular notion of Baumol's (1990) criminal entrepreneurialism where both creative and constructive compliance combine to subvert environmental regulation and its enforcement. Corporations armed with the knowledge of a weak environmental regulatory regime (both nationally and internationally) and the preference of Governments to use administrative or civil penalties as tools to deal with corporate environmental offending embed non-compliance into their operating practices. In doing so some corporations actively embrace the tools of corporate environmental responsibility, auditing and monitoring as structural mechanisms through which corporate offending can be neutralised (Sykes & Matza 1957). They achieve this by blaming 'rogue' individuals within the company, law enforcement and even environmental victims themselves.

This chapter argues that corporate assertion of environmental credentials is itself often a form of criminal entrepreneurship where corporations embrace voluntary codes of practice and self-regulation while internally promoting the drive for success and profitability and/or avoidance of the costs of true environmental compliance deemed too high. The chapter first examines the nature of corporate environmental responsibility, including its core principles and the underlying ethos behind ethical corporate environmental practices. Secondly, the chapter defines corporate environmental responsibility and environmental damage, before considering the voluntary nature of most corporate environmental responsibility activity and the impact a relative lack of regulation has over corporate compliance with environmental regulation. Finally this issue is explicitly explored within this chapter by a case study which assesses the current corporate environmental responsibility landscape against the reality of corporate environmental offending.

Obschonka, Andersson, Silbereisen and Sverke (2013) identify entrepreneurs as individuals with a propensity for action, risk-taking and a desire to push against traditional structures and rules. Scholarship on green entrepreneurship also alludes to the importance of ‘creative destruction’ where entrepreneurs promote change in part by challenging old ways of operating (Farinelli et al. 2011: 43). Thus a notion of non-compliance and testing the boundaries of structures can be incorporated into the accepted behaviours of entrepreneurs and should be considered within broad understandings of what constitutes the ‘criminal’ entrepreneur. The case study illustrates repeated corporate offending against a backdrop of apparent environmental monitoring and scrutiny of corporate environmental practices. The chapter thus explores a context in which corporations might repeatedly be the subject of regulatory enforcement action, yet continue to embed non-compliance into operating practices with fines being simply the cost of doing business. Accordingly this chapter queries whether Baumol’s legal/illegal distinction remains valid in relation to corporate environmental offending. In doing so it asks whether responsibility for environmental damage is both a corporate and social responsibility taking into account the nature of ‘illegal’ actions by legal actors, and argues that it should be the subject of regulation to ensure corporate responsibility for environmental damage.

### **THE NATURE OF CORPORATE ENVIRONMENTAL RESPONSIBILITY**

Corporate Social Responsibility<sup>1</sup> policies can be integrated into a business model that theoretically provides for adherence to the law, ethical standards and international norms of business behaviour and accountability. CSR provides a means for corporations to promote their brand as ethically and socially responsible and operates mainly on the basis of self-regulation, where corporations are trusted to voluntarily adhere to non-legally binding standards of ethical behaviour, with no single commonly accepted definition of the principle (Mazurkiewicz, 2002). Generally ‘every corporation has a policy concerning CSR and produces an annual report detailing its activity’ (Crowther & Aras, 2008:10), yet the central problem in assessing appropriate standards of CER is that a range of approaches to CER (within the broad CSR framework) exist and thus the effectiveness of CER and the extent to which corporations integrate CER into their practices as a tool to minimise environmental harm varies.

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<sup>1</sup> From this point on, the abbreviation CSR will be used when referring to general Corporate Social Responsibility (CSR) or sustainability policies and reporting while the abbreviation CER will be used when referring to specific environmental responsibilities and Corporate Environmental Responsibility reporting.

Many major corporations such as Shell, BP etc. have good CER policies on paper but continue to commit environmentally damaging (and sometimes criminal) acts albeit sometimes unwittingly. Thus the issues for green criminology to consider in examining criminal entrepreneurship are how should good standards of CER be enforced? Assessing this requires considering whether this solely consists of defining what is legal or illegal or requires going further to include regulated standards of behaviour and expectations of corporate behaviour that the public will accept as ethical compliance. Harris (2011) highlights that corporations may adopt CSR/CER for a variety of reasons, principally:

1. Acting ethically is the right way for the company to behave
2. Doing what is right and fair is expected of an organisation
3. Acting ethically is in the organisation's best interests.

(Harris, 2011:39)

The extent to which one (or all) of these reasons applies and provides the corporation's motivation for integrating CER can have an effect on whether CER is adopted as part of operational practices. This influences corporate consideration of the impact and wider implications of its activities, or whether CER becomes solely an aspect of marketing and brand management, or simply a PR tool. The need to combat negative publicity or damaging perceptions of a corporation and its valuable brand may, for example, lead to the adoption of CER purely to obtain benefits for a MNE's public image. There may even be inconsistency within a MNE about the extent to which CER should be observed or apply to its operations, especially where there is no clear chain of CER ownership at board (strategic) level and CER reporting is outside of core corporate governance, external scrutiny or stakeholder audit.

Thus, while some MNEs may engage with CER as an integral part of their corporate practices and regulatory auditing, others may only superficially engage with CER. An organisation's reporting of environmental compliance and its adoption of CER strategies are immaterial if the strategies are not adhered to in practice and make no impact on decision-making. The validity of CER policies can also be questioned if CER is in conflict with operational practices that prioritize profit over environmental law compliance whether overtly or by implication. McBarnet argues that one approach to legal compliance is creative compliance where 'practices that might be illegal, indeed criminal, if legally structured in one way could be legally repackaged and claimed to be lawful' (2006: 1091). Alternatively, active embracing of monitoring and auditing process can provide a means through which the appearance of compliance is achieved.

CER adoption may therefore suit the needs of a corporation's stakeholders or the development and protection of its brand, rather than being adopted as part of an ethical operating strategy that minimises the impact on communities affected by their actions. However it may fail as a practical tool to encourage legitimate compliance allied to entrepreneurship because of the lack of an enforceable, independently verified CER standard against which an organisation's performance and the accuracy of its reporting can be assessed. Thus CER voluntarism by itself may be inadequate and legal controls may be required to enforce CER although this can itself be problematic.

The core principles of CER are accountability; transparency and sustainability. But while corporations may publicly claim to be acting ethically and in a socially responsible manner, green criminology has documented the persistent nature of law-breaking in respect of pollution, disposal of toxic waste and misuse of environmental

resources (Lynch & Stretesky, 2014; Pearce & Tombs, 1998). It has also challenged corporate definitions of good environmental practice and provided a means through which corporate wrong doing can frequently be considered as deliberate criminal acts (White & Heckenberg, 2014; Lynch and Stretesky, 2003). In addition, Crowther and Aras (2008) argue that corporations do not truly account for the environmental impact of their activities so that externalities are routinely excluded from corporate accounting with the true costs of corporate environmental damage being met by communities. Corporations may thus add ‘misleading the public’ or fraud to their environmental activities through poor or negligent corporate environmental reporting.

Corporate directors already have a number of incentives to align their behaviour with accepted standards and routinely claim to be operating responsibly, taking account of the needs of communities. Alcock and Conde (2005) argue that further legislation to regulate responsible corporate behaviour is unnecessary, but numerous cases highlight the failure of corporations to remedy the harm they have caused (see for example persistent pollution incidents at Shell’s Deer Park refinery 2003 to 2007 discussed as a case study later in this chapter) suggesting the failure of self-regulation and voluntary compliance with ethical standards. Using perspectives on corporate governance; environmental law & regulatory justice this chapter’s contention is that corporate environmental damage should be the subject of regulatory restorative justice, in effect forcing corporations to comply with a set of CER principles and negating the harmful impacts of criminal entrepreneurship. The ‘polluter pays’ principle should be a core feature of the law, enforcement and regulatory action to ensure that corporations take (private) responsibility for and remedy their environmental damage. The following section defines how this principle is implemented in notions of CER.

## **DEFINING CORPORATE ENVIRONMENTAL RESPONSIBILITY AND ENVIRONMENTAL DAMAGE**

While a range of activities that cause harm to the environment are subject to national and international law, there is no single definition of environmental damage for which corporations should be held responsible. In addition to the definitions contained within specific legislation, the social legal perspective argues that some acts, especially by corporations, ‘may not violate the criminal law yet are so violent in their expression or harmful in their effects to merit definition as crimes’ (Situ & Emmons, 2000:3). In effect:

The social legalist approach focuses on the construction of crime definitions by various segments of society and the political process by which some gain ascendancy, becoming embodied in the law. The strict legalist approach, without denying this dynamic emphasizes these final legal definitions of crime as the starting point of any analysis because they bind the justice system in its work.

(Situ & Emmons, 2000)

While the environmental (and criminal) justice system focuses solely on those acts that are prohibited by legislation, definitions of environmental crime and corporate liability for these acts also needs to consider how criminal acts manifest themselves and consider those acts not yet defined as crimes but which go against the norms of

society. Lynch and Stretesky explain that from an environmental justice perspective a green crime is an act that '(1) may or may not violate existing rules and environmental regulations; (2) has identifiable environmental damage outcomes; and (3) originated in human action' (2003: 227). They explain that while some green 'crimes' may not contravene any existing law, where they result in or possess the potential for causing environmental and human harm, they should be considered to be crimes. In relation to CER; this requires a corporation to consider not just minimum legal standards but also the extent to which it may need to go beyond basic compliance and engage with communities and other stakeholders.

White (2012) identifies that 'much environmental harm is intrinsically transnational' (2012: 15) and is by its very nature mobile and easily subject to transference. He further argues that 'the systemic causal chains that underpin much environmental harm are located at the level of the global political economy' (White, 2012: 15). Thus the global reach of MNEs is situated within international markets and systems of production, requiring a system of understanding and addressing environmental harm that incorporates appreciation of its international dimensions (Beirne & South, 2007). However business activities are often not subject to international law or human rights norms designed to enforce environmental rights and thus there is some confusion over precisely what legal norms apply to a corporation's activities and over the precise CER policies or standards they should observe. Harvard Professor John Ruggie (Special Representative to the UN Human Rights Council) identified that 'the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in state practice' (United Nations Human Rights Council, 2012: 8). Thus not only is judging appropriate standards of corporate behaviour problematic but so too is enforcing such standards and remedying environmental/human rights problems caused by corporations. Business activity that harms or impacts on the environmental rights of communities is subject to a mixture of voluntary compliance, regulatory activity and victim litigation primarily driven by national legislation.

Mazurkiewicz (2002: 6) explained that by 2002 there had been 'over 300 CSR codes, principles performance standards, management standards developed by governments, business associations, or academia' and also a wide range of individual companies codes of conduct or different reporting mechanisms or initiatives. While international initiatives like the GRI have become widely recognised, the challenge for monitors, consumers and other stakeholders is to know the standard by which companies should be held to account, a problem complicated by the lack of an absolute CER standard agreed upon by NGOs and corporations, and by MNEs adopting and promoting different CER perspectives dependent upon the industry and legal/regulatory environment. Research by a network of Canadian environmental NGOs (ENGOS) concluded that 'ENGOS view environmental commitment and awareness as key components of CER but expressed difficulty in discerning genuine environmental commitment from public relations exercises bordering on green wash' (Jamison, Raynolds, Holroyd, Veldman & Tremblett, 2005: iv). Where CER is a fringe policy issue within a MNE it may amount to little more than a PR exercise. The ENGOS concluded, however, that the following key components were essential in achieving CER:

1. Environmental commitment and awareness

2. Stakeholder engagement
3. Measuring, reporting and auditing
4. Transparency
5. Commitment to continuous improvement
6. Going beyond compliance

However while corporations might easily put in place some form of measuring, reporting and auditing and include this in CSR, or CER policies, and annual reports; engagement with stakeholders and going beyond basic compliance presents difficulties for all but the most environmentally conscious corporations. Situ and Emmons (2000) argue that corporate environmental crime is ‘a product of motivation and opportunity conditioned by the quality of law enforcement’ (2000: 67). While this is not to suggest that all corporations are predisposed towards environmental crime; when the drive for corporate success (in terms of greater profits or lower costs) greatly exceeds the legitimate or profitable means for achieving it, the ‘structural groundwork for motivation is laid’ (2000: 67). Where this is combined with opportunity and a weak regulatory structure, corporations fearful of decreasing profits or increasing costs may seek to circumvent environmental legislation even while publicly making pronouncements of environmental responsibility. Where corporations may be dealing with multiple environmental performance demands and expectations from stakeholders and investors, the requirement to set protection and restoration of the environment as a strategic priority may result in a conflict between the interests of the corporation, environmental interests and those of the wider community. The Australian Senate Standing Committee on Legal and Constitutional Affairs (1989) summarised the potential conflict as follows:

To require directors to take into account the interests of a company’s employees, its creditors, its customers or the environment, as well as its shareholders, would be to require them to balance out what would on occasion be conflicting forces. To make it optional for directors to take into account the interests of a company’s employees, its creditors, its customers, or the environment, as well as its shareholders, again would mean that directors would be in the position of weighing up the various factors. It would also limit the enforceability of shareholders’ rights if directors were able to argue that, in making a certain decision; they had been exercising their option to prefer other interests.

(Senate Standing Committee on Legal and Constitutional Affairs, 1989).

This potential conflict and a belief that corporate norms and the natural drive of corporations to behave ethically and responsibly will automatically provide for effective self-regulation, are at the heart of movements to resist further regulation of CSR and CER. Yet while the concept of CSR is still evolving and, as yet, there exists

no globally-accepted binding definition of CSR (Kercher, 2007) there is evidence that even corporations that actively promote themselves as engaging with communities and being ethically responsible still cause significant harms to the environment. Seemingly, self-regulation and voluntary compliance with the norms of corporate behaviour and ethical business practices is not working. The following section examines the implications of relying on self-regulation to maintain compliance.

### **FAILURES IN VOLUNTARY COMPLIANCE**

Situ and Emmons (2000) identify that environmental crime is predominantly a civil matter; in other words fines and administrative penalties are the main technique for dealing with corporate environmental crime rather than rigorous criminal justice enforcement (White & Heckenberg, 2014; Stallworthy, 2008). The reason given for this is the lack of effective international law and instead reliance on state (national) legislators to define environmental crime according to the requirements of national criminal or civil justice codes. The result is often that it is not seen as a priority criminal justice issue and often falls outside of the remit of the main criminal justice agencies.

However, there are a number of international environmental Conventions, mechanisms put in place to require states to provide for effective environmental protection. Voiculescu and Yanacopulos (2011) identify the United Nations (UN) as being at the forefront of devising universally acceptable standards to embed ‘respect for human rights norms and abstention from corrupt practices’ into business and transnational corporations’ operating practices (2011: 4). Their observation is based on the idea that much environmental damage is committed by corporations falling outside the remit of much criminal law as in reality countries have different laws and ‘frequently quite different approaches to dealing with environmental crime’ (White, 2007: 184). Environmental crime is also not always dealt with by police or criminal justice agencies and in many countries falls within the jurisdiction of the enforcement arm of the state environment department, rather than being integrated into mainstream criminal justice. Indeed some jurisdictions do not provide for corporate criminal liability within their justice systems. As a result, CER becomes a matter of voluntary compliance and in practice is often enforced primarily by NGOs (Nurse, 2013; 2011). Yet voluntary compliance with good standards of CSR and CER is often dependent on; the composition of a corporation’s board, the extent to which it is willing to comply with good standards, and the size and power of that corporation.

Friedman theorised that the main responsibility of the corporate executive is ‘to make as much money as possible while conforming to the basic rules of the society’ (Friedman, 1970). Crowhurst (2006) identified that while responsible industry usually welcomes certainty in environmental legislation and clarity in CER there are corporations that actively seek to avoid ‘costly’ legislation. Global corporations which produce harmful environmental effects and who have the economic power to do so deliberately, invest in ‘pollution havens’ (countries with low levels of environmental regulation) so that as standards of environmental liability become stricter in the EU and other western countries global companies move their investments and harmful environmental activities out of the reach of the tougher regulatory systems.<sup>2</sup> This represents a form of criminal entrepreneurship.

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<sup>2</sup> ‘Balancing the Needs of Business with those of the Human Race’ (2001) 20 IFL Rev, Supp (Environment lawyers), 7-15. Comment by panel member John Emmerig, Blake Dawson Waldron, Canberra responding to the question ‘Environmental legislation is increasing in all jurisdictions. What effect is this having on trade and industry around the world?’



## **GREENWASH AND CRIMINAL ENTREPRENEURSHIP**

Gottschalk and Smith argue that the criminal entrepreneur's task is 'to discover and exploit opportunities, defined most simply as situations in which there are a profit to be made in criminal activity' (2011: 300). In the case of environmental harm, this is illustrated by situations where multinational corporations pursue profit without regard to relevant CSR/CER matters (Kercher, 2007) and, when caught in environmental wrongdoing, dispute the extent of the environmental damage they cause or the measures required to resolve the damage. Gottschalk and Smith argue that techniques of neutralization are applied by white-collar criminals to deny the criminality of their actions and that criminal entrepreneurship is sometimes embedded in the behaviour of legal organisations who become the victims of such third party actions committed by employers and managers which cause loss to the corporation (2011: 304). However, they also note that corporations become perpetrators of crime when [financial] crime is committed within the context of a legal organization.

This applies equally to environmental crime where 'Green wash' is employed as a tool to publicly promote CER while a corporation privately continues to pollute and subvert environmental regulations as a tactic. Friedman (1970) argues that corporate executives have direct responsibilities to their employers and to maximise profits. These responsibilities require executives to consider: the harm to a company's reputation (and profits) if it is repeatedly the subject of enforcement action and required to meet the costs of environmental remediation, the increased legal bills that a corporation may face in fighting lawsuits; consumer action and regulatory justice, and the increased likelihood of further regulation and scrutiny if corporations are found to be promoting CER while causing environmental damage.

McBarnet suggests a tension between conflicting responsibilities such that creative compliance becomes 'something to be emulated rather than reviled' (2006: 1092) and is considered clever rather than deviant. McBarnet primarily refers to 'clever and imaginative legal problem solving' (2006: 1096) and the use of legal mechanisms to make potentially unlawful mechanisms and practices lawful. However corporate practices that embed environmental compliance within policies that can be referred to in the event of regulatory investigations but which in practice may not be effective also represent a form of creative compliance. Gallicano refers to active 'greenwashing' where individuals are actively misled about a company's environmental practices (2011: 1). In a broader sense, inconsistency between a company's environmental claims and its actual behaviour also represents a form of 'greenwashing' as the following case study illustrates.

## **INEFFECTIVE JUSTICE: SHELL AND THE DEER PARK REFINERY**

As Situ and Emmons (2000) identify, weak environmental law enforcement allows corporate environmental crime particularly within competitive markets where the benefits of non-compliance may significantly outweigh the limited risk of detection and apprehension. This is not to suggest that all corporations are predisposed towards environmental crime and strictly speaking much environmental harm is regulatory non-compliance rather than crime. However, Heckenberg (2010) identifies that global environmental harm is part of a complex process of transference which can be 'externalised from producers and consumers in ways that make it disappear from their

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sight and oversight' (White, 2012: 21). Movement of environmentally damaging products within global markets becomes difficult to police, especially given disputes over what is defined as environmentally harmful and what gets defined as a crime (White, 2012: 22). Thus, corporations seeking to maximise profits and minimise costs within lucrative global markets subject to ineffective laws and weak regulatory structures may seek to circumvent environmental legislation even while publicly making pronouncements of environmental responsibility.

Deer Park, Texas, is home to a Shell chemical plant, one of the largest oil refineries in the US and which has been the subject of numerous environmental violations primarily of the (US) Clean Air Act 1970. For example, in June 1997 an ethylene explosion at the plant was heard and felt up to 25 miles away. In 2008 environmental organisation the Sierra Club filed a federal lawsuit against the Shell Oil Company and its subsidiaries over an estimated 1,000 incidents of pollution between 2003 and 2007 at Shell's Deer Park refinery and chemical plant. The pollution levels at the plant exceeded the levels allowed under permits issued by Texas regulators, amounting to a total of five million pounds of air pollutants into the atmosphere, 'including toxic chemicals like benzene and 1,3-butadiene, as well as sulfur dioxide and oxides of nitrogen' (Mouawad, 2009). Although Shell had been cited by regulators and had paid fines for some of the incidents, its failure to take any action over the pollution at the plant led to the Sierra Club and Environment Texas initiating the lawsuit to force enforcement of the Clean Air Act's provisions. Joshua Kratka of the National Environment Law Center (representing the Sierra Club and Environment Texas) stated that Shell was paying to pollute alleging that 'Shell is factoring these fines into its costs of operating these facilities' (Seba, 2008).

Yet publicly Shell had embedded sustainability and environmental best practice into its operating procedures since 1997. The company states that all of its operations 'must take a systematic approach to managing environmental impacts' (2008: 21). The company further states that 'Shell's groundbreaking first sustainability report *Profit and Principles – does there have to be a choice?* issued in 1998 after Shell's reputation and internal morale had suffered as a result of Brent Spar and human rights issues in Nigeria' set the benchmark for scrutiny of the company's practices (SustainAbility, 2010). Thus, at the time of the problems at Deer Park, Shell had already instituted a CSR process with external scrutiny of sustainability issues and annual reporting. Since 2005 its sustainability reporting has been subject to the scrutiny of a Committee of external experts and the company states it followed the Global Reporting Initiative's guidelines. An External Review Committee assesses Shell's sustainability reporting content and processes; details of Committee Membership and reports are openly published by Shell online. For example the 2011 Committee includes experts from; the Indigenous Peoples Working Group of the Social Investment Forum, a barrister working with the International Finance Corporation, an Environmental Policy Advisor to Rio Tinto plc (who is also a Visiting Professor at Imperial and University Colleges, London), and the co-founder and CEO of policy think tank Civic Exchange. The Committee thus arguably boasts considerable expertise independent of Shell's corporate structure; its 2011 report indicates Shell's engagement with sustainability issues but is also mildly critical of Shell's failure to achieve long term sustainability action.

While it is not suggested that Shell was in any way influencing Committee decisions an overly critical Committee risks its own survival and external advisors

may well be diplomatic in the manner in which criticisms are couched. Other corporations use external auditors for their sustainability review (BP for example uses Ernst and Young). Shell's 2008 report, comments that 'we have a structured company-wide approach for listening to our neighbours, for working with them to reduce negative impacts from our operations and produce local benefits' (Shell, 2009: 26). It further comments that 'all our refineries and chemicals facilities, as well as all upstream operations where impacts on the community could be high, have social performance plans in place' Shell, 2009: 26). The reporting further notes that Shell has instigated a 'multi-billion dollar programme to end the continuous venting and flaring of natural gas at oil production facilities' (Shell 2009: 29) and noted improvements in energy efficiency at Shell chemical plants since 2001. Yet in the case of Deer Park the concerns and impact on residents were seemingly not directly being addressed either through the regulatory mechanism or the company's own monitoring process.

Connelly and Smith (1999) suggest that collective action is often the necessary solution to environmental problems where civil action can be used to seek a remedy in ways that criminal action often fails to. The failures in formal (state) enforcement action in Texas required citizen groups to sue to stop illegal air emissions arising from so-called 'upset' events: equipment breakdowns, malfunctions, and other non-routine occurrences. Luke Metzger, Director of Environment Texas explained that 'despite repeat violation notices and fines, the Texas Commission on Environmental Quality never got to the root of the problems at Shell Deer Park' (Environment Texas/Sierra Club, 2009). The lawsuit was subject to a settlement agreement in April 2009 requiring Shell to remedy the faulty processes at the plant which were causing pollution problems and to pay a civil penalty which would be used for further environmental measures (see below). Arguably it illustrates a means through which the impacts of creative compliance and corporate non-compliance can be addressed by justice systems, as the following section discusses.

## **REPARATION FOR ENVIRONMENTAL DAMAGE**

Combating those practices which may view the continued payment of fines as preferable to the costs of remediation or organisational change requires a change in regulatory approach. The use of the 'polluter pays' principle for environmental damage was adopted by the OECD in 1972 as a background economic principle for environmental policy (Turner, 1992). By making goods and services reflect their total cost, including the cost of all the resources used, the principle required polluters to integrate (or internalise) the cost of use or degradation of environmental resources. However, environmental damage is not solely an issue of cost and increasingly legislators, regulators and the courts apply the basic principles of restorative justice which include the 'repair of harm' principle and mediation or contact between victim and offender as tools to remedy or mitigate corporate environmental damage.

Parker (2004) identifies a model where regulators are able to directly address creative non-compliance by imposing enforceable undertakings which provide regulators to employ their own creativity in recommending remedies for harm caused by corporate wrongdoing. The ideal for such effective restorative justice is that offenders are held to account for what they have done, realise the harm that they have caused and are encouraged to both remedy that harm and change behaviour. Successful restorative justice also avoids the escalation of legal justice and its

associated costs and delays (Marshall, 1999). Applied to environmental damage restorative justice provides for legal enforcement of CER and moves beyond the general criminal law approach of punishment to embrace civil law's focus on remedying injustice such as environmental harm. It potentially provides for targeted enforcement action that negates the creative non compliance of criminal entrepreneurialism.

The settlement negotiated by Shell in relation to the Deer Park pollution provides a model for negotiated settlements using restorative principles. The settlement requires Shell to; reduce emissions from air pollutants from its plant by 80 percent within three years, upgrade chemical units and reduce gas flaring, and is also accompanied by a \$5.8 million civil penalty. The settlement agreement between Shell and the environmental groups was subject to review by regulators (the EPA and the Justice Department) and also required the approval of the US District Court for the Southern District of Texas providing a measure of judicial oversight of the settlement. While it is impossible to achieve the ideal of putting the community back in the position it would have been in had the harm not occurred, the penalty will 'be used to finance environmental, public health and education projects in Harris County including a project to reduce diesel emissions from school buses, and another to install solar panels on public buildings' (Mouawad, 2009). Thus Shell's damage to the environment at Deer Park is at least partially offset by positive environmental action.

### **ENFORCING CER**

Corporations who break environmental laws and fall short of accepted standards of behaviour are not always prosecuted via the criminal law but are sometimes subject only to civil or administrative sanctions. Strong environmental legislation, regulation and environmental awareness is often driven by the activities of high profile NGOs who work to ensure that prosecution of companies for environmental damage becomes an established part of the legal landscape (Nurse, 2013). The legal responsibility of MNEs for injury to workers and environmental damage arising from their operations is increasingly exercising the interest of courts, governments, trades unions and NGOs globally and is beginning to be recognised by both civil and criminal justice systems, offering hope that an efficient mechanism for enforcing CER can be established.

However Slapper (2011) identifies that there have been modest developments in the use of the civil law to address corporate abuses (2011: 95) and that 'apart from a growth in domestic criminal liability of corporations' there has been an increase both in civil litigation against companies 'but also the advent of domestic liability for corporate torts that are committed abroad' (2011: 95). Thus, while international law may not yet have caught up with transnational corporate environmental abuses, domestic law might, in some cases, provide a civil remedy.

Slapper's point is illustrated by US civil law in the form of the *Alien Tort Claims Act 1789* which allows action to be taken against companies for their actions overseas (Slapper, 2011: 95). The *Act* confers on US federal courts jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Thus where corporate acts which are the subject of litigation raise international concerns and constitute a crime against humanity, a remedy potentially exists for victims of corporate abuses able to bring a case in US courts. Cases can also be brought in the EU against a parent company resident in the EU where it can be shown that the relevant management decisions (i.e. those which

influenced or caused the local incident) were made at parent company level. Fagan and Thompson identify class actions as being the primary legal mechanism feared by US corporations, which Hodges (2008) identifies as being based on a model where ‘one individual claim is asserted to represent a class of others, whose owners are bound by the result of the single claim unless they opt-out of the class and procedure’ (2008: 2). The class action procedure allows for punitive damages and requires parties to meet their own costs (Fagan & Thompson 2009: 56-57).

The existence of CER policies can also be a factor in litigation. The International Council for Human Rights Policy notes that many company CSR codes are little more than public relations exercises. But, where worded with sufficiently clarity ‘they can also have legal significance because they set out the values, ethical standards, and expectations of the company concerned, and might be used as evidence in legal proceedings with suppliers, employees or consumers’ (2002: 70). Fagan and Thompson (2009: 55) identify that litigation has already been brought against companies such as Wall-Mart and Nike for publishing allegedly misleading CSR materials. Nike was the subject of litigation after having allegedly lied in PR materials about the mistreatment of workers in its supply chain, while Wal-Mart was sued for a failure to enforce its supplier standards. Thus while international human rights norms or international environmental law might be difficult to enforce against companies, CSR materials can, in the US at least, be used as evidence of the standards that a corporation *claims* to meet. Fagan and Thompson argue that consumers might be able to bring misrepresentation claims against corporations if they can demonstrate that they have suffered recoverable loss as a result of the claims made (2009: 55). The threat of such litigation might encourage a change in corporate behaviour and when combined with criminal action such as that employed in the US Foreign Corrupt Practices Act (and also within UK legislation) of providing incentives for corporations to work with enforcers in order to avoid criminal prosecution and to settle cases through civil mechanisms (Hatchard 2011: 153-155) can provide a remedy.

Simpson *et al.* (2013) identify that informal controls are an important part of the regulatory environment while Hatchard argues that the threat of prosecution allied to self-reporting may prove effective in dealing with transnational corporate crime (2011: 153). The UK’s Law Commission in its consultation paper on wildlife law reform (Law Commission, 2012) argues that any regulatory approach should adopt the risk-based approach of the Hampton (2005) and McCrory (2006) principles. In essence these argue that prosecution should only be resorted to where *necessary* and, in the case of corporate offending, should be a last resort where informal methods might yield results. The practical implementation of such mechanisms can be seen in cases such as the Serious Fraud Office’s initiative to allow corporations to self-report corruption and negotiate a civil settlement as a means of avoiding prosecution (Hatchard 2011: 155). The effectiveness of such initiatives in part depends on whether the harm caused to corporations by any prosecution outweighs the financial benefits of non-compliance with environmental standards. Arguably where criminality is an endemic part of corporate behaviour (Nurse, 2011) self-reporting or negotiated settlements are unlikely to succeed.

## **CONCLUSIONS**

While corporations may achieve voluntary compliance with CER and have appropriate CER policies at least on paper, it is essential that the application of CSR and CER principles are part of the legal and regulatory justice system. This is preferable to that system being applied only after environmental harms have occurred

and disputes arise over corporate liability and appropriate remedies. Failures in voluntary compliance are inevitable where there are disputes between NGOs, corporations and communities over the responsibilities of corporations and the extent of stakeholder engagement. Where commercial imperatives override wider environmental responsibilities and are also associated with weak enforcement and regulatory regimes crime is more likely to occur. Given the lack of an enforceable standard for CER compliance, corporations and NGOs may disagree over what is required either to minimise the potential harm to the environment arising from corporate activities or to address harm to the environment once an incident has occurred. There are, therefore, undoubtedly some cases (or types of environmental damage) for which negotiation between communities and corporations, or corporations and NGOs is inappropriate and where self-regulation and voluntary CER policy-compliance fails. In these cases enforcers should be able to enforce CER through the imposition of remedial measures, reserving the right to move to formal prosecution action even though this may not provide full redress for the consumer.

Legislation needs to keep pace with persistent CER failures, corporate criminality and creative criminal entrepreneurship; EU (and UK) legislation provides one means through which this can be achieved using restorative justice principles within the environmental law regime. The UK's *Environmental Damage (Prevention and Remediation) Regulations 2009* allows UK enforcers (generally the Environment Agency, the relevant local authority or Natural England) to require corporations to remedy their environmental harm. In addition the UK's *Regulatory Enforcement and Sanctions Act 2008* allows for restorative principles to be applied to some cases of damage to the environment (including under the *Control of Pollution Act 1974*, the *Clean Air Act 1993*, the *Environment Act 1995*, *Water Industry Act 1991* and *Water Resources Act 1991*) through the use of enforcement mechanisms that are designed to repair the harm caused by business practices (particularly through discretionary restorative notices and enforcement undertakings) rather than simply punishing offenders.

As Slapper (2011) indicates, US law now also provides a model that might be applied to enforcement of failed CER where CER compliance claims are found to be untrue or exaggerated and have the effect of misleading consumers. Such claims will primarily be the subject of civil action and it should be noted that the use of class actions is commonplace in the US but less so in the EU. But at least in theory, legislative and regulatory frameworks now exist that have not only moved firmly towards the 'polluter pays principle' but which also allow for the actions of MNEs to be measured against their CER promises and an implied standard of behaviour. Thus those that are responsible for environmental damage may not only be subject to criminal enforcement activity and/or civil litigation but open themselves up to judicial scrutiny of their corporate governance procedures through legal processes. This falls short of achieving a global legal enforceable standard for CER. However the availability of several routes through which CER failures can be enforced may not only make the polluter pay, but may also make the polluter stop and think before making unfounded claims of environmental responsibility while engaging in creative environmental non-compliance.

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