Transnational Legal Theory

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rtlt20

Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world

Felix Lüth

To cite this article: Felix Lüth (2021) Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world, Transnational Legal Theory, 12:2, 315-333, DOI: 10.1080/20414005.2021.1967691

To link to this article: https://doi.org/10.1080/20414005.2021.1967691

TRANSNATIONAL LEGAL THEORY
2021, VOL. 12, NO. 2, 315–333
https://doi.org/10.1080/20414005.2021.1967691

Routledge
Taylor & Francis Group

Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world

Felix Lüth

International Law Department, Graduate Institute of International and Development Studies, Geneva, Switzerland

ABSTRACT

Nowadays, cases involving questions of corporate (ir)responsibility are largely resolved through negotiated settlements. A controversial development in this context is the cross-border rise of procedures akin to US non- and deferred prosecution agreements which allow prosecutors to agree with corporations not to prosecute serious economic crimes. The article uses this example to discuss the relevance of transnational law as an analytical framework for studying domestic criminal justice reforms in a globalised world. It revisits one of the central, albeit less noticed, themes of Philip C Jessup's seminal 1956 Storrs Lectures on Transnational Law – *transnational human problems* – and identifies its descriptive and evaluative-critical benefits. The article then investigates to what extent these benefits are reflected in today's two main theories of transnational law in criminal justice, ultimately finding that *Transnational Legal Ordering of Criminal Justice* provides a more suitable analytical framework than *Transnational Criminal Law* in this context.

KEYWORDS Corporate crime and negotiated settlements; socio-legal studies; critical legal studies; transnational criminal law; transnational legal ordering of criminal justice

1. Introduction: the curious rise of corporate non-prosecution agreements

The enforcement of corporate responsibility through judicial processes is a difficult endeavour across private and public law forums. The difficulty arises in particular from the complexity of corporate activities and structures as well as the important and historically privileged role of corporations.[1] As a

CONTACT Felix Lüth felix.luth@graduateinstitute.ch

[1] See Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886–1981* (Oxford University Press, 2020); Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Economy* (Brill, 2019).

result, cases involving questions of corporate (ir)responsibility, including those of a criminal nature, are frequently resolved through different forms of negotiated settlements.[2] For example, the Organisation for Economic Co-operation and Development (OECD) reports a significant increase in the enforcement of anti-foreign bribery laws between 15 February 1999 and 30 June 2018 which has taken place primarily outside the traditional criminal trial process with an average of 78 per cent of all cases, and 91 per cent of all cases involving legal persons, resolved through settlements.[3]

One of the most prominent and controversial developments in this context involves the recent rise of procedures that enable prosecutors to agree with corporations not to prosecute serious economic crimes in exchange for certain settlement conditions. These conditions typically include a combination of self-reporting, cooperation with law enforcement authorities, acceptance of relevant facts as well as the imposition of fines and various measures aimed at preventing future misconduct and changing corporate culture (usually through compliance and self-monitoring programmes). Prosecution can then be dismissed immediately or after a certain period of monitoring without prosecuting authorities having to prove their case in trial and with corporations avoiding many of the adverse consequences of a prosecution and conviction (such as potentially long periods of uncertainty, reputational damage, debarment from public contracts and funding, delicensing or banning of certain business activities).[4] These agreements provide an alternative to the traditional options available for resolving criminal justice conflicts of either dropping prosecution unconditionally or pursuing conviction through full or accelerated (including plea) proceedings.[5]

[2] Abiola Makinwa and Tina Søreide, 'Introduction' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar, 2020) 2–3 [*Negotiated Settlements in Bribery Cases*]; Nicholas Lord and Michael J Levi, 'Determining the Adequate Enforcement of White Collar and Corporate Crimes in Europe' in Judith van Erp, Wim Huisman and Gudrun Vande Walle (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge, 2015) 41. While not the focus of this study, civil cases between private plaintiffs and corporations are also frequently settled. See, for example, Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2012) 177–8.

[3] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD, 2019) 19, 22–3. See also United Nations High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, *Report on Financial Integrity for Sustainable Development* (UN, 2021), online: https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/602e91032a209d0601ed4a2c_FACTI_Panel_Report.pdf 15.

[4] See generally Julie R O'Sullivan, 'How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction' (2014) 51 *American Criminal Law Review* 29; OECD (n 3) 50. On the avoidance of a conviction as an important incentive for an accused legal person to enter into a settlement and a main difference to trial resolutions, see also OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: OECD Data Collection Questionnaire Results* (OECD, 2019), online: www.oecd.org/corruption/anti-bribery/Country-Data-Tables-from-Resolving-Foreign-Bribery-Cases.pdf 94–6 and 133–4.

[5] According to the United States (US) Department of Justice (DoJ) non-prosecution and deferred prosecution agreements 'occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation' (US DoJ, *Justice Manual*, (2020) Section 9–28.200 General Considerations of Corporate Liability). See also United Kingdom (UK) Deferred Prosecution Agreements Code

Such procedures—which the study collectively refers to as 'corporate non-prosecution agreements'—initially emerged in the US in the early 1900s as non- and deferred prosecution agreements to enable leniency for individuals and especially juveniles in non-serious misdemeanour cases.[6] After some scattered extensions to corporations in the 1990s, the event that, in the eyes of many commentators, catalysed a more widespread shift towards corporate non- or deferred prosecution agreements was the prosecution and failure of the US accounting firm Arthur Andersen LLP in the wake of the collapse of the Enron Corporation in 2002.[7] Since then, non- and deferred prosecution agreements have not only 'become a mainstay of white collar criminal law enforcement' in virtually all areas of corporate criminal wrongdoing committed on US territory by US corporations but also increasingly for acts committed abroad and by foreign corporations.[8] Examples have involved such important foreign corporations as Britain's HSBC in 2012, France's Total and Alstom in 2013 and 2014, Germany's Deutsche Bank in 2015, Argentina's Torneos in 2016, Singapore's Keppel in 2017, Brazil's Petroleo Brasileiro (Petrobras) in 2018, Sweden's Ericsson in 2019 as well as European multinational and Netherlands-headquartered Airbus in 2020.[9] Notably, only one out of the current ten biggest settlements by US law enforcement authorities based on the Foreign Corrupt Practices Act (FCPA) has been reported as involving a US corporation with Goldman Sachs in 2020.[10]

of Practice issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013, online: www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 1.1 (referring to 'a DPA [deferred prosecution agreement] as an alternative to prosecution').

[6] For example, the Chicago Boys' Court is said to have 'conceived deferred prosecution in 1914 in an attempt to process juvenile offenders without "branding them as criminals"' (Benjamin M Greenblum, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 *Columbia Law Review* 1863, 1866). In the context of this study, 'corporate non-prosecution agreements' are understood as an umbrella term which encompasses but is not limited to the procedure known as 'non-prosecution agreement' in the US.

[7] David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 *Maryland Law Review* 1295, 1310–1. Subsequently, the DoJ included the possibility of non- and deferred prosecution agreements in its guidance on corporate prosecution by stating that cooperation and voluntary disclosure could merit 'granting a corporation immunity or amnesty *or pretrial diversion*' (Memorandum from Larry D Thompson, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys (20 January 2003) Section VI(A–B) (emphasis added)).

[8] Speech by Assistant Attorney General Lanny A Breuer, New York Bar Association (13 September 2012), online: www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association. See Cindy R Alexander and Mark A Cohen, 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (2015) 52 *American Criminal Law Review* 537, 537; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014) 218–49.

[9] Brandon L Garrett and Jon Ashley, *Duke and UVA Corporate Prosecution Registry*, online: https://corporate-prosecution-registry.com/browse/.

[10] Harry Cassin, 'Wall Street bank earns top spot on FCPA Blog top ten list' (The FCPA Blog, 26 October 2020), online: https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/. The reported penalties and disgorgement in these settlements based on US enforcement documents only (that is excluding related settlements with foreign law enforcement authorities) amounted to over USD 13 billion.

In response to these developments, it seems, many domestic legal systems have introduced similar forms of corporate non-prosecution agreements for economic crimes such as corruption, money laundering, and fraud. They include, for example, the introduction of deferred prosecution agreements in the UK in 2014, administrative leniency agreements (*acordo de leniencia*) in Brazil in 2014, and judicial public interest agreements (*convention judiciaire d'intérêt public*) in France in 2016. In 2018, we saw the establishment of effective cooperation agreements (*acuerdo de colaboracion eficaz*) in Argentina, remediation agreements in Canada as well as deferred prosecution agreements in Singapore.[11] In 2020, the Netherlands revised its 'transaction' (*transactie*) procedure to make it more broadly available for serious economic crimes involving corporations.[12] While so far not based on an express, formal legal framework, the use of deferred prosecution agreements has also been reported in prosecutorial practice in countries such as Kenya.[13] Similar changes are also on the verge of being introduced in Australia and under serious consideration in, among others, Germany, Ireland, and Switzerland.[14] Albeit at an earlier stage, discussions appear to have started as well in countries like Ghana, Israel, Malaysia, or New Zealand.[15]

[11] Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association, Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee, 2018) 17–18 and the individual country reports; OECD (n 3) 34–5.

[12] OECD Working Group on Bribery (WGB), *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the Netherlands* (2020) 45.

[13] Office of the Director of Public Prosecutions, *Newsletter, Issue 3* (September 2020) www.odpp.go.ke/wp-content/uploads/2020/10/ODPP-Newsletter-2020-OCTOBER-10-ISSUE-IIIcompressed.pdf.

[14] Australia, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, Schedule 2, online: www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1920a/20bd099#_Toc41551903; Germany, Draft Law on the Sanctioning of Association-Related Crimes (*Gesetz zur Sanktionierung von verbandsbezogenen Straftaten*) § 36, online: www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=2; Ireland, Law Reform Commission, *Regulatory Powers and Corporate Offences* (LRC, 119–2018) 266. After a proposal for the inclusion of deferred prosecution agreements (*Aufschub der Anklageerhebung bei Verfahren gegen Unternehmen*) by the Swiss Office of the Attorney General (Consultation Overview on the Revision of the Criminal Procedure Code (March 2018) 25, 38–42, online: www.admin.ch/ch/d/gg/pc/documents/2914/Organisationen_Teil_1.pdf) was not adopted in the Federal Council's draft bill for a revision of the Criminal Procedure Code (Federal Council Message on the Revision of the Criminal Procedure of 28 August 2019, Federal Gazette 2019 6697, online: https://www.fedlex.admin.ch/eli/fga/2019/2368/de), it is currently unclear whether Parliament will follow this position or if it will be reintroduced in a modified form.

[15] Kofi Owusu, 'Ghana must adopt Deferred Prosecution Agreements - Godfred Odame' (GhanaWeb, 5 March 2020), online: www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-must-adopt-Deferred-Prosecution-Agreements-Godfred-Odame-886255 (indicating that the Deputy Attorney-General has called for the introduction of deferred prosecution agreements); OECD, (n 4), 24 (indicating that the Israeli Ministry of Justice is considering the proposal of non-prosecution agreements); Ben Lucas, 'Deferred prosecution agreements required in Malaysia before corporate failure-to-prevent-bribery offense is enforced, MACC chief says' (MLex, 28 October 2019), online: https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/anti-bribery-and-corruption/deferred-prosecution-agreements-required-in-malaysia-before-corporate-failure-to-prevent-bribery-offense-is-enforced-macc-chief-says (indicating that the head of the Malaysian Anti-Corruption Commission has called for the introduction of deferred prosecution agreements); Michael Griffiths, 'New Zealand mulls deferred prosecution agreements' (Global Investigations Review, 12 February 2019).

This cross-border rise of procedures akin to US non- or deferred prosecution agreements seems to be occurring despite not only considerable controversy over their effectiveness and appropriateness in the US[16] but also traditionally emphasised differences between jurisdictions in terms of underlying criminal justice principles.[17] Moreover, it appears to take place regardless of a lack of express coordination through the traditional vehicle of cross-border regulation: international law.[18] While international treaties and related non-binding instruments on economic crimes contain several provisions pertaining to domestic legislation on corporate liability, sanctions, and procedure more generally,[19] they do not expressly address corporate non-prosecution agreements or other forms of settlements.[20] In fact, as observed by Ivory and Søreide in relation to the OECD-ABC and UNCAC, 'the drafters do not seem to have envisaged that settlements would become the predominant means for sanctioning corporate offenders'.[21]

Using this curious case of cross-border norm diffusion as an example, the paper discusses the relevance of transnational law as an analytical framework for studying domestic criminal justice reforms in a globalised world. Following this introduction, the paper proceeds in three parts. After a brief outline of methodological nationalism evident in much of traditional criminal justice scholarship, the second part revisits one of the central, albeit less noticed, themes of Philip C Jessup's seminal 1956 Storrs Lectures on Transnational Law—*transnational human problems*. It identifies its analytical

[16] See, for example, Richard A Epstein, 'Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions' in Anthony S Barkow and Rachel E Barkow (eds), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York University Press, 2011) 38; Uhlmann (n 7) 1336; Garrett (n 8); Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 *UC Davis Law Review* 497; Jed S Rakoff, 'Justice deferred is justice denied', *New York Review of Books* (19 February 2015), online: www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/; Samuel W Buell, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (WW Norton & Co 2016) 241–6; International Consortium of Investigative Journalists, 'Global banks defy U.S. crackdowns by serving oligarchs, criminals and terrorists: The FinCEN Files show trillions in tainted dollars flow freely through major banks, swamping a broken enforcement system' (20 September 2020), online: www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/.

[17] Makinwa explains that 'NTR [non-trial resolution] regimes are adopted not only in jurisdictions where prosecutors traditionally enjoy broad prosecutorial discretion to negotiate with alleged offenders, but also in jurisdictions where the operation of principles of legality or mandatory prosecution should ostensibly prohibit such a negotiation' (Abiola Makinwa, 'Public/private co-operation in anti-bribery enforcement: non-trial resolutions as a solution?' in *Negotiated Settlements in Bribery Cases* (n 2) 43).

[18] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 *International and Comparative Law Quarterly* 945, 951.

[19] See especially OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (opened for signature 17 December 1997, entered into force 15 February 1999) 37 ILM 1, Articles 2, 3, and 5 [OECD-ABC) and *United Nation Convention against Corruption* (opened for signature 9 December 2003, entered into force 14 December 2005) 2349 UNTS 41, Articles 26, 30, and 37 (UNCAC).

[20] Ivory and Søreide (n 18) 954–7.

[21] *Ibid* 957 with further references.

benefits for the description and critical evaluation of present-day reforms such as the introduction of corporate non-prosecution agreements. The third part then investigates to what extent these descriptive and evaluative-critical benefits are reflected in today's two main theories of transnational law in criminal justice, ultimately arguing that the recently extended *Transnational Legal Ordering* theory provides a more suitable analytical framework in this context than the traditional theory of *Transnational Criminal Law*. Finally, the fourth part offers some concluding reflections.

2. From methodological nationalism to transnational human problems

The regulation of and enforcement against crimes, including corporate crimes, largely happens at the domestic level.[22] In keeping with this focus, much criminal justice scholarship has traditionally assumed a perspective that is *methodologically nationalist*,[23] applying analytical frameworks that are—in the words of Wimmer and Schiller—designed as if 'the web of social life was spun within the container of the national society, and everything extending over its borders was cut off analytically'.[24] Such a methodological orientation has been criticised in particular for approaching the study of domestic criminal justice reforms as if they were essentially divorced from foreign or international influences.[25]

In response to the increasing analytical demands posed by a 'complex interrelated world community which may be described as beginning with the individual and reaching up to the so-called "family of nations"',[26] Philip C Jessup famously coined the term *Transnational Law* in his 1956 Storrs Lectures to refer to

> all law which is concerned with actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.[27]

[22] Antoinette Perrodet, 'The Public Prosecutor' in Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 455; Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart, 2017).

[23] Katja Franko, *Globalization & Crime* (Sage Publications, 3rd edn 2020) 218–21; Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2020) *Law & Social Inquiry* 1–2.

[24] Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology' (2003) 3(3) *International Migration Review* 576, 579. For a general critique of methodological nationalism in the social sciences, see Ulrich Beck, *Power in the Global Age: A New Global Political Economy* (Polity Press, 2005) 43–50 and 'The Cosmopolitan Condition: Why Methodological Nationalism Fails' (2007) 24 *Theory, Culture & Society* 286.

[25] Aaronson and Shaffer (n 23) 1 with reference to David Nelken, 'Introduction: Comparative Criminal Justice and the Challenge of Globalisation' in David Nelken (ed) *Comparative Criminal Justice and Globalization* (Ashgate, 2011) 1. See generally Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 *Journal of Law and Society* 50.

[26] Philip C Jessup, *Transnational Law* (Yale University Press, 1956) 1.

[27] *Ibid* 2.

While this definition has time and again been picked up by legal scholars as a starting point to think about the interaction between law and globalisation, it appears that another central, more socio-legal theme or analytical perspective, namely that of *transnational human problems*, has received significantly less attention.[28] Jessup not only built his lecture series on the notion of the 'The Universality of the Human Problems' but also pointedly observed that

> some of the problems that we have considered essentially international, inevitably productive of stress and conflict between governments and peoples of two different countries, are after all merely *human problems which might arise at any level of human society – individual, corporate, interregional, or international.*[29]

Although it would seem that Jessup's primary concern here was with the limitations of perceiving problems as purely international, a broader awareness of legal problems as conflicts between human interests which may arise at any or multiple levels of society seems also relevant to understanding problems that are traditionally seen as domestic, such as the right approach to enforcing corporate responsibility through criminal justice procedures.[30] Importantly for this paper, it allows us to view domestic reform efforts in context with the various and potentially conflicting individual, corporate, public, state, or governmental interests arising within and across jurisdictions under the conditions of globalisation.[31]

For example, corporations and related private parties such as employees, shareholders, or business partners may have an interest in the widespread availability of corporate non-prosecution agreements to address suspicions of wrongdoing in a way that is as quick, lenient, and controllable as possible (especially avoiding conviction with its various adverse consequences).[32] In

[28] For more details on this general theme, see the introduction to this Special Issue. As recently noted by Zumbansen, Jessup viewed the legal nature of transnational law 'less as a legal philosopher or as a scholar writing in the tradition of analytical jurisprudence than as both a legal sociologist and legal cartographer' (Peer Zumbansen, 'Introduction: Transnational Law, with and beyond Jessup' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press, 2020) 12).

[29] Jessup (n 26) 15–16 (emphasis added).

[30] While the paper explores the analytical benefits of the suggested *transnational human problem* perspective, it does not intend to diminish critical perspectives on Jessup's *Transnational Law*, especially as regards its normative and political orientation or consequences (see, for example, Prabhakar Singh, 'The Private Life of Transnational law: Reading Jessup from the Post-Colony' in *The Many Lives of Transnational Law* (n 28) 419, 440; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 223–6; Michael Elliot, 'Problematising the 'Governance Gap': Corporations, Human Rights, and the Emergence of Transnational Law' (2021) 12(2) *Transnational Legal Theory* (upcoming).

[31] Following Twining, 'globalisation' is understood here in a broad sense, including 'any processes that tend to make human relations–economic, political, cultural, communicative etc–more interdependent. Sometimes this refers to the world as a whole, ie, those relations and issues that are genuinely worldwide; but sometimes it refers to relations that transcend national boundaries to a greater or lesser degree.' William Twining, 'Implications of "Globalisation" for Law as a Discipline' in Andrew Halpin and Volker Roeben (eds), *Theorising the Global Legal Order* (Hart Publishing, 2009) 40.

[32] See, for example, the prominent lobbying effort by the Canadian engineering giant SNC-Lavalin prior to the introduction of remediation agreements (Nicolas van Praet and Jeff Gray, 'SNC-Lavalin says

addition, they will likely be interested in levelling the 'enforcement playing field' towards competitors and coordinating final settlements across jurisdictions.[33] At the same time, individual employees may worry about their rights under criminal and labour law,[34] while some corporations may also be concerned about circumventions of fair trial and due process rights when being 'forced' into unmerited settlements.[35] Victims, however, may be primarily interested in 'sufficient' and public determination of corporate responsibility to satisfy a demand for justice, redress, and reassurance of non-repetition.[36] These interests will also regularly arise across jurisdictions in line with cross-border corporate structures and activities.

Public enforcement authorities may view the introduction of corporate non-prosecution agreements as a welcome facilitation in light of significant enforcement difficulties, or as a development lacking necessary, more substantial changes to the legal tools and resources available.[37] The introduction of corporate non-prosecution agreements may also be appealing from the

corruption charges weighing on its competitiveness' *The Globe and Mail* (10 November 2015), online: www.theglobeandmail.com/report-on-business/snc-lavalin-calls-on-feds-to-adopt-corruption-settlement-deals/article27188907/; Mario Dion, *Trudeau II Report* (Parliament of Canada, 2019) 1). See also Peggy Hollinger and Catherine Belton, 'Rolls-Royce Shares Climb on Back of Bribery Settlement' *Financial Times* (17 January 2017), online: www.ft.com/content/5740a276-dc17-11e6-9d7c-be108f1c1dce.

[33] See examples in part 1. See also OECD (n 3) 38–41; Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press, 2019) 188; Claire McLeod, 'Global Settlements: The In-house Perspective' in Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes, Luke Tolaini, Ama A Adams and Tara McGrath (eds), *The Practitioner's Guide to Global Investigations* (Global Investigations Review, 4th edn 2020) 490.

[34] Garrett (n 8) 88–95.

[35] For example, The Economist has compared these settlement procedures to mafia shakedowns (Editorial, 'Corporate settlements in the United States: The criminalisation of American business' *The Economist* (30 August 2014)). See also Barry A Bohrer and Barbara L Trencher, 'Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation' (2007) 44 *American Criminal Law Review* 1481; Roger Shiner and Henry Ho, 'Deferred Prosecution Agreements and the Presumption of Innocence' (2018) 12(4) *Criminal Law and Philosophy* 707; Joel M Cohen, Sacha Harber-Kelly and Steve Melrose, 'Recent Prosecutorial Failures in the US and UK: Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements' *New York Law Journal* (5 May 2021), online: www.law.com/newyorklawjournal/2021/05/05/recent-prosecutorial-failures-in-the-us-and-uk-why-corporations-should-rethink-how-they-evaluate-deferred-prosecution-agreements/?slreturn=20210631180034.

[36] See Transparency International and others, 'Letter to OECD Secretary-General Angel Gurria: Global Standards for Corporate Settlements in Foreign Bribery Cases' (UNCAC Coalition, 11 March 2016), online: https://uncaccoalition.org/letter-to-oecd-secretary-general-angel-gurria-global-standards-for-corporate-settlements-in-foreign-bribery-cases/; Stolen Asset Recovery Initiative, *Left out of the Bargain Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank, 2013), online: https://openknowledge.worldbank.org/bitstream/handle/10986/16271/9781464800863.pdf?sequence=1&isAllowed=y. Efforts to provide redress to victims such as through the payment of financial penalties towards funds supporting development assistance or research into restitution measures may also involve broader societal interests (see, for example, Joanna Harrington, 'Providing for Victim Redress within the Legislative Scheme for Tackling Foreign Corruption' (2020) 43(1) *Dalhousie Law Journal* 245). I am grateful to the anonymous reviewer for drawing my attention to this point.

[37] See, for example, Council of Europe, Consultative Council of European Prosecutors, Opinion No. 14 on 'The role of prosecutors in fighting corruption and related economic and financial crime' (2019) paras 17, 19, 39; Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in *Negotiated Settlements in Bribery Cases* (n 2) 156; Buell (n 16).

perspective of improving law enforcement cooperation and competitiveness across borders.[38] Governments may have competing interests in corporate non-prosecution agreements, among others, as a tool for financial recovery, to exercise regulatory influence over domestic and foreign corporations, or to protect corporate activity and wider economic interests.[39] Finally, the public interest more generally may oscillate between demands for the reliable and affordable provision of corporate goods and services undisturbed by overly invasive prosecutions and a desire for effective, equal, fair, and just law enforcement.[40]

A clearer view of the various and potentially conflicting interests arising at multiple levels of the human society is not only helpful as a general exercise in sensitisation for legal researchers, but also provides concrete analytical benefits for the description and critical evaluation of domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements.[41] Most importantly, it enables a more comprehensive appreciation of the different interest groups operating within and across jurisdictions as well as the regulatory strategies they employ in international, foreign, and local forums. This can then contribute to a more accurate identification of the actors and strategies that were relatively more successful in shaping reforms. Beyond these descriptive benefits, it also draws attention to the fact that seemingly technical domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements are neither inevitable nor inherently or exclusively positive but reflect complex conflicts of competing human interests with winners and losers.[42] While Jessup's *transnational human problem* perspective (and transnational law more generally, as it may be argued)[43] does not as such provide a framework for the

[38] See Branislav Hock, 'Policing corporate bribery: negotiated settlements and bundling' (2020) 30 *Policing and Society* 1.

[39] See, for example, *Serious Fraud Office v Airbus SE*, Approved Judgement of 31 January 2020, para 1 (noting that 'this financial sanction [USD 649 million in disgorgement and USD 441 million in fines] is … more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018'); Cassin (n 10); Garrett (n 8) 218–49; Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) *Current Issues in Criminal Law* 269, 281.

[40] See Campbell (n 39) 276; Colin King and Nicolas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan, 2018) 7; Emmanouil Billis, 'On the Limits of Informal Enforcement' in Ulrich Sieber (ed), *Prevention, Investigation, and Sanctioning of Economic Crime: Alternative Control Regimes and Human Rights Limitations* (International Review of Penal Law, 2018) 369.

[41] While this perspective foregrounds specific interest groups in an effort to provide more analytical visibility, it is not meant to exclude or diminish the relevance of structural or systemic forces such as those asserted by different forms of market economies (for a critique of such forces in the context of the free market economy, see generally the works of the American legal realist Robert Hale; drawing on Hale, see, for example, Fleur Johns, 'Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order' (2007) 34(1) *Journal of Law and Society* 116; Peer Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14(2) *Indiana Journal of Global Legal Studies* 191).

[42] See generally A Claire Cutler, 'Locating Private Transnational Authority in the Global Political Economy' in *The Many Lives of Transnational Law* (n 28) 333.

[43] See Peer Zumbansen, 'Transnational Law as Socio-Legal Theory and Critique: Prospects for "Law and Society" in a Divided World' (2019) 67(3) *Buffalo Law Review* 909, 936.

normative evaluation of what interests *should* prevail over others in case of conflict, it can inform evaluative efforts by making more visible what interests *have* influenced (or not) domestic legal change and the way this 'shape[s] our perception … of problems and appropriate responses to them'.[44] At least from this narrow analytical viewpoint it is thus suggested that transnational law can indeed be 'critical', as more broadly discussed, for example, by Zumbansen.[45]

In conclusion, moving from methodological nationalism towards viewing complex domestic criminal justice reforms—such as the introduction of corporate non-prosecution agreements—as *transnational human problems* can contribute to their more complete description and critique.

3. Two theories of transnational law in criminal justice and the study of domestic reforms

After a brief introduction, this part turns to investigating the extent to which these descriptive and evaluative-critical benefits are reflected in today's two main theories of transnational law in criminal justice, *Transnational Criminal Law* and *Transnational Legal Ordering of Criminal Justice*.

3.1. Transnational criminal law and transnational legal ordering of criminal justice

In an effort to find a doctrinal match for the criminological term 'transnational crime' which could be distinguished from international criminal law in a strict sense,[46] Neil Boister popularised *Transnational Criminal Law* (TCL) in the early 2000s.[47] Since then it has developed into the principal

[44] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) *Law & Social Inquiry* 229, 238. As aptly noted by Garland, 'if critical theory is to be taken seriously, it will have to first engage with things as they actually are'. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2002) 3.

[45] Peer Zumbansen, 'Can transnational law be critical? Reflections on a contested idea, field and method' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical International Theory* (Edward Elgar, 2019) 473. Prioritising a decolonialising focus, it should be noted that Zumbansen's conceptualisation of transnational law as a legal methodology for critical analysis differs significantly from the one proposed by transnational legal process and ordering scholars such as Shaffer which does not appear to have a particular normative focus (see, for example, Terrence Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terrence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015) 27). See also n 30.

[46] Meaning the body of law creating criminal responsibility which could be directly applied under international law and enforced before international criminal tribunals. See Neil Boister, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law* 953, 953–4, 955; Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) *Transnational Legal Theory* 9, 10.

[47] Jessica Roher, Nicola Dalla Guarda and Maryam Khalid, 'Introduction: Symposium on Transnational Criminal Law' (2015) 6(1) *Transnational Legal Theory* 1, 2.

framework for the analysis of criminal law and practice from a transnational perspective.[48]

While Boister argues that TCL 'conjoins transnational crime with Jessup's term "transnational law"', he nevertheless 'suggest[s] a more restrictive use of TCL: the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects'.[49] In other words, TCL 'consists of (a) horizontal international obligations between states to criminalize and cooperate, and (b) the vertical application of criminal law and procedures by those states to individuals in order to meet these international obligations'.[50] Together these international and domestic laws are said to create a system,[51] a field within transnational legal pluralism,[52] or a non-hierarchical order.[53]

In contrast, *Transnational Legal Ordering* (TLO) theory was only recently extended to criminal justice studies with the aim of improving their capacity to grapple with the changing nature of criminal justice policy making, especially as regards the relationships between domestic and international forms.[54] While we have seen increasing diversification and sophistication over the past decade,[55] TLO theory was initially brought to the fore by Gregory Shaffer as a socio-legal methodology to assess the kind of effects transnational legal processes have on state change.[56] Conceptualising a *transnational legal order* as 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions',[57] TLO theory is not focused

[48] See Radha Ivory, 'Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance' (2018) 6(3) *London Review of International Law* 413, 416. See generally Roher, Guarda and Khalid (n 47) 1.

[49] Boister 'Transnational Criminal Law?' (n 46) 955. This definition has been repeated throughout TCL scholarship with the subsequent addition of 'transboundary moral impacts' (see, for example, Boister 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 13; Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2nd edn 2018) 17).

[50] Boister (n 49) 18. See also Boister 'Transnational Criminal Law?' (n 46) 972; Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge, 2015) 14, 18.

[51] Boister 'Transnational Criminal Law?' (n 46) 955; Boister (n 49) 18–23.

[52] Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 25.

[53] Boister (n 49) 33.

[54] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press, 2020) 6.

[55] See, for example, Terrence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015); Gregory Shaffer, 'Theorizing Transnational Legal Orders' (2016) 12 *Annual Review of Law and Social Science* 231; Gregory Shaffer, Tom Ginsburg and Terence Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press, 2019); Gregory Shaffer and Terrence Halliday, 'With, within, and beyond the State: The Promise and Limits of Transnational Legal Ordering' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press, 2021) 987.

[56] Shaffer (n 44) 234. For a similar view on transnational law 'primarily as a methodological approach', Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21 *Transnational Law & Social Problems* 305, 308.

[57] Halliday and Shaffer (n 45) 3.

on delineating a particular legal doctrine or field of law. Rather, cutting across fields of law, it provides 'an analytical means for assessing transnationally induced change in a globalized world'.[58] In doing so, it focuses researchers on how 'social problems are conceived and ordered through law and how that legal ordering transcends and penetrates state boundaries'.[59]

3.2. Describing reform: conceptions of 'transnational law'

This section examines the relative capacity of the conceptions of 'transnational law' proposed by TCL and TLO theory to describe the actors and regulatory strategies potentially influencing domestic criminal justice reforms within and across jurisdictions.[60]

Reforms such as the rise of corporate non-prosecution agreements hold a number of challenges for TCL's conception of transnational law which seem to be primarily rooted in its doctrinal ambition and focus on traditional public international law instruments and actors. In particular, TCL's longstanding view that 'a horizontal treaty element is a necessary element of transnational criminal law because it is indicative of a formal inter-sovereign relationship … which distinguishes transnational criminal law from mere international relations' risks restricting the analysis.[61] While continuing to emphasise that TCL requires a horizontal element, Boister has more recently and seemingly reluctantly acknowledged that 'it appears that this can be constituted by a treaty, a custom, a resolution, soft law, any form of international arrangement making for coordination of approach among states and for legal acts at a domestic level'.[62] However, as outlined in part one, the cross-border diffusion of norms introducing corporate non-prosecution agreements appears to have occurred so far largely without the agency of an internationally agreed coordinating arrangement.[63] And yet these

[58] Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2013) 7.

[59] Terrence Halliday and Gregory Shaffer, 'Researching Transnational Legal Orders' in *Transnational Legal Orders* (n 45) 476.

[60] The analysis in this section is particularly indebted to Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in *Transnational Legal Ordering of Criminal Justice* (n 54) 84.

[61] Boister 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 15. See also Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 1st edn 2012) 13; Boister (n 50) 15.

[62] Boister (n 49) 22–3. However, he maintains that 'the suppression conventions provide a penal anchor for much of this transnational governance, even when it takes on a more administrative or regulatory form' (Boister (n 49) 23).

[63] See especially footnote 20. While it should be noted that some treaty monitoring bodies have occasionally accepted, embraced, or critiqued domestic laws and practices on corporate non-prosecution agreements in their compliance assessments of individual states (for example, OECD WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (2012), online: www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf 21; OECD WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Germany* (2018), online: www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf 58), this does not seem to amount to the

norms seem to fall within the ambit of TCL considering that they 'have been developed to address an issue of transnational conduct, effect and concern'.[64]

This analytical limitation also affects TCL's capacity to consider another, likely important source of influence, namely that of powerful states and foreign law.[65] While TCL has been concerned with the disproportionate influence of powerful Western states such as Great Britain and the US from the outset, it appears to be focused primarily on their ability to shape the horizontal international element of TCL (and only as a consequence of that shaping impact law reforms in other states).[66] This narrow conception of transnational law is therefore ill-equipped to capture influences of powerful states and foreign law in the absence or outside the scope of international coordinating arrangements. As outlined in part one and two, especially the direct and indirect influence of domestic US law and law enforcement are important aspects for inquiry to better understand the cross-border diffusion of corporate non-prosecution agreements.

Finally, the degree to which TCL's conception of transnational law focuses on states as the main actors makes it difficult to consider the influence of other, less public, international law actors and factors.[67] While Boister acknowledges that the 'transnational normative space is expanding', he maintains that this expansion is 'directed at states … and it is only the participants in the horizontal level that include non-state entities'.[68] It is of course true that states ultimately hold the power to enact domestic criminal justice reforms such as introducing corporate non-prosecution agreements. However, as shown in part two, the decision to do so and how may be influenced by various individual, corporate, public, state, and governmental interests and pressures arising within and across jurisdictions which are important to consider in context. Limiting the analysis of non-state influences to the horizontal international level, as seems to be suggested, is

envisaged internationally agreed coordination. Similarly, it seems doubtful that the existence of general provisions on cooperation between law enforcement authorities in the multilateral economic crime treaties or distinct mutual legal assistance treaties would be seen as an 'internationally agreed coordinating arrangement' for the domestic introduction of corporate non-prosecution agreements. If so, it would appear largely to undermine the previously described contours of the horizontal element, encompassing potentially all domestic legal changes that somehow contribute to better law enforcement cooperation. I am grateful to the anonymous reviewer for drawing my attention to this point.

[64] Boister 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 15. See especially the description of corporate non-prosecution agreements as a *transnational human problem* in part two.

[65] See Prabha Kotiswaran and Nicola Palmer, 'Rethinking the 'international law of crime': provocations from transnational legal studies' (2015) 6(1) *Transnational Legal Theory* 55, 82 ('call[ing] for a redefinition of TCL to include comparative criminal law'). For a renewal of their call, see also Prabha Kotiswaran and Nicola Palmer, 'Transnational Criminal Law: A Field in the Making' in *The Oxford Handbook of Transnational Law* (n 54) 195–8.

[66] Boister 'Transnational Criminal Law?' (n 46) 956; Boister (n 61) 18; Boister 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 26–8; Boister (n 49) 20–1.

[67] See Ivory (n 60) 98.

[68] Boister 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 23. See Boister (n 50) 21.

again problematic in the absence or outside the scope of an international coordinating arrangement.

In contrast, TLO's socio-legal and process-oriented conception of transnational law provides a more flexible analytical framework for exploration. In particular, it is less concerned with the existence and scope of international coordinating arrangements or the matching between international and domestic law.[69] Rather, departing from a new legal realist conception of law,[70] TLO scholars see 'transnational law as embodying norms that are transported across national frontiers via cross-border social structures'.[71] Unlike more traditional approaches in international law and relations studies, including TCL, TLO theory aims to emphasise transnational processes of norm construction and diffusion which integrate horizontal, top-down, and bottom-up forms of law-making and enforcement. In doing so, it is also awake to recursive interactions between actors asserting influence at different levels of society.[72]

As regards the influence of powerful states, like the US, on criminal justice reforms in other countries, this conception of transnational law may similarly illuminate a more complex picture. It may in particular contribute to a better understanding of their role and strategies in the absence or outside the scope of international coordinating arrangements as well as in the context of 'recursive interactions between bottom-up and top-down norm making processes and institutional interactions'.[73] For example, in addition to the already mentioned potential avenues for direct and indirect US influence, this conception also pays attention to the modifications during transnational norm diffusion processes such as through new legislative models. The insistence on a relatively larger role of court supervision, as well as limiting availability to legal persons, and a narrower group of economic crimes in the UK and French legislations on corporate non-prosecution agreements were subsequently implemented in several other domestic legal systems and have also led to reform discussions in the US.[74]

Finally, TLO theory's analytical openness supports a more nuanced understanding of the interactions between state and non-state actors in

[69] See Ivory (n 60) 88, 100.
[70] Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) 95 *Cornell Law Review* 61; Halliday and Shaffer (n 45) 17.
[71] Ivory (n 60) 88.
[72] Aaronson and Shaffer (n 23) 2–3.
[73] Aaronson and Shaffer (n 54) 10, 11. See also Halliday and Shaffer (n 45) 37–42.
[74] See generally Aaronson and Shaffer (n 23) 19; Brandon L Garrett and David Zaring, 'For a Better Way to Prosecute Corporations, Look Overseas' *The New York Times* (23 September 2013). While Boister signals awareness in his more recent writings that 'traffic is not all one way', he suggests, in line with the assumed central role of international coordinating arrangements, that 'the relationship between the vertical and horizontal elements is recursive in the sense that adaptations in national law can feed back into *alterations of the international template* and [from there] on to other national laws' (Boister (n 49) 20 (emphasis added).

constructing criminal justice reforms transnationally. These interactions are not necessarily limited to international networks or organisations in the horizontal international level, as may be TCL's focus, but can occur at any and multiple levels of governance and as such impact on domestic legal change.[75] TLO theory not only accommodates these dynamics but also reflects a reality in which states may not always behave as a unified actor, potentially leading officials operating within the state's constituent branches and agencies to develop their positions through interactions with different non-state actors.[76] When studying the diffusion of norms introducing corporate non-prosecution agreements, this flexible conception enables consideration of potential influences from, among others, law enforcement organisations, corporations and business associations, defence counsel organisations, and civil society organisations across international, foreign, and local levels.[77]

Thus, TLO theory's conception of transnational law is relatively better suited to describe the success and failure of different actors and regulatory strategies in shaping reforms such as the rise of corporate non-prosecution agreements.[78]

3.3. Critiquing reform: winners, losers, and our perception of problems and appropriate responses

This final section addresses the relative capacity of TCL and TLO theory for critical evaluation of corporate criminal justice reforms.

Studies engaging in evaluative efforts of transnational criminal justice reforms often examine norm diffusion processes and their outcomes with the aid of normative concepts or reference points such as legitimacy, transparency, or fairness.[79] As explained in the previous section, this paper argues that TLO theory has a relatively higher descriptive power than TCL theory to inform such studies about the success and failure of different actors and regulatory strategies. However, building on the benefits of a *transnational human problem* perspective identified in part two, this section is primarily

[75] See Ivory (n 60) 109.
[76] See Aaronson and Shaffer (n 54) 9–10.
[77] See part two.
[78] While not part of this paper's scope, a comparison of the descriptive power of TCL's conception of 'criminal law' with TLO's conception of 'criminal justice' would likely arrive at a similar conclusion (for a detailed discussion in the context of Australia's introduction of a failing to prevent offense, see Ivory 2020 (n 60) 103–8). On the limits of TCL's relatively narrow criminal law paradigm, see also Cian Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"' (2015) 6(1) *Transnational Legal Theory* 31, 34–43; Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press, 2021) 202.
[79] See, for example, Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) 14, 35–8; Murphy (n 78) 48–52; Davis (n 33) 69–72.

interested in a different and, arguably, more inherent or autonomous capacity of transnational law for critical evaluation. The argument for this critical capacity is primarily based on the realisation that seemingly technical domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements are neither inevitable nor inherently or exclusively positive. Rather, they reflect complex conflicts of competing interests at different levels of human society with winners and losers. Against this background, transnational law can sharpen our focus on the ability of relatively more successful actors and regulatory strategies to establish narratives and rationales which shape our perception of what the problem is and appropriate responses could or should be.

While TCL theory is clearly concerned about the influence of powerful states, especially as regards negative effects on the sovereignty of other states and the rights of individuals,[80] its concerns remain largely focused on TCL's function to facilitate inter-state coordination in supressing or controlling crime.[81] In contrast, while TLO theory 'takes no categorical normative position on TLOs',[82] it follows a predominantly constructivist approach which 'posit[s] that the emergence of new transnational criminal justice norms is primarily driven by political and professional actors' success in shaping the dominant frames through which a social problem is defined and acted upon'.[83] Employing, among others, the sociological concepts of framing and diagnostic struggles, TLO theory thus 'highlights the role of conflicts regarding the nature and causes of a perceived social problem in shaping the form and content of legal norms and implementation mechanisms to govern the problem'.[84]

Investigations along these lines may not only inform critical evaluations of established problem narratives and reform rationales but also facilitate the potential identification of other, alternative accounts. This seems particularly relevant where transnationally induced criminal justice reforms occur without being demonstrably effective in achieving the (usually crime control) ends conventionally claimed.[85] For example, Halliday, Levi, and Reuter observe in the anti-money laundering context (AML)

[80] See Boister 'Transnational Criminal Law?' (n 46) 956–60; Boister (n 49) 33–42, 422–7. See also Sabine Gless, 'Bird's-Eye View and Worm's-Eye View: Towards a Defendant-Based Approach in Transnational Criminal Law' (2015) 6(1) *Transnational Legal Theory* 117.

[81] See Boister 'Further Reflections on the Concept of Transnational Criminal Law' (n 46) 24; Boister (n 49) 21, 42, 422.

[82] Halliday and Shaffer (n 45) 27.

[83] Aaronson and Shaffer (n 54) 8. See already Shaffer (n 44) 238.

[84] Aaronson and Shaffer (n 23) 7 with reference to Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Cambridge University Press, 1974); Robert Benford and David Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 *Annual Review of Sociology* 611. Specifically, on diagnostic disagreements over whether a social problem should be addressed through criminal law measures or alternative policies, see Aaronson and Shaffer (n 23) 9.

[85] See, for example, Jason Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011); Simeon Obidairo, *Transnational Corruption and Corporations:*

> While the AML TLO may not rest on empirical foundations, it does offer a compelling narrative. Its real work is not to change behaviour or stop rule breakers but to 'unite good consciences, to show purity in the face of danger, to do cultural work.' It creates a persuasive account of a world in which there are dark, nefarious activities that must be stopped. It joins fear of the unknown and of the criminal with the opportunity for states and supra-state institutions to be styled as rescuers. It offers comfort that good is fighting evil. It assures publics that the fear of the unknown is being addressed – that leaders are acting to assuage fears and control the dark side of globalization.[86]

In the case of corporate non-prosecution agreements, governments have rationalised the introduction of these mechanisms primarily by their importance for combatting corporate crime and protecting the public interest, pointing in particular to innocent employees, shareholders, and customers.[87] While little empirical evidence has been offered in support of these rationales, on face value, they seem to create an inherent tension or even 'paradox' when corporate non-prosecution agreements are introduced both to remedy problems with corporate liability enforcement and avoid the consequences of conviction, that is, the successful use of corporate liability.[88] Against this background, a better understanding of the relatively more successful actors and regulatory strategies may inform critiques of these reform rationales by criminal lawyers concerned about pragmatic departures from fundamental principles of liberal criminal justice procedures,[89] or

Regulating Bribery through Corporate Liability (Routledge, 2013); Terence Halliday, Michael Levi and Peter Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money Laundering and Combat the Financing of Terrorism* (Center on Law and Globalization, American Bar Foundation and University of Illinois College of Law 2014), online: www.americanbarfoundation.org/uploads/cms/documents/report_global_surveillance_of_dirty_money_1.30.2014.pdf.

[86] Terence Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in *Transnational Legal Ordering of Criminal Justice* (n 54) 71 with reference to Sally E Merry and David Nelken. See generally Terence Halliday, 'Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance' (2018) 69(4) *British Journal of Sociology* 936.

[87] See, for example, Ministry of Justice (UK), *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements* (2012) Chapter 3; Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation* (2017) 6; Agence Française Anticorruption (France), *Annual Report* (2018) 40–1; Attorney-General's Department (Australia), *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (2017) 3; Federal Ministry of Justice and Consumer Protection (Germany), *Questions and Answers on the Bill to Strengthen Business Integrity* (*Gesetzentwurf zur Stärkung der Integrität in der Wirtschaft*) (16 June 2020) 10, 3. See also OECD (n 3) 21–2.

[88] Campbell (n 39) 270, 282. On the problem of unclear and potentially conflicting objectives, see Halliday, Levi and Reuter (n 86) 61–3. For a warning from law and economics scholars that the effects are dependent on a variety of terms within specific agreements and conditions in legal systems more generally, see Arlen (n 37).

[89] These concerns have focused on certain minimum standards of openness and procedural fairness such as transparency and publicity, impartiality and the possibility of review, equality, consistency, consideration of those affected by the conflict but not immediately involved in the procedure as well as, more specifically, the presumption of innocence and the privilege against self-incrimination. See Billis (n 40) with reference to Manfred Rehbinder, *Rechtssoziologie* (Beck, 6th edn 2007) 118; John Rawls, *A Theory of Justice* (Harvard University Press, 1971); John Thibaut and Laurens Walker,

international lawyers querying compatibility with the objectives set out in the international legal regime.[90] At the same time, it may also enhance the identification of other accounts which, for example, emphasise changing public and private functions in corporate crime governance[91] as well as international contests over corporate liability in the context of the shaping of the global economic order.[92]

Finally, such critical perspectives seem particularly pertinent at a time of growing concerns that 'transnational criminalization processes … may mask the persistent failure of states and international organizations to develop effective tools to address the root causes of the harmful activities' and rather 'perform ideological functions in a period characterized by the global spread of economic policies that have led to growing inequality around the world'.[93]

4. Conclusion

This article set out to discuss the relevance of transnational law as an analytical framework for the study of domestic criminal justice reforms using the cross-border rise of corporate non-prosecution agreements for economic crimes as an example.[94] It has shown that moving from methodological nationalism towards viewing domestic criminal justice reforms as involving various and potentially conflicting interests arising at multiple levels of the human society—or, borrowing from Jessup's 1956 Storrs Lectures, as

Procedural Justice: A Psychological Analysis (Erlbaum, 1975). See also King and Lord (n 40); Campbell (n 39); Sabine Gless and Nadine Zurkinden, 'Negotiated Justice – Balancing Efficiency and Procedural Safeguards' in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart Publishing, 2017) 117.

[90] For example, Davis argues that the rules which govern settlements should, at the very least, conform to the objectives set out in the UNCAC which he identifies as including effectiveness (with the more specific, subsidiary components of condemnation, compensation, and prevention), (cost-)efficiency, and due process. In addition, he contends that 'those objectives ought to be supplemented by the commonly endorsed objectives of legitimacy and fairness' (Kevin E Davis, 'What counts as a good settlement?' in *Negotiated Settlements in Bribery Cases* (n 2) 262).

[91] For example, depending on the perspective, these changes may be seen as reflecting an expansion of the public (governance) functions of corporations or a privatisation of corporate governance along with a redefinition of the state's role as a regulator and enforcer of corporate crime.

[92] See generally Ivory (n 48) 429–32; Carolin Liss and Jason Sharman, 'Global Corporate Crime-Fighters: Private Transnational Responses to Privacy and Money-Laundering' (2015) 22(4) *Review of International Political Economy* 693, 701–2; Elliot and Lüth (n 78).

[93] Aaronson and Shaffer (n 23) 24. On the role of ideology in criminal justice TLOs, see also Sally E Merry, 'Conclusions: A Processual Approach to Transnational Legal Orders' in *Transnational Legal Ordering of Criminal Justice* (n 54) 373–9. More generally on law's constitutive role in the global distribution of inequality and corporate power, see, for example David Kennedy, 'Law in Global Political Economy: Now You See It, Now You Don't' in Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press, 2020) 127; Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (University of Minnesota Press, 2013) 9.

[94] While space limitations have precluded engagement with other examples, my contention would be that the methodological and theoretical insights developed here may also be relevant for studying other reform efforts on corporate liability (such as the introduction of failure to prevent offences or compliance-oriented attribution rules) and beyond.

transnational human problems—can contribute to their more complete description and critical evaluation.

Building on this, the article has turned to an assessment of the relative analytical power of today's two main theories of transnational law in criminal justice. The integration of a *transnational human problem* perspective into existing comparative studies has allowed the article not only to contribute to the debate in relation to some specific elements of the descriptive power of TCL and TLO theory but also to add that the theories should be compared for their critical capacity as well. In that way, the article helps to build bridges between normative and descriptive or sociological approaches to studies of transnational law. While TCL theory will undoubtedly continue to enable important studies into supra-state rules on crime control, the article finds that the recent extension of TLO theory to the criminal justice realm offers a more suitable analytical framework for the description and critical evaluation of domestic criminal justice reforms in a globalised world. In this sense, the analysis presented here may also go some way towards answering Twining's call

> in an era of globalisation, we need a broader and much more complex picture and flexible methodology as a basis for studying processes of diffusion and their outcomes.[95]

Acknowledgements

In writing this paper, I have benefitted much from the participation in the conference on *Transnational Legal Ordering in Criminal Justice* convened by Gregory Shaffer and Ely Aaronson at the University of California, Irvine School of Law on 21–22 September 2018 as well as the conference on *Histories of Transnational Criminal Law* convened by Florian Jessberger, Neil Boister and Sabine Gless at Schloss Herrenhausen in Hannover, Germany on 15–18 October 2019. I am grateful to the anonymous reviewers, as well as Emmanouil Billis, Michael Elliot, and Radha Ivory for their comments.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This article draws on research supported by the Swiss National Science Foundation (grant number P1GEP1_181476).

[95] William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *The Journal of Legal Pluralism and Unofficial Law* 1, 5.