

Perfect Pandemic Reading

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2020-06-21T09:00:06

I am very excited about my book being discussed in the Völkerrechtsblog and grateful to Michael Bader for organising it, and for the six readers taking their time to dip into my 500-page tome. I hope I can do some justice to the reviews in these few words, and for the questions or comments not addressed, I hope the opportunity arises for a face to face discussion, over a beer perhaps. It has been really wonderful to reconnect with a dear old friend – Hannah and I practically wrote our PhDs together in London – enjoying intense discussions over wine, tea and jigsaw puzzles. It's good to see an old co-worker, Miriam, and a more recent friend and collaborator on the [Role of Law in Global Value Chains](#) interdisciplinary research project, Klaas Eller, as well as three scholars I have yet to get to know.

I consider myself fortunate to be able to engage with a German(-speaking) readership. Having worked in the UK for the past 20+ years, my intellectual framework and context is largely Anglo-Saxon – meaning we read in English, the texts of the former British Empire – and sooner British, Canadian, or Indian than German, French or Spanish. However being Dutch – and having spent time living and working in the Middle East, Berlin (I wrote the Nuremberg and Tokyo Chapters while at the Humboldt as the guest of Prof Dr Florian Jessberger), Geneva and most recently in Paris, I'm comfortable moving into different intellectual frameworks – even if never as a native speaker. What fascinates me is how the “English”, “French”, “German” (and not to mention those I don't have access to in other languages), intellectual frameworks engage similar questions but develop unique literatures, narratives and concepts in a way that isn't always easy to bridge. Certain key concepts or debates in one framework are largely unknown in another, and certain key authors in one, don't necessarily ‘translate’ into another – not because of quality but simply because there aren't the same points of reference for them to ‘stick’ to.

It is clear to me that my work is going to be received differently in Germany because of the key debates put forward by scholars such as Sonja Buckel, Andreas Fischer-Lescano and Christoph Menke. As a Marxist of course I am also interested in the way different historical-materialist contexts give rise to different perspectives, added to the – dare I say – ‘relatively autonomous’ intellectual frameworks, and the effects this has on the work we produce, the questions we ask and the futures we can imagine. In my book, I give attention to the development of intellectual frameworks, such as the current framework within which the corporation is understood, how international law and especially international criminal law is understood in given times and places, and in particular *how come* we have a narrow, mainly law-focused perspective on the solution to the problems of corporate capitalism, and of course, how we once again broaden our vision so as to be able to imagine a radically different future.

In this short reply I will say a few words about the birth of the corporation, modern law in the transition to capitalism, the commodity form theory of law (also

relevant to Horst's critique), and then I will discuss Hannah's specific comment on Weltanschauung in Nuremberg / Washington before engaging with Miriam's and Horst's perspectives on law's utility in the struggle for a better world.

The commodity form theory of law

Corporations exist in a very similar form, with the same building blocks of separate legal personality, perpetual life, limited liability of shareholders and a profit mandate-around the world. Despite local variations, for instance in governance, taking as an example the German workers' councils, those vital building blocks are now universal. Most company law textbooks don't tell us where the corporation came from, accepting it as an inevitable part of our world. In the early part of the book I describe how the corporate legal form was created as a vehicle to finance the risky overseas 'explorations' of companies like the Dutch and British East India Companies – which 'crowdfunded' their potentially extremely lucrative voyages – if the ships came back laden with looted gold, spices and enslaved people – but where investors would never lose more than what they had put in (the origin of limited liability shareholding). The Dutch East India Company founded the world's first stock exchange, originally part of the company itself, allowing the free trade in shares, which became popular especially with the issue of penny shares, which allowed anybody to, literally, 'buy into' capitalism. The corporate form has been from its inception an instrument of imperialism, colonial administration, the cross-Atlantic trade in enslaved people – the export of capitalist law all around the globe and the drawing of colonial borders in the corporate scramble for Africa. After the Berlin Conference of 1884-5, two thirds of the globe were colonised and ruled by companies.

On the domestic level, the corporate enterprise as the forerunner of the 'universalised' form, first emerged in England. This was after the enclosures driving thousands of English commoners off their land and the creation of a mass landless class to be put to work in the factories that produced cloth out of the cotton grown by the enslaved people of the Caribbean. The Industrial revolution was fuelled by the wealth extracted from the bodies of enslaved people. When production of everyday items expanded beyond the household, law transformed kinship relations into legal relations, where contract replaced trust, and 'calculable law' enabled the externalisation or the exchange of risk – allowing for literal *accountability*. Double entry bookkeeping was introduced at the same time as the cash nexus came into every relationship and people became legal subjects. The universalized 'legal system' at the time of the transition to capitalism was built upon the primary norm of private property ownership, and the protection of what is "mine not yours". This protection takes the form of a threat of violence (physical or structural/economic) which is inherent in the legal form itself.

Pashukanis understood law (the legal form generalised in legal systems) to emerge in the transition to capitalism, when the modern state form emerged. Of course, there were instances, regimes and practices of law before then, such as Roman law, ecclesiastical law, Islamic law, Chinese law, but what Pashukanis understands as law properly so-called is the law that facilitates, permits, protects the property relation and property exchange; this law enabled the move from a feudal to a market

society in the transition to capitalism in 18th C Europe. Although law inhered at times between individuals prior to this (e.g. Marx describes the Roman manifestation of “attributes of the juridical person, precisely of the individual engaged in exchange” in [Chapter 5 of the Grundrisse](#)) law becomes generalised and universalised through European imperialism. The capitalism of law inheres in law’s form – the lawness of law, as [China Miéville](#) puts it – that element that sets legal relations apart from ‘mere’ power relations or custom. This is the element that allows property owners to recognise each other as legal equals bargaining on the market, and eventually to exchange a commodity. Pashukanis writes, “[t]he juridical element in the regulation of human conduct enters where the isolation and opposition of interests begins.” To this we can add [Marx](#), who explains that “it is the economic relation that determines the subject matter comprised in each [...] juridical act.” Law is the abstracted form of the specific social relations and legal systems operate along the logic of capitalism. It is the capitalist logic of law, the logic of the commodity form, that enables the actionable calculation of the cash nexus in all legal relationships. In the book, I focus on the commodification of the responsibility relationship: transforming the responsibility relationship into one of calculable risk, which thus becomes available for exchange.

Nuremberger messiness

The leap from the origins of the commodity form theory of law in the transition to capitalism and the Nuremberg trials of the industrialist may appear to be a big one. However, these trials present an early example of the commodification of criminal responsibility in a business context. [Hannah Franzki in her work](#) examines those same trials as well as the trials which sought and, in some cases, are still seeking to address the economic dimensions of the last Argentinian dictatorship (1976-1983). In it Hannah shows international criminal law to be liberal partly because “it understands the economic dimensions of state crime according to the ontological separation of the state and the economic which is inherited from political liberalism.” Franzki found that the judges in the Nuremberg trials of the industrialists convicted the defendants on the basis of their violating this ontological principle of political liberalism – which was so deeply entrenched in the minds of liberal lawyers that it acquired a normative function.

I see the industrialist trials as far messier. There was a paradigm shift in US foreign policy with the death of Roosevelt in the Spring of 1945 and the fall from grace of Morgenthau, the main architect of post-WWII US foreign policy, and the looming war with Korea for which the US government now wished its industrialists to start producing arms. I understand the public/private divide as an *ideological* (not ontological) divide giving rise to separate spheres in international law (public international law which includes the laws of war, international humanitarian and human rights law which does not contain the corporate subject) and international economic law (which includes international trade, investment and finance law – where corporations *do* have legal personality, see Chapter 2 of the book). This divide was not that clear cut in the *domestic* law of the 1940s (and all of the US lawyers were domestically trained) at a time when businesses were still largely family owned and deeply associated with their individual owners. The Farben prosecutor relates

in his memoir how he was given the order from the War Department to *not* file aggressive war charges against the industrialists, “as the DuPonts wouldn’t like it” ([Dubois 1952](#), p. 22). Only later, during the neoliberal era of financialisation (as I illustrate in Chapter 4) did the individual businessmen largely disappear from the picture and currently we understand corporate accountability predominantly as legal person liability.

The memoirs of the US lawyers involved on the prosecution side reveal a memo coming down from Washington ordering a change of course for the trials in line with the new foreign policy priorities in light of the Cold War. In a close reading of the trial transcripts, the awkwardness and embarrassment of the lawyers and judges contradicting their earlier findings is almost tangible. On their return to the US, several of the prosecution lawyers were persecuted by McCarthy for alleged communist sympathies, and some became prominent human rights activists and lawyers. As individuals, we seek to create history within the given parameters of the structures we inhabit, steered by prevailing ideologies to some extent or another, in alignment with our class interest, in conflict with that of others. There is no doubt some of the lawyers were influenced by Franz Neumann’s *Behemoth* (a copy was given to all members of the main trial’s prosecution team), others will have acted from a sense of noblesse oblige, and yet others may well have had communist leanings. While writing these chapters, I was grateful for the US obsession with preserving all public and private documentation, while at the same time realising the ideological significance of this work.

In the end, the effect of the trials was as Franzki describes. It was the ideological separation between capitalism and communism at the inception of the Cold War which split the ‘economic’ off from the ‘humanitarian’ in international criminal law, thereby not only influencing the trials in concretely identifiable ways, but also and most importantly changing the way conflict would be understood: No longer a result of imperialism and market expansionism, but rather a result of individual and/or ethno-racial pathology. The liberal lawyers were disciplined, and ICL was recruited to the ‘capitalising mission’ – which we can see play out in the later and contemporary international criminal trials (my chapter 5).

The messy reality of wrangling over different interests is what interested me here. In the book in general I pay attention also to agency as well as structure, with a view to discovering the contradictions, where our most fertile opportunities to intervene and fuel transformation lie (and, importantly, what the dead ends are). In the case of the Nuremberg trials of the industrialists, the contradiction lies in the fact that the first example of businessmen being tried for international crimes, ended up both bolstering Western capitalism *and* giving rise to the illusion of the possibility of corporate legal accountability.

If one holds that the capitalism of law lies only or primarily in its ability to be instrumentalised by hegemonic powers then there is no specificity about the legal relation or the legal form, no lawness of law as such. The way the commodity form theory plays out in the ICL trials (aside from the prior fact that the businessmen had acted in congruence with the ‘imperialism at the heart of the corporate form’, see my Chapter 2), I explain in my Chapter 4. Pashukanis in his discussion of

domestic criminal law states 'law creates right by creating crime'. The value of criminal law lies in its demonstrative function, its morality, and it functions as a 're-moralisation' of society post cash-nexus. Thus, commodified morality (a term I link to [Shamir](#)) tells us when to feel revulsion, or when to forgive, who to grieve: it is 'canned morality', served up in the [bourgeois theatre](#) of international criminal trials. Canned morality thus produces accountability in the Weberian sense – meaning that through calculable law costs, benefits and risks of political actions can be calculated, managed, and even optimised (p. 264).

Finally: what to do with(out) law

Contrary to popular understanding I am in agreement with [Robert Knox](#) (we wrote our PhDs together, too) and do not hold an entirely nihilistic view with regard to law. The argument is rather that we must look at it defensively and tactically, but most importantly that we must look beyond it, as it alone or of itself is not going to generate the social change we want and need. As Marx said in his [Critique of the Gotha Programme](#), "Right can never be higher than the economic structure of society and the cultural development conditioned by it." Direct action and mass organising (however one understands that) is therefore needed to bring about real change, either the societal change that allows for legal change (reform), or the transformative change that breaks down the current structures and allows a new world to be built in its place. With Marx, Pashukanis and other Marxists I believe that in post-capitalist society both state and law will 'wither away'. This result will not be achieved by legal means, or through the courts.

As lawyers we tend to have an investment in law that is hard to relinquish. We have studied hard to pass our exams, spent many years learning a special code, language, skill that in England allows us to wear wigs and robes and speak Latin. As lawyers we have status and gain respect from our families, society at large at least traditionally speaking, and there is no worthier profession than being a human rights lawyer. We get to be heroes speaking truth to power, standing up in lofty court rooms representing the underdog. Law, and especially human rights is almost universally accepted as a [good thing](#).

In my Chapter 6 I respond to the concerns Miriam raises. I do not say that there is no value at all in human rights litigation. I absolutely accept (and say so in the book) that law, and the fulfilment of certain rights, is a [life or death necessity](#) for some/many people. And still, human rights litigation is beset with all sorts of problems, most significantly, the fact that human rights law limits what we can ask for. Translating harm and violence into a claim actionable in a court by necessity reduces, erases, individualises. It leaves alone the structure giving rise to the problem. And eventually, it commodifies and allows for exchange. It is certainly the case that mobilising around a human rights claim can be empowering, can lead to an increased awareness and publicity around the issues faced by people at the sharp end of corporate wrongdoing, and this is why such litigation must always be accompanied by media work, and other forms of agitation. Rarely though do these cases result in a concrete win, because the system (law) is not designed to grant such a win. Human rights law [legitimises the system](#) which holds rights (such as the economic social and cultural rights Miriam mentions) up to us as a carrot, or

as a dream, forever deferred. I am also not wholly anti-reformist: for example, I am a union organiser in the [University and College Union](#) in the UK and daily fight for the rights of increasingly precarious education workers. I am grateful to those workers before me who ensured the 8-hour day through their collective direct action, [as Marx described in Capital](#). Legal and rights battles are won on the streets, in busses, schools and factories; courts and legislators only follow when the battle is already won (and, as most obviously in the case of the Factory Acts, in order to save capitalism from itself). I too have been a human rights activist for many years. Of course, we must also use law defensively, in defence of comrades arrested, evicted, incarcerated, deported, persecuted, claiming asylum. At the same time, our legal training and analytical skills allow us to do many other and arguably [more transformative](#) things.

There is a lot we can do once we realise that neither cause lawyering nor [academic work](#) is going to achieve the liberation we crave. We can engage in [movement building](#), build [alternatives](#), alternative ways of [producing](#), [relating](#), [resisting](#). We can [re-common private spaces](#) and build [dual power](#) through [mutual aid](#), [commoning](#), [cooperatives](#). And some of this can even include legal work. For example, working to support [houseless people](#), [tenants](#), [migrants and asylum seekers](#) with fulfilling their immediate needs and protection from the violence of the system. You could update the [protest handbook](#). You could do [arrestee support](#) or [represent activists in court](#). You could build [left infrastructure](#), you could update the squatters handbook, build an [abolitionist movement](#). You could be a [photographer](#), [journalist](#), independent [film maker](#), writer, you could practice alternative forms of living and decision making and [write about them](#) so that others may learn from them, you could [organise an occupation](#), you could buy a boat and take it to the [Mediterranean](#), you could [occupy a hotel](#) and house refugees. Finally, there is still important archival and analytical work to be done – in particular on racial capitalism, supporting the work done by researchers such as [Eddie Bruce-Jones](#) and [K-Sue Park](#) for example.

I am sorry to hear that Marisa McVey finds my conclusions depressing. I would like to invite Marisa, to experience the shedding of a false ideology as liberating! While I do (with Horst) see a role for cooperatives and other more progressive organisational forms in a transition to a post-capitalist world – and the legal registration of such coops, contracts etc will probably remain essential while we still operate within a capitalist world. Ultimately though, in a post-capitalist society, as an autonomist Marxist I am committed to horizontal agreement and decision making and oppose the notion of a rule enforceable by a hierarchically placed third party or institution. I invite you also to imagine what a world would look like without state, and without law. Could it build on the consensus decision making, mutual aid principles, [activist protocols](#), restorative and [transformative justice](#) programmes currently proliferating in our pandemic world? This, to me, is where the excitement, and my next book project, begins.

Grietje Baars, *The Corporation, Law and Capitalism. A Radical Perspective on the Role of Law in the Global Political Economy*, Brill 2019. [Out in Paperback with Haymarket Books, April 2020.](#)

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Cite as: Grietje Baars, "Perfect Pandemic Reading", *Völkerrechtsblog*, 21 June 2020.

