

Law(yers) congealing capitalism:
On the (im)possibility of restraining business in conflict through
international criminal law

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I, Grietje Baars, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

The theme of ‘business in conflict’ has become a ‘hot topic’ and the subject of many academic and policy publications. The trend in this literature is to conclude that ‘corporations have (or *should* have) obligations under international human rights and humanitarian law’ and that ‘corporations must be held to account’ through law, for example for ‘complicity in international crimes’.

With this thesis, I aim to present a counterpoint to this literature. Employing dialectics as methodology and a theoretical frame based on Pashukanis’ commodity form theory of law, I investigate the progeny and role of law as *sine qua non* of capitalism. I establish that capitalism’s main motor, the corporation, was developed as a legal concept to congeal relations of production and minimise risk-exposure of the capitalists. Moreover, the corporation served as an instrument of imperialism and the global dissemination of capitalist law. Post WWII international criminal law (ICL) was developed ostensibly as an accountability mechanism. I show that it was used, contrary to early indications, to *conceal* rather than address the economic causes and imperialist nature of the war, so as to enable the continuation or rehabilitation of trade relations. ICL has been institutionalized over subsequent years and has continued to immunize economic actors from prosecution, including in the ICTR and ICTY. Yet, ICL’s strong appeal has led ‘cause lawyers’ to seek corporate accountability in ICL, largely unsuccessfully. Combined with (legalized) ‘corporate social responsibility’, ‘corporate accountability’ discourse risks becoming an instrument of legitimization for the liberal capitalist enterprise. Especially, including the corporation as a subject of ICL would complete its reification and ideological identity as a political citizen exercising legitimate authority within ‘global governance’. In conclusion, while emancipation from corporate violence cannot be achieved through law, its promise lies in counter-systemic activism and, with that, human emancipation.

For my parents

*The law locks up the man or woman
Who steals a goose from off the common,
But leaves the greater villain loose
Who steals the common from under the goose.*

(15th Century English rhyme, anonymous)

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List of abbreviations

AFPS	Association France Palestine Solidarite
AIA	Association Internationale Africaine
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
BACAR	Banque Continentale Africaine au Rwanda
BASF	Badische Anilin- und Soda-Fabrik
BIT	Bilateral investment treaty
C	Century
CAT	Convention Against Torture
CCL	Control Council Law
CCR	Centre for Constitutional Rights
CEO	Chief Executive Officer
CIA	Central Intelligence Agency
CIL	Customary International Law
CL	Criminal law
CNN	Central News Network
Co	Company
Corp	Corporation
DEICo	Dutch East India Company
DEST	Deutsche Erd- und Steinwerke
DLH	Dalhoff, Larsen and Horneman
DRC	Democratic Republic of Congo
ECCHR	European Center for Constitutional and Human Rights
EDO	Earl Dodge Osborn
EU	European Union
FBI	Federal Bureau of Investigations
FDI	Foreign direct investment
FDN	Fond Defense National
FEC	Far Eastern Commission
FEC	Far Eastern Committee
FRG	Federal Republic of Germany
FRUS	Foreign Relations of the US
FYR	Former Yugoslav Republic
GATT	General Agreement on Tariffs and Trade
GCC	Global Capitalist Class
GDR	German Democratic Republic
GWC	Global Working Class
HGW	Hermann-Göring-Werks
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International criminal law
ICSID	International Center for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IG	Industriegesellschaft
IHL	International humanitarian law
IHRL	International human rights law
IL	International law

ILC	International Law Commission
ILIP	International law of investment protection
ILP	International legal personality
IMF	International Monetary Fund
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JAG	Judge Advocate General
JCE	Joint Criminal Enterprise
JCS	Joint Chiefs of Staff
JSC	Joint Stock Corporation
LoC	Library of Congress
Ltd	Limited
MaNGO	Market-oriented non-governmental organisation
MNC	Multi-national corporation
MP	Member of Parliament
MPEPIL	Max Planck Encyclopaedia of International Law
MRND	National Republican Movement for Democracy and Development (French: Mouvement républicain national pour la démocratie et le développement)
NAFTA	North American Free Trade Agreement
NATO	North-Atlantic Treaty Organisation
NGO	Non-governmental organisation
NIEO	New International Economic Order
NMT	Nuremberg Military Tribunal
OECD	Organisation for Economic Cooperation and Development
OMGUS	Office of the Military Government of the US
OSI	Open Society Institute
OTC	Oriental Timber Company
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PoW	Prisoner of War
RAID	Rights & Accountability in Development
Res	Resolution
RTL	Radio Télévision Libre Mille Collins
RUF	Revolutionary United Front
SCAP	Supreme Commander of the Armed Forces
SCSL	Special Court for Sierra Leone
SD	Sicherheitsdienst
SMT	Soviet Military Tribunals
SS	Schutzstaffel
SWNCC	State War Navy Coordinating Committee
TNC	Transnational corporation
TRC	Truth and Reconciliation Commission
TVPA	Torture Victims Protection Act
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United National Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States

USD	United States Dollar
USSR	Union of Socialist Soviet Republics
VOC	Verenigde Oostindische Compagnie
WB	World Bank (International Bank for Reconstruction and Development)
WCCLR	United Nations War Crimes Commission
WTO	World Trade Organisation
WVHA	Wirtschaft und Verwaltungshauptamt
WWI	First World War
WWII	Second World War

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1 Introduction

1.1 “Global corporate rule is here” and the liberal approach

It seems customary to start a text in the now rather voluminous literature on ‘business and human rights’ broadly conceived, with the statement, that ‘*global corporate rule is*

¹ Literally, “the capital that is always behind it”. I owe this phrase to Fabian Schellhaas, who used it in his March 2010 presentation in Prof. Werle’s Doktorandenseminar at the Humboldt University of Berlin.

here'.² Bakan, author of *The Corporation: The Pathological Pursuit of Profit and Power*, opens as follows:

*Today, corporations govern our lives. They determine what we eat, what we watch, what we wear, where we work, and what we do. We are inescapably surrounded by their culture, iconography, and ideology. And, like the church and the monarch in other times, they posture as infallible and omnipotent, glorifying themselves in imposing buildings and elaborate displays. Increasingly, corporations dictate the decisions of their supposed overseers in government and control domains of society once firmly embedded in the public sphere. The corporation's rise to dominance is one of the remarkable events of modern history...*³

Moreover, Shamir tells us:

*Multinational corporations (MNCs) dominate the global economy, accounting for two-thirds of global trade in goods and services. Of the one hundred largest world economies, fifty-one are corporations. The top two hundred corporations generate 27.5 percent of the world gross domestic product and their combined annual revenues are greater than those of the 182 states that contain 80 percent of the world population. The combined sales of four of the largest corporations in the world exceed the gross domestic product of Africa.*⁴

Such a text will then commonly proceed with a descriptive section, outlining, for example, that 141 corporations were implicated in the Congolese genocide,⁵ or that Shell was behind the killing of Ogoni Valley human rights activist Ken Saro Wiwa,⁶ or more broadly, that (Western) multinationals (a result of recent globalization) are involved in conflicts around the world, variously causing, financing, or more generally profiting from them, while becoming directly or indirectly implicated in the human rights violations and international crimes that inevitably seem to occur in such conflicts.⁷ It then analyses whether corporations (usually seen only from the aspect of

² E.g. Shamir (2005) 92.

³ Bakan (2004) 5. For another version of this introduction, see Muchlinski (2007) 3, Zerk (2006) 7-14; Hertz (2001) 8-9; for book-length contemplations of the issue, see, Vernon (1971); Korten (2001); Klein (2001); Barnett (1974).

⁴ Shamir (2005) 92. Also, Sornarajah (2010) 239.

⁵ Stewart (2010).

⁶ E.g. Zerk (2006) 23.

⁷ E.g. Stephens (2005).

the legal person, sometimes also including the individuals ‘inside’) have obligations in international law, and then, based on the answer to that question, proceeding in one of a number of directions. If it is found that yes, corporations have obligations under international law and consequently could be considered liable for violations, the next move is to propose that they be brought before the courts in their home states (usually it is admitted host states would be in a weak position to do so), and/or that the International Criminal Court (“ICC”) statute be amended in order to include legal persons in its jurisdiction.⁸ If the conclusion is that international law does not (normally it is phrased as ‘not yet’) ‘recognise’ corporations’ obligations in international humanitarian law (“IHL”) and international human rights law (“IHRL”) then it is proposed that a new treaty be drafted clearly outlining such obligations, or, it is claimed that the many ‘soft law’ corporate social responsibility mechanisms that exist can adequately ‘fill the accountability gap’ and thus ‘end corporate impunity.’⁹ Sometimes these texts then make mention of ‘successes’ in which corporations paid out millions to hundreds of thousands of victims in settlement of civil compensation claims under the US Alien Tort Claims Act (“ATCA”) for violations of international law.¹⁰ Almost invariably they do not refer to individual liability of corporate actors. The conclusion is always the same: “Corporations must be held accountable!”¹¹ One of the more common calls in recent years is for the use of international criminal law to restrain business in conflict, and it is on this possibility that I focus here.¹²

1.2 Counterpoint: The Question

This thesis is my counterpoint to this story. What I am interested in is the paradox, the existence of which is generally acknowledged by authors writing on this topic,¹³ phrased by Sornorajah as:

[t]he need for regulation of this private power through the instrumentality of international law is a necessary fact which has not been adequately addressed,

⁸ E.g. Burchard (2010); Clapham (2008); Stoitchikova (2010).

⁹ Zerk (2006) 299; and see generally, *UN Legalising CSR Report*, *Ruggie (2009) Report*, *Ruggie (2011) Report*.

¹⁰ E.g. Stephens (2005); Shamir (2004).

¹¹ Zerk (2006), Cernic (2010), Baars (2007).

¹² E.g. Burchard (2010); Clapham (2008); Stoitchikova (2010).

¹³ Bakan (2005), Hertz (2001); Zerk (2006) 299ff.; generally, Glasbeek (2002), Pearce (1990) 430; 436.

*largely because the existence of such power itself ensures that no control is brought about.*¹⁴

My first question is about the nature of this paradox. What is the relation between law and the private power of (multinational) corporations? What *are* corporations, in law and in reality?¹⁵ I query the assumption of many legal scholars: is it even possible to use ICL to hold business to account for their (harmful) involvement in conflict? I answer this using the commodity form theory of law. With this theory, it becomes obvious quite quickly that controlling business through law is not possible, or possible at most to a very limited degree, and why this is so. This is a question of structural determination. Then, using the ‘business in conflict’ context, I investigate how this paradox manifests, by asking two interrelated questions. First, why have the proposed ‘legal solutions’ to the problem of ‘corporate impunity’ either not been realised, or, if realised, why do they not ‘work’ to punish and eradicate harmful business involvement in conflict? This is a question I seek to answer by examining historical and contemporary examples of business in conflict and attempts to hold business(women) and companies to account. The second question is, if it is obvious to Sornarajah and authors like him why no adequate legal control exists, why does he still demand it? This is a question of epistemology and ideology: the role of lawyers (consciously or otherwise) in structuring and supporting (‘congealing’) capitalism. Finally, I raise the question, if restraining business involvement in conflict through the use of ICL is impossible, what is to be done?¹⁶

The context of this set of questions is a time when, despite indications that we should have learnt our lesson from recent financial crises, “[r]eports of the death of the Washington Consensus have been greatly exaggerated.”¹⁷ It is also a time of renewed popular anti-capitalist resistance, most visibly in the global ‘Occupy’ movement.¹⁸ As such, it would seem an auspicious moment to investigate the issue of corporate excess

¹⁴ Sornarajah (2010) 240.

¹⁵ In Ch. 2A I will argue that the legal concept of the corporation is an abstraction of a certain form of social organization.

¹⁶ “What is to be done?” is the classic phrase attributed to V.I. Lenin, which emphasizes the need to turn theory into *praxis* in Marxist thought. I pose the question here but offer only limited examples of what others are attempting *to do* in relation to the issue in Ch. 6.

¹⁷ E.g. Rasulov (2010), and Sornarajah (2010) 77 (who speaks of a ‘retreat of liberalism’).

¹⁸ See, e.g. <http://www.occupytogether.org/>.

and to propose a radically different (at least within the legal literature) perspective on the issue.¹⁹

I focus on corporations, precisely because of this allegation that ‘corporate rule is here’, and because corporations are said to be capable of greater harm than many other players. In particular, these statements intrigue me because of the seeming contradiction between the abstract nature of ‘the corporation’ and its real world effect. I focus on conflict (below I explore the meaning of conflict) and ICL because many of the authors on business and human rights/business in conflict (and general ICL authors) are proposing corporate ICL as a solution to the problem,²⁰ and also, because ICL has in the past been used against business(wo)men involved in conflict (esp. Ch. 3A and 3B below). The discussion, although limited to this narrow area, should be of value in the broader context of business regulation, and more generally the role of law in capitalism also.²¹

2 Theoretical framework

In order to answer the set of questions outlined above, I use a Marxist theoretical framework (Section 2.2-2.4), and method (Section 5).

Hugh Collins, the acrid but astute critic of Marxist approaches to law, explains it thus:

[whereas t]he typical legal theory dispensed in law schools presents descriptions of law, analysis of legal concepts, and inquires into the demands of justice, based upon assumptions about the legitimate authority of the power which is exercised through the institutions of a modern legal system... Marxism is bent upon the overthrow of the existing apparatus of domination, [and thus] its objectives in the study of law differ markedly.”... “The principal aim of Marxist jurisprudence is to criticise the centrepiece of liberal political philosophy, the ideal called the Rule of Law. ...By exposing the structures of

¹⁹ Other recent new Marxist voices in legal scholarship include: Knox (2008); Knox (2009); Miéville (2009); Rasulov (2008); Rasulov (2010).

²⁰ E.g. Burchard (2010); Clapham (2008); Stoitchikova (2010).

²¹ On the role of law to regulate ‘the economic’ generally, see Baars (2011) *Appendix G*.

*domination and subverting the beliefs and values which sustain them, Marxists seek to pave the way towards a revolutionary social transformation.*²²

‘Exposing the structures of domination and subverting the beliefs and values which sustain them’, accurately describes the aim of this thesis. More specifically, I seek to achieve this task as phrased by Chris Arthur:

*The task ... is that of tracing ... both the relationships that are expressed in the legal superstructure and those that it ideologically spirits away.*²³

The claim that adequate regulation does not exist (or is not enforced), because corporate power prevents it, points us to ‘structures of domination’ mentioned by Collins above. Sornorajah’s demand for legal controls may be caused by ‘the beliefs and values which sustain them’ mentioned in the same quote. Marxist theory would seem thus an appropriate framework to help answer my questions, to investigate who it is who is dominating, and through what structures, and what the role of those structures is in the domination. Moreover, since I am focussing on business in conflict, and international criminal law, I will look at the role of law in expressing, affecting, abstracting, shifting and spiring away the relationship, between those who in criminal law terminology would be known as the ‘perpetrator’ and the ‘victim’. Through law, this relationship becomes one between legal persons, and one of the focal points of this thesis is what happens to the human relationship when it is ‘legalised’, especially, when the legal person becomes a reified *corporate* person.

Proposing a radical new approach requires going to the root of the problem.²⁴ The first point for discussion in this thesis, then, is the nature of capitalist law, which I treat in this Chapter. Not many legal texts question the notion that law is inevitable, and good,²⁵ nor deal with the question where the form of *law* came from (as opposed to, where law’s *content*: particular legal norms, or all legal norms, came from), how and why it was created or why *law* specifically was selected as opposed to other forms of social organisation.²⁶ The commodity form theory of law, the Marxist legal theory as

²² Collins (1982) 1. I have reversed the order of Collins’ sentences here, he starts his text with “The principal aim...”

²³ Arthur (1978) 31.

²⁴ Radix is Latin for root.

²⁵ Fox (1993).

²⁶ E.g. Miéville (2005) 59-60.

propounded by Evgeny Pashukanis and elaborated in particular in the area of international law by China Miéville, provides a clear, and persuasive, explanation of *where law comes from* and *why it (was) developed*.

2.1 *The commodity form theory of law – a brief outline*

In his *Law and Marxism: A General Theory*, Pashukanis outlines the commodity form theory of law which holds that law (the legal system) came about as a result of the class struggle between the feudal lords and their subjects, and was fundamental in the transition from feudalism to capitalism, from privilege to law, and, as Maine had said it prior to Marx, from status to contract.²⁷ The emergence of law is explained by the emergence of capitalism, and *vice versa*. This is the starting point of the commodity form theory of law.

Pashukanis explains that the juridical element in the regulation of human conduct enters where the isolation and opposition of interests begins. This is “tie[d] closely to the emergence of the commodity form in mediating material exchanges”²⁸ as described by Marx in *Capital I*.²⁹ At this point man comes to be seen as a legal subject, having legal personality, the bearer of rights as opposed to customary privileges and duties. Thus, the logic of the commodity form is the logic of the legal form.³⁰

In *Between Equal Rights*, Miéville elaborates that, while in commodity exchange, each commodity must be the private property of its owner, freely given in return for the other at a rate determined by their exchange value, each agent in the exchange must be first a property owner and second, formally equal to the other agent(s).³¹ Whereas previously, the formally unequal individuals implied by the hierarchical command relations of feudalism (and other prior forms of social organisation) engaged in unfree transactions, in the transition (from feudalism) to capitalism another specific form of social regulation became necessary, to formalise the method of settlement without

²⁷ Maine (1861) Ch.V. Maine of course had a different normative appreciation for this transition, shown in his “old law fixed a man’s social position irreversibly at his birth, modern law allows him to create it for himself by convention” (Ch.IX); Miéville (2005) 285.

²⁸ Arthur (1978) 13.

²⁹ Marx (1976) 163ff.

³⁰ Arthur (1978) 13.

³¹ Miéville (2005) 78. Miéville has applied his theoretical approach in Miéville (2008) and (2009).

affecting either party's formally equal status. "*That form is law.*"³² "The owners of commodities were of course proprietors even before they acknowledged one another as such, but in a different, organic, non-legal sense."³³

The change occurs gradually, imperceptibly at the time of the growth of the urban middle class, of land enclosures, of technological development enabling the production of a surplus to be taken to market. In Pashukanis' words, "only the development of the market creates the possibility of – and the necessity for – transforming the person appropriating things by his labour (or by robbery) into a legal owner. There is no clearly defined borderline between these two phases. The 'natural' changes into the juridical imperceptibly, just as armed robbery blends quite directly with trade."³⁴ Then, "[o]nly when bourgeois relations are fully developed does law become abstract in character. Every person becomes man in the abstract, all labour becomes socially useful labour in the abstract, every subject becomes an abstract legal subject. At the same time, the norm takes on the logically perfected form of abstract universal law."³⁵ Accompanying the development of the economy based on the commodity and on money, human relations become legal relations, all property is transformed into moveable property, including labour power.³⁶ The *cash nexus* is introduced into all relationships, including relationships of responsibility.³⁷

While legal forms regulate relationships between autonomous legal subjects, the subject is the 'cell form' of the legal system, a basic element of which is contestation (struggle over property). In Ch.2A I describe the becoming of legal subjects of collectivities (polities, corporations, etc.), and later, individuals, in the atomisation process of modernity.

Finally, for law, the fundamental question arises, why the machinery of state coercion is created in the form of an impersonal apparatus of public power, separate from

³² Miéville (2005) 79 (emphasis in original).

³³ Pashukanis (1978) 121. See also Cohen (2000) 217ff, who explains the relationship prior to law as one of power.

³⁴ Pashukanis (1978) 124.

³⁵ Pashukanis (1978) 120.

³⁶ Pashukanis (1978) 40; Marx (1976) 125ff.

³⁷ Pashukanis (1978) 40. On the concept of cash nexus, see Caudwell (1905) 69: "cash nexus which replaces all other social ties, so that society seems held together, not by mutual love or tenderness or obligation, but simply by profit."

society.³⁸ Pashukanis argues, that, although the emergence of the state was enabled by law, it was not *necessary*.³⁹ It was not necessary because of the coercion inherent in the form of law itself (see below). Miéville attaches great significance to this point for the “lawness” of international law, which exists without an overarching authority.⁴⁰ On the usefulness of the state for law, nonetheless, “...coercion cannot appear [in a society based on commodity production] in undisguised form as a simple act of expediency. It has to appear rather as coercion emanating from an abstract collective person, exercised not in the interest of the individual from whom it emanates – for every person in commodity-producing society is egoistic- but in the interest of all parties to legal transactions. The power of one person over another is brought to bear in reality as the force of law, that is to say as the force of an objective, impartial norm.”⁴¹ This is the power, the violence, and the *legitimacy* of law.

2.2 *The form and violence of law: property (and sovereignty) as ‘mine-not-yours’*

A crucial point in this brief exposition of the commodity form theory of law is that of the fundamental nature of property ownership as a legal right. In *Between Equal Rights*, Miéville explains, “[f]or the commodity form itself, dispute, coercion and violence are inherently implied. The notion of ‘mine’ necessary to ownership and commodity exchange is only meaningful inasmuch as it is ‘mine-not-yours’. The fact that something is ‘mine’ necessarily defines it in opposition to a counterclaim, whether or not that counterclaim is in fact made. Disputation, and hence the legal form itself, lurks at the heart of the most peaceful private property relation.”⁴² And thus, “[s]uperordinate and abstract coercion is contingent to the legal form itself.”⁴³ The contestation over property ownership also positions property ownership as the norm (a *Grundnorm* in a manner of speaking⁴⁴) at the basis of other norms⁴⁵ of law as a system of rules, institutions, processes and practices. This aspect is key in this thesis, and will be returned to especially in Ch.6.

³⁸ Pashukanis (1978) 139.

³⁹ Pashukanis (1978) 139: “The state authority introduces clarity and stability into the structure of law, but does not create the premises for it, which are rooted in the material relations of production.”

⁴⁰ Miéville (2005) 124-131.

⁴¹ Pashukanis (1978) 143-4.

⁴² Miéville (2005) 95 (fn.99, emphasis in the original); 96-97.

⁴³ Miéville (2005) 288.

⁴⁴ If not precisely in the manner used by Kelsen in, e.g. Kelsen (2008).

⁴⁵ Cf. Hohfeld (1913-14) 21-3.

3 “Developing the form on the basis of the fundamental form”

Without departing from the main tenets of the commodity form theory of law, I adjust a number of Miéville’s parameters to better fit some aspects of Marxist theory *and* the questions I seek to answer. These relate to my use of a notion of ‘law’ rather than his differentiation between national/international law (3.1); the concept of global classes in preference of Miéville’s emphasis on the international state-system (3.2), and my foregrounding of imperialist economic violence (3.3) perpetrated and participated in by the various types of members of the global capitalist class rather than inter-state war *per se*. In 3.4 and 3.5 I sketch the application of the commodity form theory to my two focal points: ICL and the corporation.

3.1 *Law: Inter-polity law and proto-law*

According to Pashukanis: “[t]he development of international law as a system was evoked not by the requirements of the state, but by the necessary conditions for commercial relations between those tribes which were not under a single sphere of authority.”⁴⁶ In other words, “(proto-) international law predates domestic law”.⁴⁷ Miéville picks up this point and adds that this “has nothing to do with any putative ontological primacy of the international sphere: it is, rather, because law is thrown up by and necessary to a systematic commodity exchange relationship, and it was between organised but disparate groups without such overarching authorities rather than between individuals that such relationships sprang.”⁴⁸ Of course it would be more accurately described as ‘inter-polity law’. Miéville omits one thing, namely that it is also inaccurate to speak of *domestic* law at this point, or of a concept of the domestic beyond the tribal community.⁴⁹ While this adjustment does not fundamentally alter Miéville’s point about the lack of overarching authority at law’s origin, rather an additional point can be made about the common root of international and domestic law – one did not predate the other, in fact, both share the same root, as ‘law’

⁴⁶ Pashukanis (1978) 89. As Weber puts it, “the oldest commerce is an exchange relation between alien tribes.” Weber (1982) 195-8.

⁴⁷ Miéville (2004) 289.

⁴⁸ Miéville (2004) 289.

⁴⁹ In that states with centralised authority in the modern sense did not emerge until at least 1648, and one cannot speak before this point about separate realms of ‘national’ (or domestic) and ‘international’ law in any meaningful way. Cf. Teschke (2009).

undifferentiated, predating the state system.⁵⁰ At this point law/the legal form was not universalised: “[t]he law only held where and when commodity exchange was likely to occur.”⁵¹ In this thesis I emphasise the common root and form of domestic and international law. A second point for the purposes of this thesis can also be made, namely that in the transitional period law’s first persons, the formally equal legal persons between whom the transaction enabled by law took place, were polities, and thus collectivities. As will become clear below, this point is obvious when seen in its historical context, if not through today’s liberal individualist spectacles. In Ch. 2A I discuss the transition from tribal and familial collectivities governed by moral and kinship ties to individual and ‘artificial’ separate legal persons for corporations governed by legal rules, focusing specifically on the reasons for this development.

3.2 *Global classes*

My main departure from Miéville (closely connected to the above) is my emphasis on the global nature of the class system at the helm of which we find mainly (but by no means exclusively) members of the Western elites – active both in business and governance, who have at their disposal law, be it international or domestic, or the more vague notion we now call ‘global governance’.⁵² Pashukanis writes on international law (“IL”): “Bourgeois see international law as a function of some ideal cultural community which mutually connects individual states. But they do not see that this community reflects (conditionally and relatively, of course) the common interest of the commanding and ruling classes of different states which have identical class structures.”⁵³ Contra Pashukanis’ hint at global class society at the basis of IL, Miéville takes a (liberal) statist perspective on IL, viewing states as the ‘atom’, the ‘fundamental contending agents’ of IL.⁵⁴ My view is that we are not only dealing with similar class structures in different states, but that those classes (or rather, members of the same class) are also connected globally, by virtue of mutual/identical interest globally and often also actually as members of global business communities and other class networks.⁵⁵

⁵⁰ Cf. Neff (2010) 6-7.

⁵¹ Miéville (2005) pp128 ff.

⁵² Baars (2011) 429. The notion of global class is the subject of debate, see, e.g. Anievas (2008).

⁵³ Pashukanis (2005) 324.

⁵⁴ Miéville (2005) 173.

⁵⁵ Global business communities: Moses (2008) 7; governance elites: Shamir (2010); Krisch (2009). On the notion of global class, see also Chimni (2011); Rasulov (2008); Sklair (1997).

If we accept with Pashukanis that the State was a ‘convenient’ but not a necessary result of capitalist law,⁵⁶ then we can begin to envisage a ‘pluralist’ Marxist perspective where states are not the atom of IL, but instead, where individuals and corporations and states and other ‘legal persons’ compete on a predominantly⁵⁷ transnational (global) plane.⁵⁸ Miéville (following Pashukanis) argues that the overarching and abstract coercion that the state represents on the domestic plane takes the form of interdependence under the conditions of balance of power⁵⁹ - which is a somewhat outdated, realist international relations perspective.⁶⁰ Instead, a pluralist perspective, or even an individualist perspective better fits with Miéville’s assessment of the origin of law: “The development of law as a system came about as a result of the commercial requirements of disparate groups (tribes, polities) that existed before the state system and thus before any overarching enforcing authority existed. *Ius gentium* was the prototype of the legal superstructure in its pure form.”⁶¹ I elaborate on this development, and global class, in Ch.2.

3.3 *Conflict, violence, imperialism, structural violence*

Miéville argues that violence and coercion are inherent in the commodity relationship itself (as in the ‘mine-not-yours’ illustration above): in international law, “self-help – the coercive violence of the legal subjects [states] themselves – regulates the legal relation.”⁶² Yet Miéville himself makes the classic liberal mistake of placing *war* at the centre of IL, which (as explained above) he conceives as a statist system. In line with my view of a ‘pluralist’ global class society I include the myriad other forms of coercion found in today’s global capitalism, and shift the focus from physical violence (war) to structural violence.⁶³ Structural violence is the opposite of *human emancipation*.⁶⁴ It is *exploitation* in Marx’s sense of the extraction of surplus value from a workforce with no choice but to subject itself to the wage labour system, the

⁵⁶ Miéville (2005) 124.

⁵⁷ The state still carries important functions, not least its judicial arm.

⁵⁸ For a similar critique of Miéville’s emphasis on states as the main actors in IL, see Knox (2009), esp. 418-423.

⁵⁹ Miéville (2005) 129.

⁶⁰ E.g. Krasner (1999) 43ff.

⁶¹ Miéville (2005) 130.

⁶² Miéville (2005) 133.

⁶³ For a similar perspective, see Knox (2009), 423-425.

⁶⁴ Marx (2000) 54.

unfreedom inherent the structural determination. It *does* at times take the form of war/physical violence but much more commonly, it is the everyday economic violence, encroachment and unfreedom the global proletariat, the wretched of the earth,⁶⁵ endure.

Relatedly, Miéville agrees with Pashukanis that “the better part of international law’s norms refer to warfare.”⁶⁶ This may have been the case in Pashukanis’ time, but is no longer so. Much is ‘international economic law’, including also examples of internationalised law in the form of agreements between the various global enterprises and between international organisations and ‘developing’ states, such as loan agreements.⁶⁷ Even if we do agree with Pashukanis that the real historical content of international law is the struggle between capitalist states, and with Miéville that that content is an ongoing and remorseless struggle for control over the resources of capitalism, that will often *as part of that capitalist (‘economic’) competitive process* spill into political violence,” we must take that ‘remorseless struggle’ and its inherent structural violence as a starting point rather than resulting instances of political violence.⁶⁸

3.4 *The commodity form theory and corporations*

The commodity form theory of law allows us to explain and understand the process of development (the *abstraction*) of the legal concept of the corporation out of earlier forms of social organisation, as well as the way in which relationships of responsibility are expressed, abstracted, and shifted by means of company law. I argue in this thesis that such relations of responsibility (in the non-legal sense) are profoundly affected by the creation of the corporation as a separate person in law, in more than one way, which I explain in Ch.2 and illustrate in Chs.3 and 4.

3.5 *The commodity form theory and (international) criminal law*

When all relationships are legalised and members of society become atomised individuals in competition with one another, the violation of certain rights constitutes a

⁶⁵ *The International*; Fanon (1963).

⁶⁶ Miéville (2005) 136 (citing Pashukanis (2005) 322).

⁶⁷ See, e.g. Qureshi (2011).

⁶⁸ Miéville (2005) 139 emphasis in the original.

crime. Criminal law transforms an issue of society at large (certain problems caused by the prevailing mode of production) to an issue (deviancy) of an individual, for which the individual may expect to ‘pay’ in time or money.⁶⁹ The introduction of the corporate legal person into criminal law further changes the relationship between the wrongdoer and the person(s) affected by the ‘crime’ – I elaborate on this in Chs.4 and 6. Criminal law has a special ideological ‘weight’, and, according to Pashukanis, “[c]riminal law is the sphere in which legal relations attain their maximum intensity and, as such, [it] was the dominant bourgeois form of regulation.” Criminal law has this function also when it is not (intended to be) enforced, or only on certain persons and not on others (Chs.3, 5, 6).

4 Beyond ‘nebulous left functionalism’: Further considerations on Marxism & law

Some further attention must be paid to key concepts in Marxist theory and how these affect an analysis of the thesis topic. Marx and Engels themselves never made law a direct object of their inquiry, although they treat it with varying degrees of depth in their works.⁷⁰ The *Communist Manifesto* is a natural starting point on certain key ideas that inform this thesis, in particular class struggle. Further, in *Capital* Volume I (Part VIII) Marx elaborates on primitive accumulation and the repressive use of law in the transition to capitalism. Other texts by Marx of relevance to this thesis, are *On the Jewish Question* (for the concept of ‘human emancipation’ which is contrasted with ‘legal emancipation’ (below Ch.6 S.6) and *Critique of the Gotha Programme* (on the notion of compromise and ‘tinkering on the surface’).⁷¹ Finally, the *German Ideology* offers an impetus toward the critique of the ideological function of law.⁷² Below, I add considerations of determination and totality (4.1), the structure vs agency question (4.2), and law’s emancipatory potential (4.3).

4.1 Law ‘congealing capitalism’: Determination, overdetermination and totality

Rasulov explains that

⁶⁹ Pashukanis (1978) 177.

⁷⁰ Cain (1979) 62.

⁷¹ Marx (2000) 46-64; 610-616.

⁷² Marx (2000) 175-206.

*the development of a consistently Marxist approach to international legal studies must begin... with the production of a general systematic account explaining the basic interrelationship between the historical patterns structuring the global division of labour (and the corresponding extraction of surplus value) and the corresponding institutional forms of the international legal order – in particular, with a view to establishing the latter’s causative contribution to the burgeoning contradiction between the immanent logic of the global productive forces and the corresponding system of the global relations of production.*⁷³

The form and content of law are determined by the mode of production. Law ‘*congeals capitalism*’. Some scholars, for example Marks, consider that economic factors, *among a range of other factors*, set limits on, and restrict the ways in which law may develop.⁷⁴ Others, including Rasulov, consider this determination strictly: “the terms on which other social factors [such as race, gender etc.] *overdetermine* the effects of class struggle are themselves determined, *in the last instance*, by the logic of class struggle.”⁷⁵ In other words, *everything* (all social phenomena) can ultimately be explained in economic terms. As I will show below (Chapter 2), Pashukanis’ General Theory also conforms to this latter point of view, and I employ this here also.

If ‘everything’ is determined by economic base of society, then it follows that everything is interrelated. Global capitalism has “create[d] a world in its image.”⁷⁶ According to Ollman: “Capitalism... stands out from earlier class societies in the degree to which it has integrated all major (and, increasingly, most minor) life functions in a single organic system dominated by the law of value and the accompanying power of money but also in the degree to which it hides and seeks to deny this singular achievement.”⁷⁷ In Marxism the concept of totality “refer[s] to the actuality that phenomena in the world are interrelated, and hence can only be properly understood when viewed as elements within larger social systems, including the system of global capitalism.”⁷⁸ For an example of a very specific interpretation of the

⁷³ Rasulov (2011) at 257.

⁷⁴ Marks (2008) 3.

⁷⁵ Rasulov (2011) at 261 (emphasis added).

⁷⁶ *Communist Manifesto* 47.

⁷⁷ Ollman (2003) 3.

⁷⁸ Marks (2007) 15.

concept of totality, in chapter 2B, I cite the work of Wilson, who uses Immanuel Wallerstein's Marxist-inspired "world systems theory".⁷⁹

I am interested in the dialectical relationship between the material world in which certain intellectual concepts arise, in this case in the sphere of law and business in conflict, how these ideas are translated into legal academic discourse and abstract legal concepts and then, sets of processes, rules, and institutions, that in turn affect material reality. One step in that process is the abstraction performed by lawyers and the fitting in of the abstract concepts into a set of ideas which come to have some internal coherence, a legal system with a (measure of) internal logic *of itself*⁸⁰ - visible at least to lawyers – and *outwardly* creating the illusion of objectivity, *autonomy*.⁸¹ As I try to show, scholars describing, representing, interpreting and *abstracting* the world tend to seek (or give) internal coherence in/to a narrative, which in itself reflects the 'totality' of material reality more or less accurately, at any given point in time, and which affect material reality when such narratives influence, or are transformed into, legal decisions/rules. This is the dialectical process of *law(yers) congealing capitalism*.

4.2 *Lawyers congealing capitalism: Who constructs the structure?*

Marx' methodology of historical materialism takes the "base" of the material reality of economic relations to determine the "superstructure", which includes the political and legal superstructure.⁸² The content of ideas such as law, religion and culture are determined by (or representations of) economic reality (the base), which is determined by the ownership of the means of production, and evolves as a result of a dialectical relationships between the two opposites: "all history is the history of class struggle".⁸³ Putting it schematically, while according to Pashukanis/Miéville the legal *form* itself belongs to the base,⁸⁴ the *content* of norms is supplied by the superstructure, and the evolutionary dialectic between base and superstructure (between material reality and ideas) is what causes change (progress) in society.⁸⁵ Where, then, is the individual in

⁷⁹ Wilson (2008) xi-xiv.

⁸⁰ Generally, Kennedy (1987).

⁸¹ Pashukanis (1978) 93.

⁸² Marx (2000) 425 and see, generally Cohen (2000); Rasulov (2011) 261, Marks (2008) 2-3, Ireland (2002) 126.

⁸³ *Communist Manifesto* 40.

⁸⁴ Miéville (2005) 88, 96; Pashukanis (1978) 93.

⁸⁵ In *Grundrisse* Marx refines the base-superstructure metaphor: Marx (2000) 106-7.

this, what is ‘our’ agency?⁸⁶ Engels said, “Men make their histories themselves, only in given surroundings which condition it and on the basis of actual relations already existing, among which the economic relations, however much they may be influenced by the other political and ideological ones, are still ultimately the decisive ones, forming the red thread which runs through them and alone leads to understanding.”⁸⁷ Man can move only within the parameters of given economic structures. Marks warns legal scholars, who are generally “attentive to the ‘false necessity’ that treats social reality as naturally arising, rather than historically constructed”,⁸⁸ not to fall into the trap of “‘false contingency’ ... according to which injustices appear random, accidental and arbitrary.”⁸⁹ She speaks of ‘planned misery’⁹⁰ in the way that I will discuss ‘planned impunity’ in Marxist terms. What appears to be the key question, thus, is, “who constructs the structure?”

Marx emphasised that current class structure of society, and indeed the economic structure of feudal society, was not simply a result of ‘luck of the draw’ as to who was born a prince and who a pauper, nor was it because some worked hard and others were lazy. In the chapters in *Capital* on primitive accumulation, Marx describes the active, deliberate construction of class society,⁹¹ which was also harrowingly described by E.P. Thompson in his *The Making of the English Working Class*.⁹² Since in the commodity form theory of law, law is an integral part (a *sine qua non*) of the economic structure of capitalist society, the ‘constructors’ of law must be part of my inquiry. There is no structure without agency.⁹³ The dialectic between the individual agency of the jurist, academic author, lawmaker (lawyers, broadly understood) and the structure of law and economic relations is where capitalism is constituted. As noted above, lawyers, through law, *congeal* capitalism.

While Miéville quotes Milliband’s argument that judges make law that accommodates the interests of the class they themselves generally belong too, he continues to argue

⁸⁶ Generally, Callinicos (2004); specifically, Thompson (1963).

⁸⁷ *Engels’ Letter to Borgius*.

⁸⁸ Marks (2008) 15.

⁸⁹ Marks (2008) 15.

⁹⁰ Marks (2011) 57-78.

⁹¹ Marx (1976) 871ff.

⁹² Thompson (1963).

⁹³ On the structure versus agency debate generally, see Callinicos (2009).

that on the international level this is not the case.⁹⁴ My argument throughout this thesis is that this *is* the case, that international law is made by the pluralist conglomerate of global administrators (bureaucrats, oligarchs, global capitalist class, global Hofmafia (Allott⁹⁵), the global judicial cocktail party (Slaughter⁹⁶), global handmaidens (Alston⁹⁷) or global invisible college (Schachter⁹⁸)) *as members of a particular class*, the global capitalist class. In my upcoming chapters I pay particular attention to the personalities behind the content of law, in order precisely to elucidate the dialectic between their agency and the structure (including their class membership).

As Ollman has pointed out, those few who benefit from capitalism use a “mixture of force and guile to order the lives and thinking of the great majority who would benefit most from radical change.”⁹⁹ Susan Marks has described and analysed the various different interpretations of the concept of ideology.¹⁰⁰ The interpretation she encourages critical international lawyers to use, is: “the role of ideas and rhetorical processes in the legitimation of ruling power.”¹⁰¹ I will focus in particular on the ideological function of law both in supporting and legitimating structures in society.

4.3 *Law’s emancipatory potential queried*

Two final points on law and Marxist theory of relevance to this thesis warrant elaboration in this section. They are, the question of law’s emancipatory potential,¹⁰² and the prospect for law in post-capitalist society. As Marx famously held, “all history is the history of class struggle” – progress in society is the result of the struggle between classes over their opposing interests. What utility is law in the struggle of the working class (including, specifically, those affected by the involvement of business in conflict) against the powerful corporations, and/or the individuals business(women) at their core? Miéville states, “[g]iven the widespread though mistaken belief that law is counterposed to power and war, the desire for a rule of law is not surprising. Its

⁹⁴ Miéville (2005) 121, quoting Miliband (1969) 124-6.

⁹⁵ Allott (2002) 380-398.

⁹⁶ Slaughter (2005) 96.

⁹⁷ Alston (1997) 453.

⁹⁸ Schachter (1977) 217.

⁹⁹ Ollman (2003) 11.

¹⁰⁰ Marks (2000) 8-10, and see also 18-25.

¹⁰¹ Marks (2008) 7.

¹⁰² See further, Baars (2012) in progress.

extension is held to be an emancipatory project, internationally and domestically.”¹⁰³ Yet, since law, in the commodity form theory of law is an inherently capitalist instrument (*qua* form, regardless even of content) based and built on the *Grundnorm* of private property ownership and inhering between formally equal legal subjects, it cannot but serve the interests of capital and reflect the underlying economic relations. As Marx said, “[r]ight cannot be higher than the economic structure of society.”¹⁰⁴ Legal struggle can at times yield progressive results (Ch3A, Ch5, Ch6), but, on law’s emancipatory potential, we can generalise Arthur’s statement,

*No amount of reformist factory legislation can overcome the basic presupposition of the law: that a property freely alienated belongs to the purchaser, and hence that the living labour of the worker becomes, through exchange, available for exploitation by capital.*¹⁰⁵

As a corollary to this, it can be said that law’s form is not an empty vessel into which we can pour any content.¹⁰⁶ Because of law’s *form*, moreover, there is no possibility of socialist law (see further below Ch.6 S.6).¹⁰⁷

5 Methodology

It could be said that by adopting the commodity form theory of law, the question of this thesis would be answered very quickly. If law is a tool to perpetuate class rule, then of course the application of ICL will not counter business involvement in imperialist wars and other situations of exploitation and abuse, if such is economically rational. However, the story does not end here. In order to understand the current situation (‘corporate impunity’ for involvement in conflict, and lawyers demanding corporations be held to account in ICL, in vain), we need to understand how the story arose and developed and how it fits into the larger context of which it is a part.¹⁰⁸ If we see the ‘corporate impunity’ and lawyers’ call as ideas, we must examine what they reflect, and how they may look different from different perspectives (e.g. from the capitalists’, or from the workers’/’victims’), what its internal contradictions are, etc.

¹⁰³ Miéville (2005) 315.

¹⁰⁴ Marx (2000) 615 (*Critique of the Gotha Programme*).

¹⁰⁵ Arthur (1978) 31.

¹⁰⁶ Arthur (1978) 29.

¹⁰⁷ Cf. e.g. Stuchka (1988) 180.

¹⁰⁸ Ollman (2003) 13.

The broader context of these ideas is the mechanisms and methods with which law is used to achieve class ends, how law and legal institutions reflect this, how economic relations are produced and reproduced through or with law, and what lawyers' role is in this.

As inspiration and guidance for the dialectical method I use Bertell Ollman's *Dance of the Dialectic*.¹⁰⁹ Ollman describes Marxist dialectics as "a way of thinking that brings into focus the full range of changes and interactions that occur in the world."¹¹⁰ Replacing common notions of 'thing' with notions of 'process' and 'relation' allows us to understand how processes have developed up to the 'now' point, and how they may continue to develop into the future, as well as how they relate to other processes. As such, it takes us away from considering that things just 'are' (this perception is an effect of ideology¹¹¹) and points us towards processes of continual change. It moreover allows us to discern our role in shaping the past, as well as realise our power to affect the development into the future.¹¹² The 'seed of the future' is present in the contradictions in the current situation – and I identify and emphasise these throughout the thesis.

In this thesis I aim to deduce the workings of capitalism and law not from the meaning of Marxist or other concepts or theories, but (after having examined the system in broad terms in this Chapter) from material reality both now and historically, using a wide variety of sources.¹¹³ In Ch. 2 onwards, then, I 'rise from the abstract to the concrete', or 'from the general to the specific'.¹¹⁴ Of Ollman's 'dance of the dialectic', I undertake the first three steps: (1) analyse (look for connections in the capitalist present), (2) historicise (look for the preconditions of the most important of these connections in the past, and (3) visionise (project major social contradictions forward from the past, to their resolution and beyond in the future), while leaving (4) organise (look for preconditions of such a future in the present and use them to develop your political strategy) to life outside this thesis.¹¹⁵

¹⁰⁹ Ollman (2003).

¹¹⁰ Ollman (2003) 12.

¹¹¹ Ollman (2003) 14.

¹¹² Ollman (2003) 20.

¹¹³ Ollman (2003) 19.

¹¹⁴ Marx (2000) 385-393 (*Grundrisse - Introduction*).

¹¹⁵ Ollman (2003) 169 (includes illustration).

6 Thesis structure– the long and short story arcs and themes

The structure of the thesis is as follows. I have divided the some of the chapters into A and B (and in one case C) sections which each contain part of a story, in order to show and emphasise the dialectical interrelation between (and interpenetration of) the two (and three) sides.

Having in Ch. 1 examined the *system* of law and capitalism within which the thesis question is located, in Chapter 2A I start at the root of the issue of ‘corporate involvement in conflict’, with the question what is a corporation and when, how and why was it first developed? I track the development of the legal construct of ‘the corporation’ (the *corporate form*) by the capitalist class to be one of the main vehicles for accumulation in the transition to capitalism. I argue here that in order for it to fulfil that function, the capitalist class developed this legal structure as a ‘structure of irresponsibility’, a separate, reified legal person that enables business(wo)men to be shielded from liabilities of different kinds.

In Chapter 2B I investigate the role of the corporation in the development and spread of IL, in particular as a tool for colonialisation and the creation of modern states: in the early 20thC we see the division of IL into public (political/humanitarian) and private (economic) spheres as an ideological device for the protection and furtherance of capitalist interests. I also look at the ideological role and effect of functional fragmentation of IL, and show how this conceals the inconsistency of the status of corporations as legal persons in some areas of law (related to investment protection), but not in others (related to responsibility). There is clearly a contradiction between the corporation’s personality (reification) on the ‘economic’ side of IL, and its invisibility on the ‘humanitarian’ side. Here I comment on how this contradiction is causing change, in scholarly conceptualisations of ‘global pluralism’ and ‘global governance’, and potentially the demise of this divide.

Then in 3A I pause at the post WWII moment of ‘Nuremberg’ and the attempts to hold cartel directors to account for ‘corporate imperialism’ and the development and application of international criminal law in the face of competing interests of public and private (economic) nature at the subsequent trials. In 3B I describe the clash of ideologies at the Tokyo Tribunal where economic interests prevailed: the US

occupation leadership decided not to try ‘corporate imperialists’ but instead to implement wholesale economic reform in Japan. The (desired) effect of Nuremberg and Tokyo has been the creation of a specific narrative of (the causes of) WWII, excluding the economic causes and actors – and, effectively, through this excluding economic actors from the scope of ICL.

ICL lay dormant (at least in terms of application) during the Cold War but post-1989 it was rediscovered and to some extent *reimagined* and re-written. In Ch. 4A I describe and evaluate the conscious creation (mostly by academic lawyers) of the tool of international criminal law post Cold War, liberal and legalist ICL discourses which figure ICL as the completion of the international law enterprise, and a liberal saviour. I contrast this with Pashukanis’ comments on the commodified visceral element of criminal law. Then in Ch. 4B I examine lawyers’ work in abstracting relationships of responsibility in the development of ICL’s ‘modes of participation’ and ‘degrees of liability’ – which – I argue – make ICL eminently applicable to business. In 4C I investigate ICL’s internal contradictions on individuality/collectivity and the putative liability of the corporation as a ‘legal person’ proposed by academic lawyers and others.

The almost complete non-application of ICL to business in conflict (even in situations where businesspersons/companies were clearly implicated) betrays the ‘capitalist logic’ of IL, I argue in Ch. 5, where we see that as in Nuremberg and Tokyo, ICL is used to create narratives that exclude the economic causes of conflict, to shield particular actors, and to form a ‘distraction’ for the implementation of far-reaching economic (liberalising) reforms.

In response to the perceived ‘corporate impunity’ however (Ch. 6), ‘cause-lawyers’ and human rights activist have tried to hold businesses to account through strategic litigation, and failed (but causing a corporate legitimacy backlash AND while *legitimising* IL by retaining a commitment). In Ch. 6 I also discuss the corporate response to the backlash: the creation of ‘corporate social responsibility’ which is ‘privatised law’ fitting into the current neoliberal global governance set-up (corporate rule as the completion of capitalism). However, anti-capitalist resistance outside/against the structures of law has also seen a recent increase.

7 Impact: And the point is to change it?

Famously, Marx said, in the *11th Thesis on Feuerbach*: “Philosophers have interpreted the world in various ways, but the point is to change it.”¹¹⁶ Aside from the academic purpose of the work, with this thesis, I have one specific practical aim.

In this thesis I examine both legal scholarship and legal practice. The examination of practice is inspired by the work of practising lawyers I have met over the years and also my own time in practice. Michael Sfar, one of the best-known anti-occupation lawyers working in the Israeli court system has expressed the need for academic reflection on cause lawyering practice, and in particular, how such practice may form the oxygen/lifeblood of the system of oppression it is seeking to overturn. He argues that practising lawyers’ ethics prevent them from turning away individual clients whose lives might be marginally improved through litigation, in favour of the ‘collective struggle’ (which may be helped by, say, boycotting the courts).¹¹⁷ The onus of finding the answers, he argues, is on legal academics. Legal academics in his view have the obligation to rise above the perspective of individual cases and provide practitioners with a better understanding of how human rights litigation in mass abuse cases works to sustain the system. “By uncovering the truth about the limited success of human rights victims in a given legal system, and by pointing to the processes that transform these limited successes into regime-empowering tools, academic debate is likely to weaken these tools. Since at least some of the perils listed [in his article] are vested in the image-creating force which ... opposition grants the regime, revealing them may diffuse their sting. This can only be done by academics. And they have failed to do so for all too long.”¹¹⁸ Sfar and practitioners like him are not helped by the fact that almost all of academia, especially in the human rights field (and in the “business and human rights” field) is unwaveringly “pro-human rights”, and without Sfar’s sobering (demystifying) practice experience adhere to the romantic notion of HR and ICL as the liberal saviour, and more broadly, of law being generally, or even potentially, a good thing.¹¹⁹ Engels exhorts us to ‘take off our law-glasses’, to set aside

¹¹⁶ Marx (2000) 173. The central hall of the Humboldt University in Berlin (Marx’ alma mater) still prominently displays this statement, apparently much to the chagrin of the current board of the university, who cannot take it down as the hall in its entirety was declared a ‘listed building’ before the end of the GDR. This, they cannot change.

¹¹⁷ Sfar (2009) 49.

¹¹⁸ Sfar (2009) 49.

¹¹⁹ Fox (1983).

our *juristische Weltanschauung*,¹²⁰ and to cease seeking solutions to world problems in law, against our better knowledge.¹²¹ It is my aim to show how a ‘materialist’ approach to business and HR can offer a critical analytical ‘real world’ perspective, that I hope responds in some small way to Sfarid’s critique.¹²²

8 Future research

This project has already spawned further research to be published separately: an in-depth treatment of the Nuremberg cases relying on primary sources, some of which have not been treated in the literature before (in progress), a shorter piece on Nuremberg’s role in consolidating US economic hegemony over Europe (forthcoming),¹²³ and articles on the commodity form theory and the regulation of the economic (*Appendix G*), and law’s emancipatory potential and cause-lawyering (in progress).¹²⁴

9 A note on references and language

For ease of reference I have used short form references and included both an alphabetical bibliography and a bibliography organised by type of source. All translations from German, French and Dutch are my own.

10 Law

Higgins has said, “[c]hanging economic contexts and changing political perceptions condition legal answers.”¹²⁵ Law is dynamic, constantly changing, adapting as material conditions change. What is “law” at any given point in time is impossible to pin down. With this caveat, I can state that I have endeavoured to describe legal processes, relations and events up to and as at November 2011.

¹²⁰ Lit. juridical world-view (Beirne (1977) 199).

¹²¹ Kropotkin (undated, unpaginated).

¹²² Further, Ollman (2003) 20.

¹²³ A publication based on the symposium ‘Untold Stories: Hidden Histories of War Crimes Trials’ held Melbourne Law School 14-16 October 2010 is forthcoming with OUP (2012) and will include a paper I presented based on the research underlying Chapters 3A and 3B, entitled “*Capitalism’s Victor’s Justice? The hidden story of the prosecution of industrialists post-WWII and subsequently*”.

¹²⁴ Estermann (2012).

¹²⁵ Higgins (1999) 87.

Chapter 2A: The roots, development and context of the legal concept of the corporation: The making of a structure of irresponsibility

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1 Introduction to A and B

In this Chapter I describe and analyse the roots and the development of the concept of the company in domestic law and its ‘reification’, on the one hand (Part A), and the place of the company in international law, on the other (Part B). What I will show is, on the one hand, how the formal legal concept of the company was developed during the transition to capitalism around the same time as the modern state form to replace relations of kinship and trust with ones of contract, partly to ensure acquisition, and then stability of ownership of the means of production and to enable the extraction of surplus value. As a corollary to this, through what Weber calls ‘calculable law’,

responsibility becomes a commodified concept capable of being expressed in terms of value (and therefore of being exchanged). On the other hand, the formal legal concept of the corporation with separate legal personality was reified in law (and in the public imagination), in order to externalise as much as possible the individual as a legally relevant agent in a specific context, to externalise individual responsibility by hiving off risk and displacing potential liability, and to render ‘accountable’ and exchangeable that which is not externalised. This construction makes the corporation capitalism’s main motor.¹²⁶ The corporate form enables, and even (through its profit mandate) demands ‘irresponsible’ behaviour where such leads to profit maximisation, which is the ‘imperialism at the heart of the corporate form’.¹²⁷ The specific characteristics of the corporation were each developed as a result of specific historical circumstances and in order to facilitate the advent of bourgeois capitalism. In the historical examples described in this chapter, I show that also in instances where the corporate form does not (perfectly) achieve the displacement of risk, political leaderships and the judiciary as members of the same class generally assist in the protection of capital. Moreover, the current explicitly pro-capital body of scholarly and instructive work in company law aids the legitimisation and consolidation of the *status quo*. As discussed in Part B, the corporation was a main vehicle for spreading capitalism and capitalist IL around the world, as a vehicle of colonisation, and later as a vehicle of concealed ‘neo-colonialism.’ Both are manifestations of the imperialism inherent in the corporate form. The development of IL consistently follows the logic of capitalism and through it, corporate interests are protected, at times through obscuring corporations’ violent past (and present), through instigating a public/private divide in IL, and thus walling off the corporate domain and through creating sui generis regimes such as ‘international law of investment protection’ and mechanisms such as investment arbitration.

International law, especially in the past 60 years, has been said to be moving towards ‘individualisation’, both in the fields of rights and responsibilities, in particular in the creation of international human rights and humanitarian law, and its corollary international criminal law.¹²⁸ This needs to be seen in a context of an accompanying

¹²⁶ Glasbeek (2010) 249.

¹²⁷ I use the term imperialism more broadly here than the commonly used Marxist understanding of imperialism as a specific phase of capitalism, but, with Miéville, as a “defining structural elements of actually-existing capitalism” which is manifested in myriad ways and forms (Miéville (2005) 273).

¹²⁸ E.g. McCorquodale (2010) 284.

trend (to some extent perhaps more of an ideological or epistemological mood) towards the “neo-medievalism” of global governance¹²⁹ (where the GCC acts through both state and corporation as normative agent¹³⁰) and more generally the critique of hegemony/imperialism.¹³¹ At the same time, the explicit logic of capitalism has made room for an outspoken discourse of ‘humanitarianism’.¹³² In the conclusion of this chapter I discuss the obvious conflict this creates in the conceptualisation of the (multinational) corporation in international law, and point at the opportunities this creates. There is an inherent tension between the corporation as a subject of IL and the trend to individualisation in IL, in other words, the dialectic between the form of international law, its subjects (states, corporations, individuals?), and its content. The underlying question – and a ‘red thread’ through this thesis - is whether the content of law which, as I argue, follows the logic of capitalism, is capable of adopting ‘humanitarian’ or perhaps anti-capitalist logic (the question of ‘law’s emancipatory potential’) – and if not, what we are to make of the apparently, outwardly humanitarian content of some IL.¹³³

2 Introduction to A: The ‘back story’ of the legal concept of the business company

It is said is that the corporation, in its various, comparable legal forms, has become the predominant medium for ‘doing business’ worldwide. According to Farrar:

*The company, incorporated under the successive Companies Acts, is a dominant institution in our society, all the more so with the retreat in recent decades of the government-owned or public sector of the economy from a number of areas in which it previously had been a monopoly or near-monopoly provider of services or, less often, of goods.*¹³⁴

¹²⁹ E.g. Krisch (2009) 16; Paulus (2001) 727.

¹³⁰ E.g. Sklair (1997).

¹³¹ E.g. Byers (2003); Anghie (2007).

¹³² E.g. Meron (2006).

¹³³ The next logical question would be how the ‘humanitarian’ goals are to be achieved, if not through law. I will offer some examples/attempts in this regard in the final chapter of this thesis.

¹³⁴ Davies (2003) 1 (first sentence of the book).

The company has become the most popular *legal* vehicle for business, in comparison with various forms of partnership (the more recent including the LLP which approximates the corporate form).¹³⁵ This is the case in the UK, but also in the rest of the world. The multi- or transnational enterprise, or global corporate group, is “perhaps the most talked about form of business association in the contemporary ‘globalising’ world and economy.”¹³⁶ In this chapter, I examine where the *corporate form* came from and how each of its key elements was developed in its specific historical context.

As Dewey noted on one particular key aspect of the corporate form in his article *The Historic Background of Corporate Legal Personality*, the controversies surrounding corporate legal personality:

*and [its] introduction into legal theory and actual legal relations, express[es] struggles and movements of immense social import, economic and political. ...To answer this question [how legal doctrine and external factors relate] is to engage in a survey of the conflict of church and empire in the middle ages; the conflict of rising national states with the medieval Roman empire; the struggle between dynastic and popular representative forms of government; the conflict between feudal institutions, ecclesiastic and agrarian, and the economic needs produced by the industrial revolution and the development of national territorial states; the conflict of the “proletariat” with the employing and capitalist class; the struggle between nationalism and internationalism, or trans-national relations, to mention only a few outstanding movements.*¹³⁷

Thus, in this Chapter I will seek discover which particular struggles took place resulting in the concept of the corporation, focussing in particular on the question of responsibility. As will become clear, the history of the corporation is part of the western/European history of social organisation, and the development of modern capitalism more generally. I will show how the idea of corporate personality came about partly as a papal ‘mystification’ and partly as a result of the organisation of the nascent urban middle classes into guilds and boroughs which still shared reward and responsibility but which were able to leverage their collective weight against feudal

¹³⁵ *Limited Liability Partnerships Act, 2000*. Before 1789 partnerships were the main form of business association in England (Getzler (2006) 16).

¹³⁶ Muchlinski (2007) 3.

¹³⁷ Dewey (1926) 664 (*footnote omitted*).

lords and kings. I discuss how these commercial organisations then give rise to partnerships and the early trading companies served as a precursor to the abdication of responsibility to the company per se. In the transition to capitalism then the capitalists-to-be appropriated the means of production and simultaneously created the now landless poor as the workforce for its factories. Development of the corporate form in the industrial revolution reflects the unabated dynamic of synergy and competition between state and capital until it reaches its modern form in *Salomon* and the contemporary multinational corporate group.

As I show in Section 3 below, mainstream scholarship and critical scholarship alike, does not generally put “[c]apital’s *seemingly natural and eternal forms*” to question.¹³⁸ In order to understand what the effect of this silence is on our ability to respond to questions of responsibility in general and the question of liability and business involvement in conflict in particular, it behoves to start here.

3 Epistemology

3.1 *Writing the history out of the corporation*

UK company law textbooks, which are also used for teaching law undergraduates in other parts of the world,¹³⁹ expend increasingly little time on the history of the concept of the corporation.¹⁴⁰ Gower and Davies’ Sixth edition (1997) contained two chapters on the history of company law in the introductory section to the volume, because, as Davies stated:

*this book is concerned with modern company law, but there are some branches of modern English Law which cannot be properly understood without reference to their historical background, and company law is one of them; indeed, of all branches of law it is perhaps the one least readily understood except in relation to its historical development, a somewhat extended account of which is therefore essential.*¹⁴¹

¹³⁸ Ireland (1987) 163.

¹³⁹ For example, outside the UK they are used in Israel.

¹⁴⁰ Dignam (2009) (one page, 8-9), Pennington (2001) (no history); Morse (2005) (has two and a half pages on the development of company law on pp. 4-6); Hicks (2008); Davies (2003) and (2008), Farrar (1998); Hannigan (2003) (no history); French (2009) (some history).

¹⁴¹ Gower (1997) 18 (footnote omitted).

Nevertheless, the Seventh Edition of 2003, omits the two historical chapters in favour of a “more functional introduction”,¹⁴² congruent with most of the UK, but also continental European¹⁴³ and North American¹⁴⁴ textbooks on company law. Societal context is also not a favourite topic of scholars writing on company law – company law is generally taught from the “inside” – from the point of view of the corporation, its structure, mechanics, its directors, and its shareholders.¹⁴⁵ Company regulation is usually discussed in terms of expediency from the point of view of the business enterprise, and, more generally, the market. Kraakman et al. describe the majority view: “the appropriate role of corporate law is simply to assure that the corporation serves the best interests of its shareholders or, more specifically, to maximise financial returns to shareholders or, more specifically still, to maximise the current market prize of corporate shares.”¹⁴⁶ This is because,

*the maximization of shareholder returns is in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare. In general, creditors, workers, and customers will consent to deal with a corporation only if they expect themselves to be better off as a result.*¹⁴⁷

This view is the modern incarnation of Adam Smith’s famous aphorism “[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own self-interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”¹⁴⁸ The role of company law in capitalism is expressed in the

¹⁴² Davies (2003) vi.

¹⁴³ Meier-Hayoz (2007); Böckli (2004), Kalls (2008) (very brief description of history); Umfahrer (2008); Wilhelm (2009) (seven pages on “Die Zeit bis zum AktG von 1965”: 21 “Die AG ist die Rechtsform der Industrialisierung”); Raiser (2006) (two pages on 18th/19thC.); Di Sabato (1995); Cozian (2004) debates the nature of the company of the past: “Les temps ont change et les querelles académiques ne sont plus de mise. La mode est aujourd’hui au libéralisme et au recul d’État. L’ère des nationalisations est révolue; celle des privatisations est envoie d’achèvement. Le nouveau droit des sociétés, qui est encore à construire, ce signalera par la confiance restituée aux associés, et la réhabilitation de la liberté contractuelle. C’est l’ère de la deregulation.” (2)); van Schilfgaarde (2006).

¹⁴⁴ Henn (1983) (eight pages of history).

¹⁴⁵ For example, Davies’ (2003) chapter “Advantages and Disadvantages of Incorporation” discusses these issues from the point of view of “the company” (including, to some extent, investors) and not of, say, workers, society large, consumers, etc. Davies holds that, as incorporation has generally worked to the advantage of companies, “[t]he main policy issue, therefore, has been how small firms should have easy access to the corporate form”. (Davies (2003) 27-44).

¹⁴⁶ Kraakman (2009) 28.

¹⁴⁷ Kraakman (2009) 28.

¹⁴⁸ Smith (1776) I.2.2.

opening line of *Pettet's*, “[a]t the heart of the UK capitalist system, the free market economy, lies company law”.¹⁴⁹

3.2 Theory and the ‘big idea’ of company law

There is only a limited body of legal *theoretical* scholarship on the corporation.¹⁵⁰ Such a lack leads authors such as Lowry to suggest “a certain flexibility of mind [is] needed to deal with the legal creation of corporate personality.”¹⁵¹ While remaining unexplained, it has now become a natural accepted part of our existing system, and “[t]here are few topics which seem more thoroughly theoretical ... [and which have been] declared by the courts to be the basis of their decisions and upon which rights in valuable property have been determined and enormous sums of money distributed.”¹⁵²

The modest body of company law theory is predominantly aimed at ‘problem solving’. The first, ‘hegemonic’, category, is that of ‘contractarians’ – law and economics scholars who are closely allied to economic theorists of the firm and concerned with reducing the transaction cost of law while optimising such economic benefits as it may deliver.¹⁵³ A second body of theory is concerned with improving the firm in terms of organisational efficiency,¹⁵⁴ and mainly focuses on corporate governance.¹⁵⁵ A minority of theorists, sociologists and socio-legal scholars, is concerned with the company’s organisational nature and dynamics,¹⁵⁶ and includes studies of ‘corporate crime’ (e.g. Wells¹⁵⁷) (below and Ch.4). Finally there is the company ‘stakeholder’ debate, which allows consideration of factors and constituencies outside the corporation *per se*.¹⁵⁸ What connects all these diverse groups of scholars is that they all accept the inevitable

¹⁴⁹ Lowry (2009) 3.

¹⁵⁰ For an overview, see French (2009) 158-9; Stokes (1986). Mainstream jurisprudence has a sizeable literature on legal personality generally (e.g. Kelsen (2008) 66), but very few scholars of legal theory engage with corporate law, and thus scholarship on legal personality does not cover or explain corporate legal personality. An exception is Hart, who nevertheless concludes we must put aside the question “what is a corporation” in favour of “under what types of conditions does the law ascribe liabilities to corporations” (Hart (1953) 43).

¹⁵¹ Dignam (2009), v.

¹⁵² Radin (1932) 643.

¹⁵³ Talbot (2007) 1.

¹⁵⁴ E.g. Farrar (2008).

¹⁵⁵ Talbot (2007) 1.

¹⁵⁶ E.g. Wheeler (2002); Williams (2002).

¹⁵⁷ E.g. Wells (2001).

¹⁵⁸ Overview: Mayson (2009) 32.

existence of corporations in their current legal form.¹⁵⁹ This includes the ‘big idea of company law’, the company’s separate legal personality.¹⁶⁰

The exact nature in law of the legal person once did “arouse[.] the excited attention of all who have discussed legal theories and of not a few who have professed a profound disinclination to such discussion...”,¹⁶¹ but is no longer the subject of theoretical debate. Nevertheless, and although few contemporary authors make this explicit, different understandings of the nature of corporate personality do affect black-letter accounts of company law.¹⁶² For example, French adopts an ‘artificial entity’ theory of corporate personality, which holds that incorporation creates an artificial separate person, produced by human artifice but treated in law as real.¹⁶³ This perspective is related to the individualist approach to business involvement in crime, which I discuss in Ch.4.

The ‘real entity’ theorists, on the other hand (associated with von Gierke and presently, e.g. with Teubner¹⁶⁴), consider the corporation as an entity *something qualitatively different* from an aggregation of individuals. This perspective underlies ‘system criminality’ arguments like those made by Nollkaemper (Ch.4). Finally the pragmatic ‘concession theorists’ regard as entities those who have been accorded separate personality by Statute, or registration – where the exact content of that personality depends on policy considerations.¹⁶⁵ This category corresponds to pragmatic approaches to legal person liability (e.g. Van den Herik, below Ch.4). Contractarians (by far the largest group) regard the firm as a ‘nexus of contracts’, emphasise freedom of contract (here, the freedom to carry on business activities without state interference) and deny the existence of, or ignore, separate personality.¹⁶⁶ This, the dominant theory, seems least amenable to the idea of corporate crime, and comes closest to the idea that

¹⁵⁹ It is not always possible to distinguish between the various strands, for example, there are the “law & economics” approaches of Roscoe Pound and others, the socio-legal approaches of Wheeler et al, and then there is the “law & socioeconomics” of scholars such as Dallas: Dallas (1988).

¹⁶⁰ French (2009) 3.

¹⁶¹ See, e.g.: Machen (1910); Geldart (1911); Hohfeld 1923; Radin (1932); Maitland (1936); DuBois (1938), Nekam (1938); Cooke (1950). For later treatments, see e.g. Hurst (1970). For a non-anglo-saxon view, see Bastid (1960).

¹⁶² French (2009) 159.

¹⁶³ French (2009) 153, see also Schilfgaard (2006) 1; Radin (1932).

¹⁶⁴ Von Gierke (1958); Teubner 1988.

¹⁶⁵ E.g. Stone (1972).

¹⁶⁶ French (2009) 158-159; generally, Easterbrook (1991).

relations of responsibility are subsumed by ‘risk transactions’ – which I return to below and in Chs.4 and 6.

Critical legal scholars are generally silent on company law.¹⁶⁷ This position is confirmed by Ireland, who, querying why such scholars leave unanswered the ‘perplexing questions’ raised by company law, considers this particularly surprising considering that the corporation is a major site of relations of domination and subordination.¹⁶⁸ Stanley suggests this may be because

*company law may be of such importance within the C.L.S. agenda of critique that no scholar has yet dared to venture into the mire which constitutes the legitimisation system of the capitalist mode of production, the underpinning mechanism for the reproduction of capitalist society.*¹⁶⁹

23 years after Stanley wrote this, the critical silence remains as perplexing, despite a relatively lively literature on corporate crime/crimes of the powerful (see Ch.4).¹⁷⁰

3.3 *Writing the history back into the corporation*

The lack of inquiry into the origins and nature of company law has helped to ‘normalise’ (and legitimise or at least neutralise) this area of law,¹⁷¹ and (*viz.* Gower’s omission of historical chapters, *supra*) could be connected to the claim of capitalism’s end of history.¹⁷² It seems apt therefore for critical scholars of company law, to advocate the need for a ‘turn to history’ comparable to that currently underway in international law (see below, Ch.2B S.1.1).¹⁷³

So it is in their footsteps I tread, (as an “explorer[...] into a region where sign-posts are too few”¹⁷⁴), in reconstructing the story of the corporation for the purpose of my thesis

¹⁶⁷ But see, e.g. Ireland (2008), Hadden (1977), Stanley (1988), De Vroey (1975). Thus far feminist legal critique of corporate law has been inchoate most - the (as yet unchallenged) conclusion of Lahey (1985). Hadden, Stanley and De Vroey have long since moved on from writing about company law.

¹⁶⁸ Ireland (1987) 149.

¹⁶⁹ Stanley (1988) 97.

¹⁷⁰ E.g. Whyte (2009).

¹⁷¹ On ‘normalisation’ as an ideological strategy, see Marks (2000) 19.

¹⁷² Fukuyama (1992), Marks (2000) 33-5.

¹⁷³ Ireland (2008), Hadden (1977), Stanley (1988) and De Vroey (1975) all delve into company law history.

¹⁷⁴ Maitland (1958) vii.

from the Western canon,¹⁷⁵ I concentrate on UK company law because (arguably) “corporate law evolved from centuries of English law & was incorporated wholesale into US law” & thus “prevails today”.¹⁷⁶ I supplement the summary accounts found in Davies,¹⁷⁷ and Farrar¹⁷⁸ with specialist works (Dubois¹⁷⁹ and Hunt¹⁸⁰), and works of general legal history from the early 20th C (Holdsworth,¹⁸¹ Pollock & Maitland¹⁸²). Standard texts on English legal history yield little material on company law (Baker¹⁸³). The main continental authors I rely on are Savigny¹⁸⁴ and Gierke,¹⁸⁵ whose ideas are said to have influenced Anglo-Saxon legal development significantly¹⁸⁶ while the work of Harris,¹⁸⁷ who is besides Ireland¹⁸⁸ the only contemporary specialist in company law history, provides an instructive comparative perspective. Beyond this, economic history¹⁸⁹ and Weber’s sociological works including, especially, “General Economic History”¹⁹⁰ are of use.¹⁹¹

While uncovering the history of company law it also becomes evident that the legitimacy of the corporate form at *has* at various times in history been questioned, even by the ‘father of the free market’, Adam Smith himself (see below at S.4.1). ‘Backlashes’ against the corporation occurred at very specific points in history, namely

¹⁷⁵ Outside of the metropole, e.g. Islamic jurists “to meet a need of their arena” (at 202) developed the doctrine of “dhimma” which is “generally defined as a presumed or imaginary repository that contains all the rights and obligations associated with a person” (at 203). Traditional scholars agree that bodies such as the waqf, Islamic Public Treasury, schools, orphanages, hospitals, mosques and other charities can have “dhimma” separate from its employees and administrators, while “modern Islamic law scholars” also extend the concept to commercial companies (Zahraa (1995) 204).

¹⁷⁶ Blumberg (1993); Kraakman (2009) which is a comparative study concluding that corporate law across jurisdictions address the same three agency problems employing the same strategies.

¹⁷⁷ Davies (1997).

¹⁷⁸ Farrar (1998).

¹⁷⁹ DuBois (1938).

¹⁸⁰ Hunt (1936).

¹⁸¹ Holdsworth (1926).

¹⁸² Pollock (1911).

¹⁸³ Baker (2005).

¹⁸⁴ Von Savigny (1840).

¹⁸⁵ Gierke (1903).

¹⁸⁶ Harris (2006).

¹⁸⁷ Harris (2000); Harris (1994), Harris (1997), Harris (2005); Harris (2006).

¹⁸⁸ Ireland (1987); Ireland (2002); Ireland (2009).

¹⁸⁹ See e.g., Braudel (1982); Blackford (2008).

¹⁹⁰ Weber (1982), esp. 202-235; see also: Roth, G. and C. Wittich (eds.): Max Weber, *Economy & Society: An Outline of Interpretive Sociology*, Vol II, University of California Press 1978, esp. 705-731.

¹⁹¹ There are significant discrepancies between e.g. Dubois, Holdsworth and Maitland. For example, Maitland dates the Bubble Act *after* the crash after the South Sea Company’s shares, likely due to inaccurate conversion of historical English calendars. Other differences are more complex, for example the disagreement on when corporations were first endowed with separate legal personality. Seeking the *correct* answer to these questions is not the purpose of this thesis. Harris provides a thorough comparative analysis based on primary sources and I rely mainly on his findings in these instances.

the mid- to end 19th C¹⁹², the 1920/30s¹⁹³ the 1970s¹⁹⁴ and in recent years.¹⁹⁵ These were periods of profound economic change (crisis) - I discuss this further below and in Ch. 6.

As I work through this chapter – it will become clear that the history of the company is also closely linked with what we now (in legal scholarship) look at mainly through the lens of international law: the history of colonialism, and also of the slave trade, and of course with the advent of global capitalism generally, and in particular the coincidence and potential relations between war, capitalism and corporations, in other words: the *political economy of international law*. I develop the international law angle more fully in Part B.

4 The creation of market society

As noted in Ch. 1, law universalised in the period of transition from feudalism to capitalism.¹⁹⁶ In this period, capitalism, instances of which had existed in some shape or form in many eras, came to penetrate the provision of everyday wants, and labour power was commodified.¹⁹⁷ The universalisation of law was thus not an isolated movement, but one that came as an integral part of greater societal changes in the transition to capitalism. Capitalism did not just mean the introduction of the market in the economic sphere, it meant the creation of the *market society*.¹⁹⁸ This is a society organised according to the rules of the market imperative.¹⁹⁹ In Marx's own words, the transition to capitalism came about as a result of a combination of specific historical circumstances,²⁰⁰ a change in the present factors. These were, technology, mental conceptions, relation to nature, the nature and manner of production, social relations (including division of labour, gender relations), how daily life was led (reproduction),

¹⁹² E.g. Cook (1891): “[p]lutocracy has appeared in a new guise, a new coat of mail – the corporation. The struggle of democracy against plutocracy – a struggle that is coming to the American people – will be between democracy and the corporation” 249.

¹⁹³ E.g. Wormser (1931).

¹⁹⁴ E.g. Hurst (1970) esp. 30-44.

¹⁹⁵ E.g. Broad (2002).

¹⁹⁶ See generally, Wood (2002); Pashukanis (1978) 44.

¹⁹⁷ Cohen (1982) XXXII.

¹⁹⁸ Woods (2002) 23-4 and generally Thompson (1963).

¹⁹⁹ Woods (2002) 36.

²⁰⁰ Capitalism therefore has historical specificity, a beginning, and a conceivable end (Wood (2002) 37).

institutional arrangements including law and the state.²⁰¹ Key among the latter, I argue here, is the development out of earlier forms of communal organisation of the corporate legal form (4.1.1-2). This I discuss here together with an example of ‘creative’ use of the corporate form (4.1.3), the concept of ‘accountability’ in law (4.2), and the process of ‘primitive accumulation’ and the creation of the working class (4.3).

4.1 The legal personality of commercial polities

The roots of the legal personality of the corporation lies in the medieval polities (Ch.1.3.1) into which communal life in the second half of the Middle Ages was organised: amongst others, “townships and manors, hundreds and counties, franchises of various kinds and boroughs, and all over is the community of the whole realm.”²⁰² Law was created to deal with this, but only in a “peculiarly untheoretical and practical manner,”²⁰³ while these communities were seen as “part of the natural order of things” in a society organised around the needs of communal agriculture and other feudal forms of cooperation, without a strong overarching central (national) authority.²⁰⁴ Holdsworth describes how “their doings, like the doings of individuals, were ordered as seemed to the judges and statesmen of this period reasonable and efficient.”²⁰⁵ The thirteenth century forms a midway point between “the undiluted communalism of the earliest period [early Middle Ages] and the bureaucratic ideas of the [20C].”²⁰⁶ The pronouncements of judges and statesmen would in Pashukanis’ scheme be ‘proto-law’: these polities were constituted as legal subjects only when and for as long as they engaged in commodity exchange with other polities. What we can see in examining these polities’ self-organising more closely, is how they became increasingly self-conscious about the wider utility of their collective identity and the possibility to leverage this nascent collective ‘personhood’,

The foundation of the modern corporation was partly organic (below) and partly mystical/ideological. According to Dewey, Pope Innocent IV promoted the “fiction theory” of corporate personality to preserve the great political power the Papal Empire

²⁰¹ David Harvey Lecture, Berkeley, 22 October 2010 – <http://davidharvey.org/> .

²⁰² Holdsworth (1925) Vol.II 401.

²⁰³ Holdsworth (1925) Vol.II 402.

²⁰⁴ Pollock (1911) Vol.I xiii-xv.

²⁰⁵ Holdsworth (1925) Vol.II 402.

²⁰⁶ Holdsworth (1925) Vol.II 404.

was enjoying in the 12th/13th Century.²⁰⁷ According to this theory, ecclesiastical chapters *as corporate bodies* could not be excommunicated, or be guilty of a delict.²⁰⁸ Put simply, and as known by “all English lawyers”²⁰⁹, the corporation has “no body to kick and no soul to damn”.²¹⁰ Pollock agrees that “the idea of the Church as the mystical body of Christ has had an important influence on the growth of the law of corporations; it did much towards fashioning for us the anthropomorphic picture of the many members in one body.”²¹¹ At the same time, it cements the idea that *societas delinquere non potest* – a society cannot commit a crime (even if it can shoulder liability for the acts or omissions of its employees or officers collectively) an idea that would persist until the 20thC (see Ch.4). Thus, in its earliest mystical conception, we see the employment of the corporate concept on the one hand for the personification of (a certain type of) power, and on the other, for the *organisation* of responsibility.

Other types of corporation in the 12th to 14th Centuries included “counties, boroughs, hundreds, townships, manors, merchant guilds, trading guilds, chantries, deans and chapters, monasteries of various kinds, the universities, and the societies of lawyers which were developed into the Inns of Court.”²¹² In this section I look at boroughs and guilds, which became the organisational units playing a key role in the rise of the capitalist class – at least partly because of their ability to ‘act as one person’.

4.1.1 The Borough

Once the papally promoted idea of the *personae fictae* had become accepted in canon law, it started to be applied to the common law bodies such as the boroughs and guilds.²¹³ Out of these, the borough stood out with greater distinctness from its individual members.²¹⁴

A thirteenth century borough was a chartered community - some were self-proclaimed, and some confirmed by royal charter.²¹⁵ The qualification ‘borough’ was both a result and a source of privilege, such as being free from the control of a sheriff. “The external

²⁰⁷ Dewey (1926) 663. See also, Maitland (1898) xiv, 18, and Pollock (1911) 494.

²⁰⁸ Dewey (1926) 663.

²⁰⁹ Pollock (1911) at 494.

²¹⁰ Quote attributed to Lord Thurlow (Coffee (1980-1981)).

²¹¹ Pollock (1911) 495.

²¹² According to Pollock (1911) Vol.I 494, the Oxford and Cambridge universities claim to be the first British Corporations.

²¹³ Holdsworth (1925) Vol.VIII 474.

²¹⁴ Holdsworth (1925) Vol.VIII 475.

²¹⁵ Holdsworth (1925) Vol.II, 385.

test in the past has been the separate appearance of the borough community before the justices ... in the future it will be its separate representation in Parliament.”²¹⁶ The borough’s trading privileges, such as the freedom of toll throughout England – toll being the main source of income for a borough,²¹⁷ made the position of ‘burgess’ (or a borough elder) a valuable one. Risk in the borough was compensated by opportunity: while the burgesses of a borough could be liable in the court of a foreign borough for the debt of their fellow burgesses, conversely, many boroughs gave the burgess the right to share in bargains made by fellow burgesses.²¹⁸ Here we see the start of a form of organised sharing of commercial risk and gain. Internal decision-making in the borough was organised to enable the most efficient use of the borough’s privileges, and a seal was used to express communal consent. The borough was quickly “coming to be a more active, more self-conscious unit than the ordinary community ...not yet regarded as a corporate body- as an artificial person, separate from its members; but ... on the high road to the attainment of that status.”²¹⁹ The burghers were becoming aware of the potential benefit that a(n evolved) corporate form might bring them, the economic power they could wield, and were on their way to evolving into the ‘bourgeoisie’.²²⁰ It was precisely this that was to worry Hobbes (below S.4.1.4).

4.1.2 Guilds

Guilds sprung up within the heterogeneous borough as forms of group organisation around a specific economic activity.²²¹ Guilds could be roughly divided into merchant guilds and trade (or craft) guilds.²²² Some of these were foreign traders with a permanent post in a city, for example the German ‘Hansards’ in London.²²³ The purpose of the trade guild was to restrict the practice of a particular skilled trade or the sale of a particular product (line) to a group with strict membership criteria.²²⁴ Merchant guilds (which were listed in *Select Charters of Trading Companies*, e.g.

²¹⁶ Holdsworth (1925) Vol.II, 386.

²¹⁷ Pollock (1911) 664.

²¹⁸ Holdsworth (1925), Vol.II, 394

²¹⁹ Holdsworth (1925) Vol.II, 394. See further Vol.III, 469-475.

²²⁰ Later chartered cities continued to operate much like businesses, with citizens becoming shareholders through paying shares in taxation (Weber (1982) 281).

²²¹ Pollock (1911) 639.

²²² See further, Pollock (1911) 664-667.

²²³ Weber (1982) 281.

²²⁴ Cooke (1950) 22.

English Merchants in Prussia (1390), Haevre Merchants, etc.²²⁵) exploited the royal grant of a trading monopoly in a particular commodity or the exploration (seeking commercial opportunity) in a particular area, or later, along a specific trade route. Once these merchant guilds took on a more permanent form e.g. as *commenda* and later regulated companies (below S.5), with permanent accounting rather than accounting on the basis of single journeys/traders, these also came to be perceived as ‘legal persons’ with a unique existence despite an ever-changing set of members. According to Cooke, the guilds were a necessary precursor to a capitalist economy, as

*the effect of this [institution of the ‘Guild’] was necessarily to increase the wealth and power of the most efficient members. Through the craft guild and the trading company, associations of merchants were able to throw off local public control. The result of this was eventually to make the whole country one economic unit and to lead to national economic policies.*²²⁶

At the same time the guilds had an interest in state regulation through official recognition by means of a “concession” because this prevented non-official organisations – i.e. organisations without an express grant from the Crown from rivalling their power.²²⁷ Such organisations were viewed and treated as “conjurations” and conspiracies.²²⁸ At the base of the “concession” lies the idea that the group granted the privilege of incorporation served a public purpose. This requirement, however, declined, according to Farrar, “due to a number of factors –... the increase of trade and manufacture and the growth of overseas trade, originally as privateering expeditions. This is the beginning of the rise of capitalistic enterprise”²²⁹ – a publicly chartered body with a *private* purpose.

Pollock observes that at times guilds of knights or merchants aspired (and presumably occasionally succeeded) to ‘boss’ the town.²³⁰ While the borough was an institution weighed down with various civic and administrative obligations, the new guild’s almost purely economic objective gave the merchant and trading classes a more agile construct through which to translate their economic power into political power. The

²²⁵ Holdsworth Vol. III 199.

²²⁶ Cooke (1950) 34.

²²⁷ Later Ch.6 we will see companies demanding regulation for the same purpose.

²²⁸ Dewey (1926) 666.

²²⁹ Farrar (1998) 16.

²³⁰ Pollock (1911) 639.

borough had to serve the interests of many, while the guild served a specific narrow class in first instance. Here we see how increasingly purely economic enterprises compete effectively with more burdensome public bodies for power and influence.

4.1.3 Illustration on the corporation and responsibility

According to Baker, “this was the period in which the distinctions between bodies politic and natural persons, and between corporations and their individual heads and members, began to receive full examination by the courts.”²³¹ Even so, the courts in this period did not come to any firm conclusions, perhaps because “it would have been such a large task to define the qualities of a corporation that it would have taken an entire vacation”.²³² This left space for imaginative use of the corporate concept.

All the same, Edward Coke, J.’s description of the corporation in the *Case of Sutton’s Hospital* (1612)²³³ has come to be cited in the textbooks as ‘the cornerstone of company law’²³⁴:

*And it is great reason that an Hospital in expectancy or intendment, or nomination, shall be sufficient to support the name of an Incorporation, when the Corporation itself is onely in abstracto, and resteth onely in intendment and consideration of the Law; for a Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law; and therefore ... They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but ... A Corporation aggregate of many cannot do fealty, for an invisible body cannot be in person, nor can swear, ... it is not subject to imbecilities, or death of the natural, body, and divers other cases.*²³⁵

Textbooks generally do not mention the facts of the case. Sutton, a businessman and money-lender and reportedly at the time of his death “the richest commoner of England”,²³⁶ had purported to establish a hospital and school (on the grounds of the

²³¹ Baker (2003) 623.

²³² Baker (2003) 623, citing Spelman’s reading (Gray’s Inn, 1519) 113 Selden Soc. 154.

²³³ *Case of Sutton’s Hospital* 973.

²³⁴ E.g. Dignam (2009) 313.

²³⁵ *Case of Sutton’s Hospital* 104 (citations excluded).

²³⁶ Description by London Metropolitan Archives, ACC/1876.

defunct London Charterhouse). Would-be heirs of Sutton (Sutton Jr. and Law) challenged his legacy on the basis that although Sutton had had a licence from the King to establish a hospital and a school for the poor, he had not yet done so.

What Sutton *did* do, however, was to create the Hospital *as a charity*, and to *sell* the school grounds and the *future* hospital to the charity's Board of Governors. Coke lists the governors established in the charter of the charity, who include not only *Coke himself* but most of the members of the King's Bench.²³⁷ Sutton Jr. argued that, since the *actual* hospital did not exist, the charity had not been properly incorporated and was merely 'utopical and mathematical'. As such, it was argued, the charity did not have legal personality and hence no capacity to own property and the transaction was void.²³⁸

The transaction was however considered valid by the bench, which decided that in accepting the transfer they and the remainder of the Board had not acted in their 'political', but in their private capacity.²³⁹ Moreover, it was held that a corporation *could be* something that existed *only in law*, and not in material reality.²⁴⁰ What we see here, then, is an early example of the attempt at *defining* and then *using* the incorporate person as a pure abstraction for speculative gain and the evasion of 'liability' (here: the 'liability' towards natural heirs) – with the explicit and almost farcical cooperation of the court and many other leading figures in the ruling class. What we also see, on another level and in another time, is the concealing/ideological function of 'positivist' teaching as the case is routinely taught without its little-known facts.

4.1.4 Conclusions on the incorporate person

Despite the clumsy descriptions given by the court in *Sutton's case*, it was immediately clear to the legal and business audience that certain powers, capacities and liabilities affecting natural persons 'obviously' did not apply to corporate persons, while others, such as a power to own property, to contract, to sue and be sued, liability on contract, for wrongs done as the owner of property, were 'obviously' included.²⁴¹

²³⁷ *Case of Sutton's Hospital* 140-1.

²³⁸ *Case of Sutton's Hospital* 8-9.

²³⁹ *Case of Sutton's Hospital* 137.

²⁴⁰ *Case of Sutton's Hospital* 104.

²⁴¹ Holsworth (1925) Vol.VIII 488.

The *Sutton's case* example illustrates that law was going to be developed not on the basis of higher principles or policies, but on the basis of commercial expediency on a case-by-case basis. As the potential of the corporation 'as we know it' was realised, merchant classes were quick to take up the construct and use it to their advantage, and the courts had to deal with the difficult questions on an *ad hoc*, responsive basis. The most difficult questions, those relating to liabilities, were not answered in a clear systematic manner in advance of the problems of liability arising. Indeed, "the broad way in which the law was laid down indicate[d] a line of thought which will long tend to restrict the delictual capacity of corporations" and "it is clear that the law on this subject was being constructed rather by considerations of expedience, than by any attempt to work out logically deductions drawn from the nature of corporate personality."²⁴² The expedience in question was the expedience of business, of capitalism. There is already a sense of the corporation becoming a creature with its own will, not subject to public control. In Pollock's words, "[t]he corporation vanishes as we pursue it."²⁴³

This flexible arrangement suited the bourgeoisie, who were becoming increasingly proactive in employing the economic power encapsulated in the legal construct of the corporation in their personal and class interest. This is precisely what worried the theorist of royal absolutism Thomas Hobbes. According to Webb, "[b]etween the Reformation and the French revolution in western Europe corporate bodies connoted privilege and political inequality, and Hobbes spoke for his age when he compared them to 'worms in the entrails of natural man'."²⁴⁴ Hobbes was a critic of the concept of the corporation, insofar as it challenged the power or authority of the absolute ruler of the Commonwealth – which he seemed to consider inevitable based on the nature of the corporation – its presence intrinsically does not serve the 'common good'. The corporation, he feared, would ultimately compete for power with the Crown, eating away at its rule.

²⁴² Holdsworth (1925) Vol.VIII 488. This is later mirrored by the legal personalities of international organisations in "*Certain Expenses*", see below Ch2B.

²⁴³ Pollock (1911) Vol.I 490.

²⁴⁴ Webb (1958) v. and see Hobbes (1651) Pt.II Ch.27 (1651).

4.2 *Primitive accumulation and the creation of the working class*

In addition to creating the legal constructs through which to organise and optimise one's business affairs, a key stage for the development of market society was on the one hand, the accumulation of the means of production by one part of society and the simultaneous creation of the working class out of the other. The former occurred according to what Marx calls 'primitive accumulation' which reflects the idea that the difference in wealth in today's society (as in Marx's society of the 19thC) did not come about simply put because one part of the population was diligent and frugal, and the other 'lazy rascals', but, rather as a result of "conquest, enslavement, robbery, murder, in short, force".²⁴⁵ The future 'owners of the means of production' managed to acquire their wealth by physically divorcing the producer from the means of production,²⁴⁶ while the working class was created as a result of this process. Starting in the late 15th C. a 'massive land grab' occurred (caused mainly by the rise in wool prices and the lords' desire to turn arable land into sheep walks²⁴⁷) in which the feudal lords managed to appropriate vast tracts of common (and, post-Reformation also Church) land, thereby turning themselves into 'landed gentry', while razing cottages and sometimes whole villages.²⁴⁸ First this occurred 'without the slightest regard to legal etiquette', but once - post 'Glorious Revolution'²⁴⁹ - the landed gentry had gained control of Parliament, it was 'legalised' through the Inclosure Acts.²⁵⁰ "[T]he advance made by the eighteenth century shows itself in this, that the law itself now becomes the instrument by which the people's land is stolen..."²⁵¹ At other times still the appropriation of the means of production in the form of land in this instance was accompanied by heavy use of force, for example during the 'Highland Clearances' in Scotland.²⁵² Such manorial farmers as remained created agricultural enterprises and sold their surplus produce at market.²⁵³ "The same people who had rebelled against property had no choice but to approve it the next day as they met in the market as

²⁴⁵ Marx (1976) 874. The process "operates two transformations, whereby the social means of production are turned into capital, and the immediate producers are turned into wage-labourers" (at 874).

²⁴⁶ Marx (1976) 475.

²⁴⁷ Marx (1982) 878-9.

²⁴⁸ Generally, Marx (1982) 877-895.

²⁴⁹ The so-called 'Glorious Revolution' "brought into power, along with William of Orange, the landed and capitalist profit-grubbers." Marx (1982) 844.

²⁵⁰ Marx (1982) 884.

²⁵¹ Marx (1982) 885.

²⁵² Marx describes this process in some detail Marx (1982) 890-893.

²⁵³ Weber argues that "[i]n England, the mere fact of the development of a market, as such and alone, destroyed the manorial system from within." Weber (1982) 98. See also, Merriman (2010), esp. Ch.10.

independent producers.”²⁵⁴ Simultaneously the urbanization of the dispossessed, now landless classes fed into the creation of a newly wealthy urban middle class who were able to exploit their labour in industrial and craft production by creating factories.²⁵⁵ While landed wealth controlled Parliament, in the transitional period it began to invest in colonial ventures and later also industry when it became clear that the commercial class started to gain position.²⁵⁶ Industry gained its workforce partly through the forcible ‘recruitment’ of the poor from cottages and workhouses - including children particularly in the cloth industry in the North of England.²⁵⁷ The poor were forced into the factories by means of repressive law e.g. by criminalising vagrancy but also by laws prohibiting proletarians from rearing cattle or provide in their own subsistence in some other way.²⁵⁸ Capitalism depends on ‘free’ labour: “persons must be present who are not only legally in the position, but are also economically compelled, to sell their labor.”²⁵⁹ The development of the institutions of capitalism, law, the state and the *business enterprise*, formed an essential ingredient in the transition, alongside technological change and the cultural and ideological aspects of capitalism.²⁶⁰

4.3 *Calculable law, risk accounting and “accountability”*

Finally, to Marx’ account of the transition to capitalism, Weber adds:

*In the last resort the factor which produced capitalism is the rational permanent enterprise, rational accounting, rational technology and rational law, but again, not these alone. Necessary complementary factors were the rational spirit, the rationalization of the conduct of life in general, and a rationalistic economic ethic.*²⁶¹

Weber’s writing is a rich source on the role of law in society, compared to Marx’.²⁶²

This is not to say that Marx considered law unimportant, but that he did not elaborate

²⁵⁴ Weber (1982) 124

²⁵⁵ Blackford (2008) 12.

²⁵⁶ Intermarriage with the industrial middle class or nouveau riche “saved” the British aristocracy from extinction - *Explainer* Docklands Museum 21/0910. See also generally, Wood (2002) and Merriman (2010) 350, 378-9.

²⁵⁷ Marx (1982) 922-3.

²⁵⁸ Merriman (2010) 382-385; Marx (1982) 877ff, generally, Thompson (1973); Baars (2011) 417-8.

²⁵⁹ Weber (1982) 177.

²⁶⁰ See also, Wood (2002) 15; Weber (1982) 343.

²⁶¹ Weber (1982) 354.

²⁶² Weber (1982) 354. See also, Weber (1978), esp. Vol.I: lxix; Vol. II: 641-808; Wood (2002) 17.

on this a great deal, leaving it to others, such as Pashukanis and indeed Weber to fill the gaps.²⁶³

Weber's concept of rational accounting enables us to understand the relation between law, business and responsibility. For capitalism to function, *accountability* was needed, meaning that an entrepreneur had to be able to predict and calculate every element of his business, including opportunity and risk, and including the cost of averting such risk. Double-entry bookkeeping enabled accountability, and the ability to see (and to some extent influence) which profits or losses could be ascribed to whom. Weber explains how rational commerce (i.e. capitalist exchange) was the field where 'quantitative reckoning' first appeared. While business was carried out by family firms, as a "closed family affair", "accountability was ... unnecessary"²⁶⁴ but in the transition to capitalism it became essential. Family, community and eventually also individual property became separated from the property of the business.

Capitalism also required law to be 'accountable' – the *development* of what Weber calls 'calculable law': "The capitalistic form of industrial organization, if it is to operate rationally, must be able to depend on calculable adjudication and administration."²⁶⁵ As time progressed business becomes less and less dependent or based on personal/social relations and when capitalism matures the legal, *commodified* relationship takes its place, in particular, or more prominently so, in business. It is only then that we can meaningfully speak of formal *legal* relations.²⁶⁶ From an arrangement based on blood and trust, we gradually move to a formal *legal* relationship called a "Trust" (or indeed a Partnership or Corporation). The corporation becomes an 'amoral calculator'²⁶⁷ and the corporate construct allows/forces its human operators to be the same. This is the specific instance of the broader notion of the introduction of the cash nexus into all human relationships.²⁶⁸ The genealogy of the notion of accountability (in the sense used by the 'business in conflict' authors discussed in Ch.1) in this *accountability in a literal sense* lies at the heart of the 'commodified responsibility' conclusion I draw in Ch.6.

²⁶³ Generally, Cain (1979); Weber (1982) 275-277.

²⁶⁴ Weber (1982) 225.

²⁶⁵ Weber (1982) 277.

²⁶⁶ As we shall see below, however, family relations and name still remain significant until after WWII in some cases (e.g. Krupp Ch.3 S.5.2) and also today 'goodwill' can be a business' biggest asset.

²⁶⁷ Sutherland (1983) 236.

²⁶⁸ Pashukanis (1978) 40; 152 Pashukanis (1978) 40; Caudwell (1905) 69.

Examples of partnership constructs that began to be used (e.g. by guilds) at the time when rational accounting was introduced, were the *commenda* and the *societas*. These are mentioned in the literature as the forerunners of the company as we now know it. The *commenda* was generally a cross between a partnership and a loan and involved one person (the commendator) advancing money to a trader on the basis that he would receive a return which varied with the profits – originally for one specific transaction such as a particular shipping voyage.²⁶⁹ The lender shared in the profit but was liable only to the extent of his/her share paid into the partnership. It was on this type of arrangement that the later merchant adventurers and colonial enterprises would initially be based. The concept spread through Europe – from the Italian City States up to Antwerp and then London - as part of the generally accepted ‘law merchant’.²⁷⁰

The *societas* was a more permanent form of partnership, “each partner being an agent of the others and liable to the full extent of his private fortune for partnership debts.” Partners invested capital and labour based on ability and shared profits based on needs and custom.²⁷¹

According to Holdsworth, “it was through the *commenda* that the idea of a society in which the capitalist could invest and limit his liability came into the commercial law of Europe.”²⁷² During the transition from feudalism to capitalism, this form enabled wealthy landowners to invest while not being involved in the day-to-day running of it. It formed an important way for European aristocracy to safeguard its economic position by channelling its capital into commerce and industry.²⁷³ Partners could be anonymous ‘sleeping partners’ who were spared the indignity of being seen to engage in business, especially so when such business failed.²⁷⁴ It was with this idea of risk-free (but potentially profitable) investment combined with the creation of a separate corporate form that the modern corporation was created.²⁷⁵

²⁶⁹ The *commenda*, see Davies (1997) 20; Harris (2000) 20; Farrar (1998) 16.

²⁷⁰ See Harris (2000) 20; Farrar (1998) 16; Davies (1997) 19. For Grotius’ interpretation of the *societas*, see below and van Ittersum (2006).

²⁷¹ Holdsworth Vol. III 198. The *commenda* in a similar form still exists in continental Europe, e.g. as the Société en Commandité in France and the Commanditaire Vennootschap in The Netherlands.

²⁷² Holdsworth Vol. III 197.

²⁷³ Harris (2000) 30.

²⁷⁴ However, in some cases such constructs could fall foul of usury laws, and would have to cap possible profits to an acceptable lending rate, Harris (2000) 30.

²⁷⁵ Harris (2000) 16.

The transition to capitalism took place in a period of intense military conflict.²⁷⁶ The synergy between business and conflict stimulated both. This includes the *legal* development of the corporation. Weber notes, because of the risk of pirate attacks, single ships (each organised as a single venture in accounting terms) normally joined together into a ‘caravan’ and were either armed themselves or joined by an armed convoy.²⁷⁷ This then ‘by commercial necessity’ led to the formation of companies with a more permanent form and joint accounting structure: the joint stock corporation.²⁷⁸

5 From the Joint Stock Corporation to the MNC

5.1 Merchant Adventurers, Inc.

In the second half of the 16th C and following, the corporate form was developed in practice and through the Chancery courts, which interpreted the rules on debt priority so as to give business the effects of separate personality, asset partitioning and limited liability.²⁷⁹ The ‘joint-stock corporation’ (“JSC”) was based on financial elements of the guild combined with the corporate form,²⁸⁰ a “concrete, profit-oriented form”,²⁸¹ that grew out of the 16th Century trading enterprises used by merchant adventurers (above). Their proliferation as part of the colonial enterprise (more about this in Part B) resulted in the formation of regulated companies, effectively extending the guild system into overseas trade.²⁸² These companies were awarded Royal Charters providing for incorporation and the grant of a trading privilege, often a trading monopoly, like the trade in a certain commodity and/or on a certain trade route or from a certain colony. For example, in 1555 the Merchants Adventurers of England for the Discovery of Lands Unknown, also known as the ‘Muscovy or Russia Company’, were incorporated to exploit the sole right to travel to Russia or further north.²⁸³ The concept of ‘joint-stock’ appeared in the mid-sixteenth Century.²⁸⁴ Davies tracks the rapid development: from 1614 there was joint stock to which members could subscribe

²⁷⁶ Brandon (2010).

²⁷⁷ Weber (1982) 208.

²⁷⁸ Harris (2000) 39.

²⁷⁹ Generally, Getzler (2006).

²⁸⁰ Getzler (2006).

²⁸¹ Harris (2000) 39.

²⁸² Farrar (1998) 17.

²⁸³ Baker (2003) 623.

²⁸⁴ Harris (2000) 24.

varying amounts for a period of years. In 1653 a permanent joint stock was introduced and in 1692 individual trading on private accounts was forbidden to members.²⁸⁵ Members shared profits and losses of all business activities of the corporation, as well as all overheads.²⁸⁶ From this point, the company traded as a single entity.²⁸⁷

The legal development of the joint-stock corporation took place within the specific context of a small number of merchant enterprises, in a specific time.²⁸⁸ “[F]rom the mid-sixteenth to the mid-seventeenth century, a mechanism was developed for raising money in return for shares, for dividing profits among shareholders, for transferring shares among members and to outsiders, and for keeping accounts of joint-stock concerns for long durations.”²⁸⁹ For the Crown, granting monopolies was a convenient way to raise increasing military expenditure while avoiding the parliamentary supervision attached to other forms of revenue such as taxation.²⁹⁰ In effect, “[t]he conduct of war by the state becomes a business operation of the possessing classes.”²⁹¹ Here we see the potential for synergy between state and corporation (a ‘military-mercantilist complex’), rather than the competition above. War loans could potentially be very lucrative if the war was won, with its spoils. Other benefits for the Crown included using the corporations as an indirect means of foreign policy²⁹² (see below under Part B S.2).

5.1.1 Jobbers and bubbles at the birth of the modern corporation

Opening up the share market to the public caused the next momentous phase in the development of company law. In 1600 the British East India Company was granted a monopoly of the trade with the Indies by Royal Charter.²⁹³ It was the first to combine incorporation, overseas trade and joint stock raised from the general public.²⁹⁴

²⁸⁵ Davies (1997) 20.

²⁸⁶ Harris (2000) 33.

²⁸⁷ Morse (2005) 5.

²⁸⁸ Harris (2000) 24.

²⁸⁹ Harris (2000) 25.

²⁹⁰ Harris (2000) 41.

²⁹¹ Weber (1982) 280.

²⁹² Weber (1982) 282,fn.2.

²⁹³ Harris (2000) 24.

²⁹⁴ Farrar (1998) 17. Similarly, in the Netherlands, the Dutch Vereenigde Oostindische Compagnie (Dutch East India Company) was established in 1602 by Royal Charter explicitly granting shareholders limited liability, and issued its holders with paper certificates that could be traded on the Amsterdam Stock Exchange (Id.).

Moreover, after the ‘bourgeois revolution’ of the English Civil War (1642-1651) and the ‘Glorious Revolution’ of 1689²⁹⁵ the business climate changed, monopoly ownership was no longer as important and in particular, the British East India Company, the Bank of England and the South Sea Company (known as ‘moneyed companies’) (re-) emerged as leaders in public finance and gained political importance.²⁹⁶ In the English revolution, a massive social and economic upheaval, the forces of Parliament and the City of London, representing the British capitalist class, mobilised popular forces to end remnants of feudal monarchical absolutism.²⁹⁷ Substantial sales of Crown land led to loss of income, while the corporations had access to vast public pool of money through the stock market. As the Crown came to depend on these companies for loans, their power grew. By 1714, 39% of the public debt was owed to the *three* ‘moneyed companies’.²⁹⁸

The key point here is that raising money from the general public also shifted (or devolved) the majority of the risk to them, ‘socialised’ the risk. Despite the obvious bubble-bursting repercussions the general public was and stayed somehow willing to take on this risk. This is perhaps a result of the capitalist *culture* that started to emerge: people literally bough into capitalism.

5.1.2 The big bang of modern company law: When the Bubble burst

The story of the South Sea Company illustrates the changing dynamic between the state and corporation. The British South Sea Company, a joint stock company, was founded in 1710 with the dual objectives of the exploitation of a monopoly of all trade to the Spanish colonies in South America and to relieve the government of the burden of national debt accrued as a result of the War of the Spanish Succession (1701-1714).²⁹⁹ The company took a gamble on both the outcome and cost of the war. In exchange the company was rewarded with solid government support for the business. The Bank of England, which had been founded in return for money lent to the government by a group of individuals, was outbid by the South Sea Company which

²⁹⁵ Merriman (2010) 226-231.

²⁹⁶ Harris (2000) 53.

²⁹⁷ Head (2008) 3.

²⁹⁸ Harris (2000) 56.

²⁹⁹ Davies (1997) 24.

had bribed government members.³⁰⁰ When rumours started circulating that the country might go bankrupt because of the size of the debt, the Company persuaded the government to convert the debt to shares in the company which were offered to the open market.³⁰¹ This move allowed for a dramatic expansion of the national debt.³⁰² The converted bonds were sold riding the wave of the popularity of the share trade. There was what we would now call ‘consumer confidence’ in the years following the war which ended with the Treaty of Utrecht in 1713. There was increased wealth, no longer confined to the upper classes, and an excitement about the luxury goods that could be acquired from foreign lands. Stocks were busily traded by stockjobbers working from the coffee houses on and around Exchange Alley in the City of London.³⁰³ The hype surrounding the South Sea shares fuelled share prices generally and led to numerous genuine and less genuine companies being set up. Stockjobbers set up stalls on the street, selling shares in companies “for importing jackasses from Spain,” “securing perpetual motion”, “an undertaking which would in due time be revealed”.³⁰⁴ With penny shares everyone (of the petty bourgeois or middle class) could and *did* invest. This in turn reflects a popular acceptance of (lit. ‘buy-in’ to) the ideology of capitalism.

The South Sea shares were valued at around 100 pounds each in January 1720, and over 1000 pounds in December of the same year. The company apparently bribed ministers and persuaded the government to pass the so-called ‘Bubble Act’,³⁰⁵ which required all companies to have charters, and declared all undertakings “tending to the common Grievance, Prejudice and Inconvenience of His Majesty’s Subjects” illegal and void.³⁰⁶ The Act exempted the South Sea Company (and the East India Company) from all its substantive restrictive provisions,³⁰⁷ and it *ex post facto* legalised certain departures from the debt conversion scheme made by the Company: “[this] demonstrates the company’s ability to manipulate Parliament at will.”³⁰⁸

³⁰⁰ Holdsworth (1925) Vol.III 213.

³⁰¹ Farrar (1998) 17.

³⁰² Harris (2000) 62.

³⁰³ After a fire destroyed many coffee houses in 1748, a group of jobbers set up a club and built a new coffee house called ‘New Jonathan’s’. It was later renamed the Stock Exchange, see <http://www.londonstockexchange.com/about-the-exchange/company-overview/our-history/our-history.htm>

³⁰⁴ Wormser (1931) 21.

³⁰⁵ Wormser (1931) 21.

³⁰⁶ Bubble Act S.18.

³⁰⁷ Bubble Act S.23, 24, 26-29 – these also protected two newly established insurance companies.

³⁰⁸ Harris (2000) 68.

The Act did nothing to stem the popularity of South Sea shares. Eventually the burst of the bubble came – possibly as a result of proceedings against rival companies (Farrar suggests these may have been instigated by South Sea³⁰⁹). The shares were back down to around 100 pounds each within days and many lost their fortune. “Everyone – merchants, professors, doctors, clergymen - even the Canton of Berne [had] invested in the company.”³¹⁰ An enquiry took place and exposed a “web of deceit, bribery and corruption”³¹¹ which involved members of the Royal Household and Government.³¹² The overwhelming public sentiment was one of a vacuum of accountability following the crash.³¹³ However, instead of punishment, the South Sea directors received the King’s gratitude for their friendship in dealing with the government debt, and King George made Baronets of John Blunt and William Chapman.³¹⁴

There were calls for the company directors to face a “Roman style execution”, but instead a sum of 2 million pounds was made available for compensation.³¹⁵ Some MPs were expelled from Parliament and MP and South Sea Director Aislabie was tried and found guilty of “most notorious, dangerous and infamous corruption that he had encouraged and promoted the dangerous and destructive execution of the South Sea scheme...”³¹⁶

5.2 *Bubble Aftermath: Effects on company law development*

Many commentators describe the Bubble Act as reactionary and prohibitive legislation aimed at impeding the rise of the joint stock company as a form of business organization.³¹⁷ Harris, on the other hand, argues that the South Sea Company, which organized the national debt conversion scheme, also instigated the Bubble Act, “because small bubble companies had become an annoying factor in the stock market

³⁰⁹ Farrar (1998) 18, and Gower (1952).

³¹⁰ Farrar (1998) 18.

³¹¹ South Sea Company Harvard Business School Project: <http://www.library.hbs.edu/hc/ssb/index.html>.

³¹² Davies (2003) 26.

³¹³ South Sea Company Harvard Business School Project.

³¹⁴ Harris (2000) 72-73.

³¹⁵ Farrar (1998) 18.

³¹⁶ *Case of Aislabie* (1721) and see Novak (2003) 574.

³¹⁷ Harris (2000) 60; Maitland (1936) 208; Holdsworth (1925) Vol.VIII 221.

of 1720.”³¹⁸ Indeed, the South Sea Company and a number of others were explicitly exempted and South Sea continued to exist for over another century.

The Bubble share-craze, by advancing the links between the various financial markets in Western Europe, “facilitated, for the first time, the emergence of an integrated and efficient international financial market.”³¹⁹ While the bubble had been a disaster for the thousands who lost their money in this first time mass-socialisation of risk, and despite the outcry over the lack of accountability, the public continued to assume corporate risk in the years and indeed centuries to follow, which is testament to the strength of capitalist ideology.

The Bubble Act did not impede economic development nor the development of company law.³²⁰ After the Bubble ‘PR fiasco’ the state created some distance between it and business, making it difficult to obtain a Charter or Statute. The effect was that lawyers began to create the same effect as “joint stock” incorporation by means of ingenuous drafting, using amongst others the “deed of settlement” construct – a cross between a trust and an association and effectively granting limited liability.³²¹ Property would be vested in a board of trustees, management would be delegated to a board of directors, although whether they could be sued remained unclear, - and “obscurity on this point was by no means a disadvantage from the point of view of the company”³²² – and even “strangely enough [use of these type of companies] seems to have been encouraged rather than frowned upon by the Government.”³²³ The agents of change in the period following the Bubble Act were businessmen and lawyers. The latter, trained on the job (often in business),³²⁴ developed law in a more pragmatic ‘managerialist’ direction compared with other countries. Such legal scholars as there were at Oxford and Cambridge exclusively read Roman and Canon law. Law was further developed by “overworked common-law judges and Lord Chancellors [whose] agenda was shaped by the disputes that reached their halls.”³²⁵ Some legal texts were also written by retired judges, and “barristers on the margins of their profession, who aimed at

³¹⁸ Harris (2000) 61.

³¹⁹ Harris (2000) 80.

³²⁰ Blackford (2008) 39.

³²¹ Farrar (1998) 19.

³²² Davies (2003) 29.

³²³ Dubois (1938) 216.

³²⁴ Weber (1978) 785-788.

³²⁵ Harris (2000) 111.

supplementing their legal fees”.³²⁶ There was no space for theoretical discussions on, for example, the nature of legal personality in the writings of those authors, who mainly focused on the ‘how’ of company law. Then as now, company law was directed by the practical concerns of entrepreneurs and their attorneys.³²⁷ An alternative explanation may be, that then (as indeed now) a separation between high public life and the world of business suited the ruling elite, and enabled it to create an ideological separation/distance between themselves and the exploitative goings-on that supplied their income. Company law in this period was made privately, for private purposes.

5.3 1844: *The first modern Companies Act*

The growth of the railways finally brought a push for company law reform. Railway companies needed to raise large amounts of capital from the public.³²⁸ The Bubble Act was eventually repealed in 1825,³²⁹ and the first “modern companies act”, The Joint Stock Companies Act 1844,³³⁰ was enacted – properly adopting the deed of settlements company and endowing it with the “qualities and incidents” of corporations, except limited liability.³³¹ Significantly, the company’s profit mandate was included in the statutory definition of the company.³³² According to Farrar, “[t]he effect of this legislation was to shift from the *privilege* of incorporation by Royal or Statutory grant to *the right of incorporation* provided the statutory conditions were fulfilled.”³³³ Incorporation could then be achieved upon registration with the newly established Registrar of Companies. This shift was indicative of a shift in the balance of power in society from crown to the bourgeoisie-dominated Parliament, and thus their private economic interests. The public/private conceptual divide stems from this period and when for the first time corporations could be formed without any explicit state interference, a private sphere was created into which corporations shifted.³³⁴ “[This] conceptual innovation... lay at the core of the longer term revolution.”³³⁵

³²⁶ DuBois (1938) 83-84 – for an earlier such text, see e.g. Kyd (1795).

³²⁷ Harris (2000) 112.

³²⁸ Davies (2003) 31.

³²⁹ Farrar (1998) 19.

³³⁰ 7 & 8 Vict, CX.

³³¹ Farrar (1998) 19.

³³² S. II 7 & 8 Vict, CX.

³³³ Farrar (1998) 19 (emphasis added).

³³⁴ Harris (2000) 284.

³³⁵ Harris (2000) 284.

Contracting for limited liability became ‘cumbrous and expensive’ with such large corporations.³³⁶ Despite the difficulties inherent in attempting to sue a fluctuating body of members and the even greater difficulties of levying execution - which made the personal liability of the members largely illusory,³³⁷ the fact that a debt of £10 could land one in debtors’ prison was a strong incentive to try to limit (shift) one’s exposure.³³⁸ Any lingering insecurity over whether contractual limited liability would stand up in court was taken away in 1852 in *Hallett v Dowdall*.³³⁹ Subsequently it was provided for in the 1855 Limited Liability Act,³⁴⁰ which, according to Gower, was passed with “almost indecent haste”.³⁴¹ As limited liability had already been introduced by statute in the US and France, the Board of Trade promoted the measure to “help vitalise British business” and stop ‘British’ companies from incorporating abroad.³⁴²

The 1855 Act contained safeguards, such as the requirement that a company must have at least 25 members and a minimum subscribed capital, which were “brushed aside in the name of laissez-faire”³⁴³ in the 1856 Joint Stock Companies Act³⁴⁴ and shortly followed the Companies Act of 1862³⁴⁵, which was dubbed the “Magna Carta of cooperative enterprise”.³⁴⁶ Many industrial enterprises took the opportunity to incorporate under this act.³⁴⁷ The modern corporation had been born.

From Wilhelm we learn that in France and Germany the run-up to the ‘modern corporation’ had been similar to the UK, even down to the popular demand for share ownership in the first half of the 1800s, leading to the establishment of bogus companies - in France for example there was a joint stock company “pour le mariage de l’Amérique et de l’Afrique”.³⁴⁸ In France the main companies legislation was

³³⁶ Farrar (1998) 19.

³³⁷ Davies (2003) 32.

³³⁸ Harris (2000) 131. Related to this, in the 19C bankruptcy became a privilege rather than a punishment (id. 132). One of the criticisms of limited liability was that it takes away the right of the creditor. However, creditors would often also themselves be able to benefit from limited liability, and in 1956 creditors’ remedies were improved through the system of winding up, which achieved its current form in 1929 (Farrar (1998) 22).

³³⁹ *Hallett v Dowdall* (1825) 21 LJQB 98.

³⁴⁰ Limited Liability Act 1855 (18 & 19 Vict. c.47)

³⁴¹ Farrar (1998) 21.

³⁴² Farrar (1998) 20.

³⁴³ Farrar (1998) 20-21.

³⁴⁴ Joint Stock Companies Act 1856 (19 & 20 Vict. c.47).

³⁴⁵ Companies Act 1862 (25 & 26 Vict. c.89)

³⁴⁶ Farrar (1998) 20-1, see also, Hadden (1977) 22.

³⁴⁷ Farrar (1998) 21.

³⁴⁸ Wilhelm (2009) 22.

introduced in 1856, and in Germany the Allgemeine Deutsche Handelsgesetzbuch of 1868 regulated joint stock companies and the “Kommanditgesellschaft auf Aktien”.³⁴⁹ As such, the legal developments in these countries mirrored those in the UK, while the development of capitalism had followed broadly similar paths there, too.³⁵⁰

Harris points out that the corporation as it came to exist in law in the mid-19C has not changed fundamentally since. All the key characteristics were in place.

5.4 *Another look at separate personality*

Of the key company characteristics that ‘solidified’ at this time it is necessary to pause once again at the concept of legal personality. When, with the joint stock company and later the modern corporation, share ownership is deliberately spread out over the general public, the risk of the economic activity of the corporation is externalized, and it becomes in ‘everyone’s’ interest that the company does well, and that, e.g. economic policies adopted by the government favour business. According to Marx: “Capital, which is inherently based on a social mode of production and presupposes a social concentration of means of production and labour-power, now receives the form of social capital (capital of directly associated individuals) in contrast to private capital, and its enterprises appear as social enterprises as opposed to private ones. This is the abolition of capital as private property within the confines of the capitalist mode of production itself.”³⁵¹ Taking this understanding it is possible to *vindicate* Pashukanis: “It is now the capitalist *project* which must use wage-labour to accumulate, as opposed to the individual capitalist. A necessary corollary of this was the development of the juridical form to allow for a corporate body to be the owner of a commodity and therefore retain legal personality. This was not a ‘new’ legal form but a development of the legal form Pashukanis outlines *on the basis of that form itself*.”³⁵²

Ireland et al. argue, “it is the emergence of the joint stock company share as a new form of fictitious capital that underlies the doctrine of separate personality and, therefore, the basic conceptual structure of contemporary company law.”³⁵³ This

³⁴⁹ Wilhelm (2009) 22-26.

³⁵⁰ Generally, Weber (1982).

³⁵¹ Marx (1981) 567.

³⁵² Miéville (2005) 108 (emphasis in the original).

³⁵³ Ireland (1987) 149.

change is reflected in the definition of the company which moved from “persons form[ing] themselves into an incorporated company” in 1856, to “persons form[ing] an incorporated company” in 1862.³⁵⁴ The company had then become, and stayed since then, something “external” to its members, a *separate* legal person.³⁵⁵ What caused the momentous change in the 1850s/60s, according to Ireland et al, was “the changing economic and legal nature of the *joint stock company share*. The share became property, “realty” in its own right, as opposed to a mere claim based on a contractual relationship.”³⁵⁶

Explaining the change in Marxist terms, it is pointed out that “such transformations can only take place under certain historical conditions – conditions in which labour power has become a commodity.” Ireland et al. use the Marxist distinction between money capitalist (who invest) and industrial capitalists (who utilise the funds). “Interest represents a relationship between the two capitalists and, as such, necessarily entails antagonism between them as they contest the division of surplus value.”³⁵⁷ Yet, common drive to maximise surplus value extraction is stronger than (and intensified by) this competition.

Marx describes the process of reification of money capital as, “[the thing] which embodies ... the social relationship... acquire[s] a fictitious life and independent existence”.³⁵⁸ Thus, “the conception of capital as a self-reproducing and self-expanding value, lasting and growing eternally by virtue of its innate properties, is thereby established.”³⁵⁹

What enabled this development to occur was the development of a secondary market for these company shares. According to Ireland, the UK railway system’s development in the early 19C led to the popularisation and proliferation of shares available and readily traded.³⁶⁰ With this “a gulf emerged between companies and their shareholders and between shareholders and their shares.”³⁶¹ Companies owned the industrial capital

³⁵⁴ Companies Act 1856 s. 3, Companies Act 1862, s. 6.

³⁵⁵ Ireland (1987) 149.

³⁵⁶ Ireland (1987) 153 (emphasis added).

³⁵⁷ Ireland (1987) 155.

³⁵⁸ Marx (1972) 483.

³⁵⁹ Marx (1972) 394.

³⁶⁰ Ireland (1987) 159.

³⁶¹ Ireland (1987) 159.

and shareholders the “fictitious” share capital which they could sell at will without affecting the size of the industrial capital. Ireland states that at this point, the company became a singular entity, separate from shareholders, “emptied of people”.³⁶² “Both the company and the share had been reified”.³⁶³ What the description of this process of course highlights is the centrality of law as “one of the primary social practices through which actual relationships embodying class power [are] created and articulated.”³⁶⁴ Through law, “[c]apitalist social relations come to be reified and depersonalised; that is, that class relations under developed capitalism cease to be personal but come, to a significant extent, to be embodied in things, some of which - like the joint stock company share - are constituted *in law* as autonomous forms of property.”³⁶⁵ This is the process that Marx calls “commodity fetishism”.³⁶⁶ Linked to this is the congealing of the corporate purpose of profit extraction in the 1844 Act: the legitimation of the narrow profit mandate, economic-rational decision making to the exclusion of moral considerations. In the words of Stanley:

*Capitalist societal relations are expressed in the reflection of the alienated individual to the mode of production. Thus the legitimisation of the mode of production through regulation of the corporate form bears witness to the legality of the process of alienation. Law is both constituted by capitalist social relations and constitutive of them. Central to this process of creation, articulation and reproduction of class relationships is the idea of alienation which is clearly seen in law through the process of the legitimisation of both the corporate entity and the relationship of the individual to that entity through the mode of production.*³⁶⁷

The relationship of the individual worker, the person affected by the activities of the corporation, the ‘victim’ becomes a relationship with *the corporation*, no longer with the individuals inside it, the corporation has been lifted up above them, or, emptied of them. The relationship between ‘outsider’ and the corporation becomes one of exchange, as formal legal equals. Below (Ch.6) I examine how this affects the

³⁶² Ireland (1987) 159.

³⁶³ Ireland (1987) 159.

³⁶⁴ Ireland (1987) 161, quoting Klare (1979).

³⁶⁵ Ireland (1987) 161-2.

³⁶⁶ Marx (1976) 163-177.

³⁶⁷ Stanley (1988) 97.

relationship of responsibility between the corporation and those affected by its operations.

5.5 *The finishing touch: Salomon*

The 1897 case of *Salomon v A. Salomon & Co. Ltd.*³⁶⁸ put the new company law to the test. The question facing the House of Lords and the lower courts before them was whether to “interpret the law literally or whether to consider more its presumed spirit and intention.”³⁶⁹ The court came down firmly on the side of the former, allowing an abstraction from material reality not seen since the *Case of Sutton’s Hospital*. While limited liability had ostensibly been created in order to stimulate arms-length investment in business ventures where investors had little oversight or input, *Salomon* showed how it could be used to the investor’s advantage in the opposite situation: the main person active in the company was able to ‘incorporate’ and thus limit his *own* liability for the consequences of his own decisions and actions. At the time of *Salomon* incorporation required seven shareholders, and the decision confirmed that this could be one active, controlling shareholder and six nominal participants.³⁷⁰ The House of Lords understood that in the case of *Salomon*, the six other shareholders besides Mr. Salomon were mere “dummies” ... “[b]ut when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights against its members which it would not otherwise possess.”³⁷¹

Lord Halsbury in the same case comments: “...it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are. ... I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own,

³⁶⁸ *Salomon v A. Salomon and Co. Ltd* [1897] AC 22.

³⁶⁹ Hicks (2008) 96.

³⁷⁰ Under the UK Companies Act 2006, one wo/man can incorporate alone: Art. 7.

³⁷¹ Lord Herschell in *Salomon*, 43. See further in Harris (2000) 40-1.

whatever may have been the ideas or schemes of those who brought it into existence.”³⁷² At this point then company law receives its current form. Protection and furthering of business interest is not a right, but a normalised entitlement: “[p]ersons are entitled to incorporate companies for the purpose of separating their business affairs from their personal affairs.”³⁷³ In the following chapters I will also touch on the effect of compartmentalising ‘business’ from ‘personal’ in the psychological, or mens rea sense: corporate anomie.³⁷⁴ The corporation ‘absorbs’ any bad faith (or worse) on behalf of the individual: as per Lord Halsbury in *Salomon*: “...the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”³⁷⁵

In 1891 Cook wrote:

*Fifty years ago wealthy men were identified with their investments, To-day, with a few exceptions, the great enterprises are not connected in the public mind with individual names. If corrupt and unscrupulous, the odium and disgrace rests upon the corporation and not upon the individual. Take it all in all, the corporation is as perfect and heartless a money-making machine as the wit of man has ever devised.*³⁷⁶

The reified corporation was complete. The development of domestic law on ‘corporate crime’ in the UK (and US) perfectly mirrors the process of reification, and eventually, anthropomorphisation, of the corporation. In the late 19th C. Judge Thurlow famously asked, “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”³⁷⁷ When norms of crime and punishment were abstracted from religious, emotional sentiment and became ‘accountable’, attitudes began to change, most likely first for practical reasons however rather than as a result of academic theorising.³⁷⁸ In the UK, from as early as 1842 a ‘corporation aggregate’

³⁷² Lord Halsbury in *Salomon*, 30-1, emphasis added.

³⁷³ Mayson (2009) 146.

³⁷⁴ Passas (2009) 153.

³⁷⁵ Lord Halsbury in *Salomon*, 30.

³⁷⁶ Cook (1891) 250-1.

³⁷⁷ Quoted in Coffee (1980-1981), 386.

³⁷⁸ Bush (2009) 1052; Canfield (1914); Edgerton (1927). No ‘anthropomorphising’ of the corporation, nor notions of ‘*corporate* corporate crime’ (see Ch. 4 below) existed at this point: in *Edwards v Midland Railway*, Justice Fry had held that “it is equally absurd to suppose that a body corporate can do a thing willfully, which implies will; intentionally, which implies intent; maliciously, which implies malice.” *Edwards v Midland Railway* (1880).

could be held criminally liable for failing to fulfil a statutory duty.³⁷⁹ This follows the joint liability of earlier forms of organization as discussed in S.4.1 above, and the logic that it made sense to seek financial recompense from large (here, railway) companies rather than indict individual employees for ‘minor’ offenses. In 1917 vicarious liability of a corporation (as *legal person*) for the acts of its employees and agents became a possibility in another railways case.³⁸⁰ In the mid-1940s the UK courts³⁸¹ accepted corporate criminal liability for crimes requiring a ‘guilty mind’ on the basis of the guilty mind of a ‘controlling officer’,³⁸² in a construction that was a decade later to be described in memorable terms by Lord Denning:

*A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.*³⁸³

In Ch.3 I uncover to what extent this reification ‘holds’ in the face of accusations of serious crimes. From this notion, eventually the current, fully anthropomorphised ‘corporate *corporate* crime’ discussed in Ch. 6 would evolve.³⁸⁴ In Ch.6 I also come back to the anthropomorphisation of the ‘good’ company through corporate social responsibility.

5.6 *The multinational corporate group*

From the Salomon decision evolved the corporate group consisting of subsidiary companies owned by parent companies based and operating in one or more

³⁷⁹ “A corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute.” *Birmingham and Gloucester Rly*; Ormerod (2008) 247.

³⁸⁰ *Mousell Bros* (employees of a company evading toll).

³⁸¹ In the US a similar development took place, some years before the UK, on breach of statutory duty (1834) vicarious liability (1852), moving to attribution mens rea of an officer to the company in 1909: *People v Corporation of Albany* (1834) (non-feasance); *State v Morris Essex* (1852) (misfeasance); *New York Central & Hudson River Railroad Company v US* (1909); Stessens (1994) 496-7.

³⁸² *DPP v Kent and Sussex Contractors*, approved in *Rex v ICR Haulage*; Ormerod (2008) 248.

³⁸³ *HL Bolton (Engineering) Co* 172.

³⁸⁴ See also e.g.: Simester (2010) 272ff; French and Ryan (2009) 629ff.

jurisdiction, each having separate legal personality. Enterprises are vertically integrated and constituted as multinational corporate groups containing sometimes hundreds of discreet corporations.³⁸⁵ The structure of multinational corporate groups is generally ‘optimized’ so as to afford maximum protection of corporate interests through locating assets and interests in specific (‘friendly’ or ‘conducive’) jurisdictions, e.g. intellectual property in The Netherlands, capital in the Bahamas, etc. and through creating relationships (contractual and ownership) between different parts of the corporate groups to efficiently distribute and protect revenue streams.³⁸⁶ Production has mostly moved to the global South, while capital (and thus power and direction) has stayed in the North/West. The case of *Adams v Cape* illustrates how the group structure serves the interests of capital in a multinational enterprise. Cape Industries is a UK parent company whose subsidiaries mined asbestos in South Africa which was then shipped to a Texas subsidiary. Workers in Texas became sick with asbestosis and sued the parent company in a US court, and subsequently attempted to enforce the judgment in their favour through the UK Court of Appeal. The court stated that although the corporate group had apparently been constructed deliberately so as to immunise the parent company from the claims that its board members already expected to arise out of its trade in asbestos, it held that “the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd* merely because it considers that justice so requires.”³⁸⁷ Thus we see how the individual ‘moral’ actors disappear behind the corporate construct, and the group structure is used to insulate not only the individuals but other companies in the group from (financial) risk through the particular group’s legal structure, which is optimised (amongst others) through the use of a technique known among corporate lawyers as ‘defensive asset partitioning’.³⁸⁸ In the following chapters I focus mainly on these transnational businesses, complex legal structures based on the single company operated by individuals.

6 Conclusion of Part A

³⁸⁵ Generally, Muchlinski (2007).

³⁸⁶ Muchlinski (2007) 203ff.

³⁸⁷ *Adams v Cape Industries plc* [1990] BCLC 479 520.

³⁸⁸ On this notion, see generally, Kraakman (2009) 135-6. There have been exceptional cases where such structures have failed and the ‘corporate veil’ has been lifted, including in another case against Cape, brought by Lubbe and around 3000 others (including children) who contracted asbestosis as a result of working at Cape’s South African subsidiary: *Lubbe et al v Cape*, [2000] UKHL 41.

In this chapter I highlighted the development from joint shouldering of risk and reward by familial and other groups bound by relationships of trust pre-capitalism, to the introduction of ‘calculable law’ and the staged development of the modern corporation. Calculable law allows the business unit to base its decisions not on normative considerations, but on economic rationality. Responsibility becomes *accountability*. The creation of separate legal personality follows this logic: “[t]he most rational actualization of the idea of the legal personality of organizations consists in the complete separation of the legal spheres of the members from the separately constituted legal sphere of the organization.”³⁸⁹ Aside from the *formal* legal aspects, the ideological aspects of reification/anthropomorphisation, the socialisation of shareholding as a factor in the legitimisation of the narrow profit mandate (‘shareholder primacy’³⁹⁰), serves to render the corporation a ‘structure of irresponsibility’,³⁹¹ which is ‘capitalism congealed’ and which serves to conceal (and enrich) the individual businessperson. Corporate groups form even more sophisticated structures that can isolate and shift, value, risk and responsibility on the global level. I also showed that this situation is normalised, rendered neutral, by means of court decisions, through the business-led development of law which stayed largely isolated from philosophical/ethical enquiry, and by means of current ‘positivist’ teaching of company law. For example, ‘limited liability’, which is actually, liability *socialised* over broader society and the natural environment, combined with profit for a limited group, is not generally seen as a controversial or unnatural concept. These factors serve to produce knowledge, policy and legal decisions and instruments, that self-perpetuate capitalism and reproduce current socio-economic hierarchies.

Moreover, as Berle and Means wrote in their 1930s classic *The Modern Corporation and Private Property*: “The corporate system has done more than evolve a norm by which business is carried on. Within it exists a centripetal attraction which draws wealth together into aggregations of constantly increasing size, at the same time throwing control into the hands of fewer and fewer men.”³⁹² The corporate form, the company as an ‘amoral calculator’³⁹³ induces its individual operatives to make

³⁸⁹ Weber (1978) 707.

³⁹⁰ French (2009) 31-32.

³⁹¹ Whyte (2009) 104.

³⁹² Berle (1991) 18.

³⁹³ Sutherland (1983) 236-8, who argues the corporation comes closer to ‘economic man’ than any person or organisation.

‘economically rational’ amoral decisions – a form of capitalist *anomie*.³⁹⁴ This anomie is expressed well by Steinbeck in *Grapes of Wrath*, when he describes one of the many farmland repossessions during the Depression:

We’re sorry. It’s not us. It’s the monster. The bank isn’t like a man.

Yes, but the bank is only made of men.

No, you’re wrong there – quite wrong there. The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It’s the monster.

Men made it, but they can’t control it.

In Section B, using the examples of slave labour and pillage (‘accumulation by dispossession’³⁹⁵) in three different periods in history, I will show the imperialism at the heart of the corporate legal form. In 1848, Marx and Engels wrote in the *Communist Manifesto*: “The need of a constantly expanding market for its products chases the bourgeoisie over the entire surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere.”³⁹⁶ It is to corporate activity on the global level, and in international law, that I turn next.

³⁹⁴ Passas (2009) 155; Bakan calls the corporation ‘psychopath’ (Bakan (2005) 134).

³⁹⁵ Below, Ch.2B.

³⁹⁶ *Communist Manifesto* 46; Veitch (2007) 44.

Chapter 2B: The Corporation and the Political Economy of International Law

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1 Introduction to Part B: The Corporation and capitalism in IL

In this section I elaborate on the argument made in Chapter 1 (S.3) above that international law finds its roots in capitalism, is an essential part of it, (indeed, a *sine qua non*) and developed according to the logic of what Kingsbury has called ‘commercial sociability’, or, the logic of capitalism.³⁹⁷ Again, my argument in this section is rooted in the commodity form theory of law, and I draw in the initial sections particularly on Pashukanis’ *Essay on International Law*³⁹⁸ and Miéville’s monograph, with the modifications outlined in Chapter 1 and here.

I start with a short overview of the epistemology and sources on this topic (S.1.1). In Section 2 I argue that the corporation was (and is) a major factor, in the early

³⁹⁷ Kingsbury (2010) 33.

³⁹⁸ Pashukanis (2005) 321.

development of IL that elites (the global capitalist class) use to channel their activities, amongst others, in overseas trade, fighting trade wars and, importantly, as a colonising entity (a tool for colonisation). I comment on the significance of (international) legal personality of both state and corporation and the phenomenon of ‘corporate sovereignty.’ Then I discuss how contemporary international law on the one hand includes the reified corporation as a ‘participant’ in areas of ‘private’ international law while in ‘public’ international law it remains largely invisible.³⁹⁹ ‘Private’ and ‘public’ IL however continue to be shaped around corporate/capital’s interests, giving credence to the claim of a ‘global capitalist class’. This sometimes occurs visibly, for example through states’ espousal of corporate claims in international fora such as the ICJ (S.3.4)). I focus specifically on nationalisation/expropriation cases as these are most relevant to the ‘business in conflict’ theme - I include colonisation (and imperialism more broadly) as a form of conflict and discuss the *corporate* scramble for Africa in this light. Likewise ‘decolonisation’ is a site for conflict. In addition (and amongst others), corporations as parties to concession agreements and under Bilateral Investment Treaties (“BITs”) are now able to ‘litigate’ against states on the international level through arbitration including at the International Centre for the Settlement of Investment Disputes (“ICSID”).⁴⁰⁰ In doing this, capitalists managed to lift their interests out of host state jurisdiction and into international law, and then to separate off certain questions of international law to the realm of ‘private international law’ thereby excluding or concealing ‘public’ and ‘domestic’ interests. At other times the corporation is a participant in a more ‘hidden’ sense, e.g. in processes of international law-making and in ‘soft law’ regulation which can be said to amount to a modern law merchant or ‘privatised law’ (on this notion see further Chapter 6). I comment briefly on the significance of ‘international legal personality’ (section 3.5). All in all, I conclude, the corporation (or rather, the global capitalist class behind the corporation) makes highly effective use of international law. In a final section I ask how the discourse of IL, and especially the logic of peace, seemingly clashes with the prior and enduring logic of the market yet, at the same time, serves to legitimise the IL enterprise and to conceal its basis in capitalist exploitation.

³⁹⁹ I use ‘Private IL’ to mean the IL that regulates (aspects of) the ‘private sphere’, and not in the technical sense of ‘conflict of laws’.

⁴⁰⁰ The Centre “provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States”, and was established by means of the *ICSID Convention*.

1.1 Epistemology: Sources in international law/history of international law

In order to locate the corporation in the history of international law, and in international legal practice, again some creativity is required. The history of international law, like the history of company law, has been a neglected area.⁴⁰¹ A renewed interest in the history of IL focuses almost exclusively on the writings of legal philosophers but not on IL as actually practised.⁴⁰² In contemporary IL, too, few authors discuss the ‘why’ of the emergence of law/international law - the development of law is often represented as a ‘self-unfolding of ideas’ or even through a ‘teleology of freedom’.⁴⁰³ Often also law and legal concepts appear (e.g. in judicial decisions or in the literature) seemingly as if out of nowhere, yet are presented as ‘elementary’ and obvious. Thus fundamental (foundational) contradictions are obscured, for example the idea of statehood being both antecedent and a product of IL.⁴⁰⁴

Additionally, as I argue below, in ‘public’ or general international law and history of international law scholarship, the political economy of international law remains largely concealed.⁴⁰⁵ Few authors have commented on this absence (see Section 3 below).⁴⁰⁶ Miéville observes, “it is only through examining the changing nature of exchange and market relations across communities and eventually nation-states that the changing nature of international law can be made sense of.”⁴⁰⁷ The state was first conceptualised as a unit of economic activity.⁴⁰⁸ Moreover, I argue, it is also only through examining the changing nature of market relations and the concomitant development of international law that we can really understand the creation and role of the corporation in the political economy of international law. In general/‘public’ international law scholarship, both doctrinal and theoretical, the corporation in any shape or form is almost completely absent.⁴⁰⁹ Current international law scholarship appears to view the corporation either as external and/or irrelevant to its field of

⁴⁰¹ Miéville (2005) 153; but see: Nussbaum (1954).

⁴⁰² Verzijl (1968); Grewe (1984); Kennedy (1997); Berman (1998-1999); Lesaffer (2002); Koskenniemi (2002); Koskenniemi (2004); Simpson (2004); Neff (2006), Kennedy (2012).

⁴⁰³ Miéville (2005) 155.

⁴⁰⁴ Craven (2010) 203.

⁴⁰⁵ Pashukanis (2005); Rasulov (2008); Carty (2008); Cutler (2008); Orford (2001); Cutler (2003); Silbey (1997).

⁴⁰⁶ Alston (1997); Scott (1998)

⁴⁰⁷ Miéville (2005) 156.

⁴⁰⁸ Craven (2010) 2010.

⁴⁰⁹ Johns (1995). But see Somers (2001); Nussbaum (27-35, 203-7); Grewe (1984) 345-354, 546-552; Verzijl (1968) – section on nationalization and the private/public IL; generally Neff (1990); Miéville (2005) 107-8; Wilson (2008) 189-260, 400-415; Gathii (2010) esp. Chs.5, 6, 7.

study,⁴¹⁰ or (in what is called ‘international economic law’ or more specifically, e.g. ‘international law of investment protection’) to treat corporations (and their bigger, international version, the multinational) as a self-evident and ‘natural’ fact of life.⁴¹¹ A notable example in the latter category is Peter Muchlinski’s monograph “Multinational Enterprises and the Law”, first published in 1995.⁴¹² In Sections 3 and 4 below I discuss the changing dynamics between corporations, states and other forms which will eventually become a manner of global governance.

Marx has said, “capital comes dripping from head to toe, from every pore, with blood and dirt.”⁴¹³ However, while it is clear that the transition to capitalism and capitalism itself was/is a ‘bloody business’ – most historical and especially legal literature has been cleansed of any evidence of this. This is of course not necessarily an innocent move. Per Miéville: “Law disguises its own brutal core.”⁴¹⁴ As I try to show in this thesis as a whole, there are many indications of continuity between primitive accumulation in Europe (e.g. Britain’s clearances see Chapter 2A), colonial practices, corporate involvement in WWII (Ch.3A and 3B) and *current* multinationals’ practices in the Third World.⁴¹⁵

1.2 *Towards International Law*

Neff stresses the fact that natural law writers in the pre-modern age considered the whole of human (and often also non-human) society “to form a single moral and ethical community”, and that “no body of law existed that was applicable *uniquely* to international relations as such.”⁴¹⁶ Such universalist natural ‘law’, however, would more appropriately be called philosophical theory, where it only existed inside the heads and treatises of the scholars of the time (i.e. in the realm of ideas) without reflecting actually existing material reality of human relations, or, indeed having much impact on them.⁴¹⁷ Seen through the prism of the commodity form theory of law, such

⁴¹⁰ More generally, Keene (2002) 2.

⁴¹¹ Allott is an exception: Allott (2002) 8.65. Key works of IL theory and history do not mention the corporation, for example, Koskenniemi (2002).

⁴¹² Muchlinski (2007).

⁴¹³ Marx (1978) 1926.

⁴¹⁴ Miéville (2005) 194. Victims’ accounts have rarely been recorded (Renton (2006) 34-36).

⁴¹⁵ Harvey proposes the term ‘accumulation by dispossession’ to emphasise the continuity between ‘primitive’ accumulation and current practices (Harvey (2003) 145).

⁴¹⁶ Neff (2010) 6-7.

⁴¹⁷ Although natural lawyers of the time might have argued that the laws were to be discovered in nature (or ‘reason’ – Grotius) itself.

law as actually existed is pre- or proto-law at most except insofar it inhered between trading polities. It is from the pluralist everyday practice of city-states and other types of polities trading as economic units (e.g. boroughs and guilds: Ch.2A) that a '*ius inter gentes*'⁴¹⁸ is eventually developed, if generally only inhering for the duration of specific exchanges without becoming systematised (or universalised).⁴¹⁹ Early examples of law developing around inter-polity trade were the bilateral agreements for the protection of merchants, both on land and sea, the latter receiving the benefit of rules such as those in the "*Consolato del Mare*" which sought to govern amongst others the right of neutral traders in wartime.⁴²⁰

Such 'law merchant' operated (in what Grewe calls the "Spanish Period"⁴²¹) on a pragmatic basis mostly between European traders and to a more limited extent their Asian and African counterparts until the 'discovery' of America by Columbus profoundly changed the socio-political space. Faced with a 'new world', the Portuguese and Spanish superpowers of the time divided the known world between them in the Treaty of Tordesillas of 1494.⁴²² In the treaty a line ('*raya*') was drawn across the world between Spanish and Portuguese spheres of hegemony. This was not the first such line but the first *global* line. It was essentially "a feudal line between two princes"⁴²³ in a rapidly altering world. A "premodern line of division was drawn onto a newly (post-feudal) scientific conception of the world, for the purposes of the exploitative distribution of a global order between two burgeoning mercantilist states"⁴²⁴ The question arose (perhaps mainly in the minds of scholars) how to view the new world, which was not part of the '*respublica Christiana*' but also not classed as 'enemy'. Once the Aztec gold was discovered this question became all the more salient. Spanish theologian and jurist Francisco de Vitoria answered it by denying the 'Indians' sovereignty (as this right was reserved for Christians), but by 'granting' them 'dominion' over their territory, a *reciprocal* right of ownership.⁴²⁵ "[T]he mere 'discovery' of the Americas does not give the Spanish ownership 'any more than if it

⁴¹⁸ Grewe (1984) 163ff.

⁴¹⁹ Miéville contradicts himself at 167 when he states "[t]he simple fact of relations between polities is not enough even to claim the legal form."

⁴²⁰ Neff (2010) 8.

⁴²¹ Grewe (1984) 163.

⁴²² Miéville (2005) 171.

⁴²³ Miéville (2005) 171.

⁴²⁴ Miéville (2005) 175.

⁴²⁵ De Victoria (1964) (no pagination: Summary of Third Section). See generally: Anghie (2007) 1-31.

been they who had discovered us”⁴²⁶ – which was clearly a rhetorical possibility only. Of course having ownership meant having the hypothetical capacity to trade (in this case specifically: to sell). In *De Indes Noviter Inventis*, de Vitoria concluded that the Spanish conquest of the native kingdoms in the New World had been ‘legal’ as the ‘Indians’ had ‘unlawfully’ attempted to exclude Spanish traders (effectively preventing them from ‘buying’ Aztec treasures).⁴²⁷ Thus, the basis on which de Vitoria decided on the legality of the actions was the principle of free trade, which was at the time in the *respublica Christiana* considered a natural law as well as a religious right.⁴²⁸ The ‘Indians’, through the right of dominion, had some measure of legal personality.

At this point the *respublica Christiana* was crumbling and the “Spanish Age” of 1492-1648 was also the period of transition to capitalism. The ‘raya’ was soon replaced by ‘lines of amity’ which were agreed between the now up and coming French, Dutch and English economic powers.⁴²⁹ Rather than dividing the world between them, these were lines that demarcated a European sphere (where international law ruled), and a space beyond. Beyond the lines of amity, the European powers considered the world was ‘up for grabs’ and, through and with their trading companies, they competed with each other to colonise the remaining world.⁴³⁰ This is when the previously ‘universal’ law becomes a *European* international law – with ‘no law beyond the line’.⁴³¹

Eventually in 1648, Spain - in the *Peace of Münster* which ended the Eighty Years War - recognised the United Netherlands as another economic power and simultaneously recognised Dutch colonial possessions.⁴³² The lines of amity became irrelevant as European powers came to recognise each others’ ‘title’ to the various parts of the rest of the world, and ‘European international law’ became universal once again.⁴³³

⁴²⁶ Miéville (2005) 177 quoting De Victoria (1964) (no pagination: Third Section).

⁴²⁷ Victoria (1964) (no pagination: final section), Miéville (2005) 177.

⁴²⁸ Neff (1990) “Free trade is the international law of God” 38, see also 15-17.

⁴²⁹ Grewe (1984) 184.

⁴³⁰ Miéville (2005) 182, Grewe (1984) 181ff.

⁴³¹ Miéville (2005) 184; Grewe (1984) 192. See also generally Anghie (2007) Ch.2.

⁴³² *Peace of Münster; Treaty of Westphalia*.

⁴³³ Grewe (1984) 270; Miéville (2005) 183.

1.3 *The commodity form theory in international law*

As discussed above (Ch.2A Section 4), in Europe around 1648 strong, centralised governments began to get the upper hand over the diffuse feudal power structures.⁴³⁴

Provinces and city states joined, or merged into, ‘national’ unions. As per Miéville:

*[t]he legal form – the form whereby the bearers of abstract rights and commodities confront each [sic] – has existed in various historical conjunctures, but it was only with the rise of sovereign states that international law can be considered to have been born, and it is with the triumph of capitalism and its commodification of all social relations that the legal form universalised and became modern international law.*⁴³⁵

Thus when the bourgeoisie came to dominate the proletariat in the West and “organised itself into separate state-political trusts” we can properly speak of international law.⁴³⁶ When the bourgeoisie completed the process of separation of state from private rule the state gained subjectivity in international law,⁴³⁷ or ‘international legal personality’ (“ILP”). That the new international law was something qualitatively different from feudal law is exemplified by the fact that states denied the binding nature of pre-existing dynastic treaties (the lines of amity had been feudal agreements between princes).⁴³⁸ As indicated above, bourgeois international law operates on two levels. On the one hand, where (mainly) European nations compete over, and divide amongst themselves the rest of the world, the previously intra-class international law (Vitoria) replaced feudal struggles and ‘primitive accumulation’ with inter-class diplomatic, contractual exchange⁴³⁹ (post-1648 international law). In sum, *international law* comes about when polities converge into (or are submerged in) states, and states obtain legal personality by virtue of relating to each other as formally equal legal persons. “It is during this period that the categories concomitant to that trade – the legal forms – begin to universalise. ... As trade became global, and definitional to sovereign states, the international order could not but become an international legal order.”⁴⁴⁰

⁴³⁴ But see Teschke (2009); cf. Neff (2010) 11; also Brandon (2011).

⁴³⁵ Miéville (2005) 161 (emphasis in original).

⁴³⁶ Pashukanis (2005) 322-325.

⁴³⁷ Pashukanis (2005) 327.

⁴³⁸ Pashukanis (2005) 327.

⁴³⁹ Pashukanis (2005) 325.

⁴⁴⁰ Miéville (2005) 200.

Both movements were mutually reinforcing:

*There can be no doubt... that the great revolutions that took place in trade in the sixteenth and seventeenth centuries, along with the geographical discoveries of that epoch, and which rapidly advanced the development of commercial capital, were a major moment in promoting the transition from the feudal to the capitalist mode of production. The sudden expansion of the world market, the multiplication of commodities in circulation, the competition among European nations for the seizure of Asiatic products and American treasures, the colonial system all made a fundamental contribution towards shattering the feudal barriers to production.*⁴⁴¹

Pashukanis posits that “[t]he real historical content of international law is the struggles between polities/states for resources.”⁴⁴² Miéville emphasises how it is the formal legal equality masking the material inequality between the Europeans and the non-Europeans, that “gave [law] in service to the strong – the coloniser.”⁴⁴³

Miéville locates colonialism in the *content* and also in the *form* of international law:

*The colonial encounter is central to the development of international law. But this centrality is not reducible to the colonialism of content, the fact that certain legal categories were invested with Western bias, though the fleshing out of such historical specificities is important. Colonialism is in the very form, the structure of international law itself, predicated on global trade between inherently unequal polities, with unequal coercive violence implied in the very commodity form. This unequal coercion is what forces particular content into the legal form.*⁴⁴⁴

Law disguises this: “law disguises its own brutal core”.⁴⁴⁵ Succinctly: “international law *is* colonialism.”⁴⁴⁶ In this thesis I argue that as well as the historically specific “colonialism”, exploitation, domination and imperialism are the very form, the very structure of international and indeed *all* law.

⁴⁴¹ Marx (1981) 447, cited by Miéville (2005) 199.

⁴⁴² Pashukanis (2005), Miéville (2005) 325ff and Miéville (2004) 292.

⁴⁴³ Miéville (2005) 177.

⁴⁴⁴ Miéville (2005) 178, emphasis in original.

⁴⁴⁵ Miéville (2005) 194.

⁴⁴⁶ Miéville (2005) 169.

As signalled above (Chapter 1, section 3.2), I consider Miéville could (or perhaps *should*) have taken his Marxist theory one step further (away from liberalism). Where Pashukanis remarks: “international law owes its existence to the fact that the bourgeoisie exercises its domination over the proletariat and over the colonial countries”⁴⁴⁷ one can read into this a perception of a global class structure. This of course follows with Marxist theory’s (or communism’s) inherently internationalist (or, properly, *global*) outlook. States, like corporations, as I showed in Chapter 2A, are fetishised (or reified) legal abstractions created for particular purposes and which nonetheless (and maybe partly consequently), come to have some ‘real world’ actuality. They are in their own peculiar way part of the ‘material base’. Miéville’s statist framing of IL however is a lapse into liberalism. For the purposes of a Marxist theoretical critique we need to both understand the workings and effect of the reification of the state and the fragmentation and bracketing of IL as a seemingly separate field of law, and simultaneously demystify the state, IL, and the corporation.

Miéville continues his explication of the commodity form theory of international law by describing how the guarantee as between formally “equal states” in the absence of a superior authority, rests in the balance of forces.⁴⁴⁸ “The historically progressive generalisation of ‘equal rights’ is the generalisation of the abstract legal subject.”⁴⁴⁹ Eventually, as Miéville surmises by quoting Marx, “between equal rights, force decides.”⁴⁵⁰ In his discussion on the essence of class struggle, which is to be found in the struggle over the working day, Marx continues after this short phrase: “Hence is it that in the history of capitalist production, the determination of what is a working-day, presents itself as the result of a struggle, a struggle between collective capital, i.e., the class of capitalists, and collective labour, i.e., the working-class.”⁴⁵¹ From this fragment we can deduce that the ‘force’ Marx means is not necessarily physical violence (war) as Miéville seems to say, but, the ‘force’ of domination and exploitation through ownership of the means of production, the ultimate *unfreedom* of labour. The capitalist class still has at its disposal the feudal ‘power’ to coerce, but it is the achievement of capitalism that this is no longer (or rarely) necessary. The capitalist

⁴⁴⁷ Pashukanis (2005) 325.

⁴⁴⁸ Pashukanis (2005) 331.

⁴⁴⁹ Miéville (2005) 88.

⁴⁵⁰ Miéville (2005) 292.

⁴⁵¹ Marx (1976) (Capital Vol. I Ch. 10).

class coerces by virtue of its ownership of the means of production, while the modern capitalist *Rechtsstaat* coerces through law backed up by the legitimate threat, or use, of physical and economic force.

Ultimately, therefore, the real regulating factor in the world, is the *economic imperialism* of the global capitalist class, first and foremost.⁴⁵² Law, laws institutions and law's bureaucracy, to some extent have been developed (mostly by lawyers) to have their own, internal logic (coherence, rhetoric),⁴⁵³ but this logic follows the logic of economic imperialism, and is based on the *commodity form*. As I argue below, modern day economic imperialism (Ch. 1) is administered first and foremost through the construct of corporation, through its international 'management committees', the Bretton Woods institutions, arbitral tribunals, and legal tools such as bilateral investment treaties, development aid, etc, by (or at the behest of) the capital owning classes.⁴⁵⁴

2 Corporations, law and capitalism

Having set out the historical-doctrinal development of international law above, I argue that the creation of trading corporations is profoundly implicated in the spread/export (and eventual *universalisation*) of capitalism, the state form, and the content and institutions of international law. A number of situations, events and phenomena show the effects of this continuing development. These can roughly be divided into three closely interlinked categories: (1) the origin of the concept of international law, states, and corporations around the same time (2.1), (2) the close relationship between state and corporation exemplified in their concurrent development in history (Sections 2.2 and 2.3), (3) the instrumentalisation of corporations in colonisation, accumulation and the spread of capitalism exemplified in the corporate scramble for Africa (2.4-6). First, I examine the corporate roots of IL and the early development of law around corporate activity including in trade wars.

⁴⁵² But see Marks (2007) esp. 211.

⁴⁵³ See generally Kennedy (1987).

⁴⁵⁴ On this, see also, e.g. Rasulov (2008); Rasulov (2011).

2.1 Grotius: ‘Father of international law’ and corporate counsel to the Dutch East India Company

Hugo de Groot, who was later named the “father of international law”, in his younger years made his mark as the legal advisor to the Dutch East India Company (Vereenigde Oostindische Compagnie or “VOC” in Dutch).⁴⁵⁵ Through Grotius’ work, placed in its historical context, we can gain some insight into the role of corporations and trade wars in the early development of international law during the period of mercantilism.

In 1603, one of the Company’s captains, Jan van Heemskerck, had captured a loaded Portuguese merchant ship, the Santa Catarina. Some of the VOC’s shareholders objected to the capture on religious/moral grounds. Grotius was commissioned to write a defence of the seizure.⁴⁵⁶ The objecting (Mennonite) shareholders had threatened to set up a rival company in France, which would confine its activities to peaceful trading and other purely commercial pursuits.⁴⁵⁷ The publication of Grotius’ *De Iure Praedae* (On the Right of Capture) was apparently pre-empted by a Dutch court order in favour of retaining the prize.⁴⁵⁸

Also on the more immediate level, *De Iure Praedae* contained *De Mare Liberum* – which introduced the idea that the seas are ‘global commons’, free for all states to navigate with a view to exploration and plying trade.⁴⁵⁹ As such the text provided a justification for breaking up various (foreign) trade monopolies. Grotius viewed the facilitation of global trade to be the overarching purpose of IL. *De Iure Belli ac Pacis* also justifies war when fought to ward off or halt interference with trade.⁴⁶⁰ Rules had to be made and agreed however between the major seafaring nations about how to tackle piracy (which was a major obstacle to free trade), who was allowed to pass through and travel where, etc., and of course what the repercussions were for non-compliance with these rules. The first Dutch-Anglo war was fought over the

⁴⁵⁵ Corporate counsel in the sense he was employed to write a legal brief, not ‘in permanent employ’ (Wilson (2008) 7).

⁴⁵⁶ Wilson (2008) 7. To satisfy any possible type of doubt entertained by his countrymen, Grotius treated the question from the point of view of whether the capture was legally justified (Ch II-XIII), honorable (Ch XIV) and expedient (Ch XV).

⁴⁵⁷ Fruin (1925) 5, 60-1.

⁴⁵⁸ Fruin (1925) 26; Grotius (2005). *De Iure Praedae* contained an early version of Grotius’ influential work *De Iure Bellis ac Paci*.

⁴⁵⁹ Grotius (2004) Ch.8 (not paginated).

⁴⁶⁰ Grotius (2005) 180ff.

disagreement between Grotius' idea of *Mare Liberum* versus the English idea of *Mare Clausum* (closed seas), which relied on the levying of passage fees.⁴⁶¹ In the words of Walter Raleigh: "Whoever rules the waves rules commerce; whoever rules commerce rules the wealth of the world, and consequently the world itself..."⁴⁶² The English Navigation Acts, a series of laws aimed at protecting English trading monopolies, stipulated amongst others that goods could only enter English harbours on board English ships.⁴⁶³ Eventually, a compromise was agreed on, where 3-mile territorial waters (the reach of protection by cannon fire) was to be considered "territorial waters" and the remainder open seas free for trade. Some 1,000 Dutch ships were taken and added to the English merchant fleet.⁴⁶⁴ For their part, according to Grewe, the merchants were not so much interested in the big philosophical questions of *mare liberum* or *mare clausum* but rather, in an effective enforcement of their interests on the high seas.⁴⁶⁵

Grotius considers states as well as other 'human associations' such as the Dutch East India Company to have rights and obligations comparable to private individuals.⁴⁶⁶ Grotius' conception of the legal realm therefore seems to be one without divisions between the domestic and the 'international' but instead one legal space organised according to the logic of commerce. Contemporary theorist Kingsbury shows an awareness of this: "... Grotius had developed his doctrine of the state of nature and the natural right to punish against the backdrop of the need to show that the Dutch East India Company, even if acting on its own behalf as a private actor, had the right to wage war against the Portuguese fleet in Southeast Asia",⁴⁶⁷ but fails to add that Grotius created his broader jurisprudential theory based on (t)his particular class' commercial interest. Grotius' theory gained broad acceptance among legal scholars over the years, detached from this motivation, instead becoming a standalone legal-philosophical representation.⁴⁶⁸ Additionally, Grotius' theory and larger role as the 'father of IL' is *now* primarily seen as 'about war and peace', concealing the

⁴⁶¹ Grewe (1884) 311.

⁴⁶² Ferro (1997) 47.

⁴⁶³ Grewe (1984) 318; Miéville (2005) 204-6.

⁴⁶⁴ Miéville (2005) 205.

⁴⁶⁵ Grewe (1984) 345.

⁴⁶⁶ Grotius (1925) 105.

⁴⁶⁷ Kingsbury and Straumann (2010) 41.

⁴⁶⁸ Wilson (2008) 51ff.; 128.

commercial imperative behind his work.⁴⁶⁹ Perhaps this should be regarded as a teleological reading of history, viewed from the current perspective, or fitting in the current dominant discourse where international law is “about” and “for” peace, common values of justice, human rights etc. (cosmopolitanism, constitutionalism) (see below, Section 5).⁴⁷⁰

Indeed, according to Wilson, “[t]he defence of the VOC came to serve as a template for a wider re-conceptualisation of the trans-national space within which the Company operated.”⁴⁷¹ Further, in 1601 Grotius was appointed the ‘national Historiographer of Holland’, which meant both that he was a “self-conscious producer of republican and patriotic texts” and that he worked in close proximity to (“in the immediate political orbit of” the Dutch ‘solicitor-general’ (*landsadvocaat*) Johan van Oldebarnevelt.⁴⁷² As such, Grotius was able to exercise great influence not only on the development of the law of nations, but also domestic law: “the Text [sic] ‘translates’ the operational requirements of the World-Economy into the terms of Nationalist Jurisprudence.”⁴⁷³ Thus we see how one individual, representative of a class and a particular company’s interest, managed to leave a particular mark on international and domestic law.

With the perspective Grotius’ story brings in mind, it is possible to re-cast our understanding of the state and corporate form. Miéville argues that for law to ‘work’ and a legal system to come into existence (and also for capitalism to mature), the creation of a state is not necessary.⁴⁷⁴ The same can be said about the corporation. However, and as shown in 2A, both are conducive to capitalism and both operate along its logic. As I discussed in Ch.2A, as the explorers wanted to undertake more ambitious expeditions, they sought to raise finance among a wider group of persons. It made sense to do so in a wider but more or less homogenous and increasingly centrally

⁴⁶⁹ The commercial logic of international law is also evident in Pufendorf, who described how *cultura*, the state of life produced by human industry, and commerce (which emerge to overcome humans’ natural state of *imbecilitas* and *indigentia*) correspond with the formation and flourishing of society, Kingsbury (2011) 47. Pufendorf’s explanation of how the “creation of civitas depended on the adoption of a contract by which the participants surrender their natural liberty” (Kingsbury (2011) 47) bears similarity to Marx’ concept of the human subject becoming a *legal* subject in capitalism/capitalist law. “Human emancipation” according to Marx entails shedding legal personhood (On the Jewish question) Marx (2000) 46ff.

⁴⁷⁰ Also Koskenniemi (2010).

⁴⁷¹ Wilson (2008) xii.

⁴⁷² Wilson (2008) 14.

⁴⁷³ Wilson (2008) 14.

⁴⁷⁴ Which makes his statist perspective all the more puzzling.

regulated market/locality, where the traders could also find customers for the goods. As many directors of the trading companies were also active in the local and provincial (e.g. Dutch Republic⁴⁷⁵) administration, the centralisation of administration and regulation came about as a matter of rationality. Perhaps then it is possible to draw a parallel here with the European state form and the large trading companies on the domestic level from the point of view of the elites, who developed both the state and corporate form as conducive to the development and spread of capitalism.⁴⁷⁶ While the state is a remnant of feudalism/pre-capitalist absolutism⁴⁷⁷ (in the sense that the national boundaries were drawn around the feudal estates of lords and larger provinces of lords sworn to the same king), conversely the *form* of the state is a construct of capitalism/the capitalist class. In the domestic and in the international sphere there seems to be in the first instance great convergence between state and corporate interests with corporations forming an extension of states, rather than states forming a ‘bureaucracy’ for the facilitation of the economy.⁴⁷⁸ In due course (as the ideological forms ‘congeal’) the state and the corporation each gain their sphere of activity and authority (private/public) internally and on the global level.⁴⁷⁹ In Chapter 6 I discuss the current status of these, now once again converging, spheres.

2.2 *Concurrent development: corporations, states and colonialism*

In this section I take a closer look at the interrelation between states and corporations as putative ‘subjects’ of the new field of international law, and the role of particular legal concepts such as sovereignty in the practice by states and corporations of colonialism. Miéville posits, “[s]overeignty is the legitimising principle by which that subject in modern international law - the state - faces others.”⁴⁸⁰ However, during the period of colonisation it was not states facing each other as sovereigns in the space ‘beyond the line’, it was the trading corporations that both interacted with each other and with non-European polities. This meant that European states were able to deal indirectly with the Eastern polities without being forced to recognise them as states. Grewe suggests that corporations were used in the colonisation process to prevent the

⁴⁷⁵ Brandon (2011) 127.

⁴⁷⁶ Miéville (2005) 201; Marx (1981) 451.

⁴⁷⁷ England and The Dutch Republic were anomalies in Europe and had representative governments, see, e.g. Merriman (2010) 208.

⁴⁷⁸ Weber (1982) 338ff.

⁴⁷⁹ Craven (2010) 211 describes the consequences of the personification of the state and the concomitant (ideological) separation between the internal sphere and the external relations.

⁴⁸⁰ Miéville (2005) 184

state form from spreading beyond Europe: “The most important [effect on the development of international law] was the dual position taken by the trading companies: semi-public, semi-private, which enabled the avoidance of a complete transfer of the European state-form, with its extensive legal consequences and its characteristics of sovereignty – nation, territory, borders – to the overseas colonial space.”⁴⁸¹ “It was through the fact that it was the corporations and not the states themselves, that encountered each other, and that were considered (or at least held out to be) more or less independent, that a *particularly elastic system of colonial international law* was constructed.”⁴⁸² Apparently, “[p]oliticians were well aware that the legal status of their colonial possessions was problematic. The East India Companies were the perfect agents to police this ‘transitional’ colonialism, because of their indistinct legal status.”⁴⁸³ The large trading corporations were the main actors (or tools⁴⁸⁴) in the colonisation process at least for England and the Netherlands, and they represented the legal and organisational form through which other colonial powers annexed their conquered territories to the motherland.⁴⁸⁵ Even the settlement of North America by the passengers of the ‘Mayflower’ took place through the use of chartered companies.⁴⁸⁶

Wilson uses the term “Corporate Sovereignty” (his capitals) to describe the nature of the VOC’s operations in the context of the Dutch republican ‘corporatism’ of the 17th C. The French, English and Dutch companies were endowed with delegated sovereign rights by way of their Charters.⁴⁸⁷ Among these were for example the grant by Charles II to the British East India Company in 1661 of the express right to send war ships, personnel, and armoury for the defence of their factories and trading posts, and to decide over war and peace with all non-Christian peoples.⁴⁸⁸ In 1677 the right to coinage was added.⁴⁸⁹ Dutch and French companies had similar delegated sovereign rights – and the right to wage war included trade war and battles over territory with other European powers. Such wars, taking place ‘beyond the line’ did not affect the

⁴⁸¹ Grewe (1984) 346.

⁴⁸² Grewe (1984) 346 (emphasis added).

⁴⁸³ Miéville (2005) 184.

⁴⁸⁴ Grewe (1984) 351.

⁴⁸⁵ Grewe (1984) 345.

⁴⁸⁶ Grewe (1984) 348-9.

⁴⁸⁷ Grewe (1984) 350.

⁴⁸⁸ Grewe (1984) 351.

⁴⁸⁹ Grewe (1984) 351.

European peace.⁴⁹⁰ The second Anglo-Dutch war mentioned above had started in 1664 with attacks by the Royal African Company on the Dutch trading posts in Guinea but did not become a ‘European’ war until the following year.⁴⁹¹ Conversely, when European powers were engaged in war ‘at home’ this did not necessarily affect their trading relationships overseas, nor did it mean their posts and territory outside Europe would be attacked.⁴⁹²

There are direct parallels to be drawn here between other, contemporary instances of protection of trade in times of conflict (about which more below, Ch.5).⁴⁹³ “Business” and “politics” are each assigned a different, separate conceptual realm despite their obvious entanglement. “The close relation between a state-authorized monopoly and the state itself ... meant that the boundaries between the company and the state were permeable, and the monopoly trade could be used to underpin political (state) control. *The monopoly nature of these companies was the means by which their parent state retained control over its colonial possessions in an era of increasingly bounded sovereignty.*”⁴⁹⁴ The strength of the nascent capitalist ‘military-industrial complex’ lies in the capitalist class’ ability to split and reunite at will, for interests at once to appear as political (or public) and at other times as commercial (or private) – as Dr. Jekyll or Mr. Hyde. It is *law* that enables this conjecture.⁴⁹⁵

The interests of the Western traders and investors were protected further by the way they managed to uphold the idea that their national laws travelled with them wherever they went overseas.⁴⁹⁶ They managed generally to enforce the application in colonies of ‘Imperial law’ (in the British case) and outside of a colonial context, by the extraterritorial application of imperial law in the trading enclaves (e.g. in China, Japan) – with disputes being referred to the imperial courts.⁴⁹⁷ The implication of this was that local rulers could not expropriate their property or pass laws that otherwise affected

⁴⁹⁰ Grewe (1984) 352.

⁴⁹¹ Grewe (1984) 318.

⁴⁹² Grewe (1984) 353.

⁴⁹³ “The victory of the bourgeoisie, in all the European countries, had to lead to the establishment of new rules and new institutions of international law which protected the general and basic interests of the bourgeoisie, ie. bourgeois property. Here is the key to the modern law of war.” Pashukanis (2005) 325.

⁴⁹⁴ Miéville (2005) 207 (emphasis in original).

⁴⁹⁵ See also Pashukanis (2005) 327.

⁴⁹⁶ Subedi (2008) 7.

⁴⁹⁷ Sornarajah (2010) 19-20; fn. 56.

the foreign merchants' operations.⁴⁹⁸ As I will show below (S.3) this state of affairs is effectively still current.

While power was the final arbiter in disputes between the European traders and their counterparts and 'gunboat diplomacy' was still the method of choice to enforce compliance,⁴⁹⁹ it was felt towards the end of the 19th C. that legal doctrine needed to be constructed to justify the use of force.⁵⁰⁰ This signals the growing 'maturity' of the 'international rule of law' and of global capitalism, where coercion predominantly occurs through means other than *direct* use of physical violence: means including law.

2.3 *The 19th C. Trade Corporations preparing the ground for states in the Western image*

The old trading companies from the first colonisation period (16th-18th C.) continued to exist into the 19th C. but their independence, power and significance had long gone.⁵⁰¹ For example, the British Crown took over direct control of India by means of the 1773 Regulating Act.⁵⁰² Anghie surmises, "[t]he direct involvement of European states in the whole process of governing resulted in a shift from the vulgar language of profit to that of order, proper governance and humanitarianism."⁵⁰³ The language of profit is hived off to 'private' IL while 'public' IL becomes the human face of capitalist IL. Koskenniemi describes the transfer of control over India differently and argues it occurred in order to lessen the burden on the taxpayer. For the British, "[d]uring 1815-1870 the slogan "trade, not rule" formed the core of British overseas policy."⁵⁰⁴ Finally Miéville puts it thus: "monopoly companies had outlived their usefulness as agents of colonialism. ...India was simply too profitable to be left in the control of a company which was structured to treat it as a treasure-chest. By taking it over *politically* the British state helped institutionalise the separation of politics and economics associated with mature capitalism."⁵⁰⁵ Moreover, "[o]stensibly aimed at checking the oppression

⁴⁹⁸ Subedi (2008) 7.

⁴⁹⁹ Hopkins (1980) 779 for an example in the context of Britain's annexation of Lagos.

⁵⁰⁰ Sornarajah (2010) 20.

⁵⁰¹ Grewe (1984) 546.

⁵⁰² *Regulating Act*.

⁵⁰³ Anghie (2007) 69.

⁵⁰⁴ Koskenniemi (2001) 112.

⁵⁰⁵ Miéville (2005) 234, emphasis in original.

of the Company's rule the real effect of the Act was to systematise the exploitation of India".⁵⁰⁶

In the 19th C. when European states *did* want to create new (although dependent) states to take over the colonised areas, they used a mostly *new* set of corporations to ensure those states took exactly the shape that they wanted (and presumably also, had exactly the leaders they wanted).⁵⁰⁷ According to Koskenniemi: "[t]he end of informal empire meant that European public institutions – in particular, European sovereignty – needed to be projected into colonial territory"⁵⁰⁸ Britain in the 19th C intensified what Koskenniemi calls 'informal' influence through a revival of chartered companies, and "[b]y the time the scramble [for Africa] was over, more than 75 percent of British acquisitions south of the Sahara were acquired by chartered companies."⁵⁰⁹

2.4 *The Corporate Scramble for Africa*

The corporate scramble for Africa marked the start of a new phase of instrumentalisation of the corporate form in colonialism – the third category of mutual implication of international law, global capitalism and the corporation identified above at S.2. This instrumentalisation occurred behind an *outwardly* clearer separation between the state sphere and a vast network of private companies given wide rein to run the colonies. For example, in 1881 the British North Borneo Company was founded, in 1886 the Royal Niger Company, in 1888 the Imperial British East Africa Company, and in 1889 the British South Africa Company.⁵¹⁰ The latter was run by Cecil Rhodes, under a charter giving him practically a free hand to administer the area – with his 'irresponsible policy' being said to have 'almost inevitably' led to the Boer War.⁵¹¹

⁵⁰⁶ Morton (1989) quoted by Miéville (2005) 234.

⁵⁰⁷ Grewe (1984) 546; Anghie (2007) 77-78. In South America, rather than corporations, the political act of recognition was employed. At the same time as Latin American colonies were gaining independence from Spain, the U.S. issued the 'Monroe Doctrine' which stated its proprietary claim on Latin American countries while *at the same time* recognising them as sovereign states (Miéville (2005) 237: "It was in the recognition of formally independent postcolonial states that the US's newly modulated imperialism articulated itself. The same instincts can be seen in Britain...").

⁵⁰⁸ Koskenniemi (2001) 121.

⁵⁰⁹ Koskenniemi (2001) 117.

⁵¹⁰ Grewe (1984) 548.

⁵¹¹ Grewe (1984) 120.

Similarly, what was to become German South West Africa was acquired in 1882 by a tobacco merchant from Bremen, with the Zanzibar region being administered by the German East Africa Company and the Imperial British East Africa Company.⁵¹² Vast tracts of land were granted by the German government to the Deutsche Kolonialgesellschaft, which proceeded with a policy of settler colonialism, granting many German farmers and entrepreneurs generous concessions.⁵¹³ German companies active on the ground included a railway company, the company running the ports, Deutsche Bank and various mining companies.⁵¹⁴ New German settlers began to question whether the colony might not be better off without the ‘black problem’. One colonial leader is quoted as saying, “I do not concur with those...who want to see the Herero destroyed altogether. Apart from the fact that a people of 60,000 or 70,000 is not so easy to annihilate, I would consider such a move a grave mistake from an economic point of view. We need the Herero as cattle breeders ...and especially as labourers. It will be quite sufficient if they are politically dead.”⁵¹⁵ This plea was apparently rejected by the companies and Imperial Germany,⁵¹⁶ which sent in General von Trotha, who had just suppressed the Arab rebellion in German East Africa, and who responded “I shall annihilate the African tribes with streams of blood and streams of gold.”⁵¹⁷ After the brutal crushing of the Herero uprising by the German army, German military rule returned. The around 15,000 surviving Herero were placed in concentration camps maintained by (amongst others) the Woermann shipping company, where they were subjected to slave labour, rape and medical experimentation.⁵¹⁸ Almost half those put to work building railways died.

In 1881 Portugal founded the Mozambique-company.⁵¹⁹ In 1900, French Equatorial Africa was divided up between forty French concession companies.⁵²⁰ These new

⁵¹² Grewe (1984)118-120.

⁵¹³ Gewald (2009) 48.

⁵¹⁴ *Herero 2001 Complaint*. The ‘Herero genocide’ became the subject of compensation litigation in the US in 2001 – see further Chapter 6 below.

⁵¹⁵ Gewald (2009) 169, quoted in *Herero 2001 Complaint* para. 92.

⁵¹⁶ The *Herero 2001 Complaint* denotes the Deutsche Bank, the Terex Corporation (then Orenstein-Koppel which built railways and ran mines) and the Woermann Line shipping and ports company together as the “German Colonial Enterprise”) see further Chapter 6 below.

⁵¹⁷ *Herero 2001 Complaint* 95.

⁵¹⁸ *Herero 2001 Complaint* 114-124. The German geneticist Eugene Fisher experimented on ‘mulatto’ offspring of German settler men and Herero women to explore his ideas about racial hygiene’ which he was later to teach – as Chancellor of the University of Berlin - to Joseph Mengele – 135.

⁵¹⁹ Grewe (1984) 548.

⁵²⁰ Renton (2006) 29. This area corresponds with what is today Chad, Gabon, Central African Republic and the Republic of the Congo.

companies were a ‘different beast’ altogether from the old trading companies, as they did not have the right to wage war, nor a trading monopoly, and were placed under strict state control.⁵²¹ Ahead of the Berlin Conference in 1884, German Chancellor Bismarck (who had inaugurated Germany’s colonial policy, actively promoting German colonial enterprise so as to find new markets for developing German industry⁵²²) expressed the demarcations of this manner of ‘corporate sovereignty’ as follows:

My intention, as approved by the Emperor, is to leave the responsibility for the material development of a colony as well as its inauguration to the action and enterprise of our seafaring and trading citizens, and to proceed less on the system of annexing the transoceanic provinces to the German Empire than that of granting charters, after the form of the English Royal Charters, encouraged by the glorious career which the English merchants experienced in the foundation of the East India Company; also to leave to the persons interested in the colony the government of the same, only granting them European jurisdiction for Europeans and so much protection as we may be able to afford without maintaining garrisons. I think, too, that a colony of this kind should possess a representative of the Imperial Authority with the title of Consul or Resident, whose duty it would be to receive complaints, while the disputes which might arise out of these commercial enterprises would be decided by one of our Maritime or Mercantile Courts at Bremen, Hamburg, or somewhere else. It is not our intention to found provinces but commercial undertakings.⁵²³

Bismarck recognised that in the political economy of the time there was no longer the possibility to isolate the company’s colonial activities from those of the state. The new arrangement seemed designed to reap possible benefits, while any commercial risk the company took remained with the company.⁵²⁴ This flexible approach allowed the state to use the company when it suited state interests, and to distance itself when it did not.

The late 19th C trading company concept “effected, that also the colonial territory was now fundamentally divided up, organised and governed according to the principles and

⁵²¹ Grewe (1984) 548.

⁵²² Dawson (1973) 146-7.

⁵²³ Dawson (1973) 150-1.

⁵²⁴ Grewe (1984) 550.

concepts of the inter-state law that was developed in Europe.”⁵²⁵ In addition to this, one of the main means of spreading capitalism and creating states in the image of the modern European state, was the replacement of local laws with the laws and legal concepts of the colonial state and institutions under the tutelage of the imperial institutions. For example, Hopkins describes how notions of *collective* ownership of property which were prevalent in the colonies were replaced by European notions of private property, “to establish a virtuous circle of development it was necessary to export commercial institutions and approved property rights”⁵²⁶ – this foremost included the commodification of commons land – just as it had done in England in the transition to capitalism (See above, 2A).⁵²⁷ Conversely, Craven describes the 1918⁵²⁸ decision of the Privy Council, *In re Southern Rhodesia*, where it was held that the British South African Company had the right to alienate certain land in Southern Rhodesia - the “absence of indigenous knowledge of the institution of private property ... effectively allowed the extinguishment of all native title through the fact of settlement.”⁵²⁹

Another way for a company to gain entry to a ‘colony’ was to buy up or refinance a government’s sovereign debt. This is how the Firestone company gained a 99 year lease over 1 million acres of Liberian land, which it transformed into a rubber plantation, removing villagers off their land and recruiting them as workers at gunpoint.⁵³⁰ By 1929, reportedly, some 350,000 Liberians were forcibly employed by Firestone, in circumstances comparable to those in Leopold’s Congo. Liberia was not a colony in the technical sense (having been founded by the American Colonization Society in 1847, but, having become indebted to the company as its sole creditor, it was entirely in the hands of Firestone.⁵³¹ The grant of the lease had been partly political, and the former Liberian president noted that since Firestone had taken control of Liberia, border disputes promptly ceased.⁵³² This shows that (colonial) corporations can at times also be instrumentalised by *host* states(‘s leaderships) for political ends.

⁵²⁵ Grewe (1984) 552.

⁵²⁶ Hopkins (1980) 777-798.

⁵²⁷ See also Marx (1976) - Capital I, Chapter 33.

⁵²⁸ Craven describes it as a 1919 case.

⁵²⁹ Craven (2007) 50; *In re Southern Rhodesia*.

⁵³⁰ *Firestone Complaint* 34-44. In 2005 a complaint was filed against the company, see further below, Chapter 6.

⁵³¹ *Firestone Complaint* 38.

⁵³² *Firestone Complaint* 38.

2.5 *The Congo Corporation and the State Form*

The story of the Congo shows in one example how companies became vehicles for the transfer of the European state form. In 1876 the *Association Internationale Africaine* (AIA) was founded at the behest of the Belgian King Leopold II, apparently motivated by private gain and political intrigue.⁵³³ In 1878 the International Congo Society, which formed the profit-seeking front for the more ‘philanthropic’ AIA. The 1884 Berlin West Africa Conference established the International Congo Commission – which was later cognised as property the Congo Society of which King Leopold was the chair.⁵³⁴ The Society soon became known as the Congo Free State and was recognised as an independent state (to reflect the fact that it was not a colony of Belgium) and member of the international community by the major powers present at Berlin.⁵³⁵ Renton, Seddon and Zeilig describe the rule of Leopold in The Congo in the broader context of turn-of-the 19th century colonial Africa. King Leopold’s company took control of the rubber and ivory trades, while giving much of the land of the Congo to concessionary businesses who would build infrastructure and control the territory. These companies were granted the right to levy taxes, which meant the previously self-sufficient non-monetary economy had to develop to produce surplus and the population had to offer itself up as wage labour.⁵³⁶ New companies were also founded to exploit the mineral wealth, e.g. Union Minière du Haut Katanga (1905) amongst many others, mostly owned directly or indirectly by King Leopold.⁵³⁷ A large bureaucracy was set up and run by around 1500 European civil servants.⁵³⁸ One of the Congo’s richest resources proved to be rubber, called ‘red rubber’ after the brutal regime in which it was harvested.⁵³⁹ King Leopold’s corporate rule created a ‘slave society’, and more generally, “[u]nder direct European or American rule, forced labour became widespread throughout the continent, and an ‘economy of pillage’ became the norm.”⁵⁴⁰ Dismissing the idea that Leopold’s rule was a return to feudalism, arguing that the process was more complex than Lenin’s analysis that colonialism is simply another expression, in a grander form, of the general tendency between businesses that

⁵³³ Grewe (1984) 551.

⁵³⁴ Hochschild (2006).

⁵³⁵ Renton (2006) 24.

⁵³⁶ Renton (2006) 25.

⁵³⁷ Renton (2006) 26.

⁵³⁸ Renton (2006)

⁵³⁹ Renton (2006) 27.

⁵⁴⁰ Renton (2006) 29.

was typical of capitalist systems,⁵⁴¹ Renton et al. consider “the most striking feature of Leopold’s rule was its similarity to an older form of accumulation, simple theft.”⁵⁴² We can see direct correspondence between the process of the forcible creation of a wage-labour force and the expropriation of land (and other natural resources) in the Congo (and indeed the rest of the African continent) and ‘primitive accumulation’ in Britain (see Part 2A above). Moreover, direct correspondence can be seen between the Congolese (and Rhodesian and Liberian) examples and the corporate imperialism – and David Harvey has called ‘accumulation by dispossession’ - that was to come in the 20th C. I will come back to these in the following Chapters.

The Congolese population declined sharply (from around 20 million in 1891 to 8.5 million in 1911) as a result of disease, massacre and the result of forced labour.⁵⁴³ The main ‘winners’ were King Leopold, the shareholders of his companies, and the banks. Many foreign mining companies, including the US companies Ryan and Guggenheim, bought concessions.⁵⁴⁴ The biggest company, Union Minière du Haut-Katanga, was part-financed by Midlands, Barings and Rothschilds.⁵⁴⁵ King Leopold was able to successfully hold on to his possession partly because he ‘presented himself as the inheritor of the liberal ideal’. However, “[b]eneath the high-flowing rhetoric, financial calculations were evidently being made.”⁵⁴⁶ The end of the corporate Congo was brought about by three factors: first, resistance and rebellions in the Congo itself,⁵⁴⁷ second, a reform movement in Europe and the U.S. and third, commercial interests by rivals. Finally, there was also the ultimately unsuccessful British government effort to end Leopold’s regime as they considered the Congo a ‘British discovery’.⁵⁴⁸ On the second factor, after missionaries’ reports of the extraordinary cruelty of Leopold’s regime, a popular campaign started to urge Belgium to take the Congo into government control or to allow it to be independent (or even to transfer it to British rule). The campaign included Mark Twain, Arthur Conan Doyle and Joseph Conrad as well as black activists Booker T. Washington and others. The third factor that is said to

⁵⁴¹ Renton (2006) 30, generally Lenin (1963).

⁵⁴² Renton (2006)

⁵⁴³ Renton (2006) 37. Generally, Hochschild (2006).

⁵⁴⁴ Renton (2006) 37.

⁵⁴⁵ Renton (2006) 37.

⁵⁴⁶ Renton (2006) 32, 33.

⁵⁴⁷ Renton (2006) 30-37.

⁵⁴⁸ Anghie (2007) 92. Here we see the effect of the reified state form taking on a (limited) logic of its own and the elites in the political sphere start acting as property owners and competing with other states’ leaders.

have ended Leopold's reign was when world powers began to realise what mineral wealth was in the Congo, including the U.S. who apparently used Congolese uranium to bomb Hiroshima and Nagasaki.⁵⁴⁹ In 1908 Belgium 'nationalised' the King's private corporate empire, and in 1913 it opened it up to 'free trade'. The British-Belgian company Union Minière stayed, recruiting (often at gunpoint) workers for its copper mines from the whole surrounding region (what is now Rwanda, Zambia, Uganda).⁵⁵⁰

2.6 *The Berlin Conference: Legalising corporate imperialism*

The Berlin West African Conference has broader significance than simply in relation to the Congo. It was called because in their rivalry European states began to fear for the validity of their agreements with non-European powers and thus the title to their territory, as they had concluded these 'treaties' and acted upon them as valid while not investing the 'uncivilised' colonised people with legal agency.⁵⁵¹ The Europeans managed to safeguard their interests and make these 'unequal treaties' part of general IL by giving them a literal, positivist reading and endorsing them as valid, ignoring been made under duress or deceit.⁵⁵² Anghie gives the example of the Wyanasa Chiefs the fact that most colonial territories were acquired by force, and the agreements had signing over "all our country...al sovereign rights...and all and every other claim absolutely, and without any reservation, to Her Most Gracious Majesty... and heirs and successors, for all time coming" cited by Lindley 'apparently without irony'. As such, an instance of primitive accumulation is legalised, and an 'agreement' forming feudal proto-law is turned into 'law'. This is how, as Miéville puts it, "law disguises its own brutal core."⁵⁵³ The Berlin Conference (where "humanitarianism and profit-seeking were presented in proper and judicious balance"⁵⁵⁴) had to locate the non-European world in the international law framework somehow and passed the *Berlin Act* which regulated freedom of navigation and trade as well as the rules on the acquisition of new territory.⁵⁵⁵ "Effective occupation" sufficed for acquisition, and this could be achieved through chartering a company.⁵⁵⁶ Through Art. 35 of the Act the parties to establish authority in the said territories "insofar as necessary to ensure free

⁵⁴⁹ Anghie (2007) 3.

⁵⁵⁰ Anghie (2007) 52.

⁵⁵¹ Anghie (2007) 71.

⁵⁵² Anghie (2007) 71-73.

⁵⁵³ Miéville (2005) 194.

⁵⁵⁴ Anghie (2007) 69.

⁵⁵⁵ *Berlin General Act*; Koskenniemi (2001) 123.

⁵⁵⁶ Koskenniemi (2001) 124.

trade”.⁵⁵⁷ Protectorates were excluded from this obligation. This “allowed the British, for instance, to uphold their unlimited commercial empire while at the same time avoiding the financial and administrative burdens ... [of] formal occupation.”⁵⁵⁸ Thus the *Berlin Act* systematized and *legalised* the scramble for Africa.⁵⁵⁹ At the same time, it *extended* the rhetoric of the civilising mission to cover (up) the economic motivations of colonisation: “[n]ow, because trade was the mechanism for advancement and progress, it was essential that trade be extended as far as possible into the interior of all these societies.”⁵⁶⁰ The ‘capitalising mission’ was thus rebranded as the ‘civilising mission’. (In the upcoming chapters I show that it becomes rebranded as a ‘development mission’ and an ‘ICL/transitional justice mission’ – while forever remaining truly a ‘capitalising mission’.) The motivations underlying colonialism have been described as purely ‘political’ ‘economic’ or even religious, but ‘civilisation’ in the 19th C. came to be understood as including the *values* (aims) of capitalism.⁵⁶¹

3 Corporations in IL in the twentieth century

Into the 20th C. corporations continued to be used for political ends, viz. the ‘banana wars’ in Central and South America,⁵⁶² and state governing elites continued to act as private property owners,⁵⁶³ viz. the military ‘racketeering’ Capt. Smedley Butler described on his 1930s lecture tour around the United States:

I spent 33 years and 4 months in active service as a member of our country's most agile military force- the Marine Corps. ... And during that period I spent most of my time being a high-class muscle man for Big Business, for Wall Street and for the bankers. In short, I was a racketeer for capitalism. ... Thus I helped make Mexico and especially Tampico safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues in. I helped in the raping of half a dozen Central American republics for the benefit of Wall Street. The record of racketeering is

⁵⁵⁷ Berlin General Act Art. 35.

⁵⁵⁸ Koskenniemi (2001) 124.

⁵⁵⁹ Anghie (2007) 92.

⁵⁶⁰ Anghie (2007) 97. In the *Berlin General Act* Preamble. Echoes of this clause can later be found in articles 74 and 76 of the *United Nations Charter*.

⁵⁶¹ Hopkins (1980) 778.

⁵⁶² Litvin (2004) 113ff.

⁵⁶³ Merriman asserts that rivalry over colonial possessions caused WWI. Merriman (2009) 859.

*long. I helped purify Nicaragua for the international banking house of Brown Brothers in 1909-12. I brought light to the Dominican Republic for American sugar interests in 1916. I helped make Honduras "right" for American fruit companies in 1903. In China in 1927 I helped see to it that Standard Oil went its way unmolested.*⁵⁶⁴

While IL was to continue to allow both, it now became more urgent to construct some semblance of separation between the economic and political realms in IL – which in the early 20th C started to gain much specifically liberal humanitarian content – with the seed of an ICL (Ch.4A).⁵⁶⁵ By creating an ideological divide separating ‘clearly’ economic activities by private actors from political/public/state activities it became acceptable to shield the former from ‘interference’ by the latter, or, in other words, to let the former be ruled by the market, and the latter (ostensibly) by liberal humanitarian concerns.⁵⁶⁶ The conceptualisation of free trade as a value in itself renders this separation legitimate.

The discourse of ‘positivism’ which had become dominant by the early 20th C – with its notion of international law as a system of rules between consenting states - also served to conceal the role of class and the legal vehicle of the corporation in international law.⁵⁶⁷ Despite earlier notions of ‘corporate sovereignty’ and effective corporate personality in IL preceding centuries, in the 20th C. the notion of corporate personality became circumscribed and contested. As non-subjects, businesspeople were able to wield the collective power of the corporation *and* construct normative regimes ‘below the radar’ of public IL – in particular, the regime of investment protection is entirely aimed at serving their specific interest, while not *formally* affecting ‘public’ law notions of statehood and sovereignty.⁵⁶⁸ The effect of positivism and the public/private divide is a sphere of liberty where the GCC can pursue (overseas) economic interests with little oversight. For example, because the discourse of ‘responsibility’ belongs in the ‘constitutional’/‘political’ part of international law,⁵⁶⁹

⁵⁶⁴ Butler (2003); generally *Special Committee on Un-American Activities*, 1934.

⁵⁶⁵ E.g. the Hague Regulations.

⁵⁶⁶ Cutler (2001) 261.

⁵⁶⁷ Koskenniemi, (2007); Anghie (2007) Chapter 2.

⁵⁶⁸ See, e.g. Pellet (2010) 6; Lael-Arcas (2010) 178.

⁵⁶⁹ Pellet (2010) 3. Note that the notion of the international responsibility of corporations receives no further attention in Pellet’s (otherwise seemingly exhaustive) *The Law of International Responsibility*, whereas there *is* a chapter on ‘Injuries to Corporations’ (Lowe (2010) 1005).

and corporate activity in the ‘private’, an ideological hurdle must be overcome before one is associated with the other.

In this section I illustrate how the various rhetorical processes (the public/private divide, the definition of key concepts in IL such as sovereignty and personality) are employed to support, strengthen and ‘spirit away’ (Ch.1 S.2) global class relationships. The ‘international law of investment protection’ (“ILIP”)⁵⁷⁰ is a key site for the analysis of international class law in the 20th C. Tellingly, ILIP is a misnomer because a majority of the (non-legal) rules of ILIP are generated by business(women) (and their lawyers and arbitrators), as members of the global capitalist class through their contractual relations and private and hybrid arbitration.⁵⁷¹ This particular regime was developed to safeguard corporate interests in the decolonisation process and during/after moments of political change and conflict in the Third World outside of the decolonisation process. One way such interests were safeguarded was through adjusting the *content* of the principle of sovereignty (S.3.1). One effect of investment protection through one of its key tools, investment arbitration (S.3.2) – has been that *corporate* international legal personality is actualised and difficult to deny even by positivists. One way around this conundrum has been to bracket the content (or incidence) of corporate legal personality in IL to *exclude* responsibility (S.3.3). In Chs. 4 and 6 I will show that this bracketing becomes untenable and is dismantled in a (counterintuitive) way favourable to the GCC.

3.1 *Concession agreements and unequal sovereigns*

Before the corporate colonialism of the 19th C. could move to global liberal capitalist statehood the ground for ‘self-determination’ and ‘decolonisation’ had to be prepared so as not to affect Western corporate interests in the Third World. The GCC had to publicly divest itself of political responsibility for the periphery while retaining its private material hold. Concession agreements were a main tool for this purpose – some being concluded in the context of mandates and trusteeships,⁵⁷² others directly.

⁵⁷⁰ According to the World Trade Organisation “foreign direct investment (FDI) occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset. The management dimension is what distinguishes FDI from portfolio investment in foreign stocks, bonds, and other financial instruments.” WTO: Trade and Foreign Direct Investment, Report, 1996.

⁵⁷¹ Sornarajah (2010) 79; Moses (2008) 7-8.

⁵⁷² Wilde (2008) 317ff. Konoplianyk (2004). See also Anghie (2007) 130.

Moreover, the *physical* shape of future states was made subject to these interests. For example, “France and Great Britain were intent on gaining control over the oil resources in their Middle Eastern mandates and they went so far as to redraw the boundaries of the mandate territories of Palestine, Mesopotamia and Syria in order to enable a more efficient exploitation of their oil reserves.”⁵⁷³ This is a striking example of the form of law affecting material reality.

The newly decolonised states are ‘unequal sovereigns’,⁵⁷⁴ in the sense that their sovereignty is recognised by the metropole/GCC conditional upon (amongst others) continued free access to markets and natural resources.⁵⁷⁵ As such, the opportunity to gain statehood presents the ‘equal opportunity to be unequal’ (Ch. 2A).

States and corporations from the metropole (or rather, the GCC through them) gained long-term control over prized natural resources in particular, by entering into concession agreements with the governors of colonised (or mandated, etc.) territories (often nationals of the colonial state or local elites in a position of loyalty to the colonial state).⁵⁷⁶ Through these agreements rulers would cede sovereign rights over vast areas of territory and/or rights over the exploitation of oil and mining products to foreign corporations for long periods of time.⁵⁷⁷ For example, the Aminol concession was granted by the Sheikh of Kuwait (then a British protectorate) in 1948 – with a royalty of two shillings and sixpence per barrel – for sixty years.⁵⁷⁸ Similarly, the Ashanti goldfields concession in Ghana was to last for 100 years.⁵⁷⁹ Many of these types of arrangements were made by Western companies throughout the Third World.⁵⁸⁰ Their length and disadvantageous terms often led to disputes, especially when the new states’ leaderships changed.⁵⁸¹

⁵⁷³ Anghie (2007) 144; Higgins (1999).

⁵⁷⁴ On this notion, see also Simpson (2004).

⁵⁷⁵ While decolonization is often presented as allowing ‘peoples’ to exercise their right to self-determination, it may be more accurate to describe decolonization as a process of *determination*, where third world populations (not necessarily divided along the lines of ‘peoples’ or nations) are shoe-horned into a particular conception of liberal capitalist statehood shaped and ‘made available’ to them by the global capitalist class. See also, Craven (2007) 260; Neff (2010) 7.

⁵⁷⁶ See generally, e.g. Cattan (1967); Cameron (2011); Higgins (1999).

⁵⁷⁷ Generally, Sornarajah (2010) 38-41; Konoplyanik (2004) 67-70.

⁵⁷⁸ *Aminol Award*.

⁵⁷⁹ Sornarajah (2010) 39.

⁵⁸⁰ E.g. in the plantation sector with companies such as Twinings and Lipton (Sornarajah (2010) 41).

⁵⁸¹ Anghie (2007) 224, and see also Nussbaum (1954) 125.

3.2 *ILIP and internationalisation*

To deal with these disputes – starting with concession agreement disputes - governing and business elites (the GCC) developed ILIP.⁵⁸² The key to ILIP is arbitration, which allows the internationalisation of investment agreements, or ‘lifting’ them out of host state jurisdiction and into (private) IL.⁵⁸³ Many of these early ILIP arbitrations relate to newly independent governments wishing to change the concession terms with still-present metropolitan multinationals – often to raise the royalty on resource extraction or to nationalise such resources and their extraction infrastructure altogether. For example, in the Middle East, all states in the early 1970s nationalised or abrogated concessions of major Western oil companies.⁵⁸⁴ ILIP arbitration increases the material inequality of the new ‘unequal sovereigns.’

The story of the *Abu Dhabi Award* illustrates this.⁵⁸⁵ This is the first, landmark decision where the arbitrator considered the contract between the Sheikh and the company to be an ‘internationalised contract’.⁵⁸⁶ As such it was to be governed not by Abu Dhabi law (which in any case the arbitrator Lord Asquith considered did not exist⁵⁸⁷) but by international principles of law. This new law of ‘investment protection’ bore an uncanny resemblance to English law: quoth Lord Asquith: “albeit English municipal law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad jurisprudence – this ‘modern law of nature’.”⁵⁸⁸ Anghie comments that hereby the law of the Third World state is in effect *selectively* replaced by the law of England.⁵⁸⁹ This is effectively so, while principles of English law are adopted into ILIP, which obviates the Third World state’s jurisdiction. ‘Elevating’ these concession agreements into international law also meant, that “by entering into such contracts, Third World states, *in effect, were investing foreign corporations with international personality*”.⁵⁹⁰ The state lost its ability to interfere with the activities of private parties for the benefit of its people as the principle of *pacta sunt servanda* now severely limited the ability of the state to change the terms of

⁵⁸² Sornarajah (2010) 20; Subedi (2008) 8.

⁵⁸³ The tribunal in the *ARAMCO Award* found petroleum concessions to be governed by international law (*ARAMCO Award* 156-168).

⁵⁸⁴ *LIAMCO, Texaco* etc.; Sornarajah (2010) 74.

⁵⁸⁵ *Abu Dhabi Award*

⁵⁸⁶ *Abu Dhabi Award*

⁵⁸⁷ *Abu Dhabi Award* 241.

⁵⁸⁸ Quoted in Anghie (2007) 229, *Abu Dhabi Award* 242.

⁵⁸⁹ Anghie (2007) 229.

⁵⁹⁰ Anghie (2007) 232 (emphasis added).

the international agreement, and in sum, the state and the corporation were positioned as ‘formal legal equals’ despite material difference both in bargaining power and in purpose.⁵⁹¹

3.3 BIT Arbitration: The silent revolution?

The internationalisation of concession agreements is carried forward in contemporary foreign direct investment practice. Investors’ rights are now generally explicitly protected under the terms of Bilateral Investment Treaties (“BITs”), which are the hardened vehicle (protective construct) provided by the home state accompanying most private foreign direct investment.⁵⁹² As with their earlier version, the concession agreement, a key feature of most BITs is its arbitration clause, by which the two states agree that any disputes are to be resolved through arbitration. This typically *includes* those disputes between an investor and the host state. In other words, BITs enable the investor ride on the back of the bilateral agreement, and *to stay out of the host state’s court*.⁵⁹³ Rather than seeking adjudication in courts of law, disputes arising from BITs are generally resolved through arbitration, either at ICSID, or through an arbitrator appointed under the UNCITRAL Arbitration rules or similar arrangement.⁵⁹⁴ There are now some 3000 BITs, most of which relate to investment by Western multinationals in the Second and Third World.⁵⁹⁵

Apart from disputes over nationalisation of investors’ assets in case of change of government in a host state many arbitrations deal with the question of ‘regulatory takings’. ‘Stabilization clauses’ in most BITs require the host state to compensate any loss (including usually loss of future profits) caused by a change in host state law.⁵⁹⁶ This has a limiting (‘chilling’) effect on the host state’s ability to pass laws and take policy decisions it considers beneficial to its citizens – specific concerns in this context include environmental protection.⁵⁹⁷ With the IMF and World Bank’s drives towards the privatisation of e.g. public services in Third World countries the presence and

⁵⁹¹ On the ‘equal treatment’ see Shalakany (2000) 419. On difference and coincidence of purpose, see Renton et al who describe kickbacks etc. to local elites/leaders of the decolonised state (Renton et al (2007) 204-6).

⁵⁹² Sornarajah (2010) 329. See generally, Jannaca-Small (2010).

⁵⁹³ Moses considers this the main point of arbitration.

⁵⁹⁴ Subedi (2008) 32.

⁵⁹⁵ See, e.g. the BIT between Germany and Afghanistan of 2005: http://www.unctad.org/sections/dite/ia/docs/bits/germany_afghanistan.pdf .

⁵⁹⁶ *Aminol Case* Fitzmaurice Separate Opinion fn. 7; Cameron (2010) 104.

⁵⁹⁷ E.g. *Santa Elena v Costa Rica*, *Metalclad*, cf. *Methanex*; Anghie (2007) 234. See also Sornarajah (2010) 282-3.

effect of foreign corporations has only increased. Through BIT arbitration, ILIP allows corporations to significantly affect the ability of Third World states/communities to manage distribution of resources, to maintain public health, and to manage the effects of exploitation and deprivation.⁵⁹⁸

Subedi calls the idea of allowing private corporations direct access to international law mechanisms to resolve disputes with states a ‘silent revolution’:⁵⁹⁹ as unequal sovereigns, Third World states engage with western states in BITs as formal legal equals and moreover with powerful multinational corporations in arbitration. It is ‘silent’ because this state of affairs occurs (and is drawn into) the ‘private side’ of IL. Also, the corporation as an actor (with ILP) remains hidden in this private side of IL. Alvarez has called BITs ‘Bills of Rights for Foreign Investors’.⁶⁰⁰ Although BITs carry reciprocal rights and obligations, due to the unidirectional investment patterns, and through ILIP’s basic techniques they significantly benefit the corporation, and thus create an ‘equal opportunity to inequality’.

3.4 Corporations in the PCIJ and ICJ

Although most of ILIP falls on the private side of IL, some of the basic principles of ILIP were developed in the public court system.⁶⁰¹ The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ)⁶⁰² in several cases have dealt with corporate interests represented by states.⁶⁰³ Some of these related to concessions (*Mavrommatis* and *Anglo-Iranian*) and others to foreign investment in another sense. States could, and did, ‘espouse’ corporate interests in these fora, in particular in the area of ILIP. Aside from the need for home state espousal of a corporate interest, the court route was less popular mainly because the PCIJ and the ICJ’s jurisdiction in disputes requires *host state* (adverse party) consent.⁶⁰⁴ In many cases, also, there was reluctance on the part of home states to take questions on foreign

⁵⁹⁸ *CEPAL FDI Arbitration and Water Report* 19.

⁵⁹⁹ Subedi (2008) 32.

⁶⁰⁰ Alvarez also calls *NAFTA* a ‘Bilateral Investment Treaty on Steroids’, Alvarez (1996-97) 304.

⁶⁰¹ See generally, Lael-Arcas (2010), Sornarajah (2010) 79-87.

⁶⁰² Which are housed in a building paid for and owned the foundation of Scottish industrialist and philanthropist Andrew Carnegie alongside the Permanent Court of Arbitration and the Iran – United States Claims Tribunal, see <http://www.icj-cij.org/information/index.php?p1=7> The Iran – US Claims Tribunal moved to its own premises in The Hague in 1982.

⁶⁰³ The constituent instrument also limits jurisdiction to disputes between states: *PCIJ Statute* Art. 34(1).

⁶⁰⁴ *PCIJ Statute*: Art. 34(1).

investment to the ('public') international fora for fear of exposing the uncertainty in the law and losing the flexibility afforded by arbitration once norms were 'set' by court.⁶⁰⁵ Moreover, it appears the ICJ itself preferred to defer jurisdiction *and* findings on IL to arbitration.⁶⁰⁶

Nevertheless, States have at times espoused the commercial interests of their private citizens, including corporations, at the PICJ and later the ICJ, and the courts have set some of the key principles of ILIP. From the point of view of epistemology it is also interesting to see how most of these cases are cited in current textbooks without their 'back story', in particular as many of these cases deal with issues of 'business in conflict'.⁶⁰⁷ The back stories reveal class interest in these cases and the significance of law in corporate-state (GCC) imperialism.

In the *Mavrommatis Palestine Concessions* case⁶⁰⁸ and the related case *Mavrommatis Jerusalem Concessions*⁶⁰⁹ - the cases that set the precedent for state espousal of business interests - Greece attempted to protect the interests of a Greek⁶¹⁰ businessman by means of diplomatic protection. The espousal argument is based on a collectivist state view: "a presumption that nationals are indispensable elements of a State's territorial attributes and a wrong done to the national invariably affects the right of the State."⁶¹¹ The case concerned a concession granted to Mavrommatis in 1914 by the Ottoman rulers of Palestine, which was arguably violated by the British when they took on the Palestine Mandate in 1920 and granted a partially conflicting concession to another company through the Zionist Organisation.⁶¹² The conflicting part of the concessions included the construction of tramways in Jerusalem. The PICJ held the

⁶⁰⁵ Sornarajah (2010) 37.

⁶⁰⁶ *Anglo-Iranian Case* 10; Sornarajah (2010) 106-7; Higgins (1999) 87.

⁶⁰⁷ Higgins (1999). See e.g. Lowenfeld (2008). Harris quotes only three paragraphs from the decision on jurisdiction in the *Mavrommatis Palestine* case (Harris (2004) 565).

⁶⁰⁸ *Mavrommatis Palestine* (1924).

⁶⁰⁹ *Mavrommatis Jerusalem* (1925).

⁶¹⁰ An interesting point was that Mavrommatis in the concession document was described as a *Turkish* citizen. The Court did not let this stand in the way of Greece claiming diplomatic protection on his behalf.

⁶¹¹ Okowa (2010) 477.

⁶¹² See also, Borchard (1925) 736-7; Bishop (2005) 444ff. See also, Borchard (1925), who comments: "One gets the impression on reading the correspondence, that Mavrommatis had lost his ability or willingness to go on with the concessions and desired to bring about their expropriation against indemnity; that the Rutenberg company and the Palestine Administration, sensing this, preferred not to exercise their power of expropriation, but invited Mavrommatis to go on with his concessions, in the belief that he would not avail himself of the privilege." 736-7. See also, Borchard (1925) 736-7; Bishop (2005) 444ff.

claim to be inadmissible with regard to the Jaffa concession but admissible with regard to the Jerusalem concession, on which it held that Mavrommatis was wrongly denied his concession and must be compensated.⁶¹³ The main legal question on jurisdiction was answered thus: “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law... By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights...”⁶¹⁴ The case is now known as authority for what constitutes an international dispute.⁶¹⁵ With the backstory in mind, we can see this case is an example of competition between different capitalists’ interests, while we can also observe joint interest between the espousing state and the industrialist.

The *Factory at Chorzów case*⁶¹⁶ concerned factories in (mineral-rich) Upper Silesia - formerly German territory part of which became Polish after the Silesian Uprisings of 1919 and 1921 - uprisings of a Polish-speaking working class majority against a German-speaking elite who owned the mines and factories - many of whom moved to Germany ‘proper’ once part of Silesia became Polish (a class conflict diffused by a border adjustment).⁶¹⁷ One of the questions before the Court was whether the property (land, moveable property and patents) belonged to Germany or to the German companies (Oberschlesische Stickstoffwerke A.G. and the Bayerische Stickstoffwerke A.G.).⁶¹⁸ The PICJ ordered restitution: full compensation to be paid to the companies (not to Germany). This case set the precedent for compensation,⁶¹⁹ but its backstory is one of a decision on state borders in an effort to quell class conflict arising from accumulation by dispossession.

The *Anglo-Iranian Oil Co. Case* of 1952 related to the property of a British company (later know as B.P.), which was subject to a nationalisation attempt by the Iranian government led by democratically elected Prime Minister Mossadegh. The property

⁶¹³ The difference lay in the timing of the concession vs. the terms of the Mandate and the fact that the Jerusalem concession had begun to be executed.

⁶¹⁴ *Mavrommatis Palestine* (1924) 12.

⁶¹⁵ Higgins (1999) 88.

⁶¹⁶ 453: “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” *Factory at Chorzów*.

⁶¹⁷ Kamil Majchrzak (correspondence 3 Mar. 11)

⁶¹⁸ These became part of the IG Farben cartel (Ch. 3A below).

⁶¹⁹ *Anglo-Iranian Oil Case*.

had been conveyed to the company in a concession granted by the Shah of Iran in 1933. The ICJ concluded it did not have jurisdiction because the concession was a contract between the Shah and the company, and not an international agreement to which the U.K. was a party.⁶²⁰ Thus the ‘public’ ICJ decided to leave the matter to private resolution, perversely by *denying* internationality in this case whereas earlier arbitral awards had found such agreements to be ‘internationalised’ precisely in order to attract jurisdiction. The following year the government in Iran was overthrown *covertly* by the CIA in “*Operation Ajax*”, and a new Shah was installed.⁶²¹ Shah Reza Pahlavi commenced “a massive programme of industrialization and modernization, principally through soliciting private investment and long-term contracts from firms in the United States.”⁶²² After the 1979 Islamic Revolution the Ayatollah Khomeini reversed many of the Shah’s policies, suspending contracts and expropriating property. After ‘Iranian students’ occupied the US Embassy in Tehran, the US froze Iranian bank accounts in the US. One of the results of the negotiation was the establishment of the Iran-United States Claims Tribunal, at which to date thousands of US companies and individuals have filed claims against Iran.⁶²³ As many arbitrations relating to concessions and BITs between the metropole and the periphery followed the disposal of the original contracting (often unrepresentative) regimes one can imagine, like in the case of regulatory takings, that such cases have a chilling effect on political change. Moreover, the Anglo-Iranian arbitration illustrates the dual use by the GCC of law and physical force in conflict.

One *unsuccessful* company case was *Interhandel*, where the claim was for the release (by the US) of funds belonging a company that had (it was argued, by the US) formed part of the IG Farben cartel (See Chapter 4 below).⁶²⁴ This case is generally cited for its findings on jurisdiction: The U.S. had sought to exclude from the ICJ’s jurisdiction disputes arising before 1946.⁶²⁵ The ICJ declared the application inadmissible on the

⁶²⁰ *Anglo-Iranian Oil Case*.

⁶²¹ The events escalated into something of a trade war, with the Anglo-Iranian Oil co. and other major international oil companies denying the new National Iranian Oil Co access to markets in Europe or North America, filing suits to ‘repossess’ shipments of oil from Iran, and, allegedly, the RAF threatening to bomb Iranian vessels (Lowenfeld (2008) 519), see also Sornorajah (2010) 20, who calls the overthrowing of the Mossadegh, together with the Allende Government in Chile, the “more obvious instances in recent history of forcible, though covert, interventions to assist foreign investment.” (fn.62).

⁶²² Lowenfeld (2008) 542.

⁶²³ See the tribunal’s website, at: <http://www.iusct.org/english/>.

⁶²⁴ *Interhandel* paras.26-30. For a discussion of the context and the diplomatic negotiations and the domestic litigation leading up to this case, see Simmonds (1961).

⁶²⁵ Harris (2004) 1047-8; Evans (2003) 494.

basis that local remedies had not been exhausted as a domestic case was still pending.⁶²⁶ Simmonds calls the decision ‘illogical’ and a missed opportunity for the ICJ to assert its jurisdiction.⁶²⁷ At the same time, perhaps the case shows the limits of the ICJ’s power to enter into politically highly sensitive territory – where a decision on the merits would have had to examine U.S. – German military/commercial ties before and partially during WWII.

At particular times, then, we can see the GCC’s resort to public institutions such as the ICJ to set formal legal principles in situations where private arbitration proved inadequate or inappropriate. Such resort to public institutions appears to be prevalent with a ‘less unequal’ adversary, and in a ‘more public’ context such as a war/conflict. The effect of such public state espousal of corporate interests is a measure of naturalisation of the corporation in IL, while conversely publicly ‘hiding’ it behind the state it needs to represent it. In the next section I revisit the issue of corporate personality in IL.

3.5 *Island of Palmas Arbitration vs Reparations for Injuries: International legal personality revisited*

Wilson argues that Grotius’ *De Indis/De Iure Praedae* “operate[d] to legitimate international personality and authority of the VOC, a ‘pre-modern institutional form’”⁶²⁸ – and that a clear relationship exists with the current debate on international legal personality of multinational/transnational corporations as well as the emergence of a ‘neo-medieval’ world order, for which ‘[m]ost important is the investiture of private non-state actors with Original Personality, particularly the TNC.”⁶²⁹ Currently, the nature and content of corporate ILP are in contention.

Although the trading corporations had acted like ‘corporate sovereigns’ and as subjects of international law by entering into treaties as among the first of IL’s persons, with the advent of positivism the corporation as ILP went away. Nevertheless, inevitably the question whether other bodies besides states could have ‘international legal personality’ came up formally in the ICJ *Reparations for Injuries* Advisory Opinion of

⁶²⁶ *Interhandel* 27.

⁶²⁷ Simmonds (1961) 547.

⁶²⁸ Wilson (2008) 128.

⁶²⁹ Wilson (2008) 127.

1949.⁶³⁰ The Court adopted a circular reasoning, holding that, where international organisations, in order to carry out the mandate given by states in their constitutive documents, needed to have the capabilities that come with international legal personality (such as *in casu* the capacity to bring an international claim), they should be considered to have this.⁶³¹ International legal personality was quite simply ‘indispensable’ for the UN to be able to function.⁶³² The idea of the UN as a body in law separate from its members is clearly comparable to the corporation’s separate legal personality in domestic law (Chapter 2A). Also here the ‘fetishisation’ occurred in a context of responsibility, this time it was the absorption by the separate legal personality of the loss borne by an individual/his family/his community and the right to claim compensation on their behalf.

Some 20 years earlier, in the *Island of Palmas Case* at the Permanent Court of Arbitration, sole arbitrator Max Huber commented on the nature of the acts of the Dutch East India Company: “[they] must in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th until the 19th century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the state to whom they were subject with public powers for the acquisition and administration of colonies.”⁶³³ Since 1677 the ‘native’ states had been ‘connected with’ the DEICo, “which conferred upon the suzerain such powers as would justify his considering the vassal state as part of his territory.”⁶³⁴ So, on the one hand, the Court accepted the Company’s treaty with the ‘natives’ for the transfer of the Island of Palmas as valid, but on the other, it would not recognise the company’s (or indeed the natives’) international legal personality.

Rather, I would suggest, both decisions present pragmatic choices made based on class interests, which reflect a desire to ‘legalise’ past corporate colonialism without bringing the corporation into ‘public international law’, on the one hand, and a desire to create an additional (potential risk-absorbing) entity besides states, on the other.

⁶³⁰ *Reparations for Injuries* 174.

⁶³¹ *Reparations for Injuries* 178.

⁶³² *Reparations for Injuries* 178. In *Certain Expenses*, in an *obiter*, or perhaps even inadvertent sentence para. 168: “Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.” The Court seems here to show it is well aware of the international legal activities and status of bodies other than states.

⁶³³ *Island of Palmas Case* 858.

⁶³⁴ *Island of Palmas Case* 867.

Although in international law doctrine ‘international legal personality’ means ‘being a subject of international law’, this in itself is not necessarily always taken to mean ‘subject of *all* international law’. Many legal norms are considered in the canon to address only a specific type or subset of ‘legal subjects’.⁶³⁵ In other words, although the *form* of subjectivity is the same, the content may be interpreted quite differently depending on whether the subject is a state, international organisation, corporation or indeed an individual.⁶³⁶ In Chapter 4 I analyse the debate around the question whether the content of corporate international legal personality includes the possibility of liability for international crimes.

The *Barcelona Traction* case of 1970⁶³⁷ relates not to corporations in conflict but is of interest as in this case Belgium asserted the right to exercise diplomatic protection on behalf of shareholders, for the ‘creeping expropriation’ of their property.⁶³⁸ The court held that shareholders have no rights independent from the company and only the home state of the company could claim diplomatic protection.⁶³⁹ This would indicate the reification of the corporation in international law similarly to domestic law – but thus far only in the economic sphere. The ICJ states, in para 38:

*All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.*⁶⁴⁰

⁶³⁵ See generally, Schermers (2003) 992, and Klabbbers (2003) 43.

⁶³⁶ *ILC Responsibility of IOs*.

⁶³⁷ *Barcelona Traction*.

⁶³⁸ *Barcelona Traction* paras 33-35.

⁶³⁹ *Barcelona Traction* 39, 88. The ICJ decided the BT case on the basis of the assumption that IL in this respect referred to the rules generally accepted by municipal legal systems in these matters. But concepts of corporate veil and the centralisation of all rights and duties in a single place may conflict with other existing rules of IL (at 5). IL allows piercing of the veil following from the principle of justice that requires reference to the substance and not merely to the legal form (citing *Cayuga Indians* 1926). However, practice does not follow any uniform pattern, the rules vary according to the person behind the veil.

⁶⁴⁰ *Barcelona Traction* 38.

This paragraph lends itself to the interpretation that the corporation must be recognised as a matter of fact, not as a matter of international law. Strikingly, the ICJ mentions *rights* here specifically. The ICJ developed this point in *Ahmadou Diallo*:

*What matters, from the point of view of international law, is to determine whether or not these [companies] have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.*⁶⁴¹

Again, the focus here is on rights, not ILP in general or (especially) responsibility. Crawford (UN Special Rapporteur responsible for the International Law Commission's Articles on State Responsibility for Wrongful Acts⁶⁴²) describes legal personality as "the paradigm for of responsibility in international law".⁶⁴³ Recognising that, as per the *Reparations for Injuries* Advisory Opinion there are other legal persons besides states, "it would seem unproblematic to substitute the words 'international organization' or 'international legal person' for 'State' in Article 1 of the ILC Articles".⁶⁴⁴ Yet, "it is doubtful whether [corporations] are in any meaningful sense 'subjects' of international law"⁶⁴⁵ and that "it is also very doubtful whether 'multinational corporations' are subjects of international law for the purpose of responsibility ... From a legal point of view, the so-called multinational corporation is better regarded as a group of corporations, each created under and amenable to its own national law as well as to any other national legal system within which it operates."⁶⁴⁶ Pellet (in the same volume) suggests that corporations have both 'active' and 'passive' personality, meaning they may invoke the responsibility of other subjects of international law on the international plane in specific circumstances (essentially in the realms of

⁶⁴¹ *Ahmadou Diallo* 61.

⁶⁴² See the *ILC State Responsibility Articles*: esp. Article 33(2): 'the content of a state's responsibility is 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.'

⁶⁴³ Crawford (2010) 17.

⁶⁴⁴ Crawford (2010) 17.

⁶⁴⁵ Crawford (2010) 18.

⁶⁴⁶ Crawford (2010) 18.

investment), and on the other, be held accountable for their own internationally wrongful acts.⁶⁴⁷ What we see here is that this area is in flux/contention. I argue in Ch.6 that, following Wilson's suggestion, corporate ILP is now being 'pursued' by the GCC – even in the 'humanitarian' sphere, as part of a gradual move to global governance.⁶⁴⁸

In other words, facilitated by unequal treaties (BITs), concluded in the name of states, business(women), using the particular (ideological, technical/legal, also epistemological) techniques including remaining outside the purview of public international law, by exercising personality only in private international law, asserting a *sui generis* position requiring its own set of rules, positing formal equality, etc. largely managed to escape the requirements of formal law-making and adjudication, the 'constitutional' elements of *public* international law. Likewise these arrangements remained outside of the 'liberal humanitarian impulse' and within the capitalist free market mandate, and outside of the IL *responsibility* domain. Yet, at the same time, we see the corporation making *some* headway as an ILP on the global level. In the following Chapters we will see where this leads.

4 Class law and class struggle in IL

Above I have spoken mostly of events on the 'private' side of IL. On the 'public' side during the course of the 20th C the discourse of law gradually turned towards cosmopolitanism, constitutionalisation, the liberal humanitarian discourse. IL came to be seen as about, and for peace and human rights.⁶⁴⁹ This was of limited use in global class struggle. Apart from the earlier nationalising efforts by newly elected Third World leaders (e.g. Mossadegh), elements of such class struggle could be seen in the increasing assertiveness of newly decolonised Third World States and their allies in the 1960s and 70s, expressed in a number of United Nations General Assembly Resolutions and Declarations including on 'Permanent Sovereignty over Natural Resources'⁶⁵⁰ and later the attempt to establish a New International Economic Order⁶⁵¹

⁶⁴⁷ Pellet (2010) 7-8. Authors such as Brown Weiss have argued that non-state actors should be given the right to invoke state responsibility, which effectively corporations *already have*, in investment arbitration (Brown Weiss (2002) 816).

⁶⁴⁸ Further, Baars (2011).

⁶⁴⁹ Generally, Meron (2006).

⁶⁵⁰ *GARes 1803; GARes 2158; GARes 3171*; see also generally, Schrijver (2008).

and the Charter of Economic Rights and Duties of States.⁶⁵² While 120 of 138 General Assembly members supported the resolution, nearly all ‘capital exporting states’ voted against the Charter, abstained or did not vote.⁶⁵³ The Third World states’ assertion of ownership was the assertion of a ‘mine not yours’ nature. More precisely however, it could also be seen as an assertion of “the right to dispose of oneself.”⁶⁵⁴

The class interest expressed in the NIEO movement was absorbed into the international development agenda, which can be seen as having become a cloak for FDI and a way of achieving competition among Third World countries for (public and private) development money. The term ‘development’ could be viewed as a euphemism for foreign direct investment, or, the global spread of capitalism and the corporate imperialist scramble for third world resources, land and labour.⁶⁵⁵

Gathii argues that “rules of international law have hollowed out the sovereignty of capital-importing States when they engage in transnational commercial activity.”⁶⁵⁶ At the same time, Third World leaderships realise that “foreign direct investment will not travel south without an arbitration clause in its luggage.”⁶⁵⁷ Western MNC bargaining power as against the Third World state is congealed in this arbitration clause.⁶⁵⁸ World Bank/IMF privatisation requirements leave Third World public services in (Western) private hands, while host state and private policing protects FDI property and personnel against host state citizens. As a result, many Third World states are no longer able to carry out important aspects of the ‘public’ function of the state internally – but are penetrated by the capitalising mission *through law*.⁶⁵⁹

Yet, on the global level institution building replicates the creation of states in the transition to capitalism (Ch.2A S.4). As private rule making, private provision of ‘public’ services, even private policing and private military become normalised and considered legitimate, states lose much of their utility. ‘Global governance’ lifts many issues previously within the domestic jurisdiction of states to the international level of

⁶⁵¹ *NIEO Resolution* (adopted without a vote).

⁶⁵² *Charter of Economic Rights* (excerpt) **Appendix A**.

⁶⁵³ *UNGA CERD voting record*.

⁶⁵⁴ Craven (2007) 59.

⁶⁵⁵ *Oxfam Land Grab Report*.

⁶⁵⁶ Gathii (2010) 187.

⁶⁵⁷ Shalakany (2000) 422.

⁶⁵⁸ Viz. e.g. the statistic of Usman (2011) 294.

⁶⁵⁹ Subedi (2008) 2.

decision-making and coordination. Authority for this international regime is provided by the ‘political’ bodies and rule-sets, including the UN peace, human rights and development sectors, and in particular also the international formal legal infrastructure of the ICJ, and now also international criminal law and the ICC. Yet, the liberal impulse expressed in ‘humanitarian’ rules and institutions is not benign or innocent: “[t]he language of human rights is essential to the oversimplification of the roots of disorder in international society at present.”⁶⁶⁰ At the same time, individuals are forced to become ‘rights-entrepreneurs’: in the same way that economic success is an individual’s own responsibility, achieving one’s ‘human rights’ becomes a matter of individual success or failure to negotiate on the state and supranational rights marketplace (see further Ch.6).

5 Conclusion

Having looked at the specific ways in which law is employed by global classes – in ways that may affect responsibility for harm caused through their involvement in conflict - it seems possible to discern a number of structural trends. First, the deployment of the ideological devices of fragmentation and the public/private divide.

Wilson surmises, “the discursive separation of the private from the public as an autonomous legal realm effectively renders World Economy both a-political and extra-judicial, superseding the direct regulatory and legislative capacities of the ‘public’, or ‘political’, ‘Nation-State’.”⁶⁶¹ Similarly Anghie, “one of the major responses of the West to the challenge of the Third World was to entrench neo-imperial economic relations in the private sphere.”⁶⁶² Also, “public international law ... was... used to further solidify the private realm and to enhance the immunity of private actors.”⁶⁶³ This occurred through the espousal by states of corporate interests in courts, and through BITs. Positivism ‘sealed’ the artificial and deliberate split between a public and a private international law. Craven has shown that the public/private divide has particular consequences in the context of succession, which may also be seen as emblematic of IL in general. An “implication of [the] separation between the public

⁶⁶⁰ Carty (2007) 194.

⁶⁶¹ Wilson (2008) 213, see also generally, Shalakany (2003).

⁶⁶² Anghie (2007) 239.

⁶⁶³ Anghie (2007) 239.

and private dimensions of succession ... is that the central function of the doctrine seemed to be to secure the primacy of capitalist relations of production – in which the relationship between the West and the periphery could be understood, above all else, in terms of the inclusion or exclusion of those societies that had not yet established the conditions for capitalism.”⁶⁶⁴ Yet, securing the presence of western corporations and creating (unequal, yet formally equal) states in the periphery in the Western image remedied this situation.

Sornarajah notes that “the role of [powerful corporate] actors in the international legal system is seldom studied due to the dominance in the field of positivist views which stress that states are the only relevant actors in international relations. They provide a convenient cloak for hiding the absence of corporate liability.”⁶⁶⁵ Also, scholars seem to prefer ignoring law-making by arbitrators and ‘the writings of highly qualified publicists’ “lest it shakes [sic] the hoary foundations on which their discipline is built.”⁶⁶⁶ However, it would seem likely that those scholars, arbitrators and the ‘highly qualified publicists’ are the very same.⁶⁶⁷ There is an element of competition/conflict of interest between *practising* lawyers, and (other) businesspersons, but ultimately the dynamic is that of class.

At the same time, business people are also effective users of IL – even if they are at times ‘disowned’ by politicians. They manage to find their way into the state-only institutions such as the PCIJ/ICJ, to have the basic parameters of law set, (and in one case even “through a curious combination of circumstances”⁶⁶⁸ a specific tribunal to deal with (mainly) commercial interests – the Iran-United States Claim Tribunal). At the same time they manage to shape their rules elsewhere in more flexible environments - in arbitrations but also more generally through ‘business as usual’ namely repeat practice of major corporations, trendsetting in the field. With the participation of business elites in rule creation the situation has changed little from that of the 1920s when, according to Pashukanis, international law was constructed around the common interest of the ruling classes of different capitalist states: “international

⁶⁶⁴ Craven (2007) 45.

⁶⁶⁵ Sornarajah (2010) 6.

⁶⁶⁶ Sornarajah (2010) 5.

⁶⁶⁷ E.g. the ICSID docket of pending cases (as at 01 January 2012) lists, among others, V. Lowe, P.M. Dupuy, A. Lowenfeld, C. Tomuschat, B. Stern, and G. Abi-Saab as arbitrators:

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending>

⁶⁶⁸ See Lowenfeld (2008) 541ff.

law owes its existence to the fact that the bourgeoisie exercises its domination over the proletariat and over colonial countries.”⁶⁶⁹

Fragmentation is one of the particular techniques (ideological moves) employed for this purpose, division between civilised and uncivilised, domestic and international, public and private, between old and new legal rules, and between ‘functionally separate’ regimes of law. Benvenisti’s summary view on fragmentation is worth quoting in full:

*Powerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created. Fragmentation accomplishes this in three ways. First, by creating institutions along narrow, functionalist lines and restricting the scope of multilateral agreements, it limits the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase their bargaining power and influence. Second, the ambiguous boundaries and overlapping authority created by fragmentation dramatically increase the transaction costs that international legal bodies must incur in trying to reintegrate or rationalize the resulting legal order. Third, by suggesting the absence of design and obscuring the role of intentionality, fragmentation frees powerful states from having to assume responsibility for the shortcomings of a global legal system that they themselves have played the major role in creating. The result is a regulatory order that reflects the interests of the powerful that they alone can alter.*⁶⁷⁰

Instead of ‘powerful states’, I have argued here, the GCC, members of governing and business elites, are the relevant actors, employing law, on a capitalising mission, to create the global market society.

Anghie has described how “international law [has] ... legitimized colonial exploitation”⁶⁷¹ – which, as I have argued was an important phase in the transition to the global market. Anghie focuses on the ‘civilising mission’ as the racist animator of

⁶⁶⁹ Pashukanis (2005) 325.

⁶⁷⁰ Benvenisti (2007) 1 (abstract).

⁶⁷¹ Anghie (2007) 2.

colonialism. In my view, the ‘civilising mission’ functions mostly as a (*post hoc*⁶⁷²) ideological cloak for economically rational behaviour and is not an actual motivation in itself. This cloak continues to cover the ‘failure to decolonise’ or, rather, the continuing presence of corporate imperialism *through* international law. In Miéville’s words, “International law is a constituent part of the dynamic of modernity”.⁶⁷³

This was explicit up to the end of the 19th C. but globalising IL required a ‘humanitarian’ makeover. In Craven’s words: “Decolonization was a moment of disciplinary anxiety and introspection; a moment at which the emancipation of the colonized world had to be accompanied by the simultaneous emancipation of the idea of international law.”⁶⁷⁴ The ideological move of the ‘decolonization of international law’ was intended to wash the blood of past colonialism off the hands of law. Contra Craven I argue that this process commenced much earlier, with liberal impulses finding their way into international law with the advancement of so-called humanitarian areas of law including those on the means and methods of warfare in the late 19th C., with the increased visibility of the individual in IL, both of which rapidly progressed with the post-WWII Nuremberg and Tokyo trials.

In these, we partially see the ‘public’ and ‘private’ collide, the discourse of liberalism and the logic of capitalism speak against one another, the individual business(wo)men practice ‘corporate imperialism’ but reappear out of the corporate structure, and the ideological play of humanitarian law turn absurd.

⁶⁷² It tends to be the lawyers and philosophers (and theologians) who seek to provide legitimisation in retrospect.

⁶⁷³ Miéville (2005) 226

⁶⁷⁴ Craven (2007) 6.

Chapter 3: Capitalism’s Victors’ Justice?: The economics of WWII, the Allies’ trials of the German industrialists and their treatment of the Japanese *zaibatsu*

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1 Introduction

Telford Taylor, who was the Chief Prosecutor for the subsequent trials at Nuremberg, wrote in his memoirs, that

“[t]he root circumstances which gave rise to the laws of war as we know them today are part of the great waves of change that swept Western civilization in

*the eighteenth and nineteenth centuries... humanitarianism played a part in the development of these laws, but the prime motivations were commercial and military. They were, in fact, very largely the product of what Dwight Eisenhower, when retiring from the presidency, called the “military-industrial complex.”*⁶⁷⁵

In the previous chapter I have shown how both ‘domestic’ and ‘international’ law were developed to further the interests of capital, and the notion of ‘responsibility’ became commodified and capable of exchange. I also commented on the relationship between capitalism and imperialism, and on the notion of a global capitalist class, where the identity of military, state and commercial agents partly overlaps, and where their interests largely converge despite short-term clashes or competition between them. In this Chapter I show how the international criminal law developed by the Nuremberg and Tokyo tribunals was a product of the military-industrial complex, on the one hand, in Japan and Germany, and on the other, the military-industrial and legal-political complex in the United States. The criminal trials following WWII served the prevailing mode of production, by on the one hand allowing ‘liberal lawyers’ to express their individual humanitarianism and through this to construct the ideological ‘play’ of the trials, while simultaneously creating a ‘diversion’ for far-reaching economic intervention.

In the immediate aftermath of the war, the Allies expressed their consensus (e.g. through the measures announced in the Potsdam Agreement⁶⁷⁶) that WWII on both the Western and Eastern fronts had been a war for markets and resources carried out by what Eisenhower would later call the ‘military-industrial complex’⁶⁷⁷: a combination of the political and military might of the state of both Japan and Germany, and the resources, productive capacity and finance of the industrial giants. The means were matched by the motivation: the imperialist drive to expansion at the core of the capitalist state and corporation. In this chapter I first discuss how and why the decision to hold criminal trials for the prosecution of the authors of the war was taken – and how this was explained to relevant publics. I also discuss the US post-war economic policies – and investigate the relation between the trials and the economic reforms

⁶⁷⁵ Taylor (1992) 5.

⁶⁷⁶ *Potsdam Agreement* (1945) – excerpt in *Appendix B*.

⁶⁷⁷ *Eisenhower Address* (1961).

implemented by the US in Japan and Germany/Europe. With the start of the Cold War 18 months after the end of WWII, US foreign and economic policy changed dramatically. I show here that this change is reflected in the conduct, discourse and outcome of the trials, in particular in the US 'subsequent trials'. I argue that the change in US attitude towards the vanquished powers, from one of punishment to one of rehabilitation, turned the trials from morality plays into *théâtre de l'absurde*, with the trial judges going to great length to exculpate the defendants, often not without a sense of irony. Most importantly, with the commencement of the Cold War, the role of economic actors in instigating WWII, which had once been a point of agreement among the Allies, became a point of sharp ideological divide. Henceforth the 'economic case' as it had been called in the main international trial at Nuremberg, has been ignored in the Western literature and remained visible only in GDR/Soviet discourse. Likewise, the omission of *zaibatsu* leaders from the Tokyo International Tribunal hid the Allies' expressed conviction that also the war on the Eastern front had been one of economic imperialism.

The construct of the corporation as a mechanism to minimise individual exposure failed to protect the directors and other high officials of some of the main German companies after the war. The 'progressive' liberal move to individual responsibility for what were previously considered 'state crimes' prevented the acceptance of 'corporate liability' for the businesses involved (although the possibility was debated and would find its echo decades later: Section 7.1.2; Ch.4). The *anomie* at the core of the corporation (Ch.2A) is reflected in the way defendants describe their own roles and their own views on their (lack of) culpability (sections 7 and 8). Moreover, the nature of (imperialist) corporate abuse during WWII in East and West - shows great similarities to the accumulation by dispossession of the colonial period, as illustrated in Ch.2B.

Part A of this Chapter deals with the Allied responses to the economic aspects of WWII in Germany, and Part B with Allied policy in the aftermath of WWII in regard to Japan. In a joint conclusion to Parts A and B (Ch. 3B S. 9) I compare the German and Japanese trajectories and draw broader conclusions about the relation between the particular material context existing at the time and the decision to employ international criminal law and ask what inferences can be drawn from the post-WWII experience for

the future application of ICL to corporate actors, leading to the questions I will seek to answer in the following Chapters.

2 Part A: Germany

Any discussion of the Nuremberg and subsequent trials is inevitably coloured by the availability of material. To explain the particular effect of a very partial availability of materials on the post-WII trials I start this chapter with a brief discussion on the sources employed. This is followed by a brief discussion of the process that led to the decision to hold international criminal trials after WWII and an exploration of the underlying motivations. In Section 3 I describe the lead-up to the main international trial at Nuremberg, with a particular focus on the treatment of the ‘economic case’, and the debates around the inclusion/exclusion industrialists – in order to highlight what has been forgotten in contemporary accounts of WWII.⁶⁷⁸

Then in Section 7 I examine the Americans’ decision to hold ‘subsequent trials’ at Nuremberg, partly motivated by the lawyers’ wish to try industrialists. As during the course of these trials US policy towards Germany/Europe changed dramatically (S.6), I show how this change reflects in the trials – concretely, in material differences between the decisions in the subsequent trials compared with the International Military Tribunal (“IMT”) judgment, in similar facts being judged differently, and legal concepts being explained and applied differently. More generally, I comment on the changed discourse in the subsequent proceedings, and pay attention to the representations made by the defendants and the judges on the role of business in conflict. Finally, I examine the aftermath of the trials, commenting on the post-trial treatment of the lawyers, and the further course of the industrialists. In Section 8 I comment on the other Allies’ trials in their respective zones of occupation, including the prosecution of Röchling and colleagues by the French Occupation authorities, Tesch and Wittig by the British and Töpf by the Soviets. Each of these reveals the respective Ally’s own political objectives.

⁶⁷⁸ E.g. Merriman (2009) Ch.26.

2.1 Sources

The fact that ‘Nuremberg’⁶⁷⁹ and the subsequent proceedings were largely a US dominated event, is reinforced for today’s researchers as most of the available materials are US-produced and published. Although I carried out this research in Germany, by far the most plentiful and detailed resources were the online US government archives, detailing the deliberations and discussions leading up to, and surrounding, the various US decisions, and trials. Some measure of similar material is available in the UK National Archives, in largely unorganised hard copy files. No documentation is available online for the UK military cases (summaries of some cases are included in the 15-volume ‘Law Reports of Trials of War Criminals’ published by the United Nations War Crimes Commission (“WCCLR”)⁶⁸⁰– the remainder of the material is stored in paper form in the UK National Archives, while full texts for the French Röchling case are stored in archives in Germany and France.⁶⁸¹ Because of linguistic limitations I was unable to research Soviet cases except by means of one translated bundle.⁶⁸² In contrast, the US authorities have published a full record of the London Agreement negotiations, with minutes of private meetings, several drafts of the agreement, and reports by government officials.⁶⁸³ Further records offering an insight into the decision making around Nuremberg are available from the US Senate, e.g. Senator Kilgore’s sub-committee investigating German industry.⁶⁸⁴ In addition, many US intelligence documents were declassified in 2000, and described and commented on in a 2007 working group report.⁶⁸⁵

The official record of the Nuremberg IMT trial is published in “The Blue Series,” a 42 volume series of books containing the official record of the proceedings. This is supplemented by “The Red Series” or “Nazi Conspiracy and Aggression”, an eight-volume, 12-book series, with the subtitle “Collection of Documentary Evidence and Guide Materials Prepared by the American and British Prosecuting Staffs for Presentation before the International Military Tribunal at Nurnberg, Germany.”⁶⁸⁶ This

⁶⁷⁹ I follow many commentators in using the term ‘Nuremberg’ as a shorthand to denote the post-WWII Allied trials in Germany as a phenomenon.

⁶⁸⁰ *WCCLR*.

⁶⁸¹ I am grateful to Fabian Schellhaas (PhD Candidate at the Humboldt University of Berlin) for a copy of the *Röchling Case* decision from the German National Archive at Koblenz.

⁶⁸² *Prozeßmaterialien*.

⁶⁸³ E.g. *Jackson Negotiations Report, Jackson Final Report*.

⁶⁸⁴ *Kilgore Report*.

⁶⁸⁵ *IWG Report*.

⁶⁸⁶ *Blue Series; Red Series*.

series includes scanned original documents used in evidence, transcripts of pre-trial interrogations and summaries of investigations carried out by the US and British prosecution teams. The subsequent proceedings are published by the US government in a fifteen volume set, the “Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10” or the “Green Series.”⁶⁸⁷ All of these US resources are publicly available through the Library of Congress (“LoC”) online collection.

The private archives of some of the key US personalities at the time yielded much material: the “Morgenthau Diaries”⁶⁸⁸; the Robert H. Jackson Center Research Archive⁶⁸⁹; the Telford Taylor Papers at Columbia Law School⁶⁹⁰ and the Hebert Nuremberg Files collection at Louisiana University Library which includes scans of handwritten notes the judge took during the IG Farben trial as well as a draft dissenting judgment that was never submitted.⁶⁹¹ The Harold S. Truman Library & Museum holds interviews with many individuals involved in the trials in its oral history collection.⁶⁹² Finally, many of the US lawyers involved in the trials have published personal memoirs and perspectives on the trials, including Ferencz,⁶⁹³ Jackson,⁶⁹⁴ Taylor.⁶⁹⁵ Calvocoressi,⁶⁹⁶ and Vishinsky⁶⁹⁷ have also published on the topic. One of the German defence lawyers at Nuremberg, Kranzbühler, has published his commentary⁶⁹⁸ while a great number of the defendants have written autobiographies.⁶⁹⁹

I have used the UK National Archives for the Tesch, Wittig and Mitsugu trials. Excerpts of the German post-WWII trials are published online by the University of Amsterdam.⁷⁰⁰

⁶⁸⁷ *Green Series*.

⁶⁸⁸ Parts of which are published in German: Schild (1970) 64ff.; and in English in Blum (1959-67) (three volumes).

⁶⁸⁹ *Jackson Archive*.

⁶⁹⁰ *Taylor Archive*.

⁶⁹¹ *Hebert Archive*.

⁶⁹² *Truman Library*.

⁶⁹³ E.g. Ferencz (1999); *Ferencz Library*.

⁶⁹⁴ See also the bibliography in Taylor (1992) 680.

⁶⁹⁵ Taylor (1992).

⁶⁹⁶ Calvocoressi (1947).

⁶⁹⁷ A bibliography containing sources in various languages can be found in Frei (2006) at 603-646.

⁶⁹⁸ Kranzbühler (2008) 433-444.

⁶⁹⁹ E.g. Schacht (1956).

⁷⁰⁰ *Nazi Crimes on Trial*.

Most scholarly writing on the issue also comes from the again US. Few British, and other European legal scholars have reflected on Nuremberg, though some offer descriptive accounts and others focus on specific legal questions.⁷⁰¹ In particular a number of German academic lawyers have provided descriptive accounts.⁷⁰² Unfortunately Polish and Soviet literature is inaccessible to me insofar as it has not been translated – and little of it has been. The zonal trials held by the allies have received very little treatment in the academic literature.⁷⁰³ A notable exception is Frei’s edited collection ‘Transnationale Vergangenheitspolitik’ which also includes chapters (and an extensive bibliography) on the treatment of WWII war crimes suspects in Germany and many other European countries and the Soviet Union.⁷⁰⁴ Besides the case reports and associated documentation, the memoirs of prosecution lawyers Dubois⁷⁰⁵ and Sasuly⁷⁰⁶ provide the main insight into the background to these trials. There has been a recent surge in interest in the trials of the industrialists – unsurprisingly coinciding with the current interest in ICL in general and ‘corporate responsibility’ in particular, with new publications being published and prepared.⁷⁰⁷

Aside from the materials related to the trials specifically, the papers related to the US administration of Germany and Japan, the US Library of Congress has also published the declassified “Enactments and approved papers of the Control Council, Coordinating Committee and Allied Control Authority for Germany”.⁷⁰⁸

3 From War to Trials: Why ‘Nuremberg’

It is striking that the main ICL texts invariably describe *that*, and also *how*, in the practical sense, the Allies came to try the Nazi leaders at Nuremberg, but not *why* they did so.⁷⁰⁹ It is as if criminal trials, and the development of an ICL, was simply the next

⁷⁰¹ E.g.: Kelsen (1947) 165.

⁷⁰² Noteworthy is the absence of ‘Nuremberg’ (and WWII more generally) in Grewe (1984). For recent examples, see e.g. Burchard (2006), 800.

⁷⁰³ But see e.g. Ueberschär (1999).

⁷⁰⁴ Frei (2006).

⁷⁰⁵ Dubois (1952).

⁷⁰⁶ Sasuly (1952); Sasuly (1947). The role of IG Farben in WWII and the IG Farben Case has attracted by far the most commentary of all ‘subsequent trials’, see, e.g. Borkin (1978); Ferencz (2002); Neumann (1963); Hayes (2000).

⁷⁰⁷ See Ch.5 below, and see, e.g. Bush (2009); Jeßberger (2010), Frei (2010); Heller (2011).

⁷⁰⁸ Library of Congress online collection: http://www.loc.gov/rr/frd/Military_Law/enactments-home.html

⁷⁰⁹ Cryer (2009); Werle (2009) 7, but see generally Simpson (2007), esp. chapters 4 and 5.

logical step in the progression of the IL enterprise. In the context of this thesis, the *why* question is important, not least, as Falk puts it, because “[i]n a fundamental sense, as with human rights, it is difficult to comprehend why sovereign states should ever have been willing to validate such a subversive idea as that of the international criminal accountability of leaders for war crimes. It goes directly against the spirit and ideology of sovereignty.”⁷¹⁰ Answering this question allows us to reveal “*the relationships that are expressed in the legal superstructure and those that it ideologically spirits away.*”⁷¹¹ In this section I examine how ‘Nuremberg’ and ‘Tokyo’ were explained publicly, while I also consider what may have been alternative underlying objectives and structural causes.

As early as 1942, in the *St. James Declaration*, the Allies had vowed to “place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for [acts of violence against civilians contrary to international law in particular the 1907 Hague Conventions], whether they have ordered them, perpetrated them, or participated in them.”⁷¹² The meaning of ‘organised’ was more straightforward than that of ‘justice’, which took longer to decide than contemporary accounts might suggest. The sixteen-member United Nations War Crimes Commission,⁷¹³ which first met on 20 October 1943, immediately commenced collecting evidence of the commission of war crimes through its London office and national sub-commissions in the Nazi occupied countries and in the Far East. Ten days later, on 30 October, in Moscow, Churchill, Stalin and Roosevelt issued the *Moscow Declaration*, largely echoing the 1942 Declaration, adding a *Statement on Atrocities* announcing “German criminals ... will be punished by joint decision of the government of the Allies”.⁷¹⁴

While these declarations were mere statements of intent, perhaps mostly made to function as deterrents to the Nazis, they did put the question of trials on the agenda. The *Statement on Atrocities*, largely drafted by Winston Churchill, was, according to

⁷¹⁰ Falk (1998-1999) at 710.

⁷¹¹ Arthur (1978) 31.

⁷¹² *St James Declaration* 1942.

⁷¹³ The commission derives its name from the conference, where the participants called themselves ‘the united nations’ (Werle (2009) 8; *Taylor Report* 246); on the establishment of the United Nations, the Commission became the UN’s War Crimes Commission. For a short history of the Commission, see: Current Notes, AJIL 39(3) 1945 at 565-579.

⁷¹⁴ *Statement on Atrocities*.

Taylor, his attempt to bring the other allies round to a punishment of “German criminals” without trial.⁷¹⁵ Churchill favoured summary execution.⁷¹⁶ The Soviets saw the Nazis’ crimes as already clearly proven, and favoured holding short hearings just to determine punishment. In the US, Roosevelt’s sudden death on 12 April brought to the fore President Truman, who was persuaded by the desirability of trials by Stimson, the lawyer at the head of the War Department. Eventually, when Hitler and Goebbels committed suicide on 30 April and 1 May 1945, also Churchill gave in to the idea of trials.⁷¹⁷ One way of viewing this moment is as the *triumph of liberalism (liberal legalism)* over the barbarism of the war (cf. the ‘civilising mission’ discourse above, Ch.2B) and also, over prior ways of dealing with the vanquished in the aftermath of war. While European leaders had failed to prosecute the German Kaiser post-WWI,⁷¹⁸ now their United States counterparts would take the lead to ‘stay the hand of vengeance’.⁷¹⁹

This was the nascent hegemon’s moment to shape the IL system of the future: “[a]ny legal position asserted on behalf of the United States w[ould] have considerable significance in the future evolution of International Law.”⁷²⁰ According to Taylor, the idea of war crimes trials originated in US War Department and was “pretty fully developed” there.⁷²¹ While negotiations were still ongoing, Stimson and his colleagues had already made significant progress in outlining the “Nuremberg ideas” which included the conspiracy charge and the aggressive war charge. Stimson’s personal conviction driving this effort was that international law would only be complete if its violation would lead to *individual* criminal responsibility.⁷²² As a corollary to the outlawing of aggressive war in *Versailles*, IL needed individual criminal responsibility for initiating and waging such a war.⁷²³

On 2 May 1945, Truman appointed Robert Jackson, until then Associate Justice of the Supreme Court, as Representative of the United States and Chief of Counsel.⁷²⁴ On

⁷¹⁵ Taylor (1992) 28-31. What follows draws on Taylor (1992) pp.1-40 unless otherwise stated.

⁷¹⁶ Taylor (1992) 30.

⁷¹⁷ Taylor (1992) 32-33.

⁷¹⁸ Werle (2009) 4-6.

⁷¹⁹ Jackson IMT Opening Address.

⁷²⁰ Taylor (1992) 73.

⁷²¹ Taylor (1992) 4.

⁷²² Taylor (1992) 37.

⁷²³ See the discussion at *Jackson Negotiations Report*, 65-7, 295, 327, 335.

⁷²⁴ Quoted in Taylor (1992) 39.

May 3rd, 1945 the Allied foreign ministers – who were in San Francisco for the United Nations’ foundational conference – riding on the ‘mood of liberal internationalism’⁷²⁵ discussed and agreed Stimson’s war crimes trial plan. Subsequently, Jackson’s negotiations report was presented as the official US position statement and placed before all delegations to the London Conference in August. Jackson, according to his own account, enjoyed an unusually wide margin of authority to negotiate an agreement in London, while “the Foreign Ministers became engaged in other things.”⁷²⁶ The contents of Jackson’s report were adopted in the London Agreement of 8 August 1945.⁷²⁷ All allies had sent legally trained negotiators.⁷²⁸ Vishinsky, the Soviet representative, remarked, “[t]he reason we were able to get an agreement was that it was left to the lawyers instead of diplomats.”⁷²⁹ Many of the London Agreement’s negotiators later appeared as prosecutors or judges at the IMT.⁷³⁰ Justice Jackson became the Nuremberg Tribunal’s chief prosecutor, and with that one of the best known names attached to the Nuremberg trials.

Taylor surmises that although the initial pressure for post war trials came from the peoples of the German-occupied nations,⁷³¹ in a real sense the trial was conceptualised and pushed by a handful of elite US lawyers “with a strong sense of noblesse oblige.”⁷³² The Allied Declarations, then, could be regarded as the public result of private efforts by (mainly US) government lawyers, who as part of their class and profession had a keen sense of the ideological and material role and purpose of law. What is harder to grasp is the motivations of the US President in approving the idea: did the President bend to the wishes of the lawyers or were there other reasons behind the decision? A hint of two further aims is given by Taylor: “To give meaning to the war against Germany. To validate the casualties we have suffered and the destruction and casualties we have caused” and secondly, “to establish and maintain harmonious relations with the other United Nations.”⁷³³ Falk adds two further reasons: “the guilty conscience of the West that not enough had been done to protect the victims of Nazi persecution before during the war itself (for example, the refusal of liberal

⁷²⁵ *Luban Lecture* (2007).

⁷²⁶ Jackson (1946) 4.

⁷²⁷ Taylor Final Report; Taylor, IC at 247.

⁷²⁸ Jackson (1949) 816.

⁷²⁹ Jackson (1949) 816.

⁷³⁰ E.g. the Soviet lawyer Nikitchenko.

⁷³¹ And the American Jewish Conference and the War Refugee Board (Taylor (1992) at 35).

⁷³² Taylor (1992) 4, 42.

⁷³³ Taylor (1992) 50.

democracies to accept Jewish refugees and the failure to bomb the railroad tracks leading to Auschwitz).”⁷³⁴

The humanitarian, liberal impulse was used to communicate the need for trials to the public, by claiming that such trials were “demanded by the conscience of the world.”⁷³⁵ Jackson talks of how the people of the US came to see the Nazi rulers as a “pack of brigands”, whose crimes caused a feeling of outrage, while it became more and more felt that “these were crimes committed against us and against the whole society of civilised nations... I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality.”⁷³⁶ Moreover, the home public had to be persuaded that their sacrifice had been worth it: In this latter sense, the trials can be seen as a ‘morality play,’ aimed at producing charismatic authority for the Western victor and his ideology.⁷³⁷ On the other hand, the US leadership wanted to (had to) satisfy public demand for supporting the war effort, also in possible future wars. The price paid for the ‘bodybags’ had to be reasonable and the readiness to go to war and defend the nation had to be maintained. Moreover, trying German war criminals allowed the creation of an ideological distance between the Nazi leaders and the (also often openly anti-Semitic) Allied leaderships.⁷³⁸

To fend off the accusation of victor’s justice, finally, Jackson warned:

*We must never forget that the record on which we judge these defendants to-day is the record on which history will judge us to-morrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.*⁷³⁹

Here, ICL is presented as applying equally to wrongdoers in an international society of formally, legally equal states. Whether this notion was naïve, or its presentation cynical, is assessed in this and the next chapters.⁷⁴⁰

⁷³⁴ Falk (1998-1999) 711.

⁷³⁵ Jackson (1946) 220.

⁷³⁶ Jackson (1946) 220.

⁷³⁷ Glasbeek (2009) 125.

⁷³⁸ E.g. UK Prime Minister Eden, who refused to adopt Auschwitz survivors as refugees (*Dubois Oral History Interview*).

⁷³⁹ Jackson, *IMT Opening Address* 5.

⁷⁴⁰ Falk (1998-1999) 706.

In conclusion, it would seem reasonable to surmise that ‘Nuremberg’ came about, on the one hand through the perseverance of lawyers, to some extent endowed with a sense of mission and ambition to be ‘jurisgenerative’,⁷⁴¹ and, like lawyers generally, being predisposed to seeking legal solutions to problems. Jackson states in 1947, “[a]s the lawyer is the most frequently chosen legislator, diplomat, executive and political leader, the intellectual discipline which we call “the law” saturates Western World statesmanship and diplomacy.” And, “[a]t the opening of this tortured and bloody century, law-trained men dominated the councils of most Western nations.”⁷⁴² On the other hand, the political leadership considered the trial-route fortuitous and in line with the objective of asserting the US elite’s moral leadership at this important juncture in world history. The international trial at Nuremberg would form the cornerstone of the Allies’ post-WWII policy, its main public spectacle and means of communication to home audiences and the wider world.

4 The US occupation and economic reform of Germany

Behind the scenes, the plan on the table was for a ‘pastoralised Germany’ – a Germany broken up and stripped of all its economic might, that would never again be able to wage an aggressive war. This plan had been authored in 1943-44 by US Treasury Secretary Henry Morgenthau, then Roosevelt’s right hand man. The Plan connected with the ongoing programme of investigation into German industry, in particular into the US based offices and subsidiaries of German firms and the worldwide activities of some of the cartels, such as IG Farben, whose assets were frozen or expropriated.⁷⁴³ Morgenthau’s controversial plan was largely adopted on 25 April 1945 in the guise of Joint Chiefs of Staff Decision 1067 (“JCS 1067”).⁷⁴⁴ Some months later echoes of the plan were found in the *Potsdam Agreement* which was concluded at the close of the Potsdam Conference on 2 August by the USSR, the UK and the US.⁷⁴⁵ The Potsdam Agreement established and regulated the Allied Control Council for the governance of occupied Germany, and provided for it “to carry out programs of industrial

⁷⁴¹ *Luban RHJ Lecture*.

⁷⁴² Jackson (1949) 813.

⁷⁴³ Including the ‘oriental face of IG Farben’, as described by Dubois (1952) 13. See also the *Kilgore Report*, and Sasuly (1952); and see Ch.2B.

⁷⁴⁴ *JCS 1067*.

⁷⁴⁵ *Potsdam Agreement*.

disarmament, demilitarization, of reparations, and of approved exports and imports” as well as *complete control over all aspects of the German economy*, “with the aim of preventing Germany from developing a war potential”.⁷⁴⁶

5 Nuremberg: Political demands translated into law

The documentary record of negotiations spanning from 22 January 1945 to October 7, 1946 published by the US Department of State in 1949 gives some insight into the manner in which the political demands raised at the time were translated into the legal process to be followed in Nuremberg.⁷⁴⁷ The Nuremberg Charter appended to the London Agreement, which was adopted by the four Allied powers and formally adhered to by 19 other nations,⁷⁴⁸ provided in Article 1 for the prosecution of ‘criminals whose offenses have no particular geographical location’. War criminals whose crimes could be localised would be tried in those localities once they were liberated. Allied occupation courts would be set up in their respective zones in Germany and given jurisdiction over crimes committed by Germans within the Reich.⁷⁴⁹

Article 6 of the Charter contained the crimes within the jurisdiction of the Tribunal: (a) crimes against peace (i.e. the crime of aggression), (b) war crimes and (c) crimes against humanity.⁷⁵⁰ “Crimes against humanity” were primarily included to enable prosecution of acts committed against Germans (mainly of course German Jews). A final section of article 6 contained the crime of “conspiracy” to commit any of the acts in the three other sections. Article 7⁷⁵¹ had been recommended by Mr Justice Jackson, citing the “principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still ‘under God and the law’.”⁷⁵² Article 8 encodes the supremacy of the laws of humanity/ICL over domestic law and sovereign government orders which was vital

⁷⁴⁶ The Control Council applied the Control Council’s law by virtue of *Control Council Proclamation No. 1*.

⁷⁴⁷ *Negotiation Record*.

⁷⁴⁸ Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, The Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

⁷⁴⁹ Werle (2009) 7.

⁷⁵⁰ *See Appendix B*.

⁷⁵¹ *See Appendix B*.

⁷⁵² *Jackson Report*, at 64; *Jackson opening address* at 36.

considering many Nazi atrocities would not have been unlawful under Reich law.⁷⁵³

5.1 *The Trial at Nuremberg*

At the next stage the defendants had to be selected, and indictments drafted. In order to produce a coherent historical narrative of the war to be communicated to the public and posterity, the trial was to focus on the grand totality (causes/origins) rather than the detail (symptoms). The IMT would also only prosecute “Major War Criminals”, leaving other suspects to be dealt with in the normal channels of military justice.⁷⁵⁴

Chief Prosecutor Jackson stated:

*Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world. ... Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war.*⁷⁵⁵

What had enabled WWII to be started, and thus all its atrocities to be committed, had been the “captur[e of] the form of the German state as an instrumentality for spreading their rule to other countries.”⁷⁵⁶ The indictment was to reflect this:

*Whom will we accuse and put to their defence? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial and economic life in Germany who by all civilised standards are provable to be common criminals.*⁷⁵⁷

From the very start it was clear that the “economic case” – the part of the prosecution dealing with the economic causes of, and motivations for, the war and the responsibility of economic actors and policy makers - would be key in the Nuremberg

⁷⁵³ See *Appendix B*.

⁷⁵⁴ *Taylor, IC*, at 249.

⁷⁵⁵ Jackson Report, Part III.

⁷⁵⁶ Jackson Report, Part III.

⁷⁵⁷ Jackson Interim Report, Part III.3.

Trial.⁷⁵⁸ From the mid-1930s the German economy had been geared up towards heavy industry, which comprised the mining of coal (Germany's main natural resource) and the manufacture of iron and steel and steel products. As a result of a deliberate policy of cartelisation implemented in the 1930s,⁷⁵⁹ these industries were in the hands of a small number of large industrial and mining combines including Krupp, Flick, Thyssen, the state owned Reich-Werks-Hermann-Göring and the chemicals concern IG Farben. The idea behind cartel formation was for Germany to become economically self-sufficient in particular with regard to those items needed for war. Not having colonies producing rubber and oil itself, Germany's aim was to produce replacements for these resources domestically. Additionally, the occupation and colonisation of neighbouring countries was to ensure the German nation's 'Lebensraum' but also the resources (including labour) that it lacked.⁷⁶⁰

When Justice Jackson and his staff commenced work in preparation for the trial, four indictment-drafting committees were established each dealing with a different core aspect of the war for which charges were to be brought. Committee 1, comprised of British representatives, was to handle the aggressive war charge, 2 was to deal with war crimes and crimes against humanity in the east (dealt with by the Soviets), 3 with equal crimes in the West (dealt with by France), while the Americans would prepare the "common plan and conspiracy" charge.⁷⁶¹ The latter charge was to cover the pre-WWII story of Nazism, Hitler's seizure and exploitation of power, his plans and steps to occupy much of Europe, and plan to attack the United States. As the first count of the indictment it would comprise the basic narrative of the case as a whole.⁷⁶² This committee was headed by Justice Jackson himself. As a vital part of this charge, the economic case – was entrusted to the American lawyer Frank Shea.⁷⁶³ Shea produced a memorandum, in which he suggested as defendants Hjalmar Schacht (former head of the Reichsbank and Minister of Economics, who had provided the financing of war production), Fritz Sauckel (primary figure in the foreign forced labour programme), Albert Speer (architect and later Minister of Armaments and Munitions), Walter Funk

⁷⁵⁸ *JCS 1067*.

⁷⁵⁹ Trainin (1945) 83.

⁷⁶⁰ *IMT Indictment (J)*.

⁷⁶¹ Taylor (1992) 79-80.

⁷⁶² Taylor (1992) 80.

⁷⁶³ Taylor (1992) 90-92.

(Schacht's successor)⁷⁶⁴ as well as Alfried Krupp and six other German industrial and financial leaders. "The guilt of the industrialists and financiers, as Shea saw it was that they had given Hitler the material means to rearm Germany, with full knowledge that Hitler planned to use these armaments to carry out a program of German aggrandizement by military conquest."⁷⁶⁵

Eisenhower would later speak, in his famous farewell speech, of the military-industrial complex. In the particular context of WWII, this was called "IG Farbenism": the inherent danger in cartel formation combined with the profit motive, or the work of the 'unholy trinity' of Nazism, militarism, economic imperialism.⁷⁶⁶ The Soviet representative at Nuremberg, A.N. Trainin stated: "Their political position is clear: these were the masters for whom the Fascist State machine was zealously working," adding, "the German financial and industrial heads must also be sent for trial as criminals."⁷⁶⁷

The "economic case", however gathered criticism from the start, with one critic fearing it would "reform European economics."⁷⁶⁸ In the end, only the former ministers were indicted, with Krupp, due to an apparent British-led effort to keep the list of indictees down and the trial short.⁷⁶⁹

The retention of Krupp, the 'main organiser of German industry', in the indictment made him the *pars pro toto* for German industry. However, there was disagreement among the different teams of lawyers working on the indictment as to whether Gustav Krupp, the man who had run the Krupp concern until 1941, or Alfried Krupp, his son, who had been in charge throughout most of the war, was the intended defendant.⁷⁷⁰ Eventually, Gustav the elder was selected: the industrialist who had also been the president of the State Union of German Industry and high official in the Economics Ministry.⁷⁷¹ It soon transpired, however, that Krupp was, at 80 years of age, too ill and demented to stand trial. The U.S. sought to replace Gustav with his son Alfried Krupp,

⁷⁶⁴ *Nazi Conspiracy and Aggression* Vol.I Ch.VIII.

⁷⁶⁵ Taylor (1992) 81.

⁷⁶⁶ Telford Taylor in Flick Case (Opening Statement for the Prosecution), 32.

⁷⁶⁷ Trainin (1945) 84, 85.

⁷⁶⁸ Taylor (1992) 85-7.

⁷⁶⁹ Taylor (1992) 85-7.

⁷⁷⁰ Taylor (1992) 92.

⁷⁷¹ *Nazi Conspiracy and Aggression* Vol.II Ch. XVI Part 13.

who had been the company's executive director since 1941. The prosecution of at least one Krupp family member was considered to be in the public interest, explained in the words of Justice Jackson:

Four generations of the Krupp family have owned and operated the great armament and munitions plants which have been the chief source of Germany's war supplies. For over 130 years this family has been the focus the symbol and the beneficiary of the most sinister forces engaged in menacing the peace of Europe. ... To drop Krupp von Bohlen from this case without substitution of Alfried drops the case from the entire Krupp family and defeats any effective judgment against the German armament makers. ... The Krupp influence was powerful in promoting the Nazi plan to incite aggressive warfare in Europe. The Krupps were thus one of the most persistent and influential forces that made this war.... Once the war was on, Krupps, both Von Bohlen and Alfried being directly responsible therefor, led German industry in violating treaties and international law by employing enslaved laborers, impressed and imported from nearly every country occupied by Germany, and by compelling prisoners of war to make arms and munitions for use against their own countries. ... Moreover, the Krupp companies profited greatly from destroying the peace of the world through support of the Nazi program... The United States respectfully submits that no greater disservice to the future peace of the world could be done than to excuse the entire Krupp family.⁷⁷²

This request was rejected on 15 November 1945.⁷⁷³ The UK had objected on the basis that it may delay the commencement of the entire trial.⁷⁷⁴ Still, important information on what might have been the first international trial of an industrialist can be gleaned from the *Indictment*⁷⁷⁵ and the underlying prosecution file.⁷⁷⁶

5.2 *The Indictment*

While in Article 22 of the London Agreement a series of trials were envisaged, in fact

⁷⁷² *Krupp Answer* 134ff.

⁷⁷³ *Krupp Order* 146. See also, Lippman (1995) 176-179.

⁷⁷⁴ *Krupp Memorandum* 139. See also, Taylor (1992) 92.

⁷⁷⁵ *IMT Indictment*.

⁷⁷⁶ *Nazi Conspiracy and Aggression* Vol.II, Ch. XVI Part 13.

the IMT eventually only held one large trial, indicting 24 individuals⁷⁷⁷ and six groups or organisations. The Indictment started with the overarching conspiracy charge, stating that:

*All the defendants, with diverse other persons...participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal, and in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such a plan or conspiracy.*⁷⁷⁸

This count encompassed the ‘Nazi master plan’⁷⁷⁹ including the strategic part of the ‘economic case’: acquiring totalitarian control of Germany and the economic planning and mobilization for aggressive war, which included using organisations of German business as instruments of economic mobilisation for war.⁷⁸⁰

Count two comprised crimes against the peace by planning, preparing, initiating and waging wars of aggression against twelve countries, count three comprised the violation the laws and customs of war, which included the widespread use of slave labour, both through utilisation of camp internees and through the deportation of hundreds of thousands of Soviets, Poles, French, Belgians and Dutch civilians to work in the German industries.⁷⁸¹ It further included the plunder of public and private property, through, amongst others, the confiscation of businesses and plants, by means of which the “Nazi conspirators created an instrument for the personal profit and aggrandizement of themselves and their adherents.”⁷⁸² Finally, count four comprised crimes against humanity: mistreatment and persecution of Jews and other political, racial and religious groups.⁷⁸³

⁷⁷⁷ The indictees were charged individually and as members of any of the groups or organisations named in the indictment.

⁷⁷⁸ *Nuremberg Trial Proceedings* Vol. II: First day, Tuesday, 20 November 1945 Morning Session, 29 – 94.

⁷⁷⁹ For a summary of the prosecution’s case, see *Economic Aspects*.

⁷⁸⁰ See **Appendix B**.

⁷⁸¹ *IMT Indictment* Count III section (B) 51 (Deportation for slave labor and for other purposes of the civilian populations of and in occupied territories) and Section (H) Conscription of civilian labour.

⁷⁸² *IMT Indictment* Count III section (E) 55, 56.

⁷⁸³ *IMT Indictment*.

5.3 *The IMT Judgment*

The IMT rendered its judgment on 1 October 1946, delivering “the world’s first post mortem examination of a totalitarian regime.” Jackson added, “That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.”⁷⁸⁴

Moreover, “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”⁷⁸⁵ This, one of the key principles of Nuremberg, which has persisted in ICL to date (see Ch. 4) at once responds to the liberal individualist belief in individual agency, and permits, through the absorption of blame by the individual, the system (Nazism, capitalism) to escape censure, the state and people to be rehabilitated and political-economic relations to resume post-prosecution.

5.3.1 The judgment on the ‘economic case’

Moreover, and despite Göring’s suicide on the eve of the trial, the ‘economic case’ featured prominently in the Nuremberg trial, which still focussed on Göring’s pivotal role as “in theory and in practice [...] the economic dictator of the Reich.”⁷⁸⁶ The judgment describes how in November 1932 a petition, signed by leading industrialists and financiers, had been presented to President Hindenburg, calling upon him to entrust the Chancellorship to Hitler.⁷⁸⁷ Subsequently, according to evidence submitted to the Tribunal

On the invitation of Goering, approximately 25 of the leading industrialists of Germany, together with Schacht, attended a meeting in Berlin on 20 February 1933. This was shortly before the German election of 5 March 1933. At this meeting Hitler announced the conspirators’ aim to seize totalitarian control over Germany, to destroy the parliamentary system, to crush all opposition by force, and to restore the power of the Wehrmacht. Among those present at that

⁷⁸⁴ Jackson October 7 Report 438.

⁷⁸⁵ IMT Judgment 223.

⁷⁸⁶ IMT Judgment 171.

⁷⁸⁷ IMT Judgment 177.

*meeting were Gustav Krupp, head of the munitions firm, Alfried Krupp, A.G.; four leading officials of the I.G. Farben Works, one of the world's largest chemical concerns; Albert Vogler, head of United Steel Works of Germany; and other leading industrialists.*⁷⁸⁸

At this meeting Göring suggested to set up an election fund to support Hitler in the March elections (which Göring predicted would be the *last* election in Germany⁷⁸⁹).

Subsequent to this meeting in April 1933 Krupp submitted to Hitler - on behalf of the Reich Association of German Industry, a plan for the reorganization of German industry. He stated the plan was “characterized by the desire to coordinate economic measures and political necessity”, and that “the turn of political events is in line with the wishes which I myself and the board of directors have cherished for a long time.”⁷⁹⁰ The industrialists’ plan was adopted.⁷⁹¹ The meeting, the election fund, and the plan are mentioned again later in the ‘subsequent trials’ (below, S.7).

Funk, who had been the Minister of Economics and the President of the Reichsbank, was convicted by the IMT for crimes against the peace for his participation in the economic preparations for war.⁷⁹² However, Hjalmar Schacht, Funk’s predecessor in both positions, was acquitted of the aggressive war charge as the Tribunal considered it not proven that Schacht had known of Hitler’s intentions. A factor in his acquittal was that Schacht had defected before the end of the war. Additionally Speer, who had been Reich Minister for Armaments and Munitions, was acquitted on the basis that his actions were taken only after the aggressive wars had been well underway.⁷⁹³

The Soviet member of the Tribunal, Justice I. Nikitschenko, filed a dissenting opinion to the majority IMT judgment to the effect that he considered Schacht’s acquittal to be in contradiction to the evidence presented to the court.⁷⁹⁴ The strong case for the recognition and condemnation of the economic instigators of the war put by the prosecution was no longer supported by the majority: an early sign of the differences to come.

⁷⁸⁸ *Economic Aspects.*

⁷⁸⁹ *Economic Aspects.*

⁷⁹⁰ *IMT Judgment* 183.

⁷⁹¹ *Economic Aspects.*

⁷⁹² *IMT Judgment* 131-4.

⁷⁹³ *IMT Judgment* 156.

⁷⁹⁴ *IMT Judgment* 342-348.

6 The Turnaround: From Germany is our Problem to Germany is our Business

In the Spring of 1947 further signs were appearing of a changing Allied policy towards Germany, from one where Germany was to be publicly castigated and disabled (in trials and through economic policies as envisaged in the Morgenthau Plan) to one where Germany was to be rehabilitated into the world community of states and its economy rebuilt.⁷⁹⁵ Here I focus on how the change (effectively, the start of the Cold War) is reflected in the decision-making regarding the industrialists' trials, and subsequently (S.7) how its effects are reflected in the proceedings and the decisions of the tribunals. I mainly focus on US policy and sources, as the US at this point has emerged as the ideological leader of the West.

Direct economic interests initially stayed in the background in US policy towards Germany and were the subject of much internal disagreement within the US administration.⁷⁹⁶ Morgenthau relates how already during WWII orders were given to the military to spare German industrial plants.⁷⁹⁷ In his memoirs, Josiah Dubois (a State Department lawyer who was to become the lead prosecutor in the *IG Farben* case) describes a *secret* State Department memorandum setting out its "post-war program" relating to *in kind* reparations payments from Germany.⁷⁹⁸ Such reparations could form a public justification for sparing, and where necessary, rebuilding Germany's productive capacity, as well as retaining US-German trade ties. However, the program remained secret as at this point public and key political support was still behind the pacific, 'pastoralised' Germany as proposed in Morgenthau's plan. Morgenthau, sensing support for his plan waning, published his as book (entitled *Germany is our Problem*) in an attempt to reinforce his stance.⁷⁹⁹

Incrementally over time, however, Morgenthau lost ground. Dubois tells of seeing a second secret memorandum, circulated within the U.S. delegation at Potsdam. According to this memo, the U.S. goal now was "rebuilding a strong Germany as a buffer against Communism".⁸⁰⁰ While the *Potsdam Agreement* (and JSC 1067⁸⁰¹)

⁷⁹⁵ See generally, Gimbel (1972) 242-269.

⁷⁹⁶ Generally, Gimbel (1972)

⁷⁹⁷ Schild (1970) 64.

⁷⁹⁸ *Dubois Interview* 13.

⁷⁹⁹ Morgenthau (1945), Schild (1970) 64ff.; also Blum (1959-67).

⁸⁰⁰ *Dubois Interview* 34.

⁸⁰¹ Generally, *Dubois Interview*.

mirrored the Morgenthau Plan, Dubois states, “of course, it was never followed through. The U.S. officials did do just what Morgenthau was afraid of, and in effect what the State Department memorandum recommended.”⁸⁰² A strong, *indentured* economy was more attractive than a pastoralised state. Shortly after Potsdam Morgenthau was “in effect ... fired by Truman”.⁸⁰³⁸⁰⁴

The turnaround was not complete at this point, though, and elements of the plan persisted for some time. For example, the work of the Office of the Military Government of the U.S. (“OMGUS”) Decartelisation Branch – whose staff were called the “Morgenthau Boys”⁸⁰⁵- continued for two years after Henry Morgenthau’s departure. Many items of machinery were shipped to the United States and the other Allies by way of reparations payment. The IG Farben Control Commission, which was run by all four occupation powers, worked to split the Farben cartel into the four sections that had only come together years before: Hoechst, Agfa, Bayer and BASF.⁸⁰⁶ The entire German economy came to be strictly controlled by the occupation authorities. In the Eastern, Soviet occupation zone, the ‘criminal concerns’ were liquidated or nationalised.⁸⁰⁷ Much has been written about the intimate relations between the U.S. (and other, European) corporations and the German cartels.⁸⁰⁸ In return for the (temporary) loss of these trading and scientific partnerships (and to boost government research projects), secret programmes were underway to control and harvest German scientific development. Thousands of industrial patents, even hundreds of scientists were transferred to the U.S. as part of “Operation Paperclip”.⁸⁰⁹

The public manifestation of the turnaround eventually came on 6 September 1946, in an address entitled *Restatement of Policy on Germany* given in Stuttgart by U.S. Secretary of State, Jimmy Byrnes.⁸¹⁰ It raised the issue of the political and economic future of Europe: “Germany is a part of Europe and recovery in Europe, and particularly in the states adjoining Germany, will be slow indeed if Germany with her

⁸⁰² *Dubois Interview* at 32, 33.

⁸⁰³ *Dubois Interview* at 25.

⁸⁰⁴ Blum (1967) 451ff.

⁸⁰⁵ *Bernstein Interview* 141-151; *Bernstein IG Farben Report*.

⁸⁰⁶ *Weiss Interview*.

⁸⁰⁷ Kahn (1952) 6.

⁸⁰⁸ E.g. Black (2008); Billstein (2000); Pauwels (2003).

⁸⁰⁹ *IWG Report* 2007.

⁸¹⁰ United States-Department of State. Documents on Germany 1944-1985. Washington: Department of State, [s.d.], pp. 91-99.

great resources of iron and coal is turned into a poorhouse.”⁸¹¹ In this statement Byrnes effectively echoed Soviet Foreign Minister Molotov’s speech on Germany’s economic future at the Paris Peace Conference in July 1946.⁸¹² However, unlike Molotov, Byrnes omitted mention of the industrialists’ role in WWII, which by then was starting to disappear from ‘Western’ discourse, and would disappear all but completely after the subsequent trials.

In March 1947 Truman announced the ‘Truman Doctrine’ promising economic support to those “states resisting attempted subjugation [to communism].”⁸¹³ Soviet representative Zhdanov responded with his ‘two camps’ speech in which he repeated the view that capitalist imperialism, personified in the directors of the cartels, was the true perpetrator of WWII.⁸¹⁴ In July 1947 JCS1067 was replaced with JCS1779 which codified the turn in US policy and stated that “[a]n orderly, prosperous Europe requires the economic contributions of a stable and productive Germany.”⁸¹⁵ German and generally Western European recovery took off speedily, partly through the Marshall Plan established on 5 June 1947, which aimed to modernise Western European industry, to integrate it, and remove barriers to trade among European countries and between Europe and the US.⁸¹⁶ It was also used as leverage to pressure French and Italian governments not to appoint communists to ministerial posts.⁸¹⁷

On the Eastern side, the Cominform, the coordinating mechanism for all communist parties, was inaugurated in September 1947 as the successor to the Comintern, and Zhdanov was installed as its chair. Soviet power in Eastern Europe was consolidating and when Soviet troops took control of the Czech government in January 1948, and in July 1948 blocked foreign trains and truck routes into Berlin, this sent shockwaves through the US trial teams at Nuremberg. Some of the US lawyers and their families returned home,⁸¹⁸ and the US occupation government now put direct pressure on Taylor to wrap up the trials.⁸¹⁹ (West) German commentator Kröll summarises the *Umorientierung* (turnaround) as follows: “With the re-formation of political camps

⁸¹¹ Id.

⁸¹² Gimbel (1972) 245.

⁸¹³ Merriman (2009) 119.

⁸¹⁴ Wentker (2002) 63.

⁸¹⁵ Time Magazine, 28 July 1947.

⁸¹⁶ Merriman (2009) 1120-1.

⁸¹⁷ Merriman (2009) 1120.

⁸¹⁸ Dubois (1952)

⁸¹⁹ Heller (2011) 102.

during the Cold War and the open warfare in Korea, the involvement of the young Federal Republic into the Western alliance weighed heavier than crime and punishment of Nazi crimes.”⁸²⁰ East German commentators accused the U.S. of “liquidating Potsdam.”⁸²¹

It is against this backdrop that we must imagine the efforts of US lawyers such as Jackson, Taylor and others on their team, to persuade the US political leadership to allow further trials.

7 The trials of the industrialists: From morality play to *théâtre de l’absurde*

In the US military trials of the industrialists we can see how this change and also specific historical events such as the blockade of Berlin, leave their mark. Although the other Allies’ political priorities were perhaps not as explicit as the US’ (partially due to the comparatively very limited publication of official documents) evidence of their political objectives can also be found reflected in the choice of defendants, and the course and outcomes of the trials in their respective occupation zones. I examine these in Section 8.

Not all trials discussed below are ‘subsequent trials’ when seen next to the main IMT trial. As early as 1944 the Allied governments had created military courts and commissions (Yamashita, see Ch.3B) to deal with crimes being committed by Axis nationals.⁸²² The British did so under British *Royal Warrant* dated 14th June, 1945.⁸²³ The *Zyklon B* case discussed below took place during the middle months of the IMT trial. Parallel to these military courts were the military government courts of the occupation, set up by virtue of Control Council Proclamation 1.⁸²⁴ Apart from the British, the other Allied military tribunals applied the *Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (“*CCLI0*”)⁸²⁵ which was promulgated on 20 December 1945 by the four occupying powers acting through their Zone Commanders in order to “establish a

⁸²⁰ Kröll (1999) 176.

⁸²¹ Kahn (1952) 6.

⁸²² Rogers (1990) 787.

⁸²³ *Royal Warrant*; Rogers (1990) 788-9; *UNWCC* Vol. I, XV.

⁸²⁴ *Control Council Proclamation No. 1*.

⁸²⁵ *CCLI0*.

uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.”⁸²⁶ *CCLIO* is based, and according to some, an improvement, on the *Nuremberg Charter*.⁸²⁷ Article II sets out the main provisions on crimes within the scope of the instrument, as well as potential defendants.⁸²⁸ One of the main differences was the intended inclusion of pre-war crimes against humanity and the explicit mention of persons who have “held high position in the financial, industrial or economic life of any such country” as potential accused.⁸²⁹ *CCLIO* authorised each of the four Zone Commanders to arrest suspected war criminals and to establish “appropriate tribunals” for their trial.⁸³⁰ According to Taylor, in the Soviet Zone little or nothing was done to carry *CCLIO* into effect⁸³¹ although this is contradicted by the literature (S. 8.3). The British tried Axis nationals starting from summer 1945 (S.8.1). The major trial held by the French was that of Röchling (S.8.2). Of the trials carried out by the Allies and eventually also the German courts,⁸³² those of the US, which took place in the same Nuremberg courthouse as the IMT trial, are by far the best documented and most widely known. It is these trials that are cited in ICL cases to this day (see Chapter 5).⁸³³

7.1 *The Trials of the Industrialists at the US military tribunal at Nuremberg*

After the IMT judgment, the decision to proceed with ‘subsequent trials’ was not without hesitation on the part of the US leadership. As the IMT trial had come to a close, criticism increased.⁸³⁴ Dubois and others have noted that some of the criticism can be put down to anti-Semitism within the US (and UK) governments.⁸³⁵ That the US trials took place at all, can be put down partly to the tenacity of the main US protagonists, Jackson, Taylor and their teams at Nuremberg.

⁸²⁶ *CCLIO*.

⁸²⁷ For example, *CCLIO* obviates the requirement for a link between crimes against humanity and war (Werle (2009) 783) meaning that crimes committed before the war could be included.

⁸²⁸ *CCLIO* S.I See *Appendix B*.

⁸²⁹ *CCLIO* S.II 2. See *Appendix B*.

⁸³⁰ *CCLIO*

⁸³¹ *Taylor Report* at 254.

⁸³² As per Art. III of *CCLIO* the French, British and Soviet commanders granted German courts jurisdiction.

⁸³³ See Ch.5.

⁸³⁴ E.g. Bloxham (2003) 97.

⁸³⁵ Dubois (1952) 68-69 and Bush (2009) 1197.

My discussion below is limited to trials relevant to the ‘economic case’ and industrialists in particular. Beyond a general account of the cases (which demonstrates a continuity of corporate abuse following from Ch. 2B and ‘corporate anomie’ discussed in Ch. 2A) I highlight three concrete ways that the change in US policy reflects in the trials: (1) the use of excessively conciliatory language by the tribunals, (2) the tribunal’s decision to ignore in their judgment facts that had been admitted by defendants and knowledge that had been established also in the IMT, and (3) use of the necessity defence in a way that contravened *CCLIO* and also disregarded the Nuremberg principles.

In the trials of the industrialists at the US Military Tribunals at Nuremberg (NMT) we can see the change in US policy reflected. Below the surface, a deeper US need can be discerned also: the need to reassure American industrialists, perhaps counter-intuitively *through these trials*, that production for the Korean and other, potentially *aggressive*, wars would not lead to prosecution.⁸³⁶ From this perspective, the Tribunals’ task was to distinguish culpable involvement with an evil regime from innocent ‘business’.⁸³⁷

7.1.1 Deciding whether to have further trials

Justice Jackson, in his report to the US Government on the IMT judgment, reminded the government that the US had wanted to try more industrialists besides Krupp in the IMT trial, and that his successor, Brig. Gen. Telford Taylor had already “prepared a programme of prosecutions against representatives of all the important segments of the Third Reich including a considerable number of industrialists and financiers, leading cabinet ministers, top SS and police officials, and militarists.”⁸³⁸ At this point Jackson notes a lack of enthusiasm on the part of the other Allies for a second international trial. British Foreign Secretary Orme Sargeant feared that such a second trial would become a “battle between capitalism and communism” and that “[t]he Russians might exploit the proceedings to discuss irrelevancies such as [the British] attitude to German rearmament”.⁸³⁹ Jackson stated, “if [the other Allies] were unwilling to take the additional time necessary to try industrialists in this case, it does not create an

⁸³⁶ Dubois (1952) 21.

⁸³⁷ Dubois (1952) 20.

⁸³⁸ *Jackson Final Report* 435.

⁸³⁹ Quoted in Bloxham (2008) 149.

obligation on the United States to assume the burdens of a second international trial. The quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out...”⁸⁴⁰ Eventually, this is what occurred.

The assumption at the time was that it would suffice for the US Military tribunals to take on the most prominent cases (British authorities handed the US administration six industrialists who had been held in the British Zone, including Alfred Krupp⁸⁴¹) and that the German courts would eventually try others, on the basis of hundreds of files already prepared by the American team.⁸⁴²

The twelve trials of the US Military Tribunal at Nuremberg (“NMT”), which was established by the US Military Governor pursuant to Military Government Ordinance No. 7 of 18 October 1946,⁸⁴³ each focus on a specific professional group who had together formed the elite of Nazi Germany. It includes trials of professional men (medical doctors who carried out medical experimentation in the concentration camps in the *Medical Case* and lawyers in the *Justice Case*,⁸⁴⁴ senior SS members including camp administrators (*SS Case*) and the Police (*Einsatzgruppen Case*), industrialists and financiers (Cases 5, 6, 10 – see below), military leaders (Cases 7 and 12) and Government Ministers (2 and 11 *Ministries Case*).⁸⁴⁵ The basis upon which the General Counsel decided whom to indict, was described thus: “... one of the first and most important responsibilities of my office was to determine, in the light of the best available information, where the deepest individual responsibility lay for the manifold crimes committed under the aegis of the Third Reich. ... it was necessary to scrutinise the conduct of leaders in all occupations, and to let the chips fall where they might...”⁸⁴⁶ Bush gives a comprehensive account of the US team’s deliberations on choice of defendants. At one time, the list counted 1000 possible defendants, many of them industrialists – “so great was the number of dirty corporations and businessmen

⁸⁴⁰ *Jackson Final Report* 435.

⁸⁴¹ Bloxham at 152.

⁸⁴² Bush (2009) 1228.

⁸⁴³ Appendix to Taylor Report, at 363. For a discussion of the question whether the Nuremberg tribunals and CCL10 were International law, or as argued by the German defence and later German commentators, “occupier’s law” see, e.g. Appendix to Taylor Report, at 289, and Burchard (2006).

⁸⁴⁴ The movie ‘*Judgment at Nuremberg*’ is based on this case.

⁸⁴⁵ *Medical Case; Justice Case; SS Case; Einsatzgruppen Case; Ministries Case*.

⁸⁴⁶ Preliminary Report to the Secretary of the Army by the Chief of Counsel for War Crimes, 12 May 1948, pp2-3, quoted in Appendix to *Taylor Report*, at 278.

that many, even potential ‘major perpetrators’, just slipped through the cracks”.⁸⁴⁷ For example the directors of Daimler-Benz, which had used many tens of thousands of forced labourers, including women held captive as prostitutes, and Siemens, which had used slave labour from Auschwitz and Sachsenhausen, were not tried.⁸⁴⁸

Brigadier Telford Taylor was appointed Chief of Counsel for War Crimes on 24 October 1946 (immediately on the resignation of Justice Jackson).⁸⁴⁹ Josiah Dubois was the main prosecutor in the *IG Farben Case*. In his memoirs, he relates that already prior to his leaving for Germany, he is instructed by the War Department to ensure there will be no aggressive war charges against industrialist, as ‘the DuPonts’ (prominent US industrialists) would not like it.⁸⁵⁰ This is an early sign of direct political pressure on the industrialists’ trials.

7.1.2 Discussions of theories of liability

As noted in Section 2, the US has published a far wider range of materials surrounding the trials than the other Allies. The documentation describing the lead-up to the industrialists’ trials detail the discussion among the lawyers as to the basis (‘theory’, in their words⁸⁵¹) on which the defendants were to be selected and charged. It is worth examining these at some length, as these discussions bear great resemblance to the discussions on corporate liability taking place again now (see Ch. 4C).

Among the theories for liability considered by the American team for the prosecution of industrialists were conspiracy liability as used by the IMT - a company or even a whole industry could be implicated in the conspiracy after which hundreds or thousands could be tried for membership. This theory was rejected as it was specifically considered to interfere with the US policy objective of rehabilitating Germany.⁸⁵² The second theory discussed was that of trying corporations as legal entities. This was proposed by Abraham Pomerantz, a US corporate litigator who had

⁸⁴⁷ Bush (2009) at 1132.

⁸⁴⁸ Bush (2009) at 1132-3.

⁸⁴⁹ Appendix to *Taylor Report*, at 273.

⁸⁵⁰ Dubois (1952) at 22.

⁸⁵¹ E.g. Dubois (1952) 49.

⁸⁵² Bush (2009) at 1143. At one point the US occupation authority held 74,000 persons in detention in Germany, while hundreds of thousands of German POWs were held in various other countries (id. at 1144).

been brought onto the team as a ‘big picture strategist’.⁸⁵³ He saw practical advantages to this theory including ease of proof (no need to tie individuals specifically to ‘corporate’ acts), and also a corporate charge could form the legal foundation for the expropriations of company property - that were already occurring. Finally, blaming the companies as such rather than individuals, would “disclose the industrial roots of Nazism” and “demonstrate to the German people the real powers behind Hitler and the NSDAP”.⁸⁵⁴ The concept of corporate liability existed in both US and UK domestic law (see Chapter 2A, S.5.5) and Pomerantz was not dissuaded by the absence of any explicit norms in international law on corporate liability or on the possible crimes that could be ascribed to corporations. However, Taylor’s deputy Drexel Sprecher dismissed the suggestion, arguing that judges would be baffled by the German economy about which they knew little, that the media would not give it the comprehensive coverage they had given individual trials and that the general public would not accept a long, ‘bogged down’ trial. Finally Leo Drachsler, a lawyer on the team with a background as a Hungarian refugee, fluent in German, who had previously worked on the German Cartels file for the US Government, proposed an ‘institutional approach’.⁸⁵⁵ This approach captured the idea that German industry had formed a ‘third pillar’ alongside the German military and the Nazi party, and that German big business had acted in unity.⁸⁵⁶ This unity was evidenced in the meetings held by industrialists in the guise of industry associations, where they had reached agreement on the allotment of slave labour and other shared goals. Drachsler proposed that symbolic or representative defendants be tried.⁸⁵⁷ Taylor ‘politely rejected’ this option, possibly partly as a result of the IMT judgement which had just come out - this contained Jackson’s now famous phrase ‘crimes are committed by men, not by abstract entities’, and restricted the application of the conspiracy charge.⁸⁵⁸ Eventually, all ‘adventurous’ theories were dropped and Sprecher’s proposal to lay charges against a small group of individuals only, and to have no broad presentations against business and no emphasis on the planning phase of pre-1939, was selected.⁸⁵⁹ After the first indictment, in the *Flick* case, had been drafted on the basis of individual liability, it was as if “nothing

⁸⁵³ Bush (2009) at 1149.

⁸⁵⁴ Bush (2009) at 1150.

⁸⁵⁵ Bush (2009) at 1157-8.

⁸⁵⁶ Bush (2009) at 1158.

⁸⁵⁷ Bush (2009) 1160. This approach resembles the analysis by Neumann – who assisted the prosecution teams after publishing his book (Neumann (1944)).

⁸⁵⁸ Bush (2009) at 1161-2. Abraham Pomerantz quit the prosecution team and became an outspoken critic of the US handling of the trials (Bush (2009) 1171-2; fn.278).

⁸⁵⁹ Bush (2009) at 1157.

else had ever been considered.”⁸⁶⁰ An overall result of the chosen approach is that the prosecution of designated individuals left the ‘structure’ or system untouched, and as such facilitated the US objective of rebuilding the corporations as part of the economy. In this sense it resembled the prosecution of individual political leaders (at the IMT), rather than ascribing responsibility to the State as such.

Finding a middle ground between the lawyers’ persistence and reluctance at the political level (an example of intra-class competition), OMGUS set a strict timetable and small budget for the ‘subsequent trials’.⁸⁶¹ In the summer of 1947, when ten of the trials had already been completed, Telford Taylor was told that he could not proceed with the six further trials previously approved. He persuaded the Government to allow three further trials. The plan of having separate trials for Dresdner Bank and the Hermann-Goering-Werks was abandoned, but Taylor managed to agree having Dresdner Bank director Rasche and three defendants of the HGW added to the Ministries trial.⁸⁶²

7.1.3 The *Flick Case*, Case No. 5

The first of the industrialist cases, *The United States of America vs. Friedrich Flick, et al. (Flick Case)*⁸⁶³ started with the indictment of 8 February 1947 and ended on 22 December 1947. Friedrich Flick and five other officials of the Flick Concern and its subsidiary companies were accused of war crimes and crimes against humanity committed principally as officials of the Flick Concern. The charges included participation in the deportation of thousands of foreigners including concentration camp inmates and prisoners of war to forced labour in inhuman conditions including in the Flick mines and plants; spoliation contrary to the Hague Conventions of property in occupied France and the Soviet Union; participation in the persecution (as a crime against humanity) of Jews in the pre-war years through securing Jewish industrial and mining properties in the “Aryanization” process; knowing participation (of Flick and Steinbrinck) in SS atrocities through membership in the “Circle of Friends of Himmler” (a select group of industrialists and SS officers).⁸⁶⁴ The Flick group of enterprises included coal and iron mines, steel producing and fabricating plants, and

⁸⁶⁰ Bush (2009) at 1177. Bush does not present any materials showing explanations as to why the decision was made, or how the defendants were chosen.

⁸⁶¹ Bush (2009) at 1197.

⁸⁶² Bush (2009) at 1217-8.

⁸⁶³ *Flick Case*.

⁸⁶⁴ *Flick Indictment* 3.

was, at around 1940, the largest steel combine rivalled in size only by Krupp AG.⁸⁶⁵ Flick and his colleagues were accused of having exploited more than 60,000 prisoners of war as slave labourers under atrocious conditions.

The defendants were not charged with “conspiracy to wage a war of aggression” even though the Prosecution had found ample material evidence to support such a charge.⁸⁶⁶ Chief Prosecutor Telford Taylor opened this first industrialist case to be tried by the Americans with a general summary of the role of industry in the Nazi war plan:

*What we are here concerned with is no mere technical form of participation in crime, or some more or less accidental financial assistance of the commission of crimes. The really significant thing, which gives the full meaning to the crimes charged, not only in this count but in all the counts of this indictment, is the fact that the defendants assisted the SS and the Nazi regime with their eyes open and their hearts attuned to the basic purposes which they were subsidizing. Their support was not merely financial. It was part of a firm partnership between these defendants and the Nazi regime that continued from before the Nazi seizure of power to the last days of the Third Reich.*⁸⁶⁷

Flick and his colleagues argued that they had not known of the slave labour programme and the mass crimes committed by the Nazis, that their position as private, business persons shielded them from liability (“we were just doing business”⁸⁶⁸), that they had acted out of “necessity” and under orders and force and threat of the state. Flick described his ostensible agreement with Nazi ideas as a self-protective “*howling with the wolves*”.⁸⁶⁹ They also employed the *tu quoque* argument of alleged Allied war crimes (e.g. the Allied bombing of German cities) previously heard in the IMT, and challenged the jurisdiction of the court and applicability of *CCL10*. Against the necessity argument in particular, the prosecution stated,

The leading defendants, Flick and Steinbrinck, were not reluctant dragons. All the defendants are uncommonly able to take care of themselves, and have been phenomenally successful at accomplishing what they set out to do. To suggest that these men, whose enterprises flourished like the green bay tree under

⁸⁶⁵ *Flick Case* Opening Statement for Prosecution.

⁸⁶⁶ Drobisch (1999) 122.

⁸⁶⁷ *Flick Case* Opening Statement for Prosecution 104.

⁸⁶⁸ *Flick Case* 972.

⁸⁶⁹ *Taylor Report* 304.

*Hitler and who occupied the most powerful and privileged positions in the German industrial fabric, spent 12 years skulking about in fear and doing what they did not want to do, is ridiculous.*⁸⁷⁰

In *Flick*, we start to see the effects of a change in US government policy. Taylor's prosecutorial statements become fiercer, while the judges adopt an excusatory tone. In its decision, the Tribunal accepted the view that the defendants (except Flick and Weiss) *had* acted under necessity, forced by the "reign of terror" employed by the Nazi regime. According to the Tribunal, the provision in paragraph 4(b) of Article II of such Control Council Law No. 10 which states- "(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation" should not "be employed to deprive a defendant of the defense of necessity under such circumstances as obtained in this case." (cf. Zyklon B below.) Flick and Weiss, however, were found to have initiated the procurement of a large number of forced labourers for two of their plants (letters by Flick and Weiss to this effect are reproduced in the U.S. publication) – these "active steps ...deprive[d] the defendants Flick and Weiss of the complete defense of necessity."⁸⁷¹

Further, the tribunal declined jurisdiction over the Aryanisation activities which the prosecution had argued amounted to persecution, as "crimes committed before and wholly unconnected with the war" were not covered by *CCLI0*, adding (obiter) that "the compulsory taking of industrial property" did not fall in the category of acts that "affect the life and liberty of oppressed people" so as to amount to crimes against humanity.⁸⁷²

On the count of participation in the SS crimes through membership of the Circle of Friends of Himmler, Flick and Steinbrinck (who was also an SS member), who had participated in the regular Circle meetings and contributed large sums of money to Himmler, were found guilty. However, the Tribunal considered a number of factors in mitigation, including "fear of retribution" and the idea they may just have attended the

⁸⁷⁰ *Flick Case* 973-4.

⁸⁷¹ *Flick Case* Judgment, 1202.

⁸⁷² *Flick Case* Judgment 1213-5.

Circle's meetings for its "excellent dinner".⁸⁷³ This argument had not been made by the defendants themselves.

The Tribunal recounted how, "[i]n 1936 [Himmler] took members of the Circle on an inspection trip to visit Dachau concentration camp which was under his charge. They were escorted through certain buildings including the kitchen where they tasted food. They saw nothing of the infamous atrocities perhaps already there begun. But Flick who was present got the impression that it was not a pleasant place."⁸⁷⁴ Flick was sentenced to seven years' imprisonment, Steinbrinck to five, and Weiss to two and a half, while the other three defendants were acquitted on all counts.⁸⁷⁵ In his report, Chief Prosecutor Taylor calls the Flick judgment "exceedingly (if not excessively) moderate and conciliatory."⁸⁷⁶

The Tribunal upheld only those charges that had become uncontrovertible – such as the active role in acquiring slave labour shown in letters signed by the defendants. *CCLIO* was specifically drafted to include pre-war acts within the jurisdiction of the *CCLIO* Tribunals as possible crimes against humanity (as mentioned above) but the Tribunal misinterpreted this. The Tribunal's application of the "necessity" defence was in direct contravention of *CCLIO* which had been considered a key foundational ideas of the Post-WWII accountability process. The Tribunal deviated from pronouncements in previous *CCLIO* cases,⁸⁷⁷ for example on its treatment of the slave labour count when compared with the *Pohl's Case* unqualified condemnation of forced labour, regardless of the conditions:

The freedom of man from enslavement by his fellow men is one of the fundamental concepts of civilization. Any program which violates that concept, whether prompted by a false feeling of superiority or arising from desperate economic needs, is intolerable and criminal. ...these defendants today are only mildly conscious of any guilt in the kidnapping and enslavement of millions of civilians. The concept that slavery is criminal per se does not enter into their

⁸⁷³ *Flick Case* Judgment 1218.

⁸⁷⁴ *Flick Case* Judgment 1218.

⁸⁷⁵ *Flick Case* Judgment 1223.

⁸⁷⁶ *Taylor Final Report* 187.

⁸⁷⁷ The subsequent trials to some extent ran contemporaneously, which partly explains how similar facts and concepts are interpreted differently in different trials, although Dubois and other report on regular meetings between the various teams. One often-heard critique is that the judges were not trained in international law, e.g. Schwarzenberger (1946-1947).

*thinking. ... They simply cannot realize that the most precious word in any language is "liberty."*⁸⁷⁸

In that case, Pohl and three others were sentenced to death by hanging, while eleven defendants were given prison sentences ranging from ten years to life, and three were acquitted (see below).

While Flick had resented 'having been singled out to make the German industrialists look like robbers and slave-drivers',⁸⁷⁹ the bench seems to have been persuaded by the defence's argument that the case formed an attack on German capitalism, wholesale.⁸⁸⁰

There was much media attention for the case in Eastern Germany, but in the West, mainly following the change in the politico-economic environment, it began to subside.⁸⁸¹ This may have contributed to the tribunals' preparedness to pass light sentences despite the atrocities described by the prosecution.

7.1.4 The *IG Farben Case*, Case No. 6

*The United States of America vs. Carl Krauch, et. al., (IG Farben Case)*⁸⁸² (indictment filed 3 May 1947, judgment 29, 30 July 1948) was the largest of the NMT proceedings, comprising 24 defendants and lasting nearly 15 months. The defendants included the members of the Vorstand (managing directorate) and four other important officers of what was once the biggest combine in Germany, and the biggest chemical company in Europe: the Industriegesellschaft Farben AG.⁸⁸³ IG Farben had a global network of partners and subsidiaries,⁸⁸⁴ and as the producer of both Aspirin and Nylon stockings, "was present in every American home."⁸⁸⁵ The company's main industrial/military products were synthetic nitrates for the manufacture of explosives, synthetic rubber made from coal (called buna), synthetic gasoline, and various poison gases including Zyklon B. The company had a yearly turnover which exceeded three

⁸⁷⁸ *Pohl's Case* 968.

⁸⁷⁹ Drobisch (1999) 131. Flick, when he had returned to head the company in his later life, gained notoriety in Germany and beyond by refusing steadfastly to contribute to a slave labour compensation fund (Drobisch (1999) 130; Ferencz (1979) 155-70).

⁸⁸⁰ *IG Farben Case* closing statement for defendant Weiss, at 1118.

⁸⁸¹ Drobisch (1999) 131.

⁸⁸² *IG Farben Case*.

⁸⁸³ One defendant was dropped from the case for health reasons. The combine included also IG Farben's own banks, and even a private intelligence service (Sasuly (1952)).

⁸⁸⁴ *Bernstein IG Farben Report*; see also generally, Sasuly (1952).

⁸⁸⁵ Dubois (1952)

billion Reichsmark.⁸⁸⁶ In addition to his position within the company as Chairman of the Supervisory Board, Karl Krauch was part of Goering's staff in the office of the Four Year Plan and his principal technical and scientific advisor. The indictment was issued in August 1947 and the judgment delivered on 29 July 1948.

The *Farben Case* was the only industrialist case where the defendants were actually put to proof on the charge of crimes against the peace (despite the War Department's warning, above). The defendants were found not guilty on the charge of conspiracy⁸⁸⁷ as the Tribunal found that – in relation to this count - they had acted merely like ordinary citizens, who, although the majority of them supported the waging of war in some way, were not the ones who planned and led a nation. They merely followed their leaders and offered no contribution greater than any other normally productive enterprise – *despite what the IMT had said in its judgment about the role of the industrialists* and despite the *CCL10*. Judge Hebert filed a dissenting opinion on the dismissal of the slave labour, in which he argued that all defendants should have been found guilty on count 3 of the indictment.⁸⁸⁸

The Tribunal took a generous view on knowledge:

*While it is true that those with an insight into the evil machinations of power politics might have suspected Hitler was playing a cunning game of soothing restless Europe, the average citizen of Germany, be he professional man, farmer, or industrialist, could scarcely be charged by these events with knowledge that the rulers of the Reich were planning to plunge Germany into a war of aggression.*⁸⁸⁹

And,

*It is argued that after the events in Austria and Czechoslovakia, men of reasonable minds must have known that Hitler intended to wage aggressive war, although they may not have known the country to be attacked or the time of initiation. This argument is not sound.*⁸⁹⁰

⁸⁸⁶ *IG Farben Case*, Judgment 1085.

⁸⁸⁷ *IG Farben Case* Judgment 1126.

⁸⁸⁸ *Hebert Dissent*.

⁸⁸⁹ *IG Farben Case*, Judgment 1106.

⁸⁹⁰ *IG Farben Case*, Judgment 1107.

Plus, most controversially, “We reach the conclusion that common knowledge of Hitler’s plans did not prevail in Germany, either with respect to a general plan to wage aggressive war, or with respect to specific plans to attack individual countries...”⁸⁹¹ Here we can see a direct contradiction of the IMT, which had detailed (amongst others) the planning and strategising meetings of Himmler’s circle of Friends, of which defendant Buete fish had been a part (with Flick and Rasche, amongst others).⁸⁹²

The tribunal, which at times sounds more like a defence counsel, remarks in one instance, “It may be noted that this is the only instance in which the defendant Krauch talked to Hitler.”⁸⁹³ This would seem unlikely, since Krauch received an Iron Cross personally from Hitler at the start of the war, “for his great victory on the battlefield of German industry.”⁸⁹⁴ Even the Vermittlungsstelle Wehrmacht (War Economic Central office) of Farben, which the prosecution had considered the main clearing house between the military authorities and the three great productive divisions of IG Farben (which Göring had requested and which was headed by Krauch, who thus became an employee of Göring⁸⁹⁵) in “neither its organisation not its operation gives any hint of plans for aggressive war.”⁸⁹⁶ In support of the claim that the Farben leaders were well aware of, and perhaps more directly involved in planning the aggressive war for their own purposes, the prosecution had produced a letter in which Krauch argued for the take-over of neighbouring countries’ industries, “peaceably at first”:

*It is essential for Germany to strengthen its own war potential as well as that of its allies to such an extent that the coalition is equal to the efforts of practically the rest of the world. This can be achieved only by new, strong, and combined efforts by all of the allies, and by expanding and improving the greater economic domain corresponding to the improved raw material basis of the coalition, peaceably at first, to the Balkans and Spain.*⁸⁹⁷

⁸⁹¹ *IG Farben Case*, Judgment 1107.

⁸⁹² *IG Farben Case*, Judgment 1107.

⁸⁹³ *IG Farben Case*, Judgment 1109.

⁸⁹⁴ Borkin 74. Cf. “IG Farben was Hitler and Hitler was IG Farben”, according to U.S. Senator Homer T. Bone to the US Senate Committee on Military Affairs on June 4, 1943.

⁸⁹⁵ Dubois (1952) 84-5.

⁸⁹⁶ *IG Farben Case*, Judgment 1109.

⁸⁹⁷ *IG Farben Case*, Judgment 1116.

When in 1936 Krauch joined Goering's staff on the execution of the Four Year Plan he was not authorised to make decisions relating to chemical production, being merely retained for his "expert advice" on "recommending plans for expansion or erection of plants," etc.⁸⁹⁸ While the Prosecution had argued that it must have been obvious to him as an expert that the quantities IG Farben had been asked to produce far outstripped the demands of a defensive war,⁸⁹⁹ the Tribunal held, that this knowledge could only be inferred "[i]f we were trying military men" and Krauch et al. "were not military men at all."⁹⁰⁰ Whereas,

*[t]he defendants may have been, as some of them undoubtedly were, alarmed at the accelerated pace that armament was taking. Yet even Krauch, who participated in the Four Year Plan within the chemical field, undoubtedly did not realize that, in addition to strengthening Germany, he was participating in making the nation ready for a planned attack of an aggressive nature.*⁹⁰¹

Seemingly going to great lengths in its effort to 'talk right' the actions of the defendants brought up by the prosecution, the Tribunal said, "[c]onsidering the whole report, it seems that Krauch was recommending plans for the strengthening of Germany which, to his mind, was being encircled and threatened by strong foreign powers, and that this situation might and probably would at some time result in war. But it falls far short of being evidence of his knowledge of the existence of a plan on the part of the leaders of the German Reich to start an aggressive war..."⁹⁰²

Eventually the Tribunal summarised its appreciation of the further evidence submitted to it out of concern for the length of the judgment and summarily states: "This labor has led to the *definite* conclusion that Krauch did not knowingly participate in the planning, preparation of initiation of an aggressive war."⁹⁰³ The role of other defendants is dealt with only briefly. In regard to the 20 February 1933 meeting with Hitler and Goering (see above S.5.3.1) after which IG Farben contributed RM400,000 to the Nazi election fund, the Tribunal states, "[t]his contribution was made to a movement that had its basic origin in the unemployment and general financial chaos of

⁸⁹⁸ *IG Farben Case*, Judgment 1110.

⁸⁹⁹ *IG Farben Case*, Judgment 1112.

⁹⁰⁰ *IG Farben Case*, Judgment 1113.

⁹⁰¹ *IG Farben Case*, Judgment 1114 (emphasis added).

⁹⁰² *IG Farben Case*, Judgment 1116.

⁹⁰³ *IG Farben Case*, Judgment 1117 (emphasis added)

a world-wide depression.... To say that this contribution indicates a sinister alliance, is to misread the facts as they then existed.”⁹⁰⁴ Here the tribunal neglects the sentiment expressed in Krauch’s letter, cited above.⁹⁰⁵

On the waging a war of aggression count, the Tribunal manages to subvert the meaning of ICL – the individualisation of responsibility in IL - as expressed by Justice Jackson at the IMT:

*We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defense of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge.*⁹⁰⁶

The Tribunal appears here to be responding to a sensitive point raised by Krauch himself during the proceedings – what if U.S. business were to stop supporting American war efforts?⁹⁰⁷ There was awareness on the bench that US industry was watching these trials, and that changing political circumstances (start of the Cold War) may well mean the US Government would come to rely on its industrialists.⁹⁰⁸

With regards to the third count (participation in slave labour programme and in the holocaust) the prosecution had argued, “Farben performed most of the research for the secret development of poison gas for war. ... In 1943, Farben produced 95 percent of the poison gas in Germany.”⁹⁰⁹ The indictment charges in paragraph 131 that “[p]oison gases and various deadly pharmaceuticals manufactured by Farben and supplied by Farben to officials of the SS were used in experimentation upon, and the extermination of, enslaved persons in concentration camps throughout Europe. Experiments on

⁹⁰⁴ *IG Farben Case*, Judgment 1117.

⁹⁰⁵ As well as, amongst others, the analysis supplied in *Bernstein IG Farben Report* (supra).

⁹⁰⁶ *IG Farben Case*, Judgment 1126.

⁹⁰⁷ *IG Farben Case*, Final statements by the Defendants, Krauch, 1055.

⁹⁰⁸ See also the ‘liberal application of the necessity doctrine’ *IG Farben Case*, 1175 and critique of this point in *Taylor Report* at 317.

⁹⁰⁹ *IG Farben Case* Indictment at 27.

human beings (including concentration camp inmates), without their consent, were conducted by *Farben* to determine the effects of deadly gases, vaccines, and related products.”⁹¹⁰ However, the Tribunal was not persuaded that the defendants *knew* the purpose of the gas supply despite the fact that a number of accused had been members of the supervisory council of Degesch, and despite the extraordinary quantities in which the gas was delivered to the extermination camps.

Only in the Auschwitz context did the Tribunal find some evidence of *Farben*’s proactive attitude regarding slave labour, but the area of criminal liability was still constructed very narrowly. Having considered various locations for a new synthetic rubber plant, on the recommendation of defendant Ambros, the small Polish village of Oświęcim was selected.⁹¹¹ It is said that Ambros visited construction site of the project and saw the concentration-camp inmates at work. He also visited the main concentration camp at Auschwitz in the Winter of 1941-42 in company with some 30 important visitors (possibly the Himmler Circle) and “he saw no abuse of inmates and thought that the camp was well conducted.”⁹¹²

The prosecution had shown how in 1942, at the instigation of *Farben*, Monowitz was built, a separate labour camp across the road from the *Farben* plant at Auschwitz.⁹¹³ “Work-to-death labour” at the *Farben* factory is described by the Tribunal in its judgment euphemistically as “[t]hose [workers] who became unable to work or who were not amenable to discipline were sent back to the Auschwitz concentration camp or, as was more often the case, to Birkenau for extermination in the gas chambers.” Also, it is noted, “[t]he plant site was not entirely without inhumane incidents.”⁹¹⁴ Nevertheless, “[i]t is clear that *Farben* did not deliberately pursue or encourage inhumane policy with respect to the workers. In fact, some steps were taken by *Farben* to alleviate the situation. It *voluntarily and at its own expense* provided hot soup for the workers on the site at noon.”⁹¹⁵ When utilising free “work-to-death labour”, however, this appears little like generosity and even less an exculpatory factor for the *Farben* defendants. The fact remained, as stated by the Tribunal, that “the labor for

⁹¹⁰ *IG Farben Case* Indictment at 54 (emphasis added).

⁹¹¹ *IG Farben Case*, Judgment 1180.

⁹¹² *IG Farben Case*, Judgment 1181.

⁹¹³ Dubois (1952) 156-7.

⁹¹⁴ *Farben* Judgment, 1184.

⁹¹⁵ *Farben* Judgment, 1185 (emphasis added).

Auschwitz was procured through the Reich Labor Office at Farben's request. Forced labor was used for a period of approximately 3 years, from 1942 until the end of the war."⁹¹⁶ Only five of the 24 defendants were found guilty under count three, but given very light sentences.⁹¹⁷

Missing in the judgment is any mention of the number of worker deaths and the fact that defendant Dürrfeld actually lived at Auschwitz for three years and entertained his colleagues there, and that they socialised with Höss, the camp commander.⁹¹⁸ In addition, neither did the medical experiments (which had been *admitted*⁹¹⁹) receive any mention in the judgment, nor the fact that IG Farben's Auschwitz plant made artificial fertilizer using ashes from the Auschwitz crematorium: "There were times, when the production at IG Farben of fertilizers, was at a level with the production (using IG Farben chemicals) at Auschwitz of ashes."⁹²⁰

In his closing statement, Krauch appears to anticipate his 'amicable'⁹²¹ sentence:

*When I heard the final plea of the prosecution yesterday, I often thought of my colleagues in the United States and in England and tried to imagine what these men would think, when they heard and read these attacks hurled at us by the prosecution. For after all, they, too, are scientists and engineers; they had similar problems. They, like us, were called upon by the state to perform certain duties. That was true then, before the world war, and that is true now, as we know from information received from the United States. A citizen cannot evade the call of the state. He must submit and must obey.*⁹²²

In particular since Farben had had close relationships with Standard Oil, this trial had been watched closely by the US home public,⁹²³ something which Krauch had no doubt anticipated, allowing him to direct his statements to his cross-Atlantic 'colleagues'. Krauch was sentenced to 6 years, Ambros to 8, and the others received sentences

⁹¹⁶ *Farben Judgment*, 1185.

⁹¹⁷ *IG Farben Case*, Judgment 1205-10.

⁹¹⁸ Dubois (1952) 212.

⁹¹⁹ Dubois describes a scene reminiscent of the film "Schindler's List" where the camp commander lives in a large villa overlooking the camp and hosts many parties there Dubois (1952) 212.

⁹²⁰ Anon. (1960) 14. Also, Dubois at 212.

⁹²¹ Term used in Jeßberger (2009) 924.

⁹²² *IG Farben Case*, Final statements by the Defendants, Krauch, 1055.

⁹²³ *Taylor Final Report* at 79.

between 1.5 and 8 years⁹²⁴ – according to Dubois, “sentences light enough to please a chicken thief.”⁹²⁵ Four were acquitted. By comparison, in the *Justices Case*, that same week, four life sentences were passed, and in the *Pohl Case* against the SS Economic and Administrative Office (who had handled the logistical and administrative side of slave labour) four death sentences were passed, and no prison sentence below 10 years with four of 20 or more.⁹²⁶ The defendant Ilgner was considered innocent even of the aggressive deeds he had admitted.⁹²⁷ Dubois surmises, “no doubt they [the judges] were influenced somewhat by our foreign policy.”⁹²⁸

7.1.5 The *Krupp Case*, Case No. 10

The judgment in the last industrialist case at the NMT, *The United States vs Alfried Krupp von Bohlen und Halbach et al.* (the *Krupp Case*),⁹²⁹ was delivered on 31 July 1947, the day after the sentencing in the *IG Farben Case*.

Alfried Krupp, the main defendant in this trial and the son of Gustav Krupp (who was still considered unfit to stand trial) had been vested with sole ownership and control of the family company by a special Reich decree (the “Lex Krupp”) of 12 November 1943. In addition to the charges levied against Alfried Krupp and eleven other Krupp officials which were comparable to the Flick charges.⁹³⁰

What is remarkable in the Krupp case is that the Prosecution had not argued that Krupp defendants had been part of the “Nazi conspiracy” in the meaning of the IMT trial, but that they had been part of a “*Krupp conspiracy*” which was a manifestation of something altogether bigger: “Nazism was, after all, only the temporary political manifestation of certain ideas and attitudes which long antedated Nazism, and which will not perish nearly so easily. In this case, we are at grips with something much older than Nazism; something which fused with Nazi ideas to produce the Third Reich, but which has its own independent and pernicious vitality.”⁹³¹ What this was, was *expansionism* close to Bukharin’s understanding of economic imperialism: to ensure

⁹²⁴ *IG Farben Case*, Judgment 1205-10.

⁹²⁵ Dubois (1952) 339.

⁹²⁶ *Justices Case*; *Pohl Case*.

⁹²⁷ Dubois (1952) 355

⁹²⁸ Dubois (1952) 357.

⁹²⁹ *Krupp Case*.

⁹³⁰ Although without SS charges nor “Aryanization” related charges.

⁹³¹ Judge Wilkins’ Separate Opinion on Counts 1 and 4, at 412.

Krupp's own continually increasing profitability, it was said to have driven the state and military to colonial expansion.⁹³² Dismissing the charge, Judge Wilkins considered that Krupp's expansionism since the 1920s merely meant Krupp had acted in the firm's financial interest as behoves a businessman.⁹³³ Taylor calls the acquittal of the aggressive war charges 'rather sketchy'.⁹³⁴

The Tribunal then considered the remaining spoliation and forced labour charges. The tribunal found, in contrast to the finding in the *Farben Case* (above), in terms of *knowledge* with regard to the Krupp firm's activities at Auschwitz, that the persecution of Jews by the Nazis was "common knowledge not only in Germany but throughout the civilised World" and that the firm's officials, could not *not* have known.⁹³⁵

Apart from ignorance, the defendants had pleaded necessity, stating that production quotas were set by the Nazi government and to reach those one had to use slave labour, and had they refused to do so, they would have suffered "dire consequences".⁹³⁶ Reviewing the Flick decision, the Tribunal rephrased the necessity question in the case as this proposition:

*To avoid losing my job or the control of my property, I am warranted in employing thousands of civilian deportees, prisoners of war, and concentration camp inmates; keeping them in a state of involuntary servitude; exposing them daily to death or great bodily harm, under conditions which did in fact result in the deaths of many of them; and working them in an undernourished condition in the production of armament intended for use against the people who would liberate them and indeed even against the people of their homelands.*⁹³⁷

The Tribunal did not allow the defence, among others because being convinced, that the Krupp defendants enjoyed Hitler's protection.⁹³⁸ Yet, the finding on the necessity defence contravenes the Nuremberg principles. The comparatively heavy sentences

⁹³² Kröll connects this with Max Weber's "Wilhelminismus": "die Allianz zwischen Großindustrie und Pseudoaristokratie mit der Folge der Derationalisierung der deutschen Weltpolitik", Kröll (1999) 176.

⁹³³ *Krupp Case* Judgment 1412.

⁹³⁴ *Taylor Report IC*, 309.

⁹³⁵ *Krupp Case* Judgment 1434.

⁹³⁶ *Krupp Case* Judgment 1435.

⁹³⁷ *Krupp Case* Judgment 1444-5, also, "If we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter," *id.*

⁹³⁸ *Krupp Case*, Judgment 1446.

ranged between six and twelve years for ten defendants, and three years for one, and included the forfeiture of Alfred Krupp's real and personal property.⁹³⁹ When compared with Taylor's statement, after what he called the 'Krupp snafu', that "Alfried Krupp was a very lucky man, for, had he been named, he would almost certainly have been convicted and given a very stiff sentence by the International Military Tribunal,"⁹⁴⁰ the Krupp defendants' trial seems 'amicable' indeed.

7.1.6 The *Pohl Case*, Case No. 4

In January 1947, just before the start of *Flick*, the Military Tribunal II commenced the prosecution of Pohl and 17 other defendants in *The United States v Oswald Pohl et al.*, with a decision being issued on 3 November 1947.⁹⁴¹ Oswald Pohl was the head of the SS's 'Main Economic and Administrative Department' (Wirtschaft und Verwaltungshauptamt - WVHA) – one of the twelve main departments of the SS.⁹⁴² One of the divisions of the WVHA dealt with the allocation of forced labourers to public and private employers in Germany and the occupied countries (Amtsgruppe D), and another, Amtsgruppe W, was responsible for the operation and maintenance of various industrial, manufacturing, and service enterprises throughout Germany and the occupied countries.⁹⁴³ Another of the WVHA's activities was the management of property expropriated from Jews.⁹⁴⁴

A defendant of note in the Pohl Case is Karl Mummmenthey. According to the judgment, "[i]n his direction and management of the German Earth and Stone Works, known as DEST, none of the defendants was more directly associated with concentration camp inmate labor than Karl Mummmenthey."⁹⁴⁵ The DEST companies comprised "brickworks and quarries at the Flossenbuerg, Mauthausen, Gross-Rosen, Natzweiler, Neuengamme (see Section 8.1.2 below), and Stutthof concentration camps. The ceramic works of Allach and Bohemia were also subordinated to office WI under Mummmenthey. The gravel works at Auschwitz and Treblinka, the granite quarry at Blizyn, the Clinker Works at Linz... The DEST industries were strictly concentration

⁹³⁹ *Krupp Case*, Judgment 1450.

⁹⁴⁰ Taylor (1992) 94.

⁹⁴¹ *Pohl Case*.

⁹⁴² One of the tasks that Pohl was to execute in this function was the destruction of the Warsaw Ghetto. Pohl engaged four private contracting firms, who employed forced labour. *Pohl Case* Judgment 986.

⁹⁴³ *Pohl Case* Indictment 6.

⁹⁴⁴ *Pohl Case* Judgment 990.

⁹⁴⁵ *Pohl Case* Judgment 1051.

camp enterprises.”⁹⁴⁶ Interestingly, in his defence it had been “Mummenthey’s plan to picture himself as a private business man in no way associated with the sternness and rigor of SS discipline, and entirely detached from concentration camp routine.”⁹⁴⁷ The picture failed to convince. “Mummenthey was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, wielded military power of command. If excesses occurred in the industries under his control he was in a position not only to know about them, but to do something. ... The evidence in this case reveals that there was perhaps no industry which permitted such constant maltreatment of prisoners as the DEST enterprises.”⁹⁴⁸ Viz. “Prosecution witness Engler, testifying to conditions in the DEST plants at the Sachsenhausen-Oranienburg concentration camp, declared that ...because of the heavy work and inadequate food there was an average of from 800 to 900 deaths per month.... the average life duration of a punitive company worker was four weeks.”⁹⁴⁹

The tone of the judges in the Pohl Case judgment is different from that of the other judgments. There is more *ad hominen* criticism of the defendants and less careful analysis of the applicable law. Some of the judgment adopts the cynical tone, e.g.: “Mummenthey’s assumed or criminal naivete went to the extreme of asserting that inmates were covered by accident insurance.”⁹⁵⁰ What can be seen in this case, compared with the IMT and the earlier cases, that there is an effort on the part of the tribunal to put business into a place subordinate to the Nazi state, even to the point that Mummenthey considers portraying himself as a businessman would make him less culpable. In the judgment, Mummenthey, as an SS officer, is considered to have had the power and authority to curb industry’s excesses with regard to the prisoners. This case at the same time sends the message (to home industry) that the responsibility for setting boundaries of propriety is of the state, not industry, hence industry can continue working on defence contracts without fear of liability.

7.1.7 Rasche in the *Ministries Case*, Case No. 11

Karl Rasche, former Chairman of Dresdner Bank, was tried in *United States v. Ernst Weizsaecker et al.* (the *Ministries Case*) as a single private banker amidst 18 former

⁹⁴⁶ *Pohl Case* Judgment 1051.

⁹⁴⁷ *Pohl Case* Judgment 1051.

⁹⁴⁸ *Pohl Case* Judgment 1052.

⁹⁴⁹ *Pohl Case* Judgment 1052.

⁹⁵⁰ *Pohl Case* Judgment 1053.

Third Reich ministers and senior civil servants, and two SS Generals.⁹⁵¹ In the indictment, which was served on 4 November 1947, Rasche was charged with facilitating slave labour through making loans to entities using slave labour, and economic plunder, as well as membership in the “Circle of Friends of Himmler” and the SS. The case took 17 months between indictment and judgment, making it the longest of the NMT cases.

The defendant Rasche directed and supervised activities of the Dresdner Bank (the “SS Bank”) and its affiliates in occupied western areas involving economic exploitation, including particularly activities involving transfer of control of Dutch enterprises to selected German firms through the process called “Verflechtung”, which was “interlacing” of Dutch and German capital and economic interests with a view to creating a single market. He was convicted only on the spoliation count, as the Tribunal found Rasche had participated actively in the Reich’s programme of “Aryanization” in The Netherlands and Czechoslovakia. In addition he was found guilty of SS membership and sentenced to seven years.

According to the Tribunal, “[t]he real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. ... Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.”⁹⁵² Rasche, in the 452 page judgment that was delivered 18 months after the indictment on 11 April 1949 “in a vastly altered international climate”, received a lenient sentence, as did the other defendants in his case.⁹⁵³

⁹⁵¹ *Ministries Case*. Other defendants on the economic side included Emil Puhl (Vice President of the Reichsbank, Paul Koerner (Deputy to Goering in the Office of the Four Year Plan), Paul Pleiger (the dominant figure in the “Hermann Goering Works”) and Hans Kehrl (who had held a number of economic positions in the Nazi government) (*Taylor Report* at 331).

⁹⁵² *Ministries Case* Judgment 622.

⁹⁵³ *Taylor IC Report* at 333-334.

Discussed sequentially, it is possible to see the changing attitude to business' role in WWII reflected in the cases. A gradual process of exoneration takes place, which is crowned, eventually, by the clemency granted the industrialists by Gen. McCloy in 1951 (S.9.1).

8 Industrialists in other zonal trials

In Germany the other Allies also tried industrialists in their respective zones of occupation. Each of the Allies' political priorities finds its reflection in these trials too.

8.1 *Industrialists in the British zonal trials*

According to Bloxham, the British purposively ran a prosecutions programme disassociated from the Nuremberg programme, and from the very beginning, sought to limit its scope.⁹⁵⁴ Bush asserts that Britain's tactic was to coopt a number of industries rather than to try industrialists.⁹⁵⁵ The British Government had been worried about the prominence of the 'economic case' at the IMT, and according to Bloxham, instrumental in preventing an 'IMT2' as (at the dawn of the Cold War) they no longer wanted to cooperate with the Soviets in what could for them be a propaganda opportunity.⁹⁵⁶ Nevertheless, already before the end of the IMT trial, the British had tried personnel of Tesch and later also members of at least one further company, Steinöl. There is next to no secondary literature on these specific trials⁹⁵⁷ nor have government deliberations been published which explain why they were held.⁹⁵⁸ The jurisdiction of the British Military Courts covered only 'war crimes', defined in Regulation 1 of the *Royal Warrant* as any violation of the laws and usages of war, and does not cover crimes against humanity or crimes against the peace.⁹⁵⁹ This *a priori* limited the British to the prosecution of crimes against *Allied nationals only*. Handing any 'major' war crimes suspect found in the British Occupation Zone to the Americans, the British tried mostly minor cases relating to crimes against British

⁹⁵⁴ Generally, Bloxham (2003).

⁹⁵⁵ Bush (2009) 1134.

⁹⁵⁶ Bloxham (2003) 100, 102.

⁹⁵⁷ The Steinöl case is only mentioned in German historical reports on the Neuengamme concentration camp: 1997.

⁹⁵⁸ British National Archives files on the *Steinöl/Wittig Case* and the *Zyklon B case* do not answer these questions, nor does UNWCC (1947), but see Bloxham (2003).

⁹⁵⁹ *Royal Warrant*.

servicemen.⁹⁶⁰ In the absence of published material documenting government policy on the issue, the (small) size, (short) length, (low) prominence of the trials as well as the language used in the trials would suggest that although there were some business(wo)men among the accused, these trials were not intended to ‘send a message’ about corporate/business involvement in the war, in the way the US industrialists’ trials were.

8.1.1 The *Zyklon B Case*

One of the best-remembered British cases is the *Zyklon B Case*, which at the time, however, was a low-profile case,⁹⁶¹ “a minor case that rested on the fact that British nationals were among the victims”.⁹⁶² The trial took place during the height of the IMT trial, between 1st-8th March 1946, lasting only a week, compared to the 8-17 months of the later US industrialists’ cases. Despite being considered a minor case at the time, the trial of Bruno Tesch, Karl Weinbacher and Joachim Drosihn at the British Military Court in Hamburg, is significant in the debate around ‘corporate accountability’ in that it was the first trial of industrialists accused of WWII crimes.⁹⁶³ The Tesch company was a subsidiary of IG Farben, which manufactured the Zyklon B gas sold by Tesch (see Section xx). While the British objective was to punish those who had killed, injured or otherwise harmed British interests/servicemen, they did not limit themselves to those directly, physically responsible for the acts. Of the defendants it was said, in the trial, that “at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used.”⁹⁶⁴

In his summing up, the Judge Advocate General (JAG) directed the Court that for a guilty verdict they would have to be certain of three facts, “first, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by Tesch and Stabenow; and thirdly, that the accused knew that the gas was to be used for

⁹⁶⁰ E.g. the famous *Stalag Luft* case (Bloxham (2003) 106).

⁹⁶¹ Bloxham (2003), but cf *Zyklon B Case*, 102, “it was not alleged that British citizens were among the victims.”

⁹⁶² Bush (2009) 1237.

⁹⁶³ *Zyklon B Case*. Case files including appeals petitions are accessible at the UK National Archives in Kew.

⁹⁶⁴ *Zyklon B Case* 93.

the purpose of killing human beings.”⁹⁶⁵ The JAG further stated “when you know what kind of man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business.”⁹⁶⁶ While there was no direct evidence specifically imputing knowledge to Weinbacher, such was inferred from “the general atmosphere and conditions of the firm”.⁹⁶⁷ The JAG considered Drohsin to have been a subordinate employee and directed the Court that in the absence of any evidence Drohsin could have influenced matters, no knowledge as to the use of the gas could make him guilty.⁹⁶⁸ The company officers were not shown (or required to have had) intent vis-à-vis the killings.⁹⁶⁹

Necessity was pleaded in mitigation of the sentences in the case. Counsel for Tesch stated that any cooperation had happened “only under enormous pressure from the S.S.”, and that furthermore, if he had not cooperated, the S.S. would surely have achieved their aims by other means.⁹⁷⁰ Counsel for Weinbacher argued that he as a business employee might have thought that the ultimate use of the gas was Tesch’s responsibility as the company director and that if he had refused to supply the gas the S.S. would have immediately handed him over to the Gestapo.⁹⁷¹

Nevertheless, after this trial of seven days, based on the JAG’s directions, the Court found Tesch and Weinbacher guilty and sentenced them to death.⁹⁷² Drohsin was acquitted. Appeals were filed on behalf of Tesch and Weinbacher, but these were dismissed and the two were hanged in May 1946.⁹⁷³

8.1.2 The Steinöl Case/Neuengamme Concentration Camp

In January 1947, coinciding with the start of the *Pohl* case, and after the US turnaround, the British tried Prof. Wittig, the director of the Steinöl company, and two colleagues. They were tried together with six guards of the (relatively) small Neuengamme concentration camp that had been built especially to provide a

⁹⁶⁵ *Zyklon B Case* 101.

⁹⁶⁶ *Zyklon B Case* 101.

⁹⁶⁷ See also the *Mauthausen Concentration Camp Case*. In Ch. 4C I discuss ‘corporate culture’ which could be compared.

⁹⁶⁸ *Zyklon B Case* 102.

⁹⁶⁹ For a discussion of the profit motive, see Ch.5, below, and Stephens (2002).

⁹⁷⁰ *Zyklon B Case* 105.

⁹⁷¹ *Zyklon B Case* 105.

⁹⁷² As is usual in such cases, there is no reasoned (written) judgment from the Court.

⁹⁷³ *Death Warrant Bruno Tesch*.

workforce for the company's shale oil extraction. The camp housed mainly Spanish communists, Belgian and French resistance fighters and Danish Jehovah's witnesses, and seven of the defendants were convicted in relation to the unlawful deaths and maltreatment of Allied nationals. Wittig's death sentence was commuted to 20 years, by Anthony Eden but he was released in 1955.⁹⁷⁴ As such, being the case that ran concurrently with the NMT trials, it follows the US pattern more closely than *Tesch*.

Little can be said about the significance of British prosecutions policy on the basis of these cases and limited discussion in the literature. However, it can be suggested that at the time, while it was a British priority to focus on crimes against British servicemen (like in the US, heavy losses among troops engaged in the liberation of Europe had to be acknowledged) there was a willingness to draw a wide circle of complicity, a focus on industry was not apparent. According to the UNWCC commentary, "[t]he Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal."⁹⁷⁵ At this point, no differentiation is made between accessories as to whether they are involved for commercial reasons or otherwise (see Ch. 4 below). The question remains why no further industrialists were tried by the British in their zone of occupation, for example, the Hamburg shipping firms which employed thousands of forced labourers.⁹⁷⁶ Ties between British and German business – which could have received the State's protection as they did in the US -undoubtedly existed, but little has been published on this topic.

8.2 *Industrialists in the French zonal trials*

The French were keener to prosecute industrialists, so as to strengthen their government's hand against French collaborationist industrialists,⁹⁷⁷ because French industry had suffered considerably from 'Aryanization', and as many more French citizens had worked as slave labourers. Successful convictions would allow for expropriations of collaborators' property and generally allow the French government to regain control over its main industries. Moreover, the specific case of Röchling was

⁹⁷⁴ National Archives file WO 235/283. This case is not mentioned in any of the other literature mentioned in this Chapter.

⁹⁷⁵ *Zyklon B Case* 103.

⁹⁷⁶ Conversation with J. Baars, whose brother Cornelis was put to labour in the Hamburg docks.

⁹⁷⁷ Bloxham (2003) 100.

of interest to the French as Röchling's empire was built in the heavily industrialised Saar region, long the subject of German-French border disputes.

8.2.1 The Case against Hermann Roechling and Others

The *Roechling Case*⁹⁷⁸ is appended to Vol. XIV of the Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10.⁹⁷⁹ The indictment is dated 25 November 1947, the judgment 30 June 1948 and the judgment on appeal 25 January 1949. The main trial, which commenced at the time of the *Pohl* judgment, thus coincided in time with the *Farben, Krupp* and *Ministries* cases.

Hermann Röchling and four other directors of the Röchling Enterprises were tried by the General Tribunal of the Military Government of the French Zone of Occupation in Germany at Rastatt. In what may have been the first recorded 20th Century war crimes case against industrialists, Hermann and Robert Röchling and several associates had already been sentenced to ten years imprisonment by a French military tribunal for wartime plunder after WWI, although the judgment was annulled for technical reasons.⁹⁸⁰

The post-WWII Röchling judgment stands out as the only *judgment* after the IMT in which a defendant was found guilty of *waging* an aggressive war (distinct from planning and preparing), and the only judgment in which an *industrialist* was found guilty on aggressive war charges.⁹⁸¹ In that sense, this judgment is truest to the ideas about the instigators/causes of WWII expressed by the Allies immediately after the war.

Indeed, the Tribunal placed the *Röchling Case* in the context of the findings of the IMT on the economic aspects of war and referred to the prosecutions being prepared at the USMT in Nuremberg. The indictment stated that “[i]f the “Directors of German Enterprises”^[982] plead that they only attached themselves to Hitler in order to oppose

⁹⁷⁸ *Roechling Case*.

⁹⁷⁹ Nuernberg, October 1946 – April 1949 at 1061.

⁹⁸⁰ Taylor (1992) 304, fn.159.

⁹⁸¹ *Roechling Case*, Judgment 1061.

⁹⁸² Earlier on the same page, “...it is apparent that these wars of aggression and these crimes could not have been rendered possible, except with the conscious assistance of certain great German Industrialists and financiers whom we will designate under the appellation “Directors of the German Enterprises.” (*Roechling Case*, Judgment 1062).

communism or “Social Democracy,” there exists no doubt that the profound reason for their attitude can be sought in their desire, long before the coming of national socialism, to extend their undertakings beyond the frontiers of the Reich.”⁹⁸³ Hermann Röchling was accused of, amongst others, urging Hitler to invade the Balkans. Röchling had appropriated enterprises and resources in a number of occupied countries.⁹⁸⁴ In a letter to a colleague, Hermann Röchling wrote:

*We shall only then succeed in reaching our objective, that is, to obtain definite possession of these enterprises, if we act in the capacity of interpreters of National-Socialist principles in maintaining these in the strongest manner and in practicing them. We must also prove that we are faithful supporters of the Fuehrer’s policies, that is to say, that we must follow here a policy of Germanization, as much as that is possible.*⁹⁸⁵

Here the scenario is congruent with the IMT’s ‘economic case’. However, the *Röchling* defendants’ sentences were significantly reduced in 1949, showing a softening of French attitudes also.⁹⁸⁶

8.3 *Industrialists in the Soviet zonal trials*

For the Soviets and GDR leaderships, the zonal trials were about *Systemkritik* (critique of the (capitalist) system) as much as they were about nationalising German industries. As reflected in Molotov’s speech (Section 6), the Soviets held on to the idea that WWII had been a German war of imperialism and the inevitable result of the convergence of power in the hands of fewer and fewer cartels. Bukharin’s theory on *Imperialism and World Economy*, written in 1915, and elaborated by Lenin in *Imperialism: The Highest State of Capitalism*, supports this analysis,⁹⁸⁷ expressed, unsympathetically, by Bloxham as “[t]he Soviets harbored the simplistic determinist view that Hitler was an instrument of German bankers and big business.”⁹⁸⁸ While there is no clear indication that the Soviets discounted the ‘Hitler factor’⁹⁸⁹ in this way,

⁹⁸³ *Roechling Case*, Judgment 1062.

⁹⁸⁴ *Roechling Case*, Judgment 1067-8.

⁹⁸⁵ *Roechling Case*, Judgment 1082.

⁹⁸⁶ *Roechling Case*, Judgment on Appeal 1142.

⁹⁸⁷ Bukharin (2003), Lenin (1934).

⁹⁸⁸ Bloxham (2003) 100.

⁹⁸⁹ Hilger (2008) 180.

it is clear that the Soviet leadership at least saw a unity of purpose in the actions of the Nazi political and military leaderships and the cartels.

It is said that the Soviet Military Tribunals (“SMT”) convicted over 17,000 German former members of the Gestapo, SS, SD and civilian Nazi leadership.⁹⁹⁰ Exact numbers are difficult to gauge as most SMT trials took place in secret and were not reported.⁹⁹¹ Exceptions are a number of public trials which Western authors such as Wentker describe as ‘political trials’. The trials relating to business must have been many, considering that the SMT over the years ordered the expropriation of business enterprises and other property under CCL38 in 337 cases.⁹⁹² As stated above (Section 2) for linguistic reasons I have not been able to research official records or press reports.

According to Wentker, from the 1950s and the foundation of the GDR in 1955 the Nazi trials became more clearly propagandistic, aimed at showing the Soviet/East German authorities had uprooted fascism in Eastern Germany while in the West many key Nazi leaders once again held high positions in government. Moreover, with the restoration of liberal capitalism West Germany was considered by the East to have once again created the premises for the emergence of fascism. These warnings were wrapped into the language of the trials. In 1963 the GDR held an *in absentia* trial of the (then) West German Secretary of State Globke, in a direct response to Israel’s Eichmann trial. Globke had been a close colleague of Eichmann and was painted by the GDR court as ‘Bonn’s Eichmann’.⁹⁹³

8.3.1 Topf & Söhne

One example of a case against industrialists conducted by the SMT that has received attention in the literature is that against four officials of the firm Topf & Söhne, which had delivered specially developed crematory ovens to Auschwitz and other death

⁹⁹⁰ And as at August 1947, 518 persons were sentenced by German courts in the Soviet Zone applying CCL10 (Wentker (2002) 64), and see generally, Marxen (2001) 159.

⁹⁹¹ Wentker (2002) 64.

⁹⁹² Wentker (2002) at 69.

⁹⁹³ Wentker (2002) 72. In fact this ‘show trial’ had the effect of a change in West German attitude to former Nazi crimes and the initiation of a number of trials (id. at 73).

camps.⁹⁹⁴ Schüle, in a company history of Topf & Söhne emphasises the generally under-researched responsibility of industry for the ‘industrialisation of killing’.⁹⁹⁵

The firm’s director, Topf, committed suicide within days of the end of the war, and his deputy, also a Topf, fled to the US occupied zone. In 1946 four further officials of the firm were detained by the Soviet Occupation Authorities, Prüfer, Braun, Schultze und Sander. Excerpts of interrogation records were published in *Der Spiegel* in 1993.⁹⁹⁶ All admitted to their roles in designing, manufacturing and selling the ovens, and ventilation systems for gas chambers, to Auschwitz and other death camps. Sander died of a heart attack during the trial while the other three were convicted and sentenced to 25 years’ in a Soviet penal camp.⁹⁹⁷ In interrogation, Schulze had said that after he and his colleague had discovered the ovens were used for the cremation of the victims of mass-murder, he continued his work. “I and Prüfer continued, because we were bound, through our signature. We stood under obligation, with the SS, the Topf firm and the NS State.”⁹⁹⁸

Schüle reads in this statement evidence of ‘self-objectification’ – the agency in the decision to place a signature on the employment and supply contracts is negated when the ‘I’ becomes the object of fulfilment of a duty towards customer and employer.⁹⁹⁹ The source of such sense of duty may not necessarily be the ideological agreement with the Nazi project, but rather, a traditional mentality of blind loyalty and negation of own responsibility. Such negation is facilitated by the legal constructs and bureaucracies of the corporation: morality leaves the legal relation. This echoes the conclusion of my Chapter 2A, that the corporate ‘structure of irresponsibility’ ‘breeds’ anomie, or the dissociation between business(wo)man and affected individual. At the same time, in the run of these cases, the ‘necessity’ defence employed in the earlier cases (protecting own safety) turns into Mumenthey’s attempt to portray himself as a businessman, ‘just doing business’ once capitalism knows itself on safer ground at Nuremberg.

⁹⁹⁴ Pressac (1994); Vest (2010) fn.7.

⁹⁹⁵ Schüle (2003) 215; on the industrialisation of killing see further Traverso (2003).

⁹⁹⁶ *Der Spiegel* (1993).

⁹⁹⁷ *Der Spiegel* (1993). *Der Spiegel* notes that the confessions were unlikely to have been obtained under pressure.

⁹⁹⁸ *Der Spiegel* (1993).

⁹⁹⁹ Schüle (2003) 218.

9 Aftermath: The warm bosom of the Western powers

Jeßberger writes, the “IG managers had a soft fall, from the ranks of the Wehrmacht into the warm bosom of the western powers.”¹⁰⁰⁰ In the IG Farben case the defendants, making their final statements to the tribunal seemed to be able to anticipate the “amicable justice”¹⁰⁰¹ they were to receive.

Krauch’s former colleague Kuehne adds:

*The American industry at the present time is undergoing to a much greater degree the same development that we underwent at the time of rearmament: that is to say, demands concerning air-raid protection, mobilization plans in the event of war, counterintelligence, and much more of the same type. It is even experiencing the stockpiling of atomic bombs without any industrialists being charged on that account for participating in aggressive warfare. And you have to bear in mind, Your Honors, there is no nation on your country's borders which is a menace to you industrially or ideologically...*¹⁰⁰²

Lawyers like Dubois and Sasuly, and to a lesser extent also Taylor, left Germany disappointed, frustrated, and enraged.¹⁰⁰³ On coming home, the case they had been fighting was now taboo. The tables had turned, the capitalists emerged as victors and the prosecutors became persecuted.

Kuehne, in his final statement to the *Farben* Tribunal, cites the New York Herald Tribune of 4 October 1947, from a report on a speech held by the Secretary of Defense, Forrestal, as follows:

*Mr. Forrestal denied that there was any historical validity for the Marxist theory according to which industrialists desired war for the sake of material gains. Mr. Forrestal said that there was no group anywhere that was more in favor of peace than the industrialists.*¹⁰⁰⁴

¹⁰⁰⁰ Jeßberger (2010).

¹⁰⁰¹ Jeßberger (2010).

¹⁰⁰² *IG Farben Case* 1073-4.

¹⁰⁰³ This is evident in the tone and content of e.g. Dubois’, Taylor’s and Sasuly’s post-war writing.

¹⁰⁰⁴ *Farben* Final Statements of Defendants, Kuehne 1073

Several of the lawyers and OMGUS staff were investigated for possible “bolshevist” sympathies.¹⁰⁰⁵ Whether these investigations (by McCarthy and his team) were intended to ensure the lawyers were subdued we will probably never know. The preface to the German edition of Sasuly’s book, states that this text, for political reasons, has not been available in the US for many years.¹⁰⁰⁶ The legacy of this has been the ‘legal amnesia’ through which the industrialists’ trials were forgotten until very recently.

9.1 The Churchill and McCloy Clemencies, McCarthyism and the rebuilding of West Germany

On January 31 1951 in Frankfurt am Main, Germany, US High Commissioner for Germany John J. McCloy and Chief of the US European Command Gen. Thomas T. Handy commuted 21 death sentences, reduced the sentences of 69 other individuals and released 33 other war criminals, including Alfried Krupp the former head of the Krupp munitions works. Commissioner McCloy and Gen. Handy also restored Krupp’s property rights.¹⁰⁰⁷ Likewise in the UK, “immediately on his return to Downing Street [in 1951] Churchill moved to release all remaining Germans”.¹⁰⁰⁸ Wittig was released in 1955.¹⁰⁰⁹

Throughout 1951, Telford Taylor spoke out against the release of Alfried Krupp, which he considered a political move making a mockery of the judicial process.¹⁰¹⁰ He echoes the sentiment expressed by Hebert in a draft dissent on the aggressive war charge in the IG Farben case, which has only recently come to light. From Hebert’s raw, and seemingly immediate response a similar perspective on the proceedings can be gleaned.¹⁰¹¹

¹⁰⁰⁵ Bush (2009) 1240.

¹⁰⁰⁶ Sasuly (1952) 5.

¹⁰⁰⁷ Washington Post, 1 February 1951. See also The Nation, 24 February 24, 1951; Taylor (1953) 197.

¹⁰⁰⁸ Bloxham (2003) 116.

¹⁰⁰⁹ *Wittig File*.

¹⁰¹⁰ *Telford Taylor Papers*. Subsequently, McCarthy threatened to subpoena Taylor to appear before his committee. By December’s end, however, McCarthy “withdrew his subpoena sword.” Taylor went on to represent young Americans who refuse military service in Vietnam on the basis that it is a “war of aggression” for which they might incur individual criminal responsibility for participating (Falk (1998-1999)).

¹⁰¹¹ The scanned type-written document is undated. Available here: <http://louisdl.louislibraries.org/u/?HNF,55>.

At this point, ‘Nuremberg’ had turned from a morality play into *théâtre de l’absurde*. The trials served not to discover and treat real causes, but rather to express the hegemon’s moral superiority, to appease home economic actors so as to further own political-economic longer term goals. Moreover, the trials partially failed to live up to Jackson’s promise that ‘justice be done’, in the eyes of the home public as well as survivors, and the broader German/European publics. Ratner commented in 2009 that “while contributing substantially to the doctrinal and procedural development of international criminal law and subjecting Nazi crime to some degree of exposure and justice, these trials, even in conjunction with their *CCLIO* counterparts, were of limited value to the societies and victims involved, the ongoing debate over responsibility and reparation for Nazi atrocities is testimony to this conclusion.”¹⁰¹²

So, while “[t]he masses of peoples liberated from the yoke fascism demanded the trial of the most evil cartel leaders, in Nuremberg,” even those who had received sentences were soon to be freed again, and by 1952 many were already back in power at their companies.¹⁰¹³ Indeed, IG Farben members soon began to produce military materials again (fabric for parachutes) which were used by the US in their war against Korea.¹⁰¹⁴ While German industry was rebuilt, the Cold War developed, the European Coal and Steel Community, GATT and the Bretton Woods institutions took shape, further congealing capitalism, institutionalising IL. In an ironic turn, McCloy was appointed to lead the World Bank.¹⁰¹⁵ Slave labour compensation agreements were made, Flick gained new notoriety for refusing to contribute, cause lawyers litigated against banks and other companies (see Ch. 6).

¹⁰¹² Ratner et al. (2009) 212.

¹⁰¹³ Anon. (1960).

¹⁰¹⁴ Anon. (1962).

¹⁰¹⁵ Bush (2009) at 1193.

Chapter 3B: The Tokyo International Military Tribunal, or, How the East was Won

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1 Part B: Japan

Once it was decided international criminal trials would be held in Germany, it seemed as if the Allies could not *not* try Japanese war crimes suspects also. While there are substantial differences, in the legal basis of the International Military Tribunal for the Far East (“IMTFE”), the content of the Charter, the composition of the bench and the shape of the indictment, the similarities with Nuremberg are perhaps more noteworthy. To some extent, ‘Tokyo’ was Nuremberg without frills, without Jackson’s flowery language to justify it, without theatrics, and without much of an audience. Above, I have argued that the Allies (and in particular the US) at Nuremberg had as their dual aim on the one hand to create a lasting ‘ICL’, and on the other hand, to immediately use this ICL to create a diversion for materially very far-reaching economic reforms. Such a combination of trials and reforms I called ‘capitalist victor’s justice’ and its desired effect was to cement the US economic hegemony as well as its charismatic authority, globally. In Japan, mostly out of view of the West, it seemed the diversion

needed to be much smaller to still achieve comparably far-reaching results on the economic front.

The US had created in Japan, to last *until today*, “an industrial superpower under American military protection and within a stable dollar-centred global financial framework... The US need Japan today ... Japan’s companies manufacture a range of both high value-added components and finished products on which America’s technological and military supremacy totally depend. Japan’s continued central role in financing the US trade and government deficits and propping up a dollar-centred international order is ... the key explanation for Washington’s ability to project and sustain a vast global military establishment ... since the mid ‘70s, ... it has been the Japanese elite that has acted to support the dollar, the Bretton Woods II regime and, by extension, the continuation of American hegemony...”¹⁰¹⁶

In this chapter I highlight aspects of how this effect was achieved, through the main trial, the selection (and omission) of indictees, and the occupation policies. I also review a number of other ICL and business-related cases, which seem somehow unconnected with the future of Japan, but play a role in how we perceive ICL and business, going forward. These trials show similarities with the secondary trials on the German side (for example, through illuminating how other states conducted trials and what the meaning of these trials were to their politics and more widely), and they also serve to ‘actualise’ ICL practice. These cases seem to confirm the reality of ICL and contribute to the notion that it is a mechanism that can (or will) be applied equally, if not now, then at some point soon.

1.1 Sources

Of the world’s international war crimes trials, those at the IMTFE are probably the most under-researched. There are many reasons why these trials are largely forgotten (outside of Japan); one is the absence of a readily available version of the judgments. Unlike the Nuremberg IMT judgment, the judgments of the Tokyo IMT (the majority judgement and several separate opinions) were not published by the US government,

¹⁰¹⁶ Murphy (2006) 47-9, quoted in Callinicos (2009) 216.

or indeed any of the other Allied governments participating in the Tribunal.¹⁰¹⁷ An early descriptive analysis by Solis Horwitz (who had been Assistant Prosecutor for the US at the IMTFE) was published in *International Conciliation* in 1950.¹⁰¹⁸ The US government deposited mimeographed copies of the entire transcript (48,288 pages of transcript and approx. 30,000 pages of exhibits) at the Department of the Army and three US universities.¹⁰¹⁹ An incomplete set is available at the British Imperial War Museum.¹⁰²⁰ There is no statement of explanation as to the failure to publish the judgment and proceedings. Cassese simply remarks “[t]here were of course political reasons for this failure to give publicity to the results of such an important trial.”¹⁰²¹

Not until the 1970s was the judgment published in a form accessible to the wider public, by Dutch former Tokyo Judge Röling.¹⁰²² In 1981 a 22-volume complete transcripts was published by Pritchard & Zaide (which is not widely available).¹⁰²³ Justice Pal published his (700 page) dissenting judgment in 1953.¹⁰²⁴ Recently a new document collection was published by Boister and Cryer, which contains the Charter, indictment and decisions.¹⁰²⁵

In Japan, China and the USSR various scholarly works and document collections have been published, but these did not receive a wide audience outside of their home/region, for linguistic, but also political reasons (in the sense that USSR, GDR produced publications rarely feature in “Western” libraries).¹⁰²⁶

In the US public interest in the trials was very low until the publication of a book on the Rape of Nanjing by Iris Chang.¹⁰²⁷ Questions began to be asked: Did the US Government deliberately repress information? Did the Government grant immunity to

¹⁰¹⁷ Although the indictment had been published by the US: *IMTFE Indictment*. Apparently no explicit reason is given for this non-publication, also, I have not been able to answer the question why the other Allied governments did not publish.

¹⁰¹⁸ Horwitz (1950) 477. Albertson calls this a “rather prejudiced account of a member of the prosecution team” Albertson (1972).

¹⁰¹⁹ Horwitz (1950) 576.

¹⁰²⁰ *National Archives Research Guide*.

¹⁰²¹ Cassese (1994) 6.

¹⁰²² Röling (1977). It is puzzling why none of the Allies nor indeed a publishing house has published least some of the documents before Röling.

¹⁰²³ Pritchard (1981).

¹⁰²⁴ *Pal Dissent* (1953).

¹⁰²⁵ Boister (2008a) xxxiii.

¹⁰²⁶ For a bibliography that includes many Japanese texts, see Totani (2008) 301-321.

¹⁰²⁷ Chang (1997).

the former Japanese Emperor Hirohito and Ishii, the notorious General in charge of Japanese Army “Unit 731” which had been accused of practising human vivisection for bacteriological warfare research?¹⁰²⁸ Additionally, the issue of “comfort women” came to the fore,¹⁰²⁹ as well as the abuse of Allied PoWs by the Japanese. According to Drea, “[t]he rise of concern about Japanese war crimes in the 1990s reinforced the notion that most Japanese war criminals escaped punishment, either because the US government needed their cooperation against the Soviet Union during the early days of the Cold War, or to appease current Japanese economic and commercial interests.”¹⁰³⁰

In response to this upsurge in interest, the US Congress passed the Japanese Imperial Government Disclosure Act in 2000, leading to the declassification of some 100,000 pages of documents, including all of the Office of Strategic Services (a WWII US intelligence outfit) files and many records of the CIA and FBI.¹⁰³¹

Very little is readily accessible about the, around 2,200, other Allied trials held in the East post-WWII. Some of the (presumably more noteworthy?) trials are summarised by the U.N. War Crimes Commission.¹⁰³² Now, aside from paper archives, such documentation is becoming available online through the “Forschungs- und Dokumentationszentrum Kriegsverbrecherprozesse” at the Philipps-Universität Marburg in collaboration with the UC Berkeley War Crimes Studies Center,¹⁰³³ The Hong Kong War Crimes Trials Collection,¹⁰³⁴ the ICC Legal Tools Database,¹⁰³⁵ the Yale University Avalon Project.¹⁰³⁶ In the U.K., Pritchard started, but abandoned a project to collect all British War Crimes Trials in the Far East.¹⁰³⁷

¹⁰²⁸ Harris (2002).

¹⁰²⁹ See, e.g. Chinkin (2001).

¹⁰³⁰ Drea (2006) 14.

¹⁰³¹ Under the *Nazi War Crimes Disclosure Act* and the *Japanese Imperial Government Disclosure Act* reportedly over 8.5 million pages of records related to Japanese and Nazi War crimes have been identified among Federal Government records and opened to the public, including certain types of records never before released, such as CIA operational files. The declassification work is described in the *Report of the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group (IWG)*, 2007. So as to facilitate and stimulate research on the topics the IWG published three research guides: Drea (2006). It should be noted that many relevant documents were never classified in the first place or had already been declassified, e.g. State Department Bulletins.

¹⁰³² *WCCLR* (supra Chapter 3A).

¹⁰³³ *Marburg/Berkeley War Crimes Project*.

¹⁰³⁴ *Hong Kong War Crimes Project*.

¹⁰³⁵ *ICC Legal Tools*.

¹⁰³⁶ *Supra*. These are works in progress, with only limited materials available as January 2012.

¹⁰³⁷ Pritchard mentions his project of publishing the 21 volume *The British War Crimes Trials in the Far East, 1946-1948*, which is referred to as “forthcoming, 1997” in fn. 1 of Pritchard (1996) 16.

The Yamashita trial¹⁰³⁸ is cited in contemporary texts as one of the first war crimes trials to deal extensively with the concept of command responsibility.¹⁰³⁹ Many commentaries on the subsequent trials are based on press articles¹⁰⁴⁰ e.g. Piccigallo's monograph "The Japanese on Trial: Allied War Crimes Operations in the Far East 1945-51"¹⁰⁴¹; and Ramasastry's article on slave labour.¹⁰⁴² In 1950, the USSR published materials on the *Chabarovsk Trial* in German and English (see below, S. 4.2.4).¹⁰⁴³ Some trials we only know of because they are referred to in other cases (S. 4.2.3).

Like their counterparts at Nuremberg, some of the lawyers involved in the IMTFE have published memoirs and articles, as well as general texts, notably prosecutors Horwitz and Donihi, and judges Pal, Keenan, and Röling (the latter in conversation with Cassese).¹⁰⁴⁴ While general ICL texts devote some attention to Tokyo,¹⁰⁴⁵ outside of Japan,¹⁰⁴⁶ some specialised monographs and edited volumes have been produced.¹⁰⁴⁷ The recent 60th anniversary of the trial has given rise to various reappraisals and revisits. Boister and Cryer, in their "Reappraisal" accompanying the documents bundle, provide a retrospective.¹⁰⁴⁸ The dissenting judgment of the Indian Judge Pal gave rise to a body of literature that almost rivals all that has been written on the Far East beside this.¹⁰⁴⁹ Much of it celebrates Pal's "postcolonial" stance,¹⁰⁵⁰ some of it in an Orientalist manner.¹⁰⁵¹

2 Why Tokyo?

Again, examining the history behind the trials, the context in which the tribunal was set up and organised, the official explanations given for its existence, as well as the

¹⁰³⁸ *Yamashita Case*.

¹⁰³⁹ E.g. Werle (2009) 500; Zahar (2008) 259; Van Sliedregt (2003) 120-125.

¹⁰⁴⁰ Short summaries of English language (media) sources can be found in Welch (2001).

¹⁰⁴¹ Piccigallo (1979).

¹⁰⁴² Ramasastry (2002).

¹⁰⁴³ *Prozessmaterialien* (1950).

¹⁰⁴⁴ Donihi (1992–1993) 733; Pal (1955); Keenan (1951); Cassese (1994).

¹⁰⁴⁵ Van Sliedregt (2003) 128-130; Cryer (2010) 115-120; Bantekas (2007) 507-508.

¹⁰⁴⁶ Japanese historian Yuma Totani published a monograph in English: Totani (2008) and see also Futamura (2008); Hosoya (1986).

¹⁰⁴⁷ Minear (1971); Simpson (1997); Brackman (1987).

¹⁰⁴⁸ Boister (2008a); Simpson (2009); Tanaka (2011).

¹⁰⁴⁹ Boister (2008a) 349; Takeshi (2011) 127.

¹⁰⁵⁰ E.g. Falk (1998-1999).

¹⁰⁵¹ Kopelman (1991).

unfolding of events during and after the trial including its ‘quiet burial’,¹⁰⁵² can tell us more about the functions and uses of ICL, in particular.

As early as 1942 the *St James Declaration* included mention of Japanese “acts of barbarism and violence”.¹⁰⁵³ In the *Cairo Declaration* of 1 December 1943 which was issued at the conclusion of a meeting between Roosevelt, Churchill, and Chinese Generalissimo Chiang Kai-shek the acts were denounced as “aggressions”.¹⁰⁵⁴ In 1944, the United Nations War Crimes Commission set up the Far Eastern Sub-Committee in Chungking, specifically to collect information on Japanese crimes in East Asia.¹⁰⁵⁵ The *Potsdam Declaration (Proclamation Defining Terms for Japanese Surrender)* of 26 July 1945, included in paragraph (10) “stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.”¹⁰⁵⁶ A US-directed Far-Eastern Advisory Committee then (October 1945) formulated policies by which Japan was to fulfil its obligation of surrender, before this body reconstituted as the Far-Eastern Committee (“FEC”) and began to concern itself also with war crimes policy.¹⁰⁵⁷

British prosecutor Comyns-Carr wrote, on behalf of the British Commonwealth prosecutors, “the aim of this International Trial is to establish the criminality of certain acts committed by Japan.”¹⁰⁵⁸ As borne out by the secondary trials in Germany and also in the ‘East’ (below), British priority was to deal with crimes against its servicemen/PoWs. In addition, however, an Allied objective was the affirmation of Nuremberg’s legal findings (in particular on individual responsibility for aggressive war¹⁰⁵⁹) - conform the ‘for law’ motivation described above (Chapter 3A S.3).

¹⁰⁵² Piccigallo (1979) 146.

¹⁰⁵³ *St James Declaration*.

¹⁰⁵⁴ National Diet Library of Japan: http://www.ndl.go.jp/constitution/e/shiryō/01/002_46/002_46tx.html

¹⁰⁵⁵ Bathurst (1945) 570.

¹⁰⁵⁶ Issued by the President of the United States, the President of the National Government of the Republic of China, and the National Diet Library of Japan:

<http://www.ndl.go.jp/constitution/e/etc/c06.html>

¹⁰⁵⁷ Piccigallo (1979) 34. MacArthur was authorised by the Japanese Instrument of Surrender (supra) to “take such steps as he deemed proper to effectuate these terms of surrender” (which was interpreted to include giving effect to the terms of the Potsdam Declaration), accorded to SCAP by a declaration of the Far Eastern Commission (FEC) founded by the foreign ministers of the United Kingdom, the United States, and the USSR, on Moscow, December 27, 1945. The FEC issued directives to the Allied Council for Japan and the declaration establishing this council also delegated the power to General MacArthur to implement the terms of the treaty of surrender and any further directives issued by the Allies.

¹⁰⁵⁸ Quoted in Totani (2008) 66.

¹⁰⁵⁹ Totani (2008) 66.

Former US prosecutor Horwitz describes setting up the tribunal as a unilateral US initiative, but insists that subsequent decisions were taken by the Allies and representatives of countries which had been occupied by Japan jointly.¹⁰⁶⁰ They did so through their participation in the FEC. Decisions taken by the commission were to be translated into Directives by the US and transmitted to the Supreme Commander for the Allied Powers (“SCAP”), US General Douglas MacArthur, who was charged with their implementation.¹⁰⁶¹ However, in reality it appears that SCAP and his team dominated not only the IMT, but also the organisation of post-WWII affairs in Japan generally.¹⁰⁶²

The main reasons given by US officials for the go-ahead of the trial, were, (1) to “impress” the Japanese,¹⁰⁶³ (2) as a way of getting the new Japanese leadership to cooperate, to “get down to business”¹⁰⁶⁴ and, finally, “to satisfy a Japanese popular demand:

*The Japanese people at present show evidence of being in a mood for reform and change, They are now thoroughly disillusioned and there is wide and outspoken criticism of the men who misled them and brought disaster upon the country. I believe it is correct to say that the Japanese people today expect the American authorities to make more arrests and that, on the part of the great majority, they will not resent those arrests.*¹⁰⁶⁵

This position is contradicted by Futamura, however, who has documented the intense resentment of the Japanese people towards the white man’s, victors’ trial (except insofar as they believed their leaders deserved punishment for *losing* the war).¹⁰⁶⁶

In this Chapter, I argue that at least part of the reason for the trials (as in Germany) was to provide the ‘public face’ of the Allied administration, a morality play (or horror story) to the Japanese public, while mostly concealing to the outside world the far-

¹⁰⁶⁰ These were, Australia, Canada, China, France, India, The Netherlands, New Zealand, the Philippine Commonwealth, the USSR and the UK (Horwitz (1950) 481). The tribunal has been accused of racism for not including Taiwan and Korea even though these countries had been victims of the war (Totani (2009) 13).

¹⁰⁶¹ Horwitz (1950) 481.

¹⁰⁶² E.g. generally, Finn (1992).

¹⁰⁶³ *FRUS* 922; 926.

¹⁰⁶⁴ *FRUS* 942.

¹⁰⁶⁵ *FRUS* 952: Atcheson “Top Secret” memo to SCAP dated 6 November 1945.

¹⁰⁶⁶ Generally, Futamura (2008); also, Onuma (2002); Boister (2008b) 315-322.

reaching economic reforms implemented by the US occupation of Japan, a programme of ‘shock therapy’ leading to “Japan’s stunning rise as an economic power”.¹⁰⁶⁷

3 The US Occupation and economic reform of Japan

The 80-month US occupation of Japan has been called, “perhaps the single most exhaustively planned operation of massive and externally directed change in world history.”¹⁰⁶⁸ Following Potsdam the US published the “US Initial Post Surrender Policy,” between June and September 1945, containing a comprehensive plan for the occupation of Japan with the purpose, “first: to prevent Japan ever again becoming a military menace, and second objective: to bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and which will support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations...”¹⁰⁶⁹ As in Germany, Allied occupation of Japan was to be a predominantly US affair.¹⁰⁷⁰

The policy document contained as one of its objectives: “the eventual participation of Japan in a World economy on a reasonable basis”,¹⁰⁷¹ and directives on the democratisation and the demilitarisation of Japan, economic policy, the opening up the Japanese market for foreign direct investment, and the *breaking up of the Japanese industrial and banking cartels*.¹⁰⁷²

In Japan during WWII there were four main *zaibatsu* (literally plutocrats or financial clique¹⁰⁷³): the Mitsui, Mitsubishi, Sumitomo and Yasuda.¹⁰⁷⁴ Zaibatsu are horizontally structured cartels that typically include a group of subsidiary companies (including mining/manufacturing/heavy industry as well as finance) arranged under a holding company, each of which was privately owned by one of Japan’s well-known elite families.¹⁰⁷⁵

¹⁰⁶⁷ Finn (1992) xviii.

¹⁰⁶⁸ Finn (1992) xix, quoting Ward (1987) i.

¹⁰⁶⁹ *Records of SWNCC*.

¹⁰⁷⁰ Ando (1991) 10.

¹⁰⁷¹ *US Initial Post-Defeat Policy*.

¹⁰⁷² *US Initial Post-Surrender Policy*.

¹⁰⁷³ Ando (1991) 18.

¹⁰⁷⁴ Finn (1992) 57.

¹⁰⁷⁵ See generally, Seita (1994) 129ff. and *Vernon DSB 1947*.

The *zaibatsu* are closely linked to the government,¹⁰⁷⁶ the Royal Family¹⁰⁷⁷ and the military – at the time of WWII for example the Mitsubishi group was closely linked to the Imperial Japanese Navy and the *Rikken Minseito* political party, while the Rikken Seiyukai was considered to have been an extension of the Mitsui group, which was also closely linked with the Imperial Japanese Army.¹⁰⁷⁸ The *zaibatsu* are said to have had great influence over Japanese national and foreign policies.¹⁰⁷⁹ By the end of the war the ten largest *zaibatsu* together controlled about 68 percent of Japan’s machinery and equipment production, about 53 percent of the financial and insurance business, 50 percent of mining production, and 38 percent of chemical production.¹⁰⁸⁰ This situation shows similar economic domination of key industries by a handful of enterprises (directed by a handful of individuals) to Germany before/during WWII. Roth relates how the two largest combines, Mitsui and Mitsubishi, in the 1930s disagreed on the use of force for economic expansion, with Mitsubishi preferring ‘economic penetration by means short of war’ while eventually Fujiwara, the head of the Mitsui *zaibatsu* ‘spoke for ever wider sections of the *zaibatsu*’ when he wrote in his *Spirit of Japanese Industry*:

Diplomacy without force is of no value. No matter how diligent the Japanese may be, no matter how superior their technical development or industrial administration may be, there will be no hope for Japanese trade expansion if there is no adequate force to back it. Now the greatest of forces is military preparedness founded on the Army and navy. We can safely expand abroad and engage in various enterprises, if we are confident of protection. In this sense, any outlay for armament is a form of investment.”¹⁰⁸¹

Roth, writing in 1945, describes a similar scenario to that of the German industrialists’ joint strategising for expansion in Europe.¹⁰⁸²

¹⁰⁷⁶ Seita (1994) 139.

¹⁰⁷⁷ Materialien 533.

¹⁰⁷⁸ Roth (1946) 61-2.

¹⁰⁷⁹ Finn (1992) 57.

¹⁰⁸⁰ Finn (1992) 57; “The significant size of the *zaibatsu* can be gauged by the number of employees in Mitsui and Mitsubishi – the two largest *zaibatsu* combines-which in 1945 was estimated to be 2.8 million and 1.0 million, respectively.” Seita (1994) 143.

¹⁰⁸¹ Quoted in Roth (1946) 63.

¹⁰⁸² During WWII there were even attempts to imitate the German model of industrial-political relations (Cohen (2000) 10).

4 The International Military Tribunal for the Far East

On war criminals, the US Initial Post Surrender Policy contained the following provision:

2. War criminals

*Persons charged by the Supreme Commander or the appropriate United Nations agency with being war criminals, including those charged with having visited cruelties upon United Nations prisoners or other nationals, shall be arrested, tried, and if convicted, punished. Those wanted by another of the United Nations for offenses against its nationals shall, if not wanted for trial or as witnesses or otherwise by the Supreme Commander, be turned over to the custody of such other nation.*¹⁰⁸³

This already implies there is an attempt to minimise the scope of the trial.

On 14 August, 1945, the Japanese Acceptance of Surrender was communicated by the Japanese leadership, accepting the terms of the Potsdam Declaration and as such proclaiming the unconditional surrender of Japan, placing it under authority of the SCAP.¹⁰⁸⁴ On 11 September the order to arrest the major war crimes suspects was given by SCAP.¹⁰⁸⁵

On 29 October 1945 already one of the military commissions commenced a prosecution: the Yamashita trial at the Manila US Military Court.¹⁰⁸⁶ The trial concluded on 7 December 1945 and Yamashita was convicted and sentenced to death for, as the commanding general of a Japanese military unit in the Philippines (which was still a US possession at the time), having failed to control his troops, who committed atrocities against American, Philippines and other nationals, that he *must have known* about.¹⁰⁸⁷ The reason given for this early trial was to establish a “precedent” or model, in the informal sense.¹⁰⁸⁸

¹⁰⁸³ *US Initial Post-Surrender Policy.*

¹⁰⁸⁴ *Japanese Acceptance of Surrender.*

¹⁰⁸⁵ Totani (2009) 63.

¹⁰⁸⁶ *Yamashita Case.*

¹⁰⁸⁷ See also Van Sliedregt (2003) 120-128. The decision was criticised in the literature (Piccigallo (1979) 56-57), amongst others as racist see e.g. Prévost (1992) 192; Piccigallo (1979) 231.

¹⁰⁸⁸ Piccigallo (1979) 58; Van Sliedregt (2003) 124. Note that also the Soviet Union had been prosecuting cases already (Prozeßmaterialien (1950)).

The IMTFE was established by means of a proclamation by Douglas MacArthur, the SCAP, issued 19 January 1946.¹⁰⁸⁹ The Declaration stated that the Tribunal was based on the Instrument of Surrender and the Potsdam Declaration, and established pursuant to “allied authority”.¹⁰⁹⁰ The Declaration received formal international sanction on 29 March 1946.¹⁰⁹¹ The Charter of the Tokyo IMT (“CIMTFE”), which was contained in the directive, was modelled on the Nuremberg Charter and closely resembled it in jurisdiction, powers and procedural provisions.¹⁰⁹² Article 1 establishes the Tribunal, Arts. 2-4 regulate membership, convening and voting. Article 5 delineates the Tribunal’s jurisdiction over persons (“Far Eastern war criminals who as individuals or as members of organisations¹⁰⁹³ are charged with offences which include Crimes against Peace”) and offences.¹⁰⁹⁴ Article 6 delineates individual responsibility.¹⁰⁹⁵

In accordance with Article 7 of the CIMTFE, the Rules of Procedure of the International Military Tribunal for the Far East were issued on 25 April 1946.¹⁰⁹⁶ Article 8 provides for the appointment of one Chief of Counsel by MacArthur, this in contrast with the Nuremberg IMT where each of the four Allied Powers appointed a Chief. MacArthur appointed prosecutor Joseph Keenan as Chief Prosecutor of the International Prosecution Section, where he coordinated the work of the prosecutors appointed by the other countries.¹⁰⁹⁷ Articles 9-15 deal with fair trial provisions, powers of the tribunal and conduct of trial. Article 16 provides for penalties (including the death penalty) and Article 17 finally gives the SCAP the power at any time to reduce the sentences.

A main difference of the Tokyo IMT was that all states to which Japan had capitulated were represented on the bench, along with India and the Philippines which were at the time still under UK and US colonial rule. The Tokyo Tribunal consisted of 11 judges,

¹⁰⁸⁹ *IMTFE Proclamation*.

¹⁰⁹⁰ *IMTFE Proclamation*.

¹⁰⁹¹ Boister (2008a) xxxvi.

¹⁰⁹² *IMTFE Charter*.

¹⁰⁹³ Although, like the Nuremberg Charter, the CIMTFE includes mention of “as a member of a group” it was decided not to include provisions on declaring groups illegal as it was found no such groups probably existed in Japan the relevant time (Horwitz (1950) 494).

¹⁰⁹⁴ *IMTFE Charter* Art. 5. **Appendix C**.

¹⁰⁹⁵ *IMTFE Charter* Art. 6. **Appendix C**.

¹⁰⁹⁶ Boister (2008a) 12.

¹⁰⁹⁷ Keenan was much criticised for his lack of legal expertise, frequent absences and alcoholism, Boister (2008a) lvi-lvii.

who were appointed by General MacArthur.¹⁰⁹⁸ The Australian Judge Webb oversaw the bench. The Tribunal was housed in the former military academy in Tokyo, which had housed the War Ministry and Army General Headquarters during the war.¹⁰⁹⁹ From a practical point of view, the trial was hampered by the Japanese destruction of official war records at the close of the war. The evidentiary standard employed by the Tribunal was relaxed (Art.13 IMTFE).¹¹⁰⁰ The Tribunal was under pressure to deliver its judgment quickly.¹¹⁰¹ That the US generally appointed lower-level officials to functions at the tribunal.¹¹⁰²

Horwitz describes US domination of the process thus: “The first time eleven nations had agreed in a matter other than actual military operations to subordinate their sovereignty and to permit a national of one of them to have final direction and control.”¹¹⁰³ The much tighter US reign was to some extent a policy adopted in response to lessons learnt by Jackson and his colleagues at (and prior to) Nuremberg, who had had great trouble reaching agreement among the various representatives involved there.¹¹⁰⁴

The indictment was lodged on 29 April 1946 charging 28 defendants with Class A (aggression), Class B (war crimes) and Class C (crimes against humanity).¹¹⁰⁵ The Indictment was a list of 55 counts related to specific occurrences (many related to maltreatment of allied POWs) with annexes setting out the general historical and political context and specifics.¹¹⁰⁶

¹⁰⁹⁸ As per Arts 2 and 3 of the *IMTFE Charter*.

¹⁰⁹⁹ Totani (2008) 8.

¹¹⁰⁰ *IMTFE Charter* Article 13. **Appendix C**.

¹¹⁰¹ *IMTFE Charter*.

¹¹⁰² For example, Chief Counsel Keenan was an assistant Attorney-General vs. Nuremberg Chief Counsel Jackson who was a Supreme Court Justice. Horwitz comments: “[r]arely has any group of men undertaking a project of similar size and scope been less prepared for their task than were the original twenty-odd members of the legal staff of the prosecution when they began their labors on 8 December 1945.... few of them had any knowledge about Japan, the Japanese, or the principal figures involved or any real appreciation of the magnitude of the venture they were undertaking.” Horwitz (1950) 494.

¹¹⁰³ Horwitz (1950) 487.

¹¹⁰⁴ Totani (2008) 24.

¹¹⁰⁵ The tribunal did not indict anyone who could *not* plausibly be charged with Class A crimes, possibly because this point it was still expected that there might be further international trials.

¹¹⁰⁶ Further, Section 4, “Methods of corruption and coercion in China and other occupied territories” – includes the use of opium to “weaken the native inhabitants’ will to resist.” 37. Also, “revenue from ... traffic in opium and other narcotics was used to finance the preparation for and waging of the wars of aggression set forth in this Indictment and to establish and finance the puppet governments set up by the Japanese Government in the various occupied territories.” (id).

The Tribunal formally convened for the arraignment of the defendants on 3 May 1946. The first session was spent reading the indictment. The main focus again was the war of aggression and conspiracy elements. The Prosecution attempted to show that there had been a conspiracy to go to war with the UK and the US since 1928. The Prosecution's strategy was to show how Japan had been taken over by a small group of individuals, members of the political cadre, the military and industry: "...the internal and foreign policies of Japan were dominated by a criminal militaristic clique ... The mind of the Japanese people was systematically poisoned with harmful ideas of the alleged racial superiority of Japan..." The second paragraph of the indictment read: "[t]he economic and financial resources of Japan were to a large extent mobilised for war aims, to the detriment of the welfare of the Japanese people." A conspiracy had been formed between the defendants, joined in by the rulers of other aggressive countries, "... the main objects of this conspiracy was to secure the domination and exploitation by the aggressive States of the rest of the world, and to this end to commit, or encourage the commission of crimes against peace, war crimes and crimes against humanity as defined in the Charter of this Tribunal..."¹¹⁰⁷

Like in Nuremberg, the economic side of the war received much attention. The "Appendix of Summarized Particulars showing the principal Matters and Events upon which the Prosecution will rely in support of the several Counts of the Indictment," included, e.g.:

Section 3: Economic Aggression in China and Greater East Asia: "During the period covered by this Indictment, Japan established a general superiority of rights in favour of her own nationals, which effectively created monopolies in commercial, industrial and financial enterprises, first in Manchuria and later in other parts of China which came under her domination, and exploited those regions not only for the enrichment of Japan and those of her nationals participating in those enterprises, but as part of a scheme to weaken the resistance of China, to exclude other Nations and nationals, and to provide funds and munitions for further aggression. This plan, as was the intention of some at least of its originators, both on its economic and military side, gradually came to embrace similar designs on the remainder of East Asia and Oceania. Later it was officially expanded into the "Greater East Asia Co-

¹¹⁰⁷ *IMTFE Indictment* 17-18.

*Prosperity Scheme: (a title designed to cover up a scheme for complete Japanese domination of those areas) and Japan declared that this was the ultimate purpose of the military campaign. The same organizations as are mentioned in Section 4 hereof were used for the above purposes.”*¹¹⁰⁸

In their expansionist policy, according to the indictment, the Japanese prepared to fight both against communism (“to eradicate the Russian menace”) and western capitalism (“against Britain and America”- in particular against their interests in East Asia).¹¹⁰⁹ The Economic policy with regard to Japanese-occupied East Asia had been led by Hoshino Naoki and Kaya Okinori, two financial leaders who were charged at the IMTFE. Hoshino had had various high financial posts in Manchuria/Manchuoko, while Kaya had been Finance Minister (twice), advisor to the Finance Minister (also twice), an official in the Manchurian Affairs Bureau, the Asian Development Committee and President of the North China Development Company.¹¹¹⁰ The Japanese had used a colonial model of economic domination of China and its resources. Japanese officials took over key government posts, confiscated factories and mines and forced all young Chinese men to work in service of the army.¹¹¹¹

In the joint defence, counsel argued that Japan’s economic activities had been necessary in the face of encirclement by Western powers.¹¹¹² From 1939 onwards, the US and other powers had taken measures to restrict Japanese trade (e.g. by the US terminating the Treaty of Commerce and Navigation), and the Netherlands had ‘preemptively’ declared war on Japan when Japan had sought to establish an economic relationship with the Dutch colony of Indonesia.¹¹¹³

The judgment was read out in full over several days from November 4-12, 1948. It contained several chapters setting down a historical narrative of the war, including its economic aspects, finding (amongst others) that Japanese economic domination over

¹¹⁰⁸ *IMTFE Indictment*.

¹¹⁰⁹ Horwitz (1950) 510. For this purpose Japan had signed both the Anti-Comintern Pact with Germany in 1936, and the Tripartite Pact in 1940 with Germany and Italy (Horwitz (1950) 513-4).

¹¹¹⁰ *IMTFE Indictment* 99 (Hoshino) and 100 (Kaya).

¹¹¹¹ Moreover, the ‘narcotization policy’ generated massive income for the Japanese military (and presumably kept Chinese resistance subdued). Japan officially encouraged the production and use of drugs, Manchuoko became the centre of world-wide drug traffic and a public enterprise of the puppet governments, generating an estimated USD300 million annually (Horwitz (1955) 512).

¹¹¹² *IMTFE Indictment*.

¹¹¹³ Horwitz (1950) 559-60.

the region had been a major war objective.¹¹¹⁴ This objective was linked to that of the Third Reich and Mussolini's Italy through the "Tripartite Pact."¹¹¹⁵

Hoshino and Kaya were convicted of conspiring to wage wars of aggression. Regarding Hoshino, the majority decision stated: "he was able to exercise a profound influence upon the economy of Manchukuo and did exert that influence towards Japanese domination of the commercial and industrial development of that country."¹¹¹⁶ About Kaya it was said that "he took part in the formulation of aggressive policies of Japan and in the financial, economic and industrial preparation of Japan for the execution of those policies."¹¹¹⁷ Jacobson observes that despite the fact that the tribunal held "the guilt of the men was derived from their role as government officials rather than from any of their personal or corporate commercial activities, ...their convictions nonetheless serve as a reminder that war-and war crimes-are dependent in part upon economic support."¹¹¹⁸

The majority judgment convicted and sentenced six defendants to death for A, B and C crimes, one for B and C crimes, sixteen were sentenced to life imprisonment for B and C crimes and one to twenty years, on to seven. Two defendants had died of natural causes during the course of the trial and one had been declared incompetent.¹¹¹⁹ On the same day, five judges submitted separate opinions.¹¹²⁰ The French judge, J. Bernard,

¹¹¹⁴ See e.g. Chapter IV: The Military Domination of Japan and Preparations for war: Introductory, 163 "Industrial Planning in Manchukuo after the Lukouchiao incident. Involved the creation of larger industrial units, responsive to government control." "Development of the war-supporting industries after the Lukouchiao incident: 'As in Manchukuo, so in Japan itself effect was given to the Army's plan for regimenting heavy industry into larger units, more susceptible of government control, The Major Industries Control Law, passed in August 1937, encouraged the formation by industrial groups of new associations or cartels, which were given wide powers of self-government.'" See also, as part of Chapter V: Japanese Aggression against China: "Japan's Economic domination and exploitation of her subject territories," (179) (includes expansion of the 'yen-bloc') and "Industrial preparations: The Synthetic oil and petroleum industry" 228-230; Chapter V, Section VII: "Japan's Economic Domination of Manchuria and other parts of China."(*IMTFE Indictment*)

¹¹¹⁵ *Tripartite Pact*: "The Governments of Japan, Germany, and Italy consider it the prerequisite of a lasting peace that every nation in the world shall receive the space to which it is entitled. They have, therefore, decided to stand by and cooperate with one another in their efforts in the regions of Europe and Greater East Asia respectively. In doing this it is their prime purpose to establish and maintain a new order of things, calculated to promote the mutual prosperity and welfare of the peoples concerned. It is, furthermore, the desire of the three Governments to extend cooperation to nations in other spheres of the world that are inclined to direct their efforts along lines similar to their own for the purpose of realizing their ultimate object, world peace."

¹¹¹⁶ *IMTFE Judgment* 604.

¹¹¹⁷ *IMTFE Judgment* 607.

¹¹¹⁸ Jacobson (2005) 196-7.

¹¹¹⁹ Hisakazu (2011) 8.

¹¹²⁰ Boister (2008a) lxix.

concluded that the entire procedure had been defective and all defendants ought to be acquitted, Dutch Judge Röling also critiqued certain legal and procedural aspects, Judge Jaranilla of the Philippines considered the prison sentences too light, while Judge Pal of India issued a comprehensive dissent defending Japanese actions during the war as those of Asia's liberator from Western colonialism.¹¹²¹

In his dissenting opinion, Röling discussed the claim by the defence that Japan fought in a good cause. Here Röling inquires whether the ideals, to which Japan publicly adhered in her propaganda for a New Order, were sincere. Defendants had claimed "Japan fought for the liberation of the peoples of Asia, and the construction of a regional economic bloc ... The New Order ... would consist ...of the liquidation of Western Imperialism, abolishment of the colonial system, and the building of a world in which all the peoples would find their proper places."¹¹²² Röling however concludes that the Greater East Asia Co-Prosperity Sphere was primarily aimed at the prosperity of the Japanese Empire.¹¹²³

The absence of a holocaust in Asia made it harder to pathologise the defendants, and showed the conflict to be very similar to imperialist power struggles such as had taken place in the world for centuries.

4.1 *Missing in Action*

The Tokyo trial has been criticised (apart from on legal grounds¹¹²⁴) for omitting crimes against Koreans and Taiwanese (Japanese colonial subjects at the time), for ignoring the fact that, and for providing blanket immunity to Western powers' crimes against their own colonial subjects (1 million Indonesians died in the war¹¹²⁵), as well as ignoring the US bombing of Hiroshima and Nagasaki,¹¹²⁶ as well as the US' firebombing of 64 further Japanese cities, plus the Japanese firebombing of several Chinese cities.¹¹²⁷ In addition, it was criticised for not prosecuting the Japanese Emperor Hirohito, and the leaders of the main business cartels. Indeed, the Soviets

¹¹²¹ Boister (2008a) lxxv-lxxxii.

¹¹²² *Röling Dissent* 128.

¹¹²³ *Röling Dissent* 134.

¹¹²⁴ For criticism on legal grounds, see generally, Boister (2008b) 28-48), for violating the principle of *nullum crimen sine lege* (Piccigallo (1979) 25), for procedural unfairness (Boister (2008b) 114.

¹¹²⁵ Boister (2008b) 313.

¹¹²⁶ Hisakazu (2011) 18.

¹¹²⁷ Tanaka (2011) 294.

perceived the IMTFE as an attempt to cover up the guilt of those Japanese most responsible for the war, namely the Emperor, major industrialists, capitalists and militarists.¹¹²⁸

4.1.1 Hirohito

The holy emperor was exempted from trial, ostensibly for legal reasons, though perhaps rather for political, or even socio-psychological reasons.¹¹²⁹ According to Piccigallo, the “strictly American decision caused perhaps more furore in Allied circles than any other relative to war crimes policy.”¹¹³⁰ Hirohito was said to have been a “mere figurehead”¹¹³¹ or conversely, to represent the Japanese state in the eyes of his subjects, such that trying him would be perceived as in effect an indictment of Japan itself.¹¹³² Totani disputes Röling’s assertion that Emperor Hirohito was granted immunity, but suggests the Americans kept the option of trying him open, which however did not happen.¹¹³³ Donihi links the decision with the feasibility of a US occupation of Japan.¹¹³⁴ Convinced that he had played a major role, the Soviets called Hirohito the ultimate leader of the *zaibatsu*.¹¹³⁵ The Emperor, while exempt from prosecution, was forced by the US occupation to renounce his divine origin.¹¹³⁶ Otomo has argued that this was required because the US “needed Japan to enter the emerging fraternity of States as a *secular* entity; an equal among brothers capable of recognising its others and of being sutured into the new international economic system.”¹¹³⁷ By analogy, we can say that the US needed Japan (a mostly isolated entity prior to WWII¹¹³⁸), in future, to be able to recognise it as a *formal legal* equal, for the purpose of participation in capitalist IL, and in the capitalist world system.

¹¹²⁸ Piccigallo (1979) 148 “They are doing their utmost to whitewash and justify the aggressive policy of the Japanese imperialists. Wall Street and its agents, who direct US policy, are resurrecting militarism in Japan and converting the country into a base for the promotion of their insensate plans of world domination.” (*Id.*).

¹¹²⁹ Finn (1992) 24-27; 71-74; Hisakazu (2011) 18.

¹¹³⁰ Piccigallo (1979) 16.

¹¹³¹ Horwitz (1950) 497.

¹¹³² The Emperor had wished MacArthur to let him assume the total burden of guilt for every political decision made and military action carried out by his people (Donihi (1992) 746).

¹¹³³ Totani (2008) 4 and generally 43-62.

¹¹³⁴ Donihi (1992) 740.

¹¹³⁵ Prozeßmaterialien 543.

¹¹³⁶ Otomo (2011) 63.

¹¹³⁷ Otomo (2011) 64.

¹¹³⁸ But see US (armed) attempts to force Japan to sign the 1852 *Treaty of Amity* (Otomo (2011) 64).

4.1.2 Zaibatsu

Although mention in the Surrender Policy and the Indictment gives the appearance that economic factors played an important role in Japan's war, no economic actors were indicted at the Tokyo IMT. It had been proposed to do so, however. In addition to the September/October lists drawn up by the SACP/US State Department¹¹³⁹, the Allies listed proposed indictees for the IMTFE and, for example, the Australian completed list, presented in October 1945, contained 64 names in all including the Emperor and fourteen bankers and industrialists.¹¹⁴⁰ Among them were the managing director of Kawasaki Heavy Industries, and the president of the Sumitomo Bank, apparently because of their alleged profitable alliance with the militarists.¹¹⁴¹

At one point the plan was to try "Class A" suspects in three groups, one of them including industrialists and bankers.¹¹⁴² However, it was decided only to have one single trial of 28 defendants.¹¹⁴³ All of the untried Class A war criminal suspects were released by Gen. MacArthur in by the end of the first and only trial in 1948.¹¹⁴⁴ According to Totani, the Japanese public believed, and continues to believe today, that the release of 'Class A' prisoners was the result of a US change of heart with regard to the pursuit of justice at the onset of the Cold War.¹¹⁴⁵

SCAP asked the US Ambassador to Japan and MacArthur's chief political advisor, Acheson, to advise who should be arrested and to provide evidence. Apparently largely on the basis of information from Washington, Acheson submitted four lists in November and December.¹¹⁴⁶ By the end of 1945, 103 major suspects had been

¹¹³⁹ *FRUS 940, FRUS 944*: mentioned US National War Crimes Office general list of Japanese war criminals and a special list of major war criminals of 14 September, and was agreed by State, War and Navy Departments. These lists were not disclosed to the FEC. The Chinese list of 12 major war criminals is published *FRUS 948* (dated 20 October 1945).

¹¹⁴⁰ Boister (2008b) fn118, and Sissons, D.: *The Australian War Crimes Trials and Investigations, 1942-1951, Berkeley War Crimes Studies Center*.

¹¹⁴¹ Boister (2008b) 62.

¹¹⁴² It has been implied, however, that Keenan's mention of further trials that point may have been aimed getting prosecution staff to agree on a small number of defendants for the first trial, rather than it being a genuine possibility (Totani (2008) 69).

¹¹⁴³ Keenan recommended against further international Class A trials as they would be repetitive, lengthy and of little educational value; moreover, as soon as 'Nuremberg' was over there would be no more media interest (Totani (2008) 68, 73).

¹¹⁴⁴ Finn (1992) 79.

¹¹⁴⁵ Totani (2008) 77. Totani suggests, however, that the decision was partly due to Keenan and MacArthur's 'inattentiveness' – as well as Washington's disinterest in Tokyo's war criminals (id.).

¹¹⁴⁶ Finn (1992) 78.

arrested, including most of the Tojo 1941 cabinet.¹¹⁴⁷ As only the US prosecutors had arrived in Japan at this point, they took the early initiative in selecting defendants.¹¹⁴⁸ However, I have found no unequivocal explanation for the decision to limit Tokyo IMT cases to those with a Class A label. In reviewing the State Department Foreign Relations of the US -1945 documentation the *impression*¹¹⁴⁹ is given that the limitation to Class A Crimes was merely a practical intended to speed up matters and to “get things over with”.¹¹⁵⁰ However, even after the limitation to Class A crimes was decided, several industrialists were proposed for inclusion.¹¹⁵¹ For example, on November 12 Atcheson sent a list of thirteen names of “major war criminal suspects, together with biographic data concerning each, which we consider sufficient evidence to support their arrest for trial under section II, Article 6(a), of the Four Power Agreement on War Crimes Trials [which relates to crimes against the peace]. ... These persons are believed, with others, to have been responsible through the policies which they advocated and the influence which they exerted for the initiation and carrying on of the attacks launched by Japan on Manchuria in 1931, and on China proper in 1937, and on the United States, Great Britain and others of our Allies in 1941.” This list names Kuhara, Funanosuke, “prominent politician, industrialist... advocate of strong policy toward China. Involved in incident of February 26, 1936 [the “Manchuria incident”]. Ardent nationalist, closely associated with military circles and aims.”¹¹⁵² The thirteen names listed in the memo came from the War Crimes Office List mentioned above.¹¹⁵³ The second list submitted by Atcheson on 14 November includes “Aikawa, Yoshisuke. Member, Cabinet Advisory Board, Koiso Cabinet. Brother-in-law and close associate of Fusanosuke (sic) Kuhara. Industrialist who worked in close

¹¹⁴⁷ Finn (1992) 78.

¹¹⁴⁸ Kentaro (2011) 57.

¹¹⁴⁹ Indeed, in the correspondence the question of “desiderata” is raised, but not answered, and it appears that proposals are made without any specific and explicit legal, evidential or even political guidelines (although such may have existed formally or informally even if this is not evident from the correspondence) *FRUS* 952-953; and *FRUS* 963: Memo by Marshall, acting Chief of Staff to the SCAP to Atcheson: “The main difficulty is to determine just who are the war criminals in that directives to the Supreme Commander have been couched in such broad and general terms that he is unable to determine those individuals that the American Government or the Allied Governments wish to prosecute.” Note this also shows the political, rather than legal considerations that guide the choice of defendants (if only legal considerations counted the SCAP could have known himself who to arrest – as any member of a domestic police force.)

¹¹⁵⁰ *FRUS* 984 Memo from Atcheson.

¹¹⁵¹ *FRUS* 960: Communicated in the memo by Acting Chairman of the State-War-Navy Coordinating Committee to the Secretary of State with annexed Draft Message to be sent by the Joint Chiefs of Staff to the SCAP: “Position of the US Government is that Tojo, his cabinet and other persons charged with crimes in category A in paragraph 1 of Appendix C of JCS 1512 should be tried by an international tribunal.”

¹¹⁵² *FRUS* 963-5: Memo from Atcheson to SCAP and Chief of Staff dated 12 November 1945.

¹¹⁵³ Atcheson mentions this in his memo: *FRUS* 962.

cooperation, and to his great profit, with aggressive elements of Army and Government.”¹¹⁵⁴

On November 17 1945 Acheson sent the Secretary of State a memo enclosing the conclusion of an analysis by a Canadian called E. Norman, chief of the Research and Analysis Section of the Office of the Chief Counter Intelligence Officer of General Headquarters [of the US occupying force in Tokyo], written about the war guilt of Prince Konoye [also spelt Konoe], Fumimare, Prime Minister of Japan until 1941 (prior to Tojo).¹¹⁵⁵ The memo motivated the argument for Konoye’s war guilt as follows: “The most valuable service which Konoye performed on behalf of Japanese aggression was one which he alone could have accomplished – namely the fusing of all the dominant sections of the ruling oligarchy, namely the Court, Army, Zaibatsu and bureaucracy. ...Konoye set in motion those policies and alliances which could only lead to a collision with the Western powers. Even though he stepped aside in favour of Tojo in October 1941, he still bears a heavy responsibility both moral and legal ..., since he made no move such as summoning an Imperial conference while still Premier to prevent the coming Japanese attack upon the United States and Britain.”¹¹⁵⁶ Eventually Konoye escaped trial by committing suicide, and while the US had given orders to arrest Tojo and “the entire “Pearl Harbor” Cabinet” on 11 September 1945.¹¹⁵⁷

On November 17, Kuhara, Funanosuke, as the only industrialist out of those mentioned here, was ordered to be arrested and held at Sugamo Prison Camp pending “trial by an international tribunal.”¹¹⁵⁸

However, on 27 November 1945 Acheson, advised the arrest for trial of a further two major war criminals – again with “sufficient evidence” for an aggressive war charge,

¹¹⁵⁴ *FRUS* 968.

¹¹⁵⁵ Norman also authored the book, *Japan’s Emergence as a Modern State* [First published by the Institute of Pacific Relations, 1940], a fact which Acheson mentions in each reference to Norman.

¹¹⁵⁶ *FRUS* 971-2. “Konoye was Prime Minister when Japan attacked China, entered into the Tri-Partite Alliance with Germany and Italy, invaded French Indochina... [and] laid the foundation for the command economy for total war, and abolished the old political parties.” (id.). When learning of US intent to arrest and try him as a war criminal, he committed suicide. [There is considerable correspondence in *FRUS* on whether or not Konoye had been promised immunity, whether (or, *as*) he was the US chosen post-war leader (Finn 1992 41) and whether he had been negotiating a peace agreement with the US on the eve of the Pearl Harbor attack.]

¹¹⁵⁷ *FRUS* 971-2.

¹¹⁵⁸ *FRUS* 972.

the first of which: “Fujiwara Ginjiro: Leading Industrialist with a record of active collaboration with the military in positions of major responsibility.” The second person listed was: “Nakajima Chikuhei, Leading aircraft manufacturer (founder and president of the Nakajima Aircraft Company), war profiteer and politician. He was described as “closely bound up with and devoted to the developing of Japan’s war machine since before the last war.” His former posts included: “President, Seiyukai Party ...Railways Minister ... Member Greater East Asia Co-Prosperity Sphere Establishment Administration ... Munitions Minister etc.”¹¹⁵⁹

Nakajima, with his roles in industry, defence and politics embodied the idea of the *zaibatsu* elite.

It appears clearly from the US official correspondence that from the Japanese side WWII was very much viewed as a joint effort of industrialists, military and political leaders, and that the main individuals’ roles were not always clearly separated/separable. There was, in other words, a military-industrial complex. It is striking that in the correspondence published in FRUS (1945 and 1946) the selection of indictees of the IMT is only discussed in terms of whose task it is to decide, rather than on what basis a selection is made. No explanation can be found in FRUS for the omission of the industrialists. There is some discussion on the omission of the Emperor, it seems likely from this that he was omitted because the Japanese public would be offended by having the still somewhat mythical figure tried as a common war criminal. Another explanation may be that he (like Konoyo) could have exposed negotiations with Western States that the Allies would wish to keep under wraps. Regarding Shigemitsu and Yamazaki it is later said that they and four others should only be arrested “if Mr Keenan [Chief Prosecutor of the Tokyo IMT] decides to try the Tojo Cabinet en bloc, their individual records ...so far fail to reveal evidence sufficient to warrant their apprehension and individual trial under the Jackson formula.”¹¹⁶⁰

Kentaro describes how, in the IPS discussion to finalise the list of indictees, Keenan stated that, although he had wished to prosecute one of the Japanese industrialists, “he

¹¹⁵⁹ FRUS 977-8.

¹¹⁶⁰ FRUS 986.

was unable to do so because of the complex preparation that would be involved.”¹¹⁶¹
This sounds rather like a (weak) excuse than a serious ground.

Donihi’s account of his work at the IMTFE includes this short paragraph on industrialists: “[t]here were no industrialists on trial, distinct from Nuremberg, where industry had used slave labour. Despite Soviet pressure, Austin Hauxhurst and I (having been assigned by Mr. Keenan to study the question) recommended against the inclusion of the industrialists (*zaibatsu*) category.”¹¹⁶² Though Donihi gives no explicit reason for the exclusion, the reference to slave labour seems to suggest the Japanese industrialists did not use slave labour.

As will become clear below, Japanese industry *did* use forced labour from surrounding Asian countries as well as foreign service personnel and members of the colonial populations. According to Drea et al., “[d]uring the war years, the Japanese government forcibly removed workers from Korea, China, and elsewhere in Asia and shipped them to Japan as unpaid labor for dangerous work in coal mines and for heavy construction. American POWs were also subjected to brutal labor details.”¹¹⁶³

Horwitz described the dilemma thus (with echoes of the concern for US domestic industry response: 3A):

*“A clear distinction must be made between the industrialist who for patriotic and economic reasons fills government orders for armaments, munitions and other implements of war to be used in connection with an aggressive war, and the industrialist, who for economic reasons, or otherwise, aids, abets, or collaborates with military and governmental leaders in the formulation and execution of a programme of aggression. No evidence was produced by the Executive Committee that any industrialist occupied the position of principal formulator of policy. Conditions in Japan made it important that the indictment of an industrialist not be undertaken unless his conviction was almost a certainty since an acquittal might well have been regarded as a blanket approval of all Japanese industry and industrialists.”*¹¹⁶⁴

¹¹⁶¹ Kentaro (2011) 61.

¹¹⁶² Donihi (1992–1993) 733.

¹¹⁶³ Drea (2006).

¹¹⁶⁴ Horwitz (1950) 498.

However, common sense would hold that convictions for war crimes (use/abuse of POWs) or crimes against humanity (forced labour) would not convey a message of blanket approval of Japanese industry and industrialists - surely not indicting/trying them would sooner convey this message.

Boister cites the *IG Farben case* as explanation for the decision not to try industrialists: “See, for example, the IG Farben case... concerned with the prosecution of the directors of IG Farben inter alia for planning and waging an aggressive war and conspiracy to do so. The accused were acquitted following the Nuremberg IMT’s lead that only political leaders with the power to control government policies could be charged with such offences. A point in the prosecution’s favour was that, unlike German conglomerates, the *zaibatsu* had not used slave labour.”¹¹⁶⁵

As shown above (Ch.3A S.3.1.4), the IG Farben leaders were *not* acquitted but indeed convicted of war crimes and crimes against humanity, even if they were found *not guilty* on the aggression charge.

Röling in the record of a long conversation with Antonio Cassese in the 1970s, explains the industrialists had been opposed to the war, and that had been quite correct not to try them.¹¹⁶⁶ Cassese conversely suggests, “[o]ne might have thought that it was done deliberately by the Western countries, because they wanted to cooperate with the industrialists of Japan, as they would need their support in future.”¹¹⁶⁷ Finn comments on a discussion between MacArthur and Konoe, where Konoe warns the SCAP of the threat of the military-Left alliance, and warns that breaking up the *zaibatsu* will lead to communism “immediately”.¹¹⁶⁸ In response, MacArthur is reported to have expressed his confidence in Konoe as a leader capable of safeguarding liberal/capitalist interests even in the event of a breakup of the *zaibatsu*.¹¹⁶⁹

¹¹⁶⁵ Boister (2008b) 55-56.

¹¹⁶⁶ Cassese (1993) 38.

¹¹⁶⁷ Cassese (1993) 39.

¹¹⁶⁸ Finn (1992) 19.

¹¹⁶⁹ Finn (1992) 19.

The USSR had asked for the indictment of three industrialists at the IMTFE.¹¹⁷⁰ The decision not to indict industrialists was not received favourably in the Soviet press.¹¹⁷¹ The “leaders of the giant Japanese monopolies...known as the Zaibatsu,” who favoured and “were the real instigators” of “predatory war,” had escaped trial. “This was no accident,” alleged the Communist Party daily, Pravda, but the results of a carefully calculated plot engineered by the *zaibatsu*’s capitalist counterparts on “Wall Street.”¹¹⁷² Another commentary suggests that Keenan did not prosecute the *zaibatsu* because of their connections with US monopolies.¹¹⁷³

4.2 Other trials of Japanese war crimes in the Far East

Allied governments tried more than 5,600 war crimes suspects in over 2,200 trials in 51 different venues around the Far East.¹¹⁷⁴ The most accessible source for information about the subsequent trials by Allies and others in the Far East is Piccigallo’s monograph, with chapters on each of the Allies’ war crimes trials.¹¹⁷⁵ Summaries of some of the trials are contained in the WCCLR publication.¹¹⁷⁶ Some case reviews are summarised by the Berkeley War Crimes Study Center (supra). Actual case reports or judgments are very difficult to find outside of (and even in) national archives.¹¹⁷⁷ Most of these trial records remain ‘hidden.’¹¹⁷⁸ I have not been able to look at Chinese and Korean cases for linguistic reasons.

The case reports (or summaries/descriptions) that are easier to track down are those of cases that have become public campaigning issues (in particular where the victims

¹¹⁷⁰ Brackman (1987) 85–6.

¹¹⁷¹ Piccigallo (1979) 146–8.

¹¹⁷² Raginsky, M. and S. Rosenblit, (from Pravda) Soviet Press Translations, 3, No. 14, July 15, 1948, p.412; Markov, M., New Times No. 8, April 15 1946, pp. 7–10. Quoted in Piccigallo (1979) 147.

¹¹⁷³ Trainin, A: ‘From Nuremberg to Tokyo’ (1948) 12 New Times 11, 12.

¹¹⁷⁴ Totani (2008) 262.

¹¹⁷⁵ Generally, Piccigallo (1979).

¹¹⁷⁶ For a very brief description of the “torrent of trials” brought by the British in various locations in South-East Asia, see Chapter 6 of Boister (Reappraisal).

¹¹⁷⁷ Pritchard echoes this sentiment (Pritchard, 1996). The National Archives describe the case documents as being ‘scattered among’ various files (National Archives research guide, supra). Case compilations such as the All England Law Reports/Lexis do not include the decisions of these military commissions, not even the Oxford Reports on International Law (which does not even have the Yamashita decision).

¹¹⁷⁸ A recent symposium aimed bringing out some of the stories of these trials: Symposium ‘Untold Stories: Hidden Histories of War Crimes Trials’ held Melbourne Law School 14–16 October 2010. A publication based on this symposium is forthcoming (2012) and will include a paper I presented based on the research underlying Chapters 3A and 3B, entitled “*Capitalism’s Victor’s Justice? The hidden story of the prosecution of industrialists post-WWII and subsequently*”.

included western citizens). For example, the case against the leaders of the Burma-Siam railroad project (the “Bridge over the River Kwai”).¹¹⁷⁹ Another such issue is that of the “comfort women”, thousands of women (in fact mostly girls) who were held as sex slaves for the Japanese military. Some of the brothels in which these women were held were owned and run by private contractors (see below). The victims and other activists on the “comfort women” issue have held a citizens’ tribunal,¹¹⁸⁰ and filed compensation suits.¹¹⁸¹ The Kinkaseki mine (see below) victims have also campaigned for many years with little success.¹¹⁸² In this section I highlight some examples of cases involving businesspersons.

4.2.1 Dutch trial of Awochi at Batavia

At the Netherlands Temporary Court-Martial at Batavia (which derived its jurisdiction from Dutch law), Japanese businessman Washio Awochi was charged with having “in time of war and as a subject of a hostile power, namely Japan,” and as “owner of the Sakura-Club, founded for the use of Japanese civilians,” committed “war crime of enforced prostitution.”¹¹⁸³ He was accused of doing so “by, in violation of the laws and customs of war, recruiting women and girls to serve the said civilians or causing them to be recruited for the purpose, and then under the direct or indirect threat of the Kempei (Japanese Military Police) should they wish to leave, forcing them to commit prostitution with the members of the said club.”¹¹⁸⁴ Among those who were forced to prostitution were girls of 12 and 14 years of age.¹¹⁸⁵ The defendant pleaded that he had operated under orders of the Japanese authorities. He was convicted and sentenced to ten years’ imprisonment.¹¹⁸⁶

This case has received praise as the only criminal prosecution in the “comfort women” issue. However, it also illustrates the innate racism of ICL, in that the case related to Dutch victims. Of the around 200,000 women and girls (most of the victims were teenagers) who were victims of Japanese enforced prostitution/sexual slavery during

¹¹⁷⁹ The Berkeley Singapore docket includes Burma-Siam Railway cases such as the Mizutani Case Singapore Cases: No. 235/911 which may include business-related cases also: *Berkeley War Crimes Study Center*.

¹¹⁸⁰ Jayasimha (2001).

¹¹⁸¹ Hae Bong (2005).

¹¹⁸² See the *Taiwan POW Camps Memorial Society*.

¹¹⁸³ *Awochi Case*.

¹¹⁸⁴ *Awochi Case* 122.

¹¹⁸⁵ *Awochi Case* 123.

¹¹⁸⁶ Statute Book Decree No. 46 of 1946 concerning the “Legal Competence in respect of War Crimes”, id. 123.

WWII, only around 200-300 were Dutch/European. The others were Korean, Chinese or Japanese.¹¹⁸⁷

4.2.2 US Trials at Yokohama

Suspected Class B and C class war criminals were tried in by a US military tribunal at Yokohama, Japan between 1946 and 1948.¹¹⁸⁸ Some cases (reviews) deal with civilian guards employed by companies who were accused and convicted of abusing POWs.¹¹⁸⁹ This included, for example, the prosecution of Tagusari, Sukeo, Kei Kai In, civilian guard employed by the Tohoku Denki Seitetsu Company. Tagusari had worked at the plant where US and other Allied PoWs from Sendai Area PW Camp No. 10 (Honshu, Japan) were forced to work. He had beaten PoWs for not working hard enough for not doing things “the right way” or, for no reason at all. He was sentenced to 22 years confinement and hard labour, a sentence which was not reduced on review by the Judge Advocate General – Defense. Another civilian guard and interpreter, Yamauchi Kunimitsu, employed by the Mitsui Mining company (part of the Mitsui *zaibatsu*), charged with wilfully and unlawfully committing cruel, inhuman and brutal atrocities and other offenses against certain PoWs, was sentenced to 40 years, reduced to 33 on review. Yamauchi (who had lived in the US and attended school there) was accused of “refusing to interpret” which had meant he had not adequately represented the complaints of American PoWs which had been his responsibility.¹¹⁹⁰ Other guards tried had been employed by Osaraizawa Mining Company, Nippon Kokan Kobushiki Kaisha and Rinko Coal Company. All were based in Japan, and all were accused of mistreatment of American and other PoWs.¹¹⁹¹

Clearly here (like in Nuremberg) there would have been a possibility to try the directors of these companies for these crimes, the use of slave labour (maybe) especially as the cases seem to show that maltreatment was endemic. A common

¹¹⁸⁷ See generally: <http://www.comfort-women.org/>.

¹¹⁸⁸ All cases in this section are taken from *Berkeley War Crimes Studies Center*, Case synopses from Judge Advocate’s Reviews: Yokohama Class B and C War Crimes Trials.

¹¹⁸⁹ Cases reviewed by the 8th Army Judge Advocate, and the results are housed the *Berkeley War Crimes Study Center* on 5 microfilm reels titled “Reviews of the Yokohama Class B and C war crimes Trials by the 8th Army judge Advocate (1946-1949).”

¹¹⁹⁰ This seems an odd case – the Reviewing Authority recommended that, as the accused had been educated in the US he “was aware of the humanitarian ideas of Americans. The commission may have ...thought it an aggravation of the offense.” Perhaps this case is one of disputed loyalty, cf. the mass internment of Japanese Americans during WWII.

¹¹⁹¹ *Berkeley War Crimes Studies Center*.

“avoidance technique” in ICL (as in domestic CL) is prosecuting the lowest ranked individuals. I discuss this further in the chapters below.

4.2.3 The British War Crimes Court in Hong Kong: The Nippon Mining Company

The British tried at least one case similar to the Yokohama cases above. In the absence of comprehensive documentation of military tribunal cases by the British, one has to rely on other means of discovering their existence. The *Nippon Mining Company* case we know about because it was mentioned in the *Krupp* case in Nuremberg.¹¹⁹²

*In the trial of Mitsugu Toda and eight others, by a British Military Court in Hong Kong, 7th-28th May, 1947, the accused were charged with “committing a war crime, in that they at Kinkaseki, Formosa, between December 1942 and May, 1945, being on the staff of the Kinkaseki Nippon Mining Coy., and as such being responsible for the safety and welfare of the British and American Prisoners of War employed in the mine under their supervisions, were, in violation of the laws and usages of war, concerned in the ill-treatment of the aforesaid Prisoners of War, contributing to the death of some of them and causing physical sufferings to the others.”*¹¹⁹³

The main question in the trial of Toda, Mitsugu et al. was whether the responsibility over the POWs was the company’s or the camp commander’s (or, as they were called by the victim-witnesses in the case, the ‘mine hanchos’ or the ‘camp hanchos’).¹¹⁹⁴ Each day the prisoners would leave the POW camp to work in the company mine, where they were under the supervision of company foremen. Conditions at the copper mine were admitted by all relevant parties to be dangerous, with excessive heat, deep pools, falling rocks and poor equipment. Beatings were common and admitted. The defence had argued that the POWs were not employed by the company but were being made to work at the mine by the military. The defence for Toda also argued the foremen were ‘seconded’ to the army and thus fell under their responsibility. Toda was the General Manager of the mine, and received a sentence of only one year. Two of the foremen received sentences of 10 years.¹¹⁹⁵ This is another example devolving responsibility for international crimes in business cases to the lowest ranked persons.

¹¹⁹² Case documentation is held the U.K. National Archives, *Mitsugu Case*.

¹¹⁹³ *Krupp Case* 168.

¹¹⁹⁴ *Mitsugu Case*.

¹¹⁹⁵ *Mitsugu Case*.

Ramasastri comments on the case that “it can be inferred that the court held the mining company legally responsible for the deaths, injuries, and the suffering of the PoWs. This is deduced from the fact that two of the defendants, Toda and Nakamura, a mining company manager and supervisor respectively, were found guilty, although they did not directly participate in the beatings or mistreatment of the prisoners.”¹¹⁹⁶ This is an illogical (incorrect) deduction often seen (e.g. Clapham¹¹⁹⁷) in those who “support” legal person liability – which I will discuss in Chapter 4. Ramasastri makes a lot of the fact that Toda was not directly involved in the abuse/did not know it happened, but this case concerns *command responsibility* rather than legal person liability.

Three of the former POWs who worked at the mine filed a civil compensation suit against Japan Energy Corp. in a US court in 2000, a case which was dismissed in 2007.¹¹⁹⁸ In Chapter 5 I discuss the relative merit of civil cases vs criminal prosecutions (and the combination: civil claims attached to criminal cases, and also punitive/compensatory damages ordered in criminal cases.

4.2.4 The Soviet trial of Unit 731

The USSR tried several Japanese war crimes suspects, among them, what may be regarded as the Japanese equivalent of the IG Farben scientists: Unit 731.¹¹⁹⁹ Like the *Topf u. Söhne* trial above, this case shows the Soviet perspective on the war, on motivations for crimes, and illustrates the ‘Systemkonkurrenz’ also seen in the West. On 25-30 December 1949 in the city of Chabarowsk in the USSR., twelve former members of Unit 731 of the Japanese Imperial Army were tried for preparation and use of bacterial weapons. The accused, who in their final statements to the tribunal admitted the charges and expressed regret, were convicted to 3-25 years of “improvement” through hard labour.¹²⁰⁰ Those members of Unit 731 (including its commander, Ishii) that had surrendered to the US at the close of the war had reportedly been granted immunity from prosecution by the US, in return for know-how.¹²⁰¹ Röling

¹¹⁹⁶ Ramasastri (2002) 115.

¹¹⁹⁷ Clapham (2008) and below Ch. 4.

¹¹⁹⁸ *Titherington vs Japan Energy Corp.* [no further info available]; see also BBC News, 23 February 2000.

¹¹⁹⁹ On the IMT’s failure to prosecute Unit 731, see Kei-Ichi (2011) 177ff.

¹²⁰⁰ *Prozessmaterialien* (1950) 600.

¹²⁰¹ Cassese (1993) 48. See also, *Vernon DSB 1947*. Vernon reports that Ishii was brought to the US along with what remained of his test result files. For a very recent accusation of US use of bacteriological warfare in its war against Korea, see Al-Jazeera, 17 March 2010.

and others have said that the scientists were taken to the US in order for the US to benefit from their knowledge and the results of their experimentation (the US is even said to have taken one of the scientists to Korea during the war there), and also that evidence of biological warfare was deliberately withheld (and at one point quietly withdrawn) from the IMTFE, despite the fact that defendant Umuzu had been directly responsible for setting up the biological laboratory in Manchuria/Manchuoko.¹²⁰²

It would appear that one difference between the Japanese and German wars/systems was that Japan had its army develop, manufacture, test and ultimately apply the biological weapons, whereas Germany had used private companies for the invention, development and manufacture of poison gases.¹²⁰³ The Soviet prosecutor at Chabarowsk describes how, in the pursuit of its imperialist/colonial aggressive war, Japan developed bacteriological weapons that could infect humans as well as cattle and seeds. One method of applying such bacteriological weapon was apparently the aerial bombing system “Ishii” which was designed to drop pestilent fleas onto enemy territory.¹²⁰⁴ This technique was apparently used by the Japanese airforce a number of times in different parts of China in 1940-42.¹²⁰⁵

The lawyer speaking in the main accused Yamada’s defence (N. Below) explains how in his view Yamada came to commit such acts. Agreeing with Locke and Rousseau that humans are innately good, he explains Marx and Engels’ point of view that “mentality, interests, will, character and moral conscience of people is a product of their historical milieu, the conditions of society and the education shaped through social relations.”¹²⁰⁶ Yamada was born in 1881 when Japan was still very much organised through the feudal system. The four main families of Mitsui, Mitsubishi, Yasuda and Sumitomi reached their monopoly positions through an alliance with the emperor in the 19th C. and in the 1930s decided to expand their economic empire through aggressive war. War industry (the “bone-mill”) was only additionally profitable. Precisely these “most exploitative and rapacious of Japanese Imperialists” poisoned the people with an aggressive nationalism and chauvinism, as they knew that

¹²⁰² Cassese (1993) 48. See also, Totani (2008) 3.

¹²⁰³ Witnesses the Chabarovsk trial suggest that the biological warfare programme of Unit 731 fell under the direct responsibility of the Emperor, which Röling considers credible (Röling and Cassese (1993) 49; Prozeßmaterialien 546).

¹²⁰⁴ Indictment, Prozeßmaterialien 11.

¹²⁰⁵ Indictment, Prozeßmaterialien 23-5.

¹²⁰⁶ Prozeßmaterialien 533 (plea of the defence).

the war could not be fought without the broad popular masses.¹²⁰⁷ The basis of the ideology was the holiness and infallibility of the Emperor. Below went on to explain, how the zaibatsu, the “inspiration, instigators, organisers and leaders of Japanese aggression” had taken the initiative and executive role in the production of bacteriological weapons.¹²⁰⁸ Within this context Yamada had been “one of the many instruments that carried out the nefarious crimes of the Japanese Imperialism,” having had the “misfortune” to have been born into such circumstances, a criminal and a victim at the same time.¹²⁰⁹

This warrants comparison with IMTFE Chief Prosecutor Keenan who was critical of Soviet motives for their call to have former Emperor Hirohito tried, and denied allegations of Japanese use of bacteriological weapons.¹²¹⁰ Keenan asserted that as regards evidence of bacteriological warfare “none whatever” had been introduced at the IMTFE.¹²¹¹ On the other hand, the USSR is said to have used this case “to assert its moral leadership in Asia.”¹²¹² Like in the discussion of the Soviet trial of the *Topfu. Söhne* defendants (Chapter 3A, Section 8.3), the ideological character of, or motivation behind Soviet trials is stressed. Likewise, the ideological motivations behind US/Western policy were stressed by the Soviets. It has since come to light that the US government offered General Ishii and others of Unit 731 prosecutorial immunity in return for their research findings.¹²¹³

The USSR accused the US of “instigating a new world war, speeding revival of Japan’s industrial war potential”¹²¹⁴ in response to the US’s willingness, to sign a peace treaty with Japan without the USSR. Such would lead to a Pacific military alliance with Japan as the military and economic foundation, and eventually to the US using Japan in its “war for United States domination.”¹²¹⁵ Piccigallo calls the Chabarowsk trial “part of a renewed propaganda assault against United States Policy in East

¹²⁰⁷ Prozeßmaterialien 534.

¹²⁰⁸ Prozeßmaterialien 539.

¹²⁰⁹ Prozeßmaterialien 540.

¹²¹⁰ “Joseph Keenan meets the Press,” American Mercury April 1950, summarised in Welch (2001) 88.

¹²¹¹ Piccigallo (1979) 251 fn56.

¹²¹² Totani (2008) 60

¹²¹³ Boister (2008b) 64.

¹²¹⁴ Piccigallo (1979) 150, citing a Moscow Radio report [which is cited in the Malay Mail, May 9, 1949].

¹²¹⁵ Piccigallo (1979) 150.

Asia.”¹²¹⁶ In agreement with Viscount Maugham, he states, “the U.S.S.R. regards a trial as one of the organs of Government power, a weapon in the hands of the rulers of the State for safeguarding its interests.” And Lord Hankey, “the British and American systems treat a court as an independent agency responsible only before the law.”¹²¹⁷ This (positivist) portrayal of law as somehow non-political, however, also actively serves to conceal the Western political goals behind the trials. One of them could plausibly have been, to divert attention from the US occupation aims in Japan, which in many ways were much more far-reaching than the ‘media-genic’ trials.

5 Economic occupation policy: zaibatsu dissolution and the ‘reverse course’

What it chose not to deal with through the courts, the US dealt with through its economic policy as Japan’s occupier. As in Germany occupation included complete control over the economy, and deep reform including legal reform (and even, reform of the education system¹²¹⁸). This started off with a plan for the break-up of cartels, fiscal and land-reform – the Japanese version of the ‘Morgenthau Plan’¹²¹⁹ – but soon changed direction in what became known as the ‘reverse course’.

5.1 Zaibatsu dissolution and other reforms

In 1945 US officials had reported that “not only were the zaibatsu as responsible for Japan’s militarism as the militarists themselves, but they profited immensely by it.... Unless the zaibatsu are broken up, the Japanese have little prospect of ever being able to govern themselves as free men.”¹²²⁰ The conclusion of the ‘Edwards Mission on economic policy’ (a mission sent by the US government to advise on economic policy¹²²¹) led to the design of a policy aimed at the formation of a broad middle class in Japan, as well as land reform, towards allowing broader private ownership of land, making these reforms similar to the policies of European colonisers (Ch. 2B).¹²²² The Edwards Mission concluded that the existence of two classes in Japan, the ruling elite

¹²¹⁶ Piccigallo (1979) 154.

¹²¹⁷ Piccigallo (1979) 155, quoting Maugham, F.: U.N.O. and War Crimes, London 1951 and Hankey, L.: Politics, Trial and Errors, p. 9 (no further details given).

¹²¹⁸ More than 400,000 teachers and professors were removed from office (Ando (1991) 17).

¹²¹⁹ See, e.g Japanese Post-Surrender Policy, excerpt in *Appendix C*.

¹²²⁰ Cohen (2000) 426; see also, Roth (1946) 57-59.

¹²²¹ *Japanese Combines Report*.

¹²²² Finn (1992) 130-2. Generally, Ando (1991).

and the masses had led to Japan's aggression, "The existence of too many peasants on too little land under the exacting tenure system imposed by feudalistic landlords was the cause of the cheap labour in Japanese industry, which in turn gave birth to a poor domestic market and militaristic expansion for overseas possessions."¹²²³ Effectively, in adopting this economic reform policy aimed at creating a middle class, the US government acknowledged that the Japanese aggressions had been at least in part, a war for markets, similar to European expansion starting in its feudal period. The creation of a middle class necessitated breaking up the *zaibatsu*.¹²²⁴ Five *zaibatsu* were slated for dissolution by the Holding Company Liquidation Commission: Mitsui, Mitsubishi, Yasuda, Sumitomi (the big four) and Fuji Industrial.¹²²⁵ The dissolution involved the surrender of vast amounts of private property.¹²²⁶ In December 1946 60 additional *zaibatsu* were designated for dissolution while a further number were placed under supervision.¹²²⁷

SCAP issued a directive in December 1946 ordering the removal of undesirable personnel from public office. The directive (which extended beyond the "*zaibatsu* problem"¹²²⁸) affected:

*zaibatsu personnel who at any time between July 7, 1937, and September 2, 1945, occupied a position as chairman of the board of directors, president, vice president, director, adviser, auditor, or manager of certain industrial and financial concerns or any other bank development company or institution whose foremost purpose was assisting in militaristic aggression.*¹²²⁹

In February 1947 the first 56 members of 10 *zaibatsu* were designated for 'purging' (removal from office and exclusion from similar posts in future).¹²³⁰

To prevent the reemergence of *zaibatsu*, the US leadership proposed, and the Japanese government adopted, an "American-style" Anti-Trust Law in April 1947.¹²³¹

¹²²³ Ando (1991) 21.

¹²²⁴ FEC 230 Policy recommendation; see generally, *Vernon DSB 1947*.

¹²²⁵ Vernon (1947) 59.

¹²²⁶ Generally, Ando (1991), who considers aspects of the US economic policy in Japan contrary to *Hague Regulations* Arts. 44 (respecting existing laws) and 55 (occupier's temporary caretaker function).

¹²²⁷ Vernon (1947) 60.

¹²²⁸ Vernon (1947) 60.

¹²²⁹ Vernon (1947) 60.

¹²³⁰ Vernon (1947) 60. Vernon adds that "[t]his action supplements the earlier resignation of important *zaibatsu* officers which took place shortly after the start of the occupation." *Id.*

¹²³¹ Ando (1991) 20.

5.2 *Reverse course*

As mentioned above (Chapter 3A Section 6) Byrnes' Frankfurt speech, the publication of the Truman Doctrine in March 1947 and the Marshall Plan in July 1947 marked a turning point in US policy not only in Europe but globally. In Japan, the arrival in June 1950 of John Foster Dulles, marked the beginning of the end of the occupation.¹²³² Dulles came seeking to negotiate a treaty, needing an ally in the face of the Korean War and the rise of Mao in China.¹²³³ The restrictions on Japanese industry, which had caused food shortages, were gradually relaxed as part of what was called the "reverse course" effort to reindustrialise Japan as a bulwark against communism,¹²³⁴ and a supplier in the Korean war.¹²³⁵ The US leadership acted partly on the advice of a group of prominent US businessmen.¹²³⁶ By July 1948 225 of the 325 companies slated for "deconcentration measures" had been taken off the list.¹²³⁷ In addition, by 1950-1 almost all of the business leaders affected by the purge law were "depurged".¹²³⁸ In 1955 also, all those who received prison sentences at the IMTFE, were released.¹²³⁹ At the same time, harassment by the US occupier of the political left in Japan continued.¹²⁴⁰

Some of the more far-reaching reforms the US occupation leadership had instigated, in particular land-reform, fiscal reform, the opening up of the economy to foreign (US) investment, remained in place,¹²⁴¹ and can be said to have achieved what was set at the outset as a priority goal of the US occupation: "the eventual participation of Japan in a World economy on a reasonable basis."¹²⁴² The 'World economy' in this vision was the capitalist world's economy.

¹²³² Finn (1992) 241.

¹²³³ Finn (1992) 242.

¹²³⁴ Kennan (1967) 368. Additionally, "as the communist movement inside Japan became active in the course of 1948, SCAP and the Japanese government resorted to [the purge] directives to remove the communist influence from the Japanese political scene. During 1949 and 1950, 61 executive committee members and editorial officers of the Japanese Communist Party, including 13 Diet members, were designated purged persons, while more than 10,000 communists or sympathizers were removed from various government posts, Several leftist organisations were ordered to liquidate and their property was seized." (Ando (1991) 27.)

¹²³⁵ Finn (1992) 226, 241.

¹²³⁶ Ando (1991) 25.

¹²³⁷ Ando (1991) 26.

¹²³⁸ Seita; Ando (1991) 27.

¹²³⁹ Cryer (2010) 119.

¹²⁴⁰ Finn (1992) 243.

¹²⁴¹ Ando (1991) 28.

¹²⁴² Ando (1991) 28.

One of the Class A war crimes suspects released from Sugamo Prison by the US occupation was Kishi Nobusuku, the former Minister of Industry and Commerce, who became Prime Minister in 1957. He was responsible for the renewal of the US-Japan Security Treaty with Pres. Eisenhower in 1960, the treaty “which many Japanese regarded as Kishi’s helping hand to entrench American military, political, and economic domination over Japan.”¹²⁴³ Totani adds, “[i]t is perhaps not surprising that the Japanese public responded to the apparent collusion between the former Class A war crimes suspect—who had escaped prosecution by the grace of the United States—and Eisenhower *by leading one of the largest popular demonstrations ever to be seen in the history of Japan.*”¹²⁴⁴

6 Conclusion to 3A and 3B: Capitalism’s Victor’s Justice

The decision to submit the authors of the war to international trials was taken in a mood of ‘liberal internationalism’, promoted by government lawyers, and it presented at the same time an opportunity to create both new law and a particular narrative of the war that would appease home publics and allow for the rehabilitation of Japan and German as major trading partners. While on the Western side, which was in the public limelight at least for the duration of the international trial, the ‘economic case’ was initially included, and industrialists were prosecuted, on the Eastern front the trial focused almost entirely on pathologising the Japanese military and political leadership, while the secondary trials were largely limited to cases affecting allied service personnel.

The industrialists’ trials in Europe offer a unique perspective on business in conflicts: individuals’ rationalised explanations for their actions illustrate how the ‘corporate anomie’ generated by the corporation as a structure of irresponsibility (Ch. 2A) allows individuals to become involved in gruesome acts for profit. The very stories of the involvement of the German cartels and Japanese zaibatsu illustrate corporate imperialism, or the imperialism at the core of the corporate form, as argued in Ch. 2B. In conclusion, in Japan as in Germany, the United States orchestrated/stage managed international criminal trials so as to give the semblance of accountability of the authors

¹²⁴³ Totani (2008) 77.

¹²⁴⁴ Totani (2008) 77 (emphasis added).

of the war, while in fact ensuring that those elites considered responsible at the outset, turned from adversaries into allies. The German and Japanese industrialists and capitalists who had been part of the national imperialist ventures, became enmeshed in the global economic system dominated by the US. Through breaking up the cartels and co-opting its leaders, the US transformed controlled, monopolised closed markets into an open Europe and Japan where US companies would find plenty of investment opportunity as well as markets for its products, access to technology and labour. I have argued that the trials formed the public face of a much broader post-war policy, occupation, reform, shaping the future Europe and East Asia - in ways similar to colonial times (Ch.2B). They did so by establishing the hegemon's moral authority, which legitimised far-reaching economic intervention. The trials also served to justify involvement in Europe and Japan during and especially also *after* WWII to the home public.

The remarkable move that happened, and that I describe here in these Chapters 3A and 3B through the story of the main Tokyo and Nuremberg IMT trials, is that the story of the *humanitarian* side of the story remains in the currently dominant liberal accounts, the story of the prosecution of criminals who threatened 'our humanity'. The ideological separation between capitalism and communism at the inception of the 'Cold War' split 'the economic' off from the 'humanitarian' in ICL, thereby influencing not only the trials being held at the time in concretely identifiable ways, but also, qualitatively changing the way conflict would be understood, and as a result, how the role of ICL in relation to conflict would be imagined: in terms of individual (or regime) pathology instead of conflict (inevitably) produced by the mode of production. The 'economic side' of WWII only remains present in Soviet and GDR literature.¹²⁴⁵

The economic causes of conflict were removed from ICL. Public and private, the logics of humanitarianism/peace/rights and of economy/trade (Ch. 2B) were once again separated – although we can see how economic reconstruction, development and market liberalisation remained allied to the peace (and security) narrative.¹²⁴⁶ The UN Charter stayed clear of the structural economic causes (and effects) of the very

¹²⁴⁵ E.g. Institut für Marxismus-Leninismus (1960), (1962).

¹²⁴⁶ Duffield (2001) esp. 22-42, 108-128.

problems it was designed to address.¹²⁴⁷ As we shall see in the next Chapters, result was a change in the way conflict came to be understood: conflict was no longer a result of imperialism, expansionism, but of an individual and/or ethno-racial pathology.

Moreover, the prosecutions of industrialists post-WWII were largely forgotten, and only recently have ‘business and conflict’ been reconnected in our thinking about ICL – seemingly as a new phenomenon (Ch.4, 5).

The tenacity and pluck of the Nuremberg lawyers mimics the “victory of law” over barbarism. In the clash between their liberal impulse and the capitalist logic, the liberal impulse lost out in substance if not in semblance, causing the liberal lawyers to be disciplined, and recruiting ICL to the ‘capitalising mission’.

¹²⁴⁷ Kennedy (2006) 162.

Chapter 4A: The (Re-)Making of ICL: Lawyers congealing capitalism

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1 Introduction to A, B and C

In recent years the phrases ‘war crimes’ and ‘crimes against humanity’ have become ubiquitous, in the media, on the streets, in legal practice and also in the academy.¹²⁴⁸ There are high expectations that ICL will be deployed to remedy many ills in the world. In the first part of this chapter I ask, how did ICL become the accountability tool of choice? Why is it, specifically, that some of us are asking for ICL to be applied to business in conflict? In Part B I look at how ICL has developed to make it potentially applicable to business in conflict, and in Part C I ask why, when demanding the application of ICL to business, we do not (or no longer) speak of individual business(women), but of application to the corporation *per se*.

In the aftermath of *Nuremberg* the trials were criticised by key international lawyers on legal grounds – it was said, for example, that law had been applied retrospectively, and that *Nuremberg* had been an exercise of ‘victor’s justice’.¹²⁴⁹ This was one of the grounds for its rethinking and remaking: ICL had to be prepared for the future. Another was, that from the particular circumstance of WWII, a *universal* ICL had to be fashioned. “International criminal law” as we know it today, was largely (re-)constructed, while building on the post-WWII experience, by lawyers, state representatives, and other members of the same class¹²⁵⁰ (the GCC) *post-Cold War* (in

¹²⁴⁸ E.g. Miéville (2005) 296-7.

¹²⁴⁹ E.g. Kelsen (1947); Schwarzenberger (1946-47); Jescheck (1957/2008); generally, Mettraux (2008); Koskenniemi (2002).

¹²⁵⁰ Marx (1979) 116.

Ch. 5 I discuss the reason for this timing). In Chapter 4A I focus on academic¹²⁵¹ lawyers' role in constructing ICL's foundational narrative: its history, meaning and purpose. It is academic lawyers' task (habit, or even compulsion) to take legal events (such as Nuremberg and Tokyo) and make doctrinal sense of them. ICL in this mode is treated as a found object, or an *unreturnable* gift left to us by a previous generation. It needs to be studied, analysed, their parts named and explained. In particular, we need to figure out how it fits into our pre-designated categories (or: whether it requires new categories?) and how it fits into our broader system of law, that abstracted, artificial 'whole'. Academic lawyers perform a post-hoc legal rationalisation of an event, attach to it a history and a logic and send it forward into 'progressive development'. Lawyers' explaining, legitimating and rationalisation may or may not be consciously ideological devices¹²⁵² - but they inevitably become so. These are then employed by state negotiators (and the official law-makers, e.g. Parliaments), civil society groups, business people and others (potentially members of different classes) to negotiate over, and struggle for. Lawyers, as noted in Ch. 1, are thus not the 'myopic handmaidens' of this world order, but active (more or less consciously) 'chefs'¹²⁵³ as members of the 'ruling' elite, *congealing capitalism*.

In this Chapter I show this process in the 'Making of ICL'. The fact that ICL was taken up as a project for (re-)construction suggests that similar material circumstances existed to the latter half of the 1940s affecting material interests at home and abroad that required some manner of intervention (Ch.3A S.3: 'Why Nuremberg' – and see Ch.5 below). On a more general level, the 'need' for an ICL can be deduced from its significance as the missing piece of the IL project (as perceived pre-Nuremberg by e.g. Stimson). It could additionally be because ICL - as part of the 'humanitarian' element of IL - serves to legitimise IL as a whole ("lending the legitimacy that comes with the enterprise of pursuing the worst criminals"¹²⁵⁴) or, it could be, as Schwarzenberger suggests, because lawyers were simply following a fashion.¹²⁵⁵ The latter points us to ideology. Why ICL is 'in fashion', the accountability tool of choice, I will seek to discover here.

¹²⁵¹ As, especially in ICL, there is no *clear* separation between academic and practising lawyers, it would be more accurate to say, lawyers acting in their academic capacity.

¹²⁵² Marks (2000) 18-25. Marks here outlines a number of ideological devices – here I seek to discover how some of these work in the 'Making of ICL'.

¹²⁵³ Scott (1998); and Alston (1997).

¹²⁵⁴ Mégret (2010) 180-1.

¹²⁵⁵ Schwarzenberger (1950) 263.

In Section B I look at the ‘congealing’ of capitalism from deeper inside ICL, where the detailed rules are worked out on the subjects and other modalities of ICL. This happens largely in the negotiations over the tribunals’ statutes, and in their cases. Academic lawyers play a role in this also, not least because academic lawyers have been doing much of the work in ICL, e.g. as part of the ILC, as judges and in other legal jobs at the tribunals, as negotiators on behalf of countries in the ICC negotiations, etc.

While ICL post-WWII complemented the enlightened liberal *Individualisierung* (individualisation/atomisation, below S.2.3) of society, law, and responsibility,¹²⁵⁶ in the past decade the *Individualisierung* of ICL has come to be challenged by scholars proposing various perspectives on ‘system crime’. Among these new critiques is the discussion of (actual or potential) corporate liability in ICL, which is taking place subsequent to the reification of the corporation in IL described in Ch.2B. The putative corporate ICL springs from the contradiction of corporate international personality in ILIP on the one hand, and on the other, the development of a regime of responsibility in IL to be applied to an area in which business involvement is increasingly visible. In 4C I analyse these developments and relate them also to domestic ‘corporate crime’ scholarship.

2 Introduction to A: Constructing ICL’s foundational narrative

Academic lawyers’ provision of a foundational narrative of ICL, providing it with a history, a sense of ‘where it came from’ can be contrasted with the way history has been written out of the mainstream company law texts. In Ch.2A I argued that this is because company law is considered mature and ‘settled in its identity’, as opposed to ICL, which to some extent is still fluid and subject to appropriation for different purposes. Yet while ICL is acknowledged to be ‘new’,¹²⁵⁷ there is also a felt need to historicise it, to gain venerability.¹²⁵⁸ Although lawyers’ narrativization serves partly to congeal ICL’s fluidity, it has resulted in different views on the related questions of the meaning of ‘international criminal law’, what constitutes an ‘international crime’, and

¹²⁵⁶ Pashukanis (1978) 178.

¹²⁵⁷ Boas (2010) 501: Boas notes (fn.1) “It must be recalled that international criminal law, at least in its modern manifestation is merely 15 years in existence.”

¹²⁵⁸ Marks (2000) 19-20.

subsequently what ICL's (stated) purpose is (sections 2.1-2.4). A further, more recent debate is over who the actual or potential subjects (or objects) of ICL are – who is a potential 'international criminal': does this include the individual company director or officer or business person, the company as a collective, or, the company *per se* as a legal person? The narrativization is a point where one can observe lawyers' congealing work in action, where one can see structural dynamics and individual agency at work.

The breadth and shape of the field of ICL is said to range from the very narrow approach (one could perhaps call this an institutional approach) adopted by Cryer et al, to the strict doctrinal (positivist) approach adopted by Werle and others, and the cosmopolitan 'justice' approach of Cassese. These first three approaches I discuss here are variants of what Kreß in the MPEPIL calls ICL '*strictu sensu*';¹²⁵⁹ a fourth is the 'catholic' or 'omnibus' approach espoused by policy-oriented authors.¹²⁶⁰ In section 3 I show how each of these four approaches contributes to the overall making of ICL – by forming ICL's 'ideological backbone'. In Section 4 I propose an alternative, perspective that forms the basis of a preliminary critique of ICL to be built on in Parts B and C and the following Chapters.

2.1 *Against all atrocities: A distinction based on morality*

The school of thought on ICL with by far the strongest appeal, including outside of legal academia, is the "humanitarian" school of thought on ICL, of which the late Antonio Cassese was a major proponent.¹²⁶¹ With clear echoes of Jackson's Nuremberg orations, Cassese described the *telos* of international criminal law (in line with the ICC Statute Preamble) "protecting society against the *most harmful transgressions* of legal standards of behaviour perpetrated by *individuals*."¹²⁶² In this perspective, international crimes are something qualitatively different from 'ordinary' crimes, and should have their own, exclusive 'area' of law. Calling ICL a *new* branch of international law, he explicitly excludes crimes such as piracy, as, in his view, the concept has not only become obsolete, but it "does not meet the requirements of *international crimes proper*."¹²⁶³ Piracy was not punished for the purpose of protecting a *community value*,

¹²⁵⁹ Kreß (2009).

¹²⁶⁰ Cryer (2005) 1; Ratner (2009) 12.

¹²⁶¹ Besides Cassese, followers of this approach include, e.g. Ferencz, See, e.g. Ferencz (1979).

¹²⁶² Cassese (2008) 20 (emphasis added).

¹²⁶³ Cassese (2008) 12.

and not thought so *abhorrent* as to amount to an international crime. Cassese further stated: “the notion of international crimes does not include illicit traffic in narcotic drugs and psychotropic substances, the unlawful arms trade, smuggling of nuclear and other potentially deadly materials, or money laundering, slave trade or traffic in women.”¹²⁶⁴ This is because these are normally perpetrated by private individuals or criminal organisations, “states usually fight against them, often by joint action. ...as a rule these offences are committed against states.”¹²⁶⁵ Apartheid is also excluded as according to Cassese it has not yet reached the status of a CIL crime.¹²⁶⁶ Cassese restricts ICL to offences occurring predominantly in the ‘public sphere’, and perpetrated mostly by public actors for political motives.¹²⁶⁷ He includes as international crimes, war crimes, crimes against humanity, genocide, torture, aggression and terrorism, which shows that even among the authors who limit their understanding of ICL to ‘core crimes’, crimes *strictu sensu* (see below, s.3.3) or ‘international crimes proper’, there is disagreement over what those are.¹²⁶⁸

2.2 *Optimists and Skeptics: A distinction based on enforcement mechanisms*

The next most prominent perspective is one that builds on the historical manifestations of (attempts at) ICL enforcement. It anchors ICL’s foundational narrative in international legal (in the ‘law in action’ sense) and legal institutional development. Cryer et al. in *An Introduction to International Criminal Law* (the “first authoritative”¹²⁶⁹ and now “market-leading”¹²⁷⁰ textbook on the subject) define ICL as the law of the crimes over which International Courts and Tribunals have been granted jurisdiction in general international law.¹²⁷¹ This covers what are also called “core crimes”, namely genocide, war crimes, crimes against humanity and the crime of aggression. Those that delineate ICL in relation to international enforcement mechanisms (but also other *strictu sensu* proponents), normally commence any

¹²⁶⁴ Cassese (2008) 13.

¹²⁶⁵ Cassese (2008) 13.

¹²⁶⁶ Cassese (2008) 13.

¹²⁶⁷ Cassese (2003) 1. Cassese in his second, 2008 edition, omits the first chapter of the 2003 edition, which was entitled “The Reaction of the International Community to Atrocities” and appraised non-judicial responses to atrocities, such as UN Security Council sanctions, countermeasures, revenge (in the biblical sense) and *forgetting*. Examples of what Cassese meant by atrocities were, the violence and bloodshed caused by the growing disparity between rich and poor, increasing poverty and hopelessness, nationalism religious fundamentalism, etc.

¹²⁶⁸ Cassese (2008) 3.

¹²⁶⁹ O’Keefe (2009) 485.

¹²⁷⁰ Cryer (2010) (second edition, back cover).

¹²⁷¹ Cryer (2007) 2; Cryer (2010) 4.

discussion of substantive ICL with a historical progress narrative which traces ICL's origin to the Allies' attempts at prosecuting the German Kaiser Wilhelm II, and ends at the present day ICC.¹²⁷² In effect, the narrative that was suggested by the lawyers at Nuremberg as a putative justification for the IMT trial, is here taken and naturalised. This narrative would list certain key moments in the development of the ICL enforcement regime, starting just before *Versailles*. Following World War I, seemingly unwilling to allow the Kaiser's self-imposed exile in The Netherlands to secure his immunity from prosecution for the heinous acts committed in Germany, the victorious Allies created a commission to look into the question of responsibility of the 'authors of the war'. The Commission reported to the 1919 Preliminary Peace Conference, that the Central Powers (the losing side in WWI) had committed numerous acts in violation of established laws and customs of war and the elementary laws of humanity.¹²⁷³ This led to the inclusion in the 1919 Treaty of Versailles of three clauses in which the states party ordered the prosecution of the Kaiser (and almost 900 others¹²⁷⁴) by an international tribunal.¹²⁷⁵ The *Versailles* Treaty marks the first time the concept of individual criminal responsibility was explicitly mentioned in an international treaty.¹²⁷⁶ Thus, in this narrative, the ICL notions of war crimes and an emerging concept of crimes against the laws of humanity had been introduced at this point.¹²⁷⁷ Histories of this kind then narrate the very tentative 1920 proposals for an ICC,¹²⁷⁸ and following this the concrete proposal (which was supported by only thirteen member states¹²⁷⁹) by the League of Nations following the assassination of King Alexander of Yugoslavia in 1934.¹²⁸⁰ Eventually, the determination of the World War II Allies led to the conclusion in 1945 of the "London Agreement" with annexed the Nuremberg Charter (the "birth certificate of ICL"¹²⁸¹) and the establishment of the two IMTs at Nuremberg and Tokyo. While the Allied post WWII trials are thus construed as laying

¹²⁷² See e.g. Cassese (2008) 30-1, Werle (2007) 1-30. Cryer (2005) 9-72 (Cryer starts in antiquity); Bassiouni and Schabas, list earlier examples including Peter von Hagenbach's 1474 trial in Germany (Bassiouni (1974) 414; Schabas (2007) 1). Ratner (2009), gives a "History of individual accountability" 3-9.

¹²⁷³ *WWI Commission Report*. The Report names 32 charges, including 'systematic terrorism' and the 'abduction of women and girls for the purpose of enforced prostitution', adding that the list is not exhaustive, pp 114-5.

¹²⁷⁴ Werle (2007) 8.

¹²⁷⁵ *Versailles Treaty*, excerpt in *Appendix D*; Schabas (2007) 2.

¹²⁷⁶ Werle (2007) 13.

¹²⁷⁷ No individuals were in fact prosecuted under these provisions, although some were tried by domestic German tribunals in the 'Leipzig Trials', Schabas (2007) 4, Werle (2007) 8; Ratner (2009) 6).

¹²⁷⁸ Phillimore (1922-3); *Draft Statute 1927*.

¹²⁷⁹ Werle (2009) 18.

¹²⁸⁰ *ICC Convention 1937*.

¹²⁸¹ Werle (2007) 14.

the foundation for contemporary *global* ICL, its further development was taken over by the UN system, also established in 1945. The United Nations General Assembly (“UNGA”) tasked its International Law Commission (“ILC”) in 1947 to draft a ‘Code of Offenses Against the Peace and Security of Mankind’ based on the IMT Charter principles and judgment.¹²⁸² After formulating the Nuremberg Principles in 1950¹²⁸³ and a draft code in 1954,¹²⁸⁴ the ILC suspended its work until 1983 because of the Cold War impasse.¹²⁸⁵

Such histories invariably show the development of international criminal law gaining momentum after the end of the Cold War with the establishment of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”). These momentous events were followed by the completion in 1996 a new Draft Code,¹²⁸⁶ which then formed a basis for the negotiations over the International Criminal Court (“ICC”) Statute. Thus, the history of ICL *culminates* in the establishment of the ICC.¹²⁸⁷ In this narrative, the ICC Statute forms the embodiment (if imperfect) of a maturing system of ICL.¹²⁸⁸ It is therefore perhaps more accurate to describe this narrative as one of the enforcement (possibilities) of ICL on the international level, rather than one of ICL in general. Strikingly, all cast their histories back *before* Nuremberg, not accepting that as its originating moment, loosening themselves from its flaws.

2.3 *German positivists: A distinction based on doctrine*

The third perspective is *internal to law*, the ‘legal scientist’s perspective’ – the lawyer whose task it is to explain law and ‘legal happenings’ resulting from legal processes, as part of, and in terms of, a coherent, autonomous system of law. This perspective is dominant in German-speaking legal academia,¹²⁸⁹ where *Völkerstrafrecht* (equivalent terms exist in Portuguese, Spanish, French and Italian but not in English - Kreß

¹²⁸² UNGARes. 177. See *ICL Nuremberg Principles Commentary*. See also, Ratner (2009) 8.

¹²⁸³ *Nuremberg Principles*.

¹²⁸⁴ *Draft Code 1954*.

¹²⁸⁵ Ratner (2009) 8.

¹²⁸⁶ *Draft Code 1996*.

¹²⁸⁷ See Schabas (2007) 1-21; De Than and Shorts (2003) 271-341; Schwarzenberger (1950) 263; Ambos (2002) (uses the term “gipfelt” which translates as “culminates”).

¹²⁸⁸ Werle (2007) V. See also, Sliedregt (2003) 3; Werle (2009) 4, 18; Ambos (2002) (in the title of his book).

¹²⁸⁹ Werle (2007) fn153.

diplomatically suggests ‘international criminal law *strictu sensu*’¹²⁹⁰) is defined as “all norms of PIL, that directly create, exclude, or in another way regulate criminal liability”.¹²⁹¹ In their perspective, *Völkerstrafrecht* must be distinguished from *Internationales Strafrecht*.¹²⁹² In the French literature the same distinction is made between *droit international pénal*, on the one hand, and *droit pénal international*, on the other.¹²⁹³ Thus, the international crimes within this definition are what authors writing in English may call ‘core crimes’ (war crimes, crimes against humanity, genocide and aggression)¹²⁹⁴. The subtle difference in terms of the content of the enforcement narrative above, is that this includes CIL crimes that do not fall under the jurisdiction of the ICC or the international tribunals, such as certain specific crimes in internal armed conflicts,¹²⁹⁵ and single occurrences of war crimes and crimes against humanity and the CIL norms on crimes in civil war (some of) which are included in the jurisdiction of the ICTR and ICTY. The core crimes covered in *Völkerstrafrecht* are *as a category* included in the ICC jurisdiction and defined there, however, *Völkerstrafrecht* generally includes custom and other sources, where these crimes are also regulated.¹²⁹⁶ Implicitly, Art 22 (3) of the *ICC Statute* itself evidences that there exist other IL crimes than those listed in the Statute.¹²⁹⁷ The bigger difference is the motivation for the difference, in that the ‘German’ approach includes as *Völkerrechtsverbrechen* all those crimes the substantive content of which is found in IL, regardless of where (or even whether) these crimes may be prosecuted. It is thus a distinction that finds its source in doctrine *per se*. The substantive content of the *Völkerrechtsverbrechen* should be found *directly* in IL itself. Whether a domestic constitution does or does not permit the direct application of the international norm containing the crime in domestic law does not affect the validity of the norm in IL.¹²⁹⁸ Crimes such as torture (in the CAT sense)¹²⁹⁹ or certain crimes against air traffic are

¹²⁹⁰ See also Kreß (2009); Vitzthum (2010) 19.

¹²⁹¹ Werle (2007) 34, fn153.

¹²⁹² Werle (2007) 35.

¹²⁹³ The distinction on the same basis also exists in the Portuguese, Italian and Spanish legal tradition (Cassese 2003 15). See also Hollán (2000), Schwarzenberger (1950).

¹²⁹⁴ Cryer (2010) 4.

¹²⁹⁵ Werle (2007) 942.

¹²⁹⁶ E.g. Ferdinandusse (2006) 11.

¹²⁹⁷ *ICC Statute* Art. 22 (3): “This article shall not affect the characterisation of any conduct as criminal under international law independently of this Statute.”

¹²⁹⁸ Werle (2007) 111.

¹²⁹⁹ For the view these and other crimes attracting universal jurisdiction should be counted as ‘*Völkerrechtsverbrechen*’ see also, Dahm (2002) 999.

thus not ICL *strictu sensu*, but “international criminal law in the meaning of internationally prescribed/authorised municipal criminal law.”¹³⁰⁰

In the German understanding, when *Völkerrechtsverbrechen* occur in the context of a systematic or massive attack or use of force, for which a collective, normally a state is responsible, the collective deed is the sum of all individual deeds.¹³⁰¹ *Völkerstrafrecht* forms part of a gapless system of IL, and borders the law on state responsibility. *Völkerstrafrecht* forms part of *Internationales Strafrecht* (lit. international criminal law), which includes all areas of criminal law that have international aspects.¹³⁰² This encompasses supranational criminal law (criminal law made by supranational organisations, which thus far does not exist), the law on the international cooperation in matters of criminal law (which includes e.g. extradition treaties), and national choice of law and jurisdiction norms.¹³⁰³

A key aspect of the German approach is the *Individualisierung* of responsibility provided by ICL: “The individual allocation shows that international crimes are committed not by abstract entities such as states, but always require the cooperation of individuals. This individualization is important for the victims and their families because they have a right to the whole truth. The individualization of the perpetrators are an opportunity to process their personal stake in the system crimes. Finally, it is important for society, because it rejects a theory of collective guilt.”¹³⁰⁴

2.4 *No distinction: The catch-all ‘omnibus’ approach*

Alternative narratives of ICL compared to the ones discussed above *do* start their account of its origins with the international norms applicable to piracy.¹³⁰⁵ According to these, since the time of the Phoenicians and the Vikings piracy has been condemned as a crime against the law of nations.¹³⁰⁶ In this view, the activities of pirates, committing acts on the open seas that under most national jurisdictions would amount

¹³⁰⁰ Schwarzenberger (1950) 266; and Werle (2007) 111.

¹³⁰¹ Werle (2007) 40.

¹³⁰² Werle (2007) 52.

¹³⁰³ In Werle’s view, the source of the universal jurisdiction principle for *Völkerrechtsverbrechen* is domestic law (Werle (2007) 54).

¹³⁰⁴ Werle (2007) at 43.

¹³⁰⁵ Bantekas (2007) 1.

¹³⁰⁶ Ferencz (1995) 1123.

to crimes, led to the development and application of international rules.¹³⁰⁷ These histories also include early regulation of the slave trade, the opium trade, and other phenomena, *in addition to* the events and developments described above.¹³⁰⁸ In this narrative, slave trade and piracy were both crimes in CIL before treaties were adopted which included crimes with a similar content.¹³⁰⁹ Neither offences had (or have) specific international enforcement mechanisms attached to them,¹³¹⁰ but “every state may seize a pirate ship ... and arrest the persons and seize the property on board” according to treaty law the capturing state, and according to CIL, applying universal jurisdiction, *any* State may prosecute the pirate.¹³¹¹ The prohibitions, violations of which amount to crimes in this approach constitute *erga omnes* obligations, meaning that every state in the world has an interest in their observance. As the enforcement of the norms on piracy occurred only in national courts, ‘*strictu sensu*’ authors argue that the CIL rule on piracy is merely jurisdictional.¹³¹² Counter to this stands the ‘omnibus’ view that the crime of piracy is defined in IL (both the content of the crime and the fact that it is a crime), regardless where that norm may be enforceable. Crimes like piracy are thus considered ‘international crimes’ in this perspective regardless of enforcement, or even whether it is explicitly designated as a ‘crime’ or indeed an ‘international crime’ in international law.¹³¹³ Whether the ICL norm can be directly applied in a domestic court or needs the intermediation of a piece of domestic legislation does not detract from the ‘international’ nature of the crime.¹³¹⁴ This approach is the least dogmatic, most pragmatic, problem-solving oriented approach.

This approach is best able to deal with a ‘messy’ reality, for example one where IL instruments do not always clearly specify whether a crime in question is an ‘*international crime*’.¹³¹⁵ Nor do all instruments specify if a crime is subject to international jurisdiction, to universal jurisdiction in national¹³¹⁶ or international fora, or whether the treaty only obligates or authorises states to criminalise a certain event in

¹³⁰⁷ E.g. *ATCA in the US* (see further below Ch.6). See also, eg *In re Piracy*.

¹³⁰⁸ Ferencz (1995) 1126; Cryer (2005) 57; Schabas (2007) 10.

¹³⁰⁹ According to Ferencz ((1995) 1123), since the time of the Phoenicians and the Vikings piracy has been condemned as a crime against the law of nations. Art. 15 *High Seas Convention*; Art. 101, *UNCLOS*.

¹³¹⁰ *In re Piracy*.

¹³¹¹ For a discussion of contemporary forms of piracy, see Guilfoyle (2008).

¹³¹² Cassese (2008) 28.

¹³¹³ Bantekas & Nash (2007) 6.

¹³¹⁴ Bantekas & Nash (2007) 6.

¹³¹⁵ E.g. Art. 1 *Genocide Convention*.

¹³¹⁶ E.g. Art. 105 *UNCLOS*.

domestic law¹³¹⁷ and/or to prosecute or extradite a suspect.¹³¹⁸ In the omnibus approach, this situation is dealt with on a case-by-case basis, with authors coming to occasionally different conclusions.¹³¹⁹ Generally the crimes that Werle would designate as ‘international crimes’ are included.

Because this is the approach potentially most receptive to ‘business crimes’, it is worth giving some examples, in particular as they relate to legal persons. Certain international instruments, such as the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*¹³²⁰ and the *United Nations Convention against Transnational Organized Crime*¹³²¹ require states to criminalise the behaviour of legal persons *if this is congruent with national legal principles*. Another category exemplified by conventions such as the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste*, seems to encompass the criminalisation of behaviour in international law, while leaving it to states to choose the *object* of domestic law criminalisation.¹³²²

The majority of these instruments require national authorities to legislate so as to give effect to the terms of the treaty – it leaves it to states to decide whether to legislate for the possible imposition of “corporate crime” sanctions or administrative sanctions or measures on corporations, or indeed criminal sanctions on individual company officials (the principle of ‘functional equivalence’).¹³²³ However, the introduction of the concepts into treaty law (despite possibly limited ratifications, or the regional nature) when there is no consensus yet on corporate crime in domestic jurisdictions, normalises, and perhaps stimulates the development of a concept of corporate crime in international law.¹³²⁴

3 These approaches as the ideological building blocks of ICL

¹³¹⁷ E.g. Arts. 5, 6, 8 *Organized Crime Convention*.

¹³¹⁸ E.g. Art. 4 *Convention Against Torture*

¹³¹⁹ Cf. lists of crimes considered ICL crimes in Van den Wijngaert (1996) and Steiner (2007) 1136.

¹³²⁰ *Bribery Convention*, excerpt in *Appendix D*.

¹³²¹ *Transnational Crime Convention*, excerpt in *Appendix D*.

¹³²² *Basel Convention*, excerpt in *Appendix D*.

¹³²³ Bantekas & Nash (2007) 49.

¹³²⁴ Ratner (2009) 17; Bantekas and Nash (2007) 47-49; *Humboldt Symposium*.

Each of the four approaches described above contributes one of the vital elements supporting the construction of ICL. First, Cassese's approach provides the ideological justification, almost the emotional *need*, for intervention in 'foreign' jurisdiction 'for the protection of higher values'.¹³²⁵ This at once *universalises* ICL, serves us, our community interest and represents us, our collectively held values.¹³²⁶ What those values are and how we may discover them Cassese does not further explain. He states, "[t]he values at issue are not propounded by scholars or thought up by starry-eyed philosophers. Rather, they are laid down in a string of international instruments, which, however, do not necessarily spell them out in so many words."¹³²⁷ Broad aspirational statements of 'values' are regularly found in preambles to treaties. Triffterer comments, that those declarations found in the Preamble to the ICC Statute "echo, in the arena of international affairs, the loftiest aspirations of an ever advancing society".¹³²⁸ They must thus be self-evident to us. Ferdinandusse has warned, that "a certain scepticism is in order" when such normative appeals are used to ground particular effects under which we might include what is/is not an 'international crime'.¹³²⁹ Ferdinandusse rightly recognises such normative claims "as techniques in a hegemonic struggle for greater control between different actors in international law".¹³³⁰ Additionally, the 'civilising mission' of law is clearly present in Triffterer's comment.¹³³¹

Within the narrative focused on the enforcement mechanisms and possibilities of ICL, two strands can be detected: those that consider the Court half full and those that consider it half empty. This rational narrative provides us with a history of how ICL was built up brick by brick, how this logical development culminated in an overarching ICC. It privileges concerns about effectiveness and how to improve ICL institutions, e.g. so as to avoid 'selectivity'.¹³³² This approach also supports global institution building in the global governance sense generally (Ch. 2B S.4). The implication is that all ICL's teething problems will be resolved when we have strong international institutions that apply the rules equally to all. The latter is also a concern

¹³²⁵ Cassese (2008) 11. Emphasis in original.

¹³²⁶ See also, Mégret (2010) 210.

¹³²⁷ Cassese (2008) 11.

¹³²⁸ Bergsmo (2008) 6.

¹³²⁹ Ferdinandusse (2006) 157.

¹³³⁰ Ferdinandusse (2006) 158.

¹³³¹ On this notion, see Koskenniemi (2003) 108-110 and more generally Koskenniemi (2002).

¹³³² *HRW: Courting History; ICC website: Situations and Cases*. For a discussion, see Cryer (2005), esp. Ch.5; Heller (2009).

for the ‘German positivists’. Both, however, assume that it is a structural possibility for this to become reality: these approaches therefore enable a ‘progressive’ debate and real activity on improving and expanding ICL’s institutions.¹³³³ Curiously, at the same time, it also allows for the argument *not* to expand ICL enforcement: we must not grow too fast. Crawford has suggested that the current limitation of the ICC’s jurisdiction is quite simply motivated by the risk of the court being “swamped” otherwise. This is a common, but peculiar argument, as the ‘size’ of the court merely depends on the funding governments make available. An analogous argument on the domestic level is unthinkable.

The ‘German’ variant seems to approach law from a purely analytical, scientific (Kelsenian positivist) perspective.¹³³⁴ It thus appears to be technical, value neutral. The differences and distinctions are purely ‘botanical’ and of limited value other than from the academic perspective of studying law as a system. For example, Kreß’ remark that the ICC Statute contains (and perhaps even creates) crimes that are not in fact ‘international crimes’ is likely to find resonance with only the smallest circle of academic specialists.¹³³⁵ Yet, precisely such debates serve to give ICL *doctrinal credibility*. Moreover, lost in doctrinal detail, it guarantees bigger (political) questions will not be asked. Most importantly, it sets the ‘legal scientist’ apart from the politician and thus denies lawyers’ role in, amongst others, congealing capitalism.

Proponents of the ‘omnibus approach’ tend to be more practice-oriented than most other academic lawyers. Bantekas & Nash conceptualise ICL as a ‘fusion of IL and domestic criminal law’ and include in their textbook on ICL discussion of IOs’ and NGOs’ progressive efforts on the eradication of issues such as human trafficking.¹³³⁶ Grant and Barker’s *Deskbook of International Criminal Law* (a documents bundle, aimed at the ICL practitioner) contains conventions ranging from the 1926 Slavery Convention to the European Convention on Cybercrime.¹³³⁷ Dugard and van den Wijngaert see ICL as a means for states to help each other in the application of their respective domestic criminal laws, necessitated by the internationalisation of crime – and thus come closest to interpreting ICL in the practical sense permitted in

¹³³³ Crawford (2003) 122.

¹³³⁴ See generally, Kelsen (2008).

¹³³⁵ Kreß (2009) in MPEPIL.

¹³³⁶ Bantekas & Nash, 2007, 1. For the converse view, see, Jescheck (1995) 1120.

¹³³⁷ Grant (2006).

Schwarzenberger's critique.¹³³⁸ Ramasastry expresses no view on the doctrinal nature of ICL, but asks only "what it can do for us".¹³³⁹

Viewing these approaches as key 'ingredients' of today's ICL, we can see that ICL is a mixture (in varying quantities) of emotions, rationality, pragmatics and 'legal soundness' – altogether, what I will show (here and in Ch. 6) to be an irresistible package to lawyers, policy makers and the general public. The pragmatic element gives it flexibility, for example to develop new rules/policies in the 'war on terror' context, the positivist foundational narrative gives it 'academic kudos' while the enforcement focus supports efforts to strengthen institutions. Moreover, as ICL symbolises 'justice' in IL,¹³⁴⁰ it has become something to believe in: it "carries a religious exercise of hope that is stronger than the desire to face everyday life."¹³⁴¹ Its crimes have become reasons to invade other countries.¹³⁴² *This* is why ICL is in fashion. It is something to propose as a remedy to a perceived problem (such as 'business in conflict'), and, something to rally around, to continually work to improve. Most of all, ICL communicates to us, reassuringly, its *exceptionality* (e.g. Cassese's effort to exclude certain 'less grave' crimes), while also confirming to us, *these, these select international crimes, are the ills of international society*. All other problems pale in comparison or even disappear altogether.¹³⁴³

In Parts B and C I investigate how business(wo)men and corporations do, or do not, fit into this narrative, and in Ch. 6 I show how various factions are challenging the notion that these are really the *only* ills in international society.

4 An alternative foundational narrative for ICL

We cannot *directly* attach to ICL the explanation for domestic criminal law commonly proposed by Marxist theorists, namely that it serves to maintain its class rule and suppress the lower classes – as "organised class terror".¹³⁴⁴ ICL crimes are mostly

¹³³⁸ Van den Wijngaert (1996) 1.

¹³³⁹ Ramasastry (2002).

¹³⁴⁰ Mégret (2010) 210, 220, 224, also Tallgren (2002a) 580.

¹³⁴¹ Tallgren (2002a) 593.

¹³⁴² In the next section and in Chs. 5 and 6 I argue that there are other reasons beyond this, or that these crimes are mainly used as a public justification.

¹³⁴³ See Ireland, who speaks of the "mysterious disappearance of capitalism" (2002).

¹³⁴⁴ Tallgren (2002a) 575; Pashukanis (1978) 173.

‘leadership crimes’ and those tried in ICL courts have been mostly members of elites. Yet, according to Pashukanis, “[e]very historically given system of penal policy bears the imprint of the class interests of that class which instigated it.”¹³⁴⁵ “Society as a whole” in whose name ICL is created, does not exist.¹³⁴⁶ What then are the GCC’s interests in ICL? In Ch.2 I showed how a ‘public’ domain was shaped, a separate sphere in which new, humanitarian, areas of law (such as the laws of war, human rights and also ICL) could develop, to apply only in a limited ‘public’ sphere. This humanitarian side serves to legitimise the IL enterprise as a whole. Currently, however, the contradiction in the artificial public/private divide is making it (more) permeable, hence the consideration now also of the corporate person in ICL (4C). Pashukanis analysed the particular element that makes ICL so attractive, and seem so necessary, and as something we cannot do without. Applying the commodity form theory to criminal law on the domestic level, he notes “this [criminal] procedure contains particular features which are not fully dealt with by clear and simple considerations of social purpose, but represent an irrational, mystified, absurd element. We wish ...to demonstrate that it is precisely this which is the specifically legal element.”¹³⁴⁷ The practical social purpose he refers to is the compensation of victims (which is often absent in CL in any case), the protection of society (which could be achieved better in other ways) or the treatment and rehabilitation of the offender (which is likewise not normally a priority).¹³⁴⁸ The value in CL according to Pashukanis lies in its “morality” – which is present both in its demonstrative function and in the ‘compulsory atonement’ it demands of the convicted criminal.¹³⁴⁹ Criminal law functions as the ‘remoralisation’ of society post-cash nexus (Ch. 2A, and analogous to the ‘humanitarian makeover’ of IL in Ch.2B S.5). Once law has replaced human relationships with legal relationships, law is – or, law-makers are – there to inform us what is right. “Law creates right by creating crime”.¹³⁵⁰ This commodified morality¹³⁵¹ tells us when to feel revulsion, or when to forgive, it is ‘canned morality’. It can be fostered and instrumentalised – and develop on its own according to the logic of the market.¹³⁵²

¹³⁴⁵ Pashukanis (1978) 174.

¹³⁴⁶ Pashukanis (1978) 174.

¹³⁴⁷ Pashukanis (1978) 177.

¹³⁴⁸ Pashukanis (1978) 176-8.

¹³⁴⁹ Pashukanis (1978) 185, 187.

¹³⁵⁰ Pashukanis (1978) 167.

¹³⁵¹ Or what Shamir calls ‘market-embedded morality’, Shamir (2008); see also Baars (2011).

¹³⁵² In Ch. 6 I elaborate on this latter aspect further in S. 4.4 on the ‘market for responsibility.’

Such artifice (fetishisation) was also hinted at by Schwarzenberger. Writing in 1950, Schwarzenberger identified six different usages of the term ICL, and concluded none of them were correct – indeed in his view there was no such thing as an international criminal law at all.¹³⁵³ According to Schwarzenberger, most of what others called ‘ICL’ was in fact internationally prescribed or authorised municipal criminal law.¹³⁵⁴ He further queried the need for an ‘international’ criminal law *per se*. This he illustrates by discussing the then newly created Genocide Convention, and quoting Hartley Shawcross, “murder remains murder whether committed against one or a million.”¹³⁵⁵ Schwarzenberger adds, “in either case a criminal can only be hanged once.”¹³⁵⁶ Practically speaking, the crimes covered by ICL are covered by domestic law in most cases, and a horizontal extension of jurisdiction, plus international cooperation on extradition, evidence gathering, etc. could be used to cover crimes committed by citizens abroad.¹³⁵⁷ Schwarzenberger’s critique metaphorically pulls the rug from under the preceding justifications of ICL. If ICL, new ICL norms and institutions, are not in fact needed to try ‘murderers’ and ‘torturers’ then why do we call for it? Designating certain behaviour as an *international crime* to be tried in an *international forum* implies another motivation and purpose than pure practical necessity. What ICL allows for, and what cannot be ‘done’ in any way fitting law’s configuration as it stands, is to intervene in other states to criminalise through supranational law acts that are not criminal in the relevant domestic law, and to allow for their prosecution externally (or post-regime). In other words, by ‘lifting’ certain behaviour, events and individuals (‘vertically’¹³⁵⁸) into international law, ICL creates the option of *centralising* the regulation and administration of this regime according to the interests of the GCC directly, as per the example of ‘international investment arbitration’ in Ch. 2B. When stripped of the practical justifications, what remains is the purely ideological element of ICL, namely the way that ICL designates certain behaviour as ‘*international crimes which form an attack on the fundamental values of the international community*’.¹³⁵⁹ This ideological element has very real practical uses: one is, (through ICL

¹³⁵³ Schwarzenberger (1950).

¹³⁵⁴ Schwarzenberger (1950) 266-274.

¹³⁵⁵ Schwarzenberger (1950) 292. Hartley Shawcross was the head of the British prosecution team Nuremberg.

¹³⁵⁶ Schwarzenberger (1950) 292.

¹³⁵⁷ Schwarzenberger considers the trials Nuremberg to have been domestic trials conducted by the Allies in their role as the substitute sovereign over occupied Germany (Schwarzenberger (1950) 289-290).

¹³⁵⁸ See also generally, Mégret (2010).

¹³⁵⁹ This idea is expressed in the Preamble to the *ICC Statute*.

prosecutions) to create specific explanations of conflicts that exempt/exonerate the economic/capitalism. Another is to form the diversion or Trojan Horse for the intervention in states that goes much further than ICL.¹³⁶⁰ Both we have seen in Nuremberg and Tokyo, and I discuss them also in the contemporary context in Ch.5.

Schwarzenberger's reservations regarding the need for an ICL still stand today. Yet, the existential question is now no longer posed.¹³⁶¹ ICL continues to be constructed, and 'believed in',¹³⁶² on various grounds. Ultimately the designation 'more harmful' used by Cassese appears to be Cassese's own, to reflect his moral indignation. Yet, aside from the harm caused, Cassese also seems to imply that the emotive reaction to his "international crimes proper" ("so abhorrent as to offend the international community as a whole"¹³⁶³) is universally felt and absent (or less) in the case of other crimes, or, for example, in the face of mass starvation, or, say, tens of thousands of children dying preventable deaths each day.¹³⁶⁴

Carl Schmitt once said, "[w]hoever invokes humanity wants to cheat."¹³⁶⁵ The humanitarian narrative was reconstructed, re-invented, re-emphasised after Nuremberg (and Tokyo). A critique of the 'humanitarian' narrative of ICL may be made analogously to Marks' critique of the concept of "Humanitarian Intervention".¹³⁶⁶ Presenting ICL as a necessity for the benefit of humanity, against atrocities, works as a rhetorical move, the function of which is to justify inaction of the political field vis-à-vis situations of injustice and suffering, and to ignore the root causes.¹³⁶⁷ The contradiction is visible in Ambos: "the worldwide impunity for grave human rights violations leads to a factual accountability gap, the closure, or at least the narrowing, of which ICL has made as its highest priority task." Tellingly, the author adds in a footnote: "[i]t concerns a *factual*, not a *normative* accountability gap, because the impunity can be traced back not to a lack of norms on international crimes, but on a

¹³⁶⁰ The *Genocide Convention* appears "based on the assumption of virtuous governments and criminal individuals, a reversion of the truth in proportion to the degree of totalitarianism and nationalism practised in any country", Schwarzenberger (1950) 292.

¹³⁶¹ Cryer (2005) 2.

¹³⁶² Tallgren (2002a) 593. On IL generally as secular religion, generally, Koskeniemi (2007).

¹³⁶³ As per *ICC Statute* Preamble.

¹³⁶⁴ Beckett (2012); <http://www.unicefusa.org/>.

¹³⁶⁵ Schmitt (1996) 54 – quoted by Koskeniemi (2003) 97.

¹³⁶⁶ Marks (2006).

¹³⁶⁷ Marks (2006) 344; Marks (2011).

lack of States' political will to prosecute."¹³⁶⁸ Why, one might ask, would state leaders create a body of norms to do something, that they do not in fact want to do? It only makes sense, if (a) that body of law is not, in fact, designed to do this thing, or (b) it is so designed, but only in relation to specific others, or exceptional, acceptable situations, or, (c) if it is done in response to a felt need (or public call) to be 'doing something' and the creation of these norms alone, with the promise of enforcement satisfies this need. ICL gives us faith that 'something is being done'. Akahvan also posits, "In contrast to the prevention of ongoing atrocities through military intervention or peacekeeping, and substantial postconflict economic assistance and social rehabilitation, resort to international tribunals incurs a rather modest financial and political cost. However, the attractive spectacle of courtroom drama, which pits darkness against the forces of light and reduces the world to a manageable narrative, could lead international criminal justice to become an exercise in moral self-affirmation and a substitute for genuine commitment and resolve."¹³⁶⁹ Or, indeed, a cloak for the systemic root causes¹³⁷⁰ of 'crimes', which may be endemic to the current mode of production.

In his monograph, Cryer lays the cause of selectivity at the dependence of courts on financiers and expects this situation to change with time. Already, he states, "the court represents a quantum leap beyond what went before."¹³⁷¹ What Cryer and others overlook is the fact that this impunity gap itself is also created through ICL. The makers of ICL create its inclusions as well as its exclusions – planned impunity - including by deciding the budget of the ICC and other institutions.

A popular demand for justice *for certain types of cases*, is manufactured,¹³⁷² based on criminal law's visceral appeal,¹³⁷³ and instrumentalised for economic goals, with Cassese's emotive discourse (like Jackson before him) providing the legitimising element. As Tallgren suggests, "[p]erhaps [ICL's] task is to naturalize, to exclude from the political battle, certain phenomena which are in fact the preconditions for the maintenance of the existing governance; by the North, by wealthy states, by wealthy

¹³⁶⁸ Ambos (2002) 39.

¹³⁶⁹ Ambos (2002) 30.

¹³⁷⁰ Marks (2010).

¹³⁷¹ Cryer (2005) 231.

¹³⁷² Generally, Chomsky (2002).

¹³⁷³ Tallgren (2002a) 591.

individuals, by strong states, by strong individuals, by men, especially white men, and so forth.”¹³⁷⁴

5 Conclusion

In this section I have outlined four broad representative approaches to international criminal law, each of which seek to define the field, respectively, along parameters given by policy, law/legal doctrine, and morality. Each of these forms a building block supporting the construction of ICL. Here we saw thought-leaders at work, as members of a class,¹³⁷⁵ of a college of experts, whose differences are ultimately only differences of degree – as I will show in the following chapters. The given purpose of ICL is now ostensibly considered limited to ‘humanitarian’.¹³⁷⁶

I pick up this critique of ICL again in Ch. 5. First, I must finish my analysis of the ‘direction of development’ which may, or may not, be heading towards the inclusion of the company as a legal person in ICL rules, if probably not in ICL practice.

¹³⁷⁴ Tallgren (2002a) 595.

¹³⁷⁵ Marx and Engels (1979) 116.

¹³⁷⁶ Which is also notable considering the first international cooperation on criminal law enforcement in the early 20thC (and compare also cooperation on combatting piracy) occurred in the area of opium and white slave trade – i.e. ‘private’ *for profit* activities and not ‘core crimes’ - Schwarzenberger (1970) 54-55.

Chapter 4B “No soul to damn and no body to kick”? Attribution, perpetration and mens rea in business

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1 Introduction to B

At Nuremberg and Tokyo, and in the other post-WWII trials, the allied lawyers and politicians worked out who they conceived of as ‘subjects’ of ICL (to whom they wanted ICL to apply) and what relation between person and act (and the victim) needed to exist (both in the factual and the ‘fault’ sense) before such a person could be considered guilty. After the revival of ICL post-Cold War these modalities were to some extent worked out afresh, partly because Nuremberg (and Tokyo) had been somewhat ‘rough and ready’ and was criticised on legal grounds,¹³⁷⁷ and partly because the ‘new ICL’ was being applied in specific new circumstances. The lawyers of the ICTY and ICTR (and those who had negotiated their statutes) developed more intricate modalities of ICL, performing the abstraction of real (or imagined) persons and relationships into legal categories and modes of responsibility: the further congealing of ICL. This congealing served to further *rationalise* criminal justice policy¹³⁷⁸: both in the sense of allowing the determination of the transactional value of each mode of responsibility,¹³⁷⁹ and, to make it seem “as if there are good reasons why things [here: ICL] are as they are”.¹³⁸⁰ As I argued in the previous chapter, academic lawyers played an important role, both indirectly by providing ICL, *post hoc*, with its foundational narrative (Part A) but also directly because of the overlap between practising and

¹³⁷⁷ Ch.4A S.1.

¹³⁷⁸ Pashukanis (1978) 178.

¹³⁷⁹ Pashukanis (1978) 179.

¹³⁸⁰ Marks (2000) 19.

academic lawyers in ICL. In particular, legal scholars (and to a lesser extent practitioners) are playing a role in deciding the legal person liability question (Part C).

The most remarkable change in ICL post-Cold War is in relation to business in conflict. Some of the scholars writing in this area claim (despite the Nuremberg cases) that ICL is *not clear* on the potential applicability to business in conflict,¹³⁸¹ argue that business involvement is somehow *different* from the involvement of other participants in a conflict,¹³⁸² and that there is a need for *new rules* for example in the form of a ‘Wirtschaftsvölkerstrafrecht’.¹³⁸³ The preceding views do not differentiate between individual or corporate liability, while Cryer et al. in 2007 *and* in 2010 describe ‘corporate liability’ as an area that “deserves more study”.¹³⁸⁴ I show in Sections 1.2-1.5, that several doctrines have been developed in ICL that could (in theory) very well be applied to business(wo)men as individuals and possibly even to legal persons. The discursive distantiation between business and criminal liability must have causes other than doctrinal, that I explore further in Chapter 4C, suggesting the perception of the *sui generis* nature of business actors fostered in IL in general (Chapter 2B) (which is based on the domestic creation of the concept of the corporation: Chapter 2A) is responsible for this ‘indecisiveness’ and eventually, the privileged treatment of business actors (I show this in Chapter 5).

1.1 “No soul to damn and no body to kick”¹³⁸⁵? Attribution, perpetration and *mens rea* in business

In the ICTY and ICTR jurisprudence, and lately also in the ICC, ICL is applied to individuals in who form part of state or military structures, which have role-delineations, functional hierarchies and power relations comparable in many ways to those in companies.¹³⁸⁶ In military and civil administrations, like in companies, some material facts of crimes may be outwardly innocuous or involve mainly desk-activity,

¹³⁸¹ See, e.g. Vest (2010).

¹³⁸² Note that the distinction between ‘armed groups’ and ‘corporations’ is another artificial categorisation of persons carrying out particular activities in some form of cooperation for particular purposes, using particular means, etc.

¹³⁸³ Jeßberger coins this term, literally meaning ‘ICL of the economy’ Jeßberger (2009).

¹³⁸⁴ Cryer (2007) 453; Cryer (2010) 587. In the latter the 2008 *JICJ Symposium* is referenced in the footnote, evidencing the perspective that it is the study performed by academic lawyers that create legal rules.

¹³⁸⁵ Coffee (1980-81) quoting Edward Thurlow 1731-1805.

¹³⁸⁶ See generally, Farrell (2010).

words alone or no activity (omissions), or, may involve acts by several individuals that together result in a crime. ICL has been applied to members of non-state groups in ways analogous to the prosecution of members of criminal gangs, and wide and amorphous organisations such as the mafia, transnational crime networks, or in instances of ‘mob violence’ on the domestic level.

In this section I seek to imagine the modes developed in ICL as mapped onto relations between individual business(wo)men and those affected by their activities (or omissions). If corporate liability is considered a possibility in ICL, corporations as legal persons could likewise be considered, e.g. as principal perpetrators, or part of a JCE, conceivably, together with military or government officials and/or with individuals ‘inside’ the corporation. The *mens rea* of a corporation could be conceived (or avoided) analogously to domestic law (Ch. 4C) through strict liability, vicarious liability, attribution through a ‘directing mind’ (an example of the identification doctrine) or through aggregation, and other doctrines developed in domestic law on corporate crime.¹³⁸⁷

Although Arts. 6 of the ICTR Statute, Art. 7 of the ICTY Statute, and Art. 6 of the SCSL Statute (which correspond in all material respects: see Appendix D) do not distinguish hierarchies of perpetration, in their decisions these tribunals have differentiated between perpetration as principal (commission as perpetrator, joint criminal enterprise) and accessory liability (planning, ordering, instigating, aiding and abetting).¹³⁸⁸ Farrell (who is currently the ICTY’s Deputy Prosecutor) has argued that co-perpetration/joint criminal enterprise and complicity/aiding & abetting are the two modes of liability most likely to be applicable to both individual business(wo)men and legal persons.¹³⁸⁹ Perpetration as a principal, however, is generally considered to form the gravest mode of criminal liability in ICL doctrine.¹³⁹⁰ This hierarchical differentiation carries some ideological weight and mystificatory potential (Ch. 4C). Here I discuss these modes together with command responsibility (S.1.4) and the putative doctrine of ‘perpetration through an organisation’ (S.1.5).

¹³⁸⁷ Simester (2010) 274-9; French (2009) 636-9.

¹³⁸⁸ Werle (2009) 168.

¹³⁸⁹ Farrell (2010) 873.

¹³⁹⁰ Werle (2009) 170.

1.2 Co-perpetration and Joint Criminal Enterprise

As a sophistication of the Nuremberg conspiracy idea, the ICTY and the SCSL have developed the concept of ‘joint criminal enterprise’ (“JCE”) to include both direct and indirect co-perpetration.¹³⁹¹ The difference between joint criminal enterprise and mere participation lies in the *mens rea* – joint perpetration/JCE requires a common plan, design or purpose’ which must be aimed at committing one or more crimes against international law¹³⁹², while other forms of joint perpetration may come in three categories ranging from the same *mens rea* as JCE, down to intention to participate in a group with the aim of committing *an* offence.¹³⁹³ Importantly for the business context (where crimes may result from what are seen as ‘neutral acts’¹³⁹⁴ or ‘business as usual’), an accused’s contribution to the JCE need not be criminal in itself.¹³⁹⁵ The JCE construct can be applied to situations where business leaders (managers, decision makers) work together to perpetrate crimes through organised structures of power. The hypothetical example Farrell gives is that of a corporation and a governmental authority cooperating in order to forcibly remove local people from an area where oil may be extracted.¹³⁹⁶ The provision of means by the company (e.g. trucks or weapons) may then constitute the ‘significant contribution’ required for the JCE. Further elements required (for e.g. war crimes or crimes against humanity) would depend on the context.

The ICC Statute’s Art. 25(3)(d) covers a ‘group of persons with a common purpose’ which broadly corresponds to the JCE construct – while in the early decisions the ICC has placed emphasis on control as mentioned above.¹³⁹⁷ In particular, joint perpetration involves the vicarious responsibility of all for the acts of others in the group (*Lubanga*¹³⁹⁸), while a slightly different form which was employed in *Al-Bashir*,¹³⁹⁹ co-perpetration, relies on joint control, meaning that each member of the group could frustrate the commission of the crime by withdrawing.¹⁴⁰⁰ Art. 25(3)(d) does not

¹³⁹¹ *Krasjnsnik Appeals Judgment; Sesay Appeals Judgment*; Werle (2009) 171-178; Cryer (2010) 363-374; Boas (2010) 510-519.

¹³⁹² *Tadić 1999 Appeal* 188.

¹³⁹³ *Tadić 1999 Appeal* 204, 228, see also Van der Wilt (2009) 158-9; Werle (2009) 174-5; Van Sliedregt (2003) 94-110.

¹³⁹⁴ See, e.g. Farrell (2010) 878.

¹³⁹⁵ *Krasjnsnik Appeals Judgment* 218.

¹³⁹⁶ Farrell (2010) 879.

¹³⁹⁷ See also, Manacorda (2011).

¹³⁹⁸ *Lubanga Charges Decision* 513.

¹³⁹⁹ *Al-Bashir Arrest Warrant*; and see generally on this point Jeßberger (2008) 853.

¹⁴⁰⁰ *Lubanga Charges Decision* 342; Cryer (2009) 364-5.

contain a requirement that the contribution be made with the intent to commit the crime, or for the purpose of assisting the crime, only intention towards the contribution, and knowledge of the crime is required. This would work to capture a corporate actor at some distance removed from events.¹⁴⁰¹ JCE is criticised, for example by Van der Wilt who argues that the doctrine, as (over)used by the tribunals enables the lax application of criminal law standards on individual involvement in order to ‘catch’ a maximum number of members of the group.¹⁴⁰² This critique approximates a ‘collective punishment’ critique (see further below, Ch. 4C).

1.3 ‘Complicity’, Aiding & Abetting

A key phrase in the business & human rights discourse is ‘corporate complicity’.¹⁴⁰³ (see below Part C) The popular phrase ‘corporate complicity’ evokes the idea that corporations (business(wo)men) may inadvertently get tangled up in others’ HR or IHL violations, but never are the principal perpetrators.¹⁴⁰⁴ As a mode of liability to capture business(wo)men and potentially legal persons, the main advantage of the complicity/aiding and abetting mode is that there is, in ICTY, ICTR and SCSL law, no need for the aider and abetter to share the intent of the principal perpetrator.¹⁴⁰⁵ As such, it covers the situation where the business(wo)man’s intent is *only* commercial (e.g. selling weapons that are then used in a genocide), as opposed to *ultimately* commercial in the forced displacement example above.

The standard developed by the ICTY and ICTR for accomplice liability has come to be seen as part of general international law.¹⁴⁰⁶ It has been identified by the ICTY as “providing practical assistance that has a substantial effect on the perpetration of the crime, with knowledge that these acts would substantially assist the commission of the offence.”¹⁴⁰⁷ The complicit corporate actor need not share the intent of the principal offender – the aider and abettor merely needs to know, or be aware, that her act assists

¹⁴⁰¹ Farrell (2010) 881.

¹⁴⁰² E.g. Van der Wilt (2009) 181. See also, Zahar (2008) 224-234.

¹⁴⁰³ E.g. Schabas (2001); Jacobson (2005); Clapham (2001); Tófaló (2006); *ICJurists Complicity Report Vol.2* (2008).

¹⁴⁰⁴ Clapham (2002).

¹⁴⁰⁵ Farrell (2010) 882.

¹⁴⁰⁶ This is accepted, for example, by the US courts in *ATCA* litigations, and by the Dutch courts, in the recent case *Van Anraat* (2005).

¹⁴⁰⁷ *Furundzija Judgment*.

in the commission of the crime.¹⁴⁰⁸ A person need not have consciously decided to act for the purpose of the assistance of a crime.¹⁴⁰⁹ As to causation, in *Kayishema* (ICTR) it was held that ‘substantial’ contribution suffices.¹⁴¹⁰ Further, the ICTY has included intangible assistance, for example moral support and encouragement. Relying on a survey of CIL on aiding and abetting, the ICTY also found that actual physical presence at the scene of the crime was not required. Authority and presence can constitute a form of assistance, particularly when a person with the authority to stop an act from occurring (e.g. by ordering subordinates to desist) fails to do so.¹⁴¹¹

Article 25(c) of the ICC Statute also includes accomplice liability for those who “otherwise assist in its commission, ... including providing the means for its commission.”¹⁴¹² In contrast to the ICTY and ICTR statutes and their interpretation in case law, the ICC Statute contains no requirement for the accomplice to make a direct or substantial contribution to the commission of crime.¹⁴¹³ On the other hand, the *mens rea* requirement includes “the purpose of facilitating the commission of such a crime”, which appears to be more specific than the rule of CIL employed by the tribunals. Farrell illustrates (by using the US *Talisman* Alien Tort Claims Act case (see below Chapter 5B) which adopts the ICC standard, the Dutch *van Anraat* case (id.) which adopts a Dutch law standard equivalent to the CIL/ICTY standard, and the ICTY *Blagojević and Jokić* decision) that the ICC regime, if it were to congeal into CIL, would be less useful for capturing corporate actors.¹⁴¹⁴ It remains to be seen how the ICC will interpret this in its own jurisprudence, and how member state domestic systems deal with this when complying with the requirement to bring their domestic laws in line with the ICC Statute.¹⁴¹⁵ The fact that international courts do look to domestic law as an informal persuasive authority¹⁴¹⁶ and the US is the place where IL is considered most regularly in ATCA cases, it may well be that the ICC/ATCA view persists. This, despite the fact that the *Talisman* court’s finding that the ICC standard is

¹⁴⁰⁸ *Krnojelac Judgment*.

¹⁴⁰⁹ *Mrksić Appeals Judgment* 159.

¹⁴¹⁰ *Kayishema Judgment* 199

¹⁴¹¹ *Furundzija Judgment* 249; on moral support see 232.

¹⁴¹² *ICC Statute*.

¹⁴¹³ Schabas suggests the absence of the word “substantially” in the *ICC Statute* may imply that the Diplomatic Conference meant to reject the higher threshold of the recent case law of The Hague. Schabas (2001) 448.

¹⁴¹⁴ Farrell (2010) 883-885.

¹⁴¹⁵ This may of course depend to some extent on the doctrines of accomplice liability already in use in these respective systems.

¹⁴¹⁶ For example, the ICJ in the *Arrest Warrant Case*.

the standard in general IL, rather than the ICTY standard which is part of CIL, is erroneous.¹⁴¹⁷

As to the CIL standard, the contribution of an aider and abettor need not be ‘direct’ but must be ‘substantial’, with the former being an evidentiary issue depending on the *mens rea*.¹⁴¹⁸ A substantial contribution may include moral support or be an accumulation of acts of support.¹⁴¹⁹ For example, this could include the company director’s acquiescence in military oppression of union leaders for the benefit of the company.

1.4 Command responsibility

The exact content of the construct of ‘command’ or ‘superior’ responsibility is in dispute.¹⁴²⁰ Some argue that it is a specific crime where a superior fails to comply with her own obligations in IL (the duty to look after/control subordinates), yet others argue a superior is effectively responsible for the crime of a subordinate which she fails to prevent or punish/report.¹⁴²¹ The latter interpretation gives rise to a ‘collective responsibility’ critique (Part C S.1). The Tokyo Tribunal took a very broad view of Command responsibility (see above, Chapter 3, S.4). Vest has argued that “[b]usiness leaders may under Article 28(b) ICC Statute, which deals with hierarchical relationships outside the military sphere, may be applied to business.¹⁴²² Subparagraph (b)(ii) states that the subordinates’ crimes must concern activities within the superior’s *effective* responsibility and control¹⁴²³, which is interpreted to mean the superior may not be responsible for acts falling outside of the scope of her duties.¹⁴²⁴ This may give rise to a debate along the line of that regarding functional immunity in IL - can the commission of crimes ever be considered to be part of someone’s role or job description? In ICL a superior may be liable if s/he knew or ‘should have known’

¹⁴¹⁷ Farrell (2010) 887. In addition, the Talisman court erroneously sought to rely on the USMT *Ministries case* (supra) while in this case the knowledge standard was explicitly cited. In addition, this was in line with other USMT cases such as the *Einstatzgruppen case*, *Flick*, *IG Farben*, and the British trial of *Tesch* (Farrell (2010) 888-9 and Chapter 3 above).

¹⁴¹⁸ Farrell (2010) 891.

¹⁴¹⁹ *Blagojević and Jokić* (supra).

¹⁴²⁰ Werle (2009) 188; Cryer (2010) 397.

¹⁴²¹ Werle (2009) 188-9. See also generally the JICJ Symposium on command responsibility in JICJ 5 (2007) 599-682.

¹⁴²² Vest (2010) 869.

¹⁴²³ Emphasis added.

¹⁴²⁴ *ICC Statute; Mucić TC Decision* 593.

about the acts in question and failed to respond appropriately in the circumstances.¹⁴²⁵ A doctrine of superior responsibility could only be effective in reducing crime if it encouraged, rather than discouraged, superiors from playing an active role in the supervision of subordinates, and if it were possible to avoid the situation where employees commit offences outside of their ‘official’ job description while superiors actively ‘look away’.

1.5 Perpetration through an organization?

Art. 25(3)(a) of the ICC Statute includes the notion of perpetration ‘through another person’. This could be the perpetration by a ‘perpetrator behind the perpetrator’ who pulls the strings, or perpetration through a non-culpable person such as a minor. In *Prosecutor v Katanga and Chui*, the ICC Pre-Trial Chamber used this concept where crimes were said to be committed through the control of a hierarchical organisation.¹⁴²⁶ Explicitly referring to the German concept of *Organisationsherrschaft* (translated by the court as perpetration through an ‘organised and hierarchical apparatus of power’), the ICC Trial Chamber defined the necessary elements of an ‘organisation’, which

*must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors’ orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.*¹⁴²⁷

The perpetrators behind the scene, or removed from the physical site of the crime “decide whether or how the offence will be committed”¹⁴²⁸ and “the leader’s control over the apparatus allows him to utilise his subordinates as a mere gear in a giant machine”.¹⁴²⁹ Citing *Eichmann*, the Pre-Trial Chamber confirms, “the degree of responsibility increases as we draw further away from the man who uses the fatal instrument”.¹⁴³⁰ From the descriptions of the factual situations in corporations as related in Chapters 3 and 4 it is clear how this analysis may approximate corporate actuality.

¹⁴²⁵ ICC Statute Arts. 28(a)(i) and (b)(i).

¹⁴²⁶ *Katanga Charges Decison*; Werle (2009) 178-180; Cryer (2010) 366.

¹⁴²⁷ *Katanga Charges Decison* 512.

¹⁴²⁸ *Katanga Charges Decison* 485.

¹⁴²⁹ *Katanga Charges Decison* 515.

¹⁴³⁰ *Katanga Charges Decison* 503, citing *Adolf Eichmann* (1961) 197.

Weigend however has queried “whether this doctrine is helpful in analysing the cases of indirect perpetration in the context of systemic crime; it might be preferable to ask what it takes to control the will of another person to such an extent as to ‘make him’ commit a crime. The existence of an organization controlled by the perpetrator may be no more than one factor relevant for answering that question.”¹⁴³¹ Arguing that the constructs of ‘instigation’ and ‘ordering’ already can be employed to cover the kinds of situations in *Katanga and Chui*, Weigend suggests that the design of the concept of ‘perpetration through an organisation’ satisfies “our sense of judicial aesthetics” rather than a doctrinal need.¹⁴³² The important question to ask, however, is whether “perpetration through an organisation” lets ‘organisation’/company in through the back door – considering the ICC membership have not utilised the opportunity of the review conference to include legal person liability?¹⁴³³ Weigend notes, however, that domestically in Germany (where this construct was used to prosecute GDR border guards¹⁴³⁴) the proposal to employ this doctrine in the business context “has been widely criticized by legal scholars, mainly because a business enterprise lacks all the main characteristics (tight hierarchical structure, general lawlessness, fungibility of members) that might justify the imposition of liability as a perpetrator to the leaders of a military or political organization.”¹⁴³⁵ Such attempt to curb the use of a doctrine to particular types of organisation seems clearly ideological.

2 Conclusion: So many (wo)men, so many modes

One can see that it can at times become difficult to distinguish between the various modes of responsibility. The point to take away from this is that it would seem that ICL modes are flexible enough to cover every conceivable scenario – including that of business actors perpetrating or otherwise involved in international crimes. In Chapter 5 I will show that despite this development, there has been virtually no ‘mapping’ of these modes onto the relations within the corporation and between the

¹⁴³¹ Weigend (2011) 91.

¹⁴³² Weigend (2011) 102. Weigend holds that “[t]here is certainly nothing to even remotely suggest that the concept of ‘perpetration through an organisation’ is a form of criminal liability recognized as customary international law,” id. 106.

¹⁴³³ See generally, <http://www.icc-cpi.int/Menu/ASP/ReviewConference/>.

¹⁴³⁴ Weigend (2011) 98.

¹⁴³⁵ Weigend (2011) 99.

business(wo)man and ‘victims’ or persons affected by their acts or omissions. In this sense, the corporation remains a ‘structure of irresponsibility’ as proposed in Ch. 2A.

The fact that business in conflict is not normally discussed in terms of these modes (except by Farrell from whose article I quoted above) points toward an attempt at the creation of a *sui generis* position for business for ideological reasons, in order to create a space between business (good) and, say, armed groups and other (private) non-state actors potentially involved in conflict (bad). So does the attempt to argue that business involvement is somehow, unexplained, *but obviously*, qualitatively different from the involvement of other participants in a conflict situation, and thus requires its own, yet to be developed, area of law (*Wirtschaftsvölkerstrafrecht*).¹⁴³⁶ Here we see an analogy with the deliberate fragmentation of legal regulation in the context of FDI discussed in Chapter 2B. These rhetorical moves go in the same direction: making it more difficult for us to imagine individual business(wo)men in the framework of ICL. Also, the reification of the corporation and its frequent anthropomorphisation (Ch. 2A, 4C and 6) lets the corporation’s ‘humanity’ take over from that of the directors, who remain anomic, anonymous and hidden.

¹⁴³⁶ Generally Jeßberger (2009); Pearce (1990) 424.

Chapter 4C Re-Making ICL: Who wants to be an international criminal? Casting business in contemporary ICL

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1 Introduction to C

Strikingly – when compared to the discourse of the Nuremberg Industrialists’ trials - the current legal literature on business in conflict centres almost exclusively on the putative liability of the corporate legal person. While ICL has been about the *Individualisierung* of IL, ILIP’s reification of the corporation (Ch. 2B S.3) posits *it* as a putative ‘individual’ subject of ICL.¹⁴³⁷ Although ‘corporate liability’ in ICL is considered by most only *lex ferenda*, some argue it already exists.¹⁴³⁸ These proposals spring from the contradiction between corporate ILP in the ‘private’ side of IL, increasingly visible business involvement in conflict and the development of a regime of responsibility dealing with responsibility especially for crimes in conflict. Already, certain regional (and also global) treaties require states to criminalise certain acts/omissions by corporations domestically (*if this is congruent with national legal principles* - 4A S.2.4), which, by some, is seen as the ‘seed’ of exceptional corporate criminal liability regionally¹⁴³⁹ or indeed used to argue the legal person is already a subject of ICL.¹⁴⁴⁰ Here, once again, we could see the ‘trend’ (‘progress’/‘fashion’) of ICL at work.

¹⁴³⁷ Cf. Stahn and Van den Herik who speak of the “de-individualisation” of ICL (Stahn (2010) 315).

¹⁴³⁸ In the latter category, e.g. Clapham (2000), Ramasastry (2002), Chiomenti (2006).

¹⁴³⁹ Bantekas & Nash (2007) 48.

¹⁴⁴⁰ Generally, Clapham (2000).

Broadly three types of arguments are made by those who consider corporate liability in ICL *lex ferenda*. The first is not an argument strictly speaking, although it is often phrased as such, but rather a description or explanation in the style of a progress narrative, reflected for example when describing the number of states that have ‘already accepted’, ‘recognised’, or ‘acknowledged’ corporate liability.¹⁴⁴¹ For example, the International Commission of Jurists notes that “significant opposition to the imposition of criminal sanctions on companies as legal entities remains,”¹⁴⁴² however, this opposition is “broadly conceptual” and based on a memory of “national criminal laws developed many centuries ago.”¹⁴⁴³ “[T]he fact that increasing numbers of jurisdictions are applying criminal law to companies is evidence that these difficulties can be overcome.”¹⁴⁴⁴ The second type of argument for corporate liability is this: “the lack of a norm of corporate liability in ICL leaves business involvement in crimes unaddressed.”¹⁴⁴⁵ Both variants are grounded in the almost complete reification of the corporation (concealing individuals) that I described in Ch.2B above and will discuss here in this context. It also builds on corporate crime law in (some) domestic jurisdictions: “just as the concept of corporate criminal responsibility emerged as a reaction to the industrialization process in the common law jurisdictions over a century ago, so should the concept now be lifted to the international level in order to address the demands and realities of the relentless globalization process.”¹⁴⁴⁶

A third argument for the existence, or creation of a norm allowing a finding of corporate liability in ICL that is being made by some scholars, forms part of a broader debate on ‘system criminality’ (see also Ch.3A S.7.1.2). Nollkaemper in the introduction to his edited volume on the subject explains system criminality as “the phenomenon that international crimes – notably crimes against humanity, genocide and war crimes – are often caused by collective entities in which the individual authors of these acts are embedded.”¹⁴⁴⁷

¹⁴⁴¹ E.g. *FAFO (Ramasastry)* (2006); *FAFO (Ramasastry)* (2004); Ramasastry (2002).

¹⁴⁴² *ICJurists Complicity Report* Vol. II 59.

¹⁴⁴³ *ICJurists Complicity Report* Vol. II 59.

¹⁴⁴⁴ The Panel gives as its only two reasons why CICL might be a good thing, the possibility of financial redress for victims, and the chance that ‘corporate culture’ might improve after the imposition of a criminal sanction on a company (*ICJurists Complicity Report* Vol. II 59).

¹⁴⁴⁵ Van den Herik (2010) 362.

¹⁴⁴⁶ Van den Herik (2010) 358.

¹⁴⁴⁷ Nollkaemper (2009) 1.

Many of the arguments both for and against corporate criminal liability echo those made in the last Century regarding the question of state criminality.¹⁴⁴⁸ The concept of state crime was discussed at length in the context of the development of the rules on state responsibility.¹⁴⁴⁹ The ILC removed Art. 19¹⁴⁵⁰ from the Draft Articles on State Responsibility in 1998¹⁴⁵¹ (apparently because of the clause's problematic wording and some states' vehement opposition to the concept of state crime¹⁴⁵²) and the Articles adopted by the General Assembly in 2001 did not contain the concept.¹⁴⁵³ Nonetheless, the idea of state crime persists in the popular political discourse of 'rogue states'.¹⁴⁵⁴

One common objection to state crime (or other forms of 'collective' criminality) is that enforcement of the concept would result in collective punishment.¹⁴⁵⁵ Yet, current *individualised* ICL practice is also criticised for leading to 'collective punishment'¹⁴⁵⁶ by punishing leaders for crimes physically committed by other individuals under their command. Additionally, ICL is being criticised for leaving 'system criminality' unaddressed.¹⁴⁵⁷ The question on individuals versus collective responsibility is being reopened, and I discuss this below.

2 The 'new ICL' and re-opening the debate on collective liability

Now that the 'new ICL' has had two decades to develop, scholars and practitioners alike are starting to reflect on and critique it – and to map out (im)possible, probable and desired directions for future development. On the one hand, ICL has been about the *Individualisierung* of responsibility, the neat delineation of each human individual's agency in a complex situation,¹⁴⁵⁸ on the other, it deals mostly with 'collective' acts (in a broader situation of conflict where many persons are involved)

¹⁴⁴⁸ E.g. Weiler (1989); Pellet (1999).

¹⁴⁴⁹ See, e.g. Brownlie (2008) 433ff. Crawford's view on this issue of State criminality was that it was unnecessary and divisive and had the potential of destroying the project as a whole: Crawford (1999) 442. For a contemporary reappraisal see Doucet (2010).

¹⁴⁵⁰ Art. 19.2 *ILC Draft Articles 1970*.

¹⁴⁵¹ *ILC 1998 Report* 319-331.

¹⁴⁵² *ILC 1998 Report* 241-259.

¹⁴⁵³ *UNGARes 589; ILC State Responsibility Articles*; also see *Serbia Genocide Convention Case*.

¹⁴⁵⁴ Simpson (2004) xi.

¹⁴⁵⁵ E.g. Van Sliedregt (2003) 343-4.

¹⁴⁵⁶ Van den Herik (2010) 362.

¹⁴⁵⁷ Nollkaemper (2009) 1.

¹⁴⁵⁸ Werle (2007) 48.

that some critics say cannot be ascribed to individuals singly.¹⁴⁵⁹ Questions are asked, for example, as to whether individuals behave differently as part of a group or within a particular system, and if so, whether this should affect the level of responsibility they can be ascribed, or even to whom responsibility can be ascribed.¹⁴⁶⁰ Some even argue that some actions are not those of individuals but of something above or outside of them: the corporation, or the government, or ‘the system’ (Section 4).¹⁴⁶¹

Current *individualised* ICL practice of the ICTY, ICTR is *also* being criticised for leading to collective punishment when punishing senior leaders for the crimes (physically) committed by (usually junior) personnel ‘on the ground’. This critique is made in relation to the use of the concept of command or superior responsibility (Part B S.1.4).¹⁴⁶² Both these critiques hinge on how we see a crime, and foregrounds the physical, violent, ‘bloody’ end of crime over the ‘invisible’ ‘intellectual’ crime of the individual who designed the policy, gave the order, authorised the operation, or who has the overall command over those on the ground. This person is the minister, the senior civil servant, the proverbial desk-killer, white-collar criminal or ‘Schreibtischtäter’ as Arendt has it, or, general in a grey suit, in Dubois’ words.¹⁴⁶³ This shift presupposes the freedom to choose not to comply with an order (the freedom to walk away), a question that was discussed at length also at Nuremberg (see above Ch. 3A). The ‘freedom’ presupposed here, as it is the freedom of the one at the bottom of the hierarchy, is analogous (or identical) to the ‘freedom’ of labour in the Marxist sense.¹⁴⁶⁴

A related critique is made in relation to the doctrine of joint criminal enterprise (Part B S.1.2). Boas calls the ICTY’s practice in regard to the latter “an increasingly obsessive preoccupation with the apportionment of responsibility to political leaders for *committing* crimes from which they are physically and structurally very far

¹⁴⁵⁹ E.g. Nollkaemper (2009) 2.

¹⁴⁶⁰ Ceretti (2009) 5-15. Ceretti in particular discusses the group dynamics of collective violence from a sociological perspective and emphasises the importance of denial of individual moral culpability by perpetrators and denial of what happened to them by those affected (at 5, 13).

¹⁴⁶¹ See e.g. generally, Arendt (1994), and to a lesser extent, Nollkaemper (2009) 1; Herik (2010) 364-5: “social scientists ... view corporations increasingly as more than the aggregation of a number of individuals ... In these situations, ...the ‘guilt’ does not lie principally with easily identifiable specific individuals but rather with the corporation as such.”

¹⁴⁶² Werle (2009) 188. See also generally Meloni (2007); Meloni (2010).

¹⁴⁶³ Dubois (1952) (title).

¹⁴⁶⁴ Gray (2006) 875.

removed.¹⁴⁶⁵ Boas posits that JCE is (over)used to attach the special stigma of being a committer, rather than an instigator or aider or abettor.¹⁴⁶⁶ Again, this critique hinges on individuals' perceived and actual role in a larger structure. If a special stigma is indeed attached to being a *committer* as Boas suggests, then a complicity conviction of a leader would signal a lower level of culpability, perhaps that of someone only marginally involved in an action directed by others, perhaps even 'from below'. A conflict could then be portrayed as 'leaders failing to control the masses', rather than leaders actively perpetrating acts of conflict and ordering/forcing 'the masses' to participate. In Ch.5 I will query whether the conflicts in the FYR and Rwanda can be characterised as such.

3 "De-Individualising ICL": Towards legal person liability?

It is not clear which way IL will develop with regard to legal person liability.¹⁴⁶⁷ Yet, as evidenced in recent literature, the trend is to argue for, or to *find*, legal person liability.¹⁴⁶⁸ It is on this putative legal person liability that I focus in the remainder of this section. I start with a look at the debate between the negotiators at the drafting stage of the ICC Statute because, as I argued in 4A, the ICC tends to be seen as the 'culmination' of ICL and as such as indicative of ICL development as a whole.¹⁴⁶⁹

3.1 *The ICC negotiations on legal persons*

The Preparatory Commission's draft which formed the basis for the ICC Statute negotiations included in Art. 23:

5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes were committed on behalf of such legal persons or by their agencies or representatives

¹⁴⁶⁵ Boas (2010) 502 (emphasis in original).

¹⁴⁶⁶ On the significance of this stigma, see also Guilfoyle (2011).

¹⁴⁶⁷ Specific fora for discussion of business in ICL in the past years have been the *JICJ (2008) Workshop* the *Humboldt Symposia* and the *ICJurists Complicity Report*.

¹⁴⁶⁸ E.g. Clapham (2006) 31; and generally, Herik (2010) 350-368, Voiculescu (2007) 418-430; generally, Chiamenti (2006), Stoitchkova (2010); for an exploratory perspective, see Burchard (2010).

¹⁴⁶⁹ Others have discussed it in terms of the application of ICL on the domestic level: Kyriakakis (2010), Wanless (2009).

6. *The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.*¹⁴⁷⁰

In the negotiations the French delegation proposed and argued strongly in favour of the inclusion of legal persons in the ICC's jurisdiction.¹⁴⁷¹ The article they initially proposed on 16 June 1998 was a mirror image of Art. 10 of the *IMT Charter* (on criminal organisations). It envisaged the declaration by the ICC of an organisation/company as a 'criminal organisation' under certain circumstances.¹⁴⁷² It went one step further than the *IMT Charter* by allowing the imposition of fines on the criminal organisation. France considered this important in terms of restitution and compensation orders for victims (effectively displaying the same priority it had during the *Röchling* trial, Ch. 3A S.8.2).¹⁴⁷³ The 19 June 1998 proposal put forward was significantly different. It proposed giving the ICC jurisdiction to try legal persons in the same way it would try natural persons. It was limited to cover only companies (and thus *not* the myriad of other groups/persons that could potentially be included such as political parties, organised armed groups, etc.), linking their criminal responsibility to that of leading members of those corporations who were in positions of control and who committed the crime "acting on behalf of and with explicit consent of the corporation and in the course of its activities".¹⁴⁷⁴ France emphasised that [t]here was nothing in the proposal to permit the concealment of individual responsibility behind that of an organisation."¹⁴⁷⁵ Eventually this proposal, too, was rejected. The delegates of the Scandinavian countries stated that the inclusion of legal persons would detract from the purpose of the ICC which was the prosecution of individuals.¹⁴⁷⁶ The representative for Syria noted that the inclusion of corporate legal persons would beg the question why States, though legal persons, could not be prosecuted.¹⁴⁷⁷ The Greek representative said categorically that there is no criminal responsibility which cannot

¹⁴⁷⁰ *ICC PrepCom Report 1998*.

¹⁴⁷¹ Ambos (2008) 746.

¹⁴⁷² *French Corporate Crime Proposal: Article 23: Appendix E*.

¹⁴⁷³ Ambos (2008) 746. It may be a funding point – the French government may have considered it preferable for victims to be compensated from the funds of perpetrators rather than the court (members) itself.

¹⁴⁷⁴ The term 'juridical person' was defined as 'a corporation whose complete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of state authority, a public international body or an organisation registered, and acting under the national law of a State or a non-profit organization.'" *WGGP Working Paper 23 1-2*.

¹⁴⁷⁵ *Id.*, see also *Committee of the Whole Record*: 32, 33.

¹⁴⁷⁶ *Committee of the Whole Record* 43, 55.

¹⁴⁷⁷ *Committee of the Whole Record* 56.

be traced back to individuals.¹⁴⁷⁸ The representative of China emphasised that the ‘criminal organisation’ provisions in the Nuremberg Charter had not been intended as a means of prosecuting legal persons as such. He added that the political context existing at the time of the Nuremberg trials was very different from the sensitive political context pertaining today. Also, he reminded the meeting that the Nuremberg trials had been conducted by victorious over defeated countries.¹⁴⁷⁹

In preparing this draft, France had been closely collaborating with the Solomon Islands – which were being represented by Andrew Clapham.¹⁴⁸⁰ Eventually, France withdrew the proposal apparently due to time constraints.¹⁴⁸¹ The Statute that was adopted on 17 July 1998 limits the Court’s jurisdiction to natural persons.¹⁴⁸² The ICC’s Article 25(1) reads: ‘The Court shall have jurisdiction over natural persons pursuant to this Statute’.¹⁴⁸³ The extension of the *ICC Statute* to cover legal persons was not proposed at the 2010 ICC Statute Review Conference, which focussed mainly on the definition of the crime of aggression.¹⁴⁸⁴

So while the ILC put aside the issue of state crime at a time when no consensus could be reached, the ICC membership put corporate (and armed group *qua* group) liability aside, potentially to be picked up again in the future. In the meantime, consensus is emerging, evidenced by statements such as “The striking phenomenon is that many other international instruments have been adopted which, unlike the Rome Statute, introduce, at the international level, the concept of corporate criminal liability.”¹⁴⁸⁵ While this statement relies on a misreading of the international instruments (see Ch. 4A S.2.4) this argument is increasingly made, contributing to the naturalisation of the idea of corporate ICL, which is the first step to its adoption in law.¹⁴⁸⁶

¹⁴⁷⁸ *Committee of the Whole Record* 57.

¹⁴⁷⁹ *Committee of the Whole Record* 36.

¹⁴⁸⁰ Clapham (2000) fn.1.

¹⁴⁸¹ Clapham (2006) 31.

¹⁴⁸² *ICC Statute* (supra).

¹⁴⁸³ The ICTY and ICTR also confine jurisdiction to natural persons: Art. 6 *ICTY Statute*; Art. 5 *ICTR Statute*.

¹⁴⁸⁴ See generally, <http://www.icc-cpi.int/Menus/ASP/ReviewConference/>.

¹⁴⁸⁵ Swart (2008) 947.

¹⁴⁸⁶ E.g. Stoitchikova (2010).

3.2 *Legal person liability for business in ICL: The ‘progress view’*

The corporate liability debate in the NGO literature employs the concept of ‘corporate complicity’ – which is part of the ‘legalising CSR’ push (see further Ch. 6), and posits that while (or, as long as) corporations cannot be liable *per se*, they can still be ‘complicit’ in violations committed by or on behalf of a state.¹⁴⁸⁷ Human Rights Watch (“HRW”) Director Kenneth Roth states, that in the 1980s, “[o]ut of the blue, we came up with the concept of complicity. It is very interesting watching it evolve into a criminal concept, because that was not what we had in mind at all.”¹⁴⁸⁸ The non-legal concept of ‘complicity’ in that literature was picked up and given legal content by the International Commission of Jurists,¹⁴⁸⁹ UN Special Rapporteur on Business & Human Rights John Ruggie (see Ch. 6) and legal scholars.¹⁴⁹⁰ The road to legalisation is one of ‘narrativization’ and ‘naturalisation’¹⁴⁹¹: a discursive process in which NGOs, legal scholars and UN officials played the main roles – and where the same individuals often switch between roles within this process. Andrew Clapham, for example, who is an influential scholar who has published widely on corporations and human rights and international criminal law, represented the Solomon Islands in the ICC negotiations (above) and served as the Special Adviser on Corporate Responsibility to High Commissioner for Human Rights Mary Robinson.¹⁴⁹² He has said, about corporate liability in ICL, “it will happen if we say it enough times” – in other words, if the idea is *naturalised*.¹⁴⁹³ Even if formal adoption of the concept for example through extension of the ICC’s jurisdiction is not achieved, the desired effect (see Ch.6) may be reached even if it is not in fact enforced internationally but there is ‘*popular opinio iuris*’ – and/or a common understanding among the ‘thought leaders’ such as Ruggie and Clapham that it exists.

Above (Section 1.1) I quoted Van den Herik’s view that corporate liability ‘should’ be adopted in response to the ‘relentless globalization process’ just as it was adopted on the domestic level. I also mentioned texts that cite those that have not *yet* adopted

¹⁴⁸⁷ *ICJurists Complicity Report*.

¹⁴⁸⁸ Roth (2008) 960 – see also below, Ch.6. Kenneth Roth has been Executive Director of Human Rights Watch since 1993.

¹⁴⁸⁹ *ICJurists Complicity Report*.

¹⁴⁹⁰ E.g. Clapham (2008), Stoitchikova (2010), Cernic (2010).

¹⁴⁹¹ Marks (2000) 19.

¹⁴⁹² *Clapham webpage*.

¹⁴⁹³ Conversation with Clapham at *Humboldt Symposium*.

corporate criminal liability as *traditional*.¹⁴⁹⁴ The US tort litigation where corporations are accused of international crimes (see Ch.6) also plays a part in the normalization of the idea of corporate criminal liability.¹⁴⁹⁵ Other arguments in the ‘progress’ vein seem to be limited to simply stating corporate liability should be adopted because corporations are there, or because corporations hold great power, or because not doing so would leave ‘corporate crime’ unaddressed.¹⁴⁹⁶ These are all arguments that make sense on the superficial level, that ‘ring true’ and therefore have traction and the effect of their repetition may well be that these ideas are internalised, and that the norms come to exist by some sort of ideological learning process rather than through their formal adoption.

Many who argue for corporate criminal liability do not explain why such liability would be a good thing – this appears as a given: to deny this would mean to deny “this idea that corporations should be prohibited from assisting governments in violating international law”¹⁴⁹⁷ and to leave corporations “largely immune from liability.”¹⁴⁹⁸ The question of responsibility here presupposes the subjectivity in IL of the corporation. Moreover, corporate liability in ICL is thus presented as the solution, while no evidence is produced how, or *that* it would ‘work’, for example by showing that corporate crime regimes on the domestic level have reduced corporate offending, and most importantly, no indication of how corporate crime enforcement would actually be executed on the international level. There is no elaboration of how the mental element of a crime (or indeed the *actus reus*) would be established in the case of multinational corporate groups, or whether doctrines of attribution or identification would be proposed or suitable. Finally no explanation is given how such a norm would even be formally adopted at all, considering “the ... realities of the relentless globalization process”¹⁴⁹⁹ (the nature of which remains unexplained). The desirability of corporate ICL is supposed to be self-evident to the point where criminal law must

¹⁴⁹⁴ See, E.g. Stessens (1994) 493: “Though some jurisdictions (e.g. the United States) have taken this step earlier, other criminal law systems in Europe apparently still have not been able to...”; Cockayne (2008) 955.

¹⁴⁹⁵ Generally, Harvard Law Review, Anon. (2001) 2025, which asks the question of corporate liability in IL from the point of view of ATCA cases, which it says “The international community should view ... as a call to collective action.” (2049).

¹⁴⁹⁶ Van den Herik (2010) 362. *That* it exist is also sometimes argued on the basis that it *should* exist, e.g. Chiomenti (2006) 295: “In conclusion, the concept of criminal responsibility for corporations is now generally accepted at the level of both national and international law.”

¹⁴⁹⁷ Clapham (2008) 899.

¹⁴⁹⁸ This argument is made in the Harvard Law Review (Anon. (2001)) 2026 “Corporations thus remain immune to liability, and victims remain without redress.”; Steinhardt (2005) 177; Cockayne (2008) 955.

¹⁴⁹⁹ Van den Herik (2010) 358.

be fundamentally changed in order to enable corporate liability: e.g. “[i]t is thus necessary to reconceptualize the parameters of guilt and blame in order to develop a criminal law theory that is tailored to corporations.”¹⁵⁰⁰

Other arguments for corporate liability appear practical: for example, “when there is not one individual that can be blamed given the collective decision-making, because the individual who originally took decision [sic] already left, or as a result of unclear corporate structures.”¹⁵⁰¹ The modes of liability developed by the tribunals (see 4B) are assumed to be inadequate, even if they have at times been applied to individuals part of ‘unclear structures’.¹⁵⁰² Here, the evidentiary difficulty inherent in pinning criminal blame on one (or, possibly more than one) legal person within the group structure of multinationals (the parent company, which may be a holding company, a local subsidiary close to the physical site of the crime, or the whole group) is not examined. ICL is of course formally equipped to deal with a person who has ‘already left’ the company or indeed the country. A further situation in which corporate liability is argued to be appropriate is where collective decision-making in the company makes it hard to see who exactly should be liable.¹⁵⁰³ Again, these arguments may sound rational and attractive, but as discussed above, the ICL tribunals have tackled exactly these questions in the context of military, state and other group structures, and on the domestic level such questions are addressed when dealing with organised crime, mob violence, etc. It becomes difficult to assess why these scholars would make (‘perform’) such arguments about corporate criminal liability – perhaps one partial explanation, as Schwarzenberger has suggested (above Part A S.1) that these lawyers are simply susceptible to fashions in the realm of political ideology – and argue within a certain liberal capitalist ‘mood of the time’.¹⁵⁰⁴ The absence of discussion on attribution doctrines suggests these authors implicitly consider liability of the corporation per se the desired option, as per Pomerantz (Ch.3A S.7.1.2) who saw the practical advantage of not having to tie specific individuals to ‘corporate acts’. As the trend (‘fashion’) may be corporate reification in other areas of IL (e.g. in ILIP, Ch.2B – and arguably in international human rights law¹⁵⁰⁵), this may be catching on in ICL too. The notion of

¹⁵⁰⁰ Van den Herik (2010) 364.

¹⁵⁰¹ Van den Herik (2010) 368.

¹⁵⁰² Viz. the cases employing a ‘joint criminal enterprise’ construct, e.g. *Krajisnik Appeals Judgment*.

¹⁵⁰³ *ICJurists Report* 56.

¹⁵⁰⁴ Schwarzenberger (1950) 263.

¹⁵⁰⁵ E.g. Muchlinski (2007).

legal scholars arguing within a (structural/ideological) trend shows the limits of their agency (see Ch.1 S.4) and provides clues as to the creation of the ‘unbreakable circle’ referred to in Ch.1.

3.3 *Legal person liability: The systems view*

In the UK and other domestic legal systems that include the concept of corporate liability, it is possible to distinguish between ‘artificial’ corporate liability (i.e. liability based on the actions and/or intent of one or more individuals within the company using attribution or identification doctrines¹⁵⁰⁶) and what Simester et al. call “*corporate corporate guilt*”.¹⁵⁰⁷ In domestic jurisdictions, there appears to be a trend towards the adoption of the latter construct. For example, in the UK the *Corporate Manslaughter and Corporate Homicide Act 2007* expresses the grounds of corporate liability in organisational terms,¹⁵⁰⁸ while in Australia *corporate corporate liability* is independent of the liability of individuals through the idea of ‘corporate culture’.¹⁵⁰⁹ Authors (explicitly, as opposed to impliedly – above) arguing from an analogous perspective in ICL regard a company (or in Nollkaemper et al.’s term: a system) as something qualitatively different from the sum of the individuals ‘inside’ it. *Corporate corporate liability*, according to Van den Herik, serves where “indicting one individual may not capture what really happened, may not provide an appropriate narrative, may not address the crime properly, and may not place the responsibility where it belongs.”¹⁵¹⁰ What *really* happened, according to this view, is that a ‘corporate culture’ has “induce[d] employees to act in a certain way that they would not do outside the corporation”¹⁵¹¹ (taking the notion of corporate anomie one step further) and what is therefore really responsible is the corporation *itself*. In many ways this line of thought echoes that of the turn of the last century (see Ch. 2A), that of “Frankenstein, Inc.”,¹⁵¹²

¹⁵⁰⁶ On the basis of the vicarious liability of the company for the acts of its agents, on the basis of the ‘identification doctrine’ where the state of mind of a ‘directing mind’ (a senior manager/director who is in actual control) and the acts of what Denning called the hands (workers) is attributed to the corporation, or on the basis of aggregation – where the acts and intentions of a number of individuals within the corporation are aggregated so as to constitute ‘the company’s crime’ even if such acts were not criminal on their own – see generally, Simester (2010) 279-80. See also, Lederman (2001).

¹⁵⁰⁷ Simester (2010) 281-3.

¹⁵⁰⁸ **Appendix E.**

¹⁵⁰⁹ Where “corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place”, The Criminal Code Art. 12.3(6). See also generally, Wells (2001).

¹⁵¹⁰ Van den Herik (2010) 365.

¹⁵¹¹ Van den Herik (2010) 364.

¹⁵¹² Wormser (1931).

the idea that corporations, like robots would become intelligent and outgrow their makers (“it’s not me, it’s the corporation”¹⁵¹³). Current scholars take this reified model to be part of the solution however, rather than the source of the problem.

The ‘corporate culture’ construct responds to the argument that corporations cannot have criminal intent as such¹⁵¹⁴ by assuming intent from the culture prevailing amongst (and presumably created/generated by) company employees and directors.¹⁵¹⁵ Criminal intent can on the other hand be seen as only an extension of the abstraction in other areas of law: while a corporation is frequently assumed to have ‘intent to create legally binding obligations’ in contract law, why could it not have ‘intent to permanently deprive’ in criminal law, or even ‘intent to destroy all or part of a group’ in ICL? It would seem easier to imagine ‘intent’ in ‘purely economic’ transactions, while seemingly non-economic, seemingly irrational behaviour (which may and indeed *must* also be rational – Ch. 2A) requires more imagination, and perhaps more convoluted ‘theories’ to be applied. However, CSR and corporate crime in domestic law is making such much easier. Indeed, such is acceptance of the abstraction of law, that “[t]he social constructedness of these concepts [intentionality and agency] make them amenable to credible reformulations that are suitable for a new paradigm of corporate agency and responsibility.”¹⁵¹⁶ I discuss this further in Ch. 6 below.

Aside from its use in the formulation of ideas around corporate liability, ‘system criminality’ *could* be a useful term when employed to identify, analyse and critique exactly those *structural* factors causing ‘deviant’ behaviour, as per the ‘Systemkritik’ (Ch. 3A section 8.3). The inherently ‘psychopath’ (as Bakan described it-Ch. 2A), conducive to immoral behaviour (the ‘amoral calculator’), creates a distance between the employee/manager and affected party (Marx’ term alienation could be used by analogy), and in fact *mandate* immoral behaviour solely focused on surplus value extraction. Thus far, such analyses have been mostly left to criminologists who have not yet started work on ICL.¹⁵¹⁷

¹⁵¹³ Steinbeck (1939) 38 (Ch.2A S.6).

¹⁵¹⁴ Other arguments may include, for example, that holding corporations to account in (international) criminal law would not actually reduce the incidence of ‘corporate crime’ in general, or that such an ‘artificial’ idea as corporate criminal liability negatively affects the ‘special nature’ of criminal law.

¹⁵¹⁵ Schwarzenberger (1952) 263.

¹⁵¹⁶ Voiculescu (2007).

¹⁵¹⁷ See further Ch. 6, and the work of Tombs, Pearce, Gray and others cited there.

4 Conclusion to C

As noted, Van den Herik asserts that the lack of formal norms on corporate liability “leave[s] corporate involvement in international crimes unaddressed.”¹⁵¹⁸ While there was some distaste for the idea of corporate liability in the style of Nuremberg (declaring an organisation criminal so as to enable prosecution of its ‘members’) partly motivated by the fear of collective punishment, and attribution models of corporate crime are not finding traction in the literature, ‘*corporate* corporate liability’ or corporate crime emptied of individuals (as the corporation itself, Ch.2A), is gaining popularity. While efforts abound not to allow ICL to ‘unnecessarily’ affect leaders (S. above) - I will argue in Ch. 6 that *corporate* corporate liability has the effect, instead (if enforced and even if not enforced) of ‘collectively punishing’ both workers and external society.

5 Conclusion to A, B and C: Who let the Dogmatisierung out?

It is said that “in the latter period of ICL’s lifespan [one] can ... speak of (some extent of) doctrinalisation of ICL”.¹⁵¹⁹ The relevance of analysing these ‘competing narratives’ (and their origins) is that “norm production is also, transnationally, increasingly the result of professional networks of experts who control certain fields.”¹⁵²⁰ I have highlighted here that the ICL norm creation happens in two main ways. One is through States (through their representatives and consultants) creating treaty law and setting up institutions, and through ‘doing’ state practice. The other is the above-mentioned professional experts who act as staff of the international tribunals and as consultants/advisors to governments. The formal norm creation field is in the hands of a very small group of individuals, who take up various roles in the field at the same time.¹⁵²¹ Much also depends on the (class¹⁵²²) progeny of the judges and other lawyers, and the still dominant view of “major legal systems of the civilised world” as well as the respected authors.¹⁵²³ In the last instance, moreover, such rules (and

¹⁵¹⁸ Van den Herik (2010) 362.

¹⁵¹⁹ See generally Bassiouni (2003); Sliedregt (2003) Chapter 1.

¹⁵²⁰ Dezalay & Garth (1996) (no page no. given), cited by Megret (2008) para 33.

¹⁵²¹ Viz. the passage in Cassese’s textbook about a dissenting opinion at the ICTY by Judge Cassese, which the textbook author declares is obviously the correct view (Cassese (2008) 23).

¹⁵²² E.g. Kennedy (1978).

¹⁵²³ Cassese (2008) 6; Article 21(1)(c) *ICC Statute*.

enforcement, if any) are an articulation of the prevailing economic relations and mode of production and the forces of competition, imperialism that propel capitalism.

Although some authors speak of ICL as a ‘maturing’ system, which is undergoing doctrinalisation or *Dogmatisierung*, from the first part of this Chapter this may appear as mere wishful thinking. There is no consensus on the nature, sources, content and subjects of ICL. “There is no international legislative policy”¹⁵²⁴ on international criminal law, and “[n]one of the proponents so far has developed a doctrinal framework, nor a methodology, that combines the approaches of international law, comparative criminal law and procedure, and international human rights law”.¹⁵²⁵ I have argued that what is driving ICL development is not policy, but structure, the form of law and the logic of capitalism. Within this structure, the development of ICL has many different instigators (and those wishing to be), with different interests: practitioners on the defense, prosecution or judicial sides, NGO activists and careerists, MaNGOs, academics of various streaks, public servants, elected leaders of powerful and less powerful states, etc. *A propos* Ferdinandusse, the various claims regarding the content of law serve “as techniques in a hegemonic struggle for greater control between different actors in international law”.¹⁵²⁶ Those victorious in this struggle (at any given point, on any given issue) can employ ICL’s ‘canned morality’ to support their interests. The competition between these actors takes place within the structural constraints of the form of law and the logic of capitalism. In Chapters 5 and 6 below I assess this dynamic further.

Notwithstanding the ‘constructive’ efforts of scholars in the first four approaches outlined above, Schwarzenberger’s scepticism takes us to the ‘dark side’ of ICL.¹⁵²⁷ Moreover, Pashukanis’ analysis of criminal law generally suggests that “international criminal processes are more a matter of asserting authority and monopolising virtue than of curbing violence and reducing security [sic]”¹⁵²⁸ The ‘ICL industry’ producing ‘canned morality’ would almost implicitly divert our attention from the structural causes of conflict. As Clapham and Marks also query, “[ca]n individual responsibility be pursued in ways that do not impede efforts to understand and *address* the political,

¹⁵²⁴ Bassiouni (1987) xxxiii.

¹⁵²⁵ Bassiouni (1987) xxxiv.

¹⁵²⁶ Ferdinandusse (2006) 158.

¹⁵²⁷ Cf. Kennedy (2005).

¹⁵²⁸ Clapham & Marks (2005) 234.

economic, social, and indeed legal, conditions within which international crime becomes possible?”¹⁵²⁹ To this question is where I turn next.

¹⁵²⁹ Clapham & Marks (2005) 234-5 (emphasis added).

Chapter 5: Contemporary Schreibtischtäter: Drinking the poison chalice?

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1 Introduction

In the preceding section I discussed the construction of a humanitarian ‘foundational narrative’ for ICL and showed that ICL has developed a reasonably intricate scheme that would seem to be capable of application to business actors. It might seem logical, after the various wars and other serious conflicts in the past decades, that like in Nuremberg, the international community would seek to prosecute those military, civilian, business and professional elites thought to have been responsible for the outbreak of the conflicts and any violations committed in it. This would seem appropriate (as in, fitting within the discourse, *raison d’être* given to ICL), especially considering the vast rise of reports detailing business involvement in conflict in the past two decades. An informal survey reveals, that since the 1940s, no individual businessperson has been tried in an international forum, with minor exceptions, which

are discussed below.¹⁵³⁰ Domestic courts likewise have not often applied ICL to businesspeople. The trial of Dutch chemicals broker Frans van Anraat in the Netherlands in 2004 is treated as a novelty by commentators. Here I analyse and discuss these exceptional cases, paying particular attention to the modes of responsibility employed in the case, the discussion of *mens rea*, the identity of the initiator of the case and the political context of the crime as well as the prosecution. I include also a section on “host state cases” – a particularly interesting category that, considering the importance attached to the ‘principle of complementarity’ in ICL, should be, but clearly is not, the main category here.

I argue here, that, as was the case in Nuremberg and Tokyo, the economic causes of the conflicts are being excluded from the story/the explanations of the conflicts being created through international criminal trials held at the ICTR, ICTY, SCSL and other venues. We also see ICL being used to ‘open up’ the legal market, to carry through wholesale political and legal reforms largely for the benefit of capital. In conclusion it can again be said, as Telford Taylor suggested, that ‘humanitarian’ laws are at base really commercial laws, despite appearances.

I conclude that the non-application of ICL to businesses and businesspersons has given rise to NGOs and so-called ‘cause-lawyers’ stepping in and, in a variety of ways, seeking to remedy this situation by ‘strategic lawyering’ (See further Ch.6). Describing a list of cases against business actors can distort the picture. I therefore also devote some attention to situations that have not been the subject of court action.

As noted above (Ch.4A S.1) post-Cold War, the time was finally considered right for ICL to be institutionalised on the supranational level. In 1993 the International Tribunal for the Former Yugoslavia was founded, on an ad hoc basis, the Rwanda Tribunal followed soon after and the negotiations for the final piece of the IL puzzle, a permanent international criminal court, began. The ICTY was created at a moment when the UN Security Council was stepping up its peace enforcement activities, implementing a new ‘internationalism’ with a strong liberal foundation, or varnish,

¹⁵³⁰ Those I have been able to check: I rely on various networks, mailing lists and personal contacts here, including with the Center for Constitutional Rights in New York, the American Civil Liberties Union, Sherpa, Business & Human Rights Resource Centre, European Coalition for Corporate Justice, CorpWatch, CorporateWatch, The European Centre for Constitutional and Human Rights, Reprieve, Redress, the Universal Jurisdiction Yahoo group, and others.

depending on one's point of view.¹⁵³¹ However, although the Security Council forms a broader coalition than the post-WWII Allies, it is a more selective, elitist group of leaderships than what would become the membership of the ICC. Moreover, both the ICTY and ICTR were set up to intervene in *internal* armed conflicts, which supports the argument that global institutionalised ICL forms part of an effort to shift power to a global governance regime, and is aimed to allow for intervention in less powerful states/against less favourable individuals, further breaking down (or, keeping porous) sovereignty and penetration of GCC interest/hegemony (as per 2B and 4A).

1.1 *The Balkans and the ICTY*

It is perhaps fitting that the first concerted international application of ICL post-Cold War would come in the context of a conflict borne out of an economy in systemic transition. According to Woodward, the cause of the Balkans war was the process of transformation from a communist state to a market economy by means of a shock therapy stabilization.¹⁵³² A critical element was a programme designed to resolve the sovereign debt crisis.¹⁵³³ Yugoslavia was struggling to repay its IMF loans and ten years of 'austerity measures' (combined with a loss of the health and education benefits of communism) fuelled resentment against the Serbian and other local elites who were seen to be benefitting from the market liberalization. The reforms demanded by creditors demanded political suicide: to reduce the state's ability to govern internally.¹⁵³⁴ At the same time, Europe/the West saw the opportunity to embrace the new territories 'coming out from the cold', territories they saw as forming part of the so-called "'Eurasian Balkans' - the vast, unstable, but energy-rich region extending from South-eastern Europe and the Horn of Africa, through the Middle East, into Central Asia, Afghanistan and Pakistan."¹⁵³⁵ Where in Nuremberg and Tokyo ICL had been used to ward off communism, here it was being used to 'welcome back' nations coming out of communism, into the (Western) European fold.¹⁵³⁶

¹⁵³¹ Koskenniemi (2002).

¹⁵³² Woodward (1995), esp. Chapter 5 and 114ff.

¹⁵³³ Woodward (1995) 15.

¹⁵³⁴ Woodward (1995) 114. See also, Woodward (2002).

¹⁵³⁵ Callinicos (2009) 217, citing Brzezinski (1998).

¹⁵³⁶ Cooperation with the ICTY was and is seen as a precondition for the former Yugoslav republics to join the European Union, see e.g. *Del Ponte (2005)* Serbian leaders recently relinquished Ratko Mladic in an effort to smooth EU-entry, see, e.g. *The Guardian*, 26 May 2011.

The UN Security Council adopted the resolution founding the Tribunal under Chapter VII of the UN Charter, which governs the UNSC's power to take measures aimed at restoring international peace and security. The hope was expressed in the resolution's preamble that prosecution of the crimes committed in the former Yugoslavia would restore international peace and security.¹⁵³⁷ Aside from this stated objective, what could have been the reasons behind the ICTY? Perhaps this was the opportunity that the international leadership had been waiting for, to revive ICL? It was also the opportunity to create a particular narrative of the conflict,¹⁵³⁸ to distract from, and to *justify*, the controversial 'illegal but legitimate' nature of the NATO intervention¹⁵³⁹ (as with Tokyo/Hiroshima and Nuremberg/Allied bombing of German cities), and to divert arguments as to the West's early inaction and later arguably ineffective, or counterproductive intervention in the conflict¹⁵⁴⁰ - as an 'insurance policy' for being found complicit by 'posterity'.¹⁵⁴¹ There had been much media coverage of the atrocities committed and public demand for action was great.¹⁵⁴² Also, it was a way of ensuring 'regime change' in an area where the leadership was still very popular despite the allegations (and later convictions) of atrocities.¹⁵⁴³

The ICTY case files and decisions do not give the impression that business played a major role in the Balkan conflict. However, there is mention of an important role for arms and drugs, and even organ traffickers, the illicit business ventures finding a profit opportunity in the war.¹⁵⁴⁴ Woodward mentions deliberate intervention by Western bankers which served to escalate the pace of political disintegration in Yugoslavia¹⁵⁴⁵ and describes how the German government persuaded the EU to recognise Croatia's independence (in 1992) as it served German economic interests and substantial investments in the area.¹⁵⁴⁶ With a focus on the local, and the illicit, the role in the story of the macro-level, and the 'normal' is excluded from the historical record created by

¹⁵³⁷ UNSC Res. 827. For a discussion of the legality of this basis, see Zahar and Sluiter (2008) at 6-9 who conclude it was probably lawful.

¹⁵³⁸ Carla del Ponte specifically mentioned this objective in her speech (*Del Ponte (2005)*).

¹⁵³⁹ See *The Kosovo Report* 185-198, which labeled the Kosovo-intervention as illegal, but legitimate.

¹⁵⁴⁰ Woodward (1995) at 374.

¹⁵⁴¹ Megret (2002) 1273.

¹⁵⁴² Zahar and Sluiter (2008) at 6 fn.13.

¹⁵⁴³ *Del Ponte (2005)*.

¹⁵⁴⁴ *Del Ponte (2005)*.

¹⁵⁴⁵ Woodward (1995) at 145.

¹⁵⁴⁶ Woodward (1995) at 185-6.

the ICTY.¹⁵⁴⁷ It suited both internal and external interests to portray the conflict as caused by ethnic nationalism rather than socio-economic circumstances. According to Woodward: “contrary to those who argue that these wars represent a clash of civilizations- between civilized and barbarian, Western and Balkan, Roman Catholic and Eastern Orthodox, Christian and Muslim – the real clash is social and economic. Territorial war for new states does not put an end to the political, economic, and social conflicts raised by the policies of global integration but that lost out to the nationalist juggernaut; they are simply played out under the guise of ethnic conflict.”¹⁵⁴⁸ Creating such a narrative secures the systemic causes from attack, and moreover helps to create the impression (aimed at the external audience) that the economic system will not lead to conflict in *our* communities, which do not share the same peculiar ethnic divisions and history.¹⁵⁴⁹

In relation to business, the ICTY may have served another goal. Carla del Ponte, the ICTY’s Chief Prosecutor at the time gave a speech at Goldman Sachs in London in 2005 (as part of a fundraising tour), in which she explained the purpose of the tribunal, and international criminal justice more broadly, in different terms.¹⁵⁵⁰ She told the audience,

*It is dangerous for companies to invest in a State where there is no stability, where the risk of war is high, and where the rule of law doesn’t exist. This is where the long term profit of the UN’s work resides. We are trying to help create stable conditions so that safe investments can take place. In short, our business is to help you make good business...*¹⁵⁵¹

ICL can thus be seen as a way to insert (a particular type of) law into a system that may have been developed or run on a different basis. ICL as law reform would fit into the national law reforms already ongoing as part of the IMF intervention – which may have been threatened by a break-up of the state – and fits into the broader legal (and economic) reform programmes carried out by the international intervention in, and

¹⁵⁴⁷ On the (tenuous) distinction between illicit and ‘normal’ business, see Chiomenti (2006), 287-312 at 288.

¹⁵⁴⁸ Woodward (1995) at 271.

¹⁵⁴⁹ This point is also made by Kamola (2008) 54.

¹⁵⁵⁰ *Del Ponte (2005)*.

¹⁵⁵¹ *Del Ponte (2005)*.

administrations of the various former Yugoslav republics.¹⁵⁵² Ultimately these EU and UN administrations would also have had the purpose to restore such law and order as would be conducive to ‘good business’, presumably with the ultimate aim of the new states joining the EU.

Towards the end of her speech in London, Carla del Ponte said, “International justice is cheap. The yearly cost of the Tribunal is less than one day of US military presence in Iraq. ...Our annual budget is well under 10% of Goldman Sachs; profit during the last quarter. See, I can offer you high dividends for a low investment.”¹⁵⁵³

The ICTY receives part of its funding from non-state voluntary donors.¹⁵⁵⁴ In the ICTY such donations are not regulated by the Tribunal’s Statute.¹⁵⁵⁵ The ICC however, is explicitly entitled to receive donations from amongst others, corporations, according to Art. 116 of its Statute. Although such donations would have to conform to the “UN Policy on Voluntary Donations”,¹⁵⁵⁶ corporate funding of ICL institutions is not likely to be conducive to corporate accountability in the sense it is mainly used now, although it will aid *accountability* in the Weberian sense (Ch.2A).

1.2 International Criminal Tribunal for Rwanda

A year after the ICTY was founded, the ICTR was created on the same basis. The ICTR did in fact indict and prosecute a small number of business persons. I first examine these, before placing them in context in Section 2.2.6 below.

1.2.1 Kabuga and Rutaganda

Félicien Kabuga was first indicted by the ICTR in August 1997.¹⁵⁵⁷ Until today Kabuga remains listed as “accused at large” by the ICTR.¹⁵⁵⁸ In the 2004 indictment

¹⁵⁵² On the administration of the former Yugoslav Republics, see generally, Wilde (2008).

¹⁵⁵³ *Del Ponte (2005)*.

¹⁵⁵⁴ See the ICTY website, section “Support and Donations”

<http://www.icty.org/sections/AbouttheICTY/SupportandDonations> In the ICTY such donations are not regulated by the tribunal’s Statute. The ICC however, is explicitly entitled to receive donations from amongst others, corporations, see Art. 116 ICC Statute. See also *PICT Financing Report*.

¹⁵⁵⁵ It would be interesting to see if Goldman Sachs did indeed donate, it is not mentioned in the ICTY’s annual reports of 2005 or 2006; the financial reports are not linked on the ICTY website. ICTY officials have thus far (07/12/11) not responded to my correspondence on this matter (dated 29 June 2011).

¹⁵⁵⁶ Although this policy is mentioned on the ICTY website, I was unable to locate the document itself and have written to the UN information desk requesting it – no response received as at 5 Jan. 12.

¹⁵⁵⁷ *Kabuga Indictment*.

Kabuga is “at all times referred to in this indictment: (a) a wealthy and influential businessman”.¹⁵⁵⁹ The indictment states that under President Habyarimana’s rule, political and financial power in Rwanda was consolidated within a tight circle (known as the Akazu¹⁵⁶⁰), of which Kabuga was a prominent member. As such he “wielded great power and influence”, having de facto control and authority over (among others) the Interahamwe,¹⁵⁶¹ while he also had control of the employees of the business enterprises that he headed, such as Kabuga ETS.¹⁵⁶²

Kabuga is accused in the indictment of (count 1) conspiracy to commit genocide, (count 2) genocide, or alternatively, (count 3) complicity in genocide, (count 4) direct and public incitement to commit genocide and (count 5) extermination as a crime against humanity.¹⁵⁶³ It describes how, allegedly, Kabuga, with other powerful and influential figures (including Nahimane and Barayagwiza, about whom below) agreed on a plan to destroy in whole or in part the Tutsi ethnic group, and to this end “to plan, fund, launch and operate a radio station (RTL) in a manner to further ethnic hatred between the Hutu and the Tutsi.”¹⁵⁶⁴ As President of the Radio station, Kabuga had *de jure* control of programming, operations as well as finances of the station, and by virtue of his chairmanship of the management committee, also *de facto* control. The radio station, during the genocide, functioned as a major source of information to the population of Rwanda, broadcasting information identifying the location of Tutsi and urging members of the Rwandan population to find and kill all Tutsi.¹⁵⁶⁵

In addition, Kabuga is said to have chaired a number of meetings where the *Fonds de Défense Nationale* (“FDN”) was established, a fund to provide financial and logistical support and arms to the Interahamwe. The indictment states that “[a]t least one of these meetings was attended by large number of businessmen from Gisenyi and other major

¹⁵⁵⁸ *Accused at large*, ICTR website, <http://www.unict.org/Cases/tabid/77/default.aspx?id=12&mnid=12>.

¹⁵⁵⁹ In addition, he is described as (b) President of the Comité Provisoire of the Fonds de Défense Nationale, or the National Defence Fund (the “FDN”); and (c) President of the Comité d’Initiative of Radio Television Libre des Mille Collines SA (“RTL”), *Kabuga Indictment 1*.

¹⁵⁶⁰ Literally, ‘little house’, a term used for the inner circle of the President (Glossary, *Nahimana TC Judgment 5*).

¹⁵⁶¹ Literally, ‘those who kill together’, the Tutsi militia (Glossary, *Nahimana TC Judgment 5*).

¹⁵⁶² *Kabuga Indictment 2*.

¹⁵⁶³ *Kabuga Indictment 2*.

¹⁵⁶⁴ *Kabuga Indictment 6*.

¹⁵⁶⁵ *Kabuga Indictment 9*.

trading centres.”¹⁵⁶⁶ The support received from FDN is said to have facilitated the Interahamwe in attacking, killing and injuring thousands of civilian Tutsis.¹⁵⁶⁷ Specifically, logistical support in the form of vehicles said to have been provided by Kabuga, were used to transport arms and Interahamwe militia to massacre and killing sites, and Tutsis to a site where they were killed. Kabuga is also said to have ordered the employees of his company ETS to import machetes, and to have ordered members of the Interahamwe to distribute these among their group. The Interahamwe is then said to have used machetes during the period between 7 April and 17 July 1994 to exterminate the ethnic Tutsi population.¹⁵⁶⁸

Not much more can be said about Kabuga, other than that his indictment shows (alleges) a situation in Rwanda similar to that of Nazi-Germany and Japan, with a small group of political, military and business leaders directing the conflict. According to a Kenyan newspaper, senior U.S. official Mr Stephen Rapp, the ambassador-at-large for War Crimes, claims Kabuga is present in Kenya,¹⁵⁶⁹ despite a USD5million bounty on his head.¹⁵⁷⁰ In 2003 the UNSC “called on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR.”¹⁵⁷¹ Nevertheless, Kabuga is said to be able to travel freely, including to Sweden and Norway in 2008.¹⁵⁷²

Rutaganda, who was also a prominent businessman from an elite family, had joined the MRND party as he thought it would best protect his economic interests¹⁵⁷³ and became the second vice president of the *Interahamwe* on the national level. He was convicted of genocide for ordering massacres in Kigali and elsewhere, and two counts of crimes against humanity (murder and extermination) for (among others) also

¹⁵⁶⁶ *Kabuga Indictment* 14.

¹⁵⁶⁷ *Kabuga Indictment* 15.

¹⁵⁶⁸ *Kabuga Indictment* 29.

¹⁵⁶⁹ Nation, February 10, 2010, see also: *ICG Rwanda Report* 15-16.

¹⁵⁷⁰ *Rewards for Justice*.

¹⁵⁷¹ *UNSC Res. 1503*.

¹⁵⁷² African Press International, 8 May 2008.

¹⁵⁷³ *Rutaganda TC Decision* 24-30.

directly participating in the massacres.¹⁵⁷⁴ In his case, the Prosecutor had submitted: “He endorsed the genocidal plan of the interim government. At the same time, he seized the occasion for his personal gain.”¹⁵⁷⁵

1.2.2 Government 1

Due to his failure to appear before the court Kabuga’s case was separated from that of the other accused in what was to become known as the trial “*Karemera et al.*”,¹⁵⁷⁶ which reached its final judgment on 21 December 2011 with Ngirumpatse and Karemera being given life sentences.¹⁵⁷⁷

In this trial, Karemera (a lawyer by training and a Minister in the Interim Government of 8 April 1994), Ngirumpatse (also a lawyer, president of the MRND political party, former diplomat and general manager of an insurance company), and Nzirorera (a former MRND parliamentarian and Minister for Industry) are accused of (amongst others) conspiracy to commit genocide, direct and public incitement to genocide, genocide or alternatively complicity in genocide.¹⁵⁷⁸ They are said, in order to commit the crimes alleged, to have formed a ‘joint criminal enterprise’ together with groups of named political leaders and prominent businessmen. The businessmen named include Barayagwiza, Kabuga, Musema and Bagaragaza (*among others*) – the indictment details some of the meetings that are said to have taken place between the accused and these businessmen including one organised by Kabuga with the aim of setting up a fund “to support the interim Government in “combating the enemy and its accomplices.”¹⁵⁷⁹ Ngirumpatse is also accused of having participated in the creation and financing of RTLM, which counts toward his incitement charge.

1.2.3 Nahimana/Radio cases

The other case of relevance here is that against Ferdinand Nahimana (a Professor of History and Dean of the Faculty of Letters of the Rwanda National University), Jean-Bosco Barayagwiza (a lawyer) and Hassan Ngeze (journalist and editor with the

¹⁵⁷⁴ *Rutaganda TC Decision* 472. Rutaganda was portrayed in the movie “Hotel Rwanda”.

¹⁵⁷⁵ *Rutaganda TC Decision* 460 (iii).

¹⁵⁷⁶ *Karemera Kabuga Severance Decision*. Kabuga was also included in a second indictment: *Bizimana Indictment Decision*.

¹⁵⁷⁷ BBC News 21 December 2011 (Decision not yet on the ICTR Website as at 12 January 2012).

¹⁵⁷⁸ *Karemera Indictment* 1.

¹⁵⁷⁹ *Kabuga Indictment* 50.

Kangura newspaper),¹⁵⁸⁰ co-founders and board members of RTLM. This case is known as the ‘media case’ as it deals with the power of those in control of the media to “create and destroy fundamental human values.”¹⁵⁸¹ These accused had been part of the Akuzwa and co-founders, promoters and contributors to RTLM.¹⁵⁸²

The Appeals Chamber upheld the Trial Chamber’s findings that RTLM’s broadcasts after 6 April 1994 contributed significantly to the commission of acts of genocide.¹⁵⁸³ The significance of this is of course that if Kabuga is brought to trial this will be an important point in his disfavour. While the Appeal Chamber dismissed the genocide charges against Nahimana, it confirmed his ‘command responsibility’, in that he had been a superior of RTLM staff who had the material ability to prevent or punish the broadcast of criminal utterances by such staff, and that there was no doubt that he knew or had reasons to know that his subordinates at RTLM were about to or had already broadcast utterances inciting the killing of Tutsi, and that he had not taken necessary and reasonable steps to prevent or punish incitement by RTLM staff. Thus Nahimana’s conviction on the count of direct and public incitement to commit genocide pursuant to Art. 6(3) of the ICTR Statute was upheld, as was the finding of guilt for persecution as a crime against humanity.¹⁵⁸⁴ Zahar has criticised this judgment amounting to ‘judicial activism’, arguing the radio broadcasts did not amount to incitement nor did Nahimana and Barayagwiza have ‘command responsibility’ over the radio station.¹⁵⁸⁵

1.2.4 Musema

Another example of the application in the business context is the ICTR prosecution of *Musema*.¹⁵⁸⁶ The *Musema* case concerned the director of one of the largest state-owned tea factories who had been present at the site of, and on several occasions participated in alongside his employees, acts of mass killing of Tutsi. His employees on some of these occasions wore the company uniform and drove the company cars.

¹⁵⁸⁰ *Nahimana TC Decision; Nahimana Appeals Judgment*.

¹⁵⁸¹ *Nahimana Appeals Judgment* 3.

¹⁵⁸² Other businessmen involved in RTLM were shareholder Georges Rutagando (above) and Joseph Serugendo, also a board member of RTLM and a radio engineer, see *Serugendo Decision*.

¹⁵⁸³ *Nahimana Appeals Judgment*.

¹⁵⁸⁴ The hate speeches and speeches calling for violence’s against Tutsi that were broadcast on RTLM themselves were considered acts of persecution (310-313). Should Kabuga ever face trial, he, having been the president in overall charge (his role as such is mentioned in the discussion (796) may be convicted on the same basis.

¹⁵⁸⁵ Zahar and Sluiter (2008) 195 fn.205.

¹⁵⁸⁶ *Musema TC Decision; Musema Appeals Decision*.

The Trial Chamber found that also for those acts where he had not himself participated, “Musema incurs individual criminal responsibility, on the basis of Article 6(1) of the [ICTR] Statute, for having ordered, and, by his presence and participation, aided and abetted in the murder of members of the Tutsi group...”. The Chamber established that Musema had de jure and de facto control over his employees and was personally present at the attack sites. From this the court inferred that “he knew, or at least ought to have known, that his subordinates were about to commit [the acts in question]. ...Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in their commission, by his presence.”¹⁵⁸⁷ For these events, and also for the occasions where he had participated¹⁵⁸⁸ Musema was found guilty of genocide and extermination as a crime against humanity¹⁵⁸⁹ and sentenced to life imprisonment.¹⁵⁹⁰

1.2.5 Bagaragaza

Bagaragaza was the Director General of OCIR/Thé, the government office that controlled the tea industry in Rwanda.¹⁵⁹¹ In this capacity, he controlled eleven tea factories, which employed approximately 55,000 persons. He was also the vice president of Banque Continentale Africaine au Rwanda (“BACAR”) and a member of the comité préfectoral of the MRND political party in Gisenyi préfecture.¹⁵⁹² He was also a member of the Akazu.¹⁵⁹³

Bagaragaza pleaded guilty and the ICTR accordingly found him guilty of complicity pursuant to Article 6(1) of the Statute for complicity in genocide pursuant to Article 2 (3) (e) of the ICTR Statute.¹⁵⁹⁴ The tribunal found Bagaragaza had substantially contributed to the killings of more than one thousand Tutsis who sought refuge at Kesho Hill and at Nyundo Cathedral. His contribution consisted in allowing the Interahamwe to use company vehicles and fuel, allowing the company employees to participate [the indictment had accused him of having *ordered* those over whom he had authority and

¹⁵⁸⁷ *Musema TC Decision 905.*

¹⁵⁸⁸ In the indictment around 15 very similar events with all slightly different details, sometimes he is said to have joined, sometimes just watched, sometimes he ordered persons to carry out certain acts e.g 4.6-4.10.

¹⁵⁸⁹ *Musema TC Decision 7.*

¹⁵⁹⁰ *Musema TC Decision 8.*

¹⁵⁹¹ *Bagaragaza TC Decision 18.*

¹⁵⁹² *Bagaragaza TC Decision 18.*

¹⁵⁹³ *Bagaragaza TC Decision 19.*

¹⁵⁹⁴ *Bagaragaza TC Decision 27.*

or *instigated* those over whom he did not¹⁵⁹⁵) in the attacks, being heavily armed, concealing arms in company factories since 1993. He also paid a significant sum of money to the militia leader after having been told money was needed to buy alcohol as an incentive for the Interahamwe to carry out its attacks. Bagaragaza *knew* about the attacks and the Interahamwe's genocidal intent through several meetings with the group's leaders. He did not himself share the genocidal special intent.¹⁵⁹⁶

1.2.6 Discussion

These cases paint the picture of the Akazu as the small group of political, military leaders plus businessmen and members of various professions centred around President Habyarimana, similar to the leadership exercised by the "Himmler Circle of Friends" in Nazi Germany and the Zaibatsu families with the court of the Emperor in Japan. While showing this element, the 'economic case' as it was told at Nuremberg is not made here. The indictments, and decisions do not go into *why* Musema and the others did what they did. Of course in criminal law generally *motive* is only of evidentiary interest as opposed to *mens rea* which is an essential element of a crime. Yet even the motivation behind, e.g., the "intent to destroy, in whole or in part" is not discussed in these cases. The ICTR indictments give a limited historical context to the occurrences of 1994. The judgments only give a brief account, a summing up of events. The bigger question of why the powerful majority Hutus seem to have wanted to exterminate a minority is not answered in the court documents or in the (legal) scholarly writing on the ICTY cases.¹⁵⁹⁷

Political scientist Chossudovsky has asserted that "the civil war was preceded by the flare-up of a deep-seated economic crisis. It was the restructuring of the agricultural system which precipitated the population into abject poverty and destitution."¹⁵⁹⁸ His assessment of the cause of the genocide can be summarised as follows. Rwanda had inherited a colonial export economy based on coffee (constituting 80% of its foreign exchange earnings) and a colonial rentier administration based on local chiefs who each controlled local plantation labour forces. The Germans and later the Belgians

¹⁵⁹⁵ Bagaragaza TC Decision 16.

¹⁵⁹⁶ Bagaragaza TC Decision 24, 25.

¹⁵⁹⁷ Chossudovsky (1996), pp.938-941. See also, Ansoms (2005); Reyntjens (2006); Reyntjens (2004); Ansoms (2009); Reyntjens (2011); Marysse (2007).

¹⁵⁹⁸ Chossudovsky (1996) 938.

used a system of ‘divide and rule’ between the ethnic groups, placing one in control of the other (which tactic prevailed during the various Western interventions undertaken since). Communal lands were transformed into individual plots for cash crop production. When the International Coffee Agreement collapsed, coffee prices plummeted and famines erupted throughout the Rwandan countryside. The state fell into disarray and IMF imposed austerity measures made the health and education systems collapse. At the high point of the economic crisis and the moment fighting started, multilateral ‘balance of payment aid’ came in but were likely at least partly diverted to arms acquisition, which was aided by a French bilateral military aid package.¹⁵⁹⁹

Jeffremovas describes a situation similar to that of the ICTY above: “[t]he media have emphasized the role of ethnicity and ethnic politics in [the Rwandan genocide] and imbued them with an air of inevitability as one more example of ‘tribal violence’ in Africa. [In fact,] Economic recession, economic restructuring, population growth, patterns of elite access to power, regional politics, civil war, ‘democratization,’ the politics of other countries of the Great Lakes Region, and international policies all played a role in the move to the genocide.”¹⁶⁰⁰ She also shows how the violence was not strictly Hutu/Tutsi but instead the elite which in places consisted both of Hutu’s and Tutsis, against the people. Keane and Jeffremovas both argue the killings were systematic and planned well in advance, with Keane adding that “[t]he theology of hate espoused by the extremists was remarkably similar to that of the Nazis in their campaign against the Jews prior to the outbreak of the Second World War”¹⁶⁰¹ and “Hutu extremism was essentially a useful tool by which the corrupt elite that ran the country could hold on to power.”¹⁶⁰²

Peter Uvin has described how the Bazungu (lit. ‘white folk’) had played out the Hutus, Tutsis and Twa against each other from the 19th C., creating local elites through allying one or the other group to their own economic and political leadership.¹⁶⁰³ Post decolonization, those Bazungu that remained in Rwanda controlled the large financial

¹⁵⁹⁹ Chossudovsky (1996) 938. A very similar account is given by Kamola (2008).

¹⁶⁰⁰ Jeffremovas (2002). For similar arguments, see also the book by BBC reporter Fergal Keane: Keane (1995) 21.

¹⁶⁰¹ Keane (1995) 10.

¹⁶⁰² Keane (1995) 25. This view is also expressed by Uvin (1998) 54.

¹⁶⁰³ Uvin (1998) esp. 13-39, and see also Kamola (2008) 63-67.

resources coming in through the development aid system, fostering a system of clientalism. Uvin also argued that the international aid system contributed to a climate of structural violence: inequality, exclusion, prejudice and hatred, which fed the frustration and enmity that led to the killings.¹⁶⁰⁴

In this context we can reassess the case against Musema. An economic study into the 1994 genocide carried out at Leuven specifically mentions Musema:

*The tea-plantations and tea-factory in Gisovu Commune were the only object of interest for the Habyarimana regime [in this region]. The plantation and the factory were managed by Ocir-thé and directed by Alfred Musema, member of the Akazu. Since Rwanda only had six tea-plantations, the Gisovu plantation was of considerable importance for export earnings. With the decline in the price of coffee at the end of the eighties, an increase in tea production and tea export became an important objective for the Habyarimana government. The local peasant population was very hostile to the establishment of the tea-plantation since their land was expropriated. The peasant families had to move to other, less fertile land or even migrate.*¹⁶⁰⁵

*“Most of the tea producing facilities were financed by donor agencies, making the tea industry, and more specifically its high operating costs, a good example of rent-seeking by the Akazu members. Only the Akazu really benefited from tea production.”*¹⁶⁰⁶

This scenario is reminiscent of the clearances described in Chapter 2A and also the colonial land reform in 2B and 3B.

The fact that genocide is often discussed in terms of irrational, emotional racist ideologies may lead to the subconscious exclusion of business actors from the scope of possible perpetrators because business actors are thought to make decisions on rational grounds. However, looking at Musema above, plus the particular economic context of the region, it is conceivable that Musema wanted to exterminate (part of) the Tutsi in order to clear land for the tea plantation, for example. Uvin has suggested that “it is

¹⁶⁰⁴ Uvin (1998) 103ff. On the role of international aid, see also, Van der Walle (2001).

¹⁶⁰⁵ Verwimp (2001).

¹⁶⁰⁶ Id, citing Uvin (1998); see also Longman (2001) 169.

...possible that some participated in the genocide in the hope to appropriate other people's land."¹⁶⁰⁷ With Musema's deeper motivation remaining unexplored, this open question is answered by our expectations/the common emotive discourse of ICL rather than a number of possible alternatives.¹⁶⁰⁸

It is not my aim here (nor in this thesis in general) to give definitive explanations for historical events or the motivations of actors, rather, to comment on the interaction between law and material reality. While ICL purports to allocate responsibility, the responsibility of others (persons, factors, processes) is concealed. In particular, the narrative generated by the ICTR cases discussed here, while to some limited extent including local economic disparity, excludes the wider role of the market, and in particular, the international economic angle in the form of colonial processes, post-colonial processes, possibly neo-colonial processes of WB/IMF/the donor community in general.¹⁶⁰⁹ The role of particular Western corporations is, even in the critical literature, difficult to find.¹⁶¹⁰

A better source on more detailed information of third state and company involvement is NGO reports. The international human rights NGO Human Rights Watch ("HRW") in its January 1994 report, "Arming Rwanda" describes six foreign governments supplying arms to Rwanda before, during and after the Rwandan war with Uganda. Corporate involvement, among others was alleged by means of credit guarantees by French bank Credit Lyonnais. HRW suggests another hidden responsibility in its 1995 report "*Rwanda/Zaire: Re-arming with Impunity: International support for the Perpetrators of the Rwandan genocide*" written by Kathi Austin (see below).¹⁶¹¹ HRW's report and further reports led to an UNSC Resolution on the basis of which a

¹⁶⁰⁷ Uvin (1998) 55.

¹⁶⁰⁸ The *Musema* decision is criticised elsewhere as having "*nothing* to do with business activities at all" (Wilt 2010 871). Vest states, "it seems absolutely clear that the production of tea as such does not constitute any risk of perpetrating or contributing to war crimes, crimes against humanity and genocide at all", which stands in contrast with his recital of the example of business leaders' involvement in forced displacement earlier in the article (868) but is perhaps emblematic of the attitude that 'neutral' acts are unlikely to amount to crimes (generally, id.863-4).

¹⁶⁰⁹ Also, post-genocide Rwanda went through a programme of drastic privatisation. Gisuvu Tea Company was bought by an Indian-owned British company, McLeod-Russell, the largest tea producer in the world: All Africa 14 February 2011, while the bulk of coffee production was bought up by US giants Costco and Starbucks: Development Afrique, 10 November 2009.

¹⁶¹⁰ Slapper and Tombs have suggested that academics may self-censor research on corporate crime (especially on specific companies) for fear of loss of research funding or libel suits by corporations, which may be winnable but are expensive to defend (Slapper & Tombs (1999) 231-2).

¹⁶¹¹ *HRW Rearming Report*.

Panel of Experts was set up to investigate arms supplies. The Panel published its Interim Report S/1996/67 in which it describes approaching governments of Bulgaria, China, France, Seychelles, South Africa and Zaire, each of which were accused of having exported arms to Rwanda. So while the ICTR includes Rwandese businesspersons on its case list, it also excludes, and thereby potentially conceals the involvement of Western banks and arms companies.

1.3 Special Court for Sierra Leone

Moving to the West of Africa, the indictment of Charles Taylor by the Special Court for Sierra Leone (“SCSL”) (which was established pursuant to a bilateral agreement between the UN and Sierra Leone¹⁶¹²) is of interest here because of its potential impact as a persuasive precedent for prosecuting arms dealers and others who aid and abet perpetrators through financing or engaging in trade with a violating party. Charles Taylor is indicted for (amongst others) having aided and abetted abuses perpetrated by the Sierra Leoneans.¹⁶¹³ While Charles Taylor is generally seen as a political leader and not a businessman as such he is said to have supplied arms to the Revolutionary United Front (“RUF”) in Liberia in exchange for “diamonds and other riches.”¹⁶¹⁴ In the 2003 indictment this is phrased as follows:

*20. To obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the State, the ACCUSED provided financial support, military training, personnel, arms, ammunition and other support and encouragement to the RUF, led by FODAY SAYBANA SANKOH, in preparation for RUF armed action in the Republic of Sierra Leone, and during the subsequent armed conflict in Sierra Leone.*¹⁶¹⁵

Writing in 2004, HRW heralds the Taylor indictment saying it will set a precedent to prosecute other arms dealers around the world for complicity in international crimes.¹⁶¹⁶ In the same publication, HRW noted that “the SCSL is also currently

¹⁶¹² *SCSL Agreement.*

¹⁶¹³ *Taylor 2007 Indictment.*

¹⁶¹⁴ *HRW Weapons Report 2.* See also BBC News, 20 May 2010.

¹⁶¹⁵ *Taylor 2003 Indictment.*

¹⁶¹⁶ *HRW Weapons Report.*

investigating other arms suppliers.”¹⁶¹⁷ Considering Charles Taylor’s well-publicised international relations amongst others with supermodel Naomi Campbell and the Russian arms dealer Victor Bout, the SCSL had the opportunity to prosecute a significant number of businesspersons on the conflict diamond and arms circuits. However, the SCSL has decided not to proceed with the prosecutions.¹⁶¹⁸

Moreover, on 17 March 2006 an Amended Indictment was filed in the Taylor case in which the paragraph above no longer appears,¹⁶¹⁹ nor does it appear in the Second Amended Indictment of 2007, which is rather brief, and vague about the exact way in which Taylor may have aided and abetted the crimes committed by the RUF and others:

*By his acts or omissions in relation to the below described events, the ACCUSED, pursuant to Article 6.1. and, or alternatively, Article 6.3 of the Statute, is individually criminally responsible for the crimes alleged below.*¹⁶²⁰

Once again, it seems the case will focus on ethnic differences rather than economic resources that could potentially involve many western individuals and companies. The one exception is the prosecution of Guus van Kouwenhoven in The Netherlands – who is accused of supplying Charles Taylor with arms (Section 5).

2 The ICC

Although the ICC does not have jurisdiction over legal persons, it could prosecute individual business persons (see Ch. 4B). The Chief Prosecutor of the ICC, Louis Moreno Ocampo, has often expressed his wish to prosecute business actors, but thus far has not indicted any.¹⁶²¹

¹⁶¹⁷ *HRW Weapons Report*.

¹⁶¹⁸ Anonymous comment from a lawyer at the SCSL: “the court knows who the people supplying arms/buying diamonds are (outside of CT) but they aren’t in any way pursuing them.” (Email 10 June 2010).

¹⁶¹⁹ *Taylor 2006 Indictment*.

¹⁶²⁰ *Taylor 2006 Indictment*. The crimes below include, “crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violations of International Humanitarian Law, in violation of Articles 2, 3 and 4 of the [SCSL] Statute.”

¹⁶²¹ E.g. at *BLIHR* (2005).

2.1 *The Democratic Republic of Congo*

Sometimes business involvement in conflict comes up in other venues. For example, the International Court of Justice (“ICJ”) in *DRC v Uganda* cited evidence that Ugandan military commanders had planned to exploit the DRC resources for business purposes; that Ugandan military aircraft had been used by businessmen to transport resources out of the DRC, and in conclusion that the Ugandan government was liable for acts of military.¹⁶²² The ICJ is not in a position to tackle this issue, but the ICC could. An ICC statement of 2003 has signalled the Prosecutor’s interest in investigation corporate involvement in international crimes in the DRC: “the prosecutor will work together with national investigators and prosecutors in order to determine the contribution, if any, that these businesses are making to the commission of crimes in the DRC. ...The Prosecutor of the ICC hopes that the prosecution of these cases [of alleged business practices fuelling atrocities] will contribute to the ongoing peace process [in the DRC] and ultimately yield stability for the DRC, fostering not just political stability but also *healthy markets*.”¹⁶²³ However, the DRC list does not contain business actors as at November 2011.¹⁶²⁴

2.2 *Kenya*

In Spring 2010 it was announced that the ICC would prosecute six “political and business leaders” who are thought to have been responsible for the election violence that claimed 1200 lives in Kenya in 2007/8.¹⁶²⁵ The Prosecutor has whittled down an initial 20 “business and political leaders,” presented in March 2010,¹⁶²⁶ to the current six. The Kenyan file raised the interest of the Pre-Trial Chamber for utilising the concept “state or organizational policy” in the latter, rather than the former meaning. In response to a request for clarification, the Office of the Prosecutor explained that “state or organizational policy” can apply to non-state actors (here, political parties).¹⁶²⁷

¹⁶²² *Armed Activities* 2005; Okowa (2007).

¹⁶²³ *ICC Ituri PR* (emphasis added); see also *ICC Ituri Communications PR*.

¹⁶²⁴ See the ICC website, Situations, The Democratic Republic of Congo: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/>.

¹⁶²⁵ France 24, 12 May 2010.

¹⁶²⁶ “The Office has presented a preliminary list of 20 political and business leaders to the Judges, belonging to or associated with both parties, the PNU and ODM. As you know, this list was just indicative. It is not binding.” *Ocampo Kenya Statement* 2010.

¹⁶²⁷ *Prosecutor Organisation Indicators, Appendix F*.

Making it clear that a political party can, in the Prosecutor's view, amount to an organization for the purposes of the ICC Statute, it may be, that the Prosecutor is paving the way (indirectly) for corporate liability in ICL (see Chs. 4 and 6).¹⁶²⁸

3 Alternative ways of dealing with business in conflict

There are limited international interventions in business involvement in conflict by other means, mostly diplomatic.

3.1 The UNSC Embargoes, sanctions and fact-finding missions

When the UNSC decides that the use of force or the creation of a tribunal is not the appropriate option, Chapter VI of the UN Charter gives other options of dealing with past, present or potential future international crimes. It seems the preferred method for dealing with arms trade (when the need is felt to 'do something') is UNSC arms embargoes. Violation of such embargoes do not necessarily attract the publicity court cases do, and can be resolved diplomatically (or ignored).

In 2000, the President of the Security Council asked the UN General Secretary to appoint a panel of experts to examine the illegal exploitation of natural resources in the Democratic Republic of the Congo and the connection between such exploitation and the conflicts in the area.¹⁶²⁹ This move was the first time at this level that conflict and private economic activity in the natural resources sector was the subject of investigation. The Panel's mandate was extended four times, ending in with a final report in October 2003.¹⁶³⁰ In its 2002 Final Report, the Panel described having found three 'elite networks' of politicians, military and business leaders that each controlled the natural resources in three separate areas controlled by the governments of the DRC, Uganda and Rwanda.¹⁶³¹ It also found a direct ink between the exploitation of natural

¹⁶²⁸ On 31 March Kenya filed a request to the Pre-Trial Chamber to declare the case inadmissible, on the basis that Kenya is investigating the issue itself: *Kenya ICC Request*.

¹⁶²⁹ *UNSCP Congo Panel Request, Appendix F*.

¹⁶³⁰ *UN Congo 2003 Report*.

¹⁶³¹ *UN Congo 2003 Report* 25-64. At 21: "The networks consist of a small core of political and military elites and business persons and, in the case of the occupied areas, selected rebel leaders and administrators. Some members of the elite networks occupy key positions in their respective Governments or rebel groups....The elite networks ensure the viability of their economic activity through control over the military and other security forces...The networks monopolize production,

resources and the ongoing conflict in the region and abuses that included the use of child forced labour.¹⁶³² In this report it also made the ‘unparalleled’ move of naming 29 companies and 54 individuals, whose association with the elite groups was well-documented.¹⁶³³ The Panel recommended the imposition of financial restrictions and travel bans. It further listed 85 companies (among which many UK, Belgian and other western) that it found to be in breach of the OECD guidelines.¹⁶³⁴ However, in its 2003 Final report, the Panel removed a number of these companies and indicated others as ‘resolved’, which commentators have taken to show that

*the panel did not manage to counter political pressure by business lobbies and governments generated by its unprecedented step of naming specific TNCs. This is reflected in the Panel’s 2003 Final Report, which raises many questions with respect to the Panel’s ultimate categorization of companies and its listing of cases as resolved without including further information.*¹⁶³⁵

Further to the Panel’s findings, the Security Council imposed an arms and ‘related material’ embargo on the Kivu and Ituri districts of the DRC¹⁶³⁶ and established a panel of experts (sanctions committee) to monitor compliance with the embargo.¹⁶³⁷ One of the tasks of the group was:

(b) To examine, and to take appropriate action on, information concerning alleged violations of the measures imposed by paragraph 20 of resolution 1493 and information on alleged arms flows highlighted in the reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo, identifying where possible individual and legal entities reported to be engaged in such violations, as well as aircraft or other vehicles used.

Kathi Austin, one of the Experts appointed to the panel, at an international conference in The Hague stated that the Security Council informally instructed the panel to disregard information related to non-African companies and individuals violating the

commerce and fiscal functions...The elite networks form business companies or joint ventures that are fronts through which members of networks carry on their respective commercial activities.”

¹⁶³² *UN Congo 2002 Report* 149-154.

¹⁶³³ *UN Congo 2002 Report* Annex I and Annex II.

¹⁶³⁴ *UN Congo 2003 Report* Annex III.

¹⁶³⁵ Papaioannou (2006) at 283.

¹⁶³⁶ UNSCRes1493.

¹⁶³⁷ UNSCRes1533.

embargo or otherwise contributing to the arms flow into the relevant localities.¹⁶³⁸ Nevertheless, the panel gathered this information and Austin is now hoping to bring western corporate involvement in the Congo conflict to light by taking this information to US and possibly other domestic courts (see below, Ch.6).¹⁶³⁹

The absence of business representatives from the ICC's DRC trial list, the UN Security Council's decision to opt for an embargo instead of setting up a tribunal or urging the ICC to prosecute, and the Security Council's apparent wish to protect western corporate interests as alleged by Kathi Austin, would seem to underline the empirical unlikelihood of Western corporate actors becoming the subject of an ICL prosecution. What is remarkable, at the same time, is the fact that Ms. Austin, having described an abuse of power in the political institution of the UN, continues to have faith in law itself, and to believe that domestic legal institutions will recognise the truth of her story and deliver 'justice'. It is on this 'faith' by cause lawyers and others in the domestic legal system that I focus briefly in the next section and again in Ch. 6.

4 ICL on the domestic level

If reading ICL literally, taking ICL's word seriously, then according to the 'principle of complementarity', the enforcement of ICL should occur primarily on the domestic level.¹⁶⁴⁰ Pursuant to the *Geneva Conventions* of 1949 (and other conventions such as the ICC Statute, for member states) states have obligations to enact national laws criminalising certain specific activities, and in respect of a number of these, they have the obligation to seek out and prosecute or extradite individuals suspected of these crimes.¹⁶⁴¹ According to the principle of universal jurisdiction (which exists in ICL as well as in treaties), certain crimes that violate obligations of a *ius cogens* nature (e.g. torture, genocide, apartheid), can potentially be tried by any state, regardless of the nationality of the perpetrator or the place where the crime is said to have occurred.¹⁶⁴² All in all, it would seem, that according to the discourse ICL can (*should*) be used on the domestic level with the ability to make serious inroads into combating the

¹⁶³⁸ Austin (2010).

¹⁶³⁹ Austin (2010).

¹⁶⁴⁰ See generally, Ferdinandusse (2008) 482-520; Ferdinandusse (2009).

¹⁶⁴¹ See further, Articles 1 and 146 of the *Fourth Geneva Convention, 1949*.

¹⁶⁴² On the principle of universal jurisdiction, see, e.g. Cryer et al. (2010) 50-63; Zahar & Sluiter (2008) 496-503.

prevalence of international crimes. Depending on national laws of the jurisdiction, cases can either be brought by prosecutorial authorities at their own instigation (which is rare for various reasons, not least cost), by private parties if such is possible in a domestic legal system (e.g. in France) or as a result of a complaint lodged on behalf of victims (by NGOs, victims' groups or private (cause) lawyers. Immigration authorities play a role in the detection and detention (or expulsion) of war crimes suspects.¹⁶⁴³ In particular, Rwandan refugees have been under scrutiny in their host states – leading to deportations and/or prosecutions in Germany, Belgium and elsewhere.¹⁶⁴⁴ From the examples below of ICL on the domestic level we can see that ICL contains the empirical impossibility of its promised 'accountability', amounting to 'planned impunity'.

4.1 *Van Anraat and Kouwenhoven, the exception and the rule*

Media attention and public interest in the case can help persuade prosecution authorities to proceed with a case. Sometimes, such as in the case of Frans van Anraat, a suspect appearing in the media boasting about his pursuits renders it politically difficult for the public prosecutor to decline prosecution.¹⁶⁴⁵ That, combined with the Dutch treaty-monist system where international conventional law prevails over domestic law in case of conflict, made The Netherlands a relatively receptive venue for a first case against a Western businessman in for crimes against IL.¹⁶⁴⁶

Above I noted that the van Anraat case forms the exception that confirms the rule of 'impunity' for business actors. The Kouwenhoven case, on the other hand, (thus far)

¹⁶⁴³ See, e.g. Ratner et al. (2009) 281-5.

¹⁶⁴⁴ Id. This includes the case in Belgium of Rwandan businessmen Etienne Nzabonimana and Samuel Ndashykirwa ("The Two Brothers" case), concerning crimes committed during 1994 genocide. Prosecutors said the two businessmen provided weapons, vehicles and beer for militias in Rwanda's south-eastern Kibungo region during the April 1994 killings. The brothers were sentenced to 12 and 10 years in June 2005, BBC News, 29 June 2005.

¹⁶⁴⁵ Van Anraat appeared on national Dutch television boasting about his relationship with Saddam Hussein. The Dutch secret service had paid van Anraat and accommodated him in a safe house in return for intelligence on Iraq but the public revelation made it difficult to ignore him: see, among others, Karskens (2006).

¹⁶⁴⁶ *Dutch Constitution*, Chapter 5(2), Arts. 90ff. e.g. "Article 94 Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."

conforms to the more regular pattern of impunity for business involvement in conflict.¹⁶⁴⁷

4.2 *Van Anraat*

The van Anraat case bears resemblance to the *Zyklon B Case* discussed in Chapter 3 (both in content and in law), in that it provides another example of inferred knowledge vis-à-vis an act of assistance. Van Anraat was a chemicals broker. The significance of van Anraat being a broker rather than supplier is that the products never entered the European Union's jurisdiction, and that van Anraat himself did not personally hold or handle them.¹⁶⁴⁸ He was tried for having brokered the supply of chemicals to former Iraqi President Saddam Hussein. The chemicals were then used to manufacture mustard gas with which the Kurdish populations of northern Iraq and Iran were attacked (the "Anfal Campaign"). Van Anraat claimed in his defence that he believed the chemicals were for use in the garment industry. However, the court found, that although the type of chemical sold were commonly used in the garment industry, the quantities requested by the Iraqi President *must have* given Van Anraat cause to think he may have had another purpose for them.¹⁶⁴⁹ Additionally, as Van Anraat was an experienced chemicals dealer he *must have known* the chemicals could be used as a component in the manufacture of poison gas, and finally, as a regular newspaper reader and someone who had spent considerable time in Iraq, Van Anraat *must have known* that, considering that Iraq was at war with its neighbour and in conflict with the Kurds in Northern Iraq, *in the ordinary course of things*, the mustard gas, once manufactured, *would be used*, and eventually was used, to gas the Kurds.¹⁶⁵⁰ Importantly, Van Anraat delivered another shipment of the chemicals after the Halabja attack in 1988 which had been widely covered in the news. On this basis Van Anraat was considered to have aided and abetted Saddam Houssein in his war crimes: he was not required to have had *intent* towards crimes carried out by Saddam. In other words, Van Anraat was not required to have *wanted* the Kurds to be gassed, it was sufficient

¹⁶⁴⁷ On the Van Anraat and Kouwenhoven cases generally, see Huisman (2010); Van Sliedregt (2007); Van der Wilt (2006); Van der Wilt (2008).

¹⁶⁴⁸ *Mark Thomas Documentary*.

¹⁶⁴⁹ *Van Anraat Appeal Decision* 12.1.1.

¹⁶⁵⁰ *Van Anraat Appeal Decision*, 11.17.

that he *knew* (*must have known*) the chemicals would be used to this end.¹⁶⁵¹ Van Anraat was sentenced to 17 years' imprisonment.¹⁶⁵²

4.3 Kouwenhoven

Also in The Netherlands, businessman Guus Kouwenhoven is being prosecuted on the accusation of having delivered arms to Liberia and of being involved in war crimes committed by Liberian troops and/or militias during the reign of Charles Taylor. Kouwenhoven was convicted of the weapons supply charges but acquitted of the war crimes charges by a lower court in 2006,¹⁶⁵³ then and released in 2007¹⁶⁵⁴ and fully acquitted by the Court of Appeal in 2008,¹⁶⁵⁵ but recently (20 April 2010) the Dutch Supreme Court ordered a retrial (expected 2012), considering the Court of Appeal had neglected to hear important witnesses in the case.¹⁶⁵⁶

Kouwenhoven had been put on a UN travel ban list in 2000 because of his alleged arms and diamond dealings for Charles Taylor and the RUF.¹⁶⁵⁷ The Global Witness report "The Usual Suspects" claims that OTC, the company managed by Kouwenhoven, ran a militia of 2500 armed fighters.¹⁶⁵⁸ Kouwenhoven is also mentioned by name in the UN Panel of Experts Reports on Liberia.¹⁶⁵⁹ OTC, the company he ran was registered in Liberia and part of a Chinese-owned group, which may explain why Kouwenhoven was indicted as an individual in The Netherlands, and the company was not.¹⁶⁶⁰

The fact that Frans van Anraat was prosecuted is partly the result of an investigation carried out by a journalist, Arnold Karskens, and partly the result of 'prosecutorial activism'. Although The Netherlands had one of the first 'war crimes units' as part of

¹⁶⁵¹ See also, Van der Wilt (2008).

¹⁶⁵² On 1 July 2009, the Dutch Supreme Court upheld the judgment, but shortened Van Anraat's sentence by six months due to the length of the trial. The Supreme Court also ordered the lower court to reconsider the compensation claims made by Kurdish victims, *Van Anraat Supreme Court Decision*.

¹⁶⁵³ *Kouwenhoven 2006 Judgment*.

¹⁶⁵⁴ *Kouwenhoven Interim Judgment*.

¹⁶⁵⁵ *Kouwenhoven Acquittal*.

¹⁶⁵⁶ *Kouwenhoven Supreme Court Judgment 2010*.

¹⁶⁵⁷ *UNSC Liberia Asset Freeze List; UN Liberia 2007 Report; Bankrolling Brutality*.

¹⁶⁵⁸ *Global Witness Liberia Report 13*.

¹⁶⁵⁹ E.g. *UN Liberia 2007 Report*.

¹⁶⁶⁰ In a magazine interview in 2007, Kouwenhoven's lawyer claims that Global Witness' report is tainted by the fact that the organisation received funding from OSI-West Africa, where at the relevant time Ellen Johnson-Sirleaf was the Chair of the Board. She is now (2007) the President of Liberia and, according to Kouwenhoven's lawyer, had an interest in eliminating her rival Taylor's main source of finance, the timber trade (of which the OTC was the main producer). He also accuses Global Witness of pressing for a timber embargo from the UNSC on the same grounds: *Vrij Nederland*, 31 Maart 2007 77.

the office of the public prosecutor,¹⁶⁶¹ international cases such as those against van Anraat and Kouwenhoven are expensive to investigate and run. As a result of this, the outside help of journalists such as Karskens, or NGOs such as Global Witness, can be a *sine qua non*. However, according to the prosecutors, the case of Kouwenhoven fell apart when NGO-produced evidence was rejected by the court,¹⁶⁶² witnesses were intimidated, etc.¹⁶⁶³ Viewing the situation from a different angle, when such prosecutions depend to such a large extent on external assistance, it also shows us something about the government's/public prosecutor's budgeting priorities.

The two Dutch prosecutions are essentially “progressive” cases. However, van Anraat and Kouwenhoven both acted as loners, even outlaws. Van Anraat incriminated himself when by boasting on tv about his dealings with Saddam Houssein. Kouwenhoven's company OTC was not prosecuted *per se*. The U.S. company that manufactured the TCG that van Anraat brokered was fined USD 200,000 for sanctions-busting.¹⁶⁶⁴

It is perhaps the model case for what we (a putative ‘ideal’ college of liberal lawyers, as well as an ‘ideal’ general public) imagine ICL could be (or, what ICL promises to be): a greedy villain, an evil dictator, a firm but fair judge, a long jail sentence and a reassured public. Van Anraat and Kouwenhoven is that they are both really mediagenic “James Bond baddies” with a certain charm. This makes prosecuting them into a popular spectacle. The case is being turned into a film.¹⁶⁶⁵ At the same time, it creates an artificial distinction between these two bad guys, and ‘legitimate’, normal, clean corporate business. Van Anraat, and (potentially Kouwenhoven) is thus the ‘fall guy’ for the ‘backlash’ (Ch.6).

5 Host state cases

It is rare to hear of (especially Western/Northern) corporate actors being prosecuted in ‘host states’ – the states where these individuals and companies do business, and where violations of the kind discussed here generally occur. Part of the reason for this

¹⁶⁶¹ Office of the Public Prosecutor: <http://www.om.nl/onderwerpen/oorlogsmisdaden/>

¹⁶⁶² Conversation with members of the War Crimes Unit, 29 October 2010.

¹⁶⁶³ *Karskens blog*.

¹⁶⁶⁴ Karskens (2006) 169.

¹⁶⁶⁵ Het Parool, 1 July 2010.

is that these cases are not widely reported in the Western media. However, some examples deserve mention. When such prosecutions do occur, reports of obstacles and buying off of judges/authorities also appear (e.g. *Trafigura in Cote d'Ivoire*¹⁶⁶⁶). Additionally, in cases such as the prosecution of Warren Anderson, CEO of Union Carbide/Dow which has been ongoing since 1987, it would be difficult to get the suspect to appear in court or even be extradited.¹⁶⁶⁷ The 2010 Bhopal Court decision lists Anderson as 'absconder'.¹⁶⁶⁸ A claim for USD489m. worth of damages that a Nicaraguan court awarded plaintiffs (who had suffered injury from pesticides) against Shell Chemicals, Dow Chemicals, Standard Fruit was declared unenforceable by a California court in 2003.¹⁶⁶⁹ A recent documentary on Al-Jazeera mentioned a local Colombian lawsuit against Chiquita, which is accused of killing local trade union leaders, workers and social activists. I have not found further details on this local case but the ATCA case in the US is well-documented.¹⁶⁷⁰ On 4 January 2012, a court in Ecuador ordered Chevron to pay USD18bn for dumping oil-drilling waste in unlined pits, polluting the forest and causing illness and deaths among indigenous people.¹⁶⁷¹ Chevron's staff immediately denounced the decision: "[The] decision is another glaring example of the politicisation and corruption of Ecuador's judiciary that has plagued this fraudulent case from the start."¹⁶⁷²

In the Democratic Republic of Congo, on 14 December 2006, three former employees of Australian mining company Anvil Mining (together with nine Congolese soldiers) went on trial on charges of complicity in war crimes over a 2004 massacre in the DRC. Pierre Mercier, the Canadian who was the general manager of Anvil Mining Ltd.'s Congolese subsidiary, as well as two South Africans stood accused of having "knowingly facilitated" war crimes committed by Congolese troops when the military suppressed an uprising near Anvil's Dikulushi mine in the Katanga Province, allegedly killing at least 70 civilians.¹⁶⁷³ The trial ended six months later in the acquittal of all accused.¹⁶⁷⁴

¹⁶⁶⁶ De Volkskrant, 24 August 2009.

¹⁶⁶⁷ BBC News, 7 June 2010.

¹⁶⁶⁸ *Bhopal Indian Criminal Case*.

¹⁶⁶⁹ Joseph (2004) at 150 (case not reported).

¹⁶⁷⁰ *Chiquita documentary*.

¹⁶⁷¹ The Independent, 5 January 2012.

¹⁶⁷² The Independent, 5 January 2012.

¹⁶⁷³ See Australian Broadcasting Corporation list of articles on the subject:

<http://www.abc.net.au/4corners/content/2005/s1408730.htm> . See also *ABC Kilwa Documentary*.

¹⁶⁷⁴ *Anvil Mining PR*.

On 17 July 2007, RAID and Global Witness together with two Congolese NGOs published a report, “The Kilwa Trial: a denial of justice”, which presents a detailed chronology of events from October 2004 to June 2007. The report argues that the proceedings were “plagued with obstructions and political interference”¹⁶⁷⁵ and documents “serious flaws and irregularities” in the trial of nine Congolese soldiers for war crimes and three employees of Anvil Mining for complicity in war crimes committed in Kilwa, in the DRC.¹⁶⁷⁶

In Ch.1 I commented above on the notion of ‘corporate power’ and quoted statistics such as “the combined sales of four of the largest corporations in the world exceed the gross domestic product of Africa.”¹⁶⁷⁷ Likewise, over 90% of Nigeria’s foreign exchange earnings are said to come from Shell,¹⁶⁷⁸ which would make local litigation, let alone prosecution, very difficult. Moreover, Shell is said to have “someone on their payroll” in every government department in Nigeria.¹⁶⁷⁹ Also, in Chapter 2B I mentioned how ‘stabilisation clauses’ in BITs leave host states very little room to adopt or strengthen human rights and other restrictive legislation. While the benefit of western (and East Asian) MNCs is felt by Third World elites, the GWC are virtually¹⁶⁸⁰ powerless in the face of exploitation and abuse.¹⁶⁸¹

6 Conclusion

There are many other examples of recent conflicts where we may have imagined international criminal trials to have been brought against the businesspersons or companies implicated.

¹⁶⁷⁵ E.g. *RAID Kilwa PR*.

¹⁶⁷⁶ *RAID Kilwa PR*.

¹⁶⁷⁷ Ch.1 S.1.1.

¹⁶⁷⁸ Usman (2011) 294.

¹⁶⁷⁹ *The Guardian*, 8 December 2010.

¹⁶⁸⁰ See Chapter 6 below.

¹⁶⁸¹ This includes African Human Rights NGOs, e.g. Africa Legal Aid (AFLA) who published *The Cairo-Arusha Principles*: “The Principles provide that universal jurisdiction applies to gross human rights offences committed “even in peacetime.” The Principles also provide that universal jurisdiction should not be limited only to natural persons, but that it should extend to legal entities as well. The Principles suggest that crimes such as acts of plunder and gross misappropriation of public resources, trafficking in human beings and serious environmental crimes, which have “major adverse economic, social or cultural consequences,” should be added to the list of crimes subject to universal jurisdiction.”

One such example is South Africa, where the South African Truth and Reconciliation Commission held three days of ‘Business Sector hearings’.¹⁶⁸² In a submission, the Center for Conflict Resolution (University of Cape Town) asserted, “Sections within the business community, through their extensive involvement in domestic arms production, and as an active participant in Total Strategy,¹⁶⁸³ provided the material means for the maintenance and defence of apartheid, both domestically and in the context of South Africa’s destabilisation campaign of the Southern African region. As such, elements within the business community are guilty of directly and indirectly perpetuating the political conflict and associated human rights abuses which characterised South Africa between March 1960 and May 1994.”¹⁶⁸⁴ It further asserted the emergence of a ‘military industrial complex’ functioning “on the basis of a structural pairing between business and military that inevitably develops into mutual interests.”¹⁶⁸⁵

The Truth & Reconciliation Commission’s Final Report weighed up two dominant points of view it had had represented to it at the hearings:

One view, which sees apartheid as part of a system of racial-capitalism, held that apartheid was beneficial for (white) business because it was an integral part of a system premised on the exploitation of black workers and the destruction of black entrepreneurial activity. According to this argument, business as a whole benefited from the system, although some sections of the business community (most notably Afrikaner capital, the mining houses and the armaments industry) benefited more than others did. This position is most clearly articulated in submissions by the African National Congress (ANC), the South African Communist Party (SACP), the Congress of South African Trade Unions (COSATU), Professor Sampie Terreblanche of the University of Stellenbosch and the Black Management Forum (BMF). ... The other position, argued mainly by business, claims that apartheid raised the costs of doing business, eroded South Africa’s skill base and undermined longterm

¹⁶⁸² TRC Business Sector Hearings Excerpt in **Appendix F**.

¹⁶⁸³ The strategy developed by the South African government over the years aimed at repelling the “communist onslaught” it expected, and which included recruitment of the private sector, and “depended on the active participation of private sector business.” CCRSA TRC Submission.

¹⁶⁸⁴ CCRSA TRC Submission.

¹⁶⁸⁵ CCRSA TRC Submission citing Smith (1983), 74.

*productivity and growth. In this view, the impact of apartheid was to harm the economy.*¹⁶⁸⁶

The TRC's findings on business was, first and foremost: "Business was central to the economy that sustained the South African state during the apartheid years. Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefited from co-operating with the security structures of the former state. Most businesses benefited from operating in a racially structured context."¹⁶⁸⁷ No prosecutions ensued, with 'truth and reconciliation' being the chosen strategy for transition. That this was not satisfactory to many victims of Apartheid, can be concluded from the class actions brought in their name against a number of corporations in the US (Ch.6).

Another example is the situation in Iraq. One could have imagined prosecutions, by analogy to the prosecution of Tesch and Zyklon B, of the *other* manufacturers and suppliers of the gas that Saddam Hussein used to kill the Kurds of Halabja and across the border in Iran. Likewise, we could imagine prosecutions for complicity in war crimes committed in post-2003 Iraq by probably every major arms supplier who supplied the US military, the banks that provided the finance, the companies that supplied the manpower in the form of mercenaries/private military contractors.¹⁶⁸⁸ I have argued that Van Anraat's prosecution is the exception that confirms the rule: it appears that ICL is *not designed* to do this, this is not what ICL is for. As I have tried to show in this chapter, ICL's purpose is partly for pro-capital intervention, partly ideological: to create a particular narrative of conflict which excludes economic causes.

While in Iraq, one trial was organized for Saddam Houssein and seven of his colleagues (a trial that has received much criticism in itself¹⁶⁸⁹) the US occupation put through a programme of economic and legal reform in Iraq that was in many ways similar to that in Japan, in Yugoslavia, and generally the reforms that accompany World bank and IMF finance. In Iraq, US appointed Bremer passed orders allowing

¹⁶⁸⁶ *TRC Final Report* Volume 4, C.2pp18ff deal with the business sector hearings.

¹⁶⁸⁷ *TRC Final Report* 48. See further, **Appendix F**.

¹⁶⁸⁸ Generally, Klein (2007) 323-382; Scahill (2007).

¹⁶⁸⁹ See, e.g. Alvarez (2004); Shany (2004); Zolo (2004).

100% foreign ownership of Iraqi companies, leaving the oil industry in the hands of a professional management team independent from political control and headed by a former Shell CEO, major tax reforms, the creation of a US-Iraq free trade area, etc.¹⁶⁹⁰ Saddam's trial formed only a thin veil over those reforms. But while many (lawyers and others) focus on the legality or illegality of the war, legal issues surrounding detention in Guantanamo and elsewhere, and torture,¹⁶⁹¹ (one could call this 'law's 'CNN effect') very few if any research focuses on the dispossession of the resources in Iraq. Our faith in ICL is important to the capitalist IL, partly because it keeps activists' and leftist legal academics' focus on prosecuting suspected war criminals. Tallgren suggests: "Focussing on the idea of international criminal justice helps us to forget that an overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law."¹⁶⁹² (Nor, indeed, that many of them are caused with, *through* law.)

ICL forms an integral part of the structure of rules congealing the economically exploitative relationships between the GCC and the GWC.

Koskenniemi and Ratner both contend that the ICTY and ICTR were created for political ends. Ratner asserts: "the [UN Security] Council created [the ICTY and ICTR] as substitutes for robust international action to prevent or stop the atrocities in these two regions"¹⁶⁹³ The visual performance of the trials at those tribunals masks the failure to prevent the tragedies in the first place. The Nuremberg, Tokyo and associated courts have overwhelmingly received the same criticism. Brownlie has stated that "political considerations, power and patronage will continue to determine who is tried for international crimes and who not."¹⁶⁹⁴ Rather than presenting ICL as a triumph of law enforcement (and the recognition of individual criminal responsibility) over politics that should be improved by eliminating 'selectivity',¹⁶⁹⁵ we should perhaps speak of the instrumentalisation of individual responsibility for political ends. These ends would include not only the accountability of, say Serbian leaders or

¹⁶⁹⁰ See Gathii (2010) 71-93; Klein (2007) 323ff., Coalition Provisional Authority website: <http://www.iraqcoalition.org/>.

¹⁶⁹¹ Viz. e.g. the case brought in Germany against Donald Rumsfeld, the case in Spain against John Yoo et al., attempted arrests of George W. Bush in Switzerland and Canada, etc. – the work of cause lawyers (see Ch. 6 below).

¹⁶⁹² Tallgren (2002a) 593.

¹⁶⁹³ Ratner et al. (2009) 9. See also, Koskenniemi (2002).

¹⁶⁹⁴ Brownlie (2008) 604. See also, Mégret (2003).

¹⁶⁹⁵ This is the conclusion of Cryer (2005).

African warlords, but also (for example) the *impunity* of Western (business and political) leaders and e.g. NATO commanders.¹⁶⁹⁶ Impunity, too, is a *legal* construct.¹⁶⁹⁷

Moreover, Akhavan has suggested that the purpose of ICL is utilitarian in the sense that accountability may contribute to post-conflict peace building and the long-term prevention of mass violence.¹⁶⁹⁸ Why this is important, he suggests in the East-Timorese example: “Accountability for atrocities and corruption ... is the key to obtaining the international investment and aid Indonesia desperately needs.”¹⁶⁹⁹ Similarly, former Chief Prosecutor Carla del Ponte, said in a speech that the function of the ICTY was “to bring law where there is none, so that we can invest.”¹⁷⁰⁰ This suggests, that when peace and justice are good for business, we use it to hide this effect, but when ICL is bad for business, ICL remains our vital dream, forever deferred.

¹⁶⁹⁶ *ICTY NATO Bombing Report*. See also Benvenuti (2001).

¹⁶⁹⁷ Cf. Susan Marks, who asserts ‘empire is a *legal* construct’ (Marks (2006) 347).

¹⁶⁹⁸ Akhavan (2001) 30.

¹⁶⁹⁹ Akhavan (2001) 29.

¹⁷⁰⁰ *Del Ponte (2005)*.

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1 Introduction

In the ‘accountability gap’¹⁷⁰¹ left by the non-application of ICL to business in the ICTY, ICTR, other international venues or indeed the domestic courts, it is possible to distinguish three closely related developments in the area of ‘business in conflict’ over the past 20 years. What connects these three is that they all revolve around the corporation *per se*, the corporate person – building on the *reification* of the corporation described in Chs.2A and 2B. The first development is the continuation of the trend introduced in Ch.2A: that of the representation of the corporate legal person as a ‘good citizen’, in what has become the thriving discourse and practice area of corporate social responsibility, “CSR”. In Section 2 I discuss CSR’s material and intellectual provenance and its development into a movement for the promotion of non-binding rules on corporate behaviour. The second development is that of ‘ICL cause lawyering’ (Section 3). It is both the availability of ICL norms, and the discontent with the level of ICL enforcement on the international level (and public prosecutor-initiated cases on the domestic level), and frustration with (of) the possibilities in host states, that has given rise to multiple attempts by NGOs and ‘cause-lawyers’ to ‘bring corporations to account’ in western domestic courts. Such cause lawyering forms a

¹⁷⁰¹ A term now often used in NGO literature on business & human rights, e.g. *Amnesty Dignity Report*.

response to the CSR movement, which in turn has developed partly to alleviate the ‘bad corporation’ accusations of the cause lawyers.¹⁷⁰² The final development discussed here in Section 4 is the call for the *legalisation* of CSR, which seeks to form a compromise between the first two responses and has advocates in the NGO/practice world as well as in academia.¹⁷⁰³ One particular demand within the ‘legalised CSR’ ambit is the inclusion of the corporate legal person as an object of ICL – as introduced above in Ch. 4C.

In Section 4 I critically assess the *practical meaning* of the corporate accountability proposed or supported within these three strategies. Most importantly, the contribution these developments make to the reification/anthropomorphisation of the corporation changes (‘spirits away’¹⁷⁰⁴) the relationship of responsibility for harm from individual to society at large/affected communities, to one of individual victims with ‘the corporation’. The practical effect of this is that individuals affected by the particular excesses of capitalism (as perpetrated by business(wo)men) in conflict, are constituted as victims who, in a legal relationship as formal equals with the corporation, can seek to negotiate the ‘price’ of the harm done to them, under the commodified responsibility relationship.

In Section 5 I reflect on the claim quoted in Ch. 1, that ‘corporate rule is here’. In the preceding chapters I have shown that the GCC rule, to a significant degree, through and with the corporate form, which “hides the essential brutality and indifference to the plight of others that characterises [corporate] profit-making activities.”¹⁷⁰⁵ Their ‘corporate rule’, is not only material, but also ideological¹⁷⁰⁶ – the corporation rules with a ‘combination of force and guile.’¹⁷⁰⁷ The two depend on, and mutually reinforce each other. Berle wrote in 1957:

The first question is that whenever there is a question of power there is a question of legitimacy. As things stand now, these instrumentalities of tremendous power [corporations] have the slenderest claim of legitimacy. This is probably a transitory period. They must find some claim of legitimacy, which

¹⁷⁰² Shamir (2004) 635.

¹⁷⁰³ E.g. the various contributions in McBarnet (2007), *Bankrolling Brutality and Amnesty Dignity Report*.

¹⁷⁰⁴ Arthur (1978) 31 (see Ch.1).

¹⁷⁰⁵ Glasbeek (2007) 249.

¹⁷⁰⁶ Pearce (1990) 428.

¹⁷⁰⁷ Ollman (2003) 11.

*also means finding a field of responsibility and a field of accountability. Legitimacy, responsibility and accountability are essential to any power system if it is to endure. They correspond to a deep human instinct.*¹⁷⁰⁸

Glasbeek notes “[a] good deal of intellectual and political massaging is needed to maintain the standing of the corporation.”¹⁷⁰⁹ Here, I discuss such in the context of corporate accountability. My conclusion (S.5) is this: as ICL was the ‘completion piece’ to legitimise the IL enterprise, CSR, corporate litigation, and also ‘corporate ICL’ – together ‘corporate accountability’ - form the main part of what Klein has called, “the 50 year campaign for total corporate liberation.”¹⁷¹⁰ In particular, (putative) *corporate* corporate ICL serves to complete the corporation as a political citizen rather than an amoral calculator, thus allowing the corporation to exercise legitimate authority within ‘global governance’.

I add an afterword (S.6) in which I highlight current anti-corporate resistance as a strand in broader anti-capitalist resistance, which presents the *seed of the new*.

2 Corporate social responsibility: Company law and the ‘last *maginot* line of capitalism’

Glasbeek calls ‘corporate social responsibility’ (“CSR”) the ‘last *maginot* line of capitalism’, which it has ‘dug’ in the face of the last remaining resistance to its main bearer, the corporation.¹⁷¹¹ It is possible to track today’s concept back to Marx’ debate on the length of the working day.¹⁷¹² In Ch.2A I introduced the early stages of the process, which should be viewed as part of a reformist agenda aimed at creating a ‘kinder capitalism’.¹⁷¹³ What we can see is that CSR (and the ideas about corporate citizenship preceding the notion) appear at times of (economic) crisis, when there is a ‘backlash’ against the legitimacy of the corporate form and profit-making activities.¹⁷¹⁴

¹⁷⁰⁸ Berle (1957) 16.

¹⁷⁰⁹ Glasbeek (2007) 249.

¹⁷¹⁰ Klein (2007) 19. In *Shock Doctrine*, Klein describes this process as represented in the economic reforms including privatisations and corporate involvement in i.a. occupied Iraq and post-Katrina New Orleans (Klein (2007)).

¹⁷¹¹ Glasbeek (1987-88) 363.

¹⁷¹² Marx (1976) 375-416; Baars (2011), *Appendix G*.

¹⁷¹³ Glasbeek (2002) 3.

¹⁷¹⁴ Generally, Broad (2002); Vernon (1971); Tugendhat (1971).

CSR is thus in part a legitimisation strategy. It is not my aim here to provide a detailed account of the various instruments proposed and adopted, the roles of the various ‘players’, the corporations, platforms, coalitions, projects, foundations and institutions, the standards, decisions, principles, guidelines, best practices, pledges, compacts, handbooks and compliance measuring tools of CSR (which has been done elsewhere¹⁷¹⁵), but instead, I aim to show what its effects are.

CSR appears to rely on the notion that the corporation’s mandate is wider than simply maximisation of shareholder return: it may include acting for the benefit of other ‘stakeholders’, though doing so may also be profitable. Although, as noted in Chapter 2A, the profit objective was by the late 19th C. the only *lawful* objective for the corporation in UK law, in the 1883 case of *Hutton v West Cork Railway Co* the court held that a company board could make a decision that at first sight went against shareholders’ interests. This would be lawful when the decision indirectly *does* make business sense, for example by pacifying employees and thereby reducing risk of industrial action or other loss of productivity: “[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.”¹⁷¹⁶

Critiques of the corporate form have been uttered on occasion since its inception (Ch.2A) and have generally grown stronger at times of economic crisis. Soon after the corporation had been formalised in the 1850s some feared it might become a Frankenstein monster.¹⁷¹⁷ To allay this fear, reification had to be followed by anthropomorphisation, and the concern was now to reinvest the corporation with morality, to portray it as a ‘good citizen’, or ‘soulful company’ rather than an ‘amoral calculator.’¹⁷¹⁸ The corporation had to be ‘re-moralised’ – but this was to be done within the logic of the market – utilising ‘commodified morality’ as discussed in Ch.4. In 1908 the U.S. telecommunications giant AT&T was one of the first to launch an advertising campaign aimed getting the public to ‘love and hold affection for’ the corporation.¹⁷¹⁹ By the end of WWI, the US’s other leading companies had followed suit, creating images of themselves as benevolent and socially responsible, in what

¹⁷¹⁵ E.g. Zerk (2006); Shamir (2005); Muchlinski (2008); McBarnet (2007); Forcese (2009).

¹⁷¹⁶ *Hutton v West Cork Railway Co* (1883).

¹⁷¹⁷ Wormser (1931).

¹⁷¹⁸ Pearce (1990) 425.

¹⁷¹⁹ Bakan (2004) 17.

became known as the ‘New Capitalism’.¹⁷²⁰ In the 1930s corporate social responsibility became known as the “best strategy ... to restore people’s faith in corporations and reverse their growing fascination with big government.”¹⁷²¹

Yet, the purpose of the corporation continued to generate discussion.¹⁷²² In the economically more secure US of the 1950s, the economist Friedman in 1952 once again floated the idea that any managerial concern with interests outside of shareholder interests (and such others as are by law required to be the corporation’s interest) *reduce* social wealth due to increased agency cost.¹⁷²³ Additionally, Friedman asked whether it should not rather be up to the state to set the rules on, e.g. wages, the environment, other ‘stakeholder’ issues, and that business(wo)men could not presume to know, and that it is not their task to decide what is best for society in general.¹⁷²⁴ Nevertheless, eventually for the domestic US and UK audiences, the stakeholder model proved dominant, an important achievement of/for CSR.¹⁷²⁵ This can be ascribed to the dual development of consumer activism and the realisation that such presents a lucrative business opportunity.¹⁷²⁶ Moreover, it presents an opportunity to some extent to devolve *responsibility for corporate responsibility* to consumers: “[w]hether we like it or not, this [the emergence of the corporation] is what has happened.... The dangers are obvious. But history cannot usually be reversed. Until engineers and economic forces give us a way by which anyone can manufacture an automobile in his back yard we will continue to have organizations the size of General Motors or Ford – as long as people want Chevrolets or Fords.”¹⁷²⁷

During the economically abundant (in the West, at least) and activist 1960s, companies came under scrutiny in a world that became more politically vocal.¹⁷²⁸ Ralph Nader in 1965 published *Unsafe At Any Speed: The Designed-In Dangers of the American Automobile* in which he criticised the American automobile industry, which had found

¹⁷²⁰ Bakan (2004) 18.

¹⁷²¹ Bakan (2004) 19.

¹⁷²² Berle (1931); Dodd (1932); Berle (1932). See also, Sommer (1991).

¹⁷²³ Glasbeek (1987-1988) 384.

¹⁷²⁴ Friedman (1962) fn.26 133-4.

¹⁷²⁵ In the UK this view was confirmed in the 1962 case of *Parke v Daily News Ltd*. Importantly, though, Friedman’s and more generally the Chicago School’s economic theories played a vital role in government policy including foreign policy – the results of which in Rwanda and the FYR I have described in Ch. 5; Klein (2007) 18-21.

¹⁷²⁶ Muchlinski (2007) 3.

¹⁷²⁷ Berle (1957) 15. CSR is most popular among producers of consumer goods, for obvious reasons.

¹⁷²⁸ Broad (2002) 6; Bakan (2005) 60; Lang (2011) 61ff.

it economically rational to produce unsafe cars and pay out compensation to accident victims after lawsuits, causing a scandal.¹⁷²⁹ In addition, the anti-Vietnam war movement of the 1960s also rallied against companies such as General Motors, General Dynamics and Chrysler, which were seen to be making large profits from the war, and against Dow Chemical, which produced the napalm used in Vietnam.¹⁷³⁰ During the 1970s crisis the *global* class struggle intensified,¹⁷³¹ and resulting (amongst others) in the NIEO Resolution mentioned in Chapter 2B.

The 1980s and 90s were once again good decades for unfettered capitalism, and it was not until the 00s that the ruthless Gordon Gecko executive lost attraction, which was partially to blame on the corporate scandals of Enron (2001) and WorldCom (2002).¹⁷³² What is interesting to note is that these scandals led to a highly visible application of individual criminal liability.¹⁷³³ Perhaps this was the last push the CSR movement needed to get off the ground in earnest. In Shamir's words, "capitalists and capitalist entities do not sit still when faced with threats and challenges. Corporations and corporate executives constantly mobilize a host of agents (e.g. NGOs, research institutions, business associations, state bureaucrats, etc.) to maintain their ideological and practical supremacy."¹⁷³⁴ CSR has been institutionalised through the work of UN Special Rapporteur on Business & Human Rights John Ruggie,¹⁷³⁵ contributing to CSR's development into a sizeable industry in its own right, with a willing market of 'ethical consumers'.¹⁷³⁶ For producers of consumer products using a CSR strategy now 'makes business sense' and thus fits within the corporation's profit mandate.¹⁷³⁷ Some concern among NGOs that CSR may amount only to window-dressing, has led to a call for replacing the various non-binding guidelines on corporate behaviour with binding rules and thus to 'legalise' CSR.¹⁷³⁸ Some who call for a *legalised* CSR also

¹⁷²⁹ Generally, Nader (1965).

¹⁷³⁰ Glasbeek (1987-88) 391. Dow also produced Agent Orange which would later become the subject of the *Agent Orange* ATCA suit, and was responsible for the disaster Bhopal (see Muchlinski (1989)). The thalidomide issue was another cause for growing scrutiny of business.

¹⁷³¹ Muchlinski (2007) 4.

¹⁷³² Karstedt (2006) 1013.

¹⁷³³ Glasbeek (2010) 248-9.

¹⁷³⁴ Shamir (2005) 94, citing Sklair (1997).

¹⁷³⁵ See e.g. *Ruggie (2008) Report; Ruggie (2011) Report*, and Baars (2011) 425-7 *Appendix G*.

¹⁷³⁶ Muchlinski (2007) 100.

¹⁷³⁷ World Business Council on Sustainable Development, *Corporate Social Responsibility: Making Good Business Sense*, Jan. 2000.

¹⁷³⁸ E.g. McBarnet (2007). In the UK this has resulted in Companies Act 2006, s.172, which includes a wider 'stakeholder' conception of director's duty to act in the interest of the company. See further, Baars (2011).

include the application of ICL to companies (S.4). It is imaginable that this call is stimulated by the recent rediscovery of the Nuremberg Industrialists Trials in cause-lawyering practice.

3 Cause lawyering

The availability of ICL norms and hard-hitting NGO reports about business involvement in conflict (Ch.1, 5), has led ‘cause lawyers’¹⁷³⁹ to attempt to hold corporations (and occasionally business(wo)men) to account for violations of international law. Cause lawyers (and broader publics) have been mobilised, and respond to, the emotive discourse around ‘corporate impunity’, calling forth Cassese’s foundational narrative of ICL (Ch.4) and the efforts of the liberal lawyers at Nuremberg (Ch.3). Their lawsuits appear to form the counterpoint to CSR, being aimed at ‘bad corporations’.¹⁷⁴⁰ On another level, the cause lawyers are the designated (and thus far *only*) putative ‘enforcers’ of (legalised) CSR and corporate ICL.¹⁷⁴¹

Cause lawyers and legal/human rights NGOs have found various ways to bring claims in national courts ultimately based on violations of ICL.¹⁷⁴² Best known of these are the compensation suits brought under the Alien Tort Claims Act and other provisions of US law, which have been numerous and highly publicised.¹⁷⁴³ A small number of similar cases have been brought in Canada¹⁷⁴⁴ and in Europe.¹⁷⁴⁵ Where civil compensation claims for ICL violations are not possible, cause lawyers have found other strategic litigation methods around corporate involvement in conflict. This may include bringing an ICL crime back to its most basic domestic law element, such as murder, or theft, as suggested by Schwarzenberger (above, Ch. 4).¹⁷⁴⁶ Public interest

¹⁷³⁹ Sarat and Scheingold are credited with the term ‘cause-lawyering’ which they define as follows: “Cause lawyering” denotes the practice of law by those committed to furthering through the upholding of a particular cause by legal means, the aims of the good society: Sarat (2001).

¹⁷⁴⁰ Elsewhere I discuss these cases in more detail, also taking into account questions of representation: Baars (2012).

¹⁷⁴¹ See, e.g. the work of the *European Centre for Constitutional and Human Rights* in this field.

¹⁷⁴² See, e.g., *Business & Human Rights Legal Accountability Portal*.

¹⁷⁴³ This U.S. instrument allows aliens (and Americans) to bring civil suits in the U.S. courts against parties who have, or are accused of having, committed a violation of international law (*ATCA*).

¹⁷⁴⁴ *Bil’in (Village Council)*; see Yap (2010) 631.

¹⁷⁴⁵ In the UK, human rights abuse cases have been brought amongst others against *Cape Plc*. Evidence of a growing interest in such cases is the recent number of conferences and workshops on the issue, such as the recent effort by the European Centre for Constitutional and Human Rights, see http://www.ecchr.eu/events_2/articles/conference-tnu.html .

¹⁷⁴⁶ *In re. Agent Orange* was a product liability case.

lawyers in France have taken some more imaginative public law and contract law cases.¹⁷⁴⁷ In this vein a recent criminal case in France against the timber company DLH deserves mention for articulating a case against a ‘conflict timber’ company in terms of a ‘handling stolen goods’ complaint.¹⁷⁴⁸

In the US, Peter Weiss, chairman of the Center for Constitutional Rights (“CCR”), unearthed the long-forgotten Alien Tort Claims Act (“ATCA”) in the 1970s while searching for a legal means to hold to account those responsible for the My Lai massacre, but drew on his experience as one of the Morgenthau Boys when applying the instrument to litigation against corporations involved in conflict.¹⁷⁴⁹ In 1996 CCR filed cases under ATCA against *Unocal*, accusing the US oil company¹⁷⁵⁰ of using slave labour in its plants in Burma, in collusion with the Burmese dictatorship.¹⁷⁵¹ According to Coliver, the facts of the Unocal cases were “typical of this generation of ATCA cases, in which the corporation enters into a business arrangement with a repressive regime or its instrumentalities ... to facilitate natural resource extraction.”¹⁷⁵² Similar cases at the time were brought against the major western oil and mining companies¹⁷⁵³ and against financiers of, and suppliers to, oppressive regimes such as the South African Apartheid government.¹⁷⁵⁴ Many of these cases explicitly refer to the Nuremberg Industrialists’ trials and the Zyklon B case.¹⁷⁵⁵ A major series of cases that is still ongoing is the *Holocaust Litigation* cases – including against Ford for the use of forced labour.¹⁷⁵⁶ Also, cases were filed in relation to corporate atrocities during colonialism,¹⁷⁵⁷ and against suppliers of the means to commit atrocities in war zones such as Vietnam and Palestine.¹⁷⁵⁸

US Courts have found that corporations (as private actors, and legal persons) could be held directly responsible for slave trade, genocide, war crimes, and other so called

¹⁷⁴⁷ *AFPS v Alstohm*.

¹⁷⁴⁸ *DLH Complaint*.

¹⁷⁴⁹ *Weiss Interview* 26.

¹⁷⁵⁰ This section in particular draws on Baars (2007).

¹⁷⁵¹ *Doe v Unocal Corp.* (1999).

¹⁷⁵² Coliver et al (2005) at 209.

¹⁷⁵³ Eg Shell (*Wiwa v Shell*), Chevron (*Bowoto v Chevron*), Freeport McMoran (*Beanal v. Freeport*).

¹⁷⁵⁴ Barclays and Citigroup, amongst others, in the *Apartheid Litigation Cases*.

¹⁷⁵⁵ E.g. *Caterpillar Appeal* 37. See also Jacobson (2005); Skinner (2008).

¹⁷⁵⁶ See, eg, *Holocaust Insurance Litigation*.

¹⁷⁵⁷ *Hereros Complaint*.

¹⁷⁵⁸ *Agent Orange, Caterpillar*; Baars (2007).

“offences of universal concern”.¹⁷⁵⁹ They have also accepted the principle of corporate liability for *complicity* in state acts of torture and summary execution, crimes against humanity, cruel, inhuman or degrading treatment, torture, violation of the right to life, liberty and security of person, prolonged arbitrary detention, and peaceful assembly.¹⁷⁶⁰ However, after the recent decision in *Kiobel* (on a claim brought on behalf of Ogoni Valley claimants against Royal Dutch Shell) the future of corporate ATCA litigation is uncertain.¹⁷⁶¹ The Court of Appeal for the Second Circuit in *Kiobel* held that the ATCA does not confer jurisdiction on the federal courts to hear claims filed under the ATCA against corporations,

“... because no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS.”¹⁷⁶²

Notable here is the qualification ‘of human rights’ – implying that international legal personality in other areas of IL does not necessarily imply such in others (*cf* Ch. 2B). Also notable is the peculiar reasoning: ‘because no company has ever been *held to account*, there is no rule that they can be so held to account.’ However, certiorari was granted and the US Supreme Court is expected to commence hearings in 2012.¹⁷⁶³

None of the ATCA corporate cases have thus far resulted in a court win for the claimants. The ‘business in conflict’ claims relate to serious atrocities that have usually affected large numbers of people. Many of these cases take years, and amicus briefs are filed by other NGOs, churches, victim support groups, trade associations, legal scholars and governments.¹⁷⁶⁴ Courts generally dismiss these cases on technical grounds, without consideration of the merits.¹⁷⁶⁵ In certain cases, to try to avoid, or settle, a mass of lawsuits against particular companies, states have set up mechanisms

¹⁷⁵⁹ In the sense that motions to strike out these cases brought by the defendant, for example, on the basis that (the specifically claimed provisions of) ICL did not apply to corporations (and thus that the plaintiff failed to state a claim, or the court lacked jurisdiction), were dismissed, see, e.g. *The Presbyterian v Talisman, Wiwa v. Shell, Bowoto v Chevron*.

¹⁷⁶⁰ Baars (2007) 121.

¹⁷⁶¹ *Kiobel v. Shell* (2010). The *Kiobel* case had been consolidated with the *Wiwa* case (*supra*) – but *Kiobel et al* refused to settle, see *CCR Wiwa docket*.

¹⁷⁶² *Kiobel v. Shell* (2010), 48.

¹⁷⁶³ *CCR Wiwa docket*.

¹⁷⁶⁴ E.g. *The Presbyterian v Talisman*.

¹⁷⁶⁵ E.g. *Caterpillar*.

to channel compensation payments to individuals that have suffered losses as a result of companies' actions or inactions.¹⁷⁶⁶ Some of these settlements have been challenged (unsuccessfully) as infringements on *individual* rights to redress.¹⁷⁶⁷ In other cases, such as recently in the *Wiwa v Shell* case, a settlement was reached directly by the (representatives of the) company and (representatives of) victims where thousands of victims are to receive nominal sums for the injury to their bodies, lives and environments, in return for abandoning the right to file future claims.¹⁷⁶⁸

3.1 *Cause lawyering problematized*

The promise of ICL has turned civil rights and criminal defence lawyers into lawyers seeking criminal prosecution.¹⁷⁶⁹ The romantic ideal of the civil rights movement, of “little people and landmark decisions”,¹⁷⁷⁰ of “speaking law to power” has – in the context of ICL, turned lawyers to voicing traditionally statist claims for order and control through criminal law. Viewed through a Marxist theoretical lense, such cause lawyering attempts might be seen as a form of resistance or class struggle, as a tactical ‘principled opportunism’¹⁷⁷¹ that may be successful when it coincides with ‘judicial activism’.¹⁷⁷² Here I argue that while these attempts do amount to resistance, they are not emancipatory, and their (unintended) effect is rather, on the one hand, to domesticate class struggle, and on the other, to actualise,¹⁷⁷³ legitimate and thus strengthen the existing structures of power.¹⁷⁷⁴ In particular compensation claims and settlements create an exchange relationship where the ‘victim’ sells her right and the corporate offender calculates risk.¹⁷⁷⁵

The active agent in actualising the legal relationship between the individual ‘victim’ and the corporation is the cause-lawyer him/herself. While human rights claims are

¹⁷⁶⁶ E.g. *Swiss Banks Holocaust Settlement*.

¹⁷⁶⁷ E.g. *In re Holocaust Victim Assets Lit.*

¹⁷⁶⁸ *CCR Wiwa docket*.

¹⁷⁶⁹ I am grateful to Hannah Franzki for this insight.

¹⁷⁷⁰ Haaretz, 28 Nov. 2008. The byline of the article is, “Sometimes all it takes to right a wrong is for one person to stand up and make his or her voice heard.”

¹⁷⁷¹ Generally, Knox (2009).

¹⁷⁷² Generally, Marks (2007).

¹⁷⁷³ Pashukanis (1978) 93.

¹⁷⁷⁴ This is the conclusion of Ziv (2001); Sfarid (2009); Barzilai (2007).

¹⁷⁷⁵ However, these cases do have limited mobilisation and demystification value (Baars (2012)).

‘claims for admittance to law’,¹⁷⁷⁶ the role of lawyers persuading people to bring cases in (western) foreign courts is in some way the equivalent of ‘spreading capitalist law’ (as part of the civilising or *capitalising* mission) as done by the corporate colonisers in the 19th C., of the arbitration decision that held English law should be applied (Ch.2B S.3.2), and Carla del Ponte’s wish to bring law where there is none (Ch.5 S.1.1). In order for a claim to be valid and recognised, the human being must become a legal subject, she must articulate her needs, grievances and desires in legal vocabulary and in a western courtroom, through the mouth of a white man.¹⁷⁷⁷ She must ‘join the system’ in the same way that ‘decolonised’ peoples had to join the Western state system and European international law.¹⁷⁷⁸ As western lawyer I may think I am the enabler, the empowering medium in this equation but in fact I am the opposite, as I produce (constitute) the ‘victim’¹⁷⁷⁹ and demand her surrender to my expertise, to become a rights-entrepreneur.¹⁷⁸⁰ (Similar critiques are made of development practice.¹⁷⁸¹) I, the white lawyer claim to speak for the oppressed, for justice, but I speak for capitalism, as its enforcer.¹⁷⁸²

4 Legalising CSR and Corporate ICL *problematized*

In recent years scholars and others have started to demand that CSR be ‘legalised’¹⁷⁸³: for example, through being codified in an optional protocol to the International Covenant on Economic, Social and Cultural Rights,¹⁷⁸⁴ or through the extension of the ICC’s jurisdiction to corporations.¹⁷⁸⁵ Just as it was argued in the 1940s that IL would only ‘make sense’ with an ICL, corporate social and human rights obligations ‘make sense’ together with corporate ICL,¹⁷⁸⁶ corporate ICL completes, validates CSR. CSR and corporate ICL both support the reification of the corporation (anthropomorphising focussing on its ‘good’ and ‘bad’ sides or incarnations), and both ‘lift’ corporate/business(women)’s behaviour out of local jurisdictions and potential local

¹⁷⁷⁶ Douzinas (2010) 95.

¹⁷⁷⁷ Cf. Neocosmos (2006) 357.

¹⁷⁷⁸ Anghie (2007).

¹⁷⁷⁹ Madlingozi (2010) at 208.

¹⁷⁸⁰ Davis (2008) 44 (uses this term for cause lawyers).

¹⁷⁸¹ Zanotti (2011); Tartir (2011).

¹⁷⁸² A more pessimistic scenario is that of cause lawyers ‘creating’ victims instrumentalising them for their own political or personal goals.

¹⁷⁸³ Generally, e.g. McBarnet (2007).

¹⁷⁸⁴ ICESCR; *UN Legalising CSR Report*.

¹⁷⁸⁵ E.g. Stoitchikova (2010) and see Ch. 4C above.

¹⁷⁸⁶ Voiculescu (2007) 419.

control (the locality of the harm and thus the affected persons) into a de facto Western capitalist realm of international normativity. Moreover, I argue here that the two strategies are closely intertwined in their practical and ideological objectives. Here, I focus on three areas that show these to be part of the problem of business in conflict: compliance and class (4.1), and enforcement and imperialism (4.2). In 4.3 I comment on the idea of a ‘market for responsibility’ – which is where corporate ICL, CSR and cause lawyering potentially meet. I conclude on corporate power and legitimacy (4.4).

4.1 *Compliance and class*

In Ch.1 and Ch.4 I noted that “corporate ICL”¹⁷⁸⁷ is being advocated as part of the solution for the problem of business involvement in conflict, and that this argument has developed out of the CSR and corporate complicity debates. A preliminary critique of the development of such *Wirtschaftsvölkerstrafrecht* is that it excludes/shields/privileges business actors from a general legal regime on the basis that it is sui generis and should thus have its own set of rules – something that also occurred on the domestic level (Ch.2A) and in ‘other’ areas of law separated off through fragmentation (Ch.2B) and more generally by the mere fact of becoming ‘caught’ by IL rather than, say, domestic criminal law (Schwarzenberger’s critique of ICL in Ch.4).¹⁷⁸⁸ The mere existence alone of a *corporate* corporate crime rule would appear to detract the focus from individual business(wo)men.¹⁷⁸⁹

The main lesson from (UK) domestic law is that ‘corporate crime’, despite having been ‘on the books’ for decades, has not been used to prosecute corporations but for in a small number of cases.¹⁷⁹⁰ On the domestic level, under neo-liberal regimes, rather than enforcement/punishment models, compliance models of corporate regulation are predominant.¹⁷⁹¹ This is a function of corporate economic power and common class interest among business and legal/political elites.¹⁷⁹² For this reason, there is likely only to be a semantic difference between the voluntary and *legally binding* norms as the latter are unlikely to be enforced with much rigour. Nevertheless, the mere

¹⁷⁸⁷ Stoitchikova, McBarnet, etc.

¹⁷⁸⁸ Pearce (1990) 424.

¹⁷⁸⁹ Cf. Simester (2010) 282-3.

¹⁷⁹⁰ Whyte (2009) 103; one such exceptional case is *R v P&O Ferries* [1991].

¹⁷⁹¹ Gray (2006) 887.

¹⁷⁹² Miliband (1969) 124-6.

existence of binding CSR/corporate ICL combined with a ‘compliance culture’ has the power to quell the complaint of ‘corporate impunity’. Building, and invoking a compliance culture has two main effects described (in the domestic context) by Hawkins, Snider, Slapper and Pearce & Tombs in the ‘punishment model versus compliance school debate’ of the early 1990s.¹⁷⁹³ The first is, that a corporation can immunise itself from criminal liability by adopting programmes that provide technical compliance while not actually reducing the incidence of crime, and the so-called ‘due diligence defence’ could be invoked (by arguing managers had followed protocol) to ward off the risk of a finding of non-compliance.¹⁷⁹⁴ On the international level compliance programmes could include the various non-binding soft law tools developed jointly by business and NGOs.¹⁷⁹⁵ The second is that internally, compliance programmes have the tendency to devolve responsibility down to individual members of lower ranked technical, operational staff (workers).¹⁷⁹⁶ This means that, even with corporate ICL, the most likely target of enforcement action is an individual worker.

CSR (specifically, the adoption of a CSR policy or document) can function to insulate against a finding of violation of the *OECD Norms*.¹⁷⁹⁷ From this it is not difficult to imagine how court litigation may be decided in a similar way: companies show readiness to cooperate by emphasising their CSR policies, promise to adopt such policies, etc. This would prove pivotal as grounds for dismissing the claim. John Ruggie (UN Special Rapporteur on Business & Human Rights) has defined the ‘duty to respect’ human rights as “in essence mean[ing] to act with due diligence to avoid infringing on the rights of others.”¹⁷⁹⁸ What does due diligence mean and how do we know when we have been duly diligent? Legalised CSR, which would likely be based on the Ruggie Framework,¹⁷⁹⁹ would have the same effect as other business regulation: it enables those same corporations to continue being harmful in a more controlled manner. Regulation works through the delegation of responsibility: each lower level employee has her/specific task list and has received training on compliance and has to

¹⁷⁹³ On the punishment vs compliance models debate in criminal law generally, see the debate in the British Journal of Criminology between Pearce & Tombs (for punishment) and Hawkins (for the compliance model) in 1990–1991: Hawkins (1990); Hawkins (1991), Gray (2006).

¹⁷⁹⁴ Wells (2001) 159.

¹⁷⁹⁵ E.g. *International Alert Conflict Sensitive Business Practice Guide*.

¹⁷⁹⁶ This is the general argument of Gray (2006)

¹⁷⁹⁷ *NCP Afrimex Statement*.

¹⁷⁹⁸ *Ruggie (2009) Report*, 2.

¹⁷⁹⁹ *Ruggie (2008) Report*; *Ruggie (2009) Report* and *Ruggie (2011) Report*; see also, *UN legalising CSR Report*.

sign off on compliance on tasks.¹⁸⁰⁰ This constitutes a ‘compliance system’ put in place by a company/senior manager (who has thus acted with due diligence) such that all aberrant result is the result of worker deviance. As such, corporate responsibility/liability immunises the capitalist class within the firm by shifting the blame to the workers. Compliance obviates ‘command responsibility’ (Ch.4B S.1.4).

Should legalised CSR or corporate ICL be enforced in an exceptional case, a financial penalty, or indeed any penalty that in a practical sense translates into a financial penalty (e.g. ordering closure of a ‘blood diamond’ mine) will be accounted for by for example raising prices of products or services, cutting workers’ numbers, pay or conditions or cutting expenditure on, say, measures to decrease the corporation’s negative effects on the environment.¹⁸⁰¹ As such punishment of the corporation is ‘socialised’ like any other risk, and may lead to the (collective) punishment of workers or external parties. Bakan has described how corporations opt to pay a fine rather than employ technology to conform to environmental regulation, if the latter is more costly.¹⁸⁰² The key barrier to ‘effectiveness’ of sanctions in the sense normally used in criminal law is that a sanction would not change the rational basis for corporate decision-making, nor the individuals that made the relevant decisions, but the burden of compliance would affect the global working class.¹⁸⁰³

4.2 *Enforcement and imperialism*

Not only is corporate supremacy expressed through CSR (above), Western capitalism in general and capitalist law’s supremacy is also thus confirmed. Forcese has described CSR as only being necessary because Third World countries, with ‘underdeveloped legal systems’ simply are not able to write and enforce their own rules for corporate behaviour.¹⁸⁰⁴ Such countries moreover may have ‘oppressive leaders’ making it even more necessary for developed country multinationals to, voluntarily, seek to set standards of good behaviour. Forcese suggests that CSR could be ‘administered’ by

¹⁸⁰⁰ Gray (2006) 885.

¹⁸⁰¹ Simester et al (2010) at 283: keep in mind negative effects of fines on employees, creditors, and shareholders not implicated in wrongdoing. Other options such as corporate probation or equity fines are wrought with practical and theoretical difficulty: Simester (2010) 283. See also, Coffee (1981); Clarkson (1996).

¹⁸⁰² Bakan (2005) 57.

¹⁸⁰³ Gray (2006).

¹⁸⁰⁴ Forcese (2009) 273.

the international investment dispute resolution mechanisms, and/or by means of ‘smart sanctions’.¹⁸⁰⁵ Such language clearly echoes that of international law’s ‘civilising mission’ discussed in Chapter 2B, and ICL as a tool for intervention in Ch. 5.

The now near-complete (formal and ideological) reification of the corporation in (‘private’) international law, which I already referred to in Chapter 2B (Section 5) mirrors the reification of the corporation in domestic law (Chapter 2A) and the emergence/construction of the concept of corporate crime in many Western countries, as well as the effective exclusion of white collar workers from criminal law enforcement in general (as argued by Sutherland, Whyte etc.¹⁸⁰⁶). This process in legal discourse is supported by the reification of corporations in public discourse (and vice versa), and the fact that corporations are no longer associated directly with a family (e.g. Krupp, Flick, DuPont etc. or prominent individual: Ch. 3). Even when firms (multinational corporate groups) are associated with their individual directors (e.g. Bill Gates, Steve Jobs, even Donald Trump and Eric Prince¹⁸⁰⁷) it is usually in a positive ‘celebrity’ sense. We no longer associate ‘crimes’ or situations of ‘human rights abuse’ with decision-makers within the corporation, but rather (if we do), with the (brand) name of the corporation “Shell in Nigeria”, “Chiquita in Colombia”, “Nike’s sweatshop scandal in Vietnam” etc.¹⁸⁰⁸ This is also partly due to the alienation, increased distance between individuals in these mega-corporations and “us” (western publics) as well as the shift of manufacturing and extraction industries to the global south, where the ‘crimes’ are not directly visible to us, and the victims are not known to western publics.

At the same time, corporations (even corporate groups, multinationals) are anthropomorphised both by lawyers and through branding, advertising in the general public. For example Swart compares ‘corporate culture’ with human character: “[Corporations] are able to develop their own social identity, their own personality. In this respect it is usual to refer to the corporate culture of a corporation, and to point to many similarities between the culture within a corporation and the character of a

¹⁸⁰⁵ Forcese (2009) 283.

¹⁸⁰⁶ Generally, Sutherland (1983), Slapper, Tombs (1999), Whyte (2009).

¹⁸⁰⁷ Although Eric Prince has been accused (among other things) of personally having murdered or facilitated the murder of individuals who cooperated with federal authorities investigating the company, see, e.g. The Nation, 4 August 2009, Scahill, J.: “Blackwater Founder Implicated in Murder”.

¹⁸⁰⁸ E.g. in the abundant “business & human rights” literature: Joseph (2004); and the contributions in De Schutter (2006).

human being.”¹⁸⁰⁹ Corporations are said to be capable of learning, of developing ‘institutional memory’ and have been held by the US Supreme Court and the European Court of Human Rights to have “the right to freely express their views on matters of concern to society”¹⁸¹⁰ and to contribute to election campaign funds.¹⁸¹¹ All these factors combined could render it ‘not intellectually absurd’ or plausible to think of corporations as capable of making moral decisions and bear culpability for crimes in mainstream discourse.

If we combine this with Forcese’s point (or *attitude*) above, we can see how corporate crime, warded off by the adoption of CSR compliance programmes, may create a distinction between ‘civilised’ western-based multinational corporations on the one hand, and host state companies and ‘rogue traders’ like van Anraat and Kouwenhoven (Ch.5) on the other. It opens the door to selective application of ICL equivalent to that of the ‘African Criminal Court’ (Ch.4).¹⁸¹²

An example of potentially ‘imperialist ICL’ is the OSI pillage litigation project,¹⁸¹³ which has as its aim to intervene in the (mainly) African context of conflict resources. It could become the paragon of pro-business use of ICL – if it activates the proposals offered during the launch of the project publication – which would appear to be aimed at regulating the natural resource market in the conflict zones of Africa so as to enable prosecution of ‘rogue’ traders and miners connected to armed groups, thus enabling international corporations to mine and trade without the (costly) ‘blood diamond’ label.¹⁸¹⁴

4.3 *Settlements and Selling Rights: A Market for Responsibility*

Through the lens of the commodity form theory in particular, compensation claims and settlements create an exchange relationship where the ‘victim’ sells her right and the corporate offender calculates the risk (price). The corporate decision maker gets to calculate the benefit of the violation (e.g. conflict diamonds are likely to be cheaper

¹⁸⁰⁹ Swart (2008) 952.

¹⁸¹⁰ Swart (2008) 953.

¹⁸¹¹ *Citizens United*.

¹⁸¹² Heller (2010) 227; Cryer (2005) 191ff.

¹⁸¹³ Stewart (2010).

¹⁸¹⁴ On the topic of conflict diamonds, see, e.g. <http://www.un.org/peace/africa/Diamond.html> .

than ‘clean’ diamonds), the chance that those affected will speak out, find (or be found by) a human rights organisation (or UN appointed expert), that they will commence litigation, the chance a court will keep the case going for a few years while the human rights NGO publicises the issue, the expected drop in sales and or share price, lawyers’ fees, finally, to come to a settlement. The decision whether to cause the harm has a *calculable* price tag. For the ‘victim’, the need, desire to be free of injury becomes a ‘right’ which can be worth investing in, lawyers’ fees, time away from regular productive labour, a calculable chance of success, what is my price, for what sum will I relinquish all further claims? Victim and violator negotiate as *formal legal equals*.

The question arises why business(women) would settle such cases at all if the record shows that the likelihood of the petitioners winning in court is next to nil.¹⁸¹⁵ To analogise Sfar, who asks a similar question in the context of anti-occupation cause-lawyering in the Israeli courts, such settlements are beneficial to the company both *directly* as it allows them to look generous and recover from bad press, it allows them to get claimants to sign statements relinquishing future claims, and on a broader level, it ‘supplies the oxygen’ of the system of capitalism itself, helping to render it sustainable and legitimate.¹⁸¹⁶

The essence of my critique here is that ATCA cases and similar (including, potentially, legalised CSR and corporate liability in ICL with mainly financial penalties) turn the ‘international crime’ from a problem of international society¹⁸¹⁷ into a problem between the individual victim (or group) and an abstracted, powerful fictional entity in a powerful state - a quantifiable problem if it is “settled” or receives a financial penalty.¹⁸¹⁸ However, criminal fines could partially be allocated to victims, meaning that a successful criminal conviction, should such occur, would ‘yield’ the same result as a successful civil complaint. For example, in December 2011, Trafigura was convicted in a Dutch court of causing harm to thousands of Ivory Coast citizens

¹⁸¹⁵ I adapt this point from Sfar (2009) at 44: “Why are the authorities ready to compromise ‘in the shadow of the court’ when reality shows that the Court rarely, if ever, decides in favour of the Palestinian petitioners?”

¹⁸¹⁶ Sfar (2009) at 45 (by analogy). On this notion see Barzilai (2007) 270: “Defying silence through litigation has also further legitimated the state, its main narratives, and state courts as markers of state and society relations.”

¹⁸¹⁷ Compare Weber and the community/family => calculable law

¹⁸¹⁸ For the current ‘enforcers’ such as CCR and other private cause lawyers it is not financially feasible to file criminal cases (aside from whether criminal cases can be brought/initiated by private parties) because they normally rely on settlement deals for their own funding also.

affected by toxic waste dumped from Trafigura's ship. The company's fine was decreased by the court to €1m because the company had set up a compensation fund for victims.¹⁸¹⁹ This 'solution' serves to take the 'victim' out of the picture as an agent and merely positions her as a recipient of goodwill gestures from the corporation.¹⁸²⁰ Corporate accountability commodifies the 'right' of the individual to be protected from crime (to remain free from harm), the individual is *forced* to sell by means of a material and (thus) power differential. I say forced, because the situation is comparable to 'free' labour and may be necessary for survival just as a third world employee cannot walk out on a situation where her rights are being abused (compare: struggle over the working day). As such, the rights/crimes paradigm is liberalism's essence: in global governance, it is each individual's own responsibility to 'valorize' or to claim (negotiate, exchange) their right: claim your prize! and responsibility for violating a right (causing harm) only exists insofar as (and to the value of) the right (which) is claimed: *accountability* is achieved.

4.4 *Corporate Power and Legitimacy*

On the domestic level, Glasbeek has argued, *corporate* corporate responsibility (see Ch.4C) was a "major response developed by law-makers trying to put their fingers in the dyke holding back the flood of illegitimacy threatening to drown the corporate form."¹⁸²¹ I noted above that corporate power has material and ideological elements. Corporate ICL, legalised CSR, actualised through claims by cause lawyers, *constitute*, and *complete* the corporation as a person. *Corporate* corporate liability constitutes the corporation not as an amoral calculator, but as a *political citizen who occasionally errs*.¹⁸²² Criminal law is a regime of exception, where corporate transgressions would be constituted as exceptional rather than the normal, inevitable and a *necessary* consequence of the prevailing means of production.

The US Government on 21 December 2011 filed an *amicus curiae* brief *in support of the claimants* in *Kiobel* (S.3 above), arguing that it is for the federal courts exercising their "residual" common law powers to determine whether and when corporate

¹⁸¹⁹ *Trafigura Appeal Court Decision*.

¹⁸²⁰ Shamir (2010), 531-53.

¹⁸²¹ Glasbeek (2004) 17.

¹⁸²² Pearce (1990) 423.

liability is appropriate.¹⁸²³ Taking into account the arguments raised in this chapter, it is clear to see why the US government would wish to keep the corporate liability for international law violations option open. The US Government itself phrases its interest in the case thus: “The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation’s foreign and commercial relations and for the enforcement of international law.”¹⁸²⁴

5 Conclusion: The dark side of ‘corporate accountability’

Although these regulatory efforts may occasionally serve to restrain business involvement in conflict or improve the situation of persons affected by such involvement, added together these regulatory efforts are only cosmetic changes on the surface of ongoing corporate involvement in conflict.¹⁸²⁵ They are *significant* cosmetic changes in that they in fact function to sustain our illusion of the possibility, forever deferred, of systemic change through law. “Human rights law”, ICL, etc. thus serve as a “ruse to perpetuate class rule”¹⁸²⁶ – while here, ICL trials are put in the limelight, by other means we reduce the room for legal manoeuvre in the states hosting our FDI and providing the workers that sow our garments and extract the resources we ‘dispossess’ from them.¹⁸²⁷ Their effect is rather, on the one hand, to domesticate class struggle, and on the other, to actualise, legitimate and thus strengthen the existing structures of power.¹⁸²⁸ All that is challenged in court and allowed to pass without sanction, is implicitly declared innocent. All that is *not* challenged by ‘rights-entrepreneurs’ *never even happened*.¹⁸²⁹

At the same time, an active human rights/cause lawyering scene willing to engage corporations in court creates the impression (illusion) that the system is democratic,

¹⁸²³ *US Government Kiobel Amicus*.

¹⁸²⁴ *US Government Kiobel Amicus* 1.

¹⁸²⁵ Sfar (2009) at 39. Sfar as a practitioner has been involved in many cases challenging the route of the Israeli Wall in the West Bank, where in some instances the court has decided that the Wall must be moved some distance away from a Palestinian village, while remaining on Palestinian land – partial victories which render the new route “legal”. Sfar’s office also represented the petitioners in the Canadian *Bil’in Village Council v Green Park* case, above S.2).

¹⁸²⁶ Glasbeek: “it is important for law to mask that it exists for capitalism” (2010) 250.

¹⁸²⁷ I use the word ‘dispossess’ to refer to Harvey’s ‘accumulation by dispossession’ Harvey (2003) 137.

¹⁸²⁸ Barzilai (2007) 270.

¹⁸²⁹ Pashukanis: “the normal as such is not prescribed at first; it simply does not exist.” Pashukanis (1978) 167.

that there is access to ‘justice’ and a remedy, that capitalism is rule-governed, with the broader implication being a “sociological and psychological process of transference of moral responsibility from the individual ... to the justice system.”¹⁸³⁰ As such, cause lawyering is a profoundly liberal ‘in-power’ activity.¹⁸³¹

In Ch. 4A I argued that ICL was the ‘completion piece’ of IL, which served, along with other elements of ‘humanitarian’ IL, to legitimise the IL enterprise. By analogy, it can be said that CSR, corporate litigation, and also ‘corporate ICL’ – together ‘corporate accountability’ – completes the reification of the corporation commenced in the 18th Century. As such, ‘corporate accountability’ forms the main part of what Klein has called, “the 50 year campaign for total corporate liberation.”¹⁸³² By constituting the corporation as a responsible citizen, who ‘like everyone else’ risks criminal penalty for doing wrong, the GCC have completed the corporation’s reification, thus allowing the corporation to exercise legitimate authority within ‘global governance’. The re-moralisation of the corporation described in this Chapter at first sight appears to be the reverse of the project achieved by ‘calculable law’ described in Ch2A. However, the corporation is infused with ‘canned morality’, a commodity form ethic, it is not. Corporate accountability is still, ‘corporate accountability’. ‘Marketised morality’,¹⁸³³ the ‘responsibilised’ corporation, has moreover dissolved the epistemological distinction between society and the market (more or less, the public and the private, or the economic and the political – Ch.2B).¹⁸³⁴ In pluralist global governance conceptions, corporations, states and individuals can now interact as formal legal equals.¹⁸³⁵ ‘Corporate rule’, or the multiplication of GCC rule through corporations, is here, and legitimate. Thus, the corporate imperialism described in 2B can continue. At the same time, the contradiction inherent in this situation, is that such legally constructed ‘irresponsibility’ (planned impunity¹⁸³⁶) contributes to the anarchy of capitalism which will inevitably lead it to its collapse.¹⁸³⁷ This, together with the GWC’s discontent and growing class-consciousness – the active factor in the coming revolution, is the ‘*seed of the new*’.

¹⁸³⁰ Sfar (2009) 45.

¹⁸³¹ Barzilai (2007).

¹⁸³² Klein (2007) 19.

¹⁸³³ Shamir (2008) 9; Shamir (2010) 531; Baars (2011) 427-430.

¹⁸³⁴ Shamir (2005) 373.

¹⁸³⁵ E.g. Krisch (2009).

¹⁸³⁶ Paraphrasing Marks (2011).

¹⁸³⁷ Luxembourg (2008) 45.

6 Consciousness-building and The Seed of the New

Rosa Luxemburg, in her polemic against the reformer Bernstein, argued that trade union work, while it would never lead to more than cosmetic improvements to workers' lives, did perform the role of mobilising and organising workers around a common cause and getting them to analyse their situation and publicly voice their demands.¹⁸³⁸ While some cause lawyers believe that they will 'win in court', others know that this is unrealistic and bring cases specifically to bring public attention to the case, and also to show up exactly the 'injustice' of the out of hand dismissal of what may on paper be a very strong case.¹⁸³⁹ Ironically, this tactic is considered clandestine and so-called 'political cases' (or, 'lawfare') lead to dismissal for that very reason alone.

There is naturally a high level self-awareness of cause-lawyers and many find themselves to be in an unbreakable bind between the potential opportunity to ease individual human suffering and "potentially empower[ing] the regime and contribut[ing] to its sustainability".¹⁸⁴⁰ As another lawyer put it, with a different spin: "We always win. Either we win in court, which is great for the client, or we lose, in which case we can blame the system!"¹⁸⁴¹

The potential for consciousness-building of cause lawyering is curbed by the extent to which it "depoliticise[s] popular politics, and ... produce[s] a passive citizenship dependent on power [states, empire, NGOs, etc.] for its existence."¹⁸⁴² Conversely, like Icarus, lawyers may be reluctant to demystify law, as they "may use their profession and fly, but not too high lest their power be melted and dissolved."¹⁸⁴³

Consciousness-building is also limited by rare, but celebrated victories. Miéville counters the claim that "developments in IL mean that Henry Kissinger must be careful where he travels" by stating there is no realistic expectation that Kissinger

¹⁸³⁸ Luxemburg (2008) 111; Baars (2011) 423.

¹⁸³⁹ Anonymous interview.

¹⁸⁴⁰ Sfar, writing on the work of Israeli lawyers working on occupation-related cases ('massive internal legal resistance'), Sfar (2009) 37-50.

¹⁸⁴¹ Hassan Jabareen, Director of Adalah, conversation, September 2006.

¹⁸⁴² Neocosmos (2006) 357.

¹⁸⁴³ Barzilai (2007) 275.

would *actually* be prosecuted.¹⁸⁴⁴ Per Miéville, “the apparent triumph of international law in cases such as this is in fact a triumph in the court of public opinion; it is a pyrrhic, extra-legal victory which only serves to underscore the inefficacy of IL as a strategy of counter-hegemonic action.”¹⁸⁴⁵ It also underscores the *efficacy* of ‘humanitarian’ IL as a part of the ideological strategy employed by the GCC.

HRW Director Roth relates the origin of ‘corporate ICL’ as something that developed through systemic forces rather than (or, despite) his/civil society agency:

*[o]ut of the blue, we came up with the concept of complicity. It is very interesting watching it evolve into a criminal concept, because that was not what we had in mind at all. ... The reason is that we did not need criminal liability for what we do. First of all, it is a remote possibility that corporations will actually be charged and given our day-to-day concerns, we were not going to be relying on prosecutors pursuing corporations; that really did not even enter in our concerns. Further, we do not get involved in tort litigation. We tend to operate in places where the judicial system does not function. The way we enforce rights is, in a sense, by appealing to peoples’ [sic] moral sense of what is right and wrong and building up that popular sentiment as a source of pressure on the actor concerned, whether it is a government or a rebel force or, in this case, a corporation.*¹⁸⁴⁶

It would seem that the move Roth describes needs to be reversed. Recently, in particular in the context of the ‘Occupy Wall Street’ movement, activism directly against corporate personhood has come to the fore.¹⁸⁴⁷ However, the point is not (just) to get rid of corporate personhood or to realise/remember that there are human individuals behind the corporate shield. The point is *not* to then to seek prosecute those individuals – the point is to realise that the property owning classes (the GCC) are employing the law in this way, to enable exploitation, ‘shift’ or sell risk, and protect themselves as individuals. As the foundational norm of law is the legal ownership of private property, however, law *cannot but* function in this way, and our resistance must

¹⁸⁴⁴ Miéville (2005) 296; Marks (2007) 205. See also, Jurist, 13 April 2011: “Spanish Court turns torture investigation over to US”.

¹⁸⁴⁵ Miéville (2005) 297, cf. Marks (2007).

¹⁸⁴⁶ Roth (2008) 960.

¹⁸⁴⁷ *Occupy Shut Down the Corporations Call*; “Target Ain’t People” *flashmob*.

turn against the concept of private property, against capitalism and against law: away from *legal* emancipation and toward *human* emancipation:

*[o]nly when the real, individual man re-absorbs in himself the abstract citizen, and as an individual human being has become a species-being in his everyday life, in his particular work, and in his particular situation, only when man has recognised and organised his “forces propres” as social forces, and consequently no longer separates social power from himself in the shape of political power, only then will human emancipation have been accomplished.*¹⁸⁴⁸

¹⁸⁴⁸ Marx (2000) 64.

Conclusion: The structural and empirical impossibility of using ICL to restrain business in conflict

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A common call anno 2011 is ‘business must be held accountable’. Increasingly, academic scholars, legal practitioners and interest groups engaged with this topic also argue for the application of ICL to companies involved in conflict. Employing a Marxist theoretical framework and methodology set out in Chapter 1, in this thesis I have argued that we cannot use ICL to restrain harmful business involvement in conflict.

1 Theory and method

The first reason for this is structural. In Chapter 1 I outline the *commodity form theory of law* as proposed by Pashukanis and developed by Miéville and myself in this thesis. According to this theory, the very *form* of law approximates that of the commodity, and is a product (or rather, an essential element) of the capitalist mode of production. Legal relations inhere in the commodity exchange between ‘formally equal legal subjects,’ while the foundational norm of law, the basic premise on which all law is constructed, is the private ownership of property. It is through this concept, specifically, the ‘mine-not-yours’ nature of the right to private property that *force* is introduced into the legal relationship: force (or the possibility of force) to exclude others from my property *actualises* the legal relationship. Based on this model, as a consequence, legal relations are never *actually* (if *formally*) ‘free’ or consensual, and

always include an element of coercion and exploitation: law *congeals* capitalism. While the *form* of law (structurally) precludes law's emancipatory potential, the *content* of law is also determined (immediately or in the last instance) by the economic reality at the material base. Legal outcomes occur within the parameters set by the market, which can be shown empirically. While the theoretical frame already answers the thesis question (in the negative), I endeavoured in the rest of the thesis to show exactly how this works and manifests itself (or not – as the workings of law are often concealed or made to appear the opposite of what they are) in material reality. To achieve this, I employed the dialectical method put forward by Bertell Ollman. Throughout, while examining historical development and the development, application and change of law, I sought to pay particular attention to the role of individuals of different classes and identities (in particular *lawyers*) within the given structure of capitalism. As the global capitalist class rules with a 'mixture of force and guile', I also observed the ideological tactics employed with or through law.

2 Roots, development and context

In Chapter 2A I showed how the corporate form was developed specifically as a structure of irresponsibility: one that would allow the calculation and externalisation (to broader society) of risk, the pursuit of a narrow mandate of surplus value extraction and to shield the human 'operatives' from liability through the creation of a separate legal person. The creation of the modern corporation replaced forms of communal burden-sharing during the transition to capitalism, and enabled the rise of the middle class and consequently the industrial revolution. As such, it formed an integral part of the creation of the modern capitalist state system and the capitalist economy that in existence today.

The narrow profit mandate and limited liability, plus the legal and ideological separation between the human individual and the legal entity of the corporation inevitably creates both the impetus and opportunity to pursue profit based solely on rational material calculation (the cash nexus), and therefore inevitably leads to business involvement in conflict (broadly conceived).

The legal form of the corporation has over the past two centuries been developed in such a way as to enable profit maximisation and liability-minimisation in changing material circumstances: for example, the multinational corporate group generally allows the legal separation of subsidiary company activities (e.g. in the global south) from the parent company, while techniques such as ‘defensive asset partitioning’ allow for high-value assets to be shielded from high-risk operations (such as those in conflict). Such arrangements have found the protection of domestic courts, congruent with the commodity form theory of law.

On the global level, as I show in 2B, the joint stock corporation at the same time caused, and was a product of, colonial expansion, primitive accumulation on a global scale and the development and universalisation of international law and the modern state form. From the 20th C. onwards the corporation was also a tool for the continuation of western imperial interests in the global south after ‘decolonisation’ and continued ‘accumulation by dispossession’ into the present time, enabled by the international legal regime of investment protection. Various ideological ‘devices’ within law serve to advance and obscure these interests. For example, the creation of *new, sui generis* regimes for the protection of capitalist interests, as well as ‘lifting’ certain issues into (favourable) international law could be seen as defensive partitioning (fragmentation) of law. This is supported by an ideological separation of the public and private realms in international law, which are explained/understood to follow the logics of peace/humanitarianism and the logic of the market respectively. Moreover, this separation constricts the scope for resistance to exploitation especially in/for the global south. In an immediate sense, international investment arbitration is a particular site where capital’s interests are forced on ‘unfree’ and unequal Third World States. Likewise, the international financial institutions, and national governments through international development programmes, use international law to force pro-capital reforms on the Global South, minimising scope for global class struggle.

Bringing together the threads from these Chapters 2A and 2B, I identified two contradictions inherent in the public/private divide, corporate personality and corporate imperialism, combined with the humanization and of law, that would in the near future come to focus much more closely on the individual. It is out of these contradiction that ‘Nuremberg’ and ‘Tokyo’ would emerge.

3 Business, conflict and ICL meet

In Chapter 3 I described how World War II on both fronts was understood by the victorious Allies as a war of economic imperialism. The existence of a number of large industrial cartels was tied directly to the aggressive expansion of Germany in Europe, and Japan in Asia. In Chapter 3A I described how, when it was decided, partly as a result of efforts by liberal lawyers, to subject the vanquished leadership to international criminal trials at Nuremberg, the ‘economic case’ and industrial leaders had to be included. This was the change born out of the contradiction of the public/private divide in 2B. While the most ‘public’ trials at Nuremberg in part formed a ‘morality play’ (performing humanitarian IL) for the home audience which had paid a heavy price for the Allies’ (viz. Allied elite) participation in the war, it descended into a farce when it was realised that economic interests demanded the reform (liberalisation) and rebuilding of the vanquished (and surrounding) economies.

In Ch. 3B I showed, how at some distance away from the public eye in Tokyo the international trials largely ignored the economic side, while the occupation policies managed far-reaching liberalisation of the Japanese economy ‘behind the scenes’. The economic reforms in Europe and Japan post-WWII served to further congeal global capitalism. Apart from the particularities of the WWII context, these chapters show that ICL has in the past to some extent ‘successfully’ been employed in arguably one of the most egregious cases of business in conflict, but that the interest of capital all but effectively reversed this when the German industrialists were amnestied and largely reinstated in 1951. On the basic level, these chapters also showed the alienation inherent in the corporate/legal form, through the (amoral) activities and self-understanding of business leaders evidenced in their defence statements. It also showed the ideological use of ICL in support of prevailing power structures.

4 Remaking ICL: removing business(wo)men and inserting legal persons as subjects

Although the ICL genie was out of the bottle it was not until after the Cold War that it was developed as an academic discourse and that it was put into practice again. In

Chapter 4 I show how academic lawyers have (re)imagined ICL in different ways, each of them remaining however within the basic parameters set by ICL within capitalist IL, namely ICL existing, being necessary and being a ‘good thing’. Legal scholars have thus contributed to the actualisation of ICL and as such to the completion of the IL enterprise, which, mirroring the domestic level, seeks to develop a ‘strong arm’ for the international/global protection of material interest of the global capitalist class. ICL in this function works alongside imperialist war, and economic liberalisation/exploitation, and fulfils the legitimating function that we also saw post WWII: it (further) congeals capitalism.

In Chapter 4B I further showed how practising lawyers and state negotiators, on the other hand, (re)created the modalities for ICL prosecution by abstracting real or imagined scenarios into legal rules and doctrines. I showed that these rules and doctrines are technically suited for application to individuals in ‘business in conflict’ scenarios and highlighted the current debates over the in- or exclusion of corporate actors as subjects of ICL. At the same time as norms were being formulated which were capable of application for the prosecution of individual business(wo)men, I placed emphasis on the move away from individual liability to a ‘de-individualised’ ICL in (much of) the literature (4C). This, the move to acceptance of the concept of corporate legal person liability mirrors a similar move towards ‘*corporate* corporate criminal liability’ on the domestic level. The unstated effect of this move is the reification of the corporation in ICL and a near-removal of the individual business(wo)man from the grasp of ICL.

5 On not drinking the poisoned chalice

In Chapter 5 I showed the effects of the ‘new ICL’ in practice: despite evidence of business(wo)men’s involvement in the various conflicts of the past three decades, almost none were in fact prosecuted, including at the ICTR and ICTY. At the same time, ICL scholars’ work, while being focussed on those rare cases where enforcement did occur (e.g. *Van Anraat*), masks the much larger *impunity* which is also a legal construct. Business(wo)men continue to be involved in ways similar to the colonial and WWII periods (expropriation, forced labour, etc) and remain protected despite the activation of ICL enforcement. Where Western business involvement in conflict does

seem to cause public concern (e.g. in the DRC with the coltan and ‘conflict diamond’ trade) the preferred method of dealing with (and to some extent protecting) is via the diplomatic channels of the UN Security Council. Overwhelmingly, however, our conceptualisation of conflicts is based on pathologising individual leaders and/or essentialising ethnic/racial/religious strife, rather than viewing it as an inevitable result of the mode of production. This conceptualisation fostered by ICL courts conceals business(wo)men’s involvement.

6 “The 50 year campaign for total corporate liberation”

In the final chapter (Ch. 6) I showed how, as a response to challenges to corporate legitimacy over time, and the perceived ‘accountability gap’, three different strategies can be discerned.

Global elites have developed regimes of ‘corporate social responsibility’ (“CSR”), consisting of soft law that effectively *softens* law and at the same time marketises morality. Secondly, ‘cause-lawyers’, driven by frustration over ‘corporate impunity’ in the face of the existence of seemingly suitable ICL norms, have started taking private criminal cases and to engage in ‘strategic litigation’ against corporations (as corporations) involved in conflict (including many of the conflicts featured earlier in this thesis) on behalf of ‘victims.’ I have argued that these cases, rather than a form of resistance or class struggle, in fact form part and parcel of the liberal rights structure and serve to legitimate and sustain it. They are also ways to domesticate resistance, produce ‘victims’ and ‘civilise’ them into making ‘claims for admittance to law’. Moreover, while these legal cases tend to fail, some are settled with compensation payments, which I argue amount to the quantification of suffering (on the ‘victim’s’ side) and on the corporation’s/business(wo)man’s side, an opportunity to calculate and barter for personal freedom on an unequal, unfree basis.

The quest for corporate accountability through legalised CSR and corporate ICL legitimises the corporation by constituting it as a political citizen exercising legitimate authority within global governance. As ICL was the ‘completion piece’ to legitimise the IL enterprise, CSR, corporate litigation, and also ‘corporate ICL’ – together

‘corporate accountability’ – legitimate corporate authority within global governance, or, rather, GCC rule through corporations.

The fact that we tend to regard law, the legal form, corporations and capitalism as ‘given’, and ‘good’, ignoring their provenance at a specific moment in history for a specific purpose (this ‘naturalisation’ is evidenced by the failure of much of legal academic texts to explore/explain the history of the corporation, for example) leads to the situation where “rather than change the world ourselves, we ask for law to change it.”¹⁸⁴⁹ Thus, many legal scholars and others continue to demand, in vain, that ‘corporations be held accountable.’

Nevertheless, “[e]very ideology dies together with the social relations which produced it. This final disappearance is, however, preceded by a moment when the ideology, suffering blows of the critique directed at it, loses its ability to veil and conceal the social relations from which it emanated.”¹⁸⁵⁰

The future is already being built: the ‘seed of the new’ is already all around us. Despite its negative aspects, the search for corporate accountability may have limited use as a demystifying immanent critique, and of coalition- and consciousness-building. Cause lawyers’ methods fail, the pyrrhic victories¹⁸⁵¹ will cease, while those affected by corporations (workers and communities mainly in the south) will reject intervention/representation. Global governance – which we effectively already have with hollowed-out state structures in the south – will replicate elsewhere, in the West we will see through ATCA and CSR, in the South workers will throw off the yoke of Western MNCs. In the North recent anti-capitalist activism is aimed at dismantling the corporate form, specifically, and at creating extra-systemic spaces. Lawyers must join the revolution: we have nothing to lose but our *legal* chains.

¹⁸⁴⁹ Kropotkin (undated, unpaginated pamphlet).

¹⁸⁵⁰ Pashukanis (1978) 64.

¹⁸⁵¹ Mieville (2005) 297, see also, Marks (2007) 205.

Appendix A

CERD

Charter of Economic Rights and Duties of States, GA Res 3281 (1974) UN Doc A/RES/29/3281.

The Charter includes, e.g.:

2. Each State has the right:

- (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. ...;
- (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State....;
- (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State

Appendix B

Potsdam Agreement

Potsdam Agreement of 2 August 1945, between the U.S.S.R., the U.S.A. and the U.K.

B. ECONOMIC PRINCIPLES.

11. In order to eliminate Germany's war potential, the production of arms, ammunition and implements of war as well as all types of aircraft and sea-going ships shall be prohibited and prevented. Production of metals, chemicals, machinery and other items that are directly necessary to a war economy shall be rigidly controlled and restricted to Germany's approved post-war peacetime needs to meet the objectives stated in Paragraph 15. Productive capacity not needed for permitted production shall be removed in accordance with the reparations plan recommended by the Allied Commission on Reparations and approved by the Governments concerned or if not removed shall be destroyed.

12. At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements.

13. In organizing the German Economy, primary emphasis shall be given to the development of agriculture and peaceful domestic industries.

14. During the period of occupation Germany shall be treated as a single economic unit. To this end common policies shall be established in regard to:

- (a) mining and industrial production and its allocation;
- (b) agriculture, forestry and fishing;
- (c) wages, prices and rationing;
- (d) import and export programs for Germany as a whole;
- (e) currency and banking, central taxation and customs;
- (f) reparation and removal of industrial war potential;
- (g) transportation and communications.

In applying these policies account shall be taken, where appropriate, of varying local conditions.

15. Allied controls shall be imposed upon the German economy but only to the extent necessary:

(a) to carry out programs of industrial disarmament, demilitarization, of reparations, and of approved exports and imports.

(b) to assure the production and maintenance of goods and services required to meet the needs of the occupying forces and displaced persons in Germany and essential to maintain in Germany average living standards not exceeding the average of the standards of living of European countries. (European countries means all European countries excluding the United Kingdom and the U. S. S. R.).

(c) to ensure in the manner determined by the Control Council the equitable distribution of essential commodities between the several zones so as to produce a balanced economy throughout Germany and reduce the need for imports.

(d) to control German industry and all economic and financial international transactions including exports and imports, with the aim of preventing Germany from developing a war potential and of achieving the other objectives named herein.

(e) to control all German public or private scientific bodies research and experimental institutions, laboratories, *et cetera* connected with economic activities.

16. In the imposition and maintenance of economic controls established by the Control Council, German administrative machinery shall be created and the German authorities shall be required to the fullest extent practicable to proclaim and assume administration of such controls. Thus it should be brought home to the German people that the responsibility for the administration of such controls and any break-down in these controls will rest with themselves. Any German controls which may run counter to the objectives of occupation will be prohibited.

17. Measures shall be promptly taken:

- (a) to effect essential repair of transport;
- (b) to enlarge coal production;
- (c) to maximize agricultural output; and
- (d) to erect emergency repair of housing and essential utilities.

18. Appropriate steps shall be taken by the Control Council to exercise control and the power of disposition over German-owned external assets not already under the control of United Nations which have taken part in the war against Germany.

19. Payment of Reparations should leave enough resources to enable the German people to subsist without external assistance. In working out the economic balance of Germany the necessary means must be provided to pay for imports approved by the Control Council in Germany. The proceeds of exports from current production and stocks shall be available in the first place for payment for such imports.

The above clause will not apply to the equipment and products referred to in paragraphs 4 (a) and 4 (b) of the Reparations Agreement.

III. REPARATIONS FROM GERMANY.

1. Reparation claims of the U. S. S. R. shall be met by removals from the zone of Germany occupied by the U. S. S. R., and from appropriate German external assets.

2. The U. S. S. R. undertakes to settle the reparation claims of Poland from its own share of reparations.

3. The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets.

4. In addition to the reparations to be taken by the U. S. S. R. from its own zone of occupation, the U. S. S. R. shall receive additionally from the Western Zones:

(a) 15 per cent of such usable and complete industrial capital equipment, in the first place from the metallurgical, chemical and machine manufacturing industries as is unnecessary for the German peace economy and should be removed from the Western Zones of Germany, in exchange for an equivalent value of food, coal, potash, zinc, timber, clay products, petroleum products, and such other commodities as may be agreed upon.

(b) 10 per cent of such industrial capital equipment as is unnecessary for the German peace economy and should be removed from the Western Zones, to be transferred to the Soviet Government on reparations account without payment or exchange of any kind in return.

Removals of equipment as provided in (a) and (b) above shall be made simultaneously.

5. The amount of equipment to be removed from the Western Zones on account of reparations must be determined within six months from now at the latest.

6. Removals of industrial capital equipment shall begin as soon as possible and shall be completed within two years from the determination specified in paragraph 5. The delivery of products covered by 4 (a) above shall begin as soon as possible and shall be made by the U. S. S. R. in agreed installments within five years of the date hereof. The determination of the amount and character of the industrial capital equipment unnecessary for the German peace economy and therefore available for reparation shall be made by the Control Council under policies fixed by the Allied Commission on Reparations, with the participation of France, subject to the final approval of the Zone Commander in the Zone from which the equipment is to be removed.

IMT Charter

London Agreement Establishing the Nuremberg Tribunal, 82 UNTS 279 (no. 251).

Article 5.

In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

Article 6.

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

CCLI0

Control Council Law No. 10, 20 December 1945, in Enactments and Approved Papers of the Control Council and Coordinating Committee, Applied Control Authority, Germany, 1945, Vol. 1, p. 306.

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

CCL 10 II 2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. ...

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. ...¹⁸⁵²

IMT Indictment

Indictment of the International Military Tribunal: The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union Of Soviet Socialist Republics against Hermann Wilhelm Goering, in 1 Trial of the Major War Criminals before the International Military Tribunal 27 1947.

Indictment Count I section (E) at p. 35.

Having gained political power the conspirators organized Germany's economy to give effect to their political aims.

¹⁸⁵² Emphasis added.

1. In order to eliminate the possibility of resistance in the economic sphere, they deprived labor of its rights of free industrial and political association as particularized in paragraph (D) 3 (c) (1) herein.
2. They used organizations of German business as instruments of economic mobilization for war.
3. They directed Germany's economy towards preparation and equipment of the military machine. To this end they directed finance, capital investment, and 'foreign trade.
4. The Nazi conspirators, and in particular the industrialists among them, embarked upon a huge re-armament program and set out to produce and develop huge quantities of materials of war and to create a powerful military potential.
5. With the object of carrying through the preparation for war the Nazi conspirators set up a series of administrative agencies and authorities. For example, in 1936 they established for this purpose the office of the Four Year Plan with the Defendant GORING.

Indictment Individual responsibility, Krupp von Bohlen von Halbach

KRUPP:

The Defendant KRUPP was between 1932 and 1945: Head of Friedrich KRUPP A.G., a member of the General Economic Council, President of the Reich Union of German Industry, and head of the Group for Mining and Production of Iron and Metals under the Reich Ministry of Economics. The Defendant KRUPP used the foregoing positions, his personal influence, and his connection with the Fuehrer in such a manner that: He promoted the accession to power of the Nazi conspirators and the consolidation of their control over Germany set forth in Count One of the Indictment; he promoted the preparation for war set forth in Count One of the Indictment; he participated in the military and economic planning and preparation of the Nazi conspirators for Wars of Aggression and Wars in Violation of International Treaties, Agreements, and Assurances set forth in Count One and Count Two of the Indictment; and he authorized, directed, and participated in the War Crimes set forth in Count Three of the Indictment and the Crimes against Humanity set forth in Count Four of the Indictment, including more particularly the exploitation and abuse of human beings for labor in the conduct of aggressive wars.

Appendix C

Charter of the (Tokyo) International Military Tribunal for the Far East 1946, TIAS No. 1589.

ARTICLE 5. Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organization are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Conventional War Crimes: Namely, violations of the laws or customs of war;

Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

ARTICLE 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Art. 13 The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Japanese National Diet Library U.S. Initial Post-Surrender Policy for Japan (SWNCC150/4/A), 21 September 1945.

(Part I (1)), “The occupation forces will be under the command of a Supreme Commander designated by the United States. Although every effort will be made, by consultation and by constitution of appropriate advisory bodies, to establish policies for the conduct of the occupation and the control of Japan which will satisfy the principal Allied powers, in the event of any differences of opinion among them, the policies of the United States will govern”, war criminals, Part II(2), democratisation (“The Japanese people shall be afforded opportunity and encourage to become familiar with the history, institutions, culture, and the accomplishments of the United States and the other democracies,” the economy (Part IV) which includes the break up of cartels (para 2 (a)), a “prohibition on the retention in or selection of individuals for places of importance in the economic field of individuals who do not direct future Japanese economic efforts solely towards peaceful ends,” reparations payments (para 4, “Reparations for Japanese aggression shall be made ... (b) Through the transfer of such goods or existing capital equipment and facilities as are not necessary for a peaceful Japanese economy or the supplying of the occupying forces.”) and opening the market for FDI (para 8 “Equality of Opportunity for Foreign Enterprise within Japan”).¹⁸⁵³

¹⁸⁵³ Emphasis added.

Appendix D

Versailles Treaty

Treaty of Peace, June 28, 1919, 225 Consol. T.S. 188, 285-286.

Article 227

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

Article 228

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

Article 229

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.

Article 230

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.

Bribery Convention

Article 2 - Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its *legal principles*, to establish the *liability of legal persons* for the bribery of a foreign public official.

Article 3 - Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. ...
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.”

Transnational Crime Convention

Article 10 - Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an **organized** criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this **Convention**.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

Basel Convention

Basel Convention on the Control of Transboundary Movements of Hazardous Waste adopted on 22 March 1989

14. “Person” means any natural or legal person”

Appendix E

ICTY Statute Article 7 Individual criminal responsibility

Statute of the International Criminal Tribunal for the Former Yugoslavia 1993 UN Doc. S/RES/827 (1993).

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

ICTR Statute Article 6 Individual Criminal Responsibility

Statute of the International Criminal Tribunal for Rwanda 1994 UN Doc S/Res/955 (1994).

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

SCSL Agreement Article 6 Individual criminal responsibility

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 UNTS 138.

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.
5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

ICC Statute Article 25 Individual criminal responsibility

International Criminal Court Statute 1998, 2187 UNTS 91.

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

French Corporate Crime Proposal

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/C.1/L.3, 16 June 1998, PROPOSAL SUBMITTED BY FRANCE

Article 23 Individual criminal responsibility

Legal persons

Paragraphs 5 and 6 (criminal organizations)

[5. When the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization.

6. In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred to in article 76, and the relevant provision of articles 73 and 79 are applicable.

In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any State party shall take the necessary measures to ensure that the judgement of the Court shall have binding force and to implement it.]

[Article 76

Penalties applicable to criminal organizations

A criminal organization shall incur one or more of the following penalties.

- (i) Fines;
- (ii) deleted
- (iii) deleted
- (iv) deleted
- (v) Forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
- [(vi) Appropriate forms of reparation].]

Corporate Manslaughter Act 2007

Corporate Manslaughter and Corporate Homicide Act 2007 c.19

1 The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

- (a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are—

(a) a corporation;

...

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

(4) For the purposes of this Act—

(a) “relevant duty of care” has the meaning given by section 2, read with sections 3 to 7;

(b) a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

(c) “senior management”, in relation to an organisation, means the persons who play significant roles in—

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

...

(6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.

...

Appendix F

Prosecutor Organisation Indicators

The Prosecutor laid out “relevant indicators to determine the existence of an organization” as follows:

- Existence of pre-determined objectives, whether formally or informally adopted by the members of the organization.
- Existence of a common identity, whether political, ethnic, religious, etc.
- Activities carried out by the group, including meetings, financial transfers, fund raising, logistical arrangements, etc.
- Public discourse, including communications, writings, broadcast, etc.
- Ability to pursue their objectives through certain agreed methods and active involvement such as directing or instigating the crime.
- Sufficient resources (material and personnel) to pursue their objectives”. Id.

UNSCP Congo Panel Request

“The Security Council requests the Secretary-General to establish this panel, for a period of six months, with the following mandate:

- To follow up on reports and collect information on all activities of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, including in violation of the sovereignty of that country;
- To research and analyse the links between the exploitation of the natural resources and other forms of wealth in the Democratic Republic of the Congo and the continuation of the conflict;
- To revert to the Council with recommendations”.

TRC Business Sector Hearings

The Commission further found that: “162 Businesses were reluctant to speak about their involvement in the former homelands. A submission by Mr Sol Kerzner and Sun International would have facilitated the work of the Commission.

163 The Land Bank and the Development Bank of South Africa, in particular, were directly involved in sustaining the existence of former homelands.

164 The denial of trade union rights to black workers constituted a violation of human rights. Actions taken against trade unions by the state, at times with the cooperation of certain businesses, frequently led to gross human rights violations.

165 The mining industry not only benefited from migratory labour and the payment of low wages to black employees; it also failed to give sufficient attention to the health and safety concerns of its employees.

166 Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule. This included involvement in the National Security Management System. Several businesses, in turn, benefited directly from their involvement in the complex web that constituted the military industry.

167 The white agricultural industry benefited from its privileged access to land. In most instances, it failed to provide adequate facilities and services for employees and their dependants.”

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