

'It's not me, it's the corporation': the value of corporate accountability in the global political economy

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Corporate accountability (CA) legitimises and thus reinforces the current system of surplus value extraction. Accountability struggles effectively to reduce corporate capitalism's violence to the good corporate citizen's occasional 'wrong-doing', which becomes a calculable risk capable of being exchanged—signifying 'planned impunity'. CA, though a seemingly emancipatory process, thus exemplifies law's constitutive role in capitalism and the need to move beyond law for emancipation.

'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.'¹

'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 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.'²

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1 J Steinbeck, *Grapes of Wrath* (Viking Press, 1939) 43.

2 A Berle, *Economic Power and the Free Society: A Preliminary Discussion of the Corporation* (Fund for the Republic, 1957) 16.

For as long as ‘the corporation’ has existed, it has had to fight for its reputation.³ Variouslly called, a ‘worm[s] in the entrails of men’, a Frankensteinian monster, or a psychopath, the suspicion has long persisted that there is something fishy about this odd, ungraspable, ‘artificial entity’ called ‘the corporation’. While reputational wounds often attach only to specific corporations and are healed through a locally-applied remedy, or by corporate atonement, sometimes the challenge extends beyond the individual corporation to the concept of the corporation *per se* or to *all* corporations or to ‘corporate capitalism’ as a whole. The 1720 scandal of the South Sea bubble, for example, was linked to the very concept of the corporation, which was called into question as a result, but left intact nonetheless. At other moments, particular corporations have become a symbolic target for a political movement because of their perceived power or privilege. This was the case with the British East India Company, which received preferential tax treatment by the British over rival American companies, sparking the Boston Tea Party and the American Revolution. ‘Misuse’ of the corporate form has shown the public what a powerful and malevolent tool the corporation can be. In the nineteenth century, abuses by the International Association of the Congo, owned by King Leopold and responsible for the deaths of millions, led to the growth of the abolitionist movement in Europe, which, in the end, only deflected criticism of the corporation.⁴ Instances of corporations employed as instruments of foreign policy, in the so-called ‘banana wars’⁵ and in the Pinochet takeover of Chile, have only recently been written into history.⁶ More complex entanglements of corporations in political-economic historical events, such as the 1920s economic crisis,⁷ or the involvement of the *zaibatsu* and German cartels in Japanese and Nazi imperialism respectively, led to a temporary clampdown on vanquished industrial power as well as the prosecution of company directors and officers, but a swift (if messy) restoration once the political landscape changed.⁸

3 See, e.g., K Yamamoto, ‘Early Modern Business Projects and a Forgotten History of Corporate Social Responsibility’, in G Baars & A Spicer (eds), *The Corporation* (Cambridge UP, forthcoming); J Taylor, *Creating Capitalism: Joint Stock Enterprise in British Politics and Culture, 1800-1870* (Boydell, 2006).

4 D Renton, D Seddon & L Zeilig, *The Congo: Plunder and Resistance* (Zed Books, 2006).

5 D Litvin, *Empires of Profit: Commerce, Conquest and Corporate Responsibility* (Thomson, 2004).

6 N Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane, 2007).

7 K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2002).

8 G Baars, ‘Capitalism’s Victor’s Justice? The Hidden Story of the Prosecution of Industrialists Post-WWII’, in G Simpson & K Heller (eds), *Untold Stories: Hidden Histories of War Crimes Trials* (Oxford UP, 2013) 163.

Despite—or I suggest because of—these periodic backlashes, the structure of the corporation has not only survived but continues to thrive. Apart from the German company directors prosecuted at Nuremberg, who got off with ‘sentences light enough to please a chicken thief’ before several of them resumed their prior positions,⁹ the individual people who owned and/or ran corporations have remained largely immune. The interests (and indeed often the identity and class membership) of capitalist and governmental elites, though at times at odds or in competition with each other, in fact largely coincide, and it is this dynamic that has driven the legal-economic development of the corporation. The Anglo-Saxon model of the corporation, with its key characteristics of separate legal personality, limited liability, indefinite lifespan and profit mandate, has been adopted (or imposed) around the world. Over its three-century history, the corporation has become the key apparatus that facilitates the surplus value-extracting function of global capitalism. This has been due to the parallel development of the ‘corporate form’ and a specific ‘corporate ideology’—an ideology which is in constant flux and constantly under (re)construction. This essay—which forms part of a growing corpus of work employing the commodity form theory of law¹⁰—focuses on the development and ‘value’ of this corporate ideology as it holds up the corporate form, and seeks to find the cracks in their seemingly unbreakable bond, in which the ‘seed of the new’ may germinate.

The latest series of backlashes against multinational corporations appears stronger than before. The current debates centre, at one end of the spectrum, on ‘corporate wrongdoing’ or the ‘excesses of capitalism’ that proper regulation can minimise and, at the other end, on the fundamental contradictions between corporate capitalism, and the global ecosystem and world peace. The ultra-left’s anti-corporate sentiment, which has built up within and alongside the anti-globalisation movement, is starting to filter through to a broader public. This is fuelled by an increasing scepticism over whether regulation will or *can* be created and enforced so as to ‘restrain’ capitalism. Unhappiness about corporate wrongdoing is only increased when it is found that even popular corporations such as Apple and Amazon avoid tax and maintain abusive working

9 Ibid.

10 This theory holds that law, by virtue of its very form, approximates the commodity form, and views law as a *sine qua non* of capitalism. The corpus includes, e.g., E Pashukanis, *Law & Marxism: A General Theory* (Ink Links, 1978); C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto, 2005); R Knox, ‘Marxism, International Law and Political Strategy’, 22 *Leiden Journal of International Law* (2009) 413; R Knox in this issue.

conditions.¹¹ Privatisation, too, is starting to attract negative attention. Broader sections of the public have become suspicious of private contractors such as Blackwater (now Xe), Veolia and G4S, people understand some wars to be fought for corporate profit, and the US ‘prison-industrial complex’ (in the UK, privately-run immigration detention) is receiving wider condemnation.¹² Bigger questions are being asked—by a so far small but vocal number of activist-critics—about the desirability and ultimate sustainability of corporate capitalism *per se*. Respectable ‘centrist’ activists in the US have challenged corporate campaign-funding, as well as the right of corporations to refuse employees elements of medical insurance on religious grounds.¹³ When Volkswagen (a ‘trustworthy’ company) was found to have been cheating environmentally-conscious consumers, this troubled a significant section of the western middle class.¹⁴ The increasing distrust of large corporations has led to the growth of ‘buy local’ and ‘small, independent’, fair trade and organic ‘locally grown’ movements.¹⁵ At the same time, it has also triggered ‘legitimacy recovery’ efforts on the part of corporate capitalism.

In this essay, I take these legitimacy backlashes seriously. My specific focus is the emergence of the debate on corporate accountability (CA).¹⁶ CA is generally understood to refer to efforts to force corporations to account for (explain, justify, excuse, compensate, make good) the negative effects of corporate activity on its ‘victims’ and the public at large. The methods employed include ‘self-accounting’—through or with the help of various NGOs, lawyers, media, activists, states and international bodies, corporate-produced corporate social

11 ‘EU Tax: Tough Love for Multinationals’ Sweetheart Deals’, *Financial Times*, 13 July 2015, available at <http://www.ft.com/cms/s/0/32e6a5c4-1a80-11e5-a130-2e7db721f996.html#axzz3n1j1vTke> (last visited 21 December 2015).

12 See, e.g., the work of CorporateWatch in the UK, available at <https://corporatewatch.org> (last visited 11 November 2015).

13 *Citizens United v Federal Election Commission*, Supreme Court No. 08-205, 21 January 2010; *Burwell v Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

14 R Hotten, ‘Volkswagen: The Scandal Explained’, *BBC*, 15 December 2015, available at <http://www.bbc.co.uk/news/business-34324772> (last visited 25 December 2015).

15 See, e.g., projects like Growing Communities in London, available at <http://www.growingcommunities.org> (last visited 4 January 2016); UK Food Sovereignty Network, available at <http://foodsovereigntynow.org.uk> (last visited 4 January 2016); the People’s Grocery in Oakland, California, available <http://www.peoplesgrocery.org> (last visited 4 January 2016) and studies such as ‘People Powered Money: Designing, Developing and Delivering Community Currencies’, *New Economics Foundation*, 18 May 2015, available at <http://www.neweconomics.org/publications/entry/people-powered-money> (last visited 4 January 2016).

16 For calls for corporate accountability, see, e.g., the work of the Business & Human Rights Resource Centre, available at <http://business-humanrights.org/en/corporate-legal-accountability> (last visited 4 January 2016).

responsibility (CSR) programmes, drawing up voluntary guidelines, standards, creating schemes for compliance, monitoring or (self-)certification, working with Public Relations officers and the media on corporate image, and so on. It also includes the work of states and courts in legally regulating, permitting self-regulation, prosecuting or threatening to prosecute, subjecting to licensing and other bureaucratic procedures, and a variety of actors in advocating and lobbying for or participating in negotiations around CA instruments and policies. CA in this sense is thought of as a vital method of restraining corporate activity, limiting wrongdoing and reducing negative effects of corporate profit-making activities.

I propose that CA also has a second, closely-related meaning. This meaning is based on Weber's *literal* understanding of 'accountability' as the ability to account the cost/benefit effects of certain events and processes. The exact value of CA work in the ordinary sense can be calculated—it is, in principle, possible to relate the money spent on CSR consultants, CSR projects and gestures, fees for certification, advertising and PR, lobbying, legal fees defending CA cases or indeed spying on and suing anti-corporate activists, and so on,¹⁷ to a specific set of effects on company share prices, brand value, and goodwill.¹⁸

My key argument here is that rather than thinking of CA as restraining corporate value-extracting activity, we should think of it as *facilitating* corporate profit-making and corporate capitalism as a whole. Corporate reputational risk becomes calculable through the ability to account—to predict, know, and thus manage, manipulate, exchange or 'bank on' future events, relations or dynamics—through 'investment' in CA efforts, which has (adds) value in itself. Secondly, and most significantly, CA work, in shaping how we think of, feel about, and deal with the corporation, as well as what we expect from it, has a legitimising effect, the value of which to the corporation and corporate capitalism more generally, is not directly calculable: it is 'priceless'.

In the first section of this article, I describe how the corporation was created as a legal structure to function as the surplus-value extracting motor of capitalism. I comment on its main elements and the main movements in its creation, the notion of corporate legal personality, limited liability and the profit mandate. As the corporation is created as an 'amoral calculator' and

17 J Scahill, 'Blackwater's Black Ops', *The Nation*, 15 September 2010, available at <http://www.thenation.com/article/blackwaters-black-ops/> (last visited 11 November 2015).

18 Indeed, '[a] 2013 study of 1000 brands found that 28% of brand value relates to corporate social responsibility.' G LeBaron & J Lister, 'Ethical Audits and the Supply Chains of Global Corporations', SPERI Global Political Economy Brief No. 1 (2016), available at <http://speri.dept.shef.ac.uk/wp-content/uploads/2016/01/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf> (last visited 19 January 2016) 6.

‘externalising machine’, the question arises, ‘why do we put up with it all?’¹⁹ The answer lies in the creation of corporate ideology legitimising this structure. I discuss this in the second section, which addresses corporate ideology production predominantly through CA in the form of corporate citizenship and CSR. I discuss CSR’s material and intellectual provenance and its development into a movement for the promotion of non-binding rules on corporate behaviour.

In the third section, I consider CA ‘cause lawyering’ and the multiple attempts by NGOs and ‘cause-lawyers’ to ‘hold corporations to account’ in western domestic courts.²⁰ Such cause lawyering, I argue, forms a civil society response to the CSR movement, which, in turn, has sought to alleviate accusations of bad corporate conduct by the cause lawyers.²¹ This dynamic then produces the call for the *legalisation* of CSR, which seeks to form a compromise between the first two responses and has advocates in the corporate and NGO/practice worlds, as well as in academia.²² One particular demand often expressed by the ‘legalised CSR’ advocates is the inclusion of corporate criminal liability in international law or the formation of a specific field of ‘corporate international criminal law’.

In the final section, I underscore the *distributive effects* of the CA tools created within these strategies. Most importantly, I show that the contribution CA makes to the reification/anthropomorphisation of the corporation changes (‘spirits away’²³) the relationship of responsibility for harm from a relationship between individual and affected communities or society at large, to one between individual victims and ‘the corporation’. The practical effect of this is that individuals affected by the particular excesses of capitalism (normally in the Global South) are constituted as victims who, in a legal relationship as formal

19 I take this evocative phrase from P Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge UP, 2002) 400.

20 See, e.g., Amnesty International, ‘Demand Dignity: Close the Accountability Gap: Corporations, Human Rights and Poverty’, 28 May 2009, available at <http://www.amnesty.org/en/library/info/ACT35/006/2009/en> (last visited 11 November 2015); Global Witness, ‘Bankrolling Brutality – Why European Timber Company DLH Should Be Held to Account for Profiting from Liberian Conflict Timber’, 18 November 2009, available at <http://www.globalwitness.org/library/bankrolling-brutality-why-european-timber-company-dlh-should-be-held-account-profiting> (last visited 11 November 2015).

21 R Shamir, ‘Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility’ 38 *Law and Society Review* (2004) 635.

22 See, e.g., the various contributions in D McBarnet, A Voiculescu & T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge UP, 2007).

23 C Arthur, ‘Editor’s Introduction’, in E Pashukanis, *Law & Marxism: A General Theory* (Ink Links, 1978) 9, 31.

equals with the corporation, can seek to negotiate the ‘price’ of the harm done to them, under the commodified responsibility relationship, where ‘planned impunity’²⁴ thus furthers contemporary imperialism.

‘Calculable’ value is created in the specific internal mechanism of CA, namely that of channelling difficult-to-predict risk to business (the potential repercussions of suffering produced by capitalism) into calculable avenues of exchange between the corporation and individual victims. Finally, and importantly, the broader effect of the availability of accountability mechanisms (whether used or not) is that of absorbing a large chunk of the critiques of capitalism and grassroots anti-capitalist resistance into a struggle where capitalism’s violence is reduced to ‘corporate wrongdoing’ and where, once accountability mechanisms exist, the backlash is reversed and the corporation and thus capitalism are ‘fixed’.²⁵ CSR, corporate cause lawyering, and advocacy towards a ‘corporate international criminal law’—together ‘CA’—form the main part of what Klein has called ‘the 50 year campaign for total corporate liberation’.²⁶ In particular, (putative) corporate ICL would serve to complete the corporation as a political citizen and legitimate participant in global governance.

CA thus serves, I argue, as an illustration of the *commodity form theory of law’s* central claim regarding law’s emancipatory potential. It shows, the essay concludes, how capitalist law generates seemingly emancipatory discourses and practices that, on closer inspection, turn out to follow the logic of capitalism itself.

ACCOUNTABILITY AND THE CREATION OF THE CORPORATE STRUCTURE AS THE MOTOR OF CAPITALISM

While up to the mid-20th century the genealogy of the corporate form was a common topic of conversation among lawyers and scholars,²⁷ it has now been written out of the main company law textbooks, leaving the corporation as an

24 I base this term on ‘planned misery’ as put forward by Susan Marks. See S Marks, ‘Human Rights and Root Causes’, 74 *Modern Law Review* (2011) 57.

25 Aside from imperialist wars, etc., but perhaps an argument can be made that these are placed outside of capitalism in the public imaginary.

26 N Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane, 2007) 19. In *Shock Doctrine*, Klein describes this process as represented in the economic reforms including privatisations and corporate involvement in, for example, occupied Iraq and post-Katrina New Orleans.

27 See, e.g., J Dewey, ‘The Historic Background of Corporate Legal Personality’ 35 *The Yale Law Journal* (1926) 655; D James ‘Frankenstein, Incorporated, by I. Maurice Wormser’ 7 *Indiana Law Journal* (1931) 197.

unquestioned ‘natural’ fact of life.²⁸ A second look at the material/social origins of this concept or ‘technology of law’ is, however, illuminating when considering the value of CA. The creation of the corporate form with its now-common elements also necessitated the creation of a corporate ideology, which facilitated the almost ubiquitous acceptance of the British/US model as the main legal form for business. Corporate ideology creates a narrative for the acceptance of the personification of capital as the main means through which humans are treated as commodities and surplus value is extracted—‘Monsieur le Capital’ driving the corporate vehicle as the motor of capitalism.²⁹

The modern corporation originates in the transition to capitalism and the creation of market society in Europe, at a time when capitalism reorganised the provision of everyday wants and labour power was commodified. In its earliest mystical conception, the corporate concept was employed for the personification of a certain type of power, and for the organisation of responsibility. From incorporated boroughs and guilds through to the famous *Case of Sutton’s Hospital*,³⁰ the concept was then developed in the English courts in response to the expansionary demands of the capitalist and the emerging entrepreneurial middle classes.³¹

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 the value of 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 decide) which profits or losses could be ascribed to whom, and, importantly, which risk/cost could be externalised to broader society and the environment. Weber explains how rational commerce (i.e. capitalist exchange) was the field where ‘quantitative reckoning’ first appeared. For as long as business was carried out by family firms, as a ‘closed family affair’, ‘accountability was . . . unnecessary’,³² but in the transition to capitalism it became essential. The development of what Weber calls ‘calculable law’ facilitated this accountability in the literal sense: ‘[t]he capitalistic form of industrial organisation, if it is to

28 G Baars, *The Corporation, Law & Capitalism* (Brill, forthcoming); P Ireland, I Grigg-Spall & D Kelly, ‘The Conceptual Foundations of Modern Company Law’ 14 *Journal of Legal Studies* (1987) 163.

29 M Neocleous, ‘Staging Power: Marx, Hobbes and the Personification of Capital’ 14 *Law and Critique* (2003) 147.

30 *Case of Sutton’s Hospital* [1612] 77 Eng Rep 960, 973.

31 This section is based on chapter 2 of Baars (forthcoming).

32 M Weber, *General Economic History* (Transaction Books, 1982) 225.

operate rationally, must be able to depend on calculable adjudication and administration.³³ Family, community and eventually also individual property became separated from each other and from the property of the business, mediated by legal (exchange) relations or the ‘cash nexus’.

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’). Calculable law allows the business unit to base its decisions not on moral considerations, but on economic rationality. Responsibility becomes *accountability* when responsibility becomes a commodified concept with a pricetag, available for exchange. The corporation becomes an ‘amoral calculator’³⁴ and the corporate construct allows/forces its human operators to be the same. Here we see the genealogy of the notion of accountability in this *literal* sense at the core of the early legal form of the corporation.

Bringing in outside capital, and consequently opening up a public market for company shares was the next big development for the legal concept of the corporation. One of the best known of the early corporations was the British East India Company (BEI Co), which raised money from the general public, thus socialising the risk of a potentially disastrous venture. At the same time, the BEI Co and companies like it, functioned as a vehicle for the global spread of capitalist law and was part of what enabled the metropole’s capitalists’ primitive accumulation, the slave trade and the subjection of three quarters of the world to Western European capitalist interest. Share trade became very popular, and the public literally ‘bought into’ capitalism enthusiastically. When the share craze around the South Sea Company and others led to a spectacular burst, revealing a web of deceit and corruption involving members of the Government and Royal Household, the 1720 Bubble Act (which, amongst other things, restricted public incorporation but was rumoured to have been put forward by South Sea company directors to root out competition) did not stem this enthusiasm.³⁵ Lawyers created Joint Stock Company equivalents through contract—‘deed of settlement’ companies, and stockjobbers proliferated, setting up street stalls selling penny shares in companies for ‘importing jackasses from Spain’, ‘securing perpetual motion’, or ‘an undertaking which would in due time be revealed’.³⁶ Their trade, in the face of healthy scepticism towards such projects, and doubts about joint-stock companies’ ability to act

33 Ibid 277.

34 E Sutherland, *White Collar Crime: The Uncut Version* (Yale UP, 1983) 236.

35 J Farrar & B Hannigan (eds), *Farrar’s Company Law* (Butterworths, 1998) 18; P Davies, *Gower and Davies: The Principles of Modern Company Law* (Sweet & Maxwell, 2003) 26.

36 M Wormser, *Frankenstein Incorporated* (McGraw-Hill, 1931) 21.

morally,³⁷ can be seen as testament to the growing strength and popular acceptance of corporate ideology developing already at this point. Projectors (as those designing such companies for investment were known) feigned public interest³⁸ and at the same time public ownership of corporations meant that ‘everyone’ was interested in the corporation’s thriving. ‘Social capital’ thus conversely makes the enterprise appear as a ‘social enterprise’.³⁹

The South Sea bubble share-craze had, by advancing links between the various financial markets in Western Europe, ‘facilitated, for the first time, the emergence of an integrated and efficient international financial market’.⁴⁰ This development led to the courts reconceptualising the company share no longer as a share in the actual assets of the corporation, but as a financial interest in company profits (and a return on winding up), and shareholders not as partners or lenders but as pure money capitalists, as ‘investors’.⁴¹ This supported the idea that shareholders were divorced from the actual goings-on in a company—not liable for, nor indeed perhaps interested in, actions of the company beyond the maximum effective extraction of surplus value. This move contributes to the corporation’s nature as an ‘amoral calculator’.

The first modern companies act, the Joint Stock Companies Act of 1844 properly adopted the deed of settlement company, endowing it with all the key characteristics of the corporation except limited liability. The Act included a provision affirming the pursuit of profit as the proper purpose of the corporation, as well as a right of incorporation (rather than a privilege bestowed by the Crown).⁴² Limited liability had been accepted by the courts and was subsequently provided for by statute in 1855.⁴³ Both the legal nature of the share and limited liability then ‘personified’ the company as a separate legal entity from the shareholders, a new legal subject, ‘capital personified’.⁴⁴ Between 1856 and

37 Taylor (2006) 23.

38 Yamamoto (forthcoming).

39 In the sense that it receives capital from society rather than operating on private capital. K Marx, *Capital: Critique of Political Economy*, vol. 3 (Penguin Classics, 1981) 567. Space does not allow for much nuance in the treatment of corporate ideology here; for a book-length treatment of popular attitudes to the corporation, see Taylor (2006).

40 R Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge University Press, 2000) 80.

41 P Ireland, ‘Finance and the Origins of Modern Company Law’, in Baars & Spicer (eds) (forthcoming). Harris suggests that ‘reconceptualising’ may be overstating the courts’ actions, since they up to that point had mostly avoided considering what the legal nature of the share was. Harris (2000) 118.

42 s II Joint Stock Companies Act 1844, 7 & 8 Vict., c.110.

43 Limited Liability Act, 18 & 19 Vict., c. 133.

44 Neocleous (2003) 158.

1862 statutory wording changed, almost unnoticed, from ‘men creating themselves into a company’ to ‘men creating a company’.⁴⁵ This, as well as the ‘finishing touch’ of company law which allowed a hands-on managing owner and not just an arm’s length investor to shift the risk of their enterprise away from themselves through limited liability in *Salomon v Salomon*, evidences the power of the idea of the corporation.⁴⁶ This ‘Frankensteinian monster’ eventually came to dominate the very society that created it.⁴⁷

‘Limited’ liability in fact *shifted* liability (or the financial cost of ‘failure’) to unsecured creditors, who, in turn, were able to rely on their own liability being limited, and who also started to gain protection through the development of insolvency laws. Ultimately, the liability (cost) beyond the limit is *socialised* over broader society and the natural environment. This, and the socialisation of shareholding as a factor in the legitimisation of the narrow profit mandate (‘shareholder primacy’⁴⁸), serves to render the corporation a ‘structure of irresponsibility’,⁴⁹ which is ‘capitalism congealed’ or ‘capital personified’ and which serves to conceal (and, of course, enrich) the individual businessperson and remove the investor to an arm’s-length distance. In the 20th and 21st centuries, we have seen corporate groups form even more sophisticated structures (multinational corporate groups, enmeshed in global value chains) that can isolate and shift value, risk and responsibility on the global level while continuing global accumulation of wealth and the exploitation of Third World labour much like its joint stock forbearer.

In sum, the creation of the legal construct of the modern corporation replaced the forms of communal burden-sharing of the pre-industrial economy during the transition to capitalism, and enabled the accumulation of wealth by the rising middle class and consequently the industrial revolution. As such, it formed an integral part of the creation of the modern capitalist system in existence today. The formal legal concept of the corporation with separate legal personality was created in order to exclude as much as possible the individual as a legally relevant agent in a specific context, to externalise individuals’ responsibility by hiving off risk and displacing potential liability, and to render ‘accountable’ (calculable and plausible) and exchangeable that which is not

45 Ireland et al. (1987); P Ireland, ‘Capitalism Without the Capitalist’ 17 *Journal of Legal History* (1996) 41.

46 *Salomon v A. Salomon and Co. Ltd* [1897] AC 22; Ireland (forthcoming).

47 Wormser (1931); Neocleous (2003).

48 D French, S Mayson & C Ryan, *Mayson, French and Ryan on Company Law* (Oxford UP, 2009) 31-32.

49 D Whyte (ed.), *Crimes of the Powerful: A Reader* (Open UP, 2008) 104.

externalised. This construction makes the corporation capitalism's main motor.⁵⁰

The corporate form, the company as an 'amoral calculator'⁵¹ induces its individual operatives to make 'economically rational', arm's-length, amoral decisions—a form of capitalist *anomie*.⁵² The fact that the corporation's history is now rarely discussed, its characteristics rarely questioned, that it is taken as given, precisely maintains this anomie. The modern corporation as 'the end of history' in economic organisation⁵³ continues to produce knowledge, policy and legal decisions and instruments, that self-perpetuate capitalism and reproduce current socio-economic hierarchies. This ideological achievement is the key source of corporate power. Maintaining this power in the face of intermittent attack, did, however, mean that the corporation, as the reification of capital, 'Monsieur le Capital', the corporate 'psychopath'⁵⁴ would require some humanisation.⁵⁵

THE CREATION OF THE CORPORATE SOUL: CORPORATE CITIZENSHIP AND CORPORATE SOCIAL RESPONSIBILITY AS THE 'LAST *MAGINOT* LINE OF CAPITALISM'

Glasbeek has called CSR the 'last *maginot* line of capitalism', which it has 'dug' in the face of the latest remaining resistance to its main bearer, the

50 H Glasbeek, 'The Corporation as Legally Constructed Site of Irresponsibility', in H Pontell & G Geis (eds), *The International Handbook of White-Collar and Corporate Crime* (Springer, 2010) 249. 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. That has been done elsewhere: see, e.g., J Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge UP, 2006); D McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability', in McBarnet et al. (eds) (2007) 9.

51 Sutherland (1983) 236-38, arguing the corporation comes closer to 'economic man' than any person or organisation.

52 N Passas, 'Anomie and Corporate Crime' 14 *Contemporary Crises* (1990) 157 excerpted in Whyte (ed.) (2008) 153, 155.

53 P Ireland, 'History, Critical Legal Studies and the Mysterious Disappearance of Capitalism' 65 *The Modern Law Review* (2002) 120.

54 J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Robinson Publishing, 2005) 134.

55 Coca Cola, 'Is it true that Santa traditionally wears red because of Coca-Cola?', available at <https://www.coca-colaanswers.co.uk/en/qtile.html/rumours/is-it-true-that-santa-traditionally-wear-red-because-of-coca-coal/> (last visited 1 November 2015). See also R Marchand, *Creating the Corporate Soul: The Rise of Public Relations and Corporate Imagery in American Big Business* (University of California Press, 2001).

corporation.⁵⁶ The first resistance to the corporation, as discussed above, was overcome through reification, normalisation, and buy-in to corporate capitalism, and, in the 20th century, corporate ideology continued to develop as part of capitalist ideology more generally. The humanisation of ‘Monsieur le Capital’, corporate citizenship, the CSR industry and corporate legal accountability are corporate ideology tools created in response to backlashes against the legitimacy of the corporate form and profit-making activities. In Europe and the US, the growing power of large monopoly corporations and cartels caused public concern in the first two decades of the 20th century while the depression of the 1930s caused another backlash, this time against the system of free enterprise itself. 19th-century reification then had to be followed by the creation of the corporate soul, to portray the corporation as a ‘good citizen’—‘institution in the service of mankind’ rather than ‘amoral calculator’.⁵⁷ In 1908, the US telecommunications giant AT&T was one of the first to launch an advertising campaign aimed at getting the public to ‘love and hold affection for’ the corporation. US historian Roland Marchand has evocatively described how corporate ideology was reconstructed when the major US corporations used advertising and, later, in-house public relations officers and even iconic architecture, to portray themselves as benevolent and socially responsible.⁵⁸ Moreover, in the 1930s, crisis corporations started to address the public as voters rather than ‘just’ buyers, positioning themselves alongside the state as benevolent providers of public goods in what was the ‘best strategy . . . to restore people’s faith in corporations and reverse their growing fascination with big government’.⁵⁹ A parallel development to the creation of the corporate soul is the pinpointing of a ‘body to kick’ and emerging ideas around corporate crime in the first half of the 20th century.⁶⁰ The ‘obvious’ involvement of the major German corporations in WWII had led to the prosecution of a number of individual German company directors but not the corporations *per se*—although this possibility had been discussed.⁶¹ Any more fundamental critique of corporate capitalism was staved off by the Allies’ realisation of their

56 H Glasbeek, ‘The Corporate Social Responsibility Movement – The Latest in Maginot Lines to Save Capitalism’ 11 *Dalhousie Law Journal* (1988) 363.

57 Marchand (2001); R Shamir, ‘The Age of Responsibilization: On Market-Embedded Morality’ 37 *Economy and Society* (2008) 1.

58 Marchand (2001) 203ff.

59 Bakan (2005) 19.

60 J Coffee, ‘No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment’ 79 *Michigan Law Review* (1981) 386.

61 JA Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’ 109 *Columbia Law Review* (2009) 1094; Baars (2013).

dependence on the major manufacturers for future war efforts. Instead, the major US corporations were given key roles in rebuilding war-ravaged Europe, allowing them to demonstrate public service and ‘good neighbourliness’.⁶² Complaints from this point onwards were no longer fundamental challenges to the corporation but rather focused on the ‘corporate excess’ and ‘abuse’ of ‘bad apples’. Wormser’s demand that the Frankensteinian corporate monster was to be made to respect its maker⁶³ seemed to have been satisfied, at least ostensibly.

In legal scholarship the debate centred on the corporation’s objective, with CSR and ‘corporate citizenship’ advocates arguing that the corporation’s mandate is (or should be) wider than simple maximisation of shareholder return: that it should act for the benefit of other ‘stakeholders’ (workers, local communities, etc.), though doing so may also be, and indeed normally is, profitable. Although the profit/shareholder return objective had, in English law, just been introduced in 1844 as the only *lawful* objective for the corporation, 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 makes business sense: ‘[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.’⁶⁴ While CSR entails a calculation as to its value for the company, the ideological move this allows is to highlight the ‘generous’ provision of ‘cakes and ales’, for example, to workers or the local community, while the corporate benefit of such provision—pacifying workers and thereby reducing risk of industrial action or other loss of productivity—remains hidden. As Marchand surmises, corporations create their soul, making us believe they are serving humanity, while in fact they serve capital⁶⁵—a move that law permits and masks.

The 1930s *Harvard Law Review* debate between Adolf Berle and E. Merrick Dodd on the proper purpose of the corporation⁶⁶ in this light appears moot, or indeed purely ideological—rephrased according to the prevailing political

62 Marchand (2001) 361.

63 M Wormser, *Frankenstein Incorporated* (McGraw-Hill, 1931) 21.

64 *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, 673.

65 Marchand (2001) 1-5.

66 A Berle, ‘Corporate Powers as Powers in Trust’ 44 *Harvard Law Review* (1931) 1049; E Dodd, ‘For Whom are Corporate Managers Trustees?’ 45 *Harvard Law Review* (1932) 1145; A Berle, ‘For Whom Corporate Managers Are Trustees’ 45 *Harvard Law Review* (1932) 1365. See also A Sommer, ‘Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later’ 16 *Delaware Journal of Corporate Law* (1991) 33.

climate. In the economically more secure US of the 1950s, the economist Milton Friedman in 1952 again floated the idea that any managerial concern with interests outside of shareholder interests *reduces* social wealth due to increased agency cost.⁶⁷ Friedman revived the ‘just business’ model dismissed in the 1920s, asking whether it should not rather be up to the state to set the rules on, for example, wages, the environment, and other ‘stakeholder’ issues, and that businessmen could not presume to know, and that it is not their task to decide, what is best for society in general.⁶⁸ The debate in the US and UK rests for now on the ‘enlightened shareholder model’, which allows attention to stakeholders to be seen as a generous gesture or progressive move.⁶⁹ In particular, the currently popular notion of ‘shared value’ communicates the possibility of a win-win resolution for society and corporate capitalism, even if it is acknowledged to be important that the discussion continue so as to offer a space for concerns over corporate activity to be aired, and discontent to be absorbed.⁷⁰ This is an important achievement of/for the ‘CSR industry’ which can be ascribed to the dialectical development between popular concerns over corporate activity and the realisation that this presents a lucrative business opportunity as well as a vital value-creating legitimising process (regardless of whether one lives up to it).⁷¹ The responsibility for this can even be shifted 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 organisations the size of General Motors or Ford—as long as people want Chevrolets or Fords.’⁷²

The more confrontational quest for CA as part of the structured process of corporate ideology picked up in the economically abundant (in the West, at least) and politically activist 1960s, when companies came under more exacting

67 Glasbeek (1988) 384.

68 M Friedman & R Friedman, *Capitalism and Freedom* (Chicago UP, 1962) 133-34, fn 26.

69 In the sense that (English) corporate boards are only legally obliged to *consider* the interests of stakeholders: s 172 Companies Act 2006.

70 J Bakan, ‘The Invisible Hand of Law: Private Regulation and the Rule of Law’ 48 *Cornell International Law Journal* (2015) 279, 292. See further P Fleming & M Jones, *The End of Corporate Social Responsibility* (Sage, 2013).

71 Marchand (2001) 363.

72 Berle (1957) 15. CSR is most popular among producers of consumer goods, for obvious reasons.

public scrutiny.⁷³ In 1965, Ralph Nader published *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile*, criticising the American automobile industry, which had found it economically rational to produce unsafe cars and pay out compensation to accident victims after lawsuits. This caused a scandal—and revealed a key tendency of corporate anomie.⁷⁴ In addition, the anti-Vietnam war movement of the 1960s 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 both the napalm and Agent Orange used in Vietnam and, almost two decades later, the devastating chemical spill at Bhopal.⁷⁵ During the period of decolonisation and the 1970s crisis, as the *global* class struggle intensified and global corporate power increased, a growing assertiveness on the part of G77 countries resulted in the various New International Economic Order Resolutions.⁷⁶ These growing accountability efforts gave impetus—in what has been called the ‘private regulation revolution’⁷⁷—to the development of the first series of soft law CSR instruments: the 1976 Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises, the 2000 United Nations Global Compact, and the 2002 Draft Norms on Multinational Enterprises on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,⁷⁸ as well as a raft of corporate and NGO-produced documents. These instruments, while doing little to curb harmful corporate activity, especially in the Global South, were ideologically highly significant, as they fed into the development of a new expanded notion of *global* ‘corporate citizenship’ and of the legitimate role of

73 R Broad, ‘Introduction’, in R Broad (ed.), *Global Backlash: Citizen Initiatives for a Just World Economy* (Rowman & Littlefield Publishers, Inc., 2002) 6; Bakan (2005) 60; A Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford UP, 2011) 61ff.

74 See generally R Nader, *Unsafe at any Speed: The Designed-In Dangers of the American Automobile* (Grossman Publishers, 1965).

75 Glasbeek (1988) 363. Dow also produced Agent Orange which would later become the subject of the *Agent Orange* ATCA suit, and was responsible for the disaster Bhopal.

76 Declaration on the Establishment of a New International Economic Order, GA Res. A/RES/S-6/3201, 1 May 1994.

77 R Shamir, ‘Capitalism, Governance and Authority: The Case of Corporate Social Responsibility’ 6 *Annual Review of Law and Social Sciences* (2010) 531.

78 Guidelines on Multinational Enterprises, Annex to the Declaration of 11 June 1976 by Governments of OECD Countries on Investment and Multinational Enterprises, available at <http://www.oecd.org/daf/inv/mne/50024800.pdf> (last visited 4 January 2006); UN Global Compact, available at <https://www.unglobalcompact.org> (last visited 4 January 2016); Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2002/13, 15 August 2002, 15-21.

corporations as partakers in neoliberal global governance and *providers* of socio-economic and civil rights⁷⁹—as, for example, builders of schools and hospitals in the Global South.

The triumphant ‘Gordon Gecko’ capitalism of the 1980s and 1990s—neoliberalism’s ‘golden age’—tripped up on the corporate scandals of Enron (2001) and WorldCom (2002).⁸⁰ What is interesting is that these scandals led to a highly visible application of individual criminal liability.⁸¹ Perhaps this—as well as the rise of the anti-globalisation movement starting in the late 1980s—was the last push the CSR movement needed to start moving towards professionalisation, formalisation and eventually legalisation beyond the judicial endorsement of ‘cakes and ale’ spending. The result is that they maintain or increase their capacity to extract surplus value. The sizeable part of, or arguably all of, CSR which concerns business impact on the enjoyment of human rights,⁸² was institutionalised through the work of UN Special Rapporteur on Business & Human Rights John Ruggie,⁸³ contributing to CSR’s development into a lucrative industry in its own right, with a willing market of ‘fair trade’ importers and ‘socially responsible investors’, meeting ‘ethical consumers’ with a multitude of non-binding standards and guidelines, private and (semi-)public labelling and certification schemes and associated monitoring agencies. For producers of consumer products, a visible CSR strategy is now an essential badge of corporate legitimacy.

The 1980s and 1990s saw a ‘private regulation revolution’⁸⁴ signalling the growing legitimacy of a governance function for corporations through the acceptance—by governments and (much of) civil society—of corporate self-regulation. Currently, however, some business representatives are joining ‘progressive’ domestic and international NGOs in responding to a more sceptical section of the public’s concern that CSR may amount only to window-dressing by calling for a ‘legalised’ CSR consisting of binding rules and

79 Fleming (2013) 34

80 S Karstedt & S Farrall ‘The Moral Economy of Everyday Crime: Markets, Consumers and Citizens’ 46 *British Journal of Criminology* (2006) 1011, 1013.

81 Glasbeek (2010) 248-49.

82 Views differ over whether the scope of ‘business & human rights’ is broader or narrower than that of CSR. C López, ‘The ‘Ruggie process’: From Legal Obligations to Corporate Social Responsibility?’, in S Deva & D Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge UP, 2013) 58, 59.

83 See, e.g., Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31, 21 March 2011; G Baars, “Reform or Revolution?” Polanyian v Marxian perspectives on the regulation of the economic’ 62 *Northern Ireland Legal Quarterly* (2011) 415, 425-27.

84 Bakan (2015).

enforcement mechanisms. There was widespread disappointment when the United Nations Special Rapporteur's final report did not propose a treaty clearly setting out corporations' legal responsibilities.⁸⁵ This has led to a 'Global Movement for a Binding Treaty' joined by 402 organisations and 745 individuals⁸⁶ and, in July 2015, the start of negotiations on a binding CSR Treaty at the United Nations Human Rights Council. The 'open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights', which was mandated 'to elaborate an international legally binding instrument'⁸⁷ published the draft report of its first session in July 2015.⁸⁸

Legalised CSR could include civil and criminal accountability in domestic law (mostly home-state legal systems as host-state legal systems are often considered to be lacking), as well as specific legislation providing for liability for civil wrongs or crimes, including international crimes, committed extraterritorially. Some who call for a legalised CSR also advocate extending the jurisdiction of international tribunals such as the International Criminal Court (ICC) to corporations.⁸⁹ This is no doubt stimulated by the growing popularity of international criminal law as well as the rediscovery of the Nuremberg Industrialists Trials in cause-lawyering practice. Corporate criminal liability was proposed but eventually rejected at the Rome Conference ICC Statute negotiations,⁹⁰ but these developments indicate that today corporate criminal liability in international law is increasingly accepted.

In many jurisdictions including the UK, the laws necessary for corporate legal accountability already exist. British NGO Traidcraft in a recent report noted that the problem is that the political will to enforce these norms is lacking. The solution offered is a new legal framework—and at first glance

85 López (2013) 58.

86 Global Movement for a Binding Treaty, available at <http://www.treatymovement.com/statement> (last visited 1 November 2015).

87 UN Doc. A/HRC/RES/26/9, 14 July 2014.

88 Draft Report of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 10 July 2015, available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Draftreport.aspx> (last visited 1 November 2015).

89 See, e.g., McBarnet (2007) 9; D Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010); N Bernaz 'Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty Necessary but Insufficient', *Business & Human Rights Resource Centre*, available at <http://business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient> (last visited 1 November 2015).

90 Baars (forthcoming) ch. 4.

this seems illogical considering the political will required to pass (and indeed enforce) such new laws. Traidcraft's report also notes that directors of 69 per cent of UK companies agree that companies should be accountable for harms caused abroad.⁹¹ Viewed in light of the dia/panlectical development of corporate ideology as described in this section, however, this makes sense. Following Joel Bakan, who has argued that corporations participate in CSR processes in order to shape the narrative and ensure that any resulting private regulation regimes are optimally calibrated to business interests,⁹² we could argue that the engagement in advocating and negotiating *legal* changes is likewise an effort to 'control the field' and possibly even *erode* existing legal standards or change liability models or enforcement policies with similar effect.⁹³

Shamir has argued that a corporate conscience, or 'soul' had to be constructed—the corporation had to be 'remoralised', in order for self-regulation to be viewed as a legitimate mechanism.⁹⁴ Likewise, by extension, it is corporate right (corporate good citizenship), which creates corporate wrong/crime and, dialectically, vice versa: CA creates the 'good corporation'.⁹⁵ CA thus equals 'commodified morality' or 'moral' behaviour with a clear economic benefit. The value of this dynamic is the legitimation of the corporation as the main surplus-value extracting mechanism—but also, as a 'good corporate citizen', as an actor in global governance with an as yet undefined mandate—as an enthusiastic participant in all important global fora, from Davos to Paris for COP21. In the next section, I set out how CA cause lawyering inadvertently contributes to this.

CA CAUSE LAWYERING

In recent years, the focus of those raising concerns about corporations has shifted largely to the Global South—possibly because a 'kinder capitalism' at home has limited, or concealed from scrutiny, 'corporate excess' in the metro-pole, and because western corporations have a global reach not seen since the BEI Co.⁹⁶ CA cause lawyers have mostly worked on these, rather than western

91 Traidcraft, 'Two-thirds of British Business Leaders Agree', Press Release, 27 November 2015, available at <http://www.traidcraft.co.uk/campaign-blog-entry/two-thirds-of-british-business-leaders-agree-with-us> (last visited 23 December 2015)

92 Bakan (2015) 295.

93 Which, in fact, it does. See below and Traidcraft (2015) 10-12.

94 Shamir (2010) 536.

95 See also Baars (2011) 415; Shamir (2008) 1.

96 Also, some Chinese, Indian and Gulf corporations have a global reach—but CA focuses largely on western corporations.

companies' domestic activities also because of the internationalisation of NGO activities (and funding), and the seemingly useful legal tools in international law. Accountability solutions have mainly been sought in international human rights and criminal law applied domestically in home states (for extraterritorial activities) rather than domestic (host state) law *per se*. Particularly, the availability of ICL norms and the growth of the international human rights industry with a new focus on private actors, producing hard-hitting reports about business involvement in 'foreign'/international conflict, extraordinarily exploitative labour conditions and environmental destruction, and in general the increasing litigiousness of human rights/social justice practice has led 'cause lawyers' to attempt to hold corporations (and occasionally individuals) to account for violations in home-state courts.⁹⁷ In a parallel, and dialectically connected, development, broader publics have been mobilised, and have responded to, the emotive discourse around 'corporate impunity'. The CA lawsuits appear to form the counterpoint to CSR, being aimed at 'bad corporations', making cause lawyers the designated (and thus far *only*) putative 'enforcers' of (legalised) CSR and corporate ICL. This puts them in a position of potentially, perhaps counter-intuitively, creating value for the corporation and corporate capitalism.

Cause lawyers and legal/human rights NGOs have found various ways of bringing claims in national courts ultimately based on violations of international human rights law and ICL.⁹⁸ Best known of these are the compensation suits brought under the Alien Tort Statute (ATS) and other provisions of US law, which have been numerous and highly publicised.⁹⁹ A small number of similar cases have been brought in Canada¹⁰⁰ and in Europe.¹⁰¹ Where civil compensation

97 Sarat and Scheingold are credited with the term 'cause-lawyers' which they define as 'lawyers who commit themselves and their legal skills to a vision of the good society'. A Sarat & S Scheingold (eds), *Cause Lawyering* (Oxford UP, 1998) 3.

98 See, e.g., Business & Human Rights Legal Accountability Portal, available at <http://business-humanrights.org/en/corporate-legal-accountability> (last visited 1 November 2015).

99 This US instrument allows aliens (and Americans) to bring civil suits in US courts against parties who have, or are accused of having, committed a violation of international law. Alien Tort Statute, 28 U.S.C. 1350.

100 *Bil'in (Village Council) v Green Park and Green Mount*, QCCS 2011 2 May 2011. See J Yap, 'Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from Bil'in (Village Council) v. Green Park International Ltd.' 8 *Journal of International Criminal Justice* (2010) 631.

101 In the UK, human rights abuse-related tort cases have been brought against, amongst others, Cape Plc. *Adams v Cape Industries plc* [1990] BCLC 479 520. Evidence of a growing interest in such cases is the recent number of conferences and workshops on the issue, such as an effort by the European Centre for Constitutional and Human Rights, available at <http://www.ecchr.eu/en/events/archive-2013.html> (last visited 4 January 2016).

claims for ICL violations are not possible, cause lawyers have found other strategic litigation methods around corporate involvement in conflict.¹⁰² Public interest lawyers in France have taken some more imaginative public law and contract law cases that are ultimately based on the allegation of an international crime.¹⁰³

The US has seen exponentially more CA cases than anywhere else in the world. A rush of cases started when Peter Weiss, chairman of the Center for Constitutional Rights (CCR), unearthed the long-forgotten ATS in the 1970s while searching for a legal means to hold to account those responsible for the My Lai massacre. He drew on his experience as one of the Morgenthau Boys, investigating the German Industrialists preceding their prosecution at Nuremberg, when applying the instrument to litigation against corporations allegedly involved in international crimes.¹⁰⁴ In 1996 CCR filed cases under the ATS against *Unocal*, accusing the US oil company¹⁰⁵ of using slave labour in its plants in Burma, in collusion with the Burmese dictatorship.¹⁰⁶ Similar cases at the time were brought against the major western oil and mining companies¹⁰⁷ and against financiers of, and suppliers to, oppressive regimes such as the South African apartheid government.¹⁰⁸ A major series of cases that is subject to a complex settlement mechanism is the *Holocaust Litigation*—including against Ford for the use of forced labour.¹⁰⁹ Cases were also filed in relation to

102 *In re Agent Orange Product Liability Litigation* 323 F. Supp. 2d 7 (EDNY 2005) (No. 04-400), a product liability case.

103 *L'Association France Palestine Solidarité (AFPS) v ALSTOM and VEOLIA TRANSPORT*, Tribunal de Grande Instance de NANTERRE, March 2007. See the AFPS website, available at http://www.france-palestine.org/article5863.html?var_recherche=veolia (last visited 4 January 2016); Global Witness, 'Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War', Press Release, 12 March 2014, available at <https://www.globalwitness.org/archive/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-0/> (last visited 4 January 2016).

104 'Gespräch mit Peter Weiss', in *ECCHR TNU Konferenz Bericht* (ECCHR, 2008) 22, 26; Baars (2013) 163-92.

105 This section in particular draws on G Baars, 'Corrie et al v Caterpillar: Litigating Corporate Complicity in Israeli Violations of International Law in the U.S. Courts' 11 *Yearbook of Islamic and Middle Eastern Law* (2006) 97.

106 *Doe v Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal.1997); *Roe v Unocal Corp.*, 70 F. Supp. 2d 1073 (C.D. Cal 1999).

107 See, e.g., *The Presbyterian Church of Sudan, et al. v Talisman Energy Inc., et al.*, USDC SDNY 2005, US Dist. 30 August 2005.

108 Barclays and Citigroup, amongst others, in the *Apartheid Litigation Cases: In re South African Apartheid Litigation: Ntsebeza et al. v Daimler et al and Khulumani et al v Barclays et al.*, 02 MDL 1499 (SAS) – 03 Civ. 4524 (SAS), 8 April 2009.

109 See, e.g., *Holocaust Insurance Litigation: In re. Assicurazioni Generali SpA. Holocaust Insurance Litigation*, MDL 1374, M21-89 (MBM) Opinion and Order, 25 September 2002.

corporate atrocities during colonialism,¹¹⁰ and against suppliers of the means to commit atrocities in war zones such as Vietnam and Palestine.¹¹¹

US Courts have found that corporations could be held directly responsible for the slave trade, genocide, war crimes, and other so-called ‘offences of universal concern’.¹¹² They 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.¹¹³

Yet, none of the ATS corporate cases—nor indeed, most of the cases brought elsewhere¹¹⁴—has resulted in a court win for the claimants. The claims relate to atrocities that have usually affected large numbers of people. Many of these cases have taken several years, and amicus briefs have been filed by other NGOs, churches, victim support groups, trade associations, legal scholars and governments. Courts have generally dismissed these cases on technical grounds, without consideration of the merits. In certain cases, in order to avoid, or settle, a mass of lawsuits against particular companies, states have set up mechanisms to channel compensation payments to individuals who have suffered losses as a result of companies’ actions or inactions. Some of these settlements have been challenged (unsuccessfully) as infringements of *individual* rights to redress.¹¹⁵ In other cases, such as 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, families, communities and environments, in return for abandoning the right to file future claims.¹¹⁶

110 *Herero 2001 Complaint: The Herero People’s Reparations Corporation and the Herero v Deutsche Bank AG et al.* (First Amended Complaint, 18 September 2001), available at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Herero_Genocide_Case_Complaint_06-09-2001.pdf (last visited 1 November 2015).

111 *In re Agent Orange Product Liability Litigation* 323 F. Supp. 2d 7 (EDNY 2005) (No. 04-400); *Caterpillar*; Baars (2006).

112 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.

113 Baars (2006) 121.

114 Among the exceptions is *Lubbe et al v Cape* [2000] UKHL 41.

115 See, e.g. *In re Holocaust Victim Assets Lit.*, 302 F. Supp. 2d 89 (EDNY 2004).

116 Centre for Constitutional Rights *Wiwa* docket, available at <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited 1 November 2015).

The 2013 US Supreme Court decision in *Kiobel* (on a claim brought on behalf of Ogoni Valley claimants against Royal Dutch Shell) changed the future of corporate ATS litigation.¹¹⁷ The Court of Appeal for the Second Circuit held that the ATS does not confer jurisdiction on the federal courts to hear claims filed under the ATS against corporations.¹¹⁸ Originally this point was to be the question in front of the Supreme Court for certiorari, however, the Court *proprio motu* changed this to the more general question of ‘whether and under what circumstances courts may recognise a cause of action under the ATS’ thus allowing for a potentially far-reaching reformulation of ATS law while remaining vague on corporate liability. The Supreme Court unanimously dismissed the claim because of the ‘presumption against extraterritorial application of US jurisdictional statutes’.¹¹⁹ Subsequently, *Cardona v Chiquita* confirmed that no US corporation shall be held liable for conduct that took place outside the US.¹²⁰ Yet, parts of the *Cardona* case continue in a federal district court in Florida.¹²¹ Cause lawyers, though ‘baffled’ by this latest string of cases, continue to litigate.¹²² We can see the dialectic at work here between legitimacy challenge and legitimacy reproduction, as these cases generated a significant amount of discovery and media coverage of corporate ‘crimes’ and ‘human rights abuses’—which in turn has spurred on corporate CSR development and the current call for legalised CSR/corporate ICL.

LEGALISED CSR, CA CAUSE LAWYERING AND CORPORATE ICL PROBLEMATISED

Just as it was argued in the 1940s that international human rights law would only ‘make sense’ if there is a way to hold individuals to account for violations, which became ICL, (global) corporate citizenship now only ‘makes sense’ when it is linked to the possibility to hold corporations to account in ICL. Subjection

117 *Kiobel v Shell* (2010). The *Kiobel* case had been consolidated with the *Wiwa* case, but *Kiobel* et al. refused to settle. See CCR *Wiwa* docket.

118 *Ibid* 48; *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

119 *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). For a detailed discussion, see T Ferrando, ‘Law, Land and Territory in Global Production: A Critical Legal Chain Approach’, PhD Thesis, Sciences-Po (2015) 183-235.

120 *Cardona, et al. v Chiquita Brands International, et al.*, No. 12-14898 (11th Cir. 2014).

121 Earth Rights International, ‘Supreme Court Allows U.S. Corporation to Finance Terrorism Without Accountability’, Press Release, 20 April 2015, available at <http://www.earthrights.org/media/supreme-court-allows-us-corporation-finance-terrorism-without-accountability> (last visited 1 November 2015).

122 Ferrando (2015).

to corporate ICL validates the moralisation of M. Le Capital, and completes the process of CSR. Here I comment on the value, as part of corporate ideology, of CSR and corporate ICL, as generated through the work of cause lawyers as well as the proponents of legalised CSR. Although the CA efforts discussed here have many positive effects, not least the vastly increased public knowledge of corporate activities globally, I argue here that the strategies are *part of the problem* along four axes. I first look at compliance and class, then enforcement and imperialism. I then comment on cause lawyering as the reproduction of white privilege, before discussing the idea of a ‘market for responsibility’—which is where corporate ICL, CSR and cause lawyering potentially meet. I conclude on corporate power, legitimacy and the logic of law.

Corporate crime, compliance and class

A preliminary critique of the development of a ‘corporate ICL’ or *Wirtschaftsvölkerstrafrecht*¹²³ is that it excludes business actors from a general legal regime on the basis that they are *sui generis* and should thus have their own set of rules and enforcement policies. Additionally, the mere existence of a corporate crime rule inevitably removes the focus from individual business(wo)men and thus contributes to the reification of the corporation ‘emptied of individuals’—further facilitating the relative risk-free extraction of surplus value by the protected owners of the means of production.

The main lesson from English law is that ‘corporate crime’, despite having been ‘on the books’ for decades, has not been used to prosecute corporations except in a small number of cases.¹²⁴ On the domestic level, under neo-liberal regimes, rather than enforcement/punishment models, compliance models of corporate regulation are predominant.¹²⁵ This is a function of corporate economic power and common class interest among business and legal/political elites. For this reason, there is likely only to be a semantic/ideological difference between existing voluntary and any new *legally-binding* norms as the latter are unlikely to be enforced with much rigour. Nevertheless, the mere existence of binding CSR/corporate ICL combined with a ‘compliance culture’ has the power to deflate the complaint of ‘corporate impunity’. Building, and invoking a compliance culture has two main effects described (in the domestic context)

123 Literally, ‘economic international criminal law’: F Jeßberger, ‘Die I.G. Farben vor Gericht: Von den Ursprüngen eines “Wirtschaftsvölkerstrafrechts”’ 19 *Juristenzeitung* (2009) 924.

124 Whyte (ed.) (2008) 103. One such exceptional case is *R v P&O Ferries (Dover) Ltd.* [1991] 93 Cr App Rep 72.

125 G Gray, ‘The Regulation of Corporate Violations: Punishment, Compliance and the Blurring of Responsibility’, 46 *British Journal of Criminology* (2006) 875, 887.

by Hawkins, Snider, Slapper and Pearce and Tombs in the ‘punishment model versus compliance school debate’ of the early 1990s.¹²⁶ The first is that a corporation can shield 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. The second is the class-effect.

The *Afrimex* case exemplifies how CSR (specifically, the adoption of a CSR policy or document) can function to insulate against a finding of violation of the *OECD Norms*.¹²⁷ From this it is not difficult to imagine how CA 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. The UN Special Rapporteur on Business & Human Rights has defined the ‘responsibility to respect’ human rights as ‘in essence mean[ing.] to act with due diligence to avoid infringing on the rights of others’.¹²⁸ Legalised CSR, which would likely be based on the Guiding Principles,¹²⁹ would have the same effect as domestic corporate crime law. Due diligence works through the delegation of responsibility: each lower level employee has her/specific task list and has received training on compliance and has to sign off on compliance on tasks. This constitutes a ‘compliance system’ put in place by a senior manager (who has thus acted with due diligence) such that all aberrant results are the result of worker deviance.¹³⁰ This means that, even with corporate ICL, the most likely target of enforcement action (if any) is an individual low-ranking worker. As such, corporate responsibility/liability immunises the corporation itself and the directors and managers by shifting the blame to the workers. Compliance, especially,

126 On the punishment versus 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): F Pearce & S Tombs, ‘Ideology, Hegemony, and Empiricism: Compliance Theories of Regulation’ 30 *British Journal of Criminology* (1990) 423; K Hawkins, ‘Compliance Strategy, Prosecution Policy and Aunt Sally: A Comment on Pearce and Tombs’ 30 *British Journal of Criminology* (1990) 444; K Hawkins, ‘Enforcing Regulation: More of the Same from Pearce and Tombs’ 31 *British Journal of Criminology* (1991) 427; *Ibid.*

127 Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, available at <http://www.oecd.org/corporate/mne/43750590.pdf> (last visited 1 November 2015).

128 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/12, 22 April 2009, 2.

129 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011.

130 Gray (2006) 875, 885.

certified compliance, obviates corporate ‘command responsibility’.¹³¹ Here we see how capital works to protect itself (preserve value) seemingly in the face of mechanisms formulated to restrain it—amounting to ‘planned impunity’ for the corporate ‘structure of irresponsibility’. Thus, it is no longer hard to see why British businesses would support the change to a due diligence, or ‘failure to prevent’ liability model.¹³²

Should legalised CSR or corporate ICL be enforced (beyond worker discipline) in an exceptional case, a financial penalty, or indeed any penalty that in a practical sense translates into a financial penalty (e.g., revoking the licence of a ‘blood diamond’ trader) will likely be accounted for by 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.¹³³ As such punishment of the corporation is ‘socialised’ like any other risk, and may lead to the (collective) punishment of workers or external parties. Nader described in the 1970s how corporations can opt to pay a fine rather than employ technology to conform to safety or environmental regulation, if the latter is more costly.¹³⁴ 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.¹³⁵ CA here maintains and reproduces, with renewed legitimacy, the value-extracting rationale of the corporation and corporate capitalism.

Enforcement and imperialism

Craig Forcese has described CSR as only being necessary because Third World countries, with ‘underdeveloped legal systems’ are simply not able to write and enforce their own rules for corporate behaviour.¹³⁶ In his view, such countries may moreover have ‘oppressive leaders’ making it even more necessary for

131 Certification and labelling schemes have a similar risk spreading/displacing rationale, see, e.g., LeBaron & Lister (2016).

132 Traidcraft (2015) 11-12: ‘Companies and directors would be able to call upon an adequate procedure defence to show that systems were in place to prevent harms.’

133 A Simester, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 2010) 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.

134 Nader (1965).

135 Gray (2006) 875.

136 C Forcese, ‘Regulating Multinational Corporations and International Trade Law’, in D Bethlehem et al. (eds), *The Oxford Handbook of International Trade Law* (Oxford UP, 2009) 723.

developed country multinationals to seek (voluntarily) to set standards of good behaviour. Forcese suggests that CSR could be ‘administered’ by the international investment dispute resolution mechanisms, and/or by means of ‘smart sanctions’.¹³⁷ Such language clearly echoes that of international law’s ‘civilising mission’, the export of ‘western’ law through IFIs, and ICL as a tool for intervention.¹³⁸

It is well known that the shift of most manufacturing and extraction industries to the Global South suits business due to lower costs (as a result of factors such as low wages and less stringent regulation or enforcement), and where the ‘crimes’ are not normally visible to us, and the victims are not known to western publics. With increased CA and public scrutiny, however, the risk of brand name damage as a result of a ‘scandal’ is real. It is exactly that brand value that enables a story to be spun that the scandal is the fault of an, at most, ‘badly chosen’ subcontractor rather than a result of supply chain power distribution and price squeeze.

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 ‘cowboy’ host-state companies on the other. Legalised CSR creates the possibility of selective enforcement against ‘uncivilised’ corporations, to ‘level the playing field’,¹³⁹ or eliminate that which ‘by its unpopularity poisons the pond in which we all must all fish’.¹⁴⁰

An example of potentially ‘imperialist ICL’ is the OSI pillage litigation project, which aims 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 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.¹⁴¹ In sum, legalised CSR and Corporate ICL appear to be deployed particularly in order to facilitate

137 Ibid 283.

138 Baars (forthcoming).

139 Traidcraft specifically refers to ‘cowboys’ who ‘act . . . as if they are above the law’ and ‘[i]n doing so . . . also damage the reputation of responsible British companies,’ echoing David Cameron’s 2013 speech to the World Economic Forum. Traidcraft (2015) 3.

140 R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge UP, 2005) 191ff.

141 J Stewart, ‘Corporate War Crimes: Prosecuting Pillage of Natural Resources’, Open Society Foundations, New York, October 2010, available at <http://ssrn.com/abstract=1875053> (last visited 4 January 2016).

continued value extraction particularly by metropolitan corporations, and thus the continued exploitation of mostly third world workers.

Cause lawyering as the domestication of class struggle and reproduction of white privilege

If we look at the matter from the point of view of those engaged in legal practice, we can see that in recent decades the promise of ICL has turned civil rights and criminal defence lawyers into lawyers seeking criminal prosecution. The romantic ideal of the civil rights movement, of ‘little people and landmark decisions’,¹⁴² 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 might be seen as a form of resistance or class struggle, as a tactical ‘principled opportunism’¹⁴³ that may be successful when it coincides with ‘judicial activism’.¹⁴⁴ Although these attempts do amount to resistance, they are not emancipatory, and their (unintended) effect is rather, on one hand, to domesticate class struggle, and on the other, to actualise, legitimate, and strengthen the existing structures of power and, thus value extraction.¹⁴⁵

CA cause lawyering, based on extraterritorial claims and CSR legalised by means of a treaty, ‘lifts’ corporate behaviour out of local host-state jurisdictions and potential local control (the locality of the harm and thus the affected persons) into a *de facto* Western capitalist realm of international normativity. In particular, compensation claims and settlements create an exchange relationship where the ‘victim’ sells her right and the corporate offender calculates risk.¹⁴⁶ We thus have a situation of ‘calculable law’ where value is created for

142 H Raz, ‘Of Little People and Landmark Decisions’, *Haaretz*, 28 November 2008, available at <http://www.haaretz.com/of-little-people-and-landmark-decisions-1.258388> (last visited 1 November 2015). The byline of the article reads ‘[s]ometimes all it takes to right a wrong is for one person to stand up and make his or her voice heard.’

143 See generally R Knox, ‘Marxism, International Law and Political Strategy’ 22 *Leiden Journal of International Law* (2009) 413.

144 See generally S Marks, ‘International Judicial Activism and the Commodity-Form Theory of International Law’ 18 *European Journal of International Law* (2007) 199.

145 This is the conclusion of N Ziv & R Shamir, ‘State-Oriented and Community-Oriented Lawyering For A Cause: A Tale of Two Strategies’, in Sarat & Scheingold (eds) (2001) 287; M Sfar, ‘The Price of Internal Legal Opposition of Human Rights Abuses’ 1 *Journal of International Criminal Justice* (2009) 37; G Barzilai, ‘The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence, and Dissent’, in TC Halliday, L Karpik & MM Feeley (eds), *Fighting for Political Freedom* (Hart, 2007) 247.

146 However, these cases do have limited mobilisation and demystification value: G Baars, ‘Lawyers Congealing Capitalism: On the (Im)possibility of Using International Criminal Law to Restrain Business in Conflict’, PhD Thesis, University College London (2012).

the corporation and corporate capitalism through predictability or risk, as well as, and more so, through the ideological effect of the existence and operation of an accountability mechanism (even if partial or selective).

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 'claims for admittance to law',¹⁴⁷ 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 century.¹⁴⁸ 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 (usually) a white man.¹⁴⁹ She must 'join the system' in the same way that 'decolonised' peoples had to join the western state system and European international law. As a 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'¹⁵⁰ and demand her surrender to my expertise, to become a rights-entrepreneur.¹⁵¹ I, the white lawyer claim to speak for the oppressed, for justice, but I speak for capitalism, as its enforcer.¹⁵² Thus, inadvertently, such cause lawyers come to create value for the corporation/corporate capitalism—extracted from those on whom the suffering has been inflicted as well as (often) the natural environment, and barely 'compensated', if at all.

Settlements and selling rights: a market for responsibility

Through the lens of the *commodity form theory of law*, compensation claims and settlements create an exchange relationship where the 'victim' sells her right and

147 C Douzinas, 'Adikia: on Communism and Rights', in S Žižek & C Douzinas (eds), *The Idea of Communism* (Verso, 2010) 95, 95.

148 Baars (forthcoming).

149 Cf. M Neocosmos, 'Can a Human Rights Culture Enable Emancipation? Clearing Some Theoretical Ground for the Renewal of a Critical Sociology' 37 *South African Review of Sociology* (2006) 356, 357.

150 T Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims' 2 *Journal of Human Rights Practice* (2010) 208, 208.

151 Davis uses this term for cause lawyers. J Davis, *Justice across Borders: the Struggle for Human Rights in U.S. Courts* (Cambridge UP, 2008) 44.

152 A more cynical scenario is that of some cause lawyers 'creating' victims, instrumentalising them for their own political or personal goals.

the corporate offender calculates the risk (price).¹⁵³ The corporate decision-maker gets to calculate the benefit of the violation (e.g., conflict diamonds are likely to be cheaper than ‘clean’ diamonds), the chance that those affected will speak out or find (or be found by) a human rights organisation (or UN appointed expert), the chance 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, and lawyers’ fees, in the process of determining whether, finally, to come to a settlement. The decision whether to cause the harm has a *calculable* price tag. For the ‘victim’, the need or desire to be free of injury becomes a ‘right’ which can be worth investing in through, for example, lawyers’ fees or time away from regular productive labour, in return for 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(wo)men would settle such cases at all if the record shows that the likelihood of the petitioners winning in court is next to nil.¹⁵⁴ To analogise Michael Sford, 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 as well as to get claimants to sign statements relinquishing future claims, and *indirectly*, as it ‘supplies the oxygen’ of the system of capitalism itself, helping to render it sustainable and legitimate.¹⁵⁵

The essence of my critique here is that ATS and similar cases (including, potentially, legalised CSR and corporate liability in ICL with mainly financial penalties or penalties that can ultimately be converted into a mere financial penalty¹⁵⁶) turn the ‘international crime’ from a problem of international society into a problem between the individual victim (or group) and a powerful ‘fictional’ economic entity in a powerful state—a quantifiable problem if it is

153 On the commodity form theory and ICL, see G Baars, ‘Making ICL History: On the need to move beyond prefab critiques’, in C Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014).

154 I adapt this point from Sford (2009) 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?’

155 Ibid 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.’

156 E.g., licensing penalties or ‘corporate death penalty’ which can be overcome through alternative licenses and the formation of new companies, at a cost.

‘settled’ or receives a financial penalty.¹⁵⁷ 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 having concealed the dangerous nature of the waste aboard the Probo Koala ship. The company’s fine was decreased by the court to €1m because the company had set up a compensation fund for victims.¹⁵⁸ 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.¹⁵⁹ Subsequent cases, filed in The Netherlands, France and the UK, seeking compensation for the harm to thousands of Ivory Coast citizens affected by toxic waste dumped from Trafigura’s ship, resulted in dismissals and out-of-court settlements.¹⁶⁰ CA 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. 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) her right: claim your prize! Responsibility for violating a right (causing harm) only exists insofar as (and to the value of) the right (which is) claimed: *accountability* is achieved.

By participating in the efforts to legalise CSR and to create the possibility for corporate ICL, corporations are not just turning a bad situation into a profitable one, but at the same time, they are again owning the process, ‘controlling the field’. It is noteworthy that the breakdown of participants at the 4th UN Annual Forum on Business & Human Rights’ is as follows: 32 per cent NGOs, 22 per cent business, 12 per cent government.¹⁶¹ The result is, the

157 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 also rely on settlement deals for their own funding.

158 Trafigura, LJN: BU9237, Gerechtshof Amsterdam, 23 December 2011, Case No. 23-003334-10.

159 Shamir (2010) 531-53.

160 ‘Trafigura lawsuits (re Côte d’Ivoire)’, Business & Human Rights Resource Centre, available at <http://business-humanrights.org/en/trafigura-lawsuits-re-côte-d’ivoire> (last visited 4 January 2015); ‘Ivory Coast Toxic Waste Victims Still Await Payments’, VOANEWS, 12 November 2015, available at <http://www.voanews.com/content/ivory-coast-toxic-waste-victims-still-await-payments/3056111.html> (last visited 4 January 2015).

161 Business & Human Rights Weekly Update, 18 November 2015, available at <http://us3.campaign-archive1.com/?u=bdd1a6a40ffad39c8719632f&id=0b6eb798e4&e=b59c4119fa> (last visited 17 November 2015).

creation of a corporate ideology of ‘canned morality’—the dispensing of commodified moral disapproval in order to conceal the transactions that lie below the surface of CA. The most important transaction is paying off the victims that have been created and placed into a relation of exchange, which results in a return to a balanced account, and to innocence. This transaction has then also concealed the structure, the broader effects on society and the natural environment, beyond that individual victim. This means that ‘canned morality’ is deployed to achieve precisely the opposite of what it is said to achieve, namely, liability is socialised, shifted to wider society and the natural environment. This move legitimises the corporation, all corporations, and corporate capitalism itself. This is allowed to occur, because, as Berle has suggested, accountability (canned morality applied to corporations) in the ‘mainstream’ sense responds to a demand, and on a deeper level, to expectations of democracy. Generally the link between accountability and legitimacy is as old as the separation of powers, the rule of law, and democracy itself. Yet, ‘canned morality’ is as far away from democracy as we can get.

Corporate power, legitimacy and law

On the domestic level, Glasbeek has argued, corporate criminal responsibility 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’.¹⁶² 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. It also facilitates the spread of capitalist law, maintains global class differences, puts a price tag on rights, and absorbs emancipatory energy. Corporate liability constitutes the corporation not as an amoral calculator (pathological ‘monster’), but as a *political citizen who occasionally errs*.¹⁶³ 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.

In a move that may have surprised some, the US Government on 21 December 2011 filed an *amicus curiae* brief in support of the claimants in *Kiobel*, arguing that it is for the federal courts exercising their ‘residual’ common law powers to determine whether and when corporate liability is appropriate. Taking into account the arguments raised in this essay, it is clear to see

162 H Glasbeek, ‘Crime, Health and Safety and Corporations: Meanings of the Failed Crimes (Workplace Deaths and Serious Injuries) Bill’, University of Melbourne Centre for Employment and Labour Relations Law, Working Paper No. 29 (2004), available at <https://apps.law.unimelb.edu.au/files/dmfile/wp291.pdf> (last visited 12 January 2016) 17.

163 Pearce & Tombs (1990) 423.

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: '[t]he 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.'¹⁶⁴

Having corporate criminal liability 'on the books' can be highly valuable for use against scapegoats or bad apples. Such liability is conceived as states' residual sovereign right to control its (or punish others') corporations. Augenstein argues (the majority CA-engaged civil society point) that CA must be seen instead as the obligation on home-states to provide Third World victims with a right of redress.¹⁶⁵ However this vision still depends on global power elites to grant *and fulfil* that right—which will only rarely be in their interest. Further, it depends on a vision of law as an unqualified good, operating autonomously from power/capital according to a logic of (social) justice, which, I hope to have shown, it does not.

Finally, the UK government was the first in the world to publish its 'Action Plan' in fulfilment of its obligations to implement the UN Guiding Principles on Business and Human Rights, the purpose of which it summarises as follows:

- 'helping to protect and enhance a company's reputation and brand value';
- 'protecting and increasing the customer base, as consumers increasingly seek out companies with higher ethical standards';
- 'helping companies attract and retain good staff, contributing to lower rates of staff turnover and higher productivity, and increasing employee motivation';
- 'reducing risks to operational continuity resulting from conflict inside the company itself (strikes and other labour disputes), or with the local community or other parties (social licence to operate)';
- 'reducing the risk of litigation for human rights abuses';
- 'appealing to institutional investors, including pension funds, who are increasingly taking ethical, including human rights, factors into account in their investment decisions';
- 'helping companies to become a partner/investor of choice for other businesses or governments that are concerned to avoid human rights risks'.¹⁶⁶

164 *US Government Kiobel Amicus* 1.

165 D Augenstein, 'The Crisis of International Human Rights Law in the Global Market Economy' 44 *Netherlands Yearbook of International Law* (2014) 41.

166 UK Foreign & Commonwealth Office, 'Good Business: Implementing the UN Guiding Principles on Business & Human Rights', 4 September 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf (last visited 23 December 2015).

This summary is remarkable for at least three reasons. First, it seems wholly and brashly premised on the ‘business case’, addressing business as its main audience, signifying the primacy of capital. Secondly, ‘victims’ or those affected by abuses of British corporations abroad¹⁶⁷ are entirely absent, and third, taken as a whole, this statement signifies the effectivity or ‘confidence’ of corporate capitalism in its legitimacy, such that only a modicum of ‘canned morality’ is required for acceptance. The effect of responsabilisation here is therefore not a tighter connection between acts and consequences, or accountability (in its common understanding), but rather an ideological achievement, namely the development of intuitive comfort with the current logic of empathy redistribution.¹⁶⁸ Corporate legitimacy has become calculably ‘cheap’—or rather—*cheaply produced* with a large profit margin.

The dark side of CA

Although CA efforts may occasionally serve to restrain business involvement in conflict or improve the situation of persons affected by such involvement, added together they are only cosmetic changes on the surface of ongoing corporate-led human and environmental exploitation.¹⁶⁹ 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. They are contextualised truth-telling functions as a tactic of mystification.¹⁷⁰ Human rights law, ICL, and so on, thus serve as a ‘ruse to perpetuate class rule’.¹⁷¹ While here I have focused on CA, 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.¹⁷² The effect of these efforts is, on the one hand, to domesticate class struggle, and on the other, to actualise, legitimate and thus strengthen the existing structures of power.¹⁷³ All that is challenged and allowed to pass without sanction, is implicitly declared

167 See, e.g., Core Coalition, ‘The Bottom Line: UK Corporate Abuse Abroad’, October 2015, available at http://corporate-responsibility.org/wp-content/uploads/2015/10/The-Bottom-Line-report_final-digital-version.pdf (last visited 4 January 2015).

168 Cf. M Konings, *The Emotional Logic of Capitalism: What Progressives have Missed* (Stanford UP, 2015) 111.

169 Sfarid (2009) 39.

170 P Fleming, ‘Bad Parresia: CSR and Corporate Mystification Today’, in Baars & Spicer (eds) (forthcoming).

171 Glasbeek (2010) 250: ‘it is important for law to mask that it exists for capitalism’.

172 I use the word ‘dispossess’ to refer to Harvey’s ‘accumulation by dispossession’. D Harvey, *The New Imperialism* (Oxford UP, 2003) 137.

173 Barzilai (2007) 270.

innocent. All that is *not* challenged by ‘rights-entrepreneurs’ *never even happened*.¹⁷⁴

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, 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’.¹⁷⁵ As such, cause lawyering is a profoundly liberal ‘in-power’ activity.¹⁷⁶

ICL can be seen as the ‘completion piece’ of international law, which served, along with other elements of ‘humanitarian’ international law, to legitimise the international law enterprise. By analogy, it can be said that CSR, corporate litigation, and also ‘corporate ICL’—together CA—completes the reification of the corporation commenced in the 18th century. As such, ‘CA’ forms the main part of what Klein has called, ‘the 50 year campaign for total corporate liberation’.¹⁷⁷ By constituting the corporation as a responsible citizen, who ‘like everyone else’ risks criminal penalty for doing wrong, the global capitalist class has completed the corporation’s reification, thus allowing the corporation to exercise legitimate authority within ‘global governance’. For example, in September 2015, the *Financial Times* reported that Shell, BHP and GE are to advise governments on climate change.¹⁷⁸ The re-moralisation of the corporation described in this essay at first sight appears to be the reverse of the project achieved by ‘calculable law’. However the corporation is infused with ‘canned morality’, not a commodity form ethic. CA is still, CA. ‘Marketised morality’,¹⁷⁹ 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). In pluralist global governance conceptions, corporations, states and individuals can now interact as formal legal equals. ‘Corporate rule’, or the multiplication of global capitalist class rule through corporations, is here, and legitimate. Thus, corporate capitalism can continue its unending search for surplus value. At the same

174 Pashukanis (1978) 167: ‘the normal as such is not prescribed at first; it simply does not exist’.

175 Sfarid (2009) 45.

176 Barzilai (2007).

177 Klein (2007) 19.

178 See, e.g., P Clark, ‘Shell, BHP and GE to advise governments on climate change’, *Financial Times*, 24 September 2015, available at <http://www.ft.com/cms/s/0/ebd4ae20-62bd-11e5-a28b-50226830d644.html#axzz3mfaCBZv8> (last visited 1 November 2015).

179 Shamir (2008) 9; Shamir (2010) 531; Baars (2011) 427-30.

time, the contradiction inherent in this situation, the cracks in the bond, is that such legally-constructed ‘irresponsibility’ (planned impunity) contributes to the anarchy of capitalism, which will inevitably lead it to its collapse.¹⁸⁰ This, together with the global 99 per cent’s growing consciousness—the active factor in the coming revolution—is the ‘seed of the new’.

CONSCIOUSNESS-BUILDING AND THE SEED OF THE NEW

Human Rights Watch Director Kenneth Roth relates the origin of ‘corporate ICL’ as something that developed through systemic forces rather than (or, despite) his/civil society agency:

Out 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. . . . [I]t is a remote possibility that corporations will actually be charged. . . . Further, we do not get involved in tort litigation. . . . 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.¹⁸¹

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 directed against corporate personhood has come to the fore.¹⁸² 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* then to seek to prosecute those individuals—the point is to realise that the property owning classes (the global capitalist class) are employing the law in this way, to enable exploitation, ‘shift’ or sell risk, and protect themselves as individuals, and create the ideology that means we put up with it all. 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 turn against the concept of private property, against capitalism and against law: away from *legal* emancipation and

180 R Luxemburg, ‘Reform or Revolution, and Mass Strike’, in H Scott (ed.), *The Essential Rosa Luxemburg: Reform or Revolution and the Mass Strike* (Haymarket, 2008) 45.

181 K Roth, ‘Discussion’ 6 *Journal of International Criminal Justice* (2008) 960.

182 Shut Down the Corporations, available at <http://www.shutdownthecorporations.org> (last visited 1 November 2015); ‘Target Ain’t People’ flashmob, video available at <https://www.youtube.com/watch?v=9FhMMmqzD8> (last visited 1 November 2015).

toward *human* emancipation¹⁸³ and the creation of alternative forms of organising, producing and distributing.¹⁸⁴

The global capitalist class 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’.¹⁸⁵ Their ‘corporate rule’, is not only material, but also ideological¹⁸⁶—the corporation rules with a ‘combination of force and guile’.¹⁸⁷ The two depend on, and mutually reinforce each other.

If the corporation is indeed the motor of capitalism, corporate ‘excesses’ are the visible manifestations of capitalism’s ‘dark side’—or, conversely, the corporation is singled out as the author of capitalism’s ‘excesses’. Corporations, as capitalism’s visible persona, ‘capital personified’ become the *pars pro toto* taking the hit for the team, for capitalism as a whole. There is value not only to the corporation itself, but to the system of capitalism more broadly in creating, repairing and maintaining the corporation’s reputation, its standing, as the ‘face’ of capitalism. I have examined the labour that goes into maintaining that value, and translating human and environmental damage into quantifiable, and exchangeable risk. While the corporation takes the hit for capitalism, the converse is that once the corporation is ‘fixed’, and rendered accountable, this immunises (temporarily) the broader structures of capitalism from critique. When our critique of capitalism and our activism mainly extend to creating avenues for or instances of CA, we inadvertently strengthen, rather than restrain, capitalism. Our labour then creates value for capitalism.

Let us instead work towards the world we *really* want to live in.

183 K Marx, ‘On the Jewish Question’, excerpted in D McLellan (ed.), *Karl Marx, Selected Writings* (Oxford UP, 2000) 46, 64.

184 M Parker, G Cheney, V Fournier & C Land, ‘Organization is Politics Made Durable: Principles and Alternatives’, in Baars & Spicer (forthcoming). See also, e.g., the work of the members of the Calafou Post-capitalist Eco-industrial Colony, available at <https://calafou.org/en> (last visited 4 January 2016).

185 Glasbeek (2010) 249.

186 Pearce & Tombs (1990) 428.

187 B Ollman, *Dance of the Dialectic: Steps in Marx’s Method* (University of Illinois Press, 2003) 11.