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Citation: Baars, G. (2017). Capital, corporate citizenship and legitimacy: The ideological force of 'corporate crime' in international law. In: Baars, G. & Spicer, A. (Eds.), *The Corporation: A Critical, Multi-Disciplinary Handbook*. (pp. 419-433). UK: Cambridge University Press. ISBN 9781107073111

This is the accepted version of the paper.

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Capital, Corporate Citizenship and Legitimacy: The Ideological Force of ‘Corporate Crime’ in International Law¹

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1 Introduction

Can we imagine Shell in the dock, at the International Criminal Court? It certainly seems as if many people around the world whose health, livelihoods and environments are affected by the extractive industries, would like to see this happen. It even seems, as if multinational corporations themselves (or the persons that run them) are on board with - the idea at least - of corporate criminal liability in international law. What does this mean? Will we ever see true ‘corporate accountability’ or is corporate support for accountability mechanisms more cynical? Are multinationals using ‘corporate accountability’ in the literal sense, in order to calculate and optimize exposure to potentially risky activities and manage civil society backlash? Is support for international criminal law nothing but the deployment of ‘canned morality’ aimed at bolstering their legitimacy in an increasingly corporate-governed world, and getting angry citizens off the streets, back home onto the sofa to Netflix & chill?

¹ This chapter is based on chapter 6 of Baars (forthcoming 2017), *Law, Capitalism and the Corporation* (Leiden: Brill). A different version of this paper is published as Baars (2016).

One of the main responses to the corporate legitimacy backlash of the past decades has been the development of the notions of ‘corporate citizenship’ and ‘corporate social responsibility’ (CSR) and a wealth of non-binding norms on corporate behaviour culminating in UN Special Representative on Business and Human Rights John Ruggie’s ‘Guiding Principles’ in 2011 (UNHCR, 2011). Frustrated by the lack of ‘teeth’ (enforceability) of these regimes - in particular when it comes to multinationals’ involvement in environmental destruction, war, displacement and other situations of grave suffering - cause lawyers, activist scholars and others have started to push for ‘corporate accountability’ through binding norms in international law. One route that is regularly debated and advocated is the creation (*or*, recognition and enforcement) of a norm of corporate liability in international criminal law (ICL), or what we might call ‘corporate ICL’ (CICL). This proposal rides on a trend of increasing acceptance of corporate criminal liability in domestic legal systems and massive popular support for ICL globally (Baars, 2014). A putative CICL has manifested itself in recent scholarly writing on the topic as well as in activist lawyer-led ‘weaponized CSR’ litigation and advocacy in multinationals’ home states based on claims of corporate complicity in war crimes, crimes against humanity, environmental and other crimes committed elsewhere in the world.

Notable ‘weaponized CSR’ cases include the Alien Tort Statute (ATS) suits against Shell for its activities in the Ogoni Valley, including its alleged role in the killing of environmental activist Ken Saro Wiwa (*Wiwa v. Royal Dutch Petroleum Company*, 226 F3d 88 (2d Cir 2000) and *Kiobel v. Royal Dutch Petroleum Company* 133 S Ct 1659 (2013)), and the prosecution of Trafigura in the Netherlands for the dumping of toxic waste in Côte d’Ivoire (Trafigura 2011; Business and Human Rights: Trafigura

Lawsuits). Moreover, a binding corporate accountability treaty which could include criminal sanctions for violations by corporations is currently being debated by a specially mandated Working Group in the UNHCR (2014; 2015; and see also Global Movement for a Binding Treaty). Here we can see that the question of broadening the jurisdiction of the International Criminal Court to include corporations – proposed, but rejected at the drafting stage of the court’s founding treaty, the Rome Statute – remains very much alive.

In this essay I argue that, while a norm of corporate criminal liability is generally understood as a desirable emancipatory tool, it should instead be seen as part of what Naomi Klein has called the ‘fifty year campaign for total corporate liberation’ (Klein, 2007: 19). Rather than curbing ‘corporate human rights abuses’ and other violations of international law, this putative legal concept would in fact reconstitute and, most importantly, legitimate and insulate the power of the corporation, the ‘motor of capitalism’, to do harm in global society.

In this chapter, I untangle the relationship between law, capital and ideology to show their symbiosis – here specifically in the context of ‘corporate accountability’ and the ‘accountability gap’ perceived to exist in the area of ‘business and human rights’. I use the commodity form theory of law, which holds that law, by virtue of its very form, approximates the commodity form, and which views law as a *sine qua non* of capitalism (the corpus includes, e.g., Pashukanis, 1978; Miéville, 2005; Knox, 2009; 2016; Baars, 2011; 2015; 2016). As I will show below, the corporation has been created in law as a criminogenic ‘structure of irresponsibility’ (Tombs and Whyte, 2015). Criminal liability in international law, as a unit of ‘canned morality’ (below and Baars, 2014), would be of great value to today’s transnational enterprise. Exemplifying the ideological power and

distributive effect of ICL, it would support corporate legitimacy, while at the same time impeding real resistance to corporate power in the global political economy.

The context in which this dynamic occurs is one where the ‘global capitalist class’ (GCC) rules to a significant degree, through and with the corporate form. The GCC’s ‘corporate rule’ is not merely material but also ideological. I focus here on the GCC’s ideological use of law. ICL is very much ‘in fashion’ at the moment and aligns with the individualization of responsibility and carcerality inherent in (neo)liberalism. This carcerality is generally discussed as affecting capitalism’s ‘subjects’ (e.g., LeBaron and Roberts, 2010). At the same time as subjects (in particular, vulnerable subjects/communities) are increasingly moved to look to criminal law and the state’s repressive apparatus more generally, viz. ‘carceral feminism’ (Bernstein, 2010), or even ‘queer necropolitics’ (Lamble, 2013; 2014), criminal prosecution becomes the ‘accountability tool of choice’ also when ‘cause lawyers’ and others look toward corporations for responsible governance (Baars, 2014). The conception of corporate legal person liability, first developed in domestic law and subsequently considered *de lege ferenda* (what the law ought to be) in ICL, completes the project (started in the 1920s) of creating the image of the corporation as a good citizen. A putative CICL plays a role in constituting the corporation as a global citizen capable of the same errors and subject to the same laws as individual human beings. This ‘citizenship’ gives access to democratic rights and, thus, as Pashukanis echoes Bentham, ‘law creates right by creating crime’ (Pashukanis, 1978: 167). In consequence, the corporation becomes a vehicle through which the GCC is able to exercise *legitimate* authority within ‘global governance’ (see generally Cutler, 2003). At the same time, I will show, it is precisely this (repeatedly contested/confirmed) legitimacy that allows ‘corporate ICL’ to remain

a practical dead letter: a practical dead letter that attempts to take the life out of anti-corporate resistance, but is ultimately doomed to irrelevance.

2 Origins of the Corporation as the Motor of Capitalism

In order to appreciate how the corporate accountability debate developed as a move towards the ‘completion’ of the corporate project, or corporate liberation, as Klein put it, we must examine the origin of the construct of the corporation and its rise to dominance as the main motor of capitalism, a history that normally remains hidden in the contemporary legal literature (Ireland, 2002; Baars, 2012).

The formal legal concept of the company was developed during the transition to capitalism at the same time, and as part of the same process, as the modern state form and modern legal systems. Modern laws on private property allowed appropriation of common goods, the ability to accumulate property and exclude others from it, while legal relations replaced relations of kinship and trust with ones of contract. Through what Weber calls ‘calculable law’, responsibility became a commodified concept capable of being expressed in terms of value (i.e., the ‘cash nexus’ of the responsibility relationship) and therefore, importantly, of being exchanged (Marx and Engels, 1952 [1848]; Weber, 1982: 277) This transformation of social relationships enabled the industrial revolution by creating the means through which ‘entrepreneurs’ expanded family-based production to industrial factory production (attracting finance capital investment) and facilitated the extraction of surplus value through the introduction of a formalized wage labour system, with the corporation becoming the most popular (because over time the most effective) vehicle by means of which value is extracted

from workers. The acceptance of the 'corporate legal person' as a contract partner, as shorthand for its owners, and the corporation's 'immortality' ensured the stability of ownership of the means of production by the capitalist class. In due course, when the idea of the corporation became normalized in the mid-nineteenth century, a subtle shift took place that allowed the corporation to be seen as a legal person *separate from* its owners – the corporation 'came of age' as its own person, reified in law (e.g., Ireland, this volume). This shift permitted the directors to move behind the 'corporate veil', thereby largely hiving off individual liability for, what were now 'the corporation's activities', to the legal person. In English law, directors' main or only obligation then becomes the duty to act for the (financial) benefit of the shareholders, which, in combination with the limited liability of the shareholder-investor leads to the cost of capitalism being 'externalized' to the wider society and the natural environment. This renders 'accountable' (calculable) and thus exchangeable (e.g., through risk insurance) that which is not externalized. This construction makes the corporation a criminogenic 'structure of irresponsibility' (Tombs and Whyte, 2015), and eminently suitable to function as capitalism's main motor, both locally and globally (Glasbeek, 2010: 249).

On the global level the precursor to the modern internationally operating publicly owned corporation, the joint-stock corporation, simultaneously formed a vehicle for, and was a product of, imperial expansion, primitive accumulation on a global scale and the development and universalization of international law and the modern state form (Baars, 2012; and see also Brandon, this volume). From the inception of the twentieth century onwards the corporation (in symbiosis with international law) remained a tool for the continuation of Western imperial interests in the Global South after 'decolonization' and continued 'accumulation by dispossession'

(Harvey, 2004) into the present time. Corporate neocolonialism (or continued racialized imperialism) was, for example, enabled by the international legal regime of 'investment protection', first applied to the various 'concessions' held by metropolitan corporations in post-mandate or post-colonial states (Baars 2015 and generally, e.g., Subedi, 2008). Various ideological 'devices' within international law serve to advance and obscure these interests. For example, the creation of new, *sui generis* legal regimes for the protection of capitalist interests, as well as 'lifting' certain issues out of domestic legal systems presumed hostile or 'primitive' into (favourable, for metropole-created) (Anghie, 2007:130ff) international law, which could be seen as the 'defensive partitioning' (Baars, 2012) or fragmentation (e.g., Koskenniemi, 2007) of law. This is supported by an ideological separation of the public and private realms in international law, which are explained and eventually understood to follow the logics of peace/humanitarianism and the logic of the market respectively (Baars, 2012). Significantly, this separation constricts the scope for resistance to exploitation especially in and for the Global South. It removed the corporation from being a subject existing within the public international law realm (where human rights law and the law of armed conflict, and ICL, belong) to the realm of 'private' international law, that of international commercial and economic law (Cutler, 2003:161ff).² It is only in recent

² In international law, international economic law is normally and strictly grouped under public rather than private international law, as it concerns the obligations between states as regards economic transactions among themselves and between 'private' actors, as well as the workings and mandates of international economic law institutions such as the World Trade Organization. Yet there is an ideological separation between truly 'public' laws (on the use of force, human rights, international humanitarian and criminal law) and the laws related to the global market; the latter of which are intended to remain at a minimum level and are aimed at global market efficiency (e.g., Cutler, 2003: 161ff).

years that this ideological public/private divide in international law has started to become porous (Baars, 2011) or, indeed, considered outmoded.³

In short, the corporation's narrow profit mandate and shareholders' limited liability, plus the legal and ideological separation between the human individual and the legal entity of the corporation, create both the impetus and opportunity to pursue profit based solely on rational material calculation, which therefore inevitably leads to business involvement in human and environmental exploitation and destruction, topics mainly regulated by areas of law from which the corporation has thus far remained shielded. This situation being perceived as an 'accountability gap' by some, has led to the development of CSR and norms of corporate criminal liability in domestic and putatively in international law.

3 Between 1842 and 1945: Discovering the Corporate Body and Searching the Corporate Soul – Roots of Corporate Crime and CSR

International and domestic law in the post-Enlightenment era (see generally Baars, 2011) moved towards individualization both in the sense of the recognition ('emancipation') of more categories of individuals as legal persons with rights (such as suffrage in domestic law) and responsibilities or liabilities (such as the duties of military personnel in the nascent area of international humanitarian law and the beginnings of a notion of individual criminal responsibility for its violation). On the domestic level, despite the fact that the corporation was not considered subject to

³ The corporation and the privatization of the public sphere, emblematic of neoliberalism, are of course key in this development (see, e.g., Shamir, 2010; Baars, 2013).

notions of rights and responsibility – which were reserved for the post-Enlightenment human citizen, some notion of collective liability existed from the start (US) and end (UK) of the industrial revolution, mainly for practical reasons. It was easier to hold a ‘collective’ to account (for harm against the sovereign, mainly) (Dubber, 2013) than to prove precisely which individual human was at fault, and corporations had deeper pockets. However, practicality gave way to principle when, because of the corporation’s ubiquitous presence in society, the very tangible power of large corporations inevitably led to debate over the precise nature and content of the notion of corporate personality in law. This threw up the question of ‘corporate responsibility’, the possibility of ‘corporate crime’ based on culpability rather than practicality, and, linked to that, the existence of a corporate ‘soul’. The tension between the post-Enlightenment trend of individualization and corporate legal personality is thus resolved through a manner of anthropomorphization of the corporation: the corporation becoming its own person. On the supranational level, in international law the debate on the corporation’s subjectivity has only just begun, over a century later, the collapse of the public into the private there lagging behind, but rapidly catching up.

3.1 The Corporate Body and the Roots of Corporate Crime in Domestic Law

The development of the law on ‘corporate crime’, which exists in most countries in Europe (with the notable exception of Germany), North America and other former British and Dutch colonies (Clifford Chance, 2015), forms one half of the ideological process of reification and ‘civilization’ of the corporation. The acceptance of corporate criminal liability based on culpability, overcoming the famous maxim ‘*societas*

delinquere non potest (a society cannot commit crime), guilt, the presence of a 'soul', is the other. In the late nineteenth century, Lord Chancellor Thurlow famously asked, 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?' (Coffee, 1981: 386). When norms of crime and punishment were abstracted from religious sentiment and became legal, 'accountable' norms, attitudes began to change, as noted above, first for practical reasons rather than as a result of academic theorizing (Canfield, 1914; Edgerton, 1927; Bush, 2009: 1052). It became possible to construct for the corporation a secular 'soul'.

In the UK, from as early as 1842 a 'corporation aggregate' could be held criminally liable for failing to fulfil a statutory duty, meaning that its owners would be jointly and severally liable (*Birmingham and Gloucester Railway Company* (1842) 3 QB 223).⁴ This follows the joint liability of earlier forms of organization and the logic that it made sense to seek financial recompense from large (here, railway) companies rather than indict individual employees for 'minor' offences (*Edwards v. Midland Railway* (1880) QB LJ 151).⁵ In 1917 vicarious liability of a corporation (as *legal person*) for the acts of its employees and agents became a possibility in another railways case (*Mousell Brothers Ltd v. London and North-Western Railway Company* [1917] 2 KB 836). In the mid-1940s, the UK courts accepted corporate criminal liability for crimes requiring a 'guilty mind' on the basis of the *mens rea* of a 'controlling officer' (*DPP v. Kent and*

⁴ 'A corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute.' *Birmingham and Gloucester Railway Company* (1842) 3 QB 223.

⁵ There was no 'anthropomorphizing' of the corporation, nor notions of 'corporate crime' at this point: in *Edwards v. Midland Railway*, Justice Fry had held that 'it is equally absurd to suppose that a body corporate can do a thing willfully, which implies will; intentionally, which implies intent; maliciously, which implies malice'. Yet, Fry J had held that "the corporation were liable".

Sussex Contractors [1944] 1 KB 146, approved in *Rex v. ICR Haulage* [1944] 1 KB 551).

This construction was a decade later to be described in memorable terms by Lord Denning:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. (*H.L. Bolton (Engineering) Co Ltd v. T J Graham & Sons Ltd* [1957] 1 QB 159 at 172)

In the United States a similar development took place, some years before the UK, on breach of statutory duty (1834) and vicarious liability (1852), moving to attributing the *mens rea* of an officer to the company in 1909: *People v. Corporation of Albany*, XII Wendell 539 (1834) (non-feasance); *State v. Morris* Essex RR, 23 Zabinski's NJR 360 (1852) (misfeasance); *New York Central & Hudson River Railroad Company v. United States*, 212 US 481 (1909); Stessens, 1994: 496–497. The basic idea of corporate liability was established in the UK, United States and elsewhere by the mid-twentieth century. From this notion, eventually the current, fully anthropomorphized 'corporate crime' – a term coined by Simester to denote crime committed by the corporation *as the corporation* – would evolve (see, e.g., Simester et al., 2010: 272ff; French et al., 2014: 632ff) and has developed (see below). Currently, corporate crime

law in several jurisdictions is moving towards liability based on 'corporate culture' or character, based on the 'attitude' towards compliance within the corporation (Clifford Chance, 2015), something that is starting to look more like the culpability of an anthropomorphized corporation with a 'soul'. This process was and is enabled by the 'soul-searching' that happened within corporations, culminating in the 1930s and 1940s.

3.2 The Corporate Soul and Corporate Responsibility

Critiques of the corporate form have been uttered on occasion since its inception and have generally grown stronger at times of economic crisis (e.g., Baars, 2016). Soon after the corporation had been established as a legal entity separate from its shareholders, it was realized that the – increasingly large and powerful – entities may become Frankensteinian monsters and outgrow their makers' control (see generally Wormser, 1931). In 1891 Cook wrote:

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

(Cook, 1891: 250–51)

It became clear that for corporate capitalism to succeed, the reification of the separate legal person had to be followed by the transformation of the corporation into an institution with its own moral compass, or soul, a 'good egg' in public perception. To this

aim, in 1908 the newly recruited 'public relations' (PR) officers of US telecommunications giant AT&T were the first to launch an advertising campaign aimed at getting the public to 'love and hold affection for' the corporation (Marchand, 1998: 4). By the end of World War I, PR professionals of the USA's other major companies had followed suit, creating images of their corporations as benevolent and socially responsible in what became known as the search for the corporate soul (ibid.).

Following on from this debate internal to the corporation, in the USA in the 1930s, a (now famous) debate took place between lawyers Adolf Berle and E. Merrick Dodd in the *Harvard Law Review* on whether or not *in law* the corporation is, or should be, obligated to act with a 'social conscience' (Berle, 1930–1931; 1932, Dodd, 1932; see also, Sommer, 1991). Dodd took the position of what would now be known as the 'stakeholder' model (the idea that a company through its directors and managers can and must act with a 'social conscience' towards other constituencies besides shareholders, including consumers and members of the local community) while Berle took the 'shareholder primacy' position, meaning that increasing shareholder value is rightfully the sole aim of the corporation. As a corollary, this primacy would in fact in and of itself benefit stakeholders – in particular because half the population at this point held stock or an indirect interest in corporate stock through insurance companies and savings banks (Weiner, 1964:1461). According to Berle, in the absence of clear legislation circumscribing corporate managers' social responsibility, leaving directors and managers a large margin of discretion to act would risk abuse and would allow managements to become absolute and unaccountable (Berle, 1932: 1367; Weiner, 1964: 1461). This situation, conversely, was the already existing prompt for another 1930s US lawyer, Wormser, who in his evocatively titled *Frankenstein, Incorporated*, held that

‘[t]he nation and the state must curb certain grave and vicious abuses in their corporate offspring. Against these abuses, war must be waged *à outrance*. Otherwise, like a cancerous growth, these may poison the body politic’ (Wormser, 1931: v–vi),⁶ arguing to resolve the Berle–Dodd dilemma by advocating the regulation of corporations to perform precisely those functions Dodd suggests it should, *in service to the public* (ibid., 1931: chapters 5–6). Through this solution, in fact the *legal* creation of the corporate soul, Wormser intended, at the historical crossroads of the 1930s, to show that (corporate) capitalism was superior both to communism and fascism (ibid., 227).⁷ For this idea to succeed, the corporation had to be made to take on some of the features of the ‘caring’ state. In the 1930s what we now call ‘corporate social responsibility’ became known as the ‘best strategy ... to restore people’s faith in corporations and reverse their growing fascination with big government’ (ibid., 19). Wormser proposed that CSR ‘makes business sense’, is important PR, and is moreover vital for the *survival of capitalism itself*:

Corporations cannot expect the public to sit by supinely and watch the spectacle of a high executive of a corporation receiving a million and a half dollars in a single year, while a few months later men with families are discharged and wages lowered by it.... If the leaders of our business system and the executive heads of our great corporations bore in mind

⁶ Wormser opens his book with a quote from Mary Shelley’s *Frankenstein*: ‘When I found so astonishing a power placed within my hands, I hesitated a long time concerning the manner in which I should employ it.’ Of course, Frankenstein is not the monster, but its maker, and in that sense Wormser is right to emphasize the human agency behind the anthropomorphized creation of the corporation.

⁷ Quoting Chancellor Flint of Syracuse University: ‘Capitalism is admitting it must espouse this social responsibility, must become its brother’s keeper, must put public service into full partnership with private profits. No one class can serve itself alone.’

‘public service’ and ‘social obligation’ as corporate slogans; if they adopted a new ‘credo’; if they shifted their ‘choked up’ and provincial point of view ... there would be far less need for elaborate ‘plans,’ and the calls for a ‘dictator’ or for ‘communism’ would be unnecessary.⁸

The vacuum created by the crisis, where fascism might have taken hold, however, was filled to some extent by US President Roosevelt’s New Deal, a series of regulatory packages created between 1933 and 1938 and partially aimed at improving government oversight over business. Rather than regulating corporations directly, however, as Wormser had suggested, or making corporations legal trustees over workers and others, the New Deal responded to the increased worker militancy which threatened to unsettle capitalism by granting labour specific statutory rights enabling workers to organize and bargain with employers. Where the people of the United States had looked to corporate managers for leadership in the 1920s, now they looked to the state (Weiner, 1964: 1463). States, not just in the USA, have mainly responded to corporate legitimacy crises by according certain rights to ‘stakeholders’, like workers, creditors and ‘consumers’, rather than placing direct obligations onto corporations. The business response to the New Deal, in order ‘to save the very system of free enterprise’ (Marchand, 1998: 202ff) and get the public back on its side, was for corporations’ increasingly highly valued in-house PR professionals to urge business leaders to learn from Roosevelt how to ‘talk to the people’. Newspaper and radio advertising aimed at

⁸ Wormser, 1931: 232. A reader may get the impression that Wormser doth protest too much, however, by repeatedly pointing out that in his ‘suggestion [of a socialized corporate capitalism where corporate directors regard themselves as ‘trustees’ of the general public (at 241)] there is no radicalism, no socialism, no communism, no bolshevism. It is downright common business sense’ (at 238) and that ‘[p]rivate property as an institution is thoroughly sound’ (at 232).

explaining, in plain language targeted at ‘the masses’, why free enterprise was better for people than New Deal liberalism, while showing how, through, for example, the provision of community vegetable gardens during the Depression, a corporation too would look after its people: it, too, would be a legitimate governing body.⁹ The result of these efforts was that by the late 1940s the corporation had been firmly established as an accepted ‘institution’, an ‘ordinary, ubiquitous component of everyday life’. The corporation, it was accepted, was here to stay. In the United States, increasingly hegemonic globally, state and corporation had also mostly reconciled after recent competition. Wartime contracts allowed large corporations to consolidate power and decrease the number of smaller companies, and gain public admiration (Marchand, 1998: 358). The final move of the 1940s was, through advertising, to humanize the corporation as a ‘good neighbour’, yet failure always to live up to this – beyond the external gesture of the neighbourly handshake (Marchand, 1998: 362) – meant that,

⁹ The alternative for business to a society organized through corporate benevolence was the old pure profit model. The ‘dictator’ referred to by Wormser was the leader chosen by a group of powerful bankers and businessmen, whom they hoped to put in place instead of President Franklin D. Roosevelt. Smedley Butler, a much-decorated former marine was sent to the White House with the message that the businessmen were assembling an army to overthrow Roosevelt (generally Archer, 1973). Apparently many US businesses were in favour of German-style corporate fascism, which some had gotten to know through doing business with Hitler;; e.g., General Motors produced the German Opel Blitz Truck and the Wunderbomber while IBM produced tabulation machines for Hitler’s extermination programme (Bakan, 2004: 87–88). Members of the plot included men from DuPont and JP Morgan, while financial backers included Andrew Mellon Associates, Rockefeller Associates, individuals from General Motors and the Pew family. However, Butler, who had served in the USA’s ‘wars for capitalism’ in Central and South America, had a change of heart and, in November 1934, he informed the government of the plot (Bakan, 2004: 93–94).

although the corporation's existence per se was accepted, the search for corporate accountability continued.

4 The Emergence of a Norm of Corporate Liability in ICL

Although the corporation was accepted as a given, even necessary fact of life in the USA and elsewhere, questions around its relations with the rest of society – and the natural environment – remained. Crises erupting in the late 1950s onwards affected pharmaceutical concerns, such as Grünenthal in the Thalidomide birth defects scandal; Dow and other manufacturers' roles in the Vietnam war atrocities committed with napalm and Agent Orange; Ford and other motor companies' deliberate efforts to evade safety regulations (e.g., Nader, 1965); and in 1984 the Bhopal disaster, also attributed to Dow (Bakan, 2004). The corporate response to these questions as they continued, in order to avoid stricter legal regulation, has been the active development of a more formal regime of 'neighbourliness', or what we now know as CSR. CSR is a broad regime comprising various practices centred around voluntary guidelines or soft law standards and, relatedly, the notion of 'corporate citizenship' (described at length in, e.g., McBarnet, 2007, and critiqued by, e.g., Fleming and Jones, 2013; Fleming, this volume), which recently culminated in the work of the UN Special Representative on Business and Human Rights John Ruggie (on the move from CSR to 'business and human rights'; see López, 2013; Ramasastry, 2015). In a process lasting several years, Ruggie produced a series of reports and ultimately the Protect, Respect and Remedy framework (2008) and Guiding Principles on Business and Human Rights, which have become the key reference point on the topic for all parties involved (UNHCR, 2011; see also Baars,

2011). As was the case with the New Deal, CSR is a tool for 'stakeholders' to engage horizontally with the corporation rather than one employed by the state for top-down enforcement. Frustrated by CSR's lack of 'teeth', however, in particular when it comes to multinationals' involvement in war and other situations of grave suffering, cause lawyers, activist scholars and others acting on behalf of stakeholders have started to push for 'corporate accountability' or 'legalized CSR' – bringing the state back into the relationship. Cause lawyers have 'weaponized' CSR by proactively, and sometimes creatively, bringing claims in domestic courts, based on domestic civil and criminal law as well as ICL, invoking the notion of corporate criminal liability developed in domestic law in the last century. In a minority of domestic jurisdictions, criminal prosecutions can be initiated by individuals (in addition to the state), while in others public pressure can make it difficult for state prosecutors to ignore complaints. Civil society actors have, for instance, persuaded public prosecutors to investigate alleged corporate crimes in international law in The Netherlands (Riwal, 2010; and Trafigura, 2011; Business & Human Rights: Trafigura lawsuits). The much-talked about ATS cases (mentioned as examples of 'weaponised CSR' above) in the US courts where civil compensation claims are based on one or more violations of international law, including those amounting to international crimes, are likewise reactions to perceived failures of CSR (Shamir, 2004; Thompson et al., 2009; Gallagher, 2010; Baars, 2007; Stewart, 2014). Both domestic civil and criminal cases are, however, normally dismissed for lack of jurisdiction and other 'technicalities'. ATS practice recently entered an impasse as a result of the US Supreme Court decision in *Kiobel v. Shell*, where it declined to hold Shell responsible for human rights abuses in the Ogoni Valley – potentially limiting all future corporate extraterritorial human rights claims under ATS. This has given further impetus to

activists and cause lawyers to pursue corporate criminal liability-based accountability on the international level, as well as demanding, in the UK, for example, the introduction of a domestic law norm of corporate liability for international crimes and other human rights violations committed extraterritorially (e.g., Traidcraft, 2015). The key advocacy point gaining traction both in civil society and academia is the expansion of the ICC's jurisdiction to include corporations (see generally on CICL, e.g., Ramasastry, 2002; Kyriakakis, 2007; Ryngaert, 2007; 2008; Farrell, 2010; Gallagher, 2010; Huisman and van Sliedregt, 2010; Meeran, 2011; Stewart 2014 – on the latter specifically, e.g., Burchard, 2010; Plomp, 2014). Efforts to persuade the ICC's prosecutor to investigate corporate abuse cases are also already underway (e.g. Ferrando, 2015).

Why might a norm of corporate criminal liability in international law be emerging now? Whyte has observed that corporate accountability mechanisms normally arise from moments of crisis (2009: 211). Right now we are facing a crisis of capitalism that once again threatens its legitimacy, and in addition the legitimacy of its main motor, the corporation, possibly signalling capitalism's imminent demise (e.g., Mason, 2015). At the same time, the legal accountability mechanism in vogue at the moment is ICL. ICL's popularity has seen constituencies of all kinds, from states, to the largest human rights organizations to the general public marching the streets of the capitals of the world in anti-war demonstrations, and even Occupy, support its call (Miéville, 2005: 296, 297). ICL is unique as an area of law in that its discourse is known, and apparently loved, by all. Even most legal scholars have restricted their critique to how ICL can be made to work better, to be applied more evenly (Baars, 2014; and generally Schwöbel, 2014).

ICL is popular partly because criminal law more than any other area of law symbolizes justice (Mégret, 2010: 210, 220, 224; see also Tallgren, 2002: 580) and communicates the exceptionality of the ills it seeks to cure (Baars, 2014). International – should it indeed become widely recognised – corporate criminal liability echoes, leverages and reconstitutes the relations of violence, coercion and constraint that have become an essential element of today's neoliberal carcerality. In response to the call for corporate accountability, it is the ultimate measure: it is the state, and the law's trump card, its biggest gun. The current corporate legitimacy crisis is such that the biggest gun is the symbolic gift the state (including the judiciary) now needs to make to its citizens. At the same time, adopting the corporation into ICL, as it has done in domestic law, puts us citizens on a par – equalizes us with the corporation in a basic ideological sense. It appeals to the ideas of corporate 'body' and 'soul' constructed half a century earlier. As management scholarship has shown us, the current trend is towards conceiving of the corporation as a global citizen (Moon et al., 2005), and while the public calls for corporations to pay their citizenship dues in the form of taxes (viz. the recent corporate tax scandals around Google, Starbucks and Amazon: *The Guardian*, 2012), the possibility of criminal punishment acknowledges the 'soul' in the corporation and appeals to its civility, which has far-reaching effects. Significantly also, the visceral attractiveness of criminal law has led to a sizeable portion of the 'corporate accountability' civil society movement being absorbed in bringing about its acceptance. For many civil society groups and actors, human rights and other *legal* arguments are those with the greatest legitimacy, persuasiveness and status (cf. Miéville, 2005: 297; Knox, 2009). As my starting optic, the commodity form theory of law, disproves law's

emancipatory potential, the draw of ICL channels away, sucks in, or ‘domesticates’ emancipatory energy leaving other non-legal tactics neglected or poorly attended.

5 The Gap between the Norm’s Emergence and Its Possible Enforcement

Thus far, cause lawyers are playing the main role in attempting to enforce corporate crime rules. As suggested above, this puts these civil society actors in the peculiar position of demanding the application of the state’s coercive, carceral power. With this demand, they implicitly support and inadvertently strengthen the state. The state apparatus’s enforcement of the norm, however, is by no means a given consequence of its adoption. The political will required, for, say a CSR treaty which criminalizes its violation in international law is of an entirely different kind compared with the political will required for its enforcement. Indeed, the absence of political will of the second kind can be a precondition for the first. Perhaps counter-intuitively, corporate criminal liability is a fast-growing feature of most domestic legal systems. The slow move on the domestic level, currently, of corporate crime law in several jurisdictions from the Denning identification model (above) to either a ‘failure to prevent’ model or another model that recognizes *organizational* rather than individual failings, for example based on the corporate ‘attitude’ towards compliance or ‘culture’ within the corporation (Clifford Chance, 2015) aligns itself with the idea of the corporation as a ‘person’ who can do wrong. On the supranational level, EU criminal law now promotes compliance-

based criminal liability (EU Report, 2016), and in international environmental law corporate criminal liability is today also a common feature.¹⁰

However, as in much domestic law on corporate crime, absence of ‘enforcement’ is likely to be guaranteed for several reasons (see also Whyte, this volume). One is that police and prosecutors’ budget and expertise are usually not adequate to investigate corporate crime across the board in most states. Moreover, legal techniques have been introduced, such as ‘deferred prosecution agreements’, where the prosecution of a body corporate is suspended pending the adoption of a compliance scheme,¹¹ and, in the rare case of actual prosecution, in many jurisdictions a so-called due diligence defence is now available, where the corporation is considered to have lacked the *mens rea* required for conviction if it shows proper procedures were in place to prevent violations (even if unsuccessful *in casu*). Finally, offenders are often given the opportunity to settle or mitigate through cooperation (Clifford Chance, 2015). Compliance which is regulated, in other words, mainly through negotiation, allows the corporate ‘offender’ to calculate precisely what a violation is ‘worth’ and will lead to the creation of a market for responsibility (Baars, 2016).¹²

Leaving the enforcement window open, however, can create a benefit for the business of a company that is able to exercise its regulatory power. Danielsen has noted

¹⁰ Environmental law, includes corporate liability (normally expressed as an obligation on states to criminalize domestically) for what are termed ‘transnational crimes’ (e.g., transboundary pollution, marine dumping of toxic waste); and, e.g., on the EU level, Directive 2008/99/EC, Article 6, Liability of Legal Persons.

¹¹ Introduced in the UK – for the benefit of corporations but not ‘human’ individuals – in Schedule 17 of the Crime and Courts Act 2013 and currently used mainly in cases of ‘economic crimes’ such as fraud and bribery.

¹² Compliance schemes can also shift the cost of violation either to single errant workers or to the auditing and certification agencies (e.g., Gray 2006: 885; Ferrando, this volume).

that, given that rule compliance is overwhelmingly voluntary and few rules are actually enforced primarily through regulatory or police action, the corporate regulatory power exercised when corporations decide to comply or ignore a rule or decide it is not applicable can be particularly important (Danielsen, 2006: 87). There is power, in other words, in the existence of a rule itself.

For this reason, as they are on the domestic level (e.g., HMRC, 2015), businesses, their lawyers and foundations have been and are now engaging in the debate around the adoption – and precise content – of the emerging norm of corporate international criminal liability, for example, through participating in the Ruggie process, in responding to government and EU consultations on corporate crime (e.g., UNSRBHR, 2011; EU Report 2016), in campaigning for a CSR convention with criminal liability (Campaign for a binding treaty; UNHRC Draft Report, 2015) and in filing amicus briefs in *Kiobel* (e.g., list at SCOTUS Blog) and other cases. They do so in order to set the terms of the debate, to ‘control the field’, but also, so as to appear responsible and set themselves apart from ‘rogue’ companies (e.g., Traidcraft, 2015). While states (state elites pressured by civil society) may seek to regulate corporations, corporations may not only seek to avoid such regulation (Berle and Means, 1932: 357), but may indeed engage with it and strategize (Danielsen, 2006: 99), in other words, to *game* it in their pursuit of profit.

For example, a norm of corporate criminal liability has the potential to work to level the competitive playing field or to disadvantage those more acutely affected – including by compelling enforcement on *others*. ICL works to ‘externalize evil’ – to appear good when others are bad. Cut-throat competition can become literally this, with

as a result that a compliant party is protected by criminal law from competition by ‘evil’ unfair players.

6 Conclusion: The Ideological Function of Corporate Crime in ICL

In short, the likely emergence of a norm of international corporate crime will strengthen the current economic system rather than challenge it. It will help to constitute the corporation as a legitimate global citizen and legitimate participant in global governance. Taking on the burden of citizenship (including admittance into criminal law)¹³ accords the corporate citizen rights – entitlements, even *duties* (Moon et al., 2005) – in governance. It strengthens corporate power – or more accurately, that of the GCC (see, e.g., Therborn, 2012), which rules to a significant degree through and with the corporate form (Van Apeldoorn and de Graaff, 2012). The GCC’s ‘corporate rule’ is thus not merely material but also ideological.

Corporate use of law, and here in particular, ICL’s ‘canned morality’ bought on the market for responsibility (Baars, 2014), is part of the ideological aspect of this power. Canned morality tells us when to feel revulsion, or when to ignore or forgive. It thus produces ‘accountability’ in the Weberian sense – meaning that by means of

¹³ ‘In recent years the public perception of the corporation has come to match the legal position – that of the corporation as a free-standing entity separate from the people who manage and control it. With this perception has come an expectation that a corporation might properly be regarded as culpable in criminal law as such, separately from (if possibly in addition to) its directors and others’ (Ormerod, 2011: 256). In English law, when a statute makes it an offence for ‘a person’ to do or omit something, that offence is capable of commission by a corporation, unless the contrary appears (ibid., 267).

‘calculable law’ costs, benefits and risks of political actions can be calculated, managed, and even optimized (Weber, 1982: 277). It convincingly responds to the popular call that ‘something must be done’, it provides a marketing opportunity to those corporations whose eponymous foundations support the corporate accountability campaign (e.g., the Ford Foundation), respond to consultations on the topic or submit amicus briefs. It enhances the brand of both corporation and state, and, most importantly, submitting proactively to this partially self-created demand allows the GCC to ‘control the field’ (Soederberg, 2010). Controlling the field, which includes forcing other stakeholders to articulate demands in this field’s discourse, within the field’s parameters, is an example of the exercise of corporate regulatory power, or, of how corporations *govern* (Danielsen, 2005: 412).¹⁴

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Mousell Brothers Ltd v. London and North-Western Railway Co [1917], 2 KB 836

New York Central & Hudson River Railroad Company v. United States, 212 US

481 (1909)

¹⁴ Danielsen gives a typology of specific modes through which corporations ‘regulate’/‘govern’: ‘when corporations create or shape the content, interpretation, efficacy or enforcement of legal regimes, and in so doing, produce effects on social welfare similar to the effects resulting from rule-making and enforcement by governments’ (Danielsen, 2005: 412).

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Rex v. ICR Haulage [1944], 1 KB 551

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