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FROM THE DUTCH EAST INDIA COMPANY TO THE CORPORATE BILL OF RIGHTS: CORPORATIONS AND INTERNATIONAL LAW¹

Grietje Baars

I. Introduction

The corporation - and especially its more complex, globally networked version, the multinational enterprise - is increasingly a target of intense debate. Critics report on 'corporate complicity' in conflict situations, environmental disasters and degradation in the oil, gas and mining sectors, the privatisation of war through the use of mercenary-like contractors, the monopolisation of intellectual property rights over essential medicines, the buying up of vast swathes of agricultural land in poverty-stricken areas of the Third World, the commodification and for-profit provision of various previously essential public services such as education and healthcare, and finally the seemingly reckless speculation on financial markets, leading to taxpayer-funded bailouts. It is felt that corporate power is able to grow unchecked, giving rise to 'corporate excess',² that international trade rules are skewed in corporations' favour,³ that bilateral investment treaties and instruments such as the putative transatlantic trade and investment treaty (TTIP) will provide a 'Corporate Bill of Rights', that 'corporate accountability' is falling short,⁴ and that we experience 'governance by corporations'.⁵ Indeed, it has come to the point, perhaps the point of neoliberalism's resolution between 'the public' and 'the private', that we increasingly look to corporations for leadership in both the realm of ideas and management.⁶

Although oftentimes corporations' influence over, abuse of, or impunity from, international law are identified as key causes of our discomfort with corporate power, a deeper understanding of the precise relationship between (multinational) corporations and (international) law remains absent in such critiques. In this chapter I show how a historical reading of the concurrent development of corporations, law and capitalism can lead us to an alternative assessment of 'the question of the corporation' and why we might formulate different responses to this question in today's global political economy. In particular, an understanding of the relationship between corporations, law and capitalism should enable us to reassess to what extent *law* is an adequate response to this question.

¹ This chapter is based on Chapter 2 of Grietje Baars, *Law(yers) Congealing Capitalism: On the Impossibility of Restricting Business Involvement in Conflict through International Criminal Law* (PhD thesis, University College London 2012).

² Anupreet Das 'The media is hungry for corporate excess' 13 March 2009, at <http://blogs.reuters.com/mediafile/2009/03/13/the-media-is-hungry-for-corporate-excess/>

³ Marie Louise Malig: *Tailored for Sharks: How Rules are tailored and public interest surrendered to suit can interests in the WTO, FTAs and BITs trade and Investment Regime*, Transnational Institute and Serikat Petani Indonesia 2013.

⁴ Sif Thorgeirsson 'Access to justice for victims of human rights abuses needs to be strengthened', Corporate Legal Accountability Project, Business & Human Rights Resource Centre, Published on: 5 December 2014, <http://business-humanrights.org/en/access-to-justice-for-victims-of-human-rights-abuses-needs-to-be-strengthened>

⁵ The Transnational Institute/Corporate Europe Observatory: *A transatlantic corporate bill of rights: Investor privileges in EU-US trade deal threaten public interest and democracy*, June 2013.

⁶ The Telegraph, Facebook 'could have prevented Lee Rigby murder', 26 november 2014, <<http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11253518/Facebook-could-have-prevented-Lee-Rigby-murder.html>>

The history of international law (IL) has long been a neglected topic.⁷ In contemporary IL, few authors discuss the ‘why’ of the emergence of law/international law - the development of law is often represented as a ‘self-unfolding of ideas’ or even a ‘teleology of freedom’.⁸ Often law and legal concepts appear (e.g. in judicial decisions or in the literature) as if out of nowhere, and yet they are presented as ‘elementary’ and obvious. Fundamental (foundational) contradictions are thereby obscured (for example the idea of statehood being both antecedent to and a product of IL).⁹ International legal scholarship has moreover had a blind spot when it comes to the notion of the corporation/multinational enterprise¹⁰ – which should seem surprising considering the latter’s obvious significance in the global political economy and our daily lives.¹¹ Current international law scholarship appears to view the corporation either as external and/or irrelevant to its field of study, or (in what is called ‘international economic law’ or more specifically, e.g. ‘international law of investment protection’¹²) to treat corporations (including multinationals) as self-evident, ‘natural’, and, most importantly, inevitable facts of life.¹³

The past 5-10 years, however, have seen something of a ‘turn to history’ as well as a ‘turn to political economy’ in critical international legal scholarship.¹⁴ The latter trend follows, and to some extent critically mirrors, the ‘economy and human rights’ trend in mainstream scholarship (for example, ‘business and human rights’, ‘trade and human rights’, ‘development and human rights’). As part of the current turn to IPE, very few writers have yet touched on the corporation in international law, with those who have mainly doing so in the context of the history of colonialism.¹⁵ These scholars are able to make use of a small surge of publications by historians on the corporation.¹⁶ The main debates in recent historical scholarship on the corporation occur around the question of the nature of the corporation as political, economic or hybrid. As such, and as pointed out by historian Pepijn Brandon, these authors presuppose the possibility of separation between ‘politics’ and ‘economics’. Brandon shows that it is in fact this ideological (illusion of) separation that has historically allowed space for corporate power to grow unchallenged. It is also this very ideological move that continues to cause a blind spot for many of today’s historians, legal and other scholars when it comes to the corporation. In this essay, like Brandon,

⁷ China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 153; cf Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan 1947).

⁸ *ibid* 155.

⁹ Matthew Craven, *Decolonization of International Law: State Succession and the Law of Treaties* (OUP 2010) 203.

¹⁰ Fleur Johns, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory’ (1995) 19 *MULR* 893. In contrast, cf Nussbaum (n 7) 27-35, 203-07; Wilhelm Grewe, *The Epochs of International Law* (first publication 184, Michael Byers tr, de Gruyter 2000) 345-57, 546-52.

¹¹ The corporation is now a hot topic in various areas of scholarship, cf Andre Spicer and Grietje Baars (eds), *The Corporation: A Critical, Interdisciplinary Handbook* (CUP, forthcoming, 2015).

¹² Strictly speaking, an amalgamation of public, private and domestic law as well as soft law and business custom.

¹³ Allott is an exception: Philip Allott, *The Health of Nations: Society and Law Beyond the State* (CUP 2002) 865. Key works of IL theory and history do not discuss the role of the corporation in detail, e.g. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001).

¹⁴ E.g. David Kennedy “Law and the Political Economy of the World,” in the *Leiden Journal of International Law*, Volume 26, pp. 7-48 (2013).

¹⁵ Miéville (n 7) 107-8; Stephen C Neff, *Friends But No Allies: Economic Liberalism and the Law of Nations* (Columbia UP 1999); James Thuo Gathii, *War, Commerce and International Law* (OUP 2010).

¹⁶ Koen Stapelbroek, ‘Trade, Chartered Companies, and Mercantile Associations’, in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 15; Philip J Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (OUP 2011); James Taylor, *Creating Capitalism: Joint-stock enterprise in British Politics and Culture, 1800-1870* (Boydell & Brewer 2006).

I use historical materialism as a method, in the manner Orford has recently sought to revive in ‘In Praise of Description’.¹⁷ Historical materialist *description* should make visible that which is so close to us that we normally do not see it.

In this chapter I focus on the ‘corporation-shaped blind spot’ in order to elucidate the relationship between the corporation, capitalism and international law. I examine the *material* use of law, and the corporation as a *technology of law*, as well as the way legal doctrine was constructed and used in response to specific historical-economic circumstances, rather than (as is usually done in histories of IL) the development of international law ‘in the abstract’ through the interpretation of the various philosophical treatises.¹⁸ The historical materialist approach shows us how international law was developed pragmatically in the service of global capitalism, rather than guided by principle – indeed, much of international law principle was articulated to fit desired material outcomes. It is only once we examine the construction of global capitalism in this dialectical manner that we get a proper grasp on the corporation and international law today.

The structure of this chapter is as follows: In section II I describe the origin of the concepts of international law, states, and corporations around the same time in the 16th and 17th Centuries. In the first half of Section III (a and b) I examine the close relationship between state and corporation exemplified in their concurrent development in history. Then in Section III c-e I show how the corporate scramble for Africa illustrates the instrumentalisation of corporations in colonisation, accumulation and the spread of capitalism in the 19th Century. In Section IV I briefly describe the implications this history has had for the way we view corporations in the 20th and 21st Centuries, before concluding in Section V.

II. Towards capitalism, law and the corporation

The first, striking discovery one makes when attempting to describe the origins of capitalism, law/international law, and the corporation is that their emergence occurs (gradually) in the same period, and is closely interlinked. The creation of trading corporations was profoundly implicated in the spread/export (and eventual *universalisation*) of capitalism, the state form, and the content and institutions of international law. I start by examining the corporate roots of IL and the early development of law around corporate activity in trade wars.

a. Towards IL

Miéville observes, “it is only through examining the changing nature of exchange and market relations across communities and eventually nation-states that the changing nature of international law can be made sense of.”¹⁹ It was from the pluralist everyday practice of city-states and other types of polities trading as economic units (precursors to the corporation) from the late Middle Ages through to the 17th C. that a ‘*ius inter*

¹⁷ Anne Orford, ‘In Praise of Description’ (2012) 25 LJIL 609-625, 618.

¹⁸ cf Grewe (n 10); Koskenniemi (n 13); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004).

¹⁹ Miéville (n 7) 156.

*gentes*²⁰ eventually developed, if generally only inhering for the duration of specific exchanges without becoming systematised (or universalised).²¹ Inter-polity law was developed in the struggle between polities to accumulate resources. Early examples of law developing around inter-polity trade were the bilateral agreements for the protection of merchants, both on land and sea - the latter receiving the benefit of rules such as those in the “*Consolato del Mare*” which sought to govern amongst others the protection rights of neutral traders in wartime.²²

Such ‘law merchant’ operated on a pragmatic basis mostly between European traders (and to a more limited extent, their Asian and African counterparts) until the ‘discovery’ of America by Columbus, which profoundly changed the socio-political space. Faced with a ‘new world’, the Portuguese and Spanish superpowers of the time divided the known world between themselves in the Treaty of Tordesillas of 1494.²³ In the treaty a line (‘*raya*’) was drawn across the world between Spanish and Portuguese spheres of hegemony. This was not the first such line but the first *global* line. It was essentially “a feudal line between two princes”²⁴ in a rapidly altering world. The question arose (predominantly in the scholarly literature of the time) how to view the new world, which was not part of the ‘*respublica Christiana*’ but also not classed as ‘enemy’. Once the Aztec gold was discovered this question became all the more salient. Spanish theologian and advisor to the Spanish King Francisco de Vitoria responded by denying the ‘Indians’ sovereignty (as this right was reserved for Christians), but advising that they did have ‘dominion’ over their territory, a *reciprocal* right of ownership.²⁵ Of course having ownership meant having the hypothetical capacity to trade (in this case specifically: to sell). In *De Indes Noviter Inventis*, de Vitoria concluded that the Spanish conquest of the native kingdoms in the New World had been ‘legal’ because the ‘Indians’ had ‘unlawfully’ attempted to exclude Spanish traders (thus preventing them from ‘buying’ Aztec treasures).²⁶ This is an early example of legal doctrine being developed – through the ideological claim that the principle of free trade was at the time in the *respublica Christiana* considered a natural law as well as a religious right – to serve the commercial desire to acquire the Aztec gold.²⁷

When the *respublica Christiana* crumbled, the ‘*raya*’ was replaced by ‘lines of amity’ which were agreed between the now up and coming French, Dutch and English economic powers.²⁸ These were lines that demarcated a European sphere (where international law ruled) and a space beyond that European powers considered up for grabs. In their competition to colonize these remaining spaces, trading companies became increasingly important actors.²⁹ Eventually in the 1648 *Peace of Münster* which ended the Eighty Years War, Spain recognised the United Netherlands as another economic power and simultaneously recognised Dutch colonial possessions.

²⁰ Grewe (n 10) 163.

²¹ Miéville (n 7) 167 (contradicting himself when he states “[t]he simple fact of relations between polities is not enough even to claim the legal form”).

²² Stephen C Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Harvard UP 2010) 8.

²³ Miéville (n 7) 171.

²⁴ *ibid.*

²⁵ Francisco de Vitoria, *De Indis et De Ivre Belli Relectiones* (first publication 1532, Ernest Nys tr, Oceana 1964) Section III; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 1-31.

²⁶ Vitoria (n 25); Miéville (n 7) 177.

²⁷ Neff (n 15) 38.

²⁸ Grewe (n 10) 184.

²⁹ Miéville (n 7) 182; Grewe (n 10) 181.

The lines of amity became irrelevant as European powers came to acknowledge each others' 'title' to the various parts of the rest of the world.³⁰ It is only at this point that we can properly speak of *international law* – even if this applied only as between European nations.

b. From Merchant Adventurers, Inc. to the Joint Stock Corporation

The transition to capitalism took place in a period of intense military conflict. The synergy between business interest and military conflict stimulated and shaped the *legal* transformation of the corporation from merchants' financing and risk management arrangements to its modern configuration.

Beginning in the second half of the 16th C, the corporate form was developed in part through the Chancery courts, which interpreted the rules on debt priority so as to give business the effects of separate personality, asset partitioning and limited liability.³¹ The 'joint-stock corporation' (JSC) was based on financial elements of the guild combined with the corporate form³² (a "concrete, profit-oriented form"³³), that grew out of the 16th Century trading enterprises used by merchant adventurers. Weber describes how, because of the risk of pirate attacks, single ships (each organised as a single venture in accounting terms) normally joined together into a 'caravan' and were either armed themselves or joined by an armed convoy.³⁴ The proliferation of these types of arrangement as part of the colonial enterprise resulted in the formation of regulated companies, effectively extending the guild system into overseas trade.³⁵ These companies were awarded Royal Charters providing for incorporation and the grant of a trading privilege (often a trading monopoly), like the trade in a certain commodity and/or on a certain trade route or from a certain colony. For example, in 1555 the Merchants Adventurers of England for the Discovery of Lands Unknown, also known as the 'Muscovy or Russia Company', were incorporated to exploit the sole right to travel to Russia and further north.³⁶ The concept of 'joint-stock' – essentially the formation of companies with a more permanent form and joint accounting structure developed 'by commercial necessity' in the mid-sixteenth Century. Davies tracks the rapid development. From 1614 onward there was joint stock to which members could subscribe varying amounts for a period of years. In 1653 a permanent joint stock was introduced, and in 1692 individual trading on private accounts was forbidden to members.³⁷ Members shared profits and losses of all business activities of the corporation, as well as all overheads.³⁸ From this point, the company traded as a single entity.

The legal development of the joint-stock corporation took place within the specific context of a small number of merchant enterprises. "[F]rom the mid-sixteenth to the mid-seventeenth century, a mechanism was developed for raising money in return for shares, for dividing profits among shareholders, for transferring shares among

³⁰ Grewe (n 10) 270; Miéville (n 7) 183.

³¹ Joshua Getzler, *A History of Water Rights at Common Law* (OUP 2006).

³² *ibid.*

³³ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (CUP 2001) 39

³⁴ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (first published 1905, Routledge 1992) 208.

³⁵ John H Farrar, *Farrar's Company Law* (Butterworth 1998) 17.

³⁶ Baker, J.H.; *An Introduction to English Legal History*, 4th ed. (Oxford University Press, 2002) 623.

³⁷ Paul Davies, *The Principles of Modern Company Law* (Sweet and Maxwell 1997) 20.

³⁸ Harris (n 33) 33.

members and to outsiders, and for keeping accounts of joint-stock concerns for long durations.”³⁹ For the Crown, granting monopolies was a convenient way to facilitate increasing military expenditure while avoiding the parliamentary supervision attached to other forms of revenue such as taxation.⁴⁰ In effect, “[t]he conduct of war by the state becomes a business operation of the possessing classes.”⁴¹ Here we see the synergy between governing and mercantile classes (a ‘military-mercantilist complex’). War loans could be very lucrative if the war was won, and in the meantime, the Crown could deploy the corporations as indirect means of foreign policy.

Opening up the share market to the public caused the next momentous phase in the development of company law. In 1600 the British East India Company was granted a monopoly of the trade with the Indies by Royal Charter.⁴² It was the first to combine incorporation, overseas trade and joint stock raised from the public.⁴³ The corporate form was thus developed in response to specific needs, which included raising finance for risky ventures, managing liability (minimizing exposure or externalizing risk), and administrative efficiency in aid of the larger project of the European mercantile and governing class finding sources for revenue in other parts of the world.

III. Corporations, law and capitalism

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

Hugo de Groot, who was later named the “father of international law”, in his younger years made his mark as the legal advisor to the Dutch East India Company (Vereenigde Oostindische Compagnie or “VOC” in Dutch)⁴⁴ – the Dutch equivalent to the British East India Company in all essential aspects. Through a historically contextualized analysis of Grotius’ work, we can gain some insight into the role of corporations and trade wars in the early development of international law amidst mercantilist practices.

In 1603, one of the VOC’s captains, Jan van Heemskerck, had captured a loaded Portuguese merchant ship, the Santa Catarina. Some of the VOC’s shareholders objected to the capture on religious/moral grounds. Grotius was commissioned to write a defence of the seizure, and did so in *De Iure Praedae (On the Law of Prize)*.⁴⁵ In Grotius’ professional view, the capture was justified on the basis of law, honour and expedience.

De Iure Praedae also contained *De Mare Liberum* – which introduced the idea that the seas are ‘global commons’, free for all states to navigate with a view to

³⁹ *ibid* 25.

⁴⁰ *ibid* 41.

⁴¹ Weber (n 34) 280.

⁴² Harris (n 33) 24.

⁴³ Farrar (n 35) 17.

⁴⁴ Corporate counsel in the sense he was employed to write a legal brief, not ‘in permanent employ’, cf Eric Wilson, *The Savage Republic: De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World-System (c.1600-1619)*, (Martinus Nijhoff 2008) 7.

⁴⁵ The publication of Grotius’ *De Iure Praedae* was apparently pre-empted by a Dutch court order in favour of retaining the prize (*ibid.* 7).

exploration and plying trade.⁴⁶ In Grotius' text, waging war to break up trading monopolies or other interferences with trade was legally justified since, the text claimed, the facilitation of free trade was the overarching purpose of IL. Indeed, the first Dutch-Anglo war was fought over the disagreement between the idea expressed by Grotius' in *Mare Liberum* and the idea of 'closed seas' described by Selden in *Mare Clausum*.⁴⁷ This idea was implemented through the English Navigation Acts, a series of laws aimed at protecting English trading monopolies through stipulations that goods could only enter English harbours on board English ships.⁴⁸ The fear among the British elite was that *Mare Liberum* would lead to Dutch control of the open seas, and closing markets or erecting significant barriers would protect the British economy. In the words of Walter Raleigh: "Whoever rules the waves rules commerce; whoever rules commerce rules the wealth of the world, and consequently the world itself..."⁴⁹ Eventually, a compromise was agreed, and a 3-mile zone (the reach of protection by cannon fire, important for local security, but also for coastal fishing⁵⁰) was to be considered "territorial waters" with the remainder open seas free for trade. The British and Dutch merchants themselves were naturally not particularly interested in the big 'philosophical' questions of *mare liberum* or *mare clausum* per se, but rather how these ideas could be operationalised to ensure the effective policing of their commercial interests on the high seas.⁵¹

Grotius' theory gained broad acceptance among legal scholars over the years, detached from its context, to become a standalone legal-philosophical representation.⁵² This theory and Grotius' larger role as the 'father of IL' is now primarily seen as 'about war and peace', concealing the commercial imperative behind his work.⁵³ Yet when retelling the story in this way we can see how international law was significantly shaped to suit the interest of one particularly important corporation, the VOC, in relation to the idea of a just war and free trade, and that the international rules still in existence today regarding territorial waters originated as a compromise reached on the basis of the respective economic power of British and Dutch trading empires.

a. Concurrent development: corporations, states and colonialism

With the perspective Grotius' story brings to mind, it is possible to re-cast our understanding of the state and corporate form. Miéville argues that for law to work and a legal system to come into existence (and for capitalism to mature), the creation of a state is not necessary. The same can be said about the corporation. However, both

⁴⁶ Hugo Grotius, *De iure prædæ commentarius*. Commentary on the Law of Prize and Booty. vol. I. A Translation of the original manuscript of 1604, by Gwladys L. Williams, with the collaboration of Walter H. Zeydel. Oxford: Clarendon Press, 1950, Ch.8.

⁴⁷ Grewe (n 10) 311.

⁴⁸ Grewe (n 10) 318; Miéville (n 7) 204-6.

⁴⁹ Marc Ferro, *Colonization: A Global History* (Routledge 1997) 47.

⁵⁰ Mathew Craven, 'Colonialism and Domination' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 862.

⁵¹ Grewe (n 10) 345.

⁵² Wilson (n 44) 51, 128.

⁵³ The commercial logic of international law is also evident in Pufendorf, who described how *cultura*, the state of life produced by human industry, and commerce (which emerge to overcome humans' natural state of *imbecilitas* and *indigentia*) correspond with the formation and flourishing of society; cf Benedict Kingsbury and Benjamin Straumann, 'The State of Nature and Commercial Sociability in Early Modern International Legal Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf,' in Besson, S and J. Tassioulas (eds): *The Philosophy of International Law*, Oxford, Oxford University Press, 2010, 33.

are conducive to capitalism and operate according to its logic. As the explorers wanted to undertake more ambitious expeditions, they sought to raise finance among a wider group of persons. It made sense to do so in a wider but more or less homogenous and increasingly centrally regulated market/locality where the traders could also find customers for the goods. As many directors of the trading companies were also active in the local and provincial administration (e.g. Dutch Republic⁵⁴), the centralisation of administration and regulation came about as a matter of rationality. Perhaps then it is possible to draw a parallel here with the European state form and the large trading companies on the domestic level from the point of view of the elites, who developed both the state and corporate form as conducive to the development and spread of capitalism. While the physical shape of European states is a remnant of feudalism/pre-capitalist absolutism⁵⁵ (in the sense that the national boundaries were drawn around the feudal estates of lords and larger provinces of lords sworn to the same king), the *legal form* of the state is conversely a construct of capitalism/the capitalist class.

In the early modern period transition to capitalism, the relative novelty and plasticity of the state and corporate forms were employed judiciously. Miéville posits, “[s]overeignty is the legitimising principle by which that subject in modern international law - the state - faces others”⁵⁶ – and indeed faces other as sovereign, *legal* equals. However, during the period of exploration and later colonialisation it was usually not states facing each other as sovereigns in the space ‘beyond the line’, it was the trading corporations that both interacted with each other and with non-European polities. This meant that European states were able to deal indirectly with the non-European polities without being forced to recognise them as states. Grewe suggests that corporations were used in the colonisation process to prevent the state form from spreading beyond Europe. “The most important [effect on the development of international law] was the dual position taken by the trading companies: semi-public, semi-private, which enabled the avoidance of a complete transfer of the European state-form, with its extensive legal consequences and its characteristics of sovereignty – nation, territory, borders – to the overseas colonial space,”⁵⁷ he explains, “It was through the fact that it was the corporations and not the states themselves, that encountered each other, and that were considered (or at least held out to be) more or less independent, that a *particularly elastic system of colonial international law* was constructed.”⁵⁸ Apparently, “[p]oliticians were well aware that the legal status of their colonial possessions was problematic. The East India Companies were the perfect agents to police this ‘transitional’ colonialism, because of their indistinct legal status.”⁵⁹ This use of the corporation required the corporation to be viewed as something quite distinct from the state, yet equally formed as an extension or instrument of the state. In this way, the large trading corporations were the main tools in the colonisation process (not least for England and the Netherlands), and they represented the legal and organisational form through which the colonial powers annexed their conquered territories to the motherland. Likewise, the settlement of North America took place through the use of chartered companies.

⁵⁴ Pepijn Brandon, ‘Marxism and the Dutch Miracle: the Dutch Republic and the transition debate’ (2011) 19 (3) *Historical Materialism* 106, 127.

⁵⁵ England and The Dutch Republic were anomalies in Europe and had representative governments.

⁵⁶ *ibid.* 184.

⁵⁷ Grewe (n 10) 346.

⁵⁸ Grewe (n 10) 346 (emphasis added).

⁵⁹ Miéville (n 7) 184.

Settlement companies such as the Virginia Company – whose aim it was, through private individual appropriation and settlement of land and (commonly) the cultivation of coffee, tea, sugar and tobacco plantations (utilising slave labour) to increase states' productive land - would assert the sovereignty needed to grant land rights to settlers even before such authority over the territory could be said to have arisen. This curious inversion⁶⁰ is another example of law's pragmatic 'invention' in the service of capitalism. The legal-economic form of the corporation allowed the assertion of political power, not simply vice versa. As a very 'direct' example of this, through the Plymouth Company, the Puritans of the 'Mayflower' hoped to gain the political freedom and independence in New England which they had been denied in Europe.⁶¹

In certain situations, corporations thus mirrored or wore the mask of 'state sovereignty', which sometimes extended well beyond the power to grant land rights. Wilson uses the term "Corporate Sovereignty" to describe the nature of the VOC's operations in the 17th C.⁶² The main French, English and Dutch colonial companies were endowed with delegated sovereign rights by way of their Charters. Among these was, for example, the grant by Charles II to the British East India Company in 1661 with the express right to send war ships, personnel, and armoury for the defence of the Company's factories and trading posts and to decide over war and peace with all non-Christian peoples. In 1677 the right to coinage was added. Dutch and French companies similarly delegated sovereign powers, such as the right to wage wars of trade and territory with other European entities. At the same time, ideological separateness allowed such wars to take place 'beyond the line' and thus not to affect the internal European peace.⁶³

There are direct parallels to be drawn here between other contemporary instances of protection of trade in times of conflict.⁶⁴ "Business" and "politics" are each assigned a separate conceptual realm despite their obvious entanglement. "The close relation between a state-authorized monopoly and the state itself ... meant that the boundaries between the company and the state were permeable, and the monopoly trade could be used to underpin political (state) control. *The monopoly nature of these companies was the means by which their parent state retained control over its colonial possessions in an era of increasingly bounded sovereignty.*"⁶⁵ The strength of the nascent capitalist 'military-industrial complex' lies in the capitalist class' ability to split and reunite at will, its interests appearing sometimes political (or public) and at other times commercial (or private). It is *law* that enables this conjecture.⁶⁶

The interests of the European traders, settlers and investors (which included, of course, European statesmen) were protected further by the way they managed to uphold the idea that their national laws travelled with them wherever they went overseas. They managed generally to enforce the application of 'Imperial law' in the

⁶⁰ Craven (n 50) 77-78.

⁶¹ Grewe (n 10) 348-9.

⁶² Wilson n 41 (his capitals)

⁶³ Grewe (n 10) 352.

⁶⁴ "The victory of the bourgeoisie, in all the European countries, had to lead to the establishment of new rules and new institutions of international law which protected the general and basic interests of the bourgeoisie, ie. bourgeois property. Here is the key to the modern law of war." Evgeny Pashukanis, *International Law*, appended in China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 325.

⁶⁵ Miéville (n 7) 207 (emphasis in original).

⁶⁶ See also Pashukanis (n 64) 327.

colonies and extraterritorial application of imperial law in the trading enclaves (e.g. in China, Japan), with disputes being referred to the imperial courts. The implication of this was that local rulers could not expropriate traders' property or pass laws that negatively affected the foreign merchants' operations. As I will show below (S. IV), this state of affairs is effectively still current.

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

While the company and crown/state interests had coincided effectively as class interest in the mercantilist period, the increasing ideological public/private and political/economic division brought also about real competition between merchants and statesmen. The old colonial companies' monopolies were slowly reconciled to the idea of free trade. The old trading companies of the first colonisation period (16th-18th C.) continued to exist into the 19th C. but their independence, power and significance had long dissipated. The British Crown, for instance, took over direct control of India from the British East India Co. by means of the 1773 Regulating Act. "[M]onopoly companies had outlived their usefulness as agents of colonialism," explains Miéville, "India was simply too profitable to be left in the control of a company which was structured to treat it as a treasure-chest. By taking it over *politically* the British state helped institutionalise the separation of politics and economics associated with mature capitalism."⁶⁷ The outcome, however, was that though "[o]stensibly aimed at checking the oppression of the Company's rule the real effect of the Act was to systematise the exploitation of India".⁶⁸ Another effect of the Regulating Act – which it exempted the financially ailing East India Company's tea from import duties - was rather momentous too. When this favourable treatment was discovered by rival American traders, Company tea was thrown into the Boston Harbour. The 'Boston Tea Party' became one of the major acts of revolt leading to the American Revolution.

When European states in the 19th C. *did* want to create new (although dependent) states to take over the colonised areas or settle new ones, they used a mostly *new* set of corporations to ensure those states took exactly the shape that they wanted (and presumably also, had exactly the leaders they wanted).⁶⁹ According to Koskenniemi: "[t]he end of informal empire meant that European public institutions – in particular, European sovereignty – needed to be projected into colonial territory".⁷⁰ Britain intensified what Koskenniemi calls 'informal' influence through the proliferation of a new type of chartered company, and "[b]y the time the scramble [for Africa] was over, more than 75 percent of British acquisitions south of the Sahara were acquired by chartered companies."⁷¹ Many of these companies sought alliances with local leaders, but often proved to be ineffective at administering territory. When these territories needed to be recognised as sovereign in their own right, however, the form (including institutional form and law) and content of that sovereignty had already been constructed.

⁶⁷ Miéville (n 7) 234.

⁶⁸ Miéville (n 7) 234.

⁶⁹ Grewe (n 10) 546; Anghie (n 25) 77-78.

⁷⁰ Koskenniemi (n 13) 121.

⁷¹ *ibid.* 117.

c. The Corporate Scramble for Africa

The corporate scramble for Africa had as its main aim the creation of markets, and the establishment of those institutional conditions necessary for these markets to function and be integrated into global capitalism. This logic included a reinterpretation of slavery to not only function as the creation of free labour but to constitute a generative condition for the market economy.⁷² The scramble marked the start of a new phase of instrumentalisation of the corporate form in colonialism – the third category of mutual implication of international law, global capitalism and the corporation identified above. This instrumentalisation occurred behind an *outwardly* clearer separation (and, ‘deniability’) between the state sphere and a vast network of private companies given wide rein to run the colonies. For example, in 1881 the British North Borneo Company was founded, in 1886 the Royal Niger Company, in 1888 the Imperial British East Africa Company, and in 1889 the British South Africa Company.⁷³ The latter was run by Cecil Rhodes, under a charter giving him practically a free hand to administer the area (his ‘irresponsible policy’ is said to have ‘almost inevitably’ led to the Boer War).⁷⁴

Similarly, what was to become German South West Africa was acquired in 1882 by a tobacco merchant from Bremen, with the Zanzibar region being administered by the German East Africa Company and the Imperial British East Africa Company.⁷⁵ Vast tracts of land were granted by the German government to the Deutsche Kolonialgesellschaft, which proceeded with a policy of settler colonialism, granting many German farmers and entrepreneurs generous concessions.⁷⁶ German companies active on the ground included a railway company, the company running the ports, Deutsche Bank and various mining companies. New German settlers began to question whether the colony might not be better off without the ‘black problem’, or, the presence of an indigenous people, the Herero. One colonial leader is quoted as saying, “I do not concur with those... who want to see the Herero destroyed altogether. Apart from the fact that a people of 60,000 or 70,000 is not so easy to annihilate, I would consider such a move a grave mistake from an economic point of view. We need the Herero as cattle breeders... and especially as labourers. It will be quite sufficient if they are politically dead.”⁷⁷ This plea was apparently rejected by the companies and Imperial Germany,⁷⁸ which sent in General von Trotha, who had just suppressed the Arab rebellion in German East Africa, and who responded “I shall annihilate the African tribes with streams of blood and streams of gold.”⁷⁹ After the brutal crushing of the Herero uprising by the German army, German military rule returned. The around 15,000 surviving Herero were placed in concentration camps maintained by (amongst others) the Woermann shipping company, where they were

⁷² Craven (n 50).

⁷³ Grewe (n 10) 548.

⁷⁴ *ibid* 120.

⁷⁵ *ibid* 118-120.

⁷⁶ *Hereros v Deutsche Afrika-Linien GmbH & Co*, 06 F3d 1684 (3rd Cir. 2001) (*Hereros Complaint*). The ‘Herero genocide’ became the subject of compensation litigation in the US in 2001, available here: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Herero_Genocide_Case_Complaint_06-09-2001.pdf. – NOTE: TO COPY EDITOR, PLEASE SEE HOW TO CITE CORRECTLY

⁷⁷ *Hereros Complaint* (n 76) para 92.

⁷⁸ The *Hereros Complaint* (n 76) denotes the Deutsche Bank, the Terex Corporation (then Orenstein-Koppel which built railways and ran mines) and the Woermann Line shipping and ports company together as the “German Colonial Enterprise”.

⁷⁹ *Hereros Complaint* (n 76) 95.

subjected to slave labour, rape and medical experimentation.⁸⁰ Almost half those put to work building railways died. This example highlights the ‘deniability’ factor of arms-length outsourcing of the colonial enterprise.⁸¹

In 1881 Portugal founded the Mozambique-company. In 1900, French Equatorial Africa was divided up between forty French concession companies. These new companies were a ‘different beast’ altogether from the old trading companies, as they did not have the right to wage war, nor a trading monopoly, and were placed under strict state control.⁸² Ahead of the Berlin Conference in 1884, German Chancellor Bismarck (who had inaugurated Germany’s colonial policy, actively promoting German colonial enterprise so as to find new markets for developing German industry⁸³) expressed the demarcations of this manner of ‘corporate sovereignty’ as follows:

‘My intention, as approved by the Emperor, is to leave the responsibility for the material development of a colony as well as its inauguration to the action and enterprise of our seafaring and trading citizens, and to proceed less on the system of annexing the transoceanic provinces to the German Empire than that of granting charters, after the form of the English Royal Charters, encouraged by the glorious career which the English merchants experienced in the foundation of the East India Company; also to leave to the persons interested in the colony the government of the same, only granting them European jurisdiction for Europeans and so much protection as we may be able to afford without maintaining garrisons. I think, too, that a colony of this kind should possess a representative of the Imperial Authority with the title of Consul or Resident, whose duty it would be to receive complaints, while the disputes which might arise out of these commercial enterprises would be decided by one of our Maritime or Mercantile Courts at Bremen, Hamburg, or somewhere else. It is not our intention to found provinces but commercial undertakings.’⁸⁴

Bismarck here describes a manner of ‘outsourcing’ *avant la lettre* of the colonial enterprise. The new arrangement seemed designed to reap all possible benefits, while any commercial risk the company took remained with the company.⁸⁵ This flexible approach allowed the state to use the company when it suited state interests, and to distance itself when it did not. The late 19th C trading company concept influenced European and colonial forms of governance and was influenced by non-private dynamics. “[T]he colonial territory was now fundamentally divided up, organised and governed according to the principles and concepts of the inter-state law that was

⁸⁰ Hereros Complaint (n 76) 114-124. The German geneticist Eugene Fisher experimented on ‘mulatto’ offspring of German settler men and Herero women to explore his ideas about racial hygiene’ which he was later to teach, as Chancellor of the University of Berlin, to Joseph Mengele.

⁸¹ In fact German responsibility for the Herero Genocide was acknowledged only in 2004. cf Speech by Federal Minister Heidemarie Wieczorek-Zeul, ‘The suppression of the Herero uprising’ (speech at the commemorations of the 100th anniversary of the suppression of the Herero uprising, embassy of the Federal Republic of Germany Windhoek website 14 August 2004)
<http://www.windhuk.diplo.de/Vertretung/windhuk/en/03/Commemorative_Years_2004_2005/Seite_Speech_2004-08-14_BMZ.html> accessed 1 February 2015.

⁸² Grewe (n 10) 548.

⁸³ Dawson, W. H.: Bismarck and State Socialism: An exposition of the Social and Economic Legislation of Germany since 1870, New York: Howard Fertig, (1973)146-7.

⁸⁴ Dawson (n 83) 150-1.

⁸⁵ Grewe (n 10) 550.

developed in Europe.”⁸⁶ At the same time, one of the main means of spreading capitalism and creating states in the image of the modern European state, was the replacement of local laws with the laws and legal concepts of the colonial state and institutions under the tutelage of the imperial institutions. For example, Hopkins describes how notions of *collective* ownership of property prevalent in the colonies were replaced by European notions of private property because “to establish a virtuous circle of development it was necessary to export commercial institutions and approved property rights”⁸⁷ Conversely, Craven describes the 1918 decision of the Privy Council, *In re Southern Rhodesia*, where it was held that the British South African Company had the right to alienate certain land in Southern Rhodesia - the “absence of indigenous knowledge of the institution of private property ... effectively allowed the extinguishment of all native title through the fact of settlement.”⁸⁸

Another way for a company to gain entry to a ‘colony’ was to buy up or refinance a government’s sovereign debt. This is how the Firestone company gained a 99 year lease over 1 million acres of Liberian land, which it transformed into a rubber plantation, removing villagers off their land and recruiting them as workers at gunpoint.⁸⁹ By 1929, some 350,000 Liberians were reportedly forced into employment by Firestone in circumstances comparable to those in Leopold’s Congo. Liberia was not a colony in the technical sense, but since its founding by the American Colonization Society in 1847, it was indebted to the company as its sole creditor.⁹⁰ This could be presented as a good thing: the former Liberian president noting that since Firestone had taken control of Liberia, border disputes promptly ceased.⁹¹ Colonial styled corporations were not simply expressions of foreign imposition, their formats allowed them to be instrumentalised by *host* state elites under the rationalities of order and self-determination.

d. The Congo Corporation and the State Form

The story of the Congo shows in one example how companies became vehicles for the transfer of the European state form. In 1876 the *Association Internationale Africaine* (AIA) was founded at the behest of the Belgian King Leopold II, apparently motivated by private gain and political intrigue.⁹² In 1878 the International Congo Society was founded (also chaired by King Leopold), which formed the profit-seeking front for the more ‘philanthropic’ AIA. The 1884 Berlin West Africa Conference recognised the society as sovereign over what became known as the Congo Free State and as a member of the international community by the major powers present at Berlin.⁹³ Renton, Seddon and Zeilig describe the rule of Leopold in The Congo within the broader context of turn-of-the 19th century colonial Africa. King Leopold’s company took control of the rubber and ivory trades, while giving much of the land of the Congo to concessionary businesses who would build infrastructure and control the territory. These companies were granted the right to levy taxes, which meant the

⁸⁶ *ibid* 552.

⁸⁷ Hopkins, A. G.: Property Rights and Empire Building: Britain’s Annexation of Lagos, 1861, *The Journal of Economic History* 40(4) (1980) 777-798.

⁸⁸ *cf* Craven (n 8) 50; *In re Southern Rhodesia* [1919] A.C. 211.

⁸⁹ *John Roe I et al v Bridgestone Corporation et al. (Firestone Complaint)* 7 November 2005, available at <http://iradvocates.org/sites/default/files/11.17.05%20Complaint.pdf>

⁹⁰ *ibid* 38.

⁹¹ *ibid* 38.

⁹² Grewe (n 10) 551.

⁹³ David Renton, David Seddon and Leo Zeilig, *The Congo: Plunder and Resistance* (Zed Books 2006) 24.

previously self-sufficient non-monetary economy had to develop to produce surplus and the population had to offer itself up as wage labour. New companies were also founded to exploit the mineral wealth, the Union Minière du Haut Katanga (1905) amongst many others, mostly owned directly or indirectly by King Leopold. A large bureaucracy was set up and run by around 1500 European civil servants. One of the Congo's richest resources proved to be rubber, called 'red rubber' after the brutal regime in which it was harvested. King Leopold's corporate rule created a 'slave society', and more generally, "[u]nder direct European or American rule, forced labour became widespread throughout the continent, and an 'economy of pillage' became the norm."⁹⁴ We can see here the direct correspondence between the process of the forcible creation of a wage-labour force and the expropriation of land (and other natural resources) in the Congo (and indeed the rest of the African continent) and 'primitive accumulation' in Britain. Moreover, direct correspondence can be seen between the Congolese (and Rhodesian and Liberian) examples and the corporate imperialism of the 20th C – what David Harvey describes as 'accumulation by dispossession'. Renton and Zeilig point out that the Congolese population declined sharply (from around 20 million in 1891 to 8.5 million in 1911) as a result of disease, massacre and the result of forced labour. The main 'winners', as they see it, were King Leopold, the shareholders of his companies, and the various banks involved in financing the enterprise.⁹⁵

King Leopold was able to successfully hold onto his possession partly because he 'presented himself as the inheritor of the liberal ideal'. However, "[b]eneath the high-flowing rhetoric, financial calculations were evidently being made."⁹⁶ The end of the corporate Congo was brought about by three factors: first, resistance and rebellions in the Congo itself;⁹⁷ second, a reform movement in Europe and the U.S.; and third, commercial interests by rivals – all in addition to the classic European rivalries with the ultimately unsuccessful British government effort to end Leopold's regime on the basis that the Congo was a 'British discovery'.⁹⁸ In contrast, the reform effort proved a more effective check on Leopold. Missionary reports of the extraordinary cruelty of Leopold's regime helped spark a popular campaign to urge Belgium to take the Congo into government control or to allow it to be independent (or even to transfer it to British rule). The campaign included Booker T. Washington, Mark Twain, Arthur Conan Doyle and Joseph Conrad as well as others. In addition, world powers began to realise the significant mineral wealth in the Congo. This included the US which would later use Congolese uranium to bomb Hiroshima and Nagasaki.⁹⁹ In 1908 Belgium 'nationalised' the King's private corporate empire, and in 1913 opened it up to 'free trade'. The British-Belgian company Union Minière stayed, recruiting (often at gunpoint) workers for its copper mines from the whole surrounding region (what is now Rwanda, Zambia, and Uganda).¹⁰⁰ The Congo example shows deniability of the state-corporate link – the Congo company state was portrayed as King Leopold's private adventure or folly. At the same time, it (and the corporate scramble for Africa

⁹⁴ Renton, Seddon and Zeilig (n 93) 29.

⁹⁵ Many foreign mining companies, including the US companies Ryan and Guggenheim, bought concessions. The biggest company, Union Minière du Haut-Katanga, was part-financed by Midlands, Barings and Rothschilds (ibid).

⁹⁶ ibid 32, 33.

⁹⁷ ibid 30-37.

⁹⁸ Anghie (n 25) 92.

⁹⁹ Ibid. 3.

¹⁰⁰ Ibid. 52.

more generally) did create the conditions for and realization of capitalism in areas previously relatively untouched by Europe's 'capitalising mission'.

e. The Berlin Conference: Legalising corporate imperialism

The Berlin West African Conference has broader significance than simply in relation to the Congo. In their rivalries, European states began to fear for the validity of their agreements with non-European powers, since the titles to their territories were concluded with colonized people otherwise considered 'uncivilized' and without legal agency. The Europeans managed to safeguard their interests and make these 'unequal treaties' part of general IL by giving them a literal, positivist reading and endorsing them as valid (ignoring whether they had been made under duress or deceit).¹⁰¹ Anghie notes the fact that most colonial territories were acquired by force combined by formal 'legal' acts of local chiefs signing over "all our country...all sovereign rights...and all and every other claim absolutely, and without any reservation, to Her Most Gracious Majesty... and heirs and successors, for all time coming".¹⁰² What is witnessed here is the concrete example of how primitive accumulation may be legalised and how an 'agreement' forming feudal proto-law is turned into what we now consider 'law'. The particular challenge in the context of the Berlin Conference (where "humanitarianism and profit-seeking were presented in proper and judicious balance"¹⁰³) was that the interests at hand had to locate the non-European world in the international law framework somehow. To do so, the conference participants passed the *Berlin Act* which regulated freedom of navigation and trade, as well as the rules on the acquisition of new territory.¹⁰⁴ Its most infamous provision, Art. 35, obliged parties to establish authority in the African territories "insofar as necessary to ensure free trade".¹⁰⁵ At the same time, protectorates were excluded from this obligation, which "allowed the British, for instance, to uphold their unlimited commercial empire while at the same time avoiding the financial and administrative burdens ... [of] formal occupation."¹⁰⁶ Thus, the *Berlin Act* systematized and *legalised* the scramble for Africa, and at the same time, *extended* the rhetoric of the civilising mission to cover (up) the economic motivations of colonisation: "[n]ow, because trade was the mechanism for advancement and progress, it was essential that trade be extended as far as possible into the interior of all these societies."¹⁰⁷ The 'capitalising mission' was thus re-branded as the 'civilising mission', paving the way for further corporate exploitation in the 20th and 21st centuries.

IV. Corporations in IL in the 20th and 21st centuries

Into the 20th C., corporations continued to be used for political ends (e.g., the 'banana wars' in Central and South America¹⁰⁸) and state governing elites continued to act as private property owners within institutional configurations that were at once formally

¹⁰¹ *ibid.* 71-73.

¹⁰² *ibid.* 92.

¹⁰³ *ibid.* 69.

¹⁰⁴ Koskenniemi (n 13) 123.

¹⁰⁵ General Act of the Berlin Conference, 26 February 1885, C 4361 1885, Art 35.

¹⁰⁶ Koskenniemi (n 13) 124.

¹⁰⁷ *ibid.* 97.

¹⁰⁸ Daniel Litvin, *Empires of profit: commerce, conquest, and corporate responsibility* (Thomson 2004) 113ff.

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

The discourse of ‘positivism’ that had become dominant by the early 20th C with its notion of international law as a system of rules between consenting states also served to conceal the role of class and the corporation in international law.¹⁰⁹ Despite earlier notions of ‘corporate sovereignty’ and effective corporate legal personality in IL, the 20th C notion of corporate personality became circumscribed and contested. As corporations are non-subjects, business people are able to wield the collective power of the corporation *and* construct normative regimes ‘below the radar’ of public IL. One particularly ‘lucrative’ area in this sense, the regime of investment protection, is entirely aimed at serving their specific interest while not *formally* affecting ‘public’ law notions of statehood and sovereignty.¹¹⁰ The effect of positivism and the public/private divide is that it constructs a sphere of liberty where the global capitalist class can pursue (overseas) economic interests with little oversight. The discourse of ‘responsibility’ is situated in the ‘constitutional’/‘political’ part of international law and ‘corporate activity’ enclosed in the ‘private’ domain of international law¹¹¹ resulting in a significant ideological hurdle that must be overcome before one might be associated with the other.

Before the corporate colonialism of the 19th C. could move to global liberal capitalist statehood of the 20th C., the ground for ‘self-determination’ and ‘decolonisation’ had to be prepared so as not to affect Western corporate interests in the Third World. The European capitalist class had to publicly divest itself of political responsibility for the periphery while retaining its private material hold. The technique, following the late 19th C. informal empire companies, was the granting of concession agreements with wide powers and long terms – some being concluded in the context of mandates and trusteeships, others directly. Moreover, the *physical* shape of future states was made subject to these interests. For example, “France and Great Britain were intent on gaining control over the oil resources in their Middle Eastern mandates and they went so far as to redraw the boundaries of the mandate territories of Palestine, Mesopotamia and Syria in order to enable a more efficient exploitation of their oil reserves.”¹¹² This is a striking example of the form of law affecting material reality – all around the shape of corporate activity.

The newly decolonised states are ‘unequal sovereigns’¹¹³ in the sense that their sovereignty is recognised by the metropole/global capitalist class conditional upon

¹⁰⁹ Koskenniemi, (n 13); Anghie (n 25).

¹¹⁰ cf James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 6.

¹¹¹ *ibid* 3.

¹¹² Anghie (n 25) 144; cf Dame Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 1999).

¹¹³ cf Simpson (n 18).

(amongst others) continued free access to markets and natural resources. As such, the opportunity to gain statehood presents the ‘equal opportunity to be unequal’. The various rhetorical processes (the public/private divide, the definition of key concepts in IL such as sovereignty and personality) are employed to support, strengthen and conceal global class relationships. The ‘international law of investment protection’ was developed to safeguard corporate interests (granted in concession agreements in the decolonisation process and after moments of political change and conflict) in the Third World outside of the decolonisation process and continues to prioritise multinational enterprises’ interests over others’ today.

V. Conclusion

In this chapter I have given some examples to show how the global capitalist class, including members of governing and business elites, have employed, and still do employ law for a capitalising mission to create the global market society we find ourselves within today. Within this process, the corporate form is one of its main technologies. As Pashukanis surmised, “international law owes its existence to the fact that the bourgeoisie exercises its domination over the proletariat and over colonial countries.”¹¹⁴ His commodity form theory of law, recently revived and elaborated by China Miéville, is helpful in analysing the relationship between law, capital and the corporation. Crucially, this theory provides us with an understanding and theorisation of law’s *form* (the ‘lawness’ of law) while also offering guidance as to the development of law’s content.

Miéville summarises the “commodity-form theory of law” as follows: “Law is a relation between subjects abstracted of social context, facing each other in a relationship predicated on private property, dependent on coercion.”¹¹⁵ Coercion and violence are inherent in the legal form as the notion of “mine” necessary to ownership and commodity exchange is only meaningful inasmuch as it is “mine-not-yours”.¹¹⁶ In the transition from feudal relations of production, this Capitalist law was “universalised”,¹¹⁷ which generally coincided with the advent of European parliamentary democracy (through which the bourgeoisie eventually gained political as well as economic control). The bourgeois state is described by Marxists as a “committee for managing the affairs of the middle class”¹¹⁸ and an “ideological smokescreen to conceal [ruling class] hegemony”.¹¹⁹

According to Miéville, the guarantee between formally “equal states” in the absence of a superior authority rests in the balance of forces.¹²⁰ Eventually, as Miéville surmises by quoting Marx, “between equal rights, force decides.”¹²¹ The ‘force’ Marx means is not necessarily physical violence (war) as Miéville seems to suggest, but the ‘force’ of domination and exploitation through ownership of the means of production - the ultimate *unfreedom* of labour. The capitalist class still has at its disposal the feudal ‘power’ to coerce, but it is the achievement of capitalism that this is no longer (or rarely) necessary. The capitalist class coerces by virtue of its ownership of the

¹¹⁴ Pashukanis (n 64) 325.

¹¹⁵ Miéville (n 7) 318.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ Pashukanis (n 64) 331.

¹²¹ Miéville (n 7) 292.

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

Ultimately, therefore, the real regulating factor in the world is the *economic imperialism* of the global capitalist class, which is first and foremost implemented using the corporate form. Law, law's institutions and law's bureaucracy, have to some extent been developed (mostly by lawyers) to have their own internal logic (coherence, rhetoric),¹²² but this logic follows the logic of economic imperialism and is based on the *commodity form*. Still, modern day economic imperialism is administered primarily through the construct of the corporation, through its international 'management committees', the World Trade Organisation and the Bretton Woods institutions, arbitral tribunals, and legal tools such as bilateral and regional investment treaties, loans and debt restructuring agreements, and so forth – and all at the behest of the capital owning classes.¹²³

Understanding the intimate, symbiotic relationship between (international) law, (global) capital and the (multinational) corporation, therefore, should give us pause to think about where precisely to locate the *response* to 'the question of the corporation'.

¹²² cf David Kennedy, *International Legal Structures* (Nomos 1987).

¹²³ cf Akbar Rasulov, 'The life and times of the modern law of reservations: the doctrinal genealogy of general comment No. 24' (2011) 14(1) *Austrian Rev of Intl and Euro L* 103.