



## THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

*TWAILR: Dialogues ~ November 2020*

### Capitalism, Civilisation and International Law

[Ntina Tzouvala](#) discusses her book, [Capitalism as Civilisation: A History of International Law](#) (Cambridge University Press, 2020) with [John Reynolds](#) of the *TWAIL Review* editorial collective.

**John:** Your book tells a story of the role that international law has played in the proliferation of material inequality in the world. You interrogate the standard of civilisation as a very particular mode of international legal argument in this context. What motivated you to write about this specifically? And what is the central claim you are making in the book about the work that the standard of civilisation does?

**Ntina:** The book grew out of my doctoral dissertation, which – looking back – was a broad and somewhat episodic treatment of international law’s continuous and structural entanglement with capitalism. When I started working toward a book manuscript, I realised that some streamlining of the focus was necessary. At the same time, I had moved from England to Melbourne Law School, a place with a long history in critical international law. It was partly this move that encouraged me to think about international legal arguments as arguments, namely as discursive structures that need to be taken seriously, but not necessarily literally.

The standard of civilisation appeared an obvious candidate as a way of thinking about international law and capitalism for two reasons: first, it is indisputable that ‘civilisation’ played an important structuring role for 19<sup>th</sup> century international law. In this sense, I was picking the thread from other critical histories of the discipline, especially those written within the TWAAIL tradition. Secondly, the story that ‘civilisation’ disappeared after 1945 either for good (in the context of mainstream histories) or to be replaced by other concepts (development, human rights, humanitarianism) bothered me a bit – possibly because it is the job of critical (and

especially Marxist) legal scholars to be contrarians. My thinking came to be the following: if we treat 'civilisation' as a bounded concept with discrete meaning, it is true that its use radically declined after 1945, and hence its significance must have also declined. However, if we treat it as an argumentative pattern, one that constantly oscillates between two opposite, yet interconnected, logics (conditional inclusion and perpetual exclusion/deferral of inclusion) then the declining use of the word 'civilisation' is not decisive. The thrust of the book ended up being exactly this: revisiting a broad (but, of course, selective) range of international legal debates and showing that despite the different terms in which they were conducted, they all shared this argumentative conundrum between linking equal rights and duties to capitalist modernity, and constantly deferring this equal inclusion based on perceptions of immutable difference and inferiority.

To return to the opening sentence of your question, I try not to make any big claims that the world is the way it is (and it is in a very bad shape) because of international law, let alone because of this one argumentative pattern that I happened to become interested in. Indeed, that would have been an amazing coincidence. Rather, my argument is that 'civilisation' has been reflective of the much broader tendency of global capitalism to produce both homogeneity and connection on one hand and unevenness and fragmentation on the other, at the same time. The constant 'push and pull' of 'civilisation' as an argumentative pattern registers this contradiction, while failing to resolve it. As I note in the book's introduction, I am somewhat wary of arguments that international law creates the world, in a very literal manner. I think there are very good reasons critical and Marxist legal scholars ended up making such claims (for example, a need to push against the base/superstructure dichotomy or a desire to show law's complicity with injustice). However, taken to the limit such claims appear to be the mirror-image of liberal internationalism, with the only difference being that we think that international law is 'bad' and they think it's 'good'. This is certainly an important political difference, but not one that grounds critique (as opposed to criticism).

**John:** Right so we see international law less as a worldmaking project in itself and more as a discursive field that reflects and reifies material realities and social relations in a variety of ways? To show how this unfolds, your account brings us back to 1873 as one point of origin in the historical constellation of civilisation. That year was formative both to the development of international law (through the establishment of the *Institut de droit international*, self-described 'legal conscience of the civilised world') and to the onset of a deep depression for European capitalism. The latter generated a

drive for geographic expansion to access new markets and resources. The Berlin and Brussels conferences followed, and the late 19<sup>th</sup> century generally was a time when, as you put it, notions of civilisation came to openly dominate the field of international law. In this context, you argue that international legal theory and practice evolved the ‘standard of civilisation’ as an argumentative pattern oscillating between two polar logics – a *logic of improvement* and a *logic of biology*. Can you talk us through what you mean by these framings, and the pendulum between them? What is the role of capitalism – and imperialism as capitalist phenomenon – in the inclusion-exclusion dynamics that are produced here?

**Ntina:** Just to clarify: international law is certainly one worldmaking force amongst many. It is in its complex intersection with other laws (statist, customary, or Indigenous), with flagrant illegality, a-legality and everything in between that the world is made. Part of what I have been trying to think about in this book is how to think about international law in materialist terms, but also in ways that do not reify it or exaggerate its determinative role.

Thinking about ‘civilisation’ as an argumentative pattern enables me to do just that. In fact, this way of thinking allows for two things: first, to avoid the positivist position of treating law as a set rules with a definite meaning. Secondly, the specific way I think about this argumentative pattern takes me back to the material realities of global capitalism. Let me explain: my position is that ‘civilisation’ encapsulated a very particular way of arguing about the distribution of rights and duties (and privileges, immunities, etc, if one is of a Hohfeldian persuasion) between political communities in international law.

This way of arguing involves two things at the same time. On the one hand, what I call the ‘logic of improvement’ promised equal rights and duties to non-Western political communities on the condition that they transformed themselves according to the imperatives of capitalist modernity. This generally involved state centralisation, legalisation of domestic and international affairs, introduction of private law, individual rights and individualised criminal responsibility, some form of separation of powers, and so on. At the core of this logic lies the idea of desirability and attainability of capitalist modernity: everyone can and should want to be a modern and capitalist state. Notably, (semi)peripheral ruling classes and legal elites have been receptive to this logic, which enabled them to promote their own material interests and worldviews at home and abroad. In this respect, what is often seen as a partial decolonisation of international law, for example by Latin American states, can more plausibly be read as

the incorporation and redeployment of this logic of improvement by factions of ruling classes and lawyers, who acted consistently as the organic intellectuals of capitalist modernity.

However, there is another aspect to ‘civilisation’, which I call the ‘logic of biology’. Indeed, the promise of even conditional equal inclusion has consistently been postponed, undermined, or modified based on ideas of immutable difference between the West (or more recently, the Western and non-Western capitalist core) and the peripheries of capitalist development. When this logic is being deployed, we see the usage of racialised, gendered or infantilising tropes that seek to undermine demands for juridical equality and to constantly pathologise the Global South. Of course, as times change due to the struggles of the oppressed, these tropes become more or less open or euphemistic. For example, Chapter 5 of my book focuses on the legal arguments surrounding the never-ending ‘war on terror’. There, I show that the ‘unwilling or unable’ doctrine relies not on what a state does or doesn’t do (for example, prevent a concrete armed attack or fail to do so) but on what it ‘is’, or more accurately, what it is perceived to be by a small number of lawyers (mostly US lawyers, but the issue is broader). In this line of thinking, some states (primarily Western states, but also non-Western states that willingly participate in the war on terror) are simply presumed to be ‘willing and able’ – and this is hardly a rebuttable presumption – while all others are potentially ‘unwilling or unable’ and therefore subject, the argument goes, to an expansive right to self-defence. Supporters of the doctrine do not necessarily use openly racist or sexist language (even though they do that too), but they nonetheless enact this rigid inequality. In a nutshell, they still argue from within this ‘logic of biology’.

**John:** Can you explain a bit more how the two logics are connected?

**Ntina:** Absolutely. My book argues that ‘civilisation’ is not one or the other of these logics, but rather precisely the oscillation between the two of them, their mutual entanglement. Take, for example, the ‘logic of improvement’, which as I said relies on the idea that capitalist modernity is desirable but also achievable for all. However, the question remained: who decides which aspects of capitalist modernity are decisive and if they have, indeed, been attained? Western international lawyers claimed that it was up to them to make this determination. This posture, though, is only theoretically and politically sustainable if we accept a certain superiority for the West. Without realising, we are now in the territory of the ‘logic of biology’, since the supposedly achievable, egalitarian character of capitalist transformation has slid into a strict hierarchy in which

it is only some people who set the standards and judge the performance of others. It is no coincidence that as semi-peripheral states and their lawyers grew in confidence, they challenged strongly this interpretation of 'who decides'. They more or less accepted the need to transform their societies, which after all served their own interests too, but they demanded that it should be up to them to decide if they have done so successfully. China trying (unsuccessfully) to unilaterally abolish consular jurisdiction in the early 20<sup>th</sup> century is a typical example of this process that involved the internalisation of the 'logic of improvement' and the partial challenge of the 'logic of biology'.

Another way you could think about the connection between the two logics is that it is almost impossible to distinguish between some objective preconditions for capitalist modernity and the culturally and historically contingent practices of statecraft of people who came to understand themselves as being 'Western' or 'white'. For example, in Chapter 5 I discuss the (in)famous Island of Palmas arbitral award, which today is known as the origin of the concept of responsibility being the grounds for sovereignty. Now, there is a grain of truth to this, but if one reads that award closely, the markers of this responsible sovereign are things like flying a flag, displaying a coat of arms, or mapping somewhat accurately (which is another word for inaccurately) the region. So what initially appears as a rock-solid manifestation of the modern capitalist state, turns out to be the culturally and historically contingent (and somewhat bizarre) markers of European statehood. This also works the other way around. For example, despite international law's and lawyers' opposition to slavery and the slave trade, the situation was somewhat different when it came to racialised chattel slavery in the Americas, such as in Haiti or the southern states of the US. Robert Knox has documented extensively the ways in which international law was mobilised to 'punish' Haiti, the first black republic established by former slaves who liberated themselves. Similarly, despite the persistence of US slavery well into the 19<sup>th</sup> century, nobody doubted that the US was a 'civilised' state, while the existence of slavery in Africa was often invoked as a proof of its supposed 'uncivilised' status. Now, one obvious way of interpreting this is through the 'logic of biology': the enslavement of black bodies by white masters was treated much less disapprovingly than slavery in Africa, and the mere suspicion of the existence of 'white slaves' (especially in the form of trafficking of white women) was enough to trigger hysteria. However, if we keep looking, capitalist modernity, built and sustained upon the transatlantic slave trade, emerges out of what seems to be 'biology'. International law and lawyers were much more tolerant toward slavery when it was an indispensable part of capitalist accumulation on both sides of the Atlantic, but anxious

about it when it represented a pre-capitalist mode of production, one that often stood in the way of capitalist transformation.

Overall, 'civilisation' is bifurcated but in an unstable manner. I need to clarify two things though. This instability does not mean that all lawyers, legal fields and legal arguments use the same 'mix' of biology and improvement. Conservative European lawyers in the 19<sup>th</sup> century were much more likely to emphasise biology, while progressive Third World lawyers after decolonisation were much more likely to emphasise improvement. Indeed, the struggles over the precise proportions of this mix have been immensely influential ones, both for the discipline of international law and even for the lives of actual people on the ground. The second clarification is that unlike other critical international lawyers, I do not treat this indeterminacy (primarily) as a terrain of argumentative freedom, but rather as the specific way in which international law is complicit with exploitation and domination.

**John:** On both those points – the conservative vs. progressive contestations around the 'mix', and international law's entanglement with exploitation – one really evocative story you tell is about the South West Africa 'saga' at the ICJ. Your reading of this (the evolution of Liberia & Ethiopia's arguments in the contentious case in particular, as well as the four advisory opinions) gives us a range of new insights and nuances. And from the perspective of hope in international law's emancipatory potential, it is pretty devastating. On one hand this was a story of Third World protagonists resisting domination by using international law while at the same time seeking to radically challenge and transform it. And amidst the manoeuvring at the UN and the back and forth to the ICJ, SWAPO was formed and the Namibian liberation movement was becoming increasingly radical. SWAPO were very conscious that 'victories in international law alone do not liberate a colonised people from their oppressors' and that the legitimacy of their struggle was 'quite independent of the niceties of international law'. They articulated the struggle against colonial-apartheid as a socialist struggle. They understood legal tactics and ICJ initiatives as subordinate to the larger political strategy. And so we might say that SWAPO and its allies (including Liberia & Ethiopia at the ICJ) got a lot right in resisting the logics of both racial hierarchy and capitalist imperatives, and insisting that racial capitalism itself was the problem to be overcome. And yet, on the other hand, in the way that they attempted to argue this they end up trapped back in the same contradictions of the standard of civilisation that you've explained. The result is that Namibian independence looks far less liberatory and anti-capitalist by the time it's achieved. Can you talk us through your analysis of

this process and how the 'civilisation' logics survived the decolonisation era and continued to shape the international legal arguments and events?

**Ntina:** Thank you for raising this point. The South West Africa saga at the ICJ is one of the most crucial and, I think, misunderstood instances of international legal struggle over decolonisation. Both at the time and today what is mostly remembered is the disgraceful reversal of 1966 when the Court decided that Liberia and Ethiopia had standing to bring this case, but not a legal interest to obtain a judgement. This was a wildly implausible distinction supported by a non-textual reading of the mandate agreement. Hence, I found the contemporaneous critique, articulated by Richard Falk and others, that this was a case of judicial conservatism to be more reflective of the broader legal debate at the time than of the specifics of this ruling. At the same time, renewed interest in the case has focused disproportionately on individual judges who are portrayed as villains or heroes and does not interrogate the legal arguments raised by both sides as arguments.

My own reading picks up the thread from the exemplary analysis of Siba Grovogui, who linked the whole ordeal to international law's complicity with racial capitalism. I argue that in their written submissions for the 1966 case, Liberia and Ethiopia attempted a ground-breaking experiment: they tried to use the language of 'civilisation' against the grain. Even though they stuck with the language of the 'civilising mission', which following the 1950 ICJ advisory opinion they conceptualised as an internationally-determined concept, they argued that the specific conditions of racial capitalism in Namibia were, in fact, in violation of international law. Their submissions offered a detailed description of the exploitation and dispossession of black Namibians and the reliance of white settlers, South African and international capital on this brutal exploitation of black bodies and Indigenous lands. However, for a number of reasons, including the fact that by using the language of 'civilisation' they had already conceded that black Namibians were in need of guidance and tutelage, they very quickly abandoned this argument during the oral proceedings. Hence, I argue that in a sense the legal debacle that was the 1966 case had already taken place before the majority's disastrous ruling. Similarly, I show that the 1971 ICJ advisory opinion, which is often praised as a reversal of the Court's position and as a victory against institutionalised racism, was a failure more than a success. Indeed, both supportive submissions and the Court totally marginalised any discussion about how apartheid was enabling extreme exploitation and adopted the abstracted idiom of the prohibition of discrimination, centring 'gifted' black Namibians as the primary victims of segregation.

In other words, the effort to use international law against itself as a vehicle to challenge racial capitalism failed.

Subsequently, Western states set up an informal negotiating group (the Western Contact Group) that gained in significance and managed to both bypass the UN and to have its workings endorsed by the UN Security Council. The Western Contact Group played a pivotal role in the drafting of Namibia's constitution, a document that was designed to ensure that political independence and formal equality would not challenge the political economy of the state, including the property rights of the white minority and the interests of transnational capital. In other words, Namibia's sovereign status was subject to the 'logic of improvement'. Therefore, 'civilisation' survived the process of decolonisation and was even central to juridical events that are commonly seen as victories of a more just, egalitarian international legal order.

**John:** It is a stark illustration of the all too familiar story of the postcolonial state's self-determination and sovereignty being delimited and diluted in quite concerted and specific ways by international institutions and capital. You show another manifestation of that in your chapter on the 'unwilling and unable' doctrine in the context of newer forms of Western imperialism through the war on terror and extraterritorial use of force, if you want to tell us more about that? I was also struck by the implications of your conclusions in that chapter and the book more broadly for the current conjuncture: if 'civilisation' imaginaries continue to shape our (supposedly collapsing) liberal international order today, and if its seemingly opposed logics of improvement and biology are actually entwined and mutually reinforcing, then the liberal order and the more openly racist and sexist authoritarianism threatening it are simply different faces of the same (capital-accumulating) beast, rather than polar opposites?

**Ntina:** That's a very good way of putting it. Early in the book, I make clear that the object of my critique is not the liberal international legal order itself, but rather the intersection between international law and capitalism. This is the case for a number of reasons both political and intellectual. Politically speaking, focusing one's critique exclusively on liberalism feels a bit out of touch in 2020. Intellectually, I suspect that when critical international law took off in the 1990s, 'liberalism' was a more acceptable object of critique (and of criticism) in comparison to capitalism, the study or even naming of which went out of fashion for a good 20 years. In this sense, I do posit that liberal projects of modernisation exist in a continuum with more overt projects of violent, racist subjugation, but I do not do so primarily in order to attack liberalism (even though this is an inescapable implication). I am mainly hoping to redirect our

critical gaze toward the material relations of domination and exploitation on a global scale that have often been justified through liberalism and now are increasingly justified through other means.

I think that the ‘unwilling or unable’ doctrine is a good way of understanding the limitations of centring one’s critique exclusively on ideology, partly because the doctrine has supporters (and opponents) that cannot be easily classified as liberal, conservative, etc, and, more importantly, because the type of reform that, I argue, is promoted through the doctrine is not liberal at all. Let me take a step back and explain. For those lucky enough not to be familiar with the debate, the ‘unwilling or unable’ doctrine suggests that a state (which somewhat facetiously is called the ‘victim state’) can use force in the territory of another state (the ‘territorial state’) to respond to an armed attack from a non-state actor, even if the territorial state does not control the non-state actor at all. Rather, it suffices that the state is ‘unwilling or unable’ to deal with such an armed attack. This is at least the ‘textbook’ definition of the doctrine. However, if one reads closely many of its most prominent advocates, one discovers a slightly different story, one that falls into the familiar patterns of ‘improvement’ and ‘biology’. Scholars such as Ashley Deeks establish ‘unwillingness or inability’ not based on a state’s concrete record in stopping specific armed attacks but rather based on whether a state is ‘known’ to be ‘weak’, indexes of ‘state failure’, or being governed by a ‘dictator’. In other words, not all states are equally likely to be ‘unwilling or unable’. This aspect of the argument rehearses the known tendency of international law to create and legitimate hierarchies between political communities based on supposedly immutable differences. It is, in a nutshell, an example of the ‘logic of biology’ in motion. Indeed, the ‘victim state’ is almost always a powerful state of the Global North and the ‘territorial state’ a state in the Global South. Even cases of South to South invocations involve stark power differentials. Simultaneously, the ‘logic of improvement’ is ever present in the writings of many advocates of the doctrine. Adopting the politics, political economy and even aesthetics of the ‘war on terror’ goes a long way toward avoiding the label of unwillingness and inability. After all, the ‘war on terror’ has been an important strategy of capitalist accumulation in the last 20 years that has benefited a particular faction of US capital especially. Redirecting scarce resources toward building a national security state or even directly accepting regional US hegemony are examples of, at the very least, willingness. Therefore, we can see that the demand for states, especially in the Global South, to transform into ‘ideal personifications’ of capital continues to be present in international legal argumentation, even in areas such as *jus ad bellum* that are not transparently related

to the global political economy. In fact, this is something I am determined to examine in more detail.

**John:** That's great. One last thought and question so, for us to think with you about the trajectories of critical international legal work in the current conjuncture. Your book is a Marxist TWAIL text. In his introduction to our first issue of the *TWAIL Review* journal, Tony Anghie refers back to Chimni's path-breaking *International Law and World Order*, suggesting it was prophetic that he would write a book on Marxism and international law in the early 1990s just as socialism was being declared dead by the mainstream. What we now know as 'Third World Approaches to International Law' began to take shape soon after. Chimni and his work were part of that, and Marxism and political economy have always been present in TWAIL, though not predominant. You mention in the book that in the post-2008 conjuncture, more TWAIL scholars have been shifting to focus more explicitly on capitalism and not 'just' on other structures and manifestations of imperialism. Thinking about the burning planet and now the aftershocks of the coronavirus pandemic, what would you say the politics, intellectual projects and research agendas of this tendency might or should look like over the coming years?

**Ntina:** *International Law and World Order* holds a strange personal resonance for me. My father joined the Greek Communist Party in the early 1990s, which was (to put it mildly) a very strange thing to do then. *International Law and World Order* feels like the intellectual equivalent of this: an act of defiance, even outright stubbornness, when Marxism and, more importantly, socialism and communism were going rapidly out of vogue. I think I can come up with reasonably good arguments about the intellectual and political value of such acts of persistence-against-all-odds, but at the end of the day I would just be rationalising something much more deeply-felt, a gut feeling about the enormity of such seemingly small acts.

Now, to the substance of your question: Marxism has, indeed, been an indispensable but minority partner in the TWAIL space from the beginning. Marxists have contributed, in my opinion, two important insights to TWAIL and to the broader turn toward the history and theory of international law. First, Marxists have demanded more clarity from the TWAIL critique of imperialism as foundational of international law. Robert Knox's doctoral thesis, for example, has pointed out that even at the height of Third Worldism there existed at least two competing conceptualisations of imperialism in international law – a radical one that linked imperialism to capitalism and challenged both, and a conservative one that only challenged Western geopolitical

and economic supremacy while ignoring or embracing global capitalism. Indeed, international law is imperialism all the way down, as Anghie has powerfully asserted, but the legal and political implications of this aphorism vary greatly depending on what you think imperialism is in the first place. Secondly, as you also mention, Marxists have tried to centre questions of global political economy and relativise what was seen (rightly or wrongly) as TWAIL's emphasis on 'cultural' imperialism. My own book attempts a comradely critique of Anghie's 'dynamic of difference' thesis. His argument strikes me as intuitively correct but as somewhat overinclusive: almost all legal systems (Occidental and not) can be said to enact some form of this 'dynamic of difference', which raises the question of what is distinctive about Western international law as it came to be in the late 19<sup>th</sup>-century. I argue that international law's entanglement with global capitalism and the historically unique global reach of the latter make Eurocentric international law singularly important in a way that other inter-national legal systems have not been. Secondly, I posit that this 'dynamic of difference' is historically specific and emerges in this constant push-and-pull between the 'logic of improvement' and the 'logic of biology'.

Early in the book I clarify that my discussion of this 'logic of biology' will exclusively involve argumentative tropes about race, gender or childhood, and not race or gender as material relationships of exploitation and domination. This was, of course, a somewhat crude distinction, but one that was necessary for my project. I now want to move on to studying the ways in which international law has interacted with race and racism as 'real life' material relations. I am especially interested in the role of legal fields that are often considered to be 'colour-blind', such as international investment law or international trade law, and how they enact what DuBois called 'whiteness as the ownership of the earth'.

~