

BOOK SYMPOSIUM: *CAPITALISM AS CIVILISATION*

MATERIALISM, CULTURE AND THE STANDARD OF CIVILIZATION

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I. INTRODUCTION

Ntina Tzouvala's book *Capitalism as Civilisation: A History of International Law*¹ (*CaC*) is a remarkable feat in international legal scholarship, not only for its core insight that the 'standard of civilization', far from being a relic of the past, remains ubiquitous and all-pervasive, but also for the way that the book engages with different theoretical and methodological approaches to international law without being polemical and, yet, still holding its own. *CaC* attempts to understand international law not in isolation but as part of its broader history, structure and, most importantly, embeddedness in political economy. Tzouvala demonstrates that 'civilization' is deeply anchored into international law's 'grammar and syntax',² making the relative decline in the use of the term largely inconsequential. Moreover, treating "civilization" as an 'argumentative pattern'³ allows Tzouvala to explore the contradictions, indeterminateness and persistence of "civilization" both historically and in contemporary practise.

What makes Tzouvala's work distinctive is that she conceives the argumentative structure of "civilization", with all its instability, oscillations and contradictions, as a reflection of the material realities of capitalism, a system that itself produces contradictory patterns of homogeneity and

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¹ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

² *Ibid* 14.

³ *Ibid*.

unevenness. *CaC* is therefore a critique of the *internal* argumentative structure of "civilization" – and a powerful one at that. More fundamentally, though, it is also a critique of 'capitalism and the way in which its contradictions structure an international legal argument'.⁴ While Tzouvala comes to this from a rigorous Marxist perspective, she also strikes up a conversation with, and draws inspiration from, other critical traditions, most notably critical legal studies (CLS) and its international law cousin New Approaches to International Law (NAIL), as well as Third World Approaches to International Law (TWAAIL). Together, *CaC* adds to the growing body of Marxist international legal scholarship by offering a sombre yet attentive material-institutional account of international law and its role in mediating the contradictory imperatives of capitalist relations.

For those of us who have followed Tzouvala's work, her effort to fuse different strands of critique comes out prominently, as does her unwavering commitment to fairer material outcomes.⁵ At a time when neoliberal hegemony, authoritarianism and racial injustice seem to have entirely co-opted the institutions of our daily lives, Tzouvala's call for a comprehensive, structural critique is most welcome and indeed urgent. In this regard, *CaC* is truly a reflection of the scholar that Tzouvala is: someone who is not afraid to confront her own contradictions⁶ but is genuinely anxious about the material ills of our society.

After going over the core argument of the book in Section II, I explain in Section III *CaC*'s engagement with Marxist critique of international law, its relationship with imperialism and colonialism and what kind of

⁴ Ibid 34.

⁵ Some of her other recent reflections on different strands of critique include Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27 *European Journal of International Law* 215–233; Ntina Tzouvala, 'Salvaging the "RF": Radical Feminism and Trans Exclusion' (Critical Legal Thinking, 3 February 2021) <<https://criticallegalthinking.com/2021/02/03/salvaging-the-rf-radical-feminism-and-trans-exclusion/>> accessed 24 April 2021; Ntina Tzouvala, Review Essay: Settler Colonialism, Race, and the Law: Why Structural Racism Persists (2021) 21(2) *Melbourne Journal of International Law* (forthcoming).

⁶ She has mentioned in a number of book launch discussions that *CaC* is a conversation with her old self and the 'Marxist Positivist' approach she adopted when writing her PhD, from which this book emerged.

conversations that starts with other critical traditions. Finally, in Section IV, I offer some reflections on what it means for the emancipatory role of international law that it cannot resolve the contradictions of capitalism.

II. THE STANDARD OF CIVILIZATION: BETWEEN 'EXCLUSION AND CONDITIONAL INCLUSION'

Tzouvala's work on "civilization" sits alongside a number of other thorough contributions that have emphasized how the very foundations of international law rest on a divide between Europe and the rest, rooted in conceptions of racial and cultural superiority.⁷ As Anghie writes, "civilization" was a means of rejecting 'non-Western values, of non-Western identity and even of legal personality'.⁸

Above all else that 'civilization' might mean, it was, as Koskenniemi tells us, fundamentally a rhetorical devise, a 'short hand'⁹ employed by lawyers to legitimize an almost permanent exclusion of certain political communities from the realm of international law and, consequently, for normalizing patterns of inequality and hierarchy within the international legal system. In much the same way, Tzouvala's starting point is her "lawyerly" intuition that rather than a 'unitary legal concept', "civilization" is best understood as a 'mode of legal argumentation' that comes with lasting consequences.¹⁰

As an 'argumentative pattern', "civilization" offers reasons to justify and explain the 'unequal distribution of rights and duties under international law'.¹¹ Moreover, "civilization" is neither coherent nor stable, but rather is

⁷ See e.g. Anthony Anghie, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 Villanova Law Review 887; David P Fidler, 'The Return of the Standard of Civilization' (2001) 2 Chicago Journal of International Law 137; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge University Press 2016).

⁸ Anghie, *Imperialism* (n 7) xii.

⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 103.

¹⁰ Tzouvala, *Capitalism as Civilisation* (n 1) 2.

¹¹ *Ibid* 33.

riddled with internal contradictions. These contradictions, however, do not take away from the normativity and potency of the concept as a means to stratify, prioritize and separate societies. "Civilization" constantly oscillates, Tzouvala writes, between, on the one hand, a distaste for and suspicion of the non-Western world's 'equal inclusion' on account of its perceived 'racial or cultural inferiority' and, on the other hand, a promise of redemption through wholesale remaking of its political, social and economic institutions in the image of 'capitalist modernity'.¹² The book captures this duality through the twin "logics" of "improvement" and "biology", the former inspiring optimism that it is possible – if not imperative – for non-Western communities to reform themselves and become worthy of membership in the civilized world, while the latter endlessly delays and impedes this membership on account of insurmountable differences. These two logics do not work separately; rather, they 'co-exist and even collapse into each other' as legal argumentation evolves and responds to particular situations.¹³

In other words, "civilization" is not simply a means of keeping certain societies 'beyond the pale of civilization',¹⁴ but also and equally a far-reaching, transformational agenda of diffusing, consolidating and structuring in the periphery a particular form of social relations centred around the capitalist mode of production, with all its attending institutions and rules. It is a form of both 'exclusion and conditional inclusion'.¹⁵ How does one explain this contradictory and opposing set of logics at play?

It is in posing and answering this particular question that *CaC* makes a distinctive break from other scholarship. Tzouvala argues that the oscillatory trajectory of "civilization" is not a product of bad lawyering or, for that matter, of the "indeterminacy" of law and legal concepts alone, 'but rather a feature of its operation within the broader structures of international law'¹⁶ – structures that are deeply rooted in the contradictions of capitalist expansion itself. Capitalism's inherent tendency for limitless spatial expansion and the

¹² Ibid 19.

¹³ Ibid 211.

¹⁴ Anghie, *Imperialism* (n 7) 65.

¹⁵ Tzouvala, *Capitalism as Civilisation* (n 1) 2.

¹⁶ Ibid 214.

'need of a constantly expanding market for its products'¹⁷ leaves in its wake a situation of 'combined and uneven development'¹⁸ that is invariably rife with 'conflict and contingency'.¹⁹ Conditioned by the social norms that capital sustains, the contradictions of "civilization" are nothing but a reflection of those 'very real contradictions of capitalism'.²⁰ By locating the contradictions of "civilization" within the broader structural constraints of capitalism – a system rooted in exploitation, domination and violence – Tzouvala brings a refreshingly materialist lens to the study of international law and its relationship with capitalism.

Studying *CaC* allows us to see the "civilizing mission" as a continuous process of making and re-making of the non-Western world that did not end with the formal denunciation of colonialism, but instead acquired newer and subtler forms through expanding imperial relations. In other words, while the 'structure' of the concept of "civilisation" has stood the test of time unchanged, its specific content has evolved in response to the ever-changing sensibilities of our times.²¹ International law and institutions assumed a central role in capitalist state-building and in managing capitalism's contradictions.

From here on, the book tracks the evolution and persistence of 'civilization' within the history of the discipline from the 19th century to our present day. Chapter 2, among other things, crucially highlights the role of non-Western lawyers including figures like Carlos Calvo who were too quick to accept the logic of civilization "wholeheartedly embracing the process of capitalist transformation" within their territories.²² Chapter 3 studies the League and the Mandate System and foregrounds the work of expertise within those institutions such that the explicit use of the term 'Civilization' was no longer needed. Chapter 4 revisits the infamous South West Africa cases to show

¹⁷ Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (first published 1848, Samuel Moore (tr), Marxists Internet Archive 2010) 16.

¹⁸ BS Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21 *European Journal of International Law* 57, 66.

¹⁹ Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31 *Yale Journal of Law & the Humanities* 389, 392.

²⁰ Tzouvala, *Capitalism as Civilisation* (n 1) 35.

²¹ *Ibid* 5.

²² *Ibid* 84.

how third world lawyers made a radical attempt to use 'Civilization' to their advantage, but ultimately failed to do so. Finally, chapter 5 brings the concept of 'Civilization' closest to our generation and applies it to the war on terror and one of its more specific illustrations: the "unwilling and unable" doctrine. Tzouvala's concluding chapter ties the different strands of the book together and calls for a critique of the law while recognizing that it is perhaps one amongst several other logics that makes the unequal and inhabitable world around us possible.

III. MATERIALISM, INDETERMINACY AND CULTURE

1. Finding Peace Between Deconstruction and Marxism

One of the major strengths of *CaC* lies in disentangling deconstructionist and Marxist critiques. CLS and Marxist approaches to international law have often spoken past each other, if not directly questioned each other's explanatory potential.²³ As David Kennedy himself anticipated from within the CLS movement, Marxists find the indeterminacy of CLS divorced from materiality and from 'real problems and real solutions, real politics and real suffering'.²⁴ The internal critique of the law that CLS pursues, argues Chimni, is ahistorical and apolitical, invisibilizing international law's complicity in colonial and imperial exploitation. In other words, Marxists are deeply sceptical about the 'politics of deconstruction in and for law', claiming that law invariably determines particular outcomes when it concerns the oppressed.²⁵ On the other hand, CLS scholars have decried Marxists for being rigid and overly deterministic, as well as for thinking in terms of the "totality" of social relations and ignoring the contingency, variability and, most importantly, the relative autonomy of the law. Though CLS scholars have

²³ Akbar Rasulov, 'CLS and Marxism: A History of an Affair' (2014) 5 *Transnational Legal Theory* 622.

²⁴ David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 *New York Journal of International Law and Politics* 335, 464. See also the discussion in BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017) 262.

²⁵ Tzouvala, *Capitalism as Civilisation* (n 1) 37.

been sympathetic to Marxist theory and vocabulary, they have always maintained a certain distance.²⁶

CaC engages with CLS/NAIL and especially its most persuasive proponents, David Kennedy and Martti Koskenniemi. Broadly put, the central insight of the CLS/NAIL movement is that law and international law is wholly internally indeterminate and contradictory and therefore cannot really determine legal outcomes; that international law constantly oscillates between 'concreteness' and 'normativity' and is hopelessly both 'over- and under-legitimizing'.²⁷ Legal arguments can thus justify and support any outcome. These contradictions in international law and legal argumentation arise for Koskenniemi because of the contradictions of the political form of liberalism and international law's embeddedness within it.

While Tzouvala accepts the indeterminacy thesis, she disagrees that contradictory patterns of legal argumentation are due to contradictions of liberalism. Rather, she argues that they reflect the inherent contradictions of capitalism as a system of social relations that is marked by the simultaneous homogenization and differentiation of communities. China Miéville has mounted a similar criticism, stating that Koskenniemi cannot explain *why* these patterns of contradictions are embedded within the specific legal form that is international law. Miéville found the indeterminacy and contradiction of international law to be a product of the contradictions of the "commodity form", which structures both the content and the legal form of international law.²⁸ Tzouvala does not take this Pashukanian path of reducing the essence of the law to the essence of the commodity form. Instead, she argues that the indeterminacy and contradictions of "civilization", while indeed structured by global patterns of contradictory capitalist relations, provide interpretive possibilities for legal argumentation, however limited they may be. In this

²⁶ Hunter (n 19).

²⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 67.

²⁸ China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 48-60.

regard, Tzouvala does not locate the essence of the law in the essence of capitalism, but instead recognizes the co-constitutive nature of the two.²⁹

Going back to Koskenniemi, Tzouvala makes the following claim:

It appears to me that these objections [from Marxists] are correct so far as they are directed not to deconstruction and the indeterminacy thesis as such, but rather to the conclusions Kennedy and Koskenniemi drew from it.³⁰

In other words, the indeterminacy thesis in and of itself does not take away anything from the structuralism of Marxist approaches. Rather, it only shifts the focal point from whence such indeterminacy arises to the contradictions and unevenness of the capitalist system. No amount of lawyerly "self-reflexivity" or "disciplinary will" is likely to make those contradictions go away, because such lawyerly activity takes place within the broader structures of capitalist social relations. A Marxist critique thus limits the terrain of possibilities for progressive forces that indeterminacy might otherwise appear to offer.

To be fair, it is not as though Koskenniemi, or for that matter CLS broadly speaking, is blind to overarching structures. In fact, Koskenniemi himself has pointed to the persistence of 'structural bias' in the institutions of international law that operates to tilt the balance of scales towards particular preferences and outcomes.³¹ However, he provides no clear answer as to what those preferences are or how are they interact with legal argumentation. Tzouvala reframes Koskenniemi's thesis to argue that indeterminacy and structural bias should not be seen as operating on different planes, or for that matter in different institutional settings, but that they inhere in legal argumentation itself: 'Bias and indeterminacy [...] are joined at the hip'.³²

This is where Tzouvala's 'materialist framework for understanding legal indeterminacy'³³ offers great potential as it situates the indeterminacy of legal

²⁹ For a different view, see Daniel R. Quiroga-Villamarín, 'Victorian Antics: The Persistence of the "Law as Craft" Mindset in the Critical Legal Imagination' (2021) 13(1) *European Journal of Legal Studies* 101.

³⁰ Tzouvala, *Capitalism as Civilisation* (n 1) 38.

³¹ Koskenniemi, *From Apology to Utopia*, (n 27) 607.

³² Tzouvala, *Capitalism as Civilisation* (n 1) 215.

³³ *Ibid* 38.

texts and arguments within the concrete material conditions of life. In a truly Marxist fashion, she frames the specific form that indeterminacy assumes, in this case the imperatives of capitalist modernity with all its contradictions, as the fullest expression of international law's bias. While this opens up radically different ways of perceiving international law's complicity in exploitation and violence, it also raises some difficult questions of method and approach.

The task of "reconciliation" between Marxism and deconstruction is fundamentally fraught with difficulties. For one thing, legal texts and material processes do not necessarily correspond to each other in concrete situations. Material processes of change and transformation, when they do transpire, are often a product of radical movement and struggle, the nature and momentum of which might surpasses the ability of language to adapt. This is not to suggest that language is static, but that 'languages change more slowly than do economic, political, or religious systems'.³⁴

To be sure, Tzouvala fully recognizes the problem of 'trac[ing] legal indeterminacy back to extra-disciplinary, "biggest picture" structure'.³⁵ However, she does not truly engage with these concerns in the book. She mentions Jacques Derrida and his tryst with "text" and "material institutions" only in passing and in a highly decontextualized manner. Derrida's acknowledgement of materialism, which Tzouvala accepts as his embrace of outside structures, does not fully account for the fact that, for Derrida, it was always through 'texts' that one could discern reality and thus also partly make it. Moreover, Derrida's relationship with Marxism is anything but straightforward. For instance, *Specters of Marx*,³⁶ Derrida's attempt at situating his own project within Marxist discourse, reveals an extremely ambivalent and inconsistent posture. Some have even pointed out that Derrida's reading essentially strips Marx's works of their most central tenants, making emancipation itself a problematic goal.³⁷

³⁴ David R Dickens, 'Deconstruction and Marxist Inquiry' (1990) 33 *Sociological Perspectives* 147, 156.

³⁵ Tzouvala, *Capitalism as Civilisation* (n 1) 16.

³⁶ Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (first published 1993, Routledge 2006).

³⁷ Eleanor Macdonald, 'Deconstruction's Promise: Derrida's Rethinking of Marxism' (1999) 63 *Science & Society* 145.

Scholars who might further engage with *CaC* need to acknowledge this nuance but also ask what implications it has for the way we perceive exploitation, oppression and international law's role in both. The danger, of course, is that if the task of linking indeterminacy with structuralism is done in an abrupt manner, there is every chance that the radical potential for critique that both these approaches offer is considerably impoverished.

These remarks do not, however, detract anything from Tzouvala's book. Bringing the insights of Marxism to bear on deconstruction is already a significant step in correcting the misperception that they are fundamentally misaligned. This has implications not only for abstract theory but also for the community of practising international lawyers. *CaC* essentially holds up a mirror to the work that lawyers – especially progressive lawyers – do in the real world by demonstrating the inherent limitations and contradictions within which they operate, and which are almost impossible to navigate. In other words, *CaC* not only provides a frame for 'dissecting and problematizing all the various practices and experiences'³⁸ that the legal community routinely encounters, but also unpacks those moments of despair and confoundment by connecting them to persistent overarching structures.

2. Sharpening the Tools of Marxist Critique – A Focus on Primitive Accumulation

Over the past two decades, there has been growing engagement with Marxist approaches to international law, perhaps because the ills that beset our societies – not least, enduring poverty, economic exploitation, inequality and racial subjugation – have increasingly laid bare the inadequacy of conventional thinking.³⁹ Marxist international lawyers have thus adopted the lens of global class struggle, foregrounding the role of ideology and, more

³⁸ Akbar Rasulov, 'From Apology to Utopia and the Inner Life of International Law' (2016) 29 *Leiden Journal of International Law* 641, 647.

³⁹ For an extremely useful resource, see Robert Knox, 'Bibliography of Marxist Approaches to International Law' (Oxford Bibliographies, 28 March 2018) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0163.xml>> last accessed 24 April 2021.

recently, the process of interpellation to explain the impact of international law in the distribution of rights, burdens, power and wealth.⁴⁰

Despite this rich literature, what remains overlooked is Marx's crucial claims regarding law's structuring of imperial and colonial violence.⁴¹ Almost a decade ago, Mark Neocleous pointed out how only a handful of international lawyers have carefully studied international law's enduring complicity in colonialism and imperialism, especially from a Marxist lens.⁴² He noted that Marx's theory of 'primitive accumulation' – a process central to the very foundations of capitalist relations and territorial expansion – has remained relatively undertheorized, taking away some of the critical edge in contemporary Marxist scholarship.

Tzouvala's description of Marx's critique of the capitalist mode of production as the singular pursuit of extracting surplus-value, together with her careful sketch of his less-theorised concept of 'primitive accumulation' and its relationship with international law, goes a long way towards correcting that omission. After outlining the extreme violence, exploitation and dispossession that marked the birth of capitalism as a historically-specific mode of production, she focuses on those writings of Marx that centrally feature the interrelationship between colonialism and primitive accumulation.⁴³ Crucially, Marx used 'primitive accumulation' to denote the process through which capital and the state, with all its legal instrumentalities of (extra-economic) force came together, in the first step, to separate workers from the ownership of their property and, as a second, to 'free' them to the

⁴⁰ See e.g. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000); Chimni, *International Law and World Order* (n 24); Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press 2019).

⁴¹ Notable exceptions include Umut Özsu, 'Grabbing Land Legally: A Marxist Analysis' (2019) 32 *Leiden Journal of International Law* 215; Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 306.

⁴² Mark Neocleous, 'International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization' (2012) 23 *European Journal of International Law* 941.

⁴³ Tzouvala (n 1) 23.

disposition of the market. Divorced from their own means of production, workers were left with no choice but to sell their labour power.⁴⁴

Capitalist accumulation did not, of course, stop at the borders of the Western world, but was brought to bear on the colonies as well. In fact, the crisis of capitalism in Europe necessitated the expansion of capital to the colonies, which Europe then sought to transform into social spaces that would be safe and productive for capital accumulation. For Marx, the very nature of the colonial enterprise and the forms of violence it engendered in the colonial territories – enslavement, plunder, conquest – were, to quote a familiar line, nothing other than the 'dawn of the era of capitalist production' and 'chief moments of primitive accumulation'.⁴⁵

Tzouvala goes a step further, positing that primitive accumulation and the violence it entails is not a thing of the past. Capitalist relations of production, once put in place, constantly produce and "reproduce" themselves in different spaces and territories. As Rosa Luxemburg most articulately put it in the context of European colonialism, violence 'has been a constant method of capital accumulation as a historical process, not merely during its emergence, but also to the present day'.⁴⁶ To illustrate not only the persistence, but also the adaptability of capitalist accumulation, Tzouvala points to the continuous process of expropriation and dispossession of land in the context of 'settler colonialism'. Accounts of settler colonialism, with its centrality of land dispossession, offer a way to think about primitive accumulation not as part of the 'pre-history'⁴⁷ of capitalism, but as a permanent and continuous process facilitated by the explicit or implicit violence of the state.

Here, Tzouvala distances herself from Pashukanian "commodity form" theory of law, which posits that the legal form is a mere reflection of, and derives from, the relationship between commodity owners.⁴⁸ Since the form

⁴⁴ See Karl Marx, *Capital: A Critique of Political Economy*, vol 1 (first published 1867, Ben Fowkes tr, Penguin Books 1990) pt VIII.

⁴⁵ Ibid 915.

⁴⁶ Peter Hudis and Paul Le Blanc (eds), *The Complete Works of Rosa Luxemburg*, vol 2 (George Shriver tr, Verso 2011) 267.

⁴⁷ Tzouvala, *Capitalism as Civilisation* (n 1) 27.

⁴⁸ See Miéville (n 28) 75-97.

of commodity relations only arose as a result of the capitalist system, for Pashukanis, law did not exist in pre-capitalist societies. This misses the point that law and 'legal, semi-legal and para-legal violence of the state' was central to the very constitution of capitalist relations.⁴⁹ Chimni also points to this crack in Pashukanis conception of the law: "He was forgetful that the state with the authority to legislate, and other legal institutions, was already present in the transition from feudalism to capitalism".⁵⁰

Still, Tzouvala dismisses Pashukanis' account of the legal form a bit too abruptly. Despite the many imperfections in Pashukanian thought, his central insight that law and capitalism are structurally connected provides a useful lens through which one can also map the uneven and fragmented development of international law – a proposition that animates the book at hand. Moreover, his account of the legal form as encapsulating the idea of formal legal equality helps to explain why law, or for that matter international law, assumes a privileged form of regulation. This perhaps does not amount to 'thingifying' either international law or capitalism, as Tzouvala suggests.⁵¹ To the contrary, as Knox points out, Pashukanis offers a 'good explanation for the haphazard and uneven development of international law'.⁵² In this regard, even though Pashukanis does not feature prominently in Tzouvala's work, many of the claims that she makes in the book, especially with regard to the expansion and development of the capitalist mode of production, can be explained through his conception of the legal form.

That aside, Tzouvala's revisiting of Marx's conception of primitive accumulation allows us to recognize "civilization" as the fundamental link between international law, colonialism and capitalist expansion. Marxist scholarship that aims to extrapolate on the continuing legacies of imperialism needs to account for the variegated but equally violent patterns of primitive accumulation that transpire in several parts of the world. Many of the current

⁴⁹ Tzouvala, *Capitalism as Civilisation* (n 1) 25.

⁵⁰ Chimni, *International Law and World Order* (n 24) 467.

⁵¹ Tzouvala, *Capitalism as Civilisation* (n 1) 41.

⁵² Robert Knox, 'Imperialism, Commodification and Emancipation in International Law and World Order' (EJIL:Talk!, 29 December 2017) <<https://www.ejiltalk.org/imperialism-commodification-and-emancipation-in-international-law-and-world-order/>> accessed 24 April 2021.

discourses on neo-colonialism or global imperialism, for instance, could benefit greatly from the historical and analytical perspective that accounts of primitive accumulation bring to the debate.

Although Tzouvala does not take a global class approach to the "standard of civilization", her historical materialist approach to the concept opens up that opportunity. One could shift the lens slightly to take into account the historical and international dimension of the division of labour that "civilization" brings about and, by doing so, expose the historical role of international law in the co-constitution of exploitation and domination.⁵³ Such an approach would further allow a tracing of the development and history of "civilization" from the perspective of a continuing class struggle. In other words, *CaC* opens up a number of different avenues through which a Marxist analysis can be brought to bear on international law and its argumentative patterns.

3. *Pushing Against TWAIL and Yet Still Grounding Gender, Race and Sexuality*

The historical-material lens adopted in Tzouvala's book throws up a challenge but also an opportunity for other critical approaches, most notably TWAIL. Despite sharing a broadly similar agenda of resisting varied forms of exploitation and domination, TWAIL and Marxist scholars have different starting points and very different frames for analysing international law's complicity with imperialism. TWAIL's conception of both international law's history and its present dynamics is rooted in the idea of imperialism of "culture", where "civilization" is primarily viewed as a "bearer of cultural differentiation and antagonism".⁵⁴ This has been expressed most persuasively in Anghie's 'dynamic of difference': 'to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as "universal" and civilized and the other as "particular" and uncivilized'.⁵⁵ Crucially tied to this cultural differentiation is the idea of international law as fundamentally

⁵³ For a class approach, see Akbar Rasulov, 'The Nameless Rapture of the Struggle: Towards a Marxist Class-Theoretic Approach to International Law' (2010) 19 *Finnish Yearbook of International Law* 243; Chimni, 'Prolegomena' (n 18).

⁵⁴ Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

⁵⁵ Anghie, *Imperialism* (n 7) 4.

ordered around a racial hierarchy of domination by Western communities over non-Western ones. Race and culture have therefore informed the bulk of the scholarly tradition within TWAIL and the post-colonial space.⁵⁶

Marxist scholars, on the other hand, have described the role of international law as primarily that of mediating the process of capitalist expansion. Accounts of race and racialization do not feature prominently. Even Chimni, who identifies himself with both the TWAIL and Marxist traditions, has assigned primacy to the 'logic of capital', as opposed to territory or culture, in determining international law.⁵⁷ As Knox points out, within the Marxist discourse, race and racism 'tend to be understood as counterposed to processes of capitalist accumulation'.⁵⁸ This has created a widening gap between TWAIL and Marxist scholars who have, unwittingly perhaps, looked past each other, dampening some of the radical potential that a combined focus could bring.

The distinctiveness of *CaC* and Tzouvala's work more broadly lies in the fact that, while she is firmly rooted within the Marxist tradition, issues of race, racialization and gender are equally important to her thinking. Her study on the standard of civilization interrogates these relationships by locating them within the context of a historically specific form. She relates European international law to the 'rise and global (but unequal) spread of capitalism' as a way to capture the historical specificity of this particular form as privileged regulation. Drawing from Third World Marxist scholars, especially Samir Amin, Tzouvala argues imperial domination and culturally superior modes of differentiation have not been specific to Europe alone. On the contrary, such

⁵⁶ See Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 195. Yet, it is also true that TWAIL's engagement with questions of race can do much more. See James Thuo Gathii, 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other' (2020) 67 *UCLA Law Review* (forthcoming); Tzouvala, Review Essay (n 5).

⁵⁷ Chimni, *International law and World Order* (n 24).

⁵⁸ Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 *London Review of International Law* 81, 100.

modes of exclusion have been a mainstay of many civilizations around the world.

What is noteworthy about "civilization" as a specifically European project, then, is not so much that it has sought to universalize the cultural specificities of Europe and exclude those communities that did not conform to it. Instead, as she notes elsewhere, it is that it 'assisted in the construction of a new, global hegemony: that of European capital' and the specificities of that particular mode of production.⁵⁹ By drawing our attention to the dynamics of capitalist exchange and production, Tzouvala pushes TWAIL scholarship to confront, if not fully embrace, the Marxist critique. In this, she joins a range of other critical international lawyers who have pushed against what they perceive as overly "naturalistic" and "idealistic" accounts of international law and imperialism in TWAIL scholarship. Haskell, for instance, decries TWAIL for falling into the same Eurocentric trap that it seeks to challenge and argues for a radically materialist account of the law and its relationship to capitalist production.⁶⁰ Knox, on the other hand, reframes Anghie's thesis towards a 'materialist' 'dynamic of difference', centring the role of capital accumulation within it.⁶¹ Rose Parfitt similarly argues that Anghie underestimates the extent to which 'sovereignty' came to be 'economized' by international law, such that the legal subjectivity of the non-Western world was made wholly contingent upon its capacity and willingness to transform itself in the image of a capitalist state.⁶²

Tzouvala, however, does not stop at that. Her narrative evinces deep reflection on how race, gender and sexuality provide the necessary justifications for the continued presence of the concept of "civilization" in international law. She examines these categories as argumentative tropes that are used by international lawyers to constantly infantilize, racialize and feminize non-Western communities – thus rationalizing the unequal

⁵⁹ Ntina Tzouvala, 'The Specter of Eurocentrism in International Legal History' (2021) 31 *Yale Journal of Law and the Humanities* 413, 432.

⁶⁰ John Haskell 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 *Canadian Journal of Law and Jurisprudence* 383.

⁶¹ Knox, 'Valuing Race?' (n 58).

⁶² Parfitt (n 40).

distribution of rights and obligations. In other words, these racialized tropes lay the groundwork for capitalist expansion while simultaneously deferring the prospect of equal inclusion of those communities into the family of civilized nations.

The intervention and occupation in Iraq that Tzouvala painstakingly documents in chapter five illustrates precisely how the constructed image of Iraq and its people as 'malicious' 'passive' 'excessively violent' and 'deceptive' provided the rationale for the continued presence of the Coalition Provisional Authority and the radical neoliberal reforms that followed. With the backing of UN Security Council resolution 1483, Iraq and its institutions were entirely remodelled along the lines of a capitalist market economy, with property rights, investment protection and central bank independence squarely entrenched. Both the World Bank and International Monetary Fund were brought in to add a layer of legitimacy, neutrality and expertise to what was undoubtedly a political undertaking. Meanwhile, a limited and weak model of democracy was foisted on Iraq as the only reasonable form of political association, given that Iraqi people had no conception of what real freedom entailed. Thus, even though the language of civilization was not explicitly invoked, Iraqi society came to be viewed as utterly incompetent, weak and prone to savagery and thus incapable to decide the terms of their own future.

What the intervention in Iraq and Tzouvala's subsequent discussion of the 'unable and unwilling' doctrine tells us is that the contradictions of capitalism take shape by legitimizing themselves through the simultaneous processes of racialization and other forms of stratification. This goes a long way towards shedding light on some of the disciplinary blind spots that hamper TWAIL and Marxist scholarship and even promises a radical engagement between the two. Although Tzouvala pursues a narrower objective in viewing race and racialization as argumentative tropes and not as "material relationships", her book opens up the space needed to fully explore the co-constitutive nature of race, gender and sexuality in the expansion of capitalist relations and the particular role that international law plays in that process.

IV. THE CONTRADICTIONS OF CIVILIZATION AND THE EMANCIPATORY ROLE OF INTERNATIONAL LAW

The South West Africa saga that Tzouvala brilliantly documents in her fourth chapter brings out the inherent limitations of using "civilization" to further progressive goals. Despite launching a radical challenge to the system of discrimination and racism of the apartheid regime, Third World lawyers ultimately failed to mobilize the language of "civilization" to question the roots of racialized capitalism in South Africa. Trapped within the contradictions of "civilization", Ethiopia and Liberia realized that the challenge to racialized capitalism would come at the cost of acknowledging that black Namibians were not civilized enough to govern on their own. In other words, the two poles of "civilization", improvement and biology, were a zero-sum game. Instead, in their submissions, the applicants before the court restricted themselves to the more mundane claim that the system of racial discrimination in South Africa prevented the liberation of certain individuals and was thus contrary to international law. This however, meant that the structural coupling between racialization and capital in South Africa was never really questioned.⁶³

What the South West Africa saga illustrates is that "civilization" as a concept of international law, though indeterminate and inherently unstable, does not offer an unlimited scope for argumentation, even when used by the most progressive of lawyers. Instead, "civilization", like many other argumentative concepts, operates within the constraints and contradictions of the very process of capitalist expansion, preventing, in some sense, the possibility of challenging "imperialism and capitalism at their core".⁶⁴ Moreover, even when "civilization" allows for a muted and highly abstracted possibility of challenge, it comes with the price of legitimizing and sustaining the very system of law that facilitated exploitation in the first place. Even if Tzouvala does not wish to put it in these terms, this is undoubtedly where the nature and constraints of 'legal form' manifest themselves most prominently. It is in this limited sense that indeterminacy can be both 'restraining and enabling'

⁶³ Tzouvala, *Capitalism as Civilisation* (n 1) 149-167.

⁶⁴ *Ibid* 41.

at the same time.⁶⁵ What implications does this have for international lawyers who wish to commit to the project of emancipation?

First of all, it cannot mean that progressively minded lawyers cease using the instrument of international law because, more often than not, that is not possible. Here, I agree with Chimni that international law can and has been used to further the cause of marginalized communities and subaltern groups, even if those attempts came with substantial riders.⁶⁶ In fact, once it becomes clear that resisting the structures of capitalist social relations is at best achievable only in the long term – if at all – the case for using international law in an instrumental, tactical way ought to become more pronounced, strengthened and even intensified.⁶⁷ Moreover, social movements that do not directly attempt to use legal institutions for their progressive goals and are thus less constrained by the legal form are also instrumental to this process of resistance.

It is also essential that we uncover and criticize the theoretical (super)structures that constrain both our legal discourse and our collective imagination. *CaC* does exactly that. It reminds us that, although "civilization" does not conform to a precise definition and is inherently unstable, it is not devoid of a structuring logic. On the contrary, "civilization" demonstrates the structural logic of capitalism and points to the mediating role international law plays in the expansion of the capitalist mode of production, incorporating into its fold the "uncivilized" world. Ultimately, the most important take-away from *CaC* is perhaps that the task of radical critique, whether through scholarship or through practise, must continue, even with the awareness that such critique is unlikely to lead to any wholesale transformation.

⁶⁵ Ibid 40.

⁶⁶ BS Chimni, 'Concluding Response from Professor Chimni: International Law and World Order' (EJIL:Talk!, 29 December 2017) <<https://www.ejiltalk.org/concluding-response-from-professor-chimni-international-law-and-world-order/>> accessed 24 April 2021.

⁶⁷ Robert Knox, 'Strategy and Tactics' in Jan Klabbers (ed), *Finnish Yearbook of International Law*, vol 21 (2010) 193.