

THE STANDARD OF CIVILISATION IN INTERNATIONAL LAW

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I. INTRODUCTION

The cover of Ntina Tzouvala's new book depicts a Goddess floating ethereally in her white dress over a landscape of colonial settlement.¹ On the ground below her, we see prairie wagons and cowboy settlers moving through yellow fields, probably in North America, probably in the 18th or 19th century. As I pick up the book, I imagine this floating figure to be Justitia, the Goddess of Justice. The look on her face is mild and benevolent. When I search a bit on the internet, I learn that, in fact, the heavenly lady on the cover is an allegorical representation of Manifest Destiny, the idea that settlers in the United States were leading civilisation westwards. She is shown bringing light and progress from East to West, stringing telegraph wire and holding a book, highlighting different stages of economic activity and evolving forms of transportation.² The metaphor seems clear from the outset: International law has always accompanied settler colonialism and capitalist expansion.

Tzouvala does not claim that her book presents a total theory of international law, nor that the law she depicts is universal.³ Her history is focused on the trope of 'civilisation', which runs through the discipline of international law as an argumentative praxis, forever oscillating between the logics of 'biology' and 'improvement'. Through a range of concrete historical and textual examples from different geographical and transnational settings (including the Mandate System of the United Nations, the South African presence in Namibia during apartheid and recent invasions of Syria and Iraq) we learn how the standard of civilisation was coined and employed in international legal argumentation. In this review, I complement her narrative with a few

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

² The painting on the cover of the book is called 'American Progress' and was painted by Prussian-born American painter John Gast in 1872.

³ See Tzouvala (n 1) 17.

thoughts about how the logics of biology and improvement can be traced back to the colonial and Christian origins of international law.

The analysis yielded by Tzouvala's sophisticated methodology resonates with my own work on the titling of lands as indigenous territories in North Eastern Nicaragua, which provides a contemporary example of how international law has failed to prevent capitalist expansion, settler colonialism and indigenous dispossession. The claim for indigenous communal property holding is grounded in international law and has increasingly been formulated in the language of human rights and cultural survival. Nonetheless, through conversations with indigenous leaders, academics and lawyers in Nicaragua, I have come to understand that many different and evolving meanings have been ascribed to the indigenous title as a legal form. I therefore find Tzouvala's methodological insights valuable for understanding the creation of arguments relating to indigenous title and self-determination (not to be confused with real and undisputed sovereignty). The indeterminate and sometimes contradictory logics of civilisation have formed part of the process of titling lands as indigenous territories, a process profoundly entangled both with international law since the conquest of the Americas and with state-building in the post-colonial moment. In other words, Tzouvala's research method and propositions can inspire new understandings of the continuous and current displacement and dispossession of indigenous peoples from their ancestral lands.

II. LAW AS CAPITALISM'S SCRIPTURE

Although Tzouvala has taken on an ambitious task in writing international law's history anew, she manages to accomplish this without resorting to oversimplifications. In a careful analysis of texts ranging from treaties and court rulings to textbooks and memorials, she shows that the model of the capitalist state that has been promoted through the international legal 'logic of improvement' (or progress) has never been static. 'Civilisation' is forever transformable and flexible but remains in place to discipline and exclude those societies deemed 'non-Western' and peripheral by the very same elusive standard. Tzouvala acknowledges that not all legal systems are necessarily textual, but her aim is not to engage with those legal systems (i.e. indigenous systems of law). Rather, she aims to subject the hegemonic and

influential project of international law (so-called 'Western' international law) to critical scrutiny.

Through an elegant review of relevant literature, Tzouvala places the textuality of this (Western) international law within capitalist structures of accumulation and imperialist expansion. Importantly, she emphasises the Marxist claim that the capitalist mode of production is a historically specific mode and not a given one, underlining also that this is what offers a prospect of possibly overcoming it. Primitive accumulation and structural exploitation of labour power emerged through processes of violent displacement and dispossession of peasants, and through bureaucratic and legal techniques of individualisation that severed individuals both from their means of production and from their ties to family, land and community. From the beginning, the state and the law were thus integral to the process of creating and recreating the capitalist relations of production.

Simultaneously, the author draws on the constructive critique of Marxism from indigenous scholars, who have underscored that the violent processes of dispossession that underlie primitive accumulation are not only a thing of the pre-capitalist historical past. As pointed out by scholars such as Glen Coulthard,⁴ as well as by current indigenous activists worldwide, violence is a continuous condition for indigenous peoples all over the world, as they are often subjected to brute force when they resist the logics of a life structured around profit and instead emphasise notions of care and interconnection between humans and non-human beings. Also, Tzouvala rightly points out that indigenous scholars have accentuated how the control over land as such, and not necessarily the goal of control over wage labour, has been a driving force in the processes of capitalist expansion.⁵ As Patrick Wolfe emphasised, invasion is a structure, not an event.⁶

⁴ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014).

⁵ For more on this topic see e.g. Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education & Society* 40.

⁶ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387.

Tzouvala does not claim to explain the entirety of the relationship between international law and capitalism through this book. Rather, she examines the relationship between one type of argumentative praxis and the specific and contradictory model of production that capitalism is. She suggests that it is the global spread and reproduction of this contradictory model of production, which carries both universalising and stratifying tendencies, that allows for the persistence, persuasiveness and even invisibility of the 'standard of civilisation' as a consistent argumentative pattern in international law. The capitalist mode of production, as well as the political, economic, and institutional structures that uphold it, is what allows the argumentative pattern to reproduce and reshape itself. The methodological finesse here is to approach 'civilisation' as an argumentative structure (rather than as a legal term to be defined or interpreted).

Tzouvala recalls Althusser's notion of *interpellation*⁷ as central in the production of legal subjects.⁸ By reference to famous nineteenth century international lawyers, she shows how only those political communities that were interpellated as modern, bureaucratic and juridically separate from both society and economy were deemed to be fully civilised subjects (a.k.a. states) capable of self-government and mutual recognition in international law. While there was a sense of possibility for non-Western communities to attain social transformation and become 'civilised', the logic of biology meant that these communities would need the guidance and stewardship of Western international lawyers to progress from backwardness and moral inferiority. While white majority societies were considered civilised by default, racialised people were under constant scrutiny and had to prove their civilised status to the guardianship of white statesmen and lawyers to be 'upgraded'. In this logic of biology, 'race as such was treated as an unchangeable historical and natural reality',⁹ and the imposition of a wide range of juridical practices of domination and disciplining were justified.

⁷ Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)' in *Lenin and Philosophy and Other Essays* (Monthly Review Press 2001).

⁸ See Tzouvala (n 1) 11-13.

⁹ Ibid 68.

This textual and critical approach is also relevant for understanding both past and contemporary processes of legal argumentation to name and define (or interpellate) the *indigenous*, and the ways in which such argumentation has contributed to creating and changing material conditions. Indigeneity has been held out as a badge of honour and a mark of the resistant unity of the marginalised. It can be understood as a political identity mobilised against processes of colonial domination and capitalist expansion. Yet, as pointed out by other scholars, indigeneity is, at best, a contentious and indeterminate term that groups together a wide range of peoples with dissimilar origins, cultural traits, languages, and forms of organisation, which is why some peoples grouped under this designation prefer to be called by the name of their nation instead.¹⁰ In addition, the category has colonial roots, and can be prone to lend itself to a romanticised, culturalist and idealised vision of the noble savages, who are also often considered to be ungovernable and lawless. Indigeneity is always juxtaposed against something else, and perhaps indigeneity's *other* would be, precisely, civilisation.

III. CHRISTIANITY: A MISSING LINK?

Tzouvala argues that the oscillation between the 'logic of biology' and the 'logic of improvement' in the standard of civilisation has been notable in international legal argumentation since the nineteenth century. During the nineteenth century, she holds, there was a global intensification of the trends toward the legalisation of social affairs, the adoption of legal systems centred around notions of individualism, private property and judicial independence, and the bureaucratisation and territorialisation of state power. At the same time, the 'logic of biology' constantly denied non-Western political communities the possibility of reaching 'civilisation', perpetually confining them into a lesser position within the architecture of international law. In this register, legal, economic, or cultural differences were attributed to unchangeable characteristics and the gap between the West and 'the rest' was made impossible to bridge.

¹⁰ See e.g. Pablo Mamani Ramírez, *Geopolíticas Indígenas* (CADES, Centro Andino de Estudios Estratégicos 2005); Silvia Rivera Cusicanqui, *Ch'ixinakax Utxiwa: A Reflection on the Practices and Discourses of Decolonization* (2012) III South Atlantic Quarterly 95.

Tzouvala links the oscillation between the two 'logics' of the standard of civilisation to nineteenth century international law's sense of Western imperialism as a force there is no point in resisting, leaving non-Western communities with no options but to assimilate or perish. In doing so, she demonstrates how the argumentative indeterminacy of 'civilisation' maps onto the contradictions of imperialism as a specifically capitalist phenomenon of unequal and combined development that tends to generate both homogenisation and unevenness on a global scale. Overall, I find this historical excavation of 'civilisation' as a trope that runs through international law most thought-provoking and skilfully done.

While I share many of the author's intuitions and appreciate her project to reconcile Marxist and deconstructive approaches to construct a materialist history of international law, I am less convinced that the logics of biology and improvement became apparent or dominant in this discipline only in the nineteenth century. Tzouvala explains taking the nineteenth century as a starting point by referring to the weakening of the authority of the Christian churches, the stabilisation of Western nation-states and the expansion of the state system in that century as determining bases of a system of modern international law. Yet, even if just in a footnote, she also acknowledges that not everyone is convinced that international law ever transitioned to secularism. Furthermore, she writes, with a reference to Brenna Bhandar, that the 'equation between civilisation, whiteness and productive economic activity, the taming of nature, and adventurous curiosity was at the core of juridical justifications of settler colonialism'.¹¹ Such logics, though shifting, indeterminate, flexible and forever evolving, might be grounded in a Christian project of hegemony.

A range of theorists and historians have, in fact, shown that notions of (Christian) civilisation versus (Indian) barbarism, savagery and infidelity were a crucial feature of the conquest and colonisation of the Americas and of the legal regimes that developed in this process.¹² As such, oppositional logics and

¹¹ Tzouvala (n 1) 70, citing Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018).

¹² See e.g. Nicole D Legnani, *The Business of Conquest: Empire, Love, and Law in the Atlantic World* (University of Notre Dame Press 2020); Robert A Williams, *The*

ideas of progress, backwardness and potential for development were inherent to the very construction of both Europe and the Americas (and all other regions) as continental entities.¹³ This indicates that the logics of civilisation were at play already at the foundation of international law as a discipline in the sixteenth century – as can be seen, for example, in texts written by Francisco de Vitoria, Hugo Grotius and Bartolomé de las Casas – regardless of whether the term 'civilisation' appears as such in these writings.¹⁴

Tzouvala suggests a need to re-work Anthony Anghie's claim that, in international law, 'the civilising mission was animated by [...] the question of cultural difference'.¹⁵ She rather wants to place the inclusion-exclusion dynamics of international law in a historically specific and evolving relationship that is both discursive and determined by the dominant and ever-expanding capitalist mode of production. However, while of course it is true that many legal systems across time and space have performed some function of 'othering', and that ideas of civilisational superiority have not been unique to the West, the book might be at risk of missing an important point about the relationship between *coloniality* and international law that decolonial scholars have struggled to emphasise.

Anthony Anghie's main claim about the colonial origins of international law were based on a reading of Francisco de Vitoria, the Roman Catholic theologian, whose sixteenth century writings dealt precisely with the issue of how to construct a universal law in the face of cultural and 'civilisational'

American Indian in Western Legal Thought: The Discourses of Conquest (Oxford University Press 1990).

¹³ See e.g. Enrique D Dussel, *1492: El Encubrimiento Del Otro: Hacia El Origen Del 'Mito de La Modernidad': Conferencias de Frankfurt, Octubre de 1992* (Ediciones Antropos 1992); Edmundo O'Gorman, *La Invención de América: Investigación acerca de la Estructura Histórica del Nuevo Mundo y del Sentido de su Devenir* (2nd edn, Fondo de Cultura Económica 1996).

¹⁴ On this, see e.g. Helen M. Kinsella 'Civilization and Empire - Francisco de Vitoria and Hugo Grotius' in *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011).

¹⁵ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005) 3.

difference.¹⁶ Vitoria has often been called 'the father of international law'¹⁷ because of his ponderings about the legal status and possible sovereignty of 'the Indian nations'. It was the question of the legal status of the Indian that drove Vitoria to develop his jurisprudence and to conclude, in a preliminary sense, that the Indians could not be deprived of their lands merely by virtue of their status as unbelievers or heretics. Unlike earlier writers, Vitoria would suggest that the Indians were not merely barbarians, heretics or animals. Rather, he argued that their institutions showed that they were human and in possession of reason, which made them able to participate in a *jus gentium* – supposedly as equals.

In fact, however, this *jus gentium* and this so-called 'universal' jurisdiction would be a jurisdiction based on Spanish and Christian values. The Indians could be excused in a sense for not having had the opportunity to know about God and Christendom before their encounter with the Spaniards, but they were not to interfere with or disapprove of missionary activities. In other words, Vitoria (and other early 'international' legal theorists) perceived there was room for *improvement*, in the sense that Indians could be Christianised. Moreover, in their framing, there was no legal basis for the Indians to resist this civilising mission; thus, Vitoria's *jus gentium* essentially legitimised Spanish incursion, looting and conquest of indigenous territories, especially if the people living there resisted Christianisation in any way.¹⁸ To my mind, a greater sensitivity to those colonial origins of international law and to the linkage between Christianity and 'civilisation' does not contradict anything that Tzouvala has to say about later developments in the supposedly secular and 'universal' system. Rather, it would qualify and strengthen the argument about civilisation as an argumentative pattern that oscillates between disciplining the state along the lines of capitalist modernity and confining some communities to a lower legal status due to their purportedly inherent inferiority.

Tzouvala also draws on Samir Amin's notion of Eurocentrism to explain the development of the standard of civilisation in a way that aims to critique a

¹⁶ See *ibid* 13-31.

¹⁷ See e.g. Charles H McKenna, *Francisco de Vitoria: Father of International Law* (1932) 21 *Studies: An Irish Quarterly Review* 635.

¹⁸ *Ibid*.

'culturalist mystification' of the transition to capitalism in the West.¹⁹ This makes sense, but perhaps it would be worthwhile to dwell more on the development of this concept by Latin American theorists and philosophers such as Anibal Quijano, Walter Mignolo, Maria Lugones and Enrique Dussel.²⁰ In their notion of Eurocentrism, the conquest of the Americas is also the defining and central basis without which the confluence of racialisation and capitalist expansion cannot be understood. Importantly, Quijano argued that while many cultures have perceived themselves as superior to others, Western 'European' culture is the only one that has succeeded in establishing a hegemonic worldwide perception of its superiority through the classification of all populations on a global axis of race, founded on the relations of domination and expansion of a capitalist mode of production that the conquest of the Americas inaugurated and imposed.²¹ While Amin seemingly saw no connection between the Castilian purge of the Moors from the Iberian Peninsula in 1492 and the project of conquest in the Americas which began the very same year, a range of (especially Latin American) theorists have advanced such notions. Scholars such as Sylvia Wynter and Kelvin Santiago-Valles have underlined the importance of looking more in depth into how the proto-racist and proto-national discourse that the Christian Spanish elites brought with them overseas was transformed by the genocidal events in the Americas and, upon returning to Europe, contributed to the rise of such tendencies there and, hence, to the configuration of the hegemonic global power relations that are still with us today.²²

¹⁹ Tzouvala (n 1) 29–30, citing Samir Amin, *Eurocentrism* (2nd edn, Monthly Review Press 2009).

²⁰ See e.g. Enrique D. Dussel, Javier Krauel and Virginia C. Tuma, 'Europe, Modernity, and Eurocentrism' (2000) 1 *Nepantla: Views from South* 465; Anibal Quijano and Michael Ennis, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 *Nepantla: Views from South* 533; Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011); Maria Lugones 'The Coloniality of Gender' in Wendy Harcourt (ed), *The Palgrave Handbook of Gender and Development* (Palgrave Macmillan 2016).

²¹ Quijano and Ennis (n 20).

²² Sylvia Wynter, 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation--An Argument' (2003)

Julia Suárez-Krabbe has argued that the configuration of the 'human' in the image of the White Christian European Man was a result of a confluence of several processes of extermination in the fifteenth and sixteenth century. First, the witch-hunt targeted women who were not (proper) Christians and who practised alternative knowledges and spiritualities. Second, the final conquest of Al-Andalus by Spanish monarchs put an end to the co-existence of different spiritualities under one political authority through the expulsion of the Jews and the Muslims. Third, the process of indigenisation in the context of the conquest of the Americas enforced already burgeoning practices of feminisation and racialisation of those whose epistemologies and very existence resisted categorisation within the strict dualisms of mind/body and human/nature, paving the way for a logic that devalued nature and yielded ideas of purity of blood. This should be seen in combination with a fourth event: the aggressive persecution and genocidal practices against the Roma people unleashed after the Catholic Church released its first 'anti-Gypsy law' in 1499 – a legal document that required the Roma to become sedentary and economically productive, predominantly through agriculture. Finally, the enslavement and genocide perpetrated against native populations in the Americas and the establishment of the transatlantic slave trade naturalised the colonial criteria of inferiority, linking racism with capitalism. In other words, racism became the foundation for the logic of capital and the exploitation of labour. Years later, this reasoning also underlined the rationale behind the elites' decision to abolish slavery.²³

Following the total extermination of various indigenous populations in the Caribbean, the Spanish clergy assembled at Valladolid between 1550 and 1551 for a lengthy and explicit discussion about whether the Indians were to be considered human or not. As Suarez-Krabbe and others have shown, this debate cemented the inferiority of those categorised as indigenous peoples, even if their humanity was eventually (at least theoretically) acknowledged. This acknowledgement was the position advocated by Bartolomé de las Casas

3(3) CR: The New Centennial Review 257; Kelvin Santiago-Valles, "'Race,' Labor, 'Women's Proper Place', and the Birth of Nations: Notes on Historicizing the Coloniality of Power' (2003) 3(3) CR: The New Centennial Review 47.

²³ Julia Suárez-Krabbe, *Race, Rights, and Rebels: Alternatives to Human Rights and Development from the Global South* (Rowman & Littlefield International 2016) 50-79.

(possibly the first human rights defender in history), but it came at the cost of regarding the Indians as a form of minor children in need of protection and stewardship.²⁴

Although the line from the Catholic discussions in the conquest of the Americas to 19th century legal debates is not entirely straight, it would be problematic to disregard the possible discursive continuities and to reject the possibility that the development of industrial capitalism in the 19th century might have merely strengthened or recalibrated pre-existing argumentative patterns already present in feudal colonial contexts. There is a connection, the way I see it, between the role that early international legal theorists assigned to priests and missionaries (such as themselves) and the role that colonial administrators and international lawyers would later assume – for example through the Mandate System – to oversee and evaluate the transformation of societies and populations perceived as backwards. Vitoria's recognition of the possibility of Indian sovereignty and self-determination, on the one hand, and his assertion of the possibility of conducting a 'just war' against non-conforming barbarians and savages in the name of Christianisation, on the other hand, also reappears in a slightly altered form in later justifications for invasions of countries like Iraq, Libya, and Syria. Thus, while I wholeheartedly agree that race and gender as relations are contingent and changeable products of complicated historical processes – or in Tzouvala words 'complex articulations of material relations of oppression and exploitation'²⁵ – I also believe that underestimating the role of European conquest, colonisation and plundering of the Americas in the configuration of those processes would be a mistake.

IV. A SENSE OF CONTINUOUS IMPROVEMENT AND PROGRESS

Even if Tzouvala does not trace her ideas back to the earliest theological foundations of international law, there is still great value in her examination of the argumentative development of the standard of civilisation from an overtly racist and moralistic reasoning into softer forms of power and governmentality during the 20th century and beyond. In particular, she

²⁴ Ibid.

²⁵ Tzouvala (n 1) 202–03.

convincingly demonstrates how the standard of civilisation was transformed and made invisible through a recourse to technocratic 'scientific' methods and a focus on administration and governance shaped by the gathering of information, statistics and 'verification of facts on the ground'.²⁶ Her historical account also makes visible how legal reform under extra-territoriality in the late nineteenth and early twentieth centuries helped strengthen a state monopoly over legality and individualise social bodies through an emphasis on individual rights. In this process, guarantees for property rights and commercial activities were considered essential for achieving 'justice' and a territory's capacity for self-government was linked to its ability to be integrated smoothly in the political, economic, commercial and other conditions of 'the modern world'.

As Tzouvala points out, when so-called peripheral and semi-peripheral societies have tried to achieve inclusion in the status of civilised nations, one of the main criteria they have had to live up to has been to adopt the institutions of capitalist modernity. This process has been intrinsically linked to the assimilation of indigenous peoples and other non-dominant groups, as well as the erosion of alternative life worlds and forms of organisation. Thus, there is a need to understand that inclusion into the dominant and globally expanding model of capitalist modernity comes with strings attached.

In this sense, Tzouvala's tracing of the standard of civilisation in international law is helpful in relation to my own research, which deals with the titling of lands as indigenous communal property in Nicaragua. This process has in many ways been driven by and entangled with developments in international law. In line with what Tzouvala describes through examples from elsewhere in the world, in Nicaragua the state building project that accelerated from the late nineteenth century onwards was also moved forward by an almost frenetic technocratic effort to map, collect detailed information about and expand authority over those areas formerly controlled and ruled by indigenous or tribal groups and their authorities.

As Tzouvala explains, once modern authoritarian states were crafted to ensure territorial control, their authority expanded over regions and peoples who previously had important levels of autonomy and locally organised lives.

²⁶ Ibid 46-54.

The expansion of modern state power in the name of 'civilisation' has not only threatened minorities but is the very process that gave meaning to the category 'minority' in the first place. Meanwhile, a political concern and mobilisation for subjugated groups were translated into international law, albeit in ways that did not always contribute to resolving tensions and indeed sometimes enabled imperial powers to intervene more-or-less directly in the affairs of newly formed independent states.

In Nicaragua, those areas (and those population groups that were categorised as minorities) were found on the country's Atlantic (Caribbean) Coast, which had never been colonised by the Spanish. While, on Nicaragua's Pacific Coast, indigenous land titles had already been introduced in Spanish colonial times to 'protect' but also to racially segregate indigenous persons, on the Atlantic Coast, the indigenous title only appeared as a legal construct as the British were withdrawing from the area and aimed to maintain strong relations with their tribal partners in commerce – as well as some form of presence and control. As such, the very first indigenous titles on the Atlantic Coast were a direct outcome of the treaties that the British concluded with the recently independent Nicaraguan state. These treaties also foreclosed the possibility for Moskitia (as the Coast was known then) to become a fully independent country and state.²⁷

Another point brought forward by Tzouvala is that, while, from the beginning of the nineteenth century, non-Western states had to conform to certain welfarist imperatives to be considered 'civilised', most international lawyers still refrained from any overt criticism of the capitalist system as a whole. Rather, they mostly focused on taming the more extreme forms of capitalist exploitation in order to prevent anti-capitalist revolutions. As Tzouvala shows in the book through the example of Namibia, 'civilisation' has been employed legally to maintain the economic status quo in recently decolonised countries, locking in a highly unequal and racialised distribution of property and wealth. Overall, Tzouvala concludes that the efforts of some post-colonial states and lawyers to go against the grain and deploy the notion

²⁷ See e.g. Carlos María Vilas, *State, Class, and Ethnicity in Nicaragua: Capitalist Modernization and Revolutionary Change on the Atlantic Coast* (Lynne Rienner 1989); Rafat Ghotme, 'El Protectorado Británico en la Costa Mosquitia, 1837-1849' (2012) 7(2) *Revista de Relaciones Internacionales, Estrategia y Seguridad* 21.

of 'civilisation' subversively was not a successful way to promote a radical critique of capitalism. Arguing that colonial and mandate systems were in fact violating the 'sacred trust of civilisation' enmeshed peripheral and semi-peripheral international lawyers in the very same 'logic of improvement' that they should rather have rejected, as this strategy did not prevent the enforcement of neoliberal policies and modes of governing from taking hold in recently decolonised states.

Tzouvala's insightful and detailed analysis of the transformation of occupied Iraq is another case in point, as it shows how comprehensive neoliberal reform was deemed essential for the rehabilitation of the country from a 'rogue state' to a 'normal' sovereign with equal rights and duties. Not only did the Coalition Provisional Authority in Iraq equate 'improvement' with the neoliberal model of capitalist accumulation – it also deprived Iraqi citizens of free information about the process and of possibilities to participate democratically in decision-making. Tzouvala shows how numerous core public services such as education, health, water and sanitation were outsourced in Iraq – often to private U.S. companies – while the public sector was limited, ideas of central planning were denounced, free-market reforms were implemented and an independent central bank was established. Meanwhile, through a racist and infantilising discourse, Iraqi state functionaries and local communities were considered either too weak, too violent, too lazy, too immature, too inefficient, or too malevolent – in short, either unwilling or unable – to be given much responsibility or control in the process.

Through such thoroughly argued and thickly descriptive examples, Tzouvala's book presents us with overwhelming evidence that civilisation as an argumentative praxis has swung like a pendulum between two poles. On the one hand, the distribution of equal duties and rights among nations is deemed possible and achievable, albeit conditional on the adoption of capitalist reforms. On the other hand, through a logic of biology and immutable difference, this possibility is endlessly postponed or negated for certain 'peripheral' or marginalised societies (mainly those previously colonised). She further asserts that this instability in the use of 'civilisation' in international law has been fatal for revolutionary projects, a conclusion I agree with based on my own research. In the Nicaraguan case, the discourse

of progress and civilisation has also severely hampered the possibility of a revolutionary process that could truly escape the logics of capitalist expansion, racialised subjugation and environmental and cultural destruction.²⁸

Although the revolutionary peasant leader Augusto C. Sandino, who fought U.S. intervention in Nicaragua in the 1920s, allied and cooperated with indigenous groups along the River Coco in his anti-imperialist guerrilla warfare, in the contradictory realm of historical realities, his writings reveal a liberalist and civilisational stance towards the Eastern regions, whose inhabitants he considered primitive and whose lands he considered underdeveloped and 'empty'.²⁹ In other words, the indigenous and tribal groups were deemed not to be sufficiently civilised, sedentary and productive.

As the socialist Sandinista revolution swept through Nicaragua in the 1970s and 80s, tensions rose between the cadres, on the one hand, who were mainly from the Pacific side of the country and set on promoting a peasants and workers revolution, and those indigenous (especially Miskitu) communities, on the other hand, who were intent instead on preserving their own communal and ancestral land management systems and felt suspicious towards the 'Spanish invaders' (as they called their compatriots from the Pacific Coast). The imperial forces jumped fast to exploit the cultural misunderstandings, the long-standing 'Anglo-affinities'³⁰ of the Miskitu and

²⁸ See e.g., *Nicaragua's Failed Revolution – Indigenous Struggle for Saneamiento* (The Oakland Institute 2020) <<https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/nicaraguas-failed-revolution.pdf>> accessed 21 May 2021, a report which details the process of deforestation and colonisation of indigenous territories due to the endorsement of extractive industries.

²⁹ This analysis of Sandino's writings and stance can be found in Byron Piñeda *Shipwrecked Identities – Navigating Race on Nicaragua's Mosquito Coast* (Rutgers University Press 2006), especially 95-105.

³⁰ This term, coined by anthropologist Charles Hale during the war in the 1980s, refers to the fact that the Miskitu had extensive relations with the British and later with North Americans due to their involvement on the Atlantic Coast as traders, investors and missionaries. Charles R Hale, *Resistance and Contradiction: Miskitu Indians and the Nicaraguan State, 1894-1987* (Stanford University Press 1996).

the conflicts regarding the land, with Ronald Reagan famously pronouncing '*I am a Miskito Indian*'³¹ and U.S. financial and military support flowing in to aid the armed indigenous uprising against the Sandinista government and army.³²

From 1984, peace talks enhanced the pressure for indigenous autonomy and self-determination in the Caribbean regions and clauses to fulfil such deep-rooted wishes were inserted into both a new Constitution and an Autonomy Statute in 1987. After the war, when the destroyed country was again bombarded with anti-socialist propaganda and campaign support for liberal politicians, Nicaragua entered a 17-year period of profound liberalisation and free-market reforms. In this context, the indigenous land title won new acclaim and was endorsed by actors such as the Organisation of American States and the World Bank, who also promoted the formalisation of private land tenure throughout the region. The indigenous title was supposed to be different from private property titles; collective and expressive of ancestral connections and understandings of the land. Nonetheless, the mercantilist vision of land seems to have proliferated since the communal titling process, indicating that this process has not in fact significantly strengthened territorial control and self-determination.

V. CIVILISATION AS DISPOSSESSION AND MARGINALISATION

As Tzouvala herself writes, her account of civilisation 'raises doubts about the rationalising force of liberal capitalism that gradually does away with supposedly archaic forms of hierarchy and oppression, such as racism or the patriarchy.'³³ Indeed, as she exposes so clearly, 'civilisation is far from being a

³¹ In 1985, in a speech in Bitburg, West Germany, Ronald Reagan announced: 'I am a Laotian, a Cambodian, a Cuban, and a Miskito Indian in Nicaragua. I, too, am a potential victim of totalitarianism'. Associated Press, 'Transcript of Reagan's Speech at Air Base after his Visit to the Cemetery' *The New York Times* (New York, 6 May 1985) <<https://www.nytimes.com/1985/05/06/world/transcript-of-reagan-s-speech-at-air-base-after-his-visit-to-the-cemetery.html>> accessed 12 May 2021.

³² See e.g. Thomas W. Walker (ed), *Reagan Versus The Sandinistas: The Undeclared War On Nicaragua* (Routledge 2019).

³³ Tzouvala (n 1) 86 (emphasis omitted).

relic of international law's imperial past';³⁴ rather, it is a persistent and profoundly oppressive pattern of argumentation in international legal disputes and debates. Tzouvala therefore warns those critical of the underlying doctrine to counter civilisation arguments from within their logic. This warning rings true when I consider the conflicts over land ownership in the Northern Caribbean region in Nicaragua. Thinking of law in the way Tzouvala does – not as a sum of rules, but as a particular type of specialised language that is essentially indeterminate (but always historically situated) – helps to make sense of the wildly different and contradictory meanings that have been ascribed to indigenous property title in this region.

Indigenous leaders, scholars and lawyers often refer to the creation of indigenous territories as a historical revindication of rights, as justice materialised or as a means of preserving cultural and 'ancestral' traditions and ways of life, and a common law doctrine has evolved in response to this.³⁵ While on the one hand this appears meaningful in terms of acknowledging and recognising a history that has often been ignored and discarded, and in terms of securing the possibility of a diversity of lifeworlds and languages to persist, the approach can also invoke a biological or ethno-nationalist logic that likens kinship and descentance to culture and promotes a kind of segregated development.³⁶ Others, such as Brenna Bhandar and Kirsten Anker, have therefore pinpointed that the property title and its implication of ownership or transferability of land for investment, production or mercantile purposes was not an indigenous invention and that the notion of territoriality and delimitation contained in the indigenous title carries a racist undercurrent of containing indigenous identity within specific areas – without building on actual indigenous and pre-colonial conceptualisations of land.³⁷ As Robert Nichols has explored, a curious juxtaposition of claims thus emerges in relation to indigenous land rights, namely, 'that the earth is not to

³⁴ Ibid 209.

³⁵ See e.g. Jérémie Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' (2007) 56 *The International and Comparative Law Quarterly* 583.

³⁶ See Nandita Sharma and Cynthia Wright, 'Decolonizing Resistance, Challenging Colonial States' (2008) 35(3) *Social Justice* 120.

³⁷ Bhandar (n 11), 68-74; Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Routledge 2017).

be thought of as property at all, and that it has been stolen from its rightful owners'.³⁸ Nichols argues – convincingly, I find – that the titling of land as indigenous territories promoted through international law combines two distinct processes. It converts non-proprietary social relations into proprietary ones (a sort of 'propertisation') while at the same time systematically transferring control and title of this newly formed property.³⁹

Many of the Nicaraguan leaders and lawyers I have interviewed clearly invoke the need for 'improvement' to become fully 'civilised', speaking of the indigenous property title, newly achieved through international law, as a basis for material and economic development that could allow poor communities to finally prosper *if they could just learn* to manage the territory together in more productive, efficient, and modern ways. Some invoke the need for civilisation in entirely different terms, stating that the indigenous communal property title has been an obstacle to rational economic development (which, implicitly, would require individual ownership and property rights). Some talk about communal title as the basis for a political organisation that is independent of the state and the articulation and titling of indigenous territories as an important step towards autonomy and self-determination – or as the nearest thing to independence for the Caribbean Coast. Others describe the title as proof of recognition of the existence and rights of indigenous peoples within the Nicaraguan nation-state and as a vehicle for enhanced cooperation and coordination with state institutions; certainly the state has both strengthened its knowledge and control over the territories through the process of mapping, demarcation, and interchange with the so-called 'indigenous territorial governments'. Finally, in the context of advancing agricultural expansion, cattle-driven colonisation, extensive illegal land deals throughout the territories and the lack of state response to violations of the communal property rights, some have started to describe the communal property title as nothing more than 'a piece of wet paper'.⁴⁰

³⁸ Robert Nichols, *Theft Is Property! Dispossession & Critical Theory* (Duke University Press 2020) 8.

³⁹ Ibid.

⁴⁰ All of these differing evaluations and appreciations of the 'meaning' and 'significance' of indigenous property title were expressed in interviews I conducted with indigenous leaders, lawyers and activists on Nicaragua's Caribbean Coast between 2017 and 2020.

Having been *interpellated* through international law, not just as indigenous collectives, but as *property owners*, has certainly brought change – but perhaps mainly in the shape of conflict and division – to these communities.

What is clear is that the indeterminacy of the law and its meaning has all but sapped the indigenous title of whatever revolutionary potential it could have held. This has only been enhanced by the fact that mainly educated individuals who work in NGOs and universities have been engaged and employed in the legal constructions and disputes regarding title, while ordinary community members are not always able to grasp nor speak the specialised language of international law and indigenous human rights.

Today, the leaders of indigenous communities on Nicaragua's Caribbean Coast are enmeshed in paperwork to create territorial governance plans or even constitutions for their territories, while to a large extent they lack the authoritative force to protect their boundaries against incoming settlers from other regions of the country and the economic force to stand up against mining and forestry companies. Proactive indigenous lawyers present complaints and denunciations of the violations of indigenous communal property rights but are also wary of calling upon themselves a militarisation of the territories to keep unwelcome newcomers out. In the process of demarcation and titling, the communities have been taught by international human rights lawyers that they are autonomous, original and self-contained while, of course, in reality they form an integrative part of a much bigger whole – namely, an unequal and discriminatory globalised economy in which imperial forces have always held their country in a tight clamp. International law has yet to fulfil its many promises to those communities, but they keep hoping, often invoking the idea that *if only* they could become more structured, get ordered and well-organised and be less corrupt and more law-abiding – *if only* they themselves and their state and regional institutions could be *more civilised* – then all would work out for the better.