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The Standard of Civilisation in International Law

Politics, Theory, Method

> The tradition of all dead generations weighs like a nightmare on the brains of the living. And just as they seem to be occupied with revolutionizing themselves and things, creating something that did not exist before, precisely in such epochs of revolutionary crisis they anxiously conjure up the spirits of the past to their service, borrowing from them names, battle slogans, and costumes in order to present this new scene in world history in time-honored disguise and borrowed language.
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> Karl Marx (1852)[1]

In July 2017, a strange scene unfolded at the G20 summit in Hamburg. Responding to a question by an Ivorian journalist about the possibility of a Marshall Plan for Africa, the President of France, Emmanuel Macron, retorted, 'The challenge of Africa, it is totally different, it is much deeper, it is *civilizational* today. What are the problems in Africa? Failed states, the complex democratic transitions, demographic transitions, which is one of the main challenges facing Africa.'[2] Paradoxically, even though Macron understood the civilisational *malaise* of Africa to run deep, his prescriptions for overcoming it sounded somewhat pedestrian: regional security pacts with France, better infrastructure and public–private partnerships. What is familiar here is not only the framing of the perceived problem as one pertaining to 'civilisation' but also the solutions proposed. The idea that the non-European world was civilisationally inferior and that the influx of (Western) capital would remedy these shortcomings has been, I argue, constitutive of modern international law at least since its emergence as a distinct discipline during the last quarter of the nineteenth century.

[1] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (first published 1852, Moscow: Progress Publishers 1972) p. 10.

[2] For a brief engagement with the incident, see: Ntina Tzouvala, 'Macron & Africa's "Civilisational" Problem' (*Critical Legal Thinking*, 14 July 2017) available at: http://criticallegalthinking.com/2017/07/14/macron-africas-civilisational-problem/.

This monograph interrogates the 'standard of civilisation' in international law. I have come to understand 'civilisation' not as a unitary legal concept lending itself to conclusive definition but as a mode of international legal argumentation. This pattern of argument establishes a link between the degree of international legal personality that political communities are recognised as having and their internal governance structure, or, to be more precise, their conformity with the basic tenets of capitalist modernity. The core of my position is the following: arguments resting implicitly or explicitly on the 'standard of civilisation' oscillate between two seemingly contradictory positions. On the one hand, there is scepticism, if not overt hostility, regarding the possibility of equal inclusion for non-Western, predominantly non-white political communities in the realm of international law, which rests on a deep-seated perception of cultural or racial inferiority. On the other hand, such inclusion is considered possible and desirable, and depends on the adoption of particular reforms by such communities that would ensure their conformity with the necessities of capitalist modernity. Therefore, the 'standard of civilisation' creates a conundrum between exclusion and conditional inclusion. I refer to the former pole of this oscillation as 'the logic of biology', a mode of argumentation that erects unsurpassable barriers against non-Western communities acquiring equal rights and obligations under international law based on some purportedly immutable difference between 'the West and the rest'. Simultaneously, what I understand to be 'the logic of improvement' offers a prospect of inclusion that has, however, been firmly conditional upon capitalist transformation.

Taking a step further, I suggest that this argumentative conundrum only becomes possible, plausible and even necessary in the context of imperialism as a specifically capitalist phenomenon. On the one hand, imperialism creates spheres of political domination and intensified economic exploitation, or in the most recent iteration, it structures 'global value chains' in order to transfer value from the periphery to the imperial centre.[3] Such centre–periphery dynamics need not be static, and indeed, inter-imperialist antagonisms lead to the re-organisation of

[3] For some critical perspectives on the role of international law in the global production and distribution of value, see: The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 *London Review of International Law* 57–79; Donatella Alessandrini, *Value Making in International Economic Law and Regulation: Alternative Possibilities* (Abingdon: Routledge 2016).

these relationships from time to time. The rapid rise of Chinese capitalism and its expansion through initiatives like the Belt and Road offer a good example of the dynamic, evolving character of these relationships, which might be partly influenced by earlier patterns of imperial domination but are not reducible to them.[4] On the other hand, the inherent tendency of the capitalist mode of production towards extended reproduction both spatially and otherwise contributes to the spread of the institutions, legalities and techniques necessary for the establishment and reproduction of the capitalist mode of production. The conundrum of the 'standard of civilisation' maps the contradictions of uneven and combined capitalist development and therefore these contradictions 'do not exist as a random flux but as a unity of differences'.[5] In other words, capitalism constitutes a mode of production that knows no inherent limit to its expansion, be it geographical, moral or concerning the aspects of life (human and non-human alike) that cannot be subjected to the imperatives of capitalist accumulation. Long before twentieth-century Marxists, such as V. I. Lenin, Rosa Luxemburg or Samir Amin, started thinking systematically about imperialism, Karl Marx himself was profoundly interested in capital's tendency for limitless spatial expansion: 'The tendency to create the world market is directly given in the concept of capital itself. Every limit appears as a barrier to be overcome.'[6] Recent efforts to expand commercial activities in the deep seabed, the outer space, and previously communally held lands and the legal edifices that accompany these initiatives all constitute recent examples of capitalism's limitless tendency towards expansion.[7] Importantly, capitalism's

[4] On the political economy of the Belt and Road Initiative and Chinese capitalism, see: Jerry Harris, 'China's Road from Socialism to Global Capitalism' (2018) 39 *Third World Quarterly* 1711–26; Liana M. Petranek, 'Paving a Concrete Path to Globalization with China's Belt and Road Initiative through the Middle East' (2019) 41 *Arab Studies Quarterly* 9–32.

[5] Robert Paul Resch, *Althusser and the Renewal of Marxist Social Theory* (Berkeley/Los Angeles/Oxford: University of California Press 1992) p. 61.

[6] Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (first published 1857–1861, New York: Penguin Books in association with the New Left Review 1973) p. 408.

[7] This process of 'land-grabbing' has not escaped the attention of critical international lawyers. For some recent engagements, see: Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30 *European Journal of International Law* 573–600; Isabel Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation' (2019) 30 *European Journal of International Law* 601–33; Umut Özsu, 'Grabbing Land Legally: A Marxist Analysis' (2018) 32 *Leiden Journal of International Law* 215–33; Ntina Tzouvala, 'A False

tendency towards global expansion does not bring about the homogenisation of life-worlds, economic development or legal systems. Rather, as dependency theorists of both Marxist and non-Marxist variants have argued, what we have come to understand as 'under-development' is not a consequence of insufficient contact with capitalism, but of the specific, uneven way different regions of the world became incorporated into global capitalism. Furthermore, 'under-development' is often the outcome of violent processes of de-industrialisation and remaking of local economies for the benefit of imperial metropoles.[8]

The 'standard of civilisation', I posit, was a historically contingent response to the need to make sense of and regulate a world shaped and reshaped by these dynamics of unequal, yet global, capitalist development. It did so by bringing together disparate ideas about human history and evolution that were influential at the time of the standard's formulation as a distinct international legal argument. These influences included, notably, a progressivist, linear outlook on human history, and an unconditional privileging of the historically specific legal and political infrastructure of European capitalism, as well as racial, gendered and sexual imaginaries of immutable difference and hierarchy. This eclecticism of references and sources persists to date. Even though ideas about human progress endure, they are today accompanied by metrics, indexes and 'best practices' that give contemporary iterations of 'civilisation' their historical distinctiveness and ground it on the hegemonic ideas, practices and disciplines of the twenty-first century.

The structure of the standard might remain constant, but what precisely constitutes 'civilisation' relies on a wide range of evolving intellectual tools to construct and maintain its credibility; for example, the relative decline of explicitly (biological) racist justifications of inequalities of wealth and power influenced the specific ways the 'standard of civilisation' was articulated in international law. 'Cultural

Promise? Regulating Land-Grabbing and the Postcolonial State' (2018) 32 *Leiden Journal of International Law* 235–53.

[8] One extreme example is the destruction of Bengal's thriving textile manufacturing under the rule of the East India Company: 'In 1750, India produced approximately 25 per cent of the world's manufacturing output. By 1800 India's share had already dropped to less than a fifth, by 1860 to less than a tenth, and by 1880 to under 3 per cent. It is therefore no stretch of the imagination to claim that Britain's industrial ascent was to a large degree predicated on India's forced deindustrialisation.' Alexander Anievas and Kerem Nişancıoğlu, *How the West Came to Rule: The Geopolitical Origins of Capitalism* (London: Pluto Press 2015) p. 262.

difference' started doing the argumentative heavy lifting, and 'objective' ways of differentiating amongst states based on their ranking in different indexes, their credit-worthiness, or their purported (un)willingness to deal with terrorism stood in for the explicit racialisation of whole populations and political communities. Furthermore, as the rise of feminism challenged the discipline's open misogyny and sexism, making explicit references to female inferiority politically unsavoury, narratives of masculinity and femininity that demanded the reader to identify with the former also arose as responses to these changing circumstances.[9] Overall, the surprising longevity of 'civilisation' is at least partly linked to its adaptability. As international lawyers attempted to understand, rationalise and bring about legal order in a world that is linked through capitalist relationships of production and exchange and constantly stratified by the same relationships, proponents of 'civilisation' drew from various disciplines, dominant ideologies and practices in order to produce convincing legal arguments that reflected and reproduced this uneven and combined development.

This book maps both the persistence of the fundamental argumentative oscillation between 'improvement' and 'biology' internal to the 'standard of civilisation' and also the ever-changing sets of ideas, practices and disciplines that are called forth to make this conundrum intelligible, and often invisible. In this respect, 'civilisation' is a structure, one with an internal logic that appears resistant to individual lawyers' will and even to significant disciplinary changes. However, it is a structure that only exists within history, not outside or above it. Mapping the evolution of the standard is, therefore, an important task.

Structuralist accounts of law have often been criticised for their purported rigidity, their emphasis on argumentative stability and constant textual logic over change, contingency and individual agency. After all, the rise of critical legal histories that privileged indeterminacy, contingency, and textual openness was to a significant extent a reaction against structuralism of the Marxian, anti-Marxian and non-Marxian varieties alike.[10] This critique should, in my opinion, be partly embraced. This

[9] On the centrality of such narratives in international legal scholarship during the 1990s, see: Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679–711.

[10] For the most eloquent account of the rise, fall and possible 're-rise' of structuralist legal histories, see: Justin Desautels-Stein, 'Structuralist Legal Histories' (2015) 78 *Law and Contemporary Problems* 37–59. One of the most canonical texts of this embrace of

monograph argues that our understanding of both the 'standard of civilisation' and of the discipline of international law as a whole is advanced by thinking in terms of patterns of argumentation that persist despite historically contingent legal developments. Thinking through structures enables us to embed legal analysis into broader considerations about the synergies between our discipline and global patterns of profoundly unequal distribution of wealth, power and pleasure.[11] One of the significant losses of the turn to postmodern modes of legal historiography was, indeed, the proclaimed impossibility to link the textual to the social, economic and political. If the law was wholly indeterminate, fluid and contingent – so the argument went – it was impossible to argue that it 'did' anything, that it somehow constituted, or even influenced relations of domination, exclusion or exploitation.[12] This side-lining of structural accounts of the past and present of international law only became possible and plausible within a context of capitalist triumphalism that rendered systematic critiques of the capitalist *status quo* implausible, if not unthinkable.[13] That said, my defence of structuralism as it has been deployed in international law so far is not unconditional.[14] Rather, this book attempts to integrate historical movement and change with the deciphering of persistent argumentative structures within the discipline. Somewhat schematically, I argue that both structuralism and history have

'unstructured indeterminacy' (in the words of Desautels-Stein) is: Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57–125.

[11] I owe this formulation to Rose Parfitt: '[T]his apparatus, the self-governing state, whose reach has now become virtually universal, is itself dedicated, at a fundamental level, to the widening and deepening of capitalist relations of production and exchange, and to the systematic upwards redistribution of wealth, power and pleasure which those relations imply.' Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge: Cambridge University Press 2019) p. 8.

[12] 'The crux of the problem, and the reason structuralist legal history fell away as critical legal history took off, was the confusing relation between law's constitutive role in society and the apparent inability of law to constitute anything if it was really so indeterminate.' Desautels-Stein, 'Structuralist Legal Histories', 54.

[13] It needs to be noted that already since the early 2010s TWAIL scholars, who did not necessarily espouse an openly Marxist project, had noticed this absence and were attempting to rethink the orientation of the movement in a way that did not exclusively focus on imperialism but also on capitalism. See: Michael Fakhri, 'Introduction – Questioning TWAIL's Agenda' (2012) 14 *Oregon Review of International Law* 1–15.

[14] The most widely acclaimed (and misunderstood) example is: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, Cambridge: Cambridge University Press 2006). See also: Martti Koskenniemi, 'What Is Critical Research in International Law? Celebrating Structuralism' (2016) 29 *Leiden Journal of International Law* 727–35.

not achieved their full critical potential. For example, the most prominent exponent of both in international law, Martti Koskenniemi, deployed them in two separate book projects, *From Apology to Utopia* and *The Gentle Civilizer of Nations*, whose relationship remains unclear and contested.[15] For a re-integration between structural and historical accounts, we first need to confront some fundamental questions about the methodology of this book, as well as about the ways it relates to the growing literature of international legal history and historiography, and, more broadly, to critical approaches to international law.

1.1 Reading Symptomatically: Towards a Materialist Method for International Law

The practice of international law entails many things, but reading is certainly a central element of it. When we teach, advocate or write memorials or journal articles, we read to ourselves and to each other. Often, when we engage with what we call 'secondary literature', we read other people's readings, their efforts to create meaning, structure or confusion out of short textual fragments. It is precisely through these acts of reading and re-reading that lawyers practise the (dark) art of making meaning move across time and space, as Anne Orford has argued.[16] We conduct such readings through the extensive usage of quotations (a paradigmatic case of reading aloud for our audience), footnotes, the retrieval of previously unread texts that purportedly support our case and condemn that of our opponents, and so on. International law's constant search for authority also makes ours a discipline particularly enamoured with textual authorities: new 'fathers' and origins are constantly retrieved, cases and treaties quoted, and diplomatic correspondences called forth in this seemingly endless process of reading. Recall for a moment the mild sense of embarrassment that arises when

[15] I owe the insight about the problems arising from the separation between the two projects and approaches and the need to rectify them to Michael Fakhri. Chimni has also advanced this criticism: 'It is worth noting that [Koskenniemi's] historical writings came after he had advanced a structural critique of international law raising the question whether the structure and history of international law . . . can be separately explored without impoverishing the understanding of both.' B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge: Cambridge University Press 2017) p. 317.

[16] Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166–97, 172.

lawyers read Article 38 of the Statute of the International Court of Justice concerning the sources of international law out loud.[17] Students are often instructed to 'read out' the uncomfortable passage that refers to the general principles of law recognised by 'civilised nations'. It seems that treating this part of the text as anything other than a legally inconsequential relic is juridical bad form. Rather, we are instructed to read as if this reference to 'civilisation' is simply not there.

This process of reading references to 'civilisation' out of the sources of our discipline is not just an *ad hoc* technique of international law teachers. Rather, reading 'civilisation' out of the doctrine of sources has been the standard mode of engagement with the 'general principles of law' in Article 38, especially by Soviet and Third World judges, who tried to push back against the openly hierarchical aspects of the concept. Shortly after the establishment of the United Nations, the Soviet Judge Krylov read out the term without much fanfare or explanation: 'In the present case, the Court cannot found (sic) an affirmative reply to Question I (b) either on the existing international convention or on international custom (as evidence of a general practice), or again, on any general principle of law (recognized by the nations).'[18] Judges Ammoun and Weeramantry did the same, and they went to great lengths to document the imperialist origins of the designation and to argue that in the context of a formally post-colonial international law, the term could not be dignified with legal meaning.[19]

It seems, therefore, that it is not only the 'crits' who 'misread' the texts of international law.[20] Certain misreadings, especially if related to the 'standard of civilisation', are widely practiced and accepted. Therefore, a theory of reading is necessary in order to both account for what I am doing in this book and for what legal practice entails more broadly.

[17] Statute of the International Court of Justice (annexed to the UN Charter) 33 USTS 993, art. 38(1)(c).

[18] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 (dissenting opinion of Judge Krylov).

[19] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* (Merits) [1993] ICJ Rep 38 (separate opinion of Judge Weeramantry); *North Sea Continental Shelf (Germany* v. *Denmark)* (Merits) [1969] ICJ Rep 3 (separate opinion of Judge Ammoun).

[20] 'Any method of engaging with texts, whether literary, legal or political, that departs from orthodox forms of interpretation, is portrayed as illegitimate, and a dangerous waste of time and energy.' Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press 2003) p. 52.

Surprisingly, even though international law is certainly a textual discipline and despite the ongoing anxieties about methodology and interdisciplinarity,[21] explicit accounts of what it means to read from within and for international law remain rare. Notably, Orford's earlier work drew from feminist and post-colonial literary theory to defend what she saw as a purposeful misreading of leading disciplinary texts on humanitarian intervention.[22] Reading these texts against the disciplinary grain and the (conscious) desires of their authors, Orford eschewed the question of whether such military action was lawful or not. Rather, she focused on the narrative and pedagogical functions of texts that positioned themselves as pure doctrinal accounts. In so doing, she centred the ongoing synergies between international law and imperialism.[23] Moving beyond international law, I have found Bennett Capers' approach on how to 'read back' and to 'read black' an indispensable guide for reading legal texts against the grain.[24] Capers fundamentally conceives of his reading method as oppositional, both to mainstream ways of reading law but also, I believe, to the texts themselves: 'I am suggesting a reading that reveals sites of contestation, a reading that is oppositional.'[25] This tension enables him to look for slippages, inconsistencies and paradoxes not as the products of technically deficient legal reasoning but as entrances to the deeper logic of the text. In so doing, he encourages us to read with an eye not only for what it is there but also for what it is not. The omissions and the silences of our texts define it as much as what is formally present: 'I use the term [reading black] here to suggest a rereading that reads not only contextually, but also critically, sensitive to the stated and the unstated, the revealed and the concealed, and the meaning to be gleaned

[21] Currently, this anxiety concerns the relationship between law and history, understood both as the past and as the organised study of the past in academic environments. However, it is worth recalling that at the turn of the century it was the relationship with the field of international relations that produced very similar feelings. The constant return of this anxiety is the subject of Aristodemou's Lacanian engagement with international law: Maria Aristodemou, 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours' (2014) 25 *European Journal of International Law* 35–58.

[22] 'The kind of productive misreading that I hope to develop here involves breaching some of the protocols that govern international legal scholarship, in order . . . to make these texts "mean differently"'. Orford, *Reading Humanitarian Intervention*, p. 37.

[23] 'The first part explores what it means to read and write legal theory after colonialism, and the demands this makes of international lawyers.' Ibid., p. 39.

[24] I. Bennett Capers, 'Reading Back, Reading Black' (2006) 35 *Hofstra Law Review* 9–22.

[25] Ibid., 9.

from both.'[26] Once we adopt this approach, cases that are nominally entirely unrelated to race and racism reveal that they do indeed play a role in the production and reproduction of racial hierarchies.

Their reasoning, which is seemingly confusing and inconsistent, acquires meaning and coherence if we accept the centrality of racial imaginaries and assumptions. Capers continues:

> To illustrate this reading practice, I have chosen two cases that on their face do not appear to be engaged in 'race work' at all. In selecting such cases, I hope to excavate the racialized thinking that informs even those opinions most removed from racial concerns. As I shall argue, each of these cases participates in forming racial identity and promulgating a type of racial hierarchy. And because these are judicial opinions, because they speak with the force of law, each of these opinions functions as an authorizing discourse on race.[27]

Importantly, Capers notes that there is no reason to perform 'black' readings exclusively instead of queer, class-based, or feminist ones.[28] He is equally quick to clarify that his method has nothing to do with simply diversifying the judiciary since one's characteristics do not guarantee their willingness to read between the lines.[29]

It is precisely because the accounts of Orford and Capers are so compelling that I want to push them to their limit in two ways. First, I want to defend a productive rather than revelatory understanding of reading of/for international law. This proposition departs from Capers' text, which is centred around metaphors of excavation and revelation. Capers occasionally appears to argue that the centrality of race and racism is already 'there' and 'reading black' enables us to see what was already present in the text but mainstream readings ignored for one reason or another. Relatedly, I suggest that every single reading of international law, whether critical or mainstream, theoretical or doctrinal, is determined by a specific *problematic* that renders some aspects of the text hyper-visible and others invisible, or more accurately, unthinkable. Drawn from the epistemological theories of Gaston Bachelard, the concept of *problematic* has entered the idiom of critical legal theory mostly through the quest to *problematise* the discipline's givens. The concept originally attempted to capture what distinguishes scientific

[26] Ibid., 12.
[27] Ibid., 13.
[28] Ibid., 12.
[29] Ibid.