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.

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.

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.⁴ Such centre–periphery dynamics need not be static, and indeed, inter-imperialist antagonisms lead to the re-organisation of

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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. 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’. 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.’ 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. Importantly, capitalism’s

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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.


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


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 Nişancioğlu, 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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{13} That said, my defence of structuralism as it has been deployed in international law so far is not unconditional.\textsuperscript{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


\textsuperscript{11} I owe this formulation to Rose Patfi: \textquote{[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 Patfi, \textit{The Process of International Legal Reproduction: Inequality, Historiography, Resistance} (Cambridge: Cambridge University Press 2019) p. 8.

\textsuperscript{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, \textit{Structuralist Legal Histories}, 54.

\textsuperscript{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, \textquote{Introduction – Questioning TWAIL’s Agenda} (2012) 14 Oregon Review of International Law 1–15.

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. 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. 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

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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.

lawyers read Article 38 of the Statute of the International Court of Justice concerning the sources of international law out loud. 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).’

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.

It seems, therefore, that it is not only the ‘crits’ who ‘misread’ the texts of international law. 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).
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, 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. 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. 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. 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.’ 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.
25 Ibid., 9.
from both.\textsuperscript{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.\textsuperscript{27}

Importantly, Capers notes that there is no reason to perform ‘black’ readings exclusively instead of queer, class-based, or feminist ones.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{problematic} has entered the idiom of critical legal theory mostly through the quest to \textit{problematis}e the discipline’s givens. The concept originally attempted to capture what distinguishes scientific

\textsuperscript{26} Ibid., 12.
\textsuperscript{27} Ibid., 13.
\textsuperscript{28} Ibid., 12.
\textsuperscript{29} Ibid.
knowledge from other practices which also produce truth-claims about the world.30 Bachelard’s idea was that the rupture that distinguishes sciences from other such practices takes place when we transcend everyday common-sense observations about the world, which he considered to be fundamentally antithetical to science. In this context, a *problematic* is not just a theory, but what is required for theories to emerge in the first place: ‘it is the *structure* of the theory; that is, the way the different concepts are diverted from their isolated and immediate ordinary semantic sense and redefined in relation to one another.’31 Thinking about law in these terms is useful in two ways. First, it enables us to question and leave behind the common sense of the discipline. Second, it unseats the idea of the texts of international law being ‘out there’ and the act of doctrinal interpretation or of historical engagement consisting in rediscovering an already-existing meaning. To return to Orford’s words: if she productively misreads the texts of international law,32 so does everyone else.

Those familiar with literary theory and/or Marxism might have already recognised my proposed method as that of ‘symptomatic reading’, a mode of textual engagement drawn from the work of French Marxist philosopher Louis Althusser. Althusser’s reception in international legal scholarship remains limited. Notably, the most productive usages of his theories thus far have focused on his famous essay on ideology,33 and the function of legal texts in interpellating lawyers and political communities alike into thinking themselves in particular ways, complying with certain ideal types, and forgetting that this process of interpellation ever took place.34 This encounter between international law and Althusser’s theory of ideology has proven productive since his writings on ideology militate against the mechanistic base–superstructure

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32 See note 21.
34 On the texts of international law as processes of interpellation to the model of masculine, muscular humanitarian, see: Orford, ‘Muscular Humanitarianism’. Parfitt has recently proposed a theory of international law as a constant process of interpellating political communities to the model of the modern, capitalist state: Parfitt, *The Process of International Legal Reproduction*. 
divide, which is occasionally found in Marxist legal theory, and the confinement of law to the latter category. Therefore, the Althusserian theory of ideology enables international lawyers to think through the centrality of law as one of the primary mechanisms that ensure the reproduction of capitalist relations of production. This approach affords law relative autonomy from economic relations and fits better with the lawyerly intuition that law does much more than simply ‘reflecting’ some already-existing economic base.

Here, however, I will draw from another major text by Althusser, *Reading Capital*, which apart from being his *magnum opus* also has the important advantage of being a text about how to relate to other texts. To read out loud:

> Our question therefore demands more than a mere literal reading, even an attentive one: it demands a truly critical reading, one which applies to Marx’s text precisely the principles of the Marxist philosophy which is, however, what we are looking for in *Capital*. This critical reading seems to constitute a circle, since we appear to be expecting to obtain Marxist philosophy from its own application . . . This apparent circle should not surprise us: all ‘production’ of knowledge implies it in its process.\(^{35}\)

In *Reading Capital*, Althusser locates the distinctiveness of Marx’s late work, notably *Capital*, in Marx’s productive process of reading texts of the classical political economy out loud to his readers.\(^{36}\) The argument goes as follows: in the process of reading critically the texts of classical political economy, Marx shifted – without realising it himself – the terrain of inquiry, thereby rendering visible the process of labour exploitation. Importantly, the earlier invisibility of this process was not the outcome of malice or incompetence but the result of the questions, or in other words, the *problematic*, that classical political economy was posing. It is irrelevant here if Althusser’s understanding of Marx’s

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\(^{36}\) ‘When we read Marx, we immediately find a reader who reads to us, and out loud. The fact that Marx was a prodigious reader is much less important for us than the fact that Marx felt the need to fill out his text by reading out loud, not only for the pleasure of quotation, or through scrupulousness in his references (his accuracy in this was fanatical, as his opponents learnt to their cost), not only because of the intellectual honesty which made him always and generously recognize his debts (alas, he knew what a debt was), but for reasons deeply rooted in the theoretical conditions of his work of discovery.’ Ibid., p. 18.
intellectual breakthrough is accurate or not. What matters is that in the process the French philosopher articulated a theory of reading as a productive practice that does not concentrate on the surface of the text recovering an already-existing meaning. Rather it looks for presences as well as for absences and, crucially, does not treat these absences as accidental omissions or as indications of incompetence, but rather as necessary consequences of the problematic, the structure of a theory that animated a text. As a mode of engaging with texts, this has distinctive advantages for those interested in engaging critically with international law. It forces us to acknowledge there is no ‘innocent’ reading, which simply assembles and reproduces the transparent, immediately available meaning of the text. Therefore, as Althusser claims, ‘we must say what reading we are guilty of’. In other words, we need to acknowledge the misreadings we engage in and recognise that every reading of the materials of international law is an act of production.

Drawing from these insights, I attempt a reading of international legal materials that does not purport to recover a pre-existing meaning from the surface of the text. This is not a case of traditional legal interpretation with the subsequent addition of historical materialism. Rather, my own ‘symptomatic reading’ aims to recover not only what is said, but also what remains unsaid, not because of an oversight but as a logical consequence of the problematic of the text. In the process, a certain ‘doubling’ of the text occurs: alongside the text that has been transmitted to us is also a second, unarticulated text, which exists in parallel to the first and carries all the silences and omissions that could not possibly have been articulated in the existing text, because otherwise, it would have become untenably contradictory. Importantly, these silences and dark spots of our texts do not simply exist somewhere, ready to be discovered. Rather, the silences are the product of the questions we choose to ask the text, the problematic that informs our own reading. A symptomatic reading, therefore, is delimited both by its own problematic and by the ‘objective existence of the text as a social-historical production’.

It is through this coupling of epistemological relativism and ontological realism – the assumption that the texts might exist objectively ‘out there’ but we only have access to them through the structure of questions we choose to ask – that I am enabled to acknowledge the non-transparency of the text and the co-constitution of the problematic and

37 Ibid., p. 30.
the text, and at the same time to make claims about the validity both of my problematic and of the reading I will shortly put in motion. However, this partial distancing from relativism does not mean that I do not have to recognise the reading put forward for what it is: an always tentative, unfinished, partial, transitionary engagement with a series of texts that is itself liable to be subject to further readings and outside the control of any one single subject, including, notably, of my own.

My reading of international law’s texts is structured around a juridical problematic. I will, therefore, read Westlake, the Permanent Mandates Commission, and the International Court of Justice as a lawyer, and not as a psychoanalyst, an aesthetician or a political theorist. This might seem obvious, but it has important ramifications. The main one is that I had to abandon the idea of ‘civilisation’ as an isolated concept that renders itself to precise definition and historical excavation independently of its relationship with other parts of international law’s grammar and syntax. Rather, I had to read with the assumption that lawyers do not generally disagree about the meaning of words, but rather about their legal consequences. Therefore, I am treating ‘civilisation’ as the crystallisation of a particular argumentative pattern. Designations such as ‘civilised’, ‘uncivilised’ or ‘semi-civilised’ did not have a concrete meaning as such, but only as shorthands for what could be done to other political communities lawfully and what could not. ‘Uncivilised’, therefore, was not a distinct legal identity with clear boundaries: it was rather a bundle of juridical relationships imposed on some by others.

In this respect, I find China Miéville’s materialist engagement with ‘civilisation’ instructive, but incomplete. Miéville’s argument goes as follows: the ‘standard of civilisation’ did not emerge as a conceptual device first, and was subsequently rolled out and applied to relationships between political communities. Rather, his argument goes, the standard


40 I am here relying on Hohfeld’s famous assertion that all legal concepts, including seemingly unitary and indivisible ones, such as the fee simple, are in reality bundles, aggregates of rights (or claims), privileges, powers, and immunities and their juridical opposites: Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913–1914) 23 Yale Law Journal 16–59.

was developed to rationalise a very specific practice: the concluding of ‘unequal treaties’ between Western powers and polities such as China, Japan, or the Ottoman Empire, which according to Miéville were clearly states and therefore, their legal subjugation required special justification.42 The ‘standard of civilisation’ emerged precisely as an attempt to justify this otherwise legally uncomfortable practice or, as Orford has put it, summarising a similar process in a different context, civilisation was the transformation of ‘deeds into words’.43 Miéville’s approach is invaluable, not least because it situates ‘civilisation’ within a broader nexus of juridical relationships and declines to treat it as a monistic carrier of meaning. However, his demystification of the concept of ‘civilisation’ is followed by the mystification of other concepts, notably sovereignty and statehood. Miéville pushes against the post-colonial interpretation of ‘civilisation’ as a way of ‘Othering’ non-Western peoples, stating instead that it was the ‘result of the paradoxes of actually-existing sovereignty’.44 In this way Miéville urges us to treat ‘civilisation’ as a condenser of a rich set of international legal practices, only to fall back to assuming that ‘sovereignty’ or even the ‘state’ has a clear, unitary meaning in the context of international law, which is metonymically captured by ‘civilisation’.

My approach relies on the idea that even when lawyers go to great lengths to define particular terms, they invariably do so with the purpose of attaching specific legal outcomes to them, or in other words, lawyers are generally in the business of crafting terms to fit legal arguments. In this instance, late-nineteenth-century international lawyers came up with a particular mode of argumentation about the distribution of rights, privileges, duties, liabilities and so on between political communities. Often, they used the moniker ‘civilisation’ to crudely summarise this pattern, but oftentimes they did not. Therefore, the decline of explicit usages of the term was not decisive for the survival of this mode of argumentation, even though it did signal a battle over the place of this argumentative pattern within international law as a whole. This leads me to the core of my argument about the structure of this particular mode of international legal argumentation that is known as the ‘standard of civilisation’. My account exploits the disjuncture between the questions

42 Ibid., p. 247.
44 Miéville, Between Equal Rights, p. 248.
late-nineteenth-century international lawyers asked themselves and tried to respond to by invoking ‘civilisation’ and my questions that revolve around the relationship between international law and imperialism. The oscillation between racialised or culturalist exclusion and conditional inclusion characteristic of the standard of civilisation was and continues to be made possible, plausible and even necessary in the final analysis by the modalities of imperialism as a material phenomenon and the antinomies of combined and uneven capitalist development.

In articulating this theory about international legal argumentation that ultimately traces legal indeterminacy back to extra-disciplinary, ‘biggest picture’ structures, I am conscious of the problems that occur when we link (or, more unfortunately, reduce) the textual to the material and the specificities of legality to the contradictory realities of imperialism. However, I think that the risks involved in this exercise are worth taking, since: ‘The enterprise of merely understanding the legal order is not one likely to be taken up by a person radically opposed to the status quo. Opposition to the status quo does not easily survive the kind of identification with the legal system that seems to be a psychological precondition for really understanding it.’ My symptomatic reading of international law’s texts is animated by the proposition that, whatever the discipline’s fathers had in mind when they were writing their treatises, the texts that they actually produced offer a blueprint for the construction of legal relations amongst political communities in a world shaped by the rapid expansion of capitalist relations of production, with all the tensions, contradictions and unevenness this process entailed. Furthermore, if ‘civilisation’, this peculiar, wholly contradictory and unstable legal argument, still lingers with us, this is because international lawyers are still tasked with producing order out of the world of combined and uneven development that capitalism constantly reproduces.

46 After all, as Tomlins has argued, if the historicist follows her approach to its logical conclusion, she will have to acknowledge the irreducible strangeness and unknowability of the past: ‘True historicism – absolute différance – would have to deny the possibility that its object of attention is intelligible, rendering it a species of antiquarianism: the past for its own sake, impossible to understand, entirely enigmatic; phenomena to preserve as best one can, in a state of reverence.’ Christopher Tomlins, ‘Historicism and Materiality in Legal Theory’ in Maksymilian Del Mar and Michael Lobban (eds.), Law in Theory and History: New Essays on a Neglected Dialogue (Oxford/Portland, OR: Hart Publishing 2016) 57–83, p. 65.
Before proceeding, however, two clarifications are required. In this section, I have treated law as a textual discipline without much argumentation to that effect. The first caveat to this approach is that this textuality is not central to all and any legal system across space and time. This book focuses on a particular model of international law that emerged in Europe as a distinct discipline and profession sometime during the late nineteenth century. Not all legal systems are necessarily textual. In fact, it is the materialist orientation of this book that compels me to emphasise that a general theory of law, across time, space, and modes of production is both impossible and undesirable.\textsuperscript{47} If law is the product of concrete social realities and relations, then it is impossible to abstract a general category of ‘law’ that somehow captures the essence of the phenomenon of legality in capitalist, feudal, Indigenous and socialist societies alike. Therefore, my insistence on textuality is not as relevant, for example, to Indigenous legal systems.\textsuperscript{48} This does not mean that these systems are not legal, only that the tools of analysing modern, capitalist legality are finite and cannot be generalised. Therefore, my first clarification concerns this book’s focus on a particular system of inter-communal legality, or what we can call – for the sake of simplicity – Western international law. This choice of focus is, of course, not uncontroversial. Both Indigenous and settler legal scholars have been stressing the necessity to provincialise Western law and acknowledge the continuing validity and effectiveness of Indigenous legal systems, not least because the displacement of Indigenous legality by that of the settler constitutes a core element of settler colonialism and its genocidal tendencies.\textsuperscript{49} The point

\textsuperscript{47} Here, I am echoing directly the remarks by the Marxist political theorist Nicos Poulantzas, who has argued that no general theory of the state is ever possible from within Marxism, only a theory of the capitalist state: ‘For just as there can be no general theory of the economy (no “economic science”) having a theoretical object that remains unchanged through the various modes of production, so can there be no “general theory” of the state-political (in the sense of a political “science” or “sociology”) having a similarly constant object.’ Nicos Poulantzas, \textit{State, Power, Socialism} (New York: Verso 2001) p. 19.


\textsuperscript{49} On the need to take Indigenous laws across the world seriously, see: Haunani-Kay Trask, \textit{From a Native Daughter: Colonialism and Sovereignty in Hawai’i} (Honolulu: University of Hawai’i Press 1999); Irene Watson, ‘There Is No Possibility of Rights without Law: So Until Then, Don’t Thumb Print or Sign Anything!’ (2000) 5 \textit{Indigenous Law Bulletin} 4–7;
is well-taken. However, it remains a fact that through the process of violent colonisation, capitalist expansion and ideological hegemony Western international law has achieved a geographical spread, thematic expansion and claim to universality that is historically unique, even if it is never complete and final. Furthermore, even though to say that international law is exclusively responsible for environmental degradation or the resurgence of the far-right and political turmoil around us would be an act of legal fetishism only a lawyer would be capable of, it is the case that Western international law shares logic with the causes of these phenomena and constitutes one aspect of the causal nexus that brings them about. Therefore, subjecting Western international law to critical scrutiny does not necessarily reify its pretences of exclusivity and universality, but rather registers its historically unique hegemony and influence.

Second, my emphasis on textuality does not imply that textual practices of reading exhaust Western international law. I am well aware of the importance of ritual as well as all these repetitive, stylised practices Jessie Allen describes as ‘legal magic’. It is not enough that the International Court of Justice judges pronounce on whether a certain territory lawfully forms part of this or that state. They have to do so in a specific time and place, following particular rituals and protocols, even wearing specifically designated clothes. Otherwise, their text is legally inconsequential. In other words, despite its pretences of modernity and rationality, international law remains steeped with legal magic, which gives validity and social influence to its texts. This recognition of the non-textual aspects of international law is essential and points, once again, to the finite


Margaret Davies has expressed this concern about critical legal scholarship reifying positive state law as follows: ‘Such descriptions of law . . . may also unwittingly entrench the power of law by presenting it as a totality, rather than as fragmented and complex. The presumption of law in its positivist sense does discursively reiterate and therefore reinforce the positivist view of law together with its in-built biases.’ Margaret Davies, ‘The Ethos of Legal Pluralism’ (2005) 27 Sydney Law Review 87–112, 93.

character of my argument. However, it does not take away from the fact that (Western) international law remains an argumentative, textual practice and that placing this textuality at the centre of our inquiry is a first, but an indispensable step in the process of comprehending both legality and its relationship with other social phenomena. This monograph is especially concerned with the interplay between international law, imperialism and capitalism. The proceeding sections attempt a critical engagement with these structures and with how we can locate the texts of international law within them.

1.2 Imperialism, Capitalism and the Contradictory Structure of International Legal Argumentation

1.2.1 The Capitalist Mode of Production: A Very Brief Introduction

Ours is a time of crises. A decade after the global financial crash the edifice known as the ‘liberal international order’ is under profound pressure. Worryingly, some of the alternatives competing for hegemony offer an even more violent, exploitative and environmentally destructive future than the current configuration. As a result, the reflex to defend the current legal order is shared by many of its critics and supporters alike. My monograph, however, is animated by a concern that unconditionally defending the status quo will turn out to be either ineffective or outright destructive. Indeed, if I am right to argue that ‘civilisation’ remains a central disciplinary argument and that it is structured around a constant sliding between ‘improvement’ and ‘biology’, then any effort to counter the rise of the far-right without questioning authoritarian neoliberal capitalism will always yield precarious gains. This does not entail an unthinking equation of the two. However, it does suggest that in terms of disciplinary logic and argumentation it is both historically and conceptually unconvincing to draw a firm line between the recurring demand for political communities to comply with the imperatives of capitalist modernity and the open subjugation of such communities.

based on presumptions of immutable difference. (Neo)liberal hopes to sever the former from the latter are, I argue, futile and particularly dangerous in the current political conjuncture.

In this section, I will outline the basic tenets of the Marxist theory of the capitalist mode of production and its tendency towards limitless expansion. In so doing, I aim to show that Marxism offers a systematic critique of capitalism as a mode of production and as a way of organising our co-existence with other humans and with nature that is not reducible to the (very real and necessary) analyses of particular social formations or even modalities of capitalist accumulation, such as neoliberalism. However, this emphasis on systematicity does not imply an aversion towards complexity or even towards the contradictory character of social relations. Rather, I will demonstrate that an emphasis on the tensions that characterise capitalism as a mode of production in general and its spatial diffusion, in particular, has consistently been at the core of Marxist engagements with capitalism and, notably, imperialism. Besides offering an overview of the Marxist critique of capitalism and imperialism, this section also briefly engages with materialist articulations of the relationship between capitalism and racist or gendered oppression. In this way, I will offer a roadmap of my engagement with international law as a specifically textual discipline and I will draw a line between race or gender as material relations that are partly constituted through law, and race or gender as metaphors and justifications for domination.

When brought to bear on the current political moment, a Marxian lens enables us to move beyond ‘false contingencies’ and to analyse the role of international law both in the construction of power and in the creation of dispossession, displacement and poverty. Furthermore, this Marxian outlook towards law enables us to conceptualise both as two sides of the same coin. Take, for example, Susan Marks’s critique of analyses of poverty that isolate the phenomenon from wealth and capitalist accumulation:

> [This] analysis is notably lacking in attention to the relational dimensions of global poverty. This is epitomised in the notion of the ‘bottom billion’

53 ‘[W]e need also to be on guard against what might correspondingly be termed false contingency. For just as things do not have to be as they are, so too history is not simply a matter of chance and will. The concept of false contingency refers to this idea, and to the limits and pressures, tendencies and orientations, over-determination and determination in the last instance, that shape both realities and possibilities.’ Susan Marks, ‘False Contingency’ (2009) 62 Current Legal Problems 1–21, 10.
itself – a number that is relative (to the top or next billion), and yet, as a concept, curiously autonomous and non-relational: these poorest of the poor are simply there, a feature on our analytical landscape . . . Those who benefit from current arrangements remain comfortably out of view.  

Marxists emphasise that wealth accumulation can only occur because of the exploitation and dispossession inflicted upon domestic working classes and colonial territories. In international law, as well as in everyday parlance, ‘exploitation’ has connotations of immorality when used in reference to interpersonal relations. However, for Marx, it meant essentially that the dominated class, which in the case of the capitalist mode of production is the working class, produces not only the means for its own subsistence, but also for that of the ruling class. What is purchased by the capitalist is the human capacity for labour (labour-power) for a specific period of time (for example, one day). If labour-power is sold for a day, the next question that arises is to determine the length of the working day. Marx argued that under the capitalist mode of production the labourer does not just work the number of hours necessary to produce goods of value equivalent of the value of her sold labour-power. Rather, the ordinary length of the working day includes a number of hours during which the labourer works to produce value not for herself, but for the capitalist who has bought her labour. In the course of this time, the labourer is not producing to sustain herself, but rather she is producing value for the capitalist. However, since the labourer receives a wage for the sum-total of the one day she has worked, it is not readily evident that the working day is divided into two parts: one in which she works to create commodities the value of which are necessary for her survival, and a second in which she creates value without being paid for it. As Marx argued: ‘The wage-form thus extinguishes every trace of the division of the working-day into necessary labour and surplus-labour, into paid and unpaid labour. All labour appears as paid labour.’

In this context, the difference between the newly added value and the value of labour-power is the surplus value. By moving from the ‘value of labour’ to the ‘value of labour-power’ Marx managed to escape the fact

that ‘[t]he exchange between capital and labour at first presents itself to the mind in the same guise as the buying and selling of all other commodities’.\textsuperscript{57} By purchasing the worker’s ability to perform labour, the capitalist has the opportunity to extract as much labour as possible from the worker. This can happen either through the extension of the working day, to which we will return shortly, or through monitoring and measuring the productive process to intensify it as much as it is humanly possible and, therefore, to extract as much labour (and surplus value) as possible within a given amount of time. Recent reports about the extreme working conditions in the warehouses of tech giants, where logistics workers are being constantly monitored and their bodily functions measured and constantly submitted to the imperatives of profit maximisation, indicate that this tendency of capital to ‘squeeze’ as much labour as possible remains relevant today. Therefore, the legal reality of the employment contract enables and also conceals the realities of the labour process that is constituted by legal, administrative and even illegal techniques and practices.

Through his analysis, Marx also performs an incidental critique of law. The ‘emptiness’ of the legal form creates an apparent reality: it persuades us that two equal commodities are, indeed, being exchanged. However, labour-power and capital are two fundamentally incommensurable commodities, and they need to be treated as such, despite the effects of legal ideology. This is the case because labour-power is a very special commodity to the extent that its application, labour, creates value:

\begin{quote}
In order to extract value out of the consumption of a commodity, our friend the money-owner must be lucky enough to find within the sphere of circulation, on the market, a commodity whose use-value possesses the peculiar property of being a source of value, whose actual consumption is therefore itself an objectification of labour, hence a creation of value. The possessor of money does find such a special commodity on the market: the capacity for labour, in other words labour-power.\textsuperscript{58}
\end{quote}

Conversely, capital ‘is essentially the command over unpaid labour . . . The secret of the self-expansion of capital resolves itself into having the disposal of a definite quantity of other people’s unpaid labour’.\textsuperscript{59} Therefore, it is a constitutional interest of capital to expand the working day and to intensify the pace of the labour-process, since this is the only

\textsuperscript{57} Ibid., p. 681.
\textsuperscript{58} Ibid., p. 270 (emphasis added).
\textsuperscript{59} Ibid., p. 500.
method of maintaining its existence as a self-valorising value, a constant drive to produce ever-increasing amounts of surplus-value. However, this is a process fundamentally destructive for labourers, whose physical and mental condition deteriorates rapidly. This is not due to individual capitalists’ greed or other objectionable moral qualities. Competition between individual capitals compels capitalists to follow this logic of accumulation through exploitation without even realising it. After all, legal ideology is not a ruse orchestrated by capitalists and their representatives. Rather, it produces hegemonic effects for the entirety of a social formation and exerts its influence over everyone, including capitalists. In this respect, Marx’s critique of the capitalist mode of production was not directed against the character of specific individuals, but it was a critique of the very structure of capitalist society.

1.2.2 The ‘Secret’ of Primitive Accumulation, Imperialism and International Law

So far, my analysis of the capitalist mode of production has assumed, albeit implicitly, a domestic legal framework. Importantly, in Marx’s thought the question of the ‘international’ appears hand-in-hand with the issue of the historicity of capitalism. From the early stages of his analysis, Marx was keenly interested in the social stratifications constantly produced and reproduced through the relations of production. Importantly, the existence of masses in possession of nothing else but their ability to work was not a natural phenomenon:

[N]ature does not produce on the one hand owners of money or commodities, and on the other hand men possessing nothing but their own labour-power. This relation has no basis in natural history, nor does it have a social basis common to all periods of human history. It is clearly the result of a past historical development, the product of many economic revolutions, of the extinction of a whole series of older formations of social production.60

In other words, Marx vehemently rejected any conceptualisation of the capitalist mode of production as ahistorical or natural. The capitalist mode of production did not always exist, nor did it emerge peacefully or automatically from the gradual and peaceful expansion of the market. It was through a process of violence, brute force and systematic

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60 Ibid., p. 273.
dispossession – in which the state and (international) law played a pivotal role – that the capitalist mode of production came into existence. In Marx’s own, graphic language: ‘[i]f money . . . “comes into the world with a congenital blood-stain on one cheek”, capital comes dripping from head to foot, from every pore, with blood and dirt.’\(^61\) The creation of free labourers presupposes the radical separation of large masses from the means of production. Marx utilised the specific case of Britain as the model capitalist state of his time, but always with the purpose of drawing general conclusions: ‘If, however, the German reader pharisaically shrugs his shoulders at the condition of the English industrial and agricultural labourers, or in optimist fashions comforts himself with the thought that in Germany things are not nearly so bad; I must plainly tell him: De te fabula narratur!’\(^62\) In a series of vivid descriptions, Marx sketched the violent process of enclosures when peasants were violently driven out of their lands and they were banned from accessing the ‘commons’: the forests, rivers and hunting sites that provided them with timber, fish or meat and other essential means of subsistence, partly decoupling their survival from their subjection to wage-labour. At the same time, draconian laws were put in place punishing those who refused to submit themselves to the discipline of wage-labour by becoming beggars, vagabonds or thieves. It was through these draconian methods that ‘men are suddenly and forcibly torn from their means of subsistence, and hurled as free and “unattached” proletarians on the labour-market’.\(^63\) The emergence of the capitalist mode of production was, thus, far from a smooth, natural or spontaneous process, with people ‘realising’ the supposed advantages of the free-market. Rather, state-sanctioned violence and law were central to the whole process. Known as ‘primitive accumulation’, this theory lies at the heart of the Marxist claim that capitalism came about as a historically specific mode of production and was established through acts of immense violence and brutality, and, therefore, does not constitute a natural phenomenon or the embodiment of human nature. Relatedly, the historicity of capitalism offered the prospect of its overcoming. This was a theoretical fact of paramount significance for Marx and Marxists, who generally are not simply interested in exploring the contradictions of capitalist production in theory but committed to overthrowing capitalism through political struggle.

\(^{61}\) Ibid., p. 926.
\(^{62}\) Ibid., p. 90.
\(^{63}\) Ibid., p. 878.
This struggle does not, however, take place in a neutral terrain. From the beginning of the process of primitive accumulation, the state and law became integral in the emergence and reproduction of the capitalist relations of production. This importance for political and legal relations for capitalism becomes far less clear if we take as the focal point of our analysis the ‘commodity-form’ and ignore Marx’s actual contributions to political economy and the philosophy of history, including his labour theory of value, his explanation of capitalist exploitation and his unpacking of the internal logic of capital. Undeniably, the generalisation of the commodity-form is a significant and integral part of this process. However, the attempt to derive the ‘nature’ of (international) law exclusively from the commodity-form attaches Marxian theories of law to the common-sense realities of the circulation sphere that involve commodity owners trading freely in the market. This, however, ignores the conceptually unbreakable ties between the sphere of circulation and the sphere of production in Marx and the fact that law plays a crucial role in organising the subjugation of this very special commodity, labour-power.

Interestingly, Marx explicitly warned against such an approach that overemphasises the importance of circulation in capitalism: ‘[i]t is typical of the bourgeois horizon, moreover, where business deals fill the whole of people’s minds, to see the foundation of the mode of production in the mode of commerce corresponding to it, rather than the other way round.’64 Such an approach collapses Marxist theories of law into classic liberal theories that assume a conceptual priority of the free and equal individual when thinking about law. In essence, a theory of law that derives the legal system from the ‘commodity owner’ replicates the liberal imaginary of individuals who exist as individuals in a pre-political stage and only adds to this conception a superficial element of political economy by designating this pre-political individual as a ‘commodity owner’. Therefore, Pashukanian approaches to law largely assume that the commodity-owner is a natural figure and not one that emerges through bureaucratic and legal techniques of individualisation and, crucially, the separation of individuals from the means of production and their traditional (legal) links to family, land and community.

This question of the separation of peoples from their traditional matrixes of production and reproduction raises once again the role of law in processes of primitive accumulation. Marx did not exclusively

64 Marx, *Capital*, vol. 2, p. 120.
focus on Britain when discussing primitive accumulation. Colonialism features centrally in his engagement with primitive accumulation, also echoing his (and Engels’) growing interest in revolutionary politics outside Western Europe. As Mark Neocleous has pointed out, the tendency of capitalism towards constant spatial expansionism was an issue of great concern to Marx for several years. Primitive accumulation in the colonies was unfolding in front of his readers’ eyes: ‘[t]here [in the colonies] the capitalist regime everywhere comes into collision with the resistance of the producer, who, as owner of his own conditions of labour, employs that labour to enrich himself, instead of the capitalist.’ Once again, Marx stressed that money, machines or otherwise accumulated wealth are not capital, for ‘capital is not a thing, but a social relation between persons which is mediated through things.’ For capitalist social relations to be established, the existing modes of production in the colonies had to be dismantled, in order for ‘free’ labourers to submit themselves to the process of capitalist accumulation.

In Marx’s later thought, colonialism is portrayed not simply as a process of alien domination and extraction of natural resources for the enrichment of the colonial metropolis. Rather, what distinguishes ‘modern’ colonialism from ancient practices of conquest and pillage were its profoundly transformative functions and its long-term effects in incorporating an ever-growing range of territories into the circuits of capitalist production and exchange. In *Capital*, colonialism is conceptualised as a distinct step in the process of primitive accumulation, as a method for the further expansion of the capitalist mode of production beyond the spatial matrix in which it originally triumphed. It is worth recalling that the closing sentence of the first volume of *Capital* reads as follows:

66 Criticising Chimni’s assertion that colonialism did not directly feature in Marx’s work, Neocleous retorts: ‘This is a bizarre claim, since capital’s tendency to spatial expansion was a main theme of Marx’s work.’ Mark Neocleous, ‘International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization’ (2012) 23 *European Journal of International Law* 941–62, 945.
67 Marx, *Capital*, vol. 1, p. 931.
68 Ibid., p. 932.
The only thing that interests us is the secret discovered in the New World by the political economy of the Old World, and loudly proclaimed by it: that the capitalist mode of production and accumulation, and therefore capitalist private property as well, have for their fundamental condition the annihilation of that private property which rests on the labour of the individual himself; in other words, the expropriation of the worker.69

Indigenous scholars sympathetic to Marxism, such as Glen Coulthard and Nick Estes, have drawn from these final pages of *Capital* to theorise settler capitalism, while simultaneously offering crucial corrections to the classic Marxist theory of primitive accumulation.70 Indeed, Coulthard suggested that Marx’s theory was indispensable, but also inadequate on two grounds. First, by confining primitive accumulation to the pre-history of capitalism, we become oblivious of the constant tendency of settler capitalism to use force, violence and brute dispossession in order to further its encroachment into Indigenous lands. In the words of Coulthard: ‘Settler colonialism is territorially acquisitive in perpetuity.’71

Relatedly, Nick Estes’s work has documented the centrality of resource extraction in such processes of combined territorial and capitalist expansion by showing that, far from being only the historical matrix of modern capitalism, violent, but also legally sanctioned, land dispossession is constantly enforced upon and resisted by Indigenous peoples across the world.72 For Estes, Indigenous history and resistance to such dispossession enact ways of life that are not structured around the imperatives of profit, but rather emphasise notions of care and interconnection between human and non-human relatives alike, offering the blueprint for a non-capitalist future for Indigenous peoples and settlers alike.73 Second, Indigenous scholars have resisted the classical Marxist conceptualisation

69 Ibid., p. 940.
71 Coulthard, *Red Skin, White Masks*, pp. 151–2 (emphasis as in the original).
72 ‘US Crude oil production skyrocketed from 2008 to 2016 – an 88 percent increase, thanks to the shale oil boom in the United States and the tar sands boom in Canada. With this acceleration came new oil pipelines and new sites of extraction . . . Indigenous lives, lands, waters and air were once again sacrificed to help pull settler economies out of the gutter.’ Estes, *Our History Is the Future*, p. 29.
73 ‘Perhaps the answers lie within kinship relations between Indigenous and non-Indigenous and the lands we both inhabit. There is a capaciousness to Indigenous kinship that goes beyond the human and that fundamentally differs from the heteronuclear family or biological family.’ Ibid., p. 256.
of land dispossession as the first step for proletarianisation. In other words, in the context of settler colonies, dispossession did not necessarily lead to the mass movement of Indigenous peoples into industrial centres and their transformation into wage labourers. Rather, economic marginalisation often followed these processes. This does not mean that in settler colonies land dispossession was not linked to capitalism. On the contrary, it is precisely in settler colonies that this process is central to capitalist transformation by providing the very spatial matrix, the terrain that settler capitalism needs in order to establish and constantly reproduce itself:

Increased European settlement combined with an imported, hyper-exploited non-European workforce meant that, in the post-fur trade period, Canadian state-formation and colonial-capitalist development required first and foremost land, and only secondarily the surplus value afforded by cheap, Indigenous labor.74

Therefore, Coulthard argued, Marxists need to suspend Eurocentric ideas about the contours of primitive accumulation and confront the fact that in settler colonies it was land as such, and not the ultimate goal of wage labour, that became central to the process, thereby tailoring both their analyses and, crucially, their anti-capitalist struggles accordingly.75

These arguments are persuasive and fruitful well beyond the context of settler colonialism. They offer us guidance on how to begin conceptualising the relationship between international law, capitalism and imperialism. First, they do so by reminding us that the expansion of capitalist relations of production in the present time is not only governed by the internal logic of capital but still relies on the legal, semi-legal and para-legal violence of the state, settler or otherwise. Moreover, thinking about primitive accumulation as re-articulated by Indigenous scholars enables us to account both for the global tendencies of capitalism and for the specific dynamics of how capitalist relations of production develop in different local, state or regional contexts. Put differently, the tendency of capitalism to expand without limit and the universalising effects of this expansion do not mean that every single region of the world is progressing towards the same material conditions, be it impoverishment (when it comes to capitalism’s critics) or prosperity (if we trust its defenders).

74 Coulthard, Red Skin, White Masks, p. 12.
75 For example, Coulthard is critical of the leftist call to ‘return to the commons’ as a response to neoliberal privatisation in the context of settler colonies in so far as this slogan ignores the claims of Indigenous peoples over such commons. Ibid.
Rather, the process of capitalist expansion assumes different concrete forms depending on the specificities of both local development and international interaction.

One major historical factor that has been continuously shaping both national dynamics and trans-boundary interactions is, of course, the earlier transition of Western Europe to capitalism and the rise of Western imperialism. Debates about the origins of capitalism and its emergence in Western Europe abound both within and beyond Marxism. Even though Marxists disagree about whether this transition to capitalism had origins internal to the West or global origins, they share a vehement rejection of culturalist explanations that credit Christianity, Western civilisation or the prodigiousness of the ‘white race’ for this transition. In fact, the Third Worldist Marxist Samir Amin coined the term ‘Eurocentrism’ to critique precisely this culturalist mystification of the West’s transition to capitalism and its subsequent political, economic, military and ideological dominance. Even though the term is currently used in international legal discourse to denote and denounce several disparate disciplinary practices and assumptions, it carried a narrower, more specific meaning in the work of Amin. Eurocentrism is an ideological construct that mystifies and thereby justifies Western prosperity and imperial domination over the rest of the world. Amin argued that imperial domination was the outcome of objective historical processes of capitalist expansion, and not the natural result of European inquisitiveness, hard work and bravery. He insisted that the military advantages of the West resulted from the historically contingent rise of both capitalism and the centralised state in that region and did not constitute the expression of some inner virtue and superiority of Christianity or the white race. For Amin, Eurocentrism obscured the material origins of the rise of the West, attributing its domination to immutable cultural difference instead. Within the Eurocentric universe, these phenomena were made to look both inevitable and historically as well as morally justifiable as the only path to modernity for an inherently

76 For an overview of the debate that adopts the latter position, see: Anievas and Nişancioğlu, How the West Came to Rule, pp. 13–42. For a riposte, see: Maïa Pal, “My Capitalism Is Bigger Than Yours!” Against Combining “How the West Came to Rule” with “the Origins of Capitalism” (2018) 26 Historical Materialism 199–224.
stationary East. Therefore, Amin argued, there was something historically unique about nineteenth-century European racism and overall sense of superiority that is incommensurate with earlier forms of xenophobia and chauvinism exhibited, for example, by Christians towards Muslims and vice versa, which were symmetrical mirrors of each other:

During the Crusades, Christians and Muslim each believed themselves to be the keepers of the superior religious faith, but at this stage of their evolution, as evidence has proven, neither one was capable of imposing its global vision on the other. This is why the judgements of the Christians, at the time of the Crusades, are no more ‘Eurocentric’ than those of the Muslims are ‘Islamocentric’. Dante relegated Mohammed to Hell, but this was not a sign of a Eurocentric conception of the world, contrary to what Edward Said has suggested. It was only a case of banal provincialism, which is something quite different, because it is symmetrical in the minds of the two opposing parties.80

Unlike this pedestrian distrust of strangers, Amin argues, Eurocentrism is a significant ideological component of the global expansion and reproduction of capitalism in ways that denied non-Europeans any form of historical agency and commanded them into Europeanising themselves at the pains of irreversible social and cultural decline.81 The impossibility of this command was central to Samir Amin’s analysis of capitalism, which for him tended towards increasing polarisation between the centre and the peripheries, rather than homogenisation around a Western model of prosperity, modernity and freedom: ‘this conquest progressively created a growing polarization at the heart of the system, crystallising the capitalist world into fully developed centres and peripheries incapable of closing the ever widening gap.’82

1.2.3 Gender, Race and Sexuality as Material Relationships and as Textual Metaphors

Amin was not the only Marxist to underscore this tendency of capitalism to create new or exploit already-existing stratifications among people and to mobilise ideology in order to justify and reproduce these stratifications. Notably, Marxist historians of race and racism were

81 Ibid., p. 180.
82 Ibid., p. 154.
adamant that even though ideas of racial differentiation might have been circulating for centuries, it was the very material practices of exploitation of colonial lands and labour as well as, notably, practices of slavery that led to the stabilisation of race as a way of ordering and governing human bodies and their relationship to the economy. Starting with Eric Williams’ classic *Capitalism and Slavery*, black Marxists made two crucial claims. First, slavery in the southern states of the United States as well as in the colonies could not be properly understood as an archaic, pre-capitalist form of production. Rather it was deeply embedded in national and transatlantic circuits of capitalist production, exchange and profit.\(^8^3\) Even though Williams’ work was initially dismissed and ignored, subsequent research into the everyday operations of slavery has shed light into the circulation of modern labour disciplining techniques between factories and the plantations as well as the deployment of highly sophisticated techniques of management and accounting to manage slavery and increase its productivity and profitability.\(^8^4\) Second, these Marxists argued that the ideological edifices of race and racism that were erected to justify these practices were not anachronisms but novel ideological schemes which were historically inseparable from the emergence of capitalism as a global mode of production. In the context of Marxist international legal scholarship, Robert Knox has drawn from these strands of thought to push back against both Marxist and post-colonial or critical race approaches that tend to privilege class/value over race and vice versa.\(^8^5\) Following closely Haiti’s encounter with international law, Knox instead argues that the history of the first black republic indicates how “[p]rofit maximisation was underscored and undergirded by racialisation”\(^8^6\) and how, notably, international law registered and


\(^8^6\) Knox, ‘Valuing Race?’, 125.
imposed upon Haiti evolving modes of racialisation that facilitated evolving patterns of global capitalist accumulation.87

Similarly, Marxists, and more broadly socialist feminists, contended that even though patriarchy predated capitalism, the latter reconfigured the former in crucial ways in order to exploit women’s reproductive capacity and to safeguard a reliable source of the unpaid domestic labour and care essential for the reproduction of labourers and the conditions of capitalist production as a whole.88 Simultaneously, these feminists argued, commodity fetishism and modern techniques of advertising and branding render this indispensable reproductive labour of women invisible, positing that it is through the purchase of this or that commodity that social reproduction is accomplished. Bringing together gender, race, commodities, and, crucially, the importance of commodities in the attainment of civilised status, Anne McClintock has argued that:

The manufacture of soap . . . burgeoned into an imperial commerce; Victorian cleaning rituals were peddled globally as the God-given sign of Britain’s evolutionary superiority, and soap was invested with magical, fetish powers. The soap saga . . . embodied a triangulated crisis in value: the undervaluation of women’s work in the domestic realm, the overvaluation of the commodity in the industrial market and the disavowal of colonized economies in the arena of empire.89

Marxist feminists and more recently queer Marxists also argue that the rise of capitalism was inexorably linked to the naturalisation of the gender binary and to the suppression of forms of sexuality that were considered wasteful and unproductive.90

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87 Ibid., 124.
This brief outline of the tendencies of capitalism to create, reproduce and repurpose stratifications based on geography, race and gender, apart from its obvious reliance on class exploitation, cannot and does not account for the rich and contradictory relationship between these different aspects of domination. Importantly, this monograph will not examine, for example, how international law has been instrumental in the production and reproduction of relationships of class, race and gender in specific historical conjunctures. Rather, this monograph focuses on the ways race, gender or sexuality have been used as metaphors to explain, justify and reproduce the unequal distribution of rights and duties under international law. In other words, I am interested in the ways these ideological and material categories have entered the international legal argument and have been constantly conditioning our collective imagination of what is possible and plausible and what is not.

Importantly, I am emphatically not arguing that there is a direct correspondence between the constitutive elements of the ‘logic of biology’ in the language of international law and the non-textual, material relations of racist, sexist domination and exploitation. Indeed, it is one thing to argue, correctly, that the international legal meaning of gender or race is a product of international law and an altogether different one to contend that gender, class or race as such are products of international law. The latter contention is often animated by a determination not to allow international lawyers to displace responsibility somewhere outside the discipline, be it ‘politics’, ‘empire’ or even ‘illegality’, as well as by a post-structuralist sensibility that takes the textuality of the law seriously and resists efforts to draw a sharp line between the text and ‘real life’. Even though I share both intuitions, I am also concerned about the fetishisation of (international) law that ends up reducing complex social realities and the products of multiple determinations into the workings of one discipline, which also happens to be the one we have dedicated our careers to. In other words, and to reverse the famous saying, with (assertions of ) great responsibility comes great (discursive) power.

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92 Orford has summarised these mainstream objections to critical theorising: ‘Lawyers have to deal with the facts on the ground and the problems facing real people in the real world. There is no time for abstract theoretical questioning when issues of life and death are at stake.’ Orford, Reading Humanitarian Intervention, p. 51.
The second reason that mandated this brief excursus into the relationship between capitalism, sexism and racism is that unlike many important critical engagements with international law, my work does not revolve around a critique of liberalism. Rather, it puts forward a critique of capitalism and the way in which its contradictions structure an international legal argument.\textsuperscript{93} Of course, I am not alone in this enterprise. Marxist engagements with international law have been studying closely different aspects of this entanglement between international law and capitalism.\textsuperscript{94} Still, in 2012 the Oxford Handbook of the History of International Law contained no index entry for capitalism or capital and only a couple of chapters dealt with issues of political economy.\textsuperscript{95} Today, as illiberal, authoritarian forms of capitalism are on the rise, it is important to remember that there is no historical or conceptual necessity for the combination of capitalism and liberalism, even though the latter has been a powerful and regular ideological companion of the former. Rather, both capitalism and imperialism have been justified and governed through an incredibly wide range of ideologies and political institutions. In fact, it is the very core of my position that international legal argument constantly oscillates between wildly divergent ideological justifications for the allocation of rights and duties amongst political communities. These


contradictions would be damning if one was trying to anchor international law to a particular ideology, or, more optimistically would raise as many questions as they answer. Take, for example, Koskenniemi’s influential argument that the constant oscillation between descending and ascending patterns of argument in international law embodies the contradictions of the liberal doctrine of politics in its attempt to reconcile methodological individualism with the need to ground normatively the existence of political communities. The shortcoming of this explanatory scheme is that it displaces the problem from one set of texts (international law) to another (the works of liberalism). It does so without reflecting on why liberalism carries these impossible contradictions in the first place and, more importantly, why and how these contradictions become invisible and, at the end of the day, inconsequential in so far as liberalism remains hegemonic. In fact, Koskenniemi explicitly refuses to engage with these questions designating his project as a ‘vertical’ bringing together of two structures of thought and argumentation. On the contrary, I argue that because these argumentative contradictions of ‘civilisation’ reflect, in however a mediated way, very real contradictions of capitalism as a global system that produces both tendencies of homogenisation and dynamics of divergence and stratification at the same time, these discursive contradictions become possible, plausible and even necessary.

1.3 On Textual Indeterminacies and Material Structures: Towards a Reconciliation of Marxism and Deconstruction

Writing in 2002, the influential critical race theorist Mari Matsuda expressed her distrust towards those sections of the legal left she identified as engaging in ‘deconstruction that comes without a progressive politics and a material component’. The target of her disagreement was dual. First, there was the long-standing debate between critical race theorists and some feminists on one side and traditional US-based critical legal studies (CLS) on the other about the usefulness of legal struggles for

96 Koskenniemi, From Apology to Utopia, pp. 91–2.
97 Ibid., p. 72.
women and racialised people and in particular about the usefulness of legal rights as a tool for the protection of the oppressed.\textsuperscript{99} Second, Matsuda expressed a broader concern about the post-structuralist impulse within and beyond legal academia to deconstruct and complicate well-established binaries, such as those of gender, race or sexuality. For her, a discursive destabilisation of such categories does not magically result in the undoing of the relevant oppressive relations. In fact, such intellectual and linguistic games can end up supplying ammunition to the opponents of progressive legal reforms, which for all their faults and simplistic conceptualisations produce tangible benefits for the oppressed.\textsuperscript{100}

Marxist international lawyers for their part have been deeply divided about the first aspect of the disagreement, proposing anything from tactical embraces of international law and human rights to the position that the ‘chaotic and bloody world around us is the rule of law.’\textsuperscript{101} Arguably, Knox’s Leninist distinction between strategy and tactics provides the most politically defensible and plausibly materialist blueprint for action to the extent that it embraces (international) legal tactics but only in so far as they do not undermine the fundamental goal of human emancipation through socialism and communism.\textsuperscript{102} However, most Marxists tend to share the second point of Matsuda’s distrust towards the various ‘post-isms’ that rose to academic prominence in the 1990s. A deep scepticism towards what they perceive to be the excessive emphasis of post-structuralism, post-modernism and post-colonialism on textuality and their detachment from material realities and struggles unifies otherwise divergent strands of Marxian thought. Interestingly,


\textsuperscript{100} Matsuda, ‘Beyond and Not Beyond’, p. 396.

\textsuperscript{101} Miéville, Between Equal Rights, p. 319 (emphasis as in the original). B. S. Chimni and Bill Bowring are amongst the staunchest defenders of international law as it emerged after decolonisation from a Marxist perspective: Bill Bowring, The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics (New York: Routledge-Cavendish 2008); Bill Bowring, ‘What Is Radical in “Radical International Law”?‘ (2011) 22 Finnish Yearbook of International Law 1–29.

and in a firm departure from Matsuda’s position, some Marxists have contended that obsession with textuality has led the non-materialist wing of TWAIL (Third World Approaches to International Law) to adopt voluntaristic approaches to international law. These underestimate the importance of mass politics and imply that the progressive re-imagination of the discipline is simply a matter of disciplinary will and professional imagination. Focusing, rather unsurprisingly, on the question of revolution, Hammoudi, Taylor and Miéville have all argued against the theoretical distortion of centring textual indeterminacy, suggesting that this necessarily leads to political co-option and rejection, or at least side-lining, of mass political struggle towards radical political rupture.  

In one way or another, the politics of deconstruction in and for law remain suspect. I hasten to add that this concern about the politics of deconstruction is also shared by legal theorists with impeccable deconstructionist credentials, albeit on very different grounds. In a 1990 article, Pierre Schlag warned against the possibility of deconstruction becoming yet another technique in the toolbox of the lawyerly subject, who (thinks that he) remains whole, rational and composed and is therefore situated outside the contradictions of the text:

Legal thinkers have learned that the text is a bad place to work out contradictions, aporias, and other intellectual difficulties. Texts create all sorts of problems . . . Better, then, to find some place to deal with these difficulties that is impervious to texts – say, for instance some mystical place outside the text – say, the good judgments of the pragmatist.

I will return to this point in the conclusion of this monograph where I push back against the joint emergence of deconstruction and the figure of the lawyer in critical international law. For now, it suffices to note that the political orientation of textual techniques that seek to expose the unstable and contradictory nature as well as the uncertain foundations of international law, or in other words its indeterminacy, is not always settled or unconditionally progressive and emancipatory and that

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scholars sympathetic to deconstruction have also acknowledged this ambiguity. However, as I will show shortly, these concerns and tensions might be justified, but they do not negate the contribution of deconstruction for engaging critically with international law. Rather, the articulation of a materialist framework for understanding legal indeterminacy is a core methodological intervention of the monograph at hand.

In international law, Marxist scepticism towards deconstruction and its emphasis on textual indeterminacy has culminated in extensive critical engagement with the works of David Kennedy and, primarily, Martti Koskenniemi. It is telling, for example, that Chimni’s second edition of his classic *International Law and World Order* included a chapter exclusively dedicated to the two ‘father figures’ of critical international law. A common objection amongst Marxists flows from adopting the standpoint of the oppressed. In so doing, both Chimni and, more recently, Parfitt have objected to the ‘openness’ and ‘instability’ of the international legal argument that flows from the Koskenniemi indeterminacy thesis. Notably, they do so by invoking Koskenniemi’s own argument about the persistent operation of ‘structural bias’ in international law. Parfitt neatly summarises this objection as follows:

[I]f international law really is normatively indeterminate – then how is it that certain communities always draw the short straw when it comes to the allocation and exercise of power and resources? How can we account, in other words, for what Koskenniemi, in a later modification of his work on indeterminacy, calls ‘structural bias’?

In other words, international law might read as open, plastic or indeterminate in Geneva, London or New York, but not so much in Baghdad, Nauru or Cairo.

It appears to me that these objections 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. That is to say, the centring of the figure of the self-reflexive international lawyer who struggles to infuse international law with his progressive,


genuinely universal political commitments but does so conscious of the fact that there is no objective anchor nor a transcendental guarantee that the law ‘actually’ aligns with these ideals. In Miéville’s words:

Faced with the question of how CLS can square its analysis with its proposals, [t]he reply lies in ‘reflexivity’. This recourse to ‘reflexivity’ ... is a typical, and typically unsatisfactory, postmodern sleight of hand, a suggestion that an impossible manoeuvre can be made simply by being aware of its impossibility.

A comprehensive re-articulation of the relationship between deconstruction and Marxism for the purposes of legal critique is still to be worked out, and it certainly exceeds the purposes of this book. For now, it suffices to say that, properly read, Derrida’s texts do not justify the overt Marxist hostility towards deconstruction nor the staunch anti-Marxism of some of Derrida’s disciples. Rather I hold, together with Terry Eagleton, that: ‘The statement that “there is nothing outside the text” is not to be taken, absurdly, to suggest that, for example, Jacques Derrida does not exist, but to deconstruct empiricist or metaphysical oppositions between discourse and some “brute” reality beyond it.’ Furthermore, in Derrida’s own words ‘it is by touching solid structures, “material” institutions, and not merely discourses or significant representations, that deconstruction distinguishes itself from analysis or “criticism”.’ My argument on the ‘standard of civilisation’ attempts to do exactly that. On the one hand, I will revisit the texts of international law ranging from textbooks and treaties to court rulings and memorials in order to show the inherent instability of ‘civilisation’ as a pattern of argument that constantly oscillates between two distinct poles: the ‘logic of improvement’ and the ‘logic of biology’. This is the first part of my argument, since I show that, in a truly Western fashion, a term that appears unitary (‘civilisation’) is, in fact, binary. My analysis proceeds to show that even though these two

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108 Both the relevant literature and my personal experience suggest that the tendency to reify the legal professional is not equally distributed amongst genders. Hence, my use of male pronouns here is deliberate.

109 Miéville, Between Equal Rights, p. 58.


111 Quoted in ibid.

112 ‘Nature versus nurture, subject versus object, reason versus will, truth versus power, lordship versus servitude – whichever way you look at the world, if you look at it through Western eyes, it always comes out as an endless chain of binary oppositions. The West just likes that kind of thing. The same, of course, holds true for Western law.’
poles are in direct tension and represent fundamentally different visions on how to distribute rights and duties amongst international communities, as international legal debates evolve they also tend to collapse into each other. So far, so Derridean or, in Rasulov’s words: ‘No entity can ever keep at bay that analytical antithesis on whose ontological isolation its identity depends. Or, to put it slightly less abstractly, every Self carries within it an ineradicable trace of its external Other, which is to say that the Other is never really external and, moreover, never really an Other.’

I could end my analysis here and still argue that my contribution is original enough. However, there is a further question that needs to be addressed: what are the political, economic and institutional structures that make possible the continuing presence, persuasiveness and even invisibility of this contradictory, unstable and overall unpleasant argumentative pattern. This monograph argues that it is the global spread and reproduction of capitalism as a fundamentally contradictory mode of production that carries both universalising and stratifying tendencies that makes the ‘standard of civilisation’ possible, plausible and even necessary. The contradictions of ‘civilisation’ do not necessarily constitute an open field of argumentative freedom for individual international lawyers, who can mobilise these contradictions to serve a supposedly unlimited range of opposing political projects. Rather, I suggest that we understand this indeterminacy as the historically contingent way in which the contradictions of capitalism as a global system of production and exchange are inscribed into international legal argumentation. In this context, indeterminacy can be understood as both restraining and enabling. It is restraining in so far as it sets the parameters and introduces inescapable contradictions and oscillations within the argumentation of international lawyers, who choose or are forced to articulate their arguments by reference to ‘civilisation’. As Chapter 4 of this monograph demonstrates, the lawyers who resisted South African apartheid and colonialism in South West Africa through the language of ‘civilisation’ occasionally ended up articulating arguments uncomfortably similar to those of the proud racists they opposed and vice versa. Indeterminacy feels like freedom until one starts arguing things one never expected or intended to.


113 Ibid., 801.
114 Chapter 4.
That said, this indeterminacy provides argumentative opportunities for those who are not willing to confront the contradictions of global capitalism, but rather struggle for the relative improvement of the position of certain groups and individuals within this given framework. Indeed, the ‘mix’ between ‘improvement’ and ‘biology’ matters hugely when it comes to the everyday life, or even survival, of the most exploited and marginalised groups of this world. However, when lawyers choose to pursue these struggles through the language and argumentative structure of ‘civilisation’ they necessarily forego the possibility of challenging imperialism and capitalism at their core. On a theoretical level, my exposition of the indeterminacy of ‘civilisation’ does not show that international law is open to all and any politics. On the contrary, I argue that some fundamental arguments of the discipline are structured by the contradictions of global capitalism that both homogenises and also constantly (re)produces unequal development and polarisation. To the extent that ‘civilisation’ is a relatively open (or, relatively closed) argumentative terrain, it enables lawyers to make arguments that manipulate these contradictions while also compelling them to subject themselves to these same contradictions with all the political and argumentative costs that come with this internalisation of the ‘logic of improvement’ and the ‘logic of biology’. As I show in Chapter 2, for bourgeois international lawyers from non-Western communities the costs were certainly worth the trouble, since this internalisation of ‘improvement’ and ‘biology’ also fitted with their domestic interests of capitalist transformation and subjugation of ‘undisciplined’ populations. However, for radicals, the costs of entering the terrain of ‘civilisation’ have consistently been catastrophic.

By treating international law as a specialised language articulated by a particular class of intellectuals, lawyers, within specific institutional structures, and civilisation as one argumentative pattern amongst many, I distance myself from Marxian attempts to locate the penultimate essence of law and link it to the penultimate essence of capitalism. When all is said and done, the Pashukanian reduction of ‘legal form’ to ‘commodity form’ does a poor job in explaining both international law and capitalism by ‘thingifying’ both. Instead, in the following pages, I construct a materialist explanation of one crucial element of international law, the ‘standard of civilisation’.

115 Chapter 2.
The theory I put forward about the structure, functions, and conditions of possibility of the ‘standard of civilisation’ is, thus, a finite one, in more than one way. As I already noted, I am not attempting to explain the entirety of the relationship between international law and capitalism, but rather the link between one type of argument and the very specific character of capitalism as a global and contradictory mode of production. The second level of finitude is that my scheme is not structured around or capable of explaining the outcome of concrete legal battles. The argumentative structure of ‘civilisation’ does not control the outcome of specific legal struggles, but it does control the range of arguments open to advocates, civil servants and judges. ‘Civilisation’ in this context is not the machine or some teleology that did, does and always will dictate the answer to concrete legal problems. Rather, it offers a range of contingently articulated answers, which, however, always remain within a particular framework – the oscillation between ‘improvement’ and ‘biology’ – as a matter of necessity. For example, when discussing the ‘unwilling or unable’ doctrine in Chapter 5, my argument is not that the emergence of the doctrine was inevitable. Rather, I am arguing that when international lawyers encountered the concrete problems of the war on terror (problems, of course, from the perspective of the United States and its allies), ‘civilisation’ offered argumentative tools and precedents that rendered arguments based on the ‘unwilling or unable’ doctrine intelligible, and even plausible. Relatedly, I am arguing that those sceptical of the doctrine would do well not to try to counter these civilisation arguments from within their logic because whatever tactical gains there might be will be outweighed by the perils of getting trapped within the argumentative conundrum of ‘civilisation’.

1.4 Overview of the Monograph

The structure of this book reflects both the historical period examined and the structure of my argument. Therefore, the book is divided into four substantive chapters that proceed in chronological order. First, I examine the emergence of the standard of civilisation as a central argumentative pattern of nineteenth-century international law covering a period stretching from the late nineteenth century until the end of the First World War. Using the example of unequal treaties and nineteenth-century...
century extraterritoriality, I show that debates about their reform and abolition were constantly oscillating between the demand or promise of equal rights and duties subject to comprehensive social, legal, political and economic reforms, and the ongoing postponement of this possibility based on ideas of immutable difference and inferiority. Crucially, I show that despite varying emphasis, non-Western international lawyers did not push against the standard of civilisation, but rather they adopted and manipulated it in order to further their national and class interests both domestically and internationally. Second, I examine the institutional life of the standard of civilisation as materialised in the League of Nations and more specifically in its openly colonial branch, the Mandate System. My engagement with the institutional life of ‘civilisation’ brings to light two important aspects of it: its potential for internal transformation, and its increasing reliance on social sciences, statistics and anthropological studies. In regard to the former, I show that as the capitalist state evolved to serve the evolving needs of capital accumulation so did the ‘logic of improvement’. Thereby, the dictates of this logic were not and – according to a materialist analysis – could not possibly be identical in 1878 and 2020. The fourth chapter revisits the South West Africa saga. Through a close reading of a wide range of legal documents submitted to and produced by the International Court of Justice, I reconstruct a moment when radical forces from the South attempted to argue ‘civilisation’ against the grain only to be trapped in the contradictions of their approach. Finally, I trace the survival and reconfiguration of the standard of civilisation and its persistence as a structure of argumentation in times of neoliberalism and the war on terror. Using the examples of the neoliberal reforms in the occupied Iraq as well as the ‘unwilling and unable’ doctrine, my final substantive chapter traces the recent reconfigurations of the capitalist state in the era of neoliberalism. Crucially, it tracks the survival of race, gender and sexuality as argumentative tropes even when the international legal order had nominally disavowed its racist, patriarchal and open imperialist past. Each of these chapters reflects in one way or another on both the distinctiveness and the interconnectedness of the two logics that constitute the ‘standard of civilisation’. The final chapter discusses the conclusions that we can draw from this new reading of ‘civilisation’ as well as the many questions that remain to be raised and answered in the process of constructing a material theory of international law. In the meanwhile, I can only hope that others will join me in my reading of international law’s materials.