

VICTORIAN ANTICS: THE PERSISTENCE OF THE "LAW AS CRAFT" MINDSET IN THE CRITICAL LEGAL IMAGINATION

Daniel R. Quiroga-Villamarín * 

I. INTRODUCTION

At the risk of circularity, I would like to begin my review of Ntina Tzouvala's innovative monograph *Capitalism as Civilisation (CaC)* with a reference to one of her own book reviews.¹ Or, perhaps more precisely, to the reaction a commentator had on Twitter to her review of the edited volume *World Trade and Investment Reimagined*.² Our Twitter user (who will remain anonymous), used Tzouvala's book review to put forward an argument on why mainstream international legal scholarship (MILS) should engage with what he³ saw as Tzouvala's exemplary summary of the core of a 'critical legal studies' (CLS) approach to international economic law. Even if we suspend for a second the problematic issue of MILS claiming the prerogative to engage with CLS-related work (a privilege rarely granted to us on the 'socio-critical spectrum'),⁴ I argue there is one further problem with this tweet: it assumes one can label

* PhD Student & Teaching Assistant, Graduate Institute of International and Development Studies (Geneva, Switzerland). daniel.quiroga@graduateinstitute.ch. I thank Alejandro León-Marín, Juan Amaya-Castro, and the editors of the EJLS for their feedback on an early draft.

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

² Ntina Tzouvala, 'World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization' (2020) 31 *European Journal of International Law* 1166.

³ Our Twitter user was obviously a "he". I share Tzouvala's brave use of non-gendered pronouns in specific situations to highlight the many ways in which our field's hierarchies are experienced in both scholarship and practice. See Tzouvala, *Capitalism as Civilisation* (n 1) 39, note 108. On a different note, I use MILS in the same way as BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017) 12.

⁴ To paraphrase Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 14. This point was aptly noted by Dimitri Van Den Meerssche and Marina Veličković on Twitter.

Tzouvala's work as part and parcel of a garden-variety CLS. This is surprising, not only because CLS and its international law cousin, the 'New Approaches to International Law' movement (NAIL), have been pronounced dead by their own founders for quite some time now,⁵ but also because Tzouvala's work is one of the many efforts undertaken by emerging scholars to *go beyond* the limitations of the CLS project, while also building on its legacy and struggles.

In what follows, I will read *CaC* precisely as an intervention in an intergenerational debate regarding the 'tragic inheritance' of contemporary critical scholarship from the CLS tradition (broadly understood).⁶ Indeed, my argument is that *CaC*'s potentials and limitations can be seen more clearly in the context of the emergence of a 'new wave of Marxist legal-theoretical enterprises' that builds on, but at the same time firmly departs from, the settled core of CLS-related insights that most mainstream commentators identify with critical legal theory or history today.⁷ My account, of course, will be partial and limited. I will not offer the reader a broad context of what I understand to be the dynastics of critique in western legal academia(s).⁸ I will not even refer too much to the perhaps more relevant tradition of British critical legal thinking that has such a strong influence in Australia,⁹ but limit

⁵ Much has – and can – be written about the histories of the CLS and NAIL projects. For a general introduction, see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 135-182.

⁶ Which, I argue, is a productive way of reading the monograph, considering that Tzouvala only a couple of years ago had urged for a debate of this sort. See Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27 *European Journal of International Law* 215, 233. On the notion of tragic inheritance, see Adil Khan, *Inheriting Persona: Narrating the Conduct of Third World International Lawyers* (PhD Thesis 1137, IHEID, 2016) cited in Bianchi (n 5) 210.

⁷ Akbar Rasulov, 'CLS and Marxism: A History of an Affair' (2014) 5 *Transnational Legal Theory* 622-622; Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31 *Yale Journal of Law & the Humanities* 389.

⁸ Stuart Elden, 'From Dynastics to Genealogy' (*Critical Legal Thinking*, 13 January 2021) <<https://criticallegalthinking.com/2021/01/13/from-dynastics-to-genealogy/>> accessed 27 April 2021.

⁹ Costas Douzinas, 'The Responsibilities of the Critic: Law, Politics, and the Critical Legal Conference' in Emilios A Christodoulidis, Ruth Dukes and Marco

myself to the United Statesean 'Boston body',¹⁰ and Martti Koskenniemi's 'Helsinki school',¹¹ partly because Tzouvala frames her argument in a close conversation with these traditions and the work of Anne Orford.¹² If one takes the material-institutional approach to legal theory, which Tzouvala and other new wave Marxists have pushed for, then the fact that Koskenniemi wrote a blurb for the book – and served as an examiner for Tzouvala's PhD dissertation – is not of minor importance.¹³

Bearing this in mind, I review the book's main contributions insofar as it follows Haskell's invitation to seize 'the hubris to venture hegemonic explanatory frameworks' from a Marxist perspective (section II).¹⁴ Indeed, Tzouvala concludes her book by calling for a totalizing theory of international law, rightly pointing out that this is perhaps 'one of the biggest challenges for materialist legal theory' in our times.¹⁵ As Susan Marks noted, for quite some time the Marxist aspiration of 'totality' has been dismissed as the return of 'grand narratives' (at its best) or the handmaiden of totalitarianism (at its worst).¹⁶ Undaunted by this stale cold-war cliché, Tzouvala pushes forward. This return of theory is particularly exciting given our field's profound distrust of general theoretical frameworks, a trait shared by most MILS scholars, as well as socio-critical scholars.¹⁷ Just like

Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019).

¹⁰ Illan Rua Wall, 'The Mytho-Poetics of Critical Legal (Secret) Society' (*Critical Legal Thinking*, 2 May 2019) <<http://criticallegalthinking.com/2019/05/02/the-mytho-poetics-of-critical-legal-secret-society/>> accessed 27 April 2021.

¹¹ Bianchi (n 5) 163-182.

¹² See n 23.

¹³ Tzouvala, 'New Approaches to International Law' (n 6) 228. See also John Haskell, 'From Apology to Utopia's Conditions of Possibility' (2016) 29 *Leiden Journal of International Law* 667.

¹⁴ Haskell (n 13) 676.

¹⁵ Tzouvala, *Capitalism as Civilisation* (n 1) 219-220.

¹⁶ Susan Marks (ed), 'Introduction', *International Law on the Left* (Cambridge University Press 2008) 1-29, 14.

¹⁷ Akbar Rasulov, 'On Theory-Bashing: Why It Happens and What It (Probably) Says About Us' (*EJIL: Talk!*, 17 March 2017) <<https://www.ejiltalk.org/on-theory-bashing-why-it-happens-and-what-it-probably-says-about-us/>> accessed 27 April 2021.

Koskenniemi's *From Apology to Utopia*, it seems to me that Tzouvala's monograph will provide a long-lasting contribution to the *theory* of international law.¹⁸

However, I also argue that – in my own modest opinion as a fellow comrade, member of the Third World Approaches to International Law (TWAAIL) movement, and Marxist legal historian – the book's contributions to *history* are perhaps less salient (section III).¹⁹ I suggest that perhaps one of the reasons for this is that while Tzouvala boldly departs from the insights most CLS/NAILers hold when it comes to legal theory, her approach to the constitution of the international legal 'archive'²⁰ remains profoundly indebted to our discipline's 'Victorian antics':²¹ a vision of international law as first and foremost an arcane ritual, ontologically – if not eschatologically –

¹⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005). In this review, I do not wish to engage in an in-depth discussion of whether *From Apology to Utopia* (FATU) represents a 'theory' or not. An interesting discussion on this issue can be found in the (all-male) symposium on FATU in the special issue of (2016) 29(3) *Leiden Journal of International Law* or in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

¹⁹ On the tense relationship between theory and history in the incipient field of the 'theory and history of international law', see Janne E Nijman, *Seeking Change by Doing History* (University of Amsterdam - Inaugural Lecture 591 2017). This review, sadly, does not offer me enough space to offer a discussion of how 'theory' and 'history' are not necessarily opposing poles in the Marxist tradition. I do share, however, the Foucauldian and Nietzschean preoccupation for the reduction of history into 'a handmaiden to philosophy'. See Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press 1980) 156.

²⁰ On the problematization of what constitutes the 'archives' or the 'fields' of our discipline, see Madelaine Chiam and others, 'History, Anthropology and the Archive of International Law' (2017) 5 *London Review of International Law* 3. See also Rose Parfitt, 'The Spectre of Sources' (2014) 25 *European Journal of International Law* 297.

²¹ Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 23.

distinct from other fields of social knowledge and practice.²² Despite their profound differences, this disciplinarian tendency can also be found in Orford's work, which is another important intellectual and institutional-material influence on the monograph at hand.²³ To be clear, in my argument I do not wish to diminish the important contribution that Tzouvala, Koskenniemi, Orford, or any other previous generations of critical scholars have made to opening up space for contemporary heterodox scholarship. My own life experience as a young researcher in Bogotá and Geneva painfully corroborates Samuel Moyn's assertion that

[m]any nonmainstream scholars owe the space they inhabit in the academy to critical legal studies, particularly those outside the United States, because in that country at least the earlier impact of legal realism had already caused a profound and unprecedented break with traditional doctrinalism and formalism that still has no parallel elsewhere.²⁴

My comradely critique, I hope, can shed some light on how I envision what a more decisive Marxist break with the CLS-tradition could look like. This is not to say it is the only way a Marxist or materialist perspective could look like. As Tzouvala herself recognizes, there is much to be celebrated in the

²² Rasulov has, aptly in my view, called this Koskenniemi's 'anti-anti-disciplinarian theoretical agenda'. Akbar Rasulov, 'From Apology to Utopia and the Inner Life of International Law' (2016) 29 *Leiden Journal of International Law* 641, 642. See also Sahib Singh, 'Koskenniemi's Images of the International Lawyer' (2016) 29 *Leiden Journal of International Law* 699, 721.

²³ Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Mark Toufayan, Emanuelle Tourme-Jouannet and Hélène Ruiz (eds), *International Law and New Approaches to the Third World: Between Repetition and Renewal* (Société de législation comparée 2013); Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166; Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017). I have elaborated on this more deeply elsewhere, see Daniel Ricardo Quiroga-Villamarín, 'Beyond Texts? Towards a Material Turn in the Theory and History of International Law' [2020] *Journal of the History of International Law* 1. Advance copy online, <<https://doi.org/10.1163/15718050-12340172>>.

²⁴ Samuel Moyn, 'Legal Theory among the Ruins' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017) 99.

constructive and productive discussion amongst Marxist fellow travellers. Indeed, after years of marginalization, it seems the field of international law has served as the stage for the revitalization of new (and old) Marxist traditions, that range from Tzouvala's concern with primitive accumulation and the contradictions of capitalism's uneven expansion, to the Benjaminian histories of international legal reproduction, Pashukanian analyses of the legal form, Chimni's Integrated Marxist Approach, Marks' twin histories of capitalism and human rights, Benton's plea for a 'Marxist-influenced socio-legal history' and my own modest proposal for a non-textual legal history.²⁵ With the rise of this plurality of innovative approaches, it seems that even the most mainstream Twitter users will also come to see that CLS 'remains the historical chapter of a theory to surpass and therefore to remember'.²⁶ Let us turn now to Tzouvala's bold attempt to surpass CLS.

II. LAW AS CAPITALISM: A THEORY OF THE CONSTRAINTS AND RESOURCES OF LEGAL ARGUMENTATION IN TIMES OF CAPITALIST ACCUMULATION

Tzouvala's monograph is, first and foremost, a powerful and compelling invitation to reread a series of classical legal materials. Drawing from Althusser's work on symptomatic reading,²⁷ she proposes what she calls a 'productive rather than revelatory understanding of/for international law'.²⁸ In this vein, rather than merely uncovering something that might be hidden in a text, her argument is that all lawyers, whether critical or mainstream, approach a certain legal text under the spell of a *problematic* that makes some aspects of the text 'hyper-visible and others invisible'.²⁹ This enables her to provide

²⁵ For general (but perhaps already dated) overviews, see Bianchi (n 5) 72-90; Robert Knox, 'Marxist Approaches to International Law' (*Online Oxford Bibliography* 2018) <<http://oxfordbibliographiesonline.com/view/document/obo-9780199796953/obo-9780199796953-0163.xml>> accessed 23 March 2021. It is exciting to see how much the field has grown in the last couple of years.

²⁶ Moyn (n 24) 99.

²⁷ Tzouvala, *Capitalism as Civilisation* (n 1) 7ff. See also Haskell (n 13) 667.

²⁸ Tzouvala, *Capitalism as Civilisation* (n 1) 10.

²⁹ *Ibid* 10.

a reading of international legal materials that does not purport to recover a pre-existing meaning from the surface of the text [... but one which recovers] 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.³⁰

This problematic, she aptly points out, frames the way in which particular visions of the correct (re)distribution of rights, privileges, duties, and liabilities between polities can be raised.³¹ In this vein, she suggests that instead of seeing 'civilization' as a 'monistic [yet ambiguous] carrier of meaning' one could interrogate it as the crystallization of a particular argumentative pattern.³²

What follows is the innovative move of the monograph. Boldly, Tzouvala suggests that this deconstructive approach is not necessarily in contradiction with a Marxist perspective, proposing a way to reconcile the 'postmodern' sensibility on the instability of discourse and a materialist interest in the structures of global legal domination.³³ I will not explain this point at length, especially as another contributor of the symposium has found this attempt of synthesis particularly productive.³⁴ Needless to say, I myself found this suggestion powerful, as it also resonated with my own attempt to reconcile Foucauldian and Marxist approaches in legal history.³⁵ For the purposes of this review, what is important to note is that while CLS/NAILers tend to argue that international law's indeterminacy remains always 'under-determined'³⁶ and other Marxists tend to discard indeterminacy in the name of 'the standpoint of the oppressed',³⁷ Tzouvala wants to insist on the importance of a deconstructive Marxism that pays attention to the way seemingly indeterminate arguments are 'overdetermined' by the structures of

³⁰ Ibid 13.

³¹ Ibid 15.

³² Ibid 15 and 14, respectively.

³³ Ibid 35ff.

³⁴ See Kanad Bagchi, 'Materialism, Culture and the Standard of Civilization' (2021) 13(1) *European Journal of Legal Studies* 61.

³⁵ Quiroga-Villamarín, 'Beyond Texts?' (n 23).

³⁶ See, for instance, Martti Koskeniemi, *The Politics of International Law* (Bloomsbury Publishing 2011) 259.

³⁷ Tzouvala, *Capitalism as Civilisation* (n 1) 38 (discussing Chimni and Parfitt's work).

capitalism.³⁸ In other words, she argues that the Derridean deconstructive project could be enriched by – and is not antithetical to – an analysis of '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'.³⁹

For this reason, she suggests that we cannot simply conclude that civilization is an indeterminate or ambiguous concept and call it a day. But rather, that the specific conditions in which the contradictory patterns of argumentation that one can group under the rubric of civilization must be understood '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'.⁴⁰ She does not suggest that one should understand the relationship between *law and capitalism*, but rather invites us to see *law as capitalism* – a move that I find both powerful and problematic, as I discuss further below.⁴¹

Tzouvala's understanding of capitalism focuses mostly on the limitless, uneven, and contradictory expansion of a specific mode of production around the world.⁴² Offering a general overview of Karl Marx's *Capital*, she highlights the importance of primitive accumulation and includes important discussions of eurocentrism, settler colonialism, and the centrality of gendered and racialized metaphors in this process of endless expansion. Personally, I would have enjoyed a more profound discussion of the different approaches that have emerged (in both the Marxist and non-Marxist camps) on the histories of capitalism in the last decades.⁴³ While I am sympathetic to what Duncan Kennedy once called 'a Marxist-theft-of-wood-anticipates-

³⁸ While Tzouvala does not use overdetermination as such, I felt this was only a natural extension of her previous Althusserian commitments. On this concept, see Louis Althusser, *For Marx* (Verso 2005) 87-128.

³⁹ Tzouvala, *Capitalism as Civilisation* (n 1) 40.

⁴⁰ *Ibid* 40.

⁴¹ Catherine Fisk and Robert Gordon, 'Foreword: 'Law As...': Theory and Method in Legal History' (2011) 1 U.C. Irvine Law Review 519. See also Tzouvala, *Capitalism as Civilisation* (n 1) 42.

⁴² Tzouvala, *Capitalism as Civilisation* (n 1) 19ff.

⁴³ See generally, 'Interchange: The History of Capitalism' (2014) 101 *Journal of American History* 503.

everything-that-the-modern-leftist-can-think-of-and-it-is-really-the-working-class-that-counts speech',⁴⁴ I do think that there is much to gain from the small window that has opened to talk about the plural histories of capitalism in a more ecumenical and interdisciplinary fashion.⁴⁵

In sum, Tzouvala puts forward a theorization of international law 'as a specialised language articulated by a particular class of intellectuals, lawyers, within specific institutional structures' in which civilization is but one of the many patterns of argumentation that provide resources and constraints for these professionals in contexts of capitalist expansion.⁴⁶ This enables her to go beyond the limitations of the Pashukanian notion of the 'legal form', while at the same time providing a theoretical framework that is relevant for both practitioners and socio-critical theorists seeking to understand the 'range of contingently articulated answers, which, however always remain within a particular framework – the oscillation between "'improvement"' and "'biology"''.⁴⁷ As one of the contributors to this symposium shows, this theoretical framework could be used productively to understand land disputes and cases of accumulation by dispossession in, and beyond, our times.⁴⁸

III. CAPITALISM AS LAW: A CRITIQUE OF CAC'S LIMITED ARCHIVE AND DISCIPLINARIAN BOUNDARIES

In the next chapters (two to five), Tzouvala aims to apply this 'meta-theory' of the 'structured indeterminacy of "civilization"' to a series of specific historical episodes,⁴⁹ with the intention of adding a 'layer of concreteness and

⁴⁴ Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10 *Unbound: Harvard Journal of the Legal Left* 1, 23.

⁴⁵ Marc Flandreau, 'Border Crossing' (2019) 1 *Capitalism: A Journal of History and Economics* 1. To be sure, Tzouvala does cite Beckert in note 84 at 31, but only as a 'subsequent research' that merely expands the work done by Afro-Unitestatesean Marxists.

⁴⁶ Tzouvala, *Capitalism as Civilisation* (n 1) 41.

⁴⁷ *Ibid* 42.

⁴⁸ See Julie Wetterslev, 'The Standard of Civilization in International Law' (2021) 13(1) *European Journal of Legal Studies* 81.

⁴⁹ Tzouvala, *Capitalism as Civilisation* (n 1) 214-5.

historical specificity' to the previous critical research on the theory and history of international law.⁵⁰ While I thought that the monograph offered a refreshing new Marxist perspective with regards to *legal theory*, I found it to be wanting with regards to *legal history*.

I was somewhat surprised to see that Tzouvala's radical theoretical critique of Koskenniemi (and what she calls the standard left legal reaction) was not accompanied by an equally radical departure from the archives, objectives, and methods of the dominant CLS/NAIL approaches to the (intellectual) history of international law.⁵¹ Of course, I am not arguing that Tzouvala's history of a 'structured pattern of argumentative practice' can be reduced to the Skinnerian intellectual biographies that have long ruled the scene in our discipline. But, at the same time, I was struck by how 'domesticated' Tzouvala's choice of case studies and materials is. While I enjoyed chapters two to five, I struggled to find what her monograph was bringing to the fore other than a (masterful) *rereading* of a series of classical legal documents and the abundant body of secondary literature that has already been written about these episodes. Tzouvala might justly retort that she never intended to 'uncover' anything that was hidden, but rather to symptomatically make the animating problematic of civilization explicit in these scenarios. However, seeing that so much has been written about these events already, is it really necessary to pursue such a sophisticated theoretical project to show that a racialised and gendered dichotomy of civilization was latent in the times of Lorimer & co,⁵² the League of Nations mandates,⁵³ the South West Africa judicial drama,⁵⁴ and the post-cold war muscular humanitarianisms?⁵⁵ While

⁵⁰ Ibid 168.

⁵¹ This is as much a *mea culpa* as a critique, as I have also undertaken this sort of work in the past. See Daniel Ricardo Quiroga-Villamarín, "'An Atmosphere of Genuine Solidarity and Brotherhood': Hernán Santa-Cruz and a Forgotten Latin American Contribution to Social Rights' (2019) 21 *Journal of the History of International Law* 71.

⁵² Tzouvala, *Capitalism as Civilisation* (n 1) 44-87. With Lorimer & co, I am referring to the (in)famous "men of 1873". See Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27 *European Journal of International Law* 415, 426.

⁵³ Tzouvala, *Capitalism as Civilisation* (n 1) 88-128.

⁵⁴ Ibid 129-166.

⁵⁵ Ibid 167-211.

I suspect that mainstream readers (like our anonymous Twitter user) will enjoy rereading familiar cases from a radical perspective, as a reader already familiar with some of the work of Tzouvala's secondary sources, I was left feeling that the monograph's powerful theoretical innovations were not aligned with its rather uncontroversial historiographical conclusions.

One issue that animates my critique is the pressing and difficult question of what to expect from legal history when there are competing approaches coming from both lawyers and historians (categories which are themselves problematic as they presume a disciplinarian consensus which is by and large absent).⁵⁶ While I have often felt frustration with the 'archive fever' of some of my colleagues trained in history,⁵⁷ I do think there is some sense in the expectation that historical research (including legal history) should try to bring a new archive of primary sources to the fore.⁵⁸ Elsewhere, Tzouvala dismisses Pedersen's critique of Anghie's work (which raises precisely this point) because she argues it was unfair to judge a book based on its 'out-of-date' sources instead of its argument.⁵⁹ But the issue Pedersen wanted to raise (or that at least I highlight) is not related only to the 'novelty' of secondary literature, but to the need for a more robust use of primary materials.⁶⁰ This is not to say that Tzouvala relies exclusively on secondary sources: chapter 3 in particular draws on some colonial documents and the minutes of the Mandate system.⁶¹ But, for those already familiar with the plethora of work

⁵⁶ Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of International Law* 7, 32. See also Nijman (n 19).

⁵⁷ Jacques Derrida, 'Archive Fever: A Freudian Impression' (1995) 25 *Diacritics* 9.

⁵⁸ Marc Bloch, *The Historian's Craft* (Peter Putnam ed, Reprint, Manchester University Press 2002) 40ff.

⁵⁹ Ntina Tzouvala, 'The Specter of Eurocentrism in International Legal History' (2021) 31 *Yale Journal of Law & the Humanities* 413, 414 note 4.

⁶⁰ Susan Pedersen, 'Back to the League of Nations' (2007) 112 *The American Historical Review* 1091, 1104.

⁶¹ Without, at any rate, going too much farther than Pedersen or the already existing histories of the League of Nations. See Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2017).

that Benton labels the interdisciplinary approach to global legal politics, it is difficult to pinpoint the novelty of Tzouvala's 'history of international law'.⁶²

I suggest that Tzouvala's provocative framing of *law as capitalism* might have a problematic unintended consequence – it pushes us to see *capitalism as law*. Indeed, Tzouvala's concern for the patterns of legal argument might have led her to sideline the many primary sources that could reveal the contradictions of capitalism that do not fit neatly into the traditional registers of legal arguments.⁶³ Just like Koskenniemi, she seems to focus excessively on the 'use of materials from international courts and doctrinal debates',⁶⁴ something that Haskell has criticized as an overreliance on the 'linguistic' determinants of legal struggles.⁶⁵ This is perhaps why Koskenniemi notes (correctly) in his blurb that the book is 'above all, legal'.⁶⁶ Just like Orford, Tzouvala tends to diminish the contributions of historians and other disciplines due to their extra-disciplinary understanding of the law (whatever that means).⁶⁷ Elsewhere I have written more extensively on what I think are the flaws of this narrow disciplinary understanding of legal history, despite my profound admiration of Koskenniemi's and Orford's work.⁶⁸ What matters for the present discussion is that, in my view, the monograph's narrow

⁶² Benton (n 56) 32.

⁶³ In my own work, for instance, I have tried to 'read' shipping containers into the history of transnational governance, even if they bear little to no resemblance to what is understood as 'legal' under the terms of the (in)famous art 38 (of the Statute of the International Court of Justice) and its spectre of sources. See Daniel R Quiroga-Villamarín, 'Normalising Global Commerce: Containerisation, Materiality, and Transnational Regulation (1956–68)' (2020) 8(3) *London Review of International Law* 457.

⁶⁴ Martti Koskenniemi, 'What Is Critical Research in International Law? Celebrating Structuralism' (2016) 29 *Leiden Journal of International Law* 727, 728.

⁶⁵ Haskell (n 13) 668.

⁶⁶ Tzouvala, *Capitalism as Civilisation* (n 1) back-cover blurb.

⁶⁷ Alexandra Kemmerer, "'We Do Not Need to Always Look to Westphalia . . ." A Conversation with Martti Koskenniemi and Anne Orford' (2015) 17 *Journal of the History of International Law* 1, 3 on Mazower's *No Enchanted Palace*. Compare with Tzouvala, *Capitalism as Civilisation* (n 1) 105 on Pedersen's aforementioned *The Guardians* (n 61): '[d]espite law occupying a minor position in Pedersen's analysis...' – perhaps this speaks well of Pedersen's book?

⁶⁸ Quiroga-Villamarín, 'Beyond Texts?' (n 23).

understanding of 'international law' as 'a specialized language articulated by a particular class of intellectuals, lawyers, within specific institutional structures'⁶⁹ restricts the potential archives of global legal politics to a rather tired and overstudied set of classical legal materials. Tzouvala's (again, masterful) discussion of the *Palmas* arbitration is perhaps a good example of this.⁷⁰ Her analysis may push mainstream international lawyers to confront the colonial implications of this (in)famous case, and I will certainly use the monograph to do so in my teaching. But those of us who were already painfully aware of *Palmas*' imperial history were left wanting more than a historiographical review of secondary materials.

Like Orford (and Koskenniemi, to a degree), Tzouvala makes a daring attempt to 'occupy' the space of law for the legal left.⁷¹ There is nothing wrong with that, of course. But, in my own perspective, the new wave of Marxist legal history could do more to engage with the (seemingly) 'non-legal' or with 'non-linguistic materials' that constitute the vast archive(s) of global governance. Tzouvala might reply, invoking Orford's authority, that my argument 'involves a rejection of the jurisprudential method as a whole and a refusal to engage with the ways legal scholars and institutions make meaning move over space and time'.⁷² She would be right. As a legal historian, I am not interested in what the mainstream (or surprisingly, some leading critical figures) consider *the* jurisprudential method. What is more, if our primary sources are telling us that 'legal battles ... have often masked the nature of the power struggles' of the histories we are interested in tracing,⁷³ then it only follows that there might be other promising 'meanings' and 'institutions' to interrogate than the limited repertoire of what (some) think lawyers 'do'.

It would be unfair to impose my own intellectual project (of a non-textual legal history) on Tzouvala, so I will conclude by suggesting a way in which her Derridean fidelity to text could be combined with a more profound

⁶⁹ Tzouvala, *Capitalism as Civilisation* (n 1) 41.

⁷⁰ Ibid 193ff.

⁷¹ Kemmerer (n 67) 13. Koskenniemi reluctantly notes that the legal left can easily fall prey to the legal center in this maneuver.

⁷² Tzouvala, 'The Specter of Eurocentrism in International Legal History' (n 58) 430 note 65.

⁷³ Tzouvala, *Capitalism as Civilisation* (n 1) 129.

engagement of what I have called (following Foucault) a 'materialism of the incorporeal'.⁷⁴ As I noted recently, in a review of Whitehall's fascinating *Three Wartime Textbooks* piece,⁷⁵ for all our talk about international law as an argumentative pattern or language, we know very little about the material 'conditions of possibility' of many classic legal interventions.⁷⁶ A productive road for future work that follows Tzouvala's synthesis of Derrida and Marxism could be the examination of the material-institutional structures that determine publishing in international law from a historical perspective. For instance, some colleagues in Colombia (drawing and contributing from the ever-growing literature on the materiality of the production of knowledge⁷⁷) recently wrote an edited volume on three mid-19th century Colombian administrative law textbooks.⁷⁸ What was exciting about their intervention was that they not only interrogated the history of legal discourse or the patterns of argumentation contained in the books, but also their material politics: cost and accessibility, size, publishing house, institutional connections, etc. This allowed them to highlight patterns of consumption, distribution, and production which went beyond a traditional 'intellectual history' or CLS account of the globalization of legal thought. Liendo-Tagle, in this vein, also recently recompiled a robust study of the market for legal journals since the 19th century in the Spanish legal academia.⁷⁹ This is a promising direction which a political economy of the 'print capitalism' of the patterns of legal discourse could take in the near future.⁸⁰

⁷⁴ Quiroga-Villamarín, 'Beyond Texts?' (n 23) section 3 (page 17 in the advance copy).

⁷⁵ Deborah Whitehall, 'Three Wartime Textbooks of International Law' (2020) 22 *Journal of the History of International Law* 385. This was in the context of an ESIL international legal history virtual meeting on 18 December 2020.

⁷⁶ Haskell (n 13) 674.

⁷⁷ Filipe Carreira da Silva and Mónica Brito Vieira, *The Politics of the Book: A Study on the Materiality of Ideas* (The Pennsylvania State University Press 2019).

⁷⁸ Antonio Barreto Rozo, Miguel Alejandro Malagón Pinzón and Ana María Otero Cleves, *Tratados y Manuales Jurídicos Del Período Radical: Análisis de La Segunda Mitad Del Siglo XIX Colombiano* (Universidad de los Andes 2015).

⁷⁹ Fernando Liendo Tagle, *Prensa Jurídica Española: Avance de un Repertorio (1834-1936)* (Universidad Carlos III 2020).

⁸⁰ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (revised edn, Verso 2016).

IV. CONCLUDING REMARKS

In sum, I argue that this monograph signals an important breakthrough in the development of a contemporary wave of (not only post- but also anti-CLS) Marxist legal thinking in international legal academia. At the same time, the book stands at a threshold of a transition, still showing a lot of fidelity to a 'Helsinki' or 'Melbourne' disciplinarian imagination that, in my own view, has reached its limits when it comes to international legal history.⁸¹ This is not to diminish its importance - I owe much to Koskeniemi, Orford, Tzouvala, and other leading critical scholars and mentors who have fought tooth and nail to open a space for critique in international law's rather reactionary landscape. But, at the same time, it would be a shame if new(er) generations of legal scholars did not take stock of the achievements of those who came before us to push against the boundaries of critique - only to be, then, outflanked by the next generation of 'young turks'.⁸²

This comment on mentoring and generational engagement leads me to a final (but not less important) remark. I was surprised to see the relative lack of engagement with Liliana Obregón's work in Tzouvala's monograph. Of course, I am biased, given my standpoint as a Feminist Latin American TWAILer who was a student of Obregón and has learned much from her work on the relevance of civilization for international law. For that reason, I was somewhat taken aback to see that a monograph that dealt precisely with Obregón's most important area of work only cited her three times, and in a rather superficial manner. In fact, Tzouvala clarifies that one of Obregón's articles is but a mere 'analysis of the historical specificities of nineteenth-century engagements with international law in Latin America'.⁸³ Given that Tzouvala cites the 2012 *Oxford Handbook of the History of International Law* (to, correctly I think, point out its lack of engagement with political economy), one is left wondering why she did not refer to Obregón's ground-breaking chapter in that volume, 'The Civilized and the Uncivilized', which deals *precisely* with the main theme of the monograph.⁸⁴ Indeed, an absent notion

⁸¹ Nijman (n 19); Benton (n 56).

⁸² While problematic, I see some sense in Duncan Kennedy's use of this term.

⁸³ Tzouvala, *Capitalism as Civilisation* (n 1) 52 note 29.

⁸⁴ Liliana Obregón, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford

(that could have intersected neatly with Tzouvala's logics of improvement and biology) was 'creolization' – a term that has been used to think beyond the 'historical specificities' of Latin America to serve as a pillar for postcolonial critique and heterodox approaches to the history of nationalism.⁸⁵

My reproach might sound petty, but my experience in Geneva has taught me the importance of highlighting (especially to Europeans) the relevance of work produced by the TWAIL tradition. I remember doing the same at least once to highlight Tzouvala's work in the *Genevoise* classrooms of international humanitarian law, in which her work (or that of other TWAILers) is rarely discussed. By the same token, I felt it was important to conclude my review by signalling my suspicion that, by writing a monograph on civilization without acknowledging the crucial work of a previous female TWAIL scholar, Tzouvala might be reproducing (unwillingly, no doubt) the same imperial dynamics she aims to critique. I do not claim any higher ground – I am sure I have willingly or unwillingly also reproduced many Eurocentric practices and knowledges in my own work. Koskenniemi, Obregón, or Tzouvala would be the first ones to admit that Eurocentrism is not something we can easily detach ourselves from.⁸⁶ I make this (self-)critique because I believe that mainstream, socio-critical, and TWAILer scholars alike could benefit from more awareness of the distributional and material-institutional consequences of our citational practices.⁸⁷

University Press 2012) 917-939. Needless to say, this is not her only piece on this matter.

⁸⁵ Anderson (n 80); Encarnación Gutiérrez Rodríguez and Shirley Anne Tate (eds), *Creolizing Europe: Legacies and Transformations* (Liverpool University Press 2015).

⁸⁶ Liliana Obregón, 'Martti Koskenniemi's Critique of Eurocentrism in International Law' in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 360-392.

⁸⁷ See Rohini Sen, 'Reading and Readings of *Capitalism as Civilisation*' (2021) 13(1) *European Journal of Legal Studies* 117.