

## CAPITALISM AS CIVILISATION, OR HOW TO RESPOND TO YOUR BOOK REVIEWS WHEN THE AUTHOR IS DEAD

Ntina Tzouvala\* 

When, early in *Capitalism as Civilisation: A History of International Law*, I positioned this book as yet another instance of productive (mis)reading,<sup>1</sup> I rendered some argumentative moves unavailable to me. Whatever I say about the engaging and thoughtful reviews by Kanad Bagchi, Daniel R. Quiroga-Villamarín, Rohini Sen, and Julie Wetterslev,<sup>2</sup> then, cannot come from a position of presumed authority (pun intended) or control over the text. Tempting as it might be, I cannot now proclaim that this is or is not what the book 'really' says. After all, one of the principal interventions of this book has been to decentre the lawyerly subject, to push back against the idea that anyone can ever be the full author and master of international law.<sup>3</sup> Rather, I have opted to take this as an opportunity not so much to respond to or to defend anything, but rather to create a new text out of the silences, omissions and slippages of the book that is under review here. In so doing, I am not claiming that my remarks had always been part of the book or even that they are in perfect harmony with that is already there. Rather, in keeping with an understanding of scholarship as structured dialogue, I will put forward three main propositions: first, I will argue that looking at conventional materials in unconventional ways is not only intellectually and politically defensible, but

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\* Senior Lecturer, ANU College of Law. I want to thank Kathryn Greenman, Robert Knox, and Luis Bogliolo for their insights and feedback. All errors and omissions remain my own.

<sup>1</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020) 43.

<sup>2</sup> Kanad Bagchi, 'Materialism, Culture and the Standard of Civilization' (2021) 13(1) *European Journal of Legal Studies* 61; Julie Wetterslev, 'The Standard of Civilization in International Law' (2021) 13(1) *European Journal of Legal Studies* 81; Daniel R. Quiroga-Villamarín, 'Victorian Antics: The Persistence of the "Law as Craft" Mindset in the Critical Legal Imagination' (2021) 13(1) *European Journal of Legal Studies* 101; Rohini Sen, 'Reading and Readings of Capitalism as Civilisation' (2021) 13(1) *European Journal of Legal Studies* 117.

<sup>3</sup> Tzouvala (n 1) 216-17.

cannot but be at the centre of critical inquiry into law as both a critical and a legal business. Secondly, I will explain why I consider the conceptualisation of international law as a product of the 19<sup>th</sup> century to be persuasive on both disciplinary and historical materialist grounds and the implications of this periodisation. Finally, I will elaborate on my own understanding of historical materialism, its implications for law, and under what conditions it can encounter deconstruction productively.

However, before I proceed with any of this, I need to diverge: structured dialogues need not, and should not, produce consensus, but – if done properly – they tell us something valuable about ourselves and our work and in so doing, they transform both.<sup>4</sup> It is, then, a happy and strange confirmation of the death of the author that the best summary of this book's arguments has not been produced by me, but by Rohini Sen. Allow me to reproduce her writing at some length:

First, for capital to reproduce and expand in diverse and (sometimes) contradictory conditions, it is necessary for international law to emerge as desirable. Second, for international law to sustain itself as plausible and reformative, it is necessary for the standard of civilisation to be flexible. And finally, for the standard of civilisation to be sustainable, it is imperative for it to move within the oppositional poles (logic of improvement and logic of biology), and to make this contradiction invisible and unthinkable.<sup>5</sup>

Similarly, I am grateful to Kanad Bagchi for putting into words my less-than-conscious tendency to 'fuse different strands of critique' and seeing my efforts in 'disentangling deconstructionist and Marxist critiques' as one of the major contributions of this book.<sup>6</sup> Wetterslev, in turn, offered to me the

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<sup>4</sup> This constitution of the lawyerly subject by an infinite number of texts is yet another reason why its reification is both intellectually hopeless and politically suspect: 'Later on, out in the hall, in informal conversation, the legal thinker will, of course, readily admit that he is just as much a fit subject for sociological, economic, psychoanalytic explanations as the next guy. But when he is doing law, when he is in role, the rhetorical form of his statements will effectively deny all these twentieth-century knowledges in favor of eighteenth-century Lockean fantasies'. Pierre Schlag, 'Le Hors De Texte, C'est Moi - The Politics and the Domestication of Deconstruction' (1990) 11 *Cardozo Law Review* 1631, 1638-9.

<sup>5</sup> Sen (n 2) 128.

<sup>6</sup> Bagchi (n 2) 62, 66.

gift of her own research and, by implication, of generalisation: by discussing how 'civilisational' arguments have been deployed against the Mayangna and Miskitu people in Nicaragua, Wetterslev confirmed my intuition that civilisation's reach goes far beyond the episodic treatment that it received in my book.<sup>7</sup> At the level of politics, this is undeniably terrible news. However, acknowledging the pervasiveness of the problem can become the first step toward confronting it. Finally, Quiroga-Villamarín pushed me in valuable ways to think about and clarify not only what is critique to me, but also who is the critical subject in international law. I am grateful to all four for the care with which they treated this text.

## I. ON THE IMPORTANCE OF BEING CONVENTIONAL: CRITIQUE IN THE TIME OF INNOVATION

In contrast to the spectacular opening of the *Communist Manifesto*,<sup>8</sup> Volume I of *Capital* begins with an astoundingly trite observation:

The wealth of societies in which the capitalist mode of production prevails appears as an 'immense collection of commodities'; the individual commodity appears as its elementary form. Our investigation therefore begins with the analysis of the commodity.<sup>9</sup>

Marx is essentially saying that we are surrounded by stuff that costs money, and that the unremarkable nature of this observation is precisely what warrants a closer look. Enacting a similar sensibility, Gayatri Chakravorty Spivak and Edward E. Said articulated the provocative claim that Western literary works that are both canonical and canonically understood as being unrelated to imperialism, could, in fact, be read as being structured by the

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<sup>7</sup> See Wetterslev (n 2).

<sup>8</sup> 'A spectre is haunting Europe – the spectre of communism. All the powers of old Europe have entered into a holy alliance to exorcise this spectre: Pope and Tsar, Metternich and Guizot, French Radicals and German police-spies'. Karl Marx and Friedrich Engels, with an introduction by David Harvey, *The Manifesto of the Communist Party* (first published 1848, Pluto Press 2008) 31.

<sup>9</sup> Karl Marx with an introduction by Ernest Mandel, *Capital: A Critique of Political Economy Vol. 1* (first published 1867, Penguin Books 1990) 123.

imperial encounter.<sup>10</sup> Once you start thinking of *Jane Eyre* as a parable about imperialist feminism sacrificing the 'other' woman at the altar of the white woman's individuation, you simply cannot go back.<sup>11</sup> Or – to bring the conversation closer to the legal realm – think of Desmond Manderson's deconstructive reading of the Hart-Fuller debate.<sup>12</sup> What if – asks Manderson – this exchange that is central to any self-respecting legal theory course in the Anglophone world, does not represent two opposing and mutually exclusive positions? What if Fuller's naturalistic account is, in fact, surprisingly positivist and it is the Hartian view that fails to account for law as a sociological fact?<sup>13</sup> Critique is the exercise of rendering the familiar strange, and engaging with the international legal canon appears inescapable,<sup>14</sup> because the canon is both familiar and powerful. To put it differently, if one is engaged with critique not due to an aesthetic preference for being avant-garde,<sup>15</sup> but because one suspects that the world is in bad shape and really-existing international law plays some part in the violence, exploitation, and environmental collapse that is unfolding around us, then it becomes impossible not to engage with the conventional sites and materials of the discipline.

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<sup>10</sup> Gayatri Chakravorty Spivak, 'Three Women's Texts and a Critique of Imperialism' (1985) 12(1) *Critical Inquiry* 235; Edward E Said, *Culture and Imperialism* (Vintage Arrow 1994).

<sup>11</sup> 'When Jean Rhys, born on the Caribbean island of Dominica, read *Jane Eyre* as a child, she was moved by Bertha Mason: "I thought I'd try to write her a life". *Wide Sargasso Sea*, the slim novel published in 1965, at the end of Rhys' long career, is that "life". I have suggested that Bertha's function in *Jane Eyre* is to render indeterminate the boundary between human and animal and thereby to weaken her entitlement under the spirit if not the letter of the Law'. Spivak (n 10).

<sup>12</sup> Desmond Manderson, 'Two Turns of the Screw' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010).

<sup>13</sup> 'Hart's positivism fails to establish the "reality" of law which is its sole goal, while Fuller's morality constantly falls back on positivism to establish the ethics of law which is its sole goal'. Ibid 200.

<sup>14</sup> See Sujith Xavier and Ntina Tzouvala, 'Series Introduction – Teaching International Law: Between Critique and the Canon' *TWAIL Review* (12 March 2021) <<https://twailr.com/series-introduction-teaching-international-law-between-critique-and-the-canon/>> accessed 13 May 2021.

<sup>15</sup> If this is the reason you are doing it, I am not necessarily judging you, but you can stop reading now. There is not much in this piece that will be of interest to you.

In this respect, my response to Rohini Sen's concern that I do not engage with 'non-textual academic modes of intervention ... [that] perform a productive reading or viewing of international law texts against the mainstream'<sup>16</sup> would be twofold. My first reaction to this concern is that these forms of practice – albeit pivotal for the transmission of international law from generation to generation – would require robust socio-legal methods in order to be studied with some degree of integrity. International lawyers – with the possible exception of US-based ones – are generally not trained in these methods and they tend not to employ them consistently in their work. Instead of resorting to claims that these practices 'matter' – a statement vague enough to be true, but not in a way that actually clarifies much in most instances – or to pronouncements about whether these practices succeed (or not!) in remaking international law, I opted for focusing on those materials that can be meaningfully interrogated through the theories and methods available to me and to most international lawyers.

Secondly, a history of the 'standard of civilisation' inevitably focuses on the canonical texts of international law for the simple reason that this is where 'civilisation' was constructed. 'Civilisation' has been a hegemonic mode of arguing that has been used to authorise exploitation, dispossession and violence. If this is true, then being excluded from the disciplinary history of 'civilisation' might as well be testament to the fact that one has not been complicit in these processes of juridified injustice. 'Civilisation' has been a tale of capitalist power and hegemony, and those excluded from both have not been its authors. Mine is not a history of international law that tries to re-authorise the discipline by enlarging the pool of its participants and constituency. After all, while the International Court of Justice (ICJ) was adjudicating the 'sacred trust of civilisation' in South West Africa, the national liberation movement of the South-West Africa People's Organization (SWAPO) was adamant that the right of Namibians to govern themselves was in no sense dependent on the international legal right to self-determination.<sup>17</sup> Counter-hegemonic practices have often entailed a refusal

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<sup>16</sup> Sen (n 2) 133.

<sup>17</sup> See Tzouvala (n 1) 129.

to engage with international law or even an open hostility to it.<sup>18</sup> These acts of refusal and dissent need not be subsumed to a history of 'civilisation'.

Similar questions of archive and materials emerge out of Quiroga-Villamarín's review. His concern about my archive is that it is both too traditional and not traditional enough. In this telling, focusing on texts and textuality is an unnecessary concession to 'the mainstream', while at the same time historiographical novelty hinges on unearthing some new materials that will, presumably, reveal a new event, person or, well, text that will change our perception of international law due to its sheer novelty. This critique hinges on three assumptions: first, the idea that 'the mainstream' actually centres law's textuality; secondly, the idea that 'the material' allows us to transcend this textuality; and finally, that the aim of legal history as a critical enterprise is revelation. I am doubtful that any of these assumptions stand up to scrutiny. Formalist legal work does not centre textuality.<sup>19</sup> The idea that legal texts (judgments, treaties, textbooks, etc) are reflective of a transcendental essence, be it legal rules or legal principles, that exists somewhere else and needs to be worked out by either removing or filling in the impurities, inconsistencies, and gaps of the texts is the essence of legal formalism as theory and practice. This formalist posturing does a lot of things, but one thing it does not do is to treat seriously the textuality of law as anything other than an embarrassing inconvenience.

I will return to the question of materiality and textuality in the third section of this essay, but for now it suffices to say the following: if a jurisprudential critique does not centre on conventional legal texts, it remains an open question whether it is actually a jurisprudential critique and not something else, be it economic history, theory and history of technology and science, etc. This can be read as an act of gate-keeping, which would not be incorrect, but with one significant qualification: gates have two sides. Here, I am not so

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<sup>18</sup> See Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of Imperialism and International Law' in Kathryn Greenman and others (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021).

<sup>19</sup> I will assume for a moment that 'the mainstream' in 2021 international law means 'legal formalism at the service of a centrist liberal sensibility'. This is, however, my working definition, not Quiroga-Villamarín's, who appears to be using the term somewhat loosely.

much interested in protecting law from other disciplines or considerations, but rather in protecting everyone else from law and – more importantly – from lawyers.<sup>20</sup> Many of the structures that sustain global capitalism and imperialism simply have nothing to do with international law, and thinking otherwise is probably closer to 'the mainstream' than we care to acknowledge. Finally, if history is to perform a critical function in international law (and this is not a given),<sup>21</sup> it can absolutely do so by articulating new claims about how exactly is it that law moves through time and space without unearthing new facts or undiscovered treaties (even though this can be a worthwhile pursuit too).<sup>22</sup> What made *Imperialism, Sovereignty and the Making of International Law* a path-breaking book was not that before 2005, lawyers were not aware of Vitoria, the League of Nations or the 'war on terror' (they were well aware of all three), but rather that Anghie showed that these disparate moments could, in fact, be arranged as part of one story, that of imperialism as *the* structuring force of international law as a whole.<sup>23</sup>

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<sup>20</sup> Rasulov has offered one theory about the origins of this expansionist trend in international legal scholarship: 'Feeling bad about disciplinary renewals, however, is no more a central part of what makes someone a good international lawyer than feeling good about them ought to be a central part of what makes someone a good international law student. Think again: there are too few real jobs in the field, even today. The house of international law is overcrowded. Unless the old guard with their old ways and habits are completely squeezed out, the new guard will have no room to take as their own. What better way to go about securing a job, then, than with a disciplinary renewal?' Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19(3) *Leiden Journal of International Law* 799, 802.

<sup>21</sup> On the domestication of history, see Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon, Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

<sup>22</sup> One way of conceptualising this exercise is as 'critical redescription': Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law* 609.

<sup>23</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

## II. ON PERIODISATION AND ITS CONSEQUENCES: CHRISTIANITY AND INTERNATIONAL LAW

Wetterslev's work on the Americas makes her alert to the question of Christianity as part of international law and of the civilising mission in a way that challenges my own.<sup>24</sup> In raising this point, her review incidentally raises broader questions of periodisation in the history of international law. Even though I do agree with her point that Christianity has operated both as part of the 'logic of biology' and as part of the 'logic of improvement' (and that my book did overlook this),<sup>25</sup> I am not convinced that this necessitates or even allows us to situate Catholic scholars such as Vitoria within the same historical trajectory as late 19<sup>th</sup>-century international legal scholars. In other words, even though my concerns about Koskenniemi's *The Gentle Civilizer of Nations* as international legal history are extensive, I agree with his proposition that international law as we know it is fundamentally a creature of the 19<sup>th</sup> century.<sup>26</sup>

My argument to that effect is threefold. My first point actually hinges on Christianity, or rather on its fragmentation. It is, indeed, hard to imagine that a Catholic theologian was part of the same lineage as Pasquale Fiore, when the latter wrote the following:

This was the sanguinary period of the religious wars. The horrible war of the Albigenses, the Crusades, the relentless struggles against the Protestants were directly due to the doctrine of the Papacy. A reaction, however, was not long in coming. As struggle began for the separation of the public law of the State from the public law of the Church, for the vindication of the essential attribute of human personality, the right to freedom of conscience, and for the freedom and equality of the three churches, Catholic, Lutheran and Calvinist. The Reformation finally triumphed and the victories it had gained were recognized in the treaty of Westphalia, which consecrated a principle of community among peoples professing different religious beliefs.<sup>27</sup>

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<sup>24</sup> See Wetterslev (n 2).

<sup>25</sup> See Wetterslev (n 2).

<sup>26</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International law 1870-1960* (Cambridge University Press 2001) 28-35.

<sup>27</sup> Pasquale Fiore, *International Law Codified and its Legal Sanction, or the Legal Organisation of the Society of States* (Baker 1918) 4.

Or that Vitoria inhabited the same intellectual universe as Bluntschli, who described the anti-liberal *Syllabus of Errors* of 1864 as a 'manifesto of war by ecclesiastic Absolutism over the modern world and its culture'<sup>28</sup> or, in other words, against civilisation. Even though Islam was overwhelmingly positioned by late 19<sup>th</sup>-century international lawyers as the greatest threat against civilisation, Catholicism followed closely after. Indeed, the rejection of non-Western societies from the realm of civilisation often did not hinge on their perceived strangeness, but rather on their perceived familiarity. The 'Orient' represented in the minds of many international lawyers the type of religious fanaticism and bigotry liberal Protestants had fought against at home only recently, and they were not about to allow it to come back through the window. And this is before we even try to account for Orthodox Christianity, represented by Russia and the always 'unruly' Balkans. Even though being Orthodox was certainly an advantage in comparison to the Muslim Ottoman Empire, close proximity to Islam was (and is) thought to have contaminated the Christian creed.<sup>29</sup> To return to Wetterslev's pre-occupation with Latin America, neither 19<sup>th</sup>-century international lawyers nor contemporary civilisational 'warriors' have considered that the continent's overwhelming embrace of Christianity (and especially Catholicism) resolve the question of its 'civilisational status'.<sup>30</sup>

This is, in my view, a story of discontinuity in more than one way. If writing about international law in the register of Marxist critiques of capitalism, another line of discontinuity worth taking seriously is that between mercantile and industrial capitalism. The transition between the two was

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<sup>28</sup> Quoted in Koskenniemi (n 26) 65.

<sup>29</sup> Huntington infamously categorised the Orthodox civilisation as distinct from the Western one: 'As the ideological division of Europe has disappeared, the cultural division of Europe between Western Christianity, on the one hand, and Orthodox Christianity and Islam, on the other, has reemerged' Samuel P Huntington, 'The Clash Of Civilisations?' (1993) 72(3) *Foreign Affairs* 22, 29-30.

<sup>30</sup> 'Historically, although this may be changing, Latin America has been only Catholic. Latin American civilization incorporates indigenous cultures, which did not exist in Europe, [and] were effectively wiped out in North America ... Latin America could be considered either a sub-civilization within Western civilization or a separate civilization closely affiliated with the West and divided as to whether it belongs in the West'. Samuel P Huntington, *The Clash of Civilizations and the Remaking of the World Order* (Simon and Schuster 1996) 46.

neither linear nor inevitable. It is worth recalling that during the 17<sup>th</sup> and 18<sup>th</sup> centuries, the joint transition to capitalism and to modern statehood stalled or was even reversed in large parts of Europe, especially Eastern Europe.<sup>31</sup> Jurisprudentially, this transition from mercantile to industrial capitalism was encapsulated in lawyerly concerns shifting away from a focus on trade and navigation to an emphasis on much more comprehensive demands for social transformation along the lines of capitalist modernity. Additionally, the legal tools through which these demands were articulated changed considerably. Even though the entanglement between state and capital persisted (and actually deepened), notions of corporate sovereignty and jurisdiction that were commonplace in the era of mercantile capitalism became increasingly unacceptable and eventually unthinkable in international law.<sup>32</sup> Instead, as Doreen Lustig has shown recently, the private corporation retained its power by jettisoning its international legal status and becoming sublimated under the state.<sup>33</sup> Similarly, pronouncements of universal reason as legally consequential – a defining feature of Vitoria's jurisprudence<sup>34</sup> – were strange to 19<sup>th</sup> and early 20<sup>th</sup> century international lawyers, whose work was much more ethnologically or, later, sociologically inflected. Even late 20<sup>th</sup>-century invocations of humanity as an organising principle of international law have

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<sup>31</sup> Charles S Maier, *Leviathan 2.0: Inventing Modern Statehood* (Harvard University Press 2014).

<sup>32</sup> On corporate jurisdiction in the early modern era, see Kate Miles, 'Uneven Empires: Extraterritoriality and the Early Trading Companies' in Daniel S. Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019). On the unsettled competition between state and company in 18<sup>th</sup>-century international law, see Sundhya Pahuja, 'Public Debt, the Peace of Utrecht and the Rivalry between Company and State' in Alfred HA Soons (ed), *The 1713 Peace of Utrecht and Its Enduring Effects* (Brill 2019).

<sup>33</sup> Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (Oxford University Press 2020).

<sup>34</sup> 'The Indian aborigines are not barred on this ground from the exercise of true dominion. This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. [...] Further, they make no error in matters which are self-evident to others; this is witness to their use of reason'. Francisco de Vitoria, 'The First Relectio of the Reverend Father, Brother Franciscus de Vitoria on the Indians Lately Discovered' in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (The Lawbook Exchange 2000) xiii.

surprisingly state-centric legal implications, as they have been used to authorise the armed force of certain states against others or to propose limits on the veto powers of the P5.<sup>35</sup> As Susan Marks has observed, contemporary critics of state-centrism do not have much to offer other than an expanded sovereignty for certain (Western) states:

What begins as a discussion about the abuse of human rights turns into a discussion about which sovereignty to prefer: the sovereign right of Iraq to determine its affairs freely within its own boundaries, or the sovereign right of the United States and its allies to protect their citizens from criminal conspiracies hatched abroad? At a more straightforward level, the championing of humanity against state-centrism becomes a justification for the supreme expression of sovereign power, the use of military force.<sup>36</sup>

All in all, the argumentative structures, institutions and constraints contemporary international lawyers work with and against are fundamentally dissimilar from those of 16<sup>th</sup>-century jurists and theologians.

None of this is to say that Wetterslev's basic concern is unfounded. She has certainly convinced me that a more careful examination of religion as both a marker of 'improvement' and/or 'biology' would enable us to grasp something valuable about their intersections. This is an especially urgent task in the era of rising Islamophobia, as anti-Islamic animus, radicalising discourses and practices, and a capitalist ethos converge from the US-led 'war on terror' to Hindu-nationalist India to Xinjiang.<sup>37</sup> However, I am inclined to say that figuring out the links between religion and civilisation does not compel us to rearrange the periodisation of the book under review in ways that undermine the historical specificity of 'civilisation' and overemphasise continuity over rupture.

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<sup>35</sup> Amongst many: Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513.

<sup>36</sup> Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 *Leiden Journal of International Law* 339, 344-5.

<sup>37</sup> Cyra A Choudhury and Khaled A Beydoun (eds), *Islamophobia and the Law* (Cambridge University Press 2020).

### III. ON TEXTS AND MATERIAL STRUCTURES, OR ON HOW TO BE A MARXIST IN LAW

Kanad Bagchi's review raises two issues, which, albeit distinct, have their origins in some core politico-intellectual anxieties of mine. Bagchi rightly observes that in distancing myself from Pashukanis and in gesturing toward deconstruction and Derrida, I actually engage with neither at great length.<sup>38</sup> In regards to the former, Bagchi observes that my analysis could have benefited from greater engagement with the Soviet jurist, since we both posit the co-constitutive nature of international law and capitalism. This is obviously correct, but it somewhat understates Pashukanis' distinct contribution to legal theory. Indeed, all sorts of legal theorists to the left of centre, be it legal realists, critical legal theorists of the 1970s and 1980s, and contemporary law and political economy scholars, would be at home with the pronouncement that law and capitalism are co-constitutive. Pashukanis' argument, instead, was much more specific and aligned with an understanding of Marxist critiques of capitalism as a critique of social forms. In his *General Theory of Law and Marxism*, the Soviet jurist proposed that there was a fundamental homology between the legal form understood as entailing free and equal subjects and of the commodity form, namely the tendency of capitalist formations to present social relationships between humans as relationships between stuff. In his own words:

The legal relationship between subjects is only the other side of the relation between the products of labour which have become commodities. The legal relationship is the primary cell of the legal tissue through which law accomplishes its only real movement. In contrast, law as a totality of norms is no more than a lifeless abstraction.<sup>39</sup>

From this premise, Pashukanis drew a number of conclusions. The most important conclusion for him personally (because it got him killed) was that the persistence of the legal form constituted evidence of the persistence of capitalist relations of production and exchange. One can imagine why this was not warmly received in the Soviet Union of the 1930s. It is somewhat

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<sup>38</sup> See Bagchi (n 2).

<sup>39</sup> Evgeny Pashukanis, 'The General Theory of Law and Marxism' in Piers Beirne and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980) 62.

more surprising that when contemporary inheritors of the Pashukanian tradition equate the continuing existence of international law with the continuing violence of capitalism,<sup>40</sup> they are accused of legal nihilism.<sup>41</sup>

This takes me to my own dilemmas when engaging with Pashukanis. As I explain in the conclusion of the book,<sup>42</sup> I remain agnostic about the possibility of a Marxist legal critique that focuses on *the* legal form. Instead, my analysis focused specifically on what I have come to see as one argumentative pattern amongst many in international law. My reasons for doing so are partly jurisprudential and partly Marxian. First, the legal form as encapsulation of free and equal subjects has more to do with the self-perception of liberal legal systems, than with the realities of capitalist international law. Even nominal commitment to sovereign equality has been surprisingly recent in the discipline, and remains accompanied by openly uneven distribution of rights, duties, immunities, liabilities, etc. In other words, if we are to focus on how the law actually operates, as opposed to the tales some legal systems tell about themselves, it is almost impossible to hold

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<sup>40</sup> It was the least controversial proposition in China Miéville's work that caused sustained controversy: 'The attempt to replace war and inequality with law is not merely utopian – it is precisely self-defeating. A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*'. China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 319. For a careful explanation and extension of what legal form critiques of international law do and do not entail, see Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413; Robert Knox, 'Imperialism, Commodification and Emancipation in International Law and World Order' (EJIL:Talk!, 29 December 2017) <<https://www.ejiltalk.org/imperialism-commodification-and-emancipation-in-international-law-and-world-order/>> accessed 13 May 2021.

<sup>41</sup> Writing about Miéville, BS Chimni remarked that: 'Equally the idea of international rule of law should be valued. In short, legal nihilism is the luxury of armchair academics. It cannot inform social and political movements in the real world'. BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press 2017) 477; See also: Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) *Verfassung und Recht in Übersee: Law and Politics in Africa, Asia and Latin America* 195, 203-4.

<sup>42</sup> Tzouvala (n 1) 220.

on to the idea of the free and equal subject as the cornerstone of international law. Secondly, the fact that the Marxist critique of the capitalist mode of production is a critique of social forms does not necessarily mean that the Marxist critique of law in particular needs to be a critique of forms as well.<sup>43</sup> Perhaps law fits within the social totality of capitalism in ways that are reflective of the contradictions of really-existing capitalisms and not of the deeper logic of the capitalist mode of production. Perhaps the opposite is true. My relative non-engagement with Pashukanis was due to this uncertainty.

Bagchi also rightly observes another silence in the text, this time surrounding deconstruction. It is undeniably true that I opted for 'doing' deconstruction, instead of explaining it. For saying that 'it is worth revisiting these arguments as arguments and not as shadows of legal rules that exist independently of them'<sup>44</sup> is an accessible way of saying that 'there is nothing outside the text'.<sup>45</sup> Often the target of scorn by Marxists, liberals, and conservatives alike, this Derridean aphorism is both much more modest and much more ambitious than its critics allow for. Derrida was well aware of the existence of buses, bombs and starving bodies as existing outside book pages and he reminded his audience of them in the midst of neoliberal triumphalism in the 1990s. It is difficult to see how the author of the following was indifferent or unaware of material realities of dispossession, exploitation, and domination:

The aggravation of the foreign debt and other connected mechanisms are starving or driving to despair a large portion of humanity. They tend thus to exclude it simultaneously from the very market that this logic nevertheless seeks to extend. This type of contradiction works through many geopolitical fluctuations even when they appear to be dictated by the discourse of democratization or human rights.<sup>46</sup>

To say that 'there is nothing outside the text' is not to negate the existence of the world beyond a piece of paper, but rather to posit that the meaning of the

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<sup>43</sup> Contra: Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31(2) *Yale Journal of Law and the Humanities* 389.

<sup>44</sup> Tzouvala (n 1) 190.

<sup>45</sup> Jacques Derrida, *Of Grammatology* (Johns Hopkins University Press 1998) 21.

<sup>46</sup> Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Routledge 1994) 103.

text does not correspond or depend on anything outside said text or, in other words, that

there is no pure transmission, uncorrupted by a secondary medium, that makes us one with our listeners or readers. To engage in deconstruction is to show, through close reading, how even the advocates of a metaphysics of presence end up acknowledging the inescapability of writing and all that it represents.<sup>47</sup>

As implied above, the implications of this thesis for formalist legal work are explosive. Suddenly, academic writings and, much more consequentially, judgments or memos cannot be assessed against some legal rules or principles that inhabit some transcendental sphere waiting to be discovered. Deconstruction invites us to treat legal texts as significant and signifying in their own right, and not as reflective of some external and eternal truth. In so doing, it undermines metaphysical thinking in relation to law. Indeed, a shared suspicion toward metaphysics is an undeniable point of convergence between Marxism and deconstruction.<sup>48</sup>

One could retort that one does not need deconstruction to move beyond metaphysical thinking in law. American legal realists crafted a wide range of arguments and tools in that direction.<sup>49</sup> Deconstruction's anti-metaphysical impulse, however, can bring into sharp focus one particular characteristic of Western international law: its reliance on symmetrical, binary oppositions (civilised/uncivilised), which upon examination turn out to be neither symmetrical (the uncivilised is conceptually subordinated to the civilised) nor exactly oppositions, since the hegemonic term (civilised) depends for its meaning on its nominal opposite (uncivilised). Nonetheless, as Kosofsky Sedgwick has noted, this conceptual incoherence is neither inefficacious or

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<sup>47</sup> Shuja Haider, 'Postmodernism Did Not Take Place: On Jordan Peterson's 12 Rules for Life' *Viewpoint Magazine* (23 January 2018) <<https://viewpointmag.com/2018/01/23/postmodernism-not-take-place-jordan-petersons-12-rules-life/>> accessed 13 May 2021.

<sup>48</sup> On this point, see Michael Ryan, *Marxism and Deconstruction: A Critical Articulation* (John Hopkins University Press 2019) 29-32.

<sup>49</sup> See notably: Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470; Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) *Columbia Law Review* 809.

innocuous nor will it go away if it is named as such.<sup>50</sup> A quintessentially deconstructionist text such as the *Epistemology of the Closet* was also adamant that

rather than embrace an idealist faith in the necessarily, immanently self-corrosive efficacy of the contradictions inherent to these definitional binarisms ... contests for discursive power can be specified as competitions for the material or rhetorical leverage required to set the terms of and to profit in some way from, the operations of such an incoherence of definition.<sup>51</sup>

In my mind, this realisation opens the door for a tactical embrace of deconstruction by Marxists in international law. Because most of the incoherent definitions in international law tend to work for the reproduction of global capitalism, deconstructing them can be a politically useful move. If anything, Marxists are uniquely placed to perform the second part of the quote above, since we can offer the most persuasive theories about who benefits from these incoherent definitions and, therefore, even make sense of their surprising (for idealist international lawyers) endurance. In this respect, I have to disagree with Bagchi that the synthesis of Marxism and deconstruction is too sudden. To me, it seems long overdue.

#### IV. CONCLUSION

Both certain versions of Marxism and of deconstruction are at home with the idea that the subject is neither self-evident nor constructed through identity, but through relation and difference. My experience of engaging with these four thoughtful reflections has had me thinking about the forms of subjectivity that emerge out of critical work in the space of international law. One alternative is offered by Quiroga-Villamarín when he writes the following: 'for those already familiar with the plethora of work that Benton labels the interdisciplinary approach to global legal politics, it is difficult to pinpoint the novelty of Tzouvala's "history of international law"'.<sup>52</sup> Another is put forward by Sen when she asserts that: 'To that end, I find Tzouvala's

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<sup>50</sup> Eve Kosovsky Sedgwick, *Epistemology of the Closet* (University of California Press 2008) 10.

<sup>51</sup> *Ibid* 11.

<sup>52</sup> Quiroga-Villamarín (n 2) 111-112.

reading of Victor Kattan's account as speculative, interesting ... As a reader, I wonder about their differential mode of approach to reading, beyond a simple methodological difference in their historiographic processes'.<sup>53</sup> I intentionally picked two excerpts that are critical of the book under review to illustrate that they nevertheless hinge on entirely different critical legal subjectivities: the former is the critic as the 'subject who knows' and demands to be impressed by new information. In this telling, the critic differs from the 'mainstream' on account of the former's superior knowledge and understanding. This subject also appears in Quiroga-Villamarín's passing remark that he is 'not interested in what the mainstream (or surprisingly, some leading critical figures) consider *the* jurisprudential method'.<sup>54</sup> In stark opposition to this subjectivity, the critic that Sen portrays is one structured around curiosity and doubt. Her difference from the 'mainstream' is not its lack and her completeness, but rather her suspicion that lack is at the centre of everyone's subjectivity. The book under review tried to decentre the lawyerly subject by ignoring it, but if I was to say anything about it, then I would have to pick things up where Sen left them.

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<sup>53</sup> Sen (n 2) 125.

<sup>54</sup> Quiroga-Villamarín (n 2) 113.