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THE NECESSITY OF IMAGINATION: USING THE COUNTERFACTUAL METHOD TO OVERCOME INTERNATIONAL LAW'S EPISTEMOLOGICAL LIMITATIONS

—Mohsen al Attar*

Abstract As a social phenomenon, law is subject to countless influences that shape its contours. This quality is compounded in international law, where the regime contends with the contexts, cultures, and complexities of disparate nation-states. Yet, despite international law's evident contingency, few publicists explore the implications of this quality, preferring to engage with the regime from within the dominant history and logic. This approach narrows both scholarly imagination and regulatory potential, confining us to a contingent status quo. In the following article, I argue for the use of counterfactuals in international legal scholarship to, first, enrich our understanding of the biases that inform our thinking and, second, disrupt scholarly engagement with international law. Today's international legal order is beset by an array of wicked problems. Since the international law we know is culpable in the rise of these problems, it is shortsighted to rely on the culprit when looking for solutions. Counterfactuals are an effective instrument in stimulating new modes of thought and helping us appreciate that what is could very well be part of the problem.

I. CHARTING A CULTURALLY REPRESENTATIVE FUTURE FOR INTERNATIONAL LAW

One of the paradoxes of international law is that it is often under siege from its proponents.[1] Across the panoply of critical international legal scholarship,

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1 Mohsen al Attar, 'TWAIL: A Paradox within a Paradox' (2020) 22 International Community Law Review 163.

we find viewpoints that challenge, sometimes condemn aspects of the regime, from its Eurocentric history to its contemporary inequity. Yet, the source of their opprobrium is laden with irony: they believe international law can be better than it is.[2]

At the core of this body of critical scholarship is concern around the cultural misrecognition and political misrepresentation that pervades international law.[3] Both inequities draw water from the same well: the over-privileging of Eurocentrism in the design and operation of the international legal regime.[4] As detailed across multiple counter-narratives of international law, it was established to legitimise the imperial ambitions of European states during the era of conquest, and mostly to mediate competition between imperial rivals.[5] Despite decolonisation and the extension of sovereignty to postcolonial states, international law remains rooted in its origins, with emergent states expected to comply — and often committed to complying — with the established order.

Yet, the order remains partial in many ways, including its overarching epistemology.[6] Born of a Eurocentric viewpoint, the world was ordered — geographically, politically, and sociologically — as Europe wished it to be. Under these circumstances, resistance was inevitable as emergent states sought cultural and political representation on par with that of former imperial powers. However, the challenge proved existential as their cultural practices and preferences were often treated as incongruent with the precepts of international law, which were historically regarded as stand-ins for the principles of civilisation.[7] Hence the demands for cultural recognition and political representation emerging today: postcolonial states are not only eager to sit at the table, they wish to set the agendas and to chair the meetings.

It is at this point that international law retreats into its reactionary character. Despite the clear contingency of the regime, proponents of the status quo — perhaps its priests — treat it as sacrosanct and impervious to renewal. For critical international legal scholars, allegiance to the status quo triggers a paradox.[8] Despite their virulent condemnation of international law's origins, they remain committed to its progeny. Their critiques are caught in a Gordian knot: having already showed their hand, those content with the status quo need only call their bluff knowing that they will continue playing anyway. We might be

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2 al Attar (n 1).

3 Nancy Fraser, 'Reframing Justice in a Globalizing World' (2005) 36 New Left Review 69.

4 Anne-Charlotte Martineau, 'Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law' (2014) 25 European Journal of International Law 329.

5 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2004).

6 Walter D Mignolo and Catherine E Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (DUP 2018).

7 Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP 2020).

8 al Attar (n 1).

more charitable and proclaim that the commitment of critical scholars is not to international law's operational parameters but to the normative promise it presents: a cooperative world order organised around sovereign equality and human flourishing. Yet, the conclusion some reach is that the parameters stymie the promise, calcifying a legacy that is anything but equal and humane. This conclusion, perhaps realisation is what produces the disaffection common among critical scholars and explains the overriding paradox.[9]

To advance the movement toward the cultural recognition and political representation that critical scholars seek, I propose in this article mainstreaming the use of the counterfactual method.[10] It is an attractive device for renewal-minded scholars for it facilitates the exploration of alternative legal imaginaries. By crafting *what if* scenarios, use of the counterfactual method creates an opportunity to engage not just with different regulatory possibilities, but also with different underlying epistemologies.[11] Despite the contingency of many features of international law, we present and practise them as though they were sacrosanct. This presumption undermines our efforts toward renewal as we take for granted the prejudicial precepts we rage against.

As I argue, the counterfactual method provides an escape from the conundrum. If deployed well, critical international legal scholarship add a new dimension to the critical disposition. What critical scholars often lament is the absence of creation or of imagining alternatives to the status quo. For example, this is the essence of Bhupinder Chimni's *Manifesto* where he gently chides critical scholarship for failing "to effectively critique neo-liberal international law or [to] project an alternative vision of international law".[12] While I think Chimni is over-egging the pudding, I take his point: identifying shortcomings within the extant regime is vital but no more so than methodically exploring how it could be otherwise. By centring the contingency of international law, on one hand, and (temporarily) suspending our commitment to it on the other, the possibilities for renewal multiply.[13]

I proceed in four parts. In the first, I highlight the contribution critical international legal scholars — with emphasis on Third World Approaches to International Law ('TWAIL') — have made to debates about international law. The counter-narrative method has transformed our understanding of the regime, underscoring the brutalities that gave rise to the contemporary system. Next, I link the limitations of critical scholarship to the rise of regional approaches to international law. Following the decolonisation era,

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9 ibid.

10 Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 Asian Journal of International Law 403.

11 ibid.

12 Bhupinder S Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3.

13 ibid 418.

new alliances of sovereign states from different continents began to influence the development of international law in culturally bespoke ways. In the fourth part, I describe the counterfactual method. While I begin with the method as practised in the relevant scholarship, I also craft a critical approach that will help the cause of TWAIL and others scholars who reject the sacredness of Eurocentric epistemology. I conclude by arguing for the use of counterfactuals to advance a more robust debate on pathways not just for legal reform, but for legal renewal.

II. THE VALUE OF COUNTER-NARRATIVES TO INTERNATIONAL LEGAL HISTORY

Critical approaches to international law abound.[14] In academic halls, we have set aside the pontifications of naturalists and positivists alike.[15] Formalism persists, as professional legal practice demands, but even this is coloured with sociological, historical, and cultural ruminations that add regional texture to our understanding of the international legal regime.[16] It would be misleading to suggest that all publicists are critical now but, at a minimum, they recognise the valuable contribution critical scholarship adds to deliberations about international law.[17]

The transition was inevitable. As international law's history is described in textbooks, it appears as little more than European outer-state law.[18] Devised during the imperial era, European states crafted a set of laws to advance their territorial ambitions. Colonialism, slavery, and even genocide was permitted under the new Eurocentric order, so long as the actions were carried out against peoples outside of Europe. Far more parochial than universal, the rules European states crafted to govern international relations presupposed what Antony Anghie termed a dynamic of difference.[19] Only states that were European in character merited statehood; others were to embrace the teachings offered — via the cannon and the canon — to gain recognition from Europe. Of course, the international law of yesteryear was built on a fallacy: that

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[14] Fleur Johns, 'Critical International Legal Theory' in Mark A. Pollack and Jeffrey L. Dunoff, *International Legal Theory: Foundations and Frontiers* (CUP 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224013> accessed 19 April 2021.

[15] To provide some clarity, I've been predisposed toward critique from an early age. This disposition, cultivated by my surroundings and upbringing, informed much of my early thoughts and now colours my scholarship. I am part of the TWAIL movement, though my thinking is also informed by more radical anti-colonial scholarship including the works of Carmichael, Davis, Fanon, Rodney, and Sankara. I am also enamoured with debates on decoloniality and epistemic violence.

[16] Tilmann Altwicker and Oliver Diggelmann, 'What Should Remain of the Critical Approaches to International Law: International Legal Theory as Critique' (2014) 24 Swiss Review of International and European Law 69.

[17] ibid.

[18] ibid.

[19] Anghie (n 5).

European subjectivity equates with human objectivity.[20] This is the legacy upon which mainstream international law rests.

Following Europe's self-obliteration and the concurrent decolonisation of the African and Asian continents circa mid-twentieth century, the narrative of European supremacy began to fray before crumbling altogether. Hence the inevitability of the transition: the fallacy was impossible to sustain in a multipolar world. Legal scholars adapted, principally by embracing the critical turn I opened this article with.

Fleur Johns argues that two phases denote critical approaches to international law.[21] In the first, they took liberal legalism to task, demonstrating that text and doctrine alone are inadequate tools for understanding either the operation or the character of international law.[22] Koskenniemi's indeterminacy thesis captures this critique.[23] In the second phase, Eurocentric critiques of Eurocentric international law were displaced by, among others, Critical Race, Feminist, Marxist, and TWAIL theories. New scholars were protesting against "the ultra-white-male ethos of the New Left".[24] Anghie and Chimni captured this shift in the pithiest of phrases: "indeterminacy very rarely works in favour of Third World interests".[25] From there, critical international legal scholarship soared.

TWAIL is, perhaps, the most recognised among critical international legal theories.[26] To some extent, this is due to the obviousness of the critique: no matter how we measure life chances, it is evident that colonial legacies continue to blight those of formerly colonised regions. The theory thus speaks to the experiences of large swathes of the global population. We might also mention the malleability of the critique. As Okafor, Mickelson, and I comment,

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20 ibid.

21 Johns (n 14).

22 Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' (2009) 20 European Journal of International Law 7.

23 ibid. In his earlier work, Koskenniemi argued that international law, as interpretative practice, is indeterminate. By this, he meant that two judges relying on the same facts, regulations, and jurisprudence, can reach diametrically opposite conclusions (think majority opinion). Both Judges are sincere in their analysis. Such is the nature of law that legal problems are intrinsically ill-structured, meaning multiple outcomes are possible, even desirable, hence law's indeterminacy. His thesis is equally applicable to municipal law.

24 Johns (n 14) 7.

25 Antony Anghie and Bhupinder S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese Journal of International Law 77, 101.

26 al Attar (n 1); Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14 Journal of International Criminal Justice 921; Bhupinder S Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade, Law and Development 14.

TWAIL is many things to many people.[27] Its flexibility facilitates wide-ranging involvement which, at least according to Antony Anghie, was the aim. Last, and I think this relevant for this article's thesis, TWAIL scholars do not posit a better universalism. On the contrary, they welcome interventions from an array of constituencies, especially those historically marginalised within Eurocentric international law. Cultural recognition and epistemological equivalency are central to the TWAIL movement. It is an ideal canvas for the involvement of disparate communities as well as for the exploration of different possibilities.[28]

Foremost, TWAIL is an analytical lens through which scholars can examine elements of international law and global governance, while placing emphasis on matters of relevance to Third World peoples and on perspectives that emanate from their region.[29] Two patterns characterise TWAIL. First, its scholars place great emphasis on the twin dichotomies of prejudice and privilege.[30] Just as we can only appreciate what is sweet by tasting what is bitter, prejudice only makes sense when it is juxtaposed alongside privilege. In practical terms, the bias that is experienced by some states manifests advantageously for others. To comment on international law with efficacy requires scholars to account for this parasitical relationship.[31] Second, these same scholars underscore critical scholarship's symbiotic relationship with its nemesis.[32] Critical international legal theory is ambivalent toward itself, for the interventions legitimise the regime through the illusion of critique and accountability, ensuring international law's preservation.[33]

To illustrate, I use positive discrimination as an analogy. By 'favouring' the employment or admission of sole individuals from a historically disadvantaged

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27 al Attar (n 1); Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371; Karin Mickelson, Ibironke Odumosu and Pooja Parmar, 'Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities' (2008) 10 International Community Law Review 351.

28 Consider this (imperfect) selection of TWAIL scholarship to appreciate the inclusivity the movement pursues: Hiroshi Fukurai, 'Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law' (2018) 5 Asian Journal of Law and Society 221; Muhammad Azeem, 'Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions under Chinese Investment in Pakistan' (2019) 20 Oregon Review of International Law 395; Mark A Chinen, 'Crumbs from the Table: The Syrophoenician Woman and International Law' (2012) 27 Journal of Law and Religion 1; Fernanda Cristina de Oliveira Franco, 'TWAIL's Opportunities and Challenges in the Latin American Context from Indigenous Peoples' Perspectives to International Law' (2015) 12 Brazilian Journal of International Law 227; Corri Zoli, 'Islamic Contributions to International Humanitarian Law: Recalibrating TWAIL Approaches for Existing Contributions and Legacies' (2015) 109 American Journal of International Law Unbound 271.

29 Okafor (n 27).

30 al Attar (n 1).

31 Martineau (n 4).

32 al Attar (n 1).

33 Robert Knox, 'What is to be Done (With Critical Legal Theory)?' (2011) 22 Finnish Yearbook of International Law 32.

or disenfranchised group, decision-makers give the illusion of concern about both the under-representation of some and over-representation of others. As critics argue, the intervention is piecemeal and designed to placate rather than reform. If the problem is systemic — as is the case with discrimination — then individual interventions will not redress the underlying cause. It is the equivalent of treating symptoms rather than illnesses. The same applies to international law. If it is the aetiology and epistemology of international law that reproduce predatory relations, then preserving the regime while implementing amendments, will do little to alter the underlying ill. Consider, for example, the Doha Development Round or developmental aid in general. If exploitation underpins global capitalism and the rules are designed to favour the strongest participants, tweaks at the margins will appease more radical demands, allowing the benefactors to plead good intentions and to rescue the regime. Few critical scholars pursue international law's radical re-imagination, preferring to trim at the edges.

Beyond the analytical and introspective lenses, TWAIL also puts forward a variety of methods for the examination of international law, the most prominent of which is the counter-narrative.[34] TWAIL scholars excavate the inequitable outcomes that manifest for those beyond the Eurosphere via international law. They, thus, leverage history's dynamic and multifarious character to retell imperial fantasies as the nightmares they were for those on the receiving end. With the democratisation of global society following decolonisation, it was only a matter of time before new narratives of international law emerged.[35] And they have.

Across the collection of TWAIL scholarship, we find a series of exposés of histories and herstories of international law. Many possess a critical character as the author challenges the established narrative, unearthing threads, experiences, and perspectives that orthodox scholarship omits.[36] While critique is central to the counter-narrative, TWAIL scholars — like other critical theorists — do not limit themselves to a counter-chronicling endeavour. Throughout their works, they explore the legacies of Eurocentrism in the continued *operation* of international law.[37] Despite the putative democratisation of the world, international institutions — like international relations — remain hopelessly

[34] Burgis-Kasthala (n 26).

[35] It is worth mentioning that resistance to European imperialism was continual. Lorca has excavated numerous examples from Latin America just as Rajagopal has from across the Asian continent. We can go further and explore the works of historian such as CLR James and Hilary Beckles as well as postcolonial scholars such as Gopal and Spivak, all of whom unearth perpetual resistance and, at least in the case of Gopal, encourage the development of a non-linear account of history including the present moment. Amy Maguire, 'Contemporary Anti-Colonial Self-Determination Claims and the Decolonisation of International Law' (2013) 22 Griffith Law Review 238.

[36] Antony Anghie, 'LatCrit and Twail' (2012) 42 California Western International Law Journal 311, 318.

[37] Zoli (n 28).

imbalanced; colonial legacies are tempered, to be sure, but even today overt (e.g. the Security Council) and covert (e.g. duty to protect) biases prevail. While they often begin with the counter-narrative, TWAIL scholars quickly shift into the critical, achieving both scholarly rigour and political relevance in the process. The conclusion is self-evident: barring a colossal act of collective renewal, the original sin of international law will continue to haunt the edifice, reproducing prejudicial outcomes over and over again.

While the critique does not end there, TWAIL and critical scholars, in general, are stricken by a sense of paralysis.[38] As I highlight in the introduction, early TWAIL scholars such as Chimni bemoan TWAIL's failure to disrupt the production of international law (though they concede that the narrative will never be the same).[39] Despite the purchase of his critique, I believe he overstates it. Third World jurists, as early as the 60s and 70s, proposed the New International Economic Order and Permanent Sovereignty Over Natural Resources doctrine.[40] Each of these challenges received wisdom and were humoured before being overrun by the centres of power. If we look further afield, we locate the Drago Doctrine and Calvo Clause, two early twentieth century attempts to inject Third World interests into international law.[41] We must contextualise our lack of success, and account for the world in which attempts at reform manifest.

Since Chimni's early reflections, we observe heightened degrees of introspection by TWAIL scholars.[42] Over the past decade, two strands of thinking about the challenges facing TWAIL — and critical approaches in general — dominate. For some, the critique is nihilistic. To say that international law is prejudicial at an aetiological level, leaves little room to manoeuvre. If the

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38 al Attar (n 1).

39 Chimni (n 12).

40 Margot E Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62 International and Comparative Law Quarterly 31.

41 Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 Harvard International Law Journal 475. The Calvo Clause, the brainchild of Argentine jurist Carlos Calvo, set forward the principle that jurisdiction over international investment disputes rests with the host country. Calvo wished to restrict the ability of European states to deploy armed intervention to enforce the demands of private actors, a practice that was pervasive at the time. Likewise, Luis Drago, also Argentinian and the then Foreign Minister, argued at the turn of the twentieth century that public debt operates beyond the purview of state-to-state relations. Building on the Calvo Clause, he further argued that private creditors should be prohibited from calling upon the military support of their states to enforce an existing liability and must instead avail themselves of the domestic legal regime. Both since developed into preeminent principles in international economic law.

42 Azeem (n 28); Srinivas Burra, 'TWAIL's Others: A Caste Critique of TWAILers and Their Field of Analysis' (2016) 33 Windsor Yearbook of Access to Justice 111; George Galindo, 'Splitting TWAIL' (2016) 33 Windsor Yearbook of Access to Justice 37; Kwadwo Appiagyei-Atua, 'Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review' (2015) 8 African Journal of Legal Studies 209.

dynamic of difference is embedded within the regime, it is impossible to countenance alternatives. For others, the confrontation is epistemological: it is not about supplanting European subjectivity with universal objectivity, it is the way in which Eurocentrism informs our thinking about what is subjective, objective, universal, and legal.[43] To ask whether it is possible to escape modernity, is the equivalent of asking whether we can escape ourselves.

Since answering either question in the context of this article is impossible, I only tackle the epistemological one in the remainder of this article. I choose the epistemological challenge for the rise in scholarship on regional approaches to international law portends a possible way forward, one that coheres with the method I encourage TWAIL scholars to explore in the penultimate section of this article: the counterfactual. To take one example, the Asian continent, inhabited by 60% of global population has made several important contributions to international legal relations including, among others, the Five Principles of Peaceful Co-Existence, the tradition of Asian values, and the Bandung Declaration.[44] Yet, they are mostly excluded from mainstream thinking about international law, reduced to regional constructs. Not without irony, Simon Chesterman explains their exclusion from an Asian perspective,

> Asian states have consistently been slowest to form regional institutions, the most reticent about acceding to major international treaties, the least likely to have a voice in proportion to their relative size and power and the wariest about availing themselves of international dispute settlement procedures.[45]

He does not end there, urging publicists to account for Asian practices for "the centre of gravity is clearly shifting towards Asia" certain to raise questions about the future "content of international law and the nature of its institutions".[46] Regional publicists, we must conclude, are breaking the Western monopoly over the practice of international law.

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43 Mignolo and Walsh (n 6).

44 Simon Chesterman, Hisashi Owada and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (OUP 2019); Fukurai (n 28); Bhupinder S Chimni, 'Asian Civilizations and International Law: Some Reflections' (2011) 1 Asian Journal of International Law 39.

45 Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2016) 27 European Journal of International Law 945, 957. As observed by an astute reviewer, Chesterman's piece is not without its problems. Two stand out: first, scholars dispute his framing of Asian practices as well as the homogeneity he presumes and, second, throughout his scholarship, we note an assumption that regional practices must be funnelled through a Eurocentric lens. Both critiques are potent but neither undermine the value of regionalism in the development of international law. On the contrary, even Chesterman's deviations accentuate the need for more research.

46 ibid 966–67.

To understand the implications, I begin with background on the rise of regionalism.

III. WHAT'S REGIONALISM GOT TO DO WITH INTERNATIONAL LAW?[47]

All laws develop within a legal system, itself a sociological phenomenon that mediates relations between disparate constituents. This simple formulation highlights key facets of international law: a sociological system designed to organise interactions between sovereign states. Like municipal law, to understand international law, we must engage with the sociological and the cultural. This is easier said than done. International law lays claim to universality, yet there is neither a global culture nor a world society to inspire the framework.[48]

Instead, since the days of Francisco de Vitoria, what we have is a regional framework that its interlocutors posit as universal and seek to impose upon the world. Here I summarise Anghie's thesis, as detailed in *Imperialism, Sovereignty, and the Making of International Law*.[49] To return to my earlier point, mainstream international law is European outer-state or regional law and nothing more. Malcolm Shaw, author of the most prominent textbook on international law, argues the same: the "nineteenth century development of the law of nations [was] founded upon Eurocentrism and imbued with the values for Christian, urbanised and expanding Europe" and the associated principles "enshrined the power and domination of the West".[50] In the decolonisation era, the challenge for postcolonial states was to adapt the regime to the cultural practices and predilections that denote their societies.

The challenge manifested at two levels. First, mainstream law was treated as *fait accompli*. To even join the club of sovereign states required a postcolonial mimicking of the mores and structures of Europe.[51] Second, many postcolonial states reflected Eurocentrism back to the metropolis, sometimes comedically described as *being more British than Britain*. To break with

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[47] It is vital to note that we note strong ties between regionalism and critical approaches. Embedded within international law is a form of ethno-chauvinism as Europe arrogated to itself the authority to speak on behalf of a mystical universalism. The critique of this is obvious, at least it is today. It is easy to see how this false universalism would produce investigations into regional alternatives, the latter of which are proliferating. In this paper, I do not go beyond stating the obvious: that regionalism and critical scholarship can be both comfortable and awkward bedfellows. As others have noted, the rise of ethno-chauvinism is not exclusive to Europe alone and some of these reactionary movements deploy the language of regionalism to state their case. This is evident in countriss as culturally and geographically distant as Australia, France, India, and South Africa.

[48] al Attar (n 1).

[49] Anghie, *Imperialism, Sovereignty, and the Making of International Law* (n 5).

[50] Malcolm Shaw, *International Law* (8th edn, CUP 2018) 28–29.

[51] Sundhya Pahuja, 'The Postcoloniality of International Law' [2005] Harvard International Law Journal 459.

Eurocentric epistemology thus demanded breaking with the self, an altogether more harrowing endeavour. For much of international law's history, compliance with the cultural precepts of Europe was thus the standard-bearer.

We face here the epistemological challenge in all its glory. If compliance with European regional law is the basis of participation in the international legal order, postcolonial states are committing to their own epistemological disenfranchisement.[52] They remain subservient to a foreign epistemology in all matters international. What is more, with the proliferation of interlinkages between international and domestic law, these states experience a gradual harmonisation with the legal — and thus cultural — predilections of their former colonial overseers.[53]

In sociology, Aníbal Quijano, Walter Mignolo, and Catherine Walsh have explored this conundrum at length.[54] The colonial matrix of power, as they term it, is embedded within the institutions and ideologies of modernity including international law. To Quijano, coloniality is not limited to colonisation. Instead, it was — he would say *is* — a process of cognitive capture that comes to inform the experiences and aspirations of postcolonial peoples. When we account for the manner in which international law developed — superimposed upon the world during the colonial era — Europe elevated a single civilisational trajectory above all others, hence my earlier reference to European subjectivity posing as human objectivity.

Through this lens, the reimagination of international law gains an altogether different character. Decolonisation was once the focus of aspirational states. This made sense, at the time, but its limitations are now evident. When examined through the prism of coloniality, we come to undertand that the challenge to reforming international law exists at an epistemological level. The legal regime is not merely a rule book for international relations, but a cultural code for human interaction. Attempts to harmonise state relations via the regime of international law are thus attempting to standardise culture, an impossible task. For critical theories such as TWAIL, the challenge becomes existential.

The pursuit of decolonisation rather than decoloniality undergirds much of the TWAIL corpus.[55] The position is sensible, even if counterproductive. Colonisation touched upon all facets of Third World peoples' existence: political, economic, and cultural.[56] Deploying varying degrees of brutality, Europe

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[52] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011).

[53] Ko Hasegawa, 'Normative Translation in the Heterogeneity of Law' (2015) 6 Transnational Legal Theory 501.

[54] Mignolo and Walsh (n 6).

[55] Pahuja (n 51).

[56] Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 Social & Legal Studies 321.

exerted dominion over the lives and lands of peoples interspersed throughout the world. Freeing themselves from these shackles thus took centre stage in liberation movements. Capitalising on the model of civilisation available, state sovereignty was the concept around which Third World struggles coalesced. Constructions of sovereignty, however, are also culturally informed.[57] While embracing sovereignty and its accessories was sensible, including its commitment to international law, it also ran against cultural autonomy. Liberation struggles found themselves in the contradictory position of advocating freedom on one hand, while coddling the same politico-economic structure — the colonial matrix of power — upon which the denial of their civilisation was fashioned.[58] To paraphrase Ngugi, the night of the gunboat was followed by the morning of the blackboard.

Third World jurists and scholars are aware of the dark side of sovereignty and statehood. Still, decolonisation understood as the routing of imperial powers remained at the heart of the struggle. In a reflection on TWAIL, Bedjaoui celebrates political realism.[59] It is only once the exodus is achieved that postcolonial states could deliberate and pursue their preferred modes of organisation and governance. To our chagrin, neither the deliberation nor the pursuit happened as a form of autopoiesis manifested: Eurocentric state logic sustained itself, transferred to a new postcolonial ruling elite.

By supporting this approach to liberation, TWAIL and others tread close to the same retrograde model of power that enabled Third World conquest. Nor is this surprising: the questions we ask and the answers we offer are "a consequence of being embedded and living in a Western imaginary enveloped in the process of becoming itself".[60] To counter this, we pursue liberation by developing new ways of thinking, knowing, and being. What does this mean for critical international legal scholars? As alluded to above, it means we "[transcend] rather than [dismantle] Western ideas [by] building our houses of thought", the theorising and praxis of decolonial liberation in law.[61] Decoloniality thus appears as a more rigorous task than decolonisation.

Breaking from the dominant epistemology, especially in the context of international law, is complicated, perhaps the greatest euphemism of this

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[57] Cornelia Vismann, 'Cultural Techniques and Sovereignty' (2013) 30 Theory, Culture & Society 83; Jessica Shadian, 'From States to Polities: Reconceptualizing Sovereignty through Inuit Governance' (2010) 16 European Journal of International Relations 485; Christian Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 Review of International Studies 519.

[58] Pahuja (n 51).

[59] Rémi Bachand, 'Les Third World Approaches to International Law: Perspectives Pour Une Approche Subalterniste Du Droit International' in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz Fabri, *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre Répétition et Renouveau* (Société de législation comparée 2013).

[60] Mignolo and Walsh (n 6) 147.

[61] ibid 7.

article. I note the rise of scholarship on the *others* of international law including African, Asian, Chinese, Indigenous, and Islamic approaches to international law. Rather than settling for the colonial construct, with all the baggage that this entails, scholars seek to do as Mignolo urges: to transcend Western thought by developing regional epistemologies that will inform bespoke approaches to the regulation of international relations. These efforts are emblematic of the *pluriverse* that characterises — or should characterise — a multi-polar world. Instead of visualising international law as an orbit that envelops humanity, we treat its regional iterations as satellites, each of which services a specific region. Like a Venn diagram, there are matters and moments of overlap, but these are still guided by the broadcasting cultural construct.

For critical international legal theorists, this involves renouncing the singularity of European epistemology in the fashioning of international law. Ways of knowing permeate other cultures as well, meaning each is capable of articulating their own preferences for international law.[62] Epistemological innovation becomes the struggle itself, countering the misrecognition and misrepresenta-tion that result from epistemic singularity.[63] It also creates space for the development of unique ways of thinking about the regulation of international relations.[64]

We find variations of this model of critical and epistemological engagement from across regions. Babatunde Fagbayibo, for example, articulates a variant of this model in relation to African thought.[65] "Many universities prescribe Euro-American textbooks that pay little or no attention to African epistemic realities", Fagbayibo argues, further noting that legal scholars of international law mostly assign "reading materials [that] stick to Eurocentric canons".[66] By treating European thought as a disciplinary foundation, the scope of representation is constricted. Most of all, Fagbayibo laments the self-immolation that this

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[62] Antony Anghie, 'C.G. Weeramantry at the International Court of Justice' (2001) 14 Leiden Journal of International Law 829.

[63] Fraser (n 3).

[64] Oscar O Eybers, 'Applying Ayittey's Indigenous African Institutions to Generate Epistemic Plurality in the Curriculum' (2019) 4 Transformation in Higher Education <http://thejournal.org.za/index.php/thejournal/article/view/68> accessed 19 April 2021; Fayth Ruffin, 'Indigenisation and Africanisation of Legal Education: Advantaging Legal Pluralism in South Africa' (2019) SP27 Alternation: Interdisciplinary Journal for the Study of the Arts and Humanities in Southern Africa <http://alternation.ukzn.ac.za/Files/articles/special-editions/27/06-Ruffin.pdf> accessed 19 April 2021; Chuma Himonga and Fatimata Diallo, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' (2017) 20 Potchefstroom Electronic Law Journal <http://www.saflii.org/za/journals/PER/2017/51.pdf> accessed 19 April 2021.

[65] Babatunde Fagbayibo, 'Some Thoughts on Centring Pan-African Epistemic in the Teaching of Public International Law in African Universities' (2019) 21 International Community Law Review 170.

[66] ibid 181.

action conveys for a plethora of African materials on international law, both historic and contemporary, prevail.

James Gathii argues a similar point, recounting the breadth of jurisprudence on diplomacy, trade, and peace that emerged across pre-colonial African cities such as Carthage as well as kingdoms such as Mali, Kongo, and Songhai.[67] Yet, as Fanon observed in the decolonisation period, the drive to "inferiorise and eliminate any trace of African knowledge systems" pervades international legal scholarship, whether produced by African or European jurists alike.[68] Making a similar point, Fagbayibo further argues that the development of African epistemologies — notice his use of plurality — will transform our understanding of international legality. By adding African epistemologies to the intellectual debate, future relations within and beyond African borders become more representative, moving us closer to the orbiting satellites and Venn diagram I referenced earlier.[69] Without epistemic plurality, we are wedded to the truncated universalism that mainstream international law is capable of.

Scholars have executed a comparable exercise in relation to the Asian continent. I identified the Five Principles of Peaceful Co-Existence, the tradition of Asian values, and the Bandung Declaration earlier. I also recounted Chesterman's explanation. Reticence notwithstanding, Chesterman believes the response of mainstream publicists is imprudent. "The centre of gravity is clearly shifting towards Asia" and "the more interesting question" for international law is about the jolt the move will trigger "on the content of international law and the nature of its institutions".[70] He proposes a range of pathways for the future of regional international law, each of which warrants further research, and I direct the reader to this useful oeuvre.[71] There is more. Consider the efforts of the Centre for International Law ('CIL') and the Foundation for the Development of International Law in Asia ('DILA'). Noted TWAIL scholars, Antony Anghie and Lee Seok-Woo, are at the heart of each respectively. Asia "is traditionally viewed as 'rule takers' rather than 'rule makers'" according to Anghie yet, over the past generation, the continent "is in various ways now playing a role in the making of international law".[72] Anghie has since launched his Teaching and Researching International Law in Asia project ('TRILA').

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67 James Thuo Gathii, 'Mapping African International Law' (2011) 2 Transnational Legal Theory 429.

68 Fagbayibo (n 65) 182.

69 ibid 186.

70 Chesterman (n 45) 966–67.

71 ibid 968–77.

72 Antony Anghie and Real JR Robert, 'Teaching and Researching International Law in Asia (TRILA) Project - 2020 Report' (Centre for international Law, National University Singapore 2020) 2.

He began the project with a conference. Held in 2018, the aim was to explore and gather data on *Asian approaches* to international law, including its pedagogy and research. Among attendees, 85% expressed a desire to consolidate and articulate an Asian consensus on international law. Partly motivated by regionalism, they wished to counter "strong Eurocentric currents pervading the field".[73] A further 64% of participants proclaimed that an Asian perspective already exists. The report highlights substantive matters but also levels of abstraction. According to Radvindra Pratap, certain "international issues, such as diplomatic relations, nuclear testing, state responsibility, food security and counter terrorism" are areas "in which Asian states have developed shared positions and an Asian perspective can be considered".[74] Like Lee Seok-Woo, who I describe in the next paragraph, Pratab belives that Asian states have developed regional practices in international law, some of which differ from those of other continents. Certainly, there are particularities to Asian conceptions of state responsibility and food security where the eponymous Asian values are relied upon when crafting regional treaties. His argument is less persuasive with regards to nuclear testing if we consider the distinct approaches adopted by China, India, Pakistan, and South Korea. Nishara Mendis and Chen Yifeng concur while cautioning against the pursuit of cultural relativity in international law. The aim of regionalism is to develop forms of international law that are more representative of groups historically excluded from its formulation, such as women.[75]

Lee Seok-Woo adopts an approach germane to the CIL, seeking to expose "materials on [international law] practice and development from Asia", an objective he regards as a priority for the region.[76] A challenge for international legal scholars is to gain knowledge about state practice across countries. Most texts, Lee asserts, remain Eurocentric and a dearth of resources from non-Western countries translates into the exclusion of practices from beyond the Eurosphere. He developed the DILA project "to disseminate international law in Asia and promote contacts and cooperation to deal with questions of international law relating to the continent".[77] He includes here the publication of the Encyclopaedia of Public International Law in Asia ('EPILA'). The first of its kind, the text reviews and analyses state practice from twenty Asian countries over a period of thirty years.

Lee is convinced that the variety of cultures interspersed across the Asian continent poses no impediment to the development of a strong regional

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[73] ibid 3.

[74] ibid 27.

[75] ibid 28–29.

[76] Seokwoo Lee, 'Critical Pedagogy Symposium: Critical International Legal Pedagogy in a Virtual Learning Climate: DILA's Digital Lecture Series' (*Opinio Juris*, September 2020) <http://opiniojuris.org/2020/08/31/symposium-saving-critical-international-legal-pedagogy-from-formalists-reactionaries-and-pandemics/>accessed 19 April 2021.

[77] ibid.

approach to international law. He refers to "a strong, albeit undefined, feeling of familiarity, mutual understanding, and even coherence and solidarity" among Asian states.[78] Like other TWAIL scholars, he returns to the exclusionary character of modern international law: "a shared experience of domination and dominance from without and within, both in the form of downright colonization, semi-colonization, as well as other forms of repression" compels a systemic approach toward the development of Asian international law.[79]

My third example draws from an essay by Balraj Sidhu.[80] Sidhu argues that ancient India, as far back as 600 BCE, developed its own Law of Nations. For obvious reasons, the sources are intertwined with the Hindu religion, much like the *Siyar* or Islamic international law.[81] Religious subjectivity is frequently exploited by mainstream publicists to deny their value for a pluriversal approach to international law. Yet, this ethnocentric outlook denies two characteristics of modern international law: first, Christianity is the foundation of the current iteration and, second, favouring a putative secular approach to international law is itself a culturally subjective viewpoint.[82] Many other societies believe that their affairs should be guided by their religious precepts. Similar to other Asian societies, Sidhu argues that the domination of Western ideology renders other modes of thinking subservient. She ends by intimating that legal scholars from outside Europe have "a moral responsibility…to shape a future international law that is more equal and representative".[83] For Sidhu, this begins by restoring "the international legal rules well laid in ancient India".[84]

Clear from these examples is that the development of regional approaches toward international law is flourishing. Obstacles abound, of course, including the ability to instrumentalise these approaches. We must also wait and see whether the same Eurocentric epistemology comes to dominate regional iterations of international law. From the perspective of critical international legal theory, the developments are both liberating and enriching. As highlighted in decoloniality scholarship, epistemological innovation stands as the final frontier to cognitive sovereignty.

To advance this mission, I propose that critical scholars go one-step further and introduce a simple and effective method into their repertoire. Subject of an edited anthology, the counterfactual is an effective approach toward stimulating

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78 ibid.

79 ibid.

80 Balraj Sidhu, 'TRILA and India: A Plea for Its Restoration' (*Afronomics*, September 2020) <https://www.afronomicslaw.org/2020/09/16/trila-and-india-a-plea-for-its-restoration/> accessed 19 April 2021.

81 N Samour, 'Is There a Role for Islamic International Law in the History of International Law?' (2014) 25 European Journal of International Law 313.

82 Anghie (n 5).

83 Sidhu (n 80).

84 ibid.

reflection on the renewal of international law.[85] While I do not argue against the counter-narrative, I observe that, in the context of critical international legal theory, it has achieved its aim: few scholars deny either international law's barbaric past or the contingency of contemporary world order. Yet, I believe that TWAIL and critical scholars can do more to alter academic reflection on international law. As I explain in the forthcoming section, the counter-factual is a promising intervention.

IV. 'WHAT IF' AS AN INTELLECTUAL PROVOCATION

Not all participants in the TRILA conference highlighted in the preceding section are sympathetic to regionalism. "However unfair and skewed [international law's] history was, an international legal system [exists]", according to Ebrahim Afsah, but "any other system built to mediate the interests of hostile states would look very much the same".[86] Afsah's position is problematic for multiple reasons, the most notable of which is his overt denial of both contingency and indeterminacy in the development of international law. In response to these types of assertions, common among formalists committed to the status quo, scholars explore the famed — and infamous — *what if?* In their deliberations, they probe potential responses to the perennial question: how could international law be otherwise?

"Saying that international law is contingent does not mean that it could have taken any shape in equal probability" asserts Ingo Venzke: "it rather means that the shape in which we find international law today was one possibility among many".[87] Does Afsah truly believe that, had China rather than England conquered much of the world, international law *would look very much the same*? Opening oneself to this possibility stimulates both legal thinking and legal theory, especially in the realm of international law where the prospective configurations are plentiful. In this section, I adumbrate the counterfactual method, highlighting some of its foundations and some of its idiosyncrasies for critical legal scholars.

At its core, the method facilitates the blossoming of alternative legal imaginaries. It is not simply a matter of imagination, but of methodical engagement with proposals for the reform of international law. Within the regime, some constraints have become sacrosanct, militating against modification, at least in the immediate. The sovereign state is one example, though the interventions of NGOs as amicus curiae and attempts to establish legal standing of companies

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[85] Ingo Venzke and Kevin Heller (eds), *Contingency in International Law: On The Possibilities of Different Legal Histories* (OUP 2021).

[86] Anghie and JR Robert (n 72) 30.

[87] Venzke (n 10) 404.

within international courts suggest that even the sacred is contingent.[88] The use of the counterfactuals enables our imagination, as we work through the trajectory of an alternative imaginary.

Counterfactuals are also valuable in stimulating deliberation about obviously contingent features of the international legal regime. Two facile examples come to mind: first, the plutocratic distribution of voting power at the international financial institutions and the absence of provisions on distribution in international economic law treaties. Counterfactuals help free "legal thinking from false beliefs in the necessity of outcomes and developments".[89]

What is counterfactual thinking? Some might recall Pascal's clever assertion about the world being different if Cleopatra had a shorter nose and averted the interests of Marc Anthony. Shortly thereafter, a literary movement known as *uchronie* developed, pursuing explorations into counterfactual histories or, as the term implies, utopias of past times.[90] The value is undeniable and I quote Patrick Boucheron favourably: "history is capable of granting the rightful place to future that were never realised, to the potentials that were never met".[91] To tease out Boucheron's point, it is essential to consider that arguments about why something happened one way are, equally, commentary on why that same thing did not happen another way. Such is the nature of historical study that scholars read the accounts in accordance with a pre-existing hypothesis, even bias.[92] I am reminded of Achebe's laconic reflection: until lions have their own historians, the hunt will always glorify the hunter. To read history another way, especially in a way that did not happen, is elucidative in its own right, helping us to understand, first, why it unfolded the way it did and, second, how we wish it might have.

Counterfactuals are a useful method for critical international legal scholars, opening the door to investigations into international law's genuine and false contingencies. For example, had the African continent pursued a re-drawing of its map as was mooted at the time — and later rehashed by Makau Mutua[93] — would the continent have remained mired in internecine wars for as long

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88 I am grateful to a reviewer for reminding me of Foucault's relocation of power. To the extent that proponents introduce new actors, it is often to deflect from meaningful reform. Neither the involvement of Amnesty or of Facebook in international legal deliberations represents the type of reimagination I am alluding to here since both have a legitimising effect on the status quo.

89 Venzke (n 10) 405.

90 A personal favourite is *Red Superman*, an alternate history involving the boy-alien's landing in Asia, specifically the Soviet Union.

91 Venzke (n 10) 408.

92 Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Beacon Press 1995).

93 Makau Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 Michigan Journal of International Law 1113.

as several regions did? We use the counterfactual not to better understand the past, but to appreciate that the future is not predestined.

I admit this type of thinking is challenging, almost impossible for many legal scholars. If law is anything, it is our prostration to the status quo. To even countenance the redrawing of maps requires the subversion of an array of international legal doctrines, before we even tackle the political and sociological upheavals that would follow.[94] Still, the point is there. To the extent that critical international legal scholars are motivated to explore epistemological alternatives, it requires deep reflection not just on the way things are, but on ways they could have been and, by extension, can still be. Exploring alternatives to the current trajectories unlocks that potential.

In an elucidative article that I reference above, Venzke provides a schematic for thinking counterfactually.[95] He sets forward core parameters, designed to preserve *reality* "to the largest degree possible".[96] Too many modifications, he cautions, would nullify the educative value of the exercise. A minimalist approach guided by high probabilities is his preferred way forward. He further notes that it is not only a matter of altering key events but of anticipating the snowball effect. It is inevitable that the alteration of one element can produce intended and unintended consequences alike. The effective use of the counterfactual method requires some mapping of the projected trajectory, adding essential rigour to the exercise. There is more and I encourage readers curious about the counterfactual to engage with the work of Venzke, Lebow, and Luhmann.

For critical international legal theorists, however, I advise operating beyond the parameters of Eurocentric legal thinking. This might involve drawing on alternate epistemologies, introducing new aspirations and benchmarks, and challenging the status quo of international legality. Most of all, it involves dismissing the intellectual and ideological obligation to always measure our proposals against European international law.

For a critical cohort, this is perhaps what makes the counterfactual method most useful. In addition to helping us home in on aspects of international law that preserve a Eurocentric outlook, it also liberates us to explore what lay beyond these parameters. For example, Venzke's chief parameter involves a commitment to *reality*, as he terms it, declaring that the counterfactual must "arise from the context" if it is to be "realistic".[97] On its face, this sounds sensible: why operate in fantasy if the ambition is a *better* version of actual international law? Nevertheless, I question the value of sensibility in a world that is

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94 ibid.
95 Venzke (n 10).
96 ibid 418.
97 ibid 419.

anything but. The historical record demonstrates over and over that even if the Third World commits to international law, even if it plays by the rules, *indeterminacy rarely works in its favour.*[98]

To be even blunter, the Third World is consistently bludgeoned by context and reality. Like the contingency of the reasonable person standard, the same is true for a sensible approach to counterfactuals: in the context of international law, for being sensible means operating within a Eurocentric epistemology. It is a facile strategy that is consistently used to delegitimise demands deemed incongruous with the status quo, and thus liable to weaken the grip of extant power holders. It is gate keeping in its crassest expression, as John Reynolds argues in his exploration of legal language.[99]

It is worth pointing out that I do not question the validity of Venzke's counterfactual model. However, for critical international legal scholars who aspire to more than a Eurocentric approach toward the regulation of international relations,we must explore possibilities that exist beyond the underlying epistemology. Among critical scholars, the paradox I explain in the introduction is pervasive. Frankly, with the current parameters, it will remain so. We must acknowledge that European international law was designed to legitimise some of the worst European depredations including slavery, genocide, conquest, colonisation, and imperialism. Even today, we have not broken with the predatory character of the order established during the ascendancy of Europe. Relying on European liberalism and law or, more to the point, committing to European epistemology is hardly an effective strategy for breaking with the partialities and prejudices embedded within the regime. They exist at an aetiological level. Hence the importance of counterfactuals that break with Eurocentric presumptions: only then will we become cognisant of the (im)possibilities that the concept of international law offers. An example will help seal the point.

As a fellow international economic academic lawyer, Venzke is drawn to examples from the regulation of international trade. In the same article, he details the European Union's ('EU') ban on the import and trade of seal products, mainstays in both the Norwegian and Canadian economies. Those familiar with seal hunting will appreciate the brutality of the practice; in the worst scenarios, it involves the clubbing to death of seal pups, producing macabre images of blood-soaked ice and seal skins. Almost to shame the EU, Venzke draws attention to the massacre of garment workers in Bangladesh's Rana Plaza. Over 1100 workers were crushed and suffocated to death, as the

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[98] Anghie and Chimni (n 25) 101. Koskenniemi's indeterminacy argument was always partial. Despite the validity of his argument, he dismissed the role of actors and of epistemology in achieving partial outcomes. He corrected this gap in a later article – the Politics of International Law 20 Years Later – cited at footnote 22.

[99] John Reynolds, 'Disrupting Civility: Amateur Intellectuals, International Lawyers and TWAIL as Praxis' (2016) 37 Third World Quarterly 2098.

manufacturing site collapsed onto itself and onto them, producing equally heart-wrenching images. Hardly an isolated incident, brutal working conditions are commonplace and well-known in fast-fashion factories. Venzke uses the counterfactual to showcase the EU's double-standards. Despite the putative humane considerations that undergird the ban on seal products, no such consideration is offered to victims of the disposable fashion sector. I expect the contours of Venzke's counterfactual are now evident: he hypothesises about a regime of international law that affords equal consideration to garment workers and to seals. "The main point remains the exposure of imbalances…why does the gruesome practice of clubbing seals trigger public action", Venzke ponders, "when the awful treatment of labourers in the garment industry is left to the choices of consumers, guided by voluntary and largely ineffective labelling schemes?"[100]

Venzke's counterfactual is hard-hitting. Readers are provoked into a state of contemplation, even guilt as we question our own consumptive habits. Does each of us agree with the EU's ranking exercise, endorsing the positioning of the lives of seals above those of Bangladeshi garment workers? Since most are likely to reject this ridiculous ordering, Venzke stimulates reflection about the regulation of trade and the value of introducing compulsory standards in garment trade, similar in strength to the ones that protect baby seals.

While I found his counterfactual elucidative, it remains deeply Eurocentric. *First*, it is telling that the best advocacy a progressive international economic lawyer can muster is to demand that Bangladeshi labourers be elevated to the level of seals. *Second*, at no point does he countenance the high probability that consumers are practising wilful blindness: that they are aware of the racist exploitation that underpins the system, but comfortable with it so long as it happens to others and preserves their purchasing power. *Third*, Venzke's counterfactual does not question capitalism, colonialism, or consumerism and the legitimacy that his counterfactual bequeaths to each of these ideological systems.

Venzke's counterfactual ultimately flounders because of the parameters he insists upon. His commitment to *reality* is also a commitment to the status quo; it's more a matter of trimming than of cutting, of tweaking than of imagining.[101] This approach stymies the counterfactual's transformative potential, locking international law into the underlying epistemology. We learn that even counterfactuals — creative departures from what is — must pledge fealty to reality, irrespective of reality's contingency and prejudice. Critical scholars devoted to advancing an international legal regime that is more representative of Third World peoples must transcend these artificial boundaries if they are to achieve the provocation and imagination that counterfactuals promise. Reality

[100] Venzke (n 10) 430.
[101] ibid 418.

and probability are red herrings. The counterfactual method's purpose is not to build an alternate framework, but to generate awareness about aspects of international legal that are contingent. By so doing, we become courageous, even indignant toward components that are presented as presumptive.

While these components might be critical to the intellectual integrity of the regime as fashioned, we must recall that it is built on a Eurocentric epistemology — and thus subjectivity — posing as universal objectivity. Once we acknowledge the partiality of the regime, even its mainstays fray, if not disintegrate altogether. For critical international legal scholars, this means probing counterfactuals that imagine international law beyond ideologies such as capitalism that sustain the status quo.[102] TWAIL provides a useful illustration. The drive to develop an alternative international law to the mainstream runs strong throughout the scholarship.[103] While both its proponents and antagonists highlight its failure to achieve this end goal, there is no denying the desire for a regime more representative of Third World interests. Counterfactuals, I suggest, provide a stimulating way forward.

Counterfactual thinking can contribute to the advance of critical international legal theories such as TWAIL. For this to prove valuable, we must eschew reasonableness. What are examples of unreasonable counterfactuals that aid the cause of critical scholarship and of the Third World? These are too numerous to itemise but some examples come to mind.

First, I would like to explore reversing the chain of authority between the Security Council and the General Assembly. If democracy is a right and preferred form of governance, as repeatedly argued by the EU, the USA, and liberal international lawyers, then it would be fascinating to consider its implications for international relations. I cannot think of a better way of testing the implications of displacing Euocentrism within the international legal regime. Second, instead of Europe and the USA enjoying nominating authority for the heads of the WB and IMF, a stimulating counterfactual would involve shifting this authority to the African and Asian continents, or perhaps rotating the authority geographically. Would this produce policies that are more favourable to the impoverished populations of the world or, as some TWAIL scholars have suggested, are pockets of the Third World more Eurocentric than Europe? A third counterfactual of topical relevance is an open-source model of vaccine development. We have already learned that most of the funding for the Oxford University and AstraZeneca vaccine was derived from governments. A counterfactual might consider the implications of this if we eliminated patent rights over pharmaceuticals altogether (much like India had prior to pursuing membership within the WTO). Would it improve access to life-saving drugs? Might

[102] Mignolo and Walsh (n 6).
[103] Chimni (n 12).

we see the growth of manufacturing of generics beyond the usual players? Would it give deeper meaning to notions of sovereignty and subsidiarity?

Last, I note that fusing the epistemological angle with counterfactuals is, perhaps, the most promising undertaking of all. Venzke's approach is limited not solely because he insists on reality but also because he remains beholden to a Eurocentric worldview. We can quibble over what exactly this means but I suspect most will accept that a liberal Christian outlook is far removed from a communitarian Muslim one and equally so from Confucian communism. We must acknowledge that each of these civilisational traditions is epistemological in character. As such, notions of responsibility, equity, legality, cooperation, and aspiration, all of which correlate with international relations and thus with international law, will look different when funneled through a distinct worldview. The desire to preserve the status quo has the desired — though not desirable — effect of excluding non-European epistemologies. Yet again, the counterfactual presents a solution to the conundrum. How do international legal scholars operating within an Islamic or communist frame propose to tackle the legal issues that emerge during a global pandemic? What perspective does Confucianism offer to deliberations on sovereign debt?

Again, the possibilities are endless for it is irrelevant whether Europe, or the United States, or nuclear powers would agree to the counterfactual we design. At its core, the counterfactual helps us appreciate the limits of our own thinking about international law, reflections adumbrated by a Eurocentric epistemology. Many of the truths we hold dear were devised to establish a dominant position for European states in relation to others. For critical international legal theory to prove useful to Third World states, our approach to counterfactuals must involve jettisoning this prejudicial model, and the introduction of new regional epistemologies to stimulate a geographically and culturally representative approach toward the regulation of international relations. The re-imagination of international law will only begin when we admit not just the force of its prejudicial history, but also the opportunity that this admission presents.

V. BREAKING BAD: IMAGINING INTERNATIONAL LAW BEYOND THE CONFINES OF EUROCENTRIC RATIONALITY

Nothing in international law is either determinate or random.[104] This does not mean that every facet is contingent, rather, the contingency of the circumstances and interests inspire the law that we develop.[105] Mainstream international law was the product of imperialism, inter-imperial rivalry, and

[104] Koskenniemi (n 22).
[105] Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1.

Eurocentrism. As it developed, the regime was logical for the circumstances, especially to support the interests of emergent European states.[106]

The fallacy about mainstream international law is not with the logic but with the suggestion that the logic could support decolonisation, sovereign equality, and inter-generational justice. These concepts are incongruent with the regime as originally contemplated. While the circumstances have since changed, European interest in dominating the Third World persists; without continued access, how else can Europe maintain a living standard that feeds on the lands and lives of others?[107] Without international law, as it is, Europe loses an instrument that is vital to its ascendancy. Stated otherwise, European standards of living would inevitably wane.

For the Third World, the conundrum is existential. Third World cultures and peoples can never be represented within international law for this would precipitate an end to the regime as it exists. We thus play at the margins while preserving the core, holding out the possibility of equity and ignoring the probability of continuity.

Moving past this conundrum requires, first, thinking beyond it. Regional approaches to international law, as described in the third section, are viable and enriching explorations into alternative epistemologies. The counterfactual method, as explicated in the fourth section, is another. *What if* quickly morphs into *what could*, not to mention *what should be*. The act of posing these questions and, more importantly, exploring possible trajectories is a provocation, both of law and of cognition. By pushing the boundaries of legal thought, we explode the boundaries of legal imagination.

Again, I acknowledge this is not easy. As a social instrument, law seeks to preserve the status quo. That is its dominant role. Due to the contingency of the status quo, by so doing, the law privileges certain actors over others, acting as an advantage privileged parties leverage to preserve the inequity they benefit from. International law is no different. Its historical contingency combines with its structural logic to adumbrate a *reality* that some live and that many more suffer.

Counterfactuals nurture imagination, enabling us to think beyond the contours that envelop and ensnare us. For critical scholars of international law to use the counterfactual effectively, they must play with possibilities that exist beyond the status quo. Far from the fantastical, counterfactuals that problematise the status quo nurture our imagination, expanding minds and thus possibilities. I do not claim the method as a panacea, but a promising approach

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[106] Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 European Journal of International Law 379.

[107] Salomon (n 40).

when thinking about the renewal of international law, one that creates genuine opportunities for the recognition and representation of others in the development of a system that binds everyone. That, I argue, is a reality worth imagining.