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## Friend or foe? International environmental law and its structural complicity in the Anthropocene's climate injustices

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### Abstract

In this paper, we focus on the *structural complicity* of international environmental law (IEL) in causing and exacerbating climate injustices. We aim to show that although the intentions behind IEL may be well-meaning, it often inadvertently, but also *deliberately* at times, plays a role in creating, sustaining and exacerbating the many paradigms that drive climate injustice in the Anthropocene. We focus on three aspects: IEL's neoliberal anthropocentrism; its entanglement with (neo)colonialism; and its entrenchment of the sovereign right to exploit energy resources. We conclude with a call for thoroughgoing, and urgent, reform of IEL.

### Key words

International environmental law; Anthropocene; climate change; climate injustice

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## Resumen

En este artículo, nos centramos en la *complicidad estructural* del derecho ambiental internacional (DAI) en el origen y la exacerbación de injusticias climáticas. Pretendemos mostrar que, pese a que las intenciones detrás del DAI puedan ser buenas, frecuentemente de forma inadvertida, pero a veces también deliberadamente, desempeña un papel en el origen, el mantenimiento y el agravamiento de muchos paradigmas que dirigen la injusticia climática en el Antropoceno. Nos centramos en tres aspectos: el antropocentrismo neoliberal del DAI; su implicación con el (neo)colonialismo; y su reforzamiento del derecho soberano a explotar recursos energéticos. Concluimos con una llamada a una reforma integral y urgente del DAI.

## Palabras clave

Derecho ambiental internacional; Antropoceno; cambio climático; injusticia climática

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## 1. Introduction

We now possibly live in the Anthropocene;<sup>1</sup> a geological epoch in which humans have become an Earth system-altering geological force (Zalasiewicz *et al.* 2017). A defining feature of the Anthropocene is climate change and the complex entwined patterns of injustice it produces. We understand climate injustice to broadly embrace climate-related impacts on present and future generations of vulnerable humans and non-human beings (inter- and intra-species injustices) that affect their wellbeing in substantive and procedural ways.<sup>2</sup> Having become an integral part of climate justice discourses, “[o]ne of the key intellectual challenges of the Anthropocene epoch is to reimagine how humans make connections between planetary and everyday life in ethical, sustainable, and ecologically just ways” as Houston argues; and reflecting on the justice-related implications of the Anthropocene has now become “a diverse political project that is firmly embedded in the choices and consequences of the Anthropocene” (Houston 2013, p. 440).

Often neglected, but deeply implicated in the factors that play a role in the Anthropocene’s crisis of climate injustice, is international environmental law (IEL). IEL is the principal collection of protective norms states use to promote global environmental protection, including measures to respond to climatic harms. The achievements, limitations and prospects of IEL in this respect have been thoroughly canvassed in the literature, and seem on balance to be a mixed bag (see, among many others, Louka 2006). Rather than focusing on the ineffectiveness of IEL in confronting climate change, we specifically address its (often unintentional) *structural complicity* in causing and exacerbating climate injustices. We argue that while the intentions behind IEL may be well-meaning, it often inadvertently, and at times *deliberately*, plays a role in creating, emboldening and exacerbating the many paradigms that drive climate injustice in the Anthropocene. As Gear (2014, pp. 111, 119) maintains, the climate crisis is “a crisis of human hierarchy” and one of “global unevenness” characterized by many (often hidden) “dynamics of privilege and oppression”. Although taking a broad view (and acknowledging the risk of generalization), we will show how IEL has been complicit in preserving this hierarchy and unevenness and embedding and veiling privilege and oppressions. While our argument would apply in respect of environmental injustice more broadly, we focus on climate injustice as one manifestation of environmental injustice.

The discussion commences in Part 2 with a brief reflection on the climate-altering impacts of climate change through the epistemic lens of the Anthropocene. These impacts cause many injustices at multiple levels that we discuss in Part 3. Part 4 critically reflects on three aspects (amongst others) that clearly expose the structural complicity of IEL in contributing to climate injustice. These are: IEL’s neoliberal anthropocentrism; its entanglement with (neo)colonialism; and its entrenchment of state sovereignty and the sovereign right to exploit energy resources. We conclude the discussion in Part 4 with a call for thoroughgoing reforms of IEL.

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<sup>1</sup> Admittedly, not an altogether uncontroversial proposition. See Malm and Hornborg 2014.

<sup>2</sup> For a comprehensive recent account, see Jafry 2019.

## 2. Climate change in the Anthropocene

Anthropogenic climate change is one of the most distinct markers of the Anthropocene. Relative to geological history, the processes that are contributing to climate change have occurred in the blink of an eye, starting “only” a few million years ago when *Homo erectus* mastered the art of controlling and manipulating fire (also called the Early Anthropocene),<sup>3</sup> “a crucial breakthrough that fundamentally altered our relationship with other animals on the planet” (Steffen *et al.* 2011, p. 846). Control of fire protected humans and gave them access to protein-rich food sources that drastically improved their physical and mental capabilities, giving *Homo sapiens* (or “wise man”) the ability to survive several ice ages and start colonizing hitherto remote parts of the Earth (Glikson 2013). There is a view among evolutionary anthropologists that “both culturally and biologically – learning to handle fire is the single most important moment in becoming human” (Clark and Yusoff 2014, p. 208).

What followed was the Agricultural or Neolithic Revolution approximately 8,000 years ago (also termed the Middle Anthropocene) (Glikson 2013, p. 91) during which people started exploiting energy from wind, water, plants and animals and growing food to feed ever-expanding human and farm animal populations. Such activities already had a significant impact on landscapes and ecological conditions. Indeed, archaeological evidence reveals that agricultural land use dating back to 10,000 years before the present (1950 is the reference year) “is implicated in anthropogenic global environmental changes ranging from greenhouse gas emissions and climate change to widespread deforestation, soil erosion, and altered fire regimes, as well as species introductions, invasions, and extinctions” (Stephens *et al.* 2019, p. 1).

It was only during the Song Dynasty in China (960-1279) that pre-industrial humans first accessed high energy-intensive coal resources, a discovery that heralded the birth of the coal industry and the dawn of carbon-infused human activities capable of altering the integrity and stability of the Earth system (Steffen *et al.* 2011, p. 846). The exploitation of coal in Asia, however, paled in comparison to what occurred in Europe during the Industrial Revolution – discussed below – where London alone was burning approximately 360,000 tonnes annually by the 1600s (Steffen *et al.* 2011, p. 846). Unlike during the Early Anthropocene, the discovery of fossil fuels enabled humans to unlock immense sources of concentrated fossil fuels that propelled industrialisation (Steffen *et al.* 2011, p. 848).

Relatively easy access to abundant fossil fuel resources fed the growing appetite for land, natural resources and energy, notably in European countries that began colonizing vast areas of foreign lands in the fifteenth century. The perverse legacy of colonialism, particularly the devastation of pristine environments, annihilation of civilizations, destruction of cultures, dispossession, and enslavement, laid the foundations for growth-without-limits, ecologically unsustainable models of economic development.

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<sup>3</sup> Glikson 2013, p. 91. Although we employ Glikson’s Early, Middle and Late Anthropocene as classification for present purposes, there are other systems of classification of the different stages of the Anthropocene that are equally useful. For instance, Bonneuil and Frescoz (2016) refer to three stages of the Anthropocene, with the first stage running from the Industrial Revolution to World War II, the second stage running from after World War II, and the third stage beginning around 2000.

Exploitative neo-colonial environmentally destructive practices continue, as we shall see below.

It is neither an accident nor a surprise that the invention of the steam engine a few years after the discovery of coal is widely considered to be the starting point of the Late Anthropocene (Glikson 2013, p. 91). Originally developed to pump water out of mines, “[c]oal mining and steam engines reinforced each other’s development” (Smil 2017, p. 238). The invention of the steam engine heralded the beginning of the Industrial Revolution, and the mass exploitation, application and distribution of cheap carbon-based energy, the physical impacts of which are now evident as a “stratigraphic signature in sediments and ice that is distinct from that of the Holocene epoch” (Waters *et al.* 2016, p. aad2622-1). Furthermore, “[w]ithout the trans-Atlantic flows of embodied African labour and embodied American land, and the African and American markets for British textiles, it is difficult to imagine a British Industrial Revolution” (Hornborg 2019, p. 10).

The Industrial Revolution laid the foundations for the Great Acceleration in the period following World War II (Steffen *et al.* 2015), which continues today through ecologically destructive activities (Steffen *et al.* 2011, pp. 849–860). Of particular concern is the increase in atmospheric CO<sub>2</sub> “to a level not seen for at least 800,000 years, and possibly several million years, thereby delaying Earth’s next glaciation event” (Lewis and Maslin 2015, p. 172). The Great Acceleration is undergirded by neoliberal capitalism and the pursuit of economic development at all costs, and it forms the contemporary manifestation of the Anthropocene’s unsustainability against which we need to evaluate our regulatory responses to climate change and its injustices. Angus (2016, pp. 171, 173) argues that capitalism and fossil fuels have become “inseparable”; and that the latter “are not an overlay that can be peeled away from capitalism, leaving the system intact. They are embedded in every aspect of the system.”

### 3. The Anthropocene’s climate injustices

Despite its association with human “progress” and the development of “modern” societies, “the old story of the Industrial Revolution as a technological triumph here meets a far less flattering narrative of far-reaching unintended environmental consequences from fossil fuel use.”<sup>4</sup> It is more accurate, as Jonsson (2012, pp. 680–681) puts it, that:

The idea of the Anthropocene suggests that the Industrial Revolution constituted not a conclusive escape from material limits but a temporary reprieve bought with finite fossil fuel stock, which in turn may be undone by climate change and other environmental threats unleashed unwittingly by economic development.

Human “development” in the Early, Middle and Late Anthropocene has been uneven across the world: which has resulted in disturbing differentially distributed injustices and associated vulnerabilities and inequalities which are multi-faceted while they also complexly embrace several concerns. Deeply intertwined and mutually reinforcing practices of legally-sanctioned extractivism, colonialism, imperialism, industrialization,

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<sup>4</sup> Jonsson 2015, p. 55. For a critique of the “narrative” that, until relatively recently, humans were unaware of the consequences of their actions on the environment generally, or of the environmental consequences of fossil fuel consumption specifically, see Bonneuil and Fressoz 2016.

and slavery (exemplars of modern progress) are key drivers of the Anthropocene that generate multiple injustices and vulnerabilities (Harris 2014, p. 103). Thus:

Although the chemical composition of the atmosphere is a global phenomenon, the highly skewed distribution of emissions, their meteorological consequences and the financial and technological capacity to cope with such consequences clearly establish that anthropogenic climate change is as inextricably connected with issues of global justice as the distribution of the technological infrastructure which is the source of those emissions. (Hornborg 2019, pp. 17–18)

Just as the Anthropocene has evolved into a concept with “spillovers from the biophysical to the social spheres (and vice versa)” (Hoffman and Jennings 2018, p. 5), the notion of justice transforms climate change from a strictly scientific or environmental “problem” to a socio-legal one with profound implications for the entire community of life, and the well-being and dignity of all species (Robinson 2014).

Climate injustice in the Anthropocene has many faces. For example, global inequality is vividly illustrated by income disparities which have partly arisen on the back of fossil fuel exploitation that benefits a few at the expense of many “others”. The 2018 World Inequality Report (Alvaredo *et al.* 2018, p. 7) estimates that “the top 1% richest individuals in the world [have] captured twice as much growth as the bottom 50% individuals since 1980”. The Anthropocene’s:

legacies and ongoing practices of Empire and globalization, racialization and privilege, and destructive land management practices, exacerbated by industrialization, capitalism, and increasing global mobility, have created circumstances in which inequalities on almost all scales are increasing. (Tuck and McKenzie 2015, p. 3)

The “thermodynamics of imperialism” (Hornborg 2019, p. 17) are kept alive by carbon-based neoliberal economics which are “allergic to normative claims of justice and injustice” (Healy and Barry 2017, p. 452). It is in the midst of this neoliberal world order that:

the poorest peoples and nations of the Earth are forced disproportionately to bear the deepening social costs of capitalism – including the toxic social and environmental fallouts now manifesting as climate crisis (Gear 2014, p. 120).

These continuing injustices can be understood with reference to Shue’s concept of “compound injustice”, in terms of which he argues that an initial injustice, such as colonial exploitation, can facilitate further injustices, such as the imposition of unequal treaties on nations weakened by such colonial exploitation (Shue 2014, p. 4).

A 2019 report of the United Nations Special Rapporteur on Extreme Poverty and Human Rights reiterates the vulnerability of the poorest members of society, describing it as a form of “climate apartheid” in which an estimated 75–80 per cent of the costs of climate change will be borne by developing countries (A/HRC/41/39, pp. 1, 5).

Similar patterns of inequality also exist within developed countries. For example, during extreme weather events in the United States, individuals with access to resources have been able to escape the worst consequences while poor people have been suffering the brunt. When Hurricane Katrina struck New Orleans in 2005, there was a striking contrast between its impacts on wealthy individuals and poor, predominantly African-Americans (Stivers 2007, Angus 2016, pp. 176–179).

While the imagery of the Anthropocene tends to be universalistic, it is not the unqualified and generalized “human” who is responsible for the signatures of the Anthropocene and its associated patterns of Earth system destruction, oppression and injustices (Kotzé 2019c). *Anthropos* is best understood as a specific type of human: the ontologically disembodied, consumerist, politically dominant, property-owning, “Northern”, “white”, “male” human subject privileged by neoliberal socio-economic structures of entitlement (for example, through laws regulating economic, political and social participation and empowering “fictions”<sup>5</sup> such as transnational corporations) (Gear 2015):

Indeed, a clique of white British men literally pointed steam-power as a weapon – on sea and land, boats and rails – against the best part of humankind, from the Niger delta to the Yangzi delta, the Levant to Latin America. Capitalists in a small corner of the Western world invested in steam, laying the foundation stone for the fossil economy: at no moment did the species vote for it either with feet or ballots, or march in mechanical unison, or exercise any sort of shared authority over its own destiny and that of the Earth System. (Malm and Hornborg 2014, p. 64)

This historically privileged subject is a persistent construct, marginalizing a host of “others”, including for example, non-human living beings, women, children, the poor, the elderly, the sick, non-whites and LGBTQ+ people (Gear 2017b). A range of critical scholarship and the historical record reveal that the “we” at the heart of the Anthropocene’s universalized “humans as a geological force of nature” is, in reality, a very small and particularized privileged subset of the past and present global human population (Rickards 2015, p. 286). *Anthropos* cannot therefore be universalized in an unqualified way and should instead be understood as a privileged, resilient subject enjoying a disproportionate share of socio-economic and environmental benefits while absorbing only a small share of climate impacts which it is able to absorb and to mitigate. Similarly, Brand and Wissen (2018, p. 289) argue that “[s]uch a perspective hides the root causes – capitalist, imperialist and patriarchal dynamics – of the crisis and related power relations by presumptively putting everybody in the same place”. To this end, unease with the term Anthropocene has given rise to the coining of other terms to describe the current geological epoch, including “Manthropocene” (Raworth 2014) and “Capitalocene” (Moore 2016a). Nevertheless, “[t]he Anthropocene makes for an easy story” (Moore 2016b, p. 82). It remains the case that privileged humans are the least vulnerable to climate change, but this is not the case for billions of “others” (including the unborn) who are oppressed, marginalized and not beneficiaries of the corporatized neoliberal fossil fuel economy (Malm and Hornborg 2014). This is fundamentally unjust. Furthermore, it has ironically been projected that a number of Northern nations which have contributed the most to the climate change problem may benefit in the short- to medium-term from global warming (Roberts and Parks 2007, pp. 10–11).

The Anthropocene’s socio-ecological crisis of hierarchy and human domination enables us to see that differentially distributed patterns of vulnerability, inequality and injustice do not exclusively apply to humans; these are also *inter-species* concerns. Ecologically destructive practices such as coal mining, oil extraction and gas flaring, flooding of huge areas to build dams and hydroelectrical power stations, and clearing of rainforests to

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<sup>5</sup> See, for a more popular but no less gripping account, Harari 2014.



make way for mining or crops for biofuels, have a significant impact on landscapes and on all forms of non-human life. The rate of global species extinction as a result of such practices is estimated to be 100 to 1,000 times pre-human or background extinction levels (De Vos *et al.* 2014). Some scientists consequently argue we are in the midst of the Sixth Mass Extinction:

[T]he evidence is incontrovertible that recent extinction rates are unprecedented in human history and highly unusual in Earth's history (...) our global society has started to destroy species of other organisms at an accelerating rate, initiating a mass extinction episode unparalleled for 65 million years. (Ceballos *et al.* 2015, p. 4)

Kolbert (2014, p. 2) similarly argues that “[n]o creature has altered life on the planet in this way before”. As with the previous five mass extinctions, the sixth is directly linked to “climate disruptions to at least some degree, including major changes to the carbon cycle with attendant modifications of the oceans and atmosphere” (Barnosky 2015, p. 2).

Yet, as troubling as this realization is, viewing the impact of anthropogenic climate change on the non-human world merely as a matter of species extinction is an oversimplification. It is essential instead to fully appreciate that the impact of human-driven climate change on the non-human world is also a matter of *interspecies injustice* when viewed in the context of what Grear (2017a, p. 91) calls, the “symbiotic generativity of life”:

[I]n a symbiotic view, the “all” of the “we” is profoundly interspecies—(or intra-species if we count “earthlings” in an all embracing way)—a lively entanglement of beings and systems that are never individual in the traditional Western sense.

Climate change affects this symbiotic generativity of life, including all its entangled human and non-human denizens. What this ultimately means for present purposes is, in the words of Baxi (2016, p. 21), that “the justice assumption is logically necessary, though not by itself sufficient unless extended to the normative protection of all lifeforms and lifeworlds on planet Earth”.

In a spatial sense, the global dimensions of climate justice are clearly evident through the lens of the North-South Divide. In this respect, concerns include several urgent but unresolved issues such as: neo-colonialism and land-grabbing (which we investigate further below); the North's disproportionate historical responsibility for causing climate change and its concomitant greater obligation to mitigating its ongoing effects (evidenced by the emergence of the principle of common but differentiated responsibilities and respective capabilities); the lack of capacity of the global South to innovatively respond to a changing climate and to increase resilience; the global South's underrepresentation in climate change decision-making fora; and the continued reliance on the global South to offset Northern carbon emissions (see, generally, Alam *et al.* 2015).

#### **4. Exposing the structural complicity of IEL**

IEL is a critical element of the human system and an important component of social regulatory institutions consciously designed to establish and maintain a specific type of socio-ecological order (Kotzé 2012, 2014); an order that is not always just, fair and/or protective of all the constituents of the Earth system. Our hypothesis is that IEL has been and continues to be complicit in causing, sustaining and exacerbating the type of climate injustices described above, if not explicitly, then certainly in subtle, but no less effective

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and disturbing ways through its promotion of those structural paradigms that underlie climate injustice. We focus on three aspects: IEL's neoliberal anthropocentrism; its entanglement with (neo)colonialism; and its entrenchment of state sovereignty and the sovereign right to exploit energy resources.

#### 4.1. *IEL's neoliberal anthropocentrism*

Climate injustices in the Anthropocene arise in part as a result of the prevailing anthropocentric worldview that permeates virtually all human systems and places humans at the centre of Earthly existence. The Anthropocene's selective imagery of anthropocentric exceptionalism, speciesism, human prominence and privilege was constructed and is maintained through law. Indeed:

when it comes to law's relationship with (and mediation of) the lifeworld of the planet and its non-human denizens, it is intensely problematic that the human subject stands at the centre of the juridical order as its only true agent and beneficiary. (Gear 2015, p. 225)

The anthropocentrism of law is perhaps nowhere clearer than in provisions of IEL (Gillespie 2014 and more recently Kotzé and French 2018). The ethically deficient anthropocentrism of IEL is a root cause of the Anthropocene's socio-ecological crisis and of its injustices, and a main reason for IEL's inability to effectively address these. As Taylor (1998, p. 3) writes, IEL's prevailing anthropocentric ethic:

has directly contributed to the environmental crisis. Because our laws reflect and affirm this environmental ethic they have become part of the problem – international environmental law merely perpetuates the crisis and is reduced to a means of suppressing the symptoms.

The foundations of IEL's anthropocentric ethic were laid in the late 1800s and early 1900s with the adoption of agreements such as the London Convention for the Preservation of Wild Animals, Birds and Fish in Africa of 1900 (London Convention), and the Fur Seals Convention of 1911. These early environmental "conservation" instruments were narrowly focused, their "dominant strain was utilitarian and anthropocentric" (Bodansky 2010, p. 24), and "their benefit, if any, for the environment was hardly more than a side effect" (Beyerlin and Marauhn 2011, p. 3). Moreover, these agreements were adopted to regulate the equitable and fair distribution and use of environmental "resources" among a small number of powerful European states. Monetizing and relegating the non-human world to mere instrumental value for the benefit of some humans<sup>6</sup> rather than providing environmental protection was their principal objective. The anthropocentrism of IEL, especially in this early iteration, was highly effective in "othering" an externalized "nature" cherished only for its instrumental value to secure human survival. Through its anthropocentrism, IEL "others" by failing to challenge objectification of the environment and Cartesian dualisms. Instead, it creates a range of

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<sup>6</sup> Although it laudably sought to protect and preserve fur seals by prohibiting pelagic sealing, the true motive behind the 1911 Fur Seals Convention was the protection of financial and proprietary interests that certain states had in fur seals as natural resources. See, for example, article XI, which contains elaborate provisions for compensation among states where some do not benefit from pelagic sealing as a result of the Convention's prohibitions.

“interrelated, virtually sacred binaries” (Gear 2018, p. 131) such as man/nature, person/property, public/private, white/black and so forth (Gear 2018, p. 131).

Some of these binaries and “othering” tendencies are glaringly evident in the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), a foundational document that shaped the future of IEL (Dupoy and Viñuales 2018, p. 9); its name proclaims the centrality of the human. According to the preamble, *man* is a separate but elevated entity apart from the submissive environment that he creates and controls, that belongs to him, and must sustain him:

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth (...). Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights [including] the right to life itself.

Not only does this preambular provision affirm human mastery over an environment that the dominant male human creates and moulds, it also places the environment at the service of the human as a mere support system. To this end, IEL's anthropocentrism effectively promotes the interests of a specific group of people through its selectivity while othering a host of marginalized, often vulnerable, human beings.<sup>7</sup> The preamble continues: “[T]he protection and improvement of the human environment is a major issue which affects the wellbeing of peoples and economic development throughout the world”; it is not an issue that affects ecological integrity or environmental protection for the sake of it. It is rather the case, as the Stockholm Declaration states, that: “Of all things in the world, people are the most precious” (Preamble). The interests of some precious people, their well-being and economic development are clearly the main concern of IEL.

Although more recent nature conservation treaties such as the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971, and the Convention on Biological Diversity of 1992 (CBD) have not pursued utilitarianism, instrumentalism and monetization as explicitly, none can be characterized as being overtly ecocentric or focused on protecting Earth system integrity in a comprehensive or meaningful way (see, for example, Kim and Bosselmann 2013). The same can be said of other multilateral environmental agreements (MEAs) that emerged post-1972: “[T]he approach adopted by most agreements on resource conservation of that time is still utilitarian rather than ecological” (Beyerlin and Marauhn 2011, p. 11). The closest the world came to adopting an agreement that could have provided an ecocentric blueprint for the subsequent development of IEL was the United Nations General Assembly's (UNGA) almost universal endorsement of the World Charter for Nature in 1982 (see, for a detailed discussion, Kotzé 2019a); an “avowedly ecological instrument, which emphasises the protection of nature as an end in itself” (Sands and Peel 2012, p. 37). Curiously, the Charter has slipped off the radar of States' concern; beyond its initial proclamation, it has not featured prominently in or exerted any significant norm-shaping influence on the development of IEL.

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<sup>7</sup> South Africa's apartheid era nature conservation legislation, which relocated people and established nature conservation areas for the enjoyment of the white minority, is one of many examples.

Instead, all subsequent global environmental conferences pointedly retreated from the deep ecological principles of the Charter (Devall 2001, p. 30), and states continued down the neoliberal “environment versus development” path, first at the United Nations Conference on Environment and Development in 1992; and 10 years later at the World Summit on Sustainable Development. With the blanket endorsement of the haloed, but deeply deceptive, idea of sustainable development, these conferences, many MEAs, and grand development visions such as Our Common Future of 1987, the Millennium Development Goals, and the Sustainable Development Goals – laudable as they may be – have only managed to promote IEL’s exploitative, neoliberal, development-biased anthropocentrism (Adelman 2018). This is problematic because sustainable development has become the dominant “framing of nature in global environmental governance” (Youatt 2014, p. 211). While it may be argued that there have simply been challenges with regard to the implementation of sustainable development, the concept itself is problematic, as it promotes human interests through the self-defeating assumption that “the increased use of these discourses of self-interest can promote better ways of living well with other species as well as ourselves” (Youatt 2014, p. 211). A “deceptively simple idea that is widely incorporated in domestic and international environmental law”, as Adelman (2018, p. 21) says, sustainable development is *not* an environmentally friendly principle or process. It is instead a convenient but fictitious ideological palliative that IEL underwrites and that legitimizes and helps humans rationalize anthropocentric Earth system-altering practices (Richardson 2011, p. 31), including a culture of “capitalist accumulation [that] rests on the idea of doing harm to others, both as a moral and legal right” (Baxi 2016, p. 23). In addition to ignoring ecological limits, sustainable development has contributed to the gap between the North and the South (Gonzalez 2015, pp. 419–420).

Turning to IEL’s current climate-related provisions, convincing evidence suggests the complicity of fossil fuels in destabilising Earth system integrity and stability and the urgent need for decisive political, legal and practical action in this respect. Despite this, there is still no overarching treaty that comprehensively regulates pollution resulting from fossil fuels; innovative ways to adapt to fossil fuel scarcity; obligations to transition to a renewable energy paradigm; and ways to promote global climate justice, among other concerns.<sup>8</sup> Very little of the United Nations Framework Convention on Climate Change of 1992 (UNFCCC) and its Kyoto Protocol of 1997 create meaningful legally binding provisions that force states to dramatically halt their reliance on fossil fuels and their concomitant pursuit of neoliberal economic development, or to rethink the prevailing unsustainable energy metabolism in dramatically different non-anthropocentric ways that comprehensively embrace climate justice.

Instead, these agreements also take their cue from sustainable development to the extent that “responses to climate change should be coordinated with social and economic development in an integrated manner with a view to *avoiding adverse impacts on the latter*” (Preamble; emphasis added). Greenhouse gas concentrations must be stabilized, but in a time frame sufficient to “*enable economic development* to proceed in a sustainable

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<sup>8</sup> It is arguably more correct to say that the bulk of developments in this respect is happening at the regional (European) level. See Leal-Areas and Wouters 2017.

manner” (Article 2; emphasis added). A guiding principle in Article 3(4) of the UNFCCC states that:

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that *economic development is essential for adopting measures to address climate change*. (Art. 3(4) UNFCCC, emphasis added)

While the Paris Climate Agreement of 2015 does recognize “the importance of ensuring the integrity of all ecosystems” (Preamble), it does so “in the context of sustainable development” (Article 2(1)). In sum, current legal efforts to restore climate integrity as a result of hundreds of years of carbon-rich energy abuse remain premised on, subject to, and guided by the neoliberal, human-focused economic development priorities of a small privileged subset of the human population rather than socio-ecological concerns related to the entire vulnerable living order.

#### 4.2. IEL, (neo)colonialism and the North-South divide

As mentioned above, there is an intimate link between the Anthropocene, colonialism and the many climate injustices arising from this nexus. Some of the earliest instruments of IEL were created at the height of colonialism and have facilitated this nexus. The lawmaking process at the time was dominated by colonial powers, with the bulk of these early agreements showing “clear traces of the close interrelation between natural conservationism and colonialism; [while] almost none of these treaties refer to the economic and social needs of underdeveloped countries and their societies” (Beyerlin and Marauhn 2011, p. 6). One example is the London Convention referred to above, through which colonial powers aimed to stake proprietary claim over environmental resources in their colonies and to ensure “the preservation throughout their possessions in Africa of the various forms of animal life existing in a wild state which are either useful to man or are harmless” (Preamble). This convention sought to conserve “useful” species in high demand while eradicating others such as lions, crocodiles, hyenas and poisonous snakes that were deemed “harmful animals (...) of which it is desirable to reduce the numbers within sufficient limits” (Schedule V). Human domination over nature was thus asserted from the outset in IEL and humans were progressively emboldened to dominate nature and the Earth system.

As with fauna and flora, the exploitation of energy resources exploded under colonialism with IEL doing little to prohibit or regulate it; instead it facilitated this in subtle and indirect ways. First, IEL played a supporting role in the appropriation of human and environmental resources that undergirded global energy metabolism. By disguising resource allocation and utilization as “conservation”, colonial powers ensured uninterrupted supply and access to a range of environmental resources that were critically important for sustaining their domestic economies: “[A]t their core, all colonial projects derive from the imperative to transform the potential energy stored in colonized (or colonizable) subjects into mechanical energy for the production of wealth” (Mavhunga 2014, p. 5).

Second, at a more abstract level, Third World Approaches to International Law (TWAIL) scholars have shown how contemporary IEL is constructed on the foundations that were laid down by colonial laws which promoted the appropriation of foreign lands, the exploitation of people through the slave trade, and resource extraction.<sup>9</sup> These foundations include the domination of nature; industrialization; and the division between “civilized” and “uncivilized” nations in which indigenous societies living in harmony with nature were “pronounced ‘uncivilised’ and in need of ‘modernization’ and ‘development’”, while deeply embedding and universalizing rationalist Northern/European notions objectifying and monetizing the non-human world and human labour (Gonzalez 2015, p. 411). IEL continues to perpetuate these colonial ideological legacies through its cornerstone principle of sustainable development, which is now seen (especially in the climate change context) to have:

become a site for mutual suspicion between the global North and South. The latter sees sustainable development as a justification for imposing unfair burdens on its development aspirations, as well as a strategy of protectionism by the global North to ward off competition from the global South. (Ogumanam 2015, p. 247)

In even starker terms, Rajagopal (2003, p. 117) states that sustainable development provides “a new, more intrusive set of reasons for managing the ‘dark, poor and hungry masses’ of the Third World”.

Third, the current neoliberal global economic order is still based on deep North-South divisions – especially evident during the often intractable climate change negotiations – and attendant disparities, inequalities, injustices and vulnerabilities created under colonialism, with IEL making half-hearted attempts at best, and nothing at worst, to address this divide. Mickelson argues that international environmental law as a discipline has failed to meaningfully respond to concerns of the global South. Rather, IEL “has accommodated these concerns at the margins, as opposed to integrating them into the core of the discipline and its self-understanding” (Mickelson 2000, p. 54). For example, while human rights have been used to address many global justice concerns arising from colonization, IEL has consistently resisted providing a global right to a clean, healthy and safe environment; a provision that could have gone (and could still go) a long way in confronting the Anthropocene’s climate injustices. Despite the almost universal emergence of domestic environmental human rights the world over (May and Daly 2014) – including rights of nature in some countries (Kotzé and Villavicencio Calzadilla 2017, Villavicencio Calzadilla and Kotzé 2018) – and apart from the Stockholm Declaration’s implicit hint at the existence of such a right (Principle 1), no other IEL instrument, hard or soft, currently provides for such a right despite high-level calls for its adoption in a global instrument (A/HRC/37/59, par. 14). The global climate law regime’s reluctance to address the many North-South and in-country injustices arising from climate change is another case in point. As Gonzalez (2015, p. 409) argues:

[T]he North has only grudgingly accepted the principle of common, but differentiated, responsibility on the basis of its superior technical and financial resources while disavowing responsibility on the basis of its historic contributions to these crises.

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<sup>9</sup> For a detailed discussion see Alam *et al.* 2015.

It is far from clear whether this principle, alongside the principles of inter- and intra-generational equity, has been effective in achieving any meaningful measure of distributive justice whatsoever.

Even as many legacies of colonialism remain evident, there is a worrying rise in neo-colonialism the world over. Practices of land-grabbing by governments, and perhaps more notoriously by private corporate actors, are an example of neo-colonialism in the quest for the expansion of agro-investment and what is described as food and energy security through the production of palm oil and biofuels, which are spuriously argued to be appropriate, effective and sustainable means for climate change mitigation (Scheidel and Sorman 2012). Dehm (2016, p. 131) argues that the market-focused approach endorsed by the UNFCCC, namely its provision for carbon trading, promotes “carbon colonialism”. Although these practices are often cunningly veiled by characterizing them in terms of “energy security”, “decarbonization”, “green economy” and “low-carbon development” (Oguamanam 2015, p. 239), they are more accurately described as “modern euphemism[s] for imperialism” (Hornborg 2019, p. 12). The corporate neo-colonial exploitation and oppression of the global South’s non-dominant humans, its non-human world and its “‘surplus’, ‘degraded’, ‘idle’, ‘waste’, ‘abandoned’, ‘underutilized’” (Oguamanam 2015, p. 240) lands is real, more pervasive and far grimmer than what we are often led to believe:

[T]he vectors of oppression linking intra-and inter-species hierarchies are particularly pronounced in industrial corporate capitalism, which has become a globally hegemonic system in which such patterns are increasingly extreme: neoliberal capitalist globalisation is a highly uneven process still exhibiting pathological patterns of domination. (Gear 2015, p. 233)

Furthermore, contrary to the belief that wealthier countries are reducing, *inter alia*, the energy intensity of their production processes and consequent emissions, evidence shows that such energy- and material-intensive processes are simply being shifted to poorer countries (Hornborg 2019, p. 18).

A major missed opportunity for IEL (along with trade, investment, human rights and intellectual property law) has been its failure to reign in neoliberal corporate globalization, particularly its resistance against creating stringent standards to regulate environmentally destructive corporate activities, especially by *transnational* corporations. IEL has failed because states want it to fail; after all, corporations are states’ most agile, lucrative, profitable and influential agents of “sustainable” development, as it were. As long as cheap fossil fuels are available to exploit, and corporations fill state coffers by doing so, there are few incentives for governments to force corporations to restrict their socio-ecological destructive activities, to shift their focus to renewable resources, and to take responsibility for the climate injustices they cause. Unsurprisingly then, to date no MEA regulates the environmentally harmful activities of corporations, including under the global climate law regime. In 2004, the United Nations Commission on Human Rights rejected the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. Only in 2008 did states half-heartedly endorse John Ruggie’s non-binding *Protect, Respect and Remedy: a Framework for Business and Human Rights*(2008) which might have been symbolically important but was a practically deficient instrument that has not effectively challenged corporate impunity for human rights and other violations – impunity that

remains firmly entrenched in IEL and the climate regime (Simons 2015, p. 477). Moreover, Brown and Spiegel (2019, p. 156) note that political pressure during the 21st Conference of the Parties under the UNFCCC resulted in the weakening of the text of the Paris Agreement so that references to “the need to rein in vested corporate interests” were excluded from the preamble.

#### 4.3. IEL, state sovereignty and the right to exploit energy resources

The right to property has been instrumental in causing climate injustices. Fully reflecting the central tenets of anthropocentrism, the right “presupposes unlimited or absolute control over property and that view is treated as sacrosanct” (McGregor 1999). The consequences for Earth system integrity of such an unfettered right and the entitlements it *legally* bestows upon *Anthropos* are far-reaching.<sup>10</sup> There is a view that property rights must urgently change “so that they cease to empower harmful activities and instead foster sustainable human-nature interaction” (Taylor and Grinlinton 2011, p. 5). Law’s socio-ecologically destructive right to property has manifested itself in state sovereignty since the Treaty of Westphalia in 1648. Fully Eurocentric in its orientation, the treaty laid the foundations for the present state-dominant global order in which “the intellectual basis of international law drifted apart from natural law and morality towards positivism and national self-interest” (Islam 2015, p. 26). Concisely understood as “supreme legitimate authority within a territory” (Philpott 1995, p. 357), state sovereignty has since become an inextricable part of international law’s canon and its “colonial international law doctrines” (Islam 2015, p. 25).

Over the years, state sovereignty has also infiltrated IEL on the back of proprietary, economic and developmental considerations (see, amongst others, Agius 1998). For example, the colonial-era London Convention Relative to the Preservation of Fauna and Flora in their Natural State of 1933, provided that animal trophies were “the property of the [colonial power] Government of the territory concerned” (Article 9(6)). The subsequent development of the principle of permanent sovereignty over natural resources occurred through several UNGA resolutions during the 1950s which sought to address major concerns of developing countries such as the “need to balance the rights of the sovereign state over its resources with the desire of foreign companies to ensure legal certainty in the stability of investments” (Sands and Peel 2012, p. 202). Foreign oil companies controlled much of the exploration and production of petroleum products in colonial and post-colonial states (Talus 2014, p. 6). The UNGA resolutions endeavored to respond to the developing world’s call for a New International Economic Order through “integrated economic development and commercial agreements” (A/RES/523 (VI)), the “right to exploit freely natural wealth and resources” (A/RES/626 (VII)), “international respect for the right of peoples and nations to self-determination” (A/RES/837 (IX)), and “concerted action for economic development of economically less developed countries” (A/RES/1515 (XV)). This culminated in the adoption of a landmark UNGA resolution in 1962 recognizing that the “rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the

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<sup>10</sup> See, however, Ostrom (2000) who highlights that when users of common-pool resources devise their own rules and monitor compliance with such rules, they often manage their resources more successfully (and sustainably) than when rules are imposed on them externally by governments.



interest of their national development of the well-being of the people of the state concerned”, and that “the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence” (A/RES/1803 (XVII)).

State sovereignty later found expression in principle 21 of the Stockholm Declaration in a more nuanced guise:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This principle was reiterated almost verbatim in the Rio Declaration on Environment and Development (Principle 2) and other MEAs such as the CBD (Article 3). The UNFCCC emphasises “the principle of sovereignty of States in international cooperation to address climate change” (Preamble).

However, other IEL principles ostensibly limit sovereignty over natural resources. The Paris Agreement acknowledges, as does the UNFCCC, that climate change is a “common concern of humankind”. Such language, in tandem with the *provisos* that state sovereignty is subject to the customary international law rule of good neighbourliness and that states have the responsibility not to cause environmental harm outside their borders, as well as the precautionary principle, indicates that IEL’s notion of sovereignty over natural resources is not absolute. But while these limitations on state sovereignty could accommodate the regulation of the transboundary effects of States’ climate impacts, they do not apply if the harmful effects of activities are purely domestic in nature; which they often are, as the impacts of coal mining, dam-building and oil extraction suggest.<sup>11</sup>

In sum, the principle of permanent sovereignty over natural resources, despite being widely accepted as a rule of customary international law, is not a socio-ecological principle appropriate for confronting climate-related injustices. Although the post-colonial provisions on permanent sovereignty over natural resources are laudably focused on addressing the North-South divide and foreign exploitation of energy resources – for instance, Atapattu (2015, p. 82) argues that limits on sovereignty strengthen the North-South divide – and being faithful to the dictates of property rights, they mostly succeed in legitimizing and emboldening the unfettered right of states to exploit natural resources. Current practice reflects the predominant view of states that their energy reserves are a “constituent element of their own national security” and that there “has been stronger interest than for decades in seeking full control over the three major elements of the ‘energy chain’-production, transit, and processing and distribution” (Austin and Bochkarev 2007, p. 36). Some believe that such developments foreshadow the rise of “energy nationalism” and unfettered “energy sovereignty” (Austin and Bochkarev 2007, p. 36).

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<sup>11</sup> See for example Shell’s devastating government-sanctioned operations in Nigeria’s oil fields (Yusuf 2008).

## 5. Challenging the system, or systemic failing?

The paper has criticised – at the systemic level – the complicity of IEL in the face of socio-ecological degradation and climate injustice. Three aspects of this complicity were identified: IEL’s neo-liberal anthropocentrism; its entanglement with (neo)colonialism; and its entrenchment of state sovereignty and the sovereign right to exploit energy resources. These are not discrete features and bleed into each other. IEL’s colonial foundations sustain its anthropocentrism. Its entrenchment of sovereignty underpins and perpetuates both its neo-colonial and neoliberal tendencies. All of this is done under the veneer and pretence of progression, which stifles critical debate particularly within the mainstream discourse.

An alternative, more all-encompassing, critique would suggest that the structure and content of international law *in toto* fails to address the Anthropocene’s socio-ecological realities. International law, as historically constituted, was perhaps effective in managing inter-state relations under the fading liberal international order even as it facilitated colonialism and imperialism; the antecedents of many of our present ills. However, purely as a matter of form, international law allowed the transactional business of governments to proceed, but public international law is failing to meet the challenges of the Anthropocene.

It is for this reason that we unapologetically refer to the complicity of IEL, not in a criminal sense – though we feel criminal law has yet to find its true activism in tackling global environmental harms – but in the sense of “[t]he fact or condition of being involved with others in an activity that is unlawful or morally wrong” (<https://www.lexico.com/en/definition/complicity>); the activity here being not an individual act but the human enterprise, more generally conceived.

This is a damning indictment of more than 50 years of international legislative activity despite some success stories. The multilateral climate change regime has been in place since 1992 but climate instability is increasing and its impacts becoming more psychologically jarring. Future generations – represented by our children – *know* that their environment is irreparably scarred, as they have been telling us during their “Fridays for Future” climate strikes (<https://www.dw.com/cda/en/fridays-for-future-students-hold-international-climate-change-protests/a-47927393>).

The precautionary principle is increasingly redundant even though the international legal community has still not settled its normative status. This is perhaps as damning a piece of evidence as you need to consider when suggesting that the present system – and us as its lawyers, its academics and, yes, even as its acolytes – have persistently failed.

Can a system so failing be reconstructed from within? Can a system imbued with the territorial, nationalistic and anthropocentric DNA of its past convert itself into an ecologically sustainable body of law? Before we sketch out an answer to these questions, let us return to the climate change regime. IEL lives in a world of the contemporary, of the now – despite the increasing evidence, we retain this belief in the linear progression of humanity. In the main, IEL scholarship – for the most part – is both ahistorical and insufficiently apocalyptic. We are too dismissive of successes and failures of the past, and not scared enough by the prospects of the future, at least sufficiently to embed them within the law. And our scholarship is largely reflective of what we see merely in our

politics. As French and Rajamani (2013, 458) have asked: “[H]ow does one distinguish between scholarship from the law and practices it is assessing and evaluating?”

In December 2015, the Paris Agreement was greeted with much fanfare. It was championed as the most important step up to that point in humanity’s battle with climate change, and after years of failure and frustration it reflected a new universal approach. The Kyoto Protocol was all but dead; invariably castigated as a failed experiment of top-down obligation and, in all but words, bad law. Kyoto had failed; the Paris Agreement would succeed. But the rhetoric in such cases is false. Not everything that went before was failing, and not everything that was to succeed it would be positive. Many scholars were as guilty of being caught up in this euphoria of contemporariness.

In the preceding paragraph, we said that the Paris Agreement was an important step in humanity’s battle with climate change. Such phraseology “others” the problem and offers humanity an evangelical mission to tackle, while emphasizing law as one of the tools in which to do battle. What we should have written was that the Paris Agreement was “an important step in humanity’s battle with itself”. Climate change is not “other”; it is a manifestation of our *own* actions. And IEL’s failure to recognize this, and to respond meaningfully, raises fundamental questions as to whether it has utility in its capacity to act in the global socio-ecological interest.

From realist to cosmopolitan scholars, the failings of international environmental law have been well documented (see, amongst others, Mickelson 2000, Atapattu 2015, Gonzalez 2015 and Islam 2015). We will not rehearse them here. Instead we raise another point, namely that the post-ontological defence of IEL – that it is not perfect, but it is the best we have – is no longer good enough. It may have sufficed at the 1992 Rio Conference on Sustainable Development when humanity still had the relative leisure to discuss whether precaution is a “principle” or an “approach”, but not any longer. Something more fundamental is required. As Greta Thunberg has said: “[Y]ou say you love your children above all else, and yet you are stealing their future in front of their very eyes... We cannot solve a crisis without treating it as a crisis... if solutions within the system are so impossible to find, then... we should change the system itself” (Sutter and Davidson 2018). IEL will obviously need to move into crisis mode, and not at a moment too soon. In the process, we will hopefully be able to reform IEL structurally in such a fundamental way, that we can again find the friend we seem to have lost along the way, and that we so critically need in the fight against Earth system decay and global injustice.

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