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# TOWARD DYSTOPIAN FUTURES? LEGAL HISTORY, POSTCOLONIALITY AND CRITIQUE AT THE DAWN OF THE ANTHROPOCENE

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## ABSTRACT

The aim of this article is to explore certain controversies that concerns climate change within a framework of critique influenced by recent methodological debates on the history of International Law. In recent years, the likely beginning of a new geological era known as the Anthropocene has been receiving considerable attention from historians. Its main assumption, one which humanity's activities on Earth since the Industrial Revolution is equivalent to a telluric force, ultimately resonates in historiographical theory and acquires a global appeal. First, it is argued that the Anthropocene holds intrinsic connections with the formation of modern international society. Through an anachronistic lens, postcolonial literature's inputs to the history of International Law forecloses forms of colonialism and imperialism as problematic dimensions of present concerns of international legal thought and global justice. In conclusion, the article contemplates an estimation of the viability of progressive teleology of history by making a case for the validity of expanding the horizons of expectations in order to account for less optimistic readings of the future.

**Keywords:** History of International Law; Climate collapse; Anthropocene.

*RUMO A FUTUROS DISTÓPICOS?  
HISTÓRIA DO DIREITO, PÓS-COLONIALIDADE E CRÍTICA NO  
ANTROPOCENO*

**RESUMO**

*Esse artigo tem por objetivo explorar certas controvérsias relativas à mudança climática a partir de enquadramento crítico influenciado por recentes debates metodológicos sobre a história do Direito Internacional. Nos últimos anos, o provável começo de uma nova era geológica denominada Antropocene vem recebendo considerável atenção da parte de historiadores. Sua principal premissa é que as atividades humanas na Terra desde a Revolução Industrial seriam equivalentes a uma força telúrica. Tal premissa ressoa na teoria historiográfica e adquire apelo global. Primeiro, o artigo argumenta que o Antropoceno guarda conexões intrínsecas com a formação da sociedade internacional moderna. Por meio de lentes anacrônicas, as contribuições da literatura pós-colonial à história do Direito Internacional descortinam formas de colonialismo e imperialismo, porquanto representam dimensões problemáticas de problemas atuais atinentes ao pensamento jurídico internacional e à justiça global. Em conclusão, o artigo contempla uma estimativa da viabilidade de teleologias progressistas históricas ao fazer defender a viabilidade da expansão do horizonte de expectativas como forma de contabilizar leituras menos otimistas quanto ao futuro.*

**Palavras-chave:** *História do Direito Internacional. Mudança Climática. Antropoceno.*

**INTRODUCTION**

Despite its logical appeal to the hard sciences, the concerns and controversies involved with climate change have been figuring in the humanities and opening a wide range of research schemes. The term *Anthropocene*, now widely employed in the academia to describe the current geological age, attracts the attention of an increasing number of scholars who defy conventional, disciplinary-driven treatment of environmental issues. At the heart of its inception, the Anthropocene treats human species as a telluric force, a power equivalent to a major geological event, that has been altering the environment in such a vast scale that throws a shadow in the future of our collective existence (CRUTZEN, STOERMER, 2000; CRUTZEN et al, 2007). As a consequence, one finds historians, lawyers, sociologists, environmentalists and philosophers devoting their research agendas to a thematic frame that challenges discipline contention and invites innovative approaches.

For contemporary international lawyers, environmental issues are anything but a novelty. It is now a common feature of both legal scholarship and legal practice and institutions to treat environmental protection, regulation and exploration as a global normative issue. Nevertheless, and at the heart of the present argument, this article argues that the Anthropocene introduces unprecedented challenges to the placement of humanity in the environment. Such challenges – which only begin to emerge – could extrapolate ordinary legal regulation efforts to curb down deforestation or the emission of greenhouse gases, to name but two major environmentally sensitive areas. More appropriately, what is being increasingly recognized is that Gaia intrudes itself in human affairs without any consideration for our plans of persevering and progressing as a species, to invoke Isabelle Stengers' (2009)' insightful remarks.

Taking the Anthropocene's reception by the humanities, this paper departs from a set of theoretical inquiries grounded upon critical approaches to international law and international legal history to set about investigating the following research-problem: by what means could the history of International Law be critically accessed in order to incorporate the complexities associated with anthropogenic climate collapse?

This paper focuses primarily on the historical dimension of the Anthropocene and its initial repercussions to the historiography of international law. The first section draws upon selected aspects of Dipesh Chakrabarty's (2009) influential article *The Climate of History* in order to map out present-day discussions of the historical controversies arising in

this new geological age. It narrows down its analysis around two themes: (i) the construction of human hierarchies associated with historical knowledge and the (ii) collapse of the dichotomy natural history/ human history. Both themes bring to the fore the specificities of international legal history in the Anthropocene that seem to depart from recent philosophical treatments of humanity as a framework category for development of international law and institutions (TEITEL, 2011).

The second section tackles the rather recent historiographical turn in International Law. As troubling connections between past and present of global society gradually surface by means of a renewed interest in history and its lessons to contemporary problems, a variety of methodological approaches produces rich narratives of past events, personalities and processes. Yet, the attention to history has been sided by a rising perception of the relevance of the understanding of the past, should international lawyers choose to engage with the call for global justice and ethics in international affairs. In this scenario, postcolonial historiography and contextualist methodology enter the stage of international legal history and are worth of consideration chiefly because of their influence over the construction of historical knowledge.

It will be argued that the complexity of the Anthropocene justifies a call for a comprehensive framework with both anachronistic – for the climate crisis relates to past injustices that still inflicts consequences upon the present – and diachronic dimensions – for the context that frames current debates tends depoliticize climate crisis by imposing a single narrative. As a conclusion, the article considers the issue of progress in history. What makes this theme relevant is that it sets the scene for historical interpretations that escape widespread teleological perceptions imbedded in international legal thought. Once the Anthropocene brings past, present and future to interact in unpredictable ways, it is worth considering the role of dystopia as an analytical category for historiographical legal scholarship.

## **2 THE ANTHROPOCENE IS THE AGE OF HUMANITY: FACING THE DESTABILIZATION OF HISTORICAL KNOWLEDGE**

Kim Stanley Robinson's sci-fi novel *Aurora* chronicles the epic saga of a group of humans whose purpose is to establish a viable colony in Aurora, a 11,9 years-light distant from Earth star located in the Tau Ceti System. The journey commences in the 26<sup>th</sup> Century, a time when humanity

had already stretched its domains towards other planets in the Solar System. In a specific passage, the portrait of certain geophysical aspects of future Earth prompt further inquire about the argument of this paper:

For of course there are no beaches. Sea level rose twenty-four meters in the twenty-second and twenty-third centuries of the common era, because of processes they began in the twenty-first century that they couldn't later reverse; and in that rise, all of Earth's beaches drowned. Nothing they have done since to chill Earth's climate has done much to bring sea level back down; that will take a few more thousand years. Yes, they are terraforming Earth now. There's no avoiding it, given the damage that's been done. In this common era year 2910, they are calling it a five-thousand-year project. Some say longer. I'll be a bit of a race with the Martians, they joke. But for now it's good-bye to the beaches, and indeed many a celebrated island of yore now lies deep under the waves. An entire world and way of life has disappeared with these fabled places, a lifeway that went right back to the beginning of the species in south and east Africa, where the earliest humans were often intimately involved with the sea. That wet, sandy, tidal, salty, sun-flecked, beautiful beach life: all gone, along with so much else, of course; animals, plant, fish. It's part of the mass extinction event they are still struggling to end, to escape. So much has been lost that will never come back again (ROBINSON, 2015, p. 436).

If understood through historical lenses, it would suffice to say that at least two anthropogenic climate change related aspects comes out. The first concerns what the 21<sup>st</sup> and 22<sup>nd</sup> Centuries stands for to those who live in the 30<sup>th</sup> Century. In this respect, the extract conveys an approximation to the clue according to which our present – the past in Robinson's narrative – is connected with the future – the present in Robinson's narrative – in ways that are yet to be considered. Secondly, but standing in a different perspective, Robinson's imagined future appear to be built upon the aftermath of human-induced climate transformations as these are already understood by climate scientists in the present.

Aurora's long gone future should not come as a complete surprise. Once history has led humanity up to this point in the evolutionary scale, it is clear that a certain teleology drives our collective existence into places ever far away from our initial creation. Robinson's fiction offers very few clues about what life on Earth looks like in a distant, nonetheless imaginable, future. Yet, in the above testimonial of earthly conditions in the

beginning of the 30<sup>th</sup> Century, Aurora discloses insights on a fresh debate related to the theory and practice of International Law: anthropogenic climate change.

In the year 2000, Earth scientists Paul Crutzen and Eugene Stoermer proposed an innovative interpretation of our geological time. The term *Anthropocene* was coined to account for a new geological era that has succeeded the Holocene. Beginning in the latter part of the 18<sup>th</sup> Century, the most prominent feature of this new era is the recognition of humanity as a geological force. Large increases in human population, vast scale urbanization, species extinction due to deforestation and pollution and, more directly for purposes of climate change debates, the unprecedented use of greenhouse gases (namely CO<sub>2</sub>) that fuelled the Industrial Revolution, these elements have impacted the environment in so rapid a scale that anthropogenic activities are changing and will continue to change the climate for millennia to come (CRUTZEN, STOERMER, 2000).

According to their argument, “it seems to be more than appropriate to emphasize the central role of mankind in geology and ecology by proposing to use the term ‘anthropocene’ for the current geological epoch” (CRUTZEN, STOERMER, 2000, p. 17). Additionally, on a follow up to the seminal research, Paul Crutzen *et al* registered what may represent the most salient feature of their defence of the Anthropocene: the rise on the emissions of atmospheric CO<sub>2</sub> from preindustrial value of 270-274 ppm to a 380 ppm value in the beginning of the 21<sup>st</sup> Century (CRUTZEN *et al*, 2007).<sup>1</sup>

As emphasized by the 2014 IPCC report, by the end of the current century average global temperature will increase between 1.1 and 6.4 degrees Celsius. When compared to the 1990 report, the first comprehensive study issued by the IPCC, one notices the substantial increment on the top projections: from the 1990’s 4.5 to the 2014’s 6.4 degrees Celsius. In any case, it is important to recognize that the increase in global temperature in but one of several elements upon which estimates of global climate are drawn from. Accordingly, major floodings, desertification, increasing occurrence of extreme temperatures, rapid melting of ice caps and resource depletion are but some of the factors associated with the rise of the Anthropocene that add up to the swift rise in global temperatures and

<sup>1</sup> These impressive figures apart, an even more astounding reading of CO<sub>2</sub> output was made public by the 2014 IPCC report with its estimate of 400 ppm in that year, the largest assessment in recorded human history. See *Myles Allen et al*, Climate Change 2014 Synthesis Report. Approved Summary for Policymakers. International Governmental Synthesis Report. Fifth Assessment Synthesis Report. 1 November 2014. <http://www.ipcc.ch/report/ar5/wg2/> (Last accessed on 3 December 2014).

prompts institutional responses in several international institutions.<sup>2</sup>

It was not until recent years that the implications of this upsetting scenario had caught the attention of the humanities in a systematic manner. Even though climate change is far from an unknown motif in the humanities, the Anthropocene is best conceived as a novelty to social scientists and perhaps a thoroughly unknown theme to international lawyers. In recent years, some general topics have figured in interdisciplinary projects devoted to the approximation of the Anthropocene. For instance, a new collection of essays edited by Clive Hamilton, Christophe Bonneuil and François Germaine have explored varied dimensions of the impact of the Anthropocene in the humanities. In the opening chapter, the editors capture the gist about what this new geological era may represent to social sciences:

The advent of the Anthropocene challenges some established boundaries between nature and culture, between climate and politics, between natural sciences and the social sciences and humanities. The point here is deeper than a call for interdisciplinarity around hybrid ‘socio-ecological’ objects. The conception of the natural world on which sociology, political science, history, law, economics and philosophy have rested for two centuries – that of an inert standing reserve of resources, an unresponsive external backdrop to the drama of human affairs – is increasingly difficult to defend. And in an epoch in which ‘Gaia’ has been reawakened, the social-only conceptions of autonomy, agency, freedom and reflexivity that have been modernity’s pillars since the nineteenth century are trembling (HAMILTON, BONNEUIL, GERMAINNE, 2015, p. 5).

The editors highlight the fact that the Anthropocene is likely to impose transformations on disciplines that had been traditionally erected upon the pillars of modern thinking. At a first glance, this implies an association of the Anthropocene with ideas about the destabilization of the conditions that qualified social sciences to flourish and to be established as centres of the production of valid knowledge about human affairs and nature (SANTOS, 1992). In this pivotal proposition, the triumph of

<sup>2</sup> Myles Allen et al, note 8 ; *Intergovernmental Panel on Climate Change (IPCC)*, IPCC Overview, 1990, p. 52. [http://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml#1](http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1) (Last accessed 3 December of 2014); *General Assembly of the United Nations*, Implementation of the International Strategy for Disaster Reduction: Report of the Secretary-General, A/65/388. <http://www.unisdr.org/files/resolutions/N1054565.pdf> (Last accessed 4 December 2016). *General Assembly of the United Nations*, Sustainable Development: Protection of Global Climate for Present and Future Generations of Humankind, A/65/436/Add.4. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/678/78/PDF/N1067878.pdf?OpenElement> (Last accessed 5 December 2016).

modern rationality was indebted to stable environmental conditions upon which canonical modern products – social contract, modern economy, social organizations, human rights, the modern subject, and so on – were crafted.

What stands out thus far is the intrusion of Gaia in human affairs, to recall Isabelle Stenger's understanding of our current predicament (STENGER, 2015). In the place of the all-nurturing, all-caring romantic character attributed to Mother Earth, there rests the disturbing presence of a Gaia irresponsive to humanity's pleas. Once anthropogenic activities are accounted for setting Gaia in an "uncontrollable trajectory that is hazardous to human life", adds Clive Hamilton, the centuries-old modern promise of stability and progress brought about by Reason gradually fades away accompanied by the parameters that provided for our collective existence (HAMILTON, 2015).

When the general realization of our ecological predicament started to surface in recent years as a response to the Anthropocene's call to arms, the question around the framing of humanities as disciplines that are separated from the environment also came to the fore (PALSSON et al, 2013). For the purposes of the present study, the debate precipitated by Chakrabarty's *The Climate of History: Four Theses* should offer a promising start to investigate prospective approximations between the Anthropocene and international legal history (CHAKRABARTY, 2009). The mentioned piece of work addressed several pressing controversies revolving climate change and postcolonial historiographies, among which at least two are worth of further consideration.

Chakrabarty's main thesis states that the Anthropocene introduces a collapse in the conventional humanist distinction between natural history and human history. According to his argument, such a split represents a threat to a *sine qua non* condition for the triumph of modern historical thought. On the one hand, modern historiography is heavily dependent upon the epistemic ruling accredited to human affairs in detriment of inferior, savage and passive characterizations of nature and the environment (COLLINGWOOD, 1995). On the other one, what climate scientists say about humanity's equivalence to a geological force differ completely from historians' conventional treatment of human agency, that is to say, while "environmental history, where it was not straightforwardly cultural, social, of economic history, looked upon human beings as biological agents", in the Anthropocene the distinction that made it possible is no longer present



because humanity has “reached numbers and invented technologies that are on a scale large enough to have an impact on the planet itself.” (CHACKRABARTY, 2009, p. 206-207).

From the standpoint of the forceful reconnection between human and natural history, an additional feature takes shape. When one considers the scale and duration of effects in climate change projections – the prospect that the “climate may depart significantly from natural behaviour over the next 50.000 years” (CRUTZEN et al, 2007, p. 615) –, it is our ability to situate ourselves in time and space, both individually and collectively, that appear to be at risk. The intangibility of climate change, being its most hazardous effects only visible at scales vastly separated from human existence, carries the danger of alienation and, as pointed out by Neimanis *et al*, could lead to a state of mind “whereby human stakeholders do not feel invested in environmental issues” (NEIMANIS, ASBERG, HEDRÉN, 2015, p. 74; GARDINER, 2011) and resonates in the disseminated scepticism that insists to disqualify overwhelming scientific findings (ORESQUES, 2007).

It is in this exact sense that Chakrabarty argues that the Anthropocene can “precipitate a sense of the present that disconnects the future from the past by putting such a future beyond the grasp of historical sensitivity.” (CHACKRABARTY, 2009, p. 197) Whatever future holds in store for humanity, be it a transhumanist post-natural set up that frees humanity by challenging “the modern conception of freedom as an escape from nature and its limits” (BONNEUIL, 2015, p. 26), or a reluctant conformity with a common collapsed future, the bottom line argument insists that idealized images of the future continue to distance themselves from present expectations while leaving behind highly unstable parameters.

With respect to Chakrabarty’s second thesis, it implies that the general framing of the term *humanity* undergoes a transformation casually linked with the species’ equivalence to a geological force. Rather than treating human agency on an individual basis, the Anthropocene calls for an approximation to collective dimensions of our acting together. The historical shift that takes place with the Industrial Revolution has invested the human species with the prerogative to affirm modern liberty while building a dependent fossil fuel framework that sustains emancipatory ideals. What Chakrabarty appears to suggest is that, by positioning humanity as a species and not as a collective of modern individuals, one

may recover a sense of historical sensitivity that has been compromised by the dawn of the anthropogenic age:

Climate change, refracted through global capital, will no doubt accentuate the logic of inequality that runs through the rule of capital; some people will no doubt gain temporarily at the expense of others. But the whole crisis cannot be reduced to a story of capitalism. Unlike in the crises of capitalism, there are no lifeboats here for the rich and the privileged (CHAKRABARTY, 2009, p. 221).

In essence, climate change touches the totality of human beings, thereby foreclosing the importance of considering the species as an analytical skeleton and putting aside attempts to understand the Anthropocene through conventional historical readings. At any case, in spite of the arguments involving the adequateness of the category species thinking, the suggestion according to which “there are no lifeboats here for the rich and the privileged” has prompted differing perspectives concerning the unfair distribution of climate related effects or, to put it differently, climate collapse raises fundamental questions of global justice by touching the underpinnings of economic and social abysms.<sup>3</sup>

With this contention in mind, nested in recent reviews of Chakrabarty’s propositions one finds critical perspectives shedding light to neglected internal hierarchies of the Anthropocene narrative. Andreas Malm and Alf Hornborg’s analysis locate certain problems that may arise if terms like species or humanity continue to be treated uncritically. Such terms, coupled with the Anthropocene narrative so far considered, ultimately foreshadow the processes of forceful inclusion of a vast spectrum of social and cultural relations that characterizes human existence. In addition, mainstream Anthropocene narrative tends to treat humanity without consideration of problematic unbalances of international society, thus contributing to enforce a depoliticized project that is highly dependent on capitalist-based world views “the emergence of which accompanied the Industrial Revolution in the hub of the British Empire, systematically obscures the asymmetric exchange of biophysical resources on which industrialization rests.” (MALM, HORNBORG, 2014, p. 64)

The allegedly over-inclusive and distorted framing denounced

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<sup>3</sup> See, for a general account of climate justice related issues, J. Timmons Roberts and Bradley C. Park (2007). For a contrasting argument that backs up national interests instead of a collective moral commitment to shared tough differentiated responsibilities toward the environment has been voiced by Eric Posner and Daniel Weisbach (2010).

by Malm and Hornborg is dependent upon discursive operations regularly employed in capitalist-dominant societies and denounced by international legal critiques of the Global South. If facts have it that inequality persists in varied aspects of international society, the critique of the Anthropocene ought to acknowledge such imbalances lest of occluding, and even sustaining and deepening, dynamics of exclusion. For instance, since 1850, northern capitalist countries have been responsible for 72.2% of total atmospheric carbon dioxide inputs, despite their fairly reduced parcel of world population: 18.8%. On the other hand, 45% of world population accounted for only 7% of carbon dioxide emissions. The average citizen of the USA responds for 500 times the emission of the average citizen in Ethiopia, Chad, Afghanistan, Cambodia, Mali or Burundi (ROBERTS, PARKS, 2007).

Should the rise of the Anthropocene narrative continue to overlook “the realities of differentiated vulnerability on all scales of human society [...] for the foreseeable future [...] there will be lifeboats for the rich and the privileged” (MALM, HORNBORG, 2014, p. 66), a consideration that objects Chakrabarty’s approach. As presented thus far, climate collapse fits squarely inside dominant ideological readings of the function of nature in an anthropocentric, self-sustained human world. This calls for a commitment to unveil internal hierarchies, introducing alternative narratives of the dawn of the human age and reflecting upon political action from the Global South.

### **3 INTERNATIONAL LEGAL HISTORY AT THE AGE OF THE ANTHROPOCENE**

The turn to international legal history potentially illuminates certain controversies arising from the Anthropocene narrative. A most disputed academic arena in itself, legal history was particularly embraced by postcolonial scholars – among others – from the Global South as a means to denounce continued historical injustices and violence, be it in theorizing or be it in practicing International Law. This section explores the argument that such a narrative displays both anachronistic and contextual textures that could benefit from recent legal scholarship developments.

The past two decades have witnessed a rebirth of the interest for international legal history<sup>4</sup> and, according to Martti Koskenniemi,

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<sup>4</sup> As well as an increase in the academic works and research in the field. A good survey on the different

the reasons that could account for this renewed pursuit have to do with the disbelief in the narratives of progress that informed legal institutions and norms throughout the 1990's. The "disappointment that reflects in the plausibility of inherited narratives" (KOSKENNIEMI, 2013, p. 216) is rooted in what could be described as a gradual, yet upsetting, loss of legitimacy that has stood in the way of the liberal spirit so characteristically embedded in international legal reasoning in the last decade of the 20<sup>th</sup> Century.

As the complexity of the historical register presents challenges for legal epistemology, canonical readings of the history of the discipline, its events and personalities also endure confrontation from methodologies with a vast range of philosophical, cultural, anthropological, social and legal influences. For example, as legal jurisprudence from the second half of the 19<sup>th</sup> Century should demonstrate, the peoples of the international realm occupy differing categories in evolutionary civilizational scales amidst teleologies of progress and backed by historicism's stage where triumphant versions of the discipline are performed (KOSKENNIEMI, 2001).<sup>5</sup> Historicism, David Kennedy (1999) points out, has influenced generations of legal historians with its promise of producing scientific understandings of the complexities surrounding historical register, time and methodology.

It is worth noting that legal historians have sustained dimensions of the law-history connect that endorses, rather than dismisses, the relevance of the past in the ordinary practice in international legal order. Anne Orford makes a thoughtful defence of the role of anachronism in legal arguments, which puts international lawyers in a different category from the one contextualist historians usually occupy. As the author stresses, "international law is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space. The past, far from being gone, is constantly being retrieved as a source of rationalisation of present obligation." (ORFORD, 2013, p. 175) Instead of an exclusively contextualist approach, international law consists on a much "broader archive" that international lawyers need to access in order to grasp legal meaning.

The complexities of the historical field receive varying, if not approaches from a critical standpoint is *Martti Koskenniemi (2011)*. A major project of a global history of International Law has been edited by *Bardo Fassbender and Anne Peters (2012)*.

<sup>5</sup> From the standpoint of critical legal history, an important analysis of a prominent figure of the period, the Scottish James Lorimer, is available *Martti Koskenniemi (2016)*.

often opposing, theoretical handlings, as the brief sketch above may reveal. On its turn, postcolonial historiography has proved to be a contrasting field in itself, for it directs its historical lenses towards past and present injustices produced by processes that have through time accorded International Law with the status of the law governing the society of states. In this sense, postcolonialists like Antony Anghie (2004) and Balakrishnan Rajagopal (2003) have contributed to contemporary debates about the role of history in critical legal theory and have done so with interpretations of the historical register particularly concerned with the placement of imperial and colonial relations at the heart of legal norms and institutions. It is important to put anachronism in a wider perspective so that its relevance to tackle the implications of the Anthropocene becomes more evident (FASSBENDER, PETERS, 2012a).

### 3.1 TWALing the Anthropocene

The approximation of postcolonialism to legal academia have in significant aspects driven legal historians toward a commitment to embrace social histories, the histories of racial relations, the histories of gender relations and the histories of capitalism not simply as neglectful elements of the history of international law (BAXI, 2005). Speaking from the Global South, a most significant methodological feature of postcolonial historicity could be described as an anachronistic engagement with the past of international society. Its aim is to identify, denounce and reform persistent violent practices that resonate in current imbalances and injustices of subaltern peoples worldwide.

The controversies revolving the Anthropocene and its hierarchies, as previously denounced by Malm and Hornborg (2014), could be examined in greater details with the analytical tools of postcolonial historicity. More noticeably, TWAIL (Third World Approaches to International Law) scholars tend to align their discourses around the critique of the inequalities in international society (GATHII, 2000). Take, for example, the work of Antony Anghie (2004). In spite of the overall inclination in the direction of contextualism<sup>6</sup>, and following the anachronistic critical intake that has benchmarked TWAIL scholars, Anghie traces five centuries of disposition of the peoples of the world by means of the evolution of an international

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<sup>6</sup> Which was mostly influenced by the Cambridge School of historians like Quentin Skinner and John Pocock. See, for example, Quentin Skinner (1969).

law contrary to the interests and perspectives of the subalterns.

According to legal philosopher Anna Grear, there has been broad academic agreement about the notion that the Anthropocene works as a trope that attracts attention to the responsibility of the human species in face of the global climate crisis. This register notwithstanding, Grear goes on, an overly neglected aspect of the rise of the term is the consideration that the Anthropocene “(and its climate crisis) represents a *crisis of human hierarchy*”, that being the “patterned imposition of hierarchies operative within the ‘anthropocentrism’ of law” throughout history. This in itself signals the place of anachronistic readings of legal history (GREAR, 2015, p. 227, italics in the original).

The first point to emerge concerns the origins of the Anthropocene. The discussion above credited the Industrial Revolution with the recognition of the origin of present-day consequences of climate change. A convergence point amidst controversies of various stripes, climate change controversies are deeply entrenched within the role played by the Industrial Revolution in present-day climate predicament. The standard account then starts with the Industrial Revolution and moves on linearly with the expansion of the international society, paralleled by the global incorporation of fossil fuel energy sources to power economies and societies, which displays the diffusion of Crutzen’s seminal proposition (CRUTZEN, STOERMER, 2007).

Rather differently, the standpoint of critical historiography tends to engage with the controversy of the origins of a given process or event in at least two ways. Initially, it involves an act of choice by which the substance of tradition in a field is detached from other elements of lesser status – and not objectively identified as in historicism. TWAIL literature insists that such a substance tends to be largely Eurocentric, henceforth the conventional, official history of International Law, is crafted in ways to absorb evolutionary trajectories in which universal (European) *jus gentium* is replaced by the Westphalian system of States, in its turn shedding light over the development of an international society of equal sovereigns, in the sense celebrated elsewhere by Leo Gross.<sup>7</sup>

<sup>7</sup> Leo Gross’s interpretation of the legacy of Westphalia to international legal thinking is an example of the very historical parameters that are denounced by contemporary critical historians. The three-Century journey of the Treaties of Westphalia, from the pacification of the religious wars among European powers in the mid Seventeenth century to the expansion and democratization of international society with the creation of the United Nations, in Gross’s view are best characterized as necessary stages for the culmination of “the law of an international community constituting a legal order for the existing states.” (GROSS, 1948, p. 40) The place of Westphalia is secured by its relevance in asserting fundamental principles, practices and legal reasoning associated with the progress of International

In second place, the standards of historiography that enabled certain events to achieve a prominent locus in the Palace of history run the risk of falling into European canons of history. A well-established component of postcolonial thought, the displacement of Western historiographical categories runs in parallel to the theoretical efforts surrounding the construction of non-Western histories. While Chakrabarty insists on the possibility of “a politics and a project of alliance between the dominant metropolitan histories and the subaltern peripheral pasts” (CHAKRABARTY, 2000, p. 42), there remains, apart from the substance of history itself, the problem of the form to signal a challenge to critical history: with the rejection of these (Western) historiographical standards, the interpreter faces the task of filling the resulting gaps with alternative approaches to legal history (KOSKENNIEMI, 2011, 2013).

Following these critical tracks, an alternative understanding of the internal hierarchies of the Anthropocene have appeared in Simon Lewis and Mark Maslin’s *Orbis hypothesis*. Placing a distance from the conventional interpretation of the origins of the age of humanity, the *Orbis hypothesis* states that the impacts of colonial encounters over human populations during colonial times – “including the geologically unprecedented homogenization of Earth’s biota” (LEWIS, MASLIN, 2015, p. 175) – have contributed in a decisive manner to the establishment of the first authentically global benchmark of anthropogenic activities in the environment. At the core of the argument, it is significant to stress how colonialism relates to anthropogenic activities in the environment:

Besides permanently and dramatically altering the diet of almost all of humanity, the arrival of Europeans in the Americas also led to a large decline in human numbers. Regional population estimates sum to a total of 54 million people in the Americas in 1492, with recent population modelling estimates of 61 million people. Numbers rapidly declined to a minimum of about 6 million people by 1650 via exposure to diseases carried by Europeans, plus war, enslavement and famine. The accompanying near-cessation of farming and reduction in fire use resulted in the regeneration of over 50 million hectares of forest, woody savannah and grassland with a carbon uptake by vegetation and soils estimated at 5–40 Pg within around 100 years. That

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Law. Nonetheless, by the same token, Gross sustains a narrative of a discipline through an intellectual manoeuvre of making itself ever distant from the influence of religion and *raison d'état* that distinguished seventeenth century *jus gentium*. A most recent episode in Gross narrative, the second half the twentieth century heralds an evolved version of the principles first laid out in Westphalia, with the difference that, at this point, sovereign equality, non-intervention and collective security arrangements are definitely posited in the Chart of the United Nations.



this event significantly contributed to the observed decline in atmospheric CO<sub>2</sub> of 7–10 p.p.m. (1 p.p.m.CO<sub>2</sub>52.1 Pg of carbon) between 1570 and 1620 documented in two high-resolution Antarctic ice core records. This dip in atmospheric CO<sub>2</sub> is the most prominent feature, in terms of both rate of change and magnitude, in pre-industrial atmospheric CO<sub>2</sub> records over the past 2,000 years (LEWIS, MASLIN, 2015, p. 175).

As in the case of postcolonial historiography, it is suggested that the *Orbis hypothesis* opens up a fresh appreciation of the historical dimensions of the Anthropocene. It does so by refuting restrictively geological framings of the debate of the origins of the age of humanity, and in place of this recurrent periodization bias, opts for tackling the issue through an analysis familiar to TWAIL scholars. The key methodological movement is to locate colonial violence, both towards the populations of colonized territories and the homogenization of ecosystem throughout the globe, at the core of the reflections on the origins of our current climate entanglement.

In this sense, and for the humanities in the context of the Anthropocene, the inclination towards an exclusively geological perspective for the purposes of dating the origins of the Anthropocene appears to share similarities with the tendency of modern historiography to forge human histories apart from natural history. As discussed above, the convergence of natural and human histories has been acknowledged by Chakrabarty (2009) as one of the most distinctive features of the age of humanity. Nonetheless, this novelty will be eclipsed for as long as the characteristic instability of causes and effects related to climate collapse remain dissociated from the discussions involving the foundations of social sciences and ecological thinking.<sup>8</sup>

Lewis and Maslin's hypothesis potentially add a different dimension to Chakrabarty's (2009) interpretation of the Anthropocene. If, as Anne Orford argues, "the task of international lawyers is to think about how concepts move across time and space. The past [...] may be a source of present obligations. Similarly, legal concepts and practices that were

<sup>8</sup> In *Living in the End Times* Slavojek argues that the key to solve the ecological crisis rests in the "deadlock of the capitalist mode of production" (ŽIŽEK, 2012, p. 333-334). Even though Žižek's critique of Chakrabarty's *Four Theses* (2009) will not be elaborated here, it is sufficient to acknowledge the former's approach to climate collapse, an approach that privileges the capitalist mode of production as the driving force of our current predicament. On the other hand, Chakrabarty assert large-scale processes dating back millions of years – in geological time-scale of deep history – in fact command other more recent processes such as global capitalism.



developed in the age of formal empire may continue to shape international law in the post-colonial era,” (ORFORD, 2012) it is worth considering the operation of modes of colonial violence the Anthropocene narrative and environmental issues. It implies the sort of critical attitude towards history akin to anachronistic readings of time that renders contextual historical narratives unjust in face of colonial and imperial relations. As a consequence, international legal history stretches the bounds of contexts in search for connections between present conditions and past events.

### 3.2 Toward dystopian futures in International Law?

Alluding to the canons of the birth of modern historiography in the 19<sup>th</sup> Century, the editors of a recently published collection of essays entitled *Historical Teleologies in the Modern World* asserted how “history thus was conceived as a progressive process of the increasing perfection of humankind, a process over the course of which reason become transparent to itself.” (TRÜPER, CHAKRABARTY, SUBRAHMANYAM, 2015, p. 6) In fact, the ancient question of teleology in history figured in philosophical thinking coupled with Enlightenment ideals that inspired Liberal Revolutions. Consequently, it is often acknowledged that its influence in the understanding of international norms and institutions has equipped international law with a sense of historical legitimacy and empowerment to produce a self-image in which, as Martti Koskenniemi (2015, p. 213) shows, “International Law’s intrinsic virtue seems inextricable from its teleological character.”

The role of teleology in international legal theory has been receiving considerable attention in recent literature. For example, whether signalling an internal *telos* – to follow Koskenniemi’s lead once again – that treats law with an inherent morality, whether attempting to pursue Kantian projects to international legal order with versions ranging from civilizational reformism of liberal internationalism in late 19<sup>th</sup> Century to transitions from functionalism to humanism since the 1960’s – in these cases advocating teleology from an external standpoint – international legal theory walks side-by-side with a commitment to equip the discipline with the legitimacy to manage international relations. In Koskenniemi’s argument, on the other end of the *telos* spectrum resides historical perceptions that places law and power relations on the same wavelength – an anti-teleology – and the more up-to-date conception of fragmented regimes operating self-

contained normative pulls, a version of hyper-teleology that connects the transformations of the world – technology, information, communications, etc. – with the demands for renewed understandings of law, for “the only thing left is to choose among law’s various ‘design alternatives’ those that best serve the functions that science and technology have identified as the law’s *telos*.” (KOSKENNIEMI, 2015, p. 228)

The operation of historical teleology also resumes contemporary forms that make it even more difficult to fathom. The blurriness and intangibility of the purposes embedded in history can owe, for example, to the posture of global powers to reform international law as a means to fulfil new forms of imperialism. TWAIL counter these such transformative impositions, such as Obiora Okafor’s scrutiny of the changes in the international realm in the aftermath of 9/11 events have put into question unilateral political intentions sustained by the US Administration in its commitment to meet the ‘newness’ of the terrorist challenge via international norms and institutions. The normative agitation of the post-9/11 demands “carefully unpacking and resisting the sophisticated and complex processes of denial and myth-making that have enabled this deceptive posture of innocence to be maintained” (OKAFOR, 2005, p. 190)<sup>9</sup> so that the “subtle displacement of third-world suffering from internationalist consciousness” (OKAFOR, 2005, p. 173) should resume the complex image of the purposes carried out by international law. Finally, Mohsen Al Attar makes the case for the transformation of the universal project of International Law into transnational meta-regulatory regimes that fulfil the interests of the First World and, in consequence, reinforces the practice of subordination of the Third World. Hence, universalism uncovers its attractive force when social meaning and legal reasoning are absorbed by development vocabulary – a historical teleology in itself.

Postulants to the position of hegemon in the future of international law have not left aside universal claims. Even as these appear in renewed institutional designs, such as the movements toward the enforcement of the *rule of law* in international legal order<sup>10</sup>, the gravitational pull around

<sup>9</sup> Okafor’s main argument connects recent pulls in international law – use of force, humanitarianism, practice of torture – with the deeply political rationale beneath the “newness claim” that serves as justification for such reforms.

<sup>10</sup> *United Nations General Assembly*, 2005 World Summit Outcome. 60<sup>th</sup> Session. UN Doc. A/RES/60/1. 2005 <http://www.un.org/summit2005> (Last accessed on 10 November 2016). *United Nations General Assembly*, The Rule of Law at National and International Levels. 62<sup>nd</sup> Session. UN Doc. A/RES/62/70. 2008. <http://www.un.org> (Last accessed on 10 November 2016). Resolution 62/70 states: “Convinced that the advancement of the rule of law at the national and international levels is

the sophisticated vocabulary of constitutionalization of international law<sup>11</sup> or the advocacy of the benefits of governance over legalism (FALK, 2008), it becomes relevant to sustain the inextricable connection between normativity and teleology for the understanding of the role of law in guiding social transformation as well as the aspirations of global society (KOSKENNIEMI, 2012).

By making due consideration of the complex dynamics involved in this discussion, it may be useful to insist in the critique of the Anthropocene as it potentially illuminates other aspects of the relations between law and teleology. The workings of legal teleology in the age of humanity ultimately expands the conceivable historical horizons insofar as it absorbs present-day experiences of localities and translates them into narratives of dispossession, dislocation and radical transformation of the conditions that enables life, both human and non-human; instead, these are sustained and aggravated by persistent purposefulness of utopian legal futures. Clive Hamilton's reflection on the disconnection between past and future illustrates the point and prompts further elaboration about the present predicament:

The Moderns [...] are like Walter Benjamin's Angel of History, flying into the future but facing backwards, fleeing from a horrible past of suffering and oppression but unable to see the destruction that lies ahead. For them, the real is what is left behind and the future is only what the autonomous subject end up creating. Few progressives have turned around to face the future; and one can see why, for the progressive who turns around can no longer be a progressive. In the Anthropocene, in addition to the past we seek to escape, now we have a future we want to avoid; we are squeezed from both ends, and any new emancipatory project must transcend the progressive category of the past (HAMILTON, 2015, p. 39).

The reasoning backing emancipatory projects in international law largely disguises the specificity of assumptions that links past, present-day experiences and the design of future developments. Once, according to Hamilton, moderns demand from history nothing short of the

essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats.”

11 A general survey of the debates around the constitutionalization of international law can be found in Dunoff and Trachtman (2009).

progressive improvement of human existence, one of the consequences is the consideration that the past should resemble a place that must be avoided at all costs for it's synonymic to backwardness. The bottom-line value in prevalent accounts of international legal history is that human history evolves toward better futures, and any reference to the past – which happens to be a rather habitual practice for international lawyers, as Anne Orford rightly highlights (ORFORD, 2013) – carries the intention of bringing legitimacy to the steady elaboration of the law governing international society (KENNEDY, 1999).

What emerges from this linear, ever-evolving timescale is not unfamiliar to critical legal historians, as the above discussion aimed to convey. If anachronistic lenses are employed both to empower non-official histories of resistance as well as to denounce processes of violence that transcends the contextual bounds of past events – so follows, for instance though not only, postcolonial legal literature –, by the same token the critique of the Anthropocene conjures up less utopianism or humanistic creeds that, due to their profound modern roots, are only capable of depicting triumphant readings of legal futures.

#### **4 CONCLUDING REMARKS**

For its embedded critical potential, postcolonial historiography inserts the Anthropocene in the tracks of International Legal history. The adoption of anachronistic continuities invites a critique of distant aspects of Eurocentrism – in the same way suggested by Lewis and Maslin (2015). Such an insertion differ from dominant teleologies of progress for it replaces the gravitational appeal of triumphant disclosures to anthropogenic climate collapse for the rather instable and ambivalent historical ground covered by postcolonialism. In essence, the critique of the Anthropocene brings about historical destabilisation to the palace of historicism, challenging modern standards of thought with interconnected, non-hierarchical and non-linear settlements of humanity on Earth.

Two concluding lines of thought converge and are expected to forge, altogether, a critique of utopian teleologies related to international legal history in the age of the Anthropocene. Postcolonial resourceful apparatus inspires the first one. And it does so by implicating itself in some kind of self-reflexive analysis. For this, the most relevant aspect is the acknowledgement that humans exist in two different modes, one that

relates to the current epistemic positioning, the other accounting for the aftermath of the collapse between human and natural history. In this sense, a call for imagination in legal theory may help overcome the framing imposed by modern law.<sup>12</sup>

These modes of existence engage in entirely diverse mechanisms. On the one hand, the first concerns matters of climate justice, the impacts on the poorer peoples, its pulls on inequality or similar struggles. On the other hand, the second assumes its indifferent posture at the point when “we, collectively, have also become a geophysical force, then we also have a collective mode of existence that is justice-blind” (CHAKRABARTY, 2012, p. 14). The inevitable contradictoriness coming out of the interplay between contrasting modes of existence in which rights are met by its authors’ actions present a challenge to emancipatory political models that, owing its belonging to unparalleled representations of individuals and collective rights, perpetrators and victims, are now touched by the “survival of the species” (CHAKRABARTY, 2009, p. 15).

Once and again, matters of *intrahuman* justice, to use Chakrabarty’s (2009) expression, will continue to put pressure on international norms and institutions. TWAIL has been a powerful force against historical injustices at multiple levels. The point-break is that, with the Anthropocene, the context of TWAIL’s mode of operation appear to be disrupted by this unequal event: it ascends in straight opposition to the normal categories of violence, oppression and resistance, producing an ever-enlarging abysm between the political, economic, environmental, racial, gender or social struggles of the past-present and the horizons of expectations (KOSELLECK, 2004) within which emancipatory ideals seek to realize (ESLAVA, PAHUJA, 2012). It means to say: Gaia looks at the fulfilment – or *not* – of our emancipatory ideals with indifference (STENGERS, 2015). The implications of this collective mode of agency that is independent of intentionality are yet to be grasped by postcolonial thinking.

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<sup>12</sup> See, for example, how Mark Antaki (2012) frames this observation when he discusses the role of imagination in legal theory and the modern promises of security and stability.

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