Ontologicidal Violence: The Muslim Subject and International Law

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Frantz Fanon, in correspondence with Ali Shari'ati, commented on the Iranian sociologist's theology of liberation and affirmed that 'Islam has, more than all other social forces and alternative ideologies, an anticolonial capacity and anti-western character' (Fanon 2015: 543, author's translation). For both the Martinican and the Iranian, recovery from the alienation and denial of agency caused by the 'colonial matrix of power' (Quijano 1992) was through the affirmation of one's identity (Fanon 1965; 1982; Shari'ati 1979; 1981; 2011; Chatterjee 2011). Most importantly, 'identity' required, for the existentialist thinkers, a 'Self' to assert, a capacity for one to understand the world that remained, at its core, immanent, embodied, and unmoved by the alienation caused by the modernity/coloniality project. The alienation caused by this Eurocentric project sought to obliterate ontologies that did not reflect that of the Cartesian Ego (or the Heideggerian Dasein for that matter), and was given effect through the normative power of European sciences. I will argue in this inquiry that the 'ontologicidal' push of this project was given effect through the technologies and modes of operation of international law, a Eurocentric normative pattern of social/inter-social relations. The underlying claim I put forward is the ethical failure of the Eurocentric world-system.

Indeed, the 'inter-national' is only so in as much as it is through the shared and embodied experience of European colonization, and the imperial geographies through which international law was circulated in the late nineteenth century (Koskenniemi 2002; Anghie 2005; Becker Lorca 2014). This alienating project, Schmitt's *Nomos der Erde* (2003), imposed a singular hermeneutical scheme of reference from which to make sense of the whole world (Mignolo 2016). What international law provided was a very specific set of references from which the world could be made sense of, a singular monistic vision from which to cognate perceptions external to the subject. The problem here lies with the fact that the *Nomos der Erde* was Eurocentric; it gave meaning to the world from the perspective of the conquering, colonial European Ego (Dussel 1993; 2008). The *Nomos der Erde* is constituted when Europe constitutes itself as a more or less homogenous Ego, against an Other or Others that, in the words of Enrique Dussel is not 'dis-covered,' but rather 'covered-up' according to what Europe assumed it to be (Dussel 1993: 66). The Other(s) are then covered-up as what they are not, as what the European perceives them to be from their own scheme of reference, edified into the monolithic normative project of the *Nomos der Erde*. The project of international law, then, is rooted in a foundational *misrecognition* of the Other(s); a view that their ways of Being, of making sense of the world, are not coeval to those of the West. This project does away with the way of making sense of the world of the Other(s), emphasizing that it stands *beyond the border*, as an irrational worldview, an irrational Being because it does not follow the standards of the European episteme.

What I wish to submit is that the medium of legal Orientalism, through various international legal modes of operation and mechanisms such as the subject of this inquiry, imperial *capitulations*, has served to repress non-European forms of social organization and their superposed normative networks. Through such modes of operation, Eurocentric international law could further absorb 'savages,' the 'periphery,' the 'underdeveloped,' and the newly organized Third World states in imperial geographies. In other words, I wish to substantiate my claim that the colonial mode of operation of international law is what allowed this normative view of the world and its views as to who is and

who is not a subject (and thus what is legal and illegal) to be disseminated in a way that created and reinforced the imperial geographies that gave meaning to the 'inter-national.' There would be no 'inter-national' without a normative standard, the *Nomos der Erde*, that disciplined the Other(s) into the imperial geographies of Europe, articulated around the concept of the 'state.' The way out of the geographies of Empire, I argue, was (and arguably still is) through the resurgent corpo-realities of the wretched of the earth, opposing the *nomos* of the earth, as we will see in this short essay in the case of Iran.

Firstly, I will argue that the concept of sovereignty had, in the context of the rise of the Islamicate nation-states, a modular and relative *value*, or a set of premises, that were based on Eurocentric premises. My proposition is that this specific conception of sovereign power and its afferent principles (such as, for example, the principles of secularism and later that of permanent sovereignty over natural resources, which I will not have time to explore in this piece) furthered the European modern/colonial project. This project then instituted an international legal 'common sense,' a 'hubris of point zero' (Castro-Gómez 2005), that presented the European experience as the only possible grounds for the establishment of 'equal' relations between polities, or quite literally a standard of civilization. I will finally propose that legal orientalism, the medium of this misrecognition of the Other(s), can be destabilized through the resurgence of a Muslim subjectivity.

The Exclusive Club of States

The legal field unsurprisingly reproduces the biases that stem from the epistemic privilege of modernity (Cardinal 2016). This paradigm gives effect to a 'universalization' of a Eurocentric conception of the world (Chakrabarty 2000) and, most notably in international law, the statist bias or what international relations theory has called 'methodological nationalism' (Giddens 1984; Beck 2007; Chernilo 2010; 2011; Dumitru 2014). International law thus suffers from the very specific bias that ties it to the European experience, where the conceptual apparatus of the state is etiologically located as a foundational moment of Europe (Anghie 1996; 2005; Koskenniemi 2002; Bowden 2005). This bias originates in the myth of Westphalia (Michaels 2013; De La Rasilla Del Moral 2015), which inaugurated the state as the central legal actor of modernity, the medium through which this project becomes articulated (Ruskola 2013). The primary function of international law has since been to identify 'as the supreme normative principle of the political organisation of mankind, the idea of a society of sovereign states … by stating and elaborating this principle and by excluding alternative principles' (Bull 2002: 140). This section will flesh out how this project was given effect in the Islamicate world through specific technologies and modes of operation. My inquiry will focus on Persia in the nineteenth and twentieth centuries.

As already briefly proposed, 'international' law was a European creation that gave European authorities the epistemic privilege to decide which people stood on what side of the border of international legality. Its purpose was to define who was a subject, and who was not (the legal and the ill/legal) using epistemic criteria, or the standards, of the European Ego. The epistemic standard of modernity, the Cartesian Ego, gave a substantive blueprint of the 'rational subject' with the state becoming the extension of this ego in terms of inter-social legal subjectivity. To this effect, Judge Bedjaoui introduces his treatise on international law, by noting that,

[b]efore the First World War there was an "exclusive club" of States which created what has been called a "European International law" or a "European public law", which broadly speaking, governed relations not only among members of the "club" but also between them and the rest of the world. If the scope of this law, which was geographically specific, had a universal character, it had nevertheless been conceived simply for the use and benefit of its founders, the states that were called "civilized" (Bedjaoui 1991: 5).

As Anghie (1996) argues, what interested the early thinkers of the discipline was not so much the issue of order among a group of states but rather that of order amongst culturally different societies, an objective of inter-cultural regulations. In other words, what Vitoria and later thinkers were interested in is the *border* that separates culturally different societies, and the rules that regulate this border. As proposed by Bedjaoui, international law imposes itself as a relational structure between the 'club,' the civilized, and its Other(s). The lands of the Islamicate world, those organized independent polities informed by, but not reducible to Islam (The Ottoman Empire and Persia) (Hodgson 1974), remained on the periphery of this select club of European nations. Their interactions with the imperial powers,

however, were still informed by the European conceptions of international law.

I contend that it was the shared experience with Eurocentric 'legality,' articulated around the principle of equality amongst sovereigns, that was one of the determinants of the discipline's internationalization — the relational claim that instituted a dividing border. Equality amongst sovereigns was then not a substantively neutral ethical principle. Sovereigns had to follow a certain pattern that replicated the European experience to attain this status. This is what I claim is the Orientalist mode of operation of international law, the translation of Orientalist biases in legal variations that misrecognize and thus *create* the Orient, inscribing international law into the project of modernity/coloniality. The cannons of eighteenth and nineteenth century European sciences articulated such a bias, notably found in anthropology in the opposition between the modern and the traditional. This dichotomy opposed Western democracy and Oriental despotism, and enshrined the underlying essential opposition of the West and Islam, making the latter's 'backwardness' determined by the former. Montesquieu's *Lettres Persanes*, amongst others, substantiated claims that the despotic kingdoms of the East were in fact lands of lawlessness, creating the East as such, and thus justifying their subtraction from the privileges of a European community and therefore from sovereign equality. This binary denotes the idea that modernity, defining itself as a more advanced historical phase, happens;

when one sheds the substantive limitation imposed by traditional values and ways of life. Substantive values limit one's access to a wider field of possibilities; the widest field of possibilities is correlated to an "empty" self, defined by its formal role of maximizing chosen satisfactions or attaining its goals with greatest efficiency (Kolb 1986: xii).

The modern/colonial project and its modes of operation are then means of creating a Self, opposed to an Other or Others that are created through the same process.

My proposition is that the Orientalist mode of operation of international law was furthered by specific legal technologies that were used specifically to discipline what Europe perceived as its lawless periphery, to make into a reality the Other(s) it created. European legal imperialism, I claim, was grounded in the usage of certain international legal documents to foment particular changes in the Islamicate world — changes that were geared to the particular experience of Europe. In this short development, I will focus primarily on the very specific legal effects produced by the *capitulations* system implemented in the lands of Persia by Russia and Great Britain. This usage of specific legal terms and forms transposed the modern/colonial project in international law, as a means to regulate relations with those polities that were not directly colonized and thus could not be directly manipulated into imperial geographies, such as Persia or the Ottoman Empire. What I am also interested in is the effect of such technologies not merely on the 'international' or external sphere, but also and most importantly the internal dimensions of the affected societies. My hypothesis is that the feeling of self-loathing of the colonized described by Fanon (1965) — what Maldonado-Torres further theorized as the 'coloniality of Being' (Maldonado-Torres 2007) as the lived experience of encounter with the imperial power — was the effect of the apparatus of legal Orientalism. Ill/legality forced on the Persian subject the full force of this feeling of self-loathing. Ill/legality is then a socio-political construction of wretchedness that could only be 'cured' by resorting to the means and methods of modernity made available by international law.

Westphalia and Secularism

Due to the importance of Islam in the East, the modern/colonial project then required the means of instituting a relationship with this reality. International law had to propose a way of *creating* the backwardness of the Eastern Others' reliance on religious knowledge, which the Westphalian birth of secularism allowed. Equating the conception of the state with the Treaty of Westphalia and its enshrinement of the principle of religious tolerance further led to an equation of state and secularism. The state and its institutions could not, after the violent religious wars that devastated Europe, be derived from religious legitimacy, nor be affiliated to any particular sectarian identity. Proto-international law shifted from a secular transcendent naturalist jurisprudence before Westphalia, to a secular positivist legal theory with thinkers such as Zouch and Gentili affirming that international legal principles were a*jus voluntarium* deriving from the consent and reason of sovereigns. Scholars from the Islamicate world have also proposed, following the Orientalist claims of Westerners, that the positivist mindset of international law originating in the post-Westphalian order distinguished it and gave it a 'universal' standing above the particular, and more traditional iterations of inter-social norms that were based in sacred narratives (Khadduri 1956; Bahar 1992). While

the pre-Westphalian system theorized by Vitoria and Grotius was Eurocentric, post-Westphalia positivism would have changed the biased premises of the system to make it stem from a 'universal science.' However, the methodological frame of both jurisprudential methods, the proto-modern and Westphalian, remain the same. Both systems of jurisprudence establish a clear divide, an epistemic barrier between the two separated poles — a 'dynamic of difference' (Anghie 2005). The two poles at play in this essay are the modern European and Islamic poles; the first mode of Vitorian/Grotian jurisprudence situated the sources of natural law in the customary practices of the civilized societies of Europe, while the second Westphalian positivist jurisprudence found the norms of international law in the 'raison d'état' of states based on a secular European model. In other words, the roots of international law are, all the way down, Eurocentric in that they propose the radical otherization of the religious.

Beaulac claimed that after Westphalia the concept of sovereignty, whether an actual reality or not, became the keystone of the discipline and the means by which the organizing structural elements of Empire imposed themselves on the world. It became the central signifier according to which relations between (European) nations were given meaning (Beaulac 2004). The national sovereign then maintains a vantage point in the translation of the project of modernity/coloniality in international law as the normative core that establishes the norms and authorities, the metanarrative structure that defines its own epistemic privilege. The state becomes the cognizing Ego from which international law is made. It is the central pole that produces meaning about the world, giving it an ethereal appearance outside of its Eurocentric geo-epistemic origin (Castro-Gómez 2005; 2007; Mignolo 2009). Westphalia and modern European sovereignty thus *created* a reality whose meaning made sense only in a world of 'sovereign equals' — that of European states. Outside of it, beyond the 'border,' was lawlessness, which needed to be disciplined into the cannons of the statist paradigm. Sovereign equality was then not an ethical premise but rather a substantive set of criteria that replicated the European experience, whose actual existence was to be 'observed.' The parameters of Westphalia then define how a particular colonial experience can be scientifically or positively observed as having attained the status of a 'universal' modernity.

This epistemic barrier, while establishing the backwardness of the Islamic ways of understanding the world and regulating it through norms, also hints at the idea that Muslims in themselves, because of their religion and their legal system, are a backward people that cannot comprehend the principles of modern international law. A French foreign agent in Istanbul wrote to the International Committee of the Red Cross in 1868, concerning the Ottoman adhesion to the 1864 Geneva Convention, that

[o]n a, dans toute affaire, à lutter à Constantinople contre une force d'inertie dont rien ne peut donner l'idée; et il faudrait des efforts inouis pour obtenir la formation sur le papier d'un comité qui ne fonctionnerait jamais et dont les Turcs ne comprendront jamais l'utilité, eux qui ramènent tout à la Providence et n'admettent pas qu'on cherche à se soustraire à ses décrets (Boissier et al. 1978: 288).[1]

The underlying rationale of the encounter between the modern and its Islamic Other(s) is that secularism is the driving force of normative progress, of the legal possibility of civilization as the 'inertia' created by religion. The Ottoman reliance on 'la Providence' is what holds back the people of the Islamicate world. Societies that lack secularism are contrasted with its presence in the West, and the presence of religion in the face of modern secularism is equated with the backwardness of a society.

The underlying claim of this rationale is thus that sacred narratives cannot sanction ontological claims, or a claim to legal subjectivity (for an ontological possibility in law), for they lack the epistemic criteria required by positivist jurisprudence, namely the reliance on the observation and apprehension of 'natural phenomena.' In other words, sacred narratives lie on the *wrong side of the border*. The state is the European direction of a society's existence through its ownership of land and organization of a population under a political authority derived from mankind. Religion, and more specifically Islam, cannot rely on its principle of divine vice-regency to attain a claim to sovereignty as legal subjectivity. Secularism then asserts that law and legal subjectivity cannot be derived from religious sources, for they would lack the objectivity required by science for the voicing of a claim. The Ottoman Empire and Persia, because of their reliance on an Islamic signifier and their lack of the universal civilizing value of secularism, could not be part of the 'exclusive club of states' that Bedjaoui identifies. The pernicious element of this argumentative structure is that it proposes that the only way to attain legal subjectivity is by imitation and replication

of the historical experience of Europe.

Capitulations in service of Empire

Starting with Persia's defeat to Russia in 1828, and the ensuing treaty of Peace and Commerce of Turkmanchay that sealed relations between the two nations, Persia granted Russian diplomatic representatives, in the peace dispositions, the rights of extraterritorial jurisdiction over Russian nationals in Persia (Hurewitz 1956: sec. 10). Moreover, the commercial treaty, in article II, established that contracts, bills of exchange, and bonds between Russian and Persian subjects were to be registered before both a Russian consul and a Persian *hakem* (governor). Those further legal measures also granted special courts and various commercial privileges to Russians in pursuit of legal matters, going as far as conferring Russian officials jurisdiction over Persian individuals in criminal cases in which they were incriminated (ibid.: sec. 8). Consequently, sovereign Persian authorities had no power over Russian-*protected* subjects, except in cases provided for under an agreement. The Turkmenchay model was then extended to other foreign nations — most importantly Great Britain in 1841 (ibid.) and then Belgium, Germany and France — so much so that capitulations were signed with most European powers by the end of the nineteenth century. Now, while the fairly similar capitulation texts did not provide for the establishment of mixed courts, British and Russians dignitaries forced Persia under political pressure to establish such tribunals at its own costs. At the turn of the century, the submission of Persian jurisdiction under capitulations — with legal protections accorded to foreigners and their protected individuals[2] — amounted to relegating Persia to a sort of semi-colonial status (Hershlag 1964).

Underlying this dispensation from jurisdiction is the idea that the laws of Persia were inappropriate for Europeans who lacked knowledge of them and were not Muslim. Interestingly, Western thinking limits the traction of Islamic norms and knowledge to that of a socially constructed and thus relative 'culture' or 'tradition' against the universal possibility of modern law. The famous English legal scholar John Westlake explained the logic of capitulations on the basis that the societies of Turkey and Persia were differing from those of Europe, and that 'Europeans or Americans in them form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection' (Westlake 1894: 102). From this, the feeling of foreigners towards the laws of the Islamicate world is self-explanatory; not only are its substantive norms lacking, but the system in itself lacks in integrity and form. The lacking Islamic legal systems of the Ottoman Empire and Persia required a replication of European norms and guarantees and the establishment of a model of European governance in order to ensure the rights *of Europeans* when they lived and traded in those lands (Anghie 2006). Capitulations and the logic of extra-territoriality were then the legal technologies that allowed Europeans to legally *create* the invalidity of religious norms through legal orientalism and also rectify it. Modern law, by being interested mostly in the rights of Europeans in the lands of the Other, established in parallel a logic of colonial obliteration of the ontological legal possibility of Muslims. Indeed, because an Islamic legal subjectivity was denied the status of an ontological possibility, Muslims could only attain an equal status by accepting the standards of the Eurocentric law.

As a matter of fact, the *Mashruteh* (Constitutional) Revolution provides a case in point in the development of the ensuing variance of self-Orientalism in Persia. The land of the Qajar Shahs was the first in the Islamicate world to change its governmental system to a parliamentary democracy founded on a constitution based on the Belgian model. The adoption of a Western legal form of this importance, as a foundation of society in the last years of the Qajar era, unavoidably led to the adoption of a Western legal system to supplement it. Necessarily, this process led to the consequent eviction of Islamic law from the fields of public law at the national and international levels. Inevitably, this new system relegated Islam, like in many other states in the region, to mere private and doctrinal concerns (Bedjaoui 1992). This new constitution then institutionalized Persia's total submission to the legal imperatives of the modern West, consecrating the lesser status of Islamic law. The *Supplementary Laws* clearly stated that the 'Supreme Ministry of Justice and the judicial tribunals are the places officially destined for the redress of public matters,' as opposed to the religious tribunal that have jurisdiction only under ecclesiastical matters (Pirnia et al. n.d.: sec.71). It is clearly stated that political and civil matters are to be judged under the rules and tribunals provided by the Ministry of Justice (ibid.: secs. 72–73). Moreover, while it must be stated in all due fairness that articles 1 and 2 of the *Supplementary Laws* did recognize that Islam was the religion of Persia, and that all laws were

to be approved by a committee of Shi'i clerics, those measures only reproduced legal Orientalist imperatives highlighted earlier. Indeed, the *Supplementary Laws* clearly established that the Islamic legal framework was to remain secondary to the new modern imports; laws adopted by the legislature did not have to be *Islamic*, but rather only had to be 'conformable' to Islam (ibid., sec. 2). The original normative framework of the legislature was then not derived from Islam, but from a purely secular vision of the state. In other words, laws could be un-Islamic, while not being *against* or *contrary* to Islamic law.

Indeed, the achievement of what was perceived as a certain level of sovereign equality required polities to accept the epistemic categories and criteria of the West, and thus to perceive their own episteme and their own Being as flawed. The Islamic 'Self' of Persia was then undermined and negated through the effects of capitulations, a legal technology that sought to replicate the legal episteme of European modernity in order to serve the interests of Empire. Extra-territorial jurisdiction explicitly enforces a system of exception as it provides for an externally imposed exception to the local legal system, and thus to its normative core, the principle of sovereign authority. It would appear from this that non-European polities were sovereign only insofar as they replicated the model of the European sovereign and only insofar as they submitted to the Eurocentric canons of modernity. Indeed, 'through the western gaze, oriental laws became essentialised, homogenised, exoticised, distanced, contrasted and made to look primitive and backward by the standards of European laws' (Tan 2013: 5–6).

Conclusion

As proposed earlier, the conception of the 'border' maintains a very symbolic role in international law, both in the sense of its 'real' field (i.e., its *conception* of reality), and in the sense of its disciplinary boundaries. Modern international law is that structure which institutes this border between the legal and the ill/legal. The epistemic privilege that modernity confers to it allows international law to define its own borders, its field of application. In other words, it determines what constitutes a subject or an object of international law, and what does not as well as which situations fall within its application and which situations do not. Modern international law, by its inception with Westphalia has, as I have argued, instituted one such border between the secular and the religious, a criteria based on an Orientalist mode of operation — i.e., a set of biased premises that *create* the wretchedness of the Other(s). This criterion then institutes a set of premises on which the norms of international law and its technologies articulate the relational structure that interacts with the border. International law then creates the border from its epistemic privilege and by doing so reproduces the Eurocentric biases at its roots in its relational structure.

As a conclusion, I would like to propose, however, that this Eurocentric international legal project is fundamentally and critically unstable (Fitzpatrick and Tuitt 2004; Pahuja 2011). Indeed, because of its reliance on a 'dynamic of difference,' a relational structure articulated around the *border* epistemic divide, it is a *critical threat* to itself (in the sense of critique), pointing to its own illogical claim to universality and rejection of the Other(s). It is also fundamentally a *critical constitutive element* of itself, in that its creation of its own borders and rejection of the Other(s) is fundamental to its reproduction. The denial of ontology and the epistemic violence that results from international law's dynamic instability is a specific character of the project of modernity/coloniality transposed in the West's incapacity and, to an extent, refusal to acknowledge or account for the specificities of the East and its normative ways of understanding the world and its agency. I claim that the instability of international law then is fundamentally based on its modern roots, and its refusal of the possible 'coevalness' (Rosa 2014: 857; see, also, Mignolo 2012) of other social existences, forms, and knowledges — a process that underlies modernity.

In short, international law is premised on a hierarchical organizing of cultures based on the centrality of the experience of Europe as the epistemic and ontological arm of the imperial project. International law is then critically unstable at its core because its own biases undermine its claims to universality (especially the democratic claims of liberal institutional international law centred on the United Nations system), a dichotomy that is however central to the reproduction and constitution of the field. Moreover, as I have proposed, this critical instability is a threat to the structure itself, pointing to its inherent deficiency, and thus how claims to 'equality in difference,' or pluriversalism, could be destructive to the inherent contradictions of the international law. As a question for further inquiry, an analysis of resurgent claims to this 'equality in difference,' such as that which my other research endeavours have found in the Islamic Revolution of Iran, could provide avenues for dismantling and rearranging the contradictions of

international law. A hypothesis I would like to frame on that matter would be that the wretchedness created by modernity cannot be cured by relying on the premises of the structure that create it (international law and sovereignty), but only by not accepting (but not necessarily wholly rejecting) the Master's frame of thought. This entails a reappropriation of this modernity, an epistemic disobedience that rejects the epistemic claims of modern international law, and subverts them by enriching one's own being, an 'identité-relation' (Glissant 2009), and not in rejection, which is the frame of thought of imperial modernity. I would conclude then on the necessity for a resurgence of the Muslim Being in international law with a short quote from Sayyid Qutb's *Milestones*, which speaks to the necessity of a self-referential nature of this resurgence to avoid the ontologicidal urges of international law: 'There is no nationality for a Muslim except his creed which makes him a member of the Islamic Ummah in the abode of Islam' (Qutb 2006: 103).

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Notes

[1] "We have, in all affairs in Constantinople, to struggle against a force of inertia that no words could accurately reflect; it would require incredible efforts to obtain, on paper, the formation of a committee that would never function, and of which the Turks would in any case never understand the utility thereof, as they refer everything back to Providence, and cannot admit that anything could be subtracted from its ordinances" (author's translation).

[2] This often included Persian political actors and, in the early twentieth century, Mohammad Ali Shah Qajar himself after his ouster by the *Majlis* the Iranian parliament.

About the author:

Pierre-Alexandre Cardinal graduated from Law School at the University of Ottawa in both Civil and Common law, with a previous degree in Development Studies. His current projects include the conclusion of a Master of Law degree at McGill University. His thesis is a (decolonial) inquiry into the nature of the legal relations between Persia and Europe in the nineteenth and early twentieth century. This is a first step in a larger research project questioning the underlying assumptions of Eurocentric international law, and more specifically its 'ontologicidal' ambivalences in its relations with the 'periphery' of Europe. Pierre-Alexandre is also engaging in a post-colonial and post-humanist critique of international environmental law.