

# Assumptions for a Decolonial International Law: A manifesto

## Supuestos para un derecho internacional decolonial: un manifiesto

## Hypotheses pour un droit international decolonial: un manifeste

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**Abstract:** Based on the recognition that International (modern) Law is a tool that allows for the construction of coloniality and the maintenance of the abyssal line, this text aims to conduct a transversal dialogue that enables a new understanding of the International Law, presenting it, alternatively, as a tool of social regulation that allows breaking with the exclusions and inequalities. For that, we propose a dialogue between decolonial authors, TWAILers and counter-hegemonic critics, enabling an epistemological encounter to think about alternatives to the Eurocentric rationality of International Law from another *locus*: the Latin American, therefore presenting the assumptions to consider a decolonial International Law.

**Keywords:** Decolonial theories, Transversion, International Law, TWAIL.

**Resumen:** Partiendo del reconocimiento de que el Derecho Internacional (moderno) es una herramienta que permite la construcción de la colonialidad y el mantenimiento de la línea abismal, este texto pretende realizar un diálogo transversal que posibilite una nueva comprensión del Derecho Internacional, presentándolo, alternativamente, como una herramienta de regulación social que permita romper con las exclusiones y desigualdades. Para ello, proponemos un diálogo entre autores decoloniales, TWAILers y críticos contrahegemónicos, posibilitando un encuentro epistemológico para pensar alternativas a la racionalidad eurocéntrica del derecho internacional desde otro locus: el latinoamericano, presentando así los presupuestos para considerar una derecho internacional decolonial.

**Palabras-clave:** teorías decoloniales, transversión, derecho internacional, TWAIL.

**Résumé:** Partant de la reconnaissance que le droit international (moderne) est un outil qui permet la construction de la colonialité et le maintien de la ligne abyssale, ce texte vise à mener un dialogue transversal qui permet une nouvelle compréhension du droit international, en le présentant, alternativement, comme un outil de régulation sociale qui permet de rompre avec les exclusions et les inégalités. Pour cela, nous proposons un dialogue entre auteurs décoloniaux, TWAILers et critiques contre-hégémoniques, permettant une rencontre épistémologique pour penser des alternatives à la rationalité eurocentrique du Droit International à partir d'un autre locus: l'Amérique latine, présentant ainsi les hypothèses pour envisager un Droit Internationale Décoloniale.

**Mots-clés:** Théories décoloniales, Transversion, Droit internationale, TWAIL.

**Summary:** I. *Introduction*. II. *The World-System as a Legitimizing Model of Exclusion*. III. *Coloniality in International Law as a Support for Abyssal Exclusions*. IV. *Conclusion*. V. *Bibliography*.

## I. Introduction

Classical International Law alludes to the liberal policies of modernity, considered as an exclusively European phenomenon developed at the time Europe affirmed itself as the “center” of World History, relegating the rest of the world to (its) periphery. This idea is called by Dussel<sup>1</sup> the “Myth of Modernity”, which, according to Anghie<sup>2</sup>, has justified violence and reaffirmed the Eurocentric hegemonic discourse of International Law, allowing the emer-

<sup>1</sup> Dussel, Enrique, *1492 - O encobrimento do outro: A origem do mito da modernidade*, tr. Jaime A. Clasen, Petrópolis, Vozes, 1993.

<sup>2</sup> Anghie, Antony, *Imperialism, sovereignty and the making of International Law*, Cambridge, Cambridge University Press, 2004.

gence and conservation of inequality, as well as refusing the participation of the Global South in the very construction of this branch of Law.

As pointed out by Maldonado-Torres, Western Modernity is treated as a characteristic that is exclusive of European Society, Western Modernity is often regarded as an exclusive trait of European society, marking a distinction from the rest of the world in terms of cultural, political, and economic considerations.<sup>3</sup> Therefore, it would be decisive to characterize the non-European as wild, primitive and less civilized. It is true that Europe was only built as modern due to the “discovery” of the Americas and from the conquest and exploitation of the New World<sup>4</sup>. So, coloniality is obscured by the discourse of Modernity.<sup>5</sup>

Latin America is therefore the place where the coloniality of power emerged, acquiring substance and form.<sup>6</sup> Its social classification system is based on the idea of race, of “conquerors” over “conquered” and its structural base is linked to modernity and Eurocentric capitalism<sup>7</sup>. The persistence of the aegis of the colonial matrix of power in contemporaneity demonstrates that, although colonialism has practically come to an end, coloniality marks the asymmetrical relations of contemporary power relations.<sup>8</sup>

<sup>3</sup> Maldonado-Torres, Nelson, “Analítica da colonialidade e da decolonialidade: algumas dimensões básicas”, in Bernardino-Costa, Joaze *et al.* (eds.), *Decolonialidade e pensamento afrodiaspórico*, Belo Horizonte, Autêntica, 2020.

<sup>4</sup> *Idem.*

<sup>5</sup> Mignolo, Walter, *Histórias locais-projetos globais: colonialidade, saberes subalternos e pensamento liminar*, Belo Horizonte, Editora da UFMG, 2020.

<sup>6</sup> It does exclude United States and Canada because this countries, despite the fact they were also colonized by Europeans, now compose what we understand as the Global North, taking part in the control of other peoples through norms and actions that disregard their interests, solely looking at their own. For examples of these countries’ participation in the exploration of the Global South, see Bragato, Fernanda Frizzo and Silveira Filho, Alex Sandro, “The colonial limits of transnational corporations accountability for Human Rights Violations”, *ThirdWorld Approaches to International Law Review*, vol. 2, 2021, pp. 34-58.

<sup>7</sup> Walsh, Catherine E., “The Decolonial For Resurgences, Shifts, and Movements”, in Walsh, Catherine E. and Mignolo, Walter (eds.), *On decoloniality: Concepts, analytics, praxis*, Durham, Duke University Press, 2018.

<sup>8</sup> Bragato, Fernanda Frizzo, “Discursos desumanizantes e violação seletiva de direitos humanos sob a lógica da colonialidade”, *Quaestio Iuris*, vol. 9, no. 4, 2016, pp. 1806-1823, <http://doi.org/10.12957/rqi.2016.21291>

In this context, International Law, as inferred from the dialogue conducted by Maldonado-Torres<sup>9</sup> with Bowden<sup>10</sup>, was a colonial tool used in three main biases: (A) to reaffirm the absence of sovereignty and, therefore, of civilization in the New World; (b) to legitimize the European civilizational project, distinguishing the European from being-of-the-colony and; (C) to legitimize, also, the conquest and exploitation of the dominated territories.

The realization that International Law is a product of modernity is what enables us to understand why Tourme-Jouannet<sup>11</sup> regards it as a cultural product of Western/European thought, which aims to govern an heterogeneous international society, characterized by the unequal way of distribution of resources between states and populations and by the disparity between individuals in terms of wealth, liberties and well-being. (Modern) International Law is then conceptualized as an instrument of international politics, a set of rules, discourses and techniques that [certain] international subjects and actors use to regulate [international] relations and achieve certain social purposes<sup>12</sup>, which do not contemplate the interests of the international community as a whole, but only of a few influential and powerful voices, which are geographically situated in the North.<sup>13</sup>

Thus, it is recognized that modern International Law is indeed a colonial tool that is used to control the international order as per the interests of the Global North, being this its common function. However, our hypothesis is that this is a problem that must be circumvented, and that International Law can offer *other* perspectives too. Hence, this text aims to conduct a transversal dialogue that allows the understanding of International Law as a tool of social regulation that breaks with the exclusions and inequalities generated

<sup>9</sup> Maldonado-Torres, Nelson, “Analítica da colonialidade...”, *cit.*

<sup>10</sup> Bowden, Brett, *The empire of civilization: the evolution of an imperial idea*, Chicago, University of Chicago Press, 2009.

<sup>11</sup> Tourme-Jouannet, Emmanuelle, *Le Droit International*, Paris, Presses Universitaires de France, 2013.

<sup>12</sup> *Idem.*

<sup>13</sup> Okafor states that the traditional international normative system implies keeping the *status quo* and, therefore, it tends to disqualify and silence any alternatives that escape from this epistemological perspective. Okafor, Obiora Chinedu, “Newness, imperialism and international legal reform in our time: a TWAIL perspective”, *Osgoode Hall Law Journal*, vol. 43, num. 1, 2005, pp. 171-191, <https://digitalcommons.osgoode.yorku.ca/ohlj/vol43/iss1/7/> (accessed 30 march 2022).

and kept by coloniality, thus allowing other normative prescriptions to arise, especially those coming from the Global South. In other words, our objective is to point out that *decolonial* international law has the function to opening up International Law in the sense of including other visions--that were until a not-so-distant past being silenced--through a transversal dialogue.

Feitosa understands transversal dialogue to be a strategy aimed at abandoning hierarchical structures and promoting knowledge hybridized by differences<sup>14</sup>. The idea of a transversal dialogue should not be confused with a mere inversion, since it is not a mere reaction or a reversal of the poles, which would transform the dominant into dominated and the dominated into dominant, but rather allows a mutual crossing of ideas, abandoning hierarchies and priorities. It is, therefore, through the transversality generated by a genuine intercultural dialogue that a decolonial international law may emerge, capable of breaking with the social hierarchy maintained simultaneously by coloniality and imperialism; both of which promote, within the international legal system, inequalities, exclusions and injustice.

A decolonial international law can, in addition to a critical discourse<sup>15</sup>, serve as an act of epistemic qualification capable of challenging hegemonic knowledge, affirm the existence of the Global South, bringing to dialogue--or to the border, as Mignolo<sup>16</sup> would say--knowledge, stories and rationalities made invisible by the logic of modern Eurocentric coloniality. This train of thought evidences the colonial logic of Modernity and exposes the dialectic of power and exclusion, understanding the dynamics of the international law built under such auspices, since it is essential when looking for alternatives to what is today exclusionary and exclusive.

That is so because decolonial International Law does not intend to be seen as a finished and taxing project, but rather an *option* that is in constant transformation precisely as it nourishes from historical and cultural experienc-

<sup>14</sup> Feitosa, Charles, "Transverter as culturas", *O povo*, 2014. <https://www20.opovo.com.br/app/colunas/filosofiapop/2014/07/14/noticiasfilosofiapop.3281249/transverter-as-culturas.shtml> (accessed 30 march 2022).

<sup>15</sup> The critical theory, as a pedagogical tool, promotes awareness of the processes that form a reality and allows us to reflect on alternative paths of society, that are nonlinear, repressive or alienated, and therefore emancipatory. Wolkmer, Antônio Carlos, *Introdução ao Pensamento Crítico*, 6ª ed., São Paulo, Saraiva, 2008.

<sup>16</sup> Mignolo, Walter, *op. cit.*

es<sup>17</sup> which introduce changes in the international legal system that match the desires and realities of the South. Thus, considering that the first step for this to occur is, according to the *Third World Approaches to International Law* (TWAIL)<sup>18</sup>, to expose the attributes of the international legal system that helped create or maintain the unjust, unreasonable and unjust global order<sup>19</sup>, and by adopting a descriptive and explanatory perspective, this study will first focus on the formation of the world-system and on the way this model contributed to the formation of modern international law, leading to a discussion about abysmal exclusions and their impact on the formation of a delegitimized legal order.

This text brings to the discussion authors such as Wallerstein and Dussel as well as others within a decolonial perspective-- Anghie, Chimni, Mutua, Pajuha from TWAIL-- and Boaventura De Sousa Santos abyssal thought as a counter-hegemonic scholar. After all, it is through the encounter between TWAIL and decolonial theories that we can find alternatives to the Eurocentric rationality of International Law from another epistemic *locus*, specifically the Latin American one, which is not commonly explored in theoretical approaches.

<sup>17</sup> Santos, Boaventura de Sousa, *A crítica da razão indolente: contra o desperdício da experiência*, 8ª ed., São Paulo, Cortez, 2011.

<sup>18</sup> It is not intended to generalize TWAIL with this statement. It is known that these approaches are plural, and include authors from different regions and different legal backgrounds, as alluded by Ramina and Galindo (2013). In fact, there is no consensus on whether TWAIL is a theory, a method or a movement. Despite this, it is worth mentioning that its authors have common assumptions, in particular, the European contribution to the formation of an imperial international law, which is not plural in its essence, dominating and silencing authors from the South. In fact, the divergence is in their objectives, whether they just note and question this past (TWAIL I), or list their consequences for sustaining vulnerabilities in the South (TWAIL II). Finally, it should be noted that this very division is questionable, as Galindo (2022) alludes to. Ramina, Larissa, "Framing the concept of TWAIL: 'Third World Approaches to International Law'", *Revista Justiça do Direito*, vol. 32, num. 1, 2018, pp. 5-26, [doi.org/10.5335/rjd.v32i1.8087](https://doi.org/10.5335/rjd.v32i1.8087); Galindo, George Rodrigo Bandeira, "Dividindo as TWAIL?" in Cardoso, Tatiana Squeff & Damasceno, Gabriel Pedro Moreira (eds.), *Direito Internacional Crítico*, Belo Horizonte, Arraes, 2022; Galindo, George Rodrigo Bandeira, "A volta do terceiro mundo ao direito internacional", *Boletim da Sociedade Brasileira de Direito Internacional*, vol. 1, num. 119-124, 2013, pp. 46-68, <https://silo.tips/download/a-volta-do-terceiro-mundo-ao-direito-internacional> (accessed 30 march 2022).

<sup>19</sup> Okafor, Obiora Chinedu. *op. cit.*, p. 176.

## II. The World-System as a Legitimizing Model of Exclusion

From Wallerstein's point of view, it is possible to carry out very important theoretical insights for the structuring of a decolonial international law, especially regarding the conceptualization and characterization of the world-system where modern international law was conceived, pretending to assert its precedence. In this case, such architecture was notably based on the participation of Latin America as a fundamental piece for the development of the modern world-system.

By world-system, according to Wallerstein<sup>20</sup>, it is understood that there is a social system that has limits, structures, associated groups, and rules of legitimacy and coherence. For the author, the system's life is made of the forces in conflict that hold it together by tension and tear it to the extent that each of the groups eternally seek to reshape him to his advantage<sup>21</sup>. As it will be shown in the course of this topic, one of the points that Wallerstein<sup>22</sup> presents is that, despite the changes that have occurred in the system, some characteristics remain stable, such as the search for centrality to use it as best suited. It has always been played--to a greater or a lesser extent--by the Europeans, which launched themselves as the central point of the world-system when they arrived in the Americas in 1492--in the moment of the "birth" of modernity.<sup>23</sup>

Moreover, Wallerstein's<sup>24</sup> idea of a world-system is based on four moments of the modern age: the first one limited to Europe (1450-1640); the second one, of its consolidation (1640-1815); the third, considered the moment of expansion, when there is a conversion of the world-economy into a global enterprise that makes possible the technological transformation of modern industrialism (1815-1917); and a fourth moment of consolidation of modern

<sup>20</sup> Wallerstein, Immanuel, *O sistema mundial moderno*, tr. Carlos Leite *et al.*, Porto, Afrontamento, 1974, vol. I.

<sup>21</sup> *Idem.*

<sup>22</sup> *Idem.*

<sup>23</sup> Dussel, Enrique, *1492...*, *cit.*; Dussel, Enrique, "Beyond Eurocentrism: The world-system and the limits of modernity", Jameson, Fredric & Miyoshi, Masao (eds.), *The cultures of globalization*, Durham, Duke University Press, 1988, pp. 3-31; Dussel, Enrique, "Transmodernidade e interculturalidade: interpretação a partir da filosofia da libertação", *Sociedade e Estado*, vol. 31, num. 1, 2016, pp. 51-73, <https://doi.org/10.1590/S0102-69922016000100004>

<sup>24</sup> Wallerstein, Immanuel, *O sistema mundial moderno...*, *cit.*

capitalist world-economy since 1917, that comprehends the Revolutionary tensions caused by this consolidation.

Wallerstein<sup>25</sup> states that in the period between the end of the fifteenth century and the beginning of the sixteenth century a European world-economy emerged. This new formation differed from the old empires (understood as a political unit), although it had similar characteristics: “it was not an empire, but, nevertheless, it was as extensive as a great empire and shared some of its characteristics”<sup>26</sup>. The new kind of social system was an economic entity, not a political one, unlike empires, city-states and nation-states. Wallerstein,<sup>27</sup> however, warns that it contained precisely within its limits (it is difficult to say borders) rising empires, city-states and nation-states.

It was thus a world-system not because it included the participation of all, but because it was broader than any legally defined political unit.<sup>28</sup> It was a world-economy on account of the basic connections between the parts of the system being made through economic links, although they were reinforced to some extent by cultural ties and eventually by political arrangements and even Confederate structures, in such a way that, in the sixteenth century, the European world-economy could already be understood as based on a capitalist mode of production. For Wallerstein,<sup>29</sup> the establishment of a capitalist world-economy would contemplate three essential pillars: an expansion with a geographical dimension of the world; the development of differentiated methods of labor control for different products and different areas of the world-economy; and the creation of relatively strong taxation apparatuses of domination in the central entities--and these characteristics are fulfilled in/by Europe.

Moreover by 1650 the basic structures of capitalism as a viable social system had already been consolidated<sup>30</sup>. This is not only because there were rules that supported this model, but they were also imposed on everyone. As much as Wallerstein<sup>31</sup> argues that the emergence of the states as sovereign entities is a myth in that no political entity could be autonomous, but are part of an inter-

<sup>25</sup> *Idem.*

<sup>26</sup> *Idem.* See p. 25.

<sup>27</sup> *Idem.*

<sup>28</sup> *Idem.*

<sup>29</sup> *Idem.*

<sup>30</sup> Wallerstein, Immanuel, *Capitalismo histórico e civilização capitalista*, tr. Renato Aguilar, Rio de Janeiro, Contraponto, 2001.

<sup>31</sup> *Idem.*

state system, this system corresponded to a set of rules within which states had to operate, and a set of legitimations without which they could not survive.<sup>32</sup>

The rules of this system, therefore, were not defined by consent or consensus, and depended only on the willingness and the capacity of the strongest states to impose them. Despite this, no state (as a political system), in an isolated way, could succeed in conquering all the others, thus transforming itself into a world-empire,<sup>33</sup> since this would meet the interests of capital. These are fundamentally opposed to a transformation, having in their favor the possibility of thwarting the designs of their own state apparatuses through alliances with other state apparatuses, thus balancing the power in the *core* of the system.<sup>34</sup> The margins,<sup>35</sup> which also form the world-system where the

<sup>32</sup> *Idem*.

<sup>33</sup> It is important to note that, as much as Wallerstein rejects the idea of a world-empire (common political system), he does not dismiss the idea of a hegemonic power, precisely because this would be a systemic imposition so that unity does not degrade into a world empire. Thus, the hegemonic power is the one that is distinguished by prominence (command, leadership and influence) in this space, even if it cannot fully control it, due to the particularity of the world-system: it is uncontrollable by a single imperial power within the framework of capitalism. Although hegemonic power is the promoter and guarantor of order, it is immersed in a highly competitive [economic] dynamic among states, the interstate system, composed of sovereign political entities. This gear is not closed, and there may be mutations, among the various layers of the international division, which configures between center, semi-periphery and periphery. Osorio, Luiz Felipe B., “Wallerstein, Arrighi e Amin: O Imperialismo no Capitalismo Fordista”, *Austral: Revista Brasileira de Estratégia e Relações Internacionais*, vol. 9, num. 18, 2020, pp. 66-86, at 74. <https://www.seer.ufrgs.br/austral/article/viewFile/95494/60231> (accessed 30 march 2022).

<sup>34</sup> Wallerstein, Immanuel, *Capitalismo histórico...*, cit.

<sup>35</sup> Intermediate and peripheral countries would be in the margins. Those are countries [that] make the system more politically stable due to the fact that they are both exploitative and exploited. Part of the surplus produced in these middle strata is appropriate in the center, but the semi-periphery also appropriates part of the surplus produced by the last structural position of the world-system. However, [the] periphery presents a capitalist dynamic, driven mainly by the dynamics that come from the accumulation of the center. The dynamic impulses along several systemic cycles of accumulation led to the formation of enslaved societies in *Latin America* [emphasis added] (...), mainly to meet the needs of accumulation arising from the center. Grazziotin, Henrique de Abreu, “O processo histórico de formação do sistema-mundo capitalista e sua dinâmica: uma interpretação baseada em Braudel, Marx, Arrighi e Wallerstein”, *Economia Ensaios*, vol. 34, num. 1, 2019, pp. 5-34, at 31. <https://doi.org/10.14393/REE-v34n1a2019-40899>

world-economy is projected, served to supply the hegemonic power through the appropriation of its surplus and guarantee its stability.<sup>36</sup>

From the nineteenth century, the liberals heralded a new era of dominant ideology of the long-standing capitalist world economy, which possessed a great belief in the idea of progress, allowing to ignore and discard the negative consequences of capitalism, based on the idea that its benefits<sup>37</sup> (in particular, industrial and technological) overcame losses<sup>38</sup>. International law has been proven to be an instrument for the realization of this project by the European elites, articulating rules and developing uniform global standards to

<sup>36</sup> This stability is maintained, first of all, [because] there is a tendency of concentration of military power in the states of the center, either by technological development or by the exploitation of the periphery that weakens its state machine. The State on the periphery is weaker, according to Wallerstein, because it is less likely to have a coalition of classes to dispute hegemonic power and due to the coercion exerted by external interventions, either in war terms or through the diplomacy of states of the center. Furthermore, the existence of a middle stratum, the semi-periphery, ensures that there is no unified opposition to the center, politically stabilizing the system and oscillating between alliances and disputes with the central power. *Idem*. See also Wallerstein, Immanuel, “The Rise and Future Demise of World-Systems Analysis”, *91st Annual Meeting of the American Sociological Association*, New York, 1996, [https://enseignement.typpad.fr/printemps08/files/wallerstein\\_rise\\_and\\_future\\_demise\\_of\\_worldsystems\\_analysis\\_1997.pdf](https://enseignement.typpad.fr/printemps08/files/wallerstein_rise_and_future_demise_of_worldsystems_analysis_1997.pdf). Accessed 30 march 2022. And: Wallerstein, Immanuel, *The essential Wallerstein*, New York, The New Press, 2000.

<sup>37</sup> At this point, it is important to stress that Wallerstein does not deny that capitalism has brought a number of benefits to society, such as the progress in scientific and technological development (in spite of the lost knowledge due to the ideology of European universalism); the increase in the mechanical reach of humanity, which increases production (although he does not state whether this implies a reduction or an increase in the total energy applied to each individual —or to all, collectively— in time or over the course of life as a whole); a greater material comfort (in spite of the growing concerns about the definition of “quality of life”, on the other hand, with the recent concern with the anomie, alienation, and mental illnesses); and the massive growth of the human security against damages arising from the endemic hazards and erratic violence (that the author’s claims it may seem to be unquestionable on a micro level, in spite of the newly discovered dangers of the urban life —, but a questionable security at a macro level, due to the danger of a nuclear war — and we’ve added the incapacity of some States facing the COVID-19 pandemic, opting to defend the ideals of the liberals and the progress, over the lost lives, as it is the case of Brazil).

<sup>38</sup> Wallerstein, Immanuel, *Capitalismo histórico...*, *cit*.

facilitate the mobility and functioning of transnational capital,<sup>39</sup> which was especially sedimented with the end of the Soviet Revolution.<sup>40</sup>

According to Wallerstein,<sup>41</sup> a central ideological theme of the capitalist world-economy was that all states could, and would eventually, achieve a high level of national income from conscious and rational action, since this would be inevitable progress. Otherwise, after the end of the World War I<sup>42</sup>, the “white settlers” were the countries of Western Europe, that reached such development, eventually reinforcing the bifurcation of the world between center and periphery through a single [international] division of labor between the multiple cultural systems<sup>43</sup>, in which some eventually served others. And the identification of the roles to be played, for example, would not only come from the technological structure or even from the profit margins of specific products, but rather from the observation of wage patterns<sup>44</sup>, which

<sup>39</sup> Chimni, Bhupinder S., “Third world approaches to International Law: a manifesto”, *International Community Law Review*, vol. 8, num. 1, 2006, pp. 3-27, <https://doi.org/10.1163/187197306779173220>

<sup>40</sup> Wallerstein is skeptical about the support of the capitalist world-economy in the way he thought of since the 1970s, when he would have broken the liberal illusion that governs the world-system. According to the author, capitalism has reached the end of the line and can no longer survive as a system. The structural crisis that we are going through [in the 21st century] started a long time ago. According to [him], around the 1970s – and it will still last another twenty, thirty or forty years. It is not a one-year, or short-lived crisis: it is the great collapse of a system. We are in a moment of transition. In fact, in the political struggle going on in the world—which most people refuse to acknowledge—it is not a question of whether capitalism will survive or not, but what will follow it. And of course: there may be two extremely different points of view about what should take the place of capitalism. Wallerstein, Immanuel, “Homenagem a Immanuel Wallerstein: ‘O tempo em que podemos mudar o mundo’”, Interview by Sophie Shevarnadze, *Brasil de Fato*, 1 de Setembro de 2019, <https://www.brasildefato.com.br/2019/09/01/o-tempo-em-que-podemos-mudar-o-mundo> (accessed 30 march 2022).

<sup>41</sup> Wallerstein, Immanuel, “The Concept of National Development 1917-1989”, *American Behavioral Scientist*, vol. 35, 1992, pp. 517-529; at 4-5, <https://doi.org/10.1177/02F000276429203500409>

<sup>42</sup> World War I marked the triumph of liberal ideology, at the European and North American core of the world system. But it also marked the point at which the political division between the center and the periphery became evident. Wallerstein, Immanuel, “O fim de que modernidade?”, *Estudos de Sociologia*, vol. 2, num. 3, 1997, pp. 1-8, <https://periodicos.fclar.unesp.br/estudos/article/view/651> (accessed 30 march 2022).

<sup>43</sup> Wallerstein, Immanuel. *The essential...*, cit.

<sup>44</sup> Lima, Pedro Garrido C., “Posicionamento no sistema mundial e semiperiferia”, *Textos de*

sharpened the difference between center and periphery from the perspective of the one who plays a central role in the economy: the worker.

That is why Wallerstein<sup>45</sup> suggests that the capitalist world economy has developed an ideological structure of oppressive humiliation that has never existed before in relation to the individual himself. From the first moment of Modern Age, there was in the Americas a vast destruction of the indigenous populations and an abundant importation of labor, making it go through a process of peripheralization in this system<sup>46</sup>. What happened in the Americas, however, became the standard, a model for the world, intertwining four fundamental characteristics —coloniality, ethnicity, racism and the very concept of novelty—.

According to Quijano and Wallerstein<sup>47</sup> coloniality began from the creation of a set of states gathered in an interstate system of hierarchical levels, where those located at the bottom —on the periphery— were transformed into colonies. The authors emphasize that this situation, however, is only one of its dimensions, since ever after the end of the formal *status* of colony, coloniality persisted in the social and cultural hierarchies between the European (civilized) and the non-European (uncivilized; barbarian).

Coloniality refers to an essential element in the integration of the interstate system, creating not only a ladder, but also setting the rules for the interaction of States with each other<sup>48</sup>. The hierarchy, in this context, has been reproduced over the years and although there was the possibility for some States to ascend in the hierarchical classification, a change in its order would not alter the continuous existence of the very idea of categories.<sup>49</sup>

Quijano and Wallerstein<sup>50</sup> point out that it was the form of States —mainly the States of the Americas, that produced the conditions of coloniality, en-

*Economia*, vol. 10, num. 2, 2007, pp. 58-85, <https://periodicos.ufsc.br/index.php/economia/article/view/1851/1614>. Accessed 30 march 2022.

<sup>45</sup> Wallerstein, Immanuel, *Capitalismo histórico...*, cit.

<sup>46</sup> Quijano, Aníbal & Wallerstein, Immanuel, “Elementos del desarrollo, la Americanidad como concepto o América en el moderno sistema mundial”, *Revista Internacional de Ciencias Sociales*, vol. 44, num. 4, 1992, pp. 549-557, [https://unesdoc.unesco.org/ark:/48223/pf00000092840\\_spa](https://unesdoc.unesco.org/ark:/48223/pf00000092840_spa) (accessed 30 march 2022).

<sup>47</sup> *Idem*.

<sup>48</sup> *Idem*.

<sup>49</sup> *Idem*.

<sup>50</sup> *Idem*.

abling the emergence of ethnicity as a constituent element of the modern capitalist world system. Ethnicity is considered by the authors as the set of community boundaries that others put partly on us and partly we impose on ourselves, as a way of defining our identity and our position with the State. The authors claim that ethnicities are contemporary constructions implying, despite constant changes, all the general categories into which, today the world is divided —Native Americans or “indians”, “blacks”, “whites” or “Creoles”/Europeans, “mestizos”<sup>51</sup>— did not exist before the modern world system. They became the cultural matrix of the entire world system —ethnicity became an inevitable cultural consequence of coloniality—. <sup>52</sup>

Within the historical evolution of the modern world system, however, ethnicity was not enough to maintain the new structures generated from the end of formal colonial rule and the abolition of slavery, so ethnicity was reinforced by a conscious and systematic racism.<sup>53</sup> From the 19th century onwards, racism acquired a theorized and explicit guise, culturally sustaining an economic hierarchy, the consequence of which was to elevate some (European) States to the category of First World and their inhabitants to a higher level, as seen until the present day. This is what Quijano expresses:

<sup>51</sup> *Idem.*

<sup>52</sup> *Idem.*

<sup>53</sup> *Idem.*

The great program of liberalism was not to transform nations into a State, but to create nations out of States, which means that the strategy was to take those who were located on the borders of a State —initially the “subjects” of a sovereign king, and then the sovereign “people”— and transform them into citizens who identified with their own State. [...] However, one last crucial element in the task of creating a national identity should not be lost sight of: *racism, which unifies the race considered superior. Racism unifies that race within the State at the expense of some minorities excluded—in whole or in part—from their citizenship rights, and unifies the nation* (emphasis added); Wallerstein, Immanuel, “O fim de que...”, *cit.*, pp. 4-5.

In all previous historical systems, xenophobia had a basic behavioral consequence: the expulsion of the “barbarian” from the physical space of the community, society, the group that shared interests and attitudes, death being the extreme version of this expulsion. Whenever we physically expel the other, we gain the “purity” of the environment that we are likely to seek, but it is inevitable, at the same time, to lose something. We lose the workforce of the expelled person and, therefore, his contribution to the creation of a surplus that we could appropriate several times. This represents a loss for any historical system, but it is particularly significant in the case of a system whose structure and logic are built around the continuous accumulation of capital. Wallerstein, Immanuel & Balibar, Étienne, *Raça, nação, classe: as identidades ambíguas*, São Paulo, Boitempo, 2021.

The ongoing globalization is, first of all, the culmination of a process that began with the constitution of America and colonial/modern and Eurocentric capitalism as a *new pattern of world power*. One of the fundamental axes of this power pattern is *the social classification of the world population according to the idea of race, a mental construction that expresses the basic experience of colonial domination and which has since permeated the most important dimensions of world power, including its specific rationality, Eurocentrism*. This axis has, therefore, a colonial origin and character, but it has proved to be more lasting and stable than the colonialism in whose matrix which it was established. It implies, therefore, an *element of coloniality in today's hegemonic power pattern*.<sup>54</sup>

And in this context of the capitalist economy-world, modern international law ended up ratifying such relations of true subordination and internalization of the inhabitants of the periphery,<sup>55</sup> giving rise to its own concealment (coloniality of being)<sup>56</sup> and silencing (coloniality of knowing<sup>57</sup>), thus limiting its participation in the world-system and ratifying its *status* of non-civilized-these elements that contributed to the continuity of the European expansionist project also through law.<sup>58</sup>

<sup>54</sup> Quijano, Anibal, “Colonialidade do poder, eurocentrismo e América Latina”, Lander, Edgardo (ed.), *A colonialidade do saber: eurocentrismo nas ciências sociais. Perspectivas latino-americanas*, Buenos Aires, CLACSO, 2005, <http://biblioteca.clacso.edu.ar/ar/libros/lander/pt/lander.html> (accessed 30 march 2022) At 107.

<sup>55</sup> Okafor, Obiora Chinedu, *op. cit.*

<sup>56</sup> The coloniality of being refers to “the experience lived since colonization and its impact in the language”, which forms the human identity; attributes that do not make up the being, but that describe it, that are intrinsic to it (Maldonado-Torres, Nelson, “Sobre la colonialidad del ser: contribuciones al desarrollo de un concepto”, in Castro-Gómez, Santiago & Grosfoguel, Ramón (eds.), *El giro decolonial: Reflexiones para una diversidad epistémica más allá del capitalismo global*, Bogotá, Siglo del Hombre Editores, 2007, pp. 127-167, <http://www.ceapedi.com.ar/imagenes/biblioteca/libreria/147.pdf> (accessed 30 march 2022. At 130.) In the case, the coloniality of being is affirmed by confirmation that the subject of legal protection, for example, is the man, white, European, Christian, heterosexual, patriarch and owner.

<sup>57</sup> The Coloniality of Knowledge also reveals that, in addition to the legacy of deep social inequality and injustice of colonialism and imperialism, already marked by dependency theory and others, there is an epistemological legacy of Eurocentrism that prevents us from understanding the world from the very world we live in and the epistemes that are their own. Porto-Gonçalves, Carlos Walter, “Apresentação da edição em português”, in Lander, Edgardo (ed.), *op. cit.*, p. 3.

<sup>58</sup> Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2001.

However, in addition to coloniality and its system of domination based on ethnicity and race originating from the colonization of the Americas<sup>59</sup>, the modern discourse it also settled as a world model due to the deification and reification of the novelty:

The New World was new, that is, was not old [...] Everything that was “new” and more “modern” was better. Furthermore, everything was always presented as new [...] It was the politics of America that represented the realization of the novelty that was said to be the best. After that, with the separation of North America from Latin America, many people attributed its advantage to the fact that it better embodies the “new”, of being more “modern”. Modernity has become the justification for economic success; but also, in its test. It was a perfect circular plot that diverted attention from development to underdevelopment<sup>60</sup>

Thus, it can be stated that the concept of novelty was one of the greatest contributions of the Americas to the development, stabilization and globalization of the modern capitalist economy. Under the pretext of offering a way out the inequalities of the present, the concept of “new” pushed and inserted its inevitability into the collective superego of the world system.<sup>61</sup> And law, as a language by which novelty can be expressed<sup>62</sup> also collaborated for its occurrence and perpetuation.

See the international articulation around the continuous structuring of the global order based on universalized justifications, thought from Europe and its historical achievements, which in the end reaffirm the structured nor-

<sup>59</sup> Maldonado-Torres, Nelson, “Sobre la colonialidad del ser...”, *cit.*, p. 132.

<sup>60</sup> Quijano, Aníbal & Wallerstein, Immanuel, *op. cit.*

<sup>61</sup> *Ibidem*, p. 4.

<sup>62</sup> Chimni, Bhupinder S., *op. cit.*

mative models<sup>63</sup> since the turn of modernity,<sup>64</sup> which, for those located on the margins, when noticed, are configured in true “intangible horizons”.<sup>65</sup> And this is repeated even when one seeks for a “new” rule to the extent that the experiences of non-Westerners (have understood as all those located on the periphery of the world-system) are not considered for their real modification.<sup>66</sup>

It is at this point that we introduce the Third World Approaches to International Law (TWAIL) to the debate, because it precisely criticizes this normative closure around the Global North’s will. For TWAIL, “International Law has always served the interests of dominant social forces and States in international relations”.<sup>67</sup> And because of it, one may argue that “the regime of International Law is illegitimate”, since it “legitimizes, reproduces and sustains the plunder and subordination of the Third World” as a whole.<sup>68</sup> Hence, under these lenses, international law would not be a regime that cares for

<sup>63</sup> As for normative models, it would make no difference to argue from a jusnaturalist or positivist model, because, as much as the second is a model, in fact, created and intended for the civilized—in contrast to the uncivilized—, which makes up the family of nations, the first is also an European historical-cultural product, as much as Anghie has argued that internationalist jusnaturalism applied in the sixteenth and seventeenth centuries had a universal nature and, therefore, would be applicable—theoretically—to all. After all, such a conception also presents problems insofar as the rules were not interculturally conceived. Magalhães, José Luís Quadros de & Afonso, Henrique Weil, “Para contar as outras histórias: direito internacional e resistência contra-hegemônica no terceiro mundo”, *Revista da Faculdade de Direito do Sul de Minas*, vol. 29, num. 1, 2013, pp. 155-182, <https://revista.fdsu.edu.br/index.php/revistafdsu/article/view/522/412>. Accessed 30 march 2022. Anghie, Antony, *Imperialism, sovereignty and the making of International Law*, Cambridge, Cambridge University Press, 2004.

<sup>64</sup> Kennedy claims that “due to the absence of a legislature, internationalists have always interpreted Law from history, mentioning famous texts, diplomatic incidents and judicial decisions to describe what the international community, as it is today called, sees as binding rule. This exercise is to some extent systematic [...], being almost always considered an argument about history”. Kennedy, David, “The Disciplines of International Law and Policy”, *Leiden Journal of International Law*, vol. 12, num. 1, 1999, pp. 9-133, <https://doi.org/10.1017/S0922156599000023>. At 88.

<sup>65</sup> Koskenniemi, Martti, *The Gentle...*, cit.

<sup>66</sup> Okafor, Obiora Chinedu, *op. cit.*

<sup>67</sup> Chimni, Bhupinder S., *op. cit.*, p. 3.

<sup>68</sup> Mutua, Makau W., “What is TWAIL?”, *Proceedings of ASIL 94th annual meeting*, vol. 35, 2000, pp. 31-38, <https://doi.org/10.1017/S0272503700054896>. At 31

“resistance and libertation”.<sup>69</sup> And TWAIL, for that matter, “challenges th[is] prevailing trend in international law that has legitimated [such] global processes of marginalization and domination” by criticizing and opposing to the colonial past, the norms then erected, and the conformation of the nations with a divided and unequal world.<sup>70</sup>

Concerning TWAIL, it is important to make it clear that we believe that criticizing modern international law and its Eurocentric epistemology can be, in itself, an alternative argument as long as it arises from a different epistemological locus than the Global North. But we are also aware that this view, shared with the so-called first generation of TWAILers<sup>71</sup>, is subject to criticism, since it is not, per se propositional.<sup>72</sup> In this case, some critics of TWAIL<sup>73</sup> tend to say that if this model is really an alternative, it should list what is wrong and bring what would be right (and why),<sup>74</sup> in a reconstructive manner.<sup>75</sup> Hence, some say there it seems to be a lack of clarity in the proposed approach.<sup>76</sup>

We do not understand, however, that it is obliged to refute an argument by necessarily bringing alternatives (although TWAIL has done so<sup>77</sup>). Under-

<sup>69</sup> *Idem*.

<sup>70</sup> Fakhri, Michael, “Questioning TWAIL’s Agenda”, *Oregon Review of International Law*, vol. 14, num. 1, 2012, pp. 1-16, <http://hdl.handle.net/1794/12600>. Accessed 30 march 2022. At 3.

<sup>71</sup> Galindo, George Rodrigo Bandeira, “Dividindo...”, *cit*.

<sup>72</sup> Mickelson, Karin, “Rhetoric and rage: Third World voices in international legal discourse”, *Wisconsin International Law Journal*, vol. 16, 1998, pp. 353-419, [https://commons.allard.ubc.ca/fac\\_pubs/227](https://commons.allard.ubc.ca/fac_pubs/227). Accessed 30 march 2022.

<sup>73</sup> Haskell, John D., “TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law”, *The Canadian Journal of Law & Jurisprudence*, vol. 27, num. 2, 2015, pp. 383-414; 95-96, <https://doi.org/10.1017/S0841820900006408>; Agarwalla, Schubhangi, “Critiquing TWAIL”, *International Law and the Global South*, 15 jul. 2020, <https://internationalallawandtheglobalsouth.com/critiquing-twail>. Accessed on: 20 jul. 2023.

<sup>74</sup> Mickelson, Karin, *op. cit*.

<sup>75</sup> Fakhri, Michael, *op. cit.*, p. 3.

<sup>76</sup> Agarwalla, Schubhangi, *op. cit*.

<sup>77</sup> Examples include the debates for the preservation of the rights of the least developed and landlocked states within the scope of the United Nations Convention of the Law of the Sea, as Enyew points out, and the launching of the New International Economic Order (NIEO), as Fatouros adds (and which is criticized by Rajagopal and Haskell, as he sustains that the NIEO has not achieved complete success in reducing North-South disparities), to name but a few. Enyew, Endalew Lijalem, “Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on

standing the pernicious past and its legacy for different existing situations is a way of saying that changes must be made, and that bringing such issues to light can contribute to change. Without this “complaint”, proposals would not be feasible. Therefore, it can be argued that the minimum that TWAIL seeks is to “*maintain* some hope for an emancipated reconstruction of international law, incorporating subaltern voices from the south into its discourse” (emphasis added), as Ramina states.<sup>78</sup>

And here is the link between critical international law (i.e., TWAIL), which questions the construction of the international legal order by the Global North and its legacy, hoping for change, and the decolonial perspectives that offer us an understanding of the division of the globe between center and periphery to justify the exclusion, concealment, silencing and subjugation of subjects from the South, racialized by the colonial process and maintained by law. We call this connection Decolonial International Law.

Together, these approaches complement each other insofar as they not only clarify the origins of Modern International Law, but also allow one to visualize how its use has maintained and maintains the global inequalities and various types of violence suffered by the subjects of the South. Besides, they both call for a change. These approaches call for the *emancipation* (even if generally speaking) of those who were victims of the division of the world-system, those who were transformed into recipients but not participants of society (including its legal order).<sup>79</sup>

An emancipation that must be carried out through Latin American perspectives in view of this being the place of the beginning of Modern International Law; an emancipation that, while not denying or excluding the European/North-centered past, match other stories<sup>80</sup> and ways of doing,<sup>81</sup>

the Law of the Sea”, *Chinese Journal of International Law*, vol. 21, num. 3, 2022, pp. 439-497, <https://doi.org/10.1093/chinesejil/jmac028>. Fatouros, Arghyrios A., “International Law and the Third World”, *Virginia Law Review*, vol. 50, num. 5, 1964, pp. 783-823; p. 800, <https://doi.org/10.2307/1071592>. Rajagopal, Balakrishnan, *International Law From Below: Development, Social Movements and the Third World*, Cambridge, Cambridge University Press, 2003. Haskell, John D., *op. cit.*, p. 91.

<sup>78</sup> Ramina, Larissa, *op. cit.*

<sup>79</sup> Nyerere, Julius K., “South-South Opinion”, in Gauhar, Altai (ed.), *The third World Strategy: economic and political cohesion in the south*, Westport, Praeger Publishers, 1993, pp. 9-10.

<sup>80</sup> Magalhães, José Luís Quadros de & Afonso, Henrique Weil, *op. cit.*

<sup>81</sup> Here, we refer to the colonality of doing, that is, of proposing international law. Squeff,

thus allowing for the liberation of the southern subject and the overcoming of the abysmal lines, breaking with the coloniality (of power, being and knowledge) that is intrinsic to Modern International Law, as will be discussed in the following point.

### III. Coloniality in International Law as a Support for Abyssal Exclusions

Modernity began with the invasion, in 1492,<sup>82</sup> of the Americas by the Spanish and Portuguese through the geopolitical opening of Europe to the Atlantic, implanting and controlling the world-system through the oceans (no longer through slow and dangerous continental caravans) and, still, “inventing” the colonial system, which, for 300 years, tilted the economic-political balance in favor of the old isolated and peripheral Europe.<sup>83</sup> Such a model, therefore, presupposes the idea of confrontation between the European and his “Other”, in which the former, in order to build and maintain his power, ended up controlling, winning and violating his opponent, defining himself “as an “ego” that discovers, conquers, colonizes the constitutive alterity of Modernity itself.”<sup>84</sup>

Tatiana Cardoso, *Direito humano ao alimento no direito internacional sob o viés descolonial: soft law como fonte libertadora e de resistência*, Tese apresentada à obtenção do título de Doutora em Direito, Porto Alegre, Universidade Federal do Rio Grande do Sul, 2018, <https://lume.ufrgs.br/handle/10183/180281>. Accessed 30 march 2022.

<sup>82</sup> This date has a double meaning: in addition to marking the arrival of the Europeans in the Americas, it also marks the fall of Granada – the last major city under Muslim rule. Magalhães, José Luiz Quadros de, *O Estado Plurinacional e o Direito Internacional moderno*, Curitiba, Juruá, 2012, pp. 25-26.

<sup>83</sup> Dussel, Enrique, “Transmodernidade...”, *cit.*

<sup>84</sup> In more details, Dussel explains that the modern *ego cogito* (I think) was preceded by more than a century by the practical *ego conquiro* (I conquer) of the Portuguese-Hispanic that imposed its will (the first modern “will to power”) on the American “indian”. The conquest of Mexico was the first scope of the modern ego. Europe (Spain) had obvious superiority over Aztec, Mayan, Inca cultures, etc., especially for their iron weapons – present throughout the Euro-Afro-Asian horizon. Modern Europe, since 1492, will use the conquest of Latin America (since North America only enters the game in the 17th century) as a springboard to take a decisive “comparative advantage” in relation to its ancient antagonistic cultures (Turkish-Muslim, etc.). Its superiority will be, to a large extent, the result of the accumulation of wealth, knowledge, experience,

In view of this, Dussel<sup>85</sup> maintains that the “Other” was not “discovered” as “Other”, but was “under-covered” as in “itself”. The Americas, therefore, would not have been “discovered” as a distinct other; in fact, Europe projected itself onto the American continent. In other words, this behavior does not refer to the appearance of the other, but the projection of oneself, in spite of a primitive “self”, which has not yet gone through a process of evolution and “arrived” at the level of development in Europe. In view of this, it is argued that the birth of Modernity meant the birth of exclusion and the invisibility of the non-European.<sup>86</sup>

Dussel<sup>87</sup> highlights the Hegelian ontology, for whom Europe would be the “end of the world”, that is, for whom the path of human development is to reach the level of European development. This discourse points out that Europe had exceptional internal characteristics that allowed it to supplant, through its rationality, every other culture.<sup>88</sup> This thesis, which Dussel<sup>89</sup> calls the Eurocentric paradigm (as opposed to the world paradigm), was imposed not only in Europe (and later in the United States<sup>90</sup>), but in the entire intellectual realm of the world periphery.

etc., which it will accumulate since the conquest of Latin America. Dussel, Enrique, “Europa, modernidade e eurocentrismo”, in Lander, Edgardo (ed.), *op. cit.*

<sup>85</sup> Dussel, Enrique, *1492...*, *cit.*

<sup>86</sup> *Idem.*

<sup>87</sup> *Idem.*

<sup>88</sup> Dussel, Enrique, “Beyond Eurocentrism...”, *cit.*

<sup>89</sup> *Idem.*

<sup>90</sup> The rise of the United States to the center of the world-system occurs especially at the end of the Second World War, despite the fact that the United States was already demanding that category in the international order after the First War. Grosfoguel defends this centrality today also occupied by the United States, for whom “the peripheral nation-states and non-European peoples live today under the regime of “global coloniality” imposed by the United States, through the International Monetary Fund (IMF), the World Bank (WB), the Pentagon and NATO”. But not only the United States – Grosfoguel also expresses that “currently, the central zones of the capitalist world-economy coincide with predominantly white/European/Euro-American societies, such as Western Europe, Canada, Australia and the United States, while the peripheral zones coincide with non-European peoples formerly colonized”. Grosfoguel, Ramón, “Para descolonizar os estudos de economia política e os estudos pós-coloniais: Transmodernidade, pensamento de fronteira e colonialidade global”, *Revista Periferia*, vol. 1, num. 2, 2009, pp. 41-91; p. 56. <https://doi.org/10.12957/periferia.2009.3428>.

In this historical trajectory, the non-European, then, remained inferior, being imposed on him characteristics of animalistic, monstrous, primitive, degenerate, in short, dehumanized. And to become human, the non-European would need the European to bring him humanity, albeit in a forced way,<sup>91</sup> insofar as this was the civilized being.<sup>92</sup> Therefore, it is said that the invasion and colonization excluded many faces and historical subjects: the others [...], the oppressed of peripheral nations [...], the innocent victims of sacrifice, [...] [were] covered up by the uncovering.<sup>93</sup>

Not only that, with modernity the process coined by Santos<sup>94</sup> of “creative destruction” also began, which sought to standardize the being to the European model, its customs, its culture, its knowledge, in short, its rationality, systematically denying diversity and creating hegemonies.<sup>95</sup> In this sense, with this creation of sides (barbarian *versus* civilized), Santos<sup>96</sup> states that historical colonialism is the central drawing board on which the abyssal line was

<sup>91</sup> Dussel, Enrique, 1492..., *cit.*

<sup>92</sup> The civilized being held a national identity, which, according to Magalhães, is constituted as follows: I am national, I am European and Spanish because I am Catholic, because I share an identity founded on common values, on a morality and ethics shared by nationals like me. I am national, I am European and Spanish because I am more than the other different, the indigenous savage, the African who is not human or the other Arab, Muslim or Jew, infidels. Magalhães, José Luiz Quadros de, *op. cit.*, p. 12.

<sup>93</sup> Dussel, Enrique. 1492..., *cit.*, p. 159.

<sup>94</sup> Santos, Boaventura de Sousa, “Para além do Pensamento Abissal: das linhas globais a uma ecologia dos saberes”, Santos, Boaventura de Sousa and Meneses, Maria Paula (eds.), *Epistemologias do sul*, Coimbra, Almedina, 2009, 23-71.

<sup>95</sup> Magalhães, José Luiz Quadros de, *op. cit.*

In the same sense Quijano weaves: As part of the new pattern of world power, Europe also concentrated under its hegemony the control of all forms of control over subjectivity, culture and especially knowledge, knowledge production. They repressed the forms of production of meaning, their symbolic universe, their patterns of expression and objectification of subjectivity. They forced the colonized to partially learn the culture of the dominators in everything that was useful for the reproduction of domination, whether in the field of material, technological, or subjective activity, especially religious. In the long term, it implied a colonization of cognitive perspectives, of ways of producing or giving meaning to the results of material or intersubjective experience, of the imaginary, of the universe of intersubjective relationships, of the world, in short, of culture. Quijano, Anibal, “Colonialidade do poder...”, *cit.*, p. 112.

<sup>96</sup> Santos, Boaventura de Sousa, *O fim do império cognitivo: a afirmação das epistemologias do Sul*, Belo Horizonte, Autêntica Editora, 2019, pp. 49-50.

drawn. Barreto<sup>97</sup> clarifies that, when speaking of “abyssal line”, Santos is using the metaphor of the abyss in order to convey the idea that hegemonic Western thought organizes the production and validation of knowledge along the lines of a precipice, separating the forms of being, thinking and relating in the North of the ways of being, thinking and relating to the South. Thus, Santos states:

Modern Western thinking is abyssal thinking. It consists of a system of visible and invisible distinctions, with the invisible underlying the visible. Invisible distinctions are drawn across radical lines that divide social reality into two distinct universes: the universe “on this side of the line” and the universe “on the other side of the line”. The division is such that “the other side of the line” disappears as reality, becomes non-existent, and is even produced as non-existent<sup>98</sup>

The division of the world along the abyssal line separates it into two parts: the metropolitan world —corresponding to “us”, the fully human— and the colonial world —inhabited by the non-fully human. According to Santos<sup>99</sup> the existence of tensions and exclusions on both sides of the line is admitted, however, in the metropolitan world there is still belonging to the “us”, its basic equivalence and reciprocity— for this reason, exclusions in the metropolitan world are called non-abyssal. On the colonial side, it is unimaginable to think of any existence of equivalence or reciprocity, on this side of the line the exclusions are abysmal and their management occurs through the dynamics of appropriation and violence.

For Santos<sup>100</sup> the struggles against non-abyssal exclusions are carried out through social emancipation, seeking to replace the current social regulation with the aim of replacing it with another less excluding social regulation. In another turn, in the colonial world, maintained by the colonial and neocolonial State, by racism, forced labor and slave labor, etc., the struggle against appropriation and violence is for its complete liberation from colonial social regulation. Unlike the struggle for social emancipation, on the metro-

<sup>97</sup> Barreto, João-Manuel, “Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice”, *Indiana Journal of Global Legal Studies*, vol. 21, num. 2, 2014. <https://www.repository.law.indiana.edu/ijgls/vol21/iss2/1>. Accessed 30 march 2022.

<sup>98</sup> Santos, Boaventura de Sousa, “Para além do Pensamento...”, *cit.*, p. 23.

<sup>99</sup> Santos, Boaventura de Sousa, *O fim do imperio...*, *cit.*

<sup>100</sup> *Idem.*

politan side of the abyssal line, the struggle for liberation does not aim at a better and more inclusive form of colonial regulation. Rather, it aims at its elimination.<sup>101</sup>

In this sense, when Chimni<sup>102</sup> states that international law is the main language through which domination is expressed in the era of globalization, to the extent that, as Koskeniemi<sup>103</sup> adds, the universal clothing attributed to its values hides the fact since its bases remain in European ethnocentrism, we can, by approaching both reflections with the concepts presented here, understand that coloniality in International Law is today the main support of the abyssal line. This is then what keeps European ideals and assumptions alive and applicable to non-Europeans, who do not only lack a role in shaping the rules but are also obliged to adhere to them, as they find themselves on the colonial side of the abyssal lines.

In this case, as Quijano<sup>104</sup> would say, the products of Eurocentric colonial domination were [and still are] assumed to be “objective”, “scientific” categories and, therefore, possessing historical significance. They are natural phenomena that support the other social relations of classes or States, including in the field of law. And if situated on the post-abyssal lines, these normative standards are imposed, even by force, and must be recognized and faithfully followed.

An example of this is provided by Chimni,<sup>105</sup> for whom international financial and commercial institutions impose a neoliberal agenda<sup>106</sup> that manipulates the regulation of international human rights law, preventing the formation of a global coalition of Third World States and peoples,<sup>107</sup> subvert-

<sup>101</sup> *Idem.*

<sup>102</sup> Chimni, Bhupinder S., *op. cit.*

<sup>103</sup> Koskeniemi, Martti, “Histories of International law: Dealing with Eurocentrism”, *Rechtsgeschichte*, vol. 19, 2011, pp. 152-176, <http://dx.doi.org/10.12946/rig19/152-176>.

<sup>104</sup> Quijano, Aníbal, “Coloniality, Modernity/Rationality”, *Cultural Studies*, vol. 21, 2007, pp. 168-178; at 2-3, <https://doi.org/10.1080/09502380601164353>.

<sup>105</sup> Chimni, Bhupinder S., *op. cit.*

<sup>106</sup> In the same way, Galindo expresses it: “International Law defines, today, what is or is not a democratic State and relocates economic sovereignty to international institutions, such as the World Bank, the IMF or the WTO.” Galindo, George Rodrigo Bandeira, “A volta do terceiro mundo...”, *cit.*

<sup>107</sup> For the purposes of this text, Mutua’s definition of ‘Third World will be used, for whom “Third World is, truly, a flow of historical experiences similar to practically all non-European

ing ways collective reflection on common problems and solutions, in addition to authorizing continuous interventions to transform the Third World into “modern”.<sup>108</sup> After all, as Anghie<sup>109</sup> states, the foundations of international law take on a different form when applied to the non-European world--or to the colonial side of the abyssal line.

Furthermore, it is important to consider this colonized international normative reality. In doing so, Kennedy,<sup>110</sup> expresses that:

for International Law, colonialism would not be a scandal as long as the discipline could say – of course, colonialism was horrible, but we have gotten rid of him and are seeking to undo his legacy. Nor would it be a scandal to demonstrate that the international doctrine articulated in the past and present was/is unrealistic – “indigenous peoples were not really treated as equals and [States’] sovereignties are not so identical”. The internationalists knew and know this. [...] *It would be a scandal, however, if the doctrine of International Law proclaimed that the interpretation of the humanity of indigenous peoples or of today’s sovereign equality are, in fact, part of a plan that affirms that the indigenous genocide was justified or that the inequality of nations must be maintained.*

This second context brought by the author, as it is exactly what modern international law predicted, brings to light the need to change the rules of international law to break with this vision, recognizing its failures in favor of a law forged on intercultural bases that allows Third World States to achieve development. But if International Law is a tool of domination that perpetuates coloniality, why keep looking for ways to rely on it? Wouldn’t we be creating a great Dry-body,<sup>111</sup> a dead creature cursed to continue walking the earth?

societies”, which gave rise to a particular voice, a form of intellectual and political consciousness. The term Third World is different from less developed, crisis-prone, industrializing, developing, underdeveloped or Southern because it correctly captures the dialectic of opposition between the European and the non-European, and identifies the plunder of the latter by the former. This places the world’s state of crisis in the global order that the West created and [still] dominates. Mutua, Makau W., *op. cit.*

<sup>108</sup> Pahuja, Sundhya, “The postcoloniality of International Law”, *Harvard International Law Journal*, vol. 46, num. 2, 2005, pp. 549-470, <https://harvardilj.org/attach.php?id=42>. Accessed 30 march 2022.

<sup>109</sup> Anghie, Antony, *op. cit.*

<sup>110</sup> Kennedy, David, “Law and the Political Economy of the World”, *Leiden Journal of International Law*, vol. 26, num. 1, 2013, pp. 7-48, <https://doi.org/10.1017/S0922156512000635>. At 30.

<sup>111</sup> The legend of Dry-body (“*Corpo-seco*”) refers to a selfish and cruel man, who always

Answering that we should simply abandon (modern) international law or that it should be destroyed seems empty, if not mistaken or unrealistic. As pointed out by Chimni,<sup>112</sup> it is also necessary to recognize that, in contemporary times, International Law offers a protective shield, albeit fragile, for the Third World.

Therefore, perhaps the ideal is not to think of international law as a Dry-body, but as a *Caipora*<sup>113</sup>. If, in folklore, *Caipora* is responsible for protecting fauna and flora, punishing those who do not respect nature, why shouldn't we imagine an international law that would protect the world, the environment and life—not just human life—which could effectively hold its transgressors accountable?

For that, as Maldonado-Torres<sup>114</sup> adds, it is necessary to carry out a decolonial epistemic turn, through which the condemned [subject from the Global South<sup>115</sup>] emerges as a questioner, thinker, theorist and writer/communicator; but it is also imperative to promote an aesthetic (and often spiritual) decolonial turn through which the condemned appears as a creator; moreover, it is necessary to promote an activist decolonial turn<sup>116</sup> through which the convict emerges as an agenda for social change.

harmed others thinking about his own benefit. According to the legend, when he died, neither heaven nor hell wanted him, leaving him condemned to wander the earth, harming people out of pure hatred.

<sup>112</sup> Chimni, Bhupinder S., *op. cit.*

<sup>113</sup> The legend of “*Caipora*” originates from Tupi-Guarani mythology. In Brazilian folklore, *Caipora* is represented by a small indigenous girl, agile and naked, who inhabits the forest and seeks to protect it, as well as the animals that live therein.

<sup>114</sup> Maldonado-Torres, Nelson, “Analítica da colonialidade...”, *cit.*

<sup>115</sup> Here, Maldonado-Torres alluded to Franz Fanon's work, “The damned of the Earth”, from 1968, in which the author criticizes the African colonial context and decolonization itself to the extent that, as they are considered wild people, the natives would be devoid of ethics, so that force/violence—whether that of the entry of the European or his departure—is always present in this context, strong in these differences imposed by the colonizer, which makes the soldier the interlocutor between European/Society and the colonized/acculturated/condemned being. Maldonado-Torres, Nelson, “Sobre la colonialidad del ser...”, *cit.*

<sup>116</sup> Ballestrin, Luciana, “América Latina e o giro decolonial”, *Revista Brasileira de Ciências Políticas*, vol. 11, 2013, pp. 89-117, <https://doi.org/10.1590/S0103-33522013000200004>. For a specific debate of the decolonial turn in international law, see Squeff, Tatiana Cardoso, “O giro decolonial no Direito Internacional”, *Revista Sequência*, vol. 43, 2023, pp. 1-24, <https://doi.org/10.5007/2177-7055.2022.e85235>.

As a result, what a Decolonial International Law must seek to offer are alternatives and to imagine new solutions that lead to true emancipation, thus not comprising themselves to seek a solution within the Europeanized neoliberal logic, nor just replacing social regulation with another less excluding social regulation, since, as Mignolo<sup>117</sup> adds, these maneuvers will not eliminate the dichotomies introduced by the colonial difference. The ultimate horizon of liminal thought is not only working towards a critique of colonial categories; it is also acting to reverse the subordination of knowledge and the colonality of power.<sup>118</sup>

Therefore, in a nutshell, we must say that Decolonial International Law is, primarily, counter-hegemonic and counter-Eurocentric. It is built from a praxis of resistance against dominant discourses and, consequently, against (Modern) International Law, which is epistemologically based on the capitalist world-system. It calls for emancipation techniques that lead subjugated, racialized, discriminated and silenced subjects to the frontier, enabling them to propose International Law through a transversal, intercultural dialogue, therefore breaking with the colonality of power, being and knowledge. And because of this, Decolonial International Law is intercultural. It recognizes the existence of different subjects, but, above all, it does not allow any hierarchization between them.

Besides, although Decolonial International Law is not built on a punitive logic, it holds any subject who violate its regulations responsible, not allowing impunity for those who abuse the rights of others (much as *Caipora*). This is because a Decolonial International Law is based on multiple existences, multiple knowledge, multiple beings and multiple thoughts. This perspective is interesting because it reveals that Decolonial International Law may present different forms of accountability, based on collectivity and belonging. And what will allow International Law to learn other ways of applying accountability is the decolonial praxis of cross-border intercultural dialogue.

In fact, the promotion of emancipatory alternatives to accountability such as the one discussed above contributes to removing the application of colonial regulation (i.e., Modern International Law) for those subjugated, racialized, discriminated and silenced subjects, pushing them away from the abyssal lines. After all, if we leave it as it is, the current modern normative model,

<sup>117</sup> Mignolo, Walter, *op. cit.*

<sup>118</sup> *Idem.*

designed to make the North (i.e., Europe and United States) stand out, based on coloniality, will remain a linear, dichotomous and excluding rule. Hence, in a last word and alluding to Quijano's speech<sup>119</sup>, it is time for International Law to stop being what it is not, that is, to pass for being a collective and plural legal order, which it really is not, according to what has been reported throughout this text.

#### IV. Conclusion

Modernity —a time introduced and materialized by the arrival of the Europeans to the Americas— is marked by the universalization of objective and subjective Eurocentric standards, which were imposed to colonized, uncivilized, ethnically and racially determined subjects, and exported to all four corners of the globe through the capitalist world-economy that created an environment in which the material inequality between those located in the center and on the periphery is not only evident but permanent. And this framework was not only maintained but allowed by the (Modern) International Law.

Even with the end of the formal political link between colony and metropolis, this model continued to be applied, causing colonization to give place to coloniality, where the same structures built in the turn of modernity remained not only in the political and economic spheres, to which the name coloniality of power is given, but also in the epistemic and scientific scope, also known as the coloniality of knowledge, and as for the subject of the south itself that continued to be subjugated, hidden, silenced, and discriminated against (i.e., the coloniality of being). Furthermore, this model was also perpetuated in terms of International Law, in which the rules still follow Eurocentric assumptions, thus collaborating for the concealment and assimilation of the Third World insofar as their interests are not recognized or even taken as legitimate, pushing them, thus, beyond the abyssal lines.

Hence, considering the Modern Age as a European phenomenon, which refers to an ideological, linear and deforming organization of history that fosters disrespect for other cultures precisely because of the reduction promoted by it to facts and events outside Europe, we understand that it urgently

<sup>119</sup> Quijano, Anibal, "Colonialidade do poder...", *cit.*

needs to be overcome, making it truly open to the whole world.<sup>120</sup> After all, as the globe is plural, it should be seen, organized and operated in this way. Therefore, as (International) Law is a structural tool used for this purpose, it should also be revamped, emancipating itself from its modern vision and from the shackles of Eurocentric epistemological domination. We therefore suggest that this be done through Decolonial International Law.

And the first step towards the construction of a Decolonial International Law is precisely to recognize its current situation, exposing its modern systematization through the recognition of the colonality of power, being, knowledge and doing that is behind the capitalist world-system. Once these characteristics have been identified, alternatives to them must be thought, insofar as it is not expected to reform the system, replacing it with another equally linear and dichotomous vision. In this case, we believe that this opening must occur from a transversal and intercultural dialogue aiming at the emancipation of colonial beings.<sup>121</sup>

We assume the positive moments of Modernity may promote an authentic intercultural dialogue if assessed by using different criteria from other cultures, especially those that were in the origins of Modernity/Modern International Law, such as the Latin American ones. An example of this is the adoption of a non-punitive culture, which still seeks to hold accountable those who violate the rights of others, including collective ones--a perspective that comes from the Caipora folklore, although not being a direct factual example. Even because examples do not necessarily need to be given for the purposes of criticism to exist. As we have stated, criticism can be theoretical, as some TWAIL points of view teach us.

In any event, it is our understanding that through the above-mentioned dialogue it might be possible to put an end to the abyssal lines even considering the asymmetries existing today, insofar as such dialogue does not position itself in favor of the North, nor does it reproduce its legal-normative discourses. It must be emancipatory, and this view is embedded in it. Only in this way can the construction of a new world-system be possible and, consequently, new relationships (including legal ones) that we still cannot visualize at the present time be built. The opening to an intercultural imagination is,

<sup>120</sup> Dussel, Enrique. "Beyond Eurocentrism...", *cit.*

<sup>121</sup> Dussel, Enrique, "Transmodernidade...", *cit.*

therefore, epistemologically desirable, and it can be achieved through Decolonial International Law.

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