Revista Brasileira de História & Ciências Sociais – RBHCS
Vol. 16 Nº 32, Jan - Jun de 2024
Universidade Federal do Rio Grande – FURG

Decolonizing international law: between demystifications and resignifications

Descolonizando o direito internacional: entre desmistificações e ressignificações

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Abstract: In the search for the existence of alternatives for how legal relations in International Law are established today, this text starts from the need to demystify International Law as a universal normative set (part I), so that it can thus look into the possibilities of resignifications of its norms from a critical stance, more specifically through the Third World Approaches to International Law – TWAIL (part II), as is already happening in the field of (International Law of) Human Rights since the Decolonial Theory , allowing not only to question the past, but also to obtain social justice for everyone, including the Third World, largely obstructed, hidden and excluded from international normative logic since the advent of modernity. In order to carry out this research of an applied nature, within the scope of international law, the hypothetical-deductive approach method will be used. As far as the objective is concerned, we will carry out an analysis from a descriptive-explanatory-critical point of view. Finally, the method of procedure adopted is mainly bibliographical, selected in a qualitative manner.

Keywords: International right; TWAIL; Decolonialism; Demystification; Resignification.

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Resumo: Na busca pela existência de alternativas para como as relações jurídicas do Direito Internacional se estabelecem hodiernamente, o presente texto parte da necessidade de desmistificar o Direito Internacional como um conjunto normativo universal (ponto I), para que, assim, debruce-se sobre as possibilidades de ressignificações de suas normas a partir de uma postura crítica, mais especificamente pelas *Third World Approaches to International Law – TWAIL* (ponto II), tal como já se realiza no campo do(s) (Direito Internacional dos) Direitos Humanos desde a Teoria Descolonial, permitindo não apenas questionar o passado, mas também obter a justiça social para todos, inclusive, para o Terceiro Mundo, largamente obstaculizado, ocultado e excluído da lógica normativa internacional desde o advento da modernidade. Para a construção desta pesquisa de natureza aplicada, no âmbito do Direito Internacional, utiliza-se do método de abordagem hipotético-dedutivo. Já no que diz respeito ao objetivo, este será analisado desde um recorte descritivo-explicativo-crítico. Por fim, o método de procedimento adotado é majoritariamente o bibliográfico, selecionado de maneira qualitativa.
Palavras-chave: Direito Internacional; TWAIL; Descolonialismo; Desmistificação; Ressignificação.

Introduction

Traditionally, International Law, as a normative branch aimed at regulating international relations, has its relevance confirmed to the extent that, even in face of differences between internal and international orders, such as the lack of a superior executive authority, an imposing legislative power and a centralized judiciary, it ensures that the existing rules are mostly followed, directing all of its members to fulfill its commandments inaugurated in Westphalia in 1648.[1] Despite being somewhat questioned, especially at the level of international relations, as to the real reason why the rules are followed[2], International Law seen from the classical perspective does not discuss the central role of Europe in its formatting (because it is

[1] On the subject, *cf.* AKENHURST, 1985; KELSEN, 1998.
[2] Here, we refer to the realist (power struggle) and liberal (cooperation for the common good) theories of international relations, and all their variants. For more information on the differences, *cf.* NOGUEIRA; MESSARI, 2005.

implicit), not even the – negative – reflections of this epicenter on other people (as it is unnecessary).

However, it is precisely by contesting such truths considered to be absolute that this text presents itself. Since Law is the branch of science[3] aimed at regulating social relations at the international level, it is no longer possible to accept it at the same time as being the product of only one continent (or, better, some countries located in Europe) or as not causing harm to others. For this reason, this article aims to identify the possibility of analyzing international law from non-hegemonic perspectives, such as the one proposed by TWAIL - Third World Approaches to International Law, which is understood as a decolonial approach to international law that allows us not only to question the past – and therefore the "traditional" emergence of this branch of law –, but also to examine the effects of the rules put in place for all those who make up international society, which do not only include the countries located today in the Global North.

Therefore, in an attempt to verify the existence of alternatives for how the legal relations of International Law are established at the present time, this text starts from the need to demystify International Law as a set of norms, which is in fact universal (part I), so that, in a second moment, we can look at the possibilities of re-signifying its norms from a critical stance (part II), as has already been done in the field of International Human Rights Law through Decolonial Theory, but now expanding it to all its branches, as a way of achieving social justice for all, especially for members of the Third World, who have been largely hindered and excluded from international normative logic since the advent of modernity.

In order to carry out this research of an applied nature, within the scope of international law, the hypothetical-deductive approach method will be used. As far as the objective is concerned, we will carry out an analysis from a descriptive-explanatory-critical point of view. Finally, the method of procedure adopted is mainly bibliographical, selected in a qualitative manner, for a better understanding of the subject proposed here.

[3] We do not question in this study whether Law is a branch of science. On this, we share Sparemberger's (2013, p. 87 – our translation) view that "[a]lthough it can be argued whether Law constitutes its own effective science (the so-called science of Law), the truth is that few authors dare to challenge the dominant view of Law as a science and its main consequences, especially after the publication of Pure Theory of Law, by Hans Kelsen, in which the author as an exponent of legal positivism, demonstrates the legal purity of Law in its typically scientific aspect".

1. A single history? Demystifying international law as a *de facto* universal set of norms.

Understanding international law is a complex task, and seeking to identify its content, its subjects and its application can lead - and for a long time it did lead - to the exclusion of subjects, behaviors, practices and narratives, thus corroborating the invisibilization of the Global South[4] - understood as "an epistemological South, not a geographical one, made up of many epistemological 'Souths' that have in common the fact that they are 'knowledges' born out of struggles against capitalism, colonialism and patriarchy" (SANTOS, 2019, p. 17).

As Emmanuelle Tourme-Jouannet (2013) points out, this happens because international law is a cultural product of Western/European thought that has governed since the 18th century a plural, non-homogeneous international society, characterized by inequality and exclusion, which openly disregards other narratives. After all, international law was a legal system created by European states that was gradually expanded to the world (GALINDO, 2015), without admitting inclusions precisely because it would be a law built according to their interests – and not those of others.

In fact, international law, as a product of the (European) state[5], did not admit any political entities as such. Only recognized states[6], coined as civilized, could benefit from it (GALINDO, 2015). This rhetoric is not merely doctrinal. It is present, for example, in the narrative of article 38(1)(c) of the Statute of the International Court of Justice, which, states that the principles of law to be considered as a source

[4] Throughout this text, we use of the Global South and Third World interchangeably. Nevertheless, it shall be noted that the doctrine tend to currently use the term Global South instead, considering it as "(...) heir to the concept of 'Third World', currently in disuse. In both denominations, the hierarchical classification between countries considers the stage of [their] economic development towards modernity as the main parameter". (BALLESTRIN, 2020 – our tranlation).

[5] This understanding was affirmed in the judgment of the *Lotus Case* (1927) by the Permanent Court of International Justice - CPJI (1927), where international law was presented as the law governing relations between states, illustrating the primacy of states in international law.

[6] This alludes to the constitutive thesis of the recognition of states at international level, the application of which only began to be questioned after the 1923 Convention on the Rights and Duties of States, although it was not openly accepted at the time. In 1948, in the Bogotá Charter of the Organization of American States, the preference for the declaratory theory was also repeated, corroborating the debates on the principle of self-determination of peoples that were beginning within the United Nations, which was seen as responsible for the shift in the thesis of state recognition at international level.

would only be those originating from civilized nations thus excluding principles of "underdeveloped" legal systems, (THIRLWAY, 2010, p. 109), denoting the existence, for the drafters, of a classification between countries.

Although built in the 1920s as a copy of the Statute of the Permanent Court of International Justice, this classification, it must be said, has been present during the process of expansion of international law over the years, and did not cease to exist even after the end of the Second World War with the creation of the United Nations and the now well-known 'humanization of international law' – points usually used to attest to a "change" in the international order that existed at the time. And despite the fact that some has harshly criticized it[7], the continued presence of the term 'civilized nations' in the above-mentioned article of the Statute denotes the ongoing division of the world on the very same basis indicated by the Europeans.

Therefore, it is notorious that International Law was established with its hard core marked by colonialism, by the establishment of the difference between the European/civilized, and the non-European/uncivilized, which promoted an asymmetry between these subjects still found today (GALINDO, 2015). Although after the process of administrative decolonization and the acquisition of sovereignty by the states of the South in the mid-20th century, they have sought to reverse the effects of colonialism and European/Northern imperialism, aiming to modify the rules of international law in order to achieve development[8] (ANGHIE, 2004), it still persists. This is what Galindo (2015, p. 344 – our translation) notes: "although the anti-colonial struggle that peaked in the 1950s, 1960s and 1970s has come to an end, it is possible that colonialism has not yet ceased: it may be an integral part of the very structure of international law" today.

With this in mind, considering that colonialism is not a completed fact and pointing to the need to use history and criticism as fundamental pieces for establishing a properly third-world discourse in International Law, which takes into

[7] Cançado Trindade (2017, p. 103-109) makes this criticism, especially because of the false dichotomy of humanity between civilized and barbarian. Despite this, there are authors who say that this nomenclature still present in the Statute does not correspond to differences between the status of countries, which precisely demonstrates the telling of history through only one lens. *Cf.*, for example, this view in DIXON, 2013, p. 42-43.
[8] For the Third World, the problem of development was inextricably linked to the colonial past, which created a set of economic and political relations that favored colonial powers and continued to operate even in the post-colonial era (ANGHIE, 2004).

account the events and developments coming from other places or even the negative impacts caused by a monolithic view of this branch of Law, the so-called Third World Approaches to International Law – TWAIL – have emerged.[9].

Regarding them, Galindo (2013) states that they are more than a unified theory or method of international law, but a series of approaches that seek to:

> (1) to understand, deconstruct and unveil the uses of international law as a means of creating and perpetuating a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans; (2) build and present an alternative legal system for international governance; (3) eradicate, through detailed study, public policies and politics, the conditions of underdevelopment in the third world (GALINDO, 2013, p. 51 – our translation).

To this end, in the perspectives proposed by TWAIL, Pahuja (2005, p. 459) affirms that, at present, international law is seen as a "'cloak of legality' throw over the subjugation of colonized peoples by the imperial powers in a distortion of international law's true spirit" which is the promise of universality and equality of sovereignty in a well-intentioned international law. At the same time, there is also the view that international law has always been an instrument of imperialism, which, at the same time, makes it easier to sustain neo-colonial practices (PAHUJA, 2005).

These two perspectives are untenable on their own: the first because it is naïve, in that it does not recognize the responsibility of International Law in instrumentalizing colonialism and imperialism as projects of domination, focusing this responsibility only on its subjects; and the second because this perspective demands abandoning International Law as a form of contestation, after all, it would in itself be a colonial and imperialist instrument. Despite this, in this article and especially in this topic, the first idea is preferred because it allows for the possibility of decolonization; that is, it offers the possibility of breaking with this hierarchical structure and ending inequalities in international society by identifying the responsibility for the use of international law itself as an instrument of domination,

[9] The use of the term "third world" emphasizes precisely the historical elements that unite states and individuals around common experiences (while recognizing that there may be different experiences) and allows this to be an instrument for a renewed praxis of International Law (GALINDO, 2013). In this way, the author states: "In fact, international law needs a theory of resistance if it is to be relevant from the point of view of empirical reality and cosmopolitan values such as human dignity, equality and peace. It is thus important because international law is not only a reflection, but a means, still in force, to perpetrate relations between colonizers and colonized. However, this same international law is also seen as possessing the face of Janus: as retaining within itself the capacity for transformation" (GALINDO, 2013, p. 58).

and above all, noting that within its own logic and system, even with such characteristics, there is the possibility of contestation[10].

Furthermore, as Menezes and Marcos (2020) point out, it is necessary to opt for an interpretation that will work as a social tool at the service of human society. And this is the role of TWAIL: third-world approaches are "a tradition that must always be excavated and re-excavated so that the possibilities for liberation (...) are inexhaustible, both for present and past generations" (GALINDO, 2013, p. 50 – our translation).

Here, then, is where the justification for demystifying international law lies, making it possible to understand it as an arena for contesting colonial and imperial inequalities. Pahuja (2005) thus states that everyone's mission should be to demystify it, stating that this Law does not represent the values of all but of one over the others, thus seeking to broaden its objectives and content, allowing other visions and approaches, rescuing the past and enabling another future.

As such, Galindo (2013) expresses that TWAIL believes in the power of international law to overturn hierarchies and bring social justice to millions of people. By highlighting colonialism and Eurocentrism in the historiography of international law, it is possible not only to make the suffering of people(s) visible over time, but also to give the history of international law the possibility of helping to build *other*[11] agendas for the contemporary world. This is why it is important to highlight and promote a profound dialogue between TWAIL and Decolonial Theories[12] in order to break International Law from its colonial and imperial structures, since not only are there arguments in these theories aimed at rethinking the exclusions carried out by the imperial/colonial/monolithic past, but they also discuss an area of International Law itself, which is International Human Rights Law.

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[10] Effective contestation can be exemplified through the Bandung Conference and the construction of the New International Economic Order, as will be shown in the next topic.

[11] It is important to highlight the use of the term "other" rather than "new" insofar as the term "new" would eventually correspond to a break with the past - precisely what is not wanted. Demystifying international law would actually mean looking at the past and, on the strength of this, suggesting other lines of argument, highlighting the imperialism/imperiality and colonialism/coloniality of the past movement. We will return to this debate in the second part of this text. On the binomials discussed here, *cf.* BALLESTRIN, 2017.

[12] In the original: *"O pensamento descolonial é um projeto epistemológico fundado no reconhecimento da existência de um conhecimento hegemônico, mas, sobretudo, na possibilidade de contestá-lo a partir de suas próprias inconsistências e na consideração de conhecimentos, histórias e racionalidades tornadas invisíveis pela lógica da colonialidade moderna"* (BRAGATO, 2014, p. 205).

Thus, by exposing the persistence or overcoming of colonialism in International Law, we point to the inclusion of criticism of the maintenance of these structures and the option for a different International Law (GALINDO, 2015, p. 351), making it possible to affirm that TWAIL is capable of demystifying the Eurocentric and colonial discourse of International Law by highlighting its plural universalism, and opening up multiple perspectives and allowing the way for its re-signification.

2. The practical nature of the history of international law: the possibility of reframing it from a critical point of view.

If, on the one hand, international law needs to be demystified in the sense that it does not take into account the interests of international society as a whole, but rather those of a small portion of the globe, which since modern times[13] has been hiding other forms of knowledge and action, and hindering the fullness of being and the recognition of differences (DUSSEL, 2005), thus impacting on the normative set that was being built and that was globalized in the following centuries; on the other hand, it also needs to be reframed.

Galindo (2015, p. 340 – our translation), pondering over the studies of Gordon (1996), has already pointed out that the practical nature of the history of international law can be static, that is, it may have a "fixed meaning established by its past uses. In this case, it would be up to the jurist to simply take this fixed meaning from the past" and apply it to the current context. However, how can we replicate an exclusionary and classist concept, forged by states that did not represent everyone's wishes, culminating in the adoption of unilateral and imposing rules?

It is important here to borrow the decolonial critique of human rights, which, when characterizing man based on his rationality, noted the "factor of exclusion of human beings outside the dominant cultural pattern, which ultimately embodied the figure of the European, white, male, Christian, conservative, heterosexual and owner" as those belonging to the human category and thus the only holders of rights (BRAGATO, 2014, p. 222 – our translation). It turns out that these specific subjects

[13] Modernity would be a European construction, which precisely marks the domination of the European - the conquerors - over the other, the dominated peoples, who are relegated, deprived of capacity, territory, etc. *Cf.* DUSSEL, 1993, p. 15-16.

were the same ones who, meeting in Vienna or The Hague, created the rules of international law.

If, in the case of human rights, "the establishment of relations of domination and subjection based on hierarchical positions has been noted, with racism as its apex" (BRAGATO, 2014, p. 223 – our translation), the rules that were forged at the time were questioned, in an attempt to make the difference visible in order to recognize and respect the excluded and the forgotten; perhaps it is time for international law to do the same, not allowing such a static vision, which maintains truths based on colonial difference. In this sense, re-signification gains a justification, since staticity would maintain colonialism and the very coloniality[14] of international relations.

Galindo (2015), however, does not limit himself to debating the static posture that the practical character of the history of international law can have, but also discusses the dynamic attitudes of jurists. "Those who adopt this attitude believe that legal interpretation not only varies, but must vary over time in order to adapt to changing conditions. The internationalist, according to this attitude, is considered an agent of progress" (GALINDO, 2015, p. 341 – our translation).

Thus, at first glance, this position would allow other foundations in the field of international law to be rescued (when they were hindered in the past by the colonial model) or even emerge, fostering a normative change that totally breaks with the norms stemming from the Europeanization and imperialism of classical/modern international law in favor of the formatting of a "legal order of a social, institutionalized and democratic nature", whose legitimacy lies precisely in past events, which have come to be entirely refuted (GALINDO, 2015, p. 341 – our translation). In other words, this position argues that "the past must be known in

[14] According to Restepo and Rojas (2010, p. 15), "*[e]l colonialismo refiere al proceso y los aparatos de dominio político y militar que se despliegan para garantizar la explotación del trabajo y las riquezas de las colonias en beneficio del colonizador; como veremos, en diversos sentidos los alcances del colonialismo son distintos a los de la colonialidad, incluso más puntuales y reducidos. La colonialidad es un fenómeno histórico mucho más complejo que se extiende hasta nuestro presente y se refiere a un patrón de poder que opera a través de la naturalización de jerarquías territoriales, raciales, culturales y epistémicas, posibilitando la re-producción de relaciones de dominación; este patrón de poder no sólo garantiza la explotación por el capital de unos seres humanos por otros a escala mundial, sino también la subalternización y obliteración de los conocimientos, experiencias y formas de vida de quienes son así dominados y explotados*".

order for the present and future to be different from it" (GALINDO, 2015, p. 342 – our translation).

> Contemporary international law needs its opposite (classical international law) to assert itself. (...) The characteristics 'social, institutionalized and democratic' are only affirmed in opposition to what is 'liberal, decentralized and oligarchic'. (...) The past needs the present to be overcome and the present needs the past to be justified. The past is thus continually articulated with the present. Although the dynamic stance appears to emphasize discontinuities (new and old international law), it is also based on great continuities. Here, the present is inseparably linked to the past and becomes a consequence, a result of what happened years ago. (GALINDO, 2015, p. 34 – our translation).

Nevertheless, precisely because it seeks new rules of international law due to its corrupted, colonial, exclusionary and imperialist past, this position can lead to a harmful emptying of meanings, since it would deny the very advances that have already been made in terms of recognizing changes, accepting multiculturalism and raising awareness that changes are needed since the colonial difference was unveiled. As a result, it is understood that the mere destruction of concepts in order to build new understandings, although being justified in past conducts, does not help to organize the international society that is sought, and could in fact lead to an even more damaging emptying of norms from the perspective of plurality.

Faced with the limitations of both attitudes, Galindo (2015, p. 342 – our translation) looks to the critical stance as a way "to bring about deeper changes in international law in favor of those traditionally excluded, making more vigorous use of the interdisciplinary contribution of historiography." This is because, as he himself explains, "we don't look to the past for authority to corroborate arguments made in the present. The 'use' of the past is more committed to the breaking of traditions or at least to their reconstruction after a thorough revisiting of their foundations" (GALINDO, 2015, p. 342 – our translation).

The critical stance towards history (of International Law) thus allows us to discover a "multiplicity of meanings that often coexist at the same time" (GALINDO, 2015, p. 342 – our translation), which clash with each other and which, as a result, need to undergo a re-signification in order to adapt to the contemporary reality that challenges the imperialist and Europeanized past. Yet the difference between the critical attitude and the dynamic one lies precisely in the revision of colonialist policies that persist today – and not in their total dismantling/annihilation because it is understood that there is no way to 'start from scratch'.

Cançado Trindade (2002), for example, points out that international law is an important instrument of social regulation, even if its use has been to allow and maintain colonization and imperialism. Although its present and past use has been in this direction, international law can still be a tool used to seek distributive justice through its process of creating other norms[15]. After all, international law must not only break with, but also no longer allow the subjugation of the peoples of the Third World by the imperialist Global North, thus needing to be re-founded in other meanings, which, to this end, translates into the need for its critical re-signification without a complete break with the structure that already exists.

There are examples of this attempt at a critical stance in recent history. As Eslava, Fakhri and Nesiah (2017, p. 5) point out, in Bandung there was restlessness on the part of its participants "to both conform to and re-signify the language and categories of the international legal order". The 29 Afro-Asian countries present at the Conference held in 1955 were trying to structure a space of their own, during the Cold War, independently of the two blocs that existed at the time:

> (...) the peoples represented in Bandung raised the banner of promoting peaceful coexistence, rejecting participation in any military pact. Based on the traumatic colonial experience, they also defended non-intervention and non-interference in the internal affairs of other countries, enshrining the principles of respect for the sovereignty and territorial integrity of all nations, with the defense of human rights as a fundamental value (BISSIO, 2015, p. 27 – our translation).

This example, much referred to by the *Twailers*, is seen as one of the first anti-colonial movements in international law[16], "which sought to formulate a solidarity based on the decentralization of Europe as the cultural and geopolitical center of the globe" (ESLAVA; FAKHRI; NESIAH, 2017, p. 6), without necessarily breaking with the previous rules, just re-signifying them so as to allow the structuring of another set of rules in the old international order, now, however, with different meanings. So

[15] In the original: *"A III Conferência das Nações Unidas sobre o Direito do Mar teve o mérito de haver estabelecido os direitos e deveres dos Estados sob a Convenção de 1982, e, ademais, de haver demonstrado a possibilidade de buscar a justiça distributiva mediante o processo legiferante internacional. Já então a busca da justiça passava a se afigurar como 'o motor mais importante da vida internacional"* (CANÇADO TRINDADE, 2002, p. 1071). This function can be exemplified through Article 82 of the United Nations Convention on the Law of the Sea, since payments and contributions made in accordance with its provisions take into account the interests and needs of Third World states and peoples who have not achieved full independence or other autonomy.

[16] Some even say that this attempt dates back to the Bretton Woods Conference in 1944. *Cf.* SQUEFF *et al.*, 2020.

much so that this process, which began in Bandung, led to later initiatives, such as the institutionalized emergence of the "Non-Aligned Movement (NAM) and the United Nations Conference on Trade and Development (UNCTAD); projects seeking to shape international law such as the New International Economic Order (NIEO) and the Law of the" (ESLAVA; FAKHRI; NESIAH, 2017, p. 6).

In a similar view, Bissio points out (2015, p. 28) that:

> Bandung is undoubtedly the starting point of this movement; among the main points on its agenda was the goal of structuring a Third World political force capable of promoting political, economic and cultural cooperation. This alliance was seen as strategic for overcoming the tragic legacy of the colonial period that independence had failed to leave behind, since neo-colonialism persisted in sometimes subtle forms.

No wonder that the aforementioned NIEO, which emerged in 1974 within the framework of the United Nations, was based on similar assumptions (SILVA, 2018). As Bissio (2015, p. 35 – our translation) rightly pointed out, denoting the need to look at the past in order to re-signify it for the future within the existing structural framework, the NIEO's proposals were:

> (...) the result of studies carried out in different places and using different methodologies, which confirmed a dramatic diagnosis: overcoming underdevelopment would not be possible without implementing profound changes in the rules of the game in the international economy and in information flows.

Hence, from a practical historicist perspective, it is possible to say that International Law not only needs to have its foundations demystified, but also re-signified, at the same time rejecting the static maintenance of concepts originating from the European/imperialist model, and not excluding its existence for the dynamic construction of a new order as a whole, which is only possible from a critical stance, which, conscious of the past, allows it to "reflect on its own presuppositions" and promote the "changes of path that may be necessary" to culminate in a true pluralism (GALINDO, 2015, p. 348 – our translation).

3. Some concrete examples of demystification and re-signification of international law

There are two examples that can be said to concretely lead to the demystification and re-signification of international law under what was proposed

above. These regard the sources and the subjects of international law. First in relation to the sources and the demystification of international law as a set of norms plurally built, one shall take into consideration that the rules of this branch of law were not established through a wide discussion among the various members of international society.

It was in 1920, with the publication of the Statute of the Permanent Court of International Justice (PCIJ), that a list was published containing the sources of international law, which would be (a) conventions; (b) international custom; (c) the general principles of law of civilized nations; (d) the doctrine of the most renowned jurists and jurisprudence (LIGA DAS NAÇÕES, 1920). It should be noted, as it is timely, that this document also pointed to equity (the *ex aequo et bono* rule) as being a way of supporting the Court's decision, if the parties agreed, despite not strictly constituting a source of International Law.

The statute of the then existing PCIJ replicated the classification made in 1907 in the Hague through the adoption of the Convention of the Peaceful Solution of Controversies (REZEK, 2010, p. 9). This document stated in its article 7 that conventions, customs, general principles of law and equity were the rules that should be used by the International Prize Court[17] that was trying to establish[18].

This list, however, is the one that continues to be used to this day. This is because, despite the PCIJ having suspended its activities during the Second World War, the International Court of Justice (ICJ), considered its successor, maintained the same role in its Statute published in 1945, which is attached to the Charter of the United Nations. Therefore, currently, the formal sources of International Law can be found in article 38 of this document, the wording of which has not undergone any substantial changes, denoting not only a concentration of the formulation of the sources of International Law in the hands of those who were present in 1907 in The Hague, as well as the attempt to maintain the international order according to the

[17] Kelsen (1995, p. 413) explains that this court would aim to investigate the possibilities of compensating those who had their vessels and goods seized/looted in a context of armed conflict – be it a State or, in exceptional cases, a neutral individual.

[18] Art. 7: "If the question of law is provided for by a *Convention* in force between the belligerent captor and the Power that is a party to the dispute or whose national is a party to it, the [International Prize] Court will comply with the stipulations of the aforementioned Convention. In the absence of these stipulations, the Court applies the rules of International Law. If there are no *generally recognized rules*, the Court decides *in accordance with general principles of law and equity*" (MELLO, 1979, p. 96-97 – emphasis added).

model that existed in the mid-twentieth century, when the world was still clearly divided between colonies and metropolises (specifically, a large part of the African and Asian continents), in addition the zones of influence of nations located at the center of the World-System (like Latin America for the United States).

As much as it is argued that the second Hague Conference had a notable contribution from Latin American delegations, especially from Brazil (Ruy Barbosa) and Argentina (Luis María Drago), it cannot be said that their collaboration was, in fact, order-changing. As Shulz (2017, p. 612 – emphasis added) argues,

> Latin American states sought recognition as full members of the international order. *They did not aim to transform the order itself*. In choosing to attend the conference, they were primarily driven by the concern of foreign policy elites—politicians, diplomats, and international lawyers—about the uncertain standing of their states in international society. The activism that has since been attributed to Latin America had more to do with the role of an emerging network of international lawyers who attended the conference and less to do with a principled stance adopted by those states.

In this sense, it would not be feasible to state that the stipulation of which normative types would be considered sources of international law was actually/widely articulated/debated. Perhaps the only contribution of the Third World at that time in terms of sources was the formulation of the principles of (state) equality and non-intervention, given their status-seeking in face of the already consolidated European States[19], as well as to anyhow "constrain the United States through international law and institutions" (SHULZ, 2017, p. 613).

"Latin America, in other words, formed part of a 'non-European penumbra' whose rightful place was ambiguous and contested" (SHULZ, 2017, p. 614), especially with regard to the formulation of International Law in general. It is for no other reason, for example, that, even though the principles mentioned above have been put together, it was still stated in article 38(1)(c), on the principles of international law, that only those "of civilized nations" [20] that would be accepted in order to still

[19] Regarding this, the discussion of Freitas and Carvalho (2023) is very interesting, as they confirm that the very search for status along European lines was a way of sustaining the *status quo*, that is, the domination and dependence of Latin Americans on the /to the European.

[20] This expression is quite controversial. Thirlway (2017, p. 95) expresses that it was understood as necessary to exclude insufficiently developed systems from the formation of the common principled list existing among nations. Mazzuoli (2013, p. 140), in turn, asserts that the use of the expression revealed a "discrimination of the then drafters of the Statute, coming from the 19th century, in relation to States not belonging to the European axis", reflecting "a trend previous to the First World War."

maintain the *status quo*, that is, of those who could 'create International Law'[21] – which, in fact, was maintained in 1945 when the ICJ Statute was created.

On this topic, Jean-Marie Lambert (2003, p. 126 *apud* MAZZUOLI, 2013, p. 140) considers that:

> The anti-colonialist spirit of the immediate post-[Second] World War was unable to remove all the existing [imperialist ideologies]. The notion [of a civilized nation] echoes an imperialist era in which a few nations, charged with a deep superiority complex, found themselves entrusted with a civilizing mission over the peoples of the earth. [...] The formula [of article 38(1)(c)] is marked by arrogance and, to acquire true operability, it would need to be cleaned up. This embarrassing locution remains intact and is, to say the least, deplorable. It sounds like an insult to those who were not part of the small circle of elected officials [...].

This is similar to the thought of Varella (2012, p. 156 – our translation), for whom the expression was maintained in the ICJ Statute, in 1945, because it was "a time in which several States emerged from the decolonization process, with a strong resistance to the acceptance of legal reflection coming from new, non-European, non-Christian, subjects of law international". After all, they should accept the already established international law, since this "would be [...] a necessary development of the union of interests of similar nations in terms of culture and civilization" (FREITAS; CARVALHO, 2023, p. 43), not to mention the lack of power (especially military) of those to contest it (O'CONNELL, 2008, p. 94).

In this context, the "heritage of Western culture" on the formation and unity of international law is clear (FREITAS; CARVALHO, 2023, p. 44), the reflection of which is, in addition to the principles, in all other sources prescribed under the article 38 of the ICJ Statute, as demonstrated by Squeff (2018) in her doctoral thesis, denoting that it is not only a myth to speak of plurality in the construction of formal sources of international law, but also necessary to debate potential openings.

In this sense, when it comes to the re-signification of international law related to its sources, soft law seems to be a way forward, as it may be seen as a decolonial tool (SQUEFF, 2021). In short (as it is not the objective of this article), soft law does not need to go through the same rigid steps to be erected as treaties do, nor it is a rule tacitly imposed to others through reiterated practices and the belief of a handful of countries that it constitutes a rule to be followed by all, as customary international law entails. It is a rule that can be proposed by any country on any matter,

[21] Here we refer to the capacity of "doing" law, as Squeff (2021) argued.

disregarding the region of the world it comes from. It is seen in fact as a way for the Global South to advance normative ideas on subjects that are important/keen to them, which would normally be refuted by the North (SQUEFF, 2021). This way, soft law may fight for breaking the Western logic that only the Global North is the one who "says" the Law, in an attempt to create a truly universal and plural international law.

Secondly, in regard to the subjects and the demystification of international law, some considerations need to be made. Indeed, the consolidation of international institutions, whether governmental or not, has transformed International Society and, consequently, international law, moving away from the centrality of the State, building an environment with new subjects. While some of these entities reinforce neoliberal principles and methods that perpetuate hegemonic norms with typical colonial impacts; others seek to awaken consciousness and foster libertarian initiatives that respond to the needs and disparities characteristic of the Global South, in the face of a variety of mechanisms for controlling and manipulating economic power.

Since the establishment of the new configurations of contemporary international law, mainly after World War II, the Global South has been striving to find its place on the international arena, using international law as a tool to drive social, political, economic, and legal transformations. However, the supposed universality of this branch of law has acted more to limit and, ultimately, weaken the claims of the Global South. This is because these efforts aimed at changing the global order are often absorbed by a dominant logic that has managed to impose the universality of a set of specific values of the North (i.e., the globalization of European perspectives) (PAHUJA, 2011), benefiting them to the detriment of the South.

The European-centered universalization of international law has established a legal domain that is still maintained by the Global North – a domain that requires all demands from the South to conform to its criteria, thus ensuring them the ongoing prerogative to determine what is considered legal and the extent of international law rules. This view also influences the interpretation of institutions that assign the condition of subjects within international law.

For instance, in the Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, of April 11, 1949, the ICJ recognized the

individual as being able to have international rights and obligations, and the capacity to exercise them. In other words, it considered the individual as a subject of international law since it established that subjects are those who hold international legal personality and capacity. And while international legal personality is understood as the ability to possess rights and obligations at the international level, international legal capacity is the ability to exercise these rights and obligations independently of the state (CRETELLA NETO, 2012; TRINDADE, 2015).

In this sense, the doctrine has established that the subjects of international law are States, international organizations, some non-state entities (such as the Vatican), and the human person. Currently, according to Silva (2018), there is a growing claim for transnational corporations, non-governmental organizations, and, we include, indigenous communities to be recognized as subjects of international law too. However, the State continues to be the central figure in this branch of law, despite no longer exclusively holding the qualification as subject. This indicates that not only we are demystifying international law as to having (or even allowing) only states as subjects, but also re-signifying when considering there is an opening for other forms of social organization that also have international personality and legal capacity (BRANT, 2020).

In fact, this helps the argument set forth above regarding the sources of international law. After all, the term "subject" serves to differentiate social actors recognized by the international legal system from those who are ignored, covering not only the attribution of rights and obligations, but also the authority to suggest norms. Consequently, by enlarging the subjects, one may argue that other formal sources may also be considered, as we proposed above as a way to re-signify international law.

Squeff and Gomes (2021), for example, emphasize the urgency of reassessing the subjects of international law, especially in light of the most vulnerable, aiming at ensuring them due participation in the international arena for concretely safeguarding their rights, values, perspectives, etc., culminating in the creation of more effective international connections that meet the needs of these peoples.

This could be the case of indigenous people, we add. In the context of the Inter-American Human Rights System (SIDH), specifically in cases against Brazil, there is a record of seven provisional measures granted by the Inter-American

Commission on Human Rights (CIDH) and a sentence from the Inter-American Court of Human Rights (CORIDH, 2018), which highlight the importance of the involvement of indigenous peoples in international law for safeguarding their rights.

And, actually, this has been a tendency, despite of the obstacles they still face before more traditional mechanisms, as the UN Global System of Human Rights Protection, where they may argue only individually (and not as a community/nation), unlike the SIDH (DAMASCENO, TEIXEIRA; 2021). Hence, to demystify international law, in this case, would be to realize that such obstacles exist because the state opposes to their full recognition, and re-signify would be the enlargement of the list of subjects to include them, particularly to safeguard their culture and territories. And for this to happen, it is vital to adopt a critical view of international law, capable of redefining the limitations in the framing of subjects.

Final considerations

The aim of this text was to make an initial reflection on the importance of studying international law from a different perspective, in this case, from a non-traditional one, as they are largely imperialist and exclusionary, based on European interests, which structured this branch of law at the turn of modernity. Therefore, instigated especially by the writings of George Bandeira Galindo, particularly those that introduce the possibility of thinking about international law from a third-world perspective, we sought to consider the need to demystify and reframe international law, as we believe that, based on these understandings, the relevance of TWAIL's work would be enhanced.

With regard to the former, demystifying international law would represent a move to take note of its colonial and imperial foundations, allowing it to be narrated from perspectives from the Third World, which, until now, have been omitted and hindered, treated as unimportant for normative construction on the external plane, since they were not thought up by the "central states", that is, by the Global North/Europe. This way, demystification makes it possible for the universal character of international law to no longer be local, but rather global, plural and, consequently, less exclusionary, bringing social justice to those who are routinely excluded – a movement that is already underway within the scope of International Human Rights

Law[22], where the rigid sources of international law and its traditional subjects, like the state, tend to obliterate subaltern voices and their will.

With regard to the second, 're-significations', in line with Galindo, the use of history in international law was highlighted as a practice that can maintain, refute or alter the meaning of its rules. With regard to the first, we pondered over the static position of international law, in which a concept would be rescued from history in order to be applied today – a perspective that we rejected insofar as it supported the colonial perspective of international law. As for the second, the possibility of using history to deny the past in favor of a totally different present/future was evaluated, and also repelled because it would lead to an emptying of the very changes that have already taken place over the years in this field of Law. Finally, with regard to the third one, we thought that this would be the approach that would allow the re-signification of normative content at international level, since, based on criticism, it would be possible to revisit the past to see what should be changed, without this constituting a new structuring of the international order, but merely the need to adapt it to the anti-imperialist aspirations highlighted, such as allowing other sources (as soft law) or subjects (as indigenous peoples) to flourish and take part of international life, respectively.

At the end, therefore, we emphasize that this final remarks also lead us to understand that bringing Third World narratives and stories to the surface, rather than leaving them in the depths of the abyss between the Global North and South, allows the problems of excluded peoples to be presented and discussed in the international arena; therefore, by demystifying the intrinsic universal local/European character and re-signifying international law, the social justice that is desired in the unequal relations that exist at international level will finally be achieved.

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[22] For explanatory purposes, *cf.* BRAGATO; DAMACENA, 2013; ACHIUME, 2018; BERNARDINO-COSTA; GROSFOGUEL , 2016; GALLARDO, 2010; HERRERA FLORES, 2009; LUGONES, 2014; RUBIO (2015); WOLKMER; LIPPSTEIN, 2017.

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Recebido em Janeiro de 2024
Aprovado em Março de 2024