V. 17 N. 2
2021

ISSN 2317-6172

Revista DIREITO GV

FGV DIREITO SP

Recebido: 25.02.2020
Aprovado: 29.06.2021

https://doi.org/10.1590/2317-6172202127

Overcoming the "Coloniality of Doing" in International Law: Soft Law as a Decolonial Tool

SUPERANDO A "COLONIALIDADE DO FAZER" NO DIREITO INTERNACIONAL: A SOFT LAW *COMO FERRAMENTA DECOLONIAL*

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Abstract
Law, as a set of norms designed to regulate social life, is a field of difficult change, being always behind its time. The case of international law is even harder due to the limits of its positivist normative structure, formulated not only by countries that hold military/economic power in the international arena, but also in a modern/colonial historical moment that has guaranteed their legitimacy for more than five centuries, which makes it extremely difficult to have rules that contemplate the desires of the Third World. Thus, what seems to exist is that, in addition to the colonialities of power, knowledge and being, there is also the "coloniality of doing", limiting the development of international rules. Hence, this paper addresses this problem, since the existing norms have a high coloniality burden and will hardly be altered by the current formulas. To this end, by following an explanation of decolonialism as an epistemic approach and its relation to the Third World Approaches to International Law (TWAIL), the role of soft law will be addressed as a decolonial tool capable of solving the existing impasse. Based on the deductive method and a critical-explanatory approach, an applied research will be conducted using the bibliographic procedure for analysis with qualitative selection.

Keywords
Decolonialism; coloniality of doing; international law; TWAIL; soft law.

Resumo
O Direito, como conjunto de normas destinadas a regular a vida social, é um campo de mudanças difíceis, estando sempre atrás da sociedade. No caso do direito internacional, é ainda mais difícil em razão da sua estrutura normativa positivista, formulada não apenas por países que detêm o poder militar/econômico no plano internacional, mas também em razão de um momento histórico/colonial que garantiu a sua legitimidade por mais de cinco séculos. Portanto, é extremamente difícil ter regras que contemplem os desejos do Terceiro Mundo. Assim, o que parece existir é que, além das colonialidades de poder, saber e ser, ainda existe a "colonialidade do fazer", que limita aqueles que podem fazer as regras internacionais. Desse modo, este artigo aborda esse problema, uma vez que as regras existentes hoje detêm uma alta carga de colonialidade e dificilmente serão alteradas pelas fórmulas atuais. Para esse fim, seguindo uma explicação do decolonialismo enquanto possível abordagem epistêmica e sua relação com as abordagens terceiro-mundistas do direito internacional, o papel da soft law *será debatido como uma possível ferramenta decolonial capaz de resolver o impasse hoje existente. Para tanto, com base no método dedutivo e seguindo uma abordagem crítico-explicativa, será realizada uma pesquisa aplicada utilizando o procedimento bibliográfico para fins de análise, o qual será selecionado qualitativamente.*

Palavras-chave
Decolonialismo; colonialidade do fazer; lei internacional; TWAIL; soft law.

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Introduction[1]

¿Qué faceta humana nos destruye?
El conformismo, la aceptación de la realidad
como un destino y no como un desafío
que nos invita al cambio, a resistir, a rebelarnos,
a imaginar en lugar de vivir el futuro
como una penitencia inevitable.
Eduardo Galeano (2012)

Galeano is very surgical in his words. Aware of the reality in which he is circumscribed, the Uruguayan author is very critical regarding to the various (in)direct foreign incursions in Latin America, which marked the trajectory of the continent. However, he says that such realities could not lead to anything but change. In fact, it seems to be the case for soft law in the Global South.

In view of the exhaustive of contributions derived from a European (and) liberal tradition, as they do not encompass other views, especially those arising in the Global South, change becomes essential. However, they are not limited to the field of human rights, where critical approaches – as decolonialism[2,3] – emerge, enabling to expand it to other areas such as international law. After all, this field is commonly known as one of the particular European roots, based on rules written by those who hold the power of the military/economic force in the international arena, thus it leads to an important question as to whether other regions of the world might have deeply contributed for its formation or are considered to be able to contribute, as they challenge the reality and imagine the future in a way other than the one traced by the European legacy, which permeates the legal and social relations of today.

In this sense, bearing in mind that it is extremely difficult to have rules that contemplate the desires of the Third World or even to change the existing ones, this article aims to

1 The author herself has translated into English the direct citations quoted throughout this article.

2 The origin of the term decolonialism goes back to the debates that took place in the modernity/coloniality group, founded "from the breakdown of the Latin American Group of Subaltern Studies, due to the divergence among some of its members on the continued use of European authors as main theoretical instruments" (SQUEFF and GOMES, 2017).

3 It is emphasized that in the present text the term decolonial will be used, although, as warned by Luciana Ballestrin (2013, p. 108), the modernity/coloniality group would prefer the use of the term decolonial to descolonial to differentiate its purposes from those linked to decolonization during the Cold War and post-colonial Asian and African studies. After all, even though they are related projects, they "are distinguished by the contexts of their elaboration and their possibilities" (SQUEFF and GOMES, 2017, p. 375).

explain why it happens by presenting another type of coloniality – the coloniality of doing – in addition to the colonialities of power, knowledge and being that express the European legacy in the world, which derives from centuries of domination and imperialism that subjugated, suppressed and silenced people (as well as their knowledge) who did not come from the "centers" of the world.

Ultimately, it seems that this new type of coloniality enables not only the understanding of why international law is typically forged by the Global North, but also why there is a need to find other routes that may "enable" the Third World to support itself – and not through typical colonialist tools. After all, thinking about discursive alternatives based on Europeanized epistemologies "would betray the goal of producing effectively subordinate studies", derived from the Global South, and it is, therefore, imperative to originally seek Latin American sources (SQUEFF and GOMES, 2017).[4]

Hence, this paper addresses the debate, which is precisely "how to act" in order to modify the rules at the international level since the current ones have a high coloniality burden and will hardly be altered by the actual accepted formulas. To this end, the role of soft law will be addressed as a decolonial tool enabling the Third World to properly speak for itself under international law.

1. Decolonialism as an Epistemic Approach

Decolonialism emerges as a counterpoint to the colonialism initiated in the second wave of globalization that occurred between the 15th and 16th centuries,[5] especially from the year 1492[6] – which marks the birth (of the myth) of modernity for (de)colonial studies by the

4 In fact, in this particular point, the difference between the decolonial analysis and those proposed by post-colonialism remains. Even if the latter try to cast away the oppressive logic inserted by the Europeans, in search of "another point of view than those one is used to [looking from] [...], identify[ing] and suspend[ing] the prejudices in the search for understanding" the reasons why there is a great disparity between North and South (BRAGATO, 2009, p. 18-23), they still employ mostly European epistemologies, which would not be the most appropriate way to break with the domination relationship of the Eurocentric tradition (BALLESTRIN, 2013, p. 90-93; MIGNOLO, 2008, p. 250).

5 It should be noted that the use of the term "globalization" carries with it a heavy colonial burden, in the sense that it is a historic moment of expansion of certain patterns to the world sphere, which ends up sedimenting a framework of domination of one culture over others (QUIJANO, 2002, p. 5).

6 It is important to highlight this date, since in the "traditional" theory – read from that "colonial" moment – "modernity" (despite all the negative, dominant and submissive connotations of that term) would only have appeared with the birth of the Modern State and, therefore, at the end of the Thirty Years' War with the Peace of Westphalia in 1648.

principle "of a process of covering up the non-European", as stated by Dussel (1993, p. 8 and 77-78). This is due to the "discovery" of America, in which "Europe interprets itself [...] as the center of human events in general and, therefore, develops its particular horizon as a universal horizon (Western culture)", so that everyone should follow the European model, considered (by itself) the center of world modernity, seen (equally by itself) as a missionary of civilization, removing any element and/or meaning that the native (American) could create (DUSSEL, 1993, p. 33-36 and 65).

However, this is a process that does not end with the independence of Latin American countries in the mid-19th century, perpetuating and expanding over time on all continents, in a continuous suppression of political, social and cultural aspects of indigenous peoples (QUIJANO, 1992, p. 11). After all, with the formal (political) self-determination of the American countries, the "material colonial syndrome" began, with a theoretical-epistemological matrix which did not allow them to have their own thought or political-economic model apart from the European standard, which is still considered the (only) modern and civilized paradigm to be followed, representing a real ontological closure of the world understanding (LOOMBA, 1998, p. 19).

In addition, the European enlargement towards Africa[7] and Asia[8] throughout the 19th century in search of new areas of persuasion, keeping in mind the differences,[9] makes

7 Africa assumes a central role in European expansionist politics with the independence of Latin American countries. A striking milestone of this vision is the Berlin Conference on West Africa (1884-1885), although it "was not aimed at the division of Africa, it ended up distributing territories", prescribing the possibility that any "European nation [...] take possession of a territory on the African coasts or assume a 'protectorate'", simply by exercising "sufficient authority to enforce acquired rights" of appropriation in that continent. However, this does not mean that Europeans did not retain areas of influence before, since they already maintained colonies (extractive and strategically occupied), commercial warehouses and missionary establishments (BOAHEN, 2010, p. 34-35).

8 In Asia, "most of the great traditional empires [...] remained nominally independent, although the Western powers [mainly British and French] defined 'zones of influence' or even direct administration that could cover the entire territory. In fact, this political and military helplessness was taken for granted. Its independence depended on its usefulness" (HOBSBAWM, 2016, p. 95). In these countries, subaltern local elites emerged, with no intention of competing with the metropolis, but to maintain a dependent structure from the West, denoting the existence of weakened (and not conquered) societies and States, whose exponents are India and China (including some North African countries, such as Egypt and Algeria, which deviate from the African "standard") (HOBSBAWM, 2011, p. 189-212).

9 According to Quijano (2005, p. 121), "the colonizers performed various operations that led to the stablishment of a new universe of intersubjective relations of domination between Europe and the Europeans as well as other regions and populations of the world, to which were attributed new geocultural identities. [...] They repressed as much as they could [...] the forms of knowledge production of the

colonialism even more present, ceasing to be just "a system of formal political domination of one society over others" and by moving towards true imperialism. It represents "an association of social interests between dominant groups (social classes and/or ethnicities) from unequally placed countries in an articulation of power" – a moment in which the "relationship between the European culture, also called 'Western', and the others becomes colonial domination, [although] it is not just a matter of subordination of other cultures to the European, in an external relationship", acting directly within the "imaginary of the dominated" (QUIJANO, 1992, p. 11).

In other words, the colonialism that started in the 15th century evolved in the course of the 19th century, represented a "repression of all forms of producing knowledge, perspectives, images and systems of images, symbols, meanings; on resources, standards and instruments of expression" in the locations impacted by Western expansionism (QUIJANO, 2005, p. 121).

This scenario leads to the period called "second modernity", which is embodied in the delimitation of new frontiers at the heart of the European colonial thought: an internal one, with the concentration of knowledge in northwest Europe (composed mainly by Germany, Netherlands, England and France), to the detriment of the south (Iberian countries); and an external one, alluding to the North American initiatives towards Latin American countries. It consists of the creation of the American white man notion to the detriment of the Hispanic (Latin), which is nothing more than a reflection of the internal inferiorization of Portugal and Spain regarding to the modern/European epistemological formation and the consequence of enshrining the inclusion of the United States in the dominant Western orbit in the middle of the 20th century[10] (GROSFOGUEL, 2002, p. 211-212).

Therefore, it is possible to evidence that these oppressive conjunctures do not interfere in the termination of the direct or indirect formal presence of Westerners in these environments, as "the multiple and heterogeneous global structures implanted during a period of 450 years did not fade away with the legal-political decolonization of the periphery over the past 50 years". It has continued "to live under the same colonial power matrix" (GROSFOGUEL,

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colonized [...]. The repression in this field was admittedly more violent, profound and lasting among the Indians of Iberian America [...]. Something similar happened in Africa. Undoubtedly the repression in Africa was lighter, where an important part of history and written intellectual heritage could be preserved".

10 It is undeniable that since the development of the "Monroe Doctrine" the United States has exercised dominance over Latin American countries (BANDEIRA, 1978, p. 150). However, after the end of World War II, the United States became part of the Western world, previously dominated by Europeans. As Grosfoguel (2008a, p. 4) claims: today "the old colonial hierarchies of West/non-West remain in place", even though they present "the United States as the undisputed hegemon over non-European people".

2008b, p. 126). However, this matrix is no longer called as a "global colonialism" but is now labled as a "global coloniality" (GROSFOGUEL, 2008b, p. 126).

According to Restrepo and Rojas (2010, p. 15), while the first "refers to the process and apparatus of political and military domination implemented to assure the exploitation of labor and the wealth of colonies for the benefit of the colonizer", the second "is a much more complex historical phenomenon that extends to the current times and refers to a pattern of power that operates through the naturalization of cultural, racial, territorial and epistemic hierarchies, allowing the (re)production of relations of domination" – a terminological distinction that proves to be extremely relevant for understanding the dimensions encompassed by decoloniality as a founding structure for considering the needs of the actual Global South.

After all, although administratively emancipated, the Third World nations[11] display "colonial situations" which reflect in a persistent "oppression/cultural, political, sexual and economic exploitation of subordinate ethnic/racialized groups by dominant ethnic-rational groups" (GROSFOGUEL, 2008b, p. 120), so as not to allow a true geopolitical articulation of knowledge in the most diverse fields, preserving the Western Euro-American "egopolitics", as Dussel (2005, p. 28) once evidenced. Admittedly seen today from three interfaces: the coloniality of power, being and knowledge.

11 It should be noted that the expression "Third World" emerges as a way of designating countries located on the fringes of the Western/European/Northern political system in the 1950s, between the Soviet Union and the United States, as Wolkmer (1989) highlights. However, the author explains that the term was used for the first time in an unpretentious way in a French newspaper to designate poor countries alluding to the Third State in the revolutionary France of 1789. Furthermore, he points out that there are authors who tend to exclude countries that were not "dominated and plundered by imperialism, removing the socialist countries of Asia, Africa and Latin America", such as China and Cuba. He also explains throughout the text that the term is currently designated to identify the non-developed countries, which were colonized by the West, located in the three "As" – (Latin) America, Africa and Asia – and, outside industrialized centers, economically dependent on the North (Europe/United States). Afonso (2015, p. 156) asserts that the use of the expression "Third World" occurred for the first time as a political category at the Bandung Conference in April 1955, based on ideological criteria, in the case of non-aligned countries. As an economic category, the author refers to the common use of the expressions "Third World" and "Developing World" in reference to developing countries from 1989 onwards, considering changes in the international order (although subject to criticism in the light of decolonialism through the "standardization" of identities of different countries with no developed economy) (AFONSO, 2015, p. 156-157). Finally, as a geographical category, the Third World is a current synonym with the Global South (formerly called East) in reference to its distance from the great normative centers – actual North and formerly – before 1989 – the West (AFONSO, 2015, p. 156-157). Once, aware of such differences, it is pointed out that all these terms will be used as synonyms in this text.

The coloniality of power corresponds to the maintenance of the power matrix established in 1492 with the arrival of Europeans in the Americas, which is based on the ethnic-racial hierarchy of the peoples, directly reflecting on the international division of labor and the accumulation of capital (QUIJANO, 1992, p. 12). This is because, "insofar as the social relations represented domination, [the socially constructed] identities were associated with the corresponding hierarchies, places and social roles", configuring a "racist distribution of work within the colonial/modern capitalism" (QUIJANO, 2005, p. 117-119).

With new social identities based on the idea of race in the 16th century between the Indian and the Iberian, and on color (as an emblematic racial sign) in the 18th century between white, black, mestizo, yellow and olive-skinned, the colonizers ended up stipulating a relation of control and inferiorization of those considered phenotypically different was materialized, imposing on them a specific division of labor, resources and products, pre-determining their participation in the capitalist world.[12]

The control of power was remained under the hegemonic dominance of (white) Europeans, in the center of capitalism, unquestionably as it was considered the only valid rationality and the only symbol of modernity. In fact, both the sustaining of power and its consequent centrality in the colonial/capitalist model are due to the categorization of individuals by their ethnicity. It would not have been possible for the Europeans to enrich with the control of workforce worldwide and with the resources and products of their localities (FERNANDES, 2014, p. 74).

Wallerstein (1985, p. 65) explains that "ethnicity [...] made it possible to reproduce the workforce, not in the sense of providing sufficient income for the groups to survive, but in terms of providing sufficient workers" at the income levels that the Europeans aimed to obtain. "In addition, precisely because the workforce [was] ethnicity based, its allocation

12 As Quijano (2005, p. 118-119) claims, "[in] the Hispanic area, the Crown of Castile soon decided to end the slavery of the Indians, in order to prevent their total extermination. Thus, they were confined to the structure of serfdom [which cannot be compared to the serfdom of European feudalism, since it did not include the protection of any feudal lord, nor the possession of a portion of land to cultivate instead of a salary]. Those who lived in their communities were allowed to practice their old reciprocity – that is, the exchange of labor and labor without a market – as a way of reproducing their workforce as servants. In some cases, the indigenous nobility, as a small minority were released from servitude and received special treatment due to their roles as an intermediary with the dominant race. They were also allowed to participate in jobs of which the Spaniards who did not belong were employed to the nobility. On the other hand, black people were reduced to slavery. The dominant races such as Spaniard and Portuguese could receive wages, be independent traders, artisans or farmers in the production of goods. However, only the nobles could occupy the middle and high positions of the colonial, civil or military administration".

was flexible [...] enabling [its] geographic mobility [...] on a large scale" according to the will of the Europeans (WALLERSTEIN, 1985, p. 65). After all, the workforce was ranked according to the individual's race (color); the "white" stratum was superior, which would justify the exercise of power in the face of physiologically inferiors. This ended up shaping the conduct and expectations of the structurally oppressed, which was economically convenient/beneficial to the Europeans (WALLERSTEIN, 1985, p. 66-67; WALLERSTEIN, 2004, p. 138).

Thus, the coloniality of power exercised by Europeans was essential to forge the bases of world capitalism, which presupposes the hegemony of capital. This is due to the form of production through the division of labor (in addition to wage earners, it included slavery and serfdom based on the social/racial classification made by Europeans),[13] which used to centralize all the production of goods (from the resources extracted from the colonies to the final products), and direct them to a single world market (centralized in Europe and in the Europeans across the world, which ended up enriching them over the others.

Furthermore, it is important to evidence that "[the] main ideology that acted to create, socialize and reproduce pictures [of continuous and efficient performance of the workforce] was not the ideology of racism [that is, of ethnicism]. It was the ideology of universalism". In other words, the European universalism constantly reinforced its power based on "significant general statements about the world – the physical and the social world – that [were considered to be] universally true" (WALLERSTEIN, 1985, p. 68), although formulated and reproduced by the Europeans themselve based on the idea that "the dominant needs to feel that it is morally and historically justified as the dominant group and the main recipient of the economic surplus produced within the system", as Wallerstein states (2007, p. 65).

Given that, it is coherent to conclude that "capital, as a social relationship of control of wage labor, was the axis around which all other forms of control of work, resources and

13 In this regard, it is important to clarify that "*[d]esde el punto de vista eurocéntrico, reciprocidad, esclavitud, servidumbre y producción mercantil independiente, son todas percibidas como una secuencia histórica previa a la mercantilización de la fuerza de trabajo. Son pre-capital. [...] [S]in embargo, que en América ellas no emergieron en una secuencia histórica unilineal; ninguna de ellas fue una mera extensión de antiguas formas precapitalistas, ni fueron tampoco incompatibles con el capital. En América la esclavitud fue deliberadamente establecida y organizada como mercancía para producir mercancías para el mercado mundial y, de ese modo, para servir a los propósitos y necesidades del capitalismo. Así mismo, la servidumbre impuesta sobre los indios, inclusive la redefinición de las instituciones de la reciprocidad, para servir los mismos fines, i.e. para producir mercancías para el mercado mundial. Eso significa que todas esas formas de trabajo y de control del trabajo en América no sólo actuaban simultáneamente, sino que estuvieron articuladas alrededor del eje del capital y del mercado mundial. Consecuentemente, fueron parte de un nuevo patrón de organización y de control del trabajo en todas sus formas históricamente conocidas, juntas y alrededor del capital. Juntas configuraron un nuevo sistema: el capitalismo*" (QUIJANO, 2005, p. 219).

products were articulated", enabling Europeans to racially classify and distribute (in relation to work) the individuals located in the colonies and dictate the direction of capitalism itself. Furthermore, at a time when "that specific social relationship was geographically concentrated in Europe, and among Europeans throughout the world of capitalism", Europe (and the Europeans) was "[in] the center of the [capitalist/colonial] world" (QUIJANO, 2005, p. 208), based on "[universalized] ethical doctrines and points of view that derive from the [European] context" (WALLERSTEIN, 2007, p. 60).

In accordance to Quijano (2005, p. 120), it is from the perception of the European historical centrality that Immanuel Wallerstein, and Raúl Prebisch,[14] created the concept of world-system to describe the structure of modern capitalism. Regarding this, Wallerstein (2002, p. 67-68) believed that "the modern world-system is a capitalist world-economy, governed by the urge to incessant capital accumulation", which "was born during the 16th century" and expanded as it incorporated "successively other parts of the world in its division of labor". Although it is not through relations between equals, but through core-peripheral relations in which Europe was the epicenter (due to Eurocentrism)[15] and Latin America[16] it was the main place of operation (due to the ethnic-racial difference universally sustained).[17]

14 "Prebisch's center-periphery thesis, first formulated in the 1940s, suggested a point of view that most economists in the United States and Western Europe still find difficult to accept. It implied a hegemonic relationship between two discrete elements in a single economic system, even if 'primary' and 'secondary' centers changed relative positions. Furthermore the establishment of the idea of unequal exchange between the two elements led to the conclusion that the center derived part of its wealth from the periphery. In Prebisch's version, the technological progress was generated by the center. Finally, the idea that the relationship was actually enduring was implicit in the original scheme. The formation of new centers by peripheral areas was possible only by breaking away from the old center" (LOVE, 1980, p. 46).

15 "*Eurocentrismo es, aquí, el nombre de una perspectiva de conocimiento cuya elaboración sistemática comenzó en Europa Occidental antes de mediados del siglo XVII, aunque algunas de sus raíces son sin duda más viejas, incluso antiguas, y que en las centurias siguientes se hizo mundialmente hegemónica recorriendo el mismo cauce del dominio de la Europa burguesa*" (QUIJANO, 2005, p. 218).

16 It should be recalled that "[t]here could not have been a capitalist world-economy without the Americas" (QUIJANO and WALLERSTEIN, 1992, p. 549).

17 This phrase retrieves, more explicitly, the way in which Quijano (2012, p. 4) summarizes the pattern of world power (Wallerstein's world-system), which, according to the author, "consists of the articulation between: (1) the coloniality of power, that is, the idea of 'race' as the foundation of the universal standard of basic social classification and social domination; (2) capitalism, as a universal standard of social exploitation; (3) the state as a universal central form of control over collective authority and the modern nation-state as its hegemonic variant; (4) eurocentrism as a hegemonic way of controlling subjectivity/intersubjectivity, particularly in the way of producing knowledge". *See also* Mignolo (2016), p. 74, debating Wallerstein's idea.

Furthermore, even with the political independence of the states that were formerly colonized and subjected to this capitalist exploitation, individuals were deprived of their particularities as they were replaced by common identities based on the argument of the existence of a lower type in a true expression of the coloniality of power. It has not dissipated (SQUEFF and GOMES, 2017) – not even in the 21st century!

As Grosfoguel states (2008b, p. 126), this coloniality may be currently evidenced with the "introduction of Third World migrants into the ethnic-racial hierarchy of global metropolitan cities" or from "the regime imposed by the United States, through the International Monetary Fund (IMF), the World Bank (BM), Pentagon and NATO". Another example is food insecurity, which is undeniably sustained by coloniality when individuals of the Global South lack access to quality food even though such products are typically originated from their location (periphery), due to a "deviation" of food routes towards the North (center of the capitalist world-system) (SQUEFF, 2018).

This means that the coloniality of power persists in (re)ordering the society and the market "around a limited set of historically invariant patterns", intermediating the transfers of wealth to the current world center (Global North), even though several singularities are already socially marked (QUIJANO, 2009, p. 77).

This is not the only coloniality remained in the current capitalist world-system. In addition to a structure strictly linked to the abuse of power through economic and political domination, coloniality has spread

> through a complex structure of several connected spheres, such as [...] the management of the environment, the control of gender and sexuality and, mainly, subjectivity and knowledge, establishing itself as an obscure constituent of modernity left by Europeans. Thus, [continued], it promotes [a] way of producing and reproducing hegemonic and Eurocentric knowledge. (SQUEFF and GOMES, 2017, p. 377-378)

The actual coloniality translates itself as a complex structure, which encompasses several levels of oppression, such as the complex "coloniality of knowledge" and the "coloniality of being" (MIGNOLO, 2010, p. 12).

For this reason, since coloniality established parameters to assess who the individual and the subject of right are (QUIJANO, 1992, p. 437-448), it automatically performs a binary exclusion, in the sense of disregarding the rights of other beings. This division performs a true dehumanization of the individual (BRAGATO, 2015, p. 58). Discrimination, subjugation, and abuse arise against the people in the Global South in relation to/through the Europeans.

This is due to the ease of manipulation of the language that came from coloniality/modernity. Europeans will restrict the application of (human) rights only to whom they see as likely to be their holder, giving rise to the classic idea that this would be only the male, white, European, Christian, heterosexual, owner of goods or minimum income, etc. – and

not, for example, a woman or a person that does not have a gender-specific identity, from the Third World, who can be white, black or brown, Muslim or Buddhist, and who has no assets or income.[18]

Decolonialism precisely enquires the cognitive and epistemological closure composed of these three dimensions. They are directly concerned with doctrinal liberation, considering "the diverse character of the elements that constitute reality" and, therefore, admitting other forms of production and exchanges, which will culminate in the full projection of oppressed thinking, beyond the self-referral carried out by the Global North. However, it seems that such colonialities are not an end in themselves. They enable other forms of colonialities to emerge in this imperial context built over five centuries of domination and subordination, as the coloniality of doing, which shall be discussed in the next part of the present article.

2. Decoloniality of Doing: Another Possible Subdivision Arising from International Law

In view of the examples that support existing colonialities, decolonial thinking is also relevant for (re-)criticizing the cognitive bases used until now, which tend to maintain these hierarchical, oppressive and excluding structures that are unconcerned with continuous social domination. It also allows the discussion regarding other positions besides the Western vision, providing the epistemological opening necessary to search for mechanisms that circumvent the coloniality of modernity, enabling more concrete responses to these realities that had been disregarded/silenced by the Global North (SQUEFF and GOMES, 2017).

After all, the struggles and assumptions are not the same. Using the theoretical bases of the West, in disregard for the oppression carried out by it, coloniality refers to its continuity, even if less apparent as the end of colonization has in fact already occurred. Based on their own human rights, their construction based on the European universalism has as its core the "classic liberalism and its ideas of individual freedom and formal equality", seeking "[to] empower individuals through the granting of rights arising from autonomy and the exercise of free will, arising from its rationality" – which does not find equivalence in the events that took place in the Global South (BRAGATO, 2014, p. 204-205).

Certainly – it is reaffirmed – these developments cannot be denied.[19] Assuming that this is an eminently global longing indeed forced, precisely due to the very implicit exclusions

18 Particularly in regard to a subdivision within the "coloniality of being", as per the "coloniality of gender". *See* Lugones (2010), p. 369-390.

19 In this sense, as mentioned by Bragato (2014, p. 220), "it cannot be denied that the various reactions to the abuse of colonial power gave rise to the formation of ideas and the recognition of values that are currently

that its concepts bring with it, in relation to the tutored individual, like the male, white, European, patriarch, heterosexual, Christian, etc. It is a fallacy to say that such groups as the women, the black, the Latin, the submissive, the homosexual, the atheist, etc., are included once the colonialities are still evidenced.

It must be remembered that "European universalism" itself disregards "any contribution of other peoples (the colonized) to the international moral and normative construction of human rights, as they are seen as initially primitive, mere legatees of the civilizing light brought by Europeans via colonization, unable to achieve modernity" without the assistance of Europeans (SQUEFF and GOMES, 2017). There is a permanent assertion of considering that the Americans are also at the center of the world-system today, since there still is a real monologue in what concerns current decision makings (to the detriment, for example, of the multiculturalism suggested by Santos [1997] and of the interculturality expressed by Walsh [2007; 2012]), like Wallerstein (2007, p. 118) suggests: "universal universalism [likewise] rejects essentialist characterizations of social reality, historicizes both the universal and the particular, reunites the so-called scientific and humanistic sides in a [single] epistemology".

Thus, it is imperative to be aware of other forms of knowledge which cannot be supported by ideas based on the traditional epistemologies that currently exist and are often used to justify the search for protection. The decolonial discourse provides the necessary to deconstruct such centrality and listen to the submissive, the covert, the ethnized – the subject of the Global South. The "historical-cultural dependency", as Quijano (2005, p. 123) already stated, as a result of coloniality, surely leads to a reduction of the dignity that exists in individuals or in the differences between the subjects belonging to a given community.

In other words, even though "the coloniality of power was not a homogeneous entity that [was] experienced in the same way by all subordinate groups", as Walsh (2007, p. 53) correctly noted, this initial concealment of distinguished individuals carried out differently by modernity/coloniality cannot be used as a justification to allow more exclusions, as cultural relativism seems to cause. In promoting severely monolithic discourses, which disregard the very plurality existing within a specific culture, relativism denies the very idea of the existence of different humanities aiming to preserve at the very end.

Concerning this, Segato (2006, p. 2017) already warned that we

> often resort to relativism in a simplifying way, focusing on the worldviews of each people as a whole. As a result, we often do not see or minimize bias with different points of view and
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> translated into the idea of human rights. As much as the European anti-absolute political struggles, the successive insurrections and rebellions of the colonial world help to explain the dynamics that human rights have assumed today".

> the various interest groups that fracture the unity of the peoples we study. We do not take into account the internal relativities that introduce cracks in the supposed monolithic consensus of values that we sometimes erroneously attribute to cultures. No matter how small the village is there will always be a dissent and groups with conflicting interests. As a result, human rights echo the aspirations of one of these groups.

Based on this, the use of relativistic discourse, whether relative or radical, is hardly feasible. It would be deeply harmful as it ignores the particularities existing in each social microenvironment, by repeating the very colonialist foundations that kept the concealment of the individual since the 15th century in the Americas, and also by fostering a "relative standardization" that refutes the existence of historical influences and intra-people exchanges that would allow the solution of problems. After all, as Segato (2002, p. 112-113) explains,

> [m]ore than a fixed horizon of culture, each people weaves its history along the path of debate and internal deliberation, revolving between the gaps in the inconsistency of its own cultural discourse, transcending its internal conflicts and choosing alternatives that are already present and that are activated by the circulation of ideas from the surrounding world, in interaction and within the universe of the nation, defined as an alliance between peoples.

Thus, by stipulating a single solution, even if contrary to universalism, it does not seem to be an appropriate way to overcome the difficulties existing in spaces forgotten by modernity (BRAGATO, 2014, p. 2018), given that it tends to reaffirm a picture of "abuse by the most powerful within [a certain] group" (SEGATO, 2011, p. 375). Decolonialism appears as a way of rupture with this scenario, as it introduces the idea of inclusion, that consists of listening to others including the subaltern to guarantee their freedom of speech and their own deliberation beyond authoritarianism, enabling the solution of issues in these places. (SEGATO, 2011, p. 375; SEGATO, 2002, p. 115).

Therefore, adopting the decolonial bias means rejecting the "apparent neutrality" existing in human rights and allowing them to be articulated based on the various humanities that were invisible and oppressed by the Europeans/Westerners due to modernity, giving rise to the colonialities of power, of knowing and being. As Bragato (2014, p. 206) affirms, considering their modernity,

> geo-historical foundations [of human rights] cannot ignore coloniality, which is the dark side of modernity. Recognizing this dimension [...] is the first step to redefine the terms of human rights discourse, [starting from] the basic question about the hegemonic role of modern Europe. [...] [That is,] one must [take] into account the totality of modern events, especially those that occur in the colonial scenario of resistance, whether in its

> political, economic or epistemological dimension, visibility and reinterpretation of the debates and political struggles of the colonized peoples, which were constant in the modern-colonial world, [will not be complete].

Therefore, considering all the experiences from more than five centuries of coloniality, which has not ended but acquired other proportions, becoming globalized, it is proposed the use of decolonial base to precisely the detachment towards modern universalist epistemology in the light of everything that occurred in that period, especially in relation to the Third World.[20] It would recognize the legitimacy of other discourses (given the existence of a plurality of knowledge), more inclusive (encompassing all beings – from North and South) and flexible, aiming to point out answers to problems today.[21]

Providing that "the decolonial option is not intended to be the universal solution", assuming only "the initial detachment from the rhetoric of modernity in which the models of thought are legitimized", as added by Mignolo (2008, p. 15), would it mean to use decolonial thinking in the scope of international law to reverse the problem of those who make the rules of this branch? The answer would be to allow other legal sources to be adopted, in addition to the resources proposed by the Global North, since they have been limited in terms of the voices and influences of their formation.

These answers must be inclusive as being from the Third World and must consider the diverse pluralities existing in international society. Along with this, there is a need to (re)think international law itself, as this field has been established under the auspices of coloniality and reflects the traditions of modernity, as it is extremely formalist (WOLKMER, 1991, p. 45-56).

It can be explained as the formalism of international law is closely related to the criticism about the difficulty of changing the rules of this field of law, even if they are considered by the Third World to be retrograde and outdated, as they are restricted by the limits of its positivist normative structure, formulated in a distinct historical moment (modern/colonial) that once guaranteed legitimacy[22] (KOSKENNIEMI, 2018a, p. 10-11). That is why it is

20 Santos (1989, p. 63) does not deny: science as a whole was "imposed by European and American cultural and social anthropology on 'wild', 'primitive', African, Asian and American societies", in a way that the "social and political hegemony of 'civilized' societies [was] considered [a] logical condition" in this period, while the others were merely "object of study" – formulations that are against the logic of universalism and cover up the "Other", which the decolonial discourse intends to battle against.

21 The aim, as Galindo (2015, p. 344-345) addresses the importance of using a critical approach (as we see decoloniality to be), is not only to see the discontinuities of legal discourse, but also to allow other perspectives to arise due to of such discontinuities.

22 "Positivism had used the language of civilization as an exclusionary device to keep non-Western countries out of international law" (RAJAGOPAL, 2003, p. 56).

difficult to change international law, especially with the existing tools (ANGHIE, 2004, p. 127-128 and 130-131).

As a consequence what seems to exist is that in addition to the colonialities of power, knowledge and being there is also the *coloniality of doing*, which is how to proceed in situations where changes in rules are required at the international level, considering that we are facing social contexts that strive for normative evolutions/transformations. In other words, if society is guided through law concerning ambitious behaviors, in addition to all the criticism and discussion that may be around those who stipulate these behaviors or to whom they are directed, there is also an urgent debate on how to act to modify them, as they are not "illegal" in the strict sense, but carry a high burden of coloniality.

Considering the basic characteristics of international law, Rajagopal (2003, p. 2) may be assertive by affirming that this field of law is for the countries of the Global North, so that the Third World is a mere observer, which suffers from the consequences of the decisions taken by others. Furthermore, how is it possible to change such field of law and to overcome the coloniality of power, knowledge, being and doing that permeates international law? These questions seem essential, given what Wolkmer (1991, p. 133) states: "it is up to the critical theory not only to denounce, but also to point the way to overcome social contradictions and guide the rescue of the dignity of the historical subject".

It brings the Third World Approaches to International Law (TWAIL) closer to the decolonial turn.[23] What is assimilated in the discussions conducted by this group is precisely the attempt to (re)define international law, (re)act against colonialist (or imperialist) bases to use the terms indicated by the movement in which it was structured,[24] in addition to excluding and alienating the struggles of Third World individuals that compose international society (from its individuals to States). It is illegitimate to solve their problems, as its construction was carried out based on "intellectual, historical and cultural experiences" of the West (MUTUA, 2000, p. 36). For this reason, even its norms are providing for sovereign equality between nations and self-determination, for example, they cannot be read separately from their initial context, as one could perpetuate an asymmetric narrative of power (GATHII, 2011, p. 35 and 40).

23 According to Ballestrin (2013, p. 105), "the 'decolonial turn' is a term originally coined by Nelson Maldonado-Torres in 2005 and which basically means the theoretical and practical, political and epistemological resistance movement, to the logic of modernity/coloniality".

24 Mutua explains that TWAIL "basically describes a response to a condition [the decolonization and the end of direct European colonial rule over non-Europeans], which is both reactive and proactive. It is reactive in the sense that it responds to international law as an imperial project. But it is proactive as it seeks the internal transformation of conditions in the Third World" (MUTUA, 2000, p. 31).

Aware of such asymmetries, according to TWAIL, internationalists cannot remain inert nor replicate contents and formulas that will not actually solve the problems as they could not act differently since there is no prediction within the traditional legal bases (modern/colonial). Internationalists should be allowed to consider alternatives that dialogue with their context, and stories, especially when the alternatives are about them, which cannot be enabled by the excuse of not having such an option in the Westphalian bases of international law.

In the end, why would the European/North American tell you how to deal with problems that are not common to them? Responses constructed in this way would only perpetuate the Northern domination of legal narratives, with latent lack of legitimacy to answer such questions. TWAIL's central project is precisely to confront this Eurocentric hegemony, by suppporting those in favor of a theoretical and practical rearrangement of the law, which makes its views also decolonial.[25]

Although there is no unitary agenda in the Third World[26] after all, conjectured by different peoples, shades, cultures, histories, etc., among the *twailers* there seems to be a consensus about their role, called

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

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25 It should be stated that the post-colonial international law perspective has been developed by some authors such as Pahuja (2005). Nevertheless, this is not the case. What is argued in the present article is that there might be also a decolonial approach to international law rooted in the studies arising from Latin America (domination). Despite this, there is a certain similarity in the discourse of both approaches as the post-colonial thinking also originates from the idea that decolonization did not lead to a full independence of the old colonies, considering that there is a continuous "imprisonment" of the latter in the post-colonial period including, in international law, the subsisting hegemonic epistemology (PAHUJA, 2005, p. 460-466). In spite of this, such post-colonial thinking comes from the criticisms of Afro-Asian cultural and literary studies, starting from the clash between West and East, and from the matters of independence, nationality, black diaspora and subalternity (BALLESTRIN, 2013, p. 90).

26 Bhabha (1998, p. 52) already affirmed that the critical theory "calls attention to the fact that our referents and political priorities – the people, community, class struggle, anti-racism, gender differences, the affirmation of its imperialist, black or third perspective – do not exist with a primordial, naturalistic sense. Nor do they reflect a unitary or homogeneous political objective".

Consequently, if the traditional (modern/colonialist) solution in international law to solve situations (such as hunger, refugee crisis or economic asymmetries) in which changes are required as they are unsustainable consists of the deals through which behaviors are imposed on members of international society. TWAIL questions this position and subordination as the coloniality of power, being and knowledge still exists at the international level. The political pressures reflect on the support of patriarchy and conservatism that forces the decision-making that commonly despises (its impact on) the South, due to the formalism which leads to a possible concealment of other ways of resolving the situation, tending to preserve the problem (based, therefore, in a possible coloniality of doing).

It is up to TWAIL to be proactive towards it, aiming not only to encompass the desires of those individuals/subjects that are largely marginalized/oppressed/covered up (the Third World), but to balance the uneven international order, leading society to responses that involve historical-cultural factors intrinsic to a given situation widely present in the Global South. Therefore, it is imperative that the answers and alternatives found are not empty (since they are anchored in universalist discourses) and inefficient (due to the disconnection with the lived world).

This panorama, however, is the most common – especially, as Rajagopal (2006) states,[27] when involving human rights, by emphasizing the importance of Third World approaches in order to challenge the role attributed to the South. It is still a challenge to act differently from the "traditional" formulations and to bring new perspectives that effectively circumvent the difficulties, eradicating clearly inept (ineffective or even soon-to-be-discontinued) mechanisms. Therefore, there is an imperative question regarding *how* the South has (re)acted in the field of international law to confront the modernity/coloniality present in international relations, particularly in the context of its sources, in an attempt to spread it to other possibilities. Such question will be addressed in the next part of the present study regarding soft law and its possibility of being a decolonial tool.

3. Soft Law as a Decolonial Tool

This section proposes the possibility of using soft law as a decolonial tool as a way to circumvent the existing imperialism in the sources of international (human rights) law. The first argument for its defense is its own structure, which allows to breach the hegemonic logic presented

27 According to the author, "a counter-hegemonic international law, one would think, starts from the human rights discourse – the pre-eminent global moral discourse of our time. Instead, human rights – or to be accurate, a broad language of 'freedom' has become the foundation for a **hegemonic** international law" (RAJAGOPAL, 2006, p. 772, emphasis added).

in other sources of international law. The structure of soft law is detailed by Nasser (2006, p. 98-111) in his doctoral thesis, consisting of six attributes: it is a (1) progressive law; (2) of a programmatic and (3) principiological nature; (4) of variable content; which is (5) non-justiciable; and, thus, (6) political.

On its progressive character, Nasser (2006, p. 98) refers to the non-pre-limitation of the content of soft law as it occurs in agreements. In this sense, soft law allows a faster adaptation of legal rules "to reality or to social needs and, as a result, have to be modified", as not being a "final" norm (NASSER, 2006, p. 98). Exactly because it does not remain constrained to its initial terms, this characteristic becomes a positive aspect, as its "moldability" allows observing what the Third World countries desire, and also (re-)create the rules, complementing or modifying them to better/sooner meet their needs.

With regard to its programmatic character, the author refers to soft law as the opposite of an immediately mandatory instrument, in the sense that it creates "generic obligation[s] of future behavior", without being a fixed concern with "[specific] conditions and deadlines for compliance", precisely not to entail questions concerning its "eventual non-compliance" (NASSER, 2006, p. 102). This characteristic is very relevant not only to maintain and renew the practices until the situation that gave rise to the formulation of such rules is reversed in the first place, but also for not explicitly defining the forms of action nor accepting their re-organization before future contexts, focusing on the problem, not on its term or form.

As for the principiological character, the author refers soft laws as being "general norms and principles that cannot be immediately interpreted in terms of specific rights and obligations, nor cannot be read as rules" in a strict sense, due to their lack of precision (NASSER, 2006, p. 102). Thus, the author alludes to the possibility of the scope and strength of soft laws being variable, depending on the interpretation they receive, so that their imprecision is not necessarily a negative aspect.

After all, when general lines are established by means of soft laws, individuals would be allowed to determine the most relevant use of concrete rules to materialize them – which is very important for the countries of the Global South in the decolonial context with an opposing result from the one sought by the North, so that they can choose the form and intensity in which they will act. Moreover, it cannot be strongly stated that soft laws are mandatory, since it depends on the choice of the State.

Regarding their variable content, the author exposes soft laws as rules that have an open texture, characterizing them as being imperfect and inaccurate mainly because they do not bear an explicit mandatory language (mandatory commands), nor that is the ambition of the States or their lack of specific knowledge on the subject. It is precisely its ambiguity that makes this rule more attractive, encouraging acceptance by States (in general) as there is no declared imposition, serving as a way of "emotional" influence towards certain behavior in the future, as Nasser (2006, p. 106) adds.

In relation to its non-justiciability, Nasser (2006, p. 108-109) refers to soft law as one that "does not have a mandatory jurisdictional solution", despite recognizing the inexistence of a vertical structure in international law, as there is at the internal level of States, which is "able to organize and apply sanctions".[28] Therefore, the author adds that the non-justiciable character of soft laws is not linked to an alleged lack of normativity nor to the lack of sanction, since this predicate, in fact, recalls that it is a (voluntary) attribution of States to follow and apply international law, regardless of the way in which it was conceived or whether it can (or cannot) be judicialized.[29] This reflection is very important in the decolonial scenario, as it excels in meta-legal[30] effectiveness of its predictions, depending on the States and the contexts in which they are inserted to be fulfilled.

Finally, concerning the political character, Nasser (2006, p. 110) demonstrates the ease which soft law has to contemplate the diverse political interests of States in certain matters, allowing a greater engagement in what seems most important to them according to their ambitions, even if there is no equal consideration – which is not feasible with other sources (hard laws) as the commitment of the States are not the same.[31] The relevance of this predicate rests exactly on the flexibility it grants in relation to the intensity of the performance of the States, reducing the chances of disobedience and overcoming the differences between North and South regarding their performances.

Based on these characteristics, it is indeed not possible to say that soft law could not be considered an autonomous source of rights and duties at the international level. Comparing it to other sources – forged in the first decades of the 20th century – it would mean denying these six extremely positive points for the rupture of imperialist structures that impose the coloniality of doing up to the present day in international relations.

28 Equally emphasizing the difficulty of international law in assuming its coercive force, *see* BRUNÉE; TOOPE, 2002, p. 274-275.

29 In fact, it is important to remember that judicialization is not the first way to resolve an international dispute; there are diplomatic solutions (CHINKIN, 1989, p. 863).

30 Bandeira and Almeida (2015, p. 512) explain that meta-legal effectiveness refers to the "faculty that norms have to cause substantial (and not only formal) effects beyond which they were created; the law may have a broader interpretation, in other words, it must go beyond the formal outline, but consider it in the historical socio-cultural context".

31 Koskenniemi (2018b, p. 33-34) explains this "political intervention". He correctly expresses the interplay of existing interests at the international level, wisely explaining that if a regime "has the support of some powerful sector of the political world, then they may be able to change [their] general bias". It means that "political intervention is, in many cases, a policy of redefinition" which will only be successful if it obtains the support of those who determine the structural bias of the international system.

Furthermore, excluding soft law as an autonomous normative category based on the fact that other sources are mandatory (jurisdictional in the light of the classic theory of international responsibility) would not only go directly against its intrinsic characteristics of progressivity, programmability, variability and non-justiciability, but also denying the "functionality" of law itself, second argument in defense of its use.

The functional perception of law – including international law – considers the purposes that are developed within its bases to the detriment of a limited right that limits undesirable behavior through negative sanctions (SQUEFF, 2016, p. 85-88), in order to ensure its own regulatory framework. Thus, instead of confirming the formal rigidity and "mechanics" of the funcionally examined law, this branch of science is seen as an instrument of social transformation, in addition to repressing fixed behaviors. It motivates and favors socially desirable behaviors, encouraging beneficial procedures, in an attempt to change an existing situation; as a result, it is in constant motion.

Bobbio (2007, p. 57), who conjectured the functional perception of law, highlights that "what distinguishes this theory from others is that it expresses an instrumental conception of law", in other words, "that of being a useful instrument to achieve the most varied ends". Under the auspices of decolonialism, such ends include the fight against the maintenance of the coloniality of power, being, knowledge and doing that permeates the most diverse areas of law and sustains situations of violations of (human) rights.

Therefore, international law can no longer be limited to normative barriers (from classical sources) which use only negative sanctions, traditionally anchored in hegemonic discourses forged in the light of what the Global North believes and defends, either to guide the society to what the norm foresees (regardless of what society as a whole currently strives for) or to separate law from non-law. It is necessary to renew this branch of applied social sciences by creating/enabling instruments that allow the achievement of its goals (such as the effective realization of – human – rights) around the globe, without any predilection, even if this does not involve punishments for transgressors or if it distances from a usual government practice.[32]

Soft law can be one of those mechanisms, especially considering its six characteristics previously described stimulating innovative social acts beyond the traditional mechanical and repressive logic imposed under the auspices of Western imperialism/universalism. After all, accepting it as a norm itself would allow proposals to be made by the South, in the best

32 Oliveira (2007, p. 29) states: "It is clear that the option to use soft law, as well as its acceptance, is closely linked to the need of adapting legal rules to social concerns, often distancing themselves from government practice".

way for its own reality, as a real expression of the functionality of law as a means to reach an outcome.[33]

Lastly, the third argument in favor of using soft law as a decolonial tool are the external factors that surround its proposition compared to other hard sources – whether they bind normative acts of international organizations or of any other classic sources of international law. In this case, it is mainly due to the low transaction costs that soft laws present, their intrinsic characteristics (or "contracting costs") as well as their effects (or "sovereignty costs").[34]

As far as "contracting costs" are concerned, it is possible to realize that the attributes of progressivity (the flexible content of its rules), variability (the absence of an express conduct to be pursued by the state from the moment of their adhesion), non-justiciability (the impossibility of legally discussing a possible non-compliance) and politicization (which allows a greater adhesion of other nations, even when the subject is controversial and/or causes hesitation)[35] favor the predilection for soft law (HAOCAL and GONGDE, 2013, p. 264-265; ABBOTT and SNIDAL, 2000, p. 435).[36] These factors mean that soft law does not

33 It is imperative to clarify that there would be no divergence between what is defended here regarding soft law to be considered a rule in itself and what Bobbio thinks about it (which could lead to a potential emptying of this second argument). It is due to the "Age of Rights", Bobbio (2004, p. 37-38) debates the value of the charters of rights, which would be nothing more than "expressions of good intentions, or general directives of action oriented towards an indeterminate and uncertain future, with no guarantee of achievement beyond the goodwill of States". According to that the Italian author explains that, in his view, it would be problematic to "call 'rights' requirements for future rights [because this] would mean creating expectations, which may never be satisfied". Therefore, "the word 'law' [...] with the meaning of expectations that can be met because they are protected" it cannot be used for such rules, which are admittedly soft laws. He also advocates the use of the term "claims". However, what we are trying to highlight is that soft laws are not mere aspirations of a (potential) future right, but non-justiciable rules (among other characteristics). There would be no confrontation with the author, enabling the use his thesis on the role of law in defense of soft law.

34 The subdivision between "contracting costs" and "sovereignty costs" was made by Abbott and Snidal (2000, p. 434-441).

35 Particularly regarding these two items – controversy and hesitation – Varella (2012, p. 83) states that both are two autonomous justifications for the existence of soft norms (he prefers "norms" to "laws") to the detriment of a hard law. In the meantime, he says that "a politically controversial issue [may encounter] resistance on the part of some states or pressure groups", soft law being an alternative when one aims to organize at the international level. Furthermore, the author supports that the adoption of a soft norm can occur as a "precautionary measure on the part of States that are hesitant to adopt restrictive norms" when they do not know the risks or potential consequences. However, it is understood that these items would be internal elements that builds the predicate of politicization based on the arguments brought by Nasser (2006, p. 110-111).

36 The complexity and timeframe for its adoption can make soft law as costly as hard law, *see* Chinkin (1989, p. 860).

involve the realization of high-degree concessions among those involved, which facilitates the circulation and acceptance of their content in the international social environment.

As for "sovereignty costs", they refer strictly to the States not losing their authority in a certain area of which the subject is addressed through soft law, even requiring their (cooperative) participation for the implementation of the command prescribed by soft law if as agreed by the State (indirectly linked to the political character of soft law). This factor is in favor of soft law in the decolonial context, in which possibly divergent closed commands produced in the unbalanced global order will not be accommodated in the national order, allowing not only a progressive internal adaptation, but also greater flexibility as to the form of implementation (referring to the variability and non-justiciability characteristics of soft law) (ABBOTT and SNIDAL, 2000, p. 436-437).

Reduced costs were a crucial factor for the approval of several soft measures within the scope of distinguished international organizations, such as Food and Agriculture Organization (SQUEFF, 2018), International Labor Organization (ABBOTT and SNIDAL, 2000), World Health Organization (KLOCK, 2012) and even sometimes the United Nations (DUPUY, 1990), especially due to the frustration of the countries of the North in "standardizing" certain rights. For this reason, soft law has been increasingly used in other international fora, confirming the relevance of considering soft law as a source itself.

In addition, the fourth argument in favor of using soft law as a source of international law from a decolonial perspective is linked to the very (lack of) legitimacy of the international order in relation to its normative production. Corroborating this position, Chimni (2012, p. 293) stresses the "fact that the list of sources of international law has not been expanded [until now because it] influences the legitimacy of the international legal order in the eyes of governments from the Third World, who wants to modify the international normative body, but find limitations imposed by Western governments".

Even though they are formally valid, many of the norms of international law may question their legitimacy, given the plural basis on which different concepts were forged (BRUNÉE and TOOPE, 2010, p. 77-78 and 81). This requires a readjustment that may comprehend new "more legitimate" sources – including soft law (BRUNÉE and TOOPE, 2002, p. 286-288). After all, "if in domestic law the law operates as a form of shield for the weakest, the view of traditional international relations evidence that the law is an instrument of the powerful ones"; therefore, the recognition of other norms "collaborates with weaker states" and "helps to reconcile contradictory views on its effects" (ABBOTT and SNIDAL, 2000, p. 447).

On this matter it is viable to add the criticism brought by Koskenniemi (2018a, p. 19) on the consensus regarding the formation and application of (traditional) sources of international law, which, in fact, could be contested in terms of who created them and/or to whom they are (sometimes forcibly) applied. For him, traditional sources "are a strategy to introduce authoritarian opinions under a democratic disguise" (KOSKENNIEMI, 2018a, p. 19).

Due to it, it is both apologetic as it allows manipulation depending on the (political) power of States, and utopian as its prescriptions are unrealistic and unreachable as they move away from the game of power previously quoted (KOSKENNIEMI, 2018a, p. 10).

Soft law can go beyond a "closed approach" to sources,[37] overcoming the abovementioned issues not only due the first argument previously explained concerning the characteristics of soft law, especially its programmatic and principiological nature for flexible and rapid adaptation to current/future contexts, but also because its formation may be evidenced outside these political power interactions, derived from below – to dialogue with Rajagopal (2003).

Soft law can be proposed by countries in the South,[38] apart from suggestions (sometimes "monogamous") of the hegemonic axis especially due to the low transaction costs involved in its edition. It could be evidenced that, as a decolonial mechanism to combat the unbalanced maintenance of power in international relations, it ultimately assists to reverse the largely dismissed problems of the Global South that are not perfectly addressed by current rules.

The traditionally accepted sources are not limited to those provided for in article 38 of the ICJ Statute, according to what the doctrine foresaw shortly after the elaboration of the Permanent Court of Permanent Justice (PCIJ) Statute[39] and through the verification of the emergence and acceptance of new sources, such as unilateral acts, there would be no "formal" objection to the recognition of another category of sources that could equally stipulate rights and duties to the subjects of international society, regardless of the way these obligations would be settled and presented to them.

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37 Traditional sources of international law present a "closed approach" due to the fact that they pass a formal test in order to be made and, thus, to become hard law (KOSKENNIEMI, 2018a, p. 19). Soft law, on the other hand, does not present such formal test. Despite this, it should be stressed that Koskenniemi does not view soft law as a possible solution as it is advocated here. In fact, he sees this division of hard and soft law (or even the jus cogens category) as evidences of political distinctions of members of the international community that may restrict the objectivity and verifiability of law under a normative approach (KOSKENNIEMI, 2018, p. 11).

38 It is important to reject, at this point, the opinion of Alan Boyle, for whom the opposition of many States directly affected by soft law could remove its law-making effect, since soft law is not – as defended here – a mere subjective element, but a legal source in itself – which, in this case, does not depend on massive acceptance for it to be considered as a rule (*see* BOYLE, 2010, p. 118-136).

39 As Cançado Trindade (2013, p. 114-115) prescribes, "G[eorge] Scelle, for example, observed in 1934 that the very conception of the aforementioned article 38 seemed to be insufficient to fulfill the social needs that should be taken into account by the international law of the time. It should be considered that the article 38 was not entitled to constitute a mandatory and exhaustive formulation of the 'sources' of international law, but only a guide to the judicial operation of the Hague Court".

Final Considerations

Decolonialism as a method of approach aimed to understand the current world through other views rather than the European/Western (of the Global North), extolling different epistemological paradigms previously denied by Europeanized academic chairs. It is a recent activity, especially in the area of law and it has been accomplishing special attention in certain areas of law, particularly in human rights, as it is used to justify the need for other perspectives, apart from those that were generally assured as the only basis for defending and demanding their protection.

However, as it has been advocated throughout this article, decolonialism could also become the theoretical foundation for the most diverse areas of knowledge, including international law – an area that has already been criticizing the colonial aspects of its norms through the "Third World Approaches to International Law" movement. Thus, by uniting decolonial thinking to international law, it is possible not only to highlight the multiple rules and regulations that were developed throughout the centuries by the Global North/Europeans/West without even taking into consideration the aspirations of those not located in the center of the system (those who do not have any [military/economic] power in international relations), but also to suggest changes, of which shall be proposed by the Global South, specifically by Latin Americans (justifying the use of decolonialism instead of post-colonialism).

Concerning the first aspect, this article suggested that the typical colonialities of power, knowledge and being are not exhaustive as they reflect a few possible demonstrations of the ongoing colonialism practiced by Europe/Global North since the Americas were (dis)covered. It was suggested that another form of colonialism is in fact related to international law, as it is present in the development of the rules that constitute this field: the coloniality of doing. This coloniality refers to the possibility of States effectively participating in the formation of norms of international law, as not of them are qualified to do it precisely as they are not at the center of the world-system. In this case, countries of the Global South would not participate in the formation of rules, making the international order largely imperialist/colonialist.

In light of this, it was suggested in the previous part of this article that a way to overcome such coloniality would be to consider soft law as a rule in international law –not a mere guide/suggestion to State action, but a norm *per se*, that may be the origin of obligations under international law just as any other source prescribed under article 38 of the ICJ Statute or the new sources (unilateral acts, resolutions from international organizations). Nonetheless, the main difference between these other typical sources and soft law would be that this rule is not structured under colonialist pattern, but rather in a decolonial way, as it allows all states to act towards its construction, regardless of their origin.

Hence, one aspect that portrays imperialism within international law could be limited through soft law, not only because of its six characteristics and low transaction costs, but also because it agrees to the effective participation of those who were usually rejected, allowing

them to suggest changes that meet their desires and needs in the international order, as well as properly advancing agendas that are important to their realities, overcoming the lack of legitimacy and upholding its functionality. As a result, soft law may be considered a typical decolonial tool.

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How to quote this article:

SQUEFF, Tatiana Cardoso. Overcoming the "Coloniality of Doing" in International Law: Soft Law as a Decolonial Tool. *Revista Direito GV*, São Paulo, v. 17, n. 2, maio/ago. 2021, e2127. https://doi.org/10.1590/2317-6172202127

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