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**MAPS AND ENCOUNTERS:**  
POSTCOLONIAL APPROACHES TO  
INTERNATIONAL LAW AND DEVELOPMENT

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MAPS AND ENCOUNTERS:  
POSTCOLONIAL APPROACHES TO  
INTERNATIONAL LAW AND DEVELOPMENT

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*A Europa é sempre Europa, a gloriosa!...  
A mulher deslumbrante e caprichosa,  
Rainha e cortesã.  
[...]  
Mas eu, Senhor!... Eu triste abandonada  
Em meio das áreas desgarrada,  
Perdida marchando em vão!*

“Vozes d’África”,  
Castro Alves

*Le peuple colonisé n’est pas seul. En dépit des efforts du colonialisme, ses frontières demeurent perméables aux nouvelles, aux échos. Il découvre que la violence est atmosphérique, qu’elle éclate çà et là, et çà et là emporte le régime colonial. Cette violence qui réussit a un rôle non seulement informateur mais opératoire pour le colonisé.*

“Les Damnés de la Terre”,  
Frantz Fanon

*José Arcadio Segundo no habló mientras no terminó de tomar el café.*

*- Debían ser como tres mil - murmuró.*

*- ¿Qué?*

*- Los muertos - aclaró él. Debían ser todos los que estaban en la estación.*

*La mujer lo midió con una mirada de lástima. “Aquí no ha habido muertos - dijo -. Desde los tiempos de tu tío, el coronel, no ha pasado nada en Macondo.”*

“Cien Años de Soledad”,  
Gabriel García Márquez

*Can the subaltern speak? What must the elite do to watch out for the continuing construction of the subaltern? The question of ‘woman’ seems most problematic in this context. Clearly, if you are poor, black and female you get it in three ways.*

“Can the Subaltern Speak?”,  
Gayatri Chakravorty Spivak

*Um mano me disse que quando chegou aqui  
Tudo era mato e só se lembra de tiro aí  
Outro maluco disse que ainda é embaçado  
Quem não morreu, tá preso sossegado*

“Periferia é Periferia”  
Racionais MC’s

## **ABSTRACT**

This master's thesis explores the encounters between international law, development and postcolonial studies. I focus in particular on how critical international legal scholarship has re-described international law and development using postcolonialism. I propose a specific body of law and development that I call postcolonial approaches to international law and development. In the first part of this thesis, I examine law and development studies and postcolonial studies separately. I revisit the debate on law and development, using five main approaches to it as proposed by Liliana Lizararo-Rodríguez: national perspectives, international perspectives, transnational approach, comparative law and development, and transnational thematic areas. Simultaneously, I propose four academic disciplines through which postcolonial studies can be understood: anti-colonial and founding moments, subaltern studies and historiographical turn, multidisciplinary voices in a postcolonial world, and Modernity/Coloniality Group and decolonial thought. I also distinguish key theoretical concepts, such as that of the Third World and Global South, that permeate both postcolonial studies and international law and development. In the second part, I use this framework to engage with specific studies of Third World Approaches to International Law (TWAIL) to propose a more specific body of scholarship that I call postcolonial approaches to international law and development, using especially the studies of Balakrishnan Rajagopal, Sundhya Pahuja and Luis Eslava. For the first time, I bring three main contributions of postcolonial approaches to international law and development: first, Third World resistance as part of international law and development dynamics; second, development discourse as structure of the ideological-institutional complex of international law; and, third, international law and development as a dynamic that modifies notions of global and local in everyday lives. Finally, I propose three elements to identify postcolonial approaches to international law and development have. First, a historical-conceptual element which expands temporal borders of international law and development. Second, a geographical-spatial element which enables multidimensional analysis to international law and development. And, third, an epistemological-conceptual element which decentralizes legal and development discourses.

**KEYWORDS:** international law and development; postcolonial studies; critical approaches to international law; development discourse.

## RESUMO

A presente dissertação explora os encontros entre direito internacional, desenvolvimento e pós-colonialismo. Eu me concentro na forma como abordagens críticas do direito internacional propuseram novas formas de descrever o direito internacional e desenvolvimento usando os estudos pós-coloniais e proponho um conjunto específico de estudos do direito e desenvolvimento que chamo de abordagens pós-coloniais ao direito internacional e desenvolvimento. Na primeira parte desta dissertação, apresento os estudos de direito e desenvolvimento e os estudos pós-coloniais separadamente. De um lado, atualizo o debate sobre direito e desenvolvimento afim de expandir seu campo, utilizando cinco abordagens principais propostas por Liliana Lizararo-Rodríguez: perspectivas nacionais, perspectivas internacionais, abordagem transnacional, direito comparado e desenvolvimento, e áreas temáticas transnacionais. De outro lado, proponho quatro ondas acadêmicas para compreender os estudos pós-coloniais: momentos anticoloniais e fundacionais, estudos subalternos e o giro historiográfico, vozes multidisciplinares em um mundo pós-colonial e Grupo Modernidade/Colonialidade e pensamento descolonial. Também distingo conceitos teóricos fundamentais, como Terceiro Mundo e Sul Global, que cruzam os estudos pós-coloniais e o direito internacional e desenvolvimento. Na segunda parte desta dissertação, utilizo este quadro anterior para me dedicar a estudos das Abordagens do Terceiro Mundo ao Direito Internacional (*Third World Approaches to International Law - TWAIL*) e a propor um corpo de estudos mais específico que chamo de abordagens pós-coloniais ao direito internacional e desenvolvimento, usando especialmente os estudos de Balakrishnan Rajagopal, Sundhya Pahuja e Luis Eslava. Em um primeiro momento, trago três contribuições principais das abordagens pós-coloniais ao direito internacional e desenvolvimento: primeiro, a resistência do Terceiro Mundo como parte do direito internacional e da dinâmica do desenvolvimento; segundo, o discurso do desenvolvimento como estrutura do complexo ideológico-institucional do direito internacional; e, terceiro, o direito internacional e o desenvolvimento como uma dinâmica que modifica as noções de global e local na vida cotidiana. Em um segundo momento, proponho três elementos para identificar as abordagens pós-coloniais ao direito internacional e desenvolvimento. Primeiro, um elemento histórico-conceitual que expande as fronteiras temporais do direito internacional e desenvolvimento. Em segundo lugar, um elemento geográfico-espacial que permite a análise multidimensional do direito internacional e desenvolvimento. E, terceiro, um elemento epistemológico-conceitual que descentraliza os discursos do direito e do desenvolvimento.

**PALAVRAS-CHAVE:** direito internacional e desenvolvimento; estudos pós-coloniais; abordagens críticas do direito internacional; discurso do desenvolvimento.

## RESUMEN

Esta tesis de maestría explora los encuentros entre el derecho internacional, el desarrollo y los estudios poscoloniales. Utilizando estudios poscoloniales, me concentro en la forma en que enfoques críticos del derecho internacional han descrito nuevas formas de derecho internacional y de desarrollo y propongo un conjunto específico de estudios que llamo enfoques poscoloniales al derecho internacional y al desarrollo. En la primera parte de esta tesis, presento los estudios de derecho, de desarrollo y poscoloniales por separado. Por un lado, actualizo el debate sobre el derecho y el desarrollo con el fin de ampliar su campo, utilizando cinco enfoques propuesto por Liliana Lizararo-Rodríguez: perspectivas nacionales; perspectivas internacionales; enfoque transnacional; derecho comparado y desarrollo; y áreas temáticas transnacionales. Por otro lado, propongo cuatro ondas académicas para comprender los estudios poscoloniales: momentos anticoloniales y fundacionales; estudios subalternos y giros historiográficos; voces multidisciplinares en un mundo postcolonial; y Grupo Modernidad/Colonialidad y pensamiento decolonial. También distingo conceptos teóricos fundamentales, como Tercer Mundo y Sur Global, que se entrecruzan tanto en los estudios poscoloniales como en los de derecho internacional y de desarrollo. En la segunda parte de esta tesis, utilizo el marco anterior para concentrarme en los estudios sobre los Enfoques del Tercer Mundo para el Derecho Internacional (*Third World Approaches to International Law - TWAIL*) y propongo un cuerpo de estudios más específico que llamo enfoques poscoloniales del derecho internacional y del desarrollo, utilizando especialmente los estudios de Balakrishnan Rajagopal, Sundhya Pahuja y Luis Eslava. En un primer momento, cito tres contribuciones principales de los enfoques poscoloniales al derecho internacional y al desarrollo: primero, la resistencia del Tercer Mundo como parte del derecho internacional y de las dinámicas de desarrollo; segundo, el discurso del desarrollo como estructura del complejo ideológico-institucional del derecho internacional; y, tercero, el derecho internacional y el desarrollo como una dinámica que modifica las nociones de global y local en la vida cotidiana. En un segundo momento, propongo tres elementos para identificar los enfoques poscoloniales del derecho internacional y el desarrollo. En primer lugar, un elemento histórico-conceptual que expande las fronteras temporales del derecho internacional y del desarrollo. En segundo lugar, un elemento geográfico-espacial que permite el análisis multidimensional del derecho internacional y del desarrollo. Y, en tercer lugar, un elemento epistemológico-conceptual que descentraliza los discursos del derecho y del desarrollo.

**PALABRAS CLAVE:** derecho internacional y desarrollo; estudios poscoloniales; enfoques críticos del derecho internacional; discurso del desarrollo.

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## PREFACE (FROM OUTSIDE)

“*En España, Roma de @alfonsocuaron está subtitulada en español peninsular, lo cual es paternalista, ofensivo y profundamente provinciano*”.<sup>1</sup> This tweet about the diffusion of the 2018 Alfonso Cuarón Academy Award-winning movie in Spain posted by the Mexican writer Jordi Soler, resident in Barcelona, caused major controversy on social media about a supposed colonialist imposition on the correct way of using the Spanish language. The heated discussion online was worsened by the fact that the subtitles were not exclusive to Spanish cinemas, and were also available in the Netflix platform. Pressured by the press, Netflix just took the peculiar attitude of removing the subtitles from the website. Local cinemas defended themselves by stating that a survey on its first performance showed that Spanish audiences struggled to follow the dialogue, and affirmed that they would keep the subtitles for the convenience of its viewers. Cuarón then pronounced for *El País*: “*Es parroquial, ignorante y ofensivo para los propios españoles*”.<sup>2</sup>

The controversy gained strength by the symbolic value of the movie itself which reflects precisely on the submission of indigenous people to the local upper middle class, of lineage directly related to its colonizers. Just over five centuries ago, its antecedents reached these lands, occupied by other people for more than a millennium, imposing its own conceptions of law, social organization, religious beliefs and – critically – development. Even though we have a political responsibility to face the legacies of colonial encounters (as, for example, our constant attempts to integrate indigenous communities in mainstream capitalist society), it seems that there is a “limit” for these people in our society. When, for example, the indigenous *Roma* main protagonist, a young woman of the Mixteca ethnic group, Yalitza Aparicio, featured on the cover of *Vogue Mexico* magazine, one of the most important fashion publications in the world, it attracted thousands of racists comments online. “It's breaking stereotypes that only people with a certain profile can aspire to be in a movie or a magazine cover. That people are getting to know these other faces of Mexico makes me feel happy and proud of my roots”, she said in an interview with the same magazine. On the other hand, she was acclaimed at the *Puy*

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<sup>1</sup> In English: “*Roma* is subtitled in peninsular Spanish, which is paternalistic, offensive and deeply provincial”.

<sup>2</sup> In English: “It's parochial, ignorant and offensive for Spaniards”.

*Ta Cuxlejaltic* Film Festival, the first Zapatista film festival, held by an indigenous organization that twenty-five years ago achieved its own autonomy in the lands of some municipalities in southern Mexico.

The (controversial) Zapatista movement is an emblematic case of a *decolonial* movement in Latin America. Despite the enormous global cultural interest in pre-Hispanic civilizations, with their emblematic pyramids and astrological knowledge, social movements argue that Mexico has paid little attention to the indigenous peoples that still populate their lands. This began to change in 1994, due to the armed uprising of the Zapatistas, who claimed autonomy over their land and self-management of indigenous people, with constitutional and political recognition. Resisting various attacks by the national army and under the watchful eye of international organizations, the *Ejército Zapatista de Liberación Nacional* (EZLN) managed to articulate a peace agreement with the Mexican government, signed in 1996 in the city of San Andrés Larráinar, the *Acuerdos de San Andrés sobre Derechos y Cultura Indígena*. The Mexican government recognized, among other things, the rights of indigenous people to their lands, including the use of existing natural resources, and their right to elect their own leaders according to their traditions. All of these requirements were supported by Indigenous and Tribal Peoples Convention, 1989.

Despite the peaceful solution, the agreements were never put into practice by the Mexican government, and never became part of the country's Constitution. Even so, the Zapatistas kept control of their territories and established their own governance. In 2019, the decolonization beliefs of the Zapatistas pitted the organization against the new Mexican president, Andrés Manuel Lopez Obrador. The Zapatistas are the main resisters to the development of a railway line, the Maya Train, that the new president intends to build in the region. The proposed construction would cut through a considerable amount of preserved lands, supposedly to develop the region by increasing tourism. The government relies on the high poverty rate in a region heavily affected by colonialism: a report by the National Council for the Evaluation of Social Development Policy shows that in 2016, only 6.4% of Chiapas population was considered non-poor and not vulnerable, while 77.1% were living in poverty. The EZLN and other Mayan communities believe that selling indigenous territories to foreign companies will inevitably lead to their destruction. “*Ése que está en el poder lo va a destruir al pueblo*

*de México pero principalmente a los pueblos originarios*”<sup>3</sup> said the deputy commander Galeano, a spokesman for the organization, during the twenty-five-year anniversary of the uprising in front of hundreds of Zapatistas’ soldiers. “*Vamos a enfrentar, no vamos a permitir que pase aquí ése su proyecto de destrucción*”.<sup>4</sup>

This kind of conflict between state development and the autonomy of ancestral communities is also present in South America. Bolivia, a country populated mostly by indigenous people, elected its first indigenous president only in 2006, and congressmen of various ethnicities, modifying the face and colors of the politicians in the country. In order to *decolonize* the State, a new Constitution was approved in 2007 under the strong influence of various indigenous Bolivian organizations. It includes, for example, the possibility for municipalities to request their indigenous autonomy. These internal pressures did not appear from nowhere. In the same year there was considerable debate within the United Nations regarding the approval of the UN Declaration on the Rights of Indigenous Peoples, which establishes self-determination, repair the theft of their properties and maintenance of their cultures as essential indigenous rights. The declaration intends to guarantee minimum parameters to other international instruments and, mainly, to influence the consolidation of pro-indigenous local laws across the planet.

This international influence was extremely important to the legal consolidation of *Autonomía Indígena Originaria Campesina* (AIOCs) in Bolivia, a fact widely celebrated and publicized by the new government. However, the practical consolidation of this “*vivir bien*” process descended into the same problem experienced in Mexico: the developmentalism encouraged by the same local government. Less than four years later, in 2011, hundreds of indigenous people participated in a massive demonstration against this same government. The Morales government had begun a project of building a road across the entire *Territorio Indígena y Parque Nacional Isiboro Secure* (TIPNIS), an indigenous territory, with the objective of connecting the north of the country with its main central cities. Although the Morales government has already completed part of the project, by the beginning of 2019, it has not yet been completed due to the powerful resistance by indigenous communities. Its future remains the subject of public debate.

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<sup>3</sup> In English: “That one who is in power is going to destroy Mexican people and the original people”.

<sup>4</sup> In English: “We are going to face it and will not let your destructive project pass here”.

TIPNIS autonomy became official only in early 2017, after completing various bureaucratic processes with the Federal Government. In turn, the Guaraní communities of the former Charagua municipality were the first to celebrate autonomy, transforming it into AIOC *Charagua Iyambae* – maybe the first time ever that indigenous autonomy was recognized by a federal government. The AIOC was guaranteed the right to choose its own political representatives according to their local customs: in this case, leaders are chosen at community assemblies.

Yet there is an obstacle to the territory becoming truly autonomous: the land is rich in oil and gas. Those particular resources have remained under the full control of the Federal Government, who do not want to lose this important source of income. Indigenous communities ideally want to keep their territory free from industrial and commercial development, but it is difficult to halt this type of industrial-scale exploitation.

Brazil has played host to major global events in recent years: the 2007 Pan American Games, the 2014 World Cup and the 2016 Summer Olympics. The promise of economic development was used to justify the money and the political efforts that were poured into these events. Although they brought short-term joy and some sense of “global citizenship” to the Brazilian people, newspapers were full of corruption allegations against the government and the private sector, stories of delayed construction work with occasional reports about people being evicted from their homes and neighborhoods. I will never forget the case of *Aldeia Maracanã*, a place occupied by a group of indigenous peoples and activists since 2006. The *Aldeia* was located in a museum complex devoted to indigenous communities next to the Maracanã football stadium. In 2013, when Rio was facing delays in its works for the World Cup, Brazilian riot police armed with “batons, teargas and pepper spray”, as reported by The Guardian, forcibly evicted an indigenous community from *Aldeia Maracanã*.

As I write this Preface, a Facebook post reminds me that the *Usina de Belo Monte*, a giant dam between developmental dreams and local communities’ nightmares, continues its construction on the northern part of the Xingu River and its power station is planned to be completed by 2019. Development has its price, one could say. And, again, dis-encounters between rights, developmental promise and real people continue...

## INTRODUCTION

The cases I presented in the Preface are pragmatic examples of the *encounters*<sup>5</sup> between international law, development and postcolonialism. This thesis, in its turn, is an academic response to my anxiety and curiosity with the ways international legal studies see and deal with these encounters in a world organized by ideas and *maps*.<sup>6</sup> In broader terms, I seek, through this work, to produce a legal academic argument that contains several alternative attempts to propose perspectives, methods and ways of arguing. I am aware that the construction of this “other” and this search for views of otherness is complicated, as we have the historical process of othering described by postcolonial studies.<sup>7</sup> But, in this thesis, I try to explore the “other” not to be caricatured or generalized,

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<sup>5</sup> I use the word “encounter” in the figurative sense and aiming to refer to the idea of the encounter between *different*, as especially worked by anthropology and, more recently, the critique of international law. See in the field of anthropology, e.g., LEIRIS, Michel. The ethnographer faced with colonialism. In: LEIRIS, Michel. *Brisées: broken branches*. San Francisco: North Point, 1989, p. 125-145; ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995; MARCUS, George E.; FISCHER, Michael M. J. *Anthropology as cultural critique: an experimental moment in the human sciences*. 2. ed. Chicago: University of Chicago Press, 1999; COMAROFF, Jean; COMAROFF, John. Ethnography on an awkward scale: postcolonial anthropology and the violence of abstraction. *Ethnography*, v. 4, n. 2, p. 147-179, 2003. On the encounters between international law and development, “Critical scholars, in contrast, conceive these ‘international’ encounters between international law and the development project as significant and yet sporadic instantiations of a far deeper set of uses and forces linking (international) law with a long and problematic tradition – a tradition that has used the ideas of civilization, modernity, progress and development to calibrate the (post)colonial world in terms of the developed North and its conditions of existence and reproduction”. ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015. See also, LORCA, Arnulf Becker. Eurocentrism in the history of international law. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 1034-1057.

<sup>6</sup> This thesis does not discuss maps and cartography in a literal sense, but uses their ends and symbolic influence to discuss the intersections between international law, development and postcolonialism. According to Raymond Craib, “[t]he contours of colonialism still configure the globe” (CRAIB, Raymond B. Cartography and decolonization. In: AKERMAN, James R. (Ed.). *Decolonizing the map: cartography from colony to nation*. Chicago: The University of Chicago Press, 2017, p. 16). In this sense, I use “maps” to explore the links between colonialism, territories and the “globalization” of several structures of social imaginary and legal studies. On maps from decolonial and Global South perspectives, see e.g.: RADCLIFFE, Sarah A. Development and geography: towards a postcolonial development geography? *Progress in Human Geography*, v. 29, n. 3, p. 291-298, 2005; GIRALDO, Yicel Nayrobis; MELENGE, James Alexander. *Territorios y cartografías educativas: construyendo sentidos de las educaciones del siglo XXI*. Medellín: CINDE, 2013; GARDNER, Anthony (Ed.). *Mapping South: journeys in South-South cultural relations*. Victoria: The South Project, 2013; AKERMAN, James R (Ed.). *Decolonizing the map: cartography from colony to nation*. Chicago: The University of Chicago Press, 2017. See particularly about the symbolical use of maps in producing knowledge: AGAZZI, Evandro. Maps and territories in scientific investigation. In: WUPPULURI, Shyam; DORIA, Francisco Antonio (Ed). *The map and the territory: exploring the foundations of science, thought and reality*. New York: Springer, 2018, p. 3-14.

<sup>7</sup> Other refers to “the social and/or psychological ways in which one group excludes or marginalizes another group. By declaring someone ‘Other’, persons tend to stress what makes them dissimilar from or opposite of another, and this carries over into the way they represent others, especially through stereotypical images”

but to put it in evidence, in an attempt to rewrite theoretical and practical spaces left blank by other academic efforts unconcerned with forgotten voices.

In legal studies terms, this construction starts from the assumption that academic production is still dominated by strictly prescriptive and normative methods. A strong technical characteristic of decidability, of a practical reason that arises specifically to solve conflicts of several orders, permeates both the law itself, as the academic production of law.<sup>8</sup> This thesis does not deny the importance of this perspective, but this work seeks to demonstrate that it is also up to the researcher of law to produce other legal knowledge that is not strictly focused on decidability and normativity. Within this perspective, critical studies, with sociological, anthropological and/or multidisciplinary orientation, have pointed to the need for holistic perspectives on the legal phenomenon.<sup>9</sup> This thesis is an attempt to demonstrate that, even within the law, it is possible to think of normativity beyond itself, in order to deconstruct it, reform it or even abandon it in favor of other normative (or non-normative) orders.

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MITCHELL, Philip Irving. Key terms in post-colonial theory. Available at: <<https://www3.dbu.edu/mitchell/postcold.htm>>. Access on February 15, 2019. The concept of Otherness sees the world “as divided into mutually excluding opposites: if the Self is ordered, rational, masculine, good, then the Other is chaotic, irrational, feminine, and evil”. AL-SAIDI, Afaf Ahmed Hasan. Post-colonialism literature the concept of Self and the Other in Coetzee’s *Waiting for the Barbarians*: an analytical approach. *Journal of Language Teaching and Research*, v. 5, n. 1, p. 96, 2014. See also about the process of “othering”, FANON, Frantz. *The wretched of the Earth*. London: Penguin Books, 2001; SAID, Edward. *Orientalism*. London: Penguin Books, 1978; GOGOL, Eugene. *El concepto del otro en la liberación latino-americana*. Bogotá: Ediciones Desde Ajabo, 2004; CARNEIRO, Sueli. *A construção do outro como não-ser como fundamento do ser*. Tese (Doutorado em Educação: Filosofia da Educação) – Faculdade de Educação, Universidade de São Paulo, São Paulo, 2005; LOOMBA, Ania. *Colonialism/postcolonialism*. 3. ed. London: Routledge, 2015, p. 103-111; 139-153.

<sup>8</sup> See, e.g., “The normativist model is the most classical in the theory of legal science. According to authors like Kelsen, Bobbio, Scarpelli, Jori, Bulygin or Vernengo, legal scholars should be devoted to describing the set of rules that belong to a legal system, and its further systematization”, VAQUERO, Álvaro Núñez. Five models of legal science. *Revus – Revija za ustavno teorijo in filozofijo prava / Journal for Constitutional Theory and Philosophy of Law*, n. 13, p. 61, 2013. See also, SMITS, Jan M. Law and interdisciplinarity: on the inevitable normativity of legal studies. *Critical Analysis of Law*, v. 1, n. 1, p. 75-86, 2014; FERRAZ JUNIOR, Tercio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 8. ed. São Paulo: Atlas, 2015, p. 57-65.

<sup>9</sup> In this sense, for example, the plurality of perspectives can lead us from the categorical affirmation of the rule of law to its complete negation. See about expanding the scope of legal research, SANTOS, Boaventura de Sousa. Law: a map of misreading. Toward a postmodern conception of law. *Journal of Law and Society*, v. 14, n. 3, p. 279-302, 1987; CAPELLER, Wanda. De que lugar falamos? Retomando um velho papo sobre o direito e a sociologia. *Revista de Estudos Empíricos em Direito*, São Paulo, v. 2, n. 2, p. 23, 2015; VALVERDE, Mariana. What counts as theory, today: A post-philosophical framework for socio-legal empirical research. *Brazilian Journal of Empirical Legal Studies*, v. 3, p. 172, 2016; NETO, José Maria de Moraes Borges; COLÁCIO, José Eduardo Barroso; BEDÊ, Fayga Silveira. A baixa incidência de pesquisa empírica e a cultura manualesca como obstáculos para o desenvolvimento do direito. *Direito e Desenvolvimento*, v. 8, n. 2, p. 247-260, 2017.



Such broader concerns are not able to be fully explored in a master's thesis. I focus instead on the encounters of legal fields with other fields of knowledge and practice in order to build an argument that can contribute to a specific debate in legal studies and use it as an academic opportunity to propose critical and decolonial ways of knowledge.<sup>10</sup> I focus on the encounters between international law, development and postcolonialism. The argument I advance in this master's thesis is that there is a particular body of critical international legal scholarship that has systematically challenged common readings of international law and development and has proposed an alternative way to *observe* international law encountering development.

## RESEARCH SCOPE

This master's thesis documents existing literature on international law and development and aims to contribute to this debate using critical international legal scholarship and postcolonial studies.<sup>11</sup> I address the following research problem: *how can postcolonial studies contribute to understanding the way we see international law and development?* My claim is that postcolonial studies has influenced a specific body of critical international legal studies, which I call postcolonial approaches to international

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<sup>10</sup> See, generally, SANTOS, Boaventura de Sousa. *Descolonizar el saber, reinventar el poder*. Montevideo: Ediciones Trilce, 2010; MIGNOLO, Walter D. Epistemic disobedience and the decolonial option: a manifesto. *Transmodernity*, v. 1, n. 2, p. 3-23, 2011. See particularly about decolonizing legal studies, DA SILVA, Simone Schuck; SCHROEDER, Paulo Víctor; BRAGATO, Fernanda Frizzo. O resgate de narrativas silenciadas como possibilidade de uma perspectiva decolonial dos direitos humanos. *Revista Culturas Jurídicas*, v. 4, n. 8, p. 298-313, 2017; WOLKMER, Antonio Carlos. Para uma sociologia jurídica no Brasil: desde uma perspectiva crítica e decolonial. *Revista Brasileira de Sociologia do Direito*, v. 4, n. 3, 2017; RIBEIRO, Bernard Constantino; FIGUEREDO, Guilherme Augusto dos Santos; SPAREMBERGER, Raquel Fabiana Lopes. A insurgência decolonial frente a negação do direito: a (re)constituição de um novo direito a partir da emersão das camadas sociais marginalizadas. In: SANTOS, Gustavo Ferreira; TEIXEIRA, João Paulo Allain; SPAREMBERGER, Raquel F. L.; RIBEIRO, Bernard Constantino (Orgs.). *Direito, subalternidade e decolonialidade*. Porto Alegre: Editora Fi, 2018, p. 37-60.

<sup>11</sup> In this aspect, the idea of relating postcolonial studies with law and development is justified because a postcolonial approach brings interesting elements to observe the phenomenon of development in the countries which were colonized in the so-called modern era and in the legal structures utilized around this ideology. See, MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014. p. 213-219; FUCHS, Vanessa Boanada. Law and development: critiques from a decolonial perspective. *Working Paper Series, International Research Network on Interdependent Inequalities in Latin America*, Berlin, n. 53, p. 1-28, 2013. Methodologically, I have elected postcolonialism as a theoretical main topic for the following reasons: first, postcolonial studies remain less explored in law and development; second, postcolonial studies is directly related to law and development because of the historical context of colonialism and development assistance projects; and, third, postcolonial studies is mainly produced by academics from the Global South.

law and development, and I argue that it redescribes the way we commonly understand the encounters between international law and development. I draw from the work of scholars from the Global South, especially Balakrishnan Rajagopal,<sup>12</sup> Sundhya Pahuja<sup>13</sup> and Luis Eslava,<sup>14</sup> to discuss the main contributions of these approaches. I present three elements able to explain its identity: an epistemological-conceptual element, a historical-temporal element and a geographical-spatial element.

In order to advance my main argument, I set out the debate on law and development and postcolonial studies. Both sets of academic field and historical practices contribute to the ideas presented in this thesis. Then, I explore how a particular body of international legal studies, which I call postcolonial approaches to international law and development, has contributed to understanding international law and development. In this moment, I use three main ideas: first, Third World resistance as part of international law and development dynamics; second, development discourse as structure of the ideological-institutional complex of international law; and, third, international law and development as a dynamic relation that modifies notions of global and local in everyday lives. Besides that, I propose that postcolonial approaches to international law and development have, at least, three common elements which enables us to identify them. First, they have a historical-temporal element which expands temporal borders of international law and development. Second, they have a geographical-spatial element which enables multidimensional approaches to international law and development. And, third, they have an epistemological-conceptual element which decentralizes legal and development discourses.

## METHODOLOGICAL CONCERNS

This thesis is a result of my research project undertaken under the academic Master's program on law and development at FGV Sao Paulo School of Law (*FGV Direito SP – Escola de Direito de São Paulo da Fundação Getulio Vargas*), with funding

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<sup>12</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003.

<sup>13</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>14</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

from the Brazilian government (*Coordenação de Aperfeiçoamento de Pessoal de Nível Superior* – CAPES), contributions from several conferences I attended in the last two years and a visiting program at Kent Law School. In terms of institutional exchanges, I have integrated the FGV Sao Paulo School of Law's Global Law and Development Study Center (*Núcleo de Direito Global e Desenvolvimento*) and Kent Law School's Centre for Critical International Law (CeCIL).<sup>15</sup>

The research is justified for the following reasons. First, the research explored existing scholarship, identified above, and intended to add academic descriptive elements to it, allowing new critical legal approaches<sup>16</sup> in law and development<sup>17</sup> to use postcolonialism and its resistance ideas.<sup>18</sup> In this sense, my research is a modest contribution to international legal studies in general and Third World Approaches to

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<sup>15</sup> Both study centers have research agendas focused on international law. For more information about them, see their websites at <<https://direitosp.fgv.br/nucleo-de-pesquisas/nucleo-de-direito-global-desenvolvimento>> and <<https://research.kent.ac.uk/cecil/>>. Access on February 15, 2019.

<sup>16</sup> See about critical approaches to law, e.g., UNGER, Roberto Mangabeira. The critical legal studies movement. *Harvard Law Review*, Cambridge, v. 96, n. 3, p. 561-675, 1983; CARTY, Anthony. Critical international law: recent trends in the theory of international law. *European Journal of International Law*, v. 2, n. 1, p. 66-96, 1991; PURVIS, Nigel. Critical legal studies in public international law. *Harvard International Law Journal*, v. 32, n. 1, p. 81-128, 1991. GATHII, James Thuo. Alternative and critical: the contribution of research and scholarship on developing countries to international legal theory. *Harvard International Law Journal*, v. 41, n. 2, p. 263-275, 2000; SINGH, Prabhakar; MAYER, Benoît (Eds.). *Critical International Law: postrealism, postcolonialism, and transnationalism*. Oxford: Oxford University Press, 2014.

<sup>17</sup> See about law and development, e.g., TRUBEK, David M.; GALANTER, Marc. Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States. *Wisconsin Law Review*, p. 1062-1103, 1974; DAVIS, Kevin E.; TREBILCOCK, Michael J. The relationship between law and development: optimists versus skeptics. *The American Journal of Comparative Law*, v. 56, n. 4, p. 895-946, 2008; PRADO, Mariana Mota. What is law and development? *Revista Argentina de Teoría Jurídica*, Buenos Aires, v. 11, n. 1, p. 1-20, 2010; RODRIGUEZ, José Rodrigo (Org.). *Fragmentos para um dicionário crítico de direito e desenvolvimento*. São Paulo: Saraiva, 2011; TAMANAHA, Brian Z. The primacy of society and the failures of law and development. *Cornell International Law Journal*, v. 44, p. 209-248, 2011; SCHAPIRO, Mario G.; TRUBEK, David M. (Org.). *Direito e desenvolvimento: um diálogo entre os BRICS*. São Paulo: Saraiva, 2012; TRUBEK, David M.; GARCIA, Helena Alviar; COUTINHO, Diogo R.; SANTOS, Alvaro (Ed.). *Law and the new developmental state: the Brazilian experience in Latin American context*. Cambridge: Cambridge University Press, 2013; LEE, Yong-Shik. General theory of law and development. *Cornell International Law Journal*, v. 50, p. 420-424, 2017.

<sup>18</sup> See about postcolonial studies, e.g., DARIAN-SMITH, Eve. *Postcolonialism: a brief introduction*. *Social & Legal Studies*, v. 5, n. 3, p. 291-299, 1996; CHAKRABARTY, Dipesh. *Provincializing Europe: postcolonial thought an historical difference*. Princeton: Princeton University Press, 2000; YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001; CASTRO-GÓMEZ, Santiago; GROSFUGUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007; MIGNOLO, Walter. Desobediência epistêmica: a opção descolonial e o significado de identidade em política. *Cadernos de Letras da UFF*, Niterói, n. 34, p. 287-324, 2008; LOOMBA, Ania. *Colonialism/postcolonialism*. 3. ed. London: Routledge, 2015; BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 89-117, 2013; HUGGAN, Graham (Ed.). *The Oxford Handbook of Postcolonial Studies*. Oxford: Oxford University Press, 2013.

International Law (TWAIL)<sup>19</sup> and postcolonial approaches to international law and development<sup>20</sup> in particular. In Brazil, where I conducted this research, it contributes to the debate on law and development and the use of postcolonialism in legal studies. Second, my research reveals a more comprehensive analysis of law and development because it uses Global South scholarship and its academic contributions.<sup>21</sup> Third, from an institutional point of view, my research is justified because it integrates a Master's program dedicated to law and development and integrates the research agenda of São Paulo's Global Law and Development Study Center. Finally, my research benefits the internationalization of Brazilian legal studies.

Three premises guided this research in terms of methodological and observation processes. As a legal researcher, I imagined myself answering three elementary questions: *where* am I, *how* am I looking to approach my research problem and *why* am I doing it.<sup>22</sup> First (*where*), I used a legal-oriented approach in general with a focus on Global South

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<sup>19</sup> See about TWAIL, e.g., MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. *Wisconsin International Law Journal*, v. 16, n. 2, p. 353-420, 1997; CHIMNI, Bhupinder S. Third World Approaches to International Law: a manifesto. *International Community Law Review*, Leiden, v. 8, p. 3-27, 2006; GATHII, James Thuo. TWAIL: a brief history of its origins, its decentralized network, and a tentative bibliography. *Trade, Law and Development*, v. 3, n. 1, p. 26-64, 2011; TOUFAYAN, Mark; JOUANNET, Emmanuelle; RUIZ FABRI, Hélène (Org.). *Droit international et nouvelles approches sur le tiers-monde: entre répétition et renouveau*. Paris: Société de législation comparée, 2013; ANGHIE, Antony; KOSKENNIEMI, Martti; ORFORD, Anne. *Imperialismo y derecho internacional: historia y legado*. Bogotá: Siglo del Hombre Editores, 2016.

<sup>20</sup> *Postcolonial approaches to international law and development* is the category I created and use to describe a specific body of works that deals with international law and development using postcolonial studies. See, e.g., RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003; PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011; ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

<sup>21</sup> See, generally, about the concept of Global South, e.g., CONNELL, Raewyn. *Southern theory: the global dynamics of knowledge in social science*. Cambridge: Polity, 2007; SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010; MAIA, João Marcelo E. Ao sul da teoria: a atualidade teórica do pensamento social brasileiro. *Sociedade e Estado*, v. 26, n. 2, p. 71-94, 2011; DADOS, Nour; CONNELL, Raewyn. The global south. *Contexts*, v. 11, n. 1, p. 12-13, 2012; COMAROFF, Jean; COMAROFF, John L. *Theory from the South: or, how Euro-America is evolving toward Africa*. Abingdon: Routledge, 2015; KLENGEL, Susanne; WALLNER, Alexandra Ortiz (Ed.). *Sur/South: poetics and politics of thinking Latin America*. Madrid: Iberoamericana, 2016; MOROSINI, Fabio; BADIN, Michelle Ratton Sanchez (Org.). *Reconceptualizing international investment law from the Global South*. Cambridge: Cambridge University Press, 2017.

<sup>22</sup> See about the observation processes in legal studies and social sciences, CAPELLER, Wanda. De que lugar falamos? Retomando um velho papo sobre o direito e a sociologia. *Revista de Estudos Empíricos em Direito*, São Paulo, v. 2, n. 2, p. 10-25, jan. 2015; RODRÍGUEZ-GARAVITO, César. Remapping law and society in Latin America: visions and topics for a new legal cartography. In: RODRÍGUEZ-GARAVITO, César (Ed.). *Law and society in Latin America: a new map*. New York: Routledge, 2015. p. 1-20. See about observation and second-order cybernetics, MOELLER, Hans-Georg. *Luhmann explained*. Chigado, La Salle: Open Court, 2006, p. 65-78.

academic production. It means I explored my research problems *from* the legal field and using its literature. I particularly relied on law and development studies and critical international legal studies and focused on studies from the Global South. Second (*how*), I employed a sociological-oriented approach to *observe* my research problems, which means, particularly in my case, looking for theoretical frameworks in contact with social contexts, biographical aspects and purpose meanings.<sup>23</sup> I choose this sociological-oriented approach because literature notices that legal scholars have difficulties in engaging in debates with other humanities in an organic way.<sup>24</sup> It also brought me close to the field of law and society which made me capable to remove the law from the limits of positivist scientism, to examine the legal discourse as the base of several shapes of the social constitution and to see its own realities with “fresh eyes”.<sup>25</sup> Finally (*why*), I imagined myself doing this research because I believe knowledge is an important part of social emancipation. I applied a critical-oriented approach to *understand* the scholarship in critical terms and to *propose* explicit political meanings to my research findings.<sup>26</sup>

The methodological premises are interconnected. In relation to the first premise, studies in the field of law and development have affirmed the importance of context and

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<sup>23</sup> See about the use of sociological-oriented approach to international law, HIRSCH, Moshe. *Invitation to the sociology of international law*. Oxford: Oxford University Press, 2015.

<sup>24</sup> See, e.g., about Brazilian legal research and its difficulty to engage with social sciences and humanities, NOBRE, Marcos. Apontamentos sobre a pesquisa em direito no Brasil. *Novos Estudos CEBRAP*, São Paulo, n. 66, p. 145-154, July 2003.

<sup>25</sup> CAPELLER, Wanda. De que lugar falamos? Retomando um velho papo sobre o direito e a sociologia. *Revista de Estudos Empíricos em Direito*, São Paulo, v. 2, n. 2, p. 23, 2015.

<sup>26</sup> See generally, KINCHELOE, Joe L.; MCLAREN, Peter. Rethinking critical theory and qualitative research. In: DENZIN, Norman K.; LINCOLN, Yvonna S. (Ed.). *Handbook of qualitative research*. 2. ed. Thousand Oaks, London, New Delhi: Sage Publications, 2000, p. 279-314; PUENTES, Ricardo Sánchez. *Enseñar a investigar: una didáctica nueva de la investigación en ciencias sociales y humanas*. Ciudad del Mexico: Universidad Nacional Autónoma de Mexico, 2014. See in particular about decolonizing methodology and knowledge: BAUTISTA, Juan José. *Hacia la descolonización de la ciencia social latinoamericana*. Cuatro ensayos metodológicos y epistemológicos. La Paz: Rincón Ediciones, 2012; GROSGOUEL, Ramón. Decolonizing Western uni-versalisms: decolonial pluri-versalism from Aimé Césaire to the Zapatistas. *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, v. 1, n. 3, p. 88-104, 2012; SMITH, Linda Tuhiwai. *Decolonizing methodologies: research and indigenous peoples*. 2. ed. London: Zed Books, 2013; WALSH, Catherine E. (Ed.). *Pedagogías decoloniales: prácticas insurgentes de resistir, (re)existir y (re)vivir*. Quito: Abya Yala, 2013; MIGLIEVICH RIBEIRO, Adelia. Por uma razão decolonial: desafios ético-político-epistemológicos à cosmovisão moderna. *Civitas – Revista de Ciências Sociais*, v. 14, n. 1, p. 66-80, 2014; MBEMBE, Achille. Decolonizing the university: new directions. *Arts and Humanities in Higher Education*, v. 15, n. 1, p. 29-45, 2016; OCAÑA, Alexander Ortiz; ARIAS, María Isabel; CONEDO, Zaira Esther Pedro. *Decolonialidad de la educación: emergencia/urgencia de una pedagogía decolonial*. Santa Maria: UniMagdalena, 2018; SANTOS, Boaventura de Sousa. *The end of the cognitive empire: the coming of age of epistemologies of the South*. Durham: Duke University Press, 2018.

of the critical perspective,<sup>27</sup> which is understood as relevant in the scope of the present research. In relation to the second premise, theoretical studies and concrete experiences went beyond hegemonic forms of socioeconomic organizations, particular Global South scholars and movements respectively.<sup>28</sup> In relation to the third premise, debates about postcolonialism and decolonial emancipation<sup>29</sup> and alternatives to development<sup>30</sup> are inserted in this body of critical perspectives.

I conducted a literature review,<sup>31</sup> with descriptive purposes<sup>32</sup> of postcolonial studies and critical theories of international law. I have used several databases to pursue such methodology<sup>33</sup> and the research has descriptive and bibliographical review purposes.<sup>34</sup> In order to comply with Brazilian academic standards, I am using ABNT

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<sup>27</sup> See, e.g., TAMANAHA, Brian Z. The primacy of society and the failures of law and development. *Cornell International Law Journal*, v. 44, p. 209-248, 2011.

<sup>28</sup> See about Global South scholarship, CONNELL, Raewyn. *Southern theory: the global dynamics of knowledge in social science*. Cambridge: Polity, 2007; SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010.

<sup>29</sup> See, e.g., CASTRO-GÓMEZ, Santiago; GROSFOGUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007; MIGNOLO, Walter. Desobediência epistêmica: a opção descolonial e o significado de identidade em política. *Cadernos de Letras da UFF*, Niterói, n. 34, p. 287-324, 2008.

<sup>30</sup> See, e.g., MAHMUD, Tayyab. Postcolonial imaginaries: alternative development or alternatives to development. *Transnational Law & Contemporary Problems*, v. 9, n. 1, p. 25-34, 1999; PIETERSE, Jan Nederveen. After post-development. *Third World Quarterly*, v. 21, n. 2, p. 175-191, 2000; ALIMONDA, Héctor. *Desarrollo, post-desarrollo y 'buen vivir'*: reflexiones a partir de la experiencia ecuatoriana. Crítica y emancipación: Revista Latinoamericana de Ciencias Sociales, v. IV, n. 7. Buenos Aires: CLACSO, 2012; KOTHARI, Ashish; DEMARIA, Federico; ACOSTA, Alberto. Buen vivir, degrowth and ecological swaraj: alternatives to sustainable development and the green economy. *Development*, v. 57, n. 3-4, p. 362-375, 2014.

<sup>31</sup> QUEIROZ, Rafael Mafei Rabelo; BEICKER, Flávio. Como encontrar, organizar e estudar os textos necessários para seu trabalho. In: QUEIROZ, Rafael Mafei Rabelo; FEFERBAUM, Marina (Coord.). *Metodologia jurídica: um roteiro prático para trabalhos de conclusão de curso*. São Paulo: Saraiva, 2012, p. 280-292.

<sup>32</sup> SIEMS, Mathias M. Legal originality. *Oxford Journal of Legal Studies*, v. 28, n. 1, p. 147-164, 2008; QUEIROZ, Rafael Mafei Rabelo. Como encontrar um bom tema dentro de minha área de interesse? In: QUEIROZ, Rafael Mafei Rabelo; FEFERBAUM, Marina (Coord.). *Metodologia jurídica: um roteiro prático para trabalhos de conclusão de curso*. São Paulo: Saraiva, 2012, p. 68-71.

<sup>33</sup> I have primarily made use of online databases Academia.edu, Brazilian Digital Library of Theses and Dissertations (BDTD), CAPES' Theses and Dissertations Catalogue, Dialnet, Google Scholar, HeinOnline, JSTOR, Oxford Bibliographies, Oxford Handbooks, Red de Bibliotecas Virtuales de Ciencias Sociales em América Latina y El Caribe (Biblioteca Virtual CLACSO), ResearchGate, SciELO and Stanford Encyclopedia of Philosophy. It was also relevant the digital platforms dedicated to postcolonial thought, lectures available online and podcasts managed by research centers.

<sup>34</sup> I faced an incredible experience during my research design trajectory. I had previously chosen the case study as my research main method and my initial idea was to understand how legal institutions respond to postcolonial resistance. In this research draft, predominantly empirical, I was trying to link three main objects to the case I was exploring: legal phenomena in Latin America context, postcolonial and decolonial studies and movements, and environmental devastation. I gladly had the opportunity to present this research draft and its initial findings in several academic events and, using the contributions from this trajectory, I found empirical concerns that were difficult to overcome without specific theoretical tools. I could not find

style, with complete citations on footnotes, except on figures which I am using author-date style. In this sense, footnotes to the following text and the references they contain are conceived (as to their style, form, and function) according to Brazilian practice.<sup>35</sup>

## THESIS OUTLINE

This master's thesis has two parts, also with preface, introduction, conclusion and postface. In the first part, *Maps*, I explore separately the academic fields of international law and development and postcolonial studies. The first part has a more conceptual and descriptive tone. The idea is to introduce the theme, its general concepts and to set common meanings to the categories that I use in the second part of the thesis. The first part of the thesis, thus, is divided into two chapters. In the first chapter, I present the field of study of law and development, particularly using the five categories proposed by Liliana Lizarazo-Rodríguez: first, national perspectives (with two perspectives, the economics-oriented/institutionalist approach versus the anthropology- and sociology-oriented approach); second, international perspectives (with two perspectives, public international law perspective and the Third World Approaches to International Law, TWAIL); third, the transnational approach; fourth, Comparative Law and Development; and finally, fifth, approaches based on transnational thematic areas (with three main areas: human rights, sustainable development and post-conflict law).<sup>36</sup> In the second chapter, I explore postcolonial studies and its main concepts. In this regard, I follow postcolonial and decolonial literature and I propose four "waves" to understand how postcolonialism, as a body of studies, has been developed: first, anti-colonial and founding moments; second, subaltern studies and historiographical turn; third, multidisciplinary voices in a postcolonial world; and, fourth, Modernity/Coloniality Group and decolonial thought.

In the second part of this master's thesis, *Encounters*, I propose connections between international law, development and postcolonialism. In chapter three, I address generic encounters explored by legal scholarship that brings together international law,

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these specific theoretical tools at the time so I thought it would be cautious to expand my research in terms of time. Therefore, I decided to focus on the theoretical aspect of postcolonialism in the present moment of my master program and, then, use my doctorate program for empirical work.

<sup>35</sup> See generally, QUEIROZ, Rafael Mafei Rabelo; FEFERBAUM, Marina (Coord.). Metodologia jurídica: um roteiro prático para trabalhos de conclusão de curso. São Paulo: Saraiva, 2012.

<sup>36</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 761-898, 2017.

development and postcolonialism. I address the ideas of “decolonizing” law and development and international law and development “from the margins”. In chapter four, I present two substantial encounters, a more generic one and a more specific one. In the first one, I propose a special look at the “encounters” between international law, development and postcolonial studies. I reach out to critical approaches to international law to understand such relations and link it to the literature on international law, mainly Third World Approaches to International Law (TWAIL). The second one is the set of specific “encounters” of postcolonial approaches to international law and development. I explain that postcolonial approaches to international law and development is a set of studies that use postcolonialism and have a postcolonial “voice” to explain international law and development. I use Balakrishnan Rajagopal,<sup>37</sup> Sundhya Pahuja<sup>38</sup> and Luis Eslava<sup>39</sup> as examples of postcolonial approaches to international law and development, and discuss their main contributions to understand international law and development using critical perspectives. In the first section, I bring three main contributions of postcolonial approaches to international law and development: first, Third World resistance as part of international law and development dynamics; second, development discourse as structure of the ideological-institutional complex of international law; and, third, international law and development as a dynamic that modifies notions of global and local in everyday lives.

Besides that, I argue that postcolonial approaches to international law share three elements that differentiate them from other perspectives on international law and development, which I explore in the second section. These three elements connect with the ideas of time, space and knowledge. First, a historical-temporal element shows these studies have extended the chronological frontiers of international legal history which now allow explanations of the legacies of power and oppression related to the past and present forms of development. In short, this element expands the temporal borders of international law and development. Second, a geographical-spatial element demonstrates that postcolonial international law authors use a more dynamic understanding of spaces. Such diverse engagement with space enables a multidimensional analysis of international

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<sup>37</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003.

<sup>38</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>39</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.



law and its effects at the global, transnational, regional, national and local levels. And, third, an epistemological-conceptual element which decentralizes legal and development discourses. This last element demonstrates that these studies have incorporated specific postcolonial-oriented approaches, related to confronting Eurocentrism and bringing subaltern voices to sciences, into the usual interactions of law and development to understand them. I argue that this element explains the alternatives ways research is being conducted to explain the law and development phenomenon.

## **PART I – MAPS**

*As far as I know, there is no history of the atlas as a genre. Insofar as such a history might turn out to be important for clarifying the question of Eurocentrism, I believe that an analysis of Mercator's Atlas is a necessary preparatory task. I also believe that the Atlas manifests the main constituents that have defined Europe as a privileged source of meaning for the rest of the world. Eurocentrism [...] is more than an ideological construct that vanishes with the brush of the pen or merely disappears when Europe loses its position of dominance. The trace of European expansionism continues to exist in the bodies and minds of the rest of the world, as well as in the fantasies of the former colonizers. The transposition of the image of the palimpsest becomes an illuminative metaphor for understanding geography as a series of erasures and overwritings that have transformed the world. The imperfect erasures are, in turn, a source of hope for the reconstitution or reinvention of the world from native and non-Eurocentric points of view.<sup>40</sup>*

*The Third World was not a place. It was a project. During the seemingly interminable battles against colonialism, the peoples of Africa, Asia, and Latin America dreamed of a new world. They longed for dignity above all else, but also the basic necessities of life (land, peace, and freedom). They assembled their grievances and aspirations into various kinds of organizations, where their leadership then formulated a platform of demands. These leaders, whether India's Jawaharlal Nehru, Egypt's Gamal Abdel Nasser, Ghana's Kwame Nkrumah, or Cuba's Fidel Castro, met at a series of gatherings during the middle decades of the twentieth century. In Bandung (1955), Havana (1966), and elsewhere, these leaders crafted an ideology and a set of institutions to bear the hopes of their populations. The "Third World" comprised these hopes and the institutions produced to carry them forward.<sup>41</sup>*

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<sup>40</sup> RABASA, José. Alegorias do Atlas. Allegories of the Atlas (1993). In: MOURA, Sabrina (Org.). *Panoramas do sul: leituras. Perspectivas para outras geografias*. São Paulo: Edições Sesc, 2015, p. 59-60.

<sup>41</sup> PRASHAD, Vijay. *The darker nations: a people's history of the Third World*. New York City: The New Press, 2007, p. xv.

As law, “the mapping of global space in the context of colonialism was as much prescriptive as it was descriptive”.<sup>42</sup> Maps are a perfect metaphor for this first part of my thesis as one of its main goals is to relate *what we see* and *how we see it* in this postcolonial world.<sup>43</sup> A map is a “mirror of the world, not because the representation of the earth has the status of a naturel sign, but because it aims to invoke a simulacrum of an always-inaccessible totality by means of an arrangement of symbols”.<sup>44</sup> It means that, although we understand maps as history and geography, we should pay more attention to maps as a combination of *histories* and *geographies*.<sup>45</sup> Such a pluriversality-oriented approach to maps remembers us that maps have both natural elements of Earth – *what we see* – and cultural representations of the world – *how we see it*.<sup>46</sup>

Tayyab Mahmud, exploring law and space, points out that “[g]eography was a critical component of the Enlightenment project of knowledge production; it helped produce improved cartography, regional descriptions, geographical data, and analyses of natural environment and political economy”.<sup>47</sup> Not only geography, but knowledge as a whole can be connected to the Enlightenment project, as Sarah Radcliffe explains:

Although the formal end of colonial rule resulted in the formation of postcolonial nation - states (formally sovereign states whose structures and modalities were conditioned by their colonial histories), the forms of knowledge – about economy, democracy, development, education, culture, racial - ethnic difference and so on – through which the world is apprehended and explained and modelled for the future are deeply rooted in post -

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<sup>42</sup> MITCHELL, Philip Irving. Key terms in post-colonial theory. Available at: <<https://www3.dbu.edu/mitchell/postcold.htm>>. Access on February 15, 2019.

<sup>43</sup> See about maps from decolonial and Global South perspectives, e.g.: RADCLIFFE, Sarah A. Development and geography: towards a postcolonial development geography? *Progress in Human Geography*, v. 29, n. 3, p. 291-298, 2005; GIRALDO, Yicel Nayrobis; MELENGE, James Alexander. *Territorios y cartografías educativas: construyendo sentidos de las educaciones del siglo XXI*. Medellín: CINDE, 2013; GARDNER, Anthony (Ed.). *Mapping South: journeys in South-South cultural relations*. Victoria: The South Project, 2013; AKERMAN, James R (Ed.). *Decolonizing the map: cartography from colony to nation*. Chicago: The University of Chicago Press, 2017.

<sup>44</sup> RABASA, José. Alegorias do Atlas. Allegories of the Atlas (1993). In: MOURA, Sabrina (Org.). *Panoramas do sul: leituras. Perspectivas para outras geografias*. São Paulo: Edições Sesc, 2015, p. 60.

<sup>45</sup> See particularly about the symbolical use of maps in producing knowledge: AGAZZI, Evandro. Maps and territories in scientific investigation. In: WUPPULURI, Shyam; DORIA, Francisco Antonio (Ed). *The map and the territory: exploring the foundations of science, thought and reality*. New York: Springer, 2018. p. 3-14.

<sup>46</sup> See about pluriversality, GROSGOUEL, Ramón. Hacia un pluri-versalismo transmoderno decolonial. *Tabula Rasa*, n. 9, p. 199-215, 2008; MIGNOLO, Walter. *The darker side of Western modernity: global futures, decolonial options*. Durham: Duke University Press, 2011, p. 213-251.

<sup>47</sup> MAHMUD, Tayyab. Geography and international law: towards a postcolonial mapping. *Santa Clara Journal of International Law*, v. 5, n. 2, p. 529-530, 2007.

Enlightenment Euro - American claims to be able to pronounce universal truths and to theorise the world.<sup>48</sup>

As I explore in this first part of my master's thesis, knowledge is related to a set of Eurocentric perspectives that endure from "modern" colonialism and the "birth" of Global South states.<sup>49</sup> Although I am not discussing maps *per se*, I face three sets of practices and studies – international law, development and postcolonialism – that use, redefine and contest maps. In this first part of this thesis, I introduce these three sets using two isolated frameworks: on one hand, international law and development; and, on the other hand, postcolonial studies.

In the first chapter, "*Legal cartography*": *mapping (international) law and development*, I introduce law and development. For my research purposes, I see law and development as a field and I borrow from Liliana Lizarazo-Rodríguez her categorization to organize it.<sup>50</sup> The idea is to frame an international perspective<sup>51</sup> to law and development, which will be important to advance my main argument in the second part of this thesis.

In the second chapter, "*South-up maps*": *mapping postcolonial studies*, I explore postcolonial and decolonial studies. I outline the concepts that permeate this thesis and I propose my own categorization to the set of critical studies and practices related to colonialism(s) endurance. As this research comes from the legal studies field, I believe

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<sup>48</sup> RADCLIFFE, Sarah A. Decolonising geographical knowledges. *Transactions of the Institute of British Geographers*, v. 42, n. 3, p. 329, 2017.

<sup>49</sup> I am using *modern* and *birth* in quotation marks because postcolonial critique challenges modernity and the history of postcolonial nations. See, e.g., FITZPATRICK, Peter. *Modernism and the grounds of law*. Cambridge: Cambridge University Press, 2001; MIGNOLO, Walter. Delinking: the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality. *Cultural studies*, v. 21, n. 2-3, p. 449-514, 2007; MÉNDEZ-REYES, Johan; MORÁN-BELTRÁN, Lino. Pensar más allá de la modernidad eurocéntrica en perspectiva decolonial. *Revista de Filosofía*, v. 78, n. 3, p. 42-55, 2014; DE SOUZA PINTO, Júlio Roberto, MIGNOLO, Walter. A modernidade é de fato universal? Reemergência, desocidentalização e opção decolonial. *Civitas – Revista de Ciências Sociais*, v. 15, n. 3, p. 381-402, 2015; ESLAVA, Luis; PAHUJA, Sundhya. The state and international law: a reading from the Global South. *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, forthcoming, 2019.

<sup>50</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 761-898, 2017.

<sup>51</sup> For my research purposes, I am considering international law as a legal studies field, which we can see in sociological terms, especially in contemporary societies which "law is seen either as a reflexive system drive by paradoxes or a set of discourses, or 'stories', rife with contradictions" and facing it as an "ideological-institutional complex". See, TREVIÑO, A. Javier. *The sociology of law: classical and contemporary perspectives*. New Jersey: Transaction Publishers, 2010, p. 6; PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 10-43.

that this second chapter is important to present postcolonialism to legal readers. Besides that, the second chapter is important to advance postcolonial approaches that help me to propose my main argument in the second part of this work.

## 1. “LEGAL CARTOGRAPHY”: MAPPING (INTERNATIONAL) LAW AND DEVELOPMENT

Alberto Acosta, an Ecuadorian economist, affirms that since the mid-20<sup>th</sup> century, the ghost of development haunts the world.<sup>52</sup> He refers to the global development project launched by Global North countries, led by the U.S., after the Second World War. Nowadays, development discourse sets global political agenda, especially at the “margins” of the World – in the “backward”, “underdeveloped”, “poor” regions of the “Third World” – where development hypothetically has not arrived yet.<sup>53</sup> Law, particularly international law, has important roles on the matter: it is an important instrument to standardize goals, make commitments and serve as an arena for the global community to vocalize demands, to settle conflicts and to establish agendas, assisting countries in their development processes.<sup>54</sup>

In this first chapter, I explore how law and development are interrelated. I see law and development as a field, considering that it “might be understood as both a tradition and a set of practices”,<sup>55</sup> and that “has been variously described as a movement and a series of projects driven primarily by funding decisions”.<sup>56</sup> I introduce law and

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<sup>52</sup> ACOSTA, Alberto. *O bem viver: uma oportunidade para imaginar outros mundos*. São Paulo: Editora Elefante, 2016, p. 43.

<sup>53</sup> I am using quotation marks because critical literature challenges the way we commonly use such expressions to organize the world in terms of categories and to name realities though universal symbols. See, e.g., SAID, Edward. *Orientalism*. London: Penguin Books, 1978; PAHUJA, Sundhya. The postcoloniality of international law. *Harvard International Law Journal*, v. 46, n. 2, p. 459-470, 2005; DODDS, Klaus. The Third World, developing countries, the South, emerging markets and rising powers. In: DESAI, Vandana; POTTER, Robert B (Ed.). *The companion to development studies*. 3. ed. Oxon: Routledge, 2014, p. 41-47; MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 213-219; SANTOS, Boaventura de Sousa. *The end of the cognitive empire: the coming of age of epistemologies of the South*. Durham: Duke University Press, 2018.

<sup>54</sup> See, e.g., DE WAART, Paul; PETERS, Paul; DENTERS, Erik (Ed.). *International law and development*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988; TRUBEK, David M.; SANTOS, Alvaro. Introduction: the third moment in Law and Development theory and the emergence of a new critical practice. In: TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006, p. 1-18; RITTICH, Kerry. Theorizing international law and development. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015, p. 820-843.

<sup>55</sup> RITTICH, Kerry. Theorizing international law and development. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Pres, 2015, p. 826.

<sup>56</sup> RITTICH, Kerry. Theorizing international law and development. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Pres, 2015, p. 828.

development with the idea of framing an international perspective to law and development, borrowing from Liliana Lizarazo-Rodríguez's categorization to do so. She argues that law and development can be understood as five main approaches: first, national perspectives (with two subcategories, the economics-oriented/institutionalist approach versus the anthropology- and sociology-oriented approach); second, international perspectives (with two subcategories, public international law perspective and the Third World Approaches to International Law, TWAIL); third, the transnational approach; fourth, Comparative Law and Development; and, fifth, approaches based on transnational thematic areas (with three main areas: human rights, sustainable development and post-conflict law).<sup>57</sup> The last section provides a summary table of the main discussion on law and development approaches explored in this chapter.

### 1.1.AN INTRODUCTION TO LAW AND DEVELOPMENT

Law and development is a plural field.<sup>58</sup> A starting point to understand law and development is that "Law & Development scholars do not adopt one single concept of

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<sup>57</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 761-898, 2017.

<sup>58</sup> See law and development in general, TRUBEK, David M. Max Weber on law and the rise of capitalism. *Wisconsin Law Review*, n. 3, p. 720-753, 1972; TRUBEK, David M.; GALANTER, Marc. Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States. *Wisconsin Law Review*, p. 1062-1103, 1974; DE SOTO, Hernando. *The mystery of capital: why capitalism triumphs in the West and fails everywhere else*. New York: Bantam Books, 2000; GATHII, James Thuo. Retelling good governance narratives on Africa's economic and political predicaments: continuities and discontinuities in legal outcomes between markets and states. *Villanova Law Review*, v. 45, n. 5, p. 971-1036, 2000; PISTOR, Katharina. Standardization of law and its effect on developing economies. *American Journal of Comparative Law*, v. 50, n. 1, p. 97-130, 2002; BERKOWITZ, Daniel; PISTOR, Katharina; RICHARD, Jean-Francois. Economic development, legality, and the transplant effect. *European Economic Review*, v. 47, n. 1, p. 165-195, 2003; KENNEDY, David. Laws and developments. In: HATCHARD, John; PERRY-KESSARIS, Amanda (Ed.). *Law and development: facing complexity in the 21st century*. London: Cavendish Publishing, 2003, p. 17-26; KAPLINSKY, Raphael. *Globalization, poverty and inequality: between a rock and a hard place*. Cambridge: Polity Press, 2005; TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006; SANTOS, Boaventura de Sousa; RODRÍGUEZ GARAVITO, César A (Eds.). *El derecho y la globalización desde abajo: hacia una legalidad cosmopolita*. Rubí: Anthropos, 2007; SCHAPIRO, Mario Gomes. Repensando a relação entre estado, direito e desenvolvimento: os limites do paradigma rule of law e a relevância das alternativas institucionais. *Revista Direito GV*, v. 6, n. 1, p. 213-252, 2010; KREVER, Tor. The legal turn in late development theory: the rule of law and the World Bank's development model. *Harvard International Law Journal*, v. 52, n. 1, p. 287-320, 2011; RODRIGUEZ, José Rodrigo (Org.). *Fragmentos para um dicionário crítico de direito e desenvolvimento*. São Paulo: Saraiva, 2011; SCHAPIRO, Mario G.; TRUBEK, David M. (Org.). *Direito e desenvolvimento: um diálogo entre os BRICS*. São Paulo: Saraiva, 2012; TRUBEK, David M.; GARCIA, Helena Alviar; COUTINHO, Diogo R.; SANTOS, Alvaro (Ed.). *Law and the new developmental state: the Brazilian experience in Latin American context*. Cambridge: Cambridge University Press, 2013; KENNEDY, David. Law and development



development, may disagree on the relationship between law and development, [they] do not adopt one single methodology in their studies”.<sup>59</sup> Besides this academic side of law and development, law and development can also be understood “as an outgrowth of the normalization of statecraft and bureaucratic administration as instruments of modernization and economic rationalization”.<sup>60</sup> Thus, law and development encompasses a set of academic studies and social and economic practices.

One complication of theorizing these traditions and practices, even a distinctive characteristic of the field itself, is the constant transversal and blurring of conceptual, institutional, and disciplinary distinctions and categories. The result is a ‘field’ with uncertain borders constituted by varied, often isolated, and sometimes incommensurable projects, preoccupations, and perspectives.<sup>61</sup>

A common narrative about law and development distinguishes two main perspectives related to law and development. On one view, “law *in* development” is an instrumental view of the law and the legal system in the promotion of development; from another perspective, “law *as* development” is the promotion of the rule of law and the improvement of the legal system as development as ends in themselves.<sup>62</sup> In general, as Kerry Rittich points out,

[...] law and development is concerned with the relationship between legal norms and institutions and economic, social, cultural, and political transformation. However, law and development analyses and initiatives are not concerned with such questions *in general*; rather, they are typically directed

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economics: toward a new alliance. In: KENNEDY, David; STIGLITZ, Joseph E. *Law and economics with Chinese characteristics: institutions for promoting development in the twenty-first century*. Oxford: Oxford University Press, 2013, p. 19-70; ALVIAR, Helena. The evolving relationship between law and development: proposing new tools. In: FORTES, Pedro; BORATTI, Larissa; PALACIOS LLERAS, Andrés; GERALD DALY, Tom (Eds.). *Law and policy in Latin America: transforming courts, institutions, and rights*. London: Palgrave Macmillan, 2017. See especially law and development as a field, DE MOERLOOSE, Stéphanie. Law and Development as a field of study: connecting law with development. *Law and Development Review*, v. 10, n. 2, p. 179-186, 2017; LEE, Yong-Shik. General theory of law and development. *Cornell International Law Journal*, v. 50, p. 420-424, 2017.

<sup>59</sup> PRADO, Mariana Mota. What is law and development? *Revista Argentina de Teoría Jurídica*, Buenos Aires, v. 11, n. 1, p. 20, 2010.

<sup>60</sup> RITTICH, Kerry. Theorizing international law and development. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015, p. 822.

<sup>61</sup> RITTICH, Kerry. Theorizing international law and development. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015, p. 826.

<sup>62</sup> PRADO, Mariana Mota. What is law and development? *Revista Argentina de Teoría Jurídica*, Buenos Aires, v. 11, n. 1, p. 3-6, 2010.

toward states that have already been designated as developing, emerging, in transition, or ‘failed’, and their perceived inability to either catch up or measure up when it comes to conventional benchmarks of economic and social performance.<sup>63</sup>

The field of law and development includes a series of studies, traditions, practices and initiatives that seek to think, elaborate and implement – in favor or against it – social, economic and cultural development policies. On the one hand, there is a political rhetoric of progress and institutional improvement that underlies this set of practices and studies;<sup>64</sup> on the other hand, there is also a critical perspective that is skeptical of the discourse surrounding law and development. Law and development, still, presents a diverse set of methodologies of research and teaching, with a strong empirical element influenced by legal sociology.<sup>65</sup>

## 1.2. REFRESHING LAW AND DEVELOPMENT THROUGH SCOPE

Law and development encompasses different approaches to the relations between legal studies, norms and practices with development studies, initiatives and projects. I bring a more comprehensive look to law and development in order to advance the literature review and to explore its contemporary meta-studies.<sup>66</sup> In this regard, I follow Liliana Lizarazo-Rodríguez, who proposes to examine law and development using a fundamental distinction between the approaches on the basis of their scope. She argues that law and development can be understood through five main approaches: first, national perspectives (with two perspectives, the economics-oriented/institutionalist approach versus the anthropology- and sociology-oriented approach); second, international perspectives (with two perspectives, public international law perspective and the Third

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<sup>63</sup> RITTICH, Kerry. Theorizing international law and development. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015, p. 828.

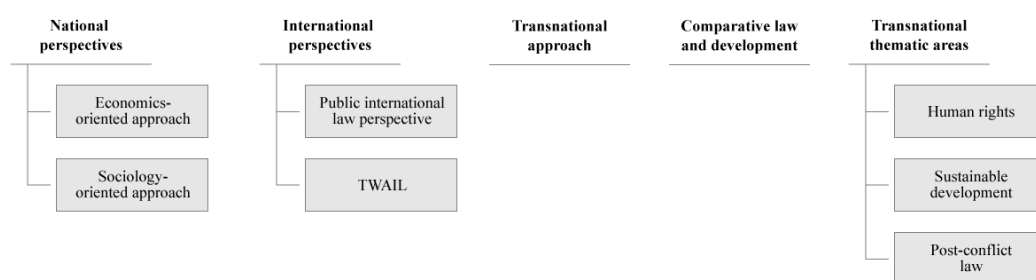
<sup>64</sup> See the debate on the use of law and development for both emancipation and oppression, DAVIS, Kevin E.; TREBILCOCK, Michael J. The relationship between law and development: optimists versus skeptics. *The American Journal of Comparative Law*, v. 56, n. 4, p. 895-946, 2008.

<sup>65</sup> See, e.g., “There is no homogeneous methodology in this field, but a plurality of methodologies and approaches. This may be related to the fact that the field of development studies is already an interdisciplinary field”, PRADO, Mariana Mota. What is law and development? *Revista Argentina de Teoría Jurídica*, Buenos Aires, v. 11, n. 1, p. 7, 2010.

<sup>66</sup> See also the Special Issue of *Law and Development Review* (v. 8, n. 2, 2015) which explores new directions for law and development studies.

World Approaches to International Law, TWAIL); third, the transnational approach; fourth, comparative Law and Development; and, fifth, approaches based on transnational thematic areas (with three main areas: human rights, sustainable development and post-conflict law).<sup>67</sup> I explore national and international perspectives to law and development below, as they are important to construct my main argument, and I present main ideas regarding the other perspectives (transnational, comparative and thematic).

**FIGURE 1 - LAW AND DEVELOPMENT APPROACHES BASED ON SCOPE**



Source: Own authorship based on Lizarazo-Rodríguez (2017).

### *1.2.1. National perspectives to law and development*

The first set of approaches focus on law and development with a national scope. Its emphasis is on the role of domestic law and legal institutions in the process of social and economic development rather than on international law or trade. According to Lizarazo-Rodríguez' categorization, national perspectives to law and development have two subcategories: the economics-oriented or institutional approach to law and development<sup>68</sup> and the sociology- and anthropology-oriented approach to law and development.<sup>69</sup> National perspectives to law and development are commonly related to the mainstream approach of law and development, usually found in policymakers'

<sup>67</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 761-898, 2017.

<sup>68</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 771-798, 2017.

<sup>69</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 798-814, 2017.

speeches and in publications driven by funding institutions. An example of this set of perspectives is the following passage of *The World Bank Legal Review*:

Modern economic systems rely on legal frameworks that facilitate market transactions and promote efficiency while safeguarding important social interests. The dynamism of the business world continually forces renewal and adaptation. New laws need to be written and old ones repealed. And institutions have to be created or modified to direct, implement, and enforce the new ways. While laws and legal institutions need to adapt and change, certain principles must remain at the core: equity, transparency, predictability, impartial application, and access to justice.<sup>70</sup>

The first category is closely related to the mainstream concept of law and development movements and encompasses “the concept of the promotion of the Rule of Law in developing countries”.<sup>71</sup> David Trubek and Alvaro Santos,<sup>72</sup> Alessandro Octaviani<sup>73</sup> and Yong-Shik Lee,<sup>74</sup> just to cite a few scholars, follow a common path of identifying law and development in terms of conceptual and historical moments directly connected with “classical thinkers like Marx and Weber”<sup>75</sup> and the U.S. law and development movement. In this perspective, Upendra Baxi proposes two historical moments for law and development – the “old” and the “new” law and development – which “[t]he former were constituted and reconstituted in the high phases of the Cold War, while the latter has emerged in the post-Cold-War contexts of contemporary economic globalization”.<sup>76</sup> In another hand, David Trubek and Alvaro Santos argue for three historical “movements” to law and development: a first movement, between the

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<sup>70</sup> TUNG, Ko-Yung. Note from the editor in chief. In: TUNG, Ko-Yung; PUymbroEck, Rudolf V. Van (Ed.). *The World Bank Legal Review*. Law and justice for development. Vol. 1. London: World Bank, 2003, p. ix.

<sup>71</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 772, 2017.

<sup>72</sup> TRUBEK, David M.; SANTOS, Alvaro. Introduction: the third moment in Law and Development theory and the emergence of a new critical practice. In: TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006, p. 1-18.

<sup>73</sup> OCTAVIANI, Alessandro. *Recursos genéticos e desenvolvimento: os desafios furtadiano e gramsciano*. São Paulo: Saraiva, 2014, p. 61-64.

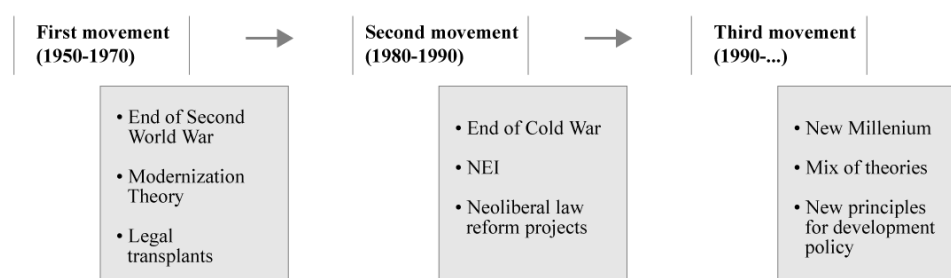
<sup>74</sup> LEE, Yong-Shik. General theory of law and development. *Cornell International Law Journal*, v. 50, p. 420-424, 2017.

<sup>75</sup> TRUBEK, David M.; SANTOS, Alvaro. Introduction: the third moment in Law and Development theory and the emergence of a new critical practice. In: TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006, p. 1.

<sup>76</sup> BAXI, Upendra. Global development and impoverishment. In: TUSHNET, Mark; CANE, Peter (Ed.). *The Oxford Handbook of Legal Studies*. Oxford: Oxford University Press, 2005, p. 473-474.

1950s and 1970s; a second movement, between the 1980s and 1990s; and, a third movement, since the late 1990s.<sup>77</sup> According to their categorization, the first movement emerged after the Second World War and utilized Weberian and modernization ideas to assist development processes in the Third World; the second movement came after the fall of the Soviet bloc, using neoliberal law projects; and, the third movement is the contemporary one that is more diverse and brings new approaches.<sup>78</sup>

**FIGURE 2 - “MAINSTREAM” LAW AND DEVELOPMENT MOVEMENTS**



Source: Own authorship based on Trubek and Santos (2006).

The first subcategory includes studies about the national promotion of the rule of law in developing countries,<sup>79</sup> the use of indicators to measure development and the

<sup>77</sup> TRUBEK, David M.; SANTOS, Alvaro. Introduction: the third moment in Law and Development theory and the emergence of a new critical practice. In: TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006, p. 1-18.

<sup>78</sup> TRUBEK, David M.; SANTOS, Alvaro. Introduction: the third moment in Law and Development theory and the emergence of a new critical practice. In: TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006, p. 1-18; LEE, Yong-Shik. General theory of law and development. *Cornell International Law Journal*, v. 50, p. 420-424, 2017.

<sup>79</sup> See, e.g., TRUBEK, David. The “rule of law” in development assistance: past, present, and future. In: TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006. p. 74-94; DAM, Kenneth W. *The law-growth nexus: the rule of law and economic development*. Washington: Brookings Institution Press, 2007; OHNESORGE, John K. M. Developing development theory: law and development orthodoxies and the Northeast Asian experience. *University of Pennsylvania Journal of International Economic Law*, v. 28, n. 2, p. 219-308, 2007; DUBASH, Navroz K.; MORGAN, Bronwen (Ed.). *The rise of the regulatory state of the South: infrastructure and development in emerging economies*. Oxford: Oxford University Press, 2013; DAVIS, Kevin E.; PRADO, Mariana Mota. Law, regulation, and development. In: CURRIE-ALDER, Bruce;

functioning of legal systems,<sup>80</sup> and also the role of colonization, “not assess levels of oppression, but rather to understand current performance of legal systems and to explain ethnic concerns and disputes”.<sup>81,82</sup>

The second subcategory (the sociology- and anthropology-oriented approach to law and development) is an alternative interdisciplinary approach to national perspective on law and development and is closely related to the legal pluralism phenomenon.<sup>83</sup> If we can see that the institutional approach to law and development relates to U.S. cooperation programs, legal scholarship (including critical perspectives) and its consequences in developing countries, the sociology- and anthropology-oriented approaches to law and development is “closely linked with the analysis of legal systems in the European colonies in the 19<sup>th</sup> and 20<sup>th</sup> centuries in Asia and Africa”.<sup>84</sup>

The emergence of law and development studies is connected to this approach, and can be traced back to the 1970s and decolonization processes. One important feature of this approach is the study of legal pluralism because “the complexity of legal orders and the conflict and potential interdependence of local laws with colonial law becomes an object of interest for anthropologists”<sup>85</sup> and is an important perspective to understand local realities influenced by development project (“development from below”). Sally

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KANBUR, Ravi; MALONE, David M.; MEDHORA, Rohinton. *International development: ideas, experience, and prospects*. Oxford: Oxford University Press, 2014, p. 204-220.

<sup>80</sup> See, e.g. FELD, Lars P.; VOIGT, Stefan. Economic growth and judicial independence: cross-country evidence using a new set of indicators. *European Journal of Political Economy*, v. 19, n. 3, p. 497-527, 2003; DREHER, Axel; SCHNEIDER, Friedrich. Corruption and the shadow economy: an empirical analysis. *Public Choice*, v. 144, n. 1-2, p. 215-238, 2010; DAVIS, Kevin E. Legal indicators: the power of quantitative measures of law. *Annual Review of Law and Social Science*, v. 10, p. 37-52, 2014; GUTMANN, Jerg; VOIGT, Stefan. The rule of law: measurement and deep roots. *CESifo Working Papers*, n. 5670, p. 1-45, 2015. See also World Bank’s *World Development Reports* and United Nation’s *Human Development Reports*.

<sup>81</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 785, 2017.

<sup>82</sup> See particularly the theory of legal origins, e.g., SOKOLOFF, Kenneth L.; ENGERMAN, Stanley L. History lessons: institutions, factor endowments, and paths of development in the New World. *Journal of Economic Perspectives*, v. 14, n. 3, p. 217-232, 2000; LA PORTA, Rafael; LOPEZ-DE-SILANES, Florencio; SHLEIFER, Andrei. The economic consequences of legal origins. *Journal of Economic Literature*, v. 46, n. 2, p. 285-332, 2008; DANIELS, Ronald J.; TREBILCOCK, Michael J.; CARSON, Lindsey D. The legacy of empire: the common law inheritance and commitments to legality in former British colonies. *The American Journal of Comparative Law*, v. 59, n. 1, p. 111-178, 2011.

<sup>83</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 798, 2017.

<sup>84</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 801, 2017.

<sup>85</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 802, 2017.

Merry, analyzing the expansion of indicators for global governance, is an example of this approach:

Interest in using indicators to monitor human rights compliance has grown significantly. Indicators introduce into the field of global human rights law a form of knowledge production in which numerical measures make visible forms of violation and inequality that are otherwise obscured. [...] This article considers two sociological aspects to the expansion of the use of indicators. The first is a knowledge effect. Numerical measures produce a world knowable without the detailed particulars of context and history. The constituent units can be compared and ranked according to some criteria. This knowledge is presented as objective and often as scientific. The interpretations lurk behind the numbers but are rarely presented explicitly. These numbers seem open to public scrutiny and readily accessible in a way that private opinions are not. The second is a governance effect. Statistical measures of populations are clearly connected to eighteenth and early-nineteenth-century ideas that the people of a country represent its wealth and that good governance requires measuring and counting these people. [...] This article advocates an ethnographic approach to understanding the role and impact of indicators.<sup>86</sup>

The second subcategory includes the conceptualization of legal pluralism,<sup>87</sup> connections with legal anthropology to understand postcolonial contexts,<sup>88</sup> and specific questions such as pluri-nationalism and inter-legality.<sup>89</sup> This approach has also

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<sup>86</sup> MERRY, Sally Engle. Measuring the world: indicators, human rights, and global governance. *Current Anthropology*, v. 52, n. S3, p. S84-S85, 2011.

<sup>87</sup> See, e.g., MOORE, Sally Falk. Law and social change: the semi-autonomous social field as an appropriate subject of study. *Law & Society Review*, v. 7, n. 4, p. 719-746, 1972; HOOKER, Michael Barry. *Legal pluralism: an introduction to colonial and neo-colonial laws*. Oxford: Oxford University Press, 1975; MERRY, Sally Engle. Legal pluralism. *Law & Society Review*, v. 22, n. 5, p. 869-896, 1988; TAMANAHA, Brian Z. The folly of the 'social scientific' concept of legal pluralism. *Journal of Law and Society*, v. 20, n. 2, p. 192-217, 1993; TAMANAHA, Brian Z.; SAGE, Caroline; WOOLCOCK, Michael (Eds.). *Legal pluralism and development: scholars and practitioners in dialogue*. Cambridge: Cambridge University Press, 2012.

<sup>88</sup> See, e.g., GRIFFITHS, John. The social working of legal rules. *The Journal of Legal Pluralism and Unofficial Law*, v. 35, n. 48, p. 1-84, 2003; VON BENDA-BECKMANN, Franz; VON BENDA-BECKMANN, Keebet. The dynamics of change and continuity in plural legal orders. *The Journal of Legal Pluralism and Unofficial Law*, v. 38, n. 53-54, p. 1-44, 2006; BRAVERMAN, Irus; BLOMLEY, Nicholas; DELANEY, David; KEDAR, Alexandre (Eds.). *The expanding spaces of law: a timely legal geography*. Stanford: Stanford University Press, 2014.

<sup>89</sup> See, e.g., PAUL, James C. N. Rural development, human rights and constitutional orders in Sub-Saharan Africa. *Third World Legal Studies*, p. 57-84, 1989; ISA, Felipe Gómez. Cultural diversity, legal pluralism, and human rights from an indigenous perspective: the approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights. *Human Rights Quarterly*, v. 36, n. 4, p. 722-755, 2014; FONSECA, Paulo Henriques da. Novo constitucionalismo latino-americano, a propriedade e colonialidade: entre rupturas e permanências de um modelo. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, São Leopoldo, v. 7, n. 3, p. 308-322, 2015.

“developed a rich research agenda on topics such as bottom-up justice, localizing human rights, legal empowerment of the poor and customary justice”.<sup>90,91</sup>

### 1.2.2. *International perspectives to law and development*

The second set of approaches focus on law and development with an international scope. They connect with international development law and, again, has two subcategories: law and development is viewed from the perspective of public international law<sup>92</sup> and its counterpart, the Third World Approaches to International Law (TWAIL), which closely interacts with political science and international relations.<sup>93</sup> The first subcategory refers to competences of international organizations (U.N. agencies, for example), regional organizations, investment banks and non-State actors. It also “covers the enforcement of International Conventions and Standards enacted in the field” and “[p]rovided the origins of Law and Development and its connection with economic growth, International Economic Law is also linked with International Development Law”.<sup>94</sup> As well various United Nations’ reports and policy papers, Paul de Waart is a good example of this approach:

International law may be an instrument for promoting development or an impediment to it. The ongoing discussion on international law and

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<sup>90</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 807, 2017.

<sup>91</sup> See, e.g., FAUNDEZ, Julio. Should justice reform projects take non-State justice systems seriously? Perspectives from Latin America. *The World Bank Legal Review*, v. 2, p. 113-139, 2006; GOODALE, Mark; MERRY, Sally Engle (Ed.). *The practice of human rights: tracking law between the global and the local*. Cambridge: Cambridge University Press, 2007; RAJAGOPAL, Balakrishnan. Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective. *Human Rights Review*, v. 8, n. 3, p. 157-186, 2007; SANTOS, Boaventura de Sousa; RODRÍGUEZ GARAVITO, César A (Eds.). *El derecho y la globalización desde abajo: hacia una legalidad cosmopolita*. Rubí: Anthropos, 2007; MEENE, Ineke van de; ROOIJ, Benjamin van. *Access to justice and legal empowerment: making the poor central in legal development co-operation*. Leiden: Leiden University Press, 2008; CUNHA, Luciana Gross; ALMEIDA, Frederico de. Justiça e desenvolvimento econômico na reforma do judiciário brasileiro. In: SCHAPIRO, Mario G.; TRUBEK, David M. (Org.). *Direito e desenvolvimento: um diálogo entre os BRICS*. São Paulo: Saraiva, 2012, p. 361-386; FRANCO, Fernanda Cristina de Oliveira; FEITOSA, Maria Luiza Pereira de Alencar Mater. Desenvolvimento e direitos humanos: marcas de inconstitucionalidade no processo Belo Monte. *Revista Direito GV*, v. 9, n. 1, p. 93-114, 2013.

<sup>92</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 814-824, 2017.

<sup>93</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 824-831, 2017.

<sup>94</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 815, 2017.



development reflects the view that a suitable international economic order is very pertinent for the realization of economic, social and cultural rights. This pertinence varies, of course, with the definition of both international law and development. As for the latter it differs according to whether development is considered to be a legal concept which law may come to grips with either as a process or effort or as a result.<sup>95</sup>

The first subcategory of international approaches to law and development includes studies related to international development law<sup>96</sup> and particularly received important support of United Nations' conventions and policies.<sup>97</sup> Other concerns includes international economic law and international environmental law.<sup>98</sup> Finally, a key part of

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<sup>95</sup> DE WAART, Paul. Introductory reflections upon international law and development. In: DE WAART, Paul; PETERS, Paul; DENTERS, Erik (Ed.). *International law and development*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988, p. xxiii.

<sup>96</sup> See, e.g., SCHACHTER, Oscar. The evolving International law of development. *Columbia Journal of Transnational Law*, v. 15, n. 1, p. 1-16, 1976; FEUER, Guy; CASSAN, Hervé. *Droit international du développement*. Paris: Dalloz, 1985; FEUER, Guy. International development law: the establishment of a francophone school of thought. *The European Journal of Development Research*, v. 3, n. 2, p. 70-77, 1991; PAUL, James C. N. The United Nations and the creation of an international law of development. *Harvard International Law Journal*, v. 36, n. 2, p. 307-328, 1995; DE FEYTER, Koen. *World development law: sharing responsibility for development*. Oxford: Intersentia, 2001; AMARAL JÚNIOR, Alberto do (Org.). *Direito internacional e desenvolvimento*. Baurerri: Editora Manole, 2005; SARKAR, Rumu. *International development law: rule of law, human rights, and global finance*. Oxford: Oxford University Press, 2009.

<sup>97</sup> According to Lizarazo-Rodríguez, "International Development Law received also important support from the adoption of the U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 (in force from 1976), the adoption of the American Convention on Human Rights (the Pact of San José) in 1969 (in force since 1978) and the adoption of the African Charter on Human and Peoples Rights (The Banjul Charter) in 1981 (in force since 1986) which recognizes the three generations of human rights. However, human rights protection did not receive O the same support in Asia, which is as such, not contradictory with its economics-focused dominant development approach. There is no regional system of human rights protection up to now. The Asian Human Rights Commission (NGO) promoted the adoption of the Asian Human Rights Charter in 1998, seeking to include human rights concerns and Law and Development concerns. However, only in 2009, the Association of Southeast Asian Nations (ASEAN) established an Intergovernmental Commission on Human Rights, and it adopted the ASEAN Human Rights Declaration in 2012 but without a formal convention or a court". LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 820, 2017.

<sup>98</sup> See about international economic law and development, e.g., BUNN, Isabella D. The right to development: implications for international economic law. *American University of International Law Review*, v. 15, n. 6, p. 1425-1468, 2000; PETERSMANN, Ernst-Ulrich. Human rights, international economic law and 'constitutional justice'. *European Journal of International Law*, v. 19, n. 4, p. 769-798, 2008; SANCHEZ BADIN, Michelle Ratton. Developmental responses in the international trade legal game: cases of intellectual property and export credit law reforms in Brazil. In: TRUBEK, David M.; GARCIA, Helena Alviar; COUTINHO, Diogo R.; SANTOS, Alvaro (Ed.). *Law and the new developmental state: the Brazilian experience in Latin American context*. Cambridge: Cambridge University Press, 2013, p. 246-300; FAUNDEZ, Julio. Between Bandung and Doha: international economic law and developing countries. *Warwick School of Law Research Paper*, n. 2015/10, p. 1-28, 2015. See about international environmental law and development, e.g., DILEVA, Charles E. International environmental law and development. *Georgetown International Environmental Law Review*, v. 10, n. 2, p. 501-550, 1998.

this subcategory is the international right to development, which combines development and human rights.<sup>99</sup>

In opposition to this mainstream perspective of law and development with international scope, the second subcategory – *Third World Approaches to International Law* (TWAIL) – is more critical to international development law, as it refers “to the behavior of International Organizations and the dynamics of North-South relations, in particular, the imperialist and Eurocentric approach of International Law”.<sup>100</sup> TWAIL question the colonial past of international law and uses critical thought to rethink the legal phenomenon of international law.<sup>101</sup> According to B.S. Chimni,

[i]nternational law has always served the interests of dominant social forces and States in international relations. However, domination, history testifies, can coexist with varying degrees of autonomy for dominated States. The colonial period saw the complete and open negation of the autonomy of the colonized countries. In the era of globalization, the reality of dominance is best conceptualized as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favor of transnational capital and powerful States. The ruling elite of the third world, on the other

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<sup>99</sup> See, e.g., ALSTON, Philip. Making space for new human rights: the case of the right to development. *Harvard Human Rights Yearbook*, v. 1, p. 3-40, 1988; ISA, Felipe Gómez. *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional*. Bilbao: Universidad de Deusto, 1999; MARKS, Stephen. The human right to development: between rhetoric and reality. *Harvard Human Rights Journal*, v. 17, p. 137-168, 2004; MARKS, Stephen P. Human rights and development. In: JOSEPH, Sarah; MCBETH, Adam (Eds.). *Research Handbook on International Human Rights Law*. London: Edward Elgar Publisher, 2010, p. 167-195; PIOVESAN, Flávia. Direito ao desenvolvimento: desafios contemporâneos. In: PIOVESAN, Flávia; SOARES, Inês Virgínia Prado (Coord.). *Direito ao desenvolvimento*. Belo Horizonte: Editora Fórum, 2010, p. 95-116.

<sup>100</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 824, 2017.

<sup>101</sup> See, e.g., MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. *Wisconsin International Law Journal*, v. 16, n. 2, p. 353-420, 1997; ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006; OBREGÓN, Liliana. Between civilisation and barbarism: Creole interventions in international law. *Third World Quarterly*, v. 27, n. 5, p. 815-832, 2006; ESLAVA, Luis; PAHUJA, Sundhya. Between resistance and reform: TWAIL and the universality of international law. *Trade, Law and Development*, v. 3, n. 1, p. 103-130, 2011; GATHII, James Thuo. TWAIL: a brief history of its origins, its decentralized network, and a tentative bibliography. *Trade, Law and Development*, v. 3, n. 1, p. 26-64, 2011; GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, n. 119-124, v. 1, p. 49-50, 2013; FRANCO, Fernanda Cristina de Oliveira. Oportunidades e desafios das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional. *Revista de Direito Internacional*, v. 12, n. 2, p. 226-244, 2015; ANGHIE, Antony; KOSKENNIEMI, Martti; ORFORD, Anne. *Imperialismo y derecho internacional: historia y legado*. Bogotá: Siglo del Hombre Editores, 2016; MANTELLI, Gabriel Antonio Silveira; BADIN, Michelle Ratton Sanchez. Repensando o direito internacional a partir dos estudos pós-coloniais e decoloniais. *Prim@ Facie - Direito, História e Política*, v. 17, n. 34, p. 1-33, 2018.

hand, has been unable and/or unwilling to devise, deploy, and sustain effective political and legal strategies to protect the interests of third world peoples.<sup>102</sup>

Its research agendas “are diverse, but the general theme of its interventions is to unpack and deconstruct the colonial legacies of international law and engage in efforts to decolonise the lived realities of the peoples of the Global South”.<sup>103,104</sup> In terms of history, “[t]he movement coalesced in the 1990s through an alliance of scholars committed to critically investigating the mutually constitutive relationship between international law and the Third World/Global South”.<sup>105</sup> The movement began in 1997 in the U.S.<sup>106</sup> In 2003, Anghie and Chimni sought to situate the TWAIL in a more ancient tradition, that dated back to the contemporary internationalists of the decolonization movements of the 1950s, 1960s and 1970s.<sup>107</sup> From that point on, the literature starts distinguishing between two generations of critical productions in international law: TWAIL I,<sup>108</sup> located in the years of African and Asian decolonization, and the TWAIL II,<sup>109</sup> identified with the academic events of 1997.<sup>110</sup>

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<sup>102</sup> CHIMNI, Bhupinder S. Third World Approaches to International Law: a manifesto. *International Community Law Review*, Leiden, v. 8, p. 26, 2006.

<sup>103</sup> NATARAJAN, Usha; REYNOLDS, John; BHATIA, Amar; XAVIER, Sujith. Introduction: TWAIL - on praxis and the intellectual. *Third World Quarterly*, v. 37, n. 11, p. 1946, 2016.

<sup>104</sup> See, e.g., FALK, Richard; RAJAGOPAL, Balakrishnan; STEVENS, Jacqueline (Eds.). *International law and the Third World: reshaping justice*. London: Routledge, 2008; ESLAVA, Luis; PAHUJA, Sundhya. Beyond the (post)colonial: TWAIL and the everyday life of international law. *Law and Politics in Africa, Asia and Latin America*, v. 45, n. 2, p. 195-221, 2012.

<sup>105</sup> NATARAJAN, Usha; REYNOLDS, John; BHATIA, Amar; XAVIER, Sujith. Introduction: TWAIL - on praxis and the intellectual. *Third World Quarterly*, v. 37, n. 11, p. 1946, 2016.

<sup>106</sup> GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, n. 119-124, v. 1, p. 49-50, 2013; ESLAVA, Luis. TWAIL coordinates. Available at: < <http://criticallegalthinking.com/2019/04/02/twail-coordinates/>>. Access on April 30, 2019.

<sup>107</sup> GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, n. 119-124, v. 1, p. 49-50, 2013; ESLAVA, Luis. TWAIL coordinates. Available at: < <http://criticallegalthinking.com/2019/04/02/twail-coordinates/>>. Access on April 30, 2019.

<sup>108</sup> According to Arnulf Becker Lorca, TWAIL I includes scholars and authors such as R. P. Anand, Taslim Olawale Elias, Nagendra Singh, Raymond Ranjeva and Wang Tieya. LORCA, Arnulf Becker. Eurocentrism in the history of international law. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 1039-1047.

<sup>109</sup> According to James Gathii, TWAIL II includes scholars and authors such as Bhupinder Chimni, Celestine Nyamu, Balakrishnan Rajagopal, Hani Sayed, Vasuki Nesiah, Antony Anghie, Makau Mutua, Obiara Okafor and Karin Mickelson. GATHII, James Thuo. TWAIL: a brief history of its origins, its decentralized network, and a tentative bibliography. *Trade, Law and Development*, v. 3, n. 1, p. 28-29, 2011

<sup>110</sup> TWAIL, in its second generation, have been organizing several academic events since 1997. “[...] The group first met at Harvard Law School in 1997 [Cambridge, U.S.] and has grown rapidly since then, with conferences at Osgoode Hall Law School in 2001 [Toronto, Canada], Albany Law School in 2007 [Albany,

My main argument in this thesis relates to this second subcategory presented by Liliana Lizarazo-Rodríguez<sup>111</sup> and, as I advance in the second part of this work, I propose that it is possible to think in a more specific set of studies that TWAIL in the context of international law and development, which I call postcolonial approaches to international law and development.

### 1.2.3. *Other perspectives to law and development (transnational, comparative and thematic)*

Here, I present the last three perspectives proposed by Liliana Lizarazo-Rodríguez. The third approach focuses on transnational legal approaches to law and development.<sup>112</sup> This approach “analyzes the interaction between legal systems and societies and contributes to the understanding of the diversity of legal systems and institutional designs that support capitalist activities in different societies and different periods”.<sup>113</sup> The main features of transnational approaches to international law and development are the ideas of hybrid governance, adaptability theories and transnational legal theory.<sup>114</sup> Transnational law also includes debates on global administrative law, an approach that seeks to “understand the coexistence of multiple levels of hybrid regulation

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U.S.], University of British Colombia in 2008 [Vancouver, Canada], Université Paris 1 Panthéon-Sorbonne in 2010 [Paris, France], and Oregon Law School in 2011 [Oregon, U.S.]”. NATARAJAN, Usha; REYNOLDS, John; BHATIA, Amar; XAVIER, Sujith. Introduction: TWAIL - on praxis and the intellectual. *Third World Quarterly*, v. 37, n. 11, p. 1946, 2016. The last conferences were held at The American University in Cairo, Egypt in 2015 and at National University of Singapore in 2018. I had the opportunity to present my partial findings of this research at TWAIL Singapore, with the paper “Latin American approaches resisting from the margins: rewriting international law, development and postcolonialism”, in panel 19 (Law, History and its Other) moderated by Vidya Kumar. Unfortunately, I could not attend physically the conference but my work was presented by Ralph Wilde, whom I am sincerely thankful.

<sup>111</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 824-831, 2017.

<sup>112</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 831-839, 2017.

<sup>113</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 832, 2017.

<sup>114</sup> See, e.g., KOH, Harold Hongju. Why transnational law matters? *Penn State International Law Review*, v. 24, n. 4, p. 745-754, 2006; ZUMBANSEN, Peer. Transnational legal pluralism. *Transnational Legal Theory*, v. 1, n. 2, p. 141-189, 2010; ZUMBANSEN, Peer. Defining the space of transnational law: legal theory, global governance, and legal pluralism. *Transnational Law & Contemporary Problems*, v. 21, n. 2, p. 305-336, 2012.

and how transparency, participation, and accountability, can be promoted in such circumstances”.<sup>115</sup>

The fourth law and development approach focuses on comparative law and comparative legal systems and “seeks to understand variations in legal systems without necessarily evaluating them from an ethical or political perspective”.<sup>116</sup> One can say that this approach is loosely related to law and development movements, but “these legal disciplines study similar topics from different perspectives”,<sup>117</sup> such as foreign law, foreign legal cultures, legal pluralism, the trans-nationalization of legal fields.<sup>118</sup>

Finally, the fifth set of approaches focus on three transversal topics related to law and development: first, human rights-based approach to development (HRBAD);<sup>119</sup> second, sustainable law and development;<sup>120</sup> third, conflict and post-conflict state-building and transitional justice.<sup>121</sup> The first thematic “seeks to identify and to promote the links between development programs and compliance with International Human Rights Law”<sup>122</sup> and includes business and human rights, human rights litigation and

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<sup>115</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 837, 2017. See generally about global administrative law, KINGSBURY, Benedict; KRISCH, Nico; STEWART, Richard B. The emergence of global administrative law. *Law and Contemporary Problems*, v. 68, n. 3-4, p. 15-62, 2005; STEWART, Richard B.; SANCHEZ BADIN, Michelle Ratton. The World Trade Organization: multiple dimensions of global administrative law. *International journal of constitutional law*, v. 9, n. 3-4, p. 556-586, 2011.

<sup>116</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 839, 2017.

<sup>117</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 839, 2017.

<sup>118</sup> See, e.g., MERRYMAN, John Henry. Comparative law and social change: on the origins, style, decline & revival of the law and development movement. *The American Journal of Comparative Law*, v. 25, n. 3, p. 457-491, 1977; SIEMS, Mathias M. Legal origins: reconciling Law & Finance and Comparative Law. *McGill Law Journal*, v. 52, n. 1, p. 55-82, 2007; SIEMS, Mathias; DEAKIN, Simon. Comparative law and finance: past, present, and future research. *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, v. 166, n. 1, p. 120-140, 2010; GAROUPA, Nuno; PARGENDLER, Mariana. A law and economics perspective on legal families. *European Journal of Legal Studies*, v. 7, n. 2, p. 33-55, 2014; PARGENDLER, Mariana. Direito contratual comparado e desenvolvimento: rumos e obstáculos. *REI - Revista Estudos Institucionais*, v. 3, n. 2, p. 982-1022, 2017. For a critical perspective, see KRONCKE, Jedidiah. Law and development as anti-comparative law. *Vanderbilt Journal of Transnational Law*, v. 45, n. 2, p. 477-556, 2012.

<sup>119</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 843-871, 2017.

<sup>120</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 871-884, 2017.

<sup>121</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 884-890, 2017.

<sup>122</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 844, 2017.

bottom-up approaches to human rights.<sup>123</sup> The second element relates to environmental aspects of development, nowadays associated with the concept of sustainability. In fact, the mainstream approach to development in the current debate is always connected with sustainable development.<sup>124</sup> Finally, the third thematic deals with conflict and post-conflict state-building and transitional justice. It “refer[s] mainly to development policies (such as the Rule of Law) in fragile States and development assistance in post-conflict periods” and to “approaches [that] seek to build peace through different (State and non-State) mechanisms such as amnesty, criminal tribunals, customary justice, and truth and reconciliation committees”.<sup>125,126</sup>

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<sup>123</sup> See, e.g., SKOGLY, Sigrun I. Human rights and economic efficiency: the relationship between social cost of adjustment and human rights protection. *Human Rights in Development Online*, v. 1, n. 1, p. 43-65, 1994; CHIMNI, Bhupinder. The Sen conception of development and contemporary international law discourse: some parallels. *The Law and Development Review*, v. 1, n. 1, p. 3-22, 2008; GREADY, Paul. Rights-based approaches to development: what is the value-added? *Development in practice*, v. 18, n. 6, p. 735-747, 2008; ERIKSEN, Silja; DE SOYSA, Indra. A fate worse than debt? International financial institutions and Human rights, 1981-2003. *Journal of Peace Research*, v. 46, n. 4, p. 485-503, 2009; RAJAGOPAL, Balakrishnan. The international human rights movement today. *Maryland Journal of International Law*, v. 24, n. 1, p. 56-62, 2009; DE FEYTER, Koen; PARMENTIER, Stephan; TIMMERMAN, Christiane; ULRICH, George. (Ed.). *The local relevance of human rights*. Cambridge: Cambridge University Press, 2011; GAURI, Varun; GLOPPEN, Siri. Human rights-based approaches to development: concepts, evidence, and policy. *Polity*, v. 44, n. 4, p. 485-503, 2012; VANDENBOGAERDE, Arne. The right to development in international human rights law: a call for its dissolution. *Netherlands Quarterly of Human Rights*, v. 31, n. 2, p. 187-209, 2013.

<sup>124</sup> See, e.g., GUPTA, Joyeeta. Global sustainable development governance: Institutional challenges from a theoretical perspective. *International Environmental Agreements*, v. 2, n. 4, p. 361-388, 2002; SEGGER, Marie-Claire Cordonier; KHALFAN, Ashfaq. *Sustainable development law: principles, practices, and prospects*. Oxford: Oxford University Press, 2004; PORRAS, Ileana M. The city and international law: in pursuit of sustainable development. *Fordham Urban Law Journal*, v. 36, n. 3, p. 537-602, 2009; DERNBACH, John C. Creating the law of environmentally sustainable economic development. *Pace Environmental Law Review*, v. 28, n. 3, p. 614-641, 2011; DUBASH, Navroz (Ed.). *Handbook of Climate Change and India: development, politics and governance*. London: Routledge, 2012; DE MOERLOOSE, Stéphanie. The World Bank's sustainable development approach and the need for a unified field of law and development studies in Argentina. *Law and Development Review*, v. 8, n. 2, p. 361-388, 2015.

<sup>125</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 884, 2017.

<sup>126</sup> See, e.g., TOLBERT, David; SOLOMON, Andrew. United Nations reform and supporting the rule of law in post-conflict societies. *Harvard Human Rights Journal*, v. 19, p. 29-62, 2006; SANNERHOLM, Richard. Legal, judicial and administrative reforms in post-conflict societies: beyond the rule of law template. *Journal of Conflict & Security Law*, v. 12, n. 1, p. 65-94, 2007; RAJAGOPAL, Balakrishnan. Invoking the rule of law in post-conflict rebuilding: a critical Examination. *William and Mary Law Review*, v. 49, n. 4, p. 1347-1376, 2008; DE GREIFF, Pablo; DUTHIE, Roger (Ed.). *Transitional justice and development: making connections*. New York: Social Science Research Council, 2009; DUTHIE, Roger. Toward a development-sensitive approach to transitional justice. *The International Journal of Transitional Justice*, v. 2, n. 3, p. 292-309, 2008; LAMBOURNE, Wendy. Transitional justice and peacebuilding after mass violence. *International Journal of Transitional Justice*, v. 3, n. 1, p. 28-48, 2009; WALDORF, Lars. Anticipating the past: transitional justice and socio-economic wrongs. *Social & Legal Studies*, v. 21, n. 2, p. 171-186, 2012.

### 1.2.4. Summary of law and development approaches

**TABLE 1 – SUMMARY OF LAW AND DEVELOPMENT APPROACHES**

Approaches		Description	History and influences
National perspectives	Economics-oriented or institutionalist approach	Top-down, mainstream approach. It relates to a particular concept of Law and Development understood as the promotion of the Rule of Law in developing countries. This approach is associated with the U.S. development cooperation, multilateral agencies and dominant in policy circles.	End of Second World War (1945) and the Cold War. Expansion of U.S. legal thought in Latin American, Africa and Asia. Influence of World Bank, USAID and Ford Foundation.
	Anthropology- and sociology-oriented approach	Bottom-up, alternative interdisciplinary approach to Law and Development. It relates to legal pluralism. It uses the methodology of social sciences to analyze local legal systems and the role that they play in development (“development from below”).	Neocolonialism and decolonization processes. Analysis of legal systems in the European colonies in the 19 <sup>th</sup> and 20 <sup>th</sup> centuries in Asia and Africa. Development of legal anthropology in the 1970s.
International perspectives	Public international law perspective	International Development Law approach to Law and Development. It refers to the competences of International Organization such as the U.N. agencies, including IFIs, with respect to development policies, but also to the role of Regional Organizations, Investment Banks, and non-State actors such as NGOs and Multinational Enterprises (MNE) in development.	Institutionalization of U.N. and international organizations. The passage from Colonial Law to the international regulation of U.N.
	Third World Approaches to International Law	A critical approach to international development law. It refers to the behavior of international organizations and the dynamics of North-South relations, in particular, the imperialist and Eurocentric approach of International Law.	Colonialism, postcolonialism, contemporary Global South studies. Calvo Doctrine (1896). Critical Legal Studies movement. Dependency theory. Bandung Conference. Decolonization movements and practices.
Transnational approach		Attempts to understand Law and Development nexus in all its complexity. Stresses the need for a collaborative approach between different levels of governance.	Transnational Legal Theory. Trans-nationalization of the law and global administrative law.

Comparative Law and Development		It seeks to understand variations in legal systems without necessarily evaluating them from an ethical or political perspective. It proposes law taxonomies and “legal families”.	Comparative Law. European legal systems and their expansion. Exportation of European legal systems along colonial lines.
Transnational thematic areas	Human rights	It seeks to identify and to promote the links between development programs and compliance with International Human Rights Law. Bottom-up approaches aspire to provide adequate answers to the failures of top-down human rights-based approaches to development based on international human rights law.	Launching of the Human Development Reports and the HDI by UNDP (1990), influenced by Amartya Sen. NGOs such as Amnesty International or the International Commission of Jurists (ICJ).
	Sustainable development	Sustainable development approach to law and development refers to a set of related topics that are of major fragmented concerns for development studies and law and development: environmental protection, respect for socio-cultural contexts, empowerment of the poor, inter-generational, and intra-generational justice.	Environmental movements (1960s). Report of the Club of Rome (1970s). U.N. environment-related conferences and conventions.
	Post-conflict law	Conflict and post-conflict state-building and transitional justice that links law and development with development policies (such as the rule of law) in fragile States and development assistance in post-conflict periods.	Influenced by the institutional approach, and the IFIs, the U.N., and the U.S. have played a key role. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

Source: Own authorship based on Lizarazo-Rodríguez (2017).



## 2. “SOUTH-UP MAPS”: MAPPING POSTCOLONIAL STUDIES

It is common to see several graphic representation of maps that confront Mercator’s projection when we are in contact with postcolonial and decolonial studies.<sup>127</sup> Joaquín Torres García’s *América Invertida* is a great example of this kind of south-up map, which features South America oriented with the south at the top.<sup>128</sup> In fact, postcolonialism, as I explore in this chapter, brings a new conceptualization of the way we see the world, its symbolic forces and cultural constructions. As Leela Gandhi points out, “[p]ostcolonial theory recognises that colonial discourse typically rationalises itself through rigid oppositions such as [...] civilization/barbarism, developed/developing, progressive/primitive”.<sup>129</sup> Boaventura de Sousa Santos explains it – a division between modern civilizations and barbarian peoples – like the establishment of an “abysm” (gap) in several cognitive and scientific-cultural contexts between Europe and the other parts of the planet.<sup>130</sup> It is interesting to note the paradox of this situation: the cognitive abyss exists at the meeting of the cultures. The creation of territorial links has resulted in the creation of cognitive frontiers, mismatches and distances. Postcolonial studies go beyond and propose alternative perspectives to history, social sciences and law that question postcolonial legacies in contemporary societies.

Postcolonial critique focuses on forces of oppression and coercive domination that operate in the contemporary world: the politics of anti - colonialism and neocolonialism, race, gender, nationalisms, class and ethnicities define its terrain. Interest in oppression of the past will always be guided by the relation of that history to the present. In that sense, postcolonial theory’s intellectual commitment will always be to seek to develop new forms of engaged theoretical work that contributes to the creation of dynamic ideological and social transformation.<sup>131</sup>

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<sup>127</sup> See about decolonizing maps, e.g., AKERMAN, James R (Ed.). *Decolonizing the map: cartography from colony to nation*. Chicago: The University of Chicago Press, 2017.

<sup>128</sup> GARCÍA, Joaquín Torres. *América Latina invertida*. In: MOURA, Sabrina (Org.). *Panoramas do Sul: leituras. Perspectivas para outras geografias do pensamento*. São Paulo: Edições SESC, 2015, p. 96-98.

<sup>129</sup> GANDHI, Leela. *Postcolonial theory: a critical introduction*. Sydney: Allen & Unwin, 1998, p. 32.

<sup>130</sup> SANTOS, Boaventura de Sousa. Para além do pensamento abissal: das linhas globais a uma ecologia de saberes. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010, p. 31-83.

<sup>131</sup> YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001, p. 11.

In this first chapter, I present postcolonial thought in two conceptual moments. First, I present the main terminological concepts within postcolonial discussions and scholarship: colonialism, neocolonialism, postcolonialism, decolonization, Third World and Global South. Second, I propose a theoretical systematization of what I call “postcolonial waves”, that is, the theoretical approaches of postcolonialism that have been established in academic field: first, *anti-colonial and founding moments*; second, *subaltern studies and historiographical turn*; third, *multidisciplinary voices in a postcolonial world*; and, fourth, *Modernity/Coloniality Group and decolonial thought*. Annex B provides a summary table of the main discussion on postcolonial studies waves explored in this chapter.

## 2.1.MAIN CONCEPTS RELATED TO POSTCOLONIALISM

The way we say (“*how*” we say, working processes) is an important concern for postcolonial and critical thinkers, as Edward Said shows the relations between wording and power.<sup>132</sup> I discuss and point out throughout this thesis that conceptualizing “things” is an important concern to postcolonial scholars and critical thinkers.<sup>133</sup> In this section, I propose a look to a few concepts that postcolonial studies use frequently and that are similar in terms of spelling but do not share the same meaning, such as the concepts of colonialism, neocolonialism, postcolonialism, decolonization and even Third World and Global South.

### 2.1.1. Colonialism(s)

First, colonialism is similar to colonization for my research purposes.<sup>134</sup> *Colonialism* is, generally speaking, a domination practice that involves the subjugation

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<sup>132</sup> SAID, Edward. *Orientalism*. London: Penguin Books, 1978.

<sup>133</sup> See, e.g., the discussion of shifting the geography of knowing, sensing and understanding: MIGNOLO, Walter D. Geopolitics of sensing and knowing: on (de)coloniality, border thinking and epistemic disobedience. *Postcolonial Studies*, v. 14, n. 3, p. 273-283, 2011.

<sup>134</sup> According to the *Stanford Encyclopedia of Philosophy*, “The term colony comes from the Latin word *colonus*, meaning farmer. This root reminds us that the practice of colonialism usually involved the transfer of population to a new territory, where the arrivals lived as permanent settlers while maintaining political allegiance to their country of origin”. KOHN, Margaret. Colonialism. In: ZALTA, Edward N. (Ed.). *The*

of one people by another.<sup>135</sup> Historically, modern colonization culminated in the conquest of the globe by European powers<sup>136</sup> and, beyond that, represented the beginning of the political hegemony in the imagination and institutional context of the colonized regions through their metropolises.<sup>137</sup> It began with Spain and Portugal in the 15<sup>th</sup> century and, then, United Kingdom, Netherlands and German followed in the 18<sup>th</sup> century.<sup>138</sup> Modern colonialism is said to be justified by Europeans, initially for religious reasons, and later by Darwinism.<sup>139</sup> The American continent's colonization represented the first stage of this movement,<sup>140</sup> whilst later reached the territories of Africa and Asia.<sup>141</sup>

In legal terms, the Catholic Church had a special influence on the beginning, using its Papal Bulls' political influence to establish territories on behalf of Portugal and Spain. With the increase of these nations' power, we can see the emergence of several global treaties legitimizing and validating the colonial system, starting especially with Treaty of Tordesillas.<sup>142</sup> In both cases, European legal structures were exported to the "New World(s)".<sup>143</sup> From a territorial point of view, the colonial system has divided the world between metropolises and colonies: in 1500 Europe accounted for about 10 per cent of the world's land surface and "[b]y 1913, eleven Western empires controlled nearly three-

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*Stanford Encyclopedia of Philosophy*. Stanford: Center for the Study of Language and Information, 2014 [online data].

<sup>135</sup> BOSI, Alfredo. *Dialética da colonização*. São Paulo: Companhia das Letras, 1992, p. 11-19; KOHN, Margaret. Colonialism. In: ZALTA, Edward N. (Ed.). *The Stanford Encyclopedia of Philosophy*. Stanford: Center for the Study of Language and Information, 2014 [online data].

<sup>136</sup> YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001, p. 15-18.

<sup>137</sup> See, e.g., QUIJANO, Anibal. Colonialidade do poder e classificação social. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010. p. 84-130.

<sup>138</sup> Niall Ferguson affirms the existence of eleven Western empires in 1913: "Austria, Belgium, France, Germany, Italy, Netherlands, Portugal, Spain, Russia, the United Kingdom and the United States. Of these only France, Portugal and Spain existed in 1500 in anything resembling their early twentieth-century form". FERGUSON, Niall. *Civilization: the West and the Rest*. New York: Penguin Books, 2011, p. 5.

<sup>139</sup> HAWKINS, Mike. *Social Darwinism in European and American thought, 1860-1945: nature as model and nature as threat*. Cambridge: Cambridge University Press, 1997.

<sup>140</sup> SKIDMORE, Thomas E.; SMITH, Peter H. *Modern Latin America*. 6. ed. New York, Oxford: Oxford University Press, 2005, p. 13-26.

<sup>141</sup> YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001, p. 15-18.

<sup>142</sup> See, e.g., CRAVEN, Matthew. Colonialism and domination. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012. p. 862-889.

<sup>143</sup> CASTRO, Marcus Faro de. Pluralismo jurídico: principais ideias e desafios. In: SILVA, Felipe Gonçalves; RODRIGUEZ, José Rodrigo (Coord.). *Manual de sociologia jurídica*. São Paulo: Saraiva, 2013, p. 158-164.

fifths of all territory and population and more than three-quarter (a staggering 79 per cent) of global economic output”.<sup>144</sup>

Second, *neocolonialism* refers to the system that replaced the previous colonial organization, and still developed by the European powers from the eighteenth century up until the Second World War and decolonization, when their colonial empires in Africa and Asia began to crumble. According to Robert Young, neocolonialism refers to a system comprised of a much more “subtle, indirect version of the old” colonialism,<sup>145</sup> consisting of a form of domination through “control by economic rather than political means”.<sup>146</sup> In this regard, neocolonialism also refers to the fact that African and Asian decolonization processes gave their countries sovereignty over their own political governance but the markets they were supposed to attend to were still controlled by the same nations that were their former colonizers.<sup>147</sup> This movement, therefore, has the consequence of establishing a “homogenization of societies with the incorporation of the world space into a single social, economic, and cultural system dominated by imperialist powers”.<sup>148</sup> The concept of imperialism, in its turn, has different meanings, ranging from the acritical meaning of a “political system of territorial domination” to, in a Marxist sense, “a general system of economic domination, with direct political domination being possible but not adjunct”,<sup>149</sup> usually utilized in a critical context.

Third, the meaning of the terms *postcolonialism* and *postcolonial* are not contained only in the chronological idea of the period after a colonial moment but also “refers to ways of criticizing the material and discursive legacies of colonialism”.<sup>150</sup> There are fundamentally two meanings from the expression. First, a historical meaning,

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<sup>144</sup> FERGUSON, Niall. *Civilization: the West and the Rest*. New York: Penguin Books, 2011, p. 5.

<sup>145</sup> YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001, p. 44.

<sup>146</sup> PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015, p. 186.

<sup>147</sup> YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001, p. 45.

<sup>148</sup> PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015, p. 186.

<sup>149</sup> YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001, p. 26.

<sup>150</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 213.

the one that succeeds the independence of the colonies.<sup>151</sup> This first meaning contains a narrow sense, which is the historic period after the processes of decolonization of the Third World (in this case, particularly African and Asian countries) after the Second World War;<sup>152</sup> and a broad sense, that relates to a set of economic, sociological and political analyses about the construction of new states, the ruptures and continuities of the colonial system and the regional alliances.<sup>153</sup> Second, postcolonialism refers to an academic meaning, a set of theoretical contributions mainly originated from literary and cultural studies which after the 1980s have gained evidence in the United States and in England.<sup>154</sup> Postcolonial studies was started by intellectuals of the black diaspora. It expanded geographically, integrating the works of authors such as Homi Bhabha, Edward Said, Gayatri Spivak, Stuart Hall and Paul Gilroy.<sup>155</sup>

Fourth, *decolonization* can refer to two meanings. The first meaning is the institutional and legal one, which refers to the political processes to undo colonialism, involving its political emancipation and gain of sovereignty. In a broad sense, it refers to all-countries decolonization moments; in a narrow sense, it refers particularly to the dismantlement of colonial empires in the years after the Second World War. The second meaning is a more academic and philosophical one, which relates to the intellectual decolonization from the colonizers' set of ideas, e.g., anti-racism movements and rights to native people.<sup>156</sup> In the Latin American tradition, this specific meaning assumes a

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<sup>151</sup> SANTOS, Boaventura de Sousa. Entre Próspero e Caliban: colonialismo, pós-colonialismo e interidentidade. *Novos Estudos CEBRAP*, n. 66, p. 26, 2003.

<sup>152</sup> BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 90, 2013.

<sup>153</sup> SANTOS, Boaventura de Sousa. Entre Próspero e Caliban: colonialismo, pós-colonialismo e interidentidade. *Novos Estudos CEBRAP*, n. 66, p. 26, 2003.

<sup>154</sup> BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 90, 2013.

<sup>155</sup> COSTA, Sérgio. Desprovincializando a sociologia: a contribuição pós-colonial. *Revista Brasileira de Ciências Sociais*, v. 21, n. 60, p. 117, 2006. See Chapter 2.2 about postcolonial studies.

<sup>156</sup> See, e.g., works that use the idea of "decolonizing": ADAMS, William Mark; MULLIGAN, Martin (Ed.). *Decolonizing nature: strategies for conservation in a post-colonial era*. London: Earthscan, 2003; JONES, Branwen Gruffydd (Ed.). *Decolonizing international relations*. Lanham: Rowman & Littlefield, 2006; SANTOS, Boaventura de Sousa. *Descolonizar el saber, reinventar el poder*. Montevideo: Ediciones Trilce, 2010; MIGNOLO, Walter D. Epistemic disobedience and the decolonial option: a manifesto. *Transmodernity*, v. 1, n. 2, p. 3-23, 2011; BARRETO, José-Manuel. Decolonial strategies and dialogue in the human rights field: A manifesto. *Transnational Legal Theory*, v. 3, n. 1, p. 1-29, 2012; GROSFUGUEL, Ramón. Decolonizing Western uni-versalisms: decolonial pluri-versalism from Aimé Césaire to the Zapatistas. *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, v. 1, n. 3, p. 88-104, 2012; SMITH, Linda Tuhiwai. *Decolonizing methodologies: research and indigenous peoples*. 2. ed. London: Zed Books, 2013; BERNARDINO-COSTA, Joaze; GROSFUGUEL, Ramón. Decolonialidade e perspectiva negra. *Sociedade e Estado*, v. 31, n. 1, p. 15-24, 2016; MBEMBE, Achille.

critical perspective of colonialism similar to the postcolonial studies, however, its reference is given from Latin America itself.<sup>157</sup> The idea of decolonial turn (“*giro decolonial*”) was proposed by Modernity/Coloniality Group and reflects a political and epistemological tendency that aims to highlight the knowledge produced in “Other” places.<sup>158</sup> Besides that, *coloniality* is a notion presented by Aníbal Quijano that highlights the colonialist heritage in the political and economic spheres.<sup>159</sup> According to Walter Mignolo, coloniality is the dark and necessary side of the modernity idea what allows Europe to be the sole producer of a unique model of social science.<sup>160</sup> Although the concepts presented here are broader and have more meanings, this minimal conceptual framework will help the reader of my research. Table 2 is a pedagogical attempt to assist in this sense.

**TABLE 2 – SUMMARY OF POSTCOLONIAL-RELATED CONCEPTS**

Concepts	Dimension	Definition
Colonialism	Basic concept	Domination practice that involves the subjugation of a people by another one.
	Historical concept	General modern colonization of American, African and Asian territories that began in the 15th century by European countries.
Neocolonialism	Historical concept	Specific modern colonization of African and Asian territories that began in the 18th century by European countries.

Decolonizing the university: new directions. *Arts and Humanities in Higher Education*, v. 15, n. 1, p. 29-45, 2016; DILGER, Gerhard; LANG, Miriam; PEREIRA FILHO, Jorge (Org.). *Descolonizar o imaginário: debates sobre pós-estrativismo e alternativas ao desenvolvimento*. São Paulo: Fundação Rosa Luxemburgo, 2016; AKERMAN, James R. (Ed.). *Decolonizing the map: cartography from colony to nation*. Chicago: The University of Chicago Press, 2017; RADCLIFFE, Sarah A. Decolonising geographical knowledges. *Transactions of the Institute of British Geographers*, v. 42, n. 3, p. 329-333, 2017; BRAGATO, Fernanda Frizzo; GORDON, Lewis R. *Geopolitics and decolonization: perspectives from the Global South*. London/New York: Rowman & Littlefield International, 2018.

<sup>157</sup> COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 118.

<sup>158</sup> See, e.g., CASTRO-GÓMEZ, Santiago; GROSFUGUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007; WALSH, Catherine. Shifting the geopolitics of critical knowledge: decolonial thought and cultural studies ‘others’ in the Andes. *Cultural studies*, v. 21, n. 2-3, p. 224-239, 2007; MALDONADO-TORRES, Nelson. Thinking through the decolonial turn: post-continental interventions in theory, philosophy, and critique. An introduction. *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, v. 1, n. 2, p. 1-15, 2011.

<sup>159</sup> QUIJANO, Anibal. Colonialidade do poder e classificação social. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010, p. 84-130.

<sup>160</sup> MIGNOLO, Walter. *The darker side of the Renaissance: literacy, territoriality, and colonization*. Ann Arbor: University of Michigan Press, 2003.

	Theoretical concept	Indirect version of old colonialism, consisting of a form of domination through control by economic rather political means.
Postcolonialism	Historical concept	General temporal period after colonial moment or independence.
		Economical, sociological and political analysis about the construction of new states, the ruptures and continuities of the colonial system and the regional alliances.
	Theoretical concept	Theoretical studies and academic movements originating from literary and cultural studies that gained traction in the 1980s.
Decolonization	Basic concept	Political processes to undo colonialism, involving political emancipation and recuperation of sovereignty.
	Historical concept	Specific temporal period after Second World War where colonized countries started to gain independence.
	Theoretical concept	Intellectual and cultural emancipation from the colonizers' set of ideas.

Source: Own authorship based on Bosi (1992), Young (2001), Santos (2003); Pahuja (2011), Colaço and Damázio (2012); Ballestrin (2013); Dodds (2014); Kohn (2014); McEwan (2014); Hartwick and Peet (2015).

### 2.1.2. *Third World and Global South*

Finally, I think that it is interesting to reflect on the concepts of *Third World* and *Global South*.<sup>161</sup> The expression “Third World” is originally attributed to the French scholar Alfred Sauvy in a short article entitled “Three worlds, one plant” published on 1952 in *L’Observateur*, a French weekly of socialist orientation, to designate a group of states of Asia, Africa and Latin America, “less developed” economically when compared to the countries of the ‘First World’.<sup>162</sup> Karin Mickelson explains the multiple uses of the expression:

<sup>161</sup> See other debates using the ideas of Third World and Global South: THERIEN, Jean-Philippe. Beyond the North-South divide: the two tales of world poverty. *Third World Quarterly*, v. 20, n. 4, p. 723-742, 1999; ARRIGHI, Giovanni. Global capitalism and the persistence of the North-South divide. *Science & Society*, v. 65, n. 4, p. 469-476, 2001; PATEL, Rajeev; MCMICHAEL, Philip. Third Worldism and the lineages of global fascism: the regrouping of the Global South in the neoliberal era. *Third World Quarterly*, v. 25, n. 1, p. 231-254, 2004; LEVANDER, Caroline; MIGNOLO, Walter. Introduction: the Global South and world dis/order. *The Global South*, v. 5, n. 1, p. 1-11, 2011; BRAGATO, Fernanda Frizzo; GORDON, Lewis R. *Geopolitics and decolonization: perspectives from the Global South*. London/New York: Rowman & Littlefield International, 2018.

<sup>162</sup> SOLARZ, Marcin Wojciech. ‘Third World’: the 60<sup>th</sup> anniversary of a concept that changed history. *Third World Quarterly*, v. 33, n. 9, p. 1561, 2012.

The term “Third World” has a number of different usages. In a purely descriptive sense, “Third World” is frequently used interchangeably with other terms such as “less-developed,” “developing,” or “underdeveloped” countries, and, increasingly, “the South.” The referent are the countries of Africa, Asia, and Latin America that have traditionally been classified as lagging behind the “West,” “North,” “First World” or “developed countries” in terms of economic growth and indicators of economic prosperity. Building on this quasi-geographical rubric, another layer is frequently added – that these countries are the marginalized within international society. [...] At another level, “Third World” could also be used to designate a political coalition, much like any other grouping of States in pursuit of common goals. From this perspective, the focus would likely be on the role played by more-or-less formal groupings such as the “Non-Aligned Movement” and the Group of 77 in international fora such as the United Nations General Assembly, the United Nations Conference on Trade and Development, and particular international conferences. Finally, the “Third World” is sometimes conceptualized as a form of “social movement” – an international protest of the weak against the strong, or the poor against the rich.<sup>163</sup>

In one hand, certain authors consider ‘Third World’ a concept which reflects a dominant Western worldview, used to designate a part of the world, because “the ‘Third World’ homogenizes peoples and countries and carries other associations [...] which are often inscribed in development writings”.<sup>164</sup> In contrast, there are authors – including scholars from Third World – who claim the use of the expression “Third World” because of its political and historical content of resistance, emancipation and solidarity among the countries part of it.<sup>165</sup>

The expression “Global South”,<sup>166</sup> differently from its ideological counterpart, the ‘Third World’, was coined in 1980s’ institutional debates by the UN-sponsored Brandt

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<sup>163</sup> MICKELSON, Karin. Rhetoric and rage: Third World voices in international legal discourse. *Wisconsin International Law Journal*, v. 16, n. 2, p. 356-357, 1997.

<sup>164</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 213.

<sup>165</sup> Benedict Kingsbury explains that the decline of the ‘Third World’ as a legal concept brought the rise of sustainable development in its place. In terms of academic movements, Kingsbury argues that “[i]f the Third World designation has diminished as a practical concept, it has survived in a network of mainly US-based migrant scholars pursuing ‘Third World Approaches to International Law’”. KINGSBURY, Benedict. The international legal order. In: TUSHNET, Mark; CANE, Peter (Ed.). *The Oxford Handbook of Legal Studies*. Oxford: Oxford University Press, 2005. p. 275-276.

<sup>166</sup> See, generally, about the concept of Global South, e.g., CONNELL, Raewyn. *Southern theory: the global dynamics of knowledge in social science*. Cambridge: Polity, 2007; SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010; MAIA, João Marcelo E. Ao sul da teoria: a atualidade teórica do pensamento social brasileiro. *Sociedade e Estado*, v. 26, n. 2, p. 71-94, 2011; DADOS, Nour; CONNELL, Raewyn. The global south. *Contexts*, v. 11, n. 1, p. 12-13, 2012; COMAROFF, Jean; COMAROFF, John L. *Theory from the South: or, how Euro-America is evolving toward Africa*. Abingdon: Routledge, 2015; KLENGEL, Susanne; WALLNER, Alexandra Ortiz (Ed.). *Sur/South: poetics and politics of thinking Latin America*. Madrid: Iberoamericana, 2016; MOROSINI,



Commission.<sup>167</sup> At that time, the world was divided from an economic point of view, considering the mechanics of exploitation and industrialization of global interactions for power. The umbrella term covers developing countries around the globe, from the so-called “emergent economies”, such as Brazil and China, to countries in Africa and Southeast Asia.<sup>168</sup> In a comprehensive explanation about the expression Anne Garland Mahler affirms that Global South has three primary definitions:

First, it has traditionally been used within intergovernmental development organizations – primarily those that originated in the Non-Aligned Movement – to refer to economically disadvantaged nation-states and as a post-Cold War alternative to “Third World.” However, within a variety of fields, and often within literary and cultural studies, the Global South has been employed in a postnational sense to address spaces and peoples negatively impacted by contemporary capitalist globalization. In this second definition, the Global South captures a deterritorialized geography of capitalism’s externalities and means to account for subjugated peoples within the borders of wealthier countries, such that there are Souths in the geographic North and Norths in the geographic South. While this usage relies on a longer tradition of analysis of the North’s geographic Souths – wherein the South represents an internal periphery and subaltern relational position – the epithet “global” is used to unhinge the South from a one-to-one relation to geography. It is through this deterritorial conceptualization that a third meaning is attributed to the Global South, in which it refers to the resistant imaginary of a transnational political subject that results from a shared experience of subjugation under contemporary global capitalism. This subject is forged when the world’s Souths mutually recognize one another and view their conditions as shared. The use of the Global South to refer to a transnational political subjectivity under contemporary capitalist globalization draws from the rhetoric of the so-called Third World Project, or the non-aligned and radical internationalist discourses of the Cold War. In this sense, the Global South may productively be considered a direct response to the category of postcoloniality in that it captures both a political subjectivity and ideological formulation that arises from lateral solidarities among the world’s multiple “Souths” and that moves beyond the analysis of colonial difference within postcolonial theory.<sup>169</sup>

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Fabio; BADIN, Michelle Ratton Sanchez (Org.). *Reconceptualizing international investment law from the Global South*. Cambridge: Cambridge University Press, 2017; SANTOS, Boaventura de Sousa. *The end of the cognitive empire: the coming of age of epistemologies of the South*. Durham: Duke University Press, 2018.

<sup>167</sup> DODDS, Klaus. The Third World, developing countries, the South, emerging markets and rising powers. In: DESAI, Vandana; POTTER, Robert B (Ed.). *The companion to development studies*. 3. ed. Oxon: Routledge, 2014. p. 43-44.

<sup>168</sup> DODDS, Klaus. The Third World, developing countries, the South, emerging markets and rising powers. In: DESAI, Vandana; POTTER, Robert B (Ed.). *The companion to development studies*. 3. ed. Oxon: Routledge, 2014. p. 44-45.

<sup>169</sup> MAHLER, Anne Garland. Global South. *Oxford Bibliographies*. Available at: <<http://www.oxfordbibliographies.com/view/document/obo-9780190221911/obo-9780190221911-0055.xml>>. Access on February 20, 2019.

One can say that the use of the term Global South is helpful because it represents an open discursive space that allows alternative forms of social and political organization to exist.<sup>170</sup> I believe that we can use both expressions in complementarity. In my case, when I use ‘Third World’, I am referring particularly to the political and ideological movement self-declared by this expression; when I use “Global South”, I am referring to geographical meaning to countries beyond contemporary global powers (as Europe and U.S.) and to the resistant imaginary of a transnational political subject.

## 2.2.POSTCOLONIAL “WAVES”

In chronological terms, postcolonial studies have become increasingly relevant in a variety of disciplines since early 1980.<sup>171</sup> Richard Peet and Elaine Hartwick affirm that postcolonialism “occupies a prominent position in several disciplines, such as modern languages, literature, history, sociology, anthropology, and geography”.<sup>172</sup> Postcolonialism “can be seen as a theoretical resistance to the mystifying amnesia of the colonial aftermath”<sup>173</sup> and as a “disciplinary project devoted to the academic task of revisiting, remembering and, crucially, interrogating the colonial past”.<sup>174</sup> According to Julian Go,

[...] postcolonial theory/postcolonial studies as it emerged in the humanities can be defined as a loosely coherent body of writing and thought that critiques and aims to transcend the structures supportive of Western colonialism and its legacies. The structures targeted by postcolonial theory shares ground with Marxist theories of dependency and the world-system. But one of postcolonial

<sup>170</sup> See generally, MOROSINI, Fabio; BADIN, Michelle Ratton Sanchez (Org.). *Reconceptualizing international investment law from the Global South*. Cambridge: Cambridge University Press, 2017.

<sup>171</sup> See about postcolonial studies, e.g., DARIAN-SMITH, Eve. *Postcolonialism: a brief introduction*. *Social & Legal Studies*, v. 5, n. 3, p. 291-299, 1996; CHAKRABARTY, Dipesh. *Provincializing Europe: postcolonial thought an historical difference*. Princeton: Princeton University Press, 2000; YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001; CASTRO-GÓMEZ, Santiago; GROSGOUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007; MIGNOLO, Walter. Desobediência epistêmica: a opção decolonial e o significado de identidade em política. *Cadernos de Letras da UFF*, Niterói, n. 34, p. 287-324, 2008; LOOMBA, Ania. *Colonialism/postcolonialism*. 3. ed. London: Routledge, 2015; BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 89-117, 2013; HUGGAN, Graham (Ed.). *The Oxford Handbook of Postcolonial Studies*. Oxford: Oxford University Press, 2013.

<sup>172</sup> PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015, p. 234.

<sup>173</sup> GANDHI, Leela. *Postcolonial theory: a critical introduction*. Sydney: Allen & Unwin, 1998, p. 4.

<sup>174</sup> GANDHI, Leela. *Postcolonial theory: a critical introduction*. Sydney: Allen & Unwin, 1998, p. 4.

theory's distinct contributions is to emphasize cultural, ideological, epistemic, or even psychological structures.<sup>175</sup>

Sundhya Pahuja gives a summary explanation about postcolonialism as a field of studies:

Postcolonial theory is a style of engagement, or loosely a method, which draws attention, inter alia, to the work of categorisation and its effects in imperial and post-imperial contexts. It does this paradigmatically in the context of the 'West' as a (defining) category. Specifically, it draws attention to the way 'that European or Western identity is constituted in opposition to an alterity that it has itself constructed. In other words, a key insight of postcolonial theory has been the demonstration of how the formation of the 'West' as an identity depends on the construction of an 'other' by reference to which the West defines itself.<sup>176</sup>

As Cheryl McEwan explains, it is possible to identify four main concerns of postcolonial studies. First, postcolonial studies subverts the dominant discourses of Global North intellectual production, once it "problematize the very ways in which the world is known, challenging the unacknowledged [...] assumptions at the heart of European and American disciplines that are [...] insensitive to the meanings, values and practices of other cultures".<sup>177</sup> Second, postcolonial studies seeks to challenge the speaking and writing experiences by which the dominant discourses arise. In this regard, ordinary practices such as describing large swathes of the planet as "Third World" and "underdeveloped countries" is not understood as value-free conduct. Such practices are, however, part of a way of understanding knowledge as a tool of power.<sup>178</sup> Third, postcolonialism "attempts to rewrite the hegemonic account of time (history) and the spatial distribution of knowledge (power) that constructs the Third World".<sup>179</sup> Fourth, it seeks to recover the historical voices and narratives that were lost, and the contemporary perspectives that are marginalized, oppressed and dominated, through a radical

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<sup>175</sup> GO, Julian. For a postcolonial sociology. *Theory and Society*, v. 42, n. 1, p. 29, 2013.

<sup>176</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 27-28.

<sup>177</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 213.

<sup>178</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 213.

<sup>179</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 214.

reconstruction of history and a production of knowledge.<sup>180</sup> In this aspect, Gyan Prakash argues that the idea of postcolonial criticism was to compel “a radical rethinking of knowledge and social identities authored and authorized by colonialism and Western domination”.<sup>181</sup> Henry Schwarz explains that, in general,

[...] postcolonial studies alerts us that the very forms through which we study the world, the academic disciplines, are implicitly structured by Europe’s imperial dominance of the world since 1500. Academic knowledge developed in the modern era in very different ways than those in which it was practiced in medieval European universities, for instance, and the practice of overseas domination had a profound impact on the structure and content of European knowledge. As Edward Said argued so brilliantly in 1978, European knowledge is colonialism. The archives of the great Western universities were built from the orientalist acquisition of information about the other. Thus to study this archive is to participate in the politics of dominance. Postcolonial studies works to make this relation of unequal power more visible, with the goal of ending it. Postcolonial studies in this sense is the radical philosophy that interrogates both the past history and ongoing legacies of European colonialism in order to undo them.<sup>182</sup>

Postcolonial studies engages with other theoretical perspectives within the social sciences. Sérgio Costa addresses the proximity of postcolonialism with poststructuralist theory, with which postcolonial studies have learned to recognize the discursive character of social aspects; with postmodernism in its condition (and not in its theoretical and political program), that is, as an empirical category which describes the decentering of contemporary subjects and narratives; and with cultural studies, because postcolonial studies also shifts its attention from concerns linked to class and Marxism to themes such as racism, ethnicities, gender and cultural identities.<sup>183</sup>

Postcolonial studies do not constitute a well-defined school, but is rather an internally diverse research agenda concerned with critiquing the relationship between colonialism and multiple dimensions of power and knowledge. As Sapiro, Steinmetz, and Ducournau (2010) have noted, it includes post-Foucaultian analyses of the relationship between colonialism and an Eurocentric imagination (in the work of Edward Said), Derridian

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<sup>180</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 214.

<sup>181</sup> PRAKASH, Gyan. Subaltern studies as postcolonial criticism. *The American Historical Review*, v. 99, n. 5, p. 1475, 1994.

<sup>182</sup> SCHWARZ, Henry. Mission impossible: introducing postcolonial studies in the US academy. In: SCHWARZ, Henry; RAY, Sangeeta (Ed.). *A companion to postcolonial studies*. Malden: Blackwell Publishing, 2000, p. 4.

<sup>183</sup> COSTA, Sérgio. Desprovincializando a sociologia: a contribuição pós-colonial. *Revista Brasileira de Ciências Sociais*, v. 21, n. 60, p. 118, 2006.

deconstruction of colonial and post-colonial texts (such as that of Gayatri Spivak), psychoanalytic assessments of colonial subjectivities (by Homi Bhabha, but also in the earlier work of Frantz Fanon and Albert Memmi), and Heideggerian critiques of western modernity (see, e.g., the work of Timothy Mitchell and Dipesh Chakrabarty). One might add to this list Gramscian anti-colonial historiography (represented well by the work of Indian Subaltern historians, such as Ranajit Guha and Partha Chatterjee) and creative combinations of Gramscian Marxism and French post-structuralism in the tradition of British cultural studies (especially by Stuart Hall and Paul Gilroy).<sup>184</sup>

Luciana Ballestrin,<sup>185</sup> Thais Colaço and Eloise Damázio,<sup>186</sup> in turn, add deconstruction and feminist theories to the role of influences.<sup>187</sup> I would add race studies and, in terms of practice, anti-racism movements in this set of influences too.<sup>188</sup> Figure 3 shows the main influences of postcolonial studies.

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<sup>184</sup> BORTOLUCI, José H.; JANSEN, Robert S. Toward a postcolonial sociology: the view from Latin America. In: GO, Julian (Ed.). *Postcolonial sociology* (Political Power and Social Theory, Volume 24). Bingley: Emerald Group, 2013, p. 221.

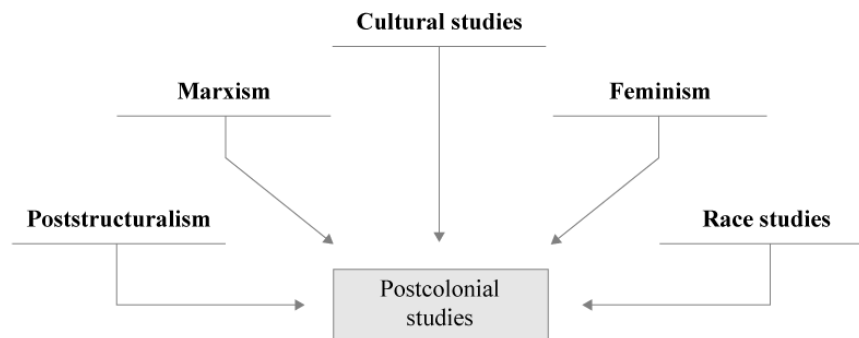
<sup>185</sup> BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 90, 2013.

<sup>186</sup> COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 113.

<sup>187</sup> See, e.g., SULERI, Sara. Woman skin deep: feminism and the postcolonial condition. *Critical Inquiry*, v. 18, n. 4, p. 756-769, 1992; LEWIS, Reina; MILLS, Sara (Ed.). *Feminist postcolonial theory: a reader*. New York: Routledge, 2003; COSTA, Claudia de Lima. Feminismos descoloniais para além do humano. *Revista Estudos Feministas*, v. 22, n. 3, p. 929-934, 2014; LUGONES, María. Rumo a um feminismo descolonial. *Estudos Feministas*, v. 22, n. 3, p. 935-952, 2014; GROSGOUEL, Ramón (Org.). *Feminismos islâmicos*. Caracas: Fundación Editorial el Perro y la Rana, 2016; MARTÍN, Rocío Medina. Feminismos periféricos, feminismos-otros: una genealogía feminista decolonial por reivindicar. *Revista Internacional de Pensamiento Político*, v. 8, p. 53-79, 2018.

<sup>188</sup> See, e.g., GILROY, Paul. *The black Atlantic: modernity and double consciousness*. London: Verso, 1993; AHMED, Sara. Moving spaces: black feminism and post-colonial theory. *Theory, Culture & Society*, v. 13, n. 1, p. 139-146, 1996; GROSGOUEL, Ramón. Race and ethnicity or racialized ethnicities? Identities within global coloniality. *Ethnicities*, v. 4, n. 3, p. 315-336, 2004; AMOKO, Apollo. Race and postcoloniality. In: MALPAS, Simon; WAKE, Paul (Ed.). *The Routledge Companion to Critical and Cultural Theory*. 2. ed. London, New York: Routledge, 2013. p. 131-142; BERNARDINO-COSTA, Joaze; GROSGOUEL, Ramón. Decolonialidade e perspectiva negra. *Sociedade e Estado*, v. 31, n. 1, p. 15-24, 2016.

FIGURE 3 - POSTCOLONIAL STUDIES INFLUENCES



Source: Own authorship based on Costa (2006), Colaço and Damázio (2012), Ballestrin (2013), and Bortoluci and Jansen (2013).

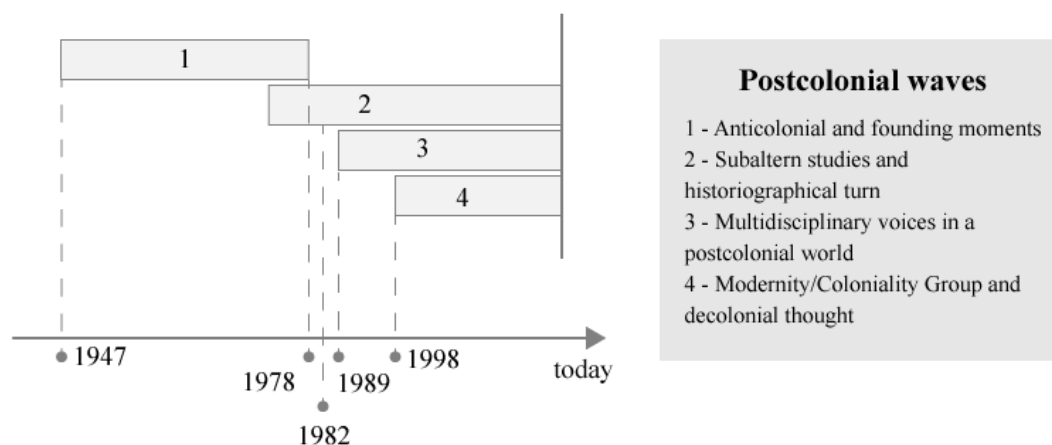
Postcolonial studies are geographically located in the postcolonial experiences of African and Asian continents. Anti-colonial studies initially emerged as a concept from Africa and the subaltern studies in India. This literature had a significant impact on the Anglo-Saxon world between 1980 and 1990. The Latin American decolonial movement intended to recover the postcolonial inspiration to understand the American continent, not only because of the epistemological bases adopted in this perspective, but also because of the radicalization of postcolonial arguments to think about the colonial regime, mainly from contemporary authors that followed this approach. I have organized postcolonial studies in four “waves”: first, *anti-colonial and founding moments*; second, *subaltern studies and historiographical turn*; third, *multidisciplinary voices in a postcolonial world*; and, fourth, *Modernity/Coloniality Group and decolonial thought*.<sup>189</sup>

Figure 4 represents a temporal perspective of postcolonial studies “waves”. I use as a founding moment for the first wave Memmi’s *The Colonizer and the Colonized*

<sup>189</sup> Although I am dividing postcolonialism in four movements, I am not arguing that such division is literally applied on the academic literature. It is worth remembering that postcolonial studies are not linear, disciplined and articulate. See BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 91, 2013; MANTELLI, Gabriel Antonio Silveira; BADIN, Michelle Ratton Sanchez. Repensando o direito internacional a partir dos estudos pós-coloniais e decoloniais. *Prim@ Facie - Direito, História e Política*, v. 17, n. 34, p. 1-33, 2018.

(1947)<sup>190</sup> and Edward Said's *Orientalism* (1978).<sup>191</sup> The second wave encompasses subaltern studies, which starts their initiatives in the late 1970s' Indian academia, and I use as historical point *Subaltern Studies I: writing on South Asian History & Society* (1982).<sup>192</sup> In the third wave case, it is more complicated to precise a historical starting point because this wave comprehends multidisciplinary and sparse studies on postcolonialism. I choose *The Empire writes back: theory and practice in post-colonial literature* (1989)<sup>193</sup> because it had an important impact on Global North academia, which helped postcolonial studies to get "globalized". Finally, the fourth wave begins when Modernity/Coloniality Group organized its first conference.

**FIGURE 4 - POSTCOLONIAL STUDIES "WAVES"**



Source: Own authorship using Said (1978), Guha (1982), Ashcroft et al (2003) and Memmi (2013).

### 2.2.1. Anti-colonial and founding moments

The first postcolonial academic movement relates to what I call *anti-colonial and founding moments*. Initially, there was no self-definition of postcolonialism but the writing

<sup>190</sup> MEMMI, Albert. *The colonizer and the colonized*. London: Routledge, 2013.

<sup>191</sup> SAID, Edward. *Orientalism*. London: Penguin Books, 1978.

<sup>192</sup> GUHA, Ranajit (Ed.). *Subaltern Studies I: writings on South Asian history & society*. New Delhi: Oxford University Press India, 1982.

<sup>193</sup> ASHCROFT, Bill; GRIFFITHS, Gareth; TIFFIN, Helen. *The Empire writes back: theory and practice in post-colonial literatures*. London: Routledge, 2003.

that emerged from this period was fundamental for the establishment of postcolonial studies. As a matter of fact, it is difficult to establish the founding theoretical referential point of postcolonial studies. However, as Luciana Ballestrin explains, there is a shared understanding about the relevance of French-speaking triad authors Aimé Césaire, Albert Memmi and Frantz Fanon, thinkers who were linked to anticolonial movements during the decolonization processes of Africa.<sup>194</sup> Their studies – Memmi’s *The Colonizer and the Colonized* (1947), Césaire’s *Discourse on Colonialism* (1950) and Fanon’s *The Wretched of the Earth* (1961) – contributed to denounce the atrocities of colonization and to influence further studies on postcolonialism.<sup>195</sup> Vidya Kumar adds to postcolonial precursors list: C. L. R. James, Chinua Achebe, Cheikh Anta Diop, W. E. B. Du Bois, Romila Thapar and Commonwealth literature authors writing in the 1960s and 1970s.<sup>196,197</sup> Finally, I agree with César Baldi and believe that we should add other scholars and authors such as Octave Mannoni, Anouar Abdel-Malek, Guerreiro Ramos and Édouard Glissant.<sup>198</sup>

Asian scholars were also fundamental during this period. Postcolonial studies has been considerably influenced by Edward Said’s *Orientalism* (1978).<sup>199</sup> In his seminal work, Said used European theorists such as Michel Foucault and Antonio Gramsci and “explored the ways in which the non-western world was constructed in Western

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<sup>194</sup> BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 92, 2013.

<sup>195</sup> See CÉSAIRE, Aimé. *Discourse on colonialism*. New York: NYU Press, 2001; FANON, Frantz. *The wretched of the Earth*. London: Penguin Books, 2001; MEMMI, Albert. *The colonizer and the colonized*. London: Routledge, 2013.

<sup>196</sup> KUMAR, Vidya. A proleptic approach to postcolonial legal studies? A brief look at the relationship between legal theory and intellectual history. *Law, Social Justice & Global Development Journal (LGD)*, n. 2, p. 3, 2003.

<sup>197</sup> See, e.g., JAMES, C. L. R. *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution*. London: Penguin UK, 2001; JAMES, C. L. R. *Beyond a boundary*. Durham: Duke University Press, 2013; ACHEBE, Chinua. *The African trilogy: Things fall apart, No longer at ease, and Arrow of God*. New York: Everyman’s Library, 2010; DIOP, Cheikh Anta. *The African origin of civilization: myth or reality*. Chicago: Chicago Review Press, 1989; DIOP, Cheikh Anta. *Civilization or barbarism*. Chicago: Chicago Review Press, 1991; DU BOIS, W. E. B. *The souls of black folk*. Old Main: Pennsylvania State University, 2006; DU BOIS, W. E. B. *Black reconstruction in America: an essay toward a history of the part which black folk played in the attempt to reconstruct democracy in America, 1860-1880*. Oxford: Oxford University Press, 2014; THAPAR, Romila. *A history of India*. London: Penguin UK, 1990.

<sup>198</sup> BALDI, César Augusto. *Nosso norte é o Sul: nova agenda de direitos humanos?* Available at: <<https://emporiododireito.com.br/leitura/nosso-norte-e-o-sul-nova-agenda-de-direitos-humanos>>. Access on November 16, 2018.

<sup>199</sup> “Orientalism” designates the study about the ways of life, geography, culture, etc. of Eastern countries and, according to Said, such studies about the so called “Orient”, during colonization, did not serve only to the sciences, but also to the European colonial project.



thought”.<sup>200</sup> In doing so, he evinces the discursive character of knowledge production by old European metropolises about the colonized territories. Said also draws attention to the fact that the images of the other, in fact, is constituting the very idea of the West. After all: “the Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience. Yet none of this Orient is merely imaginative”.<sup>201</sup> It is in this first moment of postcolonial studies that mainstream academia started to recognize that colonialism was not only the arbitrary exercise of an economic and military power but also had a cognitive and lasting dimension.<sup>202</sup> With such emerging studies, cultural aspects were involved in other social and economic discussion.<sup>203</sup>

### 2.2.2. *Subaltern studies and historiographical turn*

If in the first moment we have anti-colonial writings and studies influenced by European theorists, in the second moment – that I call *subaltern studies and historiographical turn*, we can see an important advance on the identity and self-construction of postcolonial studies. The second wave encompasses subaltern studies, which began with the late 1970s’ Indian academia, and I use *Subaltern Studies I: writing on South Asian History & Society* (1982) as a historical reference.<sup>204</sup>

At this point, subaltern studies contributed to postcolonial thought, mainly from historiography. Subaltern studies borrowed the idea of “subaltern” from Antonio Gramsci,<sup>205</sup> originally used in terms of class subordination, and added new features: caste,

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<sup>200</sup> MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008. p. 271.

<sup>201</sup> SAID, Edward. *Orientalism*. London: Penguin Books, 1978, p. 1.

<sup>202</sup> COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 116.

<sup>203</sup> In addition, the first moment contributes to the idea that the European illuminist science project is sustained by an imaginary that postulates the superiority of the European white race compared to all other cultural expressions and is able to demonstrate that with the birth of human sciences we witnessed the invisibility of the multiple historical voices of humanity. See COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 115-116.

<sup>204</sup> GUHA, Ranajit (Ed.). *Subaltern Studies I: writings on South Asian history & society*. New Delhi: Oxford University Press India, 1982.

<sup>205</sup> See generally, GRAMSCI, Antonio. *The Gramsci reader: selected writings, 1916-1935*. New York: NYU Press, 2000.

gender, race, and culture.<sup>206</sup> According to Gyan Prakash, “[t]he dissemination of Subaltern Studies, beginning in 1982 as an intervention in South Asian historiography and developing into a vigorous postcolonial critique, must be placed in such a complex, catachrestic reworking of knowledge”.<sup>207</sup> Subaltern studies challenged existing historical scholarship in South Asian and influenced a turn in the historiography of other regions and in disciplines other than history.

Gayatri Spivak explains that the project of subaltern studies is “to rethink Indian colonial historiography from the perspective of the discontinuous chain of peasant insurgencies during the colonial occupation”.<sup>208</sup> One can say Spivak is the leading name of subaltern ideas, as she “is well known for her treatment of issues of representation and, in particular, for the notion of ‘strategic essentialism’, whereby essentialist categories (‘woman’, ‘Third World’) are used for strategic or political purposes”.<sup>209</sup> Spivak works within Said’s problematic of representation and extends it to the contemporary academy. According to Colaço and Damázio, she seeks to demonstrate that the construction of history does not consist just in the uninterested identification, elaboration and ordination of facts and data, but rather constitutes a process of “epistemic violence”.<sup>210</sup>

### 2.2.3. *Multidisciplinary voices in a postcolonial world*

In the third “wave”, *multidisciplinary voices in a postcolonial world*, I refer to both the consolidation of postcolonialism as an academic field itself and to the establishment of postcolonial approaches into different disciplines. In this phase, we can

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<sup>206</sup> COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 114; PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015, p. 236.

<sup>207</sup> PRAKASH, Gyan. Subaltern studies as postcolonial criticism. *The American Historical Review*, v. 99, n. 5, p. 1476, 1994.

<sup>208</sup> SPIVAK, Gayatri Chakravorty. Can the subaltern speak? In: NELSON, Cary; GROSSBERG, Lawrence (Ed.). *Marxism and the interpretation of culture*. London: MacMillan Education, 1988. p. 271-313.

<sup>209</sup> MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008, p. 271-272.

<sup>210</sup> COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 117.

see textbooks and collections on postcolonialism<sup>211</sup> as well as studies on the intersection between postcolonial studies and humanities<sup>212</sup>, development studies,<sup>213</sup> legal studies<sup>214</sup> etc. At this point, important works reached the academy of the Global North and were able, through the academic-political power of this space, to foment postcolonial debates in several areas of knowledge. I use *Empire writes back: theory and practice in post-colonial literature*, written in 1989, as a mark of this moment of expansion of the postcolonial debate.<sup>215</sup> In the book, Bill Ashcroft, Gareth Griffiths and Helen Tiffin were capable of bringing together a wide range of postcolonial texts and connecting them to theoretical issues related to culture, language and literature.

In this wave, the work of Homi Bhabha is particularly recognized by the contributions on dualities. He returns itself to the spaces of enunciation that are not defined by the inside/outside polarity but are located between the divisions, in the frontiers that define any collective identity.<sup>216</sup> Bhabha prefers to characterize the colonial discourse by its goals – the construction of the colonized as a population of degenerate type – and he highlights the notions of ambivalence, stereotype, mime and hybridism as strategies that open cracks in the dominant discourse and indicate spaces for possible resistance.<sup>217</sup> Colonial discourse, for Bhabha, was founded more on anxiety than arrogance, and colonial power had a conflictual structure – hence, colonial stereotyping of subject peoples was complex, ambivalent, and contradictory as a form of

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<sup>211</sup> See, e.g., SCHWARZ, Henry; RAY, Sangeeta (Ed.). *A companion to postcolonial studies*. Malden: Blackwell Publishing, 2000; YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001; HUGGAN, Graham (Ed.). *The Oxford Handbook of Postcolonial Studies*. Oxford: Oxford University Press, 2013.

<sup>212</sup> See, e.g., BLUNT, Alison; ROSE, Gillian. *Writing women and space: colonial and postcolonial geographies*. New York City: Guilford Press, 1994; CHAKRABARTY, Dipesh. *Provincializing Europe: postcolonial thought an historical difference*. Princeton: Princeton University Press, 2000; COSTA, Sérgio. Desprovincializando a sociologia: a contribuição pós-colonial. *Revista Brasileira de Ciências Sociais*, v. 21, n. 60, p. 117-134, 2006; GO, Julian. For a postcolonial sociology. *Theory and Society*, v. 42, n. 1, p. 25-55, 2013.

<sup>213</sup> See, e.g., MCEWAN, Cheryl. *Postcolonialism and development*. London: Routledge, 2009; STRONGMAN, Luke. Postcolonialism and international development studies: a dialectical exchange? *Third World Quarterly*, v. 35, n. 8, p. 1343-1354, 2014.

<sup>214</sup> DARIAN-SMITH, Eve; FITZPATRICK, Peter (Ed.). *Laws of the postcolonial*. Ann Arbor: University of Michigan Press, 1999.

<sup>215</sup> ASHCROFT, Bill; GRIFFITHS, Gareth; TIFFIN, Helen. *The Empire writes back: theory and practice in post-colonial literature*. 2. ed. New York, Routledge, 2002.

<sup>216</sup> COSTA, Sérgio. Desprovincializando a sociologia: a contribuição pós-colonial. *Revista Brasileira de Ciências Sociais*, v. 21, n. 60, p. 122, 2006.

<sup>217</sup> BHABHA, Homi K. *The location of culture*. London, NYC: Routledge, 1994.

representation, as anxious as it was assertive”.<sup>218</sup> Bhabha, with other authors, such as Stuart Hall,<sup>219</sup> merges the discussion surrounding cultural studies and postcolonialism.

#### 2.2.4. *Modernity/Coloniality Group and decolonial thought*

Finally, the fourth wave is the *Modernity/Coloniality Group and decolonial thought* which englobes Latin American scholarship involved in postcolonial debates.<sup>220</sup> They entitle themselves as Modernity/Coloniality Group (“*Grupo Modernidad/Colonialidad*”), an epistemological movement for the critical and utopian renewal of social sciences in Latin America in the 21<sup>st</sup> century, which includes Walter Mignolo, Santiago Castro-Gómez and Arturo Escobar.<sup>221</sup> Through the *decolonial turn*

<sup>218</sup> PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015, p. 237.

<sup>219</sup> See generally, HALL, Stuart. *Da diáspora: identidades e mediações culturais*. Belo Horizonte: Editora UFMG, 2006.

<sup>220</sup> In addition, on the first use of the “postcolonial” term, which relates to the historical character, I find it interesting to renew and use it in a broad sense, including other geographical regions and colonial periods on their meaning, such as the case of the American continent. In this regard, my studies about the postcolonial literature have demonstrated that there are few works exploring the postcolonial moment of international law in Latin America, especially in Brazil. I also intend to deepen the research about the second use of “postcolonial” term, which is related to the theoretical approaches inspired in postcolonial debates, in order to understand the recent Latin American contributions within this theme, while also systematizing the postcolonial studies in conjunction with international law.

<sup>221</sup> See, e.g., GROSGOUEL, Ramón. Race and ethnicity or racialized ethnicities? Identities within global coloniality. *Ethnicities*, v. 4, n. 3, p. 315-336, 2004; CASTRO-GÓMEZ, Santiago; GROSGOUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007; MALDONADO-TORRES, Nelson. On the coloniality of being: contributions to the development of a concept. *Cultural studies*, v. 21, n. 2-3, p. 240-270, 2007; QUIJANO, Aníbal. Coloniality and modernity/rationality. *Cultural studies*, v. 21, n. 2-3, p. 168-178, 2007; WALSH, Catherine. Shifting the geopolitics of critical knowledge: decolonial thought and cultural studies ‘others’ in the Andes. *Cultural studies*, v. 21, n. 2-3, p. 224-239, 2007; GROSGOUEL, Ramón. Hacia un pluri-versalismo transmoderno decolonial. *Tabula Rasa*, n. 9, p. 199-215, 2008; MIGNOLO, Walter. Desobediência epistêmica: a opção descolonial e o significado de identidade em política. *Cadernos de Letras da UFF*, Niterói, n. 34, p. 287-324, 2008; QUIJANO, Aníbal. Colonialidade do poder e classificação social. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010. p. 84-130; MALDONADO-TORRES, Nelson. Enrique Dussel’s Liberation Thought in the decolonial turn. *Transmodernity*, v. 1, n. 1, p. 1-30, 2011; MALDONADO-TORRES, Nelson. Thinking through the decolonial turn: post-continental interventions in theory, philosophy, and critique. An introduction. *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, v. 1, n. 2, p. 1-15, 2011; MIGNOLO, Walter D. Epistemic disobedience and the decolonial option: a manifesto. *Transmodernity*, v. 1, n. 2, p. 3-23, 2011; MIGNOLO, Walter. *The darker side of Western modernity: global futures, decolonial options*. Durham: Duke University Press, 2011; BARRETO, José-Manuel. Decolonial strategies and dialogue in the human rights field: A manifesto. *Transnational Legal Theory*, v. 3, n. 1, p. 1-29, 2012; COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012; BALLESTRIN, Luciana. América Latina e o giro decolonial. *Revista Brasileira de Ciência Política*, Brasília, n. 11, p. 89-117, 2013; BALDI, César Augusto. De/colonialidade,

suggested by them, we have the idea to update the critical tradition of Latin American thought, offering historical rereads and problematizing old and new issues for the continent.<sup>222</sup>

In Latin America, critical studies that addressed issues related to the colonial system existed before the emergence of postcolonial studies.<sup>223</sup> However, the explicit affiliation of Latin American theorists with postcolonial approaches began in the 1990s with the *Latin American Group of Subaltern Studies*. Initially inspired by the subaltern studies, in its inaugural manifesto, for example, the group incorporated several of the themes dealt with by the Indian historian Ranajit Guha<sup>224</sup> and also placed emphasis on political categories such as class, nation and gender. Over time, however, the group added critical voices to the pre-established postcolonial projects. From that moment, the main mark of the decolonial studies that would seek to denounce the “imperialism” of cultural, postcolonial and subaltern studies that did not break with Eurocentric authors and perspectives. One of the main figures in the group, the Argentinean Walter Mignolo advocated that the Latin American movement should demand its own epistemic locus, as the continent was the first to suffer the violence of the modern/colonial/imperial scheme.<sup>225</sup>

Meetings were held in the American continent from the 1990s gave rise to the formation of the Modernity/Coloniality Group, which would self-designate as representatives of decolonial thinking. One of the group’s original works was the collective publication *La colonialidad del saber: eurocentrismo y ciencias sociales*,

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direito e quilombolas: repensando a questão. In: SOUZA FILHO, Carlos Frederico Marés de; FERREIRA, Helene Sivini; NOGUEIRA, Caroline Barbosa Contento (Orgs.). *Direito socioambiental: uma questão para a América Latina*. Curitiba: Letra da Lei, 2014, p. 31-83; VAL, Eduardo Manuel; BELLO, Enzo (Org.). *O pensamento pós e decolonial no novo constitucionalismo latino-americano*. Caxias do Sul: Educ, 2014; MIGLIEVICH RIBEIRO, Adelia. Por uma razão decolonial: desafios ético-político-epistemológicos à cosmovisão moderna. *Civitas – Revista de Ciências Sociais*, v. 14, n. 1, p. 66-80, 2014; ROSA, Marcelo C. A África, o Sul e as ciências sociais brasileiras: descolonização e abertura. *Sociedade e Estado*, v. 30, n. 2, p. 313-321, 2015; FERNANDES, Estevão Rafael. Algumas inflexões sobre o Brasil: um experimento epistêmico radical desde Abya Yala. *REALIS*, v. 6, n. 2, p. 83-101, 2016.

<sup>222</sup> CASTRO-GÓMEZ, Santiago; GROSGOUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007.

<sup>223</sup> BORTOLUCI, José H.; JANSEN, Robert S. Toward a postcolonial sociology: the view from Latin America. In: GO, Julian (Ed.). *Postcolonial sociology* (Political Power and Social Theory, Volume 24). Bingley: Emerald Group, 2013, p. 199-229.

<sup>224</sup> GUHA, Ranajit (Ed.). *Subaltern Studies I: writings on South Asian history & society*. New Delhi: Oxford University Press India, 1982.

<sup>225</sup> MIGNOLO, Walter. *The darker side of Western modernity: global futures, decolonial options*. Durham: Duke University Press, 2011.

launched in 2000.<sup>226</sup> Decolonial authors identify themselves as a research group that shares notions, concepts and analyzes that give it an identity and a vocabulary of their own. Among these concepts, I highlight three of them.

First, the concept of coloniality, initially outlined by the Peruvian Aníbal Quijano, expresses the notion that colonial relations in the economic and political spheres did not end with the destruction of colonialism.<sup>227</sup> In Mignolo's words, coloniality would be the obscure and necessary side of the idea of modernity.<sup>228</sup> Second, the ideas of the geopolitics of knowledge and the proposal of the “*giro decolonial*” (decolonial turn). The first concept is the intensification of the postcolonial argument, already developed by the classic postcolonial authors, of epistemic violence and denial of otherness, since the idea is defended for geopolitical perspectives.<sup>229</sup> The second is a consequence of the diagnosis of the former and represents the movement of theoretical and practical, political and methodological resistance to the logic of modernity/coloniality.<sup>230</sup> Third, Immanuel Wallerstein's world-system theory, originally used to divide the planet into central and peripheral regions,<sup>231</sup> is updated in decolonial grammar in terms of the modern/colonial world-system, including other categories and hierarchies, like those related to sexuality, patriarchy, race and spirituality.<sup>232</sup>

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<sup>226</sup> LANDER, Edgardo; CASTRO-GÓMEZ, Santiago. *La colonialidad del saber: eurocentrismo y ciencias sociales. Perspectivas latinoamericanas*. Buenos Aires: CLACSO, 2000.

<sup>227</sup> See, e.g., QUIJANO, Aníbal. Coloniality and modernity/rationality. *Cultural studies*, v. 21, n. 2-3, p. 168-178, 2007; QUIJANO, Aníbal. Colonialidade do poder e classificação social. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010. p. 84-130.

<sup>228</sup> MIGNOLO, Walter. *The darker side of Western modernity: global futures, decolonial options*. Durham: Duke University Press, 2011.

<sup>229</sup> See, e.g., GROSGOUEL, Ramón. Colonial difference, geopolitics of knowledge, and global coloniality in the modern/colonial capitalist world-system. *Review (Fernand Braudel Center)*, v. 25, n. 3, p. 203-224, 2002; WALSH, Catherine. Shifting the geopolitics of critical knowledge: decolonial thought and cultural studies ‘others’ in the Andes. *Cultural studies*, v. 21, n. 2-3, p. 224-239, 2007; BRAGATO, Fernanda Frizzo; GORDON, Lewis R. *Geopolitics and decolonization: perspectives from the Global South*. London/New York: Rowman & Littlefield International, 2018.

<sup>230</sup> CASTRO-GÓMEZ, Santiago; GROSGOUEL, Ramón (Ed.). *El giro decolonial: reflexiones para una diversidad epistémica más allá del capitalismo global*. Bogotá: Siglo del Hombre Editores, 2007; MIGNOLO, Walter D. Epistemic disobedience and the decolonial option: a manifesto. *Transmodernity*, v. 1, n. 2, p. 3-23, 2011; MIGLIEVICH RIBEIRO, Adelia. Por uma razão decolonial: desafios ético-político-epistemológicos à cosmovisão moderna. *Civitas – Revista de Ciências Sociais*, v. 14, n. 1, p. 66-80, 2014.

<sup>231</sup> WALLERSTEIN, Immanuel. *The capitalist world-economy*. Cambridge: Cambridge University Press, 1979.

<sup>232</sup> GROSGOUEL, Ramón. Decolonizing post-colonial studies and paradigms of political-economy: transmodernity, decolonial thinking, and global coloniality. *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, v. 1, n. 1, 2011.

### 2.2.5. Summary table of postcolonial “waves”

**TABLE 3 – SUMMARY OF POSTCOLONIAL “WAVES”**

<b>Waves</b>	<b>Description</b>	<b>References</b>
Anti-colonial and founding moments	No self-definition of postcolonialism. Anti-colonial movements denouncing the atrocities of colonization. This wave starts exploring the discursive character of knowledge production by old European metropolises about the colonized territories. Cultural aspects started to be involved in other social and economic discussion.	<i>The Colonizer and the Colonized</i> (1947). <i>Orientalism</i> (1978).
Subaltern studies and historiographical turn	Important advance on the identity and self-construction of postcolonial studies. Subaltern studies challenged existing historical scholarship in South Asian and influenced this turn in the historiography of other regions and in disciplines other than history. The main idea is to refresh colonial historiography from the perspective of the discontinuous chain of subaltern insurgencies during the colonial occupation.	<i>Subaltern Studies I: writing on South Asian History &amp; Society</i> (1982).
Multidisciplinary voices in a postcolonial world	Consolidation of postcolonialism as an academic field itself and to the establishment of postcolonial approaches into different disciplines. Studies on the intersection between postcolonial studies and humanities, development studies and legal studies. The consolidation of cultural studies and works arguing that colonial stereotyping of subject peoples was complex, ambivalent, and contradictory as a form of representation, as anxious as it was assertive.	<i>The Empire writes back: theory and practice in post-colonial literature</i> (1989).
Modernity/Coloniality Group and decolonial thought	Latin American scholarship involved in postcolonial debates. It is considered an epistemological movement for the critical and utopian renewal of social sciences in Latin America in the 21 <sup>st</sup> century. According to this wave, Latin American context demands an own epistemic locus because the history of the continent for the development of world capitalism was differentiated, being the first to suffer the violence of the modern colonial/imperial scheme.	<i>La colonialidad del saber: eurocentrismo y ciencias sociales</i> (2000).

Source: Own authorship.

## **PART II – ENCOUNTERS**



*The comity of nations was both the instrument and effect of a projected European appropriation of the world. It was initiated and sustained in the suppression of peoples marked in their very being as inimical to that enterprise and to the universal and commensurate reality it represented. With the world thus made one, those who still existed outside its ambient truth could be brought to conform to that truth, or used to achieve it, or be eliminated. Such a division was made manifest in the invention of racism. The accompanying invention of appropriate attributes of the excluded provided reference points or negative exemplars in the creation of European identity, including the identity of the European nation. As qualities of European civilization, the universal and legal, the ordered, the dynamic and progressive are all set against characters projected from the European onto its other - the particular and lawless, the chaotic, static and backward. These projected characters remain in the site of their generation, within European identity, where they are recognized as having been suppressed but as still dangerous. The possibility of reversion has to be constantly guarded against and the standards of civilization thus maintained. This whole dynamic of identity is contained in myths which invert its impetus by locating origins and their continuing force in the other and in its progressive supersession.<sup>233</sup>*

*Let me begin by noting that there are at least three key moments in the evolution of development ideology in international law, overlapping between the desire to advance the 'primitive' to civilization in a purely cultural sense, and the attempt to develop the 'backward' to well-being in a material, developmental sense. The first moment was the positing of a cultural divide, articulated in a pre-modern, theological sense, between the Christians and the infidels. This was first seen in the work of Pope Innocent IV (1243–54 AD) in the argument over whether the lands of the infidels could justly be taken by Christians, an argument that became central in the founding texts of international law, such as those by Francisco de Vitoria, that have deeply influenced the evolution of the doctrine of sovereignty. [...] The second moment was the construction of a civilizational divide, articulated in pre-modern, but economic, sense between the people of commerce and others [...]. This constructed a nexus between civilization and capitalism and gave a moral motivation for commercial expansion into the colonies [...]. The third moment was the development of an apparatus of management of anticolonial resistance struggles by colonial powers from the 1940s to the 1950s that would be able to manage the dynamics unleashed by the operation of the first two moments. This apparatus of management consisted not only of domestic techniques relating to constitutional devolution of powers and techniques of law and order such as emergencies, but also of a complex configuration of powers between various levels of international, national, metropolitan, and local authorities. Between them, these three dynamics have set the dominating course of twentieth century international law's encounter with the Third World.<sup>234</sup>*

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<sup>233</sup> FITZPATRICK, Peter. *Modernism and the grounds of law*. Cambridge: Cambridge University Press, 2001, p. 125.

<sup>234</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 24-25.

The colonial encounter was violent,<sup>235</sup> as the development encounter is.<sup>236</sup> Colonial and postcolonial encounters are themes frequently explored by anthropologists: the debates, concerns and studies relate to indigenous communities and experiences of local societies when they are faced with the consequences of colonialism in their territories, institutions and cultures.<sup>237</sup> International legal scholarship, in turn, has recently brought colonialism as a central element to understand the construction and institutionalization of international law and its legacies, continuities and contemporary dynamics. Besides the influence of Antony Anghie's work on the colonial origins of international law,<sup>238</sup> Arnulf Becker Lorca explains the role played by the studies of Gerrit Gong:<sup>239</sup>

Gong's work opened a research agenda soon followed by international lawyers interested in reinvigorating TWAIL studies. Gong showed that the encounter between Western and non-Western peoples brought about a clash over different standards of civilization, and that throughout this encounter, Western lawyers constructed the standard of civilization according to which non-European States would be admitted to the Western international community. For the new generation of TWAIL scholars, exploring the history of the encounter between the European and non-European world became—as Anghie and Chimni put it—a central quest.<sup>240</sup>

The encounters I am referring to are the connections and academic relations between (international) law, development and postcolonialism. The main encounter (discussion) of law and development frames it as a field of studies and practices (see Intersection 1 of Figure 5). When law (thinking especially as legal studies) and

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<sup>235</sup> SANTOS, Boaventura de Sousa. Para além do pensamento abissal: das linhas globais a uma ecologia de saberes. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010. p. 31-83.

<sup>236</sup> RAJAGOPAL, Balakrishnan. International law and the development encounter: violence and resistance at the margins. *American Society of International Law Proceedings*, n. 93, p. 16-27, 1999.

<sup>237</sup> See, e.g., LEIRIS, Michel. The ethnographer faced with colonialism. In: LEIRIS, Michel. *Brisées: broken branches*. San Francisco: North Point, 1989, p. 125-145; ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995; MARCUS, George E.; FISCHER, Michael M. J. *Anthropology as cultural critique: an experimental moment in the human sciences*. 2. ed. Chicago: University of Chicago Press, 1999; COMAROFF, Jean; COMAROFF, John. Ethnography on an awkward scale: postcolonial anthropology and the violence of abstraction. *Ethnography*, v. 4, n. 2, p. 147-179, 2003.

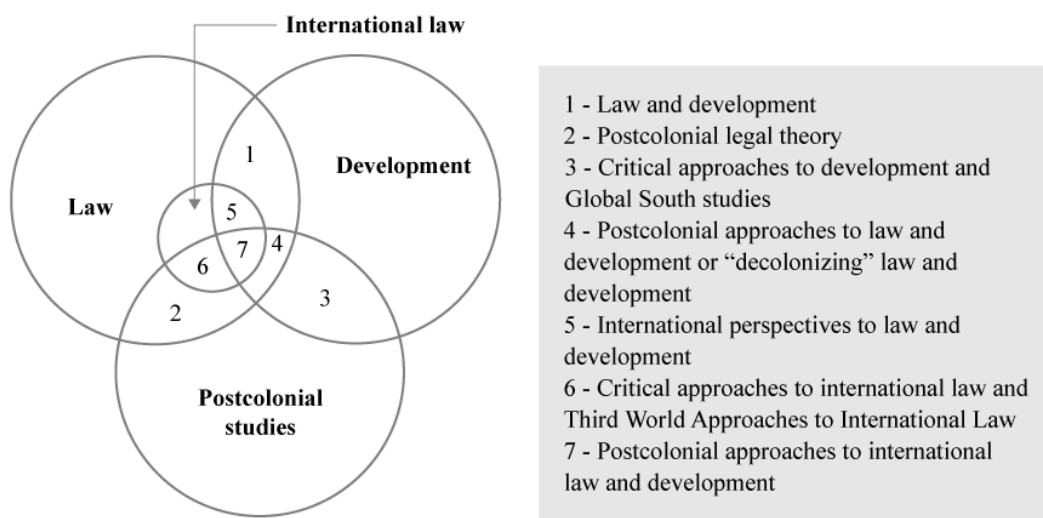
<sup>238</sup> See ANGHIE, Antony. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2005; ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006.

<sup>239</sup> GONG, Gerrit W. *The standard of civilization in international society*. Oxford: Oxford University Press, 1984.

<sup>240</sup> LORCA, Arnulf Becker. Eurocentrism in the history of international law. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 1051-1052.

postcolonial studies collide, postcolonial legal theory comes alive (see Intersection 2 of Figure 5); when development (thinking especially as development studies) and postcolonial studies meet, critical approaches to development and Global South studies (the old “Third World” studies) are explored (see Intersection 3 of Figure 5). A general encounter of law, development and postcolonialism can lead us to postcolonial approaches to law and development or, as I explore in chapter three, a “decolonizing” look to law and development (see Intersection 4 of Figure 5). If we focus in particular on the international level, we can think in three specific encounters: international perspectives to law and development (see Intersection 5 of Figure 5), critical approaches to international law (see Intersection 6 of Figure 5) and, as I propose in this master’s thesis, postcolonial approaches to international law and development (see Intersection 7 of Figure 5).

**FIGURE 5 - ENCOUNTERS BETWEEN INTERNATIONAL LAW, DEVELOPMENT AND POSTCOLONIAL STUDIES**



Source: Own authorship.

In chapter three, I address the general encounters explored by legal scholarship that brings together international law, development and postcolonialism. I address the main concern from postcolonial legal theory and the ideas of “decolonizing” law. In chapter four, I present two substantial encounters, a more generic one and a more specific

one. First, I propose a special look at the “encounters” between international law, development and postcolonial studies. I rely on critical approaches to international law to understand those relations and link it to the literature on international law and development studies, mainly Third World Approaches to International Law (TWAIL). Second, I propose the idea of postcolonial approaches to international law and development. I explain that postcolonial approaches to international law and development is a set of studies that use postcolonialism and have a postcolonial “voice” to explain international law and development. In my argument, the works of Balakrishnan Rajagopal,<sup>241</sup> Sundhya Pahuja<sup>242</sup> and Luis Eslava<sup>243</sup> are examples of postcolonial approaches to international law and development. This set of studies brings three main contributions to international law and development: first, Third World resistance as part of international law and development dynamics; second, development discourse as a structure of the ideological-institutional complex of international law; and, third, international law and development modifying notions of global and local in everyday lives.

Besides that, they share three elements that distinguish them from other perspectives on international law and development. First, a historical-temporal element shows that postcolonial international law authors have extended the chronological frontiers of international legal history, which now allow explanations of the legacies of power and oppression relating to the past and present forms of development. Second, a geographical-spatial element demonstrates that postcolonial international law authors use a more dynamic understanding of spaces. Such diverse engagement with space enables a multidimensional analysis of international law and its effects at the global, transnational, regional, national and local levels. Third, an epistemological-conceptual element demonstrates that postcolonial international law authors have incorporated specific postcolonial-oriented approaches, related to confronting Eurocentrism and bringing subaltern voices to sciences, into the usual interactions of law and development to

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<sup>241</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003.

<sup>242</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>243</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

understand them. I argue that this element explains the alternative ways research is being conducted to explain the law and development phenomenon.

### 3. “LEGAL INTERSECTIONS”: GENERAL ENCOUNTERS BETWEEN INTERNATIONAL LAW, DEVELOPMENT AND POSTCOLONIALISM

Sundhya Pahuja suggests that “like development, legal positivism is also a story”.<sup>244</sup> If maps are a great metaphor for the first part of my thesis, the idea of narratives and stories is particularly important to set the way we see the intersections between international law, development and postcolonial studies. In this third chapter, I establish the connection that the literature has made between law (legal studies) and postcolonial studies. It is important to consider the movement of legal scholars who use postcolonial studies to understand legal phenomena. At this moment, that I call “general encounters” between international law, development and postcolonialism, I am considering a broader framework where the studies, traditions, discourses and practices encounter each other. I focus on the ideas constructed from such encounters and I also propose some alternative narratives, especially taking into consideration the decolonial propositions and thinking “from the margins”.

#### 3.1. POSTCOLONIAL LEGAL THEORY

Cultural, historical and epistemological questions have received special attention from postcolonialism.<sup>245</sup> Law itself has not been configured as a central element of analysis for postcolonial scholars.<sup>246</sup> When we look to legal studies, the scenario is different and, although marginal, there are a few scholars that rely on postcolonialism as an element to analyze the law. In the late 1990s, legal studies started to use postcolonial

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<sup>244</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 193.

<sup>245</sup> See SCHWARZ, Henry; RAY, Sangeeta (Ed.). *A companion to postcolonial studies*. Malden: Blackwell Publishing, 2000; YOUNG, Robert J. C. *Postcolonialism: an historical introduction*. Oxford: Blackwell Publishing, 2001; HUGGAN, Graham (Ed.). *The Oxford Handbook of Postcolonial Studies*. Oxford: Oxford University Press, 2013.

<sup>246</sup> It is possible to relate some contributions of postcolonialism facing legal elements, such as Said (1993) when he explores the relations between culture and imperialism. I am not arguing that law is not an element of analysis by postcolonial studies, but it is fair to say that law is not a central element for postcolonial studies.

studies<sup>247</sup> and cultural studies<sup>248</sup> to understand the law. A small group of academics established the label of a *postcolonial legal theory* (also known as PLT). The book *Laws of the Postcolonial* may be a good starting point on the postcolonial legal theory, as Eve Darian-Smith and Peter Fitzpatrick were able to systematize the works on that emerging field.<sup>249</sup> Besides that, with his *Modernism and the Grounds of Law* and *The Mythology of Modern Law*, Fitzpatrick proposed to analyze law as a cultural construction molded by colonialism.<sup>250</sup> More recently, the field gained new attention with *Postcolonialism and the Law*, organized by Denise Ferreira da Silva and Mark Harris.<sup>251</sup>

Postcolonial legal scholars normally focus both on the role of law during the colonial process and on the contemporary continuities of a postcolonial world. Vidya Kumar explains that “[o]ne description of postcolonial legal theory put forward is that it is the exploration, by legal scholars, of neglected questions about law’s relation to the postcolonial”.<sup>252</sup>

In addition to both explicating the law’s role in the West’s relation to its ‘other’ and disrupting legal renditions of (and consensus around) international human rights discourse and globalisation, ‘postcolonial legal studies’ has been described as an undertaking which focuses upon law as a (sometimes the) ‘tool of colonialism’ operating on both international and domestic levels. PLT may also involve descriptions law’s justificatory role vis-à-vis imperial (state) violence. In contrast, other accounts of PLT focus less upon how law advances

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<sup>247</sup> See, e.g., DARIAN-SMITH, Eve. Postcolonialism: a brief introduction. *Social & Legal Studies*, v. 5, n. 3, p. 291-299, 1996; PURDY, Jeannine. Postcolonialism: the emperor’s new clothes? *Social & Legal Studies*, v. 5, n. 3, p. 405-426, 1996; OTTO, Dianne. Subalternity and international law: the problems of global community and the incommensurability of difference. *Social & Legal Studies*, v. 5, n. 3, p. 337-364, 1996; OTTO, Dianne. Postcolonialism and law? *Third World Legal Studies*, v. 15, p. vii-xviii, 1999; BAXI, Upendra. Postcolonial legality. In: SCHWARZ, Henry; RAY, Sangeeta (Ed.). *A companion to postcolonial studies*. Malden: Blackwell Publishing, 2000, p. 540-555; RUSKOLA, Teemu. Legal orientalism. *Michigan Law Review*, v. 101, n. 1, p. 179-234, 2002.

<sup>248</sup> See, e.g., COOMBE, Rosemary J. Contingent articulations: a critical cultural studies of law. In: SARAT, Austin; KEARNS, Thomas R. (Ed.). *Law in the domains of culture*. Arbor: University of Michigan Press, 1998. p. 21-64; COOMBE, Rosemary J. Critical cultural legal studies. *Yale Journal of Law & the Humanities*, v. 10, n. 2, p. 463-486, 1998; SARAT, Austin; KEARNS, Thomas R. (Ed.). *Law in the domains of culture*. Ann Arbor: University of Michigan Press, 1998.

<sup>249</sup> DARIAN-SMITH, Eve; FITZPATRICK, Peter (Ed.). *Laws of the postcolonial*. Ann Arbor: University of Michigan Press, 1999.

<sup>250</sup> FITZPATRICK, Peter. *Modernism and the grounds of law*. Cambridge: Cambridge University Press, 2001; FITZPATRICK, Peter. *The mythology of modern law*. London: Routledge, 2002.

<sup>251</sup> SILVA, Denise Ferreira da; HARRIS, Mark (Org.). *Postcolonialism and the law*. London: Routledge, 2017.

<sup>252</sup> KUMAR, Vidya. A proleptic approach to postcolonial legal studies? A brief look at the relationship between legal theory and intellectual history. *Law, Social Justice & Global Development Journal (LGD)*, n. 2, p. 5, 2003.

colonialism, and more upon how colonial politics ‘affect legal rights’ or how colonisation ‘can alter the [putatively independent] concept of law itself’.<sup>253</sup>

Alpana Roy notes that defining the precise space occupied by postcolonial studies in relation to law is a difficult task.<sup>254</sup> The relationship is generally critical, a characteristic already familiar in other approaches which have a critical perspective to liberal positivism. She explains that “using postcolonial theory in legal discourse may simply be viewed as [...] a gentle reminder, as the law has taken for granted some primary categories and presumptions, the foundations of which are unquestioned and, indeed, which have the status of eternal truths”.<sup>255</sup>

Roy presents three attributes to postcolonial legal studies. First, postcolonial legal studies interrogates established legal narratives as “postcolonial reading of law also compels us to explore the role played by legal discourse in continuing the colonial narrative of dominance and subordination in this apparently postcolonial age”. Second, postcolonial legal studies has alternative methodologies as “postcolonial theory offers legal discourse some critical tools about method, particularly a wariness toward generalizations which transcend the boundaries of culture and region”. And, third, postcolonial legal studies is a platform of resistance as “postcolonial theory may be used in legal discourse as a platform to challenge the nature of law’s imperialism, and the base from which it unquestioningly operates”.<sup>256</sup>

Aside from this particular approach, we can see other studies on the interaction between colonialism/postcolonialism and legal studies, particularly legal pluralism studies in law and society field. The fact that colonialism led to the adoption of European legal standards in the colonized territories is important as colonizers denied original peoples’ law. Sally Merry divides the legal pluralism into, on the one hand, the classic derived from “[r]esearch on colonial and post-colonial Societies” and focused on the

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<sup>253</sup> KUMAR, Vidya. A proleptic approach to postcolonial legal studies? A brief look at the relationship between legal theory and intellectual history. *Law, Social Justice & Global Development Journal (LGD)*, n. 2, p. 5, 2003.

<sup>254</sup> ROY, Alpana. Postcolonial theory and law: a critical introduction. *Adelaide Law Review*, v. 29, n. 2, p. 319, 2008.

<sup>255</sup> ROY, Alpana. Postcolonial theory and law: a critical introduction. *Adelaide Law Review*, v. 29, n. 2, p. 357, 2008.

<sup>256</sup> ROY, Alpana. Postcolonial theory and law: a critical introduction. *Adelaide Law Review*, v. 29, n. 2, p. 357, 2008.



“analysis of the intersections of indigenous and European law”.<sup>257</sup> Boaventura de Sousa Santos analyzes the case of Bolivia’s constituent assembly in 2007, saying that due to postcolonialism, it is important to think about two issues: first, the State is not culturally neutral; and, second, it has to deal with memory.<sup>258,259</sup>

There are also academic contributions relating to postcolonialism and human rights. As Rajagopal notes, the main feature is the Eurocentric characteristic of human rights.<sup>260</sup> Human rights constitute a dominant legal theory, not due to their universalizing pretensions, but because they are a product of coloniality. In other words, who has epistemic legitimacy to produce valid knowledge.<sup>261</sup> That way, human rights end up being a “localized and partial speech”<sup>262</sup> and what this literature also proposes is a decolonial turn in human rights discourse.<sup>263</sup>

### 3.2.DECOLONIZING LAW AND DEVELOPMENT

Development means the pursuit of improvement in the material and immaterial conditions of a certain society, based on universal and emancipatory principles, such as economic growth, human rights and social and environmental inclusion.<sup>264</sup> Even though

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<sup>257</sup> MERRY, Sally Engle. Legal pluralism. *Law and Society Review*, v. 22, n. 2, p. 872, 1988.

<sup>258</sup> Regarding the first aspect, let us take the example of legal pluralism as a legal category in contrast to the legal monism and the reflection of the legal pluralism’s internalization for the purposes of political-constitutional proposition. Regarding the second aspect, social disparities from the colonial period, within the scope of transitional justice, are mitigated by affirmative action, such as racial quota policies.

<sup>259</sup> SANTOS, Boaventura de Sousa. *La reinvenición del Estado y el Estado plurinacional*. CENDA, CEJIS, CEDIB: Santa Cruz de la Sierra, 2007, p. 19.

<sup>260</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 163-232.

<sup>261</sup> BRAGATO, Fernanda Frizzo. Para além do discurso eurocêntrico dos direitos humanos: contribuições da descolonialidade. *Novos estudos jurídicos*, Itajaí, v. 19, n. 1, p. 225, 2014.

<sup>262</sup> BRAGATO, Fernanda Frizzo. Para além do discurso eurocêntrico dos direitos humanos: contribuições da descolonialidade. *Novos estudos jurídicos*, Itajaí, v. 19, n. 1, p. 225, 2014.

<sup>263</sup> See, e.g., BARRETO, José-Manuel. Decolonial strategies and dialogue in the human rights field: A manifesto. *Transnational Legal Theory*, v. 3, n. 1, p. 1-29, 2012.

<sup>264</sup> See, e.g., SEN, Amartya K. *Development as freedom*. Oxford: Oxford University Press, 2001; DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014; PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015. See also Brazilian literature about development: DA CONCEIÇÃO TAVARES, Maria. Ajustes e reestruturação nos países centrais: a modernização conservadora. *Economia e Sociedade*, v. 1, n. 1, p. 21-57, 1992; BRESSER PEREIRA, Luiz Carlos. *Globalization and competition: why some emergent countries succeed while others fall behind*. Cambridge: Cambridge University Press, 2010.

such mainstream perspective is worth to be studied, my research faces development in critical and heterodox ways,<sup>265</sup> considering its discursive character<sup>266</sup> and the possibilities to think in alternatives to development.<sup>267</sup> In particular, it uses critical approaches<sup>268</sup> to international law to investigate the relations between international law and development.<sup>269</sup> In the case of international law and development, one can say that although they are closely related, such “encounters” are not free from criticism, tensions and, as Balakrishnan Rajagopal argues, violence:

There are at least three reasons why international law historically has been oblivious to the violence of development. The first reason has to do with the very nature of law in the international society and its relationship to violence. International law has always been under the shadow of violence, and in fact under the danger of being overwhelmed by it. [...] The second reason why international law historically has been oblivious to the violence of development is that the emphasis on political order and state building in Third World countries in the 1950s and 1960s meant that any resistance to the state or its developmental activities was seen as antinational. This inevitably followed from the establishment of development as the *raison d'état* of newly independent countries. [...] The third reason why international law has remained oblivious to the violence of the development encounter is because of the inherent limitations of what I would call the market or economic model of resistance that international law sanctions through the doctrine of human rights. In particular, I suggest that the “human” in human rights is the *Homo oeconomicus*, the modern market being who is possessed of full rationality, and whose attempt to realize his or her full potentialities are confined within the moral possibilities of the state and the material conditions of the global market.<sup>270</sup>

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<sup>265</sup> See generally, RIST, Gilbert. *The history of development: from western origins to global faith*. London, New York: Zed Books, 1997.

<sup>266</sup> See especially, ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995.

<sup>267</sup> See, e.g., MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008. p. 275-281; KOTHARI, Ashish; DEMARIA, Federico; ACOSTA, Alberto. Buen vivir, degrowth and ecological swaraj: alternatives to sustainable development and the green economy. *Development*, v. 57, n. 3-4, p. 362-375, 2014.

<sup>268</sup> In this thesis, “critique” and “heterodoxy” allude in a broad sense to sets of ideas that are in some way opposed to mainstream or orthodox thought. In a strict sense, they refer to studies influenced by emancipatory and anticapitalistic ideas such as Marxism, feminism, European critical theory and postcolonialism (ESCOBAR, 1992). In the case of international law, a critical thought opposes the hegemony of liberal law dominated by Eurocentric and universalizing ideas (JOHNS, 2019).

<sup>269</sup> See, e.g., RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003; PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011; ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

<sup>270</sup> RAJAGOPAL, Balakrishnan. International law and the development encounter: violence and resistance at the margins. *American Society of International Law Proceedings*, n. 93, p. 22-23, 1999.

Using critical perspectives, as Rajagopal and others scholars do, we can see that anti-colonial movements and postcolonial debate have both contributed, in practice, to resistance movements against development projects<sup>271</sup>, the use of international law<sup>272</sup> and, in theory, to propose alternative looks to the relations between international law and development.<sup>273</sup> Gilbert Rist argues that development is a constituent element of the religion of modernity<sup>274</sup>:

Development thus appears to be a belief and a series of practices which form a single whole in spite of contradictions between them. The belief is no less real than the practices, because they are indissolubly linked to each other. Together, they reflect the logic of a society undergoing globalization which – in order to accomplish the programme it has set itself (whose consequences are not equally heartening for all) – has to draw its legitimacy from a number of widely shared, indisputable truths that have character of myth.<sup>275</sup>

In both cases, what predominates is the hegemony of the concept, which is historically known by the literature as part of a movement that started after the end of the Second World War, to ensure prosperity in the whole planet.<sup>276</sup> When the Second World War ended, and soon after with the wave of decolonization in Africa, Asia and the Middle East, the search for development became the political ambition of the countries, “a goal

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<sup>271</sup> See, e.g., RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003.

<sup>272</sup> See, e.g., DROUBI, Sufya. *Resisting United Nations Security Council resolutions*. New York: Routledge, 2014.

<sup>273</sup> See, e.g., RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003; PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011; ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

<sup>274</sup> See Luke Strongman for the relationship between postcolonial and development studies: “Both postcolonial studies and development studies are thus linked to modernisation, the first in examining the rhetoric of knowledge systems as instruments of ‘power and coercion’ and the latter in the mix of affordances it offers to remediate the living conditions of those who have been displaced by ideology or from whom resources have been taken or denied”. STRONGMAN, Luke. Postcolonialism and international development studies: a dialectical exchange? *Third World Quarterly*, v. 35, n. 8, p. 1346, 2014.

<sup>275</sup> RIST, Gilbert. *The history of development: from western origins to global faith*. London, New York: Zed Books, 1997, p. 24.

<sup>276</sup> ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995, p. 3-12; RIST, Gilbert. *The history of development: from western origins to global faith*. London, New York: Zed Books, 1997, p. 1-7; COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 83-87; ACOSTA, Alberto. *O bem viver: uma oportunidade para imaginar outros mundos*. São Paulo: Editora Elefante, 2016, p. 43-54.

to be achieved by all humanity”.<sup>277</sup> Arturo Escobar, in the same sense, proposes alternatives looks to development:

To see development as a historically produced discourse entails an examination of why so many countries started to see themselves as underdeveloped in the early post–World War II period, how “to develop” became a fundamental problem for them, and how, finally, they embarked upon the task of “un-underdeveloping” themselves by subjecting their societies to increasingly systematic, detailed, and comprehensive interventions. As Western experts and politicians started to see certain conditions in Asia, Africa, and Latin America as a problem—mostly what was perceived as poverty and backwardness—a new domain of thought and experience, namely, development, came into being, resulting in a new strategy for dealing with the alleged problems. Initiated in the United States and Western Europe, this strategy became in a few years a powerful force in the Third World.<sup>278</sup>

Postcolonialism challenges the very meaning of development as rooted in the colonial discourse that represents the Global North as advanced and the Global South as backwards.<sup>279</sup> In this discussion, for example, we can explore how certain societies are defined as more prosperous than others, using the example of indigenous communities and peoples.

Postcolonialism challenges the very meaning of development as rooted in colonial discourse depicting the North as advanced and progressive and the South as backward, degenerate and primitive. Early postcolonial writers, such as Van der Post, challenged this assumption by referring to hunter-gatherers as the first affluent peoples. Postcolonialism has prompted questions about whether such indigenous systems of equity, reciprocity and communalism are more advantageous to peoples of the South than the pursuit of capitalism, with its emphasis on individual wealth and incorporation into the global economy. The superiority of modern industrialization and technological progress is increasingly questioned, creating alternative knowledges to reshape perceptions of non-Western societies and their environments.<sup>280</sup>

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<sup>277</sup> ACOSTA, Alberto. *O bem viver: uma oportunidade para imaginar outros mundos*. São Paulo: Editora Elefante, 2016, p. 45.

<sup>278</sup> ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995, p. 6.

<sup>279</sup> See, e.g., ESCOBAR, Arturo. Imagining a post-development era? Critical thought, development and social movements. *Social text*, n. 31/32, p. 20-56, 1992; MCEWAN, Cheryl. *Postcolonialism and development*. London: Routledge, 2009; FUCHS, Vanessa Boanada. Law and development: critiques from a decolonial perspective. *Working Paper Series, International Research Network on Interdependent Inequalities in Latin America*, Berlin, n. 53, p. 1-28, 2013.

<sup>280</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 214-215.

In the field of development studies, postcolonialism appears in critical theories of development and seeks the denaturalization of the global ideas about development,<sup>281</sup> revealing the colonial and ethnocentric character of this discourse.<sup>282</sup> According to Sundhya Pahuja,

[...] it is no coincidence that the notions of “development” and “under-development” were born at the same moment that decolonization was underway. According to this deeply historicist account, the non-universality of the newly formed nations was understood in contradistinction to the universal (Western) nations and was maintained once again through the idea that non-modern forms of social organization existed in the historical past and that the present Western nations were exemplars of the future for those non-modern nations. Thus, instead of different kinds of entities, potentially both national and non-national and existing heteronomously side by side, the modern nation existed in “homogenous empty time”. [...] This understanding of the world authorized – indeed necessitated – ongoing interventions to make the Third World “modern”. From the Trusteeship and Mandate system to the contemporary interventions of the International Monetary Fund and World Bank, as well as countless other development institutions and aid organizations, the savage, primitive, backward, and finally under-developed peoples of the world were re-constituted as Other to the West. The notion of the comity of (civilized) nations was replaced by an international community founded on “universal values”.<sup>283</sup>

Cheryl McEwan explains that “postcolonialism is a powerful critique of ‘development’ and an increasingly important challenge to dominant ways of apprehending North-South relations”.<sup>284</sup> Linguistically postcolonial studies demonstrates that the textual production of development is fundamentally representative, which means that it borrows from metaphors and makes allusions to fantasy and rhetoric. When denaturalized, it becomes evident that this process creates distorted perceptions that do not match with reality and that it produces and reproduces a fantasy devoid of representation. Postcolonial approaches aim to remove the negative stereotypes about people, places and cultures inherent in the development discourse.

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<sup>281</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014. p. 213-219; PEET, Richard; HARTWICK, Elaine. *Theories of development: contentions, arguments, alternatives*. 3. ed. New York: Guilford Press, 2015, p. 234-238.

<sup>282</sup> ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995.

<sup>283</sup> PAHUJA, Sundhya. The postcoloniality of international law. *Harvard International Law Journal*, v. 46, n. 2, p. 464-465, 2005.

<sup>284</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014, p. 214.

Publications, speeches, and texts about development are strategic and they have real political consequences in countries that adopt and disseminate them. They promote and justify certain interventions to the detriment of others, which end up being silenced. For postcolonialism, it is important “to explore the links between the words, practices and institutional expressions of development, and between the relations of power that order the world and the words and images that represent the world”.<sup>285</sup> In the field of political participation, postcolonial approaches challenge the notion of a single path to development and demand a diversity of perspectives and priorities. In this regard, postcolonialism “has been an important stimulus to alternative formulations, such as ‘indigenous’ and ‘alternative modernities’, and rights-based approaches to development”.<sup>286</sup> Arturo Escobar sustains that discourses and practices of development molded the Third World.<sup>287</sup> He uses, for example, the experience of Said and affirms that “[t]he study of development as discourse is akin to Said’s study of the discourses on the Orient”.<sup>288</sup> In addition, this study operates to decentralize the discursive character of development as a postcolonial form of alterity. The proposal of this rupture is the investigation into local practices and culturally oriented civilization projects beyond the development discourses. Postcolonialism interacts with post-development and alternatives to development.<sup>289</sup>

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<sup>285</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014. p. 215.

<sup>286</sup> MCEWAN, Cheryl. Postcolonialism. In: DESAI, Vandana; POTTER, Robert B. (Org.). *The companion to development studies*. 3. ed. New York: Routledge, 2014. p. 217.

<sup>287</sup> ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995

<sup>288</sup> ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995, p. 6.

<sup>289</sup> In this regard: “In a post-political condition (Swyngedouw, 2007), they intend to re-politicize the debate on the much-needed socio-ecological transformation, affirming dissidence with the current world representations and searching for alternative ones. Along these lines, they are a critique of the current development hegemony (Escobar, 1995; Rist, 2008), meaning a critique of the homogenization of cultures because of the widespread adoption of particular technologies, and consumption and production models experienced in the Global North. The western development model is a mental construct adopted by (read imposed upon) the rest of the world that needs to be deconstructed (Latouche, 2009). Development might thus be seen as a toxic term to be rejected (Dearden, 2014), and therefore, ‘sustainable development’ an oxymoron”, KOTHARI, Ashish; DEMARIA, Federico; ACOSTA, Alberto. Buen vivir, degrowth and ecological swaraj: alternatives to sustainable development and the green economy. *Development*, v. 57, n. 3-4, p. 366, 2014. Also, the idea of *buen vivir* (*vivir bien* or *sumak kawsay*) appears as an alternative to development, incorporating and giving voice to the postcolonial grammar and their respective decolonial turn. See ACOSTA, Alberto. *O bem viver: uma oportunidade para imaginar outros mundos*. São Paulo: Editora Elefante, 2016.

As Sundhya Pahuja proposed the decolonization of international law,<sup>290</sup> I propose the decolonization of law and development. The influence of Max Weber's work is evident in the mainstream approaches of law and development,<sup>291</sup> as well as the theory of modernization,<sup>292</sup> whereas the approaches of New Institutional Economics (NIE) have set the tonic of this fieldwork since the 1990s.<sup>293</sup> In this mainstream movement, for example, we can draw attention to two problematic factors. First, the misconception of some theorists by using Weber's contributions as prescriptive when in fact they are descriptive,<sup>294</sup> transformed "into a simplistic causal relationship".<sup>295</sup> Second, the fact that the modernization theory, adopted by law and development, can be read as an integral part of coloniality, once "the conceptions of development and underdevelopment are new version of the rhetoric of modernity insofar as both concepts were invented to re-organize the temporal and spatial colonial differences".<sup>296</sup>

In order to vocalize postcolonialism in law and development, it is important to broaden its scope, implied in the inclusion of topics such as "concerns of power, culture, local institutions and pluralism and taking the field beyond the mere concern for the reform of legal systems and institutions pro economic development".<sup>297</sup> It means asking not only about what types of legal reforms are necessary for development, but more than

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<sup>290</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>291</sup> TRUBEK, David M. Max Weber on law and the rise of capitalism. *Wisconsin Law Review*, n. 3, p. 720-753, 1972.

<sup>292</sup> See, e.g., TRUBEK, David M.; GALANTER, Marc. Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States. *Wisconsin Law Review*, p. 1062-1103, 1974; DAVIS, Kevin E.; PRADO, Mariana Mota. Law, regulation, and development. In: CURRIE-ALDER, Bruce; KANBUR, Ravi; MALONE, David M.; MEDHORA, Rohinton. *International development: ideas, experience, and prospects*. Oxford: Oxford University Press, 2014, p. 206.

<sup>293</sup> See, e.g., DAVIS, Kevin E.; PRADO, Mariana Mota. Law, regulation, and development. In: CURRIE-ALDER, Bruce; KANBUR, Ravi; MALONE, David M.; MEDHORA, Rohinton. *International development: ideas, experience, and prospects*. Oxford: Oxford University Press, 2014. p. 204-220; GUIMARÃES, Patrícia Borba Vilar. Contribuições teóricas para o direito e desenvolvimento, *Texto para Discussão*, IPEA, n. 1824, p. 8, 2013.

<sup>294</sup> RODRÍGUEZ-GARAVITO, César. Remapping law and society in Latin America: visions and topics for a new legal cartography. In: RODRÍGUEZ-GARAVITO, César (Ed.). *Law and society in Latin America: a new map*. New York: Routledge, 2015, p. 3.

<sup>295</sup> RODRIGUEZ, José Rodrigo. Segurança jurídica e desenvolvimento. In: RODRIGUEZ, José Rodrigo (Org.). *Fragmentos para um dicionário crítico de direito e desenvolvimento*. São Paulo: Saraiva, 2011, p. 36-37.

<sup>296</sup> MIGNOLO, Walter D. Delinking: the rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality. *Cultural studies*, v. 21, n. 2-3, p. 472-473, 2007.

<sup>297</sup> FUCHS, Vanessa Boanada. Law and development: critiques from a decolonial perspective. *Working Paper Series, International Research Network on Interdependent Inequalities in Latin America*, Berlin, n. 53, p. 7, 2013.

that, to question what types of development are promoted by legal reforms and which social groups are beneficiaries of these reforms.<sup>298</sup> It implies inserting society *de facto* in the debate of law and development as Brian Tamanaha proposes.<sup>299</sup> Tamanaha also analyses the issue of legal pluralism in dialogue with postcolonial grammar. His approaches have strong sociological connotation and seek to relate the rule of law with broader aspects, in the social, political and economic field of society.<sup>300</sup> Currently, new readings pave the way for an indication of a field of law and development more focused on the local specificities of nations,<sup>301</sup> in which “the context matters”.<sup>302</sup> Here, the local narratives, from the Global South,<sup>303</sup> and post-development<sup>304</sup> influences can “tell the story of colonialism (and I suggest development) from its own perspective”.<sup>305</sup>

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<sup>298</sup> FUCHS, Vanessa Boanada. Law and development: critiques from a decolonial perspective. *Working Paper Series, International Research Network on Interdependent Inequalities in Latin America*, Berlin, n. 53, p. 7-8, 2013.

<sup>299</sup> See, e.g., TAMANAHA, Brian Z. The primacy of society and the failures of law and development. *Cornell International Law Journal*, v. 44, p. 209-248, 2011.

<sup>300</sup> GUIMARÃES, Patrícia Borba Vilar. Contribuições teóricas para o direito e desenvolvimento, *Texto para Discussão*, IPEA, n. 1824, p. 13, 2013.

<sup>301</sup> GUIMARÃES, Patrícia Borba Vilar. Contribuições teóricas para o direito e desenvolvimento, *Texto para Discussão*, IPEA, n. 1824, p. 14-15, 2013.

<sup>302</sup> TAMANAHA, Brian Z. The primacy of society and the failures of law and development. *Cornell International Law Journal*, v. 44, p. 209-248, 2011.

<sup>303</sup> See the Special Issue of *Law and Development Review* (v. 10, n. 2, 2017) devoted to law and development using the Global South Perspective.

<sup>304</sup> According to Mickelson, “[p]ost-development theory is perhaps the most visible example, although there are many others. Its premise is that orthodox understandings of development have done little to bring about prosperity in the developing world, and have instead contributed to the oppression and marginalization of large sectors of the population”. MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008, p. 277. See about post-development, e.g., ESCOBAR, Arturo. Imagining a post-development era? Critical thought, development and social movements. *Social text*, n. 31/32, p. 20-56, 1992; PIETERSE, Jan Nederveen. After post-development. *Third World Quarterly*, v. 21, n. 2, p. 175-191, 2000; ESCOBAR, Arturo. Más allá del desarrollo: postdesarrollo y transiciones hacia el pluriverso. *Revista de Antropología Social*, v. 21, p. 23-62, 2012; MARTINS, Paulo Henrique; SILVA, Marcos de Araújo; LIRA, Bruno Freira; LEÃO, Éder Lira de Souza. *Guía sobre post-desarrollo y nuevos horizontes utópicos*. Buenos Aires: Estudios Sociológicos Editora, 2014.

<sup>305</sup> FUCHS, Vanessa Boanada. Law and development: critiques from a decolonial perspective. *Working Paper Series, International Research Network on Interdependent Inequalities in Latin America*, Berlin, n. 53, p. 7-8, 2013.



#### 4. “ENCOUNTERS FROM BELOW”: SPECIFIC ENCOUNTERS BETWEEN INTERNATIONAL LAW, DEVELOPMENT AND POSTCOLONIALISM

The idea of observing reality from “below” is a specific way to deal with law and its “encounters”. Part of the literature uses the terms “international law and development”, “international development law” and “law and development” interchangeably, as for example Brian-Vincent Ikejiaku does.<sup>306</sup> In my view, and using the categories proposed by Liliana Lizarazo-Rodríguez,<sup>307</sup> I think it is important to distinguish the terms because they refer to different aspects of law and development phenomena. “Law and development” refers to a broad field of studies and practices; “international law and development” refers to the international aspect of law and development; and “international development law” refers specifically to the legal framework of the international aspect of law and development.

Additionally, it is important to understand the differences between global studies in law and development (law and development as a global phenomenon) and international law and development studies itself. There is, of course, occasional overlap between these two distinct fields. Global studies in law and development relates to the U.S. law and development movement and its deployment. It seek to understand how law interferes (or can assist) the processes of socio-economic development as it has specific research schedules according to their contexts (going from new institutionalism to experimentalism, for example). By contrast, studies in international law and development explore how a certain legal field – that of international law – faces the development processes at a global level. There is a focus on the institutionalization of development as an element of cohesion of international law.

In this chapter, I also propose a look from the margins, which means trying to see law and development from alternative perspectives and using geopolitical context. We can focus on the construction of *worlds* of law and development: we can observe the direct relations between two fields of practice and different studies or even the clash between them. Further, it is possible to examine how these fields shape, influence and

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<sup>306</sup> IKEJIAKU, Brian-Vincent. International law, the international development legal regime and developing countries. *Law and Development Review*, v. 7, n. 1, p. 131-163, 2014.

<sup>307</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 761-898, 2017.

structure each other (or not) in discursive terms. Using critical thinking, law and development may refer to heterodox approaches for observing the practice of law in the context of development, such as a Marxist approach. Also, but not only in isolation, it can describe the relations between law and development, with the use of anthropologically and sociologically influenced tools and concepts. In the specific case of studies influenced by postcolonialism, there are recurrent questions, such as studies that explore how resistance in the Third World form international law and development and how the universal discourse of development shapes the current ideological-institutional complex of international law. In this last case, the studies reveal postcolonial characteristics in international law, which is interesting in terms of contributions to the South Global context of legal research, particularly in law and development.

At this point, I present two substantial encounters, a more generic one and a more specific one. First, I propose to look at the “encounters” between international law, development and postcolonial studies. I recur to critical approaches to international law to understand such relations and link it to the literature on international law and development studies, mainly Third World Approaches to International Law (TWAIL). Second, I propose the idea of postcolonial approaches to international law and development. I explain that postcolonial approaches to international law and development is a set of studies that use postcolonialism and have a postcolonial “voice” to theorize international law and development.

#### 4.1.CRITICAL APPROACHES TO INTERNATIONAL LAW

As I explained earlier, this thesis observes the relationships – or “encounters” – between international law, development, and postcolonialism. International law is an important arena for the development project and to postcolonial critique. Gregory Shaffer gives an interesting perspective to understand what “international law” may be:

Since the rise of sovereign states in the seventeenth century associated conventionally with the Treaty of Westphalia, law has been associated with state law and national legal systems. [...] Law helped to provide legitimacy to governing institutions, including by constructing a sense of national identity. [...] Public international law was based on and came into existence with the creation of states, governing their relations and providing for their mutual recognition. The central aim, in the words of Peter Malanczuk (1997:3) was to provide ‘legal regulation of the international intercourse of states’. Private

international law concurrently provides rules and standards to govern situations in which more than one state asserts jurisdiction over a transaction or event involving nonstate actors. Thus, the concepts of public and private *international law* are both state-centric, addressing relations between nation-states and between national legal systems, as reflected in the term ‘international’.<sup>308</sup>

I propose a close look to international law because it is mainly in this sphere that we can analyze issues related to postcolonialism (imperialism, global identities, nation-states, sovereignty, etc.), as well as because the academic production of this field is quite profitable given the global scale in which it occurs. I *see* international law from its mainstream approaches, as explained by Shaffer above,<sup>309</sup> and bring the possibility of looking at it through other expressions.<sup>310</sup> Critical ways of thinking relate to several ways to oppose mainstream thought,<sup>311</sup> such as a Critical Legal Studies-inspired approach which “seeks to unveil the politics and power implications of traditional legal rules, principles, institutions and thought [...] in legal education and scholarship”;<sup>312</sup> a sociologically-inclined approach, which “seeks amongst other things to examine the shaping of law and institutions through under-examined mechanisms such as social mobilization”;<sup>313</sup> and a governance-oriented approach, which “examines the limits of

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<sup>308</sup> SHAFFER, Gregory. Transnational legal ordering and state change. In: SHAFFER, Gregory (Ed.). *Transnational legal ordering and state change*. Cambridge: Cambridge University Press, 2013, p. 3.

<sup>309</sup> See, e.g., JANIS, Mark W. *An introduction to international law*. New York: Aspen Publishers, 2003, p. 1-8; SLOMANSON, William R. *Fundamental perspectives on international law*. 5. ed. Belmont: Thomson Wadsworth, 2007, p. 3-10; SHAFFER, Gregory. Transnational legal ordering and state change. In: SHAFFER, Gregory (Ed.). *Transnational legal ordering and state change*. Cambridge: Cambridge University Press, 2013, p. 3.

<sup>310</sup> I am considering that “international law” constitutes all legal phenomena on a global scale, so it is a multi-dimensional construction. Besides the established international law, I am highlighting new concepts of “global” and “transnational law”. In the words of Shaffer: “[u]nder each of these two overlapping concepts, law is being denationalized, to varying degrees, because the legal norms may not be formally part of international or national law as conventionally construed”, SHAFFER, Gregory (Ed.). *Transnational legal ordering and state change*. Cambridge: Cambridge University Press, 2013, p. 3. See more about new perspectives on international law and its relation with national law, NIJMAN, Janne; NOLLKAEMPER, André (Ed.). *New perspectives on the divide between national and international law*. Oxford: Oxford University Press, 2007; HALPIN, Andrew; ROEBEN, Volker. Introduction. In: HALPIN, Andrew; ROEBEN, Volker (Ed.). *Theorising the global legal order*. Portland: Hart Publishing, 2009.

<sup>311</sup> KINCHELOE, Joe L.; MCLAREN, Peter. Rethinking critical theory and qualitative research. In: DENZIN, Norman K.; LINCOLN, Yvonna S. (Ed.). *Handbook of qualitative research*. 2. ed. Thousand Oaks, London, New Delhi: Sage Publications, 2000. p. 279-314.

<sup>312</sup> DE BÚRCA, Gráinne; KILPATRICK, Claire; SCOTT, Joanne. Editors’ preface. In: DE BÚRCA, Gráinne; KILPATRICK, Claire; SCOTT, Joanne. *Critical legal perspectives on global governance*. Oxford, Portland: Hart Publishing, 2014, p. vi.

<sup>313</sup> DE BÚRCA, Gráinne; KILPATRICK, Claire; SCOTT, Joanne. Editors’ preface. In: DE BÚRCA, Gráinne; KILPATRICK, Claire; SCOTT, Joanne. *Critical legal perspectives on global governance*. Oxford, Portland: Hart Publishing, 2014, p. vi.

conventional legal tools in the face of complexities of transnationalism and globalization”.<sup>314</sup> The phenomenon of critical approaches in international law, in its turn, can be referred to several theoretical movements along the recent history of law that share in common the critique of liberal legal doctrine and the belief that politics and law are virtually inseparable.<sup>315</sup> Critical thinking in international law, according to Nigel Purvis,

[...] has demonstrated the incoherence of the liberal ethical basis of international law, international law’s constraining intellectual structure, the indeterminacy of international legal argument, and the self-validating nature of international law’s authority.<sup>316</sup>

In the scope of international law, I utilize as reference the influence of the “interpretive turn in the humanities, as well as the tenets of American Legal Realism, scholarship in critical, Marxist, and constructivist traditions”,<sup>317</sup> the appearance of the Critical Legal Studies in U.S. academy<sup>318</sup> and its echoes on several groups of internationalists who have started qualifying themselves as critical international lawyers:

Although originally thriving in the United States, this ‘new stream’ quickly disseminated around the world and many ‘Schools’ became breeding grounds for critical thinking in the area of international law, especially in the Anglo-Saxon world. This new postmodern critique of the abovementioned mainstream conception of international law rapidly turned too diverse and too diffuse for it to be the object of a comprehensive account within the framework

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<sup>314</sup> DE BÚRCA, Gráinne; KILPATRICK, Claire; SCOTT, Joanne. Editors’ preface. In: DE BÚRCA, Gráinne; KILPATRICK, Claire; SCOTT, Joanne. *Critical legal perspectives on global governance*. Oxford, Portland: Hart Publishing, 2014, p. vi.

<sup>315</sup> See, e.g., CARTY, Anthony. Critical international law: recent trends in the theory of international law. *European Journal of International Law*, v. 2, n.1, p. 66-96, 1991; KENNEDY, David; TENNANT, Chris. New approaches to international law: a bibliography. *Harvard International Law Journal*, v. 35, n. 2, p. 417-460, 1994; MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008. p. 262-290; TREVIÑO, A. Javier. *The sociology of law: classical and contemporary perspectives*. New Jersey: Transaction Publishers, 2010, p. 391-414; D’ASPREMONT, Jean. *Formalism and the sources of international law: a theory of the ascertainment of legal rules*. Oxford: Oxford University Press, 2011, p. 83-117; SINGH, Prabhakar; MAYER, Benoît (Eds.). *Critical International Law: postrealism, postcolonialism, and transnationalism*. Oxford: Oxford University Press, 2014; SANCHEZ BADIN, Michelle Ratton; MOROSINI, Fabio Costa; CAPELLA GIANNATTASIO, Arthur Roberto. Conseguimos pensar em narrativas críticas do direito internacional no Sul Global? *Revista de Direito Internacional*, v. 15, n. 1, p. 3-5, 2018.

<sup>316</sup> PURVIS, Nigel. Critical legal studies in public international law. *Harvard International Law Journal*, v. 32, n. 1, p. 127, 1991.

<sup>317</sup> KINGSBURY, Benedict. The international legal order. In: TUSHNET, Mark; CANE, Peter (Ed.). *The Oxford Handbook of Legal Studies*. Oxford: Oxford University Press, 2005. p. 287-288.

<sup>318</sup> See especially, UNGER, Roberto Mangabeira. The critical legal studies movement. *Harvard Law Review*, Cambridge, v. 96, n. 3, p. 561-675, 1983.

of this book. Furthermore, putting it into a single box would be misleading and at loggerheads with the essence of that critique. Indeed, it is not at all a self-conscious, separate, and unified movement, that general legal theory. While it certainly is indebted to this stream of thinking – in particular the Frankfurt School – this critique grew independently from the authors of the critical legal studies movement. Moreover, it manifested itself in very different forms. Some of these theories have embraced the cause of groups or interests not represented in traditional doctrines, as illustrated by the feminist and Third World critiques of mainstream scholarship.<sup>319</sup>

According to Anne Orford and Florian Hoffmann categories,<sup>320</sup> the main critical approaches to international law surround New Approaches to International Law (NAIL) and Third World Approaches to International Law (TWAIL):

[...] a new genre of critical scholarship that emerged in the post-Cold War period began to enliven and provoke impassioned debates about the proper relation between theory and practice in international law. A series of ground-breaking texts were published in English in the late 1980s and early 1990s, giving a new energy to theoretical work in the field. They included *The Decay of International Law* by Anthony Carty, *International Legal Structures* by David Kennedy, *From Apology to Utopia* by Martti Koskenniemi, *Eunomia* by Philip Allott, 'Feminist Approaches to International Law' by Hilary Charlesworth, Christine Chinkin, and Shelley Wright, and *International Law and World Order* by BS Chimni. Each of those texts registered a disenchantment with contemporary representations or self-understandings of international law, and a willingness to draw overtly on ideas and influences from 'outside' the field as a means for disciplinary renewal and innovation. [...] They inspired a new generation of scholars and scholarship overtly concerned with critically theorizing about international law with a view to its transformation.<sup>321</sup>

#### 4.1.1. *New Approaches to International Law (NAIL)*

In the first place, the group of *New Approaches to International Law* (NAIL) establishes institutional channels of interlocution between different internationalists around the U.S. academy.<sup>322</sup> Second, the *historiographical turn*, now commanded by the

<sup>319</sup> D'ASPREMONT, Jean. *Formalism and the sources of international law: a theory of the ascertainment of legal rules*. Oxford: Oxford University Press, 2011, p. 111.

<sup>320</sup> ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015.

<sup>321</sup> ORFORD, Anne; HOFFMANN, Florian. Introduction: theorizing international law. In: ORFORD, Anne; HOFFMANN, Florian (Ed.). *The Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2015. p. 6-7.

<sup>322</sup> See, e.g., CARTY, Anthony. Critical international law: recent trends in the theory of international law. *European Journal of International Law*, v. 2, n.1, p. 66-96, 1991; KENNEDY, David; TENNANT, Chris. New approaches to international law: a bibliography. *Harvard International Law Journal*, v. 35, n. 2, p. 417-460, 1994.

European scholars, presents the centrality of history in order to think international law critically.<sup>323</sup> Third, scholars from the Global South established the movement of the *Third World Approaches to International Law* (TWAIL), in which the colonial and postcolonial moments are highlighted.<sup>324</sup> Lastly, a movement of pulverization and interlocution between these movements and approaches that are gaining new analytical elements forms, mainly, feminism, the racial critical theory and postcolonialism can now be seen.<sup>325</sup>

Such categories have pedagogical purposes, as they do not represent the plurality and interconnection between critical approaches to international law. NAIL (New Approaches to International Law), commanded by David Kennedy, have a strong influence of the historiographical turn presented by the paradigmatic studies of Marti Koskenniemi. If we take the example of the Latin American production inside this panorama, Liliana Obregón works especially with historiographical perspective to international law; and Luis Eslava proposes anthropological perspectives to international law in dialogue with postcolonialism.<sup>326</sup>

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<sup>323</sup> See, e.g., KOSKENNIEMI, Marti. *The gentle civilizer of nations: the rise and fall of international law 1870–1960*. Cambridge: Cambridge University Press, 2001; KOSKENNIEMI, Marti. *From apology to utopia: the structure of international legal argument*. Cambridge: Cambridge University Press, 2006; CRAVEN, Matthew; FITZMAURICE, Malgosia; VOGIATZI, Maria (Ed.). *Time, history and international law*. Leiden, Boston: Martinus Nijhoff Publishers, 2007.

<sup>324</sup> See, e.g., ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006; CHIMNI, Bhupinder S. Third World Approaches to International Law: a manifesto. *International Community Law Review*, Leiden, v. 8, p. 3-27, 2006; ANGHIE, Antony. Towards a postcolonial international law. In: SINGH, Prabhakar; MAYER, Benoît (Eds.). *Critical International Law: postrealism, postcolonialism, and transnationalism*. Oxford: Oxford University Press, 2014. p. 123-142.

<sup>325</sup> See, e.g., OTTO, Diane (Ed.). *Queering International Law*. Abingdon, New York: Routledge, 2018.

<sup>326</sup> KENNEDY, David; TENNANT, Chris. New approaches to international law: a bibliography. *Harvard International Law Journal*, v. 35, n. 2, p. 417-460, 1994; OBREGÓN, Liliana. Between civilisation and barbarism: Creole interventions in international law. *Third World Quarterly*, v. 27, n. 5, p. 815-832, 2006; KOSKENNIEMI, Marti. *The gentle civilizer of nations: the rise and fall of international law 1870–1960*. Cambridge: Cambridge University Press, 2001; ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015; ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

#### 4.1.2. *Third World Approaches to International Law (TWAIL)*

Postcolonialism brings the commitment of producing knowledge from the perspective of the colonized.<sup>327</sup> Critical approaches to international law highlight how the colonial past has interfered in the design of international law.<sup>328</sup> Interrelated, postcolonialism and international law are capable of subverting certain aspects of international law taken as given. A set of postcolonial concerns is located as a theoretical framework in studies linked to the TWAIL movement.<sup>329</sup> As we see above, Lizarazo-Rodríguez considers TWAIL one of the alternatives approaches to law and development.<sup>330</sup> I focus on TWAIL – which “offers both theories of, and methodologies for, analysing international law and institutions”<sup>331</sup> – to explain its particularities and to present a more specific set of studies that I call postcolonial approaches to international law and development.

Third World Approaches to International Law (TWAIL), a critical perspective on international law and policy that has gained prominence in recent years, represents a scholarly account of the multifaceted and complex Third World engagement with international law. Through the work of scholars in a number of different countries, TWAIL problematises and contests the dominant, historically Eurocentric accounts of the origin of international law and its claims of universality, justice and equity. TWAIL scholars draw from a number of different disciplines and represent a diverse range of theoretical leanings - postcolonial, Marxist, post-structuralist and feminist, to name only a few. What these scholars share is the political, ethical and academic commitment to look at the history, structure and processes of international law and institutions from a particular standpoint: that of the peoples of the Third World.<sup>332</sup>

<sup>327</sup> See PRAKASH, Gyan. Subaltern studies as postcolonial criticism. *The American Historical Review*, vol. 99, no. 5, p. 1475-1490, 1994.

<sup>328</sup> ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006.

<sup>329</sup> See, e.g., ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006; GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, n. 119-124, v. 1, p. 49-50, 2013; MANTELLI, Gabriel Antonio Silveira; BADIN, Michelle Ratton Sanchez. Repensando o direito internacional a partir dos estudos pós-coloniais e decoloniais. *Prim@ Facie - Direito, História e Política*, v. 17, n. 34, p. 1-33, 2018.

<sup>330</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 824-831, 2017.

<sup>331</sup> OKAFOR, Obiora Chinedu. Critical Third World approaches to international law (TWAIL): theory, methodology, or both? *International Community Law Review*, v. 10, n.4, p. 377, 2008.

<sup>332</sup> MICKELSON, Karin; ODUMOSU, Ibironke; PARMAR, Pooja. Situating Third World Approaches to International Law (TWAIL): inspirations, challenges and possibilities. *International Community Law Review*, v. 10, n. 4, p. 351, 2008.

James Gathii and Arnulf Becker Lorca explain some differences between these two generations:

An example of a first generation TWAIL approach is contributionism. Contributionism, which pervaded most of the writing from the non-West on International law particularly in the immediate post-colonial period, is premised on a model of inter-civilizational participation in the process of crafting genuinely universal norms. Contributionism overstates the participation by diverse constituencies in the creation of global norms, and understates the biases and blind spots that evidence the interests that prevail at crucial stages of implementation of international legal norms. While contributionism has not been abandoned, contemporary TWAIL approaches are likely to also investigate, selectively embrace, and combine the egalitarian values of Third World and Western international legal, ethical and political norms, rather than relying on dominant narratives that reinforce the hierarchical or narrow aims of either. [...] Contemporary TWAIL approaches have therefore sought to expand or open up new conceptual spaces for international legal scholarship and praxis not by debunking certain contemporary international law norms for a newer, purer, truthful post-imperial international law, but rather a kind of international legal scholarship that takes international legal history seriously particularly in terms of the relations between formerly colonial countries and their colonial overlords. Such a process is a necessarily 'subversive and messy task' that simultaneously inhabits both its imperial legacy of colonialism and its post-imperial guarantees of sovereign equality and self-determination.<sup>333</sup>

Writing history, for the first TWAIL generation – a generation that faced the challenge of becoming international lawyers in a rather hostile professional environment, for whom acquiring sovereignty and self-determination were hard-fought victories – was not only a way to deal with the trauma of colonialism by carving out an independent position within the international legal tradition, but also a first step in a legal argument to either demand changes or utterly reject some of the rules of international law under which newly independent States would be governed. To a second generation of TWAIL academics, colonialism seemed too distant, imperialism too close, while memories of the struggle for self-determination had faded away.<sup>334</sup>

In relation to the location of these contributions in critical studies in international law, George Galindo states that the TWAIL have angered sympathizers not only in the so-called Third World, but also among authors affiliated to critical currents of international law, such as the critical legal studies, feminism, queer, and race theories.<sup>335</sup> James Gathii endorses this statement:

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<sup>333</sup> GATHII, James Thuo. TWAIL: a brief history of its origins, its decentralized network, and a tentative bibliography. *Trade, Law and Development*, v. 3, n. 1, p. 39-40, 2011.

<sup>334</sup> LORCA, Arnulf Becker. Eurocentrism in the history of international law. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 1050.

<sup>335</sup> GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Belo Horizonte, n. 119-124, v. 1, p. 47-48, 2013.



[...] a central project of TWAIL is to challenge the hegemony of the dominant narratives of international law, in large part by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade, etc. – and in inter-disciplinary ways – social, theoretical, epistemological, ontological and so on. The approaches within TWAIL include critical, feminist, post-modern, Lat-Crit Theory (Latina and Latina Critical Theory Inc.), post-colonial theory, literary theory, modernist, Marxist, critical race theory and so on.<sup>336</sup>

In terms of objectives, Makau Mutua elects three: first, to deconstruct the uses of international law that subject the non-European (Global South) to the European (Global North); second, to propose legal alternatives of international governance; and third, to eradicate the “underdevelopment” of the Third World.<sup>337</sup> With respect to post-colonialism, the author calls to attention the civilizing ideology present in international law and to how this discourse is also present in what he calls the crusade of human rights.<sup>338</sup> What a critical vision of international law does, in this theme, according to Mutua, is to assume the moral equity of cultures and reject the legal transplants without criteria.<sup>339</sup>

Sundhya Pahuja calls for the postcolonial condition of international law.<sup>340</sup> Within the interaction between international law and imperialism, according to her, there would be two ideas that do not dialogue. On one hand, the idea that international law as a “cloak of legality” thrown over colonization that, in a way, distorts the real liberating and progressive spirit of international law. On the other, there is the idea that international law is fundamentally a tool of imperialism. However, for Pahuja, there is a condition (paradox) that exists in this field of law that is at the same time a structure of power and a form of opposition imparted into it, the historical context of its implementation in a global scale, the colonization.<sup>341</sup>

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<sup>336</sup> GATHII, James Thuo. TWAIL: a brief history of its origins, its decentralized network, and a tentative bibliography. *Trade, Law and Development*, v. 3, n. 1, p. 37, 2011.

<sup>337</sup> MUTUA, Makau. What is TWAIL? *Proceedings of the ASIL Annual Meeting*, v. 94, p. 31-32, 2000.

<sup>338</sup> MUTUA, Makau. What is TWAIL? *Proceedings of the ASIL Annual Meeting*, v. 94, p. 36, 2000.

<sup>339</sup> MUTUA, Makau. What is TWAIL? *Proceedings of the ASIL Annual Meeting*, v. 94, p. 36, 2000.

<sup>340</sup> PAHUJA, Sundhya. The postcoloniality of international law. *Harvard International Law Journal*, v. 46, n. 2, p. 459-470, 2005.

<sup>341</sup> PAHUJA, Sundhya. The postcoloniality of international law. *Harvard International Law Journal*, v. 46, n. 2, p. 460, 2005.

#### 4.2.POSTCOLONIAL APPROACHES TO INTERNATIONAL LAW AND DEVELOPMENT

In chapter three, I presented general intersections between international law, development and postcolonialism. We can decolonize the global field of law and development, which means proposing an opening gesture to the use of local knowledge, contextual methodologies and epistemic disobedience.<sup>342</sup> In the last section, I explored critical approaches to international law in order to introduce a body of studies that draws on postcolonial studies. Third World Approaches to International Law (TWAIL), in fact, reveals imperialist and Eurocentric characters of international law. In this section, I argue for a specific intersection between international law, development and postcolonialism, which I call *postcolonial approaches to international law and development*.

Karin Mickelson explains that “despite the lack of a body of international law scholarship that could be labelled as specifically ‘post-colonial’, post-colonial theory is one of the strands that has informed the work of TWAIL”.<sup>343</sup> In fact, postcolonial approaches to international law, as a whole, are the perspectives and studies that use postcolonial studies to think about international law. As they are part of a broader body of studies, postcolonial approaches to international law are commonly referred as TWAIL. My argument, although, is quite different. As I am looking *from* law and development,<sup>344</sup> I frame a set of studies that are mainly influenced by postcolonial studies that deal with the encounters of international law and development.

In this section, we will explore my main argument: the existence of an even more specialized field in understanding the phenomenon of international law and development through postcolonialism. The importance of understanding this set of studies in a

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<sup>342</sup> If we think of Lizarazo-Rodríguez (2017) genealogy, there would be much similarity between what proposes sociological approaches to law and development with this “decolonized” interface of law and development.

<sup>343</sup> MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008, p. 273.

<sup>344</sup> As previously mentioned, law and development constitutes a broad field of study and practice. Part of studies in law and development analyzes national aspects, as the genealogy proposed by Lizarazo-Rodríguez points out. These studies contribute to understanding the phenomenon of law and development from the institutions and internal dynamics of the countries that face the development project. Beyond this field of study, there is work that focus on the global scope of development, especially in international law and in its structures. Finally, we can also see that there is a particular field of study, postcolonialism, which deals with postcolonial processes in developing countries and which has addressed important issues in legal studies.

specialized way can be explained by four reasons. First, there is a pedagogical importance to systematize the field of study so that it can be replicated in didactic materials and used as teaching content. Second, it is important to think of postcolonial studies of international law and development as a distinct field of study to create a research agenda and a global network of researchers that is minimally aligned in terms of common categories, research objects, and methodologies. Third, the opportunity to focus on the international analysis of law and development through the use of a postcolonial view is important because it reveals socio-legal dynamics that lie outside the "national" studies of law and development.<sup>345</sup> Fourth, I consider it important to distinguish postcolonial studies of international law and development to make clear how this set of studies differs from its broader field, the TWAIL.<sup>346</sup>

Postcolonial approaches to international law and development explores the phenomenon of international law and development, observing it both from a contextual perspective of the development project and from the use of postcolonial categories of international law. If we think of Lizarazo-Rodríguez's categorization,<sup>347</sup> postcolonial approaches to international law and development would be a subcategory of studies within the genus TWAIL. In the following sections, I consider especially the contributions of Balakrishna Rajagopal,<sup>348</sup> Sundhya Pahuja<sup>349</sup> and Luis Eslava.<sup>350</sup> Besides them, other important scholars would be, using Eslava's categorization and

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<sup>345</sup> Thus, for example, the literature on postcolonial approaches to international law and development reveals how international law and development are two halves of a major global project, while the national approach to law and development - and others analyzed of chapter 1 - focuses on local understanding of legal development issues, improvement of institutional frameworks, analysis of other specific issues (human rights, conflict, etc.).

<sup>346</sup> TWAIL analyze the integral character of international law - with the use of post-colonial, third-world tooling, and also with the use of Marxism, feminism, poststructuralism. Thus, TWAIL has a broad agenda and questions all categories of international law: its history of colonization, imperialism and development project; their exclusions in the field of classes, races and identities; its legal categories, such as nation-state, human rights, etc. The postcolonial approaches to international law and development have a more specialized agenda of research and studies focused on the intertwining of the global development project with the use of international law, and there is a preponderance of postcolonialism as a theoretical framework to explain such phenomena.

<sup>347</sup> LIZARAZO-RODRÍGUEZ, Liliana. Mapping law and development. *Indonesian Journal of International & Comparative Law*, v. 4, n. 4, p. 761-898, 2017.

<sup>348</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003.

<sup>349</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>350</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

bibliography in the same sense, “Donatella Alessandrini,<sup>351</sup> Antony Anghie,<sup>352</sup> Jennifer Beard,<sup>353</sup> Hilary Charlesworth,<sup>354</sup> Anne Orford,<sup>355</sup> [...] Alvaro Santos,<sup>356</sup> Chantal Thomas<sup>357</sup> and David Trubek”.<sup>358,359</sup> In my research, I found studies from Joel Ngugi<sup>360</sup> and Gerardo Munarriz<sup>361</sup> that I believe also represent postcolonial approaches to international law and development. Although Luis Eslava does not use the category of postcolonial approaches to international law and development, he frames a body of studies that, in my view, corresponds to the same set of works I am talking about:

This profound relation between international law and the development project has been explored in a body of critical international legal scholarship that has systematically challenged common readings of international law as a purely non-contingent normative body or as simply the outcome of the will of states. These scholars [...] have engaged in an exploration of international law in terms of the historical and material relations from which it emerges and which it generates. In particular, these authors have studied international law in terms of its relation with the expansion of European empires and their ontological structures, economies and cultural and legal frames through the colonial process and the daily disciplines that this process unleashed, as well as the global spread of the nation-state form, the expansion of the international institutional realm, especially from the second half of the twentieth century onwards, and the channelling of these historical events and their problematic

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<sup>351</sup> ALESSANDRINI, Donatella. *Developing countries and the multilateral trade regime: the failure and promise of the WTO's development mission*. London: Bloomsbury Publishing, 2010.

<sup>352</sup> ANGHIE, Antony. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2005.

<sup>353</sup> BEARD, Jennifer. *The political economy of desire: international law, development and the nation state*. New York: Routledge-Cavendish, 2007.

<sup>354</sup> CHARLESWORTH, Hilary. The public/private distinction and the right to development in international law. *Australian Yearbook of International Law*, v. 12, p. 190-204, 1988.

<sup>355</sup> ORFORD, Anne. Locating the international: military and monetary interventions after the Cold War. *Harvard International Law Journal*, v. 38, n. 2, p. 443-486, 1997.

<sup>356</sup> TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006.

<sup>357</sup> THOMAS, Chantal. Max Weber, Talcott Parsons and the sociology of legal reform: a reassessment with implications for law and development. *Minnesota Journal of International Law*, v. 15, n. 2, p. 383-424, 2006.

<sup>358</sup> TRUBEK, David M; SANTOS, Alvaro (Ed.). *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press, 2006.

<sup>359</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 26.

<sup>360</sup> NGUGI, Joel. The decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa. *Wisconsin International Law Journal*, v. 20, n. 2, p. 297-352, 2002.

<sup>361</sup> MUNARRIZ, Gerardo J. Rhetoric and reality: The World Bank development policies, mining corporations, and indigenous communities in Latin America. *International Community Law Review*, v. 10, n. 4, p. 431-444, 2008.

political and economic effects through contemporary international normative discourses, in particular the idea of development.<sup>362</sup>

In fact, postcolonial approaches to international law and development refer to a set of critical international legal scholarship that challenges common readings of international law.

Based on this understanding of the reciprocal relation between international law and development, these scholars have generated readings that attempt to overcome the usual assumption that these two fields encounter each other only through international norms or institutions dedicated to the promotion of international development. They have also shown that international programmes supported by international institutions or through international cooperation agreements involving legal related reforms in Third World nations are far from being the only places in which international law and the development project cross paths. These two most common ways of understanding the relation between international law and development promote the idea that the encountering of these fields can be either contained within specific normative subfields of *Public International Law* (i.e. *International Development Law* or *International Law of Cooperation*) or be neatly placed under the banner of *Law and Development*, a classic ‘Law and ...’ field which tends (at least in its orthodox formation) to base itself upon a narrow and pragmatic understanding of law (or the ‘rule of law’) in its effort to bring development to the South. Critical scholars, in contrast, conceive these ‘international’ encounters between international law and the development project as significant and yet sporadic instantiations of a far deeper set of uses and forces linking (international) law with a long and problematic tradition – a tradition that has used the ideas of civilization, modernity, progress and development to calibrate the (post)colonial world in terms of the developed North and its conditions of existence and reproduction.<sup>363</sup>

#### 4.2.1. *Main contributions to international law and development*

Here, I outline three main contributions from work that I call postcolonial approaches to international law and development. First, Balakrishnan Rajagopal proposes that resistance from Third World movements is an important element to understand the relations between international law and development.<sup>364</sup> Second, Sundhya Pahuja argues that development discourse is the main structure of contemporary international law, as

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<sup>362</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 26-27.

<sup>363</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 27-28.

<sup>364</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003.

both are directly connected.<sup>365</sup> Third, Luis Eslava proposes an ethnographic look at the encounters of international law and development which enables a closer understanding of the global and local everyday operation of international law in the context of developing countries.<sup>366</sup>

#### 4.2.1.1. Third World movements and resistance

The first main contribution of postcolonial approaches to international law and development is made by Balakrishnan Rajagopal with his 2003 book *International law from below: development, social movements and Third World Resistance*. Rajagopal's idea of observing international law "from below" is a response to the common readings of international law "from above", which means decentering the focus analyze from formal sources of international law to local Third World and transnational social movements resistance to the contemporary international legal order. Besides that, Rajagopal argues that development discourse has an important role in this framework:

This book chronicles the complex relationship between international law and the Third World, during the twentieth century. It does so by suggesting that it is impossible to obtain a full understanding of this complex relationship unless one factors in two phenomena: first, a focus on development discourse as the governing logic of the political, economic, and social life in the Third World; and second, an appreciation of the role of social movements in shaping the relationship between Third World resistance and international law.<sup>367</sup>

Rajagopal uses the concept of the Third World in the progressive political way that I presented on in second chapter. The relations between (international) law and development also have an important role to Rajagopal's work, not only because he is exploring this thematic but fundamentally because he proposes an alternative way of understanding such encounters.

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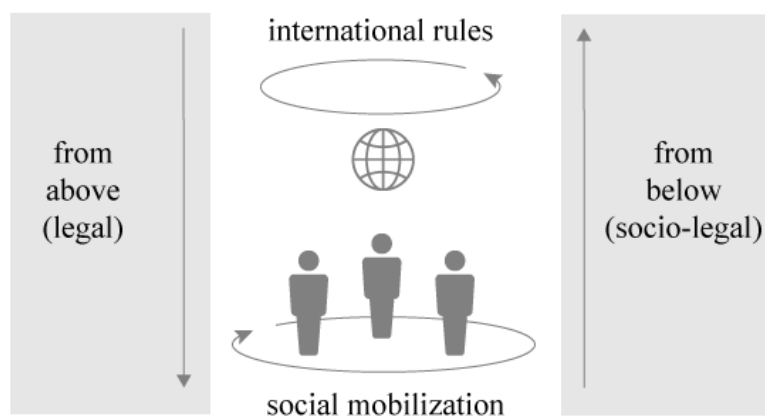
<sup>365</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>366</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015.

<sup>367</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 1.

One important contribution of Rajagopal's work is the idea of international law "from below". He is interested in centralizing social movements from the Global South in the institutional debates of international law, which, besides that, is closely related with the second wave of postcolonial studies (see, for example, the idea of bringing subaltern narratives to official spaces). It is also one characteristic that distinguishes his work from other traditional legal studies. While international law is typically analyzed "from above", which means focusing in legal and official documents, sources and treaties, Rajagopal calls our attention to influences on international law "from below" (see Figure 6). Then, his claims confront traditional narratives of international law.

**FIGURE 6 - INTERNATIONAL LAW FROM ABOVE AND FROM BELOW**



Source: Own authorship based on Rajagopal (2003).

#### 4.2.1.2. Development discourse as international law

The second main contribution of postcolonial approaches to international law and development is made by Sundhya Pahuja with her 2011 book *Decolonising international law: development, economic growth and the politics of universality*.<sup>368</sup> Pahuja makes an

<sup>368</sup> I had the opportunity to publish a review of Pahuja's book on the Brazilian Journal of International Law (*Revista de Direito Internacional*). In this section, I borrow some ideas of that previously analysis. See MANTELLI, Gabriel Antonio Silveira. Quem tem medo do pós-colonial no direito internacional? Uma resenha de "Decolonising international law: development, economic growth and the politics of universality" de Sundhya Pahuja. *Revista de Direito Internacional*, v. 15, n. 2, p. 485-488, 2018.

interesting review of how development discourse is deeply connected with international law, especially after the end of the Second World War.

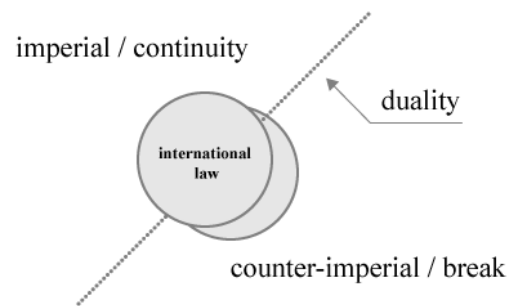
For workers and scholars in the ‘development’ field, the study reveals the way in which development as idealised history of the West has given coherence to the categories of international law by underpinning their claim to universality. So, whilst international law is usually understood as an institutional means to bring about development, in this book we will reverse that understating to show that the concept of development is a cornerstone supporting the edifice of contemporary international law. This idealized story-turned-concept produces a ‘community’ of states that is both hierarchical and inclusive. Its inclusivity takes the form of the promise of eventual equality, secured and measured by the ‘scientific’ concept of GDP. Because GDP secures the promise, economic growth stubbornly remains the secret beating heart of development, despite the numerous stakes driven through it. The misrecognition within international institutional engagements, of the discursive function of development and its relationship to international law, goes some way to explain the puzzling way in which over the last sixty years, the development project has expanded, deepened and failed to bring its promised ends all at the same time.<sup>369</sup>

Pahuja works with the conception of development as a discourse that legitimizes a new rationality in international law. The book argues that the end of the Second World War marked the establishment of a new global order, in which international law was greatly influenced by the hegemony of the U.S. and the universal discourse of development. From that point on, according to her, international law became an ideological-institutional complex which, at the same time, would be capable of encompassing both imperialism and resistance to it. And that, since then, international law would suffer both a rupture and a continuation of the dynamics of colonialism: the birth of new institutional structures that gave continuity to old imperialist practices. She calls this ambivalence as the *postcoloniality* of international law (see Figure 7).

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<sup>369</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 7-8.



**FIGURE 7 - POSTCOLONIALITY OF INTERNATIONAL LAW**

Source: Own authorship based on Pahuja (2011).

The main thesis of the work, in turn, revolves around the idea that decolonization, modern development and the universalization of international law would have produced a new form of power or, in Pahuja's words, a new ruling rationality. This new rationality would have captured the claims of the Third World and in that process would have undermined their radical potential. The main effect of this scenario would then be the emergence of a universally applied regulatory framework that has subsumed the creative promise of international law.

First, international law, understood as that body of rules, doctrines, institutions, and practices, has played a crucial, perhaps even a central, part in the evolution of the ideology and practice of development in the post-WWII period, and, conversely, that development ideology has been a driving force behind the expansion of international law. Development writers as well as international lawyers have, I suggest, overlooked this fact in general. Development writers have generally treated international law, if at all, as epiphenomenal – as mainstream development thinking treats law in general. International lawyers have, on the other hand, seen development as a specific set of socio-economic transformations occurring in the so-called newly independent states, for which international law must somehow adjust – for example, by acquiring a social character, in the words of Wolfgang Friedman – rather than understanding international law as deeply implicated in and intertwined with the very project of development. The new international law, with its focus on the status of individuals and a truly global community, was seen as constituting a clean epistemological break with the pre-war international law's subservience to power and ethnocentrism. With very few exceptions, the image of international law, according to its leading practitioners, is that of a predevelopment, pre-Third World, body of rules, doctrines, and institutions, that must somehow adapt to the new realities of development in the Third World. This image appears to be wrong because it is simplistic and ahistorical. Instead, the new international law was as much caught up in the discursive and ideological embrace of modernity, as the pre-war colonial international law, mainly through the institutions and practices of development which were invented after the war to control, manage, order, and reproduce social reality in the so-called Third World. The specific ways in which this complex dialectic emerged

between international law and development discourses, and the particular problems that it gave rise to, form a focus of my inquiry.<sup>370</sup>

In order to develop this thesis, Pahuja uses three cases: first, the decolonization movement that led to the formation of the developmental nation-state; second, the transformation of permanent sovereignty over natural resources into rules of protection for foreign investors, raising them to the category of subject of international law; and third, the transformation of the empire of international law into the internationalization of the rule of law as a development strategy. Through these three critical spheres – the nation, natural resources, and political economy – it is argued that the ancient civilizing mission of colonialism, then under the dual mandate of exploiting resources for the mutual benefit of the colony and the metropolis, ended, too, under the pretext of building a developed nation and international integration. “Decolonizing” international law, in this context, would aim to demarcate the duality of this right – its imperialist and emancipatory tendencies.

#### 4.2.1.3. Everyday life between global and local

The third main contribution of postcolonial approaches to international law and development is made by Luis Eslava with his 2015 book *Local space, global life: the everyday operation of international law and development*. According to Eslava,

the argument I advance in this book is that we, and the spaces surrounding us, are continually being constituted and reconstituted by international law through its marriage – in historical, ideological, economic and institutional terms – to the development project. The might of this encounter, I suggest, permeates our desires, the ends we aspire to and the means we use to attain such ends. The twin siblings of international law and the development project shape our territories, dreams and forms of action relentlessly. In my view, our failure to pay attention to their expansive and joint operation occludes much about how we inhabit the world and about the consequences of these modes of habitation.<sup>371</sup>

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<sup>370</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 27.

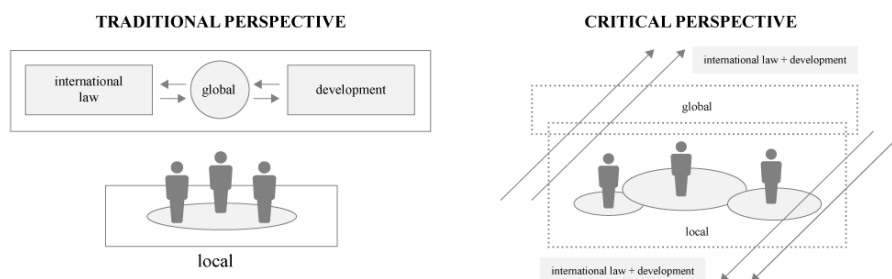
<sup>371</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015. p. xiii.

The book focuses particularly on recent urban transformations in Bogotá, Colombia. Eslava explores how, nowadays, international law and development operate and materialize at local jurisdictions, reconstituting urban spaces and influencing everyday life of urban populations, especially in the Global South.

In the language I employ throughout, these are the ‘sites’ (the norms, process, artefacts, spatial and subjective formations) in which we can observe ‘traces’ of the everyday operation of international law and the development project, particularly as they encounter each other in the local context, pulling local life in a particular international direction. At the same time, the practice of thinking outwards from these ‘sites’ makes it possible for us to perceive how the contradictions present in the current turn to localities are not simply transmitted and crystallized, but also negotiated through law and through all of those norms, processes, artefacts, spatial and subjective formations that law brings together in order to create a new local jurisdiction. Here law functions like a ‘tiny yet total ... knitted lace’.<sup>372</sup>

Eslava, like Rajagopal and Pahuja, proposes that we move from a traditional perspective to a critical one, in order to explore the relationship between international law and development. According to him, “local” and “global” spaces are traditionally observed as separate legal structures, where development norms appear isolated in the international sphere (see traditional perspective in Figure 7). In a critical view, “local” and “global” are now combined, and the binomial international law and development pervades all social relations, modifying structures and even languages and bodies (see critical perspective in Figure 8).

**FIGURE 8 - INTERNATIONAL LAW AND DEVELOPMENT OPERATION**



Source: Own authorship based on Eslava (2015).

<sup>372</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015. p. 19.

#### 4.2.2. *Main elements of postcolonial approaches to international law and development*

Although I am using several studies to frame postcolonial approaches to international law and development, critical studies outside legal studies have had an important influence on my effort to categorize these approaches using three “basic” elements of social sciences. Milton Santos, discussing spatiotemporal dynamics, specially took my attention with the idea of spatial and temporal production in the Third World:

We should remember that our interest here is the spatial analysis of the Third World, that is, a systematic study of spatial production in underdeveloped nations. However, as we also want to remain on a general footing, we will take some affirmations as a basis for discussion. a. The history of underdevelopment is intimately linked with the history of the international division of labor on a global level. In other words, the history of underdevelopment reproduces the history of capitalist accumulation. b. This history began in the late 15<sup>th</sup>, early 16<sup>th</sup> century (any more precise dating would be mere concession to the human love of historical milestones). This history is not over; it is renewed on a daily basis. c. This history is not purely economic, but also spatial, social, political, and cultural... The organization of space changes over time: it changes in accordance with the role each subunit of space performs in any one historical period. This role depends on the local arrangements permitted by techniques of an economic (production, consumption, distribution, transport, and communication), political, organizational, cultural, and/or ideological order. d. These techniques are variable, change over time, and apparently form a continuum. They keep the same name and same functions, but their efficiency is mutable.<sup>373</sup>

I argue that postcolonial approaches to international law and development have three main elements (or common markers) that enables the reader to frame them as such. In my view, there are at least three common markers of postcolonial approaches to international law and development, related to time, space and knowledge.

First, a historical-temporal element shows that postcolonial approaches to international law and development use colonialism and postcolonialism as important historical moments to understand such encounters. This element extends the chronological frontiers of international legal history allowing explanations of the legacies of power and oppression related to the past and present forms of development.

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<sup>373</sup> SANTOS, Milton. *Relações espaçotemporais no mundo subdesenvolvido. Spatiotemporal relations in the underdeveloped world* (1976). In: MOURA, Sabrina (Org.). *Panoramas do sul: leituras. Perspectivas para outras geografias*. São Paulo: Edições Sesc, 2015, p. 50.

Second, a geographical-spatial element presents that postcolonial international law authors use a more-dynamic understanding of spaces. Such diverse engagement with space enables a multidimensional analysis of international law and its effects at the global, transnational, regional, national and local levels. In summary, this element enables geopolitical and multidimensional approaches to international law and development.

And, third, an epistemological-conceptual element demonstrates that postcolonial international law authors have incorporated specific postcolonial-oriented approaches, related to confronting Eurocentrism and bringing subaltern voices to sciences, into the usual interactions of law and development to understand them. I argue that this element explains the alternative ways researches are being conducted to explain law and development phenomena. In summary, this element decentralizes legal and development discourses using postcolonialism.

#### 4.2.2.1. Time: historical-temporal element

Arnulf Lorca affirms that “[a] history of international law centered in the West can be narrow, dull, and ethnocentric”<sup>374</sup> and Tayyab Mahmud points out that

[t]he modern nation arises within the mapping order of modern History; the linear, progressive and Eurocentric history that became the hegemonic mode of experiencing time and being. History, while designating the nation-state as the agency that will realize the promise of modernity, remained mindful of the racial and colonial divide that fractured humanity.<sup>375</sup>

Postcolonial studies challenges the Eurocentric ways we produce and reproduce history<sup>376</sup> and postcolonial approaches to international law and development follows the

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<sup>374</sup> LORCA, Arnulf Becker. Eurocentrism in the history of international law. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 1035.

<sup>375</sup> MAHMUD, Tayyab. Geography and international law: towards a postcolonial mapping. *Santa Clara Journal of International Law*, v. 5, n. 2, p. 535, 2007.

<sup>376</sup> See, e.g., GUHA, Ranajit (Ed.). *Subaltern Studies I: writings on South Asian history & society*. New Delhi: Oxford University Press India, 1982; PRAKASH, Gyan. Subaltern studies as postcolonial criticism. *The American Historical Review*, vol. 99, no. 5, p. 1475-1490, 1994; CHAKRABARTY, Dipesh. *Provincializing Europe: postcolonial thought and historical difference*. Princeton: Princeton University Press, 2000; QUIJANO, Anibal. Coloniality and modernity/rationality. *Cultural studies*, v. 21, n. 2-3, p. 168-178, 2007.

same academic path. Taking this into consideration, the first element relates to the idea of time and history. Specifically, I try to highlight the way in which the history of international law is observed – and used – in postcolonial approaches to international law and development. My argument is that the history of international law is viewed taking into consideration colonial and postcolonial perspectives.<sup>377</sup> This postcolonial-oriented way of observing international law history opens space for analyzes of contestation, oppression and emancipation<sup>378</sup> and, as uses a historical dimension different than the normative one, it extends the chronological frontiers of international legal history.<sup>379</sup> This element defies these postcolonial approaches. It is opposed to the mainstream perspectives of international law and development that observe this relationship usually from the “contemporary” institutionalization of international law, that is, from the institutionalization of the United Nations and, in the case of the development project, aid programs.<sup>380</sup>

In mainstream approaches to international law and development, the prevailing narratives discuss how international law and development have a strong relation to the moment that the great powers, the winners of the Second World War, used the discourse of development and global engagement against poverty.<sup>381</sup> The inaugural address of the

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<sup>377</sup> See, e.g., ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006; CRAVEN, Matthew. Introduction: international law and its histories. In: CRAVEN, Matthew; FITZMAURICE, Malgosia; VOGIATZI, Maria (Ed.). *Time, history and international law*. Leiden, Boston: Martinus Nijhoff Publishers, 2007, p. 1-26; CRAVEN, Matthew. Colonialism and domination. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012. p. 862-889; LORCA, Arnulf Becker. Eurocentrism in the history of international law. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012. p. 1034-1057.

<sup>378</sup> ESLAVA, Luis; PAHUJA, Sundhya. Between resistance and reform: TWAIL and the universality of international law. *Trade, Law and Development*, v. 3, n. 1, p. 103-130, 2011.

<sup>379</sup> ANGHIE, Antony. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2005; ANGHIE, Antony; KOSKENNIEMI, Martti; ORFORD, Anne. *Imperialismo y derecho internacional: historia y legado*. Bogotá: Siglo del Hombre Editores, 2016.

<sup>380</sup> See mainstream approaches in this sense, SCHACHTER, Oscar. The evolving International law of development. *Columbia Journal of Transnational Law*, v. 15, n. 1, p. 1-16, 1976; FEUER, Guy; CASSAN, Hervé. *Droit international du développement*. Paris: Dalloz, 1985; FEUER, Guy. International development law: the establishment of a francophone school of thought. *The European Journal of Development Research*, v. 3, n. 2, p. 70-77, 1991; PAUL, James C. N. The United Nations and the creation of an international law of development. *Harvard International Law Journal*, v. 36, n. 2, p. 307-328, 1995; DE FEYTER, Koen. *World development law: sharing responsibility for development*. Oxford: Intersentia, 2001; AMARAL JÚNIOR, Alberto do (Org.). *Direito internacional e desenvolvimento*. Baureri: Editora Manole, 2005; SARKAR, Rumu. *International development law: rule of law, human rights, and global finance*. Oxford: Oxford University Press, 2009.

<sup>381</sup> ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995, p. 3-12; RIST, Gilbert. *The history of development: from*

US president Harry Truman from 1949 is one of the recurrent examples of historical moments representing this new context.<sup>382</sup> At the same time, international normative documents using the concept of development, especially from the United Nations, and then various global development policies in Third World countries, are also recurrent. In opposition to common readings, critical approaches to international law, in general, call the attention for the still-during process of the international law's characteristic of civilization project. Liliana Obregón, for example, states that:

From the 16<sup>th</sup> century to the early 19<sup>th</sup> century, the concepts of civilized/uncivilized (and other pairs such as progressive/backward, cultured/barbarian, modern/primitive, white/black) which categorized and stratified peoples, nations or States were key to the language of informal European imperialism. In the late 19<sup>th</sup> century, the language of civilization transitioned to formal imperialism sustained by international law.<sup>383</sup>

In the case of postcolonial approaches to international law and development, there is a direct influence of postcolonial studies on the temporal understanding of international law and development. The colonial regime is seen as central to thinking about the temporalities of international law and development, as well as to think of it in a post-colonial (i.e., ambivalent) way.<sup>384</sup>

Arturo Escobar took a critical approach to development,<sup>385</sup> as did Antony Anghie, who traced the history of international law to colonialism.<sup>386</sup> Anghie argues that far from being a secondary concern, colonialism has a profound impact in international law and in

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western origins to global faith. London, New York: Zed Books, 1997, p. 1-7; COLAÇO, Thais Luzia; DAMÁZIO, Eloise da Silveira Petter. *Novas perspectivas para a antropologia jurídica na América Latina: o direito e o pensamento decolonial*. Volume IV. Florianópolis: FUNJAB, 2012, p. 83-87; ACOSTA, Alberto. *O bem viver: uma oportunidade para imaginar outros mundos*. São Paulo: Editora Elefante, 2016, p. 43-54.

<sup>382</sup> See Appendix One, PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011.

<sup>383</sup> OBREGÓN, Liliana. The civilized and the uncivilized. In: FASSBENDER, Bardo; PETERS, Anne (Ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 937.

<sup>384</sup> PAHUJA, Sundhya. The postcoloniality of international law. *Harvard International Law Journal*, v. 46, n. 2, p. 459-470, 2005.

<sup>385</sup> See ESCOBAR, Arturo. Imagining a post-development era? Critical thought, development and social movements. *Social text*, n. 31/32, p. 20-56, 1992; ESCOBAR, Arturo. *Encountering development: the making and unmaking of the Third World*. Princeton: Princeton University Press, 1995.

<sup>386</sup> See ANGHIE, Antony. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2005; ANGHIE, Antony. The evolution of international law: colonial and postcolonial realities. *Third World Quarterly*, v. 27, n. 5, p. 739-753, 2006.

its principles to this very day.<sup>387</sup> Mahmud explains that Anghie questioned the genealogy of the concept of sovereignty as a product of the Peace of Westphalia (1648), relating to the colonial encounter as the beginning of this idea:

As Anghie demonstrates convincingly, the very origins of modern international law and the development of modern conceptions of sovereignty have little to do with the professed foundational concern of international law, i.e., management of relations between sovereign (read European) states; it was rather the facilitation of colonial domination of the racialized “others” that animated the enduring constructs.<sup>388</sup>

The “dynamic of difference” is one of the most important contributions in this set of studies. According to Anghie, international law served the European civilizational project, and today, development – and also human rights – inherit this feature when implemented in the countries of the Global South.

International lawyers over the centuries maintained this basic dichotomy between the civilized and the uncivilized, even while refining and elaborating their understanding of each of these terms. Having established this dichotomy, furthermore, jurists continually developed techniques for overcoming it by formulating legal doctrines directed towards civilizing the uncivilized world. I use the term ‘dynamic of difference’ to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society. My argument is that this dynamic animated the development of many of the central doctrines of international law -- most particularly, sovereignty doctrine. The dynamic is self-sustaining and indeed, as I shall argue, endless; each act of arrival reveals further horizons, each act of bridging further differences that international law must seek to overcome. It is in this way that international law extends itself horizontally, to encompass the entire globe and, once this is achieved, vertically, within each society, to ensure the emergence of civilized states.<sup>389</sup>

In Rajagopal’s work, colonialism is always observed as an element to understand the contemporary mechanisms of international law. Here are some examples:

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<sup>387</sup> MICKELSON, Karin. Critical approaches. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Ed.). *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2008, p. 273.

<sup>388</sup> MAHMUD, Tayyab. Geography and international law: towards a postcolonial mapping. *Santa Clara Journal of International Law*, v. 5, n. 2, p. 542-543, 2007.

<sup>389</sup> ANGHIE, Antony. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2005, p. 4.



Thus, the objective of developing the underdeveloped was firmly placed within the progressivist parameters of the project of modernity, deploying its main tools of science and technology. Before this, it had not been the international policy objective of the imperial and colonial powers to bring economic development to the natives. Indeed, the native was seen as incapable of development since he/she was seen as lazy, lacking in dynamism or impeded by the wrong cultural values. But the modernist desire to embrace the Other initiated during the early part of the century, coupled with the cosmopolitan desire to advance the uncivilized, particularized in the institution of the Mandates, started having a profound transformation on the relationship between the colonial powers and the colonized.<sup>390</sup>

The “eurocentric” history of international institutions – and therefore of international law – must be rewritten to reflect accurately the role played by various subaltern groups.<sup>391</sup>

[...] nineteenth-century positivism had used the language of civilization as an exclusionary device to keep non-western countries out of international law. Now the League Covenant introduced the language of civilization as a language of responsibility of the civilized (western powers) to ensure the humane transition of non-western peoples from tradition to the “strenuous conditions of the modern world.” This responsibility was the result of a conjunction between the economic desire to bring non-western territories within the world economic system, especially by avoiding disputes over access between the colonial powers, and humanitarianism towards the dark and uncivilized masses.<sup>392</sup>

It has been argued here that the Mandate system contributed significantly, at least in the following ways, to mediating the contentious relationship between colonialism and development during the inter-war years: first, it legitimized the ‘development and well-being of the natives’ as an international principle, which marked the move from exploitative colonialism (imperialism) to cooperative colonialism (development); second, it created a new science of law and administration which was a clear precursor to post WWII development studies; third, it invented new techniques for the self-regeneration of the bureaucratic sphere by constantly inventing gaps between facts and standards and inventing techniques to bridge that gap; fourth, it had a highly problematic relationship to the ‘local,’ represented by the facts brought forth through petitions, which had the result of deradicalizing the content of those petitions. It is quite possible that this has remained true of all petition processes in international law so far.<sup>393</sup>

In fact, far from being untainted by colonialism, human rights discourse retains many elements which are directly descended from colonial ideology and

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<sup>390</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 29.

<sup>391</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 45.

<sup>392</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 56.

<sup>393</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 71

practices. If this is indeed the case, constituting human-rights discourse as the sole discourse of resistance may run the risk of reproducing many of the assumptions and biases of colonial governance. One should then ask if it makes sense to allow human rights to be constituted as the only language of resistance. As examples of the colonial origins of human-rights discourse, I proffer two: the doctrine of emergency, and the rule prohibiting torture.<sup>394</sup>

Colonialism and the colonial regime are used to understand international law and development. Pahuja, when analyzing the institutionalization of international law, also returns to colonialism:

Although it has older roots, the rationality I am tracking was inaugurated in its current form with the contemporary institutions of international law at the end of the Second World War. Its general contours are visible throughout the history of international law since that time. In diagnosing the inauguration of this specific rationality, I differ from both of the most prominent positions on the question of decolonisation and the inception of the current international legal order. On one hand, the mainstream of the international community celebrates this period in retrospect as the moment when everything changed. It is seen as the end of overt imperialism and a purely European international law, a key or originating moment of the 'real' or 'true' universalisation of the international community, and the incipient reflection of that in international law. On the other hand, many Third World scholars would question this assertion and argue that in this shift little, if anything, changed. According to their argument, a retrospective analysis requires that we see imperialism as continuing beyond this period under another name.

In contrast to both positions, I suggest that this was not a moment of either/or but rather a moment of both/and. That is, international law was neither still imperial nor newly liberatory – and yet it was both. There was both a continuity with, and a break from, the overtly imperial period in that what was genuinely a universalisation of international law – manifested most obviously in the extension of formal sovereignty to the former colonies – did not bring the new equality it promised. Instead, it effected a shift from the old mode of power to a new rationality in which the operative mode of power was precisely the promise of a new universality for international law and the new institutions.<sup>395</sup>

Eslava, who uses anthropological approaches in his work, follows the same catachrestic in terms of historical conceptualization regarding international law and development:

[...] my anthropological perspective also led to an awareness of how international law has been engaged, again since colonial times, in shifting

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<sup>394</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 176.

<sup>395</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 3-4.

peoples' surroundings, their perception of themselves and their livelihoods worldwide.<sup>396</sup>

The assumed relationship between the intrinsic development capacities and duties of nation-states was further enabled by an already mature, though not yet fully formalized, European international legal system. It was through the language of the international of the nineteenth and early twentieth centuries that issues around colonial administration and the initial movements for independence – later transformed into claims for self-determination – began to be framed as questions of statehood and nation-building. During this time, on the one hand, imperial powers and colonial administrators confronted the problem of how to prepare native populations for their transition into fully independent citizenries able to assume the responsibilities of a nation-state. Traditionalist discourses, such as the 'white man's burden', as well as more cosmopolitan and formal institutional frameworks, especially the Mandate System of the League of Nations, provided the forums for articulating this new civilizational objective with the more mundane project of exploiting colonial resources. For independence movements and their leaders, on the other hand, the nation-state provided the default template, on the basis of which they embarked upon their political and economic search for self-rule.<sup>397</sup>

The second line of action proposed by Truman involved the inauguration of the international development project: the transplantation of previous engagements with the idea of development in the colonial context and within individual nation-states to the entire 'underdeveloped world'. Truman's idea of the development project was based on a radical simplification of the human, economic and political conditions of the non-European world. [...] Although ideologically charged and reminiscent of the rhetoric that had been used over many centuries to justify the colonization of peoples and territories in Africa, Asia, the Americas and the Pacific, 'development' was launched as a pragmatic project, one that was opposed to 'the old imperialism', as Truman called it. Truman's promise of development envisaged a democratic, fair-dealing programme, in which the wider and more vigorous application of modern scientific and technical knowledge would provide the key to equitable economic growth and international emancipation.<sup>398</sup>

The typical response in both the new and more mature postcolonial states was to formulate grand redeeming plans designed to resolve the problems stemming from their colonial legacies. In particular, regional grievances and territorial, cultural, racial and economic differences were reinterpreted in these nations through the lens of development. Racial and religious clashes and economic disparities were all transformed into expressions of 'underdevelopment'.<sup>399</sup>

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<sup>396</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. xvii.

<sup>397</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 92-93.

<sup>398</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 100-101.

<sup>399</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 111.

We can see the direct influence of postcolonial scholars in this element. Rajagopal uses studies of Partha Chatterjee,<sup>400</sup> an important subaltern scholar, to understand the postcolonial characteristic of the state and its relation to development; Pahuja uses Dipesh Chakrabarty's<sup>401</sup> work to understand the relations between history and development; and Eslava uses Ramón Grosfoguel,<sup>402</sup> a decolonial voice, to relate modernity and development projects:

Nevertheless, some clues can be drawn from the work of Partha Chatterjee about the nature of the postcolonial state in order to develop some understanding of how social movements relate to Third World states. A first theme that Partha Chatterjee develops is the centrality of the ideology of development for the very self-definition of the postcolonial state. This directly resulted from an economic critique of colonial rule, that it was illegitimate because it resulted in the exploitation of the nation.<sup>403</sup>

As Chakrabarty has observed, '[h]istoricism thus posit[s] historical time as a measure of the cultural distance (at least in institutional development) that [is] supposed to exist between the West and the non-West'. '[I]n the colonies it legitimated the idea of civilization' and in the contemporary era historicism still legitimates the idea of development. This understanding of history, namely as embodying a story of progress toward a goal and as a way of explaining difference through a projected temporality, allows the reconciliation of the fact that not all countries of the world have embraced liberal democracy (and the failures of those that have) with the claim that liberal democracy has nonetheless (ideologically) triumphed by a consignment of those non-liberal states to history.<sup>404</sup>

I argue in this chapter that the debunking of the nation-state as the preferred platform for development should be approached neither as a tragedy nor as a radical reconfiguration of the development project. It should instead be seen as part of a long-term quest for the effective deployment of authority over territory and population in the Third World. As Ramón Grosfoguel has argued, development interventions and experimentation should always be understood as part of modernity's struggle, and its forceful attempts, to bring social and institutional life within a particular universal narrative of progress.<sup>405</sup>

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<sup>400</sup> CHATTERJEE, Partha. *The nation and its fragments*. Princeton: Princeton University Press, 1993.

<sup>401</sup> CHAKRABARTY, Dipesh. *Provincializing Europe: postcolonial thought and historical difference*. Princeton: Princeton University Press, 2000.

<sup>402</sup> GROSFOGUEL, Ramón. Developmentalism, modernity, and dependency theory in Latin America. In: MORAÑA, Mabel; DUSSEL, Enrique; JÁUREQUEI, Carlos A. (Eds.). *Coloniality at large: Latin America and the postcolonial debate* Durham: Duke University Press, 2008. p. 307-333.

<sup>403</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 22.

<sup>404</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 188.

<sup>405</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 91.

To summarize, in postcolonial approaches to international law and development, the history of international law is understood using postcolonial perspectives and linking the global development project to colonialism. The historical-temporal element shows that postcolonial approaches to international law and development use colonialism and postcolonialism as important historical moments to understand such encounters. This element is visible because postcolonial approaches to international law and development extend the chronological frontiers of international legal history allowing explanations of the legacies of power and oppression related to the past and present forms of development.

#### 4.2.2.2.Space: geographical-spatial element

Again, maps – the way we *see* them and the *alternative* views that we can bring using postcolonial studies.<sup>406</sup> When we think about space in the context(s) of international law and development, we can channel several dynamics: from its debates evolving geographical and cultural displacements to geographies of law.<sup>407</sup> For the purposes of my argument, I am framing the space in international law and development as an element in the postcolonial approaches to international law and development because it examines a more-dynamic understanding of spaces.<sup>408</sup> Such diverse engagement with space enables

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<sup>406</sup> MIGNOLO, Walter D. Geopolitics of sensing and knowing: on (de)coloniality, border thinking and epistemic disobedience. *Postcolonial Studies*, v. 14, n. 3, p. 273-283, 2011; AKERMAN, James R (Ed.). *Decolonizing the map: cartography from colony to nation*. Chicago: The University of Chicago Press, 2017.

<sup>407</sup> See, e.g., “Geographical and cultural displacements have radically informed (post)colonial consciousness. Although people have always moved either voluntarily or by force, European colonialism entailed a massive dislocation of people in the form of the slave trade and later indentured labor, as well as generating other movements among European countries and their colonies. More significantly, these displacing practices of colonialism have given rise to a new set of geographical and cultural movements among the ex-colonies and the West since decolonization” BEHDAD, Ali. Global disjunctures, diasporic differences, and the New World (Dis)Order. In: SCHWARZ, Henry; RAY, Sangeeta (Ed.). *A companion to postcolonial studies*. Malden: Blackwell Publishing, 2000, p. 396.

<sup>408</sup> According to Eslava: “Current international interest in the locality therefore does not imply the disappearance of the nation-state, or that the social, economic and political lives of localities are freed from their territorial preconditions. Instead, as Neil Brenner has argued, this current moment of global ordering operates at once through a reterritorialization of socioeconomic and political-institutional spaces, and through the proliferation of levels of governance and their intrusion into the affairs of local jurisdictions”. ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 15.

a multidimensional analysis of international law and its effects at the global, transnational, regional, national and local levels.<sup>409</sup>

The geographical-spatial element is found in Rajagopal's studies when he debates private property and territory. In this context, a geopolitical understanding of space leads to a more comprehensive framework to see the relations between global law and local issues:

[...] social movements' 'turn to culture' in the last two decades has emphasized rights to identity, territory, autonomy, and alternative conceptions of modernity and development. This has brought them into direct conflict with the discourse of private property, which has acquired a principal place in international development policy, and, therefore, in liberal theories of international law for many reasons. Nowhere is this more apparent than in the case of indigenous peoples who have begun asserting their control over local property resources, thus conflicting with the developmental goals of many states, which aim to promote private or state property ownership and exploitation of such resources. But this is even the case in urban areas, which witness struggles by neighborhood communities and movements to reassert their control over local economic development, often by asserting their local sovereignty over their neighborhoods, trumping that of local governments and private developers. This has begun posing serious challenges to extant conceptions of property rights in international development policy, which are based on narrow, individualist, economistic notions of absolute rights to exclude, use, and transfer. Instead, social movements have begun forcing states to recognize alternative conceptions of property that recognize that property is a social and cultural institution based on human relationships. In addition, in asserting their collective rights to territory, many social movements explicitly disavow the language of sovereignty (and therefore of self-determination and secession), and instead seek autonomy. These aspects are of great relevance to international law for historical and contemporary reasons.<sup>410</sup>

This approach to the understanding of property rights is hardly new. In fact, there is an emerging tradition of scholarship in US property law, drawing on feminist legal theory, critical race theory, law and society, and critical legal studies, dubbed the "social relations approach," which reconceptualizes property as a social and cultural institution based on relations between individuals and communities regarding control of valued resources. By defining property as a relational concept, these scholars have repudiated the autonomous, selfish and rationalistic individual based conception of property

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<sup>409</sup> See debates in this sense, KNIGHT, David B. Territory and people or people and territory? Thoughts on postcolonial self-determination. *International Political Science Review*, v. 6, n. 2, p. 248-272, 1985; LARNER, Wendy; WALTERS, William (Ed.). *Global governmentality: governing international spaces*. New York Routledge, 2004; ELDEN, Stuart. Missing the point: globalization, deterritorialization and the space of the world. *Transactions of the Institute of British Geographers*, v. 30, n. 1, p. 8-19, 2005; O'REILLY, Gerry. Territoriality: Identity, State and Nation Revisited. In: O'REILLY, Gerry. *Aligning Geopolitics, Humanitarian Action and Geography in Times of Conflict*. New York: Springer, Cham, 2019, p. 29-57.

<sup>410</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 263.

and rights. This notion of property rights is useful for understanding the praxis of social movements as collective action that enacts a cultural politics.<sup>411</sup>

Rajagopal advances in the debate of relating global/local contexts, which is the main concern of Eslava's work:

This approach to the role of the state corresponds much more to the reality of resistance to globalization, which is staged in many sites where institutional and non-institutional actors join together in strategic, ad hoc coalitions. These sites can no longer be understood within the category of the 'nation state.' At the same time they are not 'global' sites in most cases, but peripheral or semi-peripheral sites which function adroitly within the political spaces created by globalization. In other words, as globalization has posed a challenge to the spatial ordering of the world by disrupting the centrality of the territorial nation state as the primary actor, resistance to it is also emerging along different spatial orderings which are not necessarily organized on a 'transnational' or 'global' basis. As I suggested earlier, in this new image of international order, there are particular enclaves of the 'international' that exist in different locations. International law simply does not have the theoretical framework or doctrinal tools to make sense of this complex reality.<sup>412</sup>

[...] it was suggested that social movements contradict the central tenets of the liberal internationalist vision of globalization – that globalization leads to a reduction in the importance of the local. Instead, paradoxically, globalization has led to more, not less, emphasis on the local, but also resistance to globalization manifests itself extra-territorially through globalization itself.<sup>413</sup>

The broader concept that postcolonial- and geopolitical-oriented influences bring to space enables Luis Eslava to explore the relations between global order and local rules:

[...] my anthropological approach also made it possible for me to see the extent of international law's impact and presence beyond the norms and spaces we usually associate with the 'international' domain. If one accepts the constitutive dimension of international law, as my anthropological approach encouraged me to do, one is forced to make sense of how it is that domestic norms, processes, things, spaces and subjects (e.g. our contemporary cities, their infrastructure, their residents and their urban laws) have ended up carrying the ethos of the international. In this sense, thinking about international law as an anthropological object, as I invite readers of this book to do, invites us to study international law both through its exceptional and international manifestations, and through its national, local and everyday expressions. This becomes a particularly important point as soon as we recognize and take seriously the interplay between international law and the alluring idea of development, for it is this interplay, I suggest, that causes

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<sup>411</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 265.

<sup>412</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 270.

<sup>413</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 271.

international norms and aspirations vigorously to navigate and crisscross jurisdictional spaces and all levels of government.<sup>414</sup>

The image typically brought to mind by the idea of the global order and its normative and jurisdictional system is that of a scalar and governmental arrangement that extends evenly across the world. But the global order is actually better characterized in terms of an irregular topography, in that the international operates across and impacts upon the world with diverse levels of intensity. There are historical, economic, political and military reasons that explain why some nation-states are able to enjoy their entitlement to self-determination more fully than others. For Third World nation-states, especially those with a colonial past and which are today highly dependent on development aid and international debt, international law and the pressure to internationalize are everywhere – in the ‘national’ shape of their postcolonial existence, in the conditionalities imposed on their governments and populations by international institutions, and in the permanent anxiety felt throughout their societies to ‘develop’ according to global standards. Rich nations, on the other hand, usually have more room for manoeuvre in relation to these international requests, because of their industrial and financial strength, and as a result of their role as the constituters of the contemporary international legal system (exemplified, for instance, in the voting structure of key global institutions).<sup>415</sup>

It is also possible to find this geographical-spatial element in Pahuja’s work, especially when she argues that international law shapes questions that used to be regulated by local law:

Indeed, Article 2 of the Declaration does extend a right of equality ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’, but specifically makes clear that there should be ‘no distinction [as to] the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’. Although at first glance this seems admirably even-handed, arguably it also operates as a refusal to consider foreign colonial domination as itself based in racial and cultural discrimination. Non-discrimination thus becomes a principle that is only operative within sovereign entities rather than across nation states, or even between colonised and coloniser. This relation of the application of the principles embodied in rights and an emerging international law from between states to within states is a recurrent tendency of developmentalism [...].<sup>416</sup>

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<sup>414</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. xvi-xvii.

<sup>415</sup> ESLAVA, Luis. *Local space, global life: the everyday operation of international law and development*. Cambridge: Cambridge University Press, 2015, p. 257.

<sup>416</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 64.



International law is capable of changing geographical conceptions. In postcolonial approaches to international law and development, the idea of space in the contexts of international law and development is understood using broader elements, as geopolitical concerns enable multidimensional analysis of the global development project.<sup>417</sup> The geographical-spatial element is visible because postcolonial approaches to international law and development show that concepts of territory, property and sovereignty can be changed through the influence of the encounters between international law and development. I believe that this kind of engagement with *space* enables a multidimensional analysis of international law and its effects at the global, transnational, regional, national and local levels.

#### 4.2.2.3. Knowledge: epistemological-conceptual element

Postcolonial studies have an established literature that challenges Eurocentric and imperial readings about knowledge production.<sup>418</sup> In the specific case of decolonial thought, there is an agenda to revert the situation of knowledge production in order to decolonize epistemologies thought epistemic disobedience.<sup>419</sup> The last common element

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<sup>417</sup> ELDEN, Stuart. Missing the point: globalization, deterritorialization and the space of the world. *Transactions of the Institute of British Geographers*, v. 30, n. 1, p. 8-19, 2005; O'REILLY, Gerry. Territoriality: Identity, State and Nation Revisited. In: O'REILLY, Gerry. *Aligning Geopolitics, Humanitarian Action and Geography in Times of Conflict*. New York: Springer, Cham, 2019, p. 29-57.

<sup>418</sup> See, e.g., LANDER, Edgardo; CASTRO-GÓMEZ, Santiago. *La colonialidad del saber: eurocentrismo y ciencias sociales. Perspectivas latinoamericanas*. Buenos Aires: CLACSO, 2000; GROSGOUEL, Ramón. Colonial difference, geopolitics of knowledge, and global coloniality in the modern/colonial capitalist world-system. *Review (Fernand Braudel Center)*, v. 25, n. 3, p. 203-224, 2002; COOPER, Frederick. *Colonialism in question: theory, knowledge, history*. Berkeley, Los Angeles, London: University of California Press, 2005; CONNELL, Raewyn. *Southern theory: the global dynamics of knowledge in social science*. Cambridge: Polity, 2007; WALSH, Catherine. Shifting the geopolitics of critical knowledge: decolonial thought and cultural studies 'others' in the Andes. *Cultural studies*, v. 21, n. 2-3, p. 224-239, 2007; SANTOS, Boaventura de Sousa. Para além do pensamento abissal: das linhas globais a uma ecologia de saberes. In: SANTOS, Boaventura de Sousa; MENESES, Maria Paula (Org.). *Epistemologias do sul*. São Paulo: Cortez, 2010, p. 31-83.

<sup>419</sup> See, e.g., GROSGOUEL, Ramón. Decolonizing post-colonial studies and paradigms of political-economy: transmodernity, decolonial thinking, and global coloniality. *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, v. 1, n. 1, 2011; DA SILVA, Simone Schuck; SCHROEDER, Paulo Víctor; BRAGATO, Fernanda Frizzo. O resgate de narrativas silenciadas como possibilidade de uma perspectiva descolonial dos direitos humanos. *Revista Culturas Jurídicas*, v. 4, n. 8, p. 298-313, 2017; WOLKMER, Antonio Carlos. Para uma sociologia jurídica no Brasil: desde uma perspectiva crítica e descolonial. *Revista Brasileira de Sociologia do Direito*, v. 4, n. 3, 2017; RIBEIRO, Bernard Constantino; FIGUEREDO, Guilherme Augusto dos Santos; SPAREMBERGER, Raquel Fabiana Lopes. A insurgência decolonial frente a negação do direito: a (re)constituição de um novo direito a partir da emersão das camadas sociais marginalizadas. In: SANTOS, Gustavo Ferreira; TEIXEIRA, João Paulo

relates to this concern. In my view, in postcolonial approaches to international law and development, an epistemological-conceptual element demonstrates that postcolonial international law authors have incorporated specific postcolonial-oriented approaches, related to confronting Eurocentrism and bringing subaltern voices to sciences, into the usual interactions of law and development to understand them. I believe that this element explains the alternatives ways researches are being conducted to explain law and development phenomena. In summary, this element, strongly influenced by postcolonial legal theory, decentralizes legal and development discourses using postcolonialism.<sup>420</sup>

In the case of Rajagopal's work, his conceptual framework is "aware" of the influences of colonialism in the production of "valid" knowledge. A common way of doing that is decentralizing development as a progressive and fully acceptable ideology:

Thirdly, this work seeks to displace development as a progressive Third World narrative. Traditionally, international law scholarship – both utopian mainstream and previous Third World approaches – saw development in positive, glowing terms due to its supposed potential to assist in the nation-building project or to promote liberal objectives. Instead, I approach development discourse as a particular ensemble of norms, practices, and institutions in which there is a general loss of faith in the Third World exhibited most clearly through the agitations of social movements. This is in large part due to the realization among social movements and progressive intellectuals that it is not the lack of development that caused poverty, inflicted violence, and engaged in destruction of nature and livelihoods; rather it is the very process of bringing development that has caused them in the first place. As such, social movements seek to construct alternative visions of modernity and development that constitute valid Third World approaches to international law. The mainstream and past Third World approaches must be questioned for rendering such alternative practices invisible. In this sense, this book is not concerned with traditional topics such as 'international development law.' Rather, it is more concerned with the role of international law in shaping the ideas and practices in the field of development and with the role of ideas and practices in the field of development in shaping international law.<sup>421</sup>

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Allain; SPAREMBERGER, Raquel F. L.; RIBEIRO, Bernard Constantino (Orgs.). *Direito, subalternidade e decolonialidade*. Porto Alegre: Editora Fi, 2018, p. 37-60.

<sup>420</sup> DARIAN-SMITH, Eve. Postcolonialism: a brief introduction. *Social & Legal Studies*, v. 5, n. 3, p. 291-299, 1996; PURDY, Jeannine. Postcolonialism: the emperor's new clothes? *Social & Legal Studies*, v. 5, n. 3, p. 405-426, 1996; DARIAN-SMITH, Eve; FITZPATRICK, Peter (Ed.). *Laws of the postcolonial*. Ann Arbor: University of Michigan Press, 1999; OTTO, Dianne. Postcolonialism and law? *Third World Legal Studies*, v. 15, p. vii-xviii, 1999; BAXI, Upendra. Postcolonial legality. In: SCHWARZ, Henry; RAY, Sangeeta (Ed.). *A companion to postcolonial studies*. Malden: Blackwell Publishing, 2000, p. 540-555; FITZPATRICK, Peter. *Modernism and the grounds of law*. Cambridge: Cambridge University Press, 2001; RUSKOLA, Teemu. Legal orientalism. *Michigan Law Review*, v. 101, n. 1, p. 179-234, 2002; FITZPATRICK, Peter. *The mythology of modern law*. London: Routledge, 2002; ROY, Alpina. Postcolonial theory and law: a critical introduction. *Adelaide Law Review*, v. 29, n. 2, p. 319, 2008.

<sup>421</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 3.

Pahuja goes beyond and proposes an ambivalent way of observing how this Eurocentric epistemology has led us to understand the things the way knowledge puts to us:

It is through a postcolonial lens that we can most easily understand international law as both a key means by which the categorical distinctions on which the self-constitution of the West (or 'developed' world) rests are formed and as *itself* a 'universal' object constituted by a gesture of circular self-constitution. Typically, 'law' is cut from a plurality of forms of ordering, which are then defined as something else – what law is 'not' – and denied the status of law. Such orderings provide the screen upon which the other of law (and the law and the other) may be projected, and so enable a constitutive exclusion to be effected. These orderings include other peoples' forms of social ordering, such as customs, or 'indigenous' laws, but also extend to other orders of knowledge, such as economics, or other normative schemes, such as theology, morality or grammar. This particular cut – of 'law' 'properly so called', as well as the projection of law's others, must then be secured to serve as the point of departure, or foundation for what follows. As we shall see, the discourse of development is profoundly implicated in securing the point of departure, or the 'objectivity' of positive law as 'law'.<sup>422</sup>

Besides that, this element shows that postcolonial approaches to international law and development are concerned with *other* epistemologies than the traditional ones. A special look to subaltern groups is commonly found in this body of studies:

Traditional international law did not concern itself with the resistance of mass action unless it was directed at the creation of states in the form of movements that asserted the right to self-determination. Even in such cases, international law usually left the murky terrain and 'returned' only to welcome the victor as the legitimate representative of state sovereignty. This doctrinal position enabled European and American colonial empires to defeat the legal claims of Third World anticolonial nationalist movements for independence under international law. No matter how much 'resistance' the natives posed – for example the Mau Mau rebellion in British Kenya – international law had no vocabulary for understanding and accommodating it. This enabled the colonial authorities to treat anticolonial resistance as criminal acts and deal with them through law-enforcement measures, especially through the doctrine of emergency. Indeed, traditional international law was notorious for the ease with which it sanctioned violence against non-western peoples.<sup>423</sup>

Third, the responses by First and Third World lawyers that focused on the role of individuals and international institutions maintain a totality of silence

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<sup>422</sup> PAHUJA, Sundhya. *Decolonising international law: development, economic growth and the politics of universality*. Cambridge: Cambridge University Press, 2011, p. 28-29.

<sup>423</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 11.

towards the role played by social movements in the Third World and even in Europe and the US during the colonial period. In other words, First and Third World lawyers could have been much more critical of development as a master narrative of ensuring human dignity through market-led global prosperity, if they had paid more attention to the radical democratic tradition in the Third World and the West. These traditions include the seventeenth-century levelers, the eighteenth-century sans culottes, the nineteenth-century chartists and agrarian populists, the nineteenth-century peasant rebellions in the colonies, and twentieth century women's movements and advocates of worker councils and environmental justice. These movements were/are based on two critical themes that do not find their place in the nationalist/developmentalist literature: first, that the economy and the family are no less arenas of domination than is the state; and second, that politics is not just a fight over resources but also over cultural identities, about who we are to become. Taking these progressive movements seriously as historical actors would, I suggest, destabilize the liberal understanding of the harmony between development and the 'new' international law. Several historical studies of such social movements by Eric Hobsbawm, Charles Tilly, George Rude, and others have shown the role played by ordinary men and women in them, contrary to elite historiographies that stress the role of vanguards, historical agents and structural transformations. In addition, rethinking the historiography of many anticolonial/nationalist movements in the light of ordinary peoples' resistance to the modernizing imperatives of colonialism, would also problematize the smooth incorporation of decolonization into a forward-looking progressivist narrative of international law.<sup>424</sup>

An opening agenda that contest traditional legal epistemologies is a key element in postcolonial approaches to international law and development. The ideas *per se* are used in a way that enables other histories and perspectives to come alive. An epistemological-conceptual element demonstrates that postcolonial international law authors have incorporated decolonial approaches into the usual interactions of law and development to understand them. Then, I argue that this element explains the alternatives ways research is being conducted to explain law and development phenomena. In summary, this element decentralizes legal and development discourses using postcolonialism.

#### 4.2.3. *Law and development incorporating postcolonial approaches to international law and development*

So far, I have been able to outline two conceptual frameworks that can now be observed together. First, I have demonstrated that there is a critical perspective on

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<sup>424</sup> RAJAGOPAL, Balakrishnan. *International law from below: development, social movements and Third World Resistance*. Cambridge: Cambridge University Press, 2003, p. 35-36.

international law and development, according to Liliana Lizarazo-Rodríguez systematization. For her, this perspective refers to Third World Approaches to International Law (TWAIL). Second, by examining the encounters between international law, development and postcolonialism, I was able to identify an even more specific set of studies than TWAIL, which I named postcolonial approaches to international law and development.

When we advance to the categorization that I have proposed, we have two analytical gains. First, there is a gain in theoretical categorization, with pedagogical importance. It is possible to identify that TWAIL refers to a wider set of critical studies of international law as a whole. Thus, when we study TWAIL, we look critically at international law in several spheres, not just those linked to the issue.

Second, there is a more specific gain for the field of law and development. By identifying the main elements and contributions of this literature that deals with the issue of law and development, it is easier to place this critical literature with the mainstream readings of the phenomenon of law and development, in order to confront them and expand their debate. There are also pedagogical gains, especially if we consider the inclusion of other bibliographical references in law and development programs, as well as the possibility of discussing the globalization of the discipline in critical and postcolonial terms.

## CONCLUSION

Deconstructing maps and clarifying dis-encounters: this sentence would best describe the efforts of this thesis in looking at the relationship between international law, development and postcolonialism. My research question, *how postcolonialism influences the way we understand international law and development*, led me to structure a specific argument and present modest theoretical proposals both to the law and development field and to international legal studies. My main argument frames a specific set of studies that analyzes international law and development, using postcolonial thought as the main analytical support. My theoretical proposals aim to refresh the field of law and development, expanding postcolonial thought, decolonizing law and development, and researching international law and development from the margins.

Nowadays both the law and the political force of society influence each other. Law and development is an exemplary proof of this interconnection. Not only did the law lose this “island” characteristic, but its way of behaving in world geographies has changed. The global and the local, once so distant, are ever closer. International standards have directly interfered with national law, just as local practices have shaped a new global legal regime. The strength of international capital and the almost religious promise of development changed the shape of the world. Understanding these phenomena necessarily connects with the overall economic tone of a capitalist postcolonial world. The global development project connected all the world, uniformized aesthetics, harmonized – for good and for evil – rights, regulations, expectations; at the same time, fragmented and destabilized old doctrines of (international) law.

Law and development movements, both from North America or Europe – a “hungry” Global North – have contributed to the scenario of change that has taken place in the world since the decolonization of the African and Asian continents. The practice of law and development with a strong brand of development promotion agencies and international organizations with enormous political influence, exported a ready set of regulations and legal norms for different territories and culture. At the same time, it brought the critical vision of several scholars who refused to the projects they even built, whether of an American imperialist project or a neo-colonial European project. Legal studies, whether or not inspired by sociology and anthropology, have brought substantial gains so that the Global South could “think for itself”.

Law and development needs to “come out of the closet”, as it proposes epistemic movements of otherness, be they decolonial or otherwise. Once law and development is established as a field of studies and practices, the possibility emerges to systematize the theoretical and empirical contributions of a set of studies that discusses the reciprocal influence of law with global and local development projects. There is already a set of studies that align directly with a mainstream current. There are several perspectives, as I have previously mentioned, that surround the same theme – although strangely enough, have had difficulty in asserting themselves in the field of law and development. From the moment we come to view the field of law and development as plural and multifaceted, we fail to see it as a branch of imperialist and neoliberal studies and practices. The field of law and development does not deny the political influence of law, at the same time that it is permeated by diverse political ideologies and forces, whether more liberal or less liberal, from the right or from the left of the political spectrum. Law and development is a field of practice and study that aggregates multidisciplinary voices that view development from above and from below, from the law or encountering law, in favor of the ideals of development or against them.

When we look at law and development from three “static” historical moments – as proposed by a common reading of law and development – we do not do it in a universal way. It is necessary to register that the proposal of three movements of law and development concerns only a perspective of law and development, which in this work, I called national and mainstream perspective. With the results presented in this thesis, it becomes possible to think about other histories and other periodizations of law and development in the world, from other perspectives, including alternative historical, academic and theoretical references. I am not arguing about incorrect periodizations: I am clarifying that this is a particular approach to law and development. If, for example, we turn to the other approaches presented in this master’s thesis, we perceive the possibilities of analytical gain and other stories of law and development, whether global, transnational, comparative or from specific field themes.

Postcolonial studies put subaltern stories in evidence. This set of studies, we can say, is also a *bitter* result of the global development project. From the African and Asian decolonization moments, a body of critical and anti-colonial studies was established and also structured a fertile field of knowledge, capable of modifying “traditional” fields of thought, such as history, sociology and legal studies. Whether discursively analyzing

colonization and development projects, by attracting transdisciplinary methodological tools, or by organizing a worldwide network of critical scholars and institutions, postcolonialism has influenced the global debate on the “before”, the “after” and the “continuous moment” of colonialism/coloniality. I propose that we also view postcolonial studies more broadly, ranging from anti-colonial authors, to multidisciplinary studies to the recent contributions of decolonial thinking. In fact, there are singularities among the strands of this great theoretical “soil”, but for the purposes of critical-oriented legal studies, it is important to expand the possibilities by presenting a broader theoretical role.

This master’s thesis presents a theoretical effort to rethink the way we understand law and development from critical perspectives, postcolonial thought and the Global South. It is not my intention to undermine previous work carried out under the heading of a given law and development. My intention is to show the possibilities that open up a fertile field in research, studies and practices. In this thesis, I have brought postcolonial approaches to international law and development. This field can easily be connected to the field of law and development. This new approach allowed me to clarify, for example, that TWAIL is not truly a perspective of law and development, since its efforts also depart from other traditions of thought and other legal practices. In my view, TWAIL is a critical approach to international law as a whole. Yet in the field of law and development, it seems more pedagogical and credible to say that, as opposed to a majority view of international law and development, there is a critical view which, in addition to including TWAIL, includes others. Even more specifically, if we think *from* law and development, I argue that it would be more appropriate to frame postcolonial approaches to international law and development and not generically in TWAIL, since TWAIL also addresses other issues and practices that fall outside the scope of law and development.

The idea of decolonizing “things” – that is, everything around us, based on the fact that the colonial regime modified the world and persists in modifying it with its legacies – nowadays has different connotations. In the first place, there is an anti-colonial political intention, which is to rid the “things” of the world of asymmetrical relations of power between peoples, cultures, territories. Second, there is a postcolonial historiographical influence that is to point out how certain historical events were left out of history not because they were not important, but because they were beyond the reach of a certain Eurocentric world-cut. The characteristic of this aspect of decolonization is to give voices, to bring representativeness, to open up invisible “things”, to rescue



marginal thinkers, to revisit other knowledge. Third, there is a decolonial epistemological turn which is to oppose the project of knowledge imposed as universal to the world since colonial times. This epistemic resistance, in practice, imposes the re-elaboration of curricula and the inclusion of other knowledge in the sciences. Decolonizing “things” necessarily implies re-adjusting the way we *see* the world. The common practice of dividing the world into developed and developing countries, for example, has direct implications for how people perceive themselves in their territories, how nations make their policies, and how (international) law organizes their doctrines. The Third-World wave is important as a unifying political agent of rejection of ready-made models, but still brings with it the “standardization” of world histories. It is possible to use the term Third World in this sense, as TWAIL does, but at the same time it is necessary that we theoretically advocate broader conceptualizations (and new geographies) of the world with more possibilities. Nowadays, the notion of the Global South seems to remedy this gap.

Finally, it is also important to note that my research has limits and that, as I have tried to explain throughout the thesis, the encounters I proposed are not “Cartesian” and entirely precise. The more we try to put into dialogue studies and practices with different contexts, the positions become more complex: they are incomplete, they connect to distinct traditions and may even betray some emancipatory aspects. It is also important to note that there are gaps in both the general productions of law and development, and in the postcolonial approaches to international law and development. Vacuums, disconnections, lack of coordination of approaches: there is an empirical, theoretical and legal research agenda in the context of these maps and encounters.

## POSTFACE (FROM INSIDE)

Where am I after all this academic effort and where is the knowledge? How can I contribute, change, make something? Why am I speaking another language? Well, as you can see, my academic conclusions led me to new personal concerns. This postface is a quick manifestation to this set of anxieties. This work deals with perspectives “from above” and “from below”, and I call the attention, as a Latin American researcher, to our anxieties “from outside” (see the Preface with a social media and newspaper tonic) and “from inside”.

As I was reviewing this thesis, I found asking myself the three methodological questions that I presented in Introduction: *where*, *how*, *why*. But in this final moment I was more concerned with myself as a researcher from the Global South. As my research used several scholars from the Global South, including Indians, Brazilians and Colombians, the spell-check software made me conscious of this internal anxiety. While I was writing this work, the English grammar spelling tool identified several names and surnames as “unknown”, which made me realize that there are *rights* and *wrongs* at least in the context of words (worlds?) that, as we have discussed, are permeated with power.

Rodríguez-Garavito makes an important diagnose about the Latin American production in the field of law and development:

Comparative legal and socio-legal literatures published in English are still dominated by chastened versions of the law-and-development paradigm. Despite the fact that the current geopolitical, social and legal context is drastically different from the one that inspired the first wave of law-and-development scholarship and reform projects. As critical scholars from different traditions have shown (Esquirol 2003; López 2004; Rodríguez-Garavito 2000), such assumptions tend to depict Latin American legal fields as marked by large gaps between norms and practice, exacerbated legal pluralism, clientelistic legal cultures, and authoritarianism. Explicitly or implicitly, this view is based on a comparison made against an equally skewed view of legal institutions of the Global North, where these characteristics presumably do not exist.<sup>425</sup>

But why did I write this thesis in English instead of Portuguese, my native language? First, the possibility of greater interaction with academics at the global level. I

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<sup>425</sup> RODRÍGUEZ-GARAVITO, César. Remapping law and society in Latin America: visions and topics for a new legal cartography. In: RODRÍGUEZ-GARAVITO, César (Ed.). *Law and society in Latin America: a new map*. New York: Routledge, 2015, p. 5.

faced myself in this *postcolonial* condition accepting the status quo and becoming uncomfortable with it. Second, an institutional effort to “globalize” Brazilian academia. Again, an ambivalent position that we, as researchers, must unfortunately have to live with. Third, a personal desire of scientific and academic “development” (improvement) given the international scenario of research dominated by the English language. Taking this into account, I conclude also the postcolonial condition of the researcher from the Global South, trapped in his context by ambivalent moorings: at the same time, he tries to detach himself from the condition of intellectual subalternity, he is trapped in the imperial spaces of knowledge production.

How can I contribute? For example, is there a distinctively Latin American way of understanding global public order? I believe that research is changing as the world and its relation to knowledge, data and true changes too. A postcolonial/decolonial attitude may be a possible answer:

A different approach influenced by postcolonial theory is “indigenization,” as Alatas (2006a) and Sitas (2006, pp. 364–366) call it; and a related strand of “Southern Theory” (Connell 2007). The goal of indigenization is to craft new theory and research that is based upon non-Western thinkers and postcolonial experiences. Here scholars indeed look at colonialism or postcolonial and non-western societies but in ways that do not reinscribe Eurocentrism or merely reverse it. For instance, rather than just studying imperialists and colonizers or adding colonialism as a variable into standard sociological accounts, scholars creatively mine and deploy non-Western knowledges in order to capture the felt experiences of colonialism, the voice and agency of colonized peoples, and the dilemmas and pathways of postcolonial societies. Scholars look to the nascent sociologies of underrepresented thinkers and traditions, like Jose Rizal in the Philippines, Rabindranath Tagore in India, or the African oral tradition (Akiwowo 1986; Alatas 2006a; Connell 2007; Patel 2010). Rather than relying on Max Weber alone for insights on the societies of the Middle East, they might instead turn to Abd al-Rahmān Ibn Khaldūn (Alatas 2006b). Or rather than just Karl Marx to think about Latin America, they might instead look at Simon Bolivar, Jose Martí, or more recently Nestor García Canclini (García Canclini 1995; Sosa Elizaga 2006).<sup>426</sup>

And where am I now? I cannot think alone. In the end, “I am where I think”, as Walter Mignolo proposes.<sup>427</sup>

<sup>426</sup> GO, Julian. For a postcolonial sociology. *Theory and Society*, v. 42, n. 1, p. 39-40, 2013.

<sup>427</sup> MIGNOLO, Walter. *The darker side of Western modernity: global futures, decolonial options*. Durham: Duke University Press, 2011, p. 77-117.

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