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International Law and Its Others*

Simon Chesterman

If the rule of law means anything, it is that the law is meant to apply equally to all regardless of the vacillations of power. This is the founding myth of law at the national level — famously forbidding the rich as well as the poor from sleeping under the bridges of Paris at night. More recently embraced at the international level, the myth was formalized in the United Nations Charter, article 2(1) of which founds the Organization on the principle of sovereign equality. It is a useful myth, and a popular one — in 2005, every Member State reaffirmed their commitment to the purposes and principles of the UN, and to an international order based on the rule of law.¹

Yet a myth it remains. The history of the rule of law at the domestic and international level is a tale of ongoing struggle to ensure that the powerful as well as the weak are subject to it. That struggle is all the more difficult at the international level, as the absence of a hierarchical structure means that in place of the leviathan's stick there are only the carrots of enlightened self-interest.

For the most part, in times of quiet, the rule of law chugs along, providing stability and predictability in the various interactions of daily life. In such circumstances, it is in the interests of most to comply with the rule of law and accept the security and order that it brings. Yet when there is a tectonic upheaval, an overturning of the *ancien régime*, bringing those who were powerless into a position to change that order, different priorities may emerge. In particular, for those who laboured under an unjust order — colonialism, apartheid — the very legal system itself may be tainted with injustice. The rule of law may remain a political ideal, but politics may require that the rules themselves change.

* Draft chapter for Heike Krieger & Georg Nolte (eds), *The International Rule of Law*, commenting on a chapter by Aniruddha Rajput.

¹ UNGA '2005 World Summit Outcome' UNGAOR 60th Session UN Doc A/Res. 60/1 (2005), para 134.

So it is with the international rule of law today, an order whose very description as ‘Westphalian’ speaks to its Eurocentric origins. The tectonic shift underway at present is the decline of that West and the rise of its Others — former colonies, the Global South, displaced empires — and the question is what this means for the content and the structure international law. Will the rise of those marginalized or exploited by the international order lead to a radical overhaul of that order, or an adaptation to the new political reality? Will it be evolution or revolution?

How the international order copes with rising powers is, as Aniruddha Rajput notes in his thoughtful and thought-provoking chapter,² more a question of international relations than international law. Yet it is also true that powerful States generally seek to nudge or push for the normative regime of the day at least to accommodate — and perhaps advance — their interests. Dr Rajput takes as his lens the rise of the ‘BRICS’ powers in particular — Brazil, Russia, India, China, and South Africa — and considers the possible impact on various areas of law. In this brief response I will consider the BRICS as a category before addressing some of the possible changes in the law that he discusses. The conclusion will return to the question of rising powers more generally.

1 BRICS as a Category

As Dr Rajput notes, the origins of this subversive category could not be more conventional. Coined by investment bankers at Goldman Sachs almost two decades ago, the acronym was first used in a paper speculating as to which of the emerging economies might plausibly be invited to join the G7 ‘club’. Tellingly, this was introduced by highlighting the size and trajectory of various economies and the important issues that this raised for ‘the transmission of global monetary, fiscal and other economic policies’.³

Acronyms are rarely a sound basis for rigorous taxonomy, but since the addition of South Africa in 2010 the grouping has remained relatively stable and now holds an annual summit hosted on a rotating basis among the five countries. Yet does it make sense as a category?

² Aniruddha Rajput, ‘The BRICS as “Rising Powers” and the Development of International Law’.

³ Jim O’Neill, ‘Building Better Global Economic BRICS’ (Goldman Sachs, Global Economics Paper No: 66) <<http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf>> accessed 5 February 2018.

Dr Rajput appropriately qualifies the claims to unity of the BRICS group, arguing that they may not be 'homogenous' but are nonetheless 'coherent'. He rightly draws a distinction between the BRICS countries and non-Western middle powers such as Japan and South Korea, both of which were brought into the US security umbrella and embraced the Washington consensus model of economic development. The BRICS remain outside the OECD, though they have been included in the G20. Yet he goes further to suggest that they share 'a certain philosophy and understanding of international law'.

This seems to be a stretch.

At times Dr Rajput conflates the BRICS countries with the Non-Aligned Movement or the G-77. It is not clear that the BRICS as a grouping could claim 'command of a numerical majority of States'. Normative successes of that larger grouping might include decolonization, but it would be odd for apartheid South Africa to be given credit for that today. Other initiatives like the New International Economic Order, which he mentions, saw great efforts by India, perhaps, but were limited in lasting impact and not a true priority of the other States.

It is also possible that the BRICS coordination has reached its limit. As Dr Rajput highlights, there was a degree of commonality in their positions adopted up to 2008 — measured, for example, by General Assembly votes. Yet that is around the time at which the BRICS States began coordinating more formally. Here what is striking is that an analysis of their voting patterns subsequently and up to 2014 shows no greater coordination as a result of that formalization.⁴

As an organization, then, it is possible that the BRICS grouping reflects overlapping interests rather than a shared set of aspirations. It is telling that the last three BRICS summits were held in parallel with other, more established events — a summit of the Shanghai Cooperation Organisation (SCO) in 2015, the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) in 2016, and the Emerging Markets and Developing Countries Dialogue (EMDCD) in 2017.

Lacking a secretariat, BRICS is less an organization than a rotating conference. Though each of the five States is clearly impactful in its own right, it is arguable that as an analytical category today, BRICS as a whole is less than the sum of its parts.

⁴ Bas Hooijmaijers and Stephan Keukeleire, 'Voting Cohesion of the BRICS Countries in the UN General Assembly' 2006–2014: A BRICS Too Far?' (2016) 22 (3) *Global Governance: A Review of Multilateralism and International Organizations* 389.

2 Points of Tension

None of this takes away from the important points of tension that Dr Rajput highlights in international law.

On their approach to sovereignty and the Responsibility to Protect (R2P), the BRICS States voted with all other members of the UN in favour of R2P in principle. Much as with the unanimous endorsement of the rule of law in the same document, unanimity of support should be seen as an indication of vagueness in the content of what was agreed. Subsequent developments, in particular the expansive interpretation of a Security Council resolution in relation to the conflict in Libya, saw the beginnings of a backlash against R2P on the part of the BRICS States and a great many others.

Yet is this a true challenge either to the existing international order? The defence of sovereignty and principles of non-intervention have echoes in the Five Principles of Peaceful Coexistence,⁵ adopted by China and India in 1954. The principles were incorporated into a ten point 'Declaration on the Promotion of World Peace and Co-operation'⁶ at the Bandung Conference the following year, at which Brazil joined as an observer. These in turn formed the normative core of the Non-Aligned Movement,⁷ though the absence of Russia and South Africa make it hard to draw a line to the current normative impact of the BRICS as a grouping.

In any case, the challenge to international law is very different from that posed, say, by the Soviet Union at the height of the Cold War — or even by the European Union project today. The principles adopted in the 1950s and the resistance to R2P today reflect not an alternative new vision of international law so much as a conservative defence of traditional norms of sovereignty and non-intervention. It is not a new 'Eastphalian' regime; rather, it is an attempt to preserve the original vision of the Westphalian one.

⁵ Five Principles of Peaceful Coexistence (Agreement Between the Republic of India and the People's Republic of China on Trade and Intercourse Between Tibet Region of China and India), done at Peking, 29 April 1954, 299 UNTS 57, in force 3 June 1954, available at <<http://treaties.un.org/doc/publication/unts/volume%20299/v299.pdf>>.

⁶ Final Communiqué of the Asian-African Conference, done at Bandung, 24 April 1955, available at <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf>.

⁷ See generally Hans Köchler (ed), *The Principles of Non-Alignment* (Third World Centre, 1982).

Similarly, in relation to the World Trade Organization, it is the BRICS countries that are sometimes the staunchest defenders of open trade at a time when certain Western States are beginning to undermine it. In the first year of the Trump Administration, for example, the annual meeting of the world's elite at Davos under the auspices of the World Economic Forum saw the unusual spectacle of Chinese President Xi Jinping giving a robust defence of globalization at a time when President Trump was articulating a protectionist vision of 'America First'.

There is, however, some evidence of BRICS coordination here, with the BRICS trade ministers showing signs of coordination and establishing a new Intellectual Property Rights Cooperation Mechanism.

Not so in relation to bilateral investment treaties (BITs). As Dr Rajput shows, there is real division among the BRICS States on BITs: China, India, and Russia actively participate in the practice while Brazil has long eschewed it and South Africa recently renounced it. One point of interest here is that the resistance to BITs is transcending traditional political divides of global North and South, or the West and the rest, as industrialized States like Australia have come to find themselves on the receiving end of investor claims.

Climate change negotiations have also seen division and the spawning of yet another acronym — BASIC — coined to reflect the distancing of Russia from the group. As Dr Rajput points out, BASIC and the G77 coordinate to some degree in this area, though it is incorrect to suggest that the BRICS countries as a group are 'part of the G77'. Brazil and India are founding members and South Africa joined subsequently, but Russia remains outside the grouping. China, for its part, is listed by the G77 itself as a member but does not identify as such. Hence many positions adopted by the G77 are said to be adopted by the 'G77 and China'. Brazil, India, and South Africa are also closer on human rights treaties than Russia and China.

3 Rising Powers

Of perhaps greater interest than specific normative regimes that make up the content of international law are the consequences of the rising powers — the BRICS States among others — for the structure and the future of international law.

As Dr Rajput notes, the BRICS States cooperate primarily through declarations and action plans rather than treaties or other binding agreements that might challenge the normative

order. The creation of a BRICS Bank, much like China's leadership of the Asian Infrastructure Investment Bank, could be seen as the establishment of parallel regimes that operate outside existing institutions like the Bretton Woods institutions. Yet they are modelled precisely on those institutions, albeit with a conservative approach to sovereignty that tends to downplay the importance of linking human rights to development assistance.

In terms of the content of international law, then, one potential impact of the rise of the BRICS States and others is a slowing of the move to universalize human rights and operationalize doctrines such as R2P. It is not clear that a new trajectory is being proposed — States still submit themselves to the Universal Periodic Review, for example, and R2P continues to be invoked — but the velocity appears to be diminishing.

That conservatism explains the first of the structural consequences of new rising powers: the increased difficulty of adopting new regimes. As Dr Rajput presents it, treaty-making may become 'even more tedious and time consuming'. This is an understatement. There are already indications that fewer multilateral agreements are being adopted under the auspices of the United Nations.⁸ If true, this would be the reversal of perhaps the most striking trend in international law from the middle of the twentieth century: the move from bilateralism to multilateralism.

His glass-half-full analysis is that those treaties that are negotiated in this new environment will enjoy 'greater acceptability and better compliance'. One might hope so, but another possible outcome is greater reliance on informal regimes. There is already some evidence of this, as increasing spheres of public life are governed not by traditional domestic or international legal structures but by informal networks of public officials and diverse private actors.

Political power abhors a vacuum. The decline of the West and the rise of its others brings with it a messier period than the bipolar terror of the Cold War or the irrational exuberance of the brief unipolar moment enjoyed by the United States. Though States remain important actors, the shift to what is perhaps best described as a zero-polar order suggests that the greatest challenge might come not from individual States or groups of States like the BRICS, but to the role of the State as such.

⁸ See, eg, Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European J. Int'l L.* 733.