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## **Structural Challenges in a Multipolar and Multicultural Global Legal Era: BRICS’ Global Legal Politics beyond Cultural and Economic Partnerships**

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**Abstract:** New emerging international dynamics introduce a global poly-axiological polycentric disorder which undermines the tradition of a unique global legal order in international law. Modern Era was characterized by Western European civilizational model – from which human rights is a byproduct.

This consensus had its legitimacy tested by XX<sup>st</sup> century’s scenario – and the ‘BRICS factor/actor’ is a symptom of this reality. Its empowerment in world politics lead to the rise of distinct groups of States/civilizations provided with different legal, political, economic and social traditions – promoting an unexpected uprising of otherness in international legal order and inviting it to a complete and unforeseeable reframing process.

Beyond Washington or Brussels Consensus, other custom-originated discourses (Brasília, Moscow, New Delhi, Peking or Cape Town Consensus, among other unfolded possibilities) will probably henceforth attempt shaping international law in present global legal disorder.

**Keywords:** BRICS; International Human Rights; global legal disorder; scale of existence.

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## 1 Introduction: The ‘BRICS Factor’ in Current International Law Issues

After the Second World War, the classic grand narrative informing the foundations of international law – State’s will – was no longer acceptable as a legitimate criterion to frame international law. Since State’s will had triggered the scourge of war, thus bringing untold sorrow to mankind in a very narrow period, international law could no longer be assumed as being the sole product of a mere consensus of states. A new epistemological foundation for international law was outlined: an axiological criterion was assigned as the core of international legal order, a new condition which would allow disregarding State’s will – the main source of suffering and despair from both an external and internal perspective (respectively, through making war and through totalitarian regimes).

A rational international human rights order had to be erected and universally applied to give international law the conditions to fulfill the purpose and duty of ensuring the survival of mankind, disregarding any national or international deviating will or mutable cultural synthesis. This would be achieved via qualitatively new legal resources, fitted with compulsory compliance and liability features: treaties on human rights, *ius cogens* (non-derogable norms of international law), general principles. International law would prevail even if a State disposed on the contrary for its own domestic legal order.

However, this unconditional validity is challenged by the rise of the alternative normative centers in international legal order (ZAKARIA, 2008, p. 1), i.e., the ascent of non-Western countries as global players that may question the foundations of international law. BRICS countries<sup>1</sup> – not constituted within the Western human rights culture or its legal tradition – introduce what we call a multicultural and multipolar legal disorder which undermines the tradition of a unique global legal order in international law.

One must bear in mind that they are profoundly different from each other in geographic<sup>2</sup>, economic<sup>3</sup> and social aspects<sup>4</sup>. In addition, they are also distinct political communities endowed with different legal traditions among themselves<sup>5</sup>.

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<sup>1</sup> Such acronym refers to the Euro-Asiatic-led international economic cooperation between Brazil, Russia, India, China and South Africa.

<sup>2</sup> In the case of the BRICS the spatial discontinuity presents itself as a challenge to international cooperation. However, the leading role of each of these countries within their respective regions may serve as the basis for the construction of regional diplomatic models and the identification and sharing of best public policies among these models may be quite relevant. Both Brazil and South Africa are found outside the “critical regional” in terms of

Thus, there is an erosion of the idea of a controllable, foreseeable and stable pace of international law due to the rise of new cultural environments for the making of international law, such as the one that compose the BRICS (CASELLA, 2011; LAÏDI, 2008).

The idea of this article is to explore the ‘BRICS factor’ in order to evaluate critically the limits and the possibilities of a traditional conception of international law. Beginning with a jurisprudential study on the shaping of the modern foundations of international law relying on Merleau-Ponty (1), questions concerning a potential reframing process of international law’s foundations will be raised (2), due to the rise of the BRICS as a powerful factor in world politics.

## **2 International Law’s Structures in a Contemporary Condition: International Law as International Human Rights**

Maurice Merleau-Ponty (2004), in 1948, by questioning the traditional thought existing at his time, pointed out to the fact that it is impossible to persevere with the cognitive and perceptive conceptual framework engendered within the classic scientific discourse. This impossibility was justified, according to his point of view, by the fact that this perspective was not anymore perceived as capable of producing a complete world representation: maybe it never had a sense, as hypostatizing the intelligence, it despised the world of perception and senses.

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international geopolitics: Asia (BRZEZINSKY, 1997). And in terms of relations among close neighbors Brazil stands out not only for the resolution of all legal disputes regarding its extensive frontier (CASELLA, 2009c, p. 699) but also for the fact that the last Brazilian military conflict against a neighbouring country was during the Paraguayan War (1864-1870). Meanwhile other BRICS countries could not enjoy a 150 years period of regional peace since they had been engaged in some sort of military conflict in the last century.

<sup>3</sup> GDP (*per capita*): Brazil (11,900 USD/2011); Russia (17,400 USD/2011); India (3,700/2011); China (8,500 USD/2011); South Africa (11,100 USD/2011). Available at: <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>>. Last visited: July 8, 2012.

<sup>4</sup> Human Development Index (HDI) 2011: Brazil (0.718); Russia (0.755); India (36.8/2004); China (0.687); South Africa (0.619). Available at: <[http://hdr.undp.org/en/media/HDR\\_2011\\_EN\\_Tables.pdf](http://hdr.undp.org/en/media/HDR_2011_EN_Tables.pdf)>. Last visited: July 8, 2012. Gini Index (distribution of family income): Brazil (51.9/2010); Russia (42.0/2010); India (36.8/2004); China (48.0/2009); South Africa (65.0/2005). Available at <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html>>. Last visited: July 8, 2012.

<sup>5</sup>Applying LOSANO’s analysis on the main legal systems to the BRICS countries we would find the following: Brazil (the South American branch of “Continental European Law” also known as “Civil Law”); Russia (a mixture of Civil Law with vestiges of the Soviet Legal System); India (the mixed Indian Legal System: a Hindu, Muslim and Common Law systems mixture); China (a mixture of Chinese Traditional Legal System with some Civil and Common Law features); South Africa (Common Law) (LOSANO, 2007).

His philosophical discourse is directed to criticize the Modern Philosophical Discourse, which was ignited within a more precise framework by René Descartes – who is understood by Merleau-Ponty as a classic. Nevertheless, his criticism does not aim at neglecting the scientific value as a “tool for technical development or as a school of precision and truth” (MERLEAU-PONTY, 2004, p. 5). In fact, his objective is to signalize the limits of Modern Philosophical and Scientific Discourse and of its criteria of analysis: its analytical tools cannot sense the perceived world and, for this reason, it is reputed as a misleading source, as the origin of an absence of knowledge.

The idea of evoking Merleau-Ponty’s reasoning is relevant for this study, not so much because of his phenomenological presuppositions or of the conclusions engendered within his thought; rather, his point of view focus on a particular element which is usually forgotten in the process of conceiving law: the notion of scale of existence. It is the scale of existence that builds every structuring principle of a legal order – including those of international legal order<sup>6</sup>.

There are different standards for measuring the world in order to understand it and to build knowledge upon it. More than that, there are several scales according to which are constituted thought, ways of thinking and knowledge. These scales are ruled according to a variable perspective, as they depend on the subjective conditions of the cognizant being and on its surrounding objective conditions – namely, on the holistic way it experiences the world where it lives. One cannot apply a sole scale of existence as the only way to understand and conceive the world – that would only result on a limited knowledge.

Indeed, the cognitive and operational keys erected within a Philosophical Discourse of Modernity cannot be accepted as still operational, mainly when has been stated the misguidance of the Modern Project (HABERMAS, 1992). Therefore, if one pretends to understand contemporary international law seriously, it is necessary to disentangle its own legal thought from the premises and prejudices of a modern legal discourse on international law.

Modern international law is identified with the classic westphalian discourse and it follows this specific measure for inhabiting and experiencing the world. Such measure is based on a modern construct, namely, State’s sovereignty, which is expressed by the State’s will – that is to say, the classical foundation of international law (CASELLA, 2007a).

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<sup>6</sup> Such feature is the measure considered to be the foundational rule(r) of law and of all its analytical framework, i.e., the solid upholder of every legal concept and the starting point of any philosophical and scientific reflection in law.

According to this reproduction of the contractualist tradition within international legal discourse, the entire international legal order has to be seen as a contract, or, as the product of the consent derived by an agreement concluded amid each different willing pole: law would be the outcome of a free negotiation process between self-absorbed parties – even if these parties are States.

This will-led apprehension of international legal order<sup>7</sup> is the precise grand narrative which frames modern international law discourse. For this reason, it stated that the whole international legal order must be conceived, studied, researched, taught and practiced as structured from the agreement between each States' will (ANZILOTTI, 1923, p. 39-40; OPPENHEIM, 1952, p. 24-5).

After the Second World War, this classic grand narrative informing the foundations of international legal order was no longer acceptable as a legitimate criterion to frame international law: States' will had triggered the scourge of war and brought untold sorrow to mankind in a very narrow period and could not anymore be assumed as being the sole foundation of international law.

Within contemporary condition, it is not viable to expect the construction of consensus (BITTAR, 2005, p. 99), as it implants the factor of incertitude inside the core of modern classical concepts. The insertion of this uncertainty variable allows questioning the absolute and unconditional validity of these concepts – it operates their denaturalization – and conducts to the overcoming and the destruction of the “sweet and comfortable illusions” inherited by the promise of the self-assured modern knowledge (CASELLA, 2006, 2007b, p. 13, 2008, 2009b, p. 9; FERRAJOLI, 2007). It is precisely a transitional moment, one in which General Theory of State and Law's paradigms are currently undergoing an epistemological degenerescence crisis (TOJAL, 1997)<sup>8</sup>.

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<sup>7</sup> In other words, international law would be strictly based on the *pacta sunt servanda* principle and its main source would be the formal expression given by international treaties (ACCIOLY; NASCIMENTO E SILVA; CASELLA, 2009, p. 64; ANZILOTTI, 1923, p. 39; KELSEN, 2005, p. 525).

<sup>8</sup> There is a flexibilization – but not the integral suppression – of the classical and rigid Modern notion of State sovereignty, added to a progressive disregard of national borders' limits. Moreover, one cannot ignore the rise of new arenas of Power and of normative production, new driving forces of innovative global regulatory waves which lie far beyond the willing phenomenon (CASELLA, 2009b, p. 10; FARIA, 2004, 2008; HABERMAS, 2006, p. 183-4). There is a pluralism of sources of law and a multiplicity of subjects of international law (CASELLA, 2009b, p. 7), an effective disruption of traditional legal thought which destabilizes the preceding coherent international legal order and promotes the rise of a fragmented international legal disorder (ACCIOLY; NASCIMENTO E SILVA; CASELLA, 2009, p. 97; CASELLA, 2007b, p. 13; FARIA, 2004).

Nothing is completely modern, or completely new. It is possible to state that the classical model suffers a deconstruction movement initiated by present cultural context – in spite of the fact that it continues being learnt, taught, reproduced and applied, as the new system of principles, rules and cultural procedures are not yet consolidated (CASELLA, 2007b, p. 15). For this reason, some authors prefer calling this transitional moment “neomodernity”, one condition in which Modernity’s precepts will all undergo a suiting process (KESSEDJIAN, 2002, p. 290).

It is important to precise more the discussion on this transitional moment of international law and its contemporary structural challenges posed by the current rise of a potentially disruptive factor – the “BRICS factor”. For this reason, we must address International Human Rights since it’s the core of contemporary international law<sup>9</sup>.

Contemporary condition perceives international law as the rational fruit of an international civil society which tries to make it closer to a human dimension (CASELLA, 2006, p. 1290-1), rejecting the obsolescent model of international law inherited from previous State’s will paradigm. After all, persisting within an inter-state international law – erected in the image and likeness of the States, and only directed for them – would not avoid the recommitment of all the barbarism experienced by mankind during the Second World War (BITTAR; ALMEIDA, 2006, p. 546). The idea was to refuse the permanence of that previous Modern perception of Law as a simple result of bargain and negotiation of selfish interests.

The objective is to assure “a larger effectiveness in protecting and promoting fundamental rights” (PIOVESAN, 2003, p. 60-1)<sup>10</sup> through global and regional systems of Human Rights protection, regardless the level of protection or unprotection given by State – or even against

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<sup>9</sup> International Human Rights is an answer to the atrocities practiced during the Second World War (BITTAR; ALMEIDA, 2006, p. 544; CASELLA, 2007a, p. 17; MIRAGEM, 2005, p. 308-11-2; PIOVESAN, 2003, p. 59), and can be understood as an attempt to overcome Hannah ARENDT’s conclusion (2004, p. 333-4) that the mere human condition is not enough to hinder the perpetration of the biggest carnages against those who are not citizens. A rational international human rights order had to be erected and universally applied to give international law the conditions to fulfill the purpose and duty of ensuring globally the survival of mankind, disregarding any national or international deviating will or mutable cultural synthesis. This would be achieved via qualitatively new legal resources, fitted with compulsory compliance and liability features: treaties on human rights, *ius cogens* (non-derogable norms of international law), general principles. International law would prevail even if a State disposed on the contrary for its own domestic legal order. Thus rational imperatives derived from axiological finalistic needs – International Human Rights reputed to be universally and unconditionally valid – are the main factor of International Law’s new framework. Human Rights would explain the whole international law building: the Alfa and the Omega, the Beginning and the End, the First and the Last of the Global.

<sup>10</sup> Authors’ own translation.

them. Contemporary international law is, simply, international law in the “Age of Human Rights” (CASELLA, 2009b, p. 6)<sup>11</sup>.

However, the possibility of questioning international human rights within time must not be regretted or blindly rejected: rather, it has to be adequately understood within a multicultural environment. A multicultural reality is not new<sup>12</sup>, but for the first time the so-called emerging countries – nowadays, a powerful factor in world politics which belongs to the cultural periphery of a so far Western-led world – have the means to forge international law according to their own way – or better, their own scale of existence.

This is precisely the disruptive potential of the BRICS factor: through thematic cooperation branches in which the BRICS countries are cooperating or might cooperate, they may propose alternative models for international law. That is the case, since the agenda for the BRICS countries is not given, but shall be constructed<sup>13</sup>.

### **3 Structural Challenges in Current Global Legal (Dis)Order: International Law in a Multicultural and Multipolar World**

As was stressed before, contemporary international law is centered in human rights, and it operates according to a downward movement from new international legal order over any other legal order – just as an avalanche dynamic. However, it cannot be ignored that along with the pure and peaceful whiteness of the homogeneous order it produces, it brings also a white cemetery of despair through the unconstrained, blind and insensitive running over destructive power it conveys within itself.

It is this one sole scale of existence who gives the scale of the rule – or even, who gives the rule(r) to measure, understand, explain and build the world –, which is not directly founded on man, but on Reason, as artificial as Will. The rational elimination of risks and contradictions

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<sup>11</sup> Author’s own translation.

<sup>12</sup>As Karl Zemanek (1998, p. 33) states “Decolonization in the 1950s and 1960s marked nevertheless a watershed, since the international community became for the first time truly pluralistic, insofar as its members had now, in the United Nations, a forum where to voice their values and interests. Although this has not led to considerable changes in the basic rules, their interpretation has become more diverse.”

<sup>13</sup> Some substantial issues that we believe that would contribute as a roadmap to cooperation would be the following: (i) Outer Space; (ii) Energy; (iii) Defense; (iv) Research and Innovation; (v) Environment; (vi) Poverty; (vii) Public Health.



within international law dynamics is a utopic civilizational discourse which is potentially barbarian and dystopian, such as the barbarities produced according to a will-led perspective of law. Reason and Will and their respective international legal orders can operate globally as instruments of Power, domination and destruction of the others, against the uncontrollable spontaneity of life in international dynamics.

The barbarian principle within this avant-garde international law discourse cannot be ignored. The objective is to clear the site of any reminiscence of a civilizing perspective of the legal discourse in order to expunge the force principle from it – in other words, to get rid of barbarism in contemporary legal thought on international law.

The affirmation of a global universal validity of Human Rights in different space-time conditions is precisely a discourse imbued with an unconditional validity pretension which is proper to the cultural framework of Western tradition – opposite to the singularity of other civilizations. Once again, it is possible to identify the rise of an absolute affirmative pretension within a particular and specific scale of existence over other modes of inhabiting the world. Once again, the clash of civilizations is being conducted according to a gravitational logic of the non-civilized nations around the European ones – so-called civilized -, in a centripetal sense, notwithstanding the fact that there were – and that there are still – fundamental social-cultural differences<sup>14</sup>.

Merleau-Ponty's philosophical discourse (2004) reinforces the necessity of taking into account the dimensions engendered within a scale which outside that artificial non-paradigmatic matrix, in order to know and operate adequately the world. Including and recognizing the perception of phenomena given by the no-Man (animals), by the “un-civilized” Men (the so-called “primitive” Men, or even, the non-european Men), by the no-adult Men (children) e by the not-healthy Men (insane) is crucial for a more complete comprehension of the manners whereby the world is knowledgeable and manageable from a multi-dimensional perspective of existence.

One always speaks from a limited perspective of the world. The conscience of the self-limitation only rises with the contact and the handling with the otherness, that is to say, with other limited perspectives which – also according to their own way – understand incompletely the world. Taking into account these varieties of living and inhabiting the legal phenomenon among

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<sup>14</sup> This does not mean that we agree either with Samuel Huntington's thesis (1998) of an unavoidable civilizational armed conflict, or with the one which points out to the menace of a possible sino-islamic alliance.

each people is important to understand how the “BRICS factor” contributes to deepen the complexity of the normative process in present so-called global legal order.

Indeed, as their legal, economic and political relations grow, the rise of a possible conflict between a Western legal conception and a non-Western legal perception of the law phenomenon is progressively emphasized and deepened in international legal (dis)order: the BRICS reveals itself not only as a powerful **factor** in nowadays world politics, but also as a powerful **actor**. This tension is even more stressed within a contemporary condition, when social-cultural disagreements are continuously encouraged and raised due to the ascension of custom as the preeminent source on international law (ACCIOLY; NASCIMENTO E SILVA; CASELLA, 2009).

The limits of International Human Rights are the limits of the world in which this discourse was conceived. However, these limits do not make any concrete sense to alternative socio-cultural frameworks which are getting more and more influential within the normative process of present global (dis)order. In other words, regarding Human Rights as the axiological core of international normative production or as the foundation of their own international legal practices does not make any sense for BRICS countries’ millennial socio-cultural customs and traditions.

The limits of this world are only able to be contemplated from an external standpoint, which is only adequately understood when it is “on the other side”: the rational axiological framing of international law through a human rights path might not be considered as necessary by contemporary international law States. To depart from custom in order to establish the foundation of international law is to trigger a chain of thought which will directly challenge the foundations, not only of Modern or contemporary international laws, but even of Modern Western thought itself.

The relationship between the BRICS countries is interesting, as it approximates different socio-cultural, economic, political and legal traditions, some of them with millennial foundations. Former European colonies cooperate with former Empires, some of them more – some of them less – convinced on the necessity of a global framing of international law according to an unconditional and absolute normative validity of human rights.

The “BRICS factor” is not only an embryo of alternative legal and political models of cooperation between multiple countries (not establishing a “colonial pact” among them, not

aiming an economic integration process according to European model, etc.). It is also an important sign of possible future structural modifications international law will undergo, as it criticizes an absolute discourse of unconditional and unchallengeable normative pretensions.

It is not possible to foresee which are going to be results of the structural transformations of international law due to the rise of new customary legal dynamics, manifested through the ascension of new normative sources, such as the ones conveyed by the BRICS. Or, even, it is not allowed either to foresee these results, either to judge them aprioristically from a closed traditional normative foundation. The realm of legal possibilities is always larger than both the realms of legal contingency and of legal actuality: it exists, persists, and must always be taken into account, that is to say, cannot be ignored by any legal thought.

The BRICS is an interesting laboratory of alternative international legal normative orientations, reinforcing the perception of the unavoidable transformation process all international law conceptual and normative buildings will undergo. It is only possible to notice a trend of trying to overcome an international law model which is riddled with an obsolete evolutionist Euro and ethnocentric perspective of absolute universal order, as there is a de-differentiated co-presence of dissonant signs, each one a product of different socio-cultural metric systems within time and space.

#### **4 Final Remarks**

Modern time was represented by the juxtaposition (imposition) of the Western European civilizational model over the other ones, from which human rights is a gentle civilizing byproduct (KOSKENNIEMI, 2002). This rational international human rights order was erected and pretends to be universally applied, in order to give international law the conditions to fulfill the purpose and duty of ensuring the survival of mankind, disregarding any national or international deviating will or custom.

However, human rights consensus of 1948 and 1993 had its legitimacy tested by a multi-axiological polycentrism, as XXI<sup>st</sup> century revealed a new scenario: the rise of distinct groups of States/civilizations provided with different legal, political, economic and social traditions, cooperating economically among themselves in spite of traditional international law. Perhaps

with this uprise of otherness, international law will potentially undergo a reframing process, as this unconditionally valid normativity source will not be able to remain due to the lack of sufficient legitimate ground.

The BRICS is a symptom of such reality. It offers the opportunity to perceive the creation of a diplomatic culture of cooperation and dialogue among States which at the same time are not engendered within a human rights culture, but might be as well at the forefront of international systems in forthcoming years as a strong normative source.

This means that, with the rise of mores as the foundation of international law, some countries not constituted within human rights culture or legal tradition – such as the ones who compose the BRICS –, due to their empowerment in world politics in terms of significant warfare or economic bargaining powers, were assigned to a potentially new role in contemporary global legal order: they now detain a new kind of normative capacity, which might be imbued with alterity potential

Contemporary global politics reveals that maybe human rights culture will lose its exclusivity in paving international law. Not only reason, expressed through Washington or Brussels Consensus, but other custom-originated discourses, such as Brasília, Moscow, New Delhi, Peking or Cape Town Consensus – among other unfolded possibilities – will all together henceforth attempt shaping international law the present global legal disorder. Maybe Western tradition will remain as one of many international normative factors/actors/poles – but certainly, it will not be anymore the single scale of existence which will frame international law.

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