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RULES-BASED INTERNATIONAL ORDER. A CRITICAL APPRAISAL

Abstract: The purpose of this paper is to present and evaluate the concept of rules-based international order, which is formulated both in political doctrines and in the academia of Western countries, especially the US and the EU. The concept is sometimes treated as a new form of international law or as an ideological/instrumental interpretation of it. Accordingly, the origin of the concept, its formal basis, the way it has been conceptualised by the US and the EU, its formal and content components are discussed. In addition, a political assessment of the concept is provided (Chinese, Russian). Moreover, the formal and content relationship of rules-based international order to international law is identified, assessing what the mentioned concept is from the point of view of international law and to what extent it is compatible with existing international law.

Keywords: international community; international law; liberal international law; rules-based international order; Eastern (Chinese, Russian) and Western (US, EU) concepts of international law;

Introduction

The ongoing geopolitical rivalry between the West (the US and its allies, the EU, EU) and the East (China, Russia and its allies) is expressed, *inter alia*, in the formulation of competing visions of international order and international law.¹ It has intensified in the wake of Russia's aggression against Ukraine.² In this context, the West is promoting the concept

1 Roberts, *Is International Law International?*, 277ff.

2 Mik, "Russia's aggression against Ukraine: a clash of two visions of the international community and international law. Preliminary conceptual reflections", 57ff.

of a rules-based international order (RBIO) with increasing determination. The concept is intended to be both a response to Eastern abuses and violations of the international order and, at the same time, a way of adapting it to dynamically changing conditions, a manifestation of the accomplished or ongoing transformation of the international order. The East, on the other hand, sees the RBIO as an attempt to impose unilaterally established or interpreted rules, a means to maintain the hegemonic position of the West, especially the US in international relations.³

The RBIO raises many controversies. Disputes are evident in the science of international relations, to a much lesser extent in the sphere of international law. Both the origin of the RBIO concept and its understanding, as well as its relation to international law, remain highly unclear. The concept is also subject to criticism coming from various directions. In particular, the questions arise as to whether the RBIO is identical to international law or whether it is a new interpretation or even a projection thereof; whether it represents a subjective Western vision of the international order or whether it is an expression of a perception of the current state of the international order, which is defended by the West in this formula; if the RBIO is not identical to international law, the question arises as to what other rules it encompasses and what their nature is; if the RBIO represents a new concept or a new interpretation of international law, whether it is consistent with existing international law or whether it leads to a transformation of international law.

As a key geopolitical concept in today's world, supported by global actors, the RBIO is not without influence on international law. Indeed, the nature of international law and its content depend not only on the existence of the international community, but also on the nature of the international community and the way relations are arranged within it. In this context, the position of global actors towards the international order is of particular importance.

The purpose of the paper is to establish what the RBIO is and its relationship to international law. Its achievement is served by the following structure of the paper: (1) presentation of the genesis and formal basis of the RBIO; (2) reconstruction of the RBIO as a political concept in the approaches promoted by the US and the EU; (3) definition of the elements of the RBIO; (4) presentation of the criticism of the RBIO by the actors

3 Iommi and Maass, "The United States and International Law. Paradoxes of Support across Contemporary Issues".

of the geopolitical dispute, i.e. China and Russia; (5) establishment of the scope relation of the RBIO to international law; (6) assessment of the RBIO from the perspective of international law.

1. 1. Origin and Formal Basis of the RBIO Concept

1.1. Origin of the RBIO Concept

The origin of the RBIO concept is unclear. The literature indicates that its author is unknown. H. Grotius is sometimes considered to be the protoplast of the concept. At the same time, there is no doubt that it was known earlier than the 1990s.⁴ It is also recognised that the concept has undoubtedly appeared more frequently since the end of the Cold War⁵ or at least since the beginning of the 21st century.⁶

The ideological roots of the RBIO, especially in the US and Europe, are sought in the concepts of the liberal (neoliberal) international order.⁷ In the US in particular, the importance of President W. Wilson's so-called new liberal order, proposed in the wake of the end of the First World War, is pointed to. More broadly, the RBIO is linked to so-called liberal internationalism.⁸

Today, the promotion of a rules-based international order, framed equally in terms of a new liberal plurilateral order, is sometimes seen as a response to the 'rise of authoritarian international law', posing a threat to 'liberal international law'.⁹ The RBIO, in conjunction with liberal ideology, is perceived a response to populism, protectionism and nativism.

4 It is sometimes said that, at least in a material sense, the RBIO has been in existence for at least six decades. Lieberherr, *The 'Rules-Based Order': Conflicting Understandings*, 1.

5 Dugard, "The choice before us: International law or 'rules-based international order'", 224.

6 Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, "The Concept of 'Rules-Based Order' in International Legal Discourses", 40; A. Levchenko, *Rules-Based International Order: Dos and Don'ts of Liberal Manners*, https://russiancouncil.ru/en/analytics-and-comments/analytics/rules-based-international-order-dos-and-don-ts-of-liberal-manners/?sphrase_id=106291879.

7 Delabie, *Approches américaines du droit international. Entre unité et diversité*, pp55ff., 296ff.; Hosoya and Kundnani (eds.), *The Transformation of the Liberal International Order Evolutions and Limitations*. See also Liberal international order, https://en.wikipedia.org/wiki/Liberal_international_order.

8 Joyce, "Liberal Internationalism", 471ff.

9 Sloss and Dickinson, "The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order", 799.

The RBIO is also sometimes considered to be a consequence of globalisation, which has transformed international economic reality and brought about changes in the security sphere.¹⁰ Undoubtedly, at least some elements of the RBIO correspond to globalisation (the global liberalisation of flows of people, goods, services and capital, as well as the free communication of information and ideas, the globalisation of states, including their governmental regimes, the inclusion of non-state actors in international processes).¹¹

1.2. Formal Basis of the RBIO Concept

The RBIO is primarily a political science and policy concept. As a state policy concept, the RBIO is formulated or referred to in high-level state documents such as national security, defence or foreign policy strategies, as well as in various specific documents from legitimate state actors. The RBIO appears in particular in US national security strategies (at least since the presidency of B. Obama, the 2015 National Security Strategy) and their allies (notably Australia, New Zealand or the UK).¹² Sometimes the RBIO concept is also present in individual or joint state positions or statements (e.g. in the so-called New Atlantic Charter – a joint statement by the US President and the UK Prime Minister of 10 June 2021).¹³ The idea of the RBIO is also developed in conceptual documents of some international organisations (e.g. the NATO Strategic Concept of 2022),¹⁴ including those that act like states (the EU, e.g. in declarations of the European Council or in joint communications of the High Representative of the Union for Foreign Affairs and Security Policy relating to international governance or multilateralism). At the same time, there is no doubt that special weight should be given to documents originating from, as

10 The “Rules-Based International Order,” explained, Parley Policy Initiative, May 3, 2023; file:///C:/Users/cezary/Downloads/Cable%20No%2029_The%20Rules-Based%20International%20Order%20explained.pdf.

11 On globalisation and ties to the law, among others: Auby, *Globalization, Law and the State*; Bederman, *Globalisation and International Law*.

12 Lieberherr, *ibidem*, 2; Scott, “The Decline of International Law as a Normative Ideal”, 637-639.

13 Text: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/10/the-new-atlantic-charter/>.

14 The RBIO mainly occurs in the context of threats to order and the pursuit of violations of its rules, primarily from China and Russia. Text of the Concept: <https://www.nato.int/strategic-concept/>

well as adopted with the participation of, global actors such as the US and the EU.

In the context under consideration, although the RBIO is an increasingly prevalent concept in the political documents of Western states and organisations, there is no universally accepted document in which the rules-based order is characterised in a structured way. This dispersion of the source base undoubtedly contributes to disputes over the existence of the RBIO as a coherent concept, the determination of its content, and facilitates its general critique. On the other hand, such a situation enables the authors to more easily adapt the concept to the dynamically changing international environment.

The RBIO as a political science concept is doctrinal in nature and is the subject of a growing body of scholarly work and commentary. One of the most prominent researchers of this concept is the American Princeton University scholar G. John Ikenberry.¹⁵

The RBIO concept is more difficult to find in sources of international law. Gradually, however, it is also beginning to seep into treaties, becoming an integral part of them (e.g. the German-French Treaty on Cooperation and Integration of Aachen 2019,¹⁶ the Partnership Agreement between the EU and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, on the other, of 2023¹⁷), as well as their accompanying documents (e.g. Political declaration setting out the framework for the future relationship between the EU and the United Kingdom).¹⁸ To a much lesser extent, the RBIO appears in international

15 Ikenberry, *A World Safe for Democracy: Liberal Internationalism and the Crises of Global Order*; Ikenberry, *Liberal Order and Imperial Ambition Essays on American Power and World Politics*. See also: The interview with Ikenberry, *An audio transcript of the Rachman Review podcast episode: 'Is there such a thing as a rules-based international order?'*, <https://www.ft.com/content/664d7fa5-d575-45da-8129-095647c8abe7> (April 20, 2023).

16 Effective 22 January 2020, UNTS I-56239. The RBIO appears in the preamble, in the context of an open and fair global market based on international law, and as an articulation of the parties' firm commitment to 'an international order based on rules and multilateralism, with the United Nations at its heart.'

17 The RBIO appears in the preamble of the Treaty, among the objectives of the Agreement (Article 1(5)), in the context of the international trade regime (Article 50(2)), and in the provision on multilateralism and global governance (Article 78).

18 OJ 2020, C 34, p. 1.

jurisprudence, although it is sometimes mentioned in procedural documentation.¹⁹

2. Conceptualising Rules-based International Order

2.1. The Problem of Conceptualising the RBIO

Difficulties with the conceptualisation of the RBIO occur at the political and doctrinal level. They are already revealed at the stage of terminology. Indeed, the order is also described as liberal,²⁰ democratic, open, yet multilateral, worldwide or global. These are used rather loosely and remain unspecified. Moreover, there are doubts as to whether the RBIO should be regarded as the existing order (and then, for example, as a political or legal interpretation of international law) or rather as a projection of a future reality (and, thus, as a proposal for the transformation of international law).²¹

The divergence increases at the level of content analysis. Both at the political level and in the doctrine, the RBIO is not characterised in a homogeneous way. As a result, according to some representatives of the doctrine, there is no single concept of the RBIO, no single common denominator can be established.²² Undoubtedly, rules-based order exists in various shades of meaning in the doctrines of Western states and organisations, as well as in Western science. Nonetheless, at the same time, there is an apparent effort to clarify the content of the RBIO. Thus, it seems that it is not impossible to identify at least the essentials of the RBIO.

A certain material bond for the different approaches may be the basic liberal democratic ideas. Thus, for example, G.J. Ikenberry describes the RBIO as follows:

if you were to try to identify what open rule-based order is, it's a set of commitments by states to operate according to principles, rules and

¹⁹ See annexes containing statements by a group of states in relation to interventions in the Ukraine v. Russia case pending before the ICJ concerning violations of the Genocide Convention. Text: <https://www.icj-cij.org/index.php/node/203040>.

²⁰ It is argued that the liberal order in particular is used to emphasise the leading role of the US. See Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, *ibidem*, 41.

²¹ Lieberherr, *ibidem*, 3-4.

²² *Ibidem*, 3.

institutions that provide governance that is not simply dictated by who is most powerful. So it's a set of environmental conditions for doing business – contracts, multilateral institutions – and it comes in many layers. At the deepest level it's really the system of sovereignty. It's the belief that the world has a kind of foundation built around self-determined states that respect each other. On top of that, you have these layers of treaties and institutions culminating really in the United Nations system, building rules and principles around aspirations for the inclusion of all peoples and societies. Everybody gets a seat at the table that has a membership based on statehood. And then on top of that, even more work-oriented rules and institutions that came out of world war two that are based on problem-solving, regulating interdependence: the IMF, the World Bank, the WHO. And then finally, yes, the rule-based order does have a kind of western liberal democracy component on top of those more basic fundamental institutions, sovereignty and global multilateralism. You have the old democratic stakeholders who have placed themselves in a kind of organising position as the kind of patrons and curators of a system where we have gone beyond what existed in earlier eras.²³

Thus, the RBIO can be seen as an alternative to power politics, to the rule of force, and, in political science terms, to (neo)realism in international relations.

However, more ideologically and culturally neutral definitions of the RBIO are also being formulated. Thus, for example, Julinda Beqiraj, Iris Anastasiadou and Anna Darnopykh²⁴ characterise the concept as:

a system in which countries adhere to established norms, treaties, and agreements to govern their interactions. It seeks to establish a fair, just, open and predictable system of governance on the global stage by relying on 'core principles' such as 'economic stability, non-aggression, and coordinated activity on shared challenges'. In regions often characterised by diverse cultures, histories, and socio-economic challenges, the pursuit of the RBIO can thus be deemed as crucial for fostering stability, promoting human rights, and facilitating sustainable development.

23 The interview with Ikenberry (footnote 10).

24 Beqiraj, Anastasiadou and Darnopykh, "The Rules-Based International Order: Catalyst or Hurdle for International Law?", 7.

2.2. American and European RBIO Concepts

Although various countries belonging to the so-called West formulate their own visions of the RBIO, the concepts formulated by global actors, i.e. the US and the EU, are crucial. Preceding further discussion, their positions on the RBIO are not identical, although they converge in some aspects. The RBIO concepts include basic assumptions, an assessment of the international situation and the definition of principles and instruments of action.

2.2.1. The American RBIO Concept

The RBIO has begun to play a more serious role in the US approach to international relations since the presidency of B. Obama. His 2015 National Security Strategy²⁵ recognises that the RBIO represents an order in which leadership belongs to the US and therefore its promotion is a US national interest. As stated in the Strategy's introduction,

Strong and sustained American leadership is essential to a rules-based international order that promotes global security and prosperity as well as the dignity and human rights of all peoples. The question is never whether America should lead, but how we lead.

From a substantive perspective, UNCLOS (despite its lack of ratification), global finance rules (based on the World Bank and IMF) and WTO agreements (rules-based global trading system), among others, are considered elements of the RBIO. The latter states that the future trading system is to be consistent with 'our interests and values by seeking to establish and enforce rules through international institutions and regional initiatives and by addressing emerging challenges like state-owned enterprises and digital protectionism'.

From a formal point of view, RBIOs constitute rules, norms, and institutions 'that are the foundation for peace, security, prosperity, and the protection of human rights in the 21st century'. At the same time, the Strategy adds:

²⁵ Text: https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf.

The modern-day international system currently relies heavily on an international legal architecture, economic and political institutions, as well as alliances and partnerships the United States and other like-minded nations established after World War II.

It is now subject to increasing challenges and collective action may not be effective. Simultaneously, it is recognised that

the vast majority of states do not want to replace the system we have. Rather, they look to America for the leadership needed to both fortify it and help it evolve to meet the wide range of challenges described throughout this strategy.

In terms of how and by whom the RBIO is to be implemented, the Strategy states that ‘America’s leadership role within a rules-based international order that works best through empowered citizens, responsible states, and effective regional and international organisations’.

US leadership is based on mobilising global and regional collective action,²⁶ thus building coalitions to confront contemporary global challenges (aggression, terrorism, disease),²⁷ but also on taking unilateral action, including coercive action, including targeted sanctions. It states explicitly:

Targeted economic sanctions remain an effective tool for imposing costs on those irresponsible actors whose military aggression, illicit proliferation, or unprovoked violence threaten both international rules and norms and the peace they were designed to preserve. We will pursue multilateral sanctions, including through the U.N., whenever possible, but will act alone, if necessary. Our sanctions will continue to be carefully designed and tailored to achieve clear aims while minimising any unintended consequences for other economic actors, the global economy, and civilian populations.

26 In this connection, it declared, among other things, to seek to strengthen regional institutions (ASEAN, East Asia Summit, Asia-Pacific Economic Cooperation).

27 Elsewhere in the Strategy it lists more precisely: ‘Catastrophic attack on the U.S. homeland or critical infrastructure; Threats or attacks against U.S. citizens abroad and our allies; Global economic crisis or widespread economic slowdown; Proliferation and/or use of weapons of mass destruction; Severe global infectious disease outbreaks; Climate change; Major energy market disruptions; and Significant security consequences associated with weak or failing states (including mass atrocities, regional spillover, and transnational organised crime)’.

Unilateral measures should be resorted to not only to ensure respect for international legal norms, but also ‘to deter severe threats to stability and order at the regional level’.

The Strategy also points out that while the RBIO has been successful (so it is considered an existing order rather than a projected one), it suffers competition from ‘alternative, less-open models’. In relation to China, it was indicated, *inter alia*, that the US:

will manage competition from a position of strength while insisting that China uphold international rules and norms on issues ranging from maritime security to trade and human rights. We will closely monitor China’s military modernisation and expanding presence in Asia, while seeking ways to reduce the risk of misunderstanding or miscalculation. On cybersecurity, we will take necessary actions to protect our businesses and defend our networks against cyber-theft of trade secrets for commercial gain whether by private actors or the Chinese government.

In the wake of Russia’s aggression against Ukraine, on the other hand, unilateral deterrence measures were announced, also protecting Europe.

The ideas of the RBIO were maintained and developed in President J. Biden’s 2022 National Security Strategy.²⁸ However, it is not entirely clear whether the RBIO represents an existing order or a future ideal to be achieved. Rather, one could conclude from a number of formulations in it that it is a future desired international order.

A fundamental element of the 2022 Strategy is to highlight the increasing competition between democracies and autocracies. The world of democracies, in addition to the US, clearly includes Europe, the Indo-Pacific region and democratic partners from other parts of the world. The criterion for distinguishing this group is sharing

our [US] vision for regional and international order even if they do not agree with us on all issues, and countries that do not embrace democratic institutions but nevertheless depend upon and support a rules-based international system.

²⁸ Text: <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>.

The Biden's Strategy lists the components of the US approach. These include a common desire:

for relations among nations to be governed by the UN Charter; for the universal rights of all individuals-political, civil, economic, social and cultural-to be upheld; for our environment, air, oceans, space, cyberspace and arteries of international commerce to be protected and accessible for all; and for international institutions, including the United Nations, to be modernised and strengthened to better address global challenges and deliver more tangible benefits for our citizens. The order we seek builds on what came before, but addresses serious shortcomings, new realities, and the attempts by some states to advance a much less free and open model.

In seeking to establish the RBIO, it was decided to adopt a two-pronged approach. On the one hand, the intention is to work with each state, including geopolitical rivals, to respond to common challenges, and to engage with and strengthen international institutions. On the other hand, the US intends to deepen cooperation with 'democracies and other like-minded states', from 'the Indo-Pacific Quad (Australia, India, Japan, US) to the US-EU Trade and Technology Council, from AUKUS (Australia, United Kingdom, US) to I2-U2 (India, Israel, UAE, US)'.

It is also accepted that 'The most pressing strategic challenge facing our vision is from powers that layer authoritarian governance with a revisionist foreign policy'. Their behaviour challenges international peace and stability ('waging or preparing for wars of aggression, actively undermining the democratic political processes of other countries, leveraging technology and supply chains for coercion and repression, and exporting an illiberal model of international order').

In this context, it was stated that:

Russia poses an immediate threat to the free and open international system, recklessly flouting the basic laws of the international order today, as its brutal war of aggression against Ukraine has shown. The PRC, by contrast, is the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to advance that objective.

China is accused of being 'the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic,

military, and technological power to do it'. They operate on the principle of creating a sphere of influence in the Indo-Pacific region. They use their technological potential and influence in international institutions to privilege their own interests and values. They use economic coercion against states and restrict access to their own market, making the world more dependent on themselves. They are rapidly developing military power, seeking to erode US alliances. The political and systemic differences between the two countries are also highlighted. However, at the same time, it is recognised that there is scope for peaceful cooperation and responsible competition with China. It is assumed that the next decade will be decisive in this rivalry.

In relation to Russia, however, the Strategy observes that it has recently adopted an imperialist foreign policy, culminating in the conflict in Ukraine, military intervention in Syria and the use of intelligence and digital capabilities to attack other states. It is stressed that Russia has adopted an authoritarian system of government, does not respect human rights, and has abolished the opposition and independent media. It currently represents

an immediate and persistent threat to international peace and stability. This is not about a struggle between the West and Russia. It is about the fundamental principles of the UN Charter, which Russia is a party to, particularly respect for sovereignty, territorial integrity, and the prohibition against acquiring territory through war.

It also points out that the attack on Ukraine has deprived Russia of soft power, and that its threats, including asymmetric threats, are prompting efforts to build resilience.²⁹

The response to the existing international situation is the RBIO. The order is supported by a network built from the US, its allies and partners. It adds:

Building on this network, we will assemble the strongest possible coalitions to advance and defend a world that is free, open, prosperous, and secure. These coalitions will include all nations that share these objectives. At the heart of this coalition, to ensure it is as transformative as possible, are democratic nations who share our interests and values. To make our coalitions

²⁹ See Atlantic Council thesis, Strategy of 'Constrainment', Russia's Challenge to the Rules-Based Democratic Order, 2017, text: <https://www.jstor.org/stable/resrepo3702.5>.

as inclusive as possible, we will also work with any country that supports a rules-based order while we continue to press all partners to respect and advance democracy and human rights.

It further underlines that:

The vast majority of countries want a stable and open rules-based order that respects their sovereignty and territorial integrity, provides a fair means of economic exchange with others and promotes shared prosperity, and enables cooperation on shared challenges. They strongly disapprove of aggression, coercion, and external interference. They have no interest in overturning longstanding rules and norms to make the world safe for aggression and repression.

The US wants to support coalitions of these countries. At the same time, they are aware that:

some may harbour reservations about American power and our foreign policy. Others may not be democratic but nevertheless depend upon a rules-based international system. Yet what we share in common, and the prospect of a freer and more open world, makes such a broad coalition necessary and worthwhile. We will listen to and consider ideas that our partners suggest about how to do this. Building this inclusive coalition requires reinforcing the multilateral system to uphold the founding principles of the United Nations, including respect for international law.

Biden's strategy emphasises links with Europe (it is the US foundational partner in addressing the full range of global challenges) and with partners in other regions of the world. It recognises the interdependence of the collapse of the international order in one region with threats to others. The RBIO Strategy refers to both the international political and economic order.

In US terms, the RBIO is an order subordinate to US values and interests, partly also taking into account the values and interests of its allies and partners, and explicitly based on US leadership. This leadership is intended to ensure the order's stability, peace, security and prosperity for its participants. The RBIO is inclusive in the sense that it involves a variety of stakeholders, including non-state actors. From the structural point of view, it includes rules established in accordance with these values and interests, enforced in principle through international institutions

(universal and regional, political, economic, financial, military), as well as coalitions of states, but also through unilateral action, including of a coercive nature, if this proves conjunctively necessary. The US vision of the RBIO is an unambiguously ideologically committed concept (liberal democratic one), opposed to states that are seen as rivals or disruptors of such an order.

In the context of the presentation of the US RBIO concept, it is worth noting that the concept is mainly supported by Democratic administrations, to a lesser extent by Republican administrations. The exception is the presidency of D. Trump, who has not explicitly endorsed the RBIO. In his 2017 National Security Strategy,³⁰ the term does not appear even once. Instead, he cites international law. However, this does not change the fact that the assumptions of this strategy (America first) and its implementation may lead to contradictions with international law (although only four times).

2.2.2. *The RBIO as seen by the EU*

The RBIO is one of the central concepts of the EU's external action. It is legally anchored in Articles 2, 3(5) and 21 of the TEU, although it is not explicitly mentioned. Nevertheless, it establishes the liberal values, principles and objectives of the EU's action in international relations. In particular, Article 21(1) of the TEU assumes that the Union intends to promote the following principles:

democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

It is further acknowledged to 'promote multilateral solutions to common problems, in particular in the framework of the United Nations'. Its liberal operating philosophy is further highlighted by the fact that the objectives of the external action have become, *inter alia*, (1) safeguard its values, fundamental interests, security, independence and integrity; (2) consolidate and support democracy, the rule of law, human rights and the principles of international law; (3) preserve peace, prevent conflicts and strengthen

³⁰ Text: <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

international security, in accordance with the purposes and principles of the UN Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris; (4) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (5) promote an international system based on stronger multilateral cooperation and good global governance.” It can therefore be assumed that, in the case of the EU, the vision of a liberal international order has a stronger legal basis than in the case of the US.

Acting to implement the treaties and influenced by international developments, the EU has also formulated its own view of rules-based order. In doing so, it also uses terms such as ‘rules-based global order’, ‘multilateral rules-based order’.

Thus, the Shared Vision, Common Action: A Stronger Europe A Global Strategy for the EU’s Foreign And Security Policy of 2016³¹ states that the Union will work towards a rules-based global order, making it its interest to promote ‘agreed rules to provide global public goods and contribute to a peaceful and sustainable world’. The Strategy also established that a key principle of such an order is multilateralism and that the UN is at the centre of this concept. The Union described its stance as “principled pragmatism,” meaning that the rules of order ‘stem as much from a realistic assessment of the current strategic environment as from an idealistic aspiration to advance a better world’.

The Strategy assumes that:

To promote the security and prosperity of our citizens and to safeguard our democracies, we will manage interdependence, with all the opportunities, challenges and fears it brings about, by engaging the wider world. In a more contested world, the EU will be guided by a strong sense of responsibility. We will engage responsibly across Europe and the surrounding regions to the east and south. We will act globally to address the root causes of conflict and poverty, and to promote human rights.

A willingness to work with like-minded countries and regional groupings was declared, as well as to deepen partnerships with civil society and the private sector as key players within an axed world.

31 Text: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_o.pdf.

The document speaks of a ‘global order based on international law, which ensures human rights, sustainable development and lasting access to the global commons’ and cooperative regional orders. The EU Strategy states:

Through our combined weight, we can promote agreed rules to contain power politics and contribute to a peaceful, fair and prosperous world. [...] A multilateral order grounded in international law, including the principles of the UN Charter and the Universal Declaration of Human Rights, is the only guarantee for peace and security at home and abroad. A rules-based global order unlocks the full potential of a prosperous Union with open economies and deep global connections, and embeds democratic values within the international system.

With regard to global governance for the 21st century, it is stressed that

Without global norms and the means to enforce them, peace and security, prosperity and democracy – our vital interests – are at risk. Guided by the values on which it is founded, the EU is committed to a global order based on international law, including the principles of the UN Charter, which ensure peace, human rights, sustainable development and lasting access to the global commons.

At the same time, it is recognised that this is about transforming the system rather than preserving it.

Another document worth noting is the Joint communication on strengthening the EU’s contribution to rules-based multilateralism of 2021.³² It states that the Union and its members remain ‘firm supporters of the rules-based international order with the UN at its core’. It also specifies certain components of the order. It says that

The EU will continue supporting the international judicial, arbitration, and enforcement bodies that underpin the rules-based international order – in particular the International Criminal Court, the UN’s Human Rights compliance architecture, the European Court of Human Rights – as regards both their jurisdiction and their effectiveness.

32 Join(2021) 3 final.

It is further recognised that the international environment is becoming increasingly multipolar and interdependent.

For the European position, Article 78 of the 2023 Agreement with the Organisation of ACP States is symptomatic. It states that the parties: (1) ‘are committed to the rules-based international order with multilateralism as its key principle and the UN at its core’. They shall ‘promote international dialogue and seek multilateral solutions to drive global action forward’; (2) ‘take the necessary steps for the ratification of or accession to, as appropriate, the implementation and the domestication of relevant international treaties and conventions’; (3) ‘endeavour to strengthen global governance and to support necessary reforms and the modernisation of multilateral institutions to make them more representative, responsive, effective, efficient, inclusive, transparent, democratic and accountable’; (4) ‘deepen their multi-stakeholder approach to multilateralism by more effectively engaging civil society, the private sector and social partners in developing responses to global challenges’.

The RBIO also appears in EU legal acts concerning its external action. Thus, for example, the preamble of Council Decision 2023/2296 of 23 October 2023 on Union support for activities of the Arms Trade Treaty Secretariat in support of the implementation of the Arms Trade Treaty³³ states that the Union has declared its commitment to a rules-based order. In this context it is indicated that ‘The Union strongly supports the expanding membership, universalisation, full implementation and enforcement of multilateral disarmament, non-proliferation and arms-control treaties’. The RBIO concept also appears in other contexts, e.g. UNCLOS and the freedom of navigation,³⁴ aggression against Ukraine as a deliberate undermining of the RBIO.³⁵

In this way, the EU sees the RBIO as integral to its mission. Its implementation is implicit in the Union’s tasks. *Prima facie*, it is a less

33 O.J. L 2023/2296. See also Council Decision (CFSP) 2021/257 of 18 February 2021 in support of the Oslo Action Plan for the implementation of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, O.J. L 58, 19.2.2021, p. 41.

34 See Council Decision 2024/583 of 8 February 2024 on a European Union maritime security operation to safeguard freedom of navigation in relation to the Red Sea crisis (EUNAVFOR ASPIDES), O.J. L 2024/538.

35 Council Implementing Regulation (EU) 2022/1906 of 6 October 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, O.J. L 259I, 6.10.2022, p. 79.

political concept than the American one, with a higher degree of reference to multilateralism, the UN Charter and international law, a less instrumental view of international institutions (the role of the UN and the need for its reforms is emphasised more strongly) and international law, and less subjective. At the same time, however, it is no less ideologically committed (it promotes democratic and liberal values, appeals to the interests of the Union, as well as its security) and, although based on existing principles and demanding the effective implementation of commitments made, places a strong emphasis on reforming the existing international order. The implementation of the RBIO includes the involvement of non-state actors.

3. Components of the RBIO Concept

The components of the RBIO concept should be looked at from two perspectives. On the one hand, the individual terms used in the expression rules-based international order (rules, order, international) can be characterised; on the other hand, the formal and substantive content elements of the concept should be penetrated.

3.1. Characteristics of the Components of the Concept

Rules

The international order is rules-based first. In this view, ‘rules’ are the basic category. They include, in both the US and EU approach, not only legal norms, but also ‘rules, standards, institutions or codes’. Thus, the order is co-created by legally binding rules (led by the UN Charter) and broadly defined non-binding rules of a standard-setting nature. From an RBIO perspective, it is therefore less important what formal nature the rules have. What is more important is that they are regarded as ones that should be followed. They are in a sense, following H. Bull, ‘the rules of the game’,³⁶ in which one participates. Within the RBIO framework, the rules belonging to the order are considered to be of a universal nature and, consequently, should be observed by all.

36 Levchenko, *ibidem*.

Order

In the concept under consideration, the idea of order, sometimes also referred to as a system (rules-based international system), occupies an important place. The main difference between the US and European approaches is in the role of the main actors. The US emphasises its position as a leader. The EU does not explicitly recognise the US as a leader. It also talks about changes in the international order, recognising the increasing multipolarity of the world. Responsibility for the system is shared and divided between different actors.

Contrary to its name, the RBIO is said not to be a single order, but rather interrelated orders: a security order (based on collective security), an economic order (having its basis in the WTO as well as the international financial institutions) and a political order (found in shared liberal values, recognition of the existence of common goods or interests).³⁷ These orders are considered to be linked in the sense that failure to comply with the rules of one of them constitutes a rejection of the RBIO as a whole.

In the case of the EU, the multilateral basis of order, the importance of international institutions, especially the UN, is especially emphasised. This is not alien to the American approach, but there is a higher emphasis on the importance of coalitions of democratic states as the basis and guarantee of order. At the same time, both approaches point to the need for UN reform.

Within a rules-based order, importance is attached to the mechanisms of collective action based on international institutions. Simultaneously, individual or group action is allowed, especially when collective action fails. These actions can be both preventive and repressive. They can be based on coercion. Such measures may be directed against states considered authoritarian (the US) or not adhering to the principles declared in the founding treaties (the EU). They are considered to be in line with the RBIO, although in the case of the EU, more emphasis is placed on their compliance with international law.

International

The rules-based order is usually referred to as international, global, worldwide. This is to emphasise its universal recognition (according

³⁷ See after Ikenberry: Lieberherr, *ibidem*, 2. See also on other approaches: Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, *ibidem*, 41-42.

to the US, most countries accept the RBIO) and validity (the principles are considered legitimate and therefore binding on all states; their binding force is based more on the values they promote and their acceptance than on legal authority). However, cooperative regional orders are also referred to. Participants in the international order include both state actors and international organisations, as well as non-state actors. At the same time, the division between non-democratic (authoritarian) and democratic (illiberal and liberal) states is emphasised. Nevertheless, the American view of the rules-based order indicates a desire to neutralise or attract those states that are not liberal but also not authoritarian. In the European view, the methodology is different. Rather, it is about fostering regional orders, including through the development of integration structures and links with them.

3.2. Content Elements of the Concept

Formal Elements

The formal structure of the RBIO is co-developed by rules and institutions. Rules are contained in legally binding and non-binding documents. They are not always mentioned by name. However, the UN Charter occupies a special place. The US concept generally does not explicitly mention other treaties, although one exception is UNCLOS. The EU is more inclined to list important documents and agreements (by name or category). In particular, treaties on human rights, international humanitarian law, international criminal law (the ICC Statute, scantily omitted by the US), on disarmament and arms control, UNCLOS are indicated.

In both concepts, international institutions are also important. Their continuance is assumed, but also the need for modification is recognised (the UN case). In the US perspective, reference is made in particular to economic institutions such as the WTO, the international financial institutions, UNCLOS, as well as various regional informal formats in which the US is also a stakeholder. The EU emphasises the specific role of international institutions as such, as well as the relationship with regional agreements to which it is one of the parties. At the same time, the EU places more emphasis on making the institutions more representative, responsive, effective and efficient, inclusive, transparent, democratic and accountable.

The EU also attaches much greater importance than the US to international judiciary, arbitration and enforcement bodies as a basis for

the rules-based order. Particular prominence is given to the UN Convention Committees in the human rights area, the European Court of Human Rights and the International Criminal Court – both for their jurisdiction and their effectiveness.

Substantive Elements

A distinctive feature of the RBIO is to view the order on the basis of continuity plus change. Continuity means that at the core of the order are the existing rules, established after the Second World War, including – formally – the most fundamental principles of international law. Change, however, refers to certain rules that are particularly emphasised. As a result, democracy, human rights and the rule of law in their liberal interpretation are emphasised in both analysed approaches. Human rights are therefore closely linked to the rights of persons of a different orientation. Democracy is seen only as liberal democracy, the opposite not only of authoritarianism but also of populism or nationalism. The rule of law means rule that respects liberal values. Through the prism of values understood in this way, the condition of states as actors in the international order is characterised and assessed. They set the axis of international relations, the standard of conduct. However, they also mandate action against threats and violations. Aggression, coercion, intimidation therefore come from illiberal states (stronger in the US approach). The RBIO is therefore not an axiologically neutral order in which states with different political and economic profiles have their equal place,³⁸ but a way of opposing authoritarianism, protectionism, and realism (power politics).³⁹

Both versions of the RBIO are also about removing obstacles, making different spaces accessible to all. In the case of the EU concept, this is at the same time more clearly associated with global commons and global goods, which in turn alludes to the idea of a new multilateralism proposed by the UN Secretary-General in the 2021 Our Common Agenda report.⁴⁰

38 Beqiraj, Anastasiadou and Darnopykh, *ibidem*, 8.

39 Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, *ibidem*, 41.

40 Text: https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf.

4. Political Assessment of Rules-based International Order

The RBIO concept is subject to political criticism. It is voiced at the official level and in doctrine. At the official level, it is mainly formulated by China and Russia and their allies. Scholarly criticism is carried out by scholars both by Eastern political scientists defending the position of their states and by Western ones, mainly from neo-realist positions (e.g. the representative of so-called offensive realism, J. Mearsheimer⁴¹). Here we will limit ourselves to a synthetic presentation and analysis of the positions of Russia and China.

China and Russia declare and emphasise their commitment to a legal order based on international law. This means, first and foremost, a commitment to the UN Charter and the traditional principles enshrined therein, especially such as sovereignty, equality, non-intervention in internal affairs. They advocate a multipolar world, where multilateralism will be a consequence of the democratisation of international relations, collectivism and inclusiveness within decision-making mechanisms. They are against the use of political reasons (human rights, democracy, rule of law) to interfere in the affairs of other states. This is because they consider it an expression of hypocrisy and the application of double standards (they do not apply to Western states on the same basis as they do to Eastern states). They regard the security of states as fundamental and point out that one cannot ensure one's own security at the expense of other states.⁴²

China and Russia's political documents and statements are dominated by criticism of the US perception of the international order, including the RBIO. Both past actions (from the dropping of nuclear bombs on Japan to the Vietnam War to the illegal support of the opposition in Nicaragua) and contemporary actions (the NATO attack on Yugoslavia in 1999, the military intervention in Iraq in 2003, the paralysing of the functioning of the WTO dispute settlement system) are reproached.⁴³

As for China, it has been critical of the RBIO especially since Xi Jinping became president (2012). Indeed, since then China has been trying to achieve an autonomous position vis-à-vis the US and the West. In the doctrine, their

41 Mearsheimer, *How States Think: The Rationality of Foreign Policy*; Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities*.

42 For a more extensive discussion, see Mik, "Russia's aggression against Ukraine: a clash of two visions of the international community and international law. Preliminary conceptual reflections", 69-98.

43 Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, *ibidem*, 47.

attitude towards the RBIO is described as aggressive instrumentalism. Its manifestations are the questioning of the South China Sea arbitration (the first time China has so ostentatiously refused to accept and implement the award), the definition of the political objective as the creation of a counterbalance to US domination of the international order, of which the RBIO is an expression. It is understood as an expression of power politics, a unilateral desire to impose rules contrary to international law.⁴⁴

China officially criticises mainly US hegemony in the political sphere (arbitrary assessment of democracy in other countries, interventions in the name of democracy – colour revolutions, application of double standards, imposition of an alliance system in the Indo-Pacific region), military (carrying out illegal military interventions, causing humanitarian tragedies, among other things), economic (manipulation of the dollar, control and use of international economic and financial organisations, application of unilateral economic coercion), technological (e.g. monopolisation of intellectual property, treatment of technology humanitarian tragedies), economic (manipulation of the dollar, control and exploitation of international economic and financial organisations, use of unilateral economic coercion), technological (monopolisation of intellectual property, treatment of technology as a weapon, use of double standards, digital attacks, wiretapping, among others) and cultural (infiltration of other states' media, direct interventions, manipulative influence on international public opinion, using ICT, among others).⁴⁵

China's quintessential position on the international order is articulated in the Foreign Relations Law of 2023.⁴⁶ Article 4(1) of the Law provides that China:

pursues an independent foreign policy of peace, and observes the five principles of mutual respect for sovereignty and territorial integrity, mutual

44 Wang and Cheng, "China's Approach to International Law: From Traditional Westphalianism to Aggressive Instrumentalism in the XI Jinping Era", 149-152. See also Structural Changes in Chinese Foreign Policy: From "Prosperous Nation Diplomacy" to "Strong Nation Diplomacy", 4 *Japan Review* 2021(2), pp. 2ff.

45 See China's Foreign Ministry document: US Hegemony and Its Perils, Feb. 2023, text: https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/202302/t20230220_11027664.html, and Facts on U.S. breaching international rules, *Xinhuanet*, Nov. 19 2023.

46 Text: http://en.moj.gov.cn/2023-07/11/c_901729.htm See also Pedrozo, "China's New Law on Foreign Relations: Transforming the Rules-Based International Order with Chinese Characteristics", 574ff.

non-aggression, mutual non-interference in internal affairs, equality and mutual benefit, and peaceful coexistence.⁴⁷

Its paragraph 3 also states that China:

observes the purposes and principles of the Charter of the United Nations, and endeavours to safeguard world peace and security, promote global common development, and build a new type of international relations. It is committed to settling international disputes by peaceful means and opposes the use of force or threat of force in international relations, hegemonism and power politics. It remains true to the principle that all countries are equal regardless of size, strength or level of development and respects the development paths and social systems decided upon independently by the people of all countries.

In turn, Article 19 stipulates that China:

upholds the international system with the United Nations at its core, the international order underpinned by international law, and the fundamental norms governing international relations based on the purposes and principles of the Charter of the United Nations.

It adds that China:

stays true to the vision of global governance featuring extensive consultation and joint contribution for shared benefits. It participates in the development of international rules, promotes democracy in international relations, and works for economic globalisation that is more open, inclusive, balanced and beneficial to all.

When it comes to Russia, its position is based on the belief that the West, by appealing to liberal and multicultural ideology, challenges the traditional values and principles of the existing international order. It rejects the hypocrisy of the West and demands faithful implementation of commitments, including in the field of human rights. In its The Concept

⁴⁷ The principles included into Agreement on Trade and Intercourse Between Tibet Region and India, signed by China and India on 29 April 1954. The five principles are bases of the cooperation of China with Asian (including Russia), Arab and African countries.

of the Foreign Policy of 2023,⁴⁸ Russia recognises that there are currently revolutionary and generally favourable changes in the international community that involve the formation of a more equitable multipolar world order. However, they are not:

welcomed by a number of states being used to the logic of global dominance and neocolonialism. These countries refuse to recognize the realities of a multipolar world and to agree on the parameters and principles of the world order accordingly. Attempts are made to restrain the natural course of history, to eliminate competitors in the politico-military and economic spheres, and to suppress dissent. A wide range of illegal instruments and methods is being used, including the introduction of coercive measures (sanctions) in circumvention of the UN Security Council, provocation of coups d'état and military conflicts, threats, blackmailing, manipulation of the consciousness of certain social groups and entire nations, offensive and subversive actions in the information space. A wide-spread form of interference in the internal affairs of sovereign states has become the imposition of destructive neoliberal ideological attitudes that run counter to traditional spiritual and moral values. As a result, the destructive effect extends to all spheres of international relations.

The promotion of the RBIO results in:

The international legal system is put to the test: a small group of states is trying to replace it with the concept of a rules-based world order (imposition of rules, standards and norms that have been developed without equitable participation of all interested states). It becomes more difficult to develop collective responses to transnational challenges and threats [...] The culture of dialogue in international affairs is degrading, and the effectiveness of diplomacy as a means of peaceful dispute settlement is decreasing. There is an acute lack of trust and predictability in international affairs.

It reports that:

48 Text: <https://www.mid.ru/ru/detail-material-page/1860586/?lang=en>.

Further promotion of the concept of a rules-based world order is fraught with the destruction of the international legal system and other dangerous consequences for humanity.

The crisis of economic globalisation is deepening and power politics is growing in importance. Russia also emphasises that it:

does not consider itself to be an enemy of the West, is not isolating itself from the West and has no hostile intentions with regard to it; Russia hopes that in future the states belonging to the Western community will realise that their policy of confrontation and hegemonic ambitions lack prospects, will take into account the complex realities of a multipolar world and will resume pragmatic cooperation with Russia being guided by the principles of sovereign equality and respect for each other's interests.

China and Russia also present joint positions in which they are critical of the RBIO. One recent example is their Joint Statement on Deepening the Comprehensive Strategic Partnership of Coordination for the New Era in the Context of the 75th Anniversary of China-Russia Diplomatic Relations of 16 May 2024.⁴⁹ The parties state in unison that:

the world's major changes are accelerating, and the status and strength of emerging powers in the 'Global South' are constantly increasing, and the acceleration of world multipolarisation is becoming more and more obvious. These objective factors have accelerated the reallocation of development potential, resources, opportunities, etc., in a direction favourable to emerging markets and developing countries, and promoted the democratisation of international relations and international fairness and justice. Countries that adhere to hegemonism and power politics go against this trend and attempt to replace and subvert the universally recognised international order based on international law with a 'rules-based order.' The two sides stressed that the concept of building a community with a shared future for mankind and a series of global initiatives proposed by the Chinese side have important positive significance.

⁴⁹ Access: <https://www.fredgao.com/p/china-russia-joint-statement-a-full?r=2z3nco&triedRedirect=true>.

Thus, both China and Russia reject the RBIO as a neoliberal, hegemonic, neo-colonial and confrontational interpretation of the international order, contrary to and leading to the destruction of existing international (hard) law. They believe that the RBIO was established (imposed) unilaterally, without due participation of all states and without respect for their identity. The rules-based government ignores the changes that have taken place in the international community. The instruments used to promote the RBIO are based on force and coercion in contradiction to the basic principles of international law, degrading the importance of dialogue and diplomacy. In undertaking them, existing international institutions and procedures are bypassed.

There is much right in this criticism. However, it is a one-sided, biased criticism. The picture of reality is far-fetched, untrue. It overlooks its own actions, including those based on the use of coercion (China towards many Western states), force or the threat thereof (Russia towards Georgia, Ukraine, China towards Taiwan). One's own violations of another's territorial integrity are not analysed, nor are the numerous interferences in the internal affairs of many states (e.g. cyber-attacks). Stressing that the world has become multipolar, Russia and China are in fact proposing a return to a policy of balance of power in which each power, now including China, will have its own sphere of influence. There is also no mention of the instrumental use of international institutions by the two powers, nor of violations of hard international obligations in the field of human rights.

5. The RBIO and International Law: Scope Relations

5.1. Conceptual Aspects

One of the key problems of the RBIO is defining its relationship to international law. In the documents of global actors, this is not clearly determined. Indeed, at times the RBIO and international law appear side by side, at other times the impression is given that international law is being replaced by the RBIO.

It has been inferred in the doctrine that a twofold approach to the interplay between the RBIO and international law is possible. Firstly, they can be considered as identical. In that case, such an order would be based on existing principles of international law, possibly extended by broadly defined soft law, as advocated independently of the RBIO by a certain group of scholars. In this case, the foundations of the order are the values of the international community as enshrined in the UN Charter,

multilateral treaties and customary law. In its content, however, the RBIO would go beyond the positivist account of international law to include, *inter alia*, the principles of democratic governance, the protection of human rights, economic openness and the rule of law beyond existing hard law. According to the second view, international law is viewed more traditionally, while the RBIO represents a subjective (based on the interests and values of the states supporting it) interpretation of its norms and principles or an alternative to international law.⁵⁰

Additionally, the relationship between the RBIO and international law can also be described in another way, namely by comparing the stock of rules. Then again, for some the two concepts will be synonymous, for others not. In the second case, it is theoretically possible to have a relationship of partial overlap, or inclusion (international law as part of the RBIO). In the first case, it would have to be assumed that there are rules of international law that are not classified as co-creating the RBIO (which is possible when it is considered that the content of some rules or their interpretation is too traditional to be classified as belonging to the RBIO, e.g. the conservative view of the principles of sovereignty or non-intervention), but also rules belonging to the order that are not international law. Only some of the rules would belong to both scopes.⁵¹ In the second situation, where rules of international law are contained within a rules-based order, international law is traditionally seen as a set of legally binding rules. In this way, soft rules in particular would be outside international law but within the RBIO.⁵²

5.2. Content Relations between the RBIO and International Law

Modern international law is traditionally considered to be based on six formal principles. These include: (1) ‘the principle of political neutrality: the image of international law as distinct from politics or as politically neutral in the sense that it treats all states equally’; (2) ‘the principle of peace through law: it is possible to apply international law objectively so as to settle a dispute between states’; (3) ‘the principle of compulsory compliance: it is compulsory for a state to comply with its international law obligations’;

50 Dugard, *ibidem*, 225-226.

51 Similarly, Beqiraj, Anastasiadou and Darnopykh, *ibidem*, 11. The authors consider that as individual rules in the RBIO are not necessarily rules in the sense of international law, but general values, they may leave room for political manipulation or double standards.

52 Lieberherr, *ibidem*, 3.

(4) ‘the principle of a legal/illegal dichotomy: it is possible to distinguish objectively between legal and illegal action’; (5) ‘the principle of law preceding policy: international law is timeless, at least in the sense that it pre-dates policy. Ideally, law will dictate an appropriate policy choice’; (6) ‘the principle of comprehensive coverage: international law can deal with any issue that arises between states’.⁵³

In material terms, the key principles are those contained in the UN Charter, the 1970 Declaration of Principles of International Law and customary international law. These will therefore be the principles of sovereign equality, good faith performance of obligations, peaceful settlement of international disputes, prohibition of the use of force, territorial integrity, non-interference in internal affairs, equality of peoples and their right to self-determination. The RBIO concept not only does not question these principles, but in fact continues to recognise them as the foundation of the order. Nevertheless, some of them, are subject to a new interpretation. These principles are also supplemented by the obligation to respect human rights, more broadly with the idea of a new global governance. The principle of non-intervention is particularly restricted. This is because, on the one hand, preventive and repressive unilateral measures, including coercive measures, are allowed, without the authorisation given within the collective security system for political purposes (human rights, democracy and the rule of law are considered to be practically taken out of the internal competence of states, even if their standards are only defined in soft rules), while on the other hand, the distinction between internal and external spheres is denied (explicitly in the American conception).

6. The Assessment of the RBIO by the Doctrine of International Law

The RBIO is assessed from an international law perspective. It is primarily formulated by Eastern and Western legal science. The assessment relates to the legitimacy of the RBIO, its structural assumptions, as well as the compatibility of the concept and its components with applicable international law.

When it comes to assessing the legitimacy of the concept, particularly in Russian doctrine, it is argued that due to the unilateral formulation and promotion of the RBIO, the concept has no connection to international law, it

53 Scott, *ibidem*, 630-631.

is not legally legitimate. Nor can it be seen as an adaptation of international law, as its content is legally vague, heterogeneous. It should not be considered as an element of doctrine within the meaning of Article 38 of the ICJ Statute, nor as a ‘valid idea *de lege ferenda*’, which at the same time does not mean that ‘the concept has no perspective to influence the existing international law’. It is also argued that it is not uniformly understood by the various states of the world that refer to it, as well as the various functions attributed to it in international relations. It is pointed out that the liberal world order in fact undermines existing international law, as it suggests the rejection of the principle of consensus as its basis for validity, seeks to establish new practices of unilateral coercive measures, and runs the risk of diminishing the quality or even invalidating dialogue conducted under international law.⁵⁴

At the same time, the Eastern doctrine argues that it is possible to take a constructive view of the RBIO that would allow it to be linked to international law.⁵⁵ The conditions for such a view are that: (1) the concept does not lead to questioning the legitimacy of the recognised procedures for the creation of international law and undermining the universal rules of international law; (2) it makes it possible to distinguish the types of norms that would form the basis of the order according to their degree of normativity, which would mean that such norms would have to be linked to the sources of law, and this in turn would show that it is wrong to believe that the entire rules-based order binds universally; (3) the RBIO concept cannot be abstract; (4) the effect of individual rules should be limited to a specific circle of rule-makers and rule-addressees, which would mean excluding ‘unreasonable expectations of the implementation of the rules by states not participating in their development’.⁵⁶ Such a proposal, however, leads to the very opposite effect that the RBIO would have, according to its authors.

However, the problem with the credibility of the RBIO, especially in the US approach, is also raised in Western science. The use of double standards, US exceptionalism and hypocrisy are criticised. In particular,

54 Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, *ibidem*, 42-47, 52.

55 See also the promotion of the Chinese approach as taking into account the interests of developing countries, more pragmatic and sustainable, based on accountability, dialogue and cooperation, sovereignty of states and promoting prosperity for all, rather than supporting only the privileged at the expense of other rules: X. Ying, Demystifying the subterfuge of the “rules-based international order”, <https://global.chinadaily.com.cn/a/202312/01/WS6569a9faa31090682a5f101e.html>.

56 Vyleghanin, Nefedov, Voronin, Megamedova and Zotova, *ibidem*, 57.

it is enumerated that the US is not a party to important treaties perceived as co-constituting the RBIO. They are not a party to UNCLOS, certain international humanitarian law treaties (such as Protocol I to the 1977 Geneva Conventions), the ICC Statute, certain arms control and disarmament treaties (such as the Ottawa Mine Treaty), or the protection of human rights (such as the Convention on the Rights of the Child and the Rights of Persons with Disabilities). The US has also formulated unilateral interpretations of international law to justify the use of force, including in the form of a pre-emptive right to self-defence, and violations of international humanitarian law, in the form of humanitarian interventions or against alleged terrorists. They also made their own interpretation of Security Council resolutions, aiming to use force in Iraq in 2003 and Libya in 2011. They denied prisoner of war status to the Taliban after the attack on Afghanistan in 2002. They used drones in violation of the rules of humanitarian and human rights law. Finally, they were reluctant to stigmatise certain states as violators of international law (e.g. Israel) and punish those responsible for international crimes.⁵⁷

It is also argued in relation to the RBIO that it remains unclear as to what form it takes, by whom and how it is created, what its content is and what sanctions exist in the event of non-compliance with the rules.⁵⁸ It is noted that it is dangerous to reject the principle of individual consent as the basis of the international order, as suggested by promoting the RBIO. The creators of the rules remain unknown, and difficulties arise in determining their content.

While international law is based on the principle of sovereign equality of States, a 'rules-based order' detached from the requirement of consent may become an order of the strong, or an order by dictate of the majority.

States may disobey the 'rules' of the new order because they will believe that they are not bound by them. Indeed they will not be, leading to the undermining of the credibility of international law.⁵⁹ As a result, if one looks at the RBIO as an alternative to international law, it is a dangerous

57 Dugard, *idibem*, 226-228.

58 *Ibidem*, 230-231.

59 Talmon, "Rules-based order v. international law?".

alternative to international law. It is a one-sided interpretation of international law in the interests of the West, different from universal rules.⁶⁰

7. General Assessment of the RBIO

The RBIO is a political conceptualisation of the existing international order formulated by the West, especially the US and the EU. Although it is based on international law (hard law), it goes beyond this law in two directions. On the one hand, it undertakes a liberal interpretation of the various components of the international legal order; on the other hand, it goes beyond this order insofar as it refers to soft law *sensu largo*, including arrangements contained in Western documents, e.g. the G7, or established under their considerable influence or even unilaterally, in their policy documents and legal acts. Moreover, it goes beyond international law by introducing arrangements that are not necessarily compatible with it and treating them as permissible, legitimate exceptions to existing rules.

With regard to the formal aspects of the international legal order, the RBIO seeks to introduce modifications concerning the law-making processes and sources of law, the subjects of law, the role of the judiciary and other dispute resolution/complaint mechanisms, and the enforcement of RBIO obligations.

From a formal perspective, the RBIO concept corresponds to those voices (sometimes, expressed independently from the RBIO) in the doctrine of international law that recognise that it is based not only on hard but also on soft law sources.⁶¹ At the same time, the latter are subject to enforcement, which ultimately leads to their recognition as binding, although claims based solely on them are pursued by means other than hard law (court and arbitration are excluded). Up to this point, the proposal contained in the RBIO is not revolutionary, albeit, if soft law were extended to rules, principles and standards unilaterally set by the West (or a group of non-authoritarian states), this too could be considered an important development. However, if it were to be assumed that rules of order are adopted by majority rule, it would indeed undermine the existing paradigm of international law based,

⁶⁰ Dugard, *idibem*, 232.

⁶¹ For example, Boyle, “The Choice of a Treaty: Hard Law versus Soft Law”, 101ff.; Boyle and Chinkin, *The Making of International Law*.

however, on consent. A decision by a non-authoritarian majority would suffice to establish rules.⁶²

The RBIO also introduces some modifications in the sphere of subjects of international law. Indeed, the distinction between states and other subjects of law is not sufficient. States are subject to political categorisation (liberal/liberal, non-authoritarian/authoritarian states), which is based on a one-sided assessment. The criteria for making this assessment are not precise. An important consideration, especially in the US view, is whether states are perceived as rivals, states challenging US leadership. Such an approach may raise questions of compatibility with existing international law understood as hard law. This conclusion does not alter the fact that Russia in particular, by its aggression against Ukraine, has committed a radical violation of the basic principles of international law conceived even without any connection to the RBIO.

Under the RBIO, international institutions are considered an important part of the international order. However, they are meant to serve the values and interests promoted within the RBIO. There is also a tendency in the US approach to the RBIO, to a much greater extent than in the EU approach, to disregard international institutions when they are unable to ensure the effective implementation of their national interests. In the RBIO view, it is important to extend the order to non-state actors, although it is not clear whether they are ascribed the status of subjects of international law.

From a substantive perspective, central to the RBIO is the assumption that the West, as representing liberal values and interests, has a unilateral right to judge other states in terms of their condition and policies. Consequently, this means ascribing to itself the right to intervene unilaterally when the collective system fails, when the values and interests represented by the liberal coalition are threatened or violated. In doing so, it is not about occupying and annexing someone else's territory, but about causing changes in the government or its domestic and international policies. In principle, it is about the use of non-military coercion, but in certain situations (humanitarian intervention, economic coercion applied by authoritarian/illiberal states), primarily in the US perspective, military intervention may also come into play. The problem is that the rationale for the use of unilateral coercive measures is not only a violation of the existing rules of international

62 See more on the role of consent and the majority rule: Mik, *Theory of Obligations in International Law*, 84ff.

law, but also of the rules that constitute liberal soft standards and, in addition, the national interests/interests of the US or the EU. While the former, if they fall into the category of countermeasures, may be acceptable, the latter may raise serious doubts about their compatibility with international law as it is at the moment. Linked to this perception of the RBIO is the reluctance of the US in particular to submit to certain requirements of international law. This applies to the acceptance of certain treaties and related procedures that others are obliged to respect (e.g. in the sphere of criminal responsibility for international crimes).

8. Conclusions

The current international community is in the midst of fierce geopolitical competition. China and Russia and their allies have challenged the order based on the dominance of the West, mainly the US. Their opposition also relates to the rules developed especially after the end of the Cold War, which primarily reflected Western standards. In turn, as understood by the West, these are universal rules, expressing the values and interests of the dominant majority of states, which are not contested by non-liberal non-authoritarian states. However, they are also treated by the West to some extent instrumentally. In terms of international law, the RBIO concept is an attempt to extend international principles beyond international law and, at the same time, a way of giving a new interpretation to existing international law (by placing accents differently, adding new ones).

It seemed that, after the end of the Cold War, this approach was widely accepted and could be guaranteed by both the US and the EU, as well as by international regulatory bodies, especially the courts. However, this has turned out not to be the case. China's strengthening position and Russia's military attack on Ukraine have exposed serious tensions and shown that most states are only able to accept the RBIO verbally and to a certain extent (as the heavily numerically limited coalition of sanctions against Russia has clearly demonstrated).

From a pragmatic (still political) point of view, it seems that if the West does not want to be isolated or forced into larger-scale confrontation, it needs to undertake a critical reflection on the way the rules of the international order are constructed, understood and function. In doing so, they should not be dogmatised. Rather, there is a need to democratise the rule-making process to include as many states as possible and to ensure the widest possible internalisation of commonly agreed rules. Yes, the international

order and the international law that reflects it need some revision. However, building a balanced order on the basis of disciplining the rest of the world is not possible. Nor does the end justify the means. In particular, restraint must be shown in intervening against states whose elections are not the result of foreign interference, blackmail or pressure. This approach is particularly important in the face of the offering of alternatives to the liberal order by powers unwilling or hostile to the West. In particular, the attractiveness of the Chinese vision for developing countries must be considered.

From a legal perspective, the RBIO concept, although a political and political science concept, is indicative not only of the state of political consciousness, but also of the legal consciousness of states and international organisations – both its supporters and opponents. Given the relationship between the international community and international law, it cannot be indifferent to the understanding and operation of international law. Indeed, the ideas contained in the documents and policy statements promoting the RBIO are gradually seeping into the language of international law. They are beginning to appear in treaties concluded by the West (but not universally binding treaties), and, in addition, through international agreements, internal acts, and non-binding documents on the RBIO are also manifestations of the practice or *opinio juris* of evolving customary international law.⁶³ It is, however, questionable whether such customary law is likely to become common law. The RBIO concept is also seen as a manifestation of a political interpretation of international law and therefore a unilateral interpretation. In addition, binding and non-binding documents on the RBIOs provide an understanding of and response to the behaviour of states (organisations) in international relations and facilitate their legal qualification. Due to the unilateralism of the RBIO, behaviour based on it can become a premise for international responsibility.

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⁶³ See Draft conclusions on identification of customary international law 2018, Yearbook of the International Law Commission 2018, vol. II, Part. II, conclusions 6, 10.

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