



**British Institute of
International and
Comparative Law**

Roundtable Report: “A Rules-Based International Law: Benefits and Challenges”

Iris Anastasiadou | Dr. Julinda Beqiraj





**British Institute of
International and
Comparative Law**

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

Table of Contents

- Foreword 4
- Summary of the Discussion 5
 - 1. Conceptual framework of the RBIO and the relationship with International Law.... 5
 - 2. Enforcement and Compliance..... 6
 - 3. State Sovereignty, International Security and the Role of Regional Organisations 7
 - 4. Law of the Sea, Trade and Dispute Settlement 8
 - 5. Human rights, Climate Change, Business and Trade..... 9
 - 6. Extra-legal pressures, migration and human trafficking..... 12

Foreword

A roundtable expert discussion was convened by the British Institute for International and Comparative Law on Friday, February 16th, 2024, in a hybrid format, accommodating both in-person attendance at our London Office and online participation from across the globe. The session was attended by a total of 23 participants, comprising academics and practitioners from diverse jurisdictions, representing Western perspectives as well as voices from the Global South. The participants came from varied backgrounds, including law (Public International Law, Constitutional law, International Trade Law), and political sciences.

The primary objective of the session was to initiate a discussion on the concept of the Rules-Based International Order (RBIO), a term commonly used by political scientists and diplomats, and its nexus with Public International Law (PIL). Drawing upon their expertise, participants investigated whether the RBIO complements, strengthens, or potentially undermines the established framework of international law, encompassing treaties, customary law, and soft law norms. Prior to the event, a background note, along with a set of discussion questions, was prepared and circulated among the participants to guide the deliberations.

The session was held under the Chatham House Rule, i.e. participants are free to use the information discussed, but the affiliation or identity of the speakers cannot be revealed. This approach aimed to encourage a relaxed and open conversation, inviting participants to share their perspectives, which later informed the content of a BIICL discussion paper on the topic. The moderator, **Dr Julinda Beqiraj**, facilitated the discussion and posed key points for discussion.

- Firstly, participants were invited to attempt to identify the **definition and scope** of the rules-based international order.
- Secondly, participants were prompted to examine **how the concept is understood and applied in their relevant fields of work**, such as with regard to peace and security, trade relations, environmental protection, etc.
- Finally, participants were encouraged to **identify benefits and challenges associated with the rules-based international order** and to consider whether it enhances compliance with existing international obligations or potentially serves as a tool for states to circumvent State commitments.

Summary of the Discussion

1. Conceptual framework of the RBIO and the relationship with International Law

The roundtable featured participants from diverse backgrounds, including international relations, law, human rights, and regional studies. Throughout the discussion, various perspectives, insights as well as disagreements were shared, as to the relationship between the concept of a rules-based international order and Public International Law.

The emergence of the rules-based order within the post-World War II geopolitical landscape, was primarily led by the US and evolved from “Cold War bipolarity to post-Cold War unipolarity.” This order reflects the shifting dynamics of global power relations, particularly in the face of increasing tensions among major powers. Participants pointed out that attention needs to be paid to the motivations behind the establishment of this parallel order, especially in light of the perceived failures within the existing international legal system, particularly in areas such as international security. The intentional design of the rules-based order differentiates it from the existing international legal system. In the absence of clear norms and rules within this order, its ambiguity is deliberate and dangerous for PIL. This ambiguity allows states to selectively adopt or disregard rules based on their interests, contributing to the fluidity and inconsistency of the rules-based order. Finally, RBIO is an order that is not a legal order, therefore cannot be enforced legally. Thus, the notion of RBIO is not innocent, and has very far-reaching implications.

On the other hand, there seems to be a prevailing notion, especially from Western perspectives, that the rules-based order revolves around the promotion of free trade, movement of capital, goods, and people, with the ultimate goal of achieving common objectives and interests. However, this perspective may not be universally accepted, since other great powers have reacted to the perceived underrepresentation of the dominant rules-based order. This is evidenced by the opposition from states like China and Russia, who challenge what they see as Western-imposed norms. Putin's recent statements, particularly in the context of the armed conflict against Ukraine, highlight a perceived failure of the existing rules-based order and a call for a new one. This raises concerns about the nature of this proposed new order and whether it would condone or enable states to invade others at will. Moreover, the selective application of international mechanisms, such as the ICC, and the reluctance of powerful states like the United States to submit to international jurisdiction, further complicate the understanding of the rules-based order. It begs the question of whether powerful states can cherry-pick which rules to abide by, undermining the integrity of the international legal framework set out by PIL. Instances of non-compliance by powerful states, such as the United States and the United Kingdom, highlight the inherent challenges in upholding the rules-based order. The ongoing refusal to comply with international rulings, such as the UK's stance on the Chagos Islands, underscores the need for a critical examination of the current order and its shortcomings.

2. Enforcement and Compliance

There is an interesting overlap between the rules-based international order and international law. States prefer to distinguish between the two to maintain flexibility in their interactions and agreements, allowing them room to renegotiate or alter their approaches as needed. However, this flexibility is potentially leading states disregarding or flouting these rules, as seen in instances of violations of international law, such as Russia's recent discussions about deploying nuclear weapons in space. Drawing parallels to customary international law, the evolving relationships between states and the rules guiding these interactions might gradually create novel customary norms. The rules are primarily dominated by the Global North, but there should be room for states from the Global South to influence these rules. If such influence exists, it could encourage states to adhere to these rules more closely.

The recent *South Africa v Israel* case brought before the ICJ sparked discussion around the enforcement of international law, particularly regarding issues of genocide. Similarly, cases like *Ukraine v Russia* highlight the challenge of predicting outcomes and their potential impact on third states, such as Israel. While the ICJ's jurisdiction is limited by international law, criticism arose for its perceived limitations in addressing broader issues like Israel's actions in Gaza. However, it is essential to distinguish between international law and the rules-based international order, as well as between ICJ's mandate and the broader scope of the rules-based order. Furthermore, the ICJ's provisional measures reveal a significant divide within the rules-based international order. States like the US, Germany, and the UK resist or downplay the ICJ's rulings, while others like Australia, New Zealand, and Canada express support.

Similar debates surrounding enforcement and jurisdictional constraints also arise in discussions regarding the International Criminal Court (ICC). Cooperation is essential for the effective functioning of international criminal law, particularly in cases involving surrendering of heads of state who have arrest warrants issued against them. However, the credibility of cooperation mechanisms is undermined when powerful states do not subject themselves to the jurisdiction of the ICC, leading to questions about the moral and legal authority to compel other states, especially African states, to cooperate. Addressing this challenge requires considering the development of new rules on cooperation. However, for such rules to be effective, all states, regardless of their power status, must adhere to them. Potential solutions include strengthening the capacity of states to address international crimes within their own territories and promoting the enforcement of the rule of law. Starting from the grassroots level and building up the rule of law within states, human rights violations can be limited, and friction in international relations can be reduced.

In spite of the enforcement challenges in the ICC and ICJ, there is an important role of regional organisations, particularly the AU, in addressing issues within their respective regions, such as human rights violations and international criminal law. The African human rights regional bodies, such as the African Commission and the Court on Human and People's Rights, demonstrate an outward-looking approach, striving for uniformity in their jurisprudence and standard-setting efforts. There is an inclusive and respectful nature of these bodies towards their regional and international peers in developing standards and making decisions.

Further, evidence from a recent study suggests that there is willingness to comply with decisions and judgments from various regional and UN human rights bodies. Indeed, compliance is not solely determined by the legal status of the decisions but is influenced by many factors, including political, legal, bureaucratic, and technical considerations. Ensuring state compliance with international human rights decisions is highly complicated, considering that it often requires bureaucratic and technical processes at the domestic level.

Meaningful engagement between regional organisations, powerful states, and the UN is key in addressing these issues effectively. Such engagement should be conducted on an equal basis, recognising the sovereign equality of states. However, the AU has a complicated relationship with the ICC regime. For example, attempts were made to engage with the UN through diplomatic channels, including invoking Article 16 of the ICC statute to defer investigations. However, the UN's response to such engagement has been limited. Meaningful engagement could encourage regional organisations like the AU to take more proactive measures, including capacity building and reinforcing the rule of law.

3. State Sovereignty, International Security and the Role of Regional Organisations

International law is constantly subject to change and evolution. This evolution is evident in various domains, such as peace and security, where concepts such as state sovereignty can be challenged in response to atrocities or severe violations of human rights. Furthermore, regional organisations like the AU and EU negotiate their roles and relationships, regarding interventions and their authority to enforce peace and security measures. The strengths of different regional organisations in various governance areas, such as Africa's strength in peace and security, and Latin America's focus on human rights through the Inter-American system contribute to the broader discussion on the relationship between international law and the rules-based order.

Historically, there have been instances where traditional concepts like state sovereignty have been re-evaluated in response to violations, such as the actions of the apartheid government in South Africa. The 1969 Lusaka Manifesto was a pivotal moment where the OAU (Organization of African Unity) acknowledged the need to critique internal state behaviour due to its extreme nature. Moreover, interventions like ECOMOG's involvement in Liberia in 1990, was significant in paving the way for regional intervention in conflicts, challenging the precedent set by Global North states.

The reconceptualisation of Chapter VIII of the UN Charter by African states through the African Union, shifted the focus from a construction of hierarchy to partnership and cooperation with regional organisations. These deal with logistical issues, from stable financing and peace missions to troops and division of labour. The role of regional organisations is integral in shaping international law, such as rulings by the Inter-American Court on amnesty issues. These rulings have contributed to establishing frameworks around amnesty and peace agreements, influencing global perspectives on acceptable practices. It is essential to recognising the contributions of regional

instruments, particularly those in the Global South, in constructing international law and influencing the rules-based order.

International law and the rules-based order intersect, particularly in the context of maintenance of peace and security. The conflict between the principles of state equality and the Security Council's veto power, demonstrates the politicised nature of international law. This can be seen in the United Nations' economic sanctions. Specifically, in the context of the Kadi judgement by the European Court of Justice, there were subsequent discussions surrounding the rule of law approach to UN Security Council resolutions.

Beyond the multilateral level, there is a wider discussion whether States should unilaterally seize assets and freeze funds from certain entities. There is considerable debate surrounding fairness and consistency in how international rules are applied. Some nations from the Global South feel that this approach is biased, and sets double-standards. For instance, when considering aid to Ukraine amid its invasion from Russia, opinions differ. Some argue for strict adherence to rules, while others advocate for assistance based on fairness and proportionality. Ultimately, the decision should strike a balance between upholding rules and ensuring fairness, especially for those in need.

4. Law of the Sea, Trade and Dispute Settlement

The RBIO framework is not necessarily legal in nature but serves as a platform for emerging and established powers to compete and assert their interests within a structured framework. While the RBIO concept shares commonalities with international law, it encompasses a broader framework that includes political, economic, and social dimensions. For example, the Bretton Woods institutions, such as the International Monetary Fund (IMF) and the World Bank, are integral components of the RBIO, shaping global economic governance alongside traditional legal instruments.

The definition of RBIO is troublesome in the context of the Law of the Sea. While this term is commonly employed in state rhetoric and political discourse, it is relatively rare in legal scholarship. Instead, there is a prevalence of the concept of the "international rule of law" within legal literature. Clarifying the relationship between these two concepts is crucial to avoid confusion or circular reasoning. Investigating this relationship and conducting comparative analysis between the two concepts would be beneficial. Furthermore, the existence of rules governing international relations across various areas underscores the expectation that once these rules are established, they must be adhered to as a matter of international law.

On a more positive note, the infrastructure that facilitates communication, such as undersea cables and pipelines, is only possible because of treaties and agreements that regulate maritime activities. This underscores the vital role of international law in enabling global connectivity and cooperation. On the other hand, when international law is violated, it is crucial for everyone to express concern and consider appropriate responses. These responses can include financial and trade sanctions, expropriation of assets, and exclusion from international bodies. However, it is important to note that while such violations may undermine international justice, they do not necessarily invalidate or render the international legal system unnecessary. In

fact, the majority of states consistently adhere to their international law obligations, contributing to the overall stability and progress of the international community. Despite challenges and occasional violations, we have made significant strides in various fields of international law. Collaborative efforts in environmental protection, trade, natural resource management, and public health have yielded positive outcomes, demonstrating the effectiveness of cooperation and good faith compliance among states. While hundreds of such disputes exist worldwide regarding maritime disputes, the overwhelming majority are resolved peacefully. This is a testament to the preference for peaceful means of settlement over the horrors of war, which can have devastating and long-lasting consequences. While we must remain vigilant against violations of international law, we should also celebrate the successes and progress achieved through shared cooperation and concern for common interests.

The term RBIO is deeply connected to rule-based dispute settlement in public international law. There is a shift in the nature of international disputes, since more disputes, especially in trade and investment, are increasingly intertwined with politics. This blurring of lines makes it challenging to isolate disputes from political influences, complicating the pursuit of impartial and independent dispute resolution. This changing landscape necessitates a reconsideration of the meaning of rules-based dispute settlement. While traditionally characterised by predictability and consistency, under current circumstances, flexibility may be more crucial. Scholars in public international law need to adopt a more flexible approach to rules-based dispute settlement to accommodate the politicisation of disputes.

The evolution of trade law's integration into public international law, can be categorised in three distinct periods: pre-1995, marked by pragmatic dispute settlement; 1995-2019, with the WTO's establishment and increased judicial enforcement; and post-2019, following the WTO Appellate Body's collapse, characterised by a return to pragmatism. The term RBIO can be seen positively, since it constitutes an attempt to maintain legal elements within political dynamics, especially in trade. While there is criticism against the Appellate Body, such as over-judicialization and the difficulty of applying legal principles to political realities, the law and order are not entirely distinct - there exists a continuum between them.

Regarding the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), there are two key functions they perceive it to serve. Firstly, the MPIA has a role in maintaining the two-tier system of dispute settlement, particularly in light of the dysfunctionality of the WTO Appellate Body. Secondly, it has a function in preserving the binding nature of dispute settlement. However, there is scepticism regarding the clear dichotomy between binding and non-binding dispute settlement mechanisms. While there is distinction between binding laws and non-binding rules in international law, this boundary is not always straightforward. Non-binding rules or statements can sometimes have significant practical impacts on dispute resolution, blurring the distinction between binding and non-binding mechanisms.

5. Human rights, Climate Change, Business and Trade

Human rights law is evolving beyond a state-centric approach, with developments occurring at national, sub-regional, and regional levels. These developments are

expanding the framework within which businesses operate, emphasising the importance of human rights and environmental sustainability. This broader conceptualisation of the international order, although not strictly binary like traditional international law, is influencing the evolution of international law, particularly in areas like business and human rights.

There is an evolving landscape of the rules-based order over the past two decades, particularly in terms of holding businesses accountable for human rights within the international framework. There are challenges and developments in translating these values into actionable laws, as seen from the failed attempt to establish a UN treaty and the subsequent creation of soft law mechanisms. In the midst of the ongoing negotiations for a UN treaty, there is a relationship between international institutions and emerging global challenges, such as holding multinational corporations accountable for their actions. There is however disparity in engagement between the Global North and Global South in these discussions, with the former often setting rules that affect the latter without their input. In the context of business and human rights, there are interesting aspects to explore regarding the differentiation between the rules-based order and actual public international law.

Reflecting on compliance and accountability, particularly in the context of business and human rights, it is intriguing to observe how the development of international standards for business and human rights has influenced compliance at the state level and contributed to the accountability of non-state actors, such as businesses. The establishment of international standards, such as the UN Guiding Principles on Business and Human Rights, has provided a framework for addressing human rights issues related to business activities. These principles have not only served as guidelines for states but have also been used as case law in legal proceedings, demonstrating their impact on shaping national legislation and policies. For example, countries like the Netherlands have recognised a duty of care to their citizens in relation to climate change, aligning with international standards such as the Paris Agreement. This illustrates how international norms can be incorporated into national legal frameworks to hold states accountable for addressing human rights challenges, including those related to environmental protection and climate action. However, challenges remain in holding businesses directly accountable at the international level, as the current mechanisms primarily focus on state obligations to regulate and monitor corporate behaviour. Despite this, there has been progress in holding corporations accountable at the national and regional levels through the adoption of legislation and regulations that align with international human rights standards.

The shift towards incorporating human rights considerations in investment treaties reflects a growing awareness of the need to balance investor rights with the protection of human rights and environmental concerns. The recent adoption of a regional investment treaty by the African Union, which provides policy space for green investment and emphasises compliance with climate-related issues, is a significant development. This treaty represents a proactive approach by regional actors to align investment policies with broader sustainability goals and climate objectives. While regional initiatives like the African Union treaty are promising steps towards creating a more coherent system of investment law, the question remains whether these developments signal a broader shift towards a new order in international law.

With the emergence of different principles within the rules-based international order, there have been efforts to achieve global consensus on certain issues. The ongoing discussions among global stakeholders about a potential global treaty to align investment law with other areas of international law suggest a growing recognition of the need for a coordinated approach to address emerging challenges. For example, a recent project focusing on aligning investment treaties with the Paris Agreement on climate change revealed how developing countries are advocating for the realignment of investment treaties with climate goals, particularly aiming for net-zero emissions.

The rules-based international order extends beyond international law to encompass broader global values. There has been some resistance from the Global South and indigenous communities against RBIO, where regional human rights systems, such as those in Africa and the Americas, have begun to adopt alternative worldviews and challenge the dominance of the rules-based international order.

Focusing on indigenous intellectual rights, there are ongoing efforts within the WIPO over the past two decades to incorporate treaties for the protection of traditional knowledge and genetic resources, despite challenges in achieving consensus. There is an upcoming diplomatic conference next year that aims to formulate a treaty in this regard. Regarding the relationship between the rules-based international order and international law, while the rules-based international order reflects aspects of international law, there are discrepancies, particularly concerning indigenous perspectives. International law often reflects a specific worldview that does not necessarily align with the values and interests of indigenous peoples. Historically, indigenous communities, particularly in the Global South, have been marginalised within the international legal framework, with their collective rights often being unrecognised or underrepresented.

One significant area of contention lies in international intellectual property rules, which emphasise individual ownership, neglecting the communal nature of creativity and innovation prevalent in many indigenous societies. This Eurocentric perspective not only fails to capture the full spectrum of innovations emerging from the Global South but also perpetuates a skewed perception of innovation and development. The metrics used to measure innovation, heavily reliant on intellectual property standards and levels of formal education, often overlook the rich and diverse creative output of indigenous communities. This disparity in recognition further exacerbates the inequities within the global intellectual property landscape. However, there are promising developments within international institutions, such as WIPO, which are gradually becoming more inclusive and attentive to the collective creations of indigenous groups and local communities. Efforts to recognise and protect indigenous intellectual property rights represent a significant step towards a more inclusive and respectful international order. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), while not legally binding, signifies a monumental shift in acknowledging the voices and rights of indigenous peoples within the global arena.

6. Extra-legal pressures, migration and human trafficking

RBIO is a framework encompassing legal and extra-legal dimensions, incorporating political, economic, social, and cultural aspects. There are mechanisms, particularly in security matters, that operate outside traditional legal frameworks, such as instances of states disregarding international court rulings. These extra-legal elements lead to selective adoption of international law within the rules-based order framework. RBIO is not a perfect replica of international law. Rather, it is a selective reference by the actors who endorse it, of the rules and principles that they prefer to use, only at the times that they prefer to use it.

The idea of the rules based international order can be separated into two counterparts, “rule” and “order”. “Rules” can be aligned with international law clearly. When we’re talking about “the order”, there is a wider context within which international law is developed, understood, but also applied and hopefully enforced. The two ideas should not be understood in parallel, but essentially one stream within a wider road. The broader umbrella term space International, broader can also bring in civil society actors, whether that’s the Red Cross, or whether that’s NGOs performing humanitarian functions, etc, and the role that they get to play.

With the example of human trafficking, where extra-legal pressures, like rankings in US Department Trafficking in Persons Reports or EU trade policies, are influencing states’ practices as much as international legal obligations. These pressures contribute to the strengthening of international law by encouraging states to comply with expectations set by broader frameworks. Additionally, the use of Magnitsky-style sanctions, which apply human rights standards to individuals at the international level, expand the scope of accountability beyond states to include individuals. Global compacts, such as those addressing migration and sustainable development goals (SDGs), are shaping international law, particularly in areas such as human trafficking. These compacts build upon existing legal frameworks, such as conventions and protocols, to advance the agenda further. For example, the SDGs, particularly Objective 10 focusing on human trafficking, incorporate elements from existing international agreements like the protocol and conventions related to trafficking. However, they also introduce additional targets that go beyond existing legal obligations, thus pushing the agenda forward. This demonstrates how global compacts not only reflect existing international law but also have the potential to influence its evolution and implementation.

One focal point is the migration crisis. The underlying causes of migration, such as hunger and political mismanagement in African countries, were attributed to politicians’ failure to govern effectively. This underscores the importance of addressing political development and governance issues within each country to tackle the root causes of migration.

In response to the discussion on migration, there was a debate surrounding the failure of European states to fulfil their international obligations regarding search and rescue operations and access to protection for migrants. Criticism was directed at the limitations of international law in addressing these challenges, with judgments like *Hirsi Jamaa and Others v. Italy* expanding the requirements of the European Convention to ensure some form of protection. Additionally, concerns were raised about the rhetoric surrounding borders and orderly migration, which governments like Malta, Italy, and the UK often use to justify their approaches. This includes actions such as

pushback operations, ignoring asylum claims, and implementing laws like the UK's Nationality and Borders Bill, which are seen as violations of international standards. States exploit the notion of following rules to rationalise their own violations of security standards agreed upon by the international community.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

A company limited by guarantee
Registered in England No. 615025
Registered Charity No. 209425



**British Institute of
International and
Comparative Law**