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The emergence of political commitments related to space: Is the international space order under threat?

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Abstract:

Recent years have seen an increase in States' political commitments relating to outer space, which have taken the form either of unilateral declarations (such as those not to conduct direct ascent anti-satellite (DA-ASAT) missile testing) or of non-legally binding agreements (i.e. the Artemis Accords). These commitments raise questions about their legal effects and their interplay with the main sources of international law. One aspect of particular interest is whether these commitments may be seen as part of the development of a "rules-based international order" which, by acting as an alternative regime' outside the discipline of international law, could overcome its universalistic and consent-based nature. The present paper will analyze recent regulatory developments in the space field by placing them in the context of broader debate concerning the rules-based international order and by assessing their potentially negative impact on the stability of the system of governance applicable to space activities.

Keywords: Space law, rules based international order, fragmentation, political commitments.

1. Introduction

Over the past few years, the concept of Rules-Based International Order (RBIO) has been gaining notoriety in international diplomatic discourses. The United States (US) has been the primary promoter of this term, with other Western countries progressively embracing it [1]. The example of the Ukraine war clearly showcases this point; indeed, in the aftermath of the conflict, several States emphasized the need to take actions to defend the RBIO [2]. The applicability of the RBIO concept, however, has not been limited to the Ukraine war but has been extended to other domains, such as climate change, migration, trade, the law of the sea and human rights, among others [3].

The above trend has also started to expand to the space sector, where several States have started to use it with increasing frequency. For example, when presenting 2020 the Artemis Accords, namely a set of non- legally binding provisions aimed at guiding the activities of the States participating in the Artemis Program [4], NASA's representative described them as an "opportunity...to positively define the rules and principles [...] to guide [...] civil exploration of the Moon and [...] Mars" "as we look to work with the international community to uphold and strengthen a *rules-based international order*" (emphasis added) [5]. Despite these increasing references to it, the exact understanding and implications of the RBIO concept remain uncertain. While some view it as synonymous with international law in its conventional sense, others give it a more encompassing meaning that also comprises "non-legal rules" [6].

Notably, the growing reliance on this expression and the lack of clarity as to its meaning have sparked international controversy. Representatives from the Russian Federation and the People's Republic of China have voiced their strong opposition to it; for instance, on 11 June 2021, Yang Jiechi, the then Director of the Office of the Chinese Central Commission for Foreign Affairs, stated that China upholds the international order based on international law and not the rules advocated by a small number of States [7]. Similarly, in an article published on 5 May 2023, the Russian Ministry for Foreign Affairs, Sergey Lavrov, explained that

the current crisis of the United Nations derives from the alleged desire of some Member States to replace international law and the UN Charter with a rules-based order.^[8]

Considering the above, this contribution assesses the use of the RBIO concept in the space sector and evaluates it against the broader debate concerning the relationship between the latter and international law. In doing so, it attempts to answer the following questions: how does the invocation of the RBIO intersect with, or impact on, the existing international legal framework applicable to outer space? Does the use of the RBIO concept in the space sector confirm or reverse the general observations that have been elaborated with respect to its meaning and scope? Is there an attempt to reverse the legal order in outer space?

2. Rules-Based International Order and International Law

In policy circles, the concept of the RBIO is generally referred to as the set of rules, norms and institutions that form the “Liberal International Order” (LIO), as it emerged after the conclusion of the Second World War ^[9]. Accordingly, this concept serves as the cornerstone of strategic narratives aimed at preserving the existing legal and institutional architecture, and the values it underpins, from revision or normative disputation ^[10].

Only recently the term RBIO has also caught international lawyers’ attention ^[11]. In 2023, Professor John Dugard investigated its meaning and interplay with international law ^[12]. According to his analysis, two perspectives can be taken in this matter. On the one hand, one can consider RBIO as equating to international law, to be understood in a broader, non-positivist sense, thus also comprising “soft law”, as well as standards and recommendations elaborated by non-state actors ^[13]. Put it simply, a core element of the RBIO would be “traditional” international law, the one consolidated in 1945 and reinforced in the post-Cold War era ^[14]. Nevertheless, it also takes into account the “softening” of international law through the adoption of non-binding soft law instruments. Seen from this perspective, the RBIO would be nothing more than a political term to refer to the international legal order. This view is supported in statements given by several States and the United Nations’s Secretary General. several States’ statements ^[15] and even in the use of this concept by the United Nations’ Secretary General ^[16].

On the other hand, one could look at the RBIO as an alternative to international law, a tool by which certain States are attempting to establish an order that features international law as interpreted by them ^[17]. As stated, non-Western States, such as China and the Russian Federation, have made this argument by pointing out that Western countries use the RBIO as a means to reframe the international legal order, through the use of non-consensual measures ^[18] designed to benefit themselves at others’ expense, hold other countries back and introduce “the law of the jungle” ^[19]. As a response to this trend, in 2016, the Russian Federation and China jointly adopted the “Declaration on the Promotion of International Law”, demonstrating their commitment to foundational international norms and their intention to safeguard the integrity of the international legal order ^[20].

The dichotomy envisaged by Professor Dugard, however, might lose significance in practice. As noted by Talmon, if the RBIO blurs the lines between binding and non-binding norms, “the question arises of who lays down the rules and determines their content” ^[21]. This state of uncertainty opens the door to the potential misuse of this term by those States that would selectively use it in place of international law to modify the nature of their international commitments ^[22].

An examination of the interplay between the political concept of RBIO and international law could be undertaken also from another perspective, which encompasses three dimensions: a formal dimension, a substantive dimension and a systemic dimension.

From a “formal” standpoint, any resort to this concept should be understood from the perspective of “international law-making” and the value of international norms. Accordingly, this expression would be used either to refer to the “slowdown in formal international law making” ^[23], in particular the decline of multilateral treaties, or to States’ attempts to influence the process of norm-creation. Weil noted ^[24] that references to the RBIO may act as a “conceptual tool” to overcome the well-known difficulties in establishing what is a norm and what it is not under international law, especially in relation to the expectation of compliance they bring about ^[25] and States’ voluntary intervention in the formation of customary international law ^[26].

From a substantive standpoint, the application of the RBIO concept and the invocation of certain normative dynamics intrinsic to it may, in fact, challenge the very essence of the “rules” that underpin the order. What, then, is the content of these rules? To what extent have “traditional” international norms been replaced or joined - or are in the process of being replaced or joined - by new rules?

Finally, from a systemic perspective, one may wonder whether the search for a universal legal order is losing strength and traditional forms of global governance are being transformed. As noted, references to the RBIO may in fact endanger any “attempt to agree [despite the current divisions] on international law as a universal order governing all states” ^[27]. At the same time, the use of this expression may give an account of the increasing relevance of non-State actors in the international arena and, global governance broadly considered.

3. The Dawn of a “Rules-Based International Space Order?”

As anticipated, references to the RBIO have started to emerge in the space realm, with the United States leading the way. While the 2021 United States Space Priorities Framework makes only a limited reference to the US engagement with the international community to uphold and strengthen a rules-based international order for space, the 2023 Strategic Framework for Space Diplomacy further elaborates this topic [28]. The section devoted to the “Mission” declares, in fact, that the US “will pursue and maintain a *rules-based international framework* for outer space activities, including the long-term sustainability, commercialization, exploration, and utilization of space, so as to strengthen the U.S. leadership role in coalitions, support human exploration, and expand the benefits of space for all” (emphasis added) [29]. According to the Strategic Framework, the advancement and refinement of the rules-based international order for outer space activities will be pursued through the US leadership at the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS) and at the UN disarmament and international security for a [30]. Parallely, efforts will be undertaken to cooperate with scientific and technical agencies, as well as other relevant stakeholders, including the private sector, academia, NGOs, and space practitioners, in order to facilitate US government engagement with other States and at international meetings on space policy and governance [31]. Similar affirmations are included in other public statements issued by the United States’ government [32].

Besides the United States, other countries have emphasized the need for maintaining and pursuing ‘order’ in outer space. For instance, in 2018, Australia stated that: “Its interests are strongly served by acting with others to support a rules-based international order” and that “Australia is committed to a rules-based global order, which extends to space [...]. We want to work with allies and key partners to coordinate positions on challenges and initiatives to ensure the long-term sustainability, safety and security of the outer space domain” [33]. The European Union, through its Diplomatic Service (EEAS), promoted similar arguments by pointing out that “[t]he integrity of the rules-based international system [...] can be only achieved through effective multilateralism and rules-based global governance. We will continue to do our utmost to protect these principles and values, and we reaffirm our intention to intensify support for the global rules-based order, with the United Nations at its core” [34]. Similarly, during the 77th session of the UN General Assembly (UNGA) Fourth Committee, the EU declared that “[t]he EU and its Member States strongly support the rules-based international system, with the United Nations at its core, and a multilateral approach to international affairs, including with regard to cooperation on outer space issues. We reiterate that COPUOS and its Subcommittees remains unique international platforms for international cooperation in the peaceful uses of outer space, including on the development of international space law, international norms and standards, guidelines, best practices, and other transparency and confidence-building measures regulating space activities” [35].

These examples suggest that, when Western States use the RBIO concept in relation to outer space, they do so by referring to the set of norms, rules, and principles, both of binding and non-binding nature, that guide, or should guide, the conduct of States in that domain. These statements also indicate States’ commitment to the multilateral law-making process; this is evident from a “*de lege ferenda*” perspective, as States appear to show their willingness not only to “maintain” the RBIO, but also to “pursue” it through the existing framework of multilateral governance that is rooted in the United Nations, its Charter and institutions. Importantly, States are also willing to include non-state actors among the subjects that influence the process of formation of new rules applicable to space.

Overall, the use of the expression “RBIO” in space discourses seems to confirm that the rules-based order is rooted in international law (in the specific case, international space law) and centered on the United Nations, its Charter and its institutions. At the same time, it goes past a formalistic-positivist conception of international law to incorporate non-binding rules, including the standards and recommendations elaborated by or with the participation of non-State actors. Such an approach towards the RBIO in space is hardly surprising; the *impasse* that traditional international law-making has encountered since the 1980s and the role that private entities play in the sector make outer space the “best candidate” for the application of the RBIO concept, according to the aforementioned meaning.

Notably, Western States have recently used the expression RBIO also in relation to specific “political commitments” related to the conduct of outer space activities, which could lead one to challenge - at least *prima facie* - the conclusion reached above. Indeed, the RBIO has been invoked in fact with reference to the Artemis Accords [36] and to States’ commitments not to conduct destructive direct-ascent anti-satellite missiles (ASAT) tests [37]. Both these initiatives have sparked debate and controversy about their consistency with international (space) law and their impact on the multilateral system of governance applicable to space activities. The Russian Federation, for instance, lamented that the Accords protect the interests of the United States and the People’s Republic of China complained for the “unilateral” approach to the regulation of outer space activities that they imply [38]. The same States are among those who voted against Resolution 77/41, proposed by the United States and adopted by the UN General Assembly on 7 December 2022, supporting a moratorium on the test of ASAT [39].

The next section will focus on these two case studies in order to assess whether the use of the RBIO expression in these instances underpin the willingness to establish a competing order, other than international law, which reflect the vision of Western States [40], and which would apply to all States despite the lack of their consent, or whether it eventually confirms the abovementioned conception rooted in international law. In doing so, it will inevitably investigate if similar initiatives cannot be better explained by means of reference to the dynamics of international law-making.

The analysis of these two case studies will also be useful to assess whether the RBIO concept - whilst potentially being symptomatic of a dysfunctional legal order - is indicative of a transformation of it, which is functional to its advancement.

4. The RBIO concept in space: the cases of the Artemis Accords and the ASAT moratorium

Two recent initiatives are significant in understanding how the RBIO concept has entered the space domain and begun to affect the process of formation and application of international law therein.

4.1 The Artemis Accords

The Artemis Accords are a US-led instrument aimed at guiding the activities of the countries that have joined NASA's Artemis Program, an initiative that not only intends not only to return humans to the lunar surface but also to establish a long-term presence therein, through the building an orbital station (the lunar Gateway) a lunar base (the "Moon Base Camp") and the use of lunar natural resources.

From a legal perspective, the Accords do not fall within the traditional sources of international law. As the text of the Accords itself states, they are not legally-binding since they represent "a political commitment to the principles described herein", many of which provide for operational implementation of important obligations contained in the Outer Space Treaty and other instruments". Accordingly, the Accords "establish a common vision via a practical set of principles, guidelines, and best practices to enhance the governance of the civil exploration and use of outer space", that, while not having binding nature, will require further bilateral implementation agreements to become fully operational.

The provisions of the Artemis Accords are of three types: a) there are those that simply mirrors the provisions of the 1967 Outer Space Treaty; b) there are others that offer concrete possibilities on how to apply some of the Treaty's provisions; c) finally, there are provisions that significantly depart from the Outer Space treaty and innovate in the field of space law, such as the those related to the utilization of lunar resources or the establishment of 'safety zones' on the surface of the Moon [\[41\]](#).

When one analyses the Artemis Accords, and their provisions, from the perspective of their impact on the RIBO applicable to space activities and the process of formation of rules to govern them, the following considerations can be made. With respect to the two kinds of provisions described above, the Artemis Accords seem to embrace a 'traditional' approach towards what constitutes international law in the realm of outer space and how rules applicable to that domain should be developed. As indicated, several of the Accords' principles mirror the provisions of the Outer Space Treaty or provide examples of their concrete implementation, for instance, those principles dealing with assistance to astronauts in distress and sharing of scientific data. Overall, the Accords contain several references to international law and stress the need to abide by existing international space law treaties. Indeed, the Accords are largely grounded on existing international space law instruments [\[42\]](#), as evidenced by the fact that they emphasize the importance of complying not only with the Outer Space Treaty, but also with the 1968 Rescue and Return Agreement, the 1972 Liability Convention and 1975 Registration Convention.

The Artemis Accords also uphold the benefits of cooperation via multilateral fora as a means to achieve global agreement on critical issues regarding space exploration and use.⁵⁷ In particular, they stress the central role that the UN and, more specifically, COPUOS can play [\[43\]](#). In this respect, in 2021, COPUOS established the Working Group on Space Resource Activities (WGSRA) tasked with drafting a set of set of preliminary recommended principles to govern space resources activities [\[44\]](#). These principles, once drafted, would need to be agreed by all participating States by consensus to be formally adopted as a UN document. Importantly, the United States, as well as the other signatories to the Artemis Accords, are taking part in these discussions, despite having developed the Accords. It is to be expected that the United States will take steps to make sure that the Accords' principles are largely reflected within the WGSRA's recommended principles, thus potentially opening the door for the former to be adopted in the form of a UN General Assembly resolution. Against this background, one might argue that the "RBIO" that these Accords would contribute to is rooted in existing international space law and, despite the appearances (given that the initiative originated outside traditional multilateral fora) in the central role given to the United Nations and its bodies. At the same time, however, this RBIO also includes outer space rules-making processes that depart from the traditional ones, as not only Signatories are encouraged to adhere to non-binding principles elaborated outside existing multilateral fora, but also because this approach embraces a "step-by-step, incremental approach to the regulation of space resources", thus upholding the principle of adaptive governance [\[45\]](#).

It is the position of this paper, however, that this overall positive view on the RBIO that the Artemis Accords might contribute to is only related to the sections of the Accords that re-state existing principles of the Outer Space Treaty, not to those that significantly expands upon or entirely innovate its provisions. Notably, those sections of the Artemis Accords have been extensively criticized by countries, such as China and the Russian Federation, and scholars, not only because their content might be in violation of the principles of the Outer Space Treaty (use illegal safety zone) but also because of the process used to develop them [\[46\]](#). As discussed, the Artemis Accords have been developed through a rule-making initiative that took place outside of the UN framework and that involved only a limited number of countries. The negative consequences of this approach, and the RBIO that would result from them, are multiple: 1) the weakening of the role of multilateral institutions as the forum for law-making initiatives in the field of space

law; 2) the possibility for countries to impede any meaningful progress at international level that would not reflect their own view, thus wasting years of negotiation and compromise; 3) the potential emergence of different set of rules applicable to different States in relation to the same activity, a trend that would eventually result in the ‘fragmentation’ of international space law [47].

Ultimately, it is difficult to arrive at a straightforward position, as to which RBIO is most likely to derive from the implementation of the Artemis Accords. On one side, the Artemis Accords, because of their non-binding nature, cannot be deemed to directly breach international law, but should be rather viewed as a tool to impact (directly or indirectly) the development of international space law either through State practice (with the effects this may have for the interpretation of treaty rules⁷⁰ or for the creation of international customs)⁷¹ or the conclusion of binding agreements. For example, one could argue that, by joining the Artemis Accords, States have indirectly embraced the US approach on space resources utilization (as per the 2015 US space resources utilization law [48]), thus providing elements to potentially support the theory of the formation of a rule of customary law, gradually recognizing the legality of the appropriation of space resources. Such a theory, however, in order to be legally grounded, will need to meet a second criteria, that of intent, meaning that one will have to prove that, when joining the Artemis Accords, States had expressed their consent to be bound to the US interpretation of Article II of the Outer Space Treaty or that they viewed that interpretation as the law (something that would be hard to prove) [49]. On the other side, due to their content and process of formation, the Artemis Accords may undermine the possibility to achieve a universal and consent-based approach to celestial bodies’ activities and promote collaboration only among countries that share the same interests. In doing so, the approach embraced by the Accords may exacerbate diverging views and tensions and result in an uncertain and unpredictable RBIO applicable to space activities.

4.2 The moratorium on destructive direct-ascent ASAT tests

The second relevant development which deserves attention is the recent adoption of resolutions and unilateral declarations upholding States’ commitment to refrain from destructive direct-ascent ASAT tests. On 18 April 2022, the then Vice President Kamala Harris announced the United States’ commitment not to conduct destructive direct-ascent ASAT missile testing, and the intention to establish this as a new international norm for responsible behavior in space [50]. Since then, analogous commitments have been made by more than 30 States, including the Member States of the European Union, Australia, Canada, Japan, New Zealand, South Korea, Switzerland, the United Kingdom and others.

It is noteworthy that several of these statements have been made subsequent to the adoption by the UN General Assembly of Resolution 77/41 UNGA ‘Destructive direct-ascent anti-satellite missile testing’ (the resolution was passed with 155 votes in favour, 9 against and 9 abstentions) [51]. The Resolution, after recalling the applicability of international law and emphasizing the importance of the Outer Space Treaty, calls indeed on countries to commit not to conduct destructive direct-ascent anti-satellite missile tests. At the same time, it invites them to “*continue discussions in the relevant bodies and to establish and develop further practical steps that could be taken, in order to enable risk reduction, prevent conflict from occurring in outer space and prevent an arms race in outer space; such steps could include, inter alia, transparency and confidence- building measures and additional moratoriums, which could contribute to legally binding instruments on the prevention of an arms race in outer space in all its aspects*” (emphasis added) [52].

The ban of ASAT tests has been supported also by the industry. In June 2024, in fact, several private actors working in the space industry expressed support to the commitments undertaken by several States not to conduct ASAT tests [53].

Several considerations can be made with respect to the use of the expression RBIO in the above context. First, also in this case, the RBIO concept is arguably used to indicate an order which is rooted in international law and in which the UN and its bodies play a central role. The former aspect is made evident by the references to existing treaties in the text of UNGA Resolution 77/41; the latter stands out clearly both from the proposal of a resolution on the topic to be adopted by the UN General Assembly and from the Resolution itself, which invites Member States to continue discussing the issue in the relevant bodies. Under this perspective, it is noteworthy that in 2021, through Resolution 76/231, the General Assembly had decided to convene an Open-Ended Working Group (OEWG) tasked “to make recommendations on possible norms, rules and principles of responsible behavior relating to threats by States to space systems, including, as appropriate, how they would contribute to the negotiation of legally binding instruments, including of the prevention of an arms race in outer space” [54]. What is more, in 2023, two additional OEWG have been established by the UNGA to elaborate recommendations on the prevention of an arms race in outer space through the development of norms, rules and principles of responsible behaviors [55], and to consider substantial elements of an international legally binding instrument on the prevention of an arms race in outer space [56].

That notwithstanding, the RBIO concept implies, at the same time, outer space rules-making processes that, pending multilateral concertation, take place outside the UN framework. In the case at stake, for example, these processes take the shape of unilateral declarations. Under international law, these declarations may in fact create legal obligations for the States making them, provided that certain conditions are met. These include, first and foremost, States’ intention to commit themselves.

As for the Artemis Accords, one can therefore notice a combination of unilateralism and multilateralism that is arguably aimed at breathing new life into the outer space regime. Unlike for the Artemis Accords, however, in the case of the ban of ASAT tests, there is an explicit, manifest willingness, at least for the US, to set a new norm, which is not already part of the *corpus juris spatialis*, and whose content is already clearly identified. This circumstance could nourish further the thesis that the RBIO would “replace” the current international legal order, based on consent, by crafting a new “order” reflecting the interests and the view only of certain States. It is thus no surprise that the Russian Federation and the People’s Republic of China voted against the UN General Assembly’s Resolution 77/41 and did not make any unilateral commitment to refrain from conducting ASAT tests. Notably,

in explaining his vote, the Russian representative declared that “we are not opposed to discussing this topic, but we must first agree on all the other components of the structure, and that is exactly what Western delegations are refusing to do”. By the same vein, the Chinese representative stressed that “[o]n the basis of the General Assembly resolutions on outer space adopted by an overwhelming majority in recent years, China and Russia made proposals to amend the draft resolution, proposing the inclusion of such elements as calling upon all States to take measures to prevent the placement of weapons in outer space and the early negotiation and conclusion of legally binding multilateral agreements... China calls on all members to vote in favour of the amendment”. One should also note that Russia’s opposition to the ASAT moratorium is linked to the opposition that Western countries have voiced against a Russian-led initiative labelled ‘No first placement of weapons in space’. Indeed, since 2014, Russia has been calling upon countries to commit not to be the first to place ‘a weapon’ in space with the goal of preventing the weaponization of the space environment. This initiative, which for a number of years has taken the form of a resolution adopted by the UN General Assembly with the support of over 40 countries [54], not including any western one, has been opposed by the United States and its allies based on the ground that the focus on ‘space weapon’ is misplaced and that such a commitment would not be verifiable [55].

Yet, despite the declared intention to set up new rules and, thus, to directly lead to a modified RBIO in space, it remains to be seen if these unilateral declarations and the votes in favour of the UNGA resolutions, may lead to an effective replacement of the international legal regime concerning outer space activities, or, instead, at most influence its development by accounting either as State practice or *opinio juris* contributing to the creation of a customary international rule [56].

5. Conclusion

Analysis demonstrates that the term “RBIO” is generally employed in discourses pertaining to outer space policy to signify an order rooted in international space law with the United Nations (UN) institutions at its core. At the same time, this order encompasses also non-legally binding undertakings that - despite the central role that RBIO attaches to institutional settings emerged after World War II - are increasingly adopted outside traditional multilateral fora (the Artemis Accords and the declarations on ASAT test being primary examples of this trend). The outcome of these practices is twofold and largely contradictory; on one side, they stimulate or account for State practice or opinion juris that could facilitate the interpretation and implementation of existing treaties as well as the formation of international custom. On the other side, these practices may progressively weaken the role of multilateral institutions and result into the fragmentation of international space law on. One must hope that States, while employing various methods to rule-making in space, remain aware of the importance of preserving a core set of internationally agreed principles applicable to space activities and maintaining a functioning system of multilateral governance to govern them.

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