Foundations and Functions of International Law

INTERNATIONAL LAW IN GENERAL

Rules-Based Order vs International Law?

Germany is a champion of the so-called rules-based order. In the speeches and statements of Federal Foreign Minister Heiko Maas and other Foreign Office officials there are frequent references to a ‘rules-based order’, a ‘rules-based international order’, a ‘rules-based global order’, a ‘rules-based multilateral order’ or a ‘rules-based system’. Germany considers the rules-based order as increasingly under threat and aspires to be a defender of that order. It has attempted to build an ‘alliance of multilateralists’ who would join hands in protecting and continuing to develop the rules-based order. In statements by the Federal Foreign Office the expression ‘rules-based order’ has largely replaced references to the ‘international legal order’ or ‘international law’.

The use of this new terminology has been sharply criticised, in particular by the Russian Federation. For example, on 16 January 2019 Russian Foreign Minister Sergey Lavrov stated:

There have been attempts . . . to replace the universal norms of international law with a ‘rules-based order’. This term was recently coined to camouflage a striving to invent rules depending

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on changes in the political situation so as to be able to put pressure on disagreeable states and often even on allies. . . .

I mentioned in my opening remarks the trend . . . to replace the term and the concept of international law with some rules-based order. 8

Without going as far as the Russian foreign minister, who was accusing Germany and others of trying to replace international law with a rules-based order founded on political expediency that serves their political, military, and economic interests, it is true that the new terminology and the underlying concept are not without their difficulties.

Germany initially did not define what it meant by a rules-based order and did not explain whether or to what extent this differed from the traditional international legal order or, in short, international law. A rules-based order may generally be understood as a shared commitment by States to conduct their activities in accordance with an existing set of rules. The rules-based order is underpinned by a system of global governance that has developed since the Second World War. The United Nations is considered to be at the heart of this rules-based order. 9 Judging by the situations in which the term ‘rules-based order’ was used, it seemed to have a broader meaning than ‘international law’, understood as the legally binding rules that are based on, and require the consent of, each individual State. The term ‘rules-based order’, on the other hand, seemed to encompass both traditional international law rules and the legally non-binding political commitments that generally go under the name of ‘soft law’. It also appeared to include rules made by both States and non-State actors. The term was used in the context of pressing certain States to comply with existing international legal rules to which they had not consented and by which they were thus not bound.

It was only on 6 November 2019 that the Federal Government clarified what it meant by the term ‘rules-based order’. During parliamentary question time, it was asked to elucidate the term and its relationship to international law (particularly the UN Charter) and customary international law. Federal Foreign Office Minister of State Michael Roth explained:

The terms ‘international law’ and ‘rules-based world order’ complement each other. ‘Rules-based order’ is a political term, ‘international law’ a legal one.

The ‘rules-based order’ includes not only the legally binding norms of international law but also legally non-binding norms, standards and rules of conduct. These are, for example, prompt payment of contributions, multilateral collaboration aimed at a co-operative world order or informal associations in groups of friends or alliances. The political term also refers to various international forums and their decision-making rules and negotiation processes.

‘International law’ refers to legally binding rules governing the relations between subjects of international law, especially States. It includes international agreements of a general or specific nature, such as the Charter of the United Nations or the human rights conventions, but also non-binding norms, such as the Charter of the United Nations or the human rights conventions, but also non-binding norms, standards and rules of conduct. These are, for example, prompt payment of contributions, multilateral collaboration aimed at a co-operative world order or informal associations in groups of friends or alliances. The political term also refers to various international forums and their decision-making rules and negotiation processes.

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The often interchangeable use of the terms ‘rules-based international order’ and ‘international law’ blurs the distinction between binding and non-binding rules, giving the impression that all States and international actors are subject to this order, irrespective of whether they have consented to these rules. While international law is general and universal, the rules-based order seems to allow for special rules in special – *sui generis* – cases. This has dangerous implications, for if an international order that is based on rules does not require consent to those rules, then who ultimately lays down the rules and determines their content? In practice, the rules-based order seems to reflect a move to introduce majoritarianism as a mode of law-making at international level. However, expressions of the will of a few (Western) States, or even the majority of States, cannot be equated with international or regional rules or serve as the source of a rules-based order. While international law is based on the principle of the 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.

There is a risk that States will choose not to act in compliance with this rules-based order because they consider themselves not to be bound by its ‘rules’ – which, indeed, they are not. This creates the added danger that the use of this new term will come to undermine the credibility of international law.

*Stefan Talmon*
On 26 March 2019, following the United States’ illegal recognition of Israel’s annexation of the occupied Syrian Golan, Syria asked the UN Security Council presidency, then held by France, to schedule an urgent meeting in order to ‘discuss the situation in the occupied Syrian Golan and the recent flagrant violation of the relevant Security Council’s resolution by a permanent Member State’.¹

The Security Council was due to meet behind closed doors on 27 March 2019 to discuss the situation in the Middle East and, in particular, the mandate of the peacekeeping force in the Golan, known as the United Nations Disengagement Observer Force (UNDOF). In response to Syria’s request, France decided to turn that meeting into a public session and to give members an opportunity to address the act by the United States.² Unlike the other speakers, Germany’s Permanent Representative to the United Nations, Ambassador Christoph Heusgen, rather than dwelling on the matter at hand, took advantage of the opportunity to launch an all-out attack on the Syrian government:

Today’s meeting was scheduled partly in response to a request by the Syrian regime, which called for this meeting ‘in order to discuss the situation in the occupied Syrian Golan and the recent flagrant violation of the relevant Security Council resolutions by a permanent member State’.¹

That request is deeply cynical. The Syrian Government has grossly violated the international laws of war for the past eight years and is responsible for grave war crimes and crimes against humanity. In response to peaceful protests, the Syrian regime has reacted with brutal violence against its own population. It has bombed protected facilities, including hospitals, schools, markets and civilian homes. It has used indiscriminate and illegal weapons, including cluster bombs and internationally banned barrel bombs, to kill and terrorise civilians.

The Syrian regime has repeatedly used chemical weapons against its own population – a flagrant violation of international law – and continues to refuse to fulfil its obligation to the Council to account for discrepancies in its declarations on chemical weapons. The regime has arrested, disappeared, tortured and killed tens of thousands of dissenters, activists, journalists, students, professors, medical workers, lawyers and others, including minors.

There are horrific reports and accounts of sexual violence. We have seen the Caesar photos³ displayed in the halls of the United Nations Building in New York. They provide horrifying evidence of the crimes that are happening behind bars in Al-Assad’s hell-hole prisons and detention facilities. Tens of thousands are dead, killed by that ruthless regime out of sight of cameras. Those detention atrocities, testimonies by incredibly brave torture survivors, the Caesar photos and regime documents all form the basis of the criminal cases now being investigated by the German Federal Prosecutor, the international arrest warrants issued by Germany and actual arrests being carried out in Germany. It is profoundly cynical for a regime known for its atrocious

³ A defector from Syria, now code-named Caesar, brought with him more than 55,000 photographs of the bodies of 11,000 men, women and children who died while being held in detention by the Syrian government in two military hospitals near the capital Damascus. The photographs had been taken between 2011 and 2013 on the orders of the government’s intelligence services. The photographs were exhibited, inter alia, at the United Nations in New York.
crimes and for its ruthless brutality against Syrians to come to the Security Council and criticize others for violating international law.⁴

There can be no doubt about the atrocious crimes committed by the Syrian government under President Bashar al-Assad and its repeated violations of international law. Nevertheless, Ambassador Heusgen’s comments are difficult to comprehend. Although it is nowadays commonplace at the United Nations to use the term ‘regime’ to express disdain, rejection or hostility when referring to the government of a Member State, it is rather unusual for a government’s right to seize the Security Council with a violation of international law to be called into question. However repugnant Germany may find the Assad ‘regime’, within the United Nations system it is still the government of Syria. As the government of a Member State, it is entitled to bring any situation which might lead to international friction or give rise to a dispute to the attention of the Security Council.⁵ It may also request that the President of the Security Council call a meeting to discuss such dispute or situation.⁶ Indeed, the President of the Council is obliged to call a meeting whenever a matter is brought to the Council’s attention by a Member State.⁷ The fact that the government of a Member State has itself committed serious breaches of international law does not automatically deprive it of its right under the Charter of the United Nations to seize the Security Council with a violation of international law by another Member State. The UN Charter does not contemplate the forfeiture of rights. There is also no *argumentum ad hominem tu quoque*, or appeal to hypocrisy, in international law. Thus, States are not allowed to discredit another State’s claim of a violation of international law by condemning that State’s own violations of international law. Even an aggressor may rely on international humanitarian law governing the conduct of hostilities. One may wonder whether, in a domestic law setting, Ambassador Heusgen would have denied a criminal who has become a victim of crime the right to invoke the law? As Germany agreed as a matter of principle with the Syrian government’s claim of a violation of international law by the United States, it probably chose to attack the maker of that claim in order not to be seen as supportive of the Syrian government.

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⁴ UN Security Council, 74th year, 8495th meeting, 27 March 2019, UN Doc. S/PV.8495, 10. In a tweet by the German mission to the UN in New York, Ambassador Heusgen was quoted as saying: ‘It is profoundly cynical for the Syrian regime, known for its atrocious crimes, ruthless brutality and violations of international law and human rights, to come to the UNSC and call for the respect of international law.’ German Mission to UN @GermanyUN (28 March 2019), https://twitter.com/germanyun/status/1111044951553409025?lang=en.
⁵ See UN Charter, Article 35(1).
⁷ Ibid. Rule 3.
Germany Rebukes the United States for Its Approach to International Law: ‘International Law Is Not an À la Carte Menu’

Over the years, there have been a number of heated debates on the Middle East conflict at the United Nations. However, at the Security Council meeting on 23 July 2019 the exchange between Germany’s permanent representative to the United Nations, Ambassador Christoph Heusgen, and the assistant to the US president and special representative for international negotiations, Jason D. Greenblatt, should be remembered, not just for the two countries’ different approaches to the Middle East peace process, but also, and more importantly, for their divergent positions on international law.¹

During the open debate on the agenda item ‘The situation in the Middle East, including the Palestinian question’, the US representative updated the members of the Council on the Trump administration’s peace efforts in the Middle East – the so-called ‘Deal of the Century’. With regard to the Israeli-Palestinian conflict, he stated:

The conflict will not end on the basis of an international consensus . . . In the case of the Israeli-Palestinian conflict, international consensus has not been achieved. . . .

International consensus is not international law. . . .

This conflict is also not going to be resolved by reference to international law when such law is inconclusive. We have all heard cogent arguments claiming international law says one thing or another about this or that aspect of the Israeli-Palestinian conflict. Some of those arguments are persuasive – at least to certain audiences, but none of them are conclusive. We will not get to the bottom of whose interpretation of international law is correct on this conflict. There is no judge, jury or court in the world that the parties involved have agreed to give jurisdiction to in order to decide whose interpretations are correct. International law with respect to this conflict is a tricky subject that could be discussed and argued for years without ever reaching a conclusion. We can therefore spend years and years arguing what the law is and whether it is enforceable and prolong the ongoing suffering or we could acknowledge the futility of that approach.

The conflict will also not be resolved by constantly referencing the hundreds of United Nations resolutions on the issue. The constant reference to these heavily negotiated, purposely ambiguously worded resolutions is nothing more than a cloak to avoid substantive debate about the realities on the ground and the complexity of the conflict. . . . A comprehensive and lasting peace will not be created by fiat of international law or by these heavily wordsmithed unclear resolutions.

The same holds true for the status of Jerusalem. There is no international consensus about Jerusalem, and no international consensus or interpretation of international law will persuade the United States or Israel that a city in which Jews have lived and worshipped for nearly 3,000 years and has been the capital of the Jewish State for 70 years is not today and forever the capital of Israel. . . .²

The US representative’s blunt assertion that international consensus, international law and UN resolutions are irrelevant to any future Israeli-Palestinian peace accord triggered a forthright reaction from the German representative. Ambassador Heusgen, Chancellor Angela Merkel’s former chief foreign policy adviser, stated:

Germany supports a negotiated two-State solution, based on internationally agreed parameters and the relevant Security Council resolutions.

¹ See UN Security Council 74th year, 8583rd meeting, 23 July 2019, UN Doc. S/PV.8583, 9–12, 13–14.
² Ibid. 10–11.
I would like to respond in that regard to what the representative of the United States just said. As the Ambassador of Germany, I must say that, for us, international law is relevant; international law is not futile. We believe in the United Nations … . We believe in Security Council resolutions; for us, they are binding international law.

As I said, we believe in the force of international law and we do not believe in the force of the strongest. For us, international law is not an à la carte menu. On other occasions, United States representatives have insisted on international law and on the implementation of Security Council resolutions, such as those on North Korea. We absolutely support that and, as Chair of the Committee established pursuant to resolution 1718 (2006), we work very hard to implement Security Council resolutions word by word. For us, resolution 2334 (2016) – to name the most recent Security Council resolution – is binding law and that is the international consensus. It is the United States that has withdrawn from the international consensus on resolution 2334 (2016). …

A lot has been said about settlements, although not by the representative of the United States in his intervention. For us, settlement activities are illegal under international law. They undermine the prospects for a negotiated two-State solution. The rhetoric has gone beyond talk of settlements. We now hear rhetoric alluding to the possible annexation of parts of the West Bank. We are extremely concerned. Germany will not recognize changes to the 1967 lines, including to Jerusalem; we will recognize only changes that are the result of negotiations. …

For the international community, peace is best served by observing international law. That holds true for resolution 2334 (2016) and others. It also holds true with regard to the crisis in the Gulf and Iran. I reiterate that the implementation by everyone of resolution 2334 (2016) would be a step in the right direction. …

The German ambassador’s comments came a day after Israel had begun demolishing dozens of Palestinian homes in East Jerusalem in one of the largest operations of its kind in years, despite the fact that the Security Council had condemned ‘all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the … demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions’.5

The German ambassador’s insinuation that the United States believed in the force of the strongest, violated binding Security Council resolutions and treated international law as an à la carte menu was widely reported in the media.6 The German criticism roiled the Trump administration’s Middle East peace team and prompted a fierce pushback, both privately and publicly.7 In an unprecedented move, the US representative published an op-ed in German in the 8 August 2019 edition of Die Welt, accusing Ambassador Heusgen of ‘a serious and damaging misinterpretation’ of his remarks to the Security Council. He wrote:

With respect, Mr Ambassador Heusgen …

3 Ibid. 57–64.
5 UN Security Council Resolution 2334 (2016), UN Doc. S/RES/2334 (2016), 23 December 2016, preambular para. 4. The resolution had been adopted by fourteen votes to zero, with the United States abstaining; see UN Security Council, 71st year, 7853rd meeting, 23 December 2016, UN Doc. S/PV.7853. 4.
To avoid any misunderstanding, I thus feel compelled to publicly comment on what, in the United States’ view, is a serious and damaging misinterpretation of our remarks during the monthly debate on the Middle East in the United Nations Security Council on July 23.

My colleagues in the White House responsible for peace negotiations and I were deeply troubled by the Permanent Representative of the Federal Republic of Germany portraying the United States as a country believing in the law of the strongest.

Following the US intervention, Ambassador Heusgen told our colleagues on the UN Security Council that Germany ‘does not believe in the law of the strongest’. With respect, Mr Ambassador, neither does the United States. In our intervention, we clearly stated that a solution cannot be forced upon the parties, and that the only way forward is direct negotiations between Israel and the Palestinians.

Our point was that all the UN Security Council resolutions passed with the intent of providing a framework for resolving the Israeli-Palestinian conflict have so far failed to achieve any progress. Moreover, history shows that the reflexive reference to these ambiguously worded, highly controversial resolutions serves as a pretext to avoid substantive debate about the realities on the ground and the complexity of the conflict.

There is no disagreement between the United States and the Federal Republic of Germany about the utility of UN Security Council resolutions that are clear and effective. However, in the case of the Israeli-Palestinian conflict, conflicting interpretations of these resolutions have sparked disagreement more often than consensus.

Besides, frankly speaking, it is disingenuous to insist on the United Nations as the reference point for the resolution of the Israeli-Palestinian conflict without acknowledging the deep, pervasive anti-Israel bias in the UN system.

There are no quick fixes. In this specific conflict, peace cannot be achieved through the pretense of an international consensus or international legitimacy, arguments about who is right and who is wrong as a matter of international law, or aspirations expressed as entitlements.

We want to start a new, realistic discussion that looks to the future, rather than dwelling on the past. We call on the parties to return to the negotiating table and hold direct talks on how a genuine foundation for peace can be established. And we would welcome the support of the Federal Government and the German people in this endeavour.

The op-ed did not change the German government’s view, however. Less than a fortnight later, Ambassador Heusgen once again called the United States out for ‘not abiding by all UN resolutions, were they, for example, to transfer the US Embassy from Tel Aviv to Jerusalem’.

The statement made by the German ambassador must be seen against the background of a major shift in US policy on the Israeli-Palestinian conflict. For several decades, successive US governments had tried to mediate between the conflicting parties, complying – albeit sometimes reluctantly – with Security Council resolutions which the United States had either voted for or on which it had abstained. Under the Trump administration, on the other hand, the United States openly took the side of Israel and abandoned the established international consensus on the illegality of the annexation of occupied territory, the status of Jerusalem and the invalidity of Israeli settlements in territories occupied in 1967. During the presidency of Donald Trump, the

9 Ständige Vertretung der Bundesrepublik Deutschland bei den Vereinten Nationen, ”Die UN sind das wichtigste Weltgerümm”: Botschafter Heusgen im Interview” (20 August 2019), https://new-york-un.diplo.de/de/aktuelles/heusgen-bpa-interview/22442456.
United States recognised the Israeli annexation of the occupied Syrian Golan, recognised Jerusalem as the capital of Israel and relocated its embassy from Tel Aviv to Jerusalem, and declared that it would consider the establishment of Israeli civilian settlements in the West Bank as ‘not per se inconsistent with international law’. Germany, for its part, continued to adhere to the established international consensus that these acts violated international law.

Germany was quite right in opposing the US government’s view that the relevant UN resolutions were unclear or ambiguous, that international law was inconclusive or open to different interpretations and that there was no international consensus around the Israeli-Palestinian conflict. Quite the opposite is actually true.

UN resolutions are crystal clear. The territories captured by Israel during the Six-Day War in June 1967 – the Gaza Strip, the West Bank (including East Jerusalem) and the Syrian Golan – are ‘occupied territories’. In these territories, Israel has the status of an ‘Occupying Power’ bound by international humanitarian law, including the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Israel’s establishment of settlements in these territories ‘constitutes a flagrant violation of international law’ and the United Nations has repeatedly demanded that ‘Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem’. The annexation of these territories acquired by force is inadmissible. In particular, any unilateral measures to change the status of Jerusalem have been declared invalid.

In its resolutions, the United Nations simply spells out the international law rules applicable to the Israeli-Palestinian conflict. These rules are by no means inconclusive. On the contrary, they could not be more explicit. The illegality of territorial acquisition resulting from the use of force is a norm of customary international law. Israel’s annexation of East Jerusalem and the Syrian Golan is thus illegal and invalid, as would be any annexation of parts of the West Bank. The right of the Palestinian people to self-determination is also part of customary international law, which Israel is obliged to respect. Any settlement activities and other measures adopted by Israel to alter the demographic composition of the West Bank severely impede the exercise of that right. International humanitarian law also establishes clear obligations for Israel as an ‘Occupying Power’. For example, Israel is prohibited from taking any measures ‘in order to change the established international consensus that these acts violated international law.

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ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 156 at 171, para. 87.

Ibid. 184, para. 122.

Ibid. 184, para. 122.

Ibid. 183, para. 120.
Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.\textsuperscript{18}

International consensus may not be the same as international law, but the international consensus with regard to the Israeli-Palestinian conflict has been based on international law. The US government may have decided to step outside that international consensus, but that does not call into question the existence of such a consensus. It was only under the Trump administration that the United States dropped the term ‘occupied territories’ when referring to the Syrian Golan, the West Bank (including East Jerusalem) and Gaza,\textsuperscript{19} and accused other States of having ‘weaponised’ the term ‘occupation’ in order to criticise Israel.\textsuperscript{20} Instead, it now referred to ‘Israeli-controlled’ territory\textsuperscript{21} or an ‘unresolved dispute’ over claims to certain land.\textsuperscript{22}

This is all the more remarkable as even the Israeli Supreme Court has accepted, as a general point of departure for all its considerations, that Israel holds the West Bank in belligerent occupation (occupatio bellica).\textsuperscript{23} For many years, the United States was part of the international consensus that considered Israel’s measures to alter the status of Jerusalem and its settlements in the occupied territories as contrary to international law.\textsuperscript{24} As recently as 23 December 2016, the United States representative on the Security Council made the following statement with regard to Israeli settlement activity in territories occupied in 1967: ‘Today the Security Council reaffirmed its established consensus that settlements have no legal validity.’\textsuperscript{25}

The United States may have changed its position on the Israeli-Palestinian conflict and may today reject the international consensus it helped to forge, but this should not detract from the fact that such a consensus continues to exist, is firmly based on international law and is reflected in the resolutions of the United Nations.

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\textsuperscript{18} Ibid. 184, para. 120.
\textsuperscript{20} UN Security Council 74th year, 8553rd meeting, 23 July 2019, UN Doc. S/PV.8553, 11. Back in 1969, the US representative on the UN Security Council had stated: ‘The United States considers that the part of Jerusalem that came under the control of Israel in the June 1967 war, like other areas occupied by Israel, is occupied territory and hence subject to the provisions of international law governing the rights and obligations of an occupying Power.’ (Security Council Official Records, 24th year, 1459th meeting, 1 July 1969, UN Doc. S/PV.1459, 11, para. 97).
\textsuperscript{22} UN Security Council 74th year, 8553rd meeting, 23 July 2019, UN Doc. S/PV.8553, 11.
\textsuperscript{24} Back in 1980, the US representative on the Security Council had stated that unilateral acts that sought to change the status of Jerusalem were ‘inconsistent not only with international law but with the very nature of negotiations essential for peace’. Security Council Official Records, 35th year, 2242nd meeting, 30 June 1980, UN Doc. S/PV.2242, 3, para. 20.
\textsuperscript{25} UN Security Council, 71st year, 7853rd meeting, 23 December 2016, UN Doc. S/PV.7853, 5 (italics added).