### Rules-based order v. international law?

Germany is a champion of the so-called “rules-based order”.[[1]](#footnote-1) 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”,[[2]](#footnote-2) a “rules-based international order”,[[3]](#footnote-3) a “rules-based global order”,[[4]](#footnote-4) a “rules-based multilateral order”,[[5]](#footnote-5) or a “rules-based system”.[[6]](#footnote-6) Germany considers the rules-based order to be increasingly called into question, and wants to be a defender of that order. It has attempted to build an “alliance of multilaterlists” who join forces to protect, and continue to develop, the rules-based order.[[7]](#footnote-7) In statements of the Federal Foreign Office, such references to a “rules-based order” have 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 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]](#footnote-8)

While one does not have to go so far as the Russian Foreign Minister who, in fact, accused 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 the new terminology and the underlying concept are not without their difficulties.

Germany has not defined what it means by a “rules-based order” and has not explained whether and, if so, to what extent it differs 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]](#footnote-9)

Heading

Judging by the situations in which the term “rules-based order” has been used, it seems to be a broader term than “international law”, i.e. legally binding rules that are based on, and require the consent of each individual State. It seems to encompass both traditional international law rules, and what is usually referred to as “soft law” – legally non-binding political commitments. It also appears to include rules made by both States and non-State actors. The term has been used to call upon certain States to comply with existing international legal rules which these States actually have not consented to, and thus are not bound. The term “rules-based order” 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 or not 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 is a dangerous development, because if an international order that bases itself on rules does not require consent to these rules, the question arises of who ultimately lays down these rules and determines their content. In practice, the “rules-based order” seems to be an attempt to establish law-making by majority at the international level. However, the will of a few (Western) States, or even the majority of States, cannot be equated to international or regional rules, or be the basis for a “rules-based order”. While international law is based on the principle of sovereign equality of States, a “rules-based order” detached from the requirement of consent may become an order of the strong, or an order by dictate of the majority.

States may not act in compliance with this “rules-based order” because they do not consider themselves bound by the “rules” it consists of, and in fact 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

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1. See e.g. Federal Foreign Office, A world in shatters or rejuvenated multilateralism?, 14 February 2019, https://www.auswaertiges-amt.de/en/aussenpolitik/munich-security-conference-2019/2190016. [↑](#footnote-ref-1)
2. See e.g. Federal Foreign Office, Speech by Foreign Minister Heiko Maas at the New Year reception of the German Eastern Business Association (OAOEV), 10 January 2019, https://www.auswaertiges-amt.de/en/newsroom/news/new-year-reception-german-eastern-business-association/2177446. [↑](#footnote-ref-2)
3. See e.g. Federal Foreign Office, Verbatim: Foreign Minister Heiko Maas on the new Franco-German Treaty, 9 January 2019, https://www.auswaertiges-amt.de/en/newsroom/news/maas-treaty-of-aachen/2176162. [↑](#footnote-ref-3)
4. See e.g. Federal Foreign Office, Speech by Foreign Minister Heiko Maas in the German Bundestag: “Germany’s membership of the United Nations Security Council – For a world order of lasting peace, stability and justice”, 29 June 2018, https://www.auswaertiges-amt.de/en/newsroom/news/maas-bundestag-deutchland-im-sicherheitsrat/2115306. [↑](#footnote-ref-4)
5. See e.g. Federal Foreign Office, Opening Remarks by Minister of State Niels Annen at the SWP Conference on U.S. Foreign Policy under the Trump Administration, 19 February 2019, https://www.auswaertiges-amt.de/en/newsroom/news/annen-swp-conference/2190866. [↑](#footnote-ref-5)
6. See e.g. Federal Foreign Office, Who, if not us? Article by Foreign Minister Heiko Maas and Jean-Yves Le Drian (France) at the start of the Munich Security Conference. Published in the Süddeutsche Zeitung, 14 February 2019, https://www.auswaertiges-amt.de/en/newsroom/news/maas-le-drian-sueddeutsche/2189696. [↑](#footnote-ref-6)
7. See e.g. Federal Foreign Office, Speech by Foreign Minister Heiko Maas at the Nuremberg Forum 2018 marking the 20th anniversary of the Rome Statute, 19 October 2018, https://www.auswaertiges-amt.de/en/newsroom/news/maas-nuremberg-rome-statute/2151548. [↑](#footnote-ref-7)
8. The Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov’s remarks and answers to media questions at a news conference on the results of Russian diplomacy in 2018 Moscow, January 16, 2019, http://www.mid.ru/en/web/guest/meropriyatiya\_s\_uchastiem\_ministra/-/asset\_publisher/xK1BhB2bUjd3/content/id/3476729. For a similar statement, see The Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov’s greetings at a gala meeting on Diplomats’ Day, Moscow, February 8, 2019, http://www.mid.ru/en/web/guest/meropriyatiya\_s\_uchastiem\_ministra/-/asset\_publisher/xK1BhB2bUjd3/content/id/3510024. [↑](#footnote-ref-8)
9. See e.g. Federal Foreign Office, Speech by Foreign Minister Heiko Maas at the High-Level Meeting on Peacebuilding and Sustaining Peace of the UN General Assembly, 24 April 2018, https://www.auswaertiges-amt.de/en/newsroom/news/maas-uno-sustaining-peace/2006084. [↑](#footnote-ref-9)
10. Footnote (use (hidden) style): „Footnote text”; this should be the default setting. [↑](#footnote-ref-10)