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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.[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] a 'rules-based international order',[3] a 'rules-based global order',[4] a 'rules-based multilateral order'[5] or a 'rules-based system'.[6] 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.[7] 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

[1] See, e.g., Federal Foreign Office, 'A world in shatters or rejuvenated multilateralism?' (14 February 2019), www.auswaertiges-amt.de/en/aussenpolitik/munich-security-conference-2019/2190016.

[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), www.auswaertiges-amt.de/en/newsroom/news/new-year-reception-german-eastern-business-association/2177446.

[3] See, e.g., Federal Foreign Office, 'Verbatim: Foreign Minister Heiko Maas on the new Franco-German Treaty' (9 January 2019), www.auswaertiges-amt.de/en/newsroom/news/maas-treaty-of-aachen/2176162; UN Security Council, 74th year, 8520th meeting, 30 April 2019, UN Doc. S/PV.8520, 17.

[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), www.auswaertiges-amt.de/en/newsroom/news/maas-bundestag-deutchland-im-sicherheitsrat/2115306.

[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), www.auswaertiges-amt.de/en/newsroom/news/annen-swp-conference/2190866.

[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), www.auswaertiges-amt.de/en/newsroom/news/maas-le-drian-sueddeutsche/2189696.

[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), www.auswaertiges-amt.de/en/newsroom/news/maas-nuremberg-rome-statute/2151548.

> 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 international customary law and general principles of law.[10]

[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' (16 January 2019), 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' (8 February 2019), www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/3510024.

[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), www.auswaertiges-amt.de/en/newsroom/news/maas-uno-sustaining-peace/2006084.

[10] Deutscher Bundestag, 19. Wahlperiode, Stenografischer Bericht, 123. Sitzung, 6. November 2019, Plenarprotokoll 19/123, 15288(A).

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.

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A Strange Construction of International Law by Germany's Ambassador to the United Nations

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'.
>
> 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 terrorize 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 photos[3] 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

[1] AFP, 'Syria requests UN Security Council meeting on Golan', France 24 (27 March 2019), www.france24.com/en/20190327-syria-requests-un-security-council-meeting-golan.

[2] AFP, 'UN Security Council to meet on Golan at Syria's request' (27 March 2019), www.afp.com/en/news/3954/un-security-council-meet-golan-syrias-request-doc-1f48ci3.

[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?s=11.

[5] See UN Charter, Article 35(1).

[6] Provisional Rules of Procedure of the Security Council, UN Doc. S/96/Rev.7, Rule 2.

[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. . . .[3]

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,[4] 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 oped 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. 13–14.

[4] Associated Press in Jerusalem, 'Israeli crews demolish Palestinian homes in East Jerusalem', *The Guardian* (22 July 2019), www.theguardian.com/world/2019/jul/22/israeli-crews-demolish-palestinian-homes-in-east-jerusalem.

[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.

[6] See, e.g., Michelle Nichols, 'Trump's Middle East envoy faces resistance at U.N. Security Council', Reuters (23 July 2019), https://af.reuters.com/article/uk-israel-palestinians-usa-idAFKCN1UI1ZQ.

[7] Adam Kredo, 'U.S. Knocks Germany in Row Over Middle East Peace Process', *Washington Free Beacon* (13 August 2019), https://freebeacon.com/national-security/u-s-knocks-germany-in-row-over-middle-east-peace-process/.

> . . . 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 pretence 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.[8]

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'.[9]

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

[8] Jason Greenblatt, 'Mit Verlaub, Herr Botschafter Heusgen . . .', *Die Welt* (8 August 2019), www.welt.de/debatte/kommentare/article198179335/UN-Debatte-Mit-Verlaub-Herr-Botschafter-Heusgen.html.

[9] Ständige Vertretung der Bundesrepublik Deutschland bei den Vereinten Nationen, '"Die UN sind das wichtigste Weltgremium": Botschafter Heusgen im Interview' (20 August 2019), https://new-york-un.diplo.de/un-de/aktuelles/heusgen-bpa-interview/2240436.

United States recognised the Israeli annexation of the occupied Syrian Golan,[10] recognised Jerusalem as the capital of Israel and relocated its embassy from Tel Aviv to Jerusalem,[11] and declared that it would consider the establishment of Israeli civilian settlements in the West Bank as 'not per se inconsistent with international law'.[12] 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.[13]

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.[14] 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.[15] 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.[16] 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 organize or encourage transfers of parts of its own population into the occupied territory'.[17] This led the International Court of Justice (ICJ) to conclude that 'the Israeli settlements in the

[10] White House, 'Proclamation on Recognizing the Golan Heights as Part of the State of Israel' (25 March 2019), https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/.

[11] White House, 'Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem' (6 December 2017), https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/; White House, 'President Donald J. Trump Keeps His Promise To Open U.S. Embassy In Jerusalem, Israel' (14 May 2018), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-keeps-promise-open-u-s-embassy-jerusalem-israel/.

[12] US Department of State, 'Secretary Michael R. Pompeo Remarks to the Press' (18 November 2019), https://2017-2021.state.gov/secretary-michael-r-pompeo-remarks-to-the-press/index.html.

[13] See, e.g., UN Security Council Resolutions 2334 (2016), UN Doc. S/RES/2334 (2016), 23 December 2016; 478 (1980), UN Doc. S/RES/478 (1980), 20 August 1980; 497 (1981), UN Doc. S/RES/497 (1981), 17 December 1981; 252 (1968), UN Doc. S/RES/252 (1968), 21 May 1968.

[14] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 at 171, para. 87.

[15] Ibid. 184, para. 122.

[16] Ibid. 184, para. 122.

[17] Ibid. 183, para. 120.

Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law'.[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,[19] and accused other States of having 'weaponised' the term 'occupation' in order to criticise Israel.[20] Instead, it now referred to 'Israeli-controlled' territory[21] or an 'unresolved dispute' over claims to certain land.[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*)'.[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.[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.'[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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[18] Ibid. 184, para. 120.

[19] Compare US Department of State, '2017 Country Reports on Human Rights Practices: Israel, Golan Heights, West Bank, and Gaza' (20 April 2018) and '2016 Country Reports on Human Rights Practices: Israel and The Occupied Territories' (3 March 2017), both available at www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/.

[20] UN Security Council 74th year, 8583rd meeting, 23 July 2019, UN Doc. S/PV.8583, 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, 1483rd meeting, 1 July 1969, UN Doc. S/PV.1483, 11, para. 97).

[21] See US Department of State, '2018 Country Reports on Human Rights Practices: Israel, Golan Heights, West Bank, and Gaza' (13 March 2019), www.state.gov/reports/2018-country-reports-on-human-rights-practices/israel-golan-heights-west-bank-and-gaza/.

[22] UN Security Council 74th year, 8583rd meeting, 23 July 2019, UN Doc. S/PV.8583, 11.

[23] Israel, Supreme Court, *Beit Sourik Village Council* v. *The Government of Israel*, HCJ 2056/04, 30 June 2004 (2005) 38 *Israel Law Review* 83–133 at 83, para. 1 and 97, para. 23.

[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.

[25] UN Security Council, 71st year, 7853rd meeting, 23 December 2016, UN Doc. S/PV.7853, 5 (italics added).

Germany Champions 'Alliance for Multilateralism'

As a consequence of growing nationalist and populist tendencies in several countries in recent years, Germany identified a 'worldwide crisis of multilateralism'.[1] To counter this development, in the summer of 2018 Germany's Federal Foreign Minister Heiko Maas held talks with his counterparts in several countries, including Canada, France and Japan,[2] on what could be done to prevent the disintegration of the international order. This gave rise to the idea of 'an alliance for multilateralism' – a network of partner countries standing up together to preserve and further develop the rules-based order and defend multilateralism. Foreign Minister Maas defined multilateralism as 'investing in an order when doing so does not lead to an immediate benefit for oneself, but secure in the knowledge that one can rely on this order when needed one day'.[3]

The alliance for multilateralism was not to be an exclusive club of liberal democracies, but was to be open to all States that believed in multilateralism. It was not to be directed against anyone, but was to strive for joint solutions to global problems, including climate change, rising protectionism and the refugee crisis. In reply to parliamentary questions, the Federal Government described the goals of the envisaged alliance for multilateralism as follows:

> The aim of the initiative is not to create a new organisation or a closed group with a fixed membership. Rather, based on a network approach, particularly committed partners are to come together on topics of regional or global relevance, co-ordinate with one another and agree on a joint response.[4]

The alliance was to defend existing rules and continue to develop these rules where necessary, show solidarity when international law was trampled underfoot on others' doorsteps, and assume responsibilities together within international organisations. Participants were also to be committed to climate protection as one of the greatest challenges facing humankind.[5] In an opinion piece published in the 14 February 2019 edition of the *Süddeutsche Zeitung*, Foreign Minister Maas and his French counterpart wrote:

> The international order is under huge pressure. Some players are increasingly engaging in power politics, thus undermining the idea of a rules-based order with a view to enforcing the law of the strong. . . . We firmly believe that a new commitment to multilateralism, an alliance for multilateralism, is more necessary than ever if we are to stabilise the rules-based world order, to uphold its principles and to adapt it to new challenges where necessary. We therefore want to establish a global network of like-minded states which are convinced that pursuing legitimate, national interests and protecting the collective property of humankind are fully compatible, not mutually exclusive.[6]

[1] 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), www.auswaertiges-amt.de/en/newsroom/news/maas-nuremberg-rome-statute/2151548.

[2] See Federal Foreign Office, 'Statement by Foreign Minister Heiko Maas "Defending the liberal democracy in the 21st century" in Toronto' (14 August 2019), www.auswaertiges-amt.de/en/newsroom/news/-/2238978.

[3] Federal Foreign Office, 'Speech by Foreign Minister Heiko Maas at the opening of the 16th Ambassadors Conference at the Federal Foreign Office' (27 August 2018), www.auswaertiges-amt.de/en/newsroom/news/maas-freeland-ambassadors-conference/2130332.

[4] Deutscher Bundestag, 19. Wahlperiode, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulrich Lechte, Alexander Graf Lambsdorff, Grigorios Aggelidis, weiterer Abgeordneter und der Fraktion der FDP – Drucksache 19/6530 – Deutschlands Strategie in den Vereinten Nationen während der Mitgliedschaft im Sicherheitsrat 2019 bis 2020', Drucksache 19/6985 (14 January 2019) 20 (Question 44).

[5] Federal Foreign Office, 'Speech by Minister for Foreign Affairs Heiko Maas at the National Graduate Institute for Policy Studies in Tokyo, Japan' (25 July 2018), www.auswaertiges-amt.de/en/newsroom/news/maas-japan/2121846.

[6] 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), www.auswaertiges-amt.de/en/newsroom/news/maas-le-drian-sueddeutsche/2189696.

At a meeting in New York on 2 April 2019, the two ministers presented their plans for 'an alliance for multilateralism' to fourteen countries that shared their concern for multilateralism. The alliance was presented as 'a renewed commitment to multilateralism and to the United Nations'. The objective of the initiative was 'to show that the States that support multilateralism and are committed to the United Nations remain in the majority. It is a majority that has long been silent because we have long taken international co-operation for granted. However, this is not the case today, and those States that are committed to multilateralism must make themselves known and unite their forces and their voices.'[7]

One of the first States to join the initiative in April 2019 was Canada.[8] On 12 June 2019, Germany launched the '#MultilateralismMatters' campaign. In a video, the foreign ministers of Canada, Chile, France, Ghana and Germany raised awareness of multilateral issues and promoted the new Alliance for Multilateralism. Foreign Minister Maas said: 'We put the strength of the law before the law of the strong. And we call on all like-minded partners to join our common cause.'[9] By mid-August 2019, countries from Latin America, Africa and Asia, as well as from the European Union, had joined the initiative.[10] On 20 September 2019, Foreign Minister Maas further promoted the initiative in another video entitled 'Together we are strong!', which invited all Member States of the United Nations to join.[11]

The Alliance for Multilateralism held its first meeting during the ministerial week of the 74th General Assembly in New York on 26 September 2019. At the ministerial meeting, which was organised by France and Germany, together with Canada, Chile, Ghana, Mexico and Singapore, and bore the title 'Building the Network and Presenting Results', the co-chairs issued the following statement:

> At a time when key principles of the rules-based international order and essential instruments of international cooperation are challenged, the Alliance for Multilateralism aims at bringing together those who believe that strong and effective multilateral cooperation, based on the purposes and principles of the Charter of the United Nations, international law and justice, are indispensable foundations to secure peace, stability and prosperity and who want to join hands to act along this endeavour. We confirm our conviction that the major challenges of our time, by their nature and global scope, cannot be addressed by countries separately but must be tackled jointly – and that such a rules-based multilateral cooperation is also a key guarantee for the sovereign equality of states as epitomized in the United Nations General Assembly.
>
> **Objectives.**
> The Alliance for Multilateralism concentrates in particular on the three following streams of action:
> – To protect[,] preserve and advance international law, including internationally agreed norms, agreements and institutions, including through political initiatives, budget contributions, the provision of capabilities and expertise;

[7] Représentation permanente de la France auprès des Nations Unies à New York, 'Conférence de presse de M. Jean-Yves Le Drian et M. Heiko Maas' (2 April 2019, revised 25 February 2020), https://onu.delegfrance.org/Conference-de-presse-de-M-Jean-Yves-Le-Drian-et-M-Heiko-Maas.

[8] Peter Smith, 'Canada joins new international alliance with France, Germany and Japan', *Daily Hive* (16 April 2019), https://dailyhive.com/vancouver/canada-japan-germany-alliance-of-multilateralists.

[9] Federal Foreign Office, '#MultilateralismMatters' (12 June 2019), www.auswaertiges-amt.de/en/newsroom/mediathek-startseite-node/multilateralism-matters/2225950. See also Federal Foreign Office, 'Statement by Foreign Minister Maas on "Together or Alone? The Germans and Multilateralism"' (12 June 2019), www.auswaertiges-amt.de/en/newsroom/news/maas-mulilateralism-matters/2226080.

[10] See Federal Foreign Office, 'Statement by Foreign Minister Heiko Maas' (n. 2).

[11] Federal Foreign Office, '#MultilateralismMatters' (20 September 2019), www.auswaertiges-amt.de/en/newsroom/mediathek-startseite-node/multilateralism-matters/2246104.

- To drive strong initiatives where there is the need to further develop and thereby strengthen the multilateral system, in particular where governance is absent or insufficient;
- To reform and to modernize existing international institutions, in order to make them more inclusive, representative, democratic, transparent, accountable and more effective in their functioning as well as capacity to deliver tangible results to citizens.[12]

At the meeting, Germany and France presented the following six initiatives and called for their endorsement:

- Call for Action to strengthen respect for international humanitarian law and principled humanitarian action
- Paris Call for Trust and Security in Cyberspace
- International Partnership for Information and Democracy
- Gender at the Centre Initiative
- Climate and Security Initiative
- Eleven Principles on Lethal and Autonomous Weapons Systems (LAWS).

Further initiatives for tackling global challenges together were announced for later.[13]

The Alliance for Multilateralism is not an international organisation or institution but a loose network of States. There is no founding document to sign up to and no formal membership. The Alliance can be described as a project incubator or an aggregator of good will. Involvement in one initiative does not automatically entail participation in other initiatives pursued within the framework of the Alliance. The Alliance remains open to all States interested in participating, which makes it a rather haphazard enterprise.

While initiatives to protect and promote multilateralism are generally to be welcomed, there may be questions about the added value of the Alliance. It looks very much like a project of some foreign ministers trying to distinguish themselves and to promote their countries' respective agendas. The Alliance has not developed any new initiatives but has simply tried to drum up support for a hotchpotch of existing initiatives. It seems to lack a clear agenda and direction. The position documents, which participants may sign, are political statements that in terms of international law would at best, if at all, qualify as soft law instruments. The number of States attracted to the new Alliance was rather limited. Only forty-seven States and the European Union registered for the ministerial meeting on 26 September 2019.[14] Almost half of the countries that registered came from Europe.[15] States attending from outside Europe included Afghanistan, Australia, Canada, Chile, Colombia, Ghana, India, Jordan, Mali, Mexico, Morocco, Singapore, South Africa and Tunisia. Notable absentees were the three non-European permanent members of the Security Council: China, Russia and the United States. This gives the impression that the Alliance, rather than being open to all States, is a counterweight to these powers.

Mirjam Reiter

[12] Alliance for Multilateralism, 'Building the Network and Presenting Results' (26 September 2019), https://multilateralism.org/wp-content/uploads/2020/07/Alliance-for-Multilateralism-Statement-by-the-co-chairs.pdf.

[13] See Permanent Mission of France to the United Nations in New York, 'The Alliance for Multilateralism: for a renovated form of international cooperation' (revised 27 February 2020), https://onu.delegfrance.org/The-Alliance-for-Multilateralism-for-a-renovated-form-of-international. See, further, Alliance for Multilateralism, 'Action Areas', https://multilateralism.org/actionareas/.

[14] France Diplomacy, 'Alliance for Multilateralism' (2 October 2019), www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/alliance-for-multilateralism-63158/.

[15] Johannes Leithäuser, 'Klub der lebendigen Multilateralisten', *Frankfurter Allgemeine Zeitung* (27 September 2019) 5.

SOURCES OF INTERNATIONAL LAW

German Federal Constitutional Court Once Again Rejects Argentina's Claim of a State of Necessity as a General Principle of International Law

On 3 July 2019, the Federal Constitutional Court declined to rule on two constitutional complaints lodged by the Republic of Argentina concerning the Argentine debt crisis.[1] In these complaints, Argentina argued – for a second time[2] – that in a national debt crisis a general principle of international law conferred upon States the right to refuse debt service on bonds held by private creditors who, unlike the vast majority of creditors, rejected a conversion offer (debt swap) made by the issuing State and instead sought full payment of the debt.

In 2001 and 2002, Argentina experienced the peak of one of the most severe fiscal and economic crises in its history. The country has a long history of debt crises and the national economy has had frequent ups and downs.[3] Since its independence in 1816, Argentina has repeatedly defaulted, and it has entered into more than a dozen arrangements with the International Monetary Fund (IMF) since joining the organisation in 1956.[4] In 1998, Argentina fell into a recession that lasted nearly four years. Having 'issued more bonds, in more jurisdictions, and in more currencies than any other emerging economy',[5] it found itself faced with what turned out to be the worst economic crisis in its history.

The crisis was due to a variety of reasons. In addition to the incipient global economic recession, the country was feeling the effects of financial and currency crises in Russia and Brazil. Furthermore, the country's dependence on the US dollar and the consequent over-valuation of the Argentinian peso, poor fiscal discipline and the absence of reforms, a low level of domestic savings, capital flight and shrinking foreign exchanges reserves all contributed to an economic slump.[6] Following the failure of the measures taken by Argentina and the IMF[7] and the IMF's refusal to pay an urgently needed credit tranche, Argentina declared its sovereign default and proclaimed a moratorium on debt service at the end of 2001.[8] A few days later, the federal parliament passed the Public Emergency and Exchange Regime Act,[9] proclaiming a public emergency in 'social, economic, administrative, financial, and currency exchange matters' and empowering the government to restructure the country's sovereign debt. As a result – after freezing bank deposits, converting dollar deposits and loans into peso deposits and ending the peso-dollar parity[10] – Argentina refused to service foreign bonds held by private

[1] BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 3. Juli 2019 – 2 BvR 824/15, 2 BvR 825/15 – NJW 2019, 2761.

[2] In 2007, the Federal Constitutional Court had already dealt with a much-noted Argentinian case; see BVerfG, Beschluss des Zweiten Senats vom 8. Mai 2007 – 2 BvM 1/03, 2 BvM 2/03, 2 BvM 3/03, 2 BvM 4/03, 2 BvM 5/03, 2 BvM 1/06, 2 BvM 2/06 – BVerfGE 118, 124.

[3] For a detailed analysis of Argentina's history of financial crises, see Jiri Jonas, 'Argentina: The Anatomy of a Crisis', ZEI Working Paper No. B 12-2002 (2002) 2–17.

[4] See 'At a Glance' on the IMF's Argentina country information web page, www.imf.org/en/Countries/ARG.

[5] Nouriel Roubini and Brad Setser, *Bailouts or Bail-ins? Responding to Financial Crises in Emerging Economies* (2004) 298.

[6] A detailed analysis of the causes of the crisis in Argentina can be found in Jonas (n. 3) 18–30.

[7] See Michael Mussa, *Argentina and the Fund: From Triumph to Tragedy* (2002) 27 *et seq*.

[8] On 24 December 2001, Argentina's interim president Rodríguez Saá declared a moratorium on debt service; see Clifford Krauss, 'Argentine Leader Declares Default on Billions in Debt', *New York Times* (24 December 2001), www.nytimes.com/2001/12/24/world/argentine-leader-declares-default-on-billions-in-debt.html.

[9] Ley de Emergencia Pública y de Reforma del Régimen Cambiario, Law No. 25.561, 6 January 2002 http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000-74999/71477/norma.htm.

[10] For details of the measures taken to address the crises, see Jayson J. Falcone, 'Argentina's Plight: An Unusual Temporary Solution to a Sovereign Debt Crisis' (2003) 27 *Suffolk Transnational Law Review* 357–79 at 359–62.

creditors, seeking instead to negotiate a debt swap.[11] In 2005[12] and 2010,[13] Argentina made conversion offers to its creditors, allowing holders to swap their existing bonds against new bonds with a loss in value. Most creditors – more than 92 per cent – agreed to Argentina's offer.[14] However, 7 per cent of bondholders did not take up the debt-to-debt swap offer and instead continued to seek full compensation based on their former titles.

Given Argentina's insistence on restructuring and the holdout creditors' insistence on full compensation, it was hardly surprising that the Argentine crisis became a matter for the courts. Both national[15] and international courts and tribunals[16] were called upon to address the question of whether and, if so, to what extent Argentina had the right to invoke a state of necessity to justify its interruption of debt service vis-à-vis private bondholders.

In its order of 3 July 2019, the German Federal Constitutional Court once again had the opportunity to address this question. Argentina argued that the German Federal Court of Justice had erred in its finding that there was no general rule of international law, as referred to in Article 25 of the German constitution, that dealt with a state of necessity and which Argentina could invoke as a defence against claims brought by private creditors on account of the country's default on sovereign bonds. The Federal Constitutional Court confirmed that there was no such general rule of international law, following its much-noted 2007 ruling, in which it had found that '[a] general rule of international law which entitles a State to temporarily refuse to meet private-law payment claims due to private individuals by invoking a national emergency declared because of an inability to pay cannot currently be ascertained'.[17]

In the 2019 proceedings, Argentina again argued that in a national debt crisis there was a general rule of international law as per Article 25 of the German Constitution which conferred upon States the right to refuse debt service on bonds held by private creditors who did not accept a debt swap made by the issuing State and – in contrast to the vast majority of creditors – continued to seek full payment of the debt. Argentina submitted that necessity was recognised as a general principle of law which precluded the wrongfulness of withholding full payment to the holdout creditors. For Argentina, it was an abuse of right for the creditors who did not accept the dept-to-dept swap offered by the debtor State to bring an action seeking full satisfaction instead. In particular, its right to refuse payment could be inferred from the general principle of good

[11] The structure of Argentina's public debt was particularly notable. More than 150 types of bonds with a value of more than $80 billion, issued in six different currencies and subject to eight different jurisdictions, were held by more than 500,000 bondholders; see Jörn Axel Kämmerer, 'Argentine Debt Crisis', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I (2012) 579–87 at 581 MN 7.

[12] In January 2005, Argentina opened the debt swap process, during which 76 per cent of the bondholders agreed to the conversion offer. For details see J. F. Hornbeck, 'Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts"', Congressional Research Service Report for Congress (6 February 2013) 4–6.

[13] In April 2010, Argentina reopened the debt swap process and submitted a new exchange offer to those bondholders who refused to accept the 2005 offer.

[14] By the end of 2010 more than 92 per cent of bondholders had accepted one or other of the debt restructuring deals offered in 2005 and 2010. For details, see Kämmerer (n. 11) para. 9.

[15] See, e.g., in Germany, BVerfG, Beschluss vom 8. Mai 2007 (n. 2); in the United States, Court of Appeals of the Second Circuit, *EM Ltd.* v. *Argentina*, 473 F.3d 463 (2d Cir. 2007) and Supreme Court, *NML Capital* v. *Argentina*, 573 U.S. 134 (2014); in Italy, Corte di Cassazione, Sezione Unite Civile, no. 11225, 27 May 2005 (2005) 88 *Rivista di diritto internazionale* 856.

[16] Although there is no exhaustive list of cases related to the 2001/2002 economic crisis that were brought before international arbitral tribunals, about forty cases were filed against Argentina at the International Centre for the Settlement of Investment Disputes (ICSID); see Luke Eric Peterson, 'Argentina by the Numbers: Where Things Stand with Investment Treaty Claims Arising Out of the Argentine Financial Crisis', *Investment Arbitration Reporter* (1 February 2011), www.iareporter.com/articles/argentina-by-the-numbers-where-things-stand-with-investment-treaty-claims-arising-out-of-the-argentine-financial-crisis.

[17] See BVerfG, Beschluss vom 8. Mai 2007 (n. 2) para. 29.

faith, as materialised in the equal treatment of all creditors and the integrity of formal insolvency proceedings. Argentina argued that these domestically recognised principles of insolvency law could be transferred to the international level and thus form an integral part of the international legal order for sovereign debt crisis management. In addition, Argentina referred to the increased use nowadays of well-established collective action clauses in States' debt instruments, whereby holdout creditors are bound by restructuring agreements concluded with the majority of creditors. According to Argentina, a general principle of international law to that effect had emerged in recent decades.

Examining Argentina's argument, the Federal Constitutional Court made some general pronouncements on the relationship between general rules of international law, as referred to in Article 25 of the constitution, and general principles of law. The Court held:

> General rules of international law are rules of universally applicable customary international law, supplemented by the general legal principles deriving from national legal orders. Whether a rule is one of customary international law, or whether it is a general legal principle, is determined by international law itself. Stringent requirements are to be applied to the establishment of a general rule of international law as it embodies an obligation incumbent on all States.
>
> A general rule of customary international law within the meaning of Article 38(1)(b) of the ICJ Statute is a rule underpinned by an established practice followed by many, but not necessarily all, States (*consuetudo* or *usus*) in the belief that it constitutes an obligation under international law (*opinio iuris sive necessitatis*).
>
> General principles of law within the meaning of Article 38(1)(c) of the ICJ Statute are rooted in national legal orders and can be transposed to the level of international law. They thus constitute general principles of law consistently recognised as fundamental precepts prevailing in and underlying national legal orders.[18]

Applying these principles to the question of whether international law recognised a general principle of law allowing States to suspended debt service vis-à-vis private creditors on grounds of a state of necessity, the Court held:

> However, the general principle of law now asserted by the complainant presupposes precisely the existence of such a body of bankruptcy rules at the level of international law. The complainant invokes the principle of good faith in the event of State insolvency or a situation bordering thereon. Even if it were assumed that the features mentioned by the complainant as materialisations of the principle of good faith – namely, the equal treatment of creditors and the integrity of orderly insolvency proceedings – constitute a principle consistently recognised in and underpinning domestic legal orders, and even if these are features recognised by the major legal traditions, their transposition to situations governed by international law presupposes the existence of a body of insolvency rules at the level of international law, which was ruled out by the Second Chamber in 2007. This is because the features mentioned by the complainant as materialising the principle of good faith could be transposed to the level of international law only if at that level there were an independent regulatory or supervisory authority to monitor compliance with the procedural rules and ensure that the interests of all affected parties are carefully balanced.
>
> In national systems of insolvency law, the principles of insolvency law advanced by the complainant are embedded in their elaborately conceived insolvency regimes, which provide procedural rules, including for the protection of minority creditors, the observance of which is monitored by a neutral body, generally a bankruptcy court. Without a procedural framework consistent with the rule of law, which allows for the review of decisions burdening the minority,

[18] See BVerfG, Beschluss vom 3. Juli 2019 (n. 1) paras. 31–3 (internal references omitted).

> an essential condition for transposition to the level of international law is missing. Thus, it is not possible to invoke individual principles of insolvency law under Article 38(1)(c) of the ICJ Statute.[19]

Accordingly, the Federal Constitutional Court rejected the application by analogy at international level of a principle of law derived from domestic insolvency law. Even assuming that major legal traditions recognise the principles of equal treatment of creditors and the integrity of orderly insolvency proceedings, State practice and case law were not sufficient to establish a general rule binding on the international community.

In addition, the Court held that no general principle could be derived from other international documents either. So far, there are no signs of an international regime governing sovereign debt restructuring. The Court stated that

> the documents of various United Nations bodies submitted by the complainant are not capable of evidencing a general principle of law. Apart from the fact that they are not legally binding, these documents notably do not contain the alleged legal principle. . . . All the documents cited by the complainant (Principles on Promoting Responsible Sovereign Lending and Borrowing, UNCTAD, 10 January 2012; Sovereign Debt Workouts: Going Forward, Roadmap and Guide, UNCTAD, April 2015; Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes, UN General Assembly Resolution A/RES 68/304, 9 September 2014; Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN General Assembly, Human Rights Council, A/HRC/25/50/Add. 3, 7 March 2014; Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: the activities of vulture funds, UN General Assembly, Human Rights Council, A/HRC/27/L.26, 23 September 2014) at the most make it clear that there are attempts and consent to develop regulations for States in financial difficulties, but at the same time show that such regulations do not yet exist.[20]

The documents mentioned above were endorsed by only part of the international community; most developed economies withheld their support.

There was also no support for such a rule in Principle No. 7 of the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing.[21] These principles were intended to create new international law, not codify existing law. The Court stated:

> Moreover, Principle No. 7 of the UNCTAD Principles deals with creditors who acquire a debt instrument of a State in financial distress with the intention of forcing a preferential settlement of the claim outside of a consensual debt restructuring process. The General Assembly, in its resolution of 9 September 2014, expressed concern about the actions of commercial creditors such as hedge funds that speculate on distressed debt securities purchased at greatly reduced prices (cf. Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes, UN General Assembly Resolution A/RES 68/304, 9 September 2014, preambular paragraph 16). The Human Rights Council, too, focuses exclusively on such commercial, speculative creditors and emphasises that the international financial system lacks a sound legal

[19] Ibid. paras. 38–9 (internal references omitted).

[20] Ibid. para. 41.

[21] According to Principle No. 7, '[i]n circumstances where a sovereign is manifestly unable to service its debts, all lenders have a duty to behave in good faith and with cooperative spirit to reach a consensual re-arrangement of those obligations'. UNCTAD, Consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing (10 January 2012), https://unctad.org/en/PublicationsLibrary/gdsddf2012misc1_en.pdf.

> framework for the orderly and predictable restructuring of sovereign debt (cf. Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: the activities of vulture funds, UN General Assembly, Human Rights Council, A/HRC/27/L.26, 23 September 2014). However, the situation of private investors who – like the plaintiffs in the underlying case here – have acquired bonds directly from the issuer, at the issue price and before the onset of a debt crisis, is clearly different from that situation … . In what way the rationale of these documents could be generalised and hence extended to private creditors such as the plaintiffs in the main proceedings is not clear. In the documents submitted there is thus nothing to support the legal rule asserted by the complainant.[22]

In the literature, on the other hand, voices have urged for the development of international law and argued that 'there is an emerging general principle of law backed by reasons of legitimacy according to which authoritative international sovereign debt restructurings lead to a stay of international and domestic enforcement actions against sovereign debtors'.[23]

Finally, the Federal Constitutional Court also dismissed Argentina's argument concerning the increasing use of so-called collective action clauses allowing a majority of bondholders to agree to a debt restructuring that is legally binding on all holders of the bond, including those who vote against the restructuring. According to the Court, such a private law approach proved exactly the opposite – namely, that such clauses were employed as an alternative to a non-existent international State bankruptcy law. The Court stated:

> If there were such a general principle of law, as the complainant contends, there would have been no need for the introduction of collective action clauses, since the State in distress would have had a right to refuse payment to so-called holdout creditors anyway. Nor, moreover, do the UNCTAD Principles assume that the minority of creditors are bound by the restructuring result negotiated by the majority without a corresponding collective action clauses agreement, but rather explain under Principle No. 15 ('Restructuring') that such clauses can facilitate sovereign debt restructuring and their inclusion in multi-party debt securities is therefore recommended.[24]

Accordingly, the Federal Constitutional Court declined to acknowledge the existence of a general principle of law allowing States to refuse debt service on bonds held by private creditors who – in contrast to the vast majority of creditors – have refused a conversion offer made by the issuing State in the context of a national debt crisis. The Court dismissed Argentina's arguments as unfounded, referring principally to its 2007 decision.

In short, given that there are as yet no uniform or codified rules on State bankruptcy in international law, the Federal Constitutional Court held that no such general principle of law existed.

Finally, it should be noted that, in view of the recent financial crises throughout the world and given that State bankruptcy is no longer a rare phenomenon, there are good reasons to enquire as to whether a general principle of law might exist that allows a State to refuse payment in the event of State insolvency. The other sources of international law – customary international law and treaties – merely provide some rather rudimentary rules governing relations between the debtor State and its sovereign or private creditors. While a debtor State should not be able to play

[22] See BVerfG, Beschluss vom 3. Juli 2019 (n. 1) para. 41.

[23] Armin von Bogdandy and Matthias Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law', in Carlos Espósito, Juan Pablo Bohoslavsky and Yuefen Li (eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (2013) 64 *et seq.*

[24] See BVerfG, Beschluss vom 3. Juli 2019 (n. 1) para. 43 (internal references omitted).

individual creditors off against each other, a good case can be made that debt restructuring must also uphold elementary human rights such as the protection of the life and health of the debtor State's citizens. International law has not yet found a satisfactory answer to the question of how to balance these conflicting interests. Unfortunately, the Federal Constitutional Court has once again missed the opportunity to make a substantive contribution to this debate.

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