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**Alexander N. VYLEGZHANIN**

Moscow State Institute of International Relations (University) MFA Russia  
76, pr. Vernadskogo, Moscow, Russian Federation, 119454  
danilalvy@mail.ru  
ORCID: 0000-0003-4833-2525

**Boris I. NEFEDOV**

Moscow State Institute of International Relations (University) MFA Russia  
76, pr. Vernadskogo, Moscow, Russian Federation, 119454  
boris-nefedov@mail.ru  
ORCID: 0000-0002-7762-5979

**Evgeny R. VORONIN**

Moscow State Institute of International Relations (University) MFA Russia  
76, pr. Vernadskogo, Moscow, Russian Federation, 119454  
tverv@rambler.ru  
ORCID: 0000-0002-1229-0012

**Olga S. MAGOMEDOVA**

Moscow State Institute of International Relations (University) MFA Russia  
76, pr. Vernadskogo, Moscow, Russian Federation, 119454  
olga.magomedova.96@mail.ru  
ORCID: 0000-0003-0593-3101

**Polina K. ZOTOVA**

The Government of Moscow,  
22, Voznesenskiy per., Moscow, Russian Federation, 125009  
zotovapk@mos.ru  
ORCID: 0000-0002-8647-7410

# THE CONCEPT “RULES-BASED ORDER” IN INTERNATIONAL LEGAL DISCOURSES

**INTRODUCTION.** *The term “rules-based order” is increasingly referred to in speeches within many international forums as well as declared from national political tribunes. The initial question is whether this notion is of purely political nature (since it is not used in the UN Charter or in other universal international conventions and this term is not relied upon by the International Court of Justice or by the UN International Law Commission). On the other hand, with the popularization of such a political discourse, the*

*frequent usage of this term by representatives of some states (not only of Western States, but also of China, for example) can affect international law. The very application of this term definitely provokes a splash of other questions. How does the term “rules-based order” correlate with the universally recognized term “international legal order”? Does the idea to use the term “rules-based order” have substantive legal grounds? Which rules in concreto<sup>1</sup> are meant by the term? Who and how creates these rules? What is the*

<sup>1</sup> Latin: in English - “specifically”, “defining concretely”; in French – “dans le concret”.

*nature of these rules – are they rules of national law and if so – national rules of what State? If these are rules of international law – why is it not reflected in the term? Due to the attractive wording the concept gets widespread, but lacking a common understanding of its content, everyone might put a different meaning into the concept. Does it result in the fact that some officials, representing states, become politically entitled with the right to abuse the international legal order as it is established by modern international law? This research examines these theoretic aspects of the concept “rules-based order”, taking into account that in the context of international relations it may be referred to also as “rules-based international order”. An additional question to answer is whether the concept might be regarded as one of the numerous attempts to adapt the current international law to new challenges.*

**MATERIALS AND METHODS.** *The research paper is based on the analysis of numerous statements of representatives of states, in which their attitude to the “rules-based order” concept is manifested, positive and critical remarks relating to the concept made by international lawyers, as well as other research papers of Russian and foreign international scholars. The methodological instruments include general scientific and special methods, among them the historical method, methods of formal logic, analysis, synthesis, as well as systemic, comparative legal methods.*

**RESEARCH RESULTS.** *Although the above-noted questions about the legal meaning of the term “rules-based order” have arisen only in recent years mainly in the context of the anti-Russian rhetoric of Western politicians, the term has been used much earlier at different levels in a wide variety of topics. The question of inconsistent perceptions of this term is another reflection of a more general problem of weakening or strengthening the universal legally binding international order. One of the appropriate interpretive versions of this concept might be that “rules-based order” means first and foremost the world order which is based on norms of international law (which are mandatory as well known), and on applicable non-binding international rules containing a normative element, such as international rules provided in the documents of intergovernmental organizations and conferences, interstate political arrangements, and*

*other mutually accepted rules, formed in the contemporary practice of international relations. This interpretation allows to bring the concept in line with modern international law. Nevertheless, even within such interpretation, it is necessary to respect the distinction between the norms of international law, which are binding, and other rules, which do not create State's obligations under international law. Thus, unilateral or “blocking” imposition of values of one State on other States under the guise of rules on which, according to the first State, the world order is based, will not be allowed.*

**DISCUSSION AND CONCLUSIONS.** *If another interpretation prevails, the “rules-based order” concept may have a negative impact on the existing international legal order insofar as it “washes out” the established legitimate procedures of international law-making, thus rejecting traditional international values of legal stability and diminishing the role of international law in international relations. Such scenario would not only multiply legal uncertainty and even unreasonable expectations among the participants of the international processes, but also might lead to undermining the very fundamentals of modern international law based on the UN Charter. The latter in its turn will inevitably lead to the global legal instability and will dramatically increase the risks of World War III. At the moment, the frequent abuse of the term “rules-based order” by the representatives of the NATO countries in support of their politically motivated statements, agreed upon only among them, impedes achievement of accepted understanding of the concept at the universal level, that might be consistent with international law.*

**KEYWORDS:** *rules-based order, international legal order, the rule of law, international legal system, soft law, normativity in international law*

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**Александр Николаевич ВЫЛЕГЖАНИН**

Московский государственный институт международных отношений (Университет) МИД России  
Проспект Вернадского, д. 76, Москва, 119454, Российская Федерация  
danilalvy@mail.ru  
ORCID: 0000-0003-4833-2525

**Борис Иванович НЕФЕДОВ**

Московский государственный институт международных отношений (Университет) МИД России  
Проспект Вернадского, д. 76, Москва, 119454, Российская Федерация  
boris-nefedov@mail.ru  
ORCID: 0000-0002-7762-5979

**Евгений Ростиславович ВОРОНИН**

Московский государственный институт международных отношений (Университет) МИД России  
Проспект Вернадского, д. 76, Москва, 119454, Российская Федерация  
tverv@rambler.ru  
ORCID: 0000-0002-1229-0012

**Ольга Сергеевна МАГОМЕДОВА**

Московский государственный институт международных отношений (Университет) МИД России  
Проспект Вернадского, д. 76, Москва, 119454, Российская Федерация  
olga.magomedova.96@mail.ru  
ORCID: 0000-0003-0593-3101

**Полина Константиновна ЗОТОВА**

Правительство г. Москвы  
Вознесенский переулок, д. 22, Москва, 125009, Российская Федерация  
zotovapk@mos.ru  
ORCID: 0000-0002-8647-7410

# ПОНЯТИЕ «ПОРЯДОК, ОСНОВАННЫЙ НА ПРАВИЛАХ» И МЕЖДУНАРОДНОЕ ПРАВО

**ВВЕДЕНИЕ.** На многих международных площадках и с национальных политических трибун всё чаще используется термин «международный порядок, основанный на правилах». Исходный вопрос состоит в том, является ли этот термин чисто политическим (поскольку он не используется ни в Уставе ООН, ни в других универсальных международных конвенциях, и на этот термин не опираются ни Международный суд ООН, ни Комиссия международного права ООН)? С другой стороны, с популяризацией этого политического дискурса частая практика использования данного термина представителями отдельных

государств (причем не только западных, но и, например, Китая) может повлиять и на развитие международного права. Само использование данного термина определенно вызывает ряд других вопросов. Как термин «порядок, основанный на правилах» соотносится с общепризнанным термином «международно-правовой порядок»? Имеет ли идея применять термин «порядок, основанный на правилах» существенные правовые основания? Какие правила *in concreto* подразумеваются под этим термином? Кто и как создает эти правила? Какова природа этих правил – являются ли они нормами национального права,

и если да, то национальным правом какого государства? Если имеются в виду нормы международного права, то почему это не отражено в самом термине? Ввиду привлекательной формы, но при отсутствии общего понимания его содержания, это понятие получает широкое распространение при том, что каждый может придать ему разный смысл. В результате, получают ли некоторые должностные лица, представляющие государства, политическую возможность злоупотреблять международным правом порядком, установленным на основе современного международного права? В настоящей статье представлен анализ этих проблемных аспектов концепции «порядок, основанный на правилах», учитывая, что в контексте международных отношений его также называют «международным порядком, основанным на правилах». Дополнительный вопрос, на который нужно ответить, заключается в том, может ли данная концепция рассматриваться как одна из многочисленных попыток адаптировать действующее международное право к новым вызовам.

**МАТЕРИАЛЫ И МЕТОДЫ.** Работа основана на анализе многочисленных высказываний представителей государств, в которых проявляется их отношение к концепции «порядок, основанный на правилах», положительных и критических замечаний к этой концепции со стороны юристов-международников, а также научных публикаций других отечественных и зарубежных исследователей-международников. Методологический инструментарий включает общенаучные и специальные методы, в том числе исторический метод, методы формальной логики, анализа, синтеза, а также системные, сравнительно-правовые методы.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** Хотя вышеупомянутые вопросы о правовом значении термина «порядок, основанный на правилах» возникли только в последние годы, главным образом в контексте антироссийской риторики западных политиков, этот термин использовался гораздо раньше на разных уровнях по широкому кругу тем. Проблема не единообразного понимания данного термина является одним из отражений более общей проблемы ослабления или усиления универсального, юридически обязательного международного порядка. Одним из приемлемых вариантов представляется то толкование данного понятия, согласно которому «международный порядок, основанный на правилах» означает, прежде всего, порядок в

мире, основанный на нормах международного права (которые, как известно, имеют обязательный характер), а также на применимых необязательных международных правилах, содержащих нормативный элемент, таких как международные правила, предусмотренные в документах межправительственных организаций и конференций, политических договоренностях государств и другие общепризнанные правила, сформировавшиеся в современной практике международных отношений. Такое толкование позволяет привести данную концепцию в соответствие с современным международным правом. Но даже в рамках такого толкования необходимо проводить различие между международно-правовыми нормами (обязательными) и другими правилами (не создающими обязательств государств согласно международному праву). Тем самым, не будет допускаться одностороннее или «блокирующее» навязывание ценностей одного государства другим под видом правил, на которых, по мнению первого, основывается «порядок» в мире.

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** При преобладании другого толкования концепция «порядок, основанный на правилах» может негативно влиять на существующий международный правовой порядок, размывая установившуюся практику международного правотворчества, тем самым отвергая традиционные международные ценности правовой стабильности и снижая роль международного права в международных отношениях. Такой сценарий не только множит правовую неясность и даже необоснованные ожидания участников международных процессов, но и может привести к подрыву самих основ современного международного права, основанного на Уставе ООН. Последнее, в свою очередь, приведет к глобальной правовой нестабильности и резко повысит риски третьей мировой войны. На данный момент частое злоупотребление термином «порядок, основанный на правилах» представителями государств-членов НАТО в поддержку своих политически конъюнктурных заявлений, келейно согласованных между собой, препятствует достижению на универсальном уровне взаимоприемлемого понимания данной концепции, которая соответствовала бы международному праву.

**КЛЮЧЕВЫЕ СЛОВА:** порядок, основанный на правилах, международный правовой порядок, верховенство международного права, международная



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## 1. Introduction

In recent years, a certain neo-narrative “rules-based order” has gradually gained ground at many international meetings, even at the level of the United Nations. Within the framework of a vigorous political debate, this phrase, while becoming popular, may not raise suspicion of an “anarchist” or destructive connotation, because of the key “positive” words – “order” and “rules”. However, if we scrutinize it in the context of the international legal discourse, then questions arise about the exact legal meaning of this term, and – most importantly – about the grounds for its appearance and about its relation to the existing international legal system. In the default of a clear content behind the catchy form of the neo-narrative, its meaning has to be defined from the context of its use. In this way the “uncertainty” of the concept becomes not just a shortcoming (if such is assumed), but the danger of “erosion” of the very core of the current international legal system.

In January 2019, Sergei Lavrov, Russian Minister of foreign affairs 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”<sup>2</sup>.

On the other hand, in G7 Joint Statement made in 2021 the leaders of Western countries addressed Russian “behavior that is threatening the rules-based international order”<sup>3</sup>.

As Stefan Talmon, professor of the University of Bonn remarked, “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”<sup>4</sup>. According to the Russian Foreign Minister statement presented at the 12<sup>th</sup> BRICS (summit hosted by Russian Federation in 2020), the Western countries “are advocating a West-centric concept of a “rules-based world order” as an alternative to international law”<sup>5</sup>. Obviously, the situation around the concept “rules-based international order” goes beyond the framework of discursive misunderstanding, moving to the level of competitive understanding what is the world legal order today. To identify the root of this conflict, we should address a number of questions, beginning with the emergence of the concept.

<sup>2</sup> Foreign Minister Sergey Lavrov’s remarks and answers to media questions at a news conference on the results of Russian diplomacy in 2018. January 16, 2019. URL: [https://www.mid.ru/foreign\\_policy/news/-/asset\\_publisher/ckNonkJE02Bw/content/id/3476729?p\\_p\\_id=101\\_INSTANCE\\_ckNonkJE02Bw&\\_101\\_INSTANCE\\_ckNonkJE02Bw\\_languageId=en\\_GB](https://www.mid.ru/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/3476729?p_p_id=101_INSTANCE_ckNonkJE02Bw&_101_INSTANCE_ckNonkJE02Bw_languageId=en_GB) (accessed 20.12.2020). S. Lavrov noted the problem of the rare use of the language of international law among the Western partners in his speech at the international conference in New Delhi on January 15, 2020. See Foreign Minister Sergey Lavrov’s remarks and answers to questions at a plenary session of the Raisina Dialogue international conference. January 15, 2020. URL: [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/ckNonkJE02Bw/content/id/3994885](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/3994885) (accessed 20.12.2020).

<sup>3</sup> G7 Foreign Ministers Communiqué of 5 May 2021. Para. 7. URL: [https://eeas.europa.eu/headquarters/headquarters-homepage/97842/g7-foreign-and-development-ministers-meeting-communiqué\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/97842/g7-foreign-and-development-ministers-meeting-communiqué_en) (accessed 15.05.2021).

<sup>4</sup> Talmon S. Rules-based order v. international law? – *German Practice in International Law*. January 20, 2019. URL: <https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/> (accessed 20.12.2020).

<sup>5</sup> US pushing West-centric concept of a “rules-based world order”: Russian Foreign Minister Sergey Lavrov. – *The Economic Times*. October 28, 2020. URL: [https://economictimes.indiatimes.com/news/international/world-news/us-pushing-west-centric-concept-of-a-rules-based-world-order-russian-foreign-minister-sergey-lavrov/articleshow/78905855.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/international/world-news/us-pushing-west-centric-concept-of-a-rules-based-world-order-russian-foreign-minister-sergey-lavrov/articleshow/78905855.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (accessed 20.12.2020).

## 2. The reasons for emergence and spread of the concept

Although the authorship of the wording “rules-based order” remains unknown, the term definitely appeared earlier than in the 90s of the XX century. Hugo Grotius in his famous book “De jure belli ac pacis” (published in 1646) wrote about “rules of moral actions”. The founder of the international law teachings explains that according to ‘the rules of reasonable thinking’ any action, “depending on its correspondence or not to the very wise nature” is qualified as “morally shameful or morally necessary” [Grotius 1956: 70-71]. For the XVII century such understanding of international law seems certainly reasonable. But is the wording ‘rules-based order’ reasonable today – in the period of the UN Charter?

From the very beginning, it is to be noted that there is no universal legal document that would manifest the universal approach to the “rules-based order”. According to some theorists [Kundnani 2017:3], the unfolding of the liberal thought in terms of order-building can be traced back to 1941 when the Atlantic Charter<sup>6</sup> – a so-called founding document of the “liberal international order” – was signed as a joint declaration of the President of the USA and the Prime Minister of the United Kingdom. The Charter represents a body of principles which parties of the agreement aspire to maintain, including provisions concerning peace and security, safety within national borders, the affirmation of peoples’ right to self-determination and also a block of provisions aimed to contribute to economic prosperity by establishing the fullest possible economic co-operation (e.g. trade barriers lowering) and preservation of “global commons”. However, this agreement is far from being agreed upon by all or most of the world’s powers. Commenting this document, it is correctly noted that it is the UN Charter that remains one of the few multilaterally shared bases of the post-war international order [Kundnani 2017:3].

The appeals to the concept “rules-based order” became more frequent at the turn of the millennium, especially on the margins of the UN during the period of Kofi Atta Annan’s tenure as Secretary

General of this organization (1997-2006). In 2005, Mr. Ahern, representative of Ireland, in his speech at the Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (as part of the discussion on the Treaty’s operation), declared that “... for Ireland a rules-based international order and strong international institutions were of fundamental importance”<sup>7</sup>.

Undoubtedly, there is a direct correlation between the spread and recognition of one or another international legal concept and relevant international relations. In this sense, it is no pure coincidence that the concept “rules-based order” came forth at the end of the Cold War. According to Zbigniew Brzezinski, after the collapse of the Soviet Union, the United States has become the only military superpower which no longer meets political opposition from any states [Brzezinski 1997: 256]. After the “period of détente” and Cold War, this new period (Western states dominance without Soviet bloc states) turned out to be fertile ground for the flourishing political and legal populism and gave rise (especially among middle-sized and small states of the world) to the illusion of a universal triumph of soft power, which may not rely on hard rules of international law<sup>8</sup>. The new ideas got widespread use in their optimistic interpretations: the ideas that instead of the “right of military power”, limited only to the right of avoiding global war, the time has come for “the power of good law”, basing only on military might of the “good United States” and on geoeconomic factors, and the norms of international morality, even if some of states turn out to be ‘ugly’. It was presumed in the West that the “good United States” will never organize *coup d’état* against a constitutional head of another state (like against President Yanukovich in Ukraine); that the US will never intervene into the territory of another state (like Iraq); and the US will never strike with rockets against a diplomatic mission of another state (like against the diplomatic mission of Iran). So ‘rules-based order’ should have meant “good order”, including ‘equal terms’ in relations among States, including the US and other leading powers.

Still, the term remains far from being self-explanatory. The lack of uniform approach to the definition

<sup>6</sup> Joint declaration by the President of the United States and the Prime Minister of the United Kingdom of 14 August 1941. URL: <https://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html> (accessed 14.12.2020).

<sup>7</sup> United Nations: 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. April 29, 2005. URL: <https://www.un.org/en/conf/npt/2005/npt-conf2005-18%20english.pdf> (accessed 14.02.2020).

<sup>8</sup> Joseph S. Nye understood by it the ability to achieve the desirable result through the voluntary participation of allies, sympathy and attractiveness, and not through coercion or handouts. Whereas the hard power should be understood as the ability to coerce, conditioned by the military and economic might of the country [Nye 2004].

of the term leads to a variety of concepts concerning the scope and meaning of the phrase. It is to be noted that in this context such terms as “liberal international order”, “multilateral order”, “US-led global order”, “democratic world order” are alternatively used, often as synonyms to the “rules-based order” by foreign analysts when describing the exact content [Jain, Kroenig 2019: 11]. It is to be noted that term “liberal” is used when an emphasis is made on the leading and prevailing role of the USA in current international order.

For instance, G. John Ikenberry, when defining the “liberal international order” did nothing but described it as an “open and rule-based international order” that is “enshrined in institutions such as the United Nations and norms such as multilateralism” [Ikenberry 2011a:56]. There still remains uncertainty regarding such feature of the order as “liberal”, let alone the evident definite fallacy in the definition given by Ikenberry. It is unclear whether “liberal” refers to the liberalism in the political dimension (in opposing to authoritarianism), or in the economic dimension (in opposition to the concept of protectionism), or in terms of international relations (contrary to realism policy). According to one of the theorists, the “liberal international order” encompasses all of the three mentioned aspects [Kundnani 2017:1]. Moreover, the current order is believed to be made up of diverse suborders: economic, security, and political. All of these enshrine “varying breadths of membership, levels of legitimacy, motivating logics, and effects on state behaviour” [Mazarr et al. 2016: xi].

Alongside admitting the ambiguity of the phrase “liberal international order” former Dean of the Harvard’s Kennedy School of Government J. Nye claims the order “was never global and not always very liberal” [Nye 2019: 71]. Professor J. Nye himself, however, adds more ambiguity claiming that the order in question has four major strands. Chronologically, the first strand of the rules-based order is a particular form of international economic relations, creation of which can be traced back to the Bretton Woods conference,

where such liberal economic institutions as the International Monetary Fund and the International Bank for Reconstruction and Development were conceived of. As a matter of fact, the economic suborder is usually meant when the rules-based order is described as open. Charters<sup>9</sup> of the two intergovernmental economic organizations serve as a legal basis for this strand as well as the WTO agreements<sup>10</sup> that made free trade truly global round by round. Documents mentioned above were designed not only to promote free movement of goods and services but also to enable international financial flows and thus propel global economic growth. According to J. Nye, the second strand – a security one followed the first as the creation of the United Nations marked another step in international order building. In these aspect agreements on arms control and limitation of weapons proliferation were later negotiated. Some analysts emphasize the security aspect when distinguishing a rules-based order from the one where states acts are motivated simply by power [Ikenberry 2011b:XII]. As a matter of fact, security suborder is said to have evolved over time once established in Yalta, then by reaffirming the principle of borders’ inviolability and giving rise to what is now known as the Organisation for Security and Cooperation in Europe, and finally relying upon the terms of Charter of Paris for a New Europe, in which democracy was declared to be “the only system of government of our nations”<sup>11</sup>.

The third strand, as asserted by J. Nye, concerns human rights and liberal political values that were incorporated in the United Nations Charter and later enumerated in Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. The UN Charter document “reaffirmed faith in fundamental human rights, and dignity and worth of human person” as well as committed all member states to promote and foster “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”<sup>12</sup>. However, this suborder is acknowledged to have taken “root more slowly” than the others, remaining to a great extent

<sup>9</sup> Articles of Agreement of the International Monetary Fund and Articles of Agreement of the International Bank for Reconstruction and Development of 27 December 1945. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%202/v2.pdf> (accessed 28.12.2020).

<sup>10</sup> Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol) of 15 April 1994. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-A-31874-English.pdf> (accessed 28.12.2020).

<sup>11</sup> Charter of Paris for New Europe of 21 November 1990. URL: <https://www.osce.org/files/f/documents/0/6/39516.pdf> (accessed 28.12.2020).

<sup>12</sup> Charter of the United Nations of 24 October 1945. URL: <https://www.un.org/en/about-us/un-charter/full-text> (accessed 28.12.2020).

declaratory during the Cold War period [Ikenberry 2011a:56].

According to Prof. Nye the last element of the rules-based order is aimed at protection of “global commons”, United Nations Convention on the Law of the Sea is regarded as one of the relevant documents along with agreements that deal with climate change issues, space and Antarctica.

For instance, according to Prof. Ikenberry such “rules-based order” is comprised of: “(1) shared agreement about the rules of the game within the political order; (2) the establishment of rules and institutions that bind and set authoritative limits on the exercise of power; (3) a high degree of institutional autonomy from special interests; and (4) the entrenchment of these rules, principles, and institutions within a wider and relatively immutable political system” [Ikenberry 2001:30-31]. It is the no coercive and consensual nature of the order that differs it from alternative forms of order. The author admits that “the current order” is stable and resilient because it is recognised as legitimate by all its members [Ikenberry 2001:52]. The post-war international order is characterized by other authors as based on “core principles” as “economic stability, nonaggression, and coordinated activity on shared challenges” [Mazarr et al. 2016: 13]. The authors do not bother, however, to consider *in concreto* whether these principles are already norms of international law.

This is how the contemporary concept “rules-based order” crystallized.

The attractiveness of the concept “rules-based international order”, however, is explained by the fact that, being born in political discourse, it remains free from the formal legal requirements that constitute the proper normativity of international law, and at the same time it is associated with the ideal all-encompassing “natural morality” [Koskenniemi 2006:17]. For a number of authors, the emergence of the concept can be perceived as a by-product of the revival of the natural law approach in international legal discourse [Koskenniemi 2009; Hall 2011]. Further analysis shows that this understanding has also turned out to be far from the reality.

First, the concept “rules-based order”, because of its ambiguity noted above, can’t be qualified as an institute of the current international law. This notion does not have universal recognition, it cannot be considered as part of the existing international legal “adaptation” due to the lack of the current normative

content. If, according to H. Kelsen, “international law obliges and empowers the state” [Kelsen 2015: 221] then self-declared soft and ambiguous rules are null and void; such rules do not establish concrete consequences for states in case of their failure to observe these rules. The absence of integral legal content does not allow this concept right now to develop even to the level of international legal teachings within the meaning of Article 38 of the Statute of the International Court of Justice.

Second, lacking universal recognition of legitimacy, due to incompleteness and ambiguity of the “substantive attributes” of the declared order, the concept “rules-based international order” can hardly be considered as a valid idea *de lege ferenda*.

The concept “rules-based international order” is today legally “spineless” and unviable. That does not mean, however, that the concept has no perspective to influence the existing international law. Moreover, an attractive form and “fresh words” without a rigid substantive framework contributes to the wide spread of the concept at the political level, even if understanding of the concept is non-consistent.

### 3. The problem of non-consistent understanding

Without the relevant support in the universal international treaties, solid doctrinal basis, the concept “rules-based order” can acquire completely different (if not contradictory) meanings depending on a topic of the discussion and intentions of speakers. It is noteworthy that the concept “rules-based order” is addressed by representatives of various states, and even more remarkable, in a wide variety of contexts. Let us examine some examples.

**Western Europe.** On March 16, 2004 Brian Cowen, the Minister of foreign affairs of Ireland in his speech at the disarmament conference in Geneva stated as follows: “Ireland’s approach to disarmament is rooted in a firm conviction that multilateral cooperation is in the interest of all and most particularly serves the interests of smaller States who, lacking military power, must rely on building and supporting a strong rules-based system... The European Union, over which Ireland is honored to preside at present, has put a commitment to effective multilateralism at the center of its common foreign and security policy. A rules-based international order and strong international institutions are of fundamental importance to the European Union”<sup>13</sup>. Thus, the speaker probably

<sup>13</sup> UN Conference on Disarmament. Final record of the hundred and fifty-first plenary meeting. March 16, 2004. URL: <https://undocs.org/CD/PV.951> (accessed 14.02.2020).



uses the concept as reflecting the collective security system based on rules of international law, which is supported by the coordinated efforts of the European Union, though (for some reasons) without direct references to the UN Charter as the major source of modern international law.

**Russia.** Lately, Russian Foreign Minister Sergey Lavrov has numerously drawn the international community's attention to a currently widely used term "rules-based order". Every time the Minister addresses the issue he objects to using this terminology in formal international documents as well as international discourse due to several reasons. According to Lavrov's remarks and answers to questions during the meeting with members of the Association of European Businesses in Russia on October 5, 2020, when only becoming part of the official discourse some three or four years ago, the term "rules-based order" was said to be used as a synonym for international law by Western powers in order to introduce "some fresh language"<sup>14</sup>. However, as maintained by the Russian Federation, traditional norms, principles, and mechanisms of international law are now undermined and replaced step by step by some non-universal rules, which are not only uncoded but also created on a unilateral basis without consensus intrinsic to international law.

The allegation stated above manifests itself in two areas where the system established after World War II is being eroded. The first aspect where the re-writing of generally accepted norms of international law takes place concerns the so-called process of existing international organisations' secretariats' privatisation. The most vivid example is the Organisation for the prohibition of Chemical Weapons (OPCW),

which is one of the most universal organisations. It is based on the Chemical Weapons Convention (CWC)<sup>15</sup>, which was adopted unanimously (i.e. the only possible way any convention can be adopted) and further ratified by 193 countries. Notwithstanding the fact that Convention and accordingly Organisation were created mainly to "address clearly defined tasks of technical assistance to national programmes of destructing chemical weapons' stockpiles"<sup>16</sup>, attempts made by Great Britain and other states to expand the Organisation's mandate by assigning OPCW Secretariat (which is of strictly technical nature) with attributive power to identify the perpetrators responsible for the use of chemical weapons and carry out the attribution succeeded at the Fourth Special Session of the Conference of the States Parties in 2018<sup>17</sup>. When in need of expanding Organization's mandate, it is always necessary to amend the Convention it is based upon according to amending provisions. In official Statement of the Republic of Burundi at the Fourth Special Session Burundi Delegation questioned legal grounds for the creation of attributive mechanism within the OPCW, which mission is mainly technical, as well as recalled that, unlike States, international organizations, albeit being subjects of international law, do not possess universal legal personality which leads to conclusion that "they have the right to act only within the mandate clearly stipulated in their founding documents"<sup>18</sup>. "Neither the Conference, nor the Executive Council, nor the Technical Secretariat has a mandate that would allow it to assign attribution for violating the Convention"<sup>19</sup>. So according to international law, the provisions of the Convention itself had to be amended to vest attributive powers in Organisation

<sup>14</sup> Foreign Minister Sergey Lavrov's remarks and answers to questions during the meeting with members of the Association of European Businesses in Russia. October 5, 2020. URL: [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/ckNon-kJE02Bw/content/id/4368405](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/ckNon-kJE02Bw/content/id/4368405) (accessed: 28.12.2020).

<sup>15</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. of 3 September 1992. URL: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-3&chapter=26](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-3&chapter=26) (accessed 28.12.2020).

<sup>16</sup> Russian Embassy in the UK Press Officer's reply to a question on assigning attributive functions to the OPCW Technical Secretariat to identify those responsible for the use of chemical weapons. – *Embassy of the Russian Federation to the United Kingdom of Great Britain and Northern Ireland*. June 28, 2016. URL: <https://www.rusemb.org.uk/fnapr/6571> (accessed 28.12.2020).

<sup>17</sup> OPCW: Decision Addressing the Threat from Chemical Weapons Use. The Fourth Special Session of the Conference of the States Parties. June 27, 2018. C-SS-4/DEC.3. URL: [https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3\\_e\\_.doc.pdf](https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_.doc.pdf) (accessed 28.12.2020).

<sup>18</sup> OPCW: Republic of Burundi Statement by Her Excellency Ambassador Vestine Nahimana, Permanent Representative to the Organization for the Prohibition of Chemical Weapons (OPCW) at the Fourth Special Session of the Conference of States Parties to the Convention on the Prohibition of Chemical Weapons. June 26, 2018. URL: [https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/Burundi\\_National\\_Statement\\_English.pdf](https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/Burundi_National_Statement_English.pdf). (accessed 28.12.2020).

<sup>19</sup> OPCW: Statement by Mr. G.V. Kalamonov Head of the Delegation of the Russian Federation at the Fourth Special Session of the Conference of the States Parties. June 26, 2018. URL: <https://www.opcw.org/sites/default/files/documents/2018/08/css4nat40%28e%29.pdf> (accessed 28.12.2020).

legitimately in line with Article XV of the Convention. What was done instead – the decision was taken at a special session of the Conference by less than half member states – is “an obvious abuse of the rules of procedure, undermining the spirit of consensus of the global disarmament and non-proliferation mechanisms” as Press Officer of the Russian Embassy in the UK puts it. What is more, as evidenced by the travaux préparatoires of the Chemical Weapons Convention, “any provisions which might have been interpreted as conferring on the organs of the OPCW attributive powers were intentionally excluded from the draft text or reformulated accordingly”<sup>20</sup>, which can be construed to provide for obligatory amending process in case of conferring attributive powers to the OPCW.

As underlined in Statement by the Head of the Delegation of the Russian Federation at the Fourth Special Session of the Conference of the States Parties<sup>21</sup>, not only the amending provisions stipulated in Article XV of the Convention were bypassed, but also provisions of the UN Charter regarding UN Security Council’s prerogative to take coercive measures, attribution being one of its elements. The UN Security Council remains the only international body, besides international courts, which is entitled to attribute guilt to perpetrators on the international level and take punitive measures as enshrined in the UN Charter. As long as the decision of the Conference in question clearly deviates from international law it constitutes an instrument of the rules-based order in Russian Foreign Minister’s opinion<sup>22</sup>. In the light of the above Russia calls for the “unwavering compliance with all existing rules when carrying out fact-finding activities in relation to the use of chemical weapons”<sup>23</sup>.

Another area that prompts concerns that the current international system based on international law is being eroded refers to situations when some matters characterized by Sergei Lavrov as “inconvenient” are moved outside the United Nations system. The most vivid illustration of this process is the establishment of the International Partnership against Impunity for the Use of Chemical Weapons headed by France: the question is why matters at hand cannot be discussed on the side-lines of the OPCW. The creation of a distinct organization occupied with overlooking the same aspects as already existing one does – OPCW is explained by the need to group “like-minded states”. According to Russian Foreign Minister, the final goal of this acts is to make politicized decisions in a narrow circle, that would not otherwise be adopted in organizations characterized by wider representation, and later present these decisions as an example of multilateralism<sup>24</sup>.

**Latin America.** At the 62nd session of the UN General Assembly in 2007, Charles Savarin, the Minister for Foreign Affairs, Trade, Labor and Civil Service of the Commonwealth of Dominica declared: «Dominica believes that it is only a strong United Nations, sensitive to the variable geometry of its own complex construction, that can serve as the foundation of our shared ambitions for effective multilateralism and a rules-based international order»<sup>25</sup>. In this case the concept is used in the sense of the international legal order with the UN as the pivotal institute of this order.

**Africa.** On October 29, 2009 Dire Tladi, the representative of South Africa, during the discussion of the Report of the International Court of Justice at the 64th session of the UN General Assembly remarked: «My delegation is particularly pleased to

<sup>20</sup> OPCW: Republic of Burundi Statement by Her Excellency Ambassador Vestine Nahimana, Permanent Representative to the Organization for the Prohibition of Chemical Weapons (OPCW) at the Fourth Special Session of the Conference of States Parties to the Convention on the Prohibition of Chemical Weapons. June 26, 2018. URL: [https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/Burundi\\_National\\_Statement\\_English.pdf](https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/Burundi_National_Statement_English.pdf). (accessed 28.12.2020).

<sup>21</sup> OPCW: Statement by Mr. G.V. Kalamanov Head of the Delegation of the Russian Federation at the Fourth Special Session of the Conference of the States Parties. June 26, 2018. URL: <https://www.opcw.org/sites/default/files/documents/2018/08/css4nat40%28e%29.pdf> (accessed 28.12.2020).

<sup>22</sup> Foreign Minister Sergey Lavrov’s remarks and answers to questions during the meeting with members of the Association of European Businesses in Russia. October 5, 2020. URL: [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonKJE02Bw/content/id/4368405](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonKJE02Bw/content/id/4368405) (accessed: 28.12.2020).

<sup>23</sup> OPCW: Statement by Mr. G.V. Kalamanov Head of the Delegation of the Russian Federation at the Fourth Special Session of the Conference of the States Parties. June 26, 2018. URL: <https://www.opcw.org/sites/default/files/documents/2018/08/css4nat40%28e%29.pdf> (accessed 28.12.2020).

<sup>24</sup> Foreign Minister Sergey Lavrov’s remarks and answers to questions during the meeting with members of the Association of European Businesses in Russia. October 5, 2020. URL: [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonKJE02Bw/content/id/4368405](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonKJE02Bw/content/id/4368405) (accessed: 28.12.2020).

<sup>25</sup> UN General Assembly: 15th plenary meeting. October 2, 2007. URL: <https://undocs.org/en/A/62/PV.15> (accessed 14.02.2020).

hear of the frequent visits being made to the Court by national judges, senior legal officials, researchers and other members of the legal profession. We believe that it can only strengthen the understanding of and appreciation for international law, which is an important tool towards the creation of a rules-based international system»<sup>26</sup>. Hereby, the South African speaker presented the “rules-based international order” as future, global order, achievable in compliance with the current international law with an emphasis on the role of the International Court of Justice in strengthening the international law.

**Asia.** At the plenary meeting of the 60th session of the UN General Assembly in 2005 Manmohan Singh, the Prime Minister of India, made a point: “All of us assembled here recognize that the United Nations is in need of urgent and comprehensive reform. The management of global interdependence requires strong international institutions and a rules-based multilateral system. The reform of the United Nations must be based on that principle”<sup>27</sup>. In the context of the call for reforming the UN organization, the concept seems to be used here as meaning a more perfect system of multilateral regulation of international relations.

Notwithstanding being described by western scholars as a “revisionist” power, China through its official representatives claims its respect for the concept “rules-based order”. In 2018 the Foreign Minister of the People’s Republic of China at the meeting with the United Nations General Assembly President Maria Fernanda Espinosa declared that “every nation should protect the rules-based international order, adhere to the aims and principles of the UN Charter, and resolve differences through dialogue and consultation”<sup>28</sup>. So, for China “rules-based order” does not

contradict the international order based on the UN Charter. In the Joint statement following the 20<sup>th</sup> EU-China Summit held in 2018 the parties (China and the European Union) “reaffirmed their commitment to multilateralism and the rules-based international order with the United Nations at its core”<sup>29</sup>.

**Australia.** The concept “rules-based order” has become one of the key points in Australian international policy since 2008. Used for the first time by Australia’s Prime Minister Kevin Rudd in 2008<sup>30</sup>, the concept “rules-based order” is part and parcel of Australian policymakers’ discourse. For instance, the 2016 Defence White Paper mentions the term at hand 46 times; rules-based order is defined in the document as “a shared commitment by all countries to conduct their activities in accordance with agreed rules which evolve over time, such as international law and regional security arrangements”<sup>31</sup>. Australian Government consistently advocates for the promotion and protection of the stable rules-based order and emphasizes its importance in its documents, in particular, pertaining to the South China Sea dispute. In this regard Australia’s Foreign Minister J. Bishop (at that time) reminded that all states involved in this dispute “have benefited enormously from the rules-based order” and called for the adherence to international law<sup>32</sup>. Ever since Australian policymakers have numerous addressed rules-based order concept, and the 2018 Australia’s media release (dedicated to the Special Summit between Australia and the leaders of the Association of the Southeast Asian Nations) underlines that Australia is determined to uphold its “commitment to the rules-based order and international law in the region, including the South China Sea”<sup>33</sup>. Mr. Quinlan, the

<sup>26</sup> UN General Assembly: Sixty-fourth session 30th plenary meeting. October 29, 2009. Report of the International Court of Justice. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/583/51/PDF/N0958351.pdf?OpenElement> (accessed 14.02.2020).

<sup>27</sup> UN General Assembly: Sixtieth session 5th plenary meeting. September 15, 2005. URL: <https://documents-ddsny.un.org/doc/UNDOC/GEN/N05/511/72/-PDF/-N0551172.pdf?OpenElement> (accessed 14.02.2020).

<sup>28</sup> Li Keqiang Meets President of the 73rd UN General Assembly, Maria Fernanda Espinosa. August 8, 2018. (In Chinese). URL: [https://www.fmprc.gov.cn/web/wjdt\\_674879/gjldrhd\\_674881/t1584054.shtml](https://www.fmprc.gov.cn/web/wjdt_674879/gjldrhd_674881/t1584054.shtml) (accessed 14.12.2020).

<sup>29</sup> Joint statement of the 20th EU-China Summit. July 17, 2018. URL: [https://eeas.europa.eu/delegations/china\\_en/48424/Joint%20statement%20of%20the%2020th%20EU-China%20Summit](https://eeas.europa.eu/delegations/china_en/48424/Joint%20statement%20of%20the%2020th%20EU-China%20Summit) (accessed 28.12.2020).

<sup>30</sup> Scott B. But what does “rules-based order” mean?. – *The Interpreter*. November 2, 2020. URL: <https://www.lowyinstitute.org/the-interpreter/what-does-rules-based-order-mean> (accessed 28.12.2020).

<sup>31</sup> Australian Government: 2016 Defence White Paper. P.15. URL: <https://www.defence.gov.au/whitepaper/Docs/2016-Defence-White-Paper.pdf> (accessed 28.12.2020).

<sup>32</sup> Bishop J. Australia Supports Peaceful Dispute Resolution in the South China Sea. July 12, 2016. <https://www.foreignminister.gov.au/minister/julie-bishop/media-release/australia-supports-peaceful-dispute-resolution-south-china-sea> (accessed 28.12.2020).

<sup>33</sup> Turnbull M. Enhancing Regional Collaboration to Strengthen Our Security and Prosperity.” March 18, 2018..URL: <https://www.malcolmtturnbull.com.au/media/enhancing-regional-collaboration-to-strengthen-our-security-and-prosperity-> (accessed 28.12.2020).

representative of Australia, speaking at the 52nd plenary meeting of the 66th session of the UN General Assembly on the issue of equitable representation on and expansion of the UN Security Council, stated in particular that «Australia's own outlook on reform is founded on the very simple premise that no country should have a monopoly on power. We are committed to a rules-based international order that respects international law, and we believe that the effectiveness of such an order depends on the access and buy-in of all Member States»<sup>34</sup>. Here, the representative of Australia appeals to the concept in the sense of a system of international relations which is based on the international law. A "rules-based international order" is interpreted in a similar way by the Parliamentarians for Global Action (benefiting from the consultative status within the UN Economic and Social Council<sup>35</sup>), but without expressis verbis reference to international law.

Within the UN, the concept is used sometimes to designate a certain branch of international law, and sometimes – to designate norms which are different compared to those of international law. For instance, the report of the UN Secretary General "Unilateral economic measures as a means of political and economic coercion of developing countries" provides: "The comments of Member States generally expressed disagreement with the imposition of unilateral economic measures as instruments of political and economic coercion against developing countries. Such actions are viewed as contrary to the principles of the Charter of the United Nations, the norms of international law and the rules-based multilateral trading system, which undermine the sovereign equality of States"<sup>36</sup>.

As we can see, due to different understandings of the notion "rules-based order" (or rules-based system) speakers can mean by this term: a) the world

order based on international law or b) something which is different from the world order based on international law, or c) the rules regulating certain areas of international interstate relations (trade relations, for example). Nevertheless, it is possible to identify a common message in addressing this concept – the desire to exclude the possibility of legitimizing arbitrary actions and positions of some states in the international arena by abusing the existing rules of international law. In this case, the idea of a "rules-based [international] order" is directed against negative unilateralism (even that of the United States, the most powerful military state with number one military budget in the world). Due to the fragmented understanding of "rules-based order", this positive idea is easily subject to instrumentalization when a strong international actor (like NATO bombarding Belgrade) tries to establish an international "order" that conforms exclusively to its current interests. This observation can be confirmed by the practice of using the concept by the representatives of the United States.

It might be suggested that the idea of the world domination in the U.S. foreign policy dates back to the time of the Monroe Doctrine (proclaimed in 1823), and remains prevalent in modern history, which is confirmed by the statement of Woodrow Wilson in 1917 (that the flag of the United States is "not the flag of America, but of humanity"<sup>37</sup>). Consequently, in the context of general American rhetoric, the notion of the US rules-based order manifests itself in its destructive aspect – the goal of substituting for the current international law and its core – the UN Charter. Estonian jurist R. Müllerson gave a conceptual hard-hitting assessment of the "world order" conceived outside of legal terms. He notes "that Washington is trying to impose, through military force or sanctions against the disobedient, not the noble regulatory sys-

<sup>34</sup> UN General Assembly: 52nd plenary meeting. November 9, 2011. URL: <https://undocs.org/A/66/PV.52> (accessed 28.12.2020).

<sup>35</sup> The organization's representatives explain the NPO's goal as follows: «PGA's vision is to create a *rules-based international order* for a more equitable, safe and democratic world, which is in line with the United Nations' Millennium Development Goals. See: UN. Economic and Social Council: Quadrennial reports 2002-2005 submitted through the Secretary-General pursuant to Economic and Social Council resolution 1996/31. November 14, 2006. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/-N06/615/91/PDF/N0661591.pdf?OpenElement> (accessed 14.02.2020).

<sup>36</sup> UN General Assembly: Unilateral economic measures as a means of political and economic coercion against developing countries. Report of the Secretary-General. July 27, 2009. URL: [https://digitallibrary.un.org/record/662804/files/A\\_64\\_179-EN.pdf](https://digitallibrary.un.org/record/662804/files/A_64_179-EN.pdf) (accessed 14.02.2020).

<sup>37</sup> Thanksgiving Proclamation of Woodrow Wilson dated November 7, 1917. In fact, the US flag was taken as a model for elaboration of the so-called "Humanity Flag – Auxilio Dei", which also combines the national flags of the U.S. allies in the WWI, the United Kingdom and France.



tem that somehow worked even during the Cold War [largely due to the existing balance of power], but the so-called “rules-based” liberal world order, that is, an order based on the rules of Washington and not related to international law” [Müllerson 2020]. Of course, not all speakers cited above meant by the concept “rules-based order” only “the rules of Washington”. However, a spectacular example of the U.S. policy is given by Daniel B. Baer, the U.S. Ambassador, in 2016 in the context of the review of the 1996 OSCE Arms Control Framework: “Until the past few years, the framework and elements of a rules-based international order helped to preserve peace and prosperity in the Euro-Atlantic area because they espoused and defended key principles, such as the right of states to choose freely whether to allow the stationing of foreign forces on their territory”<sup>38</sup>. This statement reduces the essence of American interest in a rules-based order to the right to deploy U.S. military bases in foreign territories.

In a broader concept, according to the United States positions cited above, the establishment of a “world order” depends entirely on the willingness to promote American global goals with references to international law or without such references and even contrary to the principle of equality of states as it is reflected in the UN Charter. At the same time these examples demonstrate that the concept “rules-based order” is used not only with different meanings, but also for different reasons. In other words, the concept “rule-based order” in speeches of the American politicians and in speeches of the politicians from the non-aligned countries – are completely different concepts. In the U.S. rhetoric the concept serves as a tool in the race for the U.S. ordering the rest of the world how to behave (both at sea and on land) whereas the spread and apparent support of the concept by the developing countries is explained rather by their interest in reforming the UN system, and by their hope for increasing their influence on the financial and economic governance of the world affairs. Taking this into account, it is appropriate to assess the scale of the problem of such different understanding, beginning with the scope of the alleged order.

#### 4. The scope of “rules-based order” in the absence of its generally recognized definition

The contextual use of the concept does not clarify, whether the international rules-based order is always understood as the international order based on international law or something different.

On the one hand, using the concept as an interchangeable synonym for international law order, established following the results of the Second World War, one is free to imply the world legal order. But there are obvious facts of violations by the U.S. of such world legal order based on international law. In Russian legal literature the following facts are listed first and foremost: the violation of the international humanitarian law in 1945, when the United States dropped atomic bombs on Japan; the violation of the UN Charter when the United State invaded Vietnam in 1960-s – 1970-s; the violation of the UN Charter when the United States invaded Nicaragua, etc [Narushenie SShA...1984]. There are other examples, as evidenced by J. Ikenberry, that since the establishment of the current international legal order the United States have repeatedly acted in violation of multilateralism by applying unilateral patterns in their diplomatic, economic, and military policies – namely, when the American government's embrace of free trade rules turned to be ambivalent in the sense that while the USA championed the creation of the WTO (one of the leading binding institutions), the Washington itself neglected the spirit and fundamental purpose of organisation with its unilateral trade policy [Ikenberry 2001:272]. Schweller finds a problem at the core of the Ikenberry's statement, underlining that it is not attainable for institutions both to restrain hegemons and to remain autonomous – they are either dependent on strong states and, consequently, capable of binding weak ones or independent of leading states and thus ineffective in “running their business” [Ikenberry 2001:182].

On the other hand, the ex-US ambassador in Ukraine, William Taylor, alleges that Russia has undermined international rules-based order: “The Kremlin attacks the rules that guided [sic] relations between nations since World War II”<sup>39</sup>. W.Taylor

<sup>38</sup> OSCE: Revisiting the 1996 OSCE Framework for Arms Control. As delivered by Ambassador Daniel B. Baer to the Joint Session of the Forum for Security Cooperation and the Permanent Council. October 19, 2016. URL: <https://osce.usmission.gov/revisiting-1996-osce-framework-arms-control-statement-joint-fsc-pc/> (accessed 14.02.2020).

continued "... for centuries until 1945 ... powerful nations dominated and invaded less powerful nations ... nations created spheres of influence that oppressed their neighbors, leading to wars and sufferings. This is how the Russian Empire and the Soviet Union conducted international relations..."<sup>40</sup>. Hereby, the politician accuses the USSR and Russia without bothering to provide neither relevant facts nor legal arguments, while ignoring even recent U.S. violations of international law, the most evident for the developing states – invading sovereign Iraq and killing its president S. Hussein. The US official also hides the fact that it is the US Administration that organized *coup d'Etat* in Kiev in 2014 (as a result of which the constitutionally elected President of Ukraine Yanukovich was replaced by the 'acting president' governed from Washington and the former territory of the Ukrainian Soviet Republic was divided) [Vylegzhanin, Kritsky 2014]. Furthermore, the US speaker reveals his nihilist attitude to international law existing before 1945. By that time international law managed to pass through milestones in the development of the world legal order, including the Westphalian world order (1648-1815); the Vienna world order (1815-1871); the Versailles world order (1919-1945). Definitely, with the evolution of the system of international relations, the former norms of the "law of war" (legitimizing territorial conquests and the implementation of colonial policy) have now become obsolete. The renewal of the international legal system is due to the evolution of the values, recognized by the international community of states, which *per se* does not deny the adequacy to the international legal system of some values that exist in international relations from the time immemorial.

As summarized by S. Patrick, the rules-based order presumes that "all sovereign states are entitled to political independence, territorial integrity, and freedom from intervention; the use of force, except in cases of self-defense, requires collective authorization by the UN Security Council (...); vessels from all states are free to traverse the open ocean without hindrance; the commerce of all nations should be accorded non-discriminatory treatment; and all peoples should be entitled to political self-determi-

nation" [Patrick 2016:11-12]. Again, the question arises, because these ideas are already better reflected in the international order based the UN Charter.

S. Van Nieuwenhuizen gives a complex and rather broad definition of the rules-based order that tends to embrace all of the elements and features that substantially characterize order in place: "The international order is generally understood to be comprised of institutions, international law and norms providing for the ordered political, military and economic interaction of states" [Nieuwenhuizen 2019:184]. The words "international law and norms" in this context look strange. Some authors claim that the rules-based system includes also informal rules alongside with formal ones [Jain, Kroenig 2019: 11].

According to some documents, the sources of "rules-based order" are identified with the sources of international law. In the Joint Statement the British Foreign Minister, Boris Johnson, French Foreign Minister, Jean-Yves Le Drian, German Foreign Minister, Heiko Maas and US Secretary of State John Sullivan on 4 April 2017 (in response to a chemical attack in a Syrian city Khan Shaykhun) declared: "Each time a chemical weapon is used, it undermines the global consensus against its employment. Further, any such use in clear violation of the Chemical Weapons Convention gravely undermines the rules-based international order". In this case the invocation of the concept addresses violations of the norms of international humanitarian law, which prohibit the use of chemical weapons; so, in this case the "international rules-based order" is understood as an international order based on modern international law (again without explicit references to it).

At the same time, for some politicians it is unclear whether there exist rules for specific "areas" of the international order or only rules for the world order as a whole. Thus, the representative of Sweden, Mr. Bennwick, who, discussing the promotion and protection of human rights at the 64th session of the UN General Assembly, noted: "The European Union supported respect for rules-based international systems in all fields"<sup>41</sup>. The representative of Ghana, Mr. Christian, speaking at the 64th session of the UN General Assembly on financing for development,

<sup>39</sup> Eks-posol SSHA v Ukraine Uil'yam Teilor ob"yasnil Pompeo, chto SSHA dolzhny sdelat' dlya Ukrainy: detal [Ex-US Ambassador in Ukraine William Taylor explained Pompeo what the US should do for Ukraine]. – *Dialog.UA*. January 29, 2020. (In Russ.). URL: [https://www.dialog.ua/world/200040\\_1580246267](https://www.dialog.ua/world/200040_1580246267) (accessed 14.02.2020).

<sup>40</sup> Ibidem.

<sup>41</sup> UN General Assembly: Sixty-fourth session. February 3, 2010. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/613/63/pdf/N0961363.pdf?OpenElement> (accessed 14.02.2020).

underlined: “The international community should more actively pursue the development of an agreed rules-based approach to sovereign debt workouts”<sup>42</sup>. The representative of the Islamic Republic of Iran, Mr. Dehghani, in turn, stated that “trade was a vital tool to provide long-term sustainable growth. In order to fully utilize its potential, it was important to uphold a universal, rules-based, open, non-discriminatory, depoliticized and equitable multilateral trading system that contributed to growth and development, especially for developing countries”<sup>43</sup>. Notably the need to “support a rules-based trading system” has been repeatedly emphasized by representatives of many countries: the representative of South Africa, Mr. Mashabane<sup>44</sup>, the representative of Thailand, Ms. Sujira<sup>45</sup>, the representative of Nigeria, Mr. Ejina<sup>46</sup>, the representative of Qatar, Mr. Al Sada<sup>47</sup>, and others. Quite often speculations on an international rules-based system can be found in international practice in relation to human rights<sup>48</sup>, disarmament, non-proliferation and arms control<sup>49</sup>, reforms of the UN Security Council<sup>50</sup>, etc.

The widespread political fashion for the use of the concept by representatives of various states leads to the formation of a “soap bubble”, when states associate many hopes with a “rules-based international order”. Thus, the representative of the Philippines, Mr. De Vega, speaking in the second UN committee on

October 4, 2011, stated that “All those challenges [empowerment of peoples to prosper, natural disasters, food security, and ongoing economic crisis] would be overcome only when international relations were firmly anchored in a rules-based system”<sup>51</sup>. Again, he does not explain what “a rules-based system” is; we can only assume that with this wording, the speaker expressed his hope for the international order based on rules which are agreed upon between States (that is – rules of international law).

Some researchers go further, suggesting that the concept may imply several “international systems based on rules”. For instance, M. Chalmers, an expert at the British Royal United Services Institute for Defence and Security studies, suggested the existence of four such systems that serve as the pillars of the international order (“four-pillared international order”): the universal security system; the universal economic system; the western system and the system of major power relations and bargains. According to him, the rules that make up each of the systems reflect the results of power-based bargains [Chalmers 2019: 3]. But do the rules of these systems by themselves have a positive legal value acceptable to the community of States as a whole?

According to M. Chalmers, the “classical” division of states into those which comply with the norms of international law and those which do not comply is

<sup>42</sup> UN General Assembly Sixty-fourth session. 77th plenary meeting. March 23, 2010. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/286/18/pdf/N1028618.pdf?OpenElement> (accessed 14.02.2020).

<sup>43</sup> Ibidem.

<sup>44</sup> UN General Assembly: Sixty-eighth session. Summary record of the 21st meeting October 24, 2013. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/529/59/pdf/N1352959.pdf?OpenElement> (accessed 14.02.2020).

<sup>45</sup> Ibidem.

<sup>46</sup> Ibidem.

<sup>47</sup> Ibidem.

<sup>48</sup> UN General Assembly: Summary record of the 44th meeting, New York. November 19, 2009. Agenda item 69: Promotion and protection of human rights. Mr. Bennwick (Sweden). URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/613/63/pdf/N0961363.pdf?OpenElement> (accessed 14.02.2020).

<sup>49</sup> UN Conference on Disarmament: Final record of the one thousand two hundred and thirty-first plenary meeting. August 4, 2011. URL: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G12/-611/42/PDF/G1261142.pdf?OpenElement> (accessed 14.02.2020). See also: UN General Assembly Sixty-second session. First Committee 7th meeting, October 16, 2007. General debate on all disarmament and international security agenda items. URL: <https://documents-ddsny.un.org/doc/UNDOC/GEN/N07/542/80/PDF/N0754280.pdf?OpenElement> (accessed 14.02.2020).

<sup>50</sup> UN General Assembly: Sixtieth session. 5th plenary meeting. September 15, 2005. Mr. Singh (India). URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/-N05/511/72/PDF/N0551172.pdf?OpenElement> (accessed 14.02.2020); See also: UN General Assembly: The rule of law at the national and international levels. Letter dated 18 April 2008 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/330/-21/PDF/N0833021.pdf?OpenElement> (accessed 14.02.2020); UN General Assembly Sixty-second session. October 16, 2007. General debate on all disarmament and international security agenda items. Mr. Kariyawasam (Sri Lanka). URL: <https://documents-ddsny.un.org/doc/UNDOC/GEN/N07/542/-80/PDF/N0754280.pdf?OpenElement> (accessed 14.02.2020).

<sup>51</sup> UN General Assembly: Sixty-sixth session. Second Committee. Summary record of the 4th meeting. November 17, 2011. URL: <https://documents-ddsny.un.org/doc/UNDOC/GEN/N11/528/67/PDF/N11-52867.pdf?OpenElement> (accessed 14.02.2020).

an oversimplification of the real state of affairs, where the balance of forces in one system affects the "legitimacy" of the state's behavior in another system. For example, the key principles of the universal security system are the principles of international law, embodied in the UN Charter in 1945, such as the right to self-determination, the prohibition of aggression, the sovereign equality of states, etc. This universal system is in constant tension with the selective Western "liberal order" system described above. Although *de facto* the system of Western values is becoming dominant in the western world (especially with the process of globalization), it cannot take legal priority in global security issues, because of the existing rules of the universal security system, as it is maintained by the UN Security Council, and by a number of relevant international treaties on the arms limitation, etc.

In this context it is logical to assume that the basis for different understandings of the concept "rules-based order" and the reason for free use of this legal neologism (attractive by wording and indefinite in content), is the lack of a clear understanding what exact rules constitute the foundation of the concept "rules-based order".

### 5. The problem of unclear content of the concept

As was shown above, the adherents of the concept "rules-based order" cannot agree on the key question – what concrete "rules" serve as a basis for this order.

Some of them do not see the difference between these "rules" and the norms of international law<sup>52</sup>. Moreover, the opinion that the rules of international legal order and international legal norms are identical is widespread not only among public officials, and also among international experts. For instance, R. Allison (the British political analyst) argues that "norms and rules are ultimately vested in international law, which is contested but is still the foundation of global order". Therefore, according to R. Allison, Russia's objections to the imposition of

"rules-based international order" are interpreted not only as an opposition between the observance of the rules and the operation of law, but as a "revisionist approach of Russia" to international law in general [Allison 2020:981-983]. The scholar calls it "the neo-revisionist argument" under which he means "the image of Russia as a status quo power, drawn into qualified revisionist actions in reaction to the earlier Western practice of liberal interventionism and concerns about Moscow's agency in interpreting international law and norms" [Allison 2020:980]. American diplomat and independent expert of the Carnegie Endowment for International Peace Ph. Rembler believes that "reducing" the foundations of international law to the provisions of the UN Charter and Security Council resolutions allows to a state to "reject on principle commitments regarding human rights and democratic governance"<sup>53</sup>. At the same time, it should be noted that the Russian prevailing legal teachings do not try to "reduce" the principles of international law to the principles set forth in the UN Charter; however, they do emphasize the significance of the UN Charter among other sources of international law<sup>54</sup>. Dutch researchers, M. Groff and J. Larik, share the same opinion on the foundations of contemporary international legal order: "There is today an overwhelming commitment to the rules-based order established in 1945" [Groff, Larik 2020].

Other publicists do not consider as identical the rules which are meant within the concept "rules-based order" and the norms of international law; however, they find "no clear or agreed set of goals, methods, or limits", which would constitute such order [Kissinger 2015:10]. Using some norms of international law as a pretext, they include into the relevant "order" within the concept such "rules" that do not have international legal character<sup>55</sup>.

These notwithstanding calls to "play by the rules" are more and more often heard from international tribunes, addressed to Russia. For example, in 2006 Condoleezza Rice, the US Secretary of State, claimed that "Russia must play by ... the rules"<sup>56</sup>, and in 2008 she spoke about the inadmissibility of the situation

<sup>52</sup> See, for example: [The Contribution...2019].

<sup>53</sup> Rembler Ph. Russia at the United Nations: Law, Sovereignty, and Legitimacy. – *Carnegie Endowment for International Peace*. January 2020. // URL: <https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753> (accessed 20.12.2020).

<sup>54</sup> See: *Mezhdunarodnoe pravo v 2 ch. Chast' 1: uchebnik*. Otv. red. A. N. Vylegzhanin. 4-e izd [International Law. In 2 parts. Part 1: a textbook. Ed. by A.N. Vylegzhanin. 4<sup>th</sup> ed.]. Moscow: Yurait Publ.2021. P.73-81. (In Russ.).

<sup>55</sup> See, for example: [Mazarr et al. 2016:7; United Nations Association of Australia... 2015:7-12].

<sup>56</sup> Berg A. Double-Edged Peace Pipes. – *AntiWar. com*. January 20, 2006. URL: <https://original.antiwar.com/ann-berg/2006/01/20/double-edged-peace-pipes/> (accessed 27.02.2020).



“when there is one set of rules for Russia – and another for everyone else”<sup>57</sup>. And that is astonishing taking into account that never has the Soviet Union nor modern Russia committed such grave violations of international law as the USA – flouting of international humanitarian law or aggression against another state, as described above.

In November 2017 Theresa May declared that the most important diplomatic task of the United Kingdom is “to defend the rules based international order against irresponsible states that seek to erode it”, she underlined “it is Russia’s actions which threaten the international order on which we all depend”<sup>58</sup>. In 2019, Ursula von der Leyen, Germany’s Minister of Defense, stated that “Russia does not respect weakness ...”. She also clarified that to play by the rules means to respect the rules-based international order, including respect to the sovereignty of other countries<sup>59</sup>. Thus, there are sufficient reasons to think that the modern concept “rules-based order” has a political connotation, first and foremost an anti-Russian one; it is added to the current political weapons of the West. Indeed, as noted above, the military intervention of the United States to Iraq, its occupation and organization of death penalty of the Iraqi president S. Hussein is a gross violation of the UN Charter. The same holds for the instructions of the U.S. Ambassador in Kiev to putchists Turchinov, Yatsenuk, Poroshenko how to overthrow the constitutionally elected Ukrainian president Yanukovich. But the flexible anti-Russian concept “rules-based order” allows justifying such actions, committed contrary to the UN Charter.

We can suggest two dimensions of the policy of realizing the concept “rules-based international order” – civilizational and political. The civilizational dimension aims to “liberalize” international relations though revision of the very role of international law in favor of interests of “western civilization” (the United States and their western allies). The political

dimension uses the extra-legal format of such order as a tool to counter the national interests of all other states excepting western states. Both dimensions are “built” on ignoring international law as a legal system though hypocritically referring sometimes to the authority of some rules of international law. In a nutshell the concept presents a tool to universalize a “one-sided western project” of the world order. If “[international] law can exist only if there is a balance, a balance of power between the members of the family of Nations” [Oppenheim 1905: 73], then the utilitarian meaning of the concept “rules-based order” can be reduced to unilaterally imposed view of certain international actors.

So, the concept which has a purely political background, is generally circulated under the guise of the international legal construct. The Russian Foreign Ministry notes that “these ‘rules’ are invented and selectively combined depending on the current needs of the authors” [Lavrov 2019: 31]. Furthermore, those alleged rules present only “a free interpretation or pulling out of the context of certain international legal norms in favor of a limited group of countries”<sup>60</sup>. Therefore, the deduced aim of the concept is to strive “to replace universally agreed international legal instruments and mechanisms with narrow formats, where alternative, non-consensual methods of resolving certain international problems are developed bypassing the legitimate multilateral framework” [Lavrov 2019:31]. Thus, the idea of rules-based international order “denies the collegial beginning of interstate interaction and, by definition, is unable to generate solutions to global problems that will be viable and sustainable in the long-term perspective, and not designed for a propaganda effect within the electoral cycle of a particular country” [Lavrov 2019:34].

Consequently, attempts to establish the predominance of the concept “rules-based order” over international law at least in rhetoric on the international

<sup>57</sup> Secretary Rice Addresses U.S.-Russia Relations at the German Marshall Fund. – *US Department of State*. September 18, 2008. URL: <https://2001-2009.state.gov/secretary/rm/2008/09/109954.htm> (accessed 27.02.2020).

<sup>58</sup> PM speech to the Lord Mayor’s Banquet. Theresa May spoke about the importance of an international rules-based system, free markets and fair societies. November 13, 2017, URL: <https://www.gov.uk/government/speeches/pm-speech-to-the-lord-mayors-banquet-2017> (accessed 27.02.2020).

<sup>59</sup> “Ne uvazhayut slabost’”: FRG prizvala Moskvu igrat’ po pravilam [“They don’t respect weakness”: Germany called on Moscow to play by the rules]. – *Gazeta.ru*. January 23, 2019. (In Russ.). URL: <https://www.gazeta.ru/politics/2019/01/23a12140233.shtml> (accessed 02.02.2020).

<sup>60</sup> Vystuplenie Postoyannogo predstavatelya V.A.Nebenzy v khode dialoga vysokogo urovnya predsedatelei General’noi Assamblei, Soveta Bezopasnosti i Ekonomicheskogo i Sotsial’nogo Soveta OON po voprosam mnogopolyarnogo mira [Speech by the Permanent Representative of the Russian Federation to the UN and the UN Security Council V.A. Nebenzya during a high-level dialogue between the Presidents of the General Assembly, the Security Council and the UN Economic and Social Council on a multipolar world]. – *News2.ru*. September 12, 2019. (In Russ.). URL: <https://news2.ru/story/576161> (accessed 20.05.2020).

arena entail the risks of destabilizing the foundations of international relations. The ambiguous “rules” widely promoted (instead of relevant concrete international legal norms) are aimed at ensuring a “liberal world order” at the cost of undermining the existing system of international law. First, such suggested order supposes to abandon the agreement-based level of relations in Europe achieved in the “post-confrontational” 1990s. Second, the new practice of coercion according to some unclear rules is asserted by introduction of unilateral measures, the so-called “sanctions”. Third, there is a risk of lowering the quality or even nullifying the diplomatic dialogue that states usually carry out, guided by the provisions of the UN Charter and other main sources of international law. Measures preventing such risks should be developed on the basis of a consistent international legal analysis of the current situation, including comparative analysis of the relevant legal teachings.

#### **6. The concept “rules-based order” in the international legal teachings**

If one seeks an explanation of this ambiguous concept in the international legal discourse, one has to face the “relative silence of international lawyers”<sup>61</sup>. This is quite understandable given that international lawyers, by their profession, deal only with those “rules” that are endowed with normative character by legitimate means of international legal rule-making. Thus, no “rules” in the sense of some conditions for making international legal decisions or of a set of values are included into the research subject of international lawyers, namely the international legal system, until they are expressed in the content of sources of international law or subsidiary means for the determination of rules of law, or, at least, in legitimate positions of states in the international arena within international law.

At the same time, some international lawyers have already drawn attention to the detrimental effect of replacing international legal terms with the category “rules-based order”. Australian international lawyer, Shirley Scott considers the emergence

of “rules-based order” as an attempt to replace the “law-based order”<sup>62</sup>. In her opinion, this dangerous tendency is leading to the extinction of the traditional understanding of international law as politically neutral. According to Dr. Scott, despite the fact that references to the “rules-based order” often include the idea of continuity with the international legal system established after the end of the Second World War, this concept has nothing to do with the principles on which the “ideal of international law” is based [Scott 1994: 313]<sup>63</sup>. S. Scott identifies six such principles: first, “the principle of political neutrality”, which is expressed in the equal effect of the norms of international law for each state; second, “the principle of peace through law”, which means the possibility of applying law for the peaceful settlement of interstate disputes; third, “the principle of compulsory compliance”, according to which states comply with international law by assuming international legal obligations; fourth, “the principle of legal/illegal dichotomy”, which establishes the distinction between permissible and wrong in legal terms; fifth, “the principle of law preceding politics”, according to which law dictates the choice of political decisions; sixth, “the principle of comprehensive coverage”, which means the ability of international law to cover any issue that arises in interstate relations [Scott 2018: 630-631]. Relying on these principles, international law represents the universally accepted normative ideal with which the international community of states as a whole has agreed on. Therefore, international law is capable of serving as the regulator of all interactions in the international arena. Consequently, the rejection of the principles of international law implies a drastic change in the very coordinate system of international relations; that is the replacement of the world order based on international law with an amorphous order based on potentially changing rules: rules of the United States and their allies – today; or rules of China – tomorrow, etc.

German international lawyer Stefan Talmon does not pose the question so radically: for him the idea of “rules-based order” does not exclude the traditional

<sup>61</sup> Jorgensen M. International Law cannot save the rules-based order. December 18, 2018. URL: <https://www.lowyinstitute.org/the-interpreter/international-law-cannot-save-rules-based-order> (accessed 20.12.2020)

<sup>62</sup> Scott Sh. In defense of the International Law-Based Order. – *Australian Institute of International Affairs*. June 7, 2018. URL: <https://www.internationalaffairs.org.au/australianoutlook/in-defense-of-the-international-law-based-order/> (accessed 20.12.2020).

<sup>63</sup> Sh. Scott is the author of a methodological approach to understanding the relationship between international law and international politics through the presentation of international law as an ideology.

<sup>64</sup> Talmon S. Op. cit.

international legal order<sup>64</sup>. If “rule-based order” is based on the commitment of states to the existing system of legal rules, then such international order inevitably reflects a system of modern global governance by the norms of international law established in 1945. But as was demonstrated, the concept “rule-based order” seems broader than legal order resulting from observance of international law. It is not limited to a system of binding norms agreed by the sovereign will of states, but also includes the so-called “soft law”, i.e. declarative acts of states, documents of international organizations and associations expressing non-legally binding political intentions. This suggestion finds confirmation of the German Ministry of Foreign Affairs: according to his statement, the concept “rule-based order” is political in nature and “covers not only legally binding norms of international law, but also non-binding norms, standards and rules of conduct. For example, timely payment of contributions, multilateral cooperation to establish a cooperative world order, or informal associations in groups of like-minded or allies. The political term also refers to various international forums, their decision-making rules and negotiation processes”<sup>65</sup>. Within this interpretation the popularity of the term “rules-based order” on the UN platform becomes understandable, as well as the inclusion of references to the rule-based order in numerous international materials.

However, even this positive approach to understanding “rule-based order” also raises concerns<sup>66</sup>. Firstly, to put the system of norms of international law on a par with a set of certain rules that do not have any normative properties means blurring the line between ‘law’ and ‘non-law’. Secondly, the “rule-based order” does not distinguish between the sub-

jects of international law and other participants in international processes, such as transnational companies, international non-governmental organizations, etc. Thirdly, the fragmentary content of the concept “rules-based order” endows the sum of different rules with unpredictable character, always “special rules in special cases”. Non-binding rules are *a priori* deprived of the universality inherent to general international law and expressed in such legal categories as “main principles of international law”, “obligations *erga omnes*”, “*jus cogens*”, etc. Fourthly, calls from political tribunals for a rule-based order are in essence an attempt to tacitly establish the universal “bindingness” of a new aggregate of rules that form the international order without the consent of all states.

In addition to the existing internal contradictions of the concept, its different interpretations and the visible shortcomings as described above, fundamental questions are not answered: *who* sets these rules and *how* are they set? Answering these questions, S. Talmon warns that the assumption of the obligatory “rules-based order” means recognition of some kind of dictate: order by “dictate of the majority” or “order of the strong”<sup>67</sup>. Moreover, if this approach is accepted, one form of establishing authoritarian rule-making at the international level is capable of transitioning into another<sup>68</sup>. Such trend runs counter to the principle of the sovereign equality of states, which includes only voluntary acceptance of international legal obligations by the state. The key question is whether the idea of a “rules-based order” *per se* affects the UN Charter global observance, modern international law in general and the principle of rule of international law in international relations?

<sup>65</sup> “Die „regelbasierte Ordnung“ umfasst neben den rechtlich verbindlichen Normen des Völkerrechts auch rechtlich nicht bindende Normen, Standards und Verhaltensregeln. Dies sind zum Beispiel das pünktliche Zahlen von Beiträgen, die multilaterale Zusammenarbeit mit dem Ziel einer kooperativen Weltordnung oder informelle Zusammenschlüsse in Freundesgruppen oder Allianzen. Der politische Begriff bezieht sich zudem auf verschiedene internationale Foren und ihre Entscheidungsregeln sowie Verhandlungsprozesse“. See: Deutscher Bundestag. 123 Sitzung. Berlin. 6 November 2019. S. 71-72. URL: <http://dip21.bundestag.de/dip21/btp/19/19123.pdf> (accessed 20.12.2020).

<sup>66</sup> Talmon S. Op. cit.

<sup>67</sup> Ibidem.

<sup>68</sup> It should be noted that the dictate of the majority is the reverse side of the idea that international law is the result of rule-making by the entire international community. For example, M. Hakimi substantiates the idea of the international community by the fact that all its participants are initially interested in achieving common goals, then the conflicts that arise between them are contradictions only in relation to what specific offices of international law and order should be and how they should be established. Contradictions and misunderstandings are only exceptions to common aspirations, and at the same time, they are a natural and even necessary feature of the development of international law. Thus, “international legal conflict can have systemic value for the global order, even when it lacks substantive resolution”. See [Hakimi 2017:317-356].

## 7. The concept “rules-based order” and the principle “rule of law in international relations”

The first concept, as noted above, has come from the political discussions and tribunes, so it is reasonable to address the question of the existence of any intentions of states to consider this order as based on the principle “rule of law in international relations”. If we follow A. Watts' assumption that “the rule of law’ cannot be other than generally acknowledged as a desirable element of any community’s structure” [Watts 1993:15], we are to say that adherence to the rule of law in international relations is the most desirable conduct among all law-abiding sovereign members of the international community of states. Individual intentions of different states are then explicitly recorded in their declared positions.

### 7.1. “Rules-based order” is not international law

Reviewing documents or statements by government officials at the level of official policy of states, it can be seen that goals to undermine the rule of law in international relations were never explicitly revealed. Moreover, the statements with references to the “rules-based order” follow the line of accepting the key sources of modern international law, first and foremost, the UN Charter. For instance, speaking at the 68th session of the UN General Assembly on the rule of law at international level, the representative of Pakistan, Mr. Masood Khan, emphasized: «The Charter, international law and a rule-based international system should underpin a just world order. In that regard, the fundamental notions of sovereign equality, the settlement of disputes by peaceful means, and the conduct of international relations without threat or use of force, the right to self-determination of peoples that remained under colonial domina-

tion and foreign occupation, and non-interference in the internal affairs of States were sacrosanct»<sup>69</sup>. The other remarkable statement was made by Al Hadji Yahya A. J. J. Jammeh, the President of Gambia, at the 14th plenary meeting of the 60th session of the UN General Assembly: «Our Organization must be the ultimate defender of the rule of international law, to which all States in the comity of nations must adhere. Any attempt to weaken or undermine our rules-based international system should be rejected without compromise»<sup>70</sup>.

In this regard, the appeal to the rule of law in international discussions correlates with the existing numerous references to the key role of the rule of international law in regulating international relations not only in scholastic works [Troekurov 2006], but also in numerous international acts adopted by the absolute majority of states, including those states the representatives of which invoke the concept “rules-based order”. Thus, the preamble of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970 includes such reference to the rule of international law: “Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations...”<sup>71</sup>. In the United Nations Millennium Declaration, adopted by a UN General Assembly Resolution in 2000, the member states decided: “To strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States...”<sup>72</sup>. At the UN World Summit in September 2005, Member States “unanimously recognized the need for universal adherence to and implementation of the rule of law at both the national and international levels”<sup>73</sup>, and also “to the purposes and principles of the Charter and international law

<sup>69</sup> United Nations A/C.6/68/SR.6. General Assembly Sixty-eighth session. October 9, 2013. Agenda item 85: The rule of law at the national and international levels (continued). URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/505/88/pdf/N1350588.pdf?OpenElement> (accessed 28.12.2020).

<sup>70</sup> UN General Assembly: 14th plenary meeting. September 19, 2005. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/513/98/PDF/N0551398.pdf?OpenElement> (accessed 28.12.2020).

<sup>71</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 24 October 1970. URL: [https://www.undocs.org/en/A/RES/2625\(XXV\)](https://www.undocs.org/en/A/RES/2625(XXV)) (accessed date: 14.02.2020). The English words “promotion of the rule of law among nations” are expressed in the French text of the Declaration “en favorisant le regne du droit parmi les nations”; in Russian text as “установление правопорядка в отношениях между государствами”.

<sup>72</sup> United Nations Millennium Declaration of 18 September 2000. Para. 9. URL: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_55\\_2.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf) (accessed 28.12.2020).

<sup>73</sup> UN General Assembly: Resolution adopted by the General Assembly on 16 September 2005. Para. 134. URL: <https://undocs.org/A/RES/60/1> (accessed 28.12.2020).



and to an international order based on the rule of law and international law”<sup>74</sup>. In 2004 Kofi Annan, the UN Secretary General called the rule of law a “concept at the very heart of the Organization’s mission”<sup>75</sup>.

In this context it might be suggested that concerns about the concept of “rules-based order” as contradicting to the rule of international law in international relations arise precisely in the case of a final equalization of international legal norms and some “rules” of non-legal nature. However, in order to scrutinize specific issues of this contraction, we should get an insight into the substance of the principle “rule of law” itself.

## 7.2. The principle “rule of law in international relations”

In contrast to the concept “rules-based order”, the very idea of the rule of law (supremacy of law) in international relations is universally developed in the generally accepted categories of “justice” and “equality” [Koskeniemi 2019:27]. Hugo Grotius deduced the possibility of the rule of law from the reasonable nature of the human being; in view of Grotius, it is the reason of a man that allows him to abandon the momentary satisfaction of individual interests, and follow the norms that can ensure the well-being of the whole society [Koskeniemi 2019:30]. The Westphalian international legal order was built on a reasonable presumption of sovereign autonomy and sovereign interests (*raison d’Etat*) that could best be satisfied by a consistent respect of balance of power [Kissinger 2015: 19].

In the XX century, H. Lauterpacht in his outstanding work “The Function of Law in the International Community” (1933) asserted the importance of the rule of law for ensuring peace within the international community. For him, “peace is pre-eminently a legal postulate. Juridically, it is a metaphor for the postulate of the unity of the legal system» [Lauterpacht 2000: 438]. H. Lauterpacht considered the rule of international law as comprehensive: moreover, this comprehensive nature is “an *a priori* assumption of every system of law, not a prescription of positive law”. This logically means that the legal system does

not consist of separate “isolated” acts of coordination of sovereign wills, (which objectively cannot cover and provide for all international legal issues arising in changing international relations), but rather is integrated by some key general principles that always allow to find an argument within international law even in a situation, for which there is no directly applicable norm [Koskeniemi 1997:226]. Thuswise, the idea of the rule of international law itself does not imply a specific course of action, but rather covers the guiding principles for relations within “legally ordered community”, which set the framework for the operation of substantive norms of law [Watts 1993:22].

According to William Bishop the rule of law presumes “the reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force” [Bishop 1961:553]. However, there is considerable skepticism concerning the very existence of the rule of law on the international level due to the exorbitant role of politics in the international relations so that, according to G. Schwarzenberger, it is more correctly to speak about the rule of force instead of the rule of law [Schwarzenberger, Brown 1976].

Generally, the criticism unfolds as follows: certain theorists believe that the international law lacks normativity due to the absence of universal coercive power in the international dimension so that there are no incentives for states to abide by its rules [Menon 2020:53]. This judgement arises from the John Austin’s command theory, which defined law as a command of the sovereign, and in the event of non-compliance, the offender could be sanctioned [Austin 1995]. However, the mentioned above theory was criticized by Austin’s successors, namely H.L.A. Hart, who emphasized the “internal aspect” of rules rather than external [Hart 1997]. Indeed, such characteristic of law as threat of coercion by the sovereign (which is absent in case of international law) does not stand scrutiny, especially when the government itself complies with decisions made against it [Fisher 1961].

On the other hand, if one takes a look at the state of compliance with the international law nowadays,

<sup>74</sup> Ibid.

<sup>75</sup> UN Security Council: The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General. August 23, 2004. Para. 6. URL: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PCS%20S%202004%20616.pdf> (accessed 14.02.2020). See also: UN General Assembly: Uniting our Strengths: Enhancing United Nations Support for the Rule of Law. Report of the Secretary-General. December 14, 2006. URL: <https://www.refworld.org/docid/45c30c5f0.html> (accessed 14.02.2020).

it turns out that by and large states do comply with its rules notwithstanding the fact that it lacks a sovereign [Menon 2020: 54]. This can be proved as follows: firstly, the sources of international law are generally recognized<sup>76</sup>, secondly, there are certain widely accepted rules, governing the process of international rulemaking<sup>77</sup>, and finally, it can be illustrated by numbers – the percentage of rulings of international courts that are complied with is consistently higher than the rate of the complete defiance [Paulson 2004:457; Llamzon 2007: 852]. Therefore, those who claim that international law does not exist due to the lack of universal coercive power at the international level simply contradict observable facts.

Indeed, “international obligations today are perhaps more enforceable than ever before” [Menon 2020: 55]. According to S. Menon, this is the result of the overall growth of the number of international judicial institutions and their significance in international relations. Such issues as consular assistance, dual nationality and the detention of foreigners are getting more attention within the corpus of international law [Trindade 2015:5]. Moreover, it is noted that individuals are gaining more mechanisms designed to hold states accountable for violations of international law vis-à-vis them within various emerging procedures such as investor-state dispute settlement mechanism, which are usually initiated by way of arbitration. The advantages of the mentioned above system include more time- and cost-effective procedure and less cumbersome compared with dispute resolution performed at the state-to-state level [De Baere, Chané, Wouters 2015: 4].

It should be emphasized that the clause “the rule of law” cannot exist without association with justice. By itself, the “dominant position” of law as a regulator of social relations is not sufficient evidence of the rule of law, since the dominant position may be occupied by a system of unjust and repressive norms [Watts 1993: 23]. For instance, it is in this way that proponents of the so called “Third World Approaches to International Law” qualify the norms of international law of the previous world legal order of the colonial system, as well as the norms of modern international law that impede the equal economic development of states [Ikejiaku 2014]. In this sense, the rule of law is a counterbalance to political power of

strong actors, exerting a deterrent effect. As V. Jenks justly noted, “no legal system operates, or can operate, in a political vacuum; no political system can provide good government, ensure justice, or preserve freedom except on the basis of respect for law” [Jenks 1964:757]. The law itself can never be ultimately perfect. But the absence of respect for law will always bring negative consequences.

### 7.3. Compatibility of the concept “rules-based order” with international law

In view of the above-mentioned arguments, is it possible to formulate criteria for those circumstances under which the concept does not contradict international law? This issue is examined by the international research group at the Free University of Berlin and the University of Potsdam as part of the project “The International Rule of Law – Rise or Decline?”, which has been implemented since 2016. Co-leader of the project, German lawyer G. Nolte identifies five factors influencing the rise and decline of the rule of international law.

First, political developments, including ‘return of geopolitics’, including ideological confrontation, the problem of legitimacy of international legal decisions related to the distribution of decision-making power, and the shift of power from the core players. Second, systemic violations of the norms of international law, which can indicate the formation of new directions in the development of international law, and raise the question of the very existence of international law. Third, structural developments in international law, which may cast doubt upon the role of international law as a necessary basis for international relations. On the one hand, structural developments make it possible to avoid stagnation in the evolution of interstate relations, ensuring the relative flexibility of the international legal system, for example, by allowing informal types of cooperation or by involving new participants. On the other hand, structural developments bring with them all the disadvantages of delegalization, such as the problem of hegemonic governance, a distorted legal consciousness and a lack of legitimacy of the rules being formed. Fourth, contestations of the underlying values of the international law, such as maintaining peace and security,

<sup>76</sup> Statute of the International Court of Justice of 26 June 1945. Art. 38(1). URL: <https://www.icj-cij.org/en/statute> (accessed 12.12.2020).

<sup>77</sup> As of April 2021, 116 State Parties have ratified the Vienna Convention on the Law of Treaties.

recognition of human rights, solidarity obligations in relation to common values, such as sustainable development, etc. Fifth, institutional challenges associated with the proliferation of international organizations, and institutions for the resolution of disputes, their expansive and fragmented international legal practice [Krieger, Nolte 2016].

According to this five-sided scheme, one can characterize the influence of the concept “rules-based order” on the principle “rule of law” – in terms of “rise or decline”. However, the positive or negative impact will depend on the proposed hypotheses. For example, the emergence of the rhetoric about the “rules-based order” as a political development is negative if it allows the unilateral imposition of selected rules by illegitimate means against the will of other states, entailing, for example, concentration of power within a group of western states at the expense of other states. In these circumstances the concept “rules-based order” becomes a factor of systemic violations of international law. The concept exerts negative impact as it serves the purpose of justifying some acts of western states through distorting the content of international legal norms. As a structural development, the establishment of such new “order” would entail erosion of the normative hierarchy in the international legal system and decrease in the legitimacy of existing legal procedures. As a factor undermining the international peace and security, the concept “rules-based order” turns out to be negative as it is aimed at rejection of the existing values of the international legal system in favour of questionable alternatives. Finally, as an institutional challenge, the concept “rules-based order” takes on a negative meaning if it is realized *de facto* via some international agreements, contacts or associations, thus claiming universality. Accordingly, it is a necessity to prevent these “negative” parameters, so that the very idea of a rules-based order does not contradict the principle of the rule of law in international relations.

Without such “negative” factors, the idea of a “rules-based order” could be compared with the concept “international juridical system” as suggested by Prof. G. Tunkin. The Soviet international lawyer introduced the concept of an “international juridical system”, which included not only legal norms, but also semi-legal norms, closely interrelated [Tunkin 1978:60-61]. He understood “semi-legal norms” as norms that though are not norms of law, contain some legal element, for instance, recommendations of international organizations and international arrangements (understandings and memoranda). This doctrinal innovation made it possible to systematize

constantly emerging norms at the international level in the context of the growing internationalization of many aspects of life. The concept presented within the walls of the Hague Academy of International Law in 1975 did not cause any controversy or refutation, and even was repeatedly mentioned in publications on the legal significance of the rule-making of international organizations [Institut...1985:39]. This is probably because the advanced legal concept positively affects the operation of the existing procedures for establishing international legal norms. It was assumed that “semi-legal” norms, as well as international legal ones, are the result of the coordination of the wills of states, and are addressed only to states, their difference lies only in the degree of normativity and flexibility of creation.

This example allows us to draw a conclusion about possible positive features of the concept “rules-based order” if it corresponds to international law. First, the concept should not question the legitimacy of recognized international law-making procedures. Consequently, the concept is to exclude any illegitimate distortion of universal legal rules. Second, the concept should distinguish between the types of norms that form the basis of the order, according to the degree of normativity. Therefore, references to the rules that form the basis of the order must contain an indication of the source, i.e. the site at which the rules were developed and within which they apply. This means that the claim that the entire “rule-based order” is universally binding is wrong. Third, the concept “rule-based order” cannot be abstract. Finally, the effect of particular rules should be limited to a specific circle of creators and addressees of the rules, thereby excluding unreasonable expectations of the implementation of the rules by states not participating in their development. These simple suggestions might promote the concerned concept into real international life without raising doubts about its compatibility with international law.

## 8. Conclusion

Research of the concept “rules-based order” has demonstrated, that the use of this concept *per se* does not shatter the stability of the existing international legal order. However, the dependence of the concept on the meaning given to it by those who refer to this concept makes the concept vulnerable to political discursive manipulation. Today, the meaning of the concept is determined by the relevant concrete circumstances and authorship. From this point of view, the concerns of the Russian Foreign Ministry about

the risks of replacing international law with the paralegal concept "rules-based order" are well reasoned and, as was shown, find support of foreign international legal scholars. The problem is that today the concept is widely accepted not only by the USA and other western states, but also by huge number of developing states and such a rising economic and military superpower as China. In these circumstances, in our opinion, the conceptual conflict is to be re-

solved. In fact, is not as sharp as, for example, the famous "War of books" ("Mare Liberum" v. "Mare Clausum"). It can be resolved without a radical rejection of the use of this popular notion nor its acceptance. It is enough to agree on the basic content of the concept which might be universally acceptable and might neutralize its negative anti-international law connotation, burdened with risks of legal nihilism in international relations.

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#### About the authors

##### Alexander N. Vylegzhanin,

Doctor of Juridical Sciences, Professor, Head of the Department of International Law, Moscow State Institute of International Relations (University) MFA Russia

76, pr. Vernadskogo, Moscow, Russian Federation, 119454

#### Информация об авторах

##### Александр Николаевич Вылегжанин,

доктор юридических наук, профессор, заведующий кафедрой международного права, Московский государственный институт международных отношений (Университет) МИД России

119454, Российская Федерация, Москва, проспект Вернадского, д. 76

danilalvy@mail.ru  
ORCID: 0000-0003-4833-2525

danilalvy@mail.ru  
ORCID: 0000-0003-4833-2525

**Boris I. Nefedov,**

Doctor of Juridical Sciences, Associate Professor, Professor at the Department of International Law, Moscow State Institute of International Relations (University) MFA Russia

76, pr. Vernadskogo, Moscow, Russian Federation, 119454

boris-nefedov@mail.ru  
ORCID: 0000-0002-7762-5979

**Борис Иванович Нефёдов,**

доктор юридических наук, доцент, профессор кафедры международного права, Московский государственный институт международных отношений (Университет) МИД России

119454, Российская Федерация, Москва, проспект Вернадского, д. 76

boris-nefedov@mail.ru  
ORCID: 0000-0002-7762-5979

**Evgeny R. Voronin,**

Retired Ambassador Extraordinary and Plenipotentiary, Cand. Sci. (Law), Professor at the Department of International Law, Moscow State Institute of International Relations (University) MFA Russia

76, pr. Vernadskogo, Moscow, Russian Federation, 119454

tverv@rambler.ru  
ORCID: 0000-0002-1229-0012

**Евгений Ростиславович Воронин,**

Чрезвычайный и Полномочный посол в отставке, кандидат юридических наук, профессор кафедры международного права, Московский государственный институт международных отношений (Университет) МИД России

119454, Российская Федерация, Москва, проспект Вернадского, д. 76

tverv@rambler.ru  
ORCID: 0000-0002-1229-0012

**Olga S. Magomedova,**

Post-graduate student at the Department of International Law, Moscow State Institute of International Relations (University) MFA Russia

76, Prospekt Vernadskogo, Moscow, Russian Federation, 119454

olga.magomedova.96@mail.ru  
ORCID: 0000-0003-0593-3101

**Ольга Сергеевна Магомедова,**

аспирант кафедры международного права, Московский государственный институт международных отношений (Университет) МИД России

119454, Российская Федерация, Москва, проспект Вернадского, д. 76

olga.magomedova.96@mail.ru  
ORCID: 0000-0003-0593-3101

**Polina K. Zotova**

Department for External Economic and International Relations, The Government of Moscow,

22, Voznesenskiy per., Moscow, Russian Federation, 125009

zotovapk@mos.ru  
ORCID: 0000-0002-8647-7410

**Полина Константиновна Зотова**

Департамент внешнеэкономических и международных связей, Правительство г. Москвы

125009, Российская Федерация, Москва, Вознесенский переулок, д. 22,

zotovapk@mos.ru  
ORCID: 0000-0002-8647-7410