

Week 1: What is public International Law?

Some recurrent themes:

- Law vs politics
- Theory vs practice
- Idealism vs realism
- International law for whom?: States vs Humans

International law is everywhere

- The way you tell the time → Final Act of the International Meridian Conference, 1884
- The cars you drive and their functions → Global Technical Regulations for Wheeled Vehicles 1998 → Constitution of the International Telecommunications Union, 1865, Space Treaty 1967
- Products and food → Uruguay Round Agreement, World Trade Organization Treaty System & related Instruments
- Internet and soundcloud services → Law of the Sea Convention → Convention for the Protection of Submarine Telegraph Cables

What is international law?

- From Latin: *inter nationes* – “between nations”
- International law is a body of rules and principles which facilitates and regulates the conduct of state and international organisations in their relations with one another and, in some cases, with individuals, groups and transnational companies. (*adapted from AGD definition*)

Public vs private international law

- **Public international law** → body of rules and principles that principally govern the relations between states, but also between states and certain non-state actors (e.g. international organisations)
- **Private international law** → principles and rules that govern relations between individuals across borders or involving transboundary elements (eg interstate marriages, business transactions and contracts etc.) Thus also regulating conflicts between rules of different domestic legal orders

Characteristics of the international legal system

- Horizontal
- Decentralised → in its creation and enforcement. There is no central law making body. States are involved in making international laws by treaties.
- Creation
- Enforcement
- NB: The position of states in the international legal system

First stage → 1648-1918 - gradual emergence

- Early history (e.g. Greek & Roman legal traditions, medieval times)
- **1648 Treaties of Westphalia** (ending the Thirty Years War) → establishing several cornerstone principles that are still relevant to international law today, such as:
 - Rejection of the secular power of the pope
 - *Concept of sovereignty*: states seen as sovereign equals and organised territorial entities
 - Early articulation of the *principle of non-interference* in internal affairs
- Building on ideas developed among others by Hugo Grotius

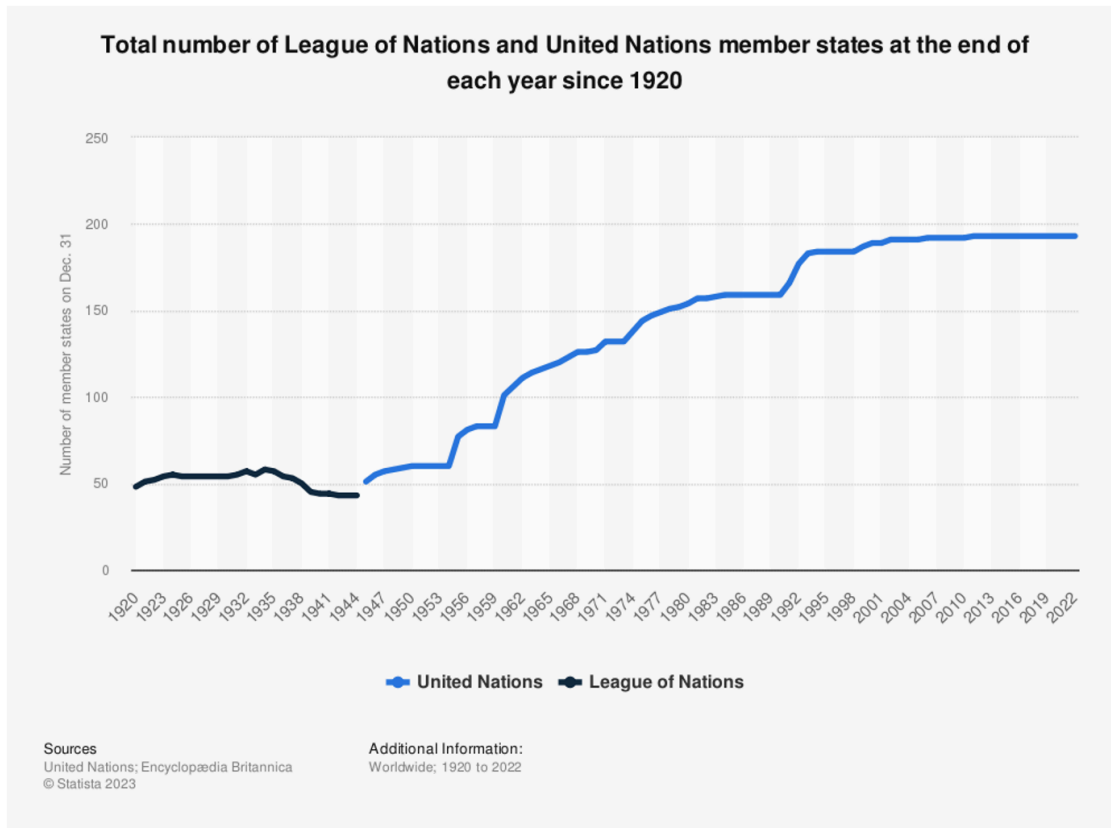
- Spread of colonialism, but also independence of the United States (1776) and Haiti (1804), followed by Latin American states
 - Early notions of the *principle of self-determination*

Second stage → From the League of Nations to World War II (1918-1945)

- World War I (1914-1918) → Paris Peace Conference
- Creation of the **League of Nations** (1920-1945), with headquarter in Geneva → first interstate organisation that aspired universal membership (though in the context of colonial rule), employing international civil servants
- Establishment of the **Permanent Court of International Justice** in The Hague (1922)
- 1928 Kellogg-Briand Pact outlawing war as a means of national policy, except for self-defence

Third stage → From the creation of the UN to end of Cold War 1945-1991)

- Experience of World War II (1939-1945) shaped a new international order
- **1945 Charter of the United Nations**, with the main goal of preserving international peace and security (headquartered in New York)
- With a General Assembly, Security Council and the International Court of Justice (continuing the work of its predecessor)
- **Rise of international human rights law** with many core treaties adopted during the 1960s and 1970s
- The **Cold War** and confrontation between the two superpowers paralysed the UN (particularly the Security Council) for several decades
- **Decolonisation**, especially during the 1950s and 1960s, challenging the Western-centric legal order (e.g. Non-Aligned Movement)



The United Nations Charter (1945)

Preamble

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I: PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

- 1 To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
- 2 To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
- 3 To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
- 4 To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Core international law principles embodied in the UN Charter

- Peaceful resolution of international disputes
- Prohibition of the use of force and maintenance of international peace and security
- Principle of sovereign equality

- Principle of non-interference in the domestic affairs of states

Fourth stage → from the end of the Cold War to today (1991-today)

Revitalisation of international law during the 1990s

- Security Council authorised new interventions in Kuwait (1990), Somalia (1992), Bosnia and the former Yugoslavia (1992-95), Haiti (1994) etc.
- Globalisation and expansion of international economic and trade agreements (e.g. establishment of World Trade Organization, WTO, 1994)
- New international criminal tribunals, including the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as establishment of a permanent International Criminal Court (ICC) in 1998
- Significant expansion of international legal rules and institutions

New challenges and new areas in the 2000s

- On the one side, new global challenges requiring global collective action, such in development, damage to the global environment and global health, e.g. 2015 Sustainable Development Goals (SDGs), 2015 Paris Agreement on Climate Change, and 2020 WHO & Covid-19 pandemic
- On the other side, increasing power competition, global inequalities and mistrust in international institutions have challenged the effectiveness of international law

Basic features of international law

- **Sovereign equality of states**, meaning each state can make its own decisions about how to order its affairs, with the result that one state may not force its will upon others (Rose 2022)
- **State sovereignty**, meaning states enjoy territorial sovereignty
- **A voluntary consent-based system**, where states have the authority or capacity to limit the exercise of their sovereign power by consenting to be bound by international legal rules → thus, state consent is generally a necessary condition for an international legal norm to come into existence (Rose 2022)
- **Horizontal rather than vertical system of authority**, with no superior authority → states are both the makers and the enforcers of international law
- **Inherently state-centered**, because states are the only actors with the capacity to consent to the creation of international legal rules that bind them → non-state actors (such as individuals, corporations, NGOs) are not viewed the same way in international law (although this idea has been challenged by international human rights and international criminal law, among others)
- **Eurocentric legacy** of international law (e.g. Security Council composition, Third World Approaches to International Law etc.)
- **International law is constantly evolving**, as new transnational problems require international legal responses (e.g. climate change, terrorism, the internet, flows of goods and people across borders, inequalities, health emergencies)

A note on compliance

“Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time” → Louis Henkin (1979)

BUT NOTE

1. PEREMPTORY NORMS OR NORMS
2. NEWLY FORMED STATES

Some reasons for compliance

- Immediate and long-term self-interest
- Compliancy pull of legitimacy
- Reputation
- Institutions
- Normative force of embedding and entrenching political preferences
- Enforcement

Is international law really law?

Some of the arguments against:

- Legal theory arguments (e.g. Kelsen)
- Lacks sovereign authority and a central law-making authority
- 'International law is routinely breached'
- Powerful states are free to flout international law whenever it suits them
- Lacks centralised and compulsory enforcement mechanisms

Some of the arguments in favour:

- International community recognises a body of international rules that are binding
- States do not claim to be above the law
- International law invoked and used by states on a daily basis
- International law is overwhelmingly complied with
- International system for resolution of disputes etc.
- Limits of the domestic law analogy (consent-based system, enforcement etc.)

Rose: "international law is best approached and understood on its own terms"