THE FALLACY OF PUBLIC INTERNATIONAL LAW

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ABSTRACT

The paper examines the idea that public international law often presents itself as fair and equal, but in practice has served the interests of powerful states more than the weaker ones. It analyses this pattern from early legal systems, through colonisation by the west, to the modern United Nations system, showing how law and power have remained closely connected. The paper argues that although international law has contributed to important developments such as human rights, treaty making, and decolonisation, its enforcement is still uneven and selective. It concludes that unless stronger and fairer enforcement mechanisms are developed, public international law will continue to protect hierarchy instead of true equality among states.

A. Introduction

The history of Public International Law (PIL) did not begin in 1945 with the victory of the Allied powers against the Axis coalition in the Second World War, but rather, forms of PIL have been documented as governing varying degrees of bilateral and multilateral relationships between civilisations, clans, and tribes since time immemorial.[1] This includes, but is not limited to, the treaties of Mesopotamia governing relationships between cities, Roman *jus gentium*,[2] Islamic *Siyar*, and other mediaeval treaty practices.[3]

There are a multitude of differences between historical forms of International Law and modern-day codified PIL, but one aspect of its application remains the same, namely the law being applied asymmetrically against weaker polities and functioning as a manager of hierarchy rather than an equaliser of state power. This article intends to examine the fallacy of public

[1] Edmarverson A. Santos, "International Law in the Ancient World: Origins, Practices, and Influence on Modern Systems," *Diplomacy and Law*, November 18, 2024, https://www.diplomacyandlaw.com/post/international-law-in-the-ancient-world-origins-practices-and-influence-on-modern-systems

[2] Svitlana Zadorozhna, "Jus Gentium and the Primary Principles of International Law," *European Journal of Law and Public Administration* 6, no. 2 (December 2019): 157–166, https://doi.org/10.18662/eljpa/93

[3] Muhammad Munir, "Islamic International Law (Siyar): An Introduction," *SSRN Electronic Journal* 35, no. 4 (January 2007), https://doi.org/10.2139/ssrn.1835823.

international law and how it has been used to serve the interests of a select few powerful states while largely ignoring the interests of the majority by drawing on historical and modern accounts of the application of this relatively weak branch of law.

B. Early International Law as a Tool of Power

The earliest manifestations of international law operated within hierarchies of power; however, most accounts do not represent these early forms as agreements between equals, and the imposition of unilateral and arbitrary terms was a common occurrence. For instance, Roman *jus gentium*, which is often cited as an early precursor to modern international law that developed in the twentieth century, did not function as a constraint on imperial authority but rather pragmatically governed the relationship between Rome and foreigners, who lacked even the most basic rights in Rome, in order to serve Rome's growing trade and territorial interests.[4] Similarly, in the Mediaeval Period, both the Papacy and the Holy Roman Empire claimed universal jurisdiction over the world as a matter of right and could authorise conquests, especially against non-Christian polities that lacked equal standing, and any treaties or agreements with them could be voided with impunity.[5]

Similar situations occurred outside Europe, with larger polities, primarily ruled by monarchs, subjugating their weaker counterparts by all means possible, including the violation of the customary law present at the time, such as the belief that treaties were somewhat sacrosanct and must be upheld by all parties. However, this and many such beliefs were rarely upheld by the powerful party, as can be seen from the innumerable treaty violations by the Indian Mughal Empire throughout its existence. One such example is the violation of a seventeenth-century peace treaty with the less formidable Bijapur, through unlawful interference with the Bijapur king's line of succession and later invasion of its territories in contravention of the treaty's terms, without any considerable repercussions.[6]

However, as international law and international relations developed over the years, the world

[4] Peter G. Stein, "The Law of Justinian," in *Roman Law*, *Encyclopaedia Britannica*, last updated February 19, 2026, https://www.britannica.com/topic/Roman-law/The-law-of-Justinian.
[5] Anne Orford, "Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect," *Michigan Journal of International Law* 30, no. 3 (2009): 981–1015, https://repository.law.umich.edu/mjil/vol30/iss3/13/
[6] Satish Chandra, *History of Medieval India: 800–1700* (Hyderabad: Orient Blackswan Private Limited, 2007), https://crpmahavidyalaya.in/wp-content/uploads/2020/04/AR_History-of-Medieval-India-by-Satish-Chandra.pdf.

witnessed a paradigm shift in the seventeenth century with the Peace of Westphalia and its ensuing agreements, which ended the Thirty Years' War between the Roman Empire and other regional European kingdoms.[7] The Westphalian system, for the first time in history, attempted to abandon existing hierarchical orders and Papal control in order to create a horizontal societal structure, with each polity having complete sovereignty over its territories, but this did not translate into equality among all polities, as its primary focus remained exclusively on European powers. Consequently, this resulted in European powers being largely ignorant of the sovereignty of other polities, especially those in Africa, Asia, and the Americas, during their brutal colonial conquests.

C. International Law and Colonialism

European powers began to proliferate their colonial aspirations in the nineteenth century and occupied large swathes of territory outside their home continent. The polities that fell victim to colonisation lost their right to self-determination and, at times, were also actively discriminated against by their colonisers, who treated the indigenous colonised population differently from their white European populace. Moreover, European powers nearly always took unilateral state action to colonise territories without the approval of the indigenous population and violated their sovereignty by virtue of claiming to be endowed with exclusive international law-making power, whereas indigenous peoples of the colonies were considered to have no right to resist, as they were deemed to be uncivilised.

This period also witnessed the repetition of the pattern of exploitation of international law by powerful states that created the law while violating the same law with impunity and subjugating less powerful polities. Here, European states concluded treaties among themselves to define zones of interest open to colonisation exclusively for the party states to those treaties, and such treaties were considered legally binding.[8] At the same time, European powers also concluded treaties with indigenous rulers, and these treaties were often unilaterally breached without any consequences. This was evident in the 1877 New Zealand Supreme Court case of *Wi Parata v Bishop of Wellington*,[9] wherein the court permitted the coloniser to breach the 1840 Treaty of

[7] Wolfgang Preiser, "History of International Law, Ancient Times to 1648," *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, last updated February 2007, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1500.

[8] Jörn Axel Kämmerer, "Colonialism," *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, 2018, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e690.

[9] "Wi Parata v Bishop of Wellington," *Wikipedia*, last modified January 21, 2026,

Waitangi based on the reasoning that the indigenous Māori who signed the treaty were "primitive barbarians",[10] and hence the colonial government was permitted not to respect Māori proprietary rights and to "act as the sole arbiter of its own justice".

The establishment of the League of Nations,[11] an international and multilateral organisation often considered the precursor to the United Nations, following the First World War in 1919, did not end colonialism, nor did it require its member states to work towards decolonisation. Rather, it explicitly permitted the creation of mandates under Article 22 of the Covenant of the League of Nations, through which existing colonial powers could control the lost territories of the Turkish Ottoman Empire and other Axis powers defeated in the First World War.[12] However, the provision also recognised certain basic rights of indigenous colonised populations, while permitting their continued subjugation by the architects of the new multilateral international legal order.

D. United Nations and Modern Public International Law

The United Nations was established in 1945 and brought with it a significant evolution of public international law.[13] The post-World War 2 order was promised to be built on the principles of sovereign equality, the prohibition of the use of force, collective security, and the protection of human rights.[14] Unlike earlier Eurocentric systems, the post-war order appeared to correct the historical exclusion and hierarchy that characterised the colonial era.

However, in reality, this was largely rhetorical and did not fundamentally alter the relationship between law and power. The UN system contained structural asymmetries from its inception, particularly within the Security Council. The veto power granted the permanent five members, who were the major powers and the driving force behind the creation of the United Nations,

https://en.wikipedia.org/wiki/Wi_Parata_v_Bishop_of_Wellington.

[10] Carwyn Jones, "Johnson v. M'Intosh, Wi Parata v. Bishop of Wellington and the Legacy of the Doctrine of Discovery in Aotearoa New Zealand," *Canopy Forum*, April 11, 2023, https://canopyforum.org/2023/04/11/johnson-v-mintosh-wi-parata-v-bishop-of-wellington-and-the-legacy-of-the-doctrine-of-discovery-in-aotearoa-new-zealand/.

[11] Jörn Axel Kämmerer, "Colonialism," *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, 2018, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e690.

[12] "The Covenant of the League of Nations," *Avalon Project*, Yale Law School, accessed March 26, 2026, https://avalon.law.yale.edu/20th_century/leagcov.asp.

[13] "History of the United Nations," *United Nations*, accessed March 26, 2026, https://www.un.org/en/about-us/history-of-the-un.

[14] "Chapter I: Purposes and Principles," *United Nations*, accessed March 26, 2026, https://www.un.org/en/about-us/un-charter/chapter-1.

the ability to protect themselves and their allies from the enforcement of provisions of international law that they might have violated.[15] Hence, the enforcement of international law became contingent not on legal breach but on geopolitical relations.

This asymmetry can be observed in United Nations Security Council resolutions, which have predominantly authorised decisive enforcement against small and less powerful states that lack veto power or powerful allies capable of blocking draft resolutions affecting them. Iraq, for example, faced UNSC Resolutions 660 (1990),[16] 661 (1990),[17] 678 (1990),[18] 687 (1991), and 1441 (2002)[19] during and after the Gulf War,[20] whereas no resolutions were passed against the Coalition of the Willing that invaded Iraq in 2003, as coalition members possessed veto power.[21] Moreover, judicial mechanisms such as the International Court of Justice depend on state consent for jurisdiction and compliance, allowing powerful states to ignore judgements passed against them with minimal consequences. Similarly, the International Criminal Court, which tried to bridge enforcement gaps, faced both jurisdictional problems and accusations of selective enforcement, with all defendants who have physically stood trial, or are standing trial, being from relatively less powerful African states,[22] with the former President of the Philippines, Rodrigo Duterte, being the only exception, while powerful states and their nationals are often not brought to justice.

Importantly, this does not make modern public international law irrelevant. The UN system has also brought with it multiple positive changes in the fields of treaty-making, setting internationally accepted humanitarian standards, decolonisation, and norm development. However, it also shows history continues to repeat itself, with the law being disproportionately successful when enforced against weaker nation states while repeatedly absolving powerful

[15] "The Veto," *Security Council Report*, February 13, 2024, https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php.
[16] "Resolution 660 (1990)," *UN Digital Library*, accessed March 26, 2026, https://digitallibrary.un.org/record/94220?ln=en.
[17] "Resolution 661 (1990)," *UN Digital Library*, accessed March 26, 2026, https://digitallibrary.un.org/record/94221?ln=en.
[18] "Resolution 678 (1990)," *UN Digital Library*, accessed March 26, 2026, https://digitallibrary.un.org/record/102245?ln=en
[19] "Resolution 1441 (2002)," *UN Digital Library*, accessed March 26, 2026, https://digitallibrary.un.org/record/478123?ln=en&v=pdf.
[20] "Persian Gulf War," *Encyclopaedia Britannica*, last updated March 24, 2026, https://www.britannica.com/event/Persian-Gulf-War.
[21] Sarah E. Kreps, "Iraq, the United States, and the 'Coalition of the Willing,'" in *Coalitions of Convenience: United States Military Interventions after the Cold War* (Oxford: Oxford University Press, 2011), 114–148, https://doi.org/10.1093/acprof:oso/9780199753796.003.0007.
[22] "Defendants," *International Criminal Court*, accessed March 26, 2026, https://www.icc-cpi.int/defendants?page=1.

states from legal liability.

E. Conclusion

This examination of Public International Law through historical and modern contexts presents an ongoing structural problem: international law has rarely functioned as a neutral system with all parties adhering to their obligations. From its earliest forms through the Westphalian order, colonial expansion, and the modern-day United Nations system, the application and enforcement of international law has been linked to power. While the forms, institutions, and language of international law have changed significantly, its application has always disproportionately favoured the polities capable of creating and enforcing it. Until enforcement mechanisms are built with safeguards to protect them from collapsing in the hands of the powerful, public international law will continue functioning as a manager of hierarchy rather than an equaliser of state power.