Chapter 2. International Public Law

2.1 Origins of the International Public Law

The origins of international public law go back to the process of the creation of national states, i.e. the 19th century. In 1815 (the Vienna Congress), the first collective security system was established under international law to protect the monarchy. In the second half of the 19th century the first international organizations were set up in the field of communications (the International Telegraph Union, the International Post Union and the International Railways Union).

In the course of its history, the practice of international public law saw the emergence of peremptory norms (sometimes referred to as the *jus cogens*) which are binding upon states. These include e.g. the observance of the principle of prohibition of the use of force, the respect for human rights, and the protection of the environment. The breach of these norms amounts to the breach of peace and security which may give rise to an action by the UN Security Council.

The UN Security Council consists of 15 members out of which 5 are standing (UK, US, Russia, China and France). For a resolution of the UN Security Council to be adopted, the consent of all 5 standing members is required. An abstention of a permanent member does not constitute a veto. The UN Security Council may adopt traditional sanctions (arms embargo, economic embargo etc.) which usually adversely affect the civilian population. Therefore, in the past years the UN Security council favors the so-called **smart sanctions**, which are addressed to individuals, usually political elites responsible for breaching international law. Smart sanctions include e.g. freezing bank accounts, not issuing visas for traveling abroad, and prohibition of trading in a stock exchange. Smart sanctions do not affect the civilian population; that is why they are getting more and more popular.

2.2 Difference between International Public Law and International Private Law

Legal scholarship makes a distinction between **International Public Law** on the one hand, and the International Private Law (also referred to as Conflict of Laws) on the other. So what is the difference between the two? Despite their denominations, only International Public Law is truly international in terms of its **origin**, whereas the rules of International Private Law are generally set by national states, even though the European Union as an international organization has greatly contributed to the harmonization and/or unification of conflict of law rules for its Member States.

Apart from their origin, the two legal disciplines differ in the addressees of the norms, and in the degree of their enforceability.

The addressees of the norms of International Public Law are (usually) states and intergovernmental international organizations, whereas the addressees of international private law are private entities (individuals and corporations). To understand the difference in practice, two examples have been given below.

(i) Example of an International Public Law treaty

The UN Charter, the founding treaty establishing the United Nations stipulates the conditions which have to be met by a candidate Member State and it establishes the procedure for endorsing a new Member State by the UN bodies. It is binding upon the Member State of the United Nations.

(ii) Example of an international private law rule applying to mutual relations between individuals: Article 4(4) of the Rome I Regulation adopted by the EU reads as follows:

Applicable law in the absence of choice *1.To the extent that the law applicable to the contract has not been chosen [by the parties to the contract] the law governing the contract shall be determined as follows:* *(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; [...]*

With respect to enforceability, it is much more difficult to enforce International Public Law, since there is no international police or a global executive force. International Public Law can be interpreted by the International Court of Justice (ICJ) which is the judiciary body of the United Nations; however, its jurisdiction is not obligatory. The jurisdiction of the ICJ includes contentious cases (i.e. there is a dispute between two member states concerning the delimitation of their borders) and advisory opinions on issues of international law (i.e. the advisory opinion on the compatibility of the unilateral declaration of independence by Kosovo with international law). States which are not parties to the dispute may present their written opinions on questions of international law in all proceedings before the ICJ as "friends of the court" (*amicus curiae* briefs). Judges of the ICJ may express their reasoned dissenting opinion. If a judgment of the ICJ is not complied with by a state on a voluntary basis, the UN Security Council may decide to adopt a resolution that the act of non-compliance equals to the breach of international peace. Also (in theory), the UN Security Council may decide to adopt some sanctions with respect to the non-compliant state, but this is rather unlikely, since the political context of adopting decisions in the UN Security Council is very delicate.

Some international organizations, such as the World Trade Organization (WTO), create their own law enforcement rules. To this end, the WTO has established its quasi-judicial body entitled the Dispute Settlement Body (DSB), which interprets the law of the WTO and often uses rules of general International Public Law to carry out this task. If a report (which is basically equivalent to a judgment) adopted by a panel or the appellate body of the DSB is not complied with, the DSB may adopt economic sanctions with respect to the non-compliant state which will also affect individuals (such as raising the customs tariffs applicable to goods to which previously reduced or no tariffs applied).

2.3 Subjects of International Public Law

International Public Law traditionally recognizes only a limited number of **subjects**, i.e. entities which have international legal personality. These include states and intergovernmental international organizations. Nevertheless, the number of **actors** in international law is much bigger and includes TNCs (trans-national corporations), and NGOs (non-governmental

organizations). Some legal instruments developed by International Public Law also protect individuals, in particular in terms of their human rights. Both TNCs and NGOs try to influence the creation of international rules by their lobbying activities. Also, NGOs often contribute with their *amicus curiae* briefs before international courts and tribunals with the aim to participate in the interpretation of International Public Law.

Some entities are treated as **semi-subjects** of **International Public Law as they are in between being a state and an international organization**, such as the Holy See (Vatican), the seat of the Roman Catholic Church. The Holy See can conclude international agreements with states, it has an observer status with the UN and it can send and receive diplomatic representatives. An equivalent of an ambassador representing the Holy See is called NUNCIUS. Also, the Holy See can grant the citizenship of Holy See to high ecclesiastical hierarchy. Since high posts in the Catholic Church can only be held by men, no woman can thus obtain the citizenship of the Holy See. The nationality of the Holy See is not exclusive. This means the member of the ecclesiastical hierarchy do not lose the nationality of his origin.

Another state element of the Holy See is its constitution. However, the usual division of state power developed by the French philosopher Montesquieu, which requires the legislative, executive and judicial power to be split among different entities, does not apply to the Vatican constitution, where all the three powers are held by the Pope, head of the Roman Catholic Church.

2.4 Constitutive elements of a state and succession of states

What makes a state a state? International Public Law requires four constitutive elements for a state to enjoy an international legal capacity. First, permanent inhabitants; second, a defined territory; third, an effective government; and fourth, a capacity to enter into international relations.

Some areas of the world lack permanent population (such as Antarctica), where an international regime for carrying out research has been put in place. With respect to the territory of a national state, the definition of its boundaries proceeds in two steps. First, there is a delimitation of the border on a detailed map, and second, there is a physical demarcation in the very border area. The national boundaries are defined by means of a three D model, since the national territory includes the airspace and subsoil of the state as well as the *terra firma* within the boundary, and the internal waters and territorial sea, where applicable. An effective government is a government which is able to exercise effective jurisdiction within the state territory. Some entities fail to meet the condition of the capacity to enter into international relations, because they have not been widely recognized by the international community, such as the Republic of Northern Cyprus which has only been recognized by Turkey.

Some entities labeled as states cannot be considered states under International Public Law, such as the so-called Islamic State, as they do not meet simultaneously all the four constitutive elements of a state.

In terms of **succession of states,** different regimes are in place depending on whether the succession concerns international treaties and membership in an international organization.

All international treaties are binding for the new states, i.e. when Czechoslovakia split in 1993, all international treaties became binding on both, the Czech and Slovak Republics respectively.

On the contrary, there is no automatic succession for membership in international organizations. Therefore, a new application of membership has to be submitted by the succeeding states. For instance, if Catalonia separated from Spain, it would not be able to keep its EU Membership, but it would have to reapply to become an EU Member.

2.5 International Organizations

Only Intergovernmental International Organizations (i.e. international organizations having national states as their members) are considered subjects of International Public Law. Private Law organizations, such as Greenpeace, which have individuals as there members, are not considered subjects of International Public Law. Intergovernmental Organizations are established by means of founding documents: There are different names for the founding documents of international organizations, such as Charter (UN Charter), Statute (Rome Statue establishing the International Criminal Court), and Treaty (Treaty on the Functioning of the European Union). The founding documents define the purpose and the objectives of the organization; its powers, the conditions of membership, the organs/bodies of the international organization; the calculation of membership contributions, the minimum number of ratifications necessary for the organization to start its operation, its seat(s) and the manner of amending the founding document.

As for the bodies of an international organization, all international organizations have a body representing the common interests (e.g. the UN Security Council) and a body representing the interests of its Member States (e.g. the General Assembly of the UN). Normally, international organizations also have an administrative body, a secretariat headed by its Secretary General. Some international organizations may have a judiciary body (such as the ICJ serving the UN) or a quasi-judicial body, such as the Dispute Settlement Body resolving trade disputes between the members of the WTO.

2.6 Implications of International Law with Respect to Individuals

Even though individuals are not subjects of International Public Law, its rules are likely to exert influence on natural persons and legal entities in a number of real life situations, such as the rules on granting nationality, rules governing extradition, the protection of human rights and responsibility for internationally criminal acts.

The nationality of business people is relevant whenever they make big international investments. If their investments have been negatively affected by actions taken by a foreign state (for instance, raising taxes for profits resulting from investments into solar panels; nationalizing privately owned property without a corresponding retribution) foreign investors may rely on bilateral investment treaties (BITs) which provide them with a privileged access to arbitration courts rather than to domestic law courts to claim compensation of damages they incurred. National states basically rely on two principles when establishing their own rules for granting nationality. The two principles are called *jus sanguinis* (nationality is derived from the

nationality of the parents) and *jus soli* (nationality is derived from the place of birth). The interplay between the principles of *jus sanguinis* and *jus soli* may lead to statelessness or dual/multiple nationality. In order to limit the occurrence of statelessness, in 1961 a special convention was concluded obliging the signatory states to apply corrective measures to their national rules on acquiring nationality. The following boxes give examples of the interplay between *jus sanguinis* and *jus soli*.

A Spanish couple spends their holiday in the Czech Republic. Their child is prematurely born within the Czech territory. Since the Czech Republic applies the principle of *jus sanguinis*, a child born within the Czech territory will not obtain Czech nationality unless at least one of the parents is Czech. Spain, on the contrary, applies as a general rule, *jus soli*. As the child was not born within the Spanish territory, it would be born stateless, if no corrective measures were adopted by Spain, allowing for the award of Spanish nationality to foreign born children whose parent is Spanish.

Now, we can twist the example detailed above.

Let us imagine a Czech couple spending their holiday in Spain. Their child is born within the Spanish territory. Following the Czech rules, the child will acquire Czech nationality and following the Spanish rules, it will also obtain the Spanish nationality. At times, where military service was obligatory in most European countries, men having two or more nationalities were facing the problem of committing the crime of serving in a foreign army. Nowadays, the defense systems of European states rely largely on professional solders and military service is mostly no longer mandatory.

Double or multiple nationality may also be linked to some advantages. If a person holding two different passports ends up in a foreign prison (for instance for drug trafficking in Thailand), the consuls of two countries will try to provide legal assistance to that person.

Apart from birth, nationality can be obtained by marriage, by long term residence in a foreign country upon completion of certain requirements (usually language and civilization tests) or by participating in investment schemes. There are currently various European Union Member States which offer investments schemes linked to obtaining the nationality of an EU Member State, for instance, Austria, Malta, Cyprus, and Portugal. Some of the schemes have been criticized by the European Commission due to a security risk they may pose if no security screening is carried out prior to awarding the nationality of an EU Member State.

Obtaining another nationality may be conditioned by giving up the previous nationality. The Czech Republic legislation provides for the possibility of obtaining the Czech nationality without having to give up the original one.

Having the nationality of an EU Member States gives rise to a number of privileges listed in the founding treaty of the European Union. EU nationals shall receive national treatment in all the other EU Member States. They shall not be treated as foreigners within the EU internal market. This means, for instance, that they can travel to other EU Member States for work, studies or for their leisure activities without the need to have visas or work permits. Also, EU nationals may set up their business in another EU Member State under the same conditions as the nationals of that state. Apart from the free movement of persons, the EU internal market grants also the free movement of goods, services and capital. Other rights of EU nationals include the possibility to petition the European Parliament if they believe that their national

state has misapplied EU law, to lodge a complaint to the European Ombudsman, should an EU body or institution commit maladministration. Also, EU citizens may turn to another EU country´s embassy for help (for instance if they lose their passports) should their own country be not represented in the third country concerned. Countries which are not members of the EU are called "third countries". There are only three countries in the world, where all EU states are represented by their respective embassies, in particular, the United States, Russia and China.

International Public Law can influence real life of individuals also with respect to **extradition rules.** The Oxford Dictionary of Law defines extradition as "The surrender by one state to another of a person accused of committing an offense in the latter." For extradition to occur, there must be a valid bilateral treaty (called extradition treaty) between the requesting state and the requested state. For instance, the Czech Republic has bilateral treaties with all former socialist countries; on the contrary, the Czech Republic has no bilateral treaty with South Africa, a popular destination for Czech criminals trying to escape justice. The act for which extradition is requested, must be criminal in both states concerned. Extradition cannot proceed for political crimes. Apart from states, also international courts and tribunals (such as the International Criminal Court) may ask states to surrender their own nationals accused of committing serious crimes.

The impact of International Public Law on the **protection of human rights** will be discussed in Chapter 5 in further detail.

Individuals, who breach rules of international law, can be held **accountable for their acts** before international courts and tribunals which usually have complementary jurisdiction. Complementary jurisdiction means a last resort jurisdiction which only applies if national states are unwilling or unable to prosecute serious crimes against international law. In the history of human kind, there was a number of *ad hoc* criminal courts which dealt with particular situations (such as the International Criminal Court for Former Yugoslavia). **In 1998 the first permanent International Criminal Court** (based in The Hague) **was set up** following the ratification of the Rome Statute, its founding treaty. The International Criminal Court is not a judicial body of the UN. It enjoys the status of a separate international legal entity.

The International Criminal Court (ICC) started being operative as of 1 July 2002. **It can only try individuals, hence it has no jurisdiction against states.** The ICC can only hear cases which occurred after 1 July 2002 and has no retroactive jurisdiction. Its jurisdiction includes genocide, war crimes and crimes against humanity. A Member State or the UN Security Council may refer a case to the ICC. It can also try cases where the crime was committed on the territory of an ICC Member State or by a national of an ICC Member State. However, many big countries have not joined (nor do they wish to join) the ICC (US, Russia, China). In the early years of its functioning, the ICC concentrated mostly on situations in Africa. Currently, also situations in Latin America and Asia are under investigation. The ICC has no prison (only a detention center) of its own. If an individual has been sentenced to imprisonment, the court has to rely on the willingness of its state parties to house the criminal in one of their national prisons. The Nordic countries are particularly willing to provide their assistance in these cases.

The jurisdiction of the ICC is complementary, i.e. it is a court of last resort that steps in only if the corresponding national court is unwilling or unable to try the suspect criminals itself.

As for its composition, the ICC consists of the Presidency (comprising 3 judges), of Chambers (pre-trial, trial and appeals chambers), of the Office of the Prosecutor and of the Registry. The pre-trial chamber is in charge of issuing an arrest warrant. The trial chamber has to decide whether the suspect is guilty or not and if he/she is guilty it has to decide on the length of the sentence and on reparations to be paid to the victims. The appeals chamber can confirm, reverse or amend the decision taken by the trial chamber or it can order a new trial. In this case, the composition of the trial chamber has to be different to the original one. Persons sentenced to a liberty penalty have to serve it outside the Netherlands, ideally in their home country, if this is impossible in another ICC Member State that volunteers to execute their liberty sentence.

2.7 Summary

This chapter has discussed the origins of International Public Law, the difference between International Public Law and International Private Law, the concept of national states and International Organizations, the differences between subjects and actors of International Public Law. Also, it dealt with the impacts that International Public Law can have on the legal status of individuals, natural persons and legal entities alike.

With respect to real life situations business people may encounter in practice, the notion of nationality was introduced as a key criterion for benefiting from the special protection provided by bilateral investment treaties (BITs). Also, the possibility of acquiring nationality by participating in an investment scheme was addressed. The legal conditions for extraditing accused persons who may have committed fraud while doing their business were discussed and so was the concept of EU nationality which grants a number of privileges to the national of EU Member States within the EU internal market.

2.8 Self-assessment questions/tasks

1. What is the difference between International Public Law and International Private Law? Give an example of a real life situation governed by International Public Law, on the one hand and by International Private Law, on the other hand.

2. What is the difference between subjects and actors of International Public Law?

3. What is the name of the judicial body of the UN and of the quasi-judicial body of the WTO?

4. Can the Vatican be considered a state or an international organization?

5. What are the constitutive elements of a state? Does the so-called Islamic State meet these criteria?

6. How is the national territory defined under International Public Law?

7. If Catalonia breaks away from Spain, will it be still part of the EU?

8. Give an example of a situation where the interplay of *ius soli* and *ius sanguinis* would cause either double nationality by birth or statelessness by birth.

9. On which conditions will a state surrender a suspected criminal to another state?

10. Fill out the following table to distinguish the jurisdiction of the ICJ and ICC.

Name of the court	UN body or independent?	Jurisdiction with respect to states or individuals?	Example of a resolved case
ICJ			
ICC			

2.9 Further reading/listening

Printed books:

Kaczorowska, Alina: Public International Law, 5th ed., Routledge, 2015 (preview available at books.google.com)

Online resources:

Bauböck, Rainer; Perchinig, Bernhard; Sievers, Wiebke (eds.), Citizenship Policies in the New Europe, Amsterdam University Press, 2009 (full view available at books.google.com)

Documentary videos:

"ICC Institutional Video, 2018" available at:

https://www.youtube.com/watch?v=gwhufH4vNzY (last accessed on February 15, 2019)

"Lecture 2B: Enforcement and Interpretation in International Law" by prof. Givens

https://www.youtube.com/watch?v=2pr9ziZjpeI (last accessed on February 15, 2019)