

The Creation of the United Nations: Break with the Past or Continuation of Wartime Power Politics?

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Abstract The article sheds light on the perception of the creation of the United Nations past and present. While the creation nowadays typically is treated as part of a “1945 as Year Zero” narrative, marking a clear break with the past, contemporaries of the founding predominantly had a different view. At the end of World War II, many regarded the new organisation as a continuation of wartime power politics or even denounced it as “great power dictatorship with impunity”. The article explains the contrast, on the one hand, by the rapid downsizing of post-war order plans during the war. The new security architecture was a disappointment for many, and progress in other important fields such as self-government of dependent peoples, human rights, and economic and social development also was modest. On the other hand, the contrast is connected with the necessity to periodise the history of international law. Periodisations are influenced by present needs and values, and the break narrative fits well with the pressing demand for a legitimate world organisation.

Keywords creation of United Nations, UN Charter, peace and stability, decolonization, beginnings of international human rights protection, periodisation of the history of international law

Die Gründung der Vereinten Nationen: Bruch mit der Vergangenheit oder Fortsetzung der Weltkriegspolitik?

Abstract Der Beitrag beleuchtet die Wahrnehmung der UNO bei ihrer Gründung und in der Gegenwart. Während ihre Schaffung heute typischerweise Teil einer „1945 als Jahr Null“-Erzählung ist, die den Bruch mit der Vergangenheit betont, war die Wahrnehmung 1945 für viele eine andere. Manche kritisierten die UNO als „Verlängerung“ der Kriegspolitik und betrachteten sie als Ausdruck einer neuen Hegemonie und Diktatur der Großmächte. Der Kontrast zwischen den Wahrnehmungen erklärt sich zum einen durch die Redimensionierung der Nachkriegspläne während des Krieges. An dessen Ende war die neue Sicherheitsarchitektur für viele eine Enttäuschung, und auch die Fortschritte in Bereichen wie Entkolonialisierung, Menschenrechte und wirtschaftliche und soziale Entwicklung waren bescheiden. Zum anderen steht der Kontrast in einem Zusammenhang mit der Notwendigkeit, die Geschichte des Völkerrechts zu periodisieren. Periodisierungen sind durch Bedürfnisse und Wertvorstellungen der Gegenwart mitgeprägt. Das „break narrative“ orientiert sich wesentlich am heutigen Bedürfnis nach einer legitimen und funktionierenden Weltorganisation.

Keywords Gründung der UNO; UNO-Charta; Frieden und Stabilität; Dekolonisierung; Anfänge des internationalen Menschenrechtsschutzes; Periodisierung der Völkerrechtsgeschichte

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1 Contrast in Perceptions: The Act of Creation then and now

1.1 Founding of the UN: Year Zero or Continuation of Wartime Politics?

“1945” has become a cipher for a new beginning and break with a tragic past. The ambiguous, but predominantly positive ring of the date is created by a bundle of associations. It refers to the war’s end and its last months and evokes images of people working in destroyed cities, of Allied troops in Berlin, and of the liberation of the concentration camps. Other associations are the new solidarity, sometimes among former enemies, the creation of the United Nations as the new world organisation, and the dock in Nuremberg with the former political, military and economic leaders of Germany put on trial. Associations vary in time and place, but a common denominator seems to be that 1945 has become “year zero”¹, at least in the Western imagination – a synonym for the beginning of a new epoch.² Some regard the year even as more than “just” the threshold between two epochs. It has been suggested to regard 1945 as the beginning of a new geochronological era, the “anthropocene”; the first nuclear bomb explosion, the argument goes, has radically and irreversibly changed the conditions for human life.³

Against this background, the creation of the UN tends to appear as a – relatively – idealistic new start for humankind.⁴ From a typical early 21st century perspective, the act of creation was the moment, when the light came back, an “hour of glory”;⁵ and the beginnings of the new world organisation – with US “New Deal” President Franklin D. Roosevelt as main architect – look like a kind of “New Deal for the world”, a social-democratic project for peace-loving states with human rights prominently mentioned in Article 1 of the Charter. The more time elapses, the more this narrative seems to be the self-evident historical truth. More critical views in recent historiographical research had virtually no impact on this reading.⁶ When a scholar writes that “today the world would not design something as strong as the UN Charter of 1945”⁷, he only seems to express the obvious.

The perception by contemporaries of the founding, however, is not easy to reconcile with this narrative. There was, of course, great relief that the organisation could be established after protracted negotiations and despite the growing divide between the Western Allies and the Soviet Union. Relief, however, does not mean that the result was borne by a feeling of jointly having paved the way to a better future. The picture was very mixed. Unsurprisingly, the most affirmative voices came from the great powers. US President Harry Truman

1 See, for example, the book “Year Zero. A History of 1945”, published by Ian Buruma in 2013, which explores the feeling of those searching a return to normality after World War II.

2 In Germany, “hour zero” became a popular formula from the 1950s on for the immediate post-war time. It implied that the end of the war had brought a complete new beginning and its reception was closely connected to the neorealist movie “Germania Anno Zero” by the Italian director Roberto Rossellini released in 1948. Critical with respect to the “new beginning” thesis, i. a.: Kocka 2006, p. 15–29. See also Winkler 2000, pp. 116–121.

3 Zalasiewicz *et al.* 2015, pp. 196–203.

4 For such a reading see, e. g.: Fassbender 2009, i. a. p. 82–94; Weiss 2015, p. 1230; Martinez 2003, p. 463; Kotzur 2017, p. 107; Khan 2012, pp. 1–23.

5 Neue Zürcher Zeitung, 29 January 2002.

6 See i. a.: Mazower 2009 (claiming continuity between the League of Nations and the UN), pp. 14–16, 194–203; White 2019, i. a. p. 282; Cottrell 2014, i. a. p. 103. Also: Hathaway/Shapiro 2017 (constructing the Peace Pact of 1928 as the turning point).

7 See Doyle 2014, p. 85.



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compared the drafting process with the elaboration of the US Constitution,⁸ emphasizing its potential, and the British delegation rather reservedly called the Charter a “notable advance” on all that had gone before.⁹ Soviet Foreign Minister Wjacheslav Molotov, a notorious sceptic of the West, praised the UN at the final plenary session in San Francisco – which more than once had been an unlikely outcome.¹⁰ The main Allies had reached their primary goals. For the US, the creation of the UN had been one of their war aims, but they also wanted the Soviet Union to enter into the war against Japan. Stalin promised to do so within three months after the German capitulation, and he in principle kept the promise. In return, the Western main Allies were prepared to accept Soviet territorial claims in Eastern Europe and the veto right of the permanent members (Permanent Five, “P5”) in the Security Council.¹¹ Last but not least, the British had succeeded to save their empire.

Many states – whether invited to San Francisco or not – were disappointed with the Charter. Not few formulated criticism from moderate to harsh and expressed their discontentment. France, which had regained its great power status only at the Yalta Conference in February 1945, generally distrusted the global approach of the Charter’s security system. It regarded the “automatic nature” of regional arrangements the essential element of a functioning international security system.¹² Offended for not having been involved into the drafting process at an earlier stage, France made no effort to hide its perplexity. Small and middle states started to grumble over what was going to take shape already before the San Francisco Conference. The plans of the Big Three had gradually been brought to light. The foreign minister of Chile, for example, blamed the proposed Charter for being simply “not in accord with sovereign equality” of “peace-loving states” and putting the permanent members “above the law”.¹³ The veto right of the P5 and the fact that small and middle states had almost no say on other key elements of the Charter enraged many and was difficult to digest even for the most loyal Allies. The United States, Great Britain and the Soviet Union (and to a lesser extent also China) had kept the drafting process strictly in their own hands – before and at the San Francisco Conference.

1.2 Part of a Package Deal: Concessions Among the Main Allies

For the understanding of the Charter adopted in San Francisco, it is fundamental that the draft discussed from 25 April to 26 June 1945 was part of a complex bundle of concessions among the three main Allies. There were many open and hidden concessions and trade-offs. The package had begun to take shape long before the conference, and it concerned all strategic war aims. At the Dumbarton Oaks Conference in August and September 1944, for the first time a concrete provisional draft of the Charter of the new organisation was discussed and negotiated among the Big Three (plus China). Compromises were pre-structured, and, as a consequence, there was not much room left in San Francisco for concessions to middle and small states. Their say was limited to peripheral aspects. The Belgian foreign minister com-

8 Arne 1945, p. 131.

9 Daily Mail, 27 June 1945, quoting Lord Halifax.

10 Mark 2001, p. 12.

11 On the complex Soviet position in particular: Pechatnov 1995, pp. 1–25.

12 Schlesinger 2003, p. 101.

13 Schlesinger 2003, pp. 100–101.



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plained after the opening of the conference that representatives of small nations were even expected to wait before they were allowed to speak.¹⁴ Independent observers noticed the complete absence of idealistic ambitions in San Francisco – in stark contrast to the spirit at the Paris Peace Conference after World War I. Of the “old Geneva idealist typus”, the leading Swiss newspaper wrote, only few were left, and it added that the new type of statesman one encountered in San Francisco was “more sober, more decided and more illusionless”.¹⁵ The “peace through law” spirit of the early League of Nations years was only a memory of the past. Another observer noticed after the conference that the Security Council seemed to have been created to prevent wars between the small countries, but not between the big five.¹⁶ Most delegations thought that there simply was no alternative to accepting the proposal by the great powers. Many perceived it as rude or even hyperrealist. In 1947, ICJ Judge Charles de Visscher complained that the UN Charter had forsaken the moral principles on which the post-war order was supposed to be based.¹⁷ The contrast to today’s predominating narrative could hardly be bigger.

1.3 Aim of the Article: Explaining the Contrast in Perceptions

The article deals with the contrast between the perceptions then and now. My intention is neither to defend one as right nor to denounce another as wrong, but to explain why “the same event” is perceived so differently as time elapses. I will argue that a substantive part of the criticism formulated in 1945 – and immediately after the war – was caused by the downsizing of post-war order plans during the war. Disappointment and disillusionment played an important role. I will discuss main elements of the earlier plans which concerned not only the key field “peace and security”, but also other important topics such as self-government of dependent territories and human rights, and, to a lesser extent, economic and social development and the rule of law in general. I will further argue that the contrast is connected with the necessity to periodise history in general and the history of international law in particular. Periodisations are influenced by present needs and values. I suggest that the break narrative fits well with the pressing present demand for a legitimate world organisation and is part of the endeavours to increase the legitimacy of today’s UN.

2 Contemporaries of the Founding: Downsizing of Post-war Plans

2.1 Stability: From Global Peace Management to Great Power Dictate

In summer 1937, in the middle of pre-World War II crises, the US government formulated new geostrategic guidelines. While the post World War I order was rapidly declining, and “the hopes, the visions, of Wilson, Cecil, Smuts, and their millions of equivalents, collapsed into rubble”¹⁸, the US already began to reflect on how a more stable world order could be

14 Neue Zürcher Zeitung, 26 April 1945.

15 Neue Zürcher Zeitung, 29 April 1945.

16 Wilcox 1945, p. 95.

17 See discussion of the Institut de Droit International at its meeting in 1947 on the topic “Les droits fondamentaux, base d’une restauration de droit international” (41 *Annuaire de l’Institut de Droit International* (1947), pp. 142–190, 153).

18 Kennedy 2006, p. 23.



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reached and what world peace would require. The guidelines mentioned the reduction of trade barriers, the limitation of armament, the regular convening of international conferences, and the creation of a new world organisation which would replace the League of Nations.¹⁹ Core ideas were that the new organisation should be led by the two greatest powers, the US and Great Britain, and that the order should be more power-based. Many of the ideas formulated in 1937 would be of long-term relevance. Immediately after the outbreak of World War II, the State Department established an in-house research team to reflect on a “global security plan”.²⁰ This was more than two years before US involvement into the war, but the US already sketched out a first possible form of a new “international machinery”.²¹ The three cornerstones were the departure from the unanimity requirement of the League of Nations, a special status for great powers in a stronger executive body, and own armed forces of the organisation for the preservation and enforcement of peace.

In August 1941, a new and better organisation officially became a joint American-British war aim. Roosevelt and Churchill met on a warship near the coast of Newfoundland to discuss war and post-war perspectives and to declare their common aims in the “Atlantic Charter” of 14 August 1941. The text mentions a new, but still unspecified “general security system” to replace the League, and Roosevelt and Churchill agreed on a ban on the use of force between states and even the threat of using of it. There should no longer be room for aggression and “gunboat diplomacy” which also had proven to be too dangerous in the past. Some months later the US were attacked themselves and dragged into the war. An Allied war coalition was formed, and the war aims of the “Atlantic Charter” became the Allies’ war aims through the “Declaration by United Nations” of 1 January 1942. It was signed by 22 states and provided the basis of the alliance against the Axis Powers.

American and British ideas differed substantively with respect to the future organisation. Roosevelt’s original plan was to establish a monopoly of military power of few great powers. He first imagined the US and the UK as the world’s leading powers would control the complete disarmament of all former enemy states. In 1942, he temporarily even imagined that *all* states would be disarmed, except the US, the UK and the Soviet Union as the world’s policemen.²² Churchill distrusted Roosevelt’s ambitious plans. He wanted a more regionalised security system as the great powers interests varied from region to region.²³ Churchill preferred a world organisation more similar to the League of Nations, with a more appropriate representation of the regions. Roosevelt regarded Churchill as a representative of the old world of colonialism. He also suspected Churchill that he would try – as in World War I – to conclude secret accords and to strive for territorial gains and therefore insisted on the inclusion of the principle of “no aggrandisement, territorial or other” into the Atlantic Charter.²⁴

Concrete discussions on the new organisation began in 1943. Roosevelt’s devise was “first things first” which required a foreseeable victory over Germany before details of the new organisation could be negotiated. In August 1943, the State Department elaborated the

19 Volger 2008, p. 1; O’Sullivan 2008, pp. 2–15.

20 Schlesinger 2003, p. 33.

21 Luard 1982, pp. 17–18.

22 See Volger 2008, pp. 5–6; Luard 1982, p. 19; Gaiduk 2012, pp. 11–12.

23 Churchill 1976, p. 459 (personal memorandum of 27 January 1943); Luard 1982, p. 20. More detailed on Churchill’s ideas: Hughes 1974, pp. 177–194.

24 Volger 2008, pp. 2–3.



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first draft of “The Charter of the United Nations”, the so called “Staff Charter”, or blueprint for the UN Charter.²⁵ At the Tehran Conference from 28 November to 1 December 1943, when the Big Three – Roosevelt, Churchill and Stalin – for the first time met in person, Roosevelt explained his concept of “Four Policemen” (China being the fourth) and his idea to create, besides the General Assembly, an “executive body” which would deal with non-military issues, and a superior “chief enforcement body” with the competence to deal with any threat to peace and emergencies.²⁶ Stalin and Churchill accepted the core idea of the new organisation. The three main Allies agreed to maintain their war alliance after the war.²⁷ Details of the new organisation were deliberately left open. Roosevelt, Churchill and Stalin agreed to welcome “other democratic nations” in the organisation provided they were “peace-loving”.²⁸ The United Nations were imagined as an extended war coalition.

Roosevelt’s key argument for the dominant role of the four great powers was that they represented roughly three quarters of the earth’s population.²⁹ No aggressor nation, he argued, would be able to start another world war as long as the Big Four stuck together. Roosevelt wanted the new organisation to be a pragmatic construction. It should not be built on “welfare politics” or “wishful thinking” as its predecessor.³⁰ Wilson’s mistakes should be avoided.³¹ Immediately after the Tehran Conference, from early December 1943 on, the State Department further elaborated on the “Staff Charter” and called the new “draft Plan for the Establishment of an International Organisation for the Maintenance of International Peace and Security”. It was handed over to Roosevelt on 23 December 1943 and relabelled as “Outline Plan”³² and finally became the basis for the “Tentative Proposals for an International Organisation” which were discussed at the Dumbarton Oaks Conference. At this point, Roosevelt had dropped the idea of complete disarmament of middle and small states.³³ No further attention was paid to Churchill’s plan of a more regionalised security system with “councils” for Europe and Asia and possibly America.³⁴ What finally made its way into the Charter of the concept of regionalism, was only the idea of the lawfulness of regional organisations of collective self-defence.

A revitalisation of the League of Nations was never a real option. The reputation of the League became disastrous in the 1930s – “the greatest crisis of all to the international rule of law”³⁵ –, and the specific history of failed ratification of the League’s Covenant in the US Senate (as part of the Versailles Treaty) made the creation of a new organisation the only

25 In: Notter 1949, pp. 526–534.

26 Luard 1982, p. 24.

27 On the idea of a “big power oligarchy” and its underlying assumptions: Luck 2008, pp. 73–81.

28 Luard 1982, p. 24.

29 New York Times, 25 December 1943.

30 Saturday Evening Post, 10 April 1943; the article was published by the journalist Forrest Davies who was known as the “mouthpiece” for the Roosevelt Administration.

31 On the perception of the missed chances after World War I see Welles 1944, pp. 7–36 (he entitled the respective chapter “It Might Have Been”).

32 Volger 2008, pp. 9–12.

33 Luard 1982, p. 21; Volger 2008, p. 7.

34 Churchill 1976, pp. 519–523 (personal memorandum of 22 May 1943); Boyd 1971, p. 57; Volger 2008, p. 2; Luard 1982, p. 20–22. When Churchill was in Washington in May 1943, he modified his original proposal and suggested a dual system with a “world council”, consisting of the Big Three, and “regional councils” which would avail of own armed forces.

35 Kennedy 2006, p. 23.



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feasible option. Roosevelt also deemed the birth deficiencies of the League incurable. The founders had falsely assumed that an unfavourable public opinion against a lawbreaker, produced by the League's Council, would prove to be an effective sanction. Not even the unanimity requirement was regarded to be a major obstacle as they assumed that the majority would acquiesce. The assumption that cooling off periods required by the Covenant in case of conflict would contribute to avoiding wars also proved to be a misjudgement.³⁶ In reality, those getting under pressure simply withdrew from the League: Japan after the Manchuria crisis, Germany nine months after Hitler's coming into power, and Italy in the course of the Abyssinia crisis.

For most states, the Conference of San Francisco was a sobering experience. Their influence was limited to peripheral decisions, and it is only a small exaggeration to say that the conference provided the scenery for a dictate by the Big Three. Many small and middle states regarded the rights of the P5 as a provocation.³⁷ Instead of a security architecture for all, some argued, the Big Three had invented a body with the competence to create "law above the law". A Turkish delegate and minister criticised the setup as to be destined "to make lawful the projects of large powers", with the voting procedure in the Security Council "ensuring them impunity".³⁸ The small were "inevitably going to be reduced to the status of satellites", he further complained.³⁹ Many had difficulties to accept that there was no obligation at all to react in case of a crisis – an option entirely in the hands of the great powers. No duties were created that corresponded with the privileges granted by Article 27 of the Charter.⁴⁰ Some small states such as New Zealand wanted mandatory action against an aggressor, an unconditional duty to react to an aggression. They imagined the UN as a multilateral defence pact and wanted something like Article 5 of the future NATO treaty which provides mandatory action in case of an aggression against a member. The great powers would never have consented to such a proposal as it would have nullified their veto right.⁴¹

A less ambitious UN was created. It was an organisation grounded in wartime realities, a sober war product in the eyes of most contemporaries. Roosevelt had insisted that the negotiations took place still during the war as this gave military power more weight. "This time," he said on 1 March 1945 in the House of Representatives, where he was promoting the UN, "we shall not make the mistake of waiting until the end of the war to set up the machinery of peace."⁴² Roosevelt was aware that the suggested UN would not please many. But he hoped that its long-time achievements would give him right.⁴³

36 The moratorium idea was strongly propagated by the so called Bryce group during the war, a group of British liberals devoted to studying international relations and options to make the world more secure. It was developed in their publication "Proposals for the Avoidance of War" which was printed in several versions over the time from autumn 1914 on. It became the most important source of key concepts and even language of the 1919 Covenant of the League of Nation. See Dubin 1970, p. 288–318.

37 Wilcox 1945, p. 947.

38 Schlesinger 2003, p. 64.

39 Schlesinger 2003, p. 64.

40 On the reasons of the major powers insistence on the veto: Fassbender 1998, pp. 165–168.

41 Wilcox 1945, p. 946.

42 Schlesinger 2003, p. 64.

43 For a both interesting and critical look back after twenty years by US Dumbarton Oaks delegation member Benjamin Cohen: Cohen 1966, pp. 185–207.

2.2 Decolonisation: From Self-Government to Trusteeship over Enemy Territory

The Atlantic Charter had also nourished hopes of colonial peoples for independence. Two out of seven principles of the Charter concerned their situation. Principle Two was a declaration by the US and the UK of a “desire” that after the war there should be “no territorial changes that do not accord with the freely expressed wishes of the peoples concerned”, and Principle Three postulated that the new order of the world be based on “respect” for the right of all peoples “to choose the form of government” and that the sovereign rights and self-government be restored to “those who have been forcibly deprived of them”. The words were vague, but the idea was clear, and it contradicted the interests and the policy of the UK.⁴⁴ Roosevelt, who regarded colonialism a backward European strategy of domination, demanded these concessions from the British.⁴⁵ Since the early 19th century, the US had tried to fend off European colonialism in the Western hemisphere.⁴⁶ Churchill, who needed the American support against the Axis Powers, had no choice than to accept Roosevelt’s proposal.

In the interwar years, colonial rule had been gradually more challenged. In the 1920s and 1930s, it was on a path of slow decline.⁴⁷ Already at the end of World War I, there had been a number of insurgencies, for example in Egypt, Ireland, China, Korea, Syria, and Iraq which preshadowed the next decades. From 1917 on, challenging colonialism became a certain pattern which could be observed in many regions. In India in particular, a strong movement for independence arose, receiving worldwide attention, and in Vietnam, an already strong movement became even more influential. There were numerous local rebellions. The right to self-determination of peoples, proclaimed by Woodrow Wilson in his State of the Union Address of 1918, allowed to frame the ambition to independence or autonomy in legal terms. This was a fundamental shift which promoted the emergence of transnational movements against colonialism and provided them with common semantics and aims.⁴⁸

The schizophrenic character of the mandate system of the League of Nations was an essential part of colonialism’s decline.⁴⁹ Mandate means temporarily limited governance in the interest of the governed – so the label of the mandate system contained the nucleus of its self-destruction. Both the concepts of self-determination and mandate were expressions of fundamental changes with respect to how the relationship between rulers and governed could and should be conceived if it were to be regarded as legitimate. A third factor accelerating the decline were the far-reaching promises the Allied colonial powers had made to colonial peoples during World War I.⁵⁰ They had created expectations that more autonomy or even independence would be granted after the war. The promise with probably the most far-reaching repercussions was the Entente powers’ promise of a nation state to the Arabs, in exchange for their support against the Ottoman Empire. Even though there were countless setbacks for independence movements in the interwar years, the years after World War I were the beginning of the end of colonialism. The war irreversibly had discredited the idea

44 On the reception of Atlantic Charter in the colonial sphere see Nwaubani 2003, pp. 507–509.

45 On Roosevelt’s convictions: Orders 2000, pp. 63–84.

46 LaFeber 2000, pp. 24–40.

47 Jansen/Osterhammel 2012, pp. 28–44.

48 Thürer/Burri 2012, N. 4.

49 On the double character of the mandate system: Tuori 2016, pp. 43–44.

50 Jansen/Osterhammel 2012, p. 31.

of imperial dominance. The Atlantic Charter of 1941 was in line with these long-term developments and seemed to promise the next steps.

The Charter adopted in San Francisco was a dramatic setback for colonial peoples – if the Atlantic Charter is used as the yardstick. On the surface, colonialism survived almost untouched, some even thought it had gained new strength. The United Nations were founded by 49 states (plus Ukraine and Belarus) which were not so many more than the 32 founding members of the League of Nations.⁵¹ The early UN rather was an accomplice in the continuation of colonialism than an opponent, it looked in this respect like a rebirth of the old world.⁵² Roosevelt clearly had given the security system priority over his aim to end colonialism. Even though self-determination is mentioned in Article 1 of the Charter, there is not a hint of an obligation to lead subject peoples towards independence. The mandate system was basically reinvented and renamed. Almost exclusively former enemy territories and mandates were included in the trusteeship council system, as after World War I, and it covered only roughly one tenth of colonial subjects.⁵³ The supervision authority deliberately was weak. When the French heard rumours that the Americans were pressing a committee for colonies modelled on the controversial Mandates Commission of the League, they went to the Soviets and asked for guarantees that no action be taken against the French possessions.⁵⁴ The old colonial powers were determined. Resurrected France bombarded Damascus in May 1945, during the San Francisco Conference, to suppress insurgents.⁵⁵

Noteworthy, the draft elaborated at the Dumbarton Oaks Conference in summer 1944 had not even mentioned self-determination. The Dumbarton Oaks documents left 750 million human beings outside the new world organisation – as if the Atlantic Charter had never been.⁵⁶ All references to Decolonisation had been dropped at the time. US priorities had gradually shifted since 1941. Enemy territory to some extent became the object of bargains. In Yalta, the US themselves concluded secret accords with the Soviet Union, in which, i. a., Sachalin was promised to Stalin.⁵⁷ As a consequence of these shifts in the war's final years, colonialism temporarily re-emerged, and the Charter became an essential part of this setback. Post-war years were brutal, and even the framing of the Universal Declaration of Human Rights – the breakthrough of universalism in conventional narratives – has prominently been called “a mere sideshow” to the “world reimposition of empire”.⁵⁸

2.3 Human Rights: From Key Element to Vague Aim

Human rights had also played a role in early post-war plans. Roosevelt recognised a direct connection between the protection of fundamental rights and international security; liberal societies tend to be less aggressive. In his State of the Union Address of January 1941, he declared that the protection of “four freedoms” – “freedom of speech and expression”, “freedom of worship”, “freedom from want”, and “freedom from fear” – would be essential to

51 Jansen/Osterhammel 2012, p. 13.

52 Moyn 2010, p. 93.

53 Moyn 2010, p. 94.

54 Schlesinger 2003, pp. 98–99.

55 Neue Zürcher Zeitung, 23 April 2020.

56 Moyn 2010, p. 93.

57 Schlesinger 2003, p. 61.

58 Moyn 2010, p. 95.



make the world more secure. He did not want a catalogue of rights, but a concise formula, a rallying call with strong appeal. The prize was the use of very vague notions such as “freedom from want” and “freedom from fear” which signified more political goals than claims an individual concretely could rely on. A catalogue such as those of the 18th century would have caused endless discussions and undermined the aim. The formula became the core of Roosevelt’s early wartime freedom rhetorics. When the Allied Powers declared their war aims on 1 January 1942 in the Declaration by United Nations, protection of human rights was included. Roosevelt’s insistence on a bundle of essential freedoms was not nearly as “logical” as one might be tempted to think from today’s perspective. In the interwar years, there had been no political or intellectual movement to defend freedom as such. Both fascism and communism threatened individual liberty, but freedom rather was understood as being part of the postulate of democracy; the liberal society defended democracy, not liberty in the 1930s.⁵⁹

When Roosevelt developed the “four freedoms” rhetorics, human rights only had a modest pre-history on the international level. During World War I, a British movement – the “Fight for Right Movement” – had demanded that the war be fought in the name of higher aims such as “human rights”.⁶⁰ The influence of the group was rather limited, however, and the end of the war completely changed the situation. At the Paris Peace Conference, Woodrow Wilson proposed to include an obligation into the Covenant to respect for religious freedom.⁶¹ Religious freedom had played a key role in US history before the founding of the union. The British delegation suggested going even further and proposed a right of the League to intervene against all states that disturbed world peace by a policy of religious intolerance.⁶² The US distrusted the British proposal and suspected the Europeans might use such a right to intervene in the American hemisphere. Wilson rejected. Japan, too, came up with a proposal and suggested a clause on equal and non-discriminatory treatment. It had made its experience with European racism, but the US and UK were not willing to accept obligations that were contrary to their own practices towards the blacks and their colonies.⁶³ The most relevant human rights related achievement of the League probably was its so called minority protection system.⁶⁴ World War I had brought the end of no less than three multinational empires – Austria-Hungary, the Russian Tsar Empire, and the Ottoman Empire –, and it had produced a number of new states with minorities. The victors imposed obligations on the defeated to protect their minorities. Many protested, and some demanded a convention that would bind all League members. The delegate for Haiti, Antoine Frangulis, even suggested general guarantees of human rights.⁶⁵ The Institut de Droit International, too, took up the topic. Ambitious studies were undertaken in the second half of the 1920s, and in 1929, a “Déclaration des droits internationaux de l’Homme” was adopted at the plenary session in New York. Against this background, Roosevelt’s initiative in 1941 appeared as a big step forward.

59 Burgers 1992, pp. 459–464.

60 Younghusband 1915, p. 5.

61 Burgers 1992, p. 449.

62 Burgers 1992, p. 449.

63 Burgers 1992, p. 449.

64 Mazower 1997, pp. 47–63.

65 Burgers 1992, p. 457.



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In the UN Charter, however, human rights are a peripheral topic. It is mentioned among the purposes, but none of the provisions of the Charter grants a concrete right upon which individuals could rely on. When the plans for the new organisation were discussed in detail, the Soviet Union made clear that it would never accept a human rights catalogue. Stalin denied a connection between human rights and international security. In the Soviet perception, most classical fundamental rights served the “bourgeois” Western world, and any catalogue would only contribute to westernizing the UN. Churchill was reluctant, too, as he feared a negative impact of human rights guarantees on the Commonwealth. Even the US gave the topic a lower priority in the course of the war. Soviet support in the war against Japan was much more important. At the Dumbarton Oaks Conference, human rights temporarily even completely disappeared from the draft. They made their way back afterwards, but their role remained peripheral. Latin American states and some NGOs had lobbied for the cause. The early UN was an organisation for the promotion of sovereign nations and not an advocate of individual rights.⁶⁶ The adoption of the Universal Declaration of Human Rights three years later, without any binding character, was a further disappointment of wartime human rights hopes.⁶⁷ A hero of human rights history, Hersch Lauterpacht, called the declaration dangerous because useless.⁶⁸ Despite the controversial discussion of its drafting, it enjoyed, however, attention by intellectuals from across the globe.⁶⁹

2.4 Further Topics: Economic and Social Progress and Rule of Law

Another lesson Western planners and politicians drew from the interwar years related to the economic and social collapse of the open market system. They believed that the breakdown was the root cause of the political unrest and extremism that had led to the wars – “[d]esperate men do desperate things”⁷⁰. Therefore the Atlantic Charter had also addressed economic and social progress in general. The topic deserves some attention, too. Once more, Roosevelt’s convictions initially were the driving force. He adhered to ideas of free trade and the – moderate – modern social state and thought that there had to be a commitment of the new world organisation to economic and social progress. Principle Four of the Atlantic Charter stated that the enjoyment “by all states” of access “on equal terms” to trade and raw materials was to be furthered, even though only with “due respect for their existing obligations”, and Principle Five mentioned a “desire” of the US and the UK to bring about “fullest collaboration between all nations in the economic field” with the object of securing improved labour standards, economic advancement, and social security. Principle Four was much more disputed than Principle Five. The fundamental problem was that Roosevelt’s ideas about free trade were not compatible with British preferential policy within the Commonwealth. Principle Four was reformulated several times.⁷¹ Churchill first suggested a joint commitment by the US and the UK to “a fair and equitable distribution” of essential produce “between the nations of the world”. The US rejected the proposal as the formulation was

66 Moyn 2010, p. 196.

67 Moyn 2010, p. 2.

68 See Lauterpacht 1948, pp. 354–381.

69 Kennedy 2006, p. 179.

70 Kennedy 2006, p. 30.

71 See Russell 1958, pp. 35–37.



too close to a number of declarations at economic conferences before the war that it meant, according to US Undersecretary of State Sumner Welles, “precisely nothing”.⁷² Welles made a new suggestion. He put more emphasis on the necessity of access to raw materials and the obligation to not discriminate, but now Churchill declined. Even though personally in favour of liberal trade policies, the non-discrimination clause would have had far-reaching consequences for the relations within the empire. Roosevelt finally gave in. He accepted the “with due respect for their existing obligations” clause as he wanted to avoid further delay.

Discussion on the concrete implications of the declared principles was postponed. It began at the Moscow Conference in October and November 1943, where the foreign ministers of the Big Three met. One month later, at the Tehran Conference, when Roosevelt displayed his ideas about the new world organisation to Stalin, he mentioned an “executive council” with vaguely the tasks of today’s ECOSOC. It should be composed like the Security Council and make recommendations in fields such as, for example, agriculture, nutrition or health.⁷³ The UK and China wanted the executive council to be even the main responsible body of the organisation.⁷⁴ They in principle supported the US which feared the return of national economic policies and militarism of the 1930s.⁷⁵ The US put the UK under pressure, as the latter had profited from the US Lend-Lease after the German attack, and demanded a massive reduction of the discriminatory tariffs within the empire.⁷⁶ A key problem of the League had been the lack of an appropriate institutional framework for cooperation in the economic and social field. It never possessed a body similar to the ECOSOC, even though the topic of economic and social cooperation was mentioned in Article 23 of the Covenant. The League’s working tools were mere *ad hoc* committees with limited influence in the long run. Their work often was inconclusive. Immediately before the outbreak of World War II, too late, a reform committee was established, the so called Bruce Committee. It recommended massive expansion of economic and social initiatives of the League and the creation of a new Central Committee for Economic and Social Questions. Some years later, when the Dumbarton Oaks Proposals were formulated, the proposal was taken as the blueprint for the ECOSOC.⁷⁷

The ECOSOC of the UN Charter became a modest body. It was more than the *ad hoc* committees of the League, but by no means a powerful and ambitious new body as Roosevelt and others had imagined. Stalin wanted to strictly limit the UN’s competences to peace and security.⁷⁸ He regarded substantive activities in other fields as not in the Soviet Union’s interest. The US prevailed over the other Allies insofar as two bodies – one for peace and security and the other for economic and social questions – were created.⁷⁹ After

72 Russell 1958, p. 35.

73 Diplomatic Papers: The Conferences at Cairo and Tehran, 1943. Foreign Relations of the United States, Doc. 365 (Diplomatic Papers Cairo and Tehran). <https://history.state.gov/historicaldocuments/frus1943CairoTehran/d365?> (accessed on 11 January 2021); Telegram of President Roosevelt to the British Prime Minister (Churchill), Washington 23.02.1944. Printed in: Foreign Relations of the United States, Diplomatic Papers, 1944, General: Economic and Social Matters, Vol. II. <https://history.state.gov/historicaldocuments/frus1944v02/d9?> (accessed on 11 January 2021); Luard 1982, p. 24.

74 Luard 1982, p. 26.

75 Reinalda 2009, p. 276.

76 Russell 1958, pp. 47–50.

77 Kunig 1991, p. 90.

78 Luard 1982, p. 26.

79 Luard 1982, p. 26.



the Tehran Conference, the US gave the social and economic dimension a lower priority, and in the Dumbarton Oaks Proposals, the idea of a strong executive council also was completely dropped. The US suggested an ECOSOC with 18 members and the competence to make recommendations and to elaborate drafts and to coordinate activities of special organisations.⁸⁰ The San Francisco Conference strengthened the body a little. It gave it the status of a principal organ, but it did not clarify the relationship with the General Assembly. The consequences of the upgrade in status remained unclear. Nevertheless, the creation of the ECOSOC was celebrated as moderate advance compared with the situation in the interwar years.

The last topic to be briefly mentioned is the rule of (international) law in general. There temporarily had been hopes that the post-war order would include a more ambitious judicial institution of the new organisation. At the Dumbarton Oaks Conference, a possible new court was discussed and the Charter draft agreed on at this meeting provided the establishment of an “international Court of Justice”. The new court was destined to become a “principal organ” of the organisation. It was entirely unclear, however, whether the Permanent Court of International Justice (PCIJ) or a newly created institution should become this “international Court of Justice”. The US invited lawyers from 44 countries to clarify this and other aspects at a conference from 9 to 20 April 1945, still before the delegates met in San Francisco. It soon turned out that expulsion of enemy states from the PCIJ would legally not be possible. The lawyers, the “Committee of Jurists”, recommended that a new court be established.⁸¹ A provisional statute was drafted and discussed. A key question was whether the court should have mandatory jurisdiction or not. Some large states, China and Brazil, and most Latin American states were in favour of mandatory jurisdiction.⁸² The other great powers, however, made clear that there was no room for negotiations in this respect.

The interwar years had brought mixed experiences with judicial dispute settlement. In the 1920s, arbitration and jurisdiction by the PCIJ both had partially flourished. A number of important arbitral awards, judgments and advisory opinions were delivered in these years which until today are treated as landmark decisions. The Palmas Arbitration, the Lotus Judgment, or the Jurisdiction of the Court of Danzig Advisory Opinion belong to any international lawyer’s basic vocabulary.⁸³ In the 1930s, a rapid decline of judicial institutions followed. When World War II broke out, they no longer played a relevant role. Only few states had ratified the optional protocol of the PCIJ which evidently limited its capacity to tame conflicts.⁸⁴ When the PCIJ had been created, mandatory jurisdiction already had been a

80 Guggenheim 1945, p. 24; Luard 1982, p. 25.

81 Kolb 2013, p. 52.

82 Minutes of the Ninth Meeting of the United States Delegation, Held at Washington, Thursday, April 12, 1945, 9 a. m. (Ninth Meeting US Delegation 1945). <https://history.state.gov/historicaldocuments/frus1945v01/d145> (accessed on 11 January 2021), p. 271; Minutes of the Twenty-third Meeting of the United States Delegation, Held at San Francisco, Monday, April 30, 1945, 9:30 a. m. (Twenty-third Meeting US Delegation 1945). <https://history.state.gov/historicaldocuments/frus1945v01/d193> (accessed on 11 January 2021), pp. 491–492.

83 Permanent Court of Arbitration (Max Huber), Netherlands vs. United States of America (Island of Palmas case), Award, 04.04.1928, UNRIIA 1928 Vol. II, p. 829; Permanent Court of International Justice, The Case of the S. S. “Lotus”, Judgment, 07.09.1927, Publications of the Permanent Court of International Justice Series A. No. 10; Permanent Court of International Justice, Jurisdiction of the Courts of Danzig, Advisory Opinion, 03.03.1928, Publications of the Permanent Court of International Justice Series B. No. 15.

84 Luard 1982, p. 8.

hotly debated issue, and a majority of states unsuccessfully had claimed it.⁸⁵ Already earlier, during World War I, the Bryce Group had argued that mandatory dispute settlement institutions would be a key element of a more stable world order.

In San Francisco, the optional protocol model of the PCIJ prevailed – as after World War I.⁸⁶ The situation was remarkably similar. Again, a majority wanted mandatory jurisdiction, and the great powers rejected such a far-reaching limitation of their sovereignty. The US and the Soviet Union had the final say. Mandatory jurisdiction would never have had the slightest chance of being accepted by the US Senate. The US delegation argued that acceptance of the ICJ's statute with the optional protocol already would be a great success.⁸⁷ To protect the court from political struggles within the organisation, the conference decided to not fully integrate it into the UN's organisational structure.⁸⁸ The ICJ in The Hague became a UN principal organ, but a body with physical and organisational distance. In sum, there was no significant change with respect to the protection of the rule of law in general.

3 Present Narratives: Periodisation Problem and Quest for Legitimacy

3.1 Predominance of Break Narratives: Connection with Periodisation Problem

The second part of my explanation of the contrast deals with the topics of periodisation and narrativization of the history of international law. The predominance of the break narrative – in the discipline in general and in the wider public – is closely connected with the question of periodisation. The tendency to idealise the founding, or some of its elements, and to emphasise the fundamentality of the break, is, given the circumstances of the founding, only fully understandable, if the “periodisation problem” is taken into account – the necessity to periodise. The topic is rather demanding.⁸⁹ I strictly limit myself to what is essential for my argument.

Talking about history is not possible without cutting the time axis into pieces. It is common to speak of the “era of the League of Nations”, the “UN epoch”, the “Cold War period” etc., and these “time units” typically are treated like facts. Periods, however, are not facts. They may appear to some extent objective, particularly if they are well established, but they are just intellectual tools which provide orientation in the vast universe of information. They are interpretations of facts and have the function of making historical information manageable. They have a beginning and an end, and there is a tendency to (over)emphasise their differences. Distinguishing between the “era of the Westphalian state system” and the “epoch of modern international law” makes sense if these “eras” are different, and consequently continuities are almost unavoidably played down.⁹⁰ This is not the result of bad faith. It results from the necessity to justify periodisation decisions – elaborating the contrasts is what periodizing is about. As a consequence, some events become key for the periodisation

85 Kolb 2013, pp. 55–57.

86 Kolb 2013, p. 57.

87 Minutes of the Twenty-third Meeting of the United States Delegation, Held at San Francisco, Monday, April 30, 1945, 9:30 a. m. (Twenty-third Meeting US Delegation 1945). <https://history.state.gov/historicaldocuments/frus1945v01/d193> (accessed on 11 January 2021), p. 492.

88 Kolb 2013, p. 53.

89 See Diggelmann 2012, pp. 997–1011.

90 On the problem of continuity: Kadelbach 1997, pp. 178–193.



decisions. They give the period its name, its ring, and some events even become what has been called “Grotian” or “constitutional” moments.⁹¹ They adopt the role of a representative of the time unit. If someone uses the notion “UN era”, for example, the founding appears as a moment of paradigm shift. The event becomes, by its strategic position in the periodisation concept, a “cathartic event”⁹², an agent of the future development.

3.2 Periodisation and Present Needs: Demand for a Legitimate World Organisation

The use of a periodisation concept strongly depends on our *present* needs and values. When, for example, the history since World War I is cut into the two main eras “League of Nations era” and “UN epoch”, current needs and values are key factors of the periodisation decision. They determine our cognitive interests. They decide on the “big picture”, i.e. which narratives appear meaningful and convincing to us. Current needs and values prestructure our perception and “shape” – through periodisation concepts – the past. Periodisations therefore are always subjective and provisional in the sense that they depend on the time and circumstances of the observer.⁹³

Among the key circumstances of the present, one may mention the pressing need for a legitimate and functioning world organisation. Not everybody shares this view, of course, but to many it seems to be a command of common sense. For the purpose of this article – to explain the presently predominant role of the break narrative – it may suffice to maintain that there is a direct connection between this insight and the decision to make the founding of the UN the turning point. When it is not possible to deny, with serious arguments, the importance of a functioning and legitimate world organisation to solve the problems of our time, then a turning point towards such an organisation is needed. Many elements of the founding fit very well with this need. The Charter with its solemn language can be understood as the “symbol” of the new beginning, and Article 2(4) represents a direct response to the excesses of violence which remained the cardinal topic to the present. The mentioning of self-determination creates distance to the old colonial world, and the vague commitment to human rights is open for interpretation as a break with totalitarianism. Against the background of such a present need, the signing of the Charter can even be perceived as the founding moment of the modern international community.⁹⁴ The underlying concern of such a periodisation decision, which makes the founding the decisive turning point, is the wish to enhance the legitimacy of the currently existing UN – as the only world organisation we have.

3.3 Final Remark: Later “UN knowledge” and Intuitions about the Founding

A final remark shall conclude this contribution. It concerns “later knowledge” of the UN’s development. The present perception of the founding is very likely to be also influenced by our knowledge of what happened after 1945. We know which of the then countless possibilities of its future have materialised – which roads were taken, and such knowledge can have

91 For thoughtful reflections on this: Kotzur 2017, pp. 103–106.

92 The term is borrowed from Andreas von Arnould: Arnould 2017, p. 13.

93 Graus 1987, p. 532. On the many pitfalls and problems: von Bernstorff 2017, pp. 39–52 (with respect to narratives of the history of the *ius ad bellum*).

94 In Bardo Fassbender’s words: The constitutional law of the international community is built “on and around” the Charter which had constitutional quality “ab initio”: Fassbender 2009, p. 1.

a prestructuring effect on our intuitions. Some may call this, if it is the case, anachronistic thinking. In my view, however, this misses my point. I want to clarify it first by way of a drastic example. We experience well-known difficulties to talk about the role of biologicistic metaphors in social theory and philosophy of the 19th century, e. g. in the sociology of Herbert Spencer.⁹⁵ We immediately think of the excesses of biologicistic thinking in the 20th century, and this knowledge creates an intuition that such metaphors are inherently dangerous and a direct path leads into the disaster – which obviously is not the case. Darwin's discoveries were revolutionary and had a great appeal for countless people who never would have drawn the dramatic conclusions we have in mind when we hear the notion “biologicistic metaphor”.

Knowledge of the UN's development and transformations since 1945 is likely to have created such intuitions and presumptions, too, which influence our perception. Younger events make the look back more difficult. In the field of self-determination, for example, we know of the UN's transformation from an accomplice of late colonialism to an organisation which demanded its immediate end in 1960.⁹⁶ This may let us think that the creation of the UN was, at least in some sense, good news for the cause of colonial peoples. In the field of human rights, we have the knowledge that the topic became a cardinal UN theme over time and even triggered a worldwide movement. The UN was more and more associated with human rights. This, too, creates the intuition that the founding must have been in some sense a milestone in human rights history. The idea should have become clear. We cannot “unknow” such knowledge. It is not easy to abstract from later knowledge, particularly when it easily fits with our present needs and values.

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95 On the influence of Darwin's theory on the understanding of international law see, e. g., Meier 2017, p. 517.

96 UN-General Assembly, Resolution 1514 (XV), UN-Doc. A/RES/1514 (XV), 14.12.1960.

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