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THE FAILURES OF INTERNATIONAL LAW: ENDEMIC, CONSISTENT, AND STRUCTURAL

AUTHORED BY - *SPANDAN MEHTA

ABSTRACT:

In the past century, International Law has been at the centre stage of discussion and development for a very long time. It has played an instrumental role in how the current world order has shaped itself. It is also important to acknowledge that geopolitics and International Law have gone hand in hand and affects the level of cooperation states may have with each other. There is ultimately a disturbing pattern which has emerged due to the deep-rooted nature of the very problems in the international legal system. These failure have only occurred in the arena of human rights, armed conflict, trade and even environmental law targets.

However, sincere the aspirations of International Law maybe its lofty goals have not been achieved and it's important to do a deep dive on why International Law has seen consistent, endemic and structural failures. To understand this very observation a variety of scenarios are analysed whether it is the WTO disputes, Conflict's in Congo and Sudan, Freedom of Navigation operations by United States among others for instance. All these scenarios portray to us the problems of International Law whether it is in terms of representation of women and all countries, enforcement mechanisms, dilution and lack of clarity regarding international laws all contribute to the problem at hand.

Hence, the aim of the article is to ultimately analyse why International Law has seen failures and subsequently consider alternate approaches, solutions to make international law more oriented towards peace, justice and human rights. The paper reflects on International Law as an overall system and while noble in its intention the framework certainly requires a targeted approach so as to truly make it reach its potential.

Keywords: International Law, Enforcement Mechanisms, Representation, Sovereignty, Geopolitics

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Introduction:

Serving as a crucial foundation for our interconnected world, international law works towards numerous objectives such as maintaining global order, promoting human rights, and fostering cooperation among countries. However, when examined closely, a disturbing pattern emerges in its historical track record. Rather than isolated incidents, these failures reveal deep-rooted systemic shortcomings within the international legal system. The presence of these flaws is not limited to specific instances, but goes beyond various aspects of international law, presenting an issue for all global stakeholders. As a result, it is necessary to dive deep into these shortcomings, reveal the complications, and discover the workings between the issues found in the international legal system and the challenges it faces in achieving its ambitious goals.

Despite its lofty aspirations, international law often leads to compromised outcomes. The failures of international law are not rare instances that can be attributed to unfavorable conditions for that time; rather, they are inherent flaws that stick throughout the international legal system. These failures occur across various areas, whether it is human rights, armed conflict, trade, environmental protection, and territorial disputes. By exploring these different arenas, we can uncover the endemic, consistent, and structural failures that continue to infest international law.

There have always been questions raised on the existence of international law in the current world order particularly when it is abundantly clear that it operates differently from domestic law. Many experts seem to have already given up on the idea of international law considering its legacy issues from the colonial era further propagated by widespread and well documented instances of sheer ignorance towards the ideals as one may highlight of International Law. Larger questions around whether International Law is ‘sui generis’ in its nature or only for a few actors also needs to be discussed and highlighted upon. Finally, it is also important other approaches to international law like Third World Approaches to International Law and even Feminist approaches to International Law and how their consideration can particularly help us consider ameliorations which can be made in the wider discourse.

The purpose of the article is not to dishonor the progress made in the field of international law. International criminal tribunals, treaties, and increasing use of customary international law highlight to us the positive developments within the international legal system. However,

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it is of utmost importance to identify that these successes do not negate the systemic problems that continue to rot the overall effectiveness of international law.

I. Definition and context of international law:

International law presents us with a set of rules and regulations directing the conduct of states and other international actors. It draws from a variety of sources, including customary practices, conventions and treaties along with judgements from the international courts. International organizations such as the United Nations alongside regional bodies play a crucial role in drafting, understanding and enforcing these laws, while international courts and tribunals, such as the International Court of Justice and the International Criminal Court, provide adjudication so as to ensure state compliance. While deriving the context of the International systems it is important to know the origin of international law particularly from the global north whether it is New York or Geneva. This has also raised the idea of International Law being primarily a western product and not worthy enough of global representation.

II. Discussion of endemic failures in international law:

Endemic failures are persistent and widespread in nature which would cut across different areas of international law. In the realm of human rights, numerous instances highlight the shortcomings of international law. The genocide in Rwanda stands as a tragic example. Despite the existence of international legal instruments such as the Genocide Convention and the Responsibility to Protect (R2P) doctrine, international legal systems failed to prevent let alone effectively respond to the mass killings. Infact, one of the biggest failures revolve around the fact that in many instances states simply fail to appear before the international judicial authorities. There are a variety of instances proving the same whether it is United States in the Nicaragua case[1] or more relevantly Russia in the cases of Ukraine v Russia. The non-appearance of one of the parties points us to distinctive characteristics when compared to proceedings where both parties appear before the tribunal. Notably, the non-appearing state does not actually submit any formal arguments whatsoever and, thus, in consequence, does not present its arguments. Similarly, in the context of the International Court of Justice, in order to make a decision it should ensure that the appearing state's claim is well founded in

[1] Nicaragua v United States - ICJ GL No 70

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fact and law as it happened in Nicaragua case[2].

Endemic failures in the protection of human rights are further enhanced by political interests and power imbalances. International responses to any crises of reckoning often reflect geopolitical interests, resulting in inconsistent and selective application of international law principles. Powerful states may turn a blind eye to human rights abuses committed by their allies or resort to double standards when addressing violations by weaker states. This politicization of international law deflates the credibility and more importantly the universality of international law for application of human rights further perpetuating endemic failures in its implementation. Political Interests and power imbalances showcases to us the modern form of colonialism to some extent where satellite states continue to bow down to the pressure of superpower states as they continue to reap the economic benefits.

The situation in Congo is worth mentioning in this scenario as various Non-Governmental Organizations alongside the United Nations have continued to highlight various human rights concerns and abuses which have occurred in the region. The sheer failure of the administrative system in the country in combination with a disinterest from international parties have resulted in frequent instances of violations international human rights and humanitarian law through sexual violence, torture, arbitrary killings going as far as child labor. All of these atrocities have continued as long as the commercial interests of international corporations get fulfilled by obtaining important minerals like lithium for making batteries or even other minerals utilized in the chipmaking process for electronics. These atrocities have gone as far as the country's own armed forces (FARDC) being charged under these crimes. It is important to remember that these crimes should ideally be considered as crimes against humanity and war crimes under the provisions of Article 7 and Article 8 respectively of the Rome Statute. The sheer lack of enforcement is complexed by the fact that ICJ as of yet does not have its own enforcement mechanism but it has to rather rely on a political organ in the form of the United Nations Security Council as per the provisions of Article 94 (2) of the United Nations Charter. Judge Shegiru Oda particularly warned that repeated disregard of the orders of the court are only going to impair the court's

[2] Lamus AS and Ramírez WA, 'Non-Appearance before the International Court of Justice and the Role and Function of Judges Ad Hoc' (*Brill*, 27 February 2017) <https://brill.com/view/journals/lape/16/3/article-p398_398.xml?language=en> accessed 12 July 2023

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credibility in the larger international community[3].

III. Discussion of consistent failures in international law:

Consistent failures in international law span various areas and reveal recurring patterns. In the realm of armed conflict, the failure to attribute those responsible for war crimes and violations of humanitarian law is a consistent problem. The situations in Syria and Yemen are prime candidates to highlight the failures of international law to deal with these atrocities. Despite the existence of legal systems such as the Geneva Conventions and the Rome Statute which contain detailed provisions for the same, in this case parties guilty tend to evade justice due to their own vested interests, power dynamics between states, alongside conflicting interpretations of international law statutes. The sheer lack of political consensus amongst states often hampers efforts to establish enforcement mechanisms, whereas the effect of powerful actors may result in biased or selective enforcement of international law like targeting a selected state. One of the examples should be Sudan where various representatives like the ICC's chief prosecutor have repeatedly pointed to violations of Rome Statute along with non-compliance by the Government of Sudan and third-party states[4].

The matter has seen never ending conversation in the security council and even in the International Criminal Court but the crux of it falls down to how states often play blame game with each other rather enforcing. Infact, the failures have been so deeply entrenched that there have been calls for all national authorities to believe in the ICC warrants and enforce the same so as to maintain the credibility of the Court and more significantly grant justice to those affected. The Swedish delegate in the during council discussions perfectly discusses the same by bringing attention to the fact that their have repeated attempts to disparage the work and the purpose of the ICC. This is despite the very same members clamoring for the ICC to be established in the first place. At this point, one must consider the observation raised by Hans Morgenthau stating " States tend to comply with international law because of reciprocity and political self-interest".

[3] 'Democratic Republic of the Congo' (Global Centre for the Responsibility to Protect, 1 June 2023) <https://www.globalr2p.org/countries/democratic-republic-of-the-congo/#:~:text=While%20combating%20armed%20groups%2C%20the,against%20humanity%20and%20war%20crimes.> accessed 26 August 2023

[4] 'Violations of Rome Statute Likely to Continue as States Fail to Arrest Fugitives Indicted over Crimes in Darfur, Chief Prosecutor Warns Security Council | UN Press' (*United Nations*) <https://press.un.org/en/2018/sc13623.doc.htm> accessed 12 July 2023

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Additionally, power imbalances among states can hamper the enforcement mechanism. Developed states may be less willing to cooperate with international investigations or tribunals, going as far as to challenge the authority and legitimacy of these institutions. These power dynamics can also create obstacles in accessing evidence, securing witnesses, and ensuring the cooperation of states in the prosecution of war crimes. These challenges add to the consistent failures in achieving fair justice and accountability during armed conflict situations. Moreover, conflicting interpretations of international law continue to pose a significant challenge. Different states and actors may interpret and apply the law differently, leading to divergent approaches in addressing violations. Disagreements over legal definitions, scope of application, and the classification of armed conflicts can hinder the consistent enforcement of international law. This lack of unanimity exacerbates the consistent failures in achieving justice and accountability in any armed conflict situation. One fundamental characteristic to consider is the two-faced nature of Russian understanding of the international law where there is a strong belief that state sovereignty is the fundamental principle in international law.

At the same time, Russia does not share the idea of "popular sovereignty," which otherwise is considered as a Western and a US constitutional idea. According to Russian policy, it is only the Russian Federation (i.e., the state), and not the people of the Federation, that can be the bearer of sovereignty—regardless of whether Russia is a democracy or autocracy, and this is significant while considering viewpoints like applications of human right conventions or international humanitarian law[5]. Despite this, Russia has always been keen to mention International Law and its significance in their foreign policy addresses and the same includes key figures like President Putin and Foreign Minister Sergei Lavrov. There is strong sense of paternalism associated with Russian policy going forward. To some extent, it sees itself as a protector of international law going up against the hegemonic status of the United States. However, the current government still largely prefers a world order which is thin in nature rather than promoting a culture of global governance which the West would like to promote.

IV. Discussion of structural failures in international law:

Structural failures are inherent flaws within the international legal framework that hamper its impact. The putrefaction nature of international law poses significant challenges. With a

[5] Baaz M, 'International Law Is Different in Different Places: Russian Interpretations and Outlooks' (2016) 14 International Journal of Constitutional Law 262

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multitude of legal instruments, differing interpretations, and overlapping jurisdictions, coming to an agreement is always a mighty task. For example, in trade law, WTO[6] and its appeals mechanism has become dysfunctional because the United States has obstructed new members to join the panel, which has led to most panel reports being appealed "into the void" and leaving the dispute simply unaddressed. As a result, it is extremely difficult right now for WTO members to enforce any of the WTO obligations through complaints against measures they believe are in violation of the regulations[7]. Now one might mention that the WTO dispute settlement system is far more effective than the GATT 1947 system on the basis of the quasi-judicial character which has been attached to the new dispute settlement allowing for easier enforcement of decisions, greater compliance and more rights for the involved parties too. While these are legitimate reasons and improvements, the fact is there is simply a long road ahead with various issues still persisting like the non-availability of provisional measures to be implemented, lack of compensation to the winning party from the opponents and the sheer amount of time it takes to resolve a dispute is something which needs to be worked upon[8].

Particularly Disputes over the South China Sea are also worth highlighting. The US continues to enforce international law under provisions of the UNCLOS[9] through routine operations by US Navy/Coast Guard ships and US Navy/Air Force aircraft FON[10] operations. These FON are generally conducted in disputed waters and airspace, in which the Chinese might be laying claim to maritime territories represented by the nine-dash line. Since UNCLOS was not ratified by the US, it enforces customary international law with respect to China's violation of UNCLOS and repeated harassment of foreign vessels. Given the tumultuous relationship in the SCS, experts have argued that the US should ratify the 1994 agreement to UNCLOS to build legitimacy with partners in the region and apply pressure to China to abide by international law. On the other hand, there are also arguments in favor of the US not having the need to necessarily ratify UNCLOS since its military FON actions are consistent with UNCLOS and customary international law. It is these very debates which hamper

[6] WTO – World Trade Organization
[7] Lester S, 'Ending the WTO Dispute Settlement Crisis: Where to from Here?' (*International Institute for Sustainable Development*) <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> accessed 12 July 2023
[8] 'World Trade Organization' (WTO) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s3p1_e.htm> accessed 26 August 2023
[9] UNCLOS - United Nation Conventions on Law of the Sea
[10] FON – Freedom of Navigation operations to enforce international law in contested waterways

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uniform application of the law[11]. It is important to note that the US does follow its legal obligations with regards to passing of civilian vessels and facilitating other trade agreements. However, the US is still not a signatory to the UNCLOS.

Furthermore, the issue of state consent and reservations in treaty law highlights another structural flaw. In an era of pressing global challenges, the commitment to consent represents a double-edged sword. One viewpoint suggests that consent protects the interests of states and supports sovereign equality. On the other hand, it functions as a barrier to effective cooperation in a world of vastly and often conflicting priorities and concerns. "A requirement of consent creates a powerful status quo bias that frustrates many attempts to solve global problems" as noted by Andrew Guzman. States continue to be the paramount actors as they represent their citizens on the global stage, enter into international agreements, claim exclusive control over their territory, and exert a monopoly over the use of force within their boundaries. The power of state sovereignty regarding internal affairs of any nation is zealously guarded. More than any other unit, states control both the content and meaning of international law. This practice disrupts the universality and effectiveness of international law, as it allows states to selectively accept or reject certain legal obligations based on their own terms and conditions[12].

V. Counterarguments and alternative perspectives:

While discussing the failures in international law, alternative viewpoints highlight its successes. The establishment of international criminal tribunals, in the form of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), showcases great achievements made by the global order to hold individuals responsible for war crimes and crimes against humanity. Going ahead, the creation of the International Criminal Court (ICC) in 2002 demonstrates a will to end impunity for the most serious crimes which considered under the ambit of being an international concern. The ICC's jurisdiction extends to crimes such as genocide, war crimes, crimes against humanity, and the crime of aggression, providing a platform for states and all actors to be responsible when domestic judiciary fails to prosecute these very crimes or does

[11] Marek CJ, 'US-China International Law Disputes in the South China Sea' (*Air University (AU)*) <https://www.airuniversity.af.edu/Wild-Blue-Yonder/Article-Display/Article/2685294/us-china-international-law-disputes-in-the-south-china-sea/> accessed 12 July 2023

[12] Guzman A, 'The Consent Problem in International Law' (E-Scholarship) <https://escholarship.org/content/qt04x8x174/qt04x8x174_noSplash_5221402d70d7d0b5afbb467a7a464009.pdf> accessed 12 July 2023

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not do so fairly. The establishment of agreements, like the Paris Agreement on climate change, further highlights global cooperation in addressing pressing challenges when push comes to shove. All of these agreements have been particularly substantial with regards to these treaties being law making in nature and not treaty contracts.

The growth of fields like customary international law, developed through consistent state practice and opinio juris, massively perpetuates the continuous development of international norms. These successes, however, should not overshadow the structural flaws that linger and threaten the overall effectiveness of international law. Customary international law has been crucial in areas such as the prohibition of torture, the protection of diplomatic immunity, and the recognition of the right to self-determination. Furthermore, customary law though not codified in specific treaties, are considered legally binding and drive forward the development of a rules-based international order to enable greater cooperation. It is important to emphasize the role which customary international law has played in ensuring that nations who were previously not signatories to treaties did not ratify the same are also now included in the global round of negotiations regarding various topics so as to ensure there is greater alignment in policy towards issues pressing the entire world. This has certainly helped with greater clarity and uniformity with regards to global practices and how they are run.

Alternate perspectives particularly referring to embracing the TWAIL methodology stems from the ideals of fostering inclusivity in International Law by looking at other jurisdictions and practices instead of the limited approaches and focus which we see in cities like The Hague, Geneva or New York. Considering other locales whether it is east Africa and the practice followed their with the East African Court of Justice which started its operations in 2005. The same can be included going forward by paying closer attention to the scholarship and judicial decisions of the court and gather different perspectives compared to just the ICC or ICJ for instance. It is of utmost significance that there is greater importance placed towards the ideas of International Law from jurisdictions like Arusha which is the hub for the same[13]. Moreover, a larger theme points us towards increasing fragmentation of international law and why the same needs to countered to prevent not just failures of international but to promote global cooperation in place of isolationist approaches which has made it increasingly difficult

[13] Gathii JT, 'The Promise of International Law: A Third World View ' (American University International Law Review - Digital Commons, 2021) <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2065&context=auilr> accessed 26 August 2023

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for the global order to survive as we have seen in the recent past. An important example to consider that it is all European or the scholarly work of the Global North which is cited and considered and all other jurisdictions are given reduced forms of credibility whether it is Asia or Africa (ILC claim).

TWAIL is also paramount which due to the colonial origins of International Law is in itself designed to subordinate all "third world countries" and the same idea persists due to the sheer lack of reforms in International law. One of the biggest examples would be the security council often considered as the arbiter in many issues only has 5 permanent members not accounting for all key blocs of the world nor does it consider the population and diversity amongst nations, yet it continues to have the final say on issues of global significance. It is important to explore the Notions of sovereign states which is considered to be a fulcrum of international law nowadays but was initially developed with the idea to justify any sort of takeover of resources or most importantly land from natives or indigenous peoples. Ultimately sovereignty as a concept appropriated colonization from erstwhile European powers. Furthermore, the current regulations directing 'the use of force' under International Law only makes all third world countries more vulnerable to be targets of all kinds of 'use of force' to be legitimate[14].

Another approach also points us towards the feminist outlook of the same. There are several implications for the same like how women are considered as mothers or having the potential to be mothers and not from any other viewpoint. It is in this very light that women are often presented in the discourse of international rather than respecting for their own identities. There are increasing difference with regards to how women's issues are considered and treated in the context of International Law. In the current system of international law there is quite a difference between public and private international law where the definition of 'public' refers to political matters or matters related to the government but 'private' refers to home or even family. This has led to a huge loophole almost where sexual abuse or torture of any woman can only be attributed if it is aligned with the public realm of matters like a government official. Additionally, there have been other instances of differences in treating

[14] Tzouvala N, 'Twail and the "Unwilling or Unable" Doctrine: Continuities and Ruptures: American Journal of International Law' (Cambridge Core, 20 January 2017) <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/twail-and-the-unwilling-or-unable-doctrine-continuities-and-ruptures/D6F783C5A82C8F5CB3661929C9E4220A> accessed 26 August 2023

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women's issues[15]. However, the larger question revolves around the fact that there is a clear existence of androcentrism in the way our policies are drafted and issues are dealt with too. Androcentrism can be particularly harmful in developing countries or nations which have been accustomed to having a patriarchal structure, women particularly in these jurisdictions will be left out and are certainly more vulnerable to oppression of various kinds whether it is overworking or sexual oppression. While there has been the successful implementation of the Convention on the elimination of Discrimination against Women (CEDAW) which in itself focuses on women's human rights[16]. However, the ultimate issue would come down to enforceability by nations even if they are member parties to the statute. A relevant example in this regard would be how women tend to remain underrepresented in leadership roles whether it is the private or the public sector let alone the education aspect of it.

Finally, there is a larger need to look at more solutions to address the problems which are found currently within the setup of International Law Framework. A solution focusing on greater capacity and institutional building is the need of the hour which will enable reinforcement for the idea of the International Law and general awareness with regards to world events and geopolitics. This has to be done from a ground up level where primary institutions focusing on dissemination of knowledge slowly advancing to higher level discussions about international cooperation and dispute resolution largely speaking. Furthermore, other practical solutions which have been in the discussion like having more judges representing different countries from around the world irrespective of the global north or south. These are some possible avenues which will allow the general population to recognize the importance of International Law and it is this very belief which would improve compliance with the measures as long as there is inclusivity.

VI. Conclusion:

To conclude, it is important to consider other perspectives revolving around the field of international which need to brought into the fold so as to allow for greater accessibility to the tools of international law. Many experts have dismissed the concept of international law and its effectiveness due to the failures which have been elaborated upon above. However, the

[15] Charlesworth H, Chinkin C and Wright S, 'Feminist Approaches to International Law' (American Journal of International Law, October 1991) <https://openresearch-repository.anu.edu.au/bitstream/1885/91777/2/01_Charlesworth_Feminist_Methods_in_1999.pdf> accessed 26 August 2023

[16] 'Women's Human Rights' (International Justice Resource Center, 17 September 2014) <https://ijrcenter.org/thematic-research-guides/womens-human-rights/> accessed 26 August 2023

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cornerstone idea behind International law has always been to ensure détente and prevent world war 3 alongside of course facilitating other global goals ranging trade facilitation to fighting for gender equality. To come of that International Law has always gone hand in hand with geopolitical affairs and the framework designed has permitted for communication channels to be kept open and with greater interdependence between nations it has simply highlighted to us how states themselves have realized that there is more to lose rather than gain in scenarios of a War or any extreme conflict for that matter. It will at least allow the world to act in a direction where there is a resolution for the same and betterment steps are being taken into account.

Addressing the endemic, consistent, and structural failures of international law requires a multifaceted approach. It involves strict application of enforcement mechanisms, enhancing compliance of states through awareness and capacity-building, depoliticizing legal processes, advocating for more dialogue and cooperation among states, along with steadily adapting legal instruments to address upcoming challenges[17]. It also requires addressing the varying power dynamics between states, ensuring equity and fairness in justice, and promoting a culture of respect for international rules and regulations. By acknowledging these structural flaws, we can strive for a more effective and just international legal system which upholds the principles of peace, justice, and human rights.

[17] Carlos AL, Dahl AL and Groff M, 'Chapter 10 - Strengthening the International Rule of Law', *Global governance and the emergence of global institutions for the 21st Century* (CAMBRIDGE UNIV PRESS 2022)