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Revisiting the Legacy of International Law

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ABSTRACT

Today, the achievements and the importance of International Human Rights Law is lauded by various international organizations, especially the United Nations. International Human Rights Law, undoubtedly, is a major area of international law. The idea of establishing these international laws, especially human rights law, was to ensure that people across the world have access to certain basic universal rights. However, instances have shown that international law and sanctions have failed to protect the most vulnerable from the violations of human rights. It certainly is an occasion of sorrow when the intended purpose of instituting an area of law does not meet its end, but it is even more remorseful when that same area of law is used as a perpetrator to further the violence that it was meant to condone. In this context, it is essential for us to learn the history surrounding these laws which has remained extremely controversial. Hence, we must understand the legacy and rethink the origins of international human rights law to ensure that it is made more inclusive and meets the intended purpose.

Keywords: *International Human Rights Law, International Law*

I. INTRODUCTION

The legacy of internationalization of law, or what is today termed as "international law", rests on the generational wrong doings and the white supremacy[3] of predominantly white men like Christopher Columbus[4], Sir Thomas Dale[5], to name a few. For instance, it would be pertinent to point out that indigenous communities were persecuted in America[6] and Canada[7], the aboriginal communities in Australia and Canada felt the wrath of being stripped off their lands

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[3] Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, UCLA Law Review (2021), https://www.uclalawreview.org/unwhitening-the-world-rethinking-race-and-international-law/ (last visited Jul 20, 2022).

[4] See: Dylan Matthews, '9 Reasons Christopher Columbus Was A Murderer, Tyrant, And Scoundrel' (*Vox*, 2022) https://www.vox.com/2014/10/13/6957875/christopher-columbus-murderer-tyrant-scoundrel

[5] See: Nathan Dorn, 'The Devil And Thomas Dale | In Custodia Legis: Law Librarians Of Congress' (*Blogs.loc.gov*, 2022) https://blogs.loc.gov/law/2011/06/the-devil-and-thomas-dale/

[6] David Smith, *Counting the Dead: Estimating the Loss of Life in the Indigenous Holocaust, 1492-Present*, https://www.se.edu/native-american/wp-content/uploads/sites/49/2019/09/A-NAS-2017-Proceedings-Smith.pdf (last visited Jul 17, 2022).

[7] Fannie Lafontaine, How Canada committed genocide against Indigenous Peoples, explained by the lawyer central to the determination The Conversation (2021), https://theconversation.com/how-canada-committed-genocide-against-indigenous-peoples-explained-by-the-lawyer-central-to-the-determination-162582.

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and culture[8]. Further, they were subjected to inhuman treatment at the hands of the colonizers[9], who now, shockingly, advocate for the very idea of "universal basic human rights", "Rule of engagement", and other similar concepts. It is pertinent to point out that the Canadian aboriginal groups, to this day, mourn and fight for their rights and for the rights of indigenous families whose children were taken from them; forced into residential schools, prohibited from speaking their native language[10], subjected to abuse and compelled to 'assimilate', the consequence of which resulted in horrid deaths in great numbers[11]. However, it is pertinent to note that history has passed us, and we are in the present, glancing over the future through a spectrum to ascertain whether the journey of international law, that we have made thus far is worthwhile, or whether we have merely instilled a utopian vision which is barred by enforceability. It is this dilemma that we intend to address.

II. INTERNATIONAL HUMAN RIGHTS LAW & SANCTIONS

The Austinian theory defines law as, "the command of the sovereign backed by sanctions", however, in the sphere of international law, "*states obligations are outlined in treaties and customs, but enforcement relies on vague clauses and empty threats found within the documents, or in international bodies like the UN Security Council (UNSC) where power asymmetries grant the more powerful states significant influence*"[12]. Here, we see that international law lacks a true "sovereign" from which the command could potentially trickle down and ensure that the command is ensued by the subjects, i.e., the nations across the world. But then again, the question arises whether the realm of international law can be considered as 'sovereign' or not. A 'sovereign' in normal parlance is a "*supreme authority within a territory*"[13], however, international law has no territory to stand on and in the absence of a well-defined territory, how can one ever determine who or what a supreme authority is?

[8] Amanda Coulson-Drasner, Land loss threatens indigenous communities worldwide | DW | 09.08.2018 DW.com (2018), https://www.dw.com/en/land-loss-threatens-indigenous-communities-worldwide/a-44997211.

[9] Greg Johnson, 'Indigenous Views Of Christopher Columbus | Penn Today' (*Penn Today*, 2022) https://penntoday.upenn.edu/news/indigenous-views-christopher-columbus

[10] Antonio Voce, Leyland Cecco and Chris Michael, "Cultural Genocide': The Shameful History Of Canada's Residential Schools – Mapped' (*the Guardian*, 2022) https://www.theguardian.com/world/ng-interactive/2021/sep/06/canada-residential-schools-indigenous-children-cultural-genocide-map

[11] Ian Mosby, Erin Millions - Canada's Residential Schools Were a Horror | Scientific American https://www.scientificamerican.com/article/canadas-residential-schools-were-a-horror/
Also see: Holly Honderich – Why Canada is mourning the deaths of hundreds of children | BBC News https://www.bbc.com/news/world-us-canada-57325653

[12] Constantine J. Petallides 2012. International Law Reconsidered: Is International Law Actually Law? Inquiries Journal/Student Pulse 4 (12), http://www.inquiriesjournal.com/a?id=715

[13] Sovereignty Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/sovereignty/ (last visited Jul 6, 2022)

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While it is not our attempt to provide a jurisprudential backing to international human rights law, but by theorizing it we try and ascertain if international human rights law can be followed merely on the principle of good faith. In this part, we discuss how the lack of sanctions or rather, the lack of enforcement body for implementation of human rights, the enforcement – or the recognition of human rights, hang in a balance.

In the context of human rights law, a country ought to ratify the international human rights treaties, and subsequently, ensure that domestic measures are formulated to comply with the demands of international treaties. This system provides for the legal protection that is provided under international law.[14] However, this does not guarantee one's protection that international law envisages to ensure. The United Nations Human Rights Council is the body which monitors and evaluates the condition of human rights across the globe.[15] However, the Council does not ensure individuals their respective rights[16] or provide access to any enforcement mechanism.[17] In the absence of an enforcement mechanism, the purpose of each good deed in the avenue of international law is bound to stand defeated. It is this harsh reality that an admirer of international law must live with.

At this juncture, it would be erroneous to suggest that sanctions have never been imposed on regimes found in violation of human rights law. However, unilateral sanctions have failed to reverberate the ethos of human rights law, i.e., of ensuring certain basic rights to individuals. For instance, as per a special rapporteur's report, unilateral measures like the imposition of sanctions have a negative impact on the rights and the lives of the people.[18] In another example from Iran, patients of genetic disease or cancer faced the wrath of sanctions which were intended to curb violation of human rights law.[19] Unilateral sanctions also have a detrimental effect on women, children, and vulnerable groups.[20]

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[14] The Foundation of International Human Rights Law | United Nations, United Nations (2022), https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (last visited Jul 6, 2022).

[15] Human Rights Enforcement Mechanisms of the United Nations, ESCR-Net, https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations (last visited Jul 6, 2022).

[16] Afghanistan: Shameful failure of UNHRC special session to address escalating human rights crisis, www.amnesty.org (2021), https://www.amnesty.org/en/latest/news/2021/08/afghanistan-shameful-failure-of-unhrc-special-session-to-address-escalating-human-rights-and-humanitarian-crisis/ (last visited Jul 7, 2022).

[17] reliefweb.int (2021), https://reliefweb.int/report/yemen/un-human-rights-council-member-states-abject-failure-renew-yemen-investigation-wake (last visited Jul 7, 2022).

[18] Special Rapporteur on the Negative Impact of Unilateral Coercive Measures Says Guiding Principles Need to Be Drafted to Protect the Rights and Lives of People, www.ohchr.org (2022), https://www.ohchr.org/en/press-releases/2022/09/special-rapporteur-negative-impact-unilateral-coercive-measures-says-guiding (last visited Sep 16, 2022).

[19] Tehran Times, *UN Rapporteur says greatly affected by impact of sanctions on Iranian patients*, 2022, https://www.tehrantimes.com/news/476684/UN-Rapporteur-says-greatly-affected-by-impact-of-sanctions-on (last visited Sep 12, 2022).

[20] https://news.un.org/en/story/2021/12/1107492

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To understand briefly, sanctions are imposed under international law, we must look at the necessity test and the proportionality test. The former helps to ascertain whether the objective will be met with a sanction, and the latter helps in contextualizing a sanction vis-à-vis the human rights situation of a jurisdiction. The tests help ascertaining the level and the type of sanction(s) which may be imposed for the violations against human rights. However, from the aforesaid examples, we can see how these tests may not be unable to contextualize the imposition of sanctions in a manner that may allow a regime to make progress of human rights within their own system. Rather, such imposition of unilateral sanctions may allow for dictatorial regimes into arguing that such sanctions do more harm than good for human rights of a larger population subset of their country.

Further, it is essential to note that those arguing in favor of the sanctions or the ones imposing sanctions fail to account for situation in their own jurisdictions. For instance, USA had announced sanctions on various governmental officials for the violation of human rights[21]. More recently, the United States had imposed sanctions on the Russian military leaders[22]. This must be observed in the backdrop of how US has failed to curb violations of Human Rights on its own soil[23]. Human Rights within the United States have reportedly been found to be abysmal[24].

Violation of Human Rights is not limited to countries. Large corporation also indulge in despicable practices which grossly violate human rights law. For instance, the case of Union Carbide's toxic gas leak in Bhopal and Trafigura's dumping of toxic waste of 540,000 liters in Abidjan[25] show how private entities disregard the law, especially in developing and under-developed nations. Furthermore, the promoter and the savior of human rights across the world, UN, which is bestowed with the responsibility to ensure the protection of human rights, was found guilty of sexually abusing children and running a child sex ring[26].

[21] US announces new sanctions on Human Rights Day VOA, https://www.voanews.com/a/us-announces-new-sanctions-on-human-rights-day-/6349595.html (last visited Sep 13, 2022)
[22] U.S. targets Russians over Ukraine invasion, human rights violations Reuters, https://www.reuters.com/world/us/us-imposes-sanctions-russians-over-human-rights-violations-2022-03-15/ (last visited Sep 13, 2022)
[23] Hypocrisy and human rights abuses in the land of the free Human Rights Pulse, https://www.humanrightspulse.com/mastercontentblog/hypocrisy-and-human-rights-abuses-in-the-land-of-the-free (last visited Sep 13, 2022)
[24] Human rights in the US are worse than you think Vox, https://www.vox.com/2019/6/7/18656568/usa-human-rights-report-police-shooting-voter-suppression (last visited Sep 13, 2022)
[25] Lucy Graham, Côte d'Ivoire: Trafigura unrepentant 10 years after toxic waste dump Amnesty International (2016), https://www.amnesty.org/en/latest/press-release/2016/08/trafigura-unrepentant-10-years-after-toxic-waste-dump (last visited Sep 13, 2022).
[26] Bethany Allen-Ebrahimian, *U.N. Peacekeepers Ran a Child Sex Ring in Haiti*, Foreign Policy, 2017.

We clearly see that despite the violations, the violators remain the vanguards for enforcing, and even recognizing these international laws. It is this paradox that needs to be resolved so that determinations of responsibilities can be drawn and the nations and entities who perpetrate human rights violations can be held accountable for the same.

III. TRACING THE HISTORICAL INFLUENCE OF HUMAN RIGHTS LAW

The idea of inherent influence or being the more powerful state comes from a position of power and privilege. This was also central to Columbus' perception of law, as Vitoria perceptively alludes to when he talks about how international law "*did not precede and thereby effortlessly resolve the Spanish-Indians relations; rather, international law was created out of the unique issues generated by the encounter between the Spanish and the Indians*."[27] This was in the context of the Spanish conquest of Columbus. It is pertinent to point out, as noted by the author Antony Anghie, that Vitoria's use of the existing jurisprudential doctrines was either reconceptualized or Vitoria merely invented new ones in the conquest of what he termed as the "novel problem of the Indians"[28].

By no means did Vitoria try to ameliorate the cultural and linguistic differences of the Indians and the Spanish during his conception of "the law", instead, they were treated as the same body of individuals by applying jurisprudence which was used by the Church, i.e., the divine law. The predominant sentiment of the "settlers" against the indigenous was that of othering them.[29] It is also prudent to ascertain whether the Indians and the Spaniards ever consented to the application of such law or violence onto them. To confront this conception of Columbus, wherein he points that he met with no resistance when he took the possession of and from the natives, it does not necessarily translate to them giving consent to acquiesce with Columbus' conception of the law. Further, it is prudent to understand the Columbus stuck to his colonial philosophy with practices of enslaving the native populations to trade or sell them as slaves.[30]

Vitoria's allegiances were not limited to that of Church made divine law, but he considered concepts like land ownership by the indigenous people as a matter of right under natural law. This shift from divine law to natural law was done as per his own convenience in order to justify

[27] Antony Anghie, 'Francisco De Vitoria And The Colonial Origins Of International Law' (1996) 5 Social & Legal Studies.
[28] Ibid.
[29] Sarah Rotz, ''They Took Our Beads, It Was A Fair Trade, Get Over It': Settler Colonial Logics, Racial Hierarchies And Material Dominance In Canadian Agriculture' (2017) 82 Geoforum. https://www.sciencedirect.com/science/article/pii/S0016718517300970
[30] Kris Lane, *Five myths about Christopher Columbus*, The Washington Post, 2015, https://www.washingtonpost.com/opinions/five-myths-about-christopher-columbus/2015/10/08/3e80f358-6d23-11e5-b31c-d80d62b53e28_story.html (last visited Jul 14, 2022).

the conquest of the lands and resources of the indigenous by the Spanish. He further used the said cultural differences as a means to wage war against the indigenous nations.

At this juncture, it must be important to understand as to how international law was internationalized in a manner that we recognize it as a concept that it is today. "*The universalization of international law was principally a consequence of the imperial expansion which took place towards the end of the 'long nineteenth century*"[31]. This clearly shows the expansion of international law was something which came as a result of colonialism and that it favored the sentiment(s) of the "settlers".

In today's time, we see how international bodies set rules and standards keeping the western and the developed nations in mind, which the Transnational Capitalist Class (TCC) – as Prof. Chimni iterates,[32] along with their internal organizations must follow. While international law has indeed allowed for some development of the basic human rights for those who live under dictatorial regimes, these laws seem to currently do more justice on paper than on the ground.[33] Further, international law did little to nothing for the indigenous people, their culture, and children in Canada. Indigenous population suffered at the hands of their colonizers just how the Spanish conquest of Columbus brought the tragedy to their country. In conclusion, while one can go so far to call international law as "law" in form, but the same cannot be held true if one observes it from the keen lens of its substance.

IV. THE ROLE OF WESTERN SCHOLARS

Winston Churchill famously reiterated that "History is written by the victors". The saying holds true in the actual and its metaphorical sense even today. Our means to elaborate the said statement would begin with the extremely renowned Rhoades Scholarship. Despite the legacy left by Cecil Rhoades – that of promoting white supremacy, paving the way for apartheid & driving annexation of swathes of lands in South Africa.[34] Today, the scholarship is given to meritorious candidates from across the globe to ensure their study at the University of Oxford.

The western scholars certainly hold a position of power in the sphere of international law, i.e., the power of setting standards despite their historical wrong doings. This power structure is only elaborated from the privilege which many (if not all) western scholars enjoy owing to the region

[31] Antony Anghie, *Imperialism, Sovereignty, And The Making Of International Law* (Cambridge University Press 2005).
[32] Chimni, B., 2004. International Institutions Today: An Imperial Global State in the Making. European Journal of International Law, 15(1)
[33] Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure Of International Human Rights Law To Matter Where Needed Most' (2007) 44 Journal of Peace Research https://www.jstor.org/stable/27640538
[34] Justin Parkinson – Why is Cecil Rhodes such a controversial figure? – BBC News Magazine. https://www.bbc.com/news/magazine-32131829

they operate out of. As Prof. Chimni brings home the point through Karl Marx and Friedrich Engels, when he claims that the history of the modern international relations is intimately bound with the history of capitalism and its different phases.[35]

Development of international law, the new world order and the emergence of the capitalist order are inextricably linked with the development of capitalism through Europe. This in turn shaped the very structure and the process of what we understand or conceptualize as international law,[36] to accommodate the global capitalist regime which was predominantly conceived in the west.

Originally, as Prof. Chimni eloquently iterated, the capitalist order received impetus from the colonial project – a system which allowed for the ships to sail scout free in the international waters with alliance of guns, treachery, and deceit[37]. As argued previously by the author Antony Anghie, that international law was generated from the issue which emerged when the Spanish encountered the Indians. Before the Spanish conquest, Columbus, or any other colonist for that fact, did not have any legal precedent as to what must be done whilst entering foreign lands. It is pertinent to note that during the British conquest in India, the British East Indian Company arrived in India with a charter from the queen which claimed that they had a monopoly to trade in the East. Similarly, England claimed monopoly once it laid down their colonies and passed the Navigation Acts.

Similarly, as Europe evolved, Hugo Grotius came with his own piece of work on international law. Grotius defended the idea of freedom of seas, but this was a mere façade to promote Dutch trade since the English had self-proclaimed their monopoly and the navigation acts, as Prof. Chimni puts it, "*hit the Dutch hard and war followed in the wake of commercial rivalry".*[38] Eventually, Britain came up with the policy to prohibit manufacturing in colonies which could compete with them[39]. Here, we saw that wealth was centered to the European merchants which were the manufacturers of goods, and the colonies from which the raw materials went from were made to purchase the goods of the colonizers.

In the New Colonialism era, we saw the emergence of a more mature and open economy, but in the British context it monopolized most of the production. Also, during this time we saw that sovereignty was the central principle in the external policy and international conduct of the

[35] B. S Chimni, International law and world order (2017).
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Digitalhistory.uh.edu (2022), http://www.digitalhistory.uh.edu/teachers/lesson_plans/pdfs/unit1_4.pdf (last visited Sep 10, 2022).

leading European states[40]. We also saw the abolition of slave trade and the advent of policy which talked about the free navigation of international rivers (an idea duly refused by the British). Eventually, the Navigation Acts were repealed.

In the final quarter of 19th century, we saw the emergence of capitalism in its monopoly stage. This was also the time when Marxist theory of capitalism was observed as a closed system by authors like David Harvey. Today, we are just a byproduct of the disparity of race, ethnicity and sociological traits which can be traced back to the very design of international law. The rationale being that the conception, formulation, and advancement of international law has always been in the hands of an international bourgeoise community.

V. INTERNATIONAL LAW AND DOMESTIC INTERPRETATION

The idea of interpreting any law is linked with how a country chooses to interpret its own domestic law as the methods of interpretation of both the laws would share similar traits.[41] When it comes to international law, interpretation is not a mere technical devise, but is a political matter.[42]

There are two prevalent methods to interpret international laws: the VCLT (Vienna Convention on the Law of Treaties) & the drafts of the ILC (International Law Commission). Another method which aids in the interpretation is the idea of Customary International Law (CIL). While there might not be a sure shot method to zero in on the most appropriate or the best method of interpreting international law, but the interpretation is intimately linked with the political stance of any country. For instance, India chooses to not focus on the Human Rights norms in its region where it has declared an ongoing emergency for a period of years, but one is still eligible to go to the Apex Court to defend their fundamental rights.

In the international sphere, India has been making a point that the issue with the sovereignty is an internal matter, but the laws which govern armed conflicts were duly made in an international sphere to ensure that the rights of the people in such regions are not hindered owing to the conflict. A similar issue emerges with Israel when talking about the issue in the Gaza Strip and the ongoing Israel-Palestine conflict. It would not be possible to interpret international law without understanding the proclivities of the political system of a country.

[40] Ibid.
[41] Odile Ammann – The Interpretative Methods of International Law: What Are They, and Why Use Them? https://brill.com/view/book/9789004409873/BP000010.xml
[42] Klabbers, 'International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?' (n 994) 274

VI. CONCLUSION

In the rigmarole that the world stands in today, the history and the current applicability of international human rights law is getting questioned daily. With the rise in civilian casualties in the Russia-Ukraine war, it becomes even more essential for us to question the very existence of such international law. At the same time, we must focus on the foundational aspects and realize why they were enacted and whether they ought to be implemented or not. In a world embroiled in conflict, enacting toothless laws will perhaps help no one is a harsh reality we might have to succumb to. If the international community even in 2022 fails to address the enforceability and implementation aspect of international law, one would most likely lose faith in the realm of international law. At a time when international law is needed the most not only for protection of States but for protection of citizens of the world at large, if international law does not provide the requisite recourse, one could argue that we have not moved any more forward from the time of establishment of the United Nations. It is time that the proponents of international law gear up and work in conjunction with the Nation States to ensure that each State is playing their part to address and ensure the implementation of international law. Unless the States come together to ensure that the letter of international law is addressed with sincerity and enforced firmly, the state of international law will merely lay in abeyance. It is thus the responsibility of each State to ensure that the thread of international law that binds us together in a hope that human rights are prioritized over everything else, is not left in a limbo.

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