Source : www.thehindu.com Date : 2024-01-10

WHY INTERNATIONAL LAW MATTERS

Relevant for: International Relations | Topic: International Treaties & Agreements, and other important organizations

January 10, 2024 12:48 am | Updated 12:48 am IST

Hamza Dahdouh, the eldest son of Al Jazeera’s Gaza bureau chief, Wael Dahdouh, was killed by an Israeli missile strike in the western part of Khan Younis, Gaza. Hamza’s sister is seen in the photo. | Photo Credit: REUTERS

Israel’s bloody war in Gaza has caused unprecedented death and destruction. Images of terrified and screaming children have stained humanity’s collective conscience. This war started when the world was still reeling from the shock of Russia’s brazenly illegal invasion of Ukraine, which, too, has caused devastation. These two wars have led many to pronounce the death of international law, especially the rule prohibiting the use of force in international relations — the crown jewel of the United Nations Charter codified in Article 2(4). But this is not the first time international law has been declared dead. More than 50 years ago too, Thomas Franck argued that Article 2(4) was dead because it worked on the flawed assumption that the permanent members of the UN Security Council would continue to cooperate after World War-2.

While it is true that the international community has abjectly failed in preventing or stopping these wars, penning an obituary for international law is a grave mistake. True, international law suffers from several structural deficiencies. In fact, critical scholars would trace the origin of the ongoing and past military conflicts in the genealogy of international law laced with imperial and colonial character. It is also a fact that, unlike municipal law, international law lacks a global police force to enforce it successfully, notwithstanding the growth of several international courts and tribunals. Yet, international law matters.

Critics argue that a poor compliance record with international law is sufficient to show that it is inconsequential. Indeed, a central preoccupation of several international lawyers has been on compliance or rule observance of international law to determine its efficacy. However, as Robert Howse and Ruti Teitel argue, the concept of compliance is inadequate to understand whether international law has normative effects. A narrow focus on rule compliance elides international law’s normative interaction with different actors, both State and non-state. For instance, national courts often use international law to interpret domestic law to enlarge its content, even if that international law has not been implemented through domestic legislation. Thus, assessing the usefulness of international law requires shifting the benchmarks away from a general theory of compliance. And if compliance alone was the matrix to determine the efficacy of law, a lot of domestic law would also have to be declared useless, given the innumerable violations in municipal legal systems.

Somewhat related to Howse and Teitel's point is Harold Hongju Koh's argument that states are accustomed to complying with international law through a complex transnational legal process. In other words, when a country engages with international law, it triggers a complex process of institutional interactions whereby global norms are debated, interpreted, and internalised by that nation's domestic legal system. In Koh's world view, this transnational legal process that leads countries to obey international law is important because there are certain material benefits or policy goals, such as combating climate change or fighting terrorism, that only international law can help achieve.

However, as Monica Hakimi argues, the significance of international law cannot be limited to material outcomes because the fundamental attribute of any legal system should be its ability to distinguish between sheer public power and legitimate authority. Hakimi argues that international law matters because, through its argumentative practices, it has the potential to hold those who wield public power accountable for their conduct. In December, South Africa moved the International Court of Justice (ICJ) alleging that Israel's conduct in Gaza violates the Convention on the Prevention and Punishment of the Crime of Genocide. This is a case in point. This accountability need not always be in the form of punishing the decision-makers for non-compliance. However, accountability stems from several actors such as states and private individuals invoking international law to ask questions of those in power and make a case if their actions are illegitimate. While this system of holding those in power accountable is not ideal, it does push countries and actors to explain their conduct. For example, the Israel Defence Forces have tried to explain how their military offensive is consistent with international law. While one may disagree with their explanations, the fact that Israel has attempted to legitimise its actions using the phraseology of international law in the eyes of various constituents who are paying attention is critical.

International law and its attendant structures are not ideal. But the world would be worse off if they weren't there. Israel would not have to explain its conduct to the larger world, and there would be no ICJ to hear a complaint against it. As Nanjala Nyabola writes, even if there is no universal compliance with international law, especially international humanitarian law, there is a universal aspiration towards compliance. International law must be moulded and accentuated to become an instrument that holds the powerful accountable in international relations. International law should be marshalled each time men who are drunk with power wish to act as they please. The world needs more, not less, of fair international law to constrain expansionist, imperial, and illiberal propensities.

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