

The Rohingya Crisis: A Critical Analysis of the United Nations Security Council and International Human Rights Law

By Emmanuel K Nartey*

This essay reviews the human rights violations against the Rohingya people in 2017 and assesses the effectiveness of accountability under the United Nations Security Council (UNSC). It is concluded that under the principles of ethics and integrity in international law and human rights law, there should have been investigations into the crimes committed against Rohingya Muslims in accordance with the judgement given by the ICC's Pre-Trial Chamber. The essay underlines the fundamental principles of ethics and integrity in international law and human rights law. The principles of ethics and integrity in international law should have allowed the UNSC to act in accordance with the international doctrine of human rights. It is concluded that the UNSC's failure to carry out its obligations was solely due to Russia's political ties with Myanmar, which also resulted in Russia using its veto power and obstructing the UNSC's statement on the situation. The banal approach to the implementation and enforcement of international law and human rights has paralysed the principle of ethics and integrity. In this light, the essay affirms there is a need to create a better framework to resolve issues such as the Rohingya genocide and the Russian invasion of Ukraine and any complications that may arise in the future. It is suggested that in addition to the United Nations Assembly and the UNSC, there is a need to create a conflict management body within these two settings.

Keywords: Accountability; Genocide; Human Dignity; Human Rights Law; Human Rights Violations; International law; Rohingya; Russia; States; Ukraine; United National General Assembly; United National Security Council;

Introduction

Even though the specific phrase ‘human rights’ is mostly traced back to the aftermath of World War II,¹ the idea is as old as humanity itself, and is inevitably intertwined with the history of justice and law.² Human rights are rights that individuals have by virtue of being human.³ The essence of human rights revolves around the question of what it is about being ‘human’ that gives rise to rights.⁴ Human beings, thus, support the ‘bottom-up’ approach to human rights, starting

*PhD, Senior Law lecturer, Cardiff Met University, Cardiff School of Management, Cardiff, UK.
Email: mnartey@cardiffmet.ac.uk

¹Steiner, Alston & Goodman (2008).

²Monteiro (2014).

³Griffin (2008).

⁴Shelton (2020).

from the essence of being human.⁵ In this understanding, human rights are viewed as moral principles and as legal principles rooted in morality. Deriving from these moral and legal principles are the overarching and interrelated principles of 'human dignity' and 'equality'.⁶ When we, therefore, conceptualise this point, then we can say that out of these moral principles, ethics and integrity are known in society.

Over the years great thinkers, jurists, judges, lawyers, and politicians have talked about the concept of human rights as a fundamental principle for upholding justice and the social structures in a state,⁷ without discussing the compound elements of this principle. The idea that human rights are an important component in traditional politics and accountability cannot be disputed. However, the idea that human rights alone bind the governing rule of society is highly contentious. Whatsoever is the principles is in human rights, and without that, no legal rule or governance can be, or be conceived is problematic. Hence, besides ethics and integrity, no legal substance can be granted or conceived on the premises of law and accountability at the state level. This goes to say human rights cannot in themselves bind everything together. Prior to the existence of the concept of human rights, society lived by virtue. Virtue became the substance - ethics - and integrity became the extended substance, in so far as it is conceivable, consist, as the great thinkers and scholars may observe. Denying the validity of virtue in legal principles undermines the tripartite doctrine of social norms and state accountability. In this essay, it is possible to observe that, the tripartite doctrine of norms and state accountability is ethics – integrity and rule of law.

As a consequence, human dignity as a concept is twofold. On the one hand, it serves as the foundational premise of human rights. On the other hand, it is a legal term, for instance serving as a tool for interpretation, while ethics and integrity complete the compound element. This last strand is often criticised for its use in methods of interpretation and application of specific human rights because of its lack of clear content or meaning in law.⁸ For the present purposes of human dignity, human rights law is referred to as the foundation of all human beings, while ethics and integrity are referred to as the foundations of all legal principles and accountability. These rules are fundamental rights that protect human beings and societies.⁹ A possible implication of this is that 'human dignity is understood as an affirmation that every human being has an equal and inherent moral value or status',¹⁰ a view shared by Kant, who stated that no human being could be used merely as a means, but must always be used at the same time as an end in his classic work *The Metaphysics of Morals*.¹¹ In this sense, ethics and integrity belong to the essence of a thing that is necessary to give meaning to all behaviours and rules. Hence, if and when it is diminished the obedience of the law is removed,

⁵*Ibid.*

⁶Griffin (2008).

⁷Bingham (2007).

⁸Bates (2005).

⁹Shelton (2020).

¹⁰McCrudden (2008).

¹¹Kant (2013).

and the thing itself will be considered as nothing, and thus it can neither be valid nor conceived as a true principle.

The concept of ethics and integrity also has value as a true legal proposition.¹² Therefore, helping human dignity serves as one of the most fundamental concepts of international human rights law, exemplified by its widespread appearance in almost all human rights instruments and regular application by human rights bodies.¹³ It is a principle recurring in binding human rights treaties as well as in jurisprudence.¹⁴ The European Court of Human Rights (ECtHR)¹⁵ for instance affirmed that ‘the very essence’ of the European Convention on Human Rights (ECHR) was ‘respect for human dignity’, as evidenced by the application of Article 3 of the ECHR.¹⁶ Human dignity is also explicitly present in the other regional human rights documents.¹⁷ The notion of human dignity not only provides for a measuring or interpretational tool in the application of civil rights but also has a role to play in respect of economic and social life in answering the question of the benefits needed for a dignified life.¹⁸ However, in this conceptual parameter then, we can say human dignity is not determined through the existence of itself, or by efficient principle or cause, which must necessarily give meaning to the obedience of the law. Thus, intrinsic factors such as ethics and integrity give human rights its accurate meaning and purpose. By this, I mean all law that has its reality and perfection is informed by ethics and integrity and has its conditioned existence in society. If then ethics and integrity and the rule of law concur in one principal action, so as to give effect to one cause of judgement, we can say the rule has its meaning and purpose, and therefore state accountability should exist.

Similarly, the concept of equality is inherently linked with human dignity, as exemplified by a reading of Article 1 of the Universal Declaration of Human Rights (UDHR) 1948: ‘All human beings are born free and equal in dignity and rights.’¹⁹ The moral principle underlying human rights is that we are all moral persons and therefore deserve equal respect, fittingly named ‘the principle of equal respect.’²⁰ What is essentially being said here could be interpreted as the consequence of equality, a foundational principle wherein most human rights must be balanced against the rights of others. Equality holds in it a right of non-discrimination which is perceived as ‘the most fundamental of the rights of man, the starting point of all other liberties.’²¹ Such reasoning indeed lies at the

¹²Donnelly (1982).

¹³Shelton (2013). Mentioning in international human rights treaties see for instance Art. 10 ICCPR, Art. 13 ICESCR and preambles of CERD, CEDAW, CRC and CRPD.

¹⁴Shelton (2020).

¹⁵Mowbray (2004).

¹⁶ECtHR (Merits) *Pretty v The United Kingdom*, para. 65; ECtHR (Judgment) *VC v Slovakia*, para. 105.

¹⁷African charter on Human Rights and Peoples’ Rights (1982), preamble; Arab Charter on Human Rights (2004), preamble, arts 3, 17, 20, and 40; ASEAN Declaration on Human Rights (2013).

¹⁸*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, No. 155/96. Furthermore German Federal Constitutional Court, 9 February 2010, BverfGE 125, 175 at 222 with comment by Winkler & Mahler (2013).

¹⁹Universal Declaration of Human Rights (UDHR), 1948, UNGA res 217 A, article 1.

²⁰Shelton (2020).

²¹Lauterpacht (2013).

foundation of the international concept of human rights, which is found for example in the abolition of slavery, minority rights and the right to self-determination.²² It is possible, therefore, to assume that for the right of self-determination to exist or be given the institution and governance must build on ethics and integrity. Therefore, ethics and integrity give meaning and purpose to something because every part of the social structure has become governed by these invisible rules. This gives it the capacity to discriminate rights from wrongs and to make choices that are beneficial and contribute to the universal good of society. Ethics and integrity help legal structures and governance to discover the good deed of character, knowledge, and the general capacity of developed moral codes in society. In this conceptual parameter, ethics and integrity are the knowledge and understanding of law, politics, science, and religion. So to address the fragmentation of these in state accountability, much attention must be given to the ethics and integrity of the individual entities, otherwise human rights law will become redundant.

In this understanding, when considering human rights in legal terms we imagine that ‘rights’ exist as a counterpart of duties. Classically states are seen as the main duty holders in this regard since they exercise authority over persons and have the power to exercise a great degree of influence on them. However, when one keeps the moral foundations of human rights in mind we may imagine that states are not the only actors in the international sphere which have the power to exercise authority over individuals and the scope of duty bearers may thus be expanded,²³ an argument traced back to the moral foundation of human rights. In a more elaborate argument on human dignity, following up on Kant’s views, Dworkin stipulates that human dignity has two faces: the intrinsic value of every human being and the moral responsibility to realise a successful life, which confirms the close interrelation of moral rights and moral duties. ‘Based on this moral conception of human dignity, it leads to the argument that human rights constitute the legal face of human beings.’²⁴ ‘That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation.’²⁵

To conclude this passage, as Shelton states: ‘human rights exist because human beings exist with goals and the potential for personal development based upon individual capacities which contribute to that personal development. This can only be accomplished if basic needs which allow for existence are met and if other persons refrain from interfering with the free and rational actions of the individual. Recognition of the fact that there are rational and legal limits to individual, corporate or state conduct that would interfere unreasonably with the free aims and

²²Ganji (1962).

²³Clapham (2006).

²⁴Nowak (2012).

²⁵*Ibid.*

life projects of others is a basic idea underlying contemporary understanding of human rights.²⁶

Deriving from ethics and integrity, the foundation of human dignity is formed; therefore, the main characteristics of human rights as they are known today stipulate that they are inherent, interdependent, and indivisible. This means first that they are of such a nature that they cannot be granted or taken away, a concept rooted in human dignity. Second, interdependence means that the enjoyment of one right influences the enjoyment of another right. This holds true not only when considering the rights of one person, but also when balancing the rights of one against the rights of another, a promulgation of the principle of equality. And third, human rights are indivisible which means that they must all be respected without exception. Though the notion of human rights throughout history has been founded on a social contract between individuals and the state,²⁷ it is only since World War II that human rights have become a part of the realm of international law, forming the 'international human rights law' branch of international law. Ethics and integrity by their construction and implementation can be observed in the moral foundation of human dignity. That is to say, through ethics and integrity human dignity exists as a universal principle of observation and implementation. Therefore, this imposes duties on states not to violate human rights.

Take, for instance, that the concept of international law relies heavily on people in positions of power exercising their authority in an appropriate and just manner.²⁸ That power must be exercised within the framework established in society, meaning states have the faculties to stop the abuses of human rights in their jurisdictions.²⁹ In an ideological concept, this point may hold water. However, in a practical sense, this point is redundant, partly because states may not have the faculty to restrain themselves from the abuse of power and influence of the environment.³⁰ This is unless the individual possesses the faculties within themselves, to stop themselves from engaging in behaviours that are a detriment to the greater good of society. This disposition, therefore, is intolerable to the concept of international law and human rights. Thus, one cannot rely on the concept of international law to stop *ultra vires* behaviours, except when one restricts themselves from going that far.

International legal doctrine requires states to work within the parameters of the law in everything they do, and they should be held accountable through law when there is human rights abuse. This point is also contentious, for where there is a lack of ethics and integrity, respect for the law is diminished, and there is no accountability, and therefore the abuse of power becomes the custodial of the law. So, why are we to observe and divide the components? The answer is that obedience to the law is a quality that must be possessed by society and its structures. Therefore, international law becomes abstract and superficially

²⁶Shelton (2020).

²⁷Söllner (2007).

²⁸Przeworski & Maravall (2003).

²⁹Bingham (2007).

³⁰Lockton (2012).

distorted if the other compound elements are not presented in society. As we imagine and discourse the compound elements, we will start to conceive the ideas and reasons behind the abuse of power in the modern world. If so, we can also regard ethics and integrity as qualities that the law must possess in its nature so we can address human rights issues under international law.

The Rohingya crisis is a typical example of the evaporation of ethics and integrity in international law and human rights. Therefore, where ethics and integrity fail, one of the potential consequences concerning human rights is crimes against humanity.³¹ This failure can also be observed in the lack of urgency at the United Nations Security Council. The legacy can be traced back to the early 1990s when Rohingya refugees left Myanmar in an effort to escape the human rights violations perpetrated by the authorities there.³² As a result of the human rights violation, the Rohingya (an ethnic Muslim group) who came from Myanmar were rendered stateless. Therefore, the purpose of this essay is to examine the Rohingya crisis in accordance with the principles of ethics and integrity in international human rights and state accountability. It shall be concluded that the atrocities were a violation of ethics and integrity, and therefore a violation of international human rights treaties and other agreements and constitutes a failure of obligation or accountability.

The Nature of Human Rights and the Law

International human rights law is the structuration of human rights in the international legal order. The great leap of said structuration became apparent in the post-WWII period.³³ International human rights law has become an area of international law that encompasses a set of individual entitlements of persons against governments.³⁴ These entitlements – human rights – range from civil to political rights such as the right to be free from arbitrary deprivation of life, torture and other ill-treatment, to the right to freedom of thought, conscience and religion, and to social and economic rights such as the right to health and education. Likewise, globalisation has reconfigured the territoriality and sovereignty that has traditionally been associated with states.³⁵ Economic actors, such as transnational corporations, have become powerful actors within the world's economy and they are increasingly using their economic power to influence the actions of states.³⁶ Transnational corporations' business operations also directly affect the enjoyment of human rights by individuals, especially women.³⁷ One such case which is considered in the literature is that of the Bangladeshi textile manufacturing factories,³⁸ which produce clothes for some of the world's biggest retailers. As the

³¹Beyrer & Kamarulzama (2017).

³²Leider (2020).

³³Sieghart (1983).

³⁴Schachter (1991).

³⁵Kaleck & Saage-Maaß (2010).

³⁶Richards, Gelleny & Sacko (2001).

³⁷Ikelegbe (2005).

³⁸Ali & Habib (2012).

case demonstrates, transnational corporations are increasingly escaping liability for abuses which happen within their corporate structures and supply chains.³⁹ Therefore, the question is one of responsibility and attribution.

Substantively, international human rights law can be found in many different sources of moral and legal rules. These rules are either conventional or customary; some are binding, while others are non-binding, and these non-binding rules are the so-called 'soft' laws.⁴⁰ Therefore, international human rights law has evolved both on the international and regional planes through several binding treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the Convention on the Elimination of All Forms Racial Discrimination 1965 (CERD), centred around state obligations and rights for individuals. Presently, a change in the international legal order can be perceived and the involvement of other actors is increasingly recognised.⁴¹

Now that the importance of human rights has been recognised in this essay the next question is: what is the law? Cassese identifies three steps toward legal positivism.⁴² These steps are: identifying the substance of the rights, establishing binding duties for the protection of those rights and, finally, enforcing those duties.⁴³ The first step was taken with the Universal Declaration of Human Rights 1948,⁴⁴ and the second through the emergence of binding human rights treaties at the United Nations as mentioned above, the first of which was the CERD in 1965,⁴⁵ closely followed by the ICCPR in 1966⁴⁶ and the ICESCR in 1966.⁴⁷ The last stage of enforcement is the most difficult one to take in the realm of international law; and it was made more difficult by the polarisation of the international community during the Cold War. Thus, international human rights law is a part of 'public international law, which is traditionally governed by and for sovereign states'.⁴⁸ 'However, the role of other actors and the individual at the centre of international human rights law is undeniable.'⁴⁹ 'Indeed it is a field of law that is subject to constant evolution.'⁵⁰ 'However one conceives human rights law, it is surely not static. Human rights law is driven, not by the steady accretion of precedents and practice, but rather by outrage and solidarity.'⁵¹ Nevertheless, the international legal system remains primarily governed by states.

³⁹Khan & Rodrigues (2015).

⁴⁰Clapham (2006).

⁴¹Cassese (2012).

⁴²*Ibid.*

⁴³Tomuschat (2014).

⁴⁴*Universal Declaration of Human Rights* (UDHR), 217 A (III).

⁴⁵UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, (1965).

⁴⁶UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).

⁴⁷UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (1966)..

⁴⁸Clapham (2006).

⁴⁹Shelton (2020)..

⁵⁰Schiettekatte (2016).

⁵¹Schiettekatte (2016).

In addition, human rights enforcement is a long-standing dilemma. Therefore, to address the irregularities in the current legal rules, human rights law should be enjoyed by everyone in the world. This enjoyment should also provide a mechanism for the enforcement of these rights. However, ‘as the international community becomes increasingly integrated, the fundamental question that needs to be asked is how can ethics and integrity of human rights be respected in all jurisdictions? Is global human rights enforcement inevitable?’⁵² ‘If so, is the world ready for it.’⁵³ And how could an emerging global human rights mechanism ‘based on and guided by human dignity and tolerance’⁵⁴ be accepted by all state parties? ‘These are some of the issues, concerns and questions underlying the debate over universal human rights and the belief in effective enforcement.’⁵⁵ Relativism of enforcement ‘is the assertion that human values, far from being universal, vary a great deal according to the different human rights perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different jurisdictions and ethnic, integrity and religious traditions.’⁵⁶ ‘In other words, according to this view, human rights are’⁵⁷ related to the perception of a state party rather than universal.⁵⁸

Taken to its extreme, the notion that human rights enforcement should be based on state discretion ‘would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the last few decades.’⁵⁹ If state discretion and jurisdiction alone govern a nation’s ‘compliance with international standards, then the widespread disregard, abuse and violation of human rights would be given legitimacy.’⁶⁰ ‘Accordingly, the promotion and protection of human rights is perceived as’⁶¹ a state obligation and should only be subject to national discretion on the grounds of security and public health. ‘By rejecting or disregarding their legal obligation to promote and protect universal human rights, states advocating jurisdictional differences could raise their human rights norms and particularities above international law and standards.’⁶² However, ‘largely through the ongoing work of the United Nations, the universality of human rights has been clearly established and recognised in international law. Human rights are emphasised among the purposes of the United Nations as proclaimed in its Charter’,⁶³ ‘which states that human rights are “for all without distinction”. Human rights are the natural-born rights of every human being, universally. They are not privileges.’⁶⁴

⁵²Schiettekatte (2016).

⁵³Shiferaw & Tesfa (2009).

⁵⁴*Ibid.*

⁵⁵*Ibid.*

⁵⁶*Ibid.*

⁵⁷*Ibid.*

⁵⁸*Ibid*; Schiettekatte (2016).

⁵⁹Shiferaw & Tesfa (2009).

⁶⁰*Ibid.*

⁶¹*Ibid.*

⁶²Shiferaw & Tesfa (2009).

⁶³Shiferaw & Tesfa (2009) and Totten (2008).

⁶⁴Shiferaw & Tesfa (2009) and Schiettekatte (2016).

The only area of international law that is capable of addressing the human rights violations of individuals' rights perpetrated by a state is the action of the government or governmental actors against its citizens⁶⁵ and aliens. This doctrine falls into two parts. The first is the law of state accountability for injury to its citizens⁶⁶ and aliens,⁶⁷ which primarily deals with the disruption of property interests by aliens of foreign states, though this also includes attacks on individual persons in their jurisdiction (including its citizens). The second is the law and custom of war, which acknowledges certain limitations on the conduct of a state in war and is designed to promote some of the fundamental human rights of an individual during wartime.⁶⁸

This concept is related to the principle of 'sovereignty'⁶⁹ that for many years has dominated international relations between states. Under current international law, sovereignty 'in the sense of contemporary public international law, denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law.'⁷⁰ This analysis indicates that it is only the state that is accountable for what happens in its jurisdiction and has a positive obligation to act. This positive obligation extends to the state's responsibility to protect not just its citizens,⁷¹ but all aliens and actors in its jurisdiction. Hence, under the current concept of international law, it is adequate. However, it can be argued that the concept restricts the practical and legal concept of accountability because it neglects the broader notion of accountability which includes ethics and integrity.

It has departed from the 'concerted' approach for access to remedies and legal standards on state conduct and human rights. Nevertheless, this does not undermine states' obligations to oversee the conduct of entities under their jurisdiction, as they would operate under the international principle of subsidiarity, by which international institutions may exercise jurisdiction in cases where national legal systems are unwilling or unable to fulfil their primary obligation to protect human rights and redress human rights violations. This could enhance domestic efforts to protect human rights through international cooperation and legal coherence, as it would impose common international standards on the problem.⁷² Thus, the current international legal framework has rejected the essential mechanism of accountability, which is an effective remedy and a fair and accessible justice system to hold entities or individuals liable for misconduct.⁷³ Even though the reason for this deficiency was clear from the beginning of the creation of international law, could it be said that international law did not anticipate future dynamics with respect to

⁶⁵Partsch (1985).

⁶⁶Weiss (2002) and Bianchi (2002)..

⁶⁷Murphy, Jr.(1966),

⁶⁸McDougal, Lasswell & Chen (1980).

⁶⁹Guiraudon & Lahav (2000).

⁷⁰Steinberger (2000).

⁷¹Thakur (2011).

⁷²Gallegos & Uribe (2016).

⁷³Shelton (2015).

the international legal obligations of state actors in relation to human rights accountability?

International law consists of the rules and principles of general application which apply to the conduct of states and international organisations, and their relations with one another and private individuals, minority groups, and transnational corporations.⁷⁴ Transnational corporations, however, do not have a legal personality under international law. The term ‘international legal personalities’ refers to the entities or legal persons that have rights and obligations under international law.⁷⁵ However, could we attribute ethics and integrity to these actors? This is something that has yet to be contested in the discussion of the relationship between non-state actors and international law.

Ethics and Integrity in Accountability

The definition of a state has the following characteristics: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter relations with other states. The international legal system is a horizontal system dominated by states which are, in principle, considered sovereign and equal. International law is predominately made and implemented by states. Only states can have sovereignty over territory.⁷⁶ Only states can become members of the United Nations and other international organisations. Only states have access to the International Court of Justice.⁷⁷ Other entities such as corporations do not meet the requirements under international law that allow them to acquire legal personality.⁷⁸ However, in the universal principles of ethics and integrity, non-state actors may not be exempt from liability as a result of a lack of legal personal.

This establishes a distinctive legal principle between the domestic legal system and the international legal framework for the liability of wrongful conduct.⁷⁹ Thus, international law and domestic law differ in terms of magnitude.⁸⁰ Domestic law governs the behaviour and actions of individuals within the state, whereas international law governs the behaviour and actions of bodies of government, including states.⁸¹ National law, which can also be called municipal law, comes from legislature and customs, whereas international law consists of treaties and customs.⁸² A legislature is a body of people who are able to make or enact laws. Treaties are formal agreements among and between countries.⁸³ Customs are practices which are deemed normal for individuals or states.⁸⁴ Corporations may nonetheless

⁷⁴Allott (1999).

⁷⁵Alvarez (2011).

⁷⁶Agnew (2005).

⁷⁷Raustiala (1997).

⁷⁸Nowrot (1998) and Mwansa (2017).

⁷⁹Portmann (2010).

⁸⁰Kratochwil (1991).

⁸¹Steinhardt (1990).

⁸²Eisenberg (2002).

⁸³Morina, Korenica & Doli (2011).

⁸⁴Merry (1998).

be a subject of national law in domestic courts and may have a legal obligation in domestic courts, though not in international legal settings. We can, therefore, say definitely that corporations are subject to the principles of ethics and integrity.

Thus, the view of international law can be said to have resulted in the development of two distinct features of corporate accountability in domestic court and international legal settings: public and private accountability, and remedial mechanisms. The latter is divided into two parts, one related to the enforcement of public law offences and the other related to private law actions by affected individuals and communities at the national level.⁸⁵ Although domestic legal regimes do not necessarily fall neatly into one or the other grouping, it can be argued that there is some element of accountability at the domestic legal system.

However, the concept of accountability in many domestic jurisdictions is limited⁸⁶ and falls short of the notion of accountability even though there are barriers common to both methods of enforcement of human rights accountability.⁸⁷ It is possible that there are sufficient differences between the two to warrant the development of an ethics and integrity concept that has the ability to help the achievement of accountability for human rights violations. The problematic aspect of the concept of accountability lies in errors related to liability, sanction, enforcement, and the principles of ethics and integrity. Ethics and integrity in relation to accountability is the notion that neither state nor non-state actors are exempt from liability for human rights violations. Therefore, under the principles of ethics and integrity, they have a duty of care not to violate the human rights of the community. If words or acts amount to a violation, the person to whom they are attributed by virtue of an economic or business relationship is responsible for the other party's conduct. With this view, ethics and integrity establish a solid ground to hold any entity accountable for misconduct.

Consequently, if ethics and integrity are to be applied to accountability, it would be presumed that this approach would result in an effective accountability system. However, this has not been the case, as the current concept of accountability has resulted in a 'free for all' or excuse for vengeance against victims of human rights abuses.⁸⁸ In this understanding, ethics and integrity do indeed establish liability for states and other entities, and this liability extends to misconduct in societal settings. But it comes with risks. The ethics and integrity being advocated in this essay will put the onus of proof in 'violations of human rights claims on entities because the relevant information (and expertise to understand it) is in the hands of the entities, not the victims. If claimants can *prima facie* demonstrate that they have suffered harm'⁸⁹ (injury), and that this is likely to have been the result of the entity's activities (causation), by the principles of ethics and integrity the burden of proof is on the entity in question.

Ethics and integrity through accountability processes should lead to liability and sanctions. If the State or an entity does not operate in accordance with human

⁸⁵OHCHR (2016).

⁸⁶Steiner, Alston & Goodman (2008)..

⁸⁷Ratner (2001).

⁸⁸Jacobson (2005); Eaton (1997); Amnesty International (2017).

⁸⁹Nartey (2021).

rights law, then sanctions should be put in place. However, the fundamental questions are: what is defined as a reasonable state or entity in the context of accountability? How does this fit with the concept of accountability?

‘The reasonable state in law, is compared to a reasonable person, reasonable man, or the man on the *Clapham omnibus*,’⁹⁰ which is a hypothetical person of legal fiction who is ultimately an anthropomorphic representation of the body of care standards crafted by the courts and communicated through case law and jury instructions.⁹¹ The reasonable person is the longest established ‘group of personalities who inhabit the legal system, which is available to be called upon when a problem arises that needs to be solved objectively’.⁹² Thus, the reasonable man could be the ordinarily prudent man of ethics and integrity,⁹³ the officious bystander,⁹⁴ the reasonable juror properly directed, and the fair-minded and informed observer.⁹⁵ All of these colourful characters and many others besides⁹⁶ provide important standard setting services to the law. The reasonable man standard is more than just a common law principle, but rather, a legal instrument to protect human rights doctrines. As states are part of society, the law is created to protect society. As international law is the manifestation of domestic and customary law, the presumption here is that the reasonable state⁹⁷ test can also be applied to international law and standards. Both states and entities should be held accountable if their conduct falls below the reasonable man standard, because the state is an entity and is required to act in accordance with the rule of law⁹⁸ and the principles of ethics and integrity in the society⁹⁹ where the entity conducts its activities.

Therefore, if the international legal system and domestic judicial systems are to hold states to a specific intent standard for human rights violations, as opposed to a knowledge standard or the reasonable man standard, the bar for accountability for human rights violations in human rights abuses would be substantially high.¹⁰⁰ It is difficult to impute specific intent on states for serious human rights abuses; arguably, the primary purpose of states is to maintain and increase security, stability and worth rather than commit human rights abuses. However, the pursuit of security may lead to complicit behaviour. An example of this is where a government itself has the specific intent to perpetrate the criminal act.¹⁰¹ A note of caution is due here since criminal intent cannot be attributed to the entire state. Thus, if one accepts the liability of legal persons before international tribunals and under international law, there remain many details that require further judicial

⁹⁰Lee (2007).

⁹¹*Blyth v Birmingham Waterworks Co* (1856) 11 Exch. 781. See also *Hall v Brooklands Auto Racing Club* [1933] 1 K.B. 205.

⁹²Gardner (2015).

⁹³*Speight v Gaunt* (1883) L.R. 9 A.C. 1 at 19, 20.

⁹⁴*Shirlaw v Southern Foundries* [1939] 2 K.B. 206 at 227.

⁹⁵*Webb v The Queen* (1994) 181 CLR 41.

⁹⁶*Healthcare at Home Ltd v The Common Services Agency* (2014) UKSC 49.

⁹⁷Lee (2007).

⁹⁸Cosgrove (1980). Dicey, Morris & Carlile (2000).

⁹⁹Simmons (1981).

¹⁰⁰Scheffer & Kaeb (2011).

¹⁰¹Kaeb (2016).

rulings in terms of determining *actus reus* and imputing *mens rea* to the legal person. Questions include: what type of decision-making authority on the part of the individual person is required to attribute responsibility to the entity? Is liability limited to the acts of ‘organs’ or ‘representatives’ of the state only, or does it extend also to acts of other agents?¹⁰² Can a reasonable man be aggregated across the entire organisation or state, or do all elements of the human rights violations need to be present in one specific individual natural person in order to attribute responsibility to the entity? What are the appropriate and effective penalties for legal persons as perpetrators of international crimes?

The ethics and integrity in question are of vital significance when holding legal persons accountable for human rights abuses, as legal persons constitute a fiction. Therefore, the court must resort to the principles of ethics and integrity as readily available doctrines to levy against entities because, as legal persons, they cannot be imprisoned or otherwise confined.¹⁰³ Ethics and integrity are necessary to ensure that the objectives of international human rights law¹⁰⁴ are achieved, particularly in terms of retribution and deterrence. Also, it is questionable whether monetary fines are an appropriate means for punishing an involvement in human rights abuses.

If states fail in their obligation to protect or entities fail in their responsibility to respect human rights, they have failed to uphold the actions of the reasonable person. However, in order to arrive at this conclusion, one needs to first establish: who is causing the violation and what are the causes; what accountability arises from failing to meet the reasonable person standard; and to whom must one account to? It should then be established who is responsible for the commission of the violation and who the duty-bearers are in order to assess the context of the violations and how they happened, in addition to determining what can be expected from a court/tribunal and the inherent limitations of the state duties. The final issue that needs to be established is the extent to which the victims or their representatives face reprisal. The extent to which the entities complied with the principles of ethics and integrity and if the acts: (1) were within the scope of the conduct; (2) were committed or ordered by state (government officials); and (3) constituted human rights violations for which the punishments included fines and forfeitures of property.

Addressing these questions will result in an actor being identified, establishing who is to blame and what accountabilities arise from this blame. This will assist both international and national judicial bodies to have the authority and ability, in law and practice, to award a range of remedies in human rights law cases arising from state-related human rights abuses. These remedies may include monetary damages¹⁰⁵ and/or non-monetary remedial measures,¹⁰⁶ orders for restitution, aggravated damages, exemplary damages, measures to assist with the rehabilitation of victims

¹⁰²In the *Case Against Al-Jadeed S.A.L. & Al Khayat*, STL-14-05/ T/CJ, Judgment, 61 (Special Trib. for Lebanon Sept. 18, 2015).

¹⁰³Coffee (1981).

¹⁰⁴Smith (2022).

¹⁰⁵Maley (1987).

¹⁰⁶Colandrea (2007).

and/or resources, satisfaction and public apologies, and guarantees of non-repetition including mandated compliance programmes, education and training, and criminal prosecution where appropriate.

It is recommended that the concept of accountability¹⁰⁷ should define, interpret, and enforce the formal legal norms and regulatory rules of international human rights.¹⁰⁸ According to this rationale, accountability should consist of a system of governance, meaning the standards, laws and norms that should be respected by all actors and all individuals and state officials operating in the international arena. Therefore, the notion of accountability should be seen as a legal framework that is capable of providing for the accountability of individuals, communities and other actors, including state and non-state actors, for their conduct. Consequently, accountability should have three essential components that are crucial for effective enforcement of human rights law and remedy: international human rights laws, norms and standards; accountability; and enforceability. This will aid in the establishment of a strong concept of accountability.

Failed Accountability in the Case of the Rohingya People

For one to say international criminal law has its validity and legitimacy in prosecution and enforcement, we must look at its institutional framework in line with accountability. Therefore, in the case of the Rohingya, the question is whether the institutional framework in its form and substance could have stopped the human rights violations from taking place. To address this form and substance, we need to view the killing of Rohingya civilians in Myanmar through a critical lens. Take, for instance, the issue that in South Asia countries, the jurisdiction of some national states is at odds with UN institutions such as the International Court of Justice (ICJ) and the International Criminal Court (ICC).¹⁰⁹ This disagreement can be seen in the measures initiated by the ICJ on 23rd January 2020, in respect of the Rohingya.¹¹⁰

When one examines this initiative in accordance with the ICJ point, Myanmar was under a duty to take reasonable steps to avoid the killing of civilians in its territory. This claim is in line with Article II of the Genocide Convention.¹¹¹ In accordance with this initiative, Myanmar is also under an obligation to exercise control over its military, people and institutions to avoid the extension of civilian killing. Therefore, it can be conceived that this duty extends to individuals and institutions that come under the direct control or support of the Myanmar government.¹¹²

¹⁰⁷Mulgan (2000).

¹⁰⁸Sieghart (1983).

¹⁰⁹Wijesinghe (2018).

¹¹⁰Lintner (2020).

¹¹¹Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/64/Add.1 (Dec. 9, 1948)

¹¹²Mohajan (2018).

This is problematic, partly because the precautionary measure does not go far.¹¹³ Accountability requires an absolute halt to human rights violations. This means the demand and obligation should be one of avoiding and halting all human rights violations. In essence, neither was achieved in the Rohingya case. Hence, it must or can be presumed that neither the ICJ approach nor the precautionary measures produced a desirable outcome for the civilians and international law in its short and long arm's length. However, accountability in this sense means non-negotiable, it is a duty that the state must bear and respect. In this conceptual analysis, we can thus say, the ICJ view of Myanmar's conduct is something that needs to be commended; specifically the decision to ask the government to show the steps taken to avoid or halt the human rights violations.¹¹⁴

Also, one of the underlining issues in the Myanmar case is the difference between the national legal system's approach to the protection of human rights and the ICJ's. This difference might be the main reason why the ICJ decision could not hold ground in Myanmar.¹¹⁵ Whether there should be a difference in human rights protection or interpretation, is a significant concern in our understanding of the relationship between the national legal system and the application of international law. This issue led to the action taken under UN's Charter, Articles 94 and 99.¹¹⁶ However, this action did not lead to anything of substance as China and Russia vetoed the action taken by the United Nations Security Council (UNSC). These vetoes mean that any enforcement action taken by the UNSC is paralysed at the outset.

In effect, the institutional dogmatism is the result of the failed human rights protection of the Rohingya. Take, for instance, that the concept of the rule of law relies heavily on people in positions of power exercising their authority in an appropriate and just manner.¹¹⁷ It went further to state that power must be exercised within the framework established in society, meaning the rule of law has the faculties to stop the abuses of power.¹¹⁸ In an ideological concept, this point may hold water. However, in a practical sense, this point is redundant, partly because humanity does not have the faculty to restrain itself from the abuse of power and influence of the environment;¹¹⁹ This is with the exception of individual who possess the faculties within themselves to stop themselves from engaging in behaviours that are a detriment to the greater good of society. In this view, the UNSC is polluted with individual agendas and less focused on human rights protection and upholding the principles of equality and justice. Therefore the paradox in this instance will be to restrict or limit the UNSC decision-making in respect of human rights protection in wartime. Fundamentally, this may lead to an effective and efficient approach to resolving human rights violations in wartime. Therefore, it is conceivable that the human rights protection decision should not be a debate or deliberated by the UNSC.

¹¹³Riyaz ul Khaliq (2020).

¹¹⁴Justice For All (2020).

¹¹⁵Rael (2021).

¹¹⁶*Ibid.*

¹¹⁷Przeworski & Maravall (2003).

¹¹⁸Bingham (2007).

¹¹⁹Lockton (2012).

The consequence of not limiting the UNSC's power from matters concerning human rights may complicate and compromise the UN's position as a legitimate organisation for peace and security in the decades to come. Take, for instance, the case of the Rohingya, where the UNSC vetoes derailed the organisation's ability to halt the killing of thousands of civilians in Myanmar.¹²⁰ The derailing constitutes a failed peace and security project, which cannot be taken for granted in the slighted sense. This could also mean that the primary aims and objectives of the UN in the present and future are questionable. If these issues are not addressed, it is possible that in the decades to come the UN may not be able to hold the fragile peace and security of the world together.¹²¹ Furthermore, the objectives of the UN as stated in the Preamble as well as in Article 1(1), are described as ones that need the maintenance of global peace and security.¹²² It moves further to attest that the achievement of peace and security must be conceived through collective responsibility, simply implying that the organisation must act as one unit.¹²³ Now, in philosophical contemplation, unity cannot be achieved if peace and security cannot be treated equally in all aspects of the globe.

This unequal treatment damages the fundamental aspect of the UN's existence in the 21st century. While it is conceived that the UN provides a platform for diplomatic relationships, it should be contemplated that without peace and security there will be no diplomacy.¹²⁴ Lest not mistaking the duties imposed by the Preamble to the UN's Charter, which seem to suggest that protecting human rights is fundamental to its value. Therefore, this means that individual values and dignity must be given protection under the duties of the UN. This is a comprehensive statement, but this lead to the question, where is the dignity of the Rohingya people? Perhaps, dignity for the Rohingya people is inconceivable? If this is so then it is perfectly adequate to reach the conclusion that the UN is as useless as a dead lion.¹²⁵ It might be adequate to assume that the institutional structure created for international human rights is not fit for its purpose and needs validation in its conception. Therefore, the killing of Rohingya Muslims should not have happened under the watch of the UNSC. It is also possible to conclude that the current approach adopted and seen at the UNSC means, the Council lacks ethics and integrity in its conception.

United Security Council Meeting Future Challenges

The future challenges for the UNSC are reaching a complete concession on the principle of the universal good of humanity. Therefore, I dare not to speak first about political will but the principle of the general good. I must interpret the current form of the UNSC as a body that lacks ethics and integrity. To meet future

¹²⁰Barber (2019).

¹²¹Klaus Schlichtmann (2010).

¹²²UN, 'Article 1' (2021) <<https://legal.un.org/repertory/art1.shtml>> accessed 26 March 2022

¹²³Eagleton (1946).

¹²⁴Kelsen (2000).

¹²⁵Anwary (2018).

challenges, there must be a willingness to maintain the commitment to the general good in the face of adversity. This should not be constructed to mean that the danger posed to the peace and security of the general good or threat must exist, but that if the adversity should arise, with ethics and integrity the UNSC must continue its pursuit of the general good. However, difficulties may arise, when we attempt to attribute adversity and how much adversity one should encounter before a concession should be reached. This point becomes critical when we seek to ask the rights questions about the 2022 Russian invasion of Ukraine.¹²⁶ The UNSC and its so-called elitism did not stop the Russian invasion, nor was it able to persuade Russia to take a different path. Therefore, the UNSC's inability to stop the invasion signals three points: first, the UNSC does not possess the faculties to resolve the issue of human rights protection; second, it is an outdated body; and third, it lacks ethics and integrity oversight. Let me explain this point further.

The UNSC, in theory, has the capacity to pass a resolution that imposes an obligation on all member states to carry out its mandate. Additionally, Chapter VI of the Charter posits that the UNSC can seek all parties to resolve their dispute by peaceful means, and can suggest actions to achieve such an agreement. Now, this point is problematic, when a purposeful interpretation is given to such a connotation, it means the UNSC is the judge and jury of its own conduct. How can that be possible in the 21st century? This is not plausible and should be rejected in its form and substance. This rejection may also suggest that the UN Charter should undergo validation that can be based on the composition of 21st-century phenomena not a general abstract of 19th-century war. In this form and substance, it is possible to observe that the UN Charter established a base for future peace and security but does not guarantee this attainment in future endeavours. Therefore an appropriate resolution will be to shake the core foundation of the Charter so that its evolution can take place.

Also, after Russia started its invasion of Ukraine, the UNSC sat on 25th February to consider a resolution submitted by the United States and Albania to examine the invasion as illegal and an act against the doctrine of international law. The resolution also suggested an immediate cease of force against Ukraine and the withdrawal of the Russian military from Ukraine. The adoption of a substantive resolution in the UNSC needs an endorsement vote of the 15 members of the Council, with a concession vote, or abstention, of the 5 permanent members of the Council, which are China, France, Russia, the United Kingdom, and the United States. In light of the Ukraine invasion, all the 11 members voted in favour, and Russia voted no, vetoing the resolution. The process of the resolution and its passing phase has become problematic. It is problematic in the sense that in light of the ongoing war, in which Russia is the instigator, it is inconceivable to even contemplate that Russia should be allowed to vote on this issue. This problem touches the core of the very structures which the UNSC is to be defending. Therefore, an appropriate way forward will be an independent adjudicator or a mechanism that can allow a total suspension of any permanent member who has perpetrated an illegal war. Perhaps this approach may help to restore ethics and integrity in the operation of the UNSC. It is then plausible to say Russia's invasion

¹²⁶Grajewski (2022).

of Ukraine presents an opportunity to reexamine the right bestowed on the UNSC permanent members.

On 28th February 2022, the UN General Assembly, of which 193 countries are members, held a special emergency session on Russia's invasion of Ukraine under General Assembly resolution 377 A(V), which is widely considered the "Uniting for Peace" (or U4P) resolution. Ironically this was the same resolution adopted to circumvent the Soviet vetoes in the UNSC during the Korean War in 1950. The U4P resolution outlines the steps the Assembly should take on an issue of international peace and security, when the UNSC is paralysed under its own dysfunctional structures, specifically when there is a lack of cooperation among the five permanent members. Furthermore, on 3rd March, the Assembly passed a resolution on Russia's invasion of Ukraine under the U4P, which confirmed the Assembly's obligation to Ukraine as a sovereign and independent state. Therefore, it strongly opposed Russia's invasion of Ukraine and the breach of Article 2(4) of the UN Charter. The resolution also demanded an immediate withdrawal of the Russian military from Ukraine. 141 members voted in favour of passing the resolution (including the United States) and five against (Belarus, Eritrea, North Korea, Russia, and Syria), with 35 abstentions (including China, India, Pakistan, and South Africa).

The Assembly approach, in general, is comprehensive and one that should be commended. For example, a resolution at the Assembly requires two-thirds of all the members present to vote in order for it to pass. This includes those adopted under the U4P framework, which turns out to be a recommendation in nature and nonbinding. However, it is also important to note that the General Assembly resolution carries political weight and the show of collective will of UN Member States. When we, therefore, speak of different obligations and commitments to the protection of human rights, we can see the significance of this in the conception of the Assembly approach. This may mean we need to distinguish our understanding of the duties of the UNSC from a different kind of obligation for the protection of human rights. I am, therefore, under no illusion to say that UNSC is a political and nuclear war system. It has lost legitimacy and does not represent the interests of the greater good.

There is a need to create a better framework to resolve issues such as the Russian invasion of Ukraine and any future complications that may arise in the future. I will suggest that in addition to the Assembly and UNSC, there is a need to create a conflict management body within these two settings. This new, independent body should be given the legal mandate to impose sanctions on states that fail to comply with the findings of the body. This sanction should carry enforcement and possible military intervention as a last result. However, it is also important for this body to manage interstate conflict in such a manner to ensure ethics and integrity are not compromised for individual gain. This could be achieved by a combination of the two concepts of conflict management, such as integrating, avoiding, obliging and dominating.¹²⁷ In this developmental approach, we thus hope that the UNSC will be able to meet future challenges with an open-door policy and vision.

¹²⁷Rahim (2011).

Conclusion

This essay has discourse on and reviews the Rohingya crisis in line with the current developments in the international area. It has also explained international human rights law and how it can be found in many different sources of moral and legal rules. These rules are either conventional or customary; some are binding, while others are non-binding, and these non-binding rules are the so-called 'soft' laws. Therefore, international human rights law has evolved both on the international and regional planes through several binding treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the Convention on the Elimination of All Forms Racial Discrimination 1965 (CERD), centred around state obligations and rights for individuals. The has gone on to observe that ethics and integrity put the onus of proof in 'violations of human rights claims on entities because the relevant information (and expertise to understand it) is in the hands of the entities, not the victims. If claimants can *prima facie* demonstrate that they have suffered harm' (injury) and that this is likely to have been the result of the entity's activities (causation), by the principles of ethics and integrity, the burden of proof moves to the entity in question.

Consequently, if ethics and integrity are to be applied to accountability, it would be presumed that this approach would result in an effective accountability system. However, this has not been the case, as the current concept of accountability has resulted in a 'free for all' or excuse for vengeance against victims of human rights abuses. In this understanding, ethics and integrity do indeed establish liability for state and other entities, and this liability extends to misconduct in societal settings. But it comes with risks. The ethics and integrity being advocated in this essay will put the onus of proof in 'violations of human rights claims on entities because the relevant information (and expertise to understand it) is in the hands of the entities, not the victims. If claimants can *prima facie* demonstrate that they have suffered harm' (injury) and that this is likely to have been the result of the entity's activities (causation), by the principle of ethics and integrity the burden of proof to the entity in question. Before, perhaps, dignity for the Rohingya people is inconceivable? If this is so then it is perfectly adequate to reach the conclusion that the UN is as useless as a dead lion. It might be adequate to assume that the institutional structure created for international human rights is not fit for its purpose and need validation in its conception. Therefore, the killing of Rohingya Muslims should not have happened under the watch of the UNSC. It is also possible to conclude that the current approach adopted and seen at the UNSC means the Council lacks ethics and integrity in its conception.

Lastly, the essay concluded that there is a need to create a conflict management body within these Assembly and UNSC. This new independent body should be given the legal mandate to impose sanctions on the state that fails to comply with the finding of the body. This sanction should carry enforcement and possible military intervention as a last result. However, it is also important for this body to manage interstate conflict in such a manner to ensure ethics and integrity is not compromised for an individual gain. This could be achieved by a combination of

the two concepts of conflict management, such as integrating, avoiding, obliging and dominating. In this developmental approach we thus, hope that the UNSC will be able to meet future challenges with an open-door policy and vision.

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