



International law's response to the plight of the Rohingya

WADE MANSELL, MODULE CONVENOR PUBLIC INTERNATIONAL LAW

VIDEO TRANSCRIPT

Well, good morning, good afternoon, or good evening, depending on your time zone and where in the world you're watching this. My name is Wade Mansell, and I'm a convenor of the Public International law module.

This is to be a short presentation, the aim of which is to at least introduce you to a topical matter for discussion. I've turned to approach this in a rather tentacular way, I suppose. Tentacular, of course, means that like the octopus, there are a number of strands which, hopefully, all come together at one central point at the end. I've chosen to do it this way, because it allows me to confront, if perhaps indirectly, problems which many followers of this module seem to experience.

The first of this, which I'm going to really address today, I think, is that significant numbers of course participants remain concerned with the inability of international law to enforce or coerce its subjects to comply with its rules. Of course, one has to remember that these are rules to which the subject have themselves agreed to uphold, they are rules which the international community has agreed upon. Even within the International Court of Justice, of course, there's no realistic means of directly enforcing judgments of the International Court of Justice should a defeated party refuse to comply.

Of course, as you all know, it was envisaged that non-compliance would be a very rare event indeed, because, of course, it was the states themselves that accepted through their membership of the United Nations the obligation to comply with rulings of the International Court. Indeed, non-compliance is very rare, although no doubt everyone remembers the case of Nicaragua against the United States. The position of a party aggrieved by non-compliance with an International Court of Justice decision is that they should proceed to the Security Council to apply for enforcement.

Again, however, such a course of action may well be stymied because of the paralysis of the Security Council arising from the power of veto, as you all know. The popular view of the Security Council is that not only is the veto destructive, as I get this very often in answers to questions in the examinations-- Not only is the power of the veto destructive of the council's power of enforcement, but also, it's impossible to justify the choice of states holding the veto powers, in particular, of course, the United Kingdom and France. Leaving that point aside for the moment, I think that it is crucial to appreciate why great powers, however they're defined - certainly the United States and China, and probably also Russia and maybe Europe and maybe India - should not be placed in a position where they have to submit to a court to enforce why we have the veto power. My view is that to do otherwise, to take away the veto power, would actually be quite unrealistic and could inevitably lead to actual armed conflict.

A contemporary case which I wish to use to deepen the discussion of the United Nations and Security Council and the International Court of Justice, is the plight of the Muslim Rohingya

people, many of whom since October 2016 have been expelled from Myanmar. Estimates vary, but probably a roughly accurate estimate is something like 700,000. Many of them, of course, almost 700,000 are living in refugee camps in the most abject conditions in Bangladesh, itself a poor country and suddenly faced with refugees approaching a million. In the course of the expulsion of the Rohingya by the Myanmar forces, undoubtedly, there were terrible acts of violence committed: multiple rapes, appalling murders, desperate cruelty, crimes which, however, you look at them, must be considered as being crimes against humanity. The villages in Rakhine State in Myanmar where they lived have since been almost totally obliterated and removed. Even if they were permitted to return, the refugees would certainly face at least a well-founded fear of persecution or worse.

Well, despite an outpouring of sympathy and indignation and anger, many are onlookers and probably most of the people are studying this course, are very depressed by the apparent inability of the international community generally and of the United Nations in particular to apply international law to remedy the grievous wrongs and sufferings of the Rohingya population. So much, some people think, for the United Nations doctrine of the responsibility to protect.

Yet it is worth considering such actions has been taken to re-examine the relevance of international law in order to assess both possibilities and limitations. The possibilities obviously circumscribe. They are not as broad as they might be. Any United Nations Security Council Resolution for action would undoubtedly be vetoed, at least by China, both because China has close physical and trade ties to Myanmar, and also because China has consistently rejected projected direct intervention into the internal machinations of another state. China's history and background persuades us that international intervention and the internal affairs of a country is almost never justified. Leaving aside the United Nations Security Council, which we can see is likely to be impotent because of the veto, what are the alternatives? Today, I just want to mention three international law institutions which, perhaps, compliment the Security Council.

The first is the Human Rights Council. The second is the International Criminal Court. The third is the International Court of Justice.

But let me remind you first to bear in mind the charter of the United Nations. Something is overlooked in much discussion of the United Nations and human rights is that the charter was drafted with the principal purpose of the prevention and settlement of international disputes, that is disputes between states, not problems within states. The objective of Article 1 of the United Nations Charter is, of course, to avoid war through the prevention and settlement of those international disputes. And as one author put it in a rather memorable phrase, which I think is important, it suggested that in the drafting of that Article 1, "The acceptance of violence within states acted as the price to be paid for limiting violence between states." In other words, even if the violence was terrible, as long as it was confined to a state, it did not represent a threat to the international order. It doesn't mean it should be tolerated, but it did mean that there were constraints in what could be done.

When you remember that, it becomes clearer why the United Nations has had problems in solving quite appalling human rights abuses in states such as Indonesia, Cambodia - or Kampuchea, as it was when the atrocities were committed - Rwanda, Libya, the former Republic of Yugoslavia, and, indeed, in Myanmar. Of course, the position might have been different, could have been different, though it's unlikely, had the United Nations pursued the path which was initially intended of creating its own military force, but that itself might have brought problems.

To the Human Rights Council. The Human Rights Council is a body based in Geneva, was established in 2006 as a subsidiary body of the General Assembly of the United Nations. While it hasn't been an outstanding success in many ways, it has done some useful things. With regard to

Myanmar, it hasn't been inactive. In March 2017, after the expulsions have been continuing for some time, it formed an independent fact-finding mission on Myanmar to look into "Alleged recent human rights violations by military and security forces." The mission was not granted access to Myanmar, and consequently, most of its evidence was gathered from those who had fled the country. They did take some 850 statements that all of which are incredibly impressive. The mission was not granted access to Myanmar, which meant that the witnesses that were interviewed were those who had moved outside Myanmar. That was because the Myanmar government refused them permission to come in to investigate. The resulting thorough and meticulous inquiry evidenced horrendous events and said that the army must be investigated for genocide against the Rohingya people. Also concluded that, at the very least, investigations must consider crimes against humanity, which, in the view of the investigating mission, were clearly proven. They actually named and recommended that six senior military figures be prosecuted for these crimes against humanity. These included the commander-in-chief of the Myanmar army and his deputy. It recommended a referral of the investigation to the International Criminal Court or to a new tribunal. Of course, recognizing that China will veto any strong National Security Council resolutions required, they didn't recommend referring it to the Security Council.

As to the International Criminal Court, as a result of the report from the Human Rights Council, the International Criminal Court prosecutor requested authorization to open an investigation into alleged crimes within the International Criminal Court jurisdiction committed against the Rohingya people from Myanmar. Of course, while Myanmar is not a state party to the Rome Statute, Bangladesh did, in fact, ratify this statute in 2010. The pre-Trial Chamber, considering whether or not to authorize the investigation by the International Criminal Court, relied very largely on the report of the Human Rights Council. They accepted that this provided evidence of widespread and systematic violent act that could amount to crimes against humanity and authorized an investigation into crimes within the jurisdiction of the court, if any alleged crime was committed, at least, in part, in Bangladesh and after the date of entry of Bangladesh to the Rome Statute.

Obviously, because the International Criminal Court is concerned with the criminal responsibility of individuals, the six military figures named in the Human Rights Mission will be prime suspects in such an investigation. You will, of course, realize the difficulties that might be raised in enforcing any arrest warrants that might be issued. Please also reflect upon the political realities that give rise to these impediments, why it is it is difficult to arrest people who are suspected of committing crimes against humanity, if the state in which they are living does not want to surrender them.

The most recent development, of course, of the international law's involvement in the suffering of the Rohingya people, came in the International Court of Justice with an application from the Republic of Gambia, in Africa, small state, instituting proceedings against the Republic of the Union of Myanmar. It was filed on the 11th of November, that is last month, 2019. You'll remember that unlike the International Criminal Court, as mentioned, the International Court of Justice is concerned only with state responsibility. Of course, only states may be parties to cases in that court. That says, although, over the last couple of days, as I record this, Aung San Suu Kyi, the Nobel Prize winner, made submissions to the effect that the violence was an internal armed conflict-- remember Article 1 of the Charter. She appeared only on behalf of the Myanmar government. She did not appear as somebody who suspected herself of being implemented in these crimes against humanity. I do suggest that you read this application of 11th of November, 2019, in the International Court of Justice. It is a very full document which relies very heavily once more on the Human Rights Council's evidence. In particular, just note the relationship between the Human Rights Council's mission and this application from the Gambia.

The purpose of the application was to request the International Court to adjudge and declare that Myanmar had breached and continues to breach the Genocide Convention of 1948, and that it must, therefore, desist and provide reparations to those affected. It also requested the court to indicate provisional measures in order to prevent any further harm to the victims.

While you might well ask why such a state as Gambia would file this application and whether, indeed, it would have the required standing to do so, not being in any way directly or, perhaps, even indirectly, affected by the alleged crimes of Myanmar. The answer to this is that both Gambia and Myanmar are parties to the Genocide Convention of 1948, and so allegations of crime of genocide, at least, would clearly come within the Court's jurisdiction. Myanmar does have some reservations to the Genocide Convention, but these are probably ineffective, because they deal with prosecutions of individuals rather than with state responsibility.

You might also ask what the effect of this application being successful would be. The short answer, of course, is that enforcement of any decision, as we said, is only possible through the Security Council. The prospect of this, given the veto power of China and probably Russia, is extraordinary unlikely.

I'm coming to my major point now, for the purpose of this talk, and that is that does the question arises, does this mean that we, therefore, have clear evidence of what Antonio Cassese referred to as "The disappointment of international law." My response to that, I'm afraid, is equivocal. On the one hand, we do have international organizations able to provide a damning testimony of atrocities within a state which has accepted the fact that such actions are indeed atrocities-- if they're able to do that even without that state's cooperation. Secondly, the real sanction is the humiliation of a state committing egregious crimes against its own people, whether that's by way of trade sanctions, or even diplomatic pressure, and even ostracisation. In other words, it may treating a state as a pariah state. Now, those may seem poultry and certainly ineffective as a response to their terrible crimes which have been committed against the Rohingya Muslims in Myanmar, but I think we ought to contemplate the alternatives. What we want or sanction. Again, remembering Article 1 of the United Nations, sanction and international war in order to enforce the judgment, a war which might cause even more pain to the innocent than has already been caused. What effect might be the effect even of a victorious war? What are we left with if we are, if states were to intervene in Myanmar to try to prevent the suffering of the Rohingya?

It's that reality that explains, I think, the limitations of international law. Whether or not you consider that this reality nevertheless requires international legal institutions to be able to make moral pronouncements in order to promote human rights observance, it is probably for you to decide and argue.

What I've tried to do here is simply to problematise this question as to whether or not the United Nations should be given more power to directly enforce judgments of the International Court of Justice or, indeed, the International Criminal Court, and whether or not it is sensible to suggest that the veto of the major states, the powerful states of the Permanent Five, should really be constrained. Thanks very much. Thank you.