William Schabas Speaking at the War Crimes Research Symposium

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Frederick K. Cox International Law Center

<https://www.youtube.com/watch?v=7wM_SBlo6JM>

Thank you very much.  Let me also thank Michael Sharf for the invitation to once again come to Case and to participate in these wonderful conferences, which have contributed so much over the years on various subjects, the crime of aggression was one, genocide.

I was, I think like some of the other speakers, a bit uneasy about the title of this one, because it does have a pejorative tone, the idea of lawfare, and coupled with the fact that on the publicity material there was that rather stunning quotation from Netanyahu about how the three threats to - the three greatest threats to the survival of Israel were - now I can't remember what the first two were, but the third one was Richard Goldstone.

[Moderator: The Iranian nuclear program, rockets aimed at our civilians]

Iranian nuclear weapons, rockets, and Goldstone.  Yeah.  And I had people approach me, knowing I was coming here, thinking that this was going to be a Goldstone-bashing thing.  Frankly, if I had to think of the individual who would be the greatest threat to the survival of Israel, I'd probably choose Netanyahu and not Goldstone.

I think-I was going to speak about the International Criminal Court and the fact that under Article 12(3) of the Rome Statute, the Palestinian Authority has given jurisdiction, or attempted to give jurisdiction to the Court, and if I have a few minutes at the end I'll get to that.  But I really do feel that I have to step in and say a few words in defense of Richard Goldstone and of the Goldstone report. It would be a shame if this conference left the impression - left such a negative impression about what he's done and his contribution.

I don't think that lawfare is at all an appropriate term, at least in its pejorative context, to describe what that report is about.  It's not about trying to impede tactical operations, it's not about trying to manipulate law.  First of all, the idea of lawfare, or warfare for that matter, suggests that you're on one side or another.  And I don't know how one could say that about Richard Goldstone.  It's hard to think of a public personality of such integrity as Richard Goldstone and the role he's played.  I think he certainly didn't go in to this difficult job, difficult for him personally as well.  Those of you who followed his involvement, you know he's a Jew who often visited Israel, he won't go back to Israel.  He probably can't for personal safety, he has undergone all kinds of very unhappy consequences as a result of doing something that the rest of us would be fortunate if we get to do in our lives, which is to  show the kind of courage he did in stating his opinions honestly and in a forthright manner, which is what's in the report.

What the report's main conclusion is, of course, is that the Cast Lead operation, Cast Lead was a punitive action, and it was aimed to punish the people of Gaza, and that's not an unreasonable conclusion for someone to reach.  If we look at the poor people of Gaza, who are now into what? The third or the fourth generation living in refugee camps, living in one of the most populous and impoverished parts of the world, and all they want is a state, and they get punished for insisting upon this and for supporting a political party in their own determination and their own assessment that seems to be representing that aspiration.

And Goldstone looked at the facts that Operation Cast Lead - I don't have the numbers at my finger tips, because as I say, I was planning to speak on something else, but were there what? 1300 or 1400 deaths in Operation Cast Lead?  Is that about right?  And how many of them were civilians?  About 1000?  And how many of those were children?  3 or 400?  I forget the exact numbers, I am speaking from memory, but it's of that order of magnitude.  And I don't remember how many Israeli civilians were killed in Operation Cast Lead, but I don't think there were very many.  Were there any civilians?  Not one?  And how many have been killed from the rockets?  3?  300 children, 400 children killed and so the Goldstone report looks at this and says it looks like a punishment operation.

It's a very helpful thing for us that we have someone like Richard Goldstone, who can look at a conflict like this and draw legal conclusions about it, and suggest that both sides are violating the laws of war and human rights obligations that they have.  And the debate about human rights obligations, whether they are applicable in a territory such as Gaza in a situation of conflict is an interesting technical question.  I think there's one small example in the report where there's a finding of a human rights violation and a killing where it wasn't also deemed to be a war crime.  This is really a detail, it's a detail, it shouldn't detract us from observing and understanding the great wisdom of the whole report.

I think on the other- and I did read this morning, I hadn't received Laurie's paper before today, but I did - I apologize to the speakers who were speaking while I was reading the report this morning, but I couldn't resist reading it.  And I went through the objections.  At first I thought that it was a case of what I call praising with faint damns, because in the end, it didn't really strike any serious blows to the main import of the Goldstone report, which is the violations of international law committed by the Israeli Defense Force.  It didn't really - maybe a couple of glancing blows - but the thrust, and you heard it in her presentation a few minutes ago, was mainly, well exclusively about the behavior of Hamas.  It was about the other side.  So maybe Hamas didn't behave properly, I don't think anyone has any doubts about that, and nor does Goldstone, and it's in the report.  But it doesn't really address, it doesn't challenge in any significant way the conclusion that Israel violated international law, and that this resulted in the deaths of approximately 1000 civilians, including many many children, and that's out of all proportion to anything that happened to Israel on the other side.

In terms of the specific conclusions, I'm even not really very convinced by the specific points.  The accusation of perfidy, I'm not sure that-there are many experts in international humanitarian law in the room, much more expert than I am, but my understanding of perfidy, that it was essentially trying to, using some sort of a ruse or a trick to get the other side, to induce the other side to, in order to respect the law, to put themselves at a great disadvantage in a vulnerable situation.  And the section in your paper, Laurie, that talks about this, I think you actually concede this, fighting without uniforms but using mortars and other weapons isn't really perfidy.  That's just being a combatant who's not wearing a uniform.  And so I don't know that the failure to condemn perfidy is a fatal law on the Goldstone report.  The fact that they haven't cited perfidy specifically, or they did in one place, or they didn't specifically mention Article 58 of the First Protocol, these are, I think, details, I think they're quibbles.  Nobody's perfect, the report isn't perfect, it has its own shortcomings and flaws, but it's a fundamentally positive, helpful contribution to moving this issue forward.

I think that one of the problems with it, and not just with the comments about the Goldstone report, but more generally with this issue of Palestine, but there are others as well, is that we want to use law to help bring peace and to resolve conflicts.  We're usually doing it in a situation, and I'm always intrigued by the use of the word asymmetry - of course I guess when it's asymmetry both sides are at fault - but if when we're looking to use the word asymmetrical to describe the situation in Palestine, it's really not the poor Palestinians who are the authors of asymmetry to the extent that anybody can be responsible for, that they are in an extremely, and always have been, terribly vulnerable situation.  But I was thinking, there are other conflicts that we might address.  We've seen in recent months, actually, attempts to solve Kosovo using law, which led to an advisory opinion at the International Court of Justice.  Cyprus is another case that comes to mind, where there's been a lot of - we could have another panel on Cyprus and the conflict there.  And finally, Northern Ireland and the Irish government, asymmetrically, because Ireland is not going to go to war with the United Kingdom, that would be asymmetry, you know, that would not be a wise thing.  But all Ireland could do, when it wanted to get the British to behave themselves in Northern Ireland, was go to court.  So that was lawfare, maybe that was one of the first examples.

And so when we look at the situation in Palestine, I think we all hope that maybe a legal way can help us find a way out of it, which is why we should encourage developments like the Goldstone report and welcome them, and welcome the fact that we're using law to try and find solutions.

The - do I have a minute or two left? The subject that I was going to speak to you in more detail about, is Article 12 paragraph 3 of the Rome Statute, which has been invoked by the Palestinian Authority to give jurisdiction to the International Criminal Court.  It's a curious provision in the Rome Statute.  It's a bit of a remnant, really, because it's - like all negotiations, you move forward in developing an instrument or a model and that's what happened with the Rome Statute, and you have little bits from the old, outdated part of it that just linger on, and that's what happened.  What Article 12 paragraph 3 does is it allows a state that's not a member of the Court, that hasn't ratified the Statute, to give jurisdiction to the Court without joining it.  And although it's a bit of an anomaly, in a way it's, I think, a very helpful provision.  It's proven to be useful, and I think it will be in the future, because it enables a state which joins the Court to say, we join it as of today but we're actually going to give jurisdiction to the Court in the past.  And one country has done that, Uganda did that, Uganda made such a declaration.

Why this is so useful is that it helps us to send a message to all states that there's nothing in the world that can't potentially come before the International Criminal Court.  One of these years, David Scheffer's efforts are going to pay off and the United States will ratify the Rome Statute, and it could give jurisdiction retroactively up to the beginning of the Court, which will be the first of July 2002.  And I think that's a very useful, helpful message to send out, so that nobody - that all that can do is contribute to ending impunity for human rights.  (Are you telling me I'm done?  I'm just looking for a sign up there.  I still got two minutes, that's great.)  All that can do is encourage that.

So, I'd like to think that I might be even responsible, way back in the past, for the Palestinian declaration, because in in my book The Introduction to the International Criminal Court, I wrote a paragraph on this potential use of Article 12, paragraph 3, and I said maybe the Palestinian Authority can make a declaration saying that when they are a state, they will ratify the Rome Statute and they will give jurisdiction to the Court over their territory going back to July 1, 2002. I thought that would be a helpful message, might focus the mind of some of the Israeli soldiers and their leaders on the possibility that they would be prosecuted. So they went one step further and actually made such a declaration.  So now there's a great debate going on about whether the declaration is valid, the central issue being, is Palestine now a state? Because the Rome Statute says you have to be a state to make the declaration.

Those of you who are interested in reading more on this, if you go onto the website of the Prosecutor of the International Criminal Court, there's a detailed explanation, there's an analysis of the various submissions, and then you have all of the submissions that have been given to the International Criminal Court by some of the most notorious practitioners of lawfare in the world.  Law professors, even my name pops up there on one of the statements, because I signed a number of European, mainly European law professors signed a paper, an opinion, where we advanced the view that for the purposes of the Rome Statute, maybe we should have a purpose of, and somewhat flexible, functional approach, to the definition of a state, so as to expand the possibility of the jurisdiction of the Court.  And said that, under those circumstances, even if perhaps in some certain technical senses, Palestine didn't meet the definition of a state, that nevertheless, it was desirable that the Court, that the Prosecutor in the first place, give a fairly liberal approach to this.

But there are people on the other side.  One practitioner of lawfare I know, his name is John Ashcroft, he may be a familiar name here, and he signed one of the opinions.  And there are many others, they're on all ends of the spectrum, so it's actually very interesting to read.  You've got all of the views out there and you can reach their own conclusion.

We don't know what will happen.  The Prosecutor has suggested that in the next few months there will be a decision as to whether or not to accept this conclusion.  He would still have to then go to a Pre-Trial Chamber, he would first have to decide that he wants to prosecute, and then go to a Pre-Trial Chamber.  So I don't think that the Israeli generals are trembling in their boots and thinking that they'll be prosecuted anytime soon.

But it's probably better that we move forward on this then that we don't do it.  It's going to help bring peace and help save lives, which is the goal.  Thank you.