**After Gaza 2014: Schabas**

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In the face of the heart-rending loss and injury of civilian life including children in the recent Gaza conflagration, it was neither unexpected nor inappropriate for the UN Rights Council to announce on 23 July 2014 that it was to launch ‘an independent inquiry to investigate purported violations of international humanitarian law and human rights laws in the Occupied Palestinian Territory, including East Jerusalem’.

People hold very strong views on the rights and wrongs of the Israeli-Palestinian conflict. Articles in *EJIL* dealing with this topic are always amongst the most downloaded. Passions run high, tempers flare, intemperate language is used. When such is translated into legal writing there is, with some exceptions, a tendency whereby the author’s political and moral views on the conflict translate almost linearly into legal conclusions. I say this with the experience of 25 years on the Board of Editors of *EJIL*. This is not necessarily an indictment of bad faith or an accusation of ‘brief writing’ disguised as scholarship.  One of the least contested insights of Legal Realism is the manner in which our normative sensibilities and sensitivities condition the very way we experience both facts and the law. But there is plenty of barely disguised lawfare too. Given our own scholarly mission and our belief, mocked by some, that the search for objective legal evaluation is a worthy, if at times Sisyphean, endeavour, we have often ‘balanced’ things out by encouraging debate and reaction pieces. This predates my tenure as Editor-in-Chief. Those with a long memory will recall the exchange between Francis Boyle and James Crawford on the 1988 Palestinian Declaration of Independence in one of our earliest issues.

One is typically blind to one’s own shortcomings. Personally I take some measure of comfort from the fact that my occasional legal writings on the conflict are regularly criticized, always with passion, by partisans on one or the other sides of the conflict, most recently in our own EJIL: Talk! in response to comments I made on the Levy Report.

Be that as it may, when the firing and killing ceases and judicial inquiry takes over it is in the interest of justice and the credibility of the bodies who administer it to adopt those other idioms of the law – dispassionate, ‘blind’, fair – and to heed the wisdom of justice needing not only to be done but to be seen to be done.

It is, thus, appropriate that the UN Rights Council speaks of an ‘independent’ inquiry to investigate ‘purported’ violations of IHL and HR. So it should be.

The Council in the same meeting condemned in the strongest terms ‘widespread, systematic and gross violations of international human rights and fundamental freedoms’ perpetrated by Israel in the conduct of hostilities. It serves neither the interests of justice nor the credibility of the bodies charged in administering such to reach these categorical conclusions before the body set up, in the same breath, to investigate purported violations has investigated and reported. Careful factual and legal analyses are needed before any definitive conclusions may be reached. One might think that the appointing body, already sticking the arrow and drawing the target around it, may put undue pressure on the independent investigating body to reach certain conclusions. Even if these were the views of Members of the Council, they should have been withheld when the Council, a political body, exercised its investigative and judicial authority. The dissonance jars and is compromising. The same is true for the failure of the Council explicitly to make Hammas, the effective government of Gaza, alongside Israel an object for investigating purported violations of IHL and HR.

In fairness, the resolution was far from unanimous, with a large body of Western countries abstaining.

Which brings us to the appointment of Professor William Schabas. Schabas has perfect professional credentials for membership; he is a distinguished and justly influential scholar in the field.  I know him to be an entirely honourable person of impeccable integrity. But once his statement, albeit in another context, emerged, available on Youtube, that ‘Netanyahu would be his favourite to be in the dock of the ICC’, I believe the only right thing was to recuse himself and step down.

I do not say this lightly, and saying this does not detract in any way from my laudatory comments about Schabas above. In this instance, the appointing body, in setting up the independent inquiry, specifically stated that the Commission was not only to explore purported violations of the law but to identify those responsible. Ms Pillay spoke in this context of the need to ‘end the culture of impunity’.  Netanyahu is Prime Minister of Israel and in his public statements has not, to his credit, tried to shift any responsibilities for the actions in Gaza to, say, the military. He could well be, in legalese, a target of investigation by the Commission.

Article 4 of the Code of Ethics of the ICC addresses the issue of impartiality. The Commission to investigate Gaza 2014 appointed by the UN Human Rights Council is not the ICC, but given its quasi-judicial function I do not see any reason why the standards of impartiality should be different.

Article 4(1) provides as follows:

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.

The impartiality of Professor Schabas has been called into question in the light of an answer he gave to the Netanyahu comment. He explained, if press reports are to be trusted, that it was a comment made in view of the findings of the Goldstone Report. It has been pointed out that Netanyahu was in the Opposition during the Cast Lead operation and would have had *ipso facto* and *ipso jure* no responsibility for any findings in the Goldstone Report – a fact which could point to unacceptable animus by Schabas. There is another Youtube video in which Professor Schabas addresses Netanyahu in derogatory terms, again cited as indicating animus. I express no position on this.

But it is hard for me to accept that his pronouncement on Netanyahu as being his favourite to be in the dock of the ICC – regardless of the context of the comment – is consistent with ensuring ‘the appearance of impartiality’. That very question – whether there is evidence to indict Netanyahu for violation of international criminal law, might, directly or indirectly, be before the Commission.  In my view, this is a self-evident case where an appearance of impartiality might be created. For the Commissioner, the UN Council, the Commission of Inquiry and William Schabas himself to dig in is, in my view, unwise and counterproductive. When the appearance of justice is compromised, so is justice itself.