William Schabas: From Vow to Law: How can Prohibition of Sociocide Become an International Norm?

October 7, 2012

Russell Tribunal on Palestine - New York

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

Thank you very much, members of the tribunal. I’m very honored to be here. I'm very grateful to you as well for giving me an opportunity once again to affirm and manifest my own commitment to the right of self-determination of the Palestinian people and my profound belief that international law can be used to demonstrate and underscore the violations committed by the State of Israel, and moreover can be used to hold accountable individuals who have perpetrated international crimes against the people of Palestine.

I believe I was originally invited to testify on another topic when I was first contacted and I was then subsequently asked to speak on this panel about sociocide, which I should confess was a term that really wasn’t very familiar to me. I’m not a sociologist. I’m an international lawyer, as has been explained. And I would have, had I been asked, to speak about use of international criminal law to address this problem, I would have been inclined to speak about crimes against humanity, war crimes and the crime of aggression, all of which I think can be shown have been perpetrated at various times during the history of the State of Israel. These are all crimes that have become increasingly robust in their definition in recent decades and for which we now have international institutions capable of prosecuting the crimes. And I think it’s an important point, and I wasn’t here yesterday but it may already have been made, that the International Criminal Court is in a position to exercise jurisdiction over crimes committed on the territory of Palestine since 2002. This is a matter of some debate of course, like everything in this field, but a strong and arguable case can be made that the Court can already exercise jurisdiction over crimes against humanity and war crimes perpetrated in Palestine, and that the obstacle to that moving forward at this point is simply a decision by the Prosecutor of the International Criminal Court. And so much of my effort these times is addressed to try to get that decision rethought and reversed, and pointing out the fallacy, the legal fallacy and the policy error of the Court in failing to take up this burning, important issue.

I believe I was asked to speak on sociocide because my own background in a lot of my academic work on the crime of genocide was felt to be relevant to a better understanding of the nature of the crime. And so let me speak a little bit to this. I was asked to discuss the development of the crime of genocide in the belief that this would help us to understand better the nature of the – of sociocide.

The word genocide is a relatively new word, in the English and in other languages, because it’s also used in various languages. It was invented, I believe, here in New York, probably not very far from where we sit this afternoon, in 1944 by a Polish Jewish refugee from Hitler’s armies. He wrote a book about Nazi rule in occupied Europe that was published by the Carnegie Foundation in November of 1944. Most of the book is rarely ever consulted today, but there’s one unforgettable chapter, which is entitled, Genocide. That’s where the word first appears. And it was a word that caught fire. So within two months, by January of 1945, the book was reviewed on the front page of the New York Times’ book review section. And several months later, as the Nuremberg trial was being prepared, first the American prosecutor and then other prosecutors used the term, had become part of the language.

The man who invented the word, his name is Rafael Lemkin, the man who invented the word in the book had a broad conception of what genocide actually meant, and one can see this in the chapter, and in the paper that I produced- I hope you’ve had the chance to consult- I reproduced a section of it where he explains what he considers to be the components of genocide, which indeed, although he entitles the chapter “Genocide,” he means it to be the crime of genocide. He wants it to be called a crime, rather than an illegal act. A crime for which people can be punished, sent to jail. And he lists a range of forms of genocide in there, starting with physical genocide, extermination, biological genocide, and then he proceeds to a range of other forms of genocide, including economic, social, genocide, cultural genocide. I think that what Profession [] has described as sociocide is contained within that vision of genocide. He saw the attack on the Jews and on other minorities in Europe and peoples in Europe by the Nazis as one whose ultimate goal was physical extermination, but that had other facets and that perhaps in other cases it was not going to go by the route of the extreme route of massacres, but of destruction in other ways. So I think he already understood that part of the attack on a people, where the objective is ultimately to destroy, to eliminate that people.

The word of course caught on, and then went to the next level, which was always part of Lemkin’s agenda, which was an international codification, you have to be included in an international treaty for it to start to bite in terms of its legal effects. And this meant, it had to be negotiated, it had to be negotiated, as it was, in the first sessions of the United Nations General Assembly. And it meant that ultimately, there had to be a broad level of consensus about the definition of genocide that would satisfy, not only the growing numbers of people from the South, who were increasingly dominant in the United Nations, from places like India, which was a founding member of the United Nations, Cuba, Costa Rica, Philippines, and so on, but also, of course, what were then called the Great Powers, powerful countries, the main victors in the war. And that meant that the ultimate definition that was agreed to and that is now the official legal definition of genocide represented a compromise. And as Professor Galtung mentioned earlier as well, was designed to a certain extent to protect those very states from being held accountable themselves. They had already done this once, when they set up the Nuremberg trial, and when they had to define the label that was used at Nuremberg to prosecute the Nazis, which was crimes against humanity. The word genocide was only used in a rhetorical sense at Nuremberg. The crime of the extermination of the Jews was described as crimes against humanity. And when that was being negotiated in London, we have the records of the conference, there’s a very telling moment when the American negotiator, Justice Robert Jackson, a Justice of the U.S. Supreme Court, said that great care had to be taken in developing this definition because, he said, we have to make sure that it applies to the Germans and not to us. He said, in particular, if we’re going to describe the persecution of minority groups in Germany as an international crime, we should link it, we should make it conditional on its association with the waging of an aggressive war because – and Jackson was a Roosevelt Democrat, I’m sure he was a fairly progressive man for his time – but he says, we have in our own country a situation where minorities are abused and mistreated and we don’t want to be held accountable for that at international law.

So it’s of course very true to say that these definitions were – are flawed, both of crimes against humanity and of genocide, although – and I say this particularly about crimes against humanity, it has become improved greatly over the years. And it’s, I think, a feature of international law, that it’s something that from the beginning, I should say it, 60 or 70 years ago when people spoke about international law, they would start by apologizing for the fact that it’s law at all. You don’t hear that so much these days because people understand that international law is effective as a way of holding accountable the strong as well as the weak, and of underscoring the existence of double standards. It’s a body of law that is constantly struggling to demonstrate and to manifest double standards, so that law that is relatively easy to apply to the weak is also applied to the powerful,

Some of you may have seen the statement by Archbishop Desmond Tutu three weeks ago complaining about the fact that the International Criminal Court focuses entirely on Africa and fails to address the man, well, he would like to see in the dock, Tony Blair. Actually, my favorite would be Netanyahu in the dock at the International Criminal Court.

So, I say this because I- I know I was preceded by a speaker who was a little critical of international law or of international lawyers, and I acknowledge that there are limits to what we do. I know that I’m speaking before a body that’s called a tribunal. So if we were just applying sociology, this should just be the Russell Symposium or the Russell Conference. It’s a tribunal and I would urge you not to lose sight entirely of the law and the legal significance. I’m confident that sociocide has a – has to be injected into the debate and the nature of it, that’s described so well by Professor Galtung, has to inform the discussion and ultimately a report that will result from this, from these sessions. It might be useful to remind people that sociocide is very much a part of the original vision of genocide of the man who invented the term, Rafael Lemkin.

I think it would also be very helpful to indicate that much, if not all, that is contained in sociocide is now recognized as falling within the definition of crimes against humanity. I think this is – it’s important that we not lose sight of this because there’s a – I think there’s a danger that in using a new term or in emphasizing a new term, it appears as if we’re conceding the argument that the old terms don’t apply.

When I heard the Chair speaking about how sociocide applied to the, for example, the condition and the treatment, the historic treatment of aboriginal peoples in the Americas, and I think elsewhere in the world, I thought, sociocide, but also genocide. And I don’t think you should – that anything should be said that suggests an unease or anxiety about using that term. And when we talk about the treatment of Africans who were brought to the Americas as slaves, that is described as the crime against humanity of enslavement and of other crimes against humanity, and so I wouldn’t- I’m not sure it would be a positive development to suggest that we’re giving that up, or that we feel that the existing terms are either not adequate or unsatisfactory or even applicable. So I guess what I’m urging is that you find a way to marry these two notions so that you enrich the debate with the notion of sociocide but without implying that its necessary to deal with the situation in the Occupied Territories.

We already have much evidence that the existing international crimes address much of the worst that’s happened. Yesterday, you heard a discussion of the advisory opinion of the International Court of Justice. We have the report of the Commission that was presided over by Richard Goldstone. And let me remind you that although Goldstone rather notoriously now has appeared to backtrack on a part of the report, most of the report and the worst of it -- the worst of it, because the core of the report was about the campaign, not the behavior of individual soldiers in Gaza, but of the campaign of Israel to teach a lesson to the people of Gaza, learning from 2006, when it had taught a lesson to the people of Lebanon. And that point, from everything I've read of Richard Goldstone, is not retracted by him, and certainly none of the other three members of the commission have said anything to cast any doubt on their conclusions. So those arguments are made, and they’re important, and the value of a body like the Russell Tribunal, amongst other things, is to insist on those things and to remind people of them and to make sure that they don’t slip through our fingers. Thank you.

Q: Thank you Mr. Schabas. I am going to take the co-chair liberty of asking the first question. At lunch today, I had the opportunity to speak with Craig Corrie, who mentioned the idea of preemptive justice, and on this jury we have a woman, Angela Davis, who has written a book about restorative justice. So could you kind of explain in the face of sociocide, genocide, and basically crimes against humanity, what restorative justice could look like?

Schabas: I think that in Professor Galtung’s remarks earlier, he alluded to some of this, when he spoke about the mechanisms that we used in South Africa to achieve reconciliation, that were notably the truth and reconciliation commission, that was presided over by Archbishop Tutu. And I think ultimately that in all of these contexts of conflict, Northern Ireland is another one, where we have, as the conflict moves towards post-conflict, we turn our attention to ways of ensuring that the people in the society who remain can live together. And I’m sure that that will be at some point on the agenda in Palestine and in the Middle East more generally. I regret that we’re not close enough to post-conflict to really map that out at this point. I think that in all of the societies where this has been done – I personally had experience as a commissioner on the Sierra Leone truth and reconciliation commission- that each one has its own, its own features, and has to be created, as it was in South Africa and as the mechanisms in Northern Ireland as well, they have to be indigenous. So I can’t be more prescriptive of that except to say there’s a huge body of reflection and material on this now and that at a certain point, it will start to dominate the agenda, but we’re certainly not at that point yet.

Q: Thank you, we have three more questions. First we’ll take Michael Mansfield, then Stefon, and John.

Q: The question I want to ask, it really stems from an experience I had at lunchtime. It’s not the food, because I didn’t have any. I chose to sit in here, and there was a film showing, ‘Where should birds fly?’ Now those of you who were in here would have been as shocked, even though I thought I knew what was going on, shocked as anybody could be about the appalling situation. We’ve heard a lot about the appalling situation but the film says it all. Farmers being shot at, as I speak, fishermen being sunk, as I speak. Phosphorous burns from Cast Lead still taking their toll. It’s in that context that I have a feeling, since there are so few Palestinians here today, for reasons that we’ll come to later, that there’s a sense of urgency, emergency and that has to be communicated into legal redress. And I just want to give an example which is linked to everything that is being said. I’m involved in a campaign to make ecocide illegal, an international crime, the fifth international crime against the peace. I slot it in, again if you can incorporate it in your response, because this has been discussed for thirty years, this was agreed by all the nations, save three, to go into the treaty of Rome in 1998. It won’t take too much imagination to work out the three who opposed it, because the three who might end up in the dock, if it became a crime against the peace. And we still, there is a- if you like an ambassador, a lawyer going around the world at the moment, Polly Higgins, trying to get governments to agree, and she still hasn’t managed to get the consensus. So I’m going to be blunt. Sociocide is a very interesting concept, but I’m interested in the farmers, the fishermen, and the people in Palestine right now. So my question is this: Is there not sufficient material, concepts within international law now, and I’m not talking about punishment, I’m not an international lawyer, I’m interested in transitional justice. Is there not sufficient concepts to start bringing Israel to a recognition that they will be excluded from the international community unless they recognize their failure on basic, fundamental rights that we’ve all been talking about.

Schabas: The issue – part of the issue that you’re raising is the definition of the incorporation of new crimes into an existing body of law. And I think that there are two things at work, actually, in international law. And speaking now over the history of many many decades. One is the attempt to codify new things, and the other is the use by judges of the existing law, and stretching it, to take into account progressive social developments and changing values. And I think that there’s a great deal of potential on both tracks. I would think that a very strong case can be made for much that is ecocide, as well as a great deal of what is sociocide, for its inclusion within the concept of persecution as a crime against humanity, and other inhuman acts as crimes against humanity. Now, it’s a choice, but often things move faster when you get a handful- when you get a case before a handful of judges with a bit of imagination and courage, than when you convene an international conference and they start trying to negotiate the terms of it. It just- often it just gets worse. So I’m not against moving forward on both fronts, but I would be- if I had to invest, if someone said you can only, you have to invest in one of them, I’d actually be more prone to saying, look at the tools we have and try to stretch them, but with the goal of putting the problems that you’re concerned about, ecocide in particular, into the middle of the agenda in the middle of the project. I think that’s already possible, but it does require, it requires judges. And of course the other challenge is finding the court to get it into.

Years ago there were no courts at all. When genocide was invented, there was no court at all. There was no court for crimes against humanity. But we have them now. And with a bit of luck and by twisting things and maneuvering, we can get them before the courts. Who would have believed 40 or 50 years ago that you’d get Palestine before the International Court of Justice? Got there through the advisory opinion, with all of its weaknesses and flaws, but nevertheless got there and moved the goalposts in the debate, and legally put some issues – this is something that I don’t need to tell you is, as a great barrister, put some issues – One of the things that we can do is put some issues out of the debate. And there were some issues that I – I can remember going to a UN conference in 1999 in Egypt about the application of the Geneva Conventions of the occupied territories. People were still arguing about that. The decision, the advisory opinion just drew a line on that, there’s no argument anymore about that. And now we have to pry open the International Criminal Court. There’s a little crack, and we just have to keep pushing it open.

Q: With the extended questions and more extended responses, it’s very difficult for us to get everyone in. But we have Stephane Hessel and John who have questions. So maybe the idea would be for the two of them to ask their questions successively and then you give one comprehensive response.

Q: Thank you, I can be extremely brief. I want to plead for the resumption of the use of the word sociocide. Why? Because we know that what is at stake is more and more, not only a large group of human beings like in the case of genocide or of animals like in the case of ecocide, but what is in front of us is something that is being brought to existence by the action of another nation or another society. It is to something which is a society or wants to be a society and is prevented from becoming a society as defined so rightly by Professor Galtung. Therefore, I think it is useful for the judges of the criminal tribunal to have this word as one of the words they can make use of and be called on for. And that may sometimes be quicker than to be able to tell them to look in this case, what has been committed is largely similar to genocide. It isn’t quite genocide but it’s nearly as bad or this is something else and it can be defined as a criminal, international criminal actions. Let us be brave enough to say when a society is at, in case, and where that society is being prevented from going forward to arrive at its required status, then there is a crime and that crime we call sociocide. Thank you.

John Dugard: I would like to ask a very different question, and my question is this: Isn’t there a danger that by introducing a new concept, a new crime, sociocide, at this stage, we give the impression that the existing international law crimes are inadequate to deal with what is happening in Palestine. In other words, we send out the message that we can’t quite categorize what is happening so we call it sociocide, and that does give the impression that it does not qualify as a crime against humanity or war crimes. And isn’t it more important at this stage to persist in trying to secure prosecutions for crimes against humanity and war crimes.

Schabas: I can be very brief, Madam Chair. I agree with both Mr. Hessel and Professor Dugard, in that I recognize the value of enriching the debate with the use of sociocide but I have the very concern that John Dugard has mentioned, that this be – that this open up the chance for our enemies to attack us by suggesting that we’re acknowledging they’re admitting that the law, the existing law, is inadequate to describe the horrors that are being committed. I don’t want to do that. Thank you.