

CONGRESSIONAL STAFF BRIEFING:
Human Rights in the Middle East (War Crimes in Yemen as a Case Study)
Rayburn House Office Building, Room 2045

Remarks of Steven M. Schneebaum
Steven M. Schneebaum, P.C.
Interim Director, International Law and Organizations Program
Paul H. Nitze School of Advanced International Studies
The Johns Hopkins University
September 20, 2019

Ladies and gentlemen, I am going to take a slightly different approach to the discussion of what is going on in Yemen, even today, even as we speak. I want to propose an approach grounded in international law.

There is nothing new in the notion that armed conflict must be conducted according to certain rules, and that those rules have the force of law.

From biblical dictates concerning the treatment of non-combatants, through the Lieber Code developed during President Lincoln's administration, certain principles have emerged, intended to guide both soldiers on the ground and officers who command their movements and their activities. Yet the conduct of war lies outside the more familiar realm of the criminal law. After all, soldiers in uniform are permitted by the laws of war to kill other soldiers wearing different uniforms: acts that in peacetime would be prosecutable as homicides.

The Nuremberg and Tokyo trials established a benchmark for the latter half of the twentieth century, to the effect that war crimes are crimes, that crimes against humanity are crimes, and that the indiscriminate massacre of civilians is a crime. These crimes are answerable in courts, with their perpetrators to be held accountable at the bar of justice.

Such developments as the Universal Declaration of Human Rights, and such international agreements as the Geneva Conventions of 1949 establishing the foundation for what we now call international humanitarian law, built the momentum that marked the second half of the twentieth century. They and other developments brought about a momentous shift in the conception of human rights in the broadest sense. In short, human rights were, and now are, recognized as legal rights, with correlative legal obligations. As an American judge put the point most succinctly: no longer are human rights to be seen as a "mere set of benevolent yearnings, never to be given effect."

This does not mean, of course, that the violation of human rights has notably abated in our lifetimes. Nor does it mean that humanity has finally resolved the epochal struggle between justice and vengeance. But it does mean that the conduct of armed conflict may be evaluated through a different lens, which may permit the universal condemnation of crimes, even if committed in warfare, in ethnic struggle, and even in the pursuit of national liberation.

Of course, the United States is not one of the 118 parties to the Rome Statute of the International Criminal Court. As we all know, the attitude of our government toward the ICC has been far more negative than passivity or tolerance: despite the important role of American diplomats in drafting that landmark document, the Bush and now the Trump Administrations have been openly hostile toward it. Yet the Rome Statute is significant here: it provides working definitions of war crimes and crimes against humanity that are reflective of customary international law.

The war in Yemen has been characterized by a so far unending series of atrocities. The indiscriminate bombing of places and people taking no part in hostilities, the targeting of civilians, the use of human shields, the deployment of landmines, rape as a weapon of war, starvation, blockades: all of these now attract not only moral condemnation, but the judgment that these things are illegal.

In this instance, of course, there is plenty of blame to go around. The Saudi and UAE campaign of bombings, which have resulted in so many documented deaths – whether reflecting ineptitude, carelessness, or systematic homicidal intent – is unfortunately matched in kind by the brutality of the Yemeni government – if that is still an accurate term – and the various rebel forces, including, but certainly not limited to, the Houthis.

Yet it is the attitude of third states, including the one in which we now meet, that is most troubling. It is unlikely that the belligerents on the ground will be responsive to legal arguments, and although one can hope for the eventual prosecution of the perpetrators of these offenses, that day remains far in the future. But surely the nations not directly engaged in the fighting, but providing the instruments by which it is being conducted, must be reminded of their obligations that are not only moral – in an ideal world that might be enough – but also legal.

Supplying arms without concern as to how they are used might be described as simply cavalier, or might be condemned as inappropriate and dangerous. If that pattern of behavior is motivated by a desire for financial gain – the sale of weapons is lucrative, after all – that makes it all the worse. It is venal, crass, and irresponsible. If it is driven by geopolitical objectives – that is, if the people whose lives are ended or ruined by the conflict are treated as pawns in a contest controlled from far away – it is inhuman and malicious.

But if arms are supplied in the full knowledge of how they will be used, and if it is well-established that they will be put to use to do little more than magnify suffering, then it is hard to avoid the conclusion that something worse is afoot. The person who handed the loaded gun to someone who has clearly expressed his intent to use it to foment mayhem is criminally liable for aiding and abetting the inevitable and foreseeable homicides. And here, the suppliers of materiel, of training, and of support, must surely explain why they are not liable for the crimes that they know will be committed with that assistance, and that could not be committed without it.

The Report just issued by the Group of International and Regional Eminent Experts on Yemen, created by the UN Human Rights Council, makes this point with stark, clear, and undeniable force. That war crimes are being committed wantonly in Yemen is beyond doubt. Countless journalists, human rights NGOs, and international observers have reported and documented these crimes, to the point that

readers sitting in comfortable homes and offices in foreign lands are becoming blasé to them. Human suffering of this kind – far away from us, and seen as part of a series of struggles whose origins are as obscure as their goals – can become invisible, at least to those not experiencing it. “Compassion fatigue” is a real phenomenon.

Yet the Experts Report, and the legal context within which it was delivered, make it necessary that three things happen, and they must happen now, before the situation already dire becomes far worse.

First, third states, aided by the United Nations, must make it clear to all factions in the fighting that there will be real sanctions against them if they continue their bloodshed. The United States obviously has special influence in and over Saudi Arabia. The President tweeted to the world at the recent G20 meeting that the Crown Prince is “a friend of mine,” and that it is “an honor to be with him.” President Trump must be reminded that friends have a responsibility to correct their friends when they misbehave.

Of course, everyone in this room is now thinking the same thing: we are all thinking of the murder of Jamal Khashoggi. And we all watched the video of the recent encounter in Osaka when Donald Trump shook the blood-stained hand of Mohammad Bin Salman. But Congress has a role to play here, and it is well past time to play it. Turning a blind eye to war crimes committed by Saudi Arabia and the United Arab Emirates – both supposed to be American allies – must no longer be tolerated.

On the other side, it is beyond doubt that shame is not available to persuade the Iranian regime to change its ways, because the concept of shame seems to have been abolished in Iran along with tolerance and civility. But there are western countries that trade with Iran, and that are linked to it through various bilateral and multilateral treaties (including, of course, the JCPOA). They must use what leverage they have to reduce the malign Iranian presence in the carnage in Yemen.

Second, arms sales to all of the belligerents must stop. Complicity in war crimes is itself a crime. While the ICC definition requires an element of intention – of *mens rea* – in establishing culpability, it is hard to argue that support for butchery can be forgiven because the outcome was unforeseeable. Not in Yemen, anyway. We know too much.

Governments, obviously including this one, must prevent these transactions, without exceptions and without hesitation. The coercive force of the law must be employed to ensure compliance. And even if renegade regimes – North Korea, for example – can always be counted on to look for creative means of avoiding or circumventing sanctions, that is no excuse for permitting the delivery of weapons by suppliers from states that have not only a conscience, but a healthy respect for the rule of law. To elevate the financial aspects of arms sales over their consequences – over the tragedies and the suffering that they inevitably produce – is not only reprehensible, but it is illegal.

Finally, it is essential that the perpetrators of these atrocities must be identified, and they must be brought to account. Since 2001, there seems to have arisen a confusion between subjecting violators of international law to justice, and defeating them on the battlefield. That confusion has too often been seen in enactments adopted in these very Capitol buildings. But the issue here is not that one side or

another should “win” the Yemeni war and then impose its will on everyone else. The issue is that “winning” is irrelevant: “winners,” like “losers,” are in this era legally responsible for their conduct, and they are answerable for the crimes that they commit.

The Experts Report declares that names of potential defendants are being compiled, and that is a good thing. Such people must be given an opportunity to have counsel, and to defend themselves against the charges brought against them, which should be evaluated ultimately by a neutral institution. Here, as in so many other places around the world, it is essential that outrages be treated not as legitimate acts of war, but as the crimes that they are. Crimes must have consequences for their perpetrators, and if we are to create a world in which the rule of law matters, we all have a responsibility, here and now, to enlist the support of our own governments in a campaign for accountability before the law.

Thank you.