



ICC Observers Project-Oxford Transitional Justice Research
Exclusive Interview: William Schabas, Professor of Human Rights Law and
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Professor William A. Schabas is director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds the chair in human rights law. William Schabas is an Officer of the Order of Canada. Professor Schabas is the author of eighteen monographs dealing in whole or in part with international human rights law, including Introduction to the International Criminal Court (Cambridge: Cambridge University Press, 2004, 2nd ed.), and Genocide in International Law (Cambridge: Cambridge University Press, 2000). Schabas has often participated in international human rights missions on behalf of non-governmental organizations such as Amnesty International (International Secretariat), the International Federation of Human Rights, and the International Centre for Human Rights and Democratic Development to Rwanda, Burundi, South Africa, Kenya, Uganda, Sudan, Cambodia and Guyana. He is legal counsel to Amnesty International Ireland. In May 2002, the President of Sierra Leone appointed Professor Schabas to the country's Truth and Reconciliation Commission, upon the recommendation of Mary Robinson, the United Nations High Commissioner for Human Rights.

Q: In a recent article, you wrote that the UN Commission of Inquiry’s report on Darfur, while finding that “the Government of Sudan has not pursued a policy of genocide,” left room for the possibility of individual actors having committed genocidal acts. Does the ICC ruling change your opinion about this possibility? What is the distinction in customary international law between “acts of genocide” and an organized state “policy of genocide”?

A: There is case law from the Yugoslavia tribunal that holds that the crime of genocide as defined internationally doesn’t require any contextual element such as a state plan or policy. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that an individual acting alone can commit genocide. That view was endorsed, in a sense, by the Commission of Inquiry that was presided over by Professor Cassese, but in a purely theoretical sense, because the Commission did not find any individual with a genocidal intent in Darfur on which to hang that accusation. I have personally never found this to be a particularly helpful proposition because I do not think the problem of an individual with a genocidal intent should be of any concern to international criminal law. The problem of an individual acting in isolation with a genocidal intent should be a concern in psychiatry. I have argued this position since the 1999 decision of the ICTY, I’ve written about this, and I reiterate my position in the second edition of my book on genocide, which is that a state policy element is essential for a determination of genocide. In the article you are referring to, I took the view that the Commission of Inquiry of Darfur had confirmed the importance of a state policy because it had in effect responded to a question from the Security Council – was genocide being committed in Darfur? – with the answer, “No, we don’t see any genocide in Darfur because we do not observe a

state policy of genocide.” So I took the report of the Commission of Inquiry as confirmation of my position, although I have to acknowledge that in a footnote the Commission says that they cannot exclude the possibility that an individual acting alone could have genocidal intent. I know this to be the view of Professor Cassese, but I don’t agree with that position.

Now, in the recent decision on the Bashir arrest warrant, the majority of judges hold the view that genocide requires the state policy element, in effect deriving this standard from the elements of crimes. It is important to understand that the elements of crimes, which were negotiated in late 1990s and early 2000s, took place in context of the ICTY and the cases involving the lone genocidal perpetrator. It is well known that the requirement of a contextual element for genocide, which is in the elements of crimes, was a response to the decisions of the ICTY. The majority of the Pre-Trial Chamber has insisted that that is an element for the purposes of applying the law of the Rome Statute. They distinguish it from the position taken by the ICTY but without making any observation as to what it might constitute for international criminal law. The judges of the ICTY would no doubt say that the Pre-Trial Chamber’s decision is a particular interpretation of the provisions of the law applicable to the ICC rather than a statement of customary law; this is only because they think what they are pronouncing on is customary law. I have noticed that the judges of the ICTY refer to the Rome Statute as authority of customary law when they agree with it, and when they do not agree with it they say it is not representative of customary international law. This suggests that customary international law is what the five judges at the ICTY think it is. I do not think that’s the correct position.

I think that the elements of crimes, which represent a consensus of the states involved in the ICC, is more authoritative of what customary international law is than what the judges of the appeals chamber of the ICTY think it is. However, no one can answer that question definitively – we now have a situation where we have one interpretation from the Yugoslavia Tribunal, which is based on the judges’ own interpretation of treaty law, Article 2 of the Genocide Convention as repeated in Article 4 of the Yugoslavia Statute. The ICTY judges are relying on a literal interpretation of that provision, because they argue that there is nothing in the text that says that in order to commit genocide there needs to be a contextual element or state policy element, so they conclude that you do not need a state policy element. That is, unfortunately, the extent of their analysis. To say that this view is customary international law is pretty superficial, because there is no attempt to identify what customary international law is in this case, but rather their opinion is based only on a literal interpretation of the treaty provision.

What the ICC has in its favor is that when you combine its text - which is the same text in Article 2 of the Genocide Convention, Article 4 of the ICTY Statute, and Article 6 of the Rome Statute - with the elements of the crimes, and a dose of common sense, you end up with a contextual element to the crime of genocide. What we do not know now is whether people will look to the Pre-Trial Chamber’s decision in the future and say this is a useful correction that helps us to clarify customary law or if are people going to interpret it as a particular decision dictated by the specific terms of the elements of crimes.

We have to bear in mind that there is a dissenting opinion in this case that tends to dismiss the significance of the elements of crimes. There is also Article 10 of the Rome Statute that reminds us that the Rome Statute is not necessarily a codification of international law. Those are all the pieces of the puzzle and where things will go from here I cannot say, but I am pleased with the arrest warrant decision.

Q: How does the Pre-Trial Chamber's ruling in the Bashir case relate to the 2005 UN Commission of Inquiry's findings? Does the Court's refusal to grant the genocide charges support the findings of the Commission? Are we reaching a consensus that the violence in Darfur is not appropriately classified as genocide? How will this influence the future development of international criminal law?

A: Yes, it is clear that there is a growing authority for the view that the events of Darfur do not constitute the crime of genocide: the Commission of Inquiry, the Pre-Trial Chamber, and the major human rights NGOs – Human Rights Watch and Amnesty International – have not used the term genocide. I think it is clear that when one gives an interpretation based on the definition of the Genocide Convention, we get the result that this is not a case of genocide. When one looks at something like the document produced by Madeline Albright entitled *Preventing Genocide*, from her Genocide Task Force in 2008, we see it adopts a definition that genocide means all forms of mass killings. That is not a particularly legal determination and they tend to dismiss objections to their view as legal pedantry. I, however, do not know that it is proper to dismiss the Genocide Convention and the Rome Statute as merely legalistic pedantry. These are significant and recognized distinctions in international criminal law between genocide and other forms of mass killing, which would constitute crimes against humanity or war crimes.

The definition of genocide and the answer to the question of whether genocide is taking place in Darfur depends on who you are talking to. If you are talking to an international lawyer, then it is not genocide. If you are talking to an American politician or sociologist or professor, then they might say it is genocide. It just depends how you use the word. The Oxford English Dictionary adopts the definition from the Genocide Convention. However, people are free to use words as they want. For example, sometimes people will use rape to describe violent sexual assault, while some merely use the word to describe something unpleasant.

For international law, it means that there is growing support for the feeling that Darfur is best not characterized as genocide, and there is also growing authority for the view that the definition of genocide in the Convention and Rome Statute should be interpreted in a relatively strict and narrow manner. We now have a great deal of authority for this view: the decision of Pre-Trial Chamber, the ICJ ruling in *Bosnia v. Serbia*, and the Yugoslavia Tribunal in the *Krstic* ruling, and we have the report of the Commission of Inquiry. Against that, you have a few dissenting judges, and you have a few national court decisions that weigh on the other side, but on balance, the authority is clearly in favor of a narrower interpretation. That is why so many thought that the actions of the prosecutor in attempting to get the arrest warrant for genocide given the indications of the law were not very productive. I am not talking about the demagoguery or extravagant use of the

term genocide in this case. The consensus among international lawyers and from the UN Commission was that the prosecutor could not get an arrest warrant on the grounds of genocide. So in terms of international law, the Pre-Trial Chamber's decision is just further evidence of a trend towards a narrow interpretation of the crime of genocide.

Q: What do you make of the possibility that Ocampo might appeal the judges' decision or bring future charges of genocide against Bashir and other Sudanese officials?

A: I do not see that as a serious possibility. In terms of appealing the decision of the Pre-Trial Chamber, the first question is whether there is an appeal of such a decision. I have never seen an attempt in any of the Yugoslavia or Rwanda cases to appeal an arrest warrant for an indictment. We know that in drafting the Rome Statute there were proposals addressing the possibility of an appeal on an arrest warrant as part of Article 82 of the Rome Statute, and this provision was in some of the early drafts, but it was cut out. The possibility of an appeal or of a right of an appeal to an arrest warrant decision was rejected by the Rome Conference. It is still possible under Article 82, paragraph 3, for there to be an appeal with leave of the Pre-Trial Chamber. So technically what Ocampo would have to do is get the Pre-Trial Chamber to give him leave to appeal the decision. I know of no precedence of doing this at the other international criminal tribunals. This suggests to me that it is unlikely the Pre-Trial Chamber judges would give him leave to appeal this.

As for him producing new evidence—and people have made a lot of the fact that the judges included a paragraph to this effect—you can say that about anything. There is no need to put that in the judgment; it is obvious. If he produces new evidence, he can get a new arrest warrant. If new evidence comes to light, he does not even have to get the arrest warrant amended. The judges themselves can propose that the charges be amended to include genocide. The introduction of new evidence has always been a possibility. I do not know if it is particularly productive to insist that there is something significant about the fact that the judges reserved his right to come back with new evidence, since the prosecutor had this right anyway. On one occasion in the past the judges even asked for new evidence, and I assume Ocampo gave it his best shot. This is not like Srebrenica where there was a mystery about whether they could get secret communications from the Serbs ordering the massacre. Here the facts are pretty straightforward and well known. A lot has been written about this issue documenting the statistics similar to the arguments of the prosecutor.

If someone were to come forward and say that the prosecutor made a mistake because there is a whole lot of evidence that was not presented with regard to the case of Darfur, then we might have a more compelling argument that the Pre-Trial Chamber ruling could be revised or that there will be another bite at the apple. I have not heard that, and I assume the prosecutor has presented the best evidence that he has, and it is widely available evidence, including the UN Commission's report and all the NGO material. I do not think it is likely that he will get leave to appeal, and I question whether the judges will even agree that they can give him leave to appeal such a decision. If they do grant

him room to appeal, well, then we are into the question of fact and of law. Mainly, however, we are not debating the facts here, we are debating the application of the legal definition to the facts. No one quarrels with the facts Ocampo presented and I do not think he has additional facts that could provide him with stronger arguments for a genocide charge.

Q: Does the Court's refusal to grant the genocide charge amount to a failure in any way for the prosecutor? Some have argued, in Sudan, that this shows the weakness of all the charges. Others think that it shows that the Pre-Trial Chamber is a credible body and not merely a rubber-stamp for the prosecutor. What do you think?

A: I think this shows one more bad exercise of discretion by the prosecutor, one more bad call by Ocampo. He was chastened last year because of his decisions on gathering evidence that he could not then disclose to the defense and that led to a terrible and unnecessary delay in the Lubanga proceedings for more than six months. This was an error in judgment and I think seeking a warrant for genocide charges in Darfur was also an error in judgment. I think he should have consigned himself to the clearly established charges of crimes against humanity and war crimes. The same Pre-Trial Chamber has already granted two arrest warrants for those charges; the judges had already concluded that the events in Darfur justify those two charges, as in the Ali Kushyab and Ahmad Harun arrest warrants. Presumably they would have done the same thing in the blink of an eye should that have been all it was asked to do. Then the only question would be: does the evidence link the dots between Bashir and those crimes. Had this been Ocampo's strategy, we probably would have had an arrest warrant in August instead of February. The delay of six months in issuing the arrest warrant was due to the prosecutor insisting on trying to get a genocide charge, which was doomed to fail as shown by the Pre-Trial Chamber's ruling. These actions show a lack of good judgment on the prosecutor's part; it is a mistake, and not the first he's made.

As for showing weakness or strength of the Court, it just shows it is a Court that functions properly. When the prosecutor asks for something, the judges look at it seriously and come to a decision that is based on an accurate, intelligent and well-reasoned assessment of the law; people should be satisfied that what we have here is a serious, functioning institution capable of issuing judgments of high quality. What more could you ask for?

Q: In one of your articles you mention that some human rights activists considered the UN Commission's report a betrayal because it failed to find genocide charges. What will be the reaction of human rights activists to the Court's findings? How will the Court's ruling influence the actions of human rights activities on Darfur in the future?

A: Well, I cannot predict how they all will react. As I've mentioned, two of the leading international NGOs, Amnesty International and Human Rights Watch, have not labeled the conflict in Darfur a genocide. I haven't checked what the International Federation of

Human Rights or International Commission of Jurists have said on the matter, but I imagine they've taken the same cautious approach. The big international human rights organizations have not bought into the idea that the violence in Darfur should be labeled as genocide, and everything from these organizations I have read indicates great satisfaction that a head of state was charged with serious atrocities and this is being addressed by the ICC. I think there must be a considerable amount of jubilation, at least among the major international NGOs.

There is, of course, another community, a specialized community of NGOs focused on Darfur, and some of the academics who write about Darfur as well, and they may find this ruling to be a repudiation of their views. Some of them are not singing from the same hymn sheet as the rest of us because they adopt of a definition of genocide that is simply their own. I work from the Genocide Convention, the Yugoslavia Statute, the Rome Statute, and so on, but some of the people involved in these debates have their own definition of genocide. All that these actors can say is that the narrow definition of genocide, which they do not endorse, has been applied by the Court. I think that's a set back for them.

I have always thought that there was a bit of an obsession with trying to label Darfur as genocide. This is not the only case where we see this obsession: there are people who want to label speeches by Iranian President Ahmadinejad as genocidal, people who want to label the war in Gaza as genocide, etc. There are many examples of what I call the 'extravagant' use of the term genocide. For people who indulge in that, they can keep doing it, but if they want to be part of the legal debate, they should just get over it.

Q: What kind of outcomes will we need to see from the Court in order to ensure its legitimacy? What about the Lubanga and Bemba trials: do you think the Bashir case has taken too much attention away from these cases? What will be the outcome for the Court if these two cases are tried successfully, but Bashir remains at large? What do we need to see overall from the Court in order to establish it as a legitimate actor on the international stage?

A: The Court is doing that right now. It is becoming more and more of a legitimate actor on the international stage. It had a slow start. The first phase in the history of the Court was the adoption of the Rome Statute and that was from the early 1990s until 1998. This was an exhilarating period in terms of the development of international criminal law and particularly because the more hesitant or conservative models of what an international criminal court might look like, which were the ones advanced by the International Law Commission in 1994, were totally set aside in favor of a much more robust and innovative, radical if you will, international criminal court, with an independent prosecutor separate from the UN, and many features that I won't go into. But what resulted was the Rome Statute. So that was a very exciting period. And then there was a period of about four years for entry into force, which was like a continuation of the first period. Achieving 67 ratifications within less than four years was something nobody had

ever dreamed would take place. Most people on the night of July 17, 1998 when the Statute was adopted thought it would take at least a decade to get to 60 and maybe longer. So things went very quickly. And then when the Court started, when all the officials were elected and the Court became operational in mid- 2003, it went through a difficult period when things didn't seem to work. There were plans that it would hold its first trial in 2005, the budget set aside money for the first trial, but there was no trial until 2009. That's four years behind schedule, and pretty much everything has seemed to take much longer [in this period]. I don't know what the explanation is for that, but whatever it is, it's taking longer than expected and perhaps it is simply that that's how long things should take. We'd been through a previous period that had gone exceedingly quickly and that led us to think that it would always be like that and it hasn't been. But now the Court is operating and it is addressing the big conflicts of our time, like Darfur. It wasn't insignificant that a little over a month ago the Palestinian Authority attempted to engage the Court with regard to Gaza. Whether that will or can take place is a matter of some debate, but the idea that the Court was appearing to engage with or be relevant to the conflict in the Middle East is a big step; it shows the Court is on the big stage now. It's moving forward, it's just taken a little longer than we thought. Now we have a trial going, we're going to have more trials. This is great. I don't have any magic formula for what it should do now. I think it should just do more of what it's doing. The prosecutor ought to reflect upon some of his mistakes and try to correct them. That would make his office more productive and more efficient.

Q. Does the ICC have an implicitly political role to fulfill in conflict situations? If so, what should that role be? Should the Court strive to remain politically neutral?

A. I'm glad you asked that question. I have strong opinions on this. I would have held to the view in the 1990s that the Court should be totally separate from political debates and that there should be no possibility of political involvement in the work of the Court. As you know, in the final Statute, there's a bit of a compromise there, mainly with respect to Article 16, which allows the Security Council to temporarily halt the proceedings of the Court. The other places where you have quite a clear political involvement of the Court are the triggering mechanisms where you allow both the Security Council and states to trigger the Court. This is politics. These are political bodies that make their decisions politically. I'm increasingly of the view that politics is actually a part of international criminal law and that it's unavoidable.

I see this increasingly in decisions about who to prosecute: decisions about individuals who are prosecuted and also about the organizations that are targeted. In Uganda, for example, the prosecution has targeted the rebels and not the government. I think that's a political decision. The prosecutor has couched it in a strange and ultimately unconvincing theory about prosecuting the most serious crimes, but he defines this in a purely quantitative way. So if the rebels kill more people than the government, then the rebels should be the focus. But the problem with that is you need a more qualitative approach when deciding who your targets should be. Most of us living in an orderly society would find it far more threatening that the government is committing crimes, even if the outlaws

are committing more, because outlaws are supposed to commit crimes and governments aren't. So the prosecutor's decision to go after rebels rather than the government has a whiff of the political to it. If it is purely based on this mathematical calculation, then it's a mistaken one.

I think there's politics going on already. The Darfur prosecution, the decision to prosecute a head of state, is a profoundly political decision. There can hardly be anything more political. You're calling for regime change; that's the consequence of what you're doing. When the prosecutor explained this last July, he said: "I investigate the facts, I'm just an apolitical prosecutor who investigates the facts and goes where they lead me," as if he were Colombo or Sherlock Holmes and that's not what he's doing. It's a political decision: he goes to the Security Council and asks them to intervene. I'm increasingly of the view that there is politics in this.

I think that our debates in the 1990s when the Rome Statute was being adopted were a bit distorted. What we didn't like about politics in the 1990s was the idea that the Security Council would be the political guardian. That was the extent of our vision. So the way we rejected the Security Council's engagement with the Court and the Security Council's possible control over the Court was with the argument that there should be no politics in the Court. I think in retrospect that maybe we went too far with that. I actually think that those prosecutions often, perhaps not always, involve political determinations.

I've asked people about this at the Court and some people say no, there should be no politics, like what the prosecutor said. Others have said to me, actually the prosecutor has political advisors around him, which kind of confirms my own intuition, which is that there is politics involved and it is quite conscious. But that being said, I think part of the problem is, the idea that political decisions will be taken by the prosecutor suggests a prosecutor who has a different skill set than the man in the job right now. He's a criminal law prosecutor. Once you acknowledge that the role of the prosecutor has a strong political dimension, then you either solve it by getting a prosecutor who is recruited for their political expertise and judgment, or you provide some other mechanism to provide political oversight for the prosecutor. These are almost preliminary reflections of mine.

I go back and look at things like Nuremberg, where you could say it was political forces who set up the tribunal and they decided politically that the Nazis needed to be prosecuted. One of the critiques of Nuremberg that you often hear was that it was one-sided. That's obviously true, but my question to people is: what should they have done then? Should they have had a second trial of the tribunal that tried 24 British leaders and 24 American leaders? Everyone seems to acknowledge that that's an absurd suggestion, but say maybe they should have prosecuted a few of the allied war crimes for balance. We get this debate at the Yugoslavia tribunal with choosing the ethnicity of the defendants, we get into claims at the Rwanda tribunal that the RPF and Hutu extremists should be prosecuted, we've had it at the Sierra Leone Special Court where they submitted arguments about which faction should be prosecuted and how harshly, how relevant it was that one side was good guys and one bad guys, and all of this involves politics. And I'm sort of more and more of the view that rather than being in denial about

the politics we should acknowledge it and then confront it. We should recognize that it is part of these decisions and then find ways to address it in an appropriate and transparent and convincing way, rather than saying as the prosecutor sometimes does that this isn't about politics. It is about politics.

Q. Could you speculate on the future of the Court five or ten years from now? What are the best and worst case scenarios for the Court and what can international actors do to improve the Court's standing and legitimacy in the next few years?

A: I really don't know. It is extremely difficult to predict the future in this case.

I think, when you say best and worst case, certainly people shouldn't exclude the possibility that the Court will be a failure, that it will collapse and won't work. I think that people are naïve to just think that this just moves ahead. The idea that the Court is just going to move ahead and keep progressing and everything, which we would all like, I don't see that as being guaranteed, and we certainly have historical examples of institutions created way ahead of their time. The League of Nations, for example, was ahead of its time. It collapsed and a new institution had to be created. I can't rule that out for the ICC. I heard James Crawford, involved in the International Law Commission in the early 1990s and one of the key architects of the Rome Statute, speculating about this at a conference last May. He said we had a conservative draft at the International Law Commission in 1994 because we didn't think the international community was ready for more than that. It wasn't because we were conservative; we were giving the international community what we thought it was ready for. But of course what happened between the draft in 1994 and the Rome Statute in 1998 was the radical reconfiguration of the Statute and a new conception of what the Court should be. That happened very quickly and maybe we moved too quickly. Maybe we created an institution that's ahead of its time. I'm not arguing that position, but it is just one of the possible scenarios. That was Crawford's explanation of maybe why we're having such a hard time now, why we had such a hard time getting the Court going. I can't rule that possibility out.

The other scenario is that the Court moves forward, solves its problem, and becomes a more dynamic and more universal institution. Here the difficulties are, as I've mentioned, the role of politics in the Court. And I do think we need to find a solution to this one or face continuing difficulties or problems. In terms of participation in the Court, we're now up to 108 state parties and likely there will be some more. But we still don't have we still don't have the biggest countries or some of the most powerful countries, including India, China, or the US, and we don't have three of the five permanent members of the Security Council: China, the US, and the Russian Federation. We don't have India, Pakistan, or Iran. These are big pieces and it's a question, a big question mark, of whether the Court will become more universal by engaging with those pieces. The other part of it is that the Court is right now not dominated by the permanent members of the Security Council. So the absence of three of the permanent members is perhaps a weakness but it is also a blessing because its enabled this institution to develop and grow without the overwhelming role and participation and presence of the permanent members of the Security Council and the Security Council acting as the Security Council, which is what

would happen if you got 3 or 4 of them. I'm told now that at the Assemblies of States Parties they talk about the P4, which describes the permanent members excluding the US, because it has been boycotting the Assembly of States Parties for the last several years. If the big players are brought in, will change the dynamics of the Court and it may make the smaller players less enthusiastic and less keen on it. So that's maybe a development too that we have to keep an eye on.

But you know, if one looked at the last 15 years or so, since what we might call the international justice accountability movement began in earnest, it now shows no signs of stopping. It reflects some kind of idea in the human rights movement and a thirst that people have in countries around the world to see that the perpetrators of serious human rights violations are brought to justice in one form or another. That field generally continues to grow. I would assume that the ICC is in a way the centerpiece of this, and the movement that surrounds the ICC keeps growing in so many other ways, that even if the ICC would falter a little bit, the movement would keep pulling the Court along with it. I would bet my money on the ICC being a much more significant and meaningful and relevant institution ten years from now than it is at present. But I'm prepared to acknowledge the caveat, because it focuses our mind to accept the danger that the Court could fail. We shouldn't be overconfident; we have to keep addressing the shortcomings and the problems.

Interview Conducted by Zachary Manfredi and Julie Veroff.