

Interview - William Schabas

Written by E-International Relations

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E-INTERNATIONAL RELATIONS, DEC 19 2017

Professor William A. Schabas is professor of international law at Middlesex University in London and professor of international human law and human rights at Leiden University. He is also emeritus professor of human rights law at the National University of Ireland Galway and honorary chairman of the Irish Centre for Human Rights, invited visiting scholar at the Paris School of International Affairs (Sciences Po), honorary professor at the Chinese Academy of Social Sciences in Beijing, and *professeur associé* at the Université du Québec à Montréal. He has appeared as counsel before several international and national courts and tribunals including the International Court of Justice, the International Criminal Court, the Grand Chamber of the European Court of Human Rights and the Supreme Court of Canada.

Professor Schabas is the author of more than twenty books dealing in whole or in part with international human rights law, including: *The European Convention on Human Rights: A Commentary*, *Genocide in International Law, and Unimaginable Atrocities*, *Justice, Politics and Rights at the War Crimes Tribunals*. He has also published more than 350 articles in academic journals, principally on international human rights law and international criminal law. His writings have been translated into several languages. Professor Schabas has worked as a consultant on capital punishment for the United Nations Office of Drugs and Crime, and drafted the most recent quinquennial reports of the Secretary-General on the status of the death penalty.

Where do you see the most exciting research/debates happening in your field?

When I began working in the field of international criminal law, about 25 years ago, there was almost no academic literature at all. The field had been relatively dormant since the immediate post-Second World War period. That has changed dramatically and today it might be true to speak of a literature that has become super-saturated. Established researchers as well as doctoral students and young scholars are obsessed with minute details of the procedure and legal technique of international institutions like the International Criminal Court. "Exciting" is not a word that springs to my lips when I think of ongoing research in the field at the present time.

There is a growing interest in the history of international criminal law. Here I think there is much to learn. Recently Oona Hathaway and Scott Shapiro published *The Internationalists*, which takes a historical approach to understanding the development of the law of peace. Another study that fascinated me was Susan Pedersen's *The Guardians*, which is about human rights monitoring in the League of Nations. We are looking at this old stuff through eyes that have been trained in our modern debates. Here I do not hesitate to use the word "exciting".

How has the way you understand the world changed over time, and what (or who) prompted the most significant shifts in your thinking?

When I was young, the world was dominated by the two superpowers. Everything else had to line up within that framework. This is no longer the case. More generally, small and middle powers have found ways to break through the domination of the big and powerful. The word "globalisation" is quite clichéd, and often seems to mean a liberal, capitalist economic system. But the "global" nature of the world is quite astonishing. Despite the recent rise of nationalism in some places, I think that generally it is on the decline. Nation states are losing their hegemony and other political spaces, such as cities, are taking on more importance. There is increased mobility, on a global scale,

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and this is transforming how we act and even how we look. Many big urban centres have become genuine “melting pots”. I have trouble identifying those who have prompted changes in my own thinking. I’ve been greatly influenced by the pioneers in the field of international criminal law, such as Cherif Bassiouni and Antonio Cassese, but I think I am too much of a lone wolf to say that one or other of them, or anyone else, would be my “guru”.

You have previously argued that US opposition to the ICC is ‘all about the Security Council’. Can this thesis help to explain the hot and cold relationship between the US and the Court in recent years?

Many years ago I published an article on this subject in order to explain the US attitude to the ICC. It has not really changed at all. What has happened since I wrote the article is that the deep freeze in US-ICC relations changed, beginning with the second Bush administration. Many think it was with the Obama administration, the implication being that US attitudes shifted because of changes in Washington. But actually, the warming up towards the Court began much earlier. The main factor is the growing confidence within the US that the Prosecutor of the Court, who has immense power, was going to be cooperative with Washington and would not threaten its key interests. There was a price to pay at the Court. As the US was becoming keener on the Court, Africa became disillusioned. But that is simply following the laws of thermodynamics. For something to heat up somewhere, it has to get cold somewhere else. That is what has happened. The recent revelations about the first Prosecutor of the ICC tend to confirm the understanding that in its first decade it was a pro-US Court.

How do you anticipate the nature of future relations between the US and the ICC to be under Trump?

The relationship will deteriorate, but not mainly because Trump is less supportive of multilateral institutions than Obama. It will turn pear-shaped because of the evident willingness of the Court in its second decade to start to explore areas where the US is uncomfortable. Recently the Prosecutor announced her application for authorisation to investigate CIA torture accusations in Afghanistan and at “black sites” in Central and Eastern Europe. It is really quite unprecedented for an international criminal court to conduct such an investigation into US operations. Had the earlier model of an international criminal court proposed by the International Law Commission in the early 1990s prevailed, the Security Council would have controlled the Court’s docket, and that would have made an investigation into US activities in Afghanistan or elsewhere exceedingly unlikely. Because the Court is independent of the Security Council, at least to a large extent, such an investigation becomes possible and, it seems, a reality. So we are back to the point I made in that old article that the relationship of the US to the Court is governed by the extent to which its orientation can be controlled by the US, through the Security Council.

Would you be able to tell us a little about any current texts or projects you are working on?

I have been studying the real dawn of international criminal law. Most think this was Nuremberg, but actually the first great international debates were at the Paris Peace Conference in 1919. For the past year or so, I have been spending my time in national archives, in London, Paris, Washington and so, searching through the records of those debates. I’ve a manuscript nearing completion that I call “The Trial of the Kaiser”. It is about the attempts to prosecute the former German emperor that took place just about exactly a century ago. Over the longer term, I would like to try and write a more comprehensive history of international criminal law. I am also planning to write a monograph on the customary law of human rights. That’s a project I’ve had in mind for a long time. But I think I’m ready to do it now.

Some scholars have explored the notion that the ICC may be ‘anti-African’ or ‘afro-centrist’, do you think these kind of critiques have a justifiable basis?

Of course, it has been obsessed with Africa. I have been writing about the dangers of an African focus for more than a decade. Much of the enthusiasm for the Court in the 1990s and into the first decade of the new century was driven by a desire for an impartial and independent institution that would address the misdeeds not only of weak and powerless States but also of the most powerful. But in its early years the Court only went after “soft targets”. It never seemed to be the result of an anti-African focus so much as an unwillingness to go elsewhere. And that was because the further it strayed from central Africa, the more likely it was to bump into the sensitivities of the most powerful

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States.

In a previous article, you contend that enthusiasm for international criminal justice appears to rise and fall in peaks and troughs. With some African states suggesting that they will leave the ICC, do you think this is indicative of a global trough in the pursuit of international criminal justice?

Only one African state, Burundi, has left the Court. And the willingness of the Court to open an investigation into US military activities in Afghanistan will help to counter claims about the African obsession of the institution. We are in an uncertain phase where the ICC is still searching for its groove. But it seems far too early to talk about a trough.

During the foundational talks for the ICC, there were calls for the Court to maintain universal jurisdiction. The Syrian and Myanmar cases arguably demonstrate the limitations of the Court's current jurisdictional model. Do you envision any future changes to the ICC's jurisdiction?

No, I don't think any amendment is likely in the foreseeable future. Actually, the more limited jurisdictional regime of the Court may be a blessing in disguise. The problem with a Court based upon universal jurisdiction is that there is less incentive for States to join it. One way or another, whether or not they ratify the Rome Statute, the Court can prosecute crimes committed on their territory. Right now the Statute says they have to join the Court for it to be able to exercise jurisdiction over crimes committed on their territory (other than by nationals of other States Parties). I think that provides an incentive to join because this assists in protecting the State.

With nearly 20 years now having passed since the adoption of the Rome Statute, do you think it is possible to tangibly measure the ICC's success, and if so, how?

The most important contribution of the Court is general deterrence. The problem is that it is impossible to measure this because of the difficulty in identifying those who have been deterred. All we see are the actions of those who are not deterred, in Syria and Myanmar and elsewhere. But that does not mean deterrence is not taking place. Earlier this year, it was reported that the possibility of an ICC investigation and prosecution of Israeli officials for the construction of new settlements in the West Bank was being considered within the Israeli cabinet and in the country's parliament. Undoubtedly, some Israeli officials were indifferent to the threat. But I firmly believe that many others in the country now hesitate, and a factor in their hesitation is the very real possibility that building new settlements in occupied territories may lead to international prosecutions. It is only one example of how the ICC is contributing to the strengthening of international law and human rights.

What is the most important advice you could give to young scholars of International Criminal Law?

Do not be afraid to stray from the comfort of "conventional wisdom". Dare to challenge the double standards that continue to afflict international law, international justice and international human rights.

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This interview was conducted by Michael Bolt. Michael is an Associate Features Editor at E-IR.