

## William Schabas

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## Interview

Professor Schabas was in conversation with Dr Rainer Huhle and Kiran Mohandas Menon. The interview was conducted via zoom on 23 January, 2025. Additions were made in April 2025.

### Huhle

What influence did your upbringing have on your understanding of human rights, the law in general and the development of a sense of justice?

### Schabas

I was very influenced by my parents who were very sympathetic towards issues of human rights, but were not active in any way. However, my maternal grandmother was very politically active. She was in the Communist Party in Canada and I vividly recall that when I was probably eight or nine years old, she showed me a scrapbook that she was keeping about decolonisation in Africa. It had maps showing the different countries as they were becoming independent. I was too young really to know about the full political context, but I knew about this interest in Africa, and so I started doing the same thing as my grandmother. I would cut out articles from the newspaper about countries in Africa that were becoming independent. I remember the Sharpeville massacre<sup>1</sup> and other very important events. I was born in 1950 and we are talking now about my early teens. I was also very engaged with opposition to the Vietnam war, with the civil rights movement in the United States and the campaign against apartheid in South Africa. These were the issues that were very important to me. In university, I was very politically active on a range of student issues.

### Huhle

Did your grandmother's interest in decolonialization have something to do with her profession, or was it just a political commitment?

**Schabas**

She described herself as a historian and had written a few books but I don't believe she ever had a professional career position. She was from England and had gone to Oxford University around 1907. She had obtained all the credits for an undergraduate degree but Oxford would not give a young woman a degree in those days. She was welcomed by a university in Canada where she was told that if she would come to work for them for a year and supervise their female students, they would give her the degree in recognition of her academic achievements at Oxford. So, she got the degree at the University of Alberta in Canada for the work she had done at Oxford. While at the University, she met my grandfather, who was a young scholar starting an academic career. He came from the same part of the north of England as she did, but he had gone to do a doctoral degree in German literature at the University of Jena. My maternal grandfather was actually a globally well-known expert on German literature. He retired as a professor at the University of Toronto in about 1960.

**Huhle**

What about the significance of your Jewish descent? Has that been an important influence?

**Schabas**

Yes, it has, but in a different kind of a way. My paternal grandparents came from Eastern Galicia, which is now Western Ukraine. All that I can recall of them in terms of their views and their outlook was that they told me that you always had to vote Democratic if you were a Jew - things are changing, I know. I had an awareness of, but without knowing a great deal about, the details that the family, which had moved to Germany, had fled Europe in the late 1930s and that my grandfather's brothers had all gone to South America. I never met the great uncles but I am in touch with one of the cousins. My father was born in New York and served in the US Army in the Second World War. He met my mother when she was studying for a master's degree in the United States. That's where I was born although we moved to Toronto when I was about two years old. So, my Jewish family was far away and I did not see them much. We would go sometimes to New York for the Passover Seder and for bar mitzvahs. Having that Jewish background, the Holocaust had a huge influence on my life and on my views even though it happened before I was born.

**Huhle**

So, your family stems from the same little part of Eastern Galicia as Lauterpacht<sup>2</sup> and Lemkin?<sup>3</sup>

**Schabas**

Yes, absolutely. My father always used to say that they were from Lwów, as we called it then. We have now learned more about the details. They were from little towns to the east of Lwów. Later, my grandfather's family moved to Berlin. I've seen the building where they lived on Pariser Straße. I think they were quite well off, quite comfortable in Berlin, until 1933 of course.

**Menon**

You mentioned some very important historic moments that influenced you. Were there any writers or non-academic intellectual influences that shaped you?

**Schabas**

Of course, because I'm a great reader of literature, and non-fiction as well. Some years ago, on their 13th birthdays, I started giving my grandsons three books that I said I wanted them to read, because they had a big influence on me when I was an adolescent. The first book is *The Grapes of Wrath* by John Steinbeck. The second book, not as well known, is *The Forty Days of Musa Dagh*, by a German Jewish writer called Franz Werfel, about the Armenian genocide. The third book is *Cry the Beloved Country* by Alan Paton, about South Africa, just at the very beginnings of apartheid. I am glad you asked the question because I think that the literature I read has influenced me as much as anything else. I believe that.

**Menon**

I once read in an interview that you stated that even though figures such as Cherif Bassiouni<sup>4</sup> or Judge Cassese<sup>5</sup> influenced you, that you consider yourself to be too much of a lone wolf to say that any one of them was like a guru. So could you maybe tell us a little more of what you meant by this?

**Schabas**

I don't think I had a guru at all. I had academics who took an interest in me somehow and they helped me a lot. For younger scholars, it can be very important that people kind of promote you a little bit. For me, Cherif Bassiouni was one of them. When I first met Cherif about 30 years ago, I was in awe of him because he was the only recognizable authority in International Criminal Law at the time. There were a few others who dabbled in it but Cherif had been doing it his whole career. I met Roger Clark<sup>6</sup> when I was still doing my master's degree, at the International Law Weekend of the American Society of International Law in October of 1990. Roger and I just started chatting, and then we went for lunch, and we have been close ever since. The other person, who was curiously a few years younger than me, was Daniel Turp.<sup>7</sup> He taught me when I did a master's degree in international law at the University of Montreal in the late 1980s. That's when I initially learned about international human rights law. When Daniel got invited to some conference and couldn't go sometimes he would suggest that I take his place. He introduced me to a whole network of people and a whole community of scholars that I've been very fortunate to be associated with, the French language scholars like Alain Pellet,<sup>8</sup> and Gérard Cohen-Jonathan,<sup>9</sup> who's now passed on, and Emmanuel Decaux,<sup>10</sup> and of course the great Robert Badinter.<sup>11</sup>

**Huhle**

This is really exceptional because in the human rights world or academic world, French contributions are quite often overlooked. Since you mentioned you were really concerned with colonialism, was Jean-Paul Sartre an important figure in that context? I ask since he was engaged in the Algerian national independence fight, and at the same time, had an unwavering commitment for the Israeli state, and was deeply concerned with the Jewish question, and especially the Holocaust.

**Schabas**

Sartre? I wouldn't say so. I actually had a letter he wrote me 50 years ago when we organized a conference at the University of Toronto on racism and racial discrimination. We invited Sartre and because I was one of the organizers, I signed the letter, and he wrote back to me explaining that he was sympathetic and wanted to attend, but he didn't. It

disappeared one day off my desk. Somebody else must have that souvenir, a letter from Sartre to me. But I wouldn't say that he influenced me a great deal although I have read him in later life.

I would have loved to meet Derrida<sup>12</sup> although I never did. He did a series of lectures on the death penalty more than 20 years ago and he referred to my book on capital punishment at some length. When I discovered this, he had already passed on but I would have been thrilled to have met him. I'd like to think he would have been interested in talking with me as well, but for some reason we never connected.

### **Menon**

Before we go into specific research topics, can you tell us a little bit about your writing and research process in general. How has it evolved over the years?

### **Schabas**

I have a motto that I teach my students and have put on my CV. I saw it when I visited the house of Émile Zola<sup>13</sup> in the Parisian suburbs. He had written over the fireplace: "Nulla dies sine linea." Don't let a day go by without writing a line. I show my doctoral students a photo of this. I was a writer long before I did international law. After I finished my master's degree in history, I started working as a journalist. I needed a job to earn a little money, and I found myself as a journalist. Since my early 20s and I guess even before that, I have always written prodigiously.

The output has led to a large number of books and many journal articles. Some of them are textbook type books like my commentaries on the Rome Statute and on the European Convention. They tend to be rather technical. Then, there are books that combine history and law, like the book I did on the attempt to try Kaiser Wilhelm II.<sup>14</sup> The most recent book, which is the one I think I am most proud of, is on racial discrimination and the colour line.<sup>15</sup> I feel that this is a book where I discovered things and developed an original narrative about the history of human rights within the United Nations, and more broadly. It emphasizes both the role of the Global South in a general sense, but also the importance of racial discrimination as the sort of defining issue in the history of the development of international human rights law. I've just done a revision of my book on the Genocide Convention since many things have happened in recent years and genocide is an important issue once again.<sup>16</sup> I'm looking for another topic, like racial discrimination, something a little more unique, but I haven't quite found it yet. But I certainly haven't stopped writing books.

### **Huhle**

For a prolific writer, as you say, and a passionate writer and a journalist, was it a terrible step forward - or backward - to become a lawyer? I mean, writing as a lawyer is a very restrictive kind of writing, I imagine. How did a professional journalist become a lawyer?

### **Schabas**

The journalism I was doing wasn't really very stimulating. I was mainly a technical journalist. I was earning a living as a journalist, which was fine but I wasn't a political journalist. I wasn't a columnist for a major newspaper. I edited magazines, industrial trade

magazines. I was in my 20s, I had a young family, and I needed to earn some money. It was a job. I was lured away to study law. I don't quite know why. I can't even explain it. I think it was a reaction to my frustration with journalism. I probably should have just gone immediately and done a postgraduate academic degree and pursued an academic career. But instead, I did the law degree and started to practice law. It was only when I was practicing law that I realized how much I missed the academic life of the university. And so, I started doing postgraduate degrees and that is when I discovered international human rights law.

I saw myself as an activist lawyer.

### **Huhle**

When did you feel that academics or the law profession wasn't enough for you, and you needed to become also an activist in the United States? If I remember well, the first big field of action for you was the fight against the death penalty. Could you just try to gauge the balance between the two, between the profession and the activism work? Because I feel it is a challenge for many people to find a balance between these things.

### **Schabas**

I started law school in 1980 and I was called to the bar in 1985 or late 1984. When I started to practice law, I immediately took up human rights cases. I saw myself as an activist lawyer who would defend and fight human rights cases. I didn't have a strategic plan on how to do this. I remember one case that I took on challenging the constitutionality of legislation that was discriminatory against immigrants in the unemployment insurance context. I was developing a reputation in Canada, in Montreal, of being that kind of a lawyer.

The interest in the death penalty was something that really happened almost by accident. When I started doing a doctoral thesis, I had the ambition to do it on the International Covenant on Civil and Political Rights. On the whole thing. I was naive and ambitious. I didn't realize then that others had tried to do this or were doing it. Manfred Nowak<sup>17</sup> did it, actually. I had this idea that I was going to do it on the substantive articles and not on the procedural stuff. I started on Article 6, the right to life, and I collected materials on everything to do with the right to life; the death penalty, abortion, euthanasia, armed conflict, police violence and so on. Then after about a year or more, I thought, well, I'll never finish. There are 21 more articles to go. This is going to take too long. I moved on to Article 7, and I collected materials on torture. I had three big boxes of photocopies on the right to life and one on torture and I thought, well, I'm going to have to recalibrate. By this time, I was teaching as I had obtained a temporary appointment as a full-time lecturer, which I did while practicing law.

I had a little chat with a friend of mine and told her of my frustration. Very helpfully, she said, why don't you just do it on one of the articles on which you have the most material? I said that was the right to life. But there were too many issues in the right to life, I said. She said, what's the issue where you have the most material. And I said, the death penalty. That is how it happened. Until that point, of course I wasn't ever in favor of the death penalty,

but I wasn't an activist about it. It had been abolished in Canada. I did the thesis on capital punishment and international human rights law, which was then published by Eli Lauterpacht and the publishing house founded by his father.<sup>18</sup> Immediately, I started being invited to events by Amnesty International and others to work on the death penalty. Amnesty International, after I got to know them a bit, asked me to go and represent them as a trial observer in South Africa when the constitutional court ruled on the death penalty. That was in February of 1995.

**Huhle**

Was that the Goldstone Court?<sup>18</sup>

**Schabas**

It was the Goldstone Court, but he had taken a break to serve as the prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>20</sup> So, Richard wasn't sitting there and it was Sydney Kentridge<sup>21</sup> who replaced him temporarily on the Constitutional Court. I met Albie Sachs<sup>22</sup> and we've remained friends ever since. I also met the lawyer who argued the case named George Bizos<sup>23</sup> and we too became friends. George passed away some years ago, but we saw each other frequently. When I went to South Africa again in 2001, George introduced me to Nelson Mandela.

After I started to teach, I began to think of myself more as an academic involved in human rights issues. I was invited to go on a fact-finding mission to Rwanda at the end of 1992 and in our report we talked about the risk of genocide in Rwanda. This is how I became engaged with the whole issue of genocide. We're talking early 1993 when the ICTY was being set up and the UN was getting geared up to work on the International Criminal Court. I was teaching criminal law, and I had practiced it. I loved international law but I could not imagine how I could ever practice it. I thought, well this field of International Criminal Law is great, as it's a mix of criminal law and international law. I may not be great at either one of them, I thought, but I knew a little bit about both. So, this is where I belonged, and I started working on International Criminal Law.

**Menon**

You also of course spent a significant part of your career in Ireland. Did Ireland's very unique history, being a post-colonial nation that has made quite a significant contribution to international law, influence you?

**Schabas**

Ireland again happened by chance in my career. I was then a professor in Montreal, at the Université du Québec à Montréal, and I was getting eager to move on a bit. Typically, for a Canadian academic, you would maybe go to a big job in the United States. I had this idea to direct a human rights centre, and I actually interviewed for such a job in the United States at a university, but I didn't get it. Then I saw an ad in The Economist. I wasn't very active on the job market, but I was open to a development. I saw this ad about a University in Ireland that wanted to appoint a professor of international human rights law and to set up a human rights centre. I knew nothing about the university, and I didn't know a soul in Ireland. I just phoned up and talked to the dean who asked me to send them my CV. Three months later, I had forgotten all about it when they called me and invited me for an

interview. When I was offered the job, my wife and I decided immediately that we would just pick up everything and move. That was quite dramatic as we had two daughters in Canada who we kind of left behind but they were grownups by then. We moved to Ireland, and loved it. I loved the people there and I think a big part of that has to do with an affinity for the Irish colonial history. Ireland is a country divided between being a prominent member of the EU and being a member of the Global South. I love the Irish people and often regret leaving.

**Huhle**

When you were still in Montreal, did you know John Peters Humphrey?<sup>24</sup> Was he very much respected because of his role in the founding of the human rights system of the UN and did that make impression on you?

**Schabas**

Absolutely. We were in awe of Humphrey. He lived in Montreal where I also lived. He was at McGill University. I was not at the same university and so he was never really a colleague of mine, but I would see him sometimes in Montreal at different events. We would also meet every year at the Canadian Council of International Law meetings. I never worked closely with him, but I certainly knew him. When he stepped down at McGill University in the early 90s, the dean asked me to come and teach the course that he was teaching, which I thought was quite an honor.

**Huhle**

Coming back to the question of academic work and activism, how would you see the relationship between these two sorts of activities? Is there a tension for you? Is it simply complementary? Should every scholar also be an activist or vice versa? Should an activist also have at least basic academic knowledge?

**Schabas**

From my own point of view, I would be hard placed to tell you whether I'm a scholar who became an activist or an activist who became a scholar. I think it's two facets of who I am that came together. I think an academic career is a very good platform for somebody to be an activist in the field of human rights and, I suppose, in other fields as well. It provides you with the flexibility in your employment and the prestige that you get as a specialist or an expert. I have had many students over the years and I love that part of my life. I'm constantly saying that a good way to pursue a career in human rights is to do your PhD and become an academic. And some of them do it. And some of them don't. Academic work was the path that opened up for me.

**Huhle**

Would you say that your activist interests had an influence on the choice of your academic topics? Or more concretely was your special dedication to the topic of genocide influenced by some practical issues, by some real-life experiences, beyond academic interests? Because genocide obviously is academically extremely interesting because of all the controversies around the concept.

**Schabas**

Absolutely. We mentioned before the issue of capital punishment. That was far away really from my reality because it was abolished in Canada before I became engaged in the subject. But genocide was different and I have explained this in the preface of the book I wrote on the genocide convention that first appeared at the end of the 1990s. I refer to the three great genocides of the 20th century. I was sort of directly engaged with the first, of course, which is the holocaust, because my own family comes from an area where the Jewish population was virtually eliminated. The other being Rwanda, which I visited in early January of 1993 and participated in trying to alert world public opinion to the danger of genocide. I then worked after that for a number of years on some of the post-genocide issues in Rwanda, including contributing a little bit to the justice issues, but also to capacity building in the law school at the university in post-genocide Rwanda. Like my recent book on racial discrimination, it is an issue that has always been close to my heart. I could take up other issues in human rights law but if they didn't touch my heart, I don't know if I'd have that much enthusiasm for it.

**Menon**

We definitely want to get more into that book on racial discrimination. But before that, if I could just ask you a bit more about the Irish influence, was Seán MacBride<sup>25</sup> ever an influence? And secondly, I remember hearing stories about Kevin Boyle<sup>26</sup> when I was in Galway. Did you interact with him much?

**Schabas**

MacBride was before my time. I never met him. He passed away in the 1980s. I did an article once looking at MacBride and the MacBride papers because he was involved in the early stages of the drafting of the European Convention on Human Rights. His niece was a student of mine. But Kevin Boyle, yes. We got very close, and we did a number of things together. The Human Rights Centre<sup>27</sup> that I was brought in to lead, people often say that I was the first director of. They had actually started something that was the ancestor of it and it was Kevin Boyle who had done so along with Mary Robinson.<sup>28</sup> Kevin, amongst other things, sat on the board that hired me in Ireland. So, we became quite close and we did conferences together and I would go to him for guidance and advice on things. I wrote his obituary in the Irish Times after he passed away.

I wouldn't be at all negative or pessimistic about the UN human rights system.

**Huhle**

Talking about the UN human rights protection system, I think it's not exaggerated to say that it is having a crisis at this moment. You have observed it and participated over the years within it. How would you evaluate the development of the UN human rights system, especially the Council, but also the special procedures and the treaty bodies? In your view, have they lost weight and importance, or is it still an important pillar upholding an international human rights protective system?

**Schabas**

I wouldn't be at all negative or pessimistic about the subject generally. I remember the big



reforms of the system in 2005-2006 when the Commission was abolished and the Council was set up. At the time there was dire talk within the community. It turns out that those reforms in general have appeared to be positive. I think this is the case especially in relation to the replacement of the Commission with the Council and the creation of the Universal Periodic Review, which has done wonders, amongst other things, just in terms of reporting by states that would escape or evade the reporting mechanisms of the treaties if they were subject to them at all. The special procedures vary very much depending on the individuals, but they have had great impact.

I think the phenomenal development is that of the International Court of Justice in the area of human rights, which I don't know that anybody saw coming. A few days ago, Cambridge sent me the Cambridge Companion to the International Court of Justice, and it has a concluding chapter by the editor. The book came out two years ago and I guess, the chapters were written three years ago. The editor started by talking about the neglect and disinterest of the International Court of Justice in human rights issues, which he blamed on the fact that it's a court of states, and that states don't want to litigate human rights issues. We need civil society and individuals to force them to do it because they resist doing it, he wrote. Now at the ICJ, half the cases are based on human rights treaties. There was also a chapter in the book that talked about how the advisory opinions were now more or less irrelevant, that states weren't doing advisory opinions anymore. We've had four in the last two and a half years. Something magical is happening there. I can't explain it entirely, but it is really a turn by states towards an even more robust mechanism. And I think maybe I said this in the Nuremberg Academy Lecture<sup>29</sup> that I gave last year about how the International Court of Justice is in a way becoming that global human rights court that people campaigned for, but that never actually happened. So, the human rights system has its great weaknesses and is terribly politicized. In a sense, the turn towards the ICJ may be a vote of non-confidence born from a certain frustration of states with the more political bodies, be they the bodies like the Human Rights Council, the General Assembly, the fact-finding commissions and so on.

#### **Menon**

You've written that the development of International Criminal Law has been defined by cycles of revivals and dormancy. Do you think this momentum will last with the ICJ?

#### **Schabas**

I think it probably will for a while. People constantly refer back to the famous case of South Africa at the ICJ in the 1960s, when by barely one vote the court took the position that it could not deal with the complaint by Liberia and Ethiopia against South Africa. The case dealt with Southwest Africa, modern-day Namibia, and the court held that Liberia and Ethiopia had no interest in the proceedings and were not injured states. The conservatism of the judges resulted in a loss of enthusiasm for the International Court of Justice that lasted many years. This has changed a lot and the court and the judges are aware of it. They will have to keep delivering good judgments like the one they delivered in the Advisory Opinion on Occupied Palestine of July of 2024, bearing in mind that they cannot please everybody all the time.

#### **Huhle**

The ICJ has in that sense a big advantage of being a court of the United Nations and of being composed of a large number of judges from many different countries. It does not have such an exposed figure like the Prosecutor at the ICC and is not so much at the center of aggressive behavior directed against it, unlike the ICC. Coming to the ICC, you mentioned your participation in the negotiations in Rome and the satisfaction of everybody with the creation of that court 50 years after Nuremberg. It is now obviously becoming the object of extremely aggressive behavior by several states and also of disobedience and non-compliance. France has said, well we don't know whether we will detain Netanyahu as has Poland. Italy did not deliver a Libyan defendant to the ICC. So, is this a story of a pyrrhic success in a way? How would you evaluate that?

### Schabas

I am very attached to the ICC and have been very involved in it although I've never worked there. Technically, I am on the list of defense counsel although I only was involved in one case very briefly. In the Al-Senussi Case, where Ben Emmerson brought in myself and Amal Clooney, but we never did much.<sup>30</sup> So, this has been my very limited involvement at the institutional level with the ICC, but of course I've written a huge amount on the ICC. I've followed it very closely and attended the two big conferences, the Rome conference and the Kampala conference, from beginning to end. As a general observation, I'd say I am disappointed by the ICC. I like the idea that they issued the arrest warrant against Netanyahu and Galant.<sup>31</sup> It took a long time for that to happen. It was very frustrating. There was a lack of enthusiasm in the Office of the Prosecutor for taking up the case of the situation in Palestine, although they finally did that and have obtained the arrest warrants. Now, it seems unlikely that anything much is going to happen because of the difficulty in apprehending those who are charged. The same is true with Ukraine. The same will also be true when they charge the Taliban leaders, as the Prosecutor announced that he's seeking arrest warrants against them. If you look on the website of the court and at the calendar of upcoming cases, there is almost nothing. It's virtually blank. They were lucky when the Philippines helped them arrest Duterte. But I wouldn't think the trial will actually begin for a year to two. So, you know, it's becoming a bit of a symbolic institution rather than one that is delivering in an effective way what it was created to do. I'm not blaming the people in the Court for this but in practice, right now, it's not a very significant institution in terms of what it's doing. And even in the trials they've had, they've now convicted six people. Four of the six people have an average sentence of around 12 years in prison. I'm not in favor of long prison terms in general, but if this is the court whose purpose to judge the most serious crimes committed in the world, if the best they can do is people who deserve a sentence of nine or 10 years in jail, these are not the Eichmann's of the modern world. Of course, the existence of the institution is a good thing. But really there should be many trials and many people should be going to jail, more than is happening right now.

On the issue that you've raised about cooperation by states, the Court is very unlikely to be able to prosecute Netanyahu in the near future. That is not because France will not surrender him, because Netanyahu is not going to go to France. It's not going to prosecute Putin, and that is not because Mongolia refused to surrender him. Nobody really could expect poor little Mongolia to arrest Putin. I mean, have you ever heard of one state arresting the head of state of the neighboring state, especially if the neighboring state is 20 times more powerful than it? I think it's unrealistic to think that would happen even if it is

being presented as defiance of obligations under the Rome Statute. It was never clear legally that states were to waive immunity for everybody before the Court, even for heads of states of countries that hadn't joined the court. It's unlikely that that's the view that the ICJ would take. I think the Appeals Chamber of the Court made a very radical ruling where they said there is no immunity before the court, and people rejoiced and thought that was wonderful, but it's clear that a lot of states didn't agree with that. Recognizing immunity before the ICC for heads of state or government that have not ratified the Rome Statute is hardly an unreasonable interpretation. The judges of the Appeals Chamber adopted an extreme position and we're seeing the consequences of this.

A French official said they wouldn't arrest Netanyahu but later France slightly altered its position, and said, "we'll let the law take its course." Whether or not the Rome Statute is applied by domestic courts and prosecutors is not something that government spokesmen or foreign ministries can determine. This is what happened in South Africa. When Bashir went to South Africa, the South African government said, "Come on in, you're coming here for this conference." And then they said to him, "You know, we don't want to do this to you, but there's a judge who's going to arrest you. So you'd better leave." Presidents and prime ministers can tell Netanyahu that they don't want to arrest him, but unless they are tyrants like Orban they cannot make guarantees about how the justice system will behave, to the extent that it is truly independent, which is the case in many European countries. I don't think that the chancellor or any political figure in Germany can promise somebody they have immunity. You live in the rule of law in Germany. The courts will decide this. Netanyahu would be very stupid to trust a promise from a political figure in a truly democratic country (I don't mean Hungary). I also think it's quite possible that were he to be arrested somewhere his lawyers would come before the court and say, "Under customary law, he has immunity, and don't tell us we're bound by the Appeals Chamber of the ICC because the judges in this country are not bound by the Appeals Chamber of the ICC. So, we'll make up our own mind what that would be." Netanyahu is many things, but he would be crazy to go traveling in Europe. Absolutely crazy.

### **Menon**

If we can just go back to the book you mentioned, *The International Legal Order's Colour Line*. In it, you highlight the perhaps often overlooked contributions of the Global South to various landmark moments and negotiations in international law. If you reflect on the teaching of international law, how do you think we can emphasize these dimensions more within it? Because it is quite insular, isn't it? The way we still present the historiography of its development?

### **Schabas**

The research I did on this book was a voyage of discovery for me. There were things I was not really looking for and that I was surprised to discover as the reality of the situation became more and more apparent to me. It has transformed my teaching and I know that the students appreciate this very much. I hope that it will transform the teaching of others. Our problem in the teaching of human rights law is that far too much of it is a narrative about European intellectuals transforming the ideas of the Enlightenment and of the constitutions of the 18th and 19th century into positive international law, whereas in fact, the history of human rights in the UN is one of struggle by people, especially from the

South. In the early years, the African Americans in particular, but also minorities from other countries, in France and in the United Kingdom, were using the UN the way human rights activists use it today. They were the first human rights activists.

At the time of John Humphrey back in 1940s, there was no Amnesty International or Human Rights Watch. Instead, there were the African Americans. But that history is a footnote for most people and it is often barely mentioned. In the lectures I do on the book, I explain that when the Commission on Human Rights met for the first time in January of 1947, the representative of the Secretary General gave a speech.<sup>31</sup> You can find it in the archives of the UN and it is also online. The speech stated to the Commission that you have all these jobs to do including drafting the universal declaration. He went on to say that work on human rights had already begun in the UN General Assembly. He spoke of three resolutions adopted at the first session of the General Assembly, in November and December of 1946, dealing with human rights. The first was the resolution of India against South Africa about the treatment of the Indian diaspora in South Africa. The second was the resolution of Egypt on prejudice and discrimination, which remained, until the declaration on racial discrimination was adopted in 1963, the document on racial discrimination, within the UN. The third was the resolution on the genocide convention proposed not by France and Britain and the United States, but by Panama and Cuba and India.

All three of the human rights resolutions at the first session of the General Assembly were from countries of the Global South. You can imagine yourself being there at the General Assembly. The representatives of these countries who never had a voice before. Here they had this opportunity to make international law, for the first time, and they were taking advantage of it. I regret something that I could have done more about in the book, and that I'll do it at some point, is to talk a little more also about the role of Haiti. This ruined, desperate country which right now has no purchase at all at the United Nations. The Haitian diplomats in those early years in the UN were fantastic. They were great.

So, it's a narrative about history which we should be teaching to our students. I do the same with International Criminal Law (ICL), too, and point out that crimes against humanity and ICL didn't go to sleep during the Cold War. The development of ICL did not stop in the 1950s and revive again in the early 1990s when all of the European countries wanted it to revive. It's not true. The countries of the South were pounding on the door, putting crimes against humanity into General Assembly resolutions, adopting the conventions on apartheid and on statutory limitation. These were all the work of the countries of the South, and they don't get credit in the narratives that are taught. So yeah, transform the teaching.

I've been involved in the project of a convention for crimes against humanity from the very beginning.

#### **Huhle**

Talking about crimes against humanity, what do you think about the upcoming potential convention?<sup>33</sup>

#### **Schabas**

I'm a big supporter of it. I've been involved in the project from the very beginning. It started with an initiative of the great Leila Sadat. She had obtained some funding for a project on this and then she created a steering committee to run the project, and the steering committee was composed of Richard Goldstone, Cherif Bassiouni, Juan Méndez,<sup>34</sup> Hans Corell,<sup>35</sup> Christine Van Den Wyngaert<sup>36</sup> and myself. We worked on the first stage, to produce a draft. Then, it went to the International Law Commission and it was out of our control, although Leila continued to work on it, and we did little things in the background, but this was really the work of the International Law Commission.<sup>37</sup> And now, it has this new momentum from the General Assembly resolution adopted at the beginning of December of 2024. So, I'm excited to see it happening.

I remember the very early meetings of the Steering Committee. I think it was Cherif Bassiouni who said, well, you know, now we can improve on the definition of crimes against humanity in the Rome Statute. But we quickly decided that we were going to leave it alone and not touch it because we didn't want to open up that box, that Pandora's box. Instead, we would talk about the various mechanisms and issues like extradition and so on. It would be complementary to the Rome Statute and it could only do that if it didn't quarrel with the definition in the Rome Statute. So that was the position that we adopted for better or for worse. And essentially, it is what the International Law Commission did. But there is a movement now to develop the definition of crimes against humanity. We'll see how that goes and it may take the form of adding things like gender apartheid and the slave trade and slavery and so on. And there may be other refinements.

It is not going to be easy. It never has been easy because the notion of crimes against humanity is the most difficult of all of the crimes. Most states, if they look at the Rome Statute, they see genocide and think, we'll never commit that. War crimes, we don't get involved in wars. There are only a few countries who do that really, and we're not concerned by that. And the crime of aggression, we don't do that. But crimes against humanity, we don't know where the limits are and how it's going to develop. One of the examples I give is the issue of prohibitions on marriage. As you know, there were Nazi laws on the prohibition of marriages between Jews and non-Jews, and in fact, my great aunt was divorced during the 1930s, apparently, to avoid the impact of that legislation. She then remarried the same person after the war in late 1945, in Berlin. Everyone agrees that if you were to have a law that prohibited marriage based on race, ethnicity, and so on, that that would be a form of persecution as a crime against humanity. What if someone then went to court somewhere and said, well, it's also a crime against humanity to prohibit marriage between two people of the same sex, of the same gender. Would that too be a crime against humanity? We would scratch our heads and say, well, I don't know the answer. It's possible it could be interpreted in that way. Well, some countries will then say that if you don't know the answer, then I'm not signing the convention. Never. And I think that's the problem with crimes against humanity, that the boundaries of it are uncertain. It's too prone to development and mutation. This is, on the one hand, what we love about crimes against humanity from a human right standpoint, its great potential to evolve as values evolve. But this makes governments very uneasy. This is the challenge that we face. Of course, it will be a convention and states don't have to ratify. Even if it's a convention ratified by a smaller number of states, that is okay. We can start there. There was a time when the convention on torture or on enforced disappearance only had a small number of

states parties and gradually they grew, and that will happen too with this convention. So, it's a very good development. And we passed a big hurdle in the Sixth Committee in November of 2024, getting that through, after it had been stalled there for four years.

**Huhle**

Going back to the biographical aspect of the interview, you're looking at possible leverages in bringing forward human rights. What would be your dream position to be an active part in promoting human rights beyond teaching and beyond writing, for the future?

**Schabas**

I would say I don't have any ambition to do anything more than what I'm doing. It's not as if I have a dream of doing something. They talk about at some point having a special rapporteur on capital punishment. I could be tempted to do a job like that, and there are some jobs that I wouldn't be opposed to doing. But it's not an ambition to go and do them. I'm very content with where I am and what I do.

**Menon**

To be a bit more hopeful perhaps, you were involved when the consensus was reached at Rome and you know how fragile that was, and how unlikely it seemed. Talking about unlikely moments, is there another development or consensus you hope that we can reach which would be better to counter the uneven implementation of ICL, even if it seems unlikely at this moment?

**Schabas**

Well, I have already mentioned the crimes against humanity convention. We have got a timeline for that now for the next five years. It's not going to happen overnight. The other thing which I would dearly love to see would be a revision of the provisions on aggression in the Rome Statute which are just not fit for purpose. I vividly remember, aside from the euphoric moment when the Rome Statute was adopted, the not quite so euphoric moment when the aggression amendments were adopted at Kampala.<sup>38</sup> We were sitting in the room at the back with the NGO group. Benjamin Ferencz<sup>38</sup> was there. His son Don, Chile Eboe-Osuji<sup>40</sup> and David Scheffer<sup>41</sup> were there too. When Christian Wenaweser<sup>42</sup> announced the agreement, people cheered and applauded although it was nowhere near the excitement and the enthusiasm of 1998. But still, it was a moment of great satisfaction. However, Benjamin Ferencz sat there and he didn't stand up and didn't applaud. We went over to him, many of us including his son, and I remember speaking to him and saying, "Ben you know this is your life's work and we've just made a big positive step forward". He replied that he was very unhappy about it. I now look back and I think Ben was right. It's proven to be just a big trick. The whole thing, the whole business about aggression is that we have this thing that doesn't work. I'm convinced now that some countries that came and said they had a positive view of it and that wanted to contribute in a helpful way, did so because they did not want to fight this off directly. Instead, they just made it so complicated that in practice, it'll never work. That is what they did because you could very simply address it by just saying there's a fourth crime, the crime of aggression and it should be prosecuted according to the normal rules. Instead, we have this very cumbersome and complicated mechanism and the responsibility for this mess rests with the Permanent Five<sup>43</sup> and in particular, with the French and the British. It was the friends of the P5 who made the

provisions so convoluted and unworkable. France made a statement that's on the record that said, "Well, we can't support these amendments because they don't leave the Security Council with the absolute authority to decide whether a case will be prosecuted." And on the record, there's a footnote saying the United States said they agreed with this. And somewhere else, there's another document where the British said they agreed with this as well.

This issue has returned in the discussions about a tribunal for Russia, for Ukraine, for Putin. I've been hearing about this idea since March of 2022, when Philippe Sands first made the proposal to have an ad hoc tribunal to judge aggression. There were resolutions by the European Parliament, by the Parliamentary Assembly of the Council of Europe, and a lot of political statements supporting the idea of an ad hoc aggression tribunal. If you look at the statements from the British and the French, they are ambiguous. They have been presented in an inaccurate way in newspapers like The Guardian where it is suggested that the British and the French support an ad hoc tribunal. I am not at all sure that they do, because they haven't changed their position that you can only create such a tribunal with the blessing of the Security Council. They haven't changed their view on it. The Americans have been a little more explicit in saying that they don't think an international tribunal is the way forward. They have said there should be a system rooted in the Ukrainian justice system with an 'international component', which is code, in American jargon, for a bunch of American lawyers running the show. We are still living with that view.

The current proposal seems to be essentially what the Americans wanted, namely a tribunal created within the Ukrainian legal system but with an 'international component' to be provided by the Council of Europe. It will suck up a lot of money and give work to plenty of international lawyers. NGOs will write policy papers, doctoral students will produce theses, there will be great conferences in exotic places. But it isn't going to solve the problem. Moreover, there is something pretty distasteful about a tribunal that is created expressly to prosecute one person whose identity is already known. That's an ad hominem and not an ad hoc tribunal. This was the idea when the Treaty of Versailles proposed to try Kaiser Wilhelm II in 1919. Haven't we moved on from that? What we need to do is to fix the Rome Statute. We need the States Parties to the Rome Statute to do this. The British and the French won't agree, but the Assembly of States Parties of the International Criminal Court is not the Security Council. London and Paris don't have a veto there. I would be confident that a good majority of States Parties to the Rome Statute will support an amendment that will permit prosecution for aggression under the same conditions as prosecution of the other core crimes. That's what I hope. I'd like to see that.

## Fußnoten

1. On 21 March 1960, South African police forces opened fire against a crowd of ca. 5000 people who protested against the racial laws imposed on the black workers. It is estimated that at least 91 people were killed at Sharpeville and 238 people were wounded. The Sharpeville massacre remains one of the emblematic events in the struggle against apartheid in South Africa.
2. Hersch Lauterpacht (1897-1960) was a British international lawyer, born in a Jewish family in Eastern Galicia (today Ukraine). For the Nuremberg IMT, he played an important role in drafting the most significant speeches delivered by British prosecutor Hartley Shawcross. In 1945, he published his book *An International Bill of the Rights of Man*, a vigorous plea for an international human rights convention (in contrast to a mere declaration). Lauterpacht advocated for the term “crimes against humanity” to describe the gravest international violations of human rights.
3. Raphael Lemkin (1900-1959) was Polish-American international lawyer, born in a Jewish family in what was then Eastern Poland (today Belarus), who escaped the Holocaust. While in exile, he compiled an analysis of the legal frameworks regulating the Nazi Rule in Europe (*Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*). The book, published in 1944, contains also the first draft of his concept and coinage of “genocide” to cover political crimes aiming at the destruction of inter alia national, ethnic and religious groups. After the war he campaigned for an international convention on genocide, which was finally adopted by the UN General Assembly in December 1948.
4. Mahmoud Cherif Bassiouni (1937-2017) was an Egyptian-American professor of law who authored numerous books on international law and human rights law, among them the first comprehensive study of the concept of “Crimes against Humanity in International Criminal Law” (Martinus Nijhoff 1992). He served in manifold positions at the United Nations and was involved in many major initiatives to promote and institutionalize international criminal law. Professor Bassiouni was also instrumental in advancing victims’ right to reparations.
5. Antonio Cassese (1937-2011) was an Italian law professor and judge who specialized in public international law, criminal law and human rights law. He was in charge of many positions at the European human rights system as well as at the United Nations. He was the first President of the International Criminal Tribunal for the former Yugoslavia and the first President of the Special Tribunal for Lebanon.
6. Roger S. Clark is a professor at Rutgers University School of Law. An expert on nuclear disarmament, human rights, international criminal law, and U.S. foreign relations law, he represented Samoa and the Marshall Islands before the International Court of Justice in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.
7. Daniel Turp (\*1955) is a professor of constitutional and international law at the Université de Montréal in Quebec. From 1997 to 2000 he was a member of the Canadian Parliament for the Bloc Québécois and of the Quebec National Assembly from 2003 to 2008, as a member of the Parti Québécois.
8. Alain Pellet (\*1947) is a French lawyer and professor of international law and international economic law at the Université de Paris Ouest - Nanterre La Défense. A former president of the United Nations International Law Commission, he is internationally known because of his many appearances as counsel and lawyer before the International Court of Justice.



9. Gérard Cohen-Jonathan (1936-2014) was professor at the University Panthéon-Assas, the dean of the University of Strasbourg Faculty of Law and president of the International Institute of Human Rights. He was also the Founding Director of the Paris Human Rights Centre.
10. Emmanuel Decaux is a French professor at the University of Paris II – Panthéon-Assas for public international law and human rights law. Beyond many academic functions, he served in the United Nations as a member of the Sub-Commission on the Promotion and Protection of Human Rights and from 2011-2019 of the Committee on Enforced Disappearances. Since 2019, he is the President of the OSCE Court of Conciliation and Arbitration.
11. Robert Badinter (1928-2024) was French politician and jurist. As French Minister of Justice (1981-1986), he abolished the Death Penalty in France.
12. Jacques Derrida (1930-2004) was a French philosopher of the “deconstructive” school of thinking. The lectures mentioned by Professor Schabas have been published as “Séminaire: La peine de mort” in two volumes (Paris, Galilée, 2012 and 2015). They have also been published in an English translation by the University of Chicago Press.
13. Émile Zola (1840-1902) was a novelist and journalist. Zola led the public campaign against the antisemitic prosecution of the Jewish army officer Alfred Dreyfus, known as the “Dreyfus affair”. His article „J'accuse...!“ (1898), dissecting the affair, is considered a landmark moment in the fight against antisemitism and state-sponsored discrimination.
14. William A. Schabas, *The Trial of the Kaiser* (Oxford, 2018).
15. William A. Schabas, *The International Legal Order's Colour Line: Racism, Racial Discrimination, and the Making of International Law* (Oxford, 2023).
16. William A. Schabas, *Genocide in International Law, the Crime of Crimes* (Cambridge, 2025).
17. Manfred Nowak (\*1950) is an Austrian professor for Constitutional and International Law and Human Rights in Vienna and Venice (Global Campus of Human Rights). In addition to many academic functions in different countries he also serves in many functions for the United Nations and the European Human rights system. In the UN, he was inter alia Special Rapporteur on Torture, member of the Working Group on Involuntary or Enforced Disappearances. The book Schabas refers to is Manfred Nowak, *Commentary on the UN Covenant on Civil and Political Rights* (Kehl am Rhein, 1993).
18. William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge, 1993).
19. Richard Goldstone (\*1938) was from July 1994 to October 2003 a judge at the Constitutional Court of South Africa. Before the transition from apartheid, he headed the “Goldstone Commission” that investigated political violence in South Africa during apartheid. He later became the first chief prosecutor of the International Criminal Tribunal for the former Yugoslavia and for Rwanda.
20. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in May 1993 by the UN Security Council to prosecute crimes committed during the wars in the former Yugoslavia.
21. Sir Sydney Woolf Kentridge (\*1922) was Acting Justice of the South African Constitutional Court (1995-1996).

22. Albie Sachs (\*1935) is a South African lawyer, activist and writer. He became one of the founding members of the Constitutional Court of South Africa after the end of apartheid.
23. George Bizos (1927-2020) was a South African lawyer who defended, among others, Nelson Mandela in the Rivonia trial in 1963/1964.
24. John Peters Humphrey (1905-1995) was a legal scholar who taught international law at McGill University in Montreal. In 1946, Assistant Secretary-General Henri Laugier appointed John Peters Humphrey as the first Director of the United Nations Division of Human Rights within the United Nations Secretariat.
25. Seán MacBride (1904-1988) was an Irish statesman who was awarded the Nobel Peace Prize in 1974. He was inter alia one of the founders of Amnesty International and later the United Nations High Commissioner for Namibia.
26. Northern-Irish human rights activist and law professor. In 1980 he founded the Human Rights Centre at the University of Galway (Republic of Ireland) and later co-founded the Essex Human Rights Law Centre. 2001–2002 he served as a special advisor to UN High Commissioner for Human Rights Mary Robinson.
27. Kevin Boyle (1943-2010), Irish Centre for Human Rights, School of Law, University of Galway.
28. Mary Robinson (\*1944), Irish lawyer who served as the President of Ireland from 1990-1997. From 1997-2002, she was the UN High Commissioner for Human Rights.
29. Professor Schabas delivered the 2024 Nuremberg Academy Lecture titled “Enigmas of the Genocide Convention: 75 years after its adoption, puzzles remain”.
30. The case against Abdullah Al-Senussi, a former head of the Libyan military intelligence was declared inadmissible before the ICC on 11 October 2013 due to national proceedings in Libya regarding the same crimes.
31. On 21 November 2024, the International Criminal Court issued arrest warrants for two senior Israeli officials, Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the former Minister of Defense of Israel as well as for the Hamas military commander, Mohammed Deif.
32. The session took place in Lake Success, New York. The address was given by Henri Laugier, at the time Assistant Secretary-General for Social Affairs at the United Nations. It is recorded in the Summary Record of this first meeting (document E/CN.4/SR.1).
33. The initiative for a Convention on Crimes Against Humanity was started in 2008 by professor Leila Sadat, then director of the Whitney R. Harris World Law Institute of the Washington University in St. Louis (USA). In 2013, it was then taken up by the International Law Commission which presented several drafts for such a convention. On 22 November, 2024, the 6th committee approved the text to launch the process to negotiate the convention. Leila Nadya Sadat is professor of International Criminal Law at Washington University School of Law. She is the Director of The Crimes Against Humanity Initiative.
34. Juan Méndez (\*1944) is an Argentinean human rights activist and lawyer. A former political prisoner of Argentina’s dictatorship, he was a founder of Human Rights Watch for the Americas and worked as president of the International Center for Transitional Justice. In the UN he served as Special Rapporteur for torture. In this capacity he stressed the necessity for sound methods of interviewing and investigating cases of violations that finally were adopted as the Principles on

Effective Interviewing for Investigations and Information Gathering (Méndez Principles).

35. Hans Corell (\*1939) is a Swedish diplomat and lawyer. From 1994 – 2004 he was Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations.
36. Christine Van Den Wyngaert (\*1952) is a Belgian jurist and judge, currently serving on the Kosovo Specialist Chambers. She has been a judge at the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court.
37. The International Law Commission is an organ of the United Nations. Its members are elected by the General Assembly and tasked with the development of International Law.
38. In 2010, a conference in Uganda's capital Kampala was convened to review the ICC's Rome Statute, with a particular view of developing the crime of aggression that is part of the crimes for which the ICC has jurisdiction. However, since it is not defined in the Rome Statute, its application by the Court has been hindered. The outcome of the reforms decided in Kampala to amend this lack of competence is subject of many disputes and has been described as the "Kampala compromise" by Claus Kress.
39. Benjamin Ferencz (1920-2023) was a prosecutor at the subsequent Nuremberg trials against the Einsatzgruppen. He later became a leading figure in the promotion of International Criminal Law, participating in nearly all the major initiatives driving its development and institutionalization.
40. Chile Eboe-Osuji (\*1962) Nigerian and Canadian jurist, then the legal advisor to the High Commissioner for Human Rights and later, the 4th President of the International Criminal Court.
41. David Scheffer (\*1953) is a US lawyer and diplomat. He was the first US Ambassador-at-Large for War Crimes Issues and was involved in the creation of several international criminal courts and hybrid courts. He also headed the US delegation at the Rome conference that created the ICC.
42. Christian Wenaweser (\*1963) is a diplomat from Liechtenstein. Since 2002, he has been the Permanent Representative of Liechtenstein to the UN. In this capacity he has actively participated in many initiatives for the promotion of international criminal justice. Among these, he was the chair of the Special Working Group on the war of aggression.
43. The Permanent Five are the five states that have permanent seats and veto power in the UN Security Council

## Zitation

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