State Obligations in Implementing Arrest Warrants

By William Schabas

Descriptive Title:
The Genocide Convention does not Assist the Prosecutor with respect to non-party States to the Rome Statute. No Legal Rule Resolves the Conflict between Decisions of the African Union and Obligations Resulting from the Rome Statute.

Summary of Opinion:
On the Genocide Convention. Many African States, including some directly involved in issues concerning enforcement of the Al Bashir arrest warrants, are not Contracting Parties to the Genocide Convention. For those that are, a distinction must be made between States Parties and non-party States to the Rome Statute. The legal regime applicable to States Parties is slightly enhanced by the possibility of recourse to the International Court of Justice in accordance with article IX of the Genocide Convention. This conclusion results from the Bosnia v. Serbia ruling of the International Court of Justice. For non-party States, there does not seem to be any particular impact of the Genocide Convention, as they have not accepted the International Criminal Court, something required by article VI of the Genocide Convention. In any event, no obligation to prosecute under the Genocide Convention arises if genocide has not in fact been established. The insistence of the Prosecutor and the holding by Pre-Trial Chamber I that there are ‘reasonable grounds to believe’ genocide has been committed must be weighed against much authority to the contrary.

On the African Union. States Parties to the Rome Statute are under an obligation to cooperate with the International Criminal Court in the enforcement of the Al Bashir arrest warrants. However, two Decisions of the African Union, which are binding upon Member States, require that the arrest warrants not be enforced. Thus, African States that are members of the African Union and that are also States Parties to the Rome Statute are confronted with conflicting obligations. These cannot be resolved by principles of interpretation. The impasse requires a political solution.

Argument:
1. Obligations of Contracting Parties to the Genocide Convention to implement arrest warrants issued by the International Criminal Court.

A discussion of the obligations of States Parties to the Genocide Convention to implement arrest warrants issued by the International Criminal Court can usefully begin by recalling the low rate of ratification of the Convention by African States. Of the fifty-four members of the African Union, only thirty-one are parties to the
Genocide Convention. For example, some of the countries that have failed to respect their obligation to enforce arrest warrants of the International Criminal Court, such as Chad, Kenya and the Central African Republic, have not ratified or acceded to the Genocide Convention.

The low ratification rate in Africa is a puzzling phenomenon. Of the fifty-one United Nations Member States that have not ratified or acceded to the Convention, approximately half are in Africa. This is all the more striking given that the most important violations of the Genocide Convention in recent decades have taken place in Africa. The failure of so many African states to ratify the Convention probably does not indicate any particular disagreement with the substance of the instrument. Rather, it may simply result from the fact that the Convention was adopted prior to decolonization, and newly independent African States willingly ratified human rights treaties that were adopted subsequently, such as the International Covenants, but did not necessarily review all of the already existing instruments and ratify them. Article XII of the Convention allows States parties to extend the application of the Convention to sovereign territories for which they are responsible. The only relevant application of this provision to Africa is the 1952 declaration by Belgium declaring the Convention applicable to the Belgian Congo and to the Trust Territory of Rwanda-Urundi. Arguably, the Convention remained in force for these countries following decolonization. In any event, the Democratic Republic of the Congo made a declaration of succession on 31 May 1962; Rwanda and Burundi acceded to the Convention on 15 April 1975 and 6 January 1997 respectively.

Two provisions of the Convention are especially relevant in addressing the obligations imposed upon Contracting States to the Genocide Convention as regards arrest warrants issued by the International Criminal Court.

**Article 1**
The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

**Article 6**
Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.
The International Court of Justice addressed the issue of the obligations of States Parties to the Genocide Convention to cooperate with international criminal tribunals in the *Bosnia v. Serbia* case. There, the Court held that Serbia had violated its obligations under the Genocide Convention by having failed to transfer Ratko Mladić to the International Criminal Tribunal for the former Yugoslavia, where he was charged with genocide, thereby failing fully to co-operate with the Tribunal. The Court treated the issue under the heading ‘the obligation to punish genocide’. The Court recalled that article VI obliges the Contracting Parties to cooperate with an ‘international penal tribunal’ to the extent that they ‘shall have accepted its jurisdiction’ According to the Court, this ‘implies that they will arrest persons accused of genocide who are in their territory - even if the crime of which they are accused was committed outside it - and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal’.\(^1\) The Court observed that the drafters of the Convention had contemplated an international criminal tribunal established by treaty rather than by resolution of the Security Council, but said it would be contrary to the object of the Convention to exclude a tribunal created in such a manner.\(^2\) This issue does not even arise with respect to the International Criminal Court because it is indeed established by treaty.

The Court then turned to the question of whether Serbia had ‘accepted the jurisdiction of the Court’, concluding this to be the case. Serbia had not, of course, actually ratified the Statue of the International Criminal Tribunal. This is not legally possible given that the founding instrument of the Tribunal is a Security Council resolution. Nevertheless, Serbia had assumed an obligation to cooperate when it accepted the Dayton Agreement, which explicitly requires cooperation with the International Tribunal.\(^3\) The Court said that ‘the admission of the [Federal Republic of Yugoslavia] to the United Nations in 2000 provided a further basis for its obligation to co-operate’.\(^4\)

It is tempting to draw upon this as support for an obligation imposed upon Contracting Parties to the Genocide Convention who are not States parties to the

---

Rome Statute to cooperate with the International Criminal Court in enforcing the arrest warrants, given that the jurisdiction of the Court over The Sudan was established by Security Council resolution rather than by consent. The Sudan is not a State Party to the Rome Statute. Therefore, the situation is not identical to what was considered by the International Court of Justice in the *Bosnia* case. In particular, there is no comparable act of commitment to the institution analogous to the acceptance of the Dayton Agreement by Serbia. Nevertheless, there is the suggestion that the obligation flows from the Charter of the United Nations. While this is not further explained, it may well be that the Court considered that Serbia had ‘accepted’ the International Criminal Tribunal for the former Yugoslavia by virtue of its membership in the United Nations.

In the Darfur case, the extent of Security Council involvement is the referral of the situation in accordance with article 13(b). Basically, there are two approaches to assessing the scope of the referral. There is a large view, by which the referral has some special additional implications, such as the removal of Head of State immunity that would normally exist under customary international law. The more narrow approach derives support from the drafting history of the Rome Statute, which indicates an intent to restrict the authority of the Security Council, and certainly does not point to additional implications of such referral. Furthermore, operative paragraph 2 of the Security Council resolution referring the situation in Darfur, Sudan to the International Criminal Court ‘recogniz[es] that States not party to the Rome Statute have no obligation under the Statute’. These words seem inconsistent with the idea that there is an implied duty to cooperate with the Court flowing either from the Genocide Convention, which has, after all, been ratified by the permanent members of the Security Council, or from customary international law.

When all of these elements are taken into account, the argument that Contracting Parties to the Genocide Convention that have not ratified the Rome Statute are nevertheless under some obligation to cooperate with the International Criminal Court seems difficult to sustain. The only States that are not parties to the Rome Statute but that are Contracting States to the Genocide Convention and that are required to cooperate with the Court are ‘the Government of Sudan and all other

---

5 UN Doc S/RES/1593 (2005), para. 2.
parties to the conflict in Darfur’, but this obligation arises from operative paragraph 2 of Security Council Resolution 1593(2005) rather than from the Genocide Convention itself.

With regard to Contracting Parties to the Genocide Convention that are also States Parties to the Rome Statute, the International Criminal Court is indeed the tribunal contemplated by article VI of the Convention. As a result, such States are obliged to cooperate with the Court by virtue not only of the Rome Statute itself but also article I of the Genocide Convention, in accordance with the pronouncement of the International Court of Justice. The major consequence of this is to confer jurisdiction upon the International Court of Justice, pursuant to article XI of the Convention, enabling it to consider applications alleging that a Contracting State has indeed breached article I by failing to cooperate with the International Criminal Court. The only exception here would be if the State had formulated a reservation to article IX. Since the withdrawal of Rwanda’s reservation to article IX, there do not appear to be any operative reservations by African states, so this is not in practice an issue of any substance.

Even if such obligations do in fact exist under the Genocide Convention, it cannot be said that a State has violated the provisions of the treaty because it fails to enforce an arrest warrant that charges genocide. There can only be a violation of the Genocide Convention if genocide is actually established. The fact that the Prosecutor of the International Criminal Court has insisted upon charging the President of Sudan with genocide, and the fact that three judges of a Pre-Trial Chamber have agreed that there are ‘reasonable grounds to believe’ that genocide was committed, does not mean that the charge is proven in a satisfactory manner. It is worth recalling that the Commission of Inquiry established pursuant to a request from the Security Council did not conclude, in its January 2005 report, that genocide had been committed. Nor did the Prosecutor of the International Criminal Court, in his first applications for arrest warrants in the Situation in Darfur, Sudan, allege that genocide had been

---


committed in Darfur.\(^8\) The approach of the Prosecutor himself is therefore characterized by ambivalence. Even the Pre-Trial Chamber, in its initial decision on the application for an arrest warrant against President El Bashir, of 4 March 2009, communicated its own serious doubts about the validity of a genocide charge.\(^9\) The charge that genocide was committed in Darfur and that Sudan’s President is personally responsible remains tenuous. It cannot be said that a State has violated its obligations to punish the crime of genocide if in fact genocide has not been committed. Only if and when this is established can there be a breach of the Convention.

2. **Obligations of African Union Member States to Implement ICC arrest warrants generally**

The Assembly of Heads of State and Government of the Union of the African Union has decided that ‘AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan’.\(^10\) This Decision, adopted in Kampala in July 2010, affirms a Decision adopted the previous year but couched in slightly different terms: ‘Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.’\(^11\)

The Assembly is empowered to determine the common policies of the Union, and to receive, consider and take decisions on reports and recommendations from the other organs of the Union.\(^12\) Although there is no explicit statement to this effect, decisions of the Assembly appear to be intended to have a binding effect, because article 23 of the Constitutive Act of the African Union provides that sanctions may be

---

\(^9\) *Prosecutor v. Al Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest, 4 March 2009.  
\(^12\) Constitutive Act of the African Union, art. 9(a) and (b).
imposed upon ‘any Member State that fails to comply with the decisions and policies of the Union’. When Pre-Trial Chamber I informed the Security Council that ‘the Republic of Kenya has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest’, 13 and did likewise using slightly different terms with respect to Chad, 14 the Commission of the African Union issued a press release stating that ‘[t]he decisions adopted by the AU policy organs are binding on Chad and Kenya…’ 15

Therefore, with respect to Member States of the African Union that are also States Parties to the Rome Statute, there would appear to be a conflict between the binding obligations imposed by the Rome Statute and the binding obligations imposed by the Decisions of the African Union. Conflicts in international norms can be resolved in a number of ways. For example, one norm may be hierarchically superior to the other, in which case the former will prevail. This is the case, for example, with norms that are in conflict with the Charter of the United Nations. However, the arrest warrant debate does not involve the Charter of the United Nations. It is also the case if one of the norms can be described as jus cogens. Although the Rome Statute of the International Criminal Court deals with crimes that have often been characterized in this manner, it is highly doubtful that the essentially procedural obligation to enforce an arrest warrant can be so described.

Otherwise, apparent conflicts in norms may be resolved by techniques of interpretation that, in effect, deliver an analysis by which there is in fact no actual conflict. This is the approach taken by Amnesty International in a recent report. 16 Amnesty International’s reasoning seems quite contrived, however, and is very difficult to reconcile with the very clear wording of the African Union Decisions. According to Amnesty International, it was the intent of the African Union that its

Decisions be consistent with the Rome Statute. Apparently, this is explained by its reference to article 98 of the Statute in the first of the two Decisions. But, says Amnesty International, the African Union’s ‘provisional interpretation’ of article 98 is not correct. It seems far-fetched to conclude that the African Union intended that its Decision ordering States not to enforce the arrest warrants be consistent with the Rome Statute, and at the same time to declare the interpretation of a provision of the Rome Statute upon which the Decision of the African Union is based to be erroneous.

The heart of Amnesty International’s critique of the African Union decisions, and indeed its entire analysis of the issue, is predicated on its rejection of the decision of the 2002 International Court of Justice in this area. However, in preparing an academic legal opinion addressing the obligations of African Union Member States, a distinction must be made between what Amnesty International (and others) would like the law to become, and what it actually is.

There has been much debate in the academic literature about the role of immunities in the case of President Al Bashir. Article 98(1) declares:

Article 98. Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Under customary law, it seems unchallengeable that the Head of State of Sudan benefits from immunity with regard to national justice systems except those of his own State. Not only does article 98(1) acknowledge the right of a State to invoke such immunities, it is even worded in such a way as to imply that this is mandatory. The report of Amnesty International suggests that there are no such immunities under international law. But if this were the case, then article 98(1) would be futile. In the Congo v. Belgium case, the International Court of Justice recognized that immunities of Heads of State and senior officials, such as ministers of foreign affairs, remain

---

17 Ibid., p. 25: ‘Amnesty International disagrees with these narrow findings.’
effective under international law even with respect to prosecutions for genocide and crimes against humanity.

Article 27 of the Rome Statute is also relevant:

Article 27. Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Principles of interpretation require that articles 27 and 98 be read together in such a way as to make them both effective. Article 27(2) suggests there are no immunities before the Court, yet article 98(1) requires the Court to observe them. The solution is really quite simple: in ratifying the Rome Statute, States Parties agree that the immunities to which they are entitled in accordance with customary international do not apply before the International Criminal Court. This is the effect of article 27(2). Non-party States have not abandoned such immunity because they have not accepted the Rome Statute. If the Prosecutor contemplates prosecuting the Head of State of a non-party State, article 98(2) instructs the Court not to proceed because this would require the requested State to act in a manner inconsistent with its obligations under international law. This is an interpretation that disappoints those who would prefer that there be no immunity, of course. But immunity is a fact of international law, and the Rome Statute confirms this.

Pre-Trial Chamber I, in Bashir, held that the position of the accused person as head of State of a non-party State ‘has no effect on the Court's jurisdiction over the present case’. It said this conclusion was based upon four considerations. The first is a rather gratuitous and unhelpful reference in the preamble to the core goals of the Statute, which are ‘to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished”’. The second consists of an equally gratuitous and unhelpful recital of

21 Ibid., para. 42.
the terms of article 27. The third is more compelling: a reference to article 21 of the Statute, and the observation that unless there is a lacuna in the Statute the Court is not to apply other sources of law. The message is that even if general public international law provides for Head of State immunity, it is not formally contemplated by article 27 and therefore cannot be invoked in proceedings before the Court. But the Pre-Trial Chamber did not reference article 98(1). Finally, the Pre-Trial Chamber said that by referring the Darfur situation to the Court in accordance with article 13(b) of the Statute, the Security Council ‘accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole’. The reasoning of the Pre-Trial Chamber rests upon an interpretation of article 27(2) by which it applies to Heads of State of non-party States because the provision does not say the contrary. But a construction by which article 27(2) only applies to States Parties is certainly equally plausible, if not more so. To start with, the Chamber might have considered article 34 of the Vienna Convention on the Law of Treaties: ‘A treaty does not create either obligations or rights for a third State without its consent.’ Moreover, as we have already mentioned, if article 27(2) applies to Heads of State of non-party States, then what is the purpose of article 98(1)? Surely it is also reasonable to presume that the Security Council took all of these elements into account and did not consider that the referral of the Situation in Darfur, Sudan to the Court encroached upon existing immunities of Heads of State of non-party States. The consequence of the Pre-Trial Chamber’s reasoning is that the Security Council also intended to strip the presidents of the United States, Russia and China of their immunity before the International Criminal Court. I really doubt that this is what it intended, and suspect that a quick verification with senior legal officers of the concerned governments would confirm this.

Pre-Trial Chamber I might also have considered the Relationship Agreement between the International Criminal Court and the United Nations, which is instructive for the interpretation of article 27(2) of the Rome Statute. During the negotiations of the Relationship Agreement, in 2001, the Government of Belgium, which for many

---

22 Ibid., para. 43.
23 Ibid., para. 44.
24 Ibid., para. 45.
years adopted a rather extreme position on immunities, reflected in the dissenting opinion of *ad hoc* judge Van den Wyngaert in the *Arrest Warrant* case,

proposed the following provision: ‘Paragraph 1 of this article shall be without prejudice to the relevant norms of international law, particularly article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide and article 27 of the Statute, in respect of the crimes that come under the jurisdiction of the Court.’ In other words, Belgium’s position was that United Nations officials did not benefit from immunity with respect to genocide, crimes against humanity and war crimes. When the text of the Relationship Agreement was being prepared, Belgium was embroiled in its litigation with the Democratic Republic of the Congo before the International Court of Justice, and obviously understood that recognition of immunity for United Nations officials in that text would seem incompatible with its claim that there was no immunity at all for the core crimes of international law. But Belgium’s provision was rejected by negotiators for the United Nations, whose objections were sustained by the representatives of the Court. The final version of the Agreement confirms the immunities to which officials of the United Nations are entitled. According to article 19 of the Relationship Agreement, the United Nations agrees to waive these immunities. But if article 27(2) removed such immunity, there would be no need for any such provision, and this was precisely the point that Belgium had unsuccessfully tried to confirm.

For these reasons, and contrary to the arguments submitted by Amnesty International, the obligations imposed by the African Union Decisions concerning non-enforcement of arrest warrants of the International Criminal Court and those imposed by the Rome Statute upon States Parties to the Rome Statute cannot be reconciled. Nor is there any apparent rule or formula establishing a hierarchy by which one prevails over the other. This conflict of legal norms requires a political solution.

When African States questioned the wisdom of issuance of the arrest warrant against an African head of State involved in a delicate peace process, they were met with rather abrupt references to article 16 of the Rome Statute. But article 16, which authorises the Security Council to suspend prosecutions, was inserted in the Statute as

---

a compromise in order to win support from some permanent members of the Council as the negotiations progressed. Most States participating in the Rome Conference would have preferred to see article 16 removed entirely. The suggestion that article 16 provides a unique mechanism to block prosecution where there may be dramatic and unpredictable consequences for ongoing conflicts should not be sustained. Remonstrating with African States that are parties to the Rome Statute about their obligations to enforce arrest warrants is unlikely to provide a productive result and a way out of the impasse. It only contributes to the festering malaise in Africa’s relationship with the International Criminal Court. Rather, due account must be taken of the concerns reflected in the African Union decisions.

Profile Information
Full Name: William A. Schabas, LLD, OC, MRIA
Job Title: Professor of Human Rights Law
Affiliation: National University of Ireland, Galway

Biography: Professor William A. Schabas is director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he holds the chair in human rights law. He is also an associate professor at the University of Middlesex in London, a professeur associé at the Université du Québec à Montréal and a visiting fellow at Kellogg College of the University of Oxford. He is a ‘door tenant’ at the chambers of 9 Bedford Row, London.

Professor Schabas holds BA and MA degrees in history from the University of Toronto and LLB, LLM and LLD degrees from the University of Montreal, as well as honorary doctorates in law from Dalhousie University and Case Western Reserve University. He is the author of more than twenty books dealing in whole or in part with international human rights law, and some 300 articles in academic journals, principally in the field of international human rights law and international criminal law. His writings have been translated into Russian, German, Spanish, Portuguese, Chinese, Japanese, Arabic, Persian, Turkish, Nepali and Albanian.

Professor Schabas is editor-in-chief of Criminal Law Forum, the quarterly journal of the International Society for the Reform of Criminal Law. He is Chairman of Board of Trustees of the United Nations Voluntary Fund for Technical Assistance in the Field of Human Rights, President of the International Association of Genocide Scholars, President of the Irish Branch of the International Law Association and chair of the International Institute for Criminal
Investigation. From 2002 to 2004 he served as one of three international members of the Sierra Leone Truth and Reconciliation Commission.

Professor Schabas was named an Officer of the Order of Canada in 2006. He was elected a member of the Royal Irish Academy in 2007.

Selected Cites to Your Published Materials:
*Genocide in International Law* (Cambridge: Cambridge University Press, 2nd ed., 2009)

Biographical Web URL: humanrightsdoctorate.blogspot.com

Email Address for Display in Profile: william.schabas@nuigalway.ie