
Volume 45 | Issue 1

2012

Reflections from the International Criminal Court Prosecutor

Fatou Bensouda

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Fatou Bensouda, *Reflections from the International Criminal Court Prosecutor*, 45 Case W. Res. J. Int'l L. 505 (2012)

Available at: <https://scholarlycommons.law.case.edu/jil/vol45/iss1/14>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

Case Western Reserve Journal of International Law

Volume 45

Fall 2012

Issues 1 & 2

REFLECTIONS FROM THE INTERNATIONAL CRIMINAL COURT PROSECUTOR

Fatou Bensouda

REFLECTIONS FROM THE INTERNATIONAL CRIMINAL COURT PROSECUTOR

*Fatou Bensouda**

Distinguished ladies and gentlemen, I am delighted to be with you today to give the Frederick K. Cox International Law Center Lecture on Global Justice. Allow me to thank the Case Western Reserve University School of Law for inviting me to speak to you. I look forward to our discussion.

In June of this year, I took up the function of Prosecutor of the International Criminal Court, an international, independent, judicial institution that started its activities ten years ago.

After ten years in operation, an overview and definition of the new perspectives related to international criminal justice is essential for reviewing and further improving the operations of the Court.

Within the Office of the Prosecutor, this exercise has coincided with the transitional period, which started last December following my election by the Assembly of States Parties and completed on June 15 when I officially took up my duties.¹

It is almost an understatement to say that the world today is very different than what it was ten years ago. In 2002, the aim was to establish an innovative and unprecedented institution created by the Rome Statute: the first independent, impartial, and permanent

* Mrs. Bensouda is the Prosecutor of the International Criminal Court. She was elected to this position on December 12, 2011 and sworn in on June 15, 2012. Previously, she served as the Deputy Prosecutor. Prior to her work at the International Criminal Court, Mrs. Bensouda worked as Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, rising to the position of Senior Legal Advisor and Head of The Legal Advisory Unit. Before joining the ICTR, she was General Manager of a leading commercial bank in The Gambia. Between 1987 and 2000, she was successively Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, and Attorney General and Minister of Justice, in which capacity she served as Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia. Mrs. Bensouda holds a masters degree in International Maritime Law and Law of The Sea and as such is the first international maritime law expert of The Gambia.

1. *Mrs. Fatou Bensouda, ICC Prosecutor*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Biographies/TheProsecutor2012.htm> (last visited Nov. 13, 2012).

international criminal court.² In 2002, the stakes were high: would this new judicial institution be able to assert itself in the international arena? Would it be able to open and successfully carry out a case? Could the Court be anything other than a paper tiger, an abortive project generating legal and academic debates but with no role to play in managing mass violence in real time, and with no hope of contributing effectively to the prevention of such violence?

Ten years on, an objective observation would provide positive answers to all of these questions. The International Criminal Court, by virtue of its mandate and operations in the last ten years, has introduced a new paradigm in international relations: utilizing law as a global tool to promote peace and international security.

To what does the Court today owe its status and legitimacy as a major actor on the international scene in relation to justice and conflict management? I would like to suggest two main causes. Firstly, its operational framework—its mandate—as defined by the Rome Statute; and secondly, the standardized, clear, transparent, and predictable working methods of the Office of the Prosecutor, providing it with the necessary legitimacy as a strictly judicial actor, in order to function effectively in a highly political international environment.

Ladies and Gentlemen, allow me now to briefly present the four cardinal points, the four key elements of the model of international criminal justice established by the Rome Statute, which in my opinion explain why this model is both legitimate and sustainable.

First, the International Criminal Court is **permanent and could potentially have worldwide jurisdiction**. Differing from other models—from the Nuremberg and Tokyo tribunals to the courts dealing with the former Yugoslavia, Rwanda, Sierra Leone and Cambodia—the Court is a permanent actor with non-retroactive³ and potentially universal jurisdiction,⁴ which provides it with further legitimacy. These characteristics of the Court also encourage States as well as other international actors to realign their positions in accordance with the norms of the Court and to build a relationship and a model of cooperation over the long term.

2. See Rome Statute of the International Criminal Court, July 12, 1998, 2187 U.N.T.S. 900, pmbl. [hereinafter Rome Statute] (“Determined . . . to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole . . .”).

3. *Id.* art 24.

4. See Rome Statute, *supra* note 2, art. 125(3) (“This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.”).

Second, the Court is **independent**, as is its Prosecutor.⁵ So, it is the Prosecutor who, with complete independence and on the basis of the criteria laid down by the Rome Statute, initiates preliminary examinations, selects situations and cases, and decides whether or not to open an investigation into a situation referred by a State or the United Nations Security Council.⁶ The Prosecutor also has the capacity, of course, to open investigations *proprio motu*, with the authorization of the judges.⁷ Independence is the most fundamental component of the legitimacy of our mandate and work, and the main source of the impact of the Court on international relations, particularly its preventative impact.

Complementarity is one of the founding principles of the Rome Statute model.⁸ States have primacy in terms of investigations and proceedings; the ICC was established as a court of last resort.⁹ It is within this context that the Office of the Prosecutor has developed its policy of positive complementarity, namely, a proactive policy of cooperation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities.¹⁰ The Rome Statute did not just create a Court, but also

-
5. *See generally* Rome Statute, *supra* note 2, pmbl. (“Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system. . . .”); *id.* art. 42(1) (“The Office of the Prosecutor shall act independently as a separate organ of the Court.”).
 6. *See id.* art. 15 (describing the authority of the Prosecutor to initiate investigations).
 7. *Id.*
 8. *See id.* art. 1 (stating the Court “shall be complementary to national criminal jurisdictions”).
 9. *See id.* art. 17(1).
 10. OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009-2012 ¶ 16 (Feb. 1, 2010), *available at* <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>.

According to the Statute, States have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office is exceptional – it will only step in when States fail to conduct genuine investigations and prosecutions. This principle of complementarity has two dimensions: (i) the admissibility test, *i.e.* how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, *i.e.* a proactive policy of cooperation aimed at promoting national proceedings.

Id.

a system of global criminal justice, within which national, regional, and international actors operate, in addition to other mechanisms of justice and reconciliation. Such interdependent and complementary action must guarantee that justice is rendered for all crimes committed in a given situation and ensure that impunity is eliminated.

Finally, the fourth key element of the Rome system is the role of the Court in **preventing and managing conflicts**. The preamble to the Statute gives the Court the mandate to “contribute to the prevention of . . . crimes.”¹¹ Recently, thanks in particular to the intervention by the Court and the Office of the Prosecutor, judicial issues have begun to form part of the considerations of the international community regarding international peace and security. An example of this is the unanimous referral of the situation in Libya by the United Nations Security Council.¹² The importance of the **preliminary examinations** phase, which gives the States concerned the possibility of intervening to put an end to crimes before the Office of the Prosecutor initiates an investigation,¹³ should be highlighted here. This phase enables the Office of the Prosecutor to act as a catalyst for national proceedings.

Ladies and Gentlemen, allow me now to say a few words about the working methods developed by the Office of the Prosecutor since the start of its operations which have enabled it to strengthen the legitimacy of its work and helped it to position the institution as a major actor in the conflict prevention and management. The publication of various documents on general policy and our prosecutorial strategy, the adoption of an operational manual, learning from previous experiences, and the transitional process between the first Prosecutor and myself, have helped my Office to fully standardize and enhance its operational process. This process is based on three fundamental phases.

First, **the preliminary examination phase**: a policy document was prepared almost two years ago following a process of consultation with our partners—states, civil society, and international, and regional organizations.¹⁴ The preliminary examination phase allows

11. Rome Statute, *supra* note 2, pmbl.

12. See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

13. See Policy Paper on Preliminary Examinations, Int’l Crim. Ct. ¶ 13 (Oct. 4, 2010), available at http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpoli_cypaperonpreliminaryexaminations04101.pdf (“Before making a determination on whether to initiate an investigation, the Office [of the Prosecutor] will also seek to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.”).

14. See generally *id.*

various actors to have the opportunity to take action.¹⁵ The objective is to ensure that the Office will contribute to the prevention or cessation of abuses by establishing transparent communication and ensuring predictability of its judicial activities.¹⁶

The Office thus examines the extent to which its preliminary examination activities can serve to stimulate genuine national proceedings against those who appear to bear the greatest responsibility for the most serious crimes. This phase is one of the most remarkable efficiency tools we have at our disposal as it encourages national prosecutions and prevents or puts an end to abuses. Thus, this process allows the Court to avoid opening investigations and prosecutions when national mechanisms are functioning in accordance with our founding Statute. This is what we are doing in Colombia, Georgia, and Guinea.¹⁷

Second, at the end of the preliminary examination process, on the basis of criteria set out in the Statute and on the basis of available evidence, we have to establish whether or not there are reasonable grounds to **open an investigation into a given situation**.¹⁸ Before opening an investigation or requesting authorization from the Pre-Trial Chamber, our policy is to inform the relevant State officials and offer them the option to refer the situation to the Court with the aim of increasing the prospects of cooperation *inter alia*.¹⁹ This is what we have done with regards to the situations in the Democratic Republic of Congo and Uganda, for example.²⁰

If the relevant State chooses not to refer the situation, the Office remains prepared at all times to proceed *proprio motu*, as was done in the Kenya situation.²¹ In this case, after consultations with the national authorities over a possible referral, the Kenyan government decided to support *proprio motu* action by the ICC, stating that it remained fully committed to discharging its primary responsibility to establish a local judicial mechanism to deal with the perpetrators of the post-election violence and that it remained committed to cooperating with the ICC.²² Pursuant to the principle of independence, the policy of inviting referrals remains without prejudice to the case selection and prosecutorial strategy of the Office.

15. *Id.* ¶ 94.

16. *Id.* ¶ 20.

17. *Id.* ¶ 31.

18. *Id.* ¶¶ 27, 45.

19. *Id.* ¶ 16.

20. *Id.* ¶ 28.

21. *Id.* ¶ 81.

22. *Id.*

Finally, the Office of the Prosecutor is provided with the **discretion to select cases**.²³ In its September 2003 policy document, the Office established that, on the basis of the Statute, and given the Court's limited resources, the Office of the Prosecutor ought to focus the efforts and resources employed in investigation and prosecution on persons bearing the greatest responsibility, like heads of States or other organizations presumed to be responsible for these crimes.²⁴ This policy of focused prosecutions encourages marginalization of high level suspects which may lead to demobilization of armed groups. It also, through the principle of complementarity, encourages national authorities and other justice and reconciliation mechanisms to guarantee that the minor perpetrators of serious crimes are brought to justice as well.

The Office is equally responsible for drawing particular attention to sexual and gender-based crimes, in addition to crimes against children. Since its inception, the Office has sought to file charges accordingly in the great majority of its cases. This will continue to be one of my priorities over the course of my mandate.

One key point remains: in selecting its cases, the Office of the Prosecutor cannot yield to political considerations or adapt its work according to the peace negotiations timetable. It must always conduct its work on the basis of the law and of the evidence it has collected, and act accordingly, in an independent manner. However, the Office of the Prosecutor may, and has so far endeavoured to, announce the various phases of its work in advance, thereby permitting other actors, through its transparency and predictability, to adapt to the on-going judicial process.

Thus, in December 2007, the Office of the Prosecutor announced to the Security Council that it would investigate those within the Sudanese government who were protecting and supporting Ahmad Harun.²⁵ Six months later, in July 2008, the Office requested an arrest warrant for the Sudanese President, Omar al-Bashir.²⁶ In the course

23. Rome Statute, *supra* note 2, art. 15.

24. Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 3 (Sept. 2003), *available at* http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

25. *See generally* Office of the Prosecutor, Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) (Dec. 5, 2007); Press Release, Security Council, International Criminal Court Prosecutor Tells Security Council Sudan's Government "Not Cooperating" in Darfur Investigation, Massive Crimes Continue, U.N. Press Release SC/9186 (Dec. 5, 2007).

26. *Omar Hassan Ahmad Al Bashir*, INT'L CRIM. CT., <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB> (last visited Nov. 13, 2012).

of these six months, the international community could have made preparations to support the action taken by the Office of the Prosecutor; but it did not and, therefore, an opportunity to put an end to the genocide in Darfur was missed.

Ladies and Gentlemen, the issues faced by the Court today are no longer the same as in 2002. The Court no longer risks being an irrelevant entity: it has become a key actor on the international scene. Nevertheless, other challenges have presented themselves.

First and foremost, the Court's **independence** risks being attacked. Independence should not be taken for granted. National or community interests may provide incentives to control the Court through the undue strengthening of States' oversight prerogatives. Even though these are accepted diplomatic practices in the international arena, they will harm the system established by the Rome Statute which is based on the concept of independent judicial activity. Without its independence, the Court is worthless. The second risk possible is the **isolation of the Court**. Reality has shown that some leaders sought by the Court have threatened to commit more crimes to retain power,²⁷ thus blackmailing the international community by imposing on it an unbearable choice: peace or justice. The effectiveness of the Court will depend on how the political leaders and conflict managers respond to such blackmail. The third and final issue is **cooperation**. After ten years in operation, we have established a system that is operational. But in order to maximize our role and impact, as well as improving our effectiveness, we need the sustained cooperation of all the States Parties to the Statute.

For the Court to be effective, it needs the strong and unwavering support of all the relevant actors, in keeping with its judicial mandate and its independence. It is with this support that the preventative potential of the Court and its impact on conflict management will be able to express itself. This is the objective we must achieve. I hope I can count on the support of those present here today to help us get there.

27. See Xan Rice & Tania Branigan, *Sudanese President Expels Aid Agencies*, THE GUARDIAN, Mar. 5, 2009, <http://www.guardian.co.uk/world/2009/mar/05/sudan-aid-agencies-expelled> ("The Sudanese president, Omar al-Bashir, has reacted defiantly to his arrest warrant for war crimes in Darfur, vowing to act 'decisively' towards anyone threatening the country's stability and announcing the expulsion of 10 international aid organisations today.").