

Washington University Global Studies Law Review

Volume 11 | Issue 2

2012

Looking Back, Looking Ahead - Reflections from the Office of the Prosecutor of the ICC

Fatou Bensouda
International Criminal Court

Follow this and additional works at: https://openscholarship.wustl.edu/law_globalstudies



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Fatou Bensouda, *Looking Back, Looking Ahead - Reflections from the Office of the Prosecutor of the ICC*, 11 WASH. U. GLOBAL STUD. L. REV. 437 (2012), https://openscholarship.wustl.edu/law_globalstudies/vol11/iss2/5

This Speech is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

LOOKING BACK, LOOKING AHEAD— REFLECTIONS FROM THE OFFICE OF THE PROSECUTOR OF THE ICC

FATOU BENSOUDA*

Ladies and Gentlemen,

Thank you for being here, and thank you to the Whitney R. Harris World Law Institute for this very kind invitation.

Today I would like to share with you some reflections in relation to the International Criminal Court (“ICC”), a unique institution of which I have the privilege and the responsibility to be the Prosecutor. I will look back on some historical developments; I will discuss current activities and challenges for the Office; and finally I will look ahead, and take this opportunity to present to you some ideas to deal with today’s global problems, and more importantly prevent them from reoccurring.

The ICC was created in 1998 by the Rome Statute.¹ The Statute defines the mission of the Office of the Prosecutor (“OTP”): to put an end to impunity for the most serious crimes of concern to the international community—genocide, crimes against humanity and war crimes—and thereby contribute to the prevention of such crimes. The OTP and the Court itself are part of a new system of international justice created by the Statute. There are now 121 State Parties to the Rome Statute, the latest member being the Guatemala, all committed to prevent and punish massive crimes, using the rule of law to protect their own citizens.² This is a twenty-first century institution.

We cannot overemphasize the role of institutions. The world is facing different international problems, which in turn require regulation: climate change, international trade, international finances, and international crimes. The two areas in which we can see some progress are those where international institutions were created to manage the challenges:

* Prosecutor of the International Criminal Court. Prosecutor Bensouda, sworn-in as Prosecutor on June 14, 2012, gave this speech in her previous capacity as Deputy Prosecutor at Washington University School of Law, Public lecture, St. Louis, September 22, 2011. This text includes updates to reflect the situation as of July 1, 2012.

1. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

2. At the time of the speech, the States Parties numbered 117. The number of States Parties continues to increase and at the time of final edits, the number of States Members had grown to 121. *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menu/ASP/states+parties/> (last visited June 29, 2012) (providing a listing of States Members and a breakdown of States Members).

international trade and massive crimes; the World Trade Organization, and the ICC Rome Statute.

Sixty years ago, with the Nuremberg Trials, for the first time, those who committed massive crimes were held accountable before the international community. For the first time, the victors of a conflict chose the law to define responsibilities.

In the words of the Nuremberg Prosecutor Justice Robert H. Jackson:

That four great nations, flushed with victory and stung with injure stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of law is one of the most significant tributes that power has ever paid to reason.

Nuremberg was a landmark. However, the world was not ready to transform such a landmark into a lasting institution.

In the end, the world would wait for almost half a century after Nuremberg, and would witness again two genocides—first in the Former Yugoslavia, and then in Rwanda—before the UN Security Council decided to create the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, thus connecting peace and international justice again.

The *ad hoc* tribunals paved the way for the decision of the international community to establish a permanent criminal court, to avoid a repetition of its past experiences. A court built upon the lessons of decades when the world had failed to prevent massive crimes.

The ICC Rome Statute was created in 1998 in Rome during the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and added an independent and permanent justice component to the world's efforts to achieve peace and security. As UN Secretary-General Ban Ki-Moon stated in 2007, "The rule of law is a fundamental principle on which the United Nations was established. . . . International criminal justice, a concept based on the premise that the achievement of justice provides a firmer foundation for lasting peace, has become a defining aspect of the work of the Organization."³

The ICC Rome Statute offers a solution, as a new instrument of peace creating global governance without a global Government but with

3. U.N. Secretary-General, *Report of the Secretary-General on the work of the Organization*, ¶ 81, U.N. Doc. A/62/1 (Aug. 31, 2007), available at <http://www.un.org/millenniumgoals/sgreport2007.pdf?OpenElement>.

international law and courts. The Court was built as a matter of realism, as a form of protection. That is the main point: accountability and the rule of law provide the framework to protect individuals and nations from massive atrocities and to manage conflicts. Citizens of the States Parties of the Rome Statute are under protection of the ICC.

The legal framework established by the Rome Statute consolidates a new trend: no more impunity for alleged perpetrators of massive crimes; no more golden exiles for people like Idi Amin Dada or General Pinochet. In the Rome Statute community, leaders using massive violence to gain or retain power will be held accountable.

One of the main principles of the Statute is that all States Parties commit to investigate, prosecute and prevent massive crimes when perpetrated within their own jurisdiction. States accepted that, should they fail to investigate and prosecute, the ICC could independently decide to step in. Under the principle of complementarity proceedings before the ICC, as Court of last resort, should remain an exception to the norm. The primary responsibility for the prosecution of the gravest crimes lies within the national jurisdictions.

Under the Rome Statute, States Parties moreover commit to cooperate with the Court whenever and wherever the Court decides to act. The Court can therefore rely on the cooperation of the police of all States Parties to implement its decisions. This is not just an abstraction. Cooperation with the Court is a fact. The Democratic Republic of Congo surrendered three of their nationals to the Court. Belgian police implemented in one day an arrest warrant against Jean-Pierre Bemba, former Vice-President of the DRC.

Ladies and Gentlemen,

Let me briefly explain how the Office of the Prosecutor conducts its activities in practice.

As you know, the Court's jurisdiction can be triggered in three manners: a State Party may refer a situation where massive crimes appear to have been committed to the Prosecutor; the UN Security Council acting under Chapter VII of the UN Charter may also refer a situation to the Prosecutor; or the Prosecutor can initiate an investigation on his own motion.

It is however important to note that neither a State party referral nor a UN Security Council referral binds the Prosecutor into opening an investigation into a situation.

Under the Rome Statute, it is for the first time the Prosecutor of an international court is given the mandate to independently open investigations in situations. In the instance of the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, the States selected the situations to

investigate, or even the cases in the instance of the Special Tribunal for Lebanon.

On the basis of criteria relating to jurisdiction, admissibility and the interests of justice, the Prosecutor of the ICC must determine whether there is a *reasonable basis* to initiate an investigation. These criteria apply irrespective of the manner in which the Court's jurisdiction is triggered

With regard to jurisdiction, the Office of the Prosecutor assesses whether the alleged crimes are committed on the territory of States Parties or by nationals or State Parties; whether these crimes have been committed after the entry into force of the Rome Statute on July 1, 2002 (or later if the relevant State ratified later); and whether the alleged crimes fall within the Court's subject matter jurisdiction which covers crimes against humanity, genocide and war crimes.

This jurisdictional limitation is the main reason why the Office cannot investigate or monitor situations in Non-States Parties, such as Somalia or Syria. This can only be repaired by a referral of the UN Security Council or through acceptance of jurisdiction by the State concerned, such as in the case of Côte d'Ivoire. Naturally, a State could also decide to join the Rome Statute.

With regard to admissibility, the Office has a duty *not* to investigate when there are genuine national investigations or prosecutions, pursuant to the principle of complementarity which I mentioned before.

The Statute also requires that the crimes reach a threshold of gravity. For instance, the Office conducted a preliminary examination of alleged crimes committed in Iraq by nationals of 25 States Parties involved in the military operation there. We found cases of willful killings and torture, but they were not committed "*as part of a plan or policy or as part of a large-scale commission.*"⁴ So the Office could not open an investigation because the cases did not reach the gravity threshold established by the Statute. In addition, the States concerned were conducting domestic investigations and prosecutions.

Finally, in accordance with the Statute, the Prosecutor should not proceed with an investigation or prosecution if it is not in the "interests of justice."⁵ It would, however, be exceptional to decide that an investigation would not be in the interest of justice and the victims. I should stress here that the "interests of justice" must not be confused with the interests of peace and security, which falls within the mandate of other institutions,

4. Rome Statute, *supra* note 1, art. 8.

5. *Id.* art. 53(1)(c).

notably the UN Security Council. In fact, the Statute provides in Article 16 that no investigation or prosecution may be commenced or proceeded with if the Security Council, in a resolution adopted under Chapter VII of the UN Charter—thus in the interest of peace and security—has requested the Court to that effect. The Court and the Office of the Prosecutor itself are not involved in political considerations. We have to respect scrupulously our legal limits. The prospect of peace negotiations is therefore not a factor that forms part of the Office's determination on the interests of justice or any other assessment of the Court.

Ladies and Gentlemen,

Following the legal framework, the Office of the Prosecutor has opened investigations and brought cases in seven situations: the Democratic Republic of Congo, Uganda, Central African Republic, Darfur, Kenya, Libya, and Côte d'Ivoire.

In these situations, a total of eleven arrest warrants are still outstanding today. Arrests remain the biggest test for the international community. The long-outstanding arrest warrants against President Al Bashir, Joseph Kony, and Bosco Ntaganda show the difficulties. It requires collaborative efforts and a consistent approach of States and international organisations. Massive crimes require a careful plan. Whereas the Court has indeed become a global judicial institution that is part of the greater world system, cooperation with and support for the Court needs to be upheld and increased in a strong and consistent manner by all actors, in order to ensure the Court's relevance in the management of violence and the effective exercise of its mandate to investigate, prosecute and prevent massive crimes.

In so doing we should not be guided by the words and propaganda of a few influential individuals that may have an interest in absconding themselves from justice, but rather we should focus on and listen to the millions of victims that suffer from their crimes. Certainty that these crimes will be investigated and prosecuted will modify the calculus of the criminals, deter the crimes, and protect the victims.

As to the tangible question of whether arrests warrants negatively impact mediation efforts, this has not been empirically proven. Indeed, in some of the Office's previous cases, negotiations appear to have been prompted by the request and issuance of arrest warrants. In other cases, the prospect for negotiations was used as an excuse by those who allegedly committed the crimes to regain power or to commit new atrocities and mediation efforts were manipulated by those leaders.

Eventually, implementing the arrest warrants will be the most effective way to protect civilians under attack.

Ladies and Gentlemen,

Besides its investigations and trials, the Office is also conducting preliminary examinations analyzing alleged crimes in Honduras, Republic of Korea, Afghanistan and Nigeria; and checking if genuine national proceedings are being carried out in Guinea, Colombia, and Georgia.

Whereas the goal of the Rome Statute is to end impunity to contribute to the prevention of future crimes, the practice of the Office has shown that the mere initiation of such preliminary examination has a deterrent impact. This impact will depend on the national and international support to the justice activities to end impunity. The Office has a legal mandate, with no flexibility to adjust to political considerations; other actors will have to factor in the Court's activities.

Guinea is a good example in this regard. Shortly after the Office publicly announced that it was monitoring the serious allegations surrounding the events of September 28, 2009 in Conakry, the Guinean Foreign Affairs Minister travelled to the Court and met with me on October 20, 2009. The Minister described the events and set out what measures had been taken by Guinea to ensure that the crimes allegedly committed would be investigated. The Office also met with other senior members of the Guinean Government, who affirmed that Guinea would "strive to ensure that justice prevails within the country, in partnership and with the concurrence of the Office of the Prosecutor." Since then, the Office has sent various missions to Guinea to encourage and cooperate with national and international efforts to conduct genuine national proceedings, thereby ensuring that the commission of new massive crimes is prevented.

Another example is Colombia, where the prospect of the ICC attaining jurisdiction was mentioned by prosecutors, courts, legislators, and members of the Executive Branch as a reason to make policy choices in implementing the Justice and Peace Law, thus ensuring that the main perpetrators of crimes would be prosecuted.

The Court will only do a few cases, but each case can have an exponential impact, to reach beyond the confines of the courtroom. As described by Prosecutor Moreno-Ocampo and by UN Secretary-General Ban Ki-Moon, there is now a large "shadow of the Court,"⁶ referring to the impact of the Court or a single Court ruling, extending to States Parties, and even beyond, to reach non-States Parties. It is affecting the behaviour of Governments and political leaders; armies all over the world are

6. U.N. Secretary-General, *Address at the Review Conference on the International Criminal Court: "An Age of Accountability"*, UN.ORG (May 31, 2010), http://www.un.org/apps/news/infocus/speeches/search_full.asp?statID=829.

adjusting their operational standards; conflict managers and peace mediators are refining their strategy taking into account the work of the Court, respecting the legal limits. The world increasingly understands the role of the Court.

We can see that cases before the Court already reverberate across the world.

For instance, even before the verdict against Thomas Lubanga Dyilo, the trial process had already helped triggering debates on child soldiers and child recruitment in countries far from Democratic Republic of Congo like Colombia and Sri Lanka. The effects of the verdict in the Lubanga case were, indeed, global, as Nepal and Somalia started taking measures against the conscription of children.

Also education is an important aspect as Lubanga's crimes interrupted, delayed, and denied the right to education to Ituri children. The Court cannot write the history of these cases, but it can provide information to those who can and will use it.

The Jean-Pierre Bemba Gombo case is also illustrative of the preventive impact of the Court. This is the first time the international criminal justice system has addressed a situation where allegations of sexual crimes far outnumbered the allegations of killings. It is also the first trial before the Court that concerns command responsibility. A commander's failure to act can result in unimaginable atrocities that deeply shock the conscience of humanity.

Allow me to emphasize this point: gender crimes are prominent in our prosecutions because they are prominent in the contexts being prosecuted. This only becomes remarkable against the backdrop of the prior, and still prevalent, norm of denying their existence, ignoring them, shaming their victims, or defining them in legally improvable ways. In other settings, it was as if there were a tacit agreement to look the other way while women and children were sexually abused—minimizing, trivializing, denigrating, and silencing the victims, destroying their credibility, and further violating their dignity, so abusers could continue unimpeded. The body of the ICC's first cases, however, signals to the world that here, at least, this deal is off.

According to our evidence, Jean-Pierre Bemba clearly failed his responsibility to stop and prevent his militia forces from using rape as a primary weapon of war. In terms of impact, this trial is a significant opportunity. Unlike any other court, the ICC's decision will influence the behaviour of thousands of military commanders in all States Parties, and beyond. The decision will establish the difference between a military commander and a criminal based on the respect for the law.

This is the way forward. The shadow of the Court is what really matters.

Ladies and Gentlemen,
Let me conclude.

There is now a new international justice system. In Rome, States made a conscious decision to create a justice system that could stop or prevent violence rather than an *ad hoc* creation acting *a posteriori*. New rules were created that other actors must adjust to, that need to be implemented.

As UN Secretary-General Ban Ki-Moon said last year at the ICC Review Conference in Kampala:

Now, we have the ICC. Permanent, increasingly powerful. (. . .)
There is no going back. In this new age of accountability, those who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders; whether they are lowly civil servants following orders, or top political leaders, they will be held accountable.⁷

Thank you.

7. U.N. Secretary-General, *Address at the Review Conference on the International Criminal Court: "An Age of Accountability"*, UN.ORG (May 31, 2010), http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=829.