"We Should at All Costs Prevent the ICC from Being Politicized"

Interview with Fatou Bensouda, Chief Prosecutor of the International Criminal Court (ICC), and former Attorney General and Minister of Justice of the Republic of The Gambia on the impact of the ICC, criticism from African states, a new investigation strategy, the importance of witness protection, cooperation with non-states parties and the UN secretariat, and on the Court's function as a deterrent.

Ms. Bensouda, you were Senior Legal Adviser at the International Criminal Tribunal for Rwanda, Deputy Prosecutor of the ICC from September 2004 until June 2012, and since then, Prosecutor. You have gained a lot of experiences in international criminal law. Does the ICC as it is today live up to the expectations you yourself had in the beginning?

When, in 1998, the international community decided to establish the International Criminal Court, it was the crystallization of a common resolve and yearning to bring into being an institution that would address mass atrocities, namely genocide, crimes against humanity, and war crimes, and serve as a deterrent for such crimes. The ICC is the first permanent voluntarily treaty-based international criminal judicial mechanism created to hold perpetrators of mass crimes to account for their atrocities. The Court was created at a moment where the global push for international justice was very strong. The United Nations had just established the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively. I think these precedents and the horrors they aimed to rectify greatly influenced the international community in 1998. The moment had arrived for a permanent, independent, impartial International Criminal Court.

I believe that since its creation, the ICC has continued to evolve and has taken its rightful place as a key player in international relations. Much has been done and to be sure, there is still a lot of room for the Court to demonstrate its full potential. So, to answer your question, I am encouraged by our progress and our prospects for the future. I have great hope that this institution will become increasingly relevant in this new century. This is our collective hope and our resolve.

Since its founding in 2002 the successes of the court are quite moderate: After ten years there are only one guilty verdict (Thomas Lubanga) and one acquittal for want of evidence (Mathieu Ngudjolo Chui). None of the accused has been put to jail so far. Do you think that this a good result?

I don't think it is sufficient to measure the successes of the ICC in terms of convictions and acquittals alone. The successes and the relevance of the ICC should also be measured in terms of the impact it has had so far. And I do believe that it has had a constructive impact.

In which way?

I will give you a few examples. But before doing so, I wanted to say a few words about the Court's case docket. The case docket of the ICC is quite heavy: we are investigating and prosecuting in eight situations. We have 18 cases in relation to more than 25 suspects and accused persons. Furthermore, we are conducting preliminary examinations in eight situations in four different continents, five of them, I believe are outside of Africa. We are conducting several investigations in difficult situations. I just wanted to give you the picture of how busy the Court is.

But coming back to the issue of impact: take the example of Thomas Lubanga Dyilo. The case against him represented the first time that an international criminal tribunal or court decided to charge someone solely for the crimes of enlisting and conscripting children and using them in hostilities as child soldiers.

The Special Court for Sierra Leone had charged individuals for this before. But they charged together with other offences. We concentrated only on this war crime based on our conviction that we have to demonstrate to the world the seriousness of this crime. To let the world know that a whole generation of children is being abducted and destroyed; robbing these children of their right to live, learn and play as children, and in many cases, depriving their countries and their communities of future leaders. When children are forced to undergo such traumatic experiences, it could lead to countless problems tomorrow. And through our prosecution in the Lubanga case, we were able to draw the world's attention to that. The first international conference on child soldiers took place in Paris in 2007. The event was organized by France and UNICEF.I think that was largely as a result of the attention our case had brought to the issue of child soldiers. Radhika Coomaraswamy, the then Special Representative of the Secretary-General for Children and Armed Conflict, had informed us that she was actually using the Lubanga case to negotiate with armies and militias around the world to demobilize child soldiers. She reported to the Court that 3,000 children had been demobilized in Nepal largely as a result of using the Lubanga case. So here you are: a country that is *not* a party to the Rome Statute was able to demobilize child soldiers as a result of the cases that are taking place at the Court. This is an example of the Court's impact. This is what we call the "shadow of the Court. "

Another example is Kenya, where successive presidential elections have for some time now been marred by various degrees of violence. The Presidential election of 2013 was the first time in 21 years that Kenya was able to go through the elections with little more than scuffles. The degree of violence was nothing compared to what used to happen, and definitely nothing compared to the post-election violence which erupted in 2007-2008. I am not saying that result can be attributed solely to the ICC, but I do think that the intervention of the ICC in the Kenya situation was an important factor in reducing the violence during the latest round of presidential elections.

Would you say that it is not either justice or peace, but in this case it was peace through justice because the ICC intervened?

Yes, I think so because the mistake we all make is to think that if you are negotiating peace you must forget justice and accountability completely. I think we all need to move away from that perception. These virtues – peace and justice – are not mutually exclusive; they can actually work together very well if we just know how to go about it.

Take the example of the Lord's Resistance Army (LRA). We charged the top commanders of the LRA and identified five people (following the death of two of them, now three). At the time, Uganda was running an amnesty program encouraging people to leave the bush and take advantage of the amnesty. My predecessor had publicly stated whom the Office is interested in for their role in committing mass crimes in the country. And that all remaining LRA members wanting to take advantage of the amnesty were free to do so. This is an example which demonstrates that the ICC is not against peace and reconciliation. On the contrary, as I've stated, justice and peace can be complementary and work well together.

According to the ICC's constitution, the Rome Statute, nobody is above the law and everyone can be tried by the court. But trying sitting heads of states puts the ICC to the test. Either these cases cause highly unstable situations in those countries or the court loses credibility because it cannot take hold of the accused in a reasonable time. What can be done in such cases?

The Court was established, among other things, to try persons accused of massive crimes in situations where their own national jurisdictions are neither willing nor genuinely able to do so, for example, because of the powerful positions they occupy. Yes, we will face challenges, it is only normal. But that should not mean that the ICC's mandate should not be pursued. The Court's founding treaty, the Rome Statute is very clear: no one is above the law. Is it a fair criticism to state that the Court is ineffective because certain individuals are difficult to investigate and prosecute because of their positions of influence? The difficulties are there because those who commit the crimes and against whom the Court has evidence —often heads of militia or heads of state—are protected; militias by the army; heads of state by the state apparatus. But we should at all costs prevent the Court from being politicized. We should continuously and always be guided by the evidence and the Rome Statute legal framework. These alone, not any other consideration, guide the Office's actions. .

How difficult is it for you to gain reliable, waterproof evidence?

The Court is created in a way that our investigations are dependent on the cooperation of States. When we deploy to the field, we need cooperation on the ground to assist us, not with collecting evidence, but say with logistics or security. In all cases, we must make a full assessment and be satisfied that the evidence we bring before the judges meets the requisite legal threshold for that particular stage of the proceedings.

I am not saying that this is not difficult. Our investigations take place under extremely difficult circumstances. Most of the time, we are investigating in a situation of ongoing conflict, where the security of the witnesses or our staff poses a huge challenge. As Prosecutor, I have an obligation under the Rome Statute to ensure that witnesses or people we contact are protected.

During the first nine years, the Office used a strategy of focused investigations and prosecutions. This strategy allowed the Office to achieve a number of positive results. Part of the thinking behind this approach, for example, was to reach as few witnesses as possible and necessary for the case, in order not to place the lives of individuals at peril. Once you reach the witnesses, you expose them, and your duty is to protect them. I have just recently unveiled a new strategy for the Office. The notion of focused investigations is being replaced by the principle of in-depth, open-ended investigations.

What do you mean by that?

Whereas our previous policy required a focus on those persons who according to our evidence collected were the most responsible, what I am planning to do now is to start with the mid-level perpetrators and then we carefully move up. This does not mean that we will not go for the most responsible. We will get there if our investigations lead us there. But we start with the mid-level.

This is a big departure in policy and I believe that this broader strategic approach also allows us to bridge, in a comprehensive way, the impunity gap that always exists when you investigate and prosecute only those most responsible and let the States deal with the others. What we have

discovered is that even though States may have the political will to investigate at the lower levels, they may often lack the capacity. So, I believe this new Office strategy will be more effective.

The new strategy also provides for expanding and diversifying our collection of evidence, in addition to witness statements, in particular scientific evidence, such as cyber evidence, and video and documentary evidence. We will use other forms of forensic evidence, like hospital records. Not having to entirely depend on witnesses coming to testify in court is one way to address the increased attempts to interfere with witnesses or their relatives, and manage the protection of persons at risk because of their interaction with the Office.

How do you guarantee that the witnesses are protected before, during and after the trial?

Witness protection, of course, is one of the biggest challenges that the Office faces. Fortunately, the Office has not experienced the death of a witness to prevent testimony since the time we started operating. And it must stay that way. However, the issue of witness protection and interference with our witnesses has become an unprecedented phenomenon, notably in the Kenya situation. This has posed an immense challenge for the Office. We are the first to reach witnesses. Once we do that and have thoroughly assessed the witness's situation, we refer the witness to the "Victims and Witnesses Unit," which is a section in the Registry of the Court. From then on, we work very closely with this Unit to determine the appropriate level of protection for the witness in his/her particular situation; whether it is suitable for the witness to stay at home or be relocated inside or outside his/her own country. This last measure is an extreme one. We try to do it only in a situation of last resort, not right away. It is a major upheaval which will definitely change their lives. We also need the support of States Parties. If we are able to enter into as many relocation agreements as possible and have the assistance of States to safely relocate and establish witnesses there, this will also help the Court.

You mentioned a new phenomenon with the Kenya cases?

Yes, as I said, in our Kenya cases, we have experienced witness interference to an extreme and unprecedented extent. I resolved that my office is going to do something about that. We do everything we can to preserve the integrity of the cases but unfortunately witnesses are being interfered with; they are being bribed, threatened, intimidated. All manner of efforts are made to make the witnesses recant their stories which they already told us, or even deny them. But we are not accepting this: Recently, I requested the judges to issue a warrant of arrest against Walter Barasa in Kenya on suspicion of corruptly influencing or attempting to corruptly influence Prosecution witnesses. The warrant of arrest has been issued. We are waiting for Kenya to execute this warrant and to send Mr. Barasa to The Hague to be tried under Article 70 of the Rome Statute, for committing offences against the administration of justice.

Let me give you another example: in recent months, we conducted a very complex operation, arresting four persons in four different countries almost simultaneously. This was in relation to the case against Jean-Pierre Bemba. Formerly Vice-President of the Democratic Republic of the Congo, he is being tried before the Court for offences that he allegedly committed in the Central African Republic. Five persons were named in the warrant of arrest, including Mr. Bemba himself who is already in detention in The Hague. We suspect these persons to have been coaching the witnesses and also involved in bribing witnesses to come and give false testimony to the Court. Those allegedly concerned include the lawyer for Mr. Bemba, another member of his defense team, a defense witness and a Member of Parliament in the Democratic Republic of the Congo. These persons are

now before the Court. Three of them have made their initial appearance and we are waiting for the confirmation of the charges. But this operation and the charges we have brought forth are a warning to others that we are watching very closely. If we have strong evidence that they are interfering with the administration of justice and trying to derail our cases, I will go before the judges and request warrants of arrest against them.

You mentioned Kenya. The Court is being accused of primarily targeting people from Africa. All its current cases concern Africa and African perpetrators. The strong focus, however well justified in each case, seems to do considerable harm to the court's credibility and prestige. What can you and others do to dispel this criticism?

I think the criticism is not only unfair to the Court but also unfair to the African continent. The African continent has been requesting the intervention of the ICC. They are saying: we do not want impunity on our soil. We are not able to try these cases but we are part of an institution which can and we are taking the cases there. Which is what African states have done. If you look at our docket now, you can see we are investigating in eight situations. Yes, all of them are from Africa, but five of them were referrals from the African states themselves. I do not think people expect that if the African states that are party of the Rome Statute request the Court to intervene, that we should not intervene because they are from Africa.

Two of the eight situations were referrals by the UN Security Council. These are the cases of Libya and Darfur, Sudan. The only situation that is neither a state referral nor a Security Council referral is the Kenya situation. With regards to the Kenya situation we should note that my predecessor decided to open investigations in Kenya after a strong call from the Kenyans themselves, and also, after a strong pledge by the then leaders of Kenya to support and fully cooperate with the investigation and prosecutions of these crimes in the country.

This accusation that the ICC is only targeting African leaders is simply not backed by the facts. At best, it is propaganda that is leveled against the Court. I think that the ICC and the African Union share the same values. If you look at the Constitutive Act of the African Union, you will note that it also talks about fighting impunity and helping states within the African Union to ensure accountability.

Judge Hans Peter Kaul voted against the case of Kenya's president Uhuru Kenyatta been taken up by the court, saying that the 2007 post-election violence did not amount to crimes against humanity and could be tried by a national court. Has it been wrong to accuse Kenyatta?*

I cannot comment on Judge Kaul's opinion. I have stated that the Prosecution has a case, and that its strength will be for the judges to decide. Through the objectivity and fairness of the Prosecution investigative process, most recently a key witness was revealed to have given false evidence and another has refused to testify.

It's important to highlight that the case met the evidentiary threshold of the confirmation of charges stage of the proceedings to the satisfaction of the Court's judges who committed the case to trial. The Prosecution reacts to events as they occur. As mentioned, there have been very recent changes in the evidence available to the Prosecution. We have made a careful assessment of the evidence as it now stands and then acted without delay to acknowledge the difficulties in a transparent manner and to ask the Court for additional time. The fact is that two witnesses we have lost recently were

critical to the Prosecution's case. Without these two witnesses, I don't believe proof beyond a reasonable doubt can be established at trial. My decision in December to ask the judges for an adjournment of the trial date was based solely on the specific facts of this case devoid of extraneous considerations. As Prosecutor, I have consistently stated my actions and decisions are at all times strictly guided by the evidence in accordance with the Rome Statute legal framework. This recent decision is no different.

It is my professional duty to react, and to take the necessary decisions when the state of the evidence changes, as it has in this case. Our pursuit of justice for the victims of the 2007-2008 post-election violence in Kenya has faced many challenges. Notwithstanding, my commitment and that of my staff to the pursuit of justice without fear or favor has remained firm.

It is precisely because of our dedication and sense of responsibility to the victims that I have asked the judges presiding over the case for more time to undertake all remaining steps possible to strengthen the case to ensure justice for the victims. On 23 January 2014, the Judges vacated the trial commencement date and granted my Office's request for a status conference to address the issues raised by the Prosecution and the other parties.

Do you fear that the African states parties will withdraw from the Rome Statute?

The decision by any State to join and remain within the ICC is a sovereign one. As officials of the Court we fully respect this principle. I believe that many States in Africa realize that there is an opportunity in being part of the ICC, offering their citizens the chance to look to an independent judicial institution for justice when they do not have it at home. I think that leaders are acutely aware of the significant responsibility on their part to ensure that justice is present in their territories. If it is not at a national level, then membership in the ICC means it can be at the international level.

Unfortunately, misperceptions and misinformation about the Court are spread and continue to abound. Some of it is deliberate spread, because it serves a purpose. But some if it is a genuine lack of knowledge about how the Court works. Therefore, outreach, information and raising awareness about our work is very important. It is important to know why, when and how we intervene, who comes under our jurisdiction and who does not. Greater understanding about our jurisdiction and how we work can help the Court and dispel - or at least reduce - criticism and the issue of the Court lacking credibility.

Are there signs that the situation in Syria will be taken up by the ICC? Or under which circumstances can you take it up?

The ICC can only intervene in situations where crimes under its subject matter jurisdiction are committed on a territory of a State Party or by a national of a State Party. If the territory or if the State where such crimes are taking place is not a State Party, the only way that the ICC could intervene is if the state in question makes a declaration pursuant to Article 12.3 of the Rome Statute to accept the exercise of jurisdiction by the Court or through a referral by the UN Security Council. To date Syria is neither a State Party nor has it lodged a declaration pursuant to Article 12.3 and the Council has not decided to refer the situation in Syria to the ICC.

How is your cooperation with non-states parties?

We have received assistance from non-States Parties in many instances. I can give you the example of Bosco Ntaganda. He was indicted by the Court in 2006 for, amongst other things, recruiting child soldiers. In March 2013, he decided to walk into the American Embassy in Kigali (Rwanda) and requested to be transferred to the ICC. Neither Rwanda nor the US is a State Party to the Court. One would have expected this to create difficulties getting hold of Ntaganda, but it happened. We were able to work with both States, and the transfer took place in the most efficient way.

Another example is Russia. We have a preliminary examination on-going in Georgia, in the wake of the August 2008 armed conflict in South Ossetia. Georgia, which is a State Party, has given us documents; we have also visited the country on several occasions. But Russia, a non-State Party, has also sent more than 3000 documents to the Office. This shows that being a non-State Party does not necessarily preclude you from working with the Court.

Are you satisfied with the cooperation with the UN?

Yes, I am. The UN, as much as they can, and within their mandate, are working very closely with the Court; they are assisting where they can. We have a relationship agreement with the United Nations. This draws the contours of the cooperation that we have with the UN and its various agencies. In some situations where we investigate, UN agencies are on the ground. We sometimes draw up memoranda of understanding with them, setting out how they can help us in a range of areas, from logistics to security measures on the ground. I also work very closely with the Office of Legal Affairs (OLA). We send our requests to the UN mainly through the OLA. They do what they can to assist the Court provided it does not interfere with their mandate or expose their staff. We have a very good working relationship. The Secretary-General himself is very supportive of the work of the Court.

What will happen to Palestine's declaration in 2009, asking the ICC to investigate the Gaza war of 2008/2009? What is the latest status bearing in mind that the General Assembly in 2012 decided "to accord to Palestine non-member observer State status in the United Nations"? Does it make a difference?

In 2009, the Palestinian National Authority lodged a declaration pursuant to Article 12.3 of the Rome Statute which allows non-states parties to accept the Court's jurisdiction. The Office carefully assessed the declaration and determined that it did not meet the legal criteria required and closed its preliminary examination on the situation. The UN General Assembly resolution of November 2012, while directly relevant to the Court's jurisdiction, did not cure the legal invalidity of the 2009 declaration. As a result, at this stage, the Office has no legal basis to open a new preliminary examination.

Do you have enough financial resources for your work?

When I was sworn into office in June 2012, I made a very thorough review of the resources of the Office and the amount of work that must be accomplished. We also commissioned an independent study. As this study confirmed, the resources of the Office are not sufficient to match our workload. We definitely need additional resources. Recently, I made a presentation before the Committee on Budget and Finance requesting additional resources. I ensured that we justified every single cent we were requesting.

We need additional resources to implement the new strategy of the Office, and I explained exactly why this new strategy needs added resources. Last November, the Assembly of States Parties met to

make their final decision on the budget for 2014. Even though not all our requests were met, because the Committee had recommended some cuts, the Assembly nevertheless accorded additional resources—not only to the Office of the Prosecutor but to the whole Court. I am grateful that there is an increase, allowing us to implement the new strategy.

Has the ICC fulfilled its aim so far of being a deterrent? Deterring perpetrators?

I believe the Court has had and is having a deterrent effect on the commission of massive crimes. Various countries are adjusting their behavior; the armies are adjusting their rules of engagement to ensure conformity with the Rome Statute. This is also another form of deterrence. Another observation is this: In Africa, for instance, there have been close to 20 presidential elections in 2012 or 2013. Most of them have gone relatively peacefully. I am not giving credit to the ICC for that. History will judge that, but the ICC has a role to play. The institution is emerging, finding its rightful place. I firmly believe the world is a better place for having the ICC as an institution. I just want us to ask this question: What would the world be like without an ICC?

Where do you see the Court in 20 years?

The Court was established to complement national systems. The role of the Court is to ensure the end of impunity, to deter States from failing to properly investigate or prosecute mass crimes. This is what we term *positive complementarity:* for by the same token, we are actively encouraging national jurisdictions to take up this responsibility. It remains the primary responsibility of national jurisdictions to investigate and prosecute. It is only when they do not or they cannot, when they are unwilling or genuinely unable, to do so, that the ICC may step in.

What this means actually is, that over time, as the ICC encourages national systems to develop their national jurisdiction and their capacity to try these crimes, people will recognize that the fewer cases we have, the more successful the Court is. “Success” for the ICC should not be gauged by the number of cases we have. Success will be gauged by the deterrent effect of the shadow of the Court in preventing crimes; and by the increase in capacity and ability of national jurisdictions to investigate and prosecute their own crimes. Then the ICC’s role will have been fulfilled.

The interview took place on 7 December 2013 in Frankfurt/Main, Germany, on the occasion of the Dag Hammarskjöld Honorary Medal Award Ceremony by the United Nations Association of Germany, see:
www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr972.aspx
*The question concerning the Kenyatta case was taken up in January 2014. A German version of the Interview was published in VEREINTE NATIONEN, Vol. 62, No. 1, 2014, pp. 16–21. See: http://www.dgvn.de/fileadmin/publications/PDFs/Zeitschrift_VN/VN_2014/Heft_1_2014/05_Interview_Bensouda_VN_1-14_6-2-2014.pdf
The interviewer was Anja Papenfuss, Editor-in-Chief of VEREINTE NATIONEN – German Review on the United Nations, www.dgvn.de/journal-vereinte-nationen/