

**Coalition for the International Criminal Court
Interview with International Criminal Court Deputy Prosecutor and Prosecutor-
Elect H.E. Ms. Fatou Bensouda**

The following interview with Ms. Fatou Bensouda was conducted in May 2012, prior to her swearing in as prosecutor of the International Criminal Court (ICC) on 15 June 2012. Ms. Bensouda served as deputy prosecutor at the ICC for nearly eight years, beginning in September 2004. Prior to joining the ICC, Ms. Bensouda served as a senior legal advisor and head of the legal advisory unit of the International Criminal Tribunal for Rwanda (ICTR), where she had previously worked as a legal adviser. Ms. Bensouda has also held a number of high-level positions in the public and private sectors in The Gambia.

In this 10th anniversary year of the International Criminal Court (ICC), what, in your view, are the biggest challenges for the ICC in delivering justice in a fair, effective and independent manner?

Bensouda: There are three fundamental challenges that ICC faces in its course of providing justice in a fair, effective and independent manner. **First**, the Court does not have a physical enforcement mechanism of itself. For example, it cannot dispatch police forces or an army to enforce its arrest warrants. Thus, it is dependent on the cooperation of states and international organizations for enforcement. While in general cooperation is forthcoming with over 70% of the Office of the Prosecutor (OTP) requests for cooperation to States Parties, Non-States Parties and International Organizations receiving positive answers, the court encounters more difficulties when it comes to arresting individuals that are protected by active militias or the State apparatus that they used to commit massive crimes. In order to be effective, the court requires collaborative efforts of other actors in a consistent manner, not on a case-by-case basis.

The **second** challenge is somehow related with the first one: the interplay between conflict resolution initiatives and justice. Some leaders sought by the Court threatened to commit more crimes to retain power, blackmailing the international community with a false option: peace or justice. The OTP has to follow its independent justice mandate. To guarantee its impartiality, OTP cannot take into account the prospect of peace initiatives. If politicians isolate the role of the Court and the justice component of conflict management by not cooperating, the Court's effectiveness would be seriously hampered. The efficiency and impartiality of the Court, thus, depends on how political leaders and conflict managers react to aforementioned blackmail.

The **third** challenge is related to the independence of the Court. A Court with no practical independence would lose its legitimacy and subsequently its effectiveness. We rely on partners, including civil society, to ensure that the judicial and prosecutorial independence of the Court is protected, so that it has full capacity to exercise justice.

Which of the lessons you have learned as Deputy Prosecutor do you plan to integrate into your new role as ICC Prosecutor? What is your vision of effective team work between Prosecutor and Deputy Prosecutor? What are the qualities that you believe a Deputy Prosecutor should have?

Bensouda: One of the most important requirements of being the prosecutor of a significant international institution such as the ICC is to be a good organizer. You have to be able to organize people who are working in the Office in an efficient way. This entails coordinating different roles of the staff and using their different abilities to build strong teams.

I thank Prosecutor Moreno-Ocampo for his inspiration and his total commitment to the mandate of the Court. I am proud to inherit a well respected and sound functioning Office with high calibre dedicated staff, and organised policies and practices. This solid basis will be the starting point of my work, and any adjustment will be well considered. I will continue efforts to uphold the highest standards in Court.

We are currently in the process of preparing a shortlist of candidates for the Deputy Prosecutor's position, which will be submitted to the Assembly of States Parties (ASP) later on this year.

What additional steps could the Office of the Prosecutor (OTP) take in order to ensure that the rights of victims to participation and reparations are fully met?

Bensouda: The OTP considers that victims' participation in proceedings before the Court is an essential feature of the Rome system and an important contribution to international justice. The Office's work must be relevant to victims, to affected communities, and more broadly to all relevant communities in order to foster conciliation and prevent future crimes, as this is a strategic priority for us.

I believe that there is scope for further development of the interaction between the victims and the Court especially during the early stages of the OTP's work, i.e. in the preliminary examinations. The OTP is refining its best practices to better enable victims to submit information concerning alleged crimes and ensure effective interaction through public notice of its preliminary examination and investigation activities.

Moreover the Office will continue to seek to address the interests of a wider community of victims through its submissions on the gravity of the crimes, including in terms of their impact.

At the reparations stage, the Office favours a wider approach to allow participation of victims and representations from or on behalf of victims and other interested persons. We

believe any other approach would be overly restrictive and unfair, since the Prosecution must necessarily limit the incidents selected in its investigation and prosecution. Accordingly the Office will support reparations applications, as appropriate by a broader range of individuals and entities than those who are linked to the charges for which the accused is ultimately convicted.

These principles of the Office were the building blocks of our submission to the Trial Chamber about the reparation procedure in the Lubanga case. The OTP argued for the inclusion of child soldiers, their families, persons who suffered harm when attempting to interdict the abduction of children from schools for the purposes of recruitment, victims of sexual violence due to enlistment and conscription and civilians of any ethnic group who suffered at the hands of the UPC without restriction to the period of charges as victims who should benefit from reparations.

With almost 8 years under your belt at the OTP, you have gained experience in building evidence of gender crimes. What will you do as Prosecutor to ensure some of the roadblocks to successfully prosecuting gender crimes are removed during your tenure?

Bensouda: Prosecuting gender related crimes have been an integral part of the Rome Statute system since its inception. Article 54 of the Statute specifically provides that the Prosecutor shall “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”. Moreover the Article 42(9) of the Statute requires the Prosecutor to appoint advisers with legal expertise on sexual and gender related crimes. Following these requirements, the OTP established the Gender and Children Unit, comprised of advisors with legal and psycho-social expertise to deal specifically with these issues. Additionally, the OTP has reflected the primacy of gender related crimes by integrating them into the overwhelming majority of our cases.

Under the new Prosecution, I will guarantee that the primacy given to the gender related crimes will stand and will even be furthered. We will in particular continue to strengthen our cooperation with local gender groups in situation countries that provide sometimes the only form of support available for gender crimes victims, who often are excluded and shunned from their communities. The process of prosecuting gender related crimes has to be handled very delicately to ensure the well being of the victims. In order to ensure clarity, transparency and predictability of our work about the matter, the OTP is preparing a gender policy which is on the brink of being finalized. We will also continue to periodically and consistently revisit our policies and practices regarding sexual and gender related crimes, making sure they are effective and improving them if needed. The Office will also continue to provide gender-related training to its staff, from investigators to prosecutors.

One thing we have to understand, however, is that gender related crimes are very sensitive issues in certain domestic contexts. As it can be a challenge to gather evidence of these crimes in certain contexts, we will continue to look for innovative methods for the collection of evidence in a way that would ensure the prosecution of criminals and protection of victims.

Every current ICC investigation is on the African continent. Despite the fact that no one can deny that gross human rights violations are being committed in these countries, many have called on the OTP to also move forward with its preliminary examinations in other regions. How would you respond to this?

Bensouda: I believe there is one thing we have to understand about the so-called “Africa bias”. We should not focus on the words and propaganda of a few powerful, influential individuals, and forget about the millions of anonymous people that suffer from their crimes. Indeed, the greatest affront to victims of these brutal, unimaginable crimes – women and young girls raped, families brutalized, robbed of everything, entire communities terrorized and shattered – is to see those powerful individuals responsible for their sufferings trying to portray themselves as the victims of a “pro-Western”, “anti-African” Court. The ICC is and will always be with the real victims and will act to protect their well being no matter which continent they are from.

Apart from the normative point of view, the African bias arguments are also factually invalid. Uganda, Democratic Republic of Congo (DRC) and the Central African Republic (CAR) all voluntarily referred their situations to the Court whereas the situations in Libya and Darfur were referred to the Court by the United Nations Security Council (UNSC). The *proprio motu* powers of the Prosecutor were only invoked in Kenya and Cote d’Ivoire which received a high level of cooperation from the relevant states.

To answer the second part of the question, we just have to take a look at what is actually going on right now in the OTP. The Office is currently engaged in preliminary examinations in Honduras, the Republic of Korea, Afghanistan, Nigeria, Guinea, Colombia and Georgia. As can be seen, preliminary cases range from Latin America to the Far East, from Central Asia to Eurasia. We are currently reviewing the evidence in these situations and will decide whether to move on with an investigation or not.

Some have criticized the OTP for its treatment of the various preliminary examinations under consideration, arguing that irregular treatment, a lack of transparency and substantive reporting, as well as inappropriate time delays, have created unrealistic expectations among victims that the OTP will be proactive in ensuring justice. What are your views on these critiques and how do you plan to address some of them?

Bensouda: Preliminary examinations are key elements of the OTP activities as they provide an early opportunity, through contacts with relevant authorities and through widening public information about the cases, to encourage national proceedings and prevent recurrence of violence. Adherence with the complementarity principle of the Court requires effective preliminary examinations in certain cases.

In October 2010, the OTP published its policy paper about the preliminary examinations to provide clarity, transparency and predictability in this field, and we have consulted our civil society partners in the process. A one year report on preliminary examination activities was also published in December 2011. The report consisted of background information on all of the current preliminary examinations as well as any disclosable information about the nature of the examination. I believe these reporting activities will meet the concerns of our partners about the preliminary examination processes.

The Inter-American Court for Human Rights has issued landmark rulings on crimes for which the ICC has jurisdiction, setting important precedents in international law. Are there any steps that you see the ICC could take in order to learn from the experience and practice of this and other tribunals?

Bensouda: Learning from the experiences and best practices of all international and regional courts has been an integral part of the consolidation process of the ICC. The Nuremberg Military Tribunal, for example, can be considered as the first ancestor of the ICC. More contemporarily, the Special Court for Sierra Leone, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have provided the ICC with very valuable examples on how to proceed with prosecutions. They have also played a very crucial role in the expansion of the international criminal jurisprudence. The Inter-American Court has also played a similar role especially regarding the development of jurisprudence on crimes that can be categorized as crimes against humanity by exercising jurisdiction over crimes such as extrajudicial executions, forced disappearances and torture.

How do you see your role vis-à-vis the media and do you have any plans to enhance the OTP's communications work?

Bensouda: One of the most important requirements of the OTP in terms of effectiveness is being able to reach people. If OTP wants to have an impact through its work, including preventive impact, it has to be transparent, clear and predictable in all actions that it undertakes. It is also our duty to victims and affected communities in our situation countries and the countries under preliminary examination, to provide them with information on our work and ensure that they feel connected with this Court. We do have a public information unit within the OTP dedicated to communicating OTP messages and actions regarding our cases and strategies. I will make sure that in my term, the public information unit will continue its work in an enhanced manner.

How do you see the role of civil society—the Coalition for the International Criminal Court in particular—around the Court's work?

Bensouda: In general, civil society has played a crucial role in supporting the work of the OTP. They have been key partners in the field, during the preliminary and investigative periods, and in reaching out to the affected communities and victims. These organizations have been actively working to expand the outreach of the Court, organizing public campaigns for arrests of the indicted individuals, lobbying with their respective states for

cooperation towards the Court as well as providing valuable input to the OTP strategies and policies.

The Coalition for the International Criminal Court (CICC), in particular, has always been one of our key partners, since the inception of the idea of establishing the Court.

In my opinion, the most important function of the CICC has been to act as an umbrella organization, a crucial convenor of all these different NGOs with differing interests and priorities. It is clear that we need to have a coordinated and integrated response to challenges facing the ICC for our efforts to be effective, while of course respecting the autonomous mandates. We are currently in the process of analyzing the past 9 years of collaboration with our NGO partners, to see what can be further improved.

At the end of your term, for what do you hope to be remembered?

Bensouda: The first 9 years of the Court, under the leadership of Mr. Ocampo, were about placing the ICC on the map, to establish it, so to say. Operationalizing the office, forming our team and defining duties, standardizing our practices and launching our first cases were the defining characteristics of this period. We have managed to get our first verdict with the Lubanga judgement, which I believe was a huge success for the OTP.

Now it is time for consolidation, which I believe is a great challenge as well. Now that we have the Office fully operational and staffed, we have to make sure that we fulfil our mandate by following best practices. Our primary responsibility is to ensure that the victims are not forgotten and they receive justice to the full extent. In this respect, we would especially be focusing on gender crimes and crimes against children. Keeping these in mind, in my term, and with my team, I will do my very best to boost the protective and preventive impact of the work of the OTP.