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## The International Criminal Court: A New Approach to International Relations

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*from David Rockefeller Lecture and The David Rockefeller Lecture Series*

Fatou Bensouda, prosecutor for the International Criminal Court (ICC), discusses her vision for the ICC, her current caseload, and the court's role on the international stage.

*This meeting is part of the David Rockefeller Lecture Series.*

JOHN B. BELLINGER III: Thank you. Everybody's already gotten quiet before I've even opened my notes.

So—well, thank you. As people are gathering, good afternoon. Welcome to today's meeting with Mrs. Fatou Bensouda, where—who has moved—there she is, right here in front of me—the new prosecutor for the Internet Criminal Court. Congratulations. (Applause.) They will

do that. I think this worth a round of applause. We'll be hearing more in a moment.

I'm John Bellinger. I'm a partner in the international law practice at Arnold & Porter in Washington, and I am the Council on Foreign Relations senior fellow in international and national security law, mostly operating out of Washington, and I'm also a counselor to the American Society of International Law.

A couple of housekeeping items before we dive in. Today's meeting is part of the David Rockefeller Lectureship, which is awarded to a distinguished African leader from government or nongovernmental organization, and it recognizes Mr. Rockefeller's interest in African affairs.

The council is pleased to be co-hosting today's meeting with the American Society of International Law. And the American society's president, Donald Donovan, will be with us today, and their executive director, Betsy Andersen, is here in the front row. So we're delighted to be co-hosting today.

Today's meeting—unusual for the Council on Foreign Relations—is on the record. Nonetheless, please turn off all of your cellphones, so if you will check your cellphones just so that we don't have any interference, thank you very much.

So as most of you know, today is—or this year, rather, is the 10th anniversary of the International Criminal Court. The Rome Statute entered into force on July 1st, 2002, so this is a(n) opportune time to have a new prosecutor.

A hundred and twenty-one countries are now members. It's opened investigations into seven situations, all in Africa; publicly indicted 29 individuals, all in Africa. Last month it completed its first prosecution, with the conviction and sentencing of Thomas Lubanga of the Congo.

Mrs. Bensouda, Fatou Bensouda of the Gambia, has been the prosecutor of the International Criminal Court since June 15th of this year. She's only the second prosecutor for the ICC. She previously served as its deputy for eight years, from 2004 to 2012, under the court's first prosecutor, Luis Moreno Ocampo, who has been here at the council with us on several occasions.

Obviously it's extremely significant to have a woman and a woman from Africa as the court's prosecutor. Time magazine recently listed her as the amongst the most—hundred most influential people in the world. And if Ken Roth is here, I think Ken Roth of Human Rights Watch—there he is—was the one who actually wrote the entry in Time magazine about what it means for her to be the prosecutor of the court.

So we're very pleased to have you here today to give what I think is your first address as the prosecutor here in the United States. We're honored to have you. The floor is yours. She's going to make some opening remarks, and then she and I will have a brief discussion while you all collect your questions.

So welcome. It's wonderful to have you here.

FATOU BENSoudA: Thank you. (Applause.) Thank you very much. Good afternoon, ladies and gentlemen. Thank you for being here.

And I'm also grateful to the American Society of International Law and the Council on Foreign Relations for inviting me to give this lecture.

I am delighted to be there today to discuss with you, this expert audience, the new paradigm of international justice that the International Criminal Court introduced in contemporary international relations.

I would like to discuss with you how the preventive impact of the court's work could be maximized. How can we stop the current genocide in Darfur? How can we prevent a cycle of violence during the next elections in Kenya? How can we support Colombia's efforts to end half a century of violence?

And I would say one word: institutions. In our countries, the congress, the police, the prosecutors and the courts are the basic institutions to establish and enforce law and order.

The Rome Statute, which establishes the ICC, is building the same idea internationally. Judicial institutions are created to contribute—to prevent and manage massive violence.

Ladies and gentlemen, in the aftermath of the World War II, the United Nations security model under the United Nations council, with five permanent members with veto powers, was set up as the new model of international peace and security. The underlying principle of this security council system was to ensure political consensus among the permanent five to undertake collective action for international peace and security.

A complementary trend has also emerged in 1945 with the Nuremberg Trials, as for the first time those who committed massive crimes were

held accountable before the international community. But Nuremberg was a landmark, and the world was not ready to transform this landmark into a lasting solution. In the end, the world would wait again for almost half a century after Nuremberg. We would witness again two genocides, first in the former Yugoslavia and then in Rwanda, before the United Nations Security Council decided to create the international criminal tribunal for first Yugoslavia and then for Rwanda, thereby again complementing international peace and security with international justice.

The Rome Statute establishing the International Criminal Court added an independent and permanent justice component to the world's efforts to achieve peace and security. The Rome Statute offers a solution, creating global governance without a global government with its international law and courts; a new paradigm in international relations, utilizing law as a global tool to promote peace and international security, and to put an end to impunity, thereby preventing or at least trying to prevent future crimes.

In 1998 this was just an idea, but in 2012, today, we have put it in motion. The ICC has become a recognized institution that is part of the international landscape. The unanimous referral by the United Nations Security Council of the situation in Libya in 2011, which included the positive votes from five nonstate parties, is one confirmation of that.

Ladies and gentlemen, since the start of our operations, the office of the prosecutor developed into a well-organized institution. Based on the Rome Statute's clear legal criteria, the office can start investigations regarding war crimes, crimes against humanity and genocide committed after July 2002 on the territory of or by a national of the state—the courts' states parties. And today, as already mentioned, we have 121 states, and the number is constantly growing.

The court's jurisdiction can also be triggered by a referral by the United Nations Security Council acting under Chapter VII of the U.N. Charter or by a declaration of an—of acceptance by the court's jurisdiction by a nonstate party.

In this case, the court can act regarding situations involving nonstate parties, like it has done so for Darfur, for Libya and for Cote d'Ivoire. However, short of a U.N. Security Council referral or a declaration of acceptance, the court cannot intervene in situations like Syria or Yemen or Sri Lanka, which are nonstate parties of the court.

Since 2003 we have opened investigations in seven situations. We have opened 15 cases in relation to 25 persons, and the court has already issued one verdict, with more expected very soon. In addition to its investigations and prosecutions, the office is also engaged in preliminary examinations in Honduras, the Republic of Korea, Afghanistan, in Mali, also in Nigeria, in Guinea, Colombia and Georgia as well.

The true relevance of trials as well as the other activities of the court, will, however, more importantly lie on the fact that by their global impacts, they will contribute to preventing—or prevention of recurring violence. It will come as no surprise to all of you that in a time of rapid globalization, the world has increasingly become a smaller place. New technologies allow us to reach each other in previously remote places. Political, military and economical interests are more and more complex. Wars and conflicts are no longer opposition of two states or two armies; they involve various groups. States and nonstate actors have huge ripple effects, from destabilizing entire regions to impacting on the international financial markets. We are no longer confined to our town or to our region and our national borders due to the spillover effects of internal conflicts on other parts of the world.

Similarly, the ruling of one court can affect a multiplicity of cases. And this is what the secretary-general of the United Nations has referred

to as the shadow of the court, meaning that the court's capacity to set precedents that would meet the global challenges of our times. This should be considered as the most important impact of the court.

What is the shadow of the court, the first—what is the shadow of the court's trials of the first International Criminal Court? Excuse me. The Lubanga trial, even before the verdict, has helped to trigger debates on child recruitment in Colombia and Sri Lanka, and child soldiers were in fact released in Nepal. The special representative of the United Nations secretary-general on children in armed conflict immediately—(inaudible)—potential on the use of other tools to campaign around the world and secure even more releases. This is an example of how to use the law to prevent crimes.

The second trial of the ICC, The Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui—it focuses on militia groups that fought against Thomas Lubanga's group. This, I believe, will also help to bring accountability and reconciliation in the Ituri region of the DRC and will further contribute to the pacification of the region.

Another unprecedented opportunity in terms of impact can be provided by our third trial, against Jean-Pierre Bemba. In this case, it is the first time for the international criminal justice system to address a situation where the sexual violence and rape outnumber the killings. And according to our evidence, Mr. Bemba allegedly failed his responsibility to stop and prevent his militia forces from using rape as a primary weapon of war. Like any other criminal—any other criminal court, the judges will decide, of course, on the individual criminal responsibility of Jean-Pierre Bemba. But like—but unlike any other court, the ICC's decision will influence the behavior of thousands of military commanders from at least a 121 states parties.

As a final example, I will mention our prosecutions in Kenya, where charges have been confirmed against four individuals allegedly responsible for the post-election violence in 2007 and 2008. This trial hopefully will prevent violence in Kenya during the next presidential elections. We have already seen that (proceeding ?) electoral violence cases, including in Cote d'Ivoire, can serve as a deterrent in other presidential elections across the world, putting political leaders on notice if they use massive violence to gain or to retain power, they will be held accountable.

Ladies and gentlemen, allow me to conclude. We see the effects of the court's activities in practice. It is affecting the behavior of governments and political leaders. Armies all over the world are 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 Rome Statute is building a network of actors to maximize the prevention of massive violence. The court is modifying the dynamics of the U.N. model without actually changing the rules.

The United Nations charter envisaged a collective security system to maintain international peace and security. This was a huge advance, but it left all critical decisions in the hands of politics. With the adoption of the Rome Statute model, states parties shifted the paradigm from the Westphalian model of national self-regulation to the model of international scrutiny under the United Nations Security Council supervision and now to the Rome Statute model of the rule of law. Be it because of principles of self-interest, they adopted a rule-of-law paradigm. They agreed to respect the decisions of an independent and international criminal court. They are determined to ensuring lasting peace and respect for and the enforcement of international justice.

So step by step, the Rome Statute system is moving ahead and creating a new international dynamic, impacting other institutions and



changing international relations forever. As the new prosecutor of the International Criminal Court, I will continue to contribute to solidify this change, and I continue to count on your support in this endeavor. I thank you. (Applause.)

BELLINGER: That's wonderful. Do we—are these microphones on, Jake (sp)? They're on immediately. Very good. Well, wonderful. That was fantastic.

I think it—I just have to say up front, as someone who has served for eight years in the Bush administration, which I think everybody knows had some concerns about the International Criminal Court—and I think it's—I think most people would realistically say—and I would say this is something that has continued from the Clinton administration, the Bush administration, the Obama administration—I think it's probably unlikely that the United States is going to become party to the court anytime soon.

That said, I think it is undeniable—it would be very hard for anybody to deny what you said, which is the court has really cast a shadow. It is having an effect. It is changing behavior around the world. So thank you for that. It's really interesting to hear you talk about these new days.

Let me start with something a little bit easier than you—that you did not mention, I think probably in the interest of brevity. We have a new prosecutor for the first time in eight years. You're a very different person than Luis Moreno Ocampo, although you served with him for eight years. Tell us about your priorities. You know well what people's concerns are about the Office of the Prosecutor, about the court generally, many challenges for you. I'm sure you've got a list of priorities. Tell us about them.

BENSOUDA: I think my immediate focus is on building on the office that I have inherited, especially ensuring that we improve, to a very

large extent, investigations and prosecutions. This is a priority for me. I think that as a—this is our core business as an—as an Office of the Prosecutor, and to consistently revisit our strategies we had in place, our operations, and ensure that we're improving on that as we go along, because I think it continues to remain a challenge that we have to adjust to the realities as they present themselves, not to be stuck in the—in the ways that we have before but to look for innovative ways of investigating and prosecuting.

And this is just in the broad context of things, but specifically focusing on gender and sexual crimes. I have made this a priority for my office that we again revisit our methods, our modes of investigations and prosecuting these kind of crimes, because as you know, they are very difficult to investigate, but I always say that this is not an excuse. We need to ensure that we have the staff, the trained staff in place to be able to investigate and prosecute, and plus—and do effectively. Recently I made an appointment of a special gender adviser, Bridget Inda (ph), who I believe is also going to add some more experience to the staff. We do have quite a good unit already in place, but they need to be complemented, I think, in the investigations of this crime. So this is a priority area that I am focusing a lot of attention on.

Another area where the—which I think that I need to focus on and which I have already started doing is the relations shaped between the ICC and the—and the—and Africa. It's a very sensitive relationship, as you know, with ICC being accused of targeting Africa and African leaders. And of course, this is not the case, but I think it needs some work to be able to turn around, if possible, this belief.

I have already started identifying certain individuals, certain leaders on the Africa continent whom we can work with, not only—and in all regions of Africa, both south, west and north, who we can work with and who can—whom we ensure that they understand the work of the court and what the court is trying to do. Recently I received the minister of justice for Mali. And this was the fourth African country that is asking the ICC to intervene. But this is not the story that goes down in Africa. It is not known, maybe, or it is deliberately manipulated that it

is ICC who is going after Africa.

And I think it's the other way around. It is really African leaders coming towards the court and seeking for the court's assistance. Like, if you receive a case of, like Mali, and they ask the ICC to intervene, are you going to say that because it is in Africa, I'm not going to intervene, when you know that your core business is to—as the statute says, you investigate and prosecute where (our ?) crimes take place.

So these are determinations that I think it needs to be explained, because I think if it is explained carefully and properly, it will be understood. So that relationship is something that I'm working with. Already I've requested to see the new chairperson of the African Union who has just taken office. I think that we can find a way of working together.

My priorities are (long ?). It's a—it's a—it's a long list—(chuckles)—because—you know, because all of them are important. But all of them need to be done.

I'm also looking very closely at our preliminary examination, the phase. We're looking at—in each individual situation where we are, whether we need to go forward with it or whether we need to abandon it, or whether we need to do something different. But I think it's a good thing to look at it closely and decide on what to do. So we are revisiting the policies. We are revisiting the individual situation.

So these are first four areas that I think I can—I can see my priorities (like right now ?).

BELLINGER: I was, in fact, just going to ask you about Africa because, as you heard in my introduction, all of the investigations, all of the

public indictments have been of African officials. The African countries feel it's become a African criminal court.

Of course, the best counterweight to that probably would be to start an investigation or an indictment somewhere else in the world, and there is pressure in various other places, whether it's Israel or Colombia or Russia. But of course, it would be inappropriate to just pick a country to—so that you can show that to the Africans.

Do you think you can assure the African leaders by some of the things you just said, demonstrating to them that the court is not just a tool of the colonial powers, or—what you said, that really, this has been referred by Africans leaders themselves. Do you think you can provide that assurance to them?

BENSOUDA: I will definitely try. I think what I have just started by going to individual African leaders and engaging with them on a personal level and explaining the work of the court and also explaining that we are actually complementing the efforts they're making on the continent to address the conflict—I have received so far very positive feedback and also very good reassurances of cooperation.

I visited Senegal. Of course, it was a very symbolic visit, but I took the opportunity to speak to the president, Senegal being the first country that ratified the Rome Statute, and I think that after 10 years it was good at least to show them how important that was. And I've received assurances from there. In Nigeria likewise. In fact, Nigeria, as you know, is under preliminary examination. But when we visited, we had—we received a lot of information from them. They were cooperating fully.

And maybe this is something I probably should mention in passing: We don't have any problems with individual African countries. We don't.

We receive a lot of—we ask—request for assistance. We give out a lot of requests for assistance. And almost all of them come back positive to African states. And that shows the level of cooperation we are receiving from them. Sometimes when they're together as a group, that's when things become difficult. But with individual African countries, we don't have that. And to be able to identify some voices that when they get together can also speak for the court maybe is something to look at, and I'm exploring that avenue.

We're also, at the operation level, still insisting with the African Union on meetings. In fact, I think next week there is going to be a meeting in Addis Ababa between the court staff and the—and the Addis—and the African Union staff discussing also the way forward. As you know, some time back we requested to open a liaison office in Addis, and this was not accepted. But we are trying to see how we can turn all of these things around. And I believe dialogue is one of the ways of doing it, dialogue and explaining where we are, why we are doing this, what—explain the limits, our legal limits, why we are—we are—we are investigating or prosecuting certain situations.

BELLINGER: So let's talk about Libya. We were talking about this beforehand. The court has issued arrest warrants for originally three Libyan officials, including Gadhafi and then his son, Seif Gadhafi, and his intelligence chief, Senussi. Gadhafi, of course, is dead. Seif and Senussi have been turned over to Libyans. They've been saying for nine months now that they are insistent on prosecuting them themselves. They can do it. The courts' arrest warrant remain outstanding.

We were talking about something very interesting before. Is—in the court's review—which, of course, the Rome Statue complements the national justice system of Libya—is the court's review limited to determining whether Libya can do a creditable job to actually prosecute them? Or is it really looking at the fairness of the Libyan system, which I think all of us could raise some concerns about the fairness of a system looking at the Gadhafi regime? What will the court look at in determining whether to insist that Seif and Senussi be turned over to

the court or to leave it to Libyans?

BENSOUDA: I think, as opposed to the ad hoc tribunals that have primacy over these crimes, ICC does not have primacy over the crimes. We are a backup system. We are a system that complements the national efforts. And what Libya has done is to challenge the admissibility of the case and have explained to the court that they are in a position to investigate and prosecute these crimes.

And they have been doing this under the—using the provisions of the Rome Statute. They've done that for Seif al-Islam, and they've not yet done that for Senussi. We have in the meantime reminded them that they're supposed to surrender Senussi. But they are working within the confines of the Rome Statute.

And I think that we are not judging the entire Libyan system. That's not the role of the ICC.

Our role is to see whether genuine national proceedings are going on between the persons that we have asked for warrants of arrest to issue. And if they are doing that, of course that is the next phase, monitoring, continuing to see what they are doing, depending on what the court decides, whether the case is admissible or it is not admissible.

If the court decides in the Libyans' favor, I do not think there is anything the court—the Office of the Prosecutor will be able to do except to monitor what the Libyans are doing with regards to the charges and the persons that we have requested warrants for.

BELLINGER: That's interesting. Let me see how we're doing on time. Let me ask, then, just one last question before I open it up to the

audience. Circling back to the United States again, I think most of us would accept that the United States, at least the United States Senate, is not going to approve the Rome Statute any time soon. But both the Bush administration in its second term and the Obama administration have begun more cooperation with the court.

What things can the United States do that would be helpful to the court, and in particular maybe, but not limited to it, some of these high-profile warrants for Bashir in Sudan and Joseph Kony. How can the United States be helpful during the period of time that it's not a party to the Rome Statute?

BENSOUDA: I think we already are experiencing significant cooperation from the United States as opposed to what was happening before. And as you know, our investigations—sometimes the persons we need, the witnesses, et cetera, do find their way here in the U.S. Of course, we have to work within the national legal limit of that, of accessing those witnesses or trying to get information from here.

But when it comes to that, I think it is—so far, I can so far so good, we're receiving good cooperation. I also think that it will be useful for the court if the positive statements, public statements that sometimes the U.S. makes, or people like Stephen Rapp, et cetera, they make in support of the court's investigations and prosecutions, this is also very useful for the court. And I think that it also at least helps us on the ground where we need to go in and investigate and prosecute. But all of it has to do with how can it be facilitated for us to be able to investigate and prosecute, and of course not asking to the U.S. to do anything that is not within their legal limits.

BELLINGER: I'm going to turn to you all. I'm going to collect your questions. Since you have been more succinct in your answers than I have been in my questions, I'm going to ask one more and then to the audience.

Budget. You are being asked to do a lot of things. The budget is steady. The Security Council has actually been referring situations to you which were not necessarily expected but without giving you more money. How do you—how do you manage the budget for an increasing number of cases, and then in five years then you'll have the crime of aggression, as well?

BENSOUDA: We have been trying to work within the zero nominal growth that is being imposed on the court. And over time, over these past couple of days—years, what we have been doing to work within the budget is we've tried to find various cost-effective ways of doing that, including rotating teams, you know, including—like this year we have to cut such things like consultancy budget, or the GCSs (sp), all of the organs are having to let staff go.

But I think we've been very clear to explain to the states, and we are going to do that—the CBF is just coming next week—to explain to the court that we have tried always to work within the budget, but we've cut it as near as possible to the bone and we cannot go any further. This has to be very clear. And if the states parties want the court to be as effective and to do the things it was set out to do, we need to have the—at least a sufficient budget to be able to do, because what happens when we continue to cut the budget at the same time, as you note, cases are increasing?

We're trying to—let's say with investigations, we try to do maybe two missions where we should have done three missions. We try to cut down on people, investigators, who should go on the missions. If we can have two instead of four, that is what we will do to be able to cut corners. But what that is directly doing is having a consequence on the quality of our investigations and prosecutions. If we want to improve on the quality of investigations and prosecutions, we must have the means to do that.



And I think it is important for the states to know about the consequences of cutting the budget. It should be clear. And I think this will be explained to the—of course, we understand there is the economic situation, which states parties are also facing, but at the same time, we need to remember or recall why this institution was set up. You know, are we now just thinking of a resource-driven court or a case-driven court? You know, this debate has to be made. But if we have to go to the extent of maybe even deciding to open an investigation or not because of the budget, I think that would be—that would not be good.

BELLINGER: The floor is open. Please identify yourself and your affiliation and keep your questions short. Right here in the front row.

QUESTIONER: Binta Brown, Kirkland & Ellis. So this is in some ways a flip side of the question you asked before. You spoke about the court as a mechanism of the rule of law, of international rule of law. From your perspective, what does it mean—or from the ICC's perspective what does it mean that the United States, which is an advanced rule-of-law country, is not a party? What bearing does that have on the ICC?

BENSOUDA: This is 10 years since ICC has been in operation. I don't think we've done badly, given the number of situations and cases that the court has. It is very difficult for me as an official to speak about any state, including the United States, whether they should or should not join the court. I know that there are other people, like the CICC and other partners, who are doing that.

But I can say that with respect to the court operating, we've done quite well. We've done quite well in spite of the fact that big countries like the U.S., like China, like India, are not part of the court.

Of course, the aim of the court and the aim of those who have decided to set up the court, the states parties, is to obtain universality of this institution. And I think even in the name of the rule of law, maybe states that are not part of the ICC should think about joining the court. But the impact that the court has made already in spite of whether big states are or are not part of the court I think is already significant.

BELLINGER: I think you missed your calling as a diplomat, Prosecutor. (Laughter.)

Right here in the second row. Yeah. I'll get to you in a minute.

QUESTIONER: I'm Donald Shriver of Union Theological Seminary. We've just heard Aung San Suu Kyi eloquently speak of reconciliation in Burma. And among other things, she says she thinks that her side of the conflict there should refrain from too much talk about the blame of the regime that put her in prison.

I'm wondering, what is your feeling about the ways in which the prosecution of, let us say, war criminals in a country can serve reconciliation in the nation rather than hinder reconciliation? What is the role of a prosecution of the leaders and the impact on national reconciliation?

BENSODA: I think this is a debate that has been there forever; you know, whether you have peace or justice, whether you sequence them, whether you have only reconciliation and not justice. It's a debate that even today, in all of our situations we face that. We had the same problem with Lord's Resistance Army, that our warrants have stopped Joseph Kony from surrendering. We should not have issued it when we

did. We have the same—with all of our other cases, whether it is Darfur, whether it is—even in Kenya, we talk about peace versus justice.

But I think that we need to start thinking about having both, because I think it's possible. I do not think that it is mutually exclusive, that you either have to have one or the other. You can have both at the same time. And this is what both mediators and prosecutors have to start thinking about: How can we make sure that those who are to be prosecuted are prosecuted, because you know the role of the ICC and the capacity of the ICC. We are not able to investigate and prosecute everybody. It is not possible. But we can have those leaders who we know that they bear the greatest responsibility, without whom these crimes would not have been committed, and we prosecute them.

But others that we cannot prosecute, we can encourage the national system or maybe work with the national system to, either within the amnesty programs they have, to see what to do with them, or do even domestic prosecutions. But I do not think that we should—we should continue to say, let's have one or the other or let us sequence; let's have peace, and when we find peace, then we will be able to have justice, because I think in the end you have neither.

BELLINGER: So the gentleman here in the second row, and then here, and then I'm going to work my way back. You know, there were advantages to coming early and sitting in the front row, but I will start looking back as well. Please.

QUESTIONER: Thank you, John. Jeff Laurenti with the Century Foundation. Prosecutor Bensouda, I don't know whether the Vatican has been—has ratified the ICC statute, but very soon I expect we will have another observer state at the United Nations that is expected to very quickly, upon such recognition of state status, come knocking on your door to sign the Rome Statute. And I wonder if you could explore for us, because this is going to be a political as well as legal minefield—during the interim period that Palestine might be a party to the ICC,

before there be a final agreement on permanent borders between Israel and Palestine, what would the court see as the area of jurisdiction within Palestine that Palestine might bring to the court's attention? And what are the kinds of issues—because the Israelis are very concerned precisely about this—that would legitimately fall within the purview of the ICC? I don't think you have things like controlling occupation authorities from settling their own inhabitants. What are the kinds of issues that you could envision, in a world of diplomatic delicacy, bubbling up and the kinds of repercussions they might have either if you do act or in terms of the credibility of the court if you don't, right?

BENSOUDA: As you know, we have—we had the Palestinian issue just decided just before my predecessor left. And the main issue that we were really looking at was about the state—whether the Palestinian Authority has a state status or not. And in the end, we decided that this was not something that the ICC should determine, that there are other bodies, like the General Assembly, that should give Palestine that status first.

And maybe let me back up a little bit just to mention that Palestine made a declaration under the statute accepting the jurisdiction of the court. As you know, this is one of the ways in which we can have jurisdiction to investigate and prosecute. Cote d'Ivoire did it, and because Cote d'Ivoire has no question of whether it is a state or not, we have been able to start investigating in Cote d'Ivoire.

But in Palestine, we had that problem. And I think we tried to deal with it for over two years, in the end deciding that because it is a state, according to the statute, that can make a declaration and because Palestine has not yet been accepted as a state, therefore the declaration under Article 12 does not meet the legal requirements under the Rome Statute. But what we have also done is to leave the door open and to say that if this—if Palestine is able to pass over that hurdle, of course, under the General Assembly, then we will revisit what the ICC can do.

But at the moment I do not think it is for the judges of the ICC to decide the status of Palestine, neither is it for the Office of the Prosecutor to make that determination.

BELLINGER: Here in the front row. (Laughter.)

QUESTIONER: Thank you. I'm Aikei Kush (ph) with New African magazine. I have a few questions, very short. One, can your office open an investigation and prosecute alleged war criminals without the approval of the United Nations Security Council?

BENSOUDA: Say that again?

QUESTIONER: Can your office open investigations and prosecute alleged war criminals without the approval of the United Nations Security Council?

BENSOUDA: Of course. Of course. You know that the ICC will have jurisdiction and can open investigations where these crimes occur on the territory of a state party. A party that has signed and ratified the Rome Statute can refer this case to the ICC to investigate and prosecute. But even where it does not refer the case to the—to the ICC prosecutor, the ICC prosecutor can use her—(inaudible)—powers to—(laughter)—to go in and investigate and prosecute when these crimes—as I said, either war crimes, crimes against humanity or genocide.

QUESTIONER: One more. Yes, recently --

BENSOUDA: And we do not need, in that case, the U.N. Security Council's referral or permission, as you call it, to do that. Once the state—once that state is a state, a state party to the Rome Statute, it can be done. We only need the U.N. Security Council's referral when it is not a state party. And maybe an example, to be clear—like in Syria, for example, there is—these crimes are taking place, allegedly --

BELLINGER: Or Sudan.

BENSOUDA: Yeah, or Sudan. Sudan, we could not go without the U.N. Security Council referral. In Syria today, if the crimes are falling within the jurisdiction of the court, we cannot go there because there is no Security Council referral. But --

QUESTIONER: And then one last question. Recently Archbishop Desmond Tutu called for the arrest of former Prime Minister Tony Blair and former President George W. Bush for war crimes and crimes against humanity with regards to the Iraqi war, and he cited several statutes —(inaudible). Will your office entertain his call? Will your office entertain his call?

BENSOUDA: In the case of Iraq, it may interest you to know that we have done preliminary examinations with regarding Iraq. But you have to recall that Iraq is not a state party to the Rome Statute.

We did a preliminary examination—this was, I think, since 2005 or '6—on the—on those—the nationals of those countries that are states parties and were involved in the conflict, if you know what I mean. Those countries, on the basis of nationality, who were involved in the conflict—and the preliminary examination that we did was only regarding that—I can give you example, like the U.K., like Germany, et cetera. What we could not do is, of course, regarding the U.S., because neither the U.S. nor Iraq is a state party to the Rome Statute.

And we have issued a detailed report on that preliminary examination regarding the actions in Iraq. And we came to the conclusion that we were not going to open investigations regarding that—those particular states because either they were already doing some investigations and prosecutions—and as you know, the jurisdiction of the court—I've already said it is complementary to national systems. If they are doing it, we don't do it, until we find that it is not genuine.

And we found—in the case of U.K., let me be specific—at the time they were doing their own investigations and prosecutions. We also issued the statement on the basis of gravity because gravity is something that, as a policy of the office, we also look into, you know, based on not the number of persons killed, but maybe what is the nature of the crime, what is the impact of the crime, what is the manner of committing the crime, et cetera, and whether it is in the interest of justice to intervene or not.

So anyway, it's a very detailed report that we have put out there. It's in the website if you want to take a look. And on those bases, we decided that we were not going to open investigations with regard to these states that were in the Iraqi conflict.

BELLINGER: Let me work on the back, in the middle, now. Who had their hands up before? All the way in the back, with the green tie.

QUESTIONER: Eric Agiyar (ph) from Thomas—(inaudible). I wonder what level in organizations you think you can be an effective deterrent, the ICC. Like, I imagine Joseph Kony thinks about the ICC differently than one of his colonels or captains who's actually committing criminal activity on the ground. Is there a way to be effective up and down an organization, such as Lord's Resistance Army?

BENSOUDA: Can you say that again? I'm sorry.

QUESTIONER: I was wondering if you're effective up and down an organization; for example, Lord's Resistance Army. Joseph Kony might think of the ICC differently than a captain or colonel on the ground actually committing the crimes, if they're aware.

BELLINGER: How do you deter the lower-level person?

QUESTIONER: Yeah, or both, I mean, actually, but --

BENSOUDA: I think we have made it very early on as a policy of the office that we will go after those who bear the greatest responsibility for the crimes. We cannot investigate everyone. And I think by setting an example and getting those without whom the crimes would not have committed can also send a very strong message to the others that those who are giving you, you know, these commands are being held responsible for these crimes.

And also I think it was—it's an opportunity for—to see how the national systems can respond to this, because the whole idea is to get those who are most responsible for these crimes and see how you can—the impunity gap can be bridged by encouraging the national system to also take up the responsibility to investigate and prosecute.

If you see what has happened in Uganda, even though we have not yet arrested Joseph Kony. He's still out there, but you see the efforts that are being made at the national level, both in terms of granting of amnesty and—I recall when we just issued the warrants against the five top



leaders of the Lord's Resistance Army, we had given out public messages encouraging those who were not subject of the arrest warrants to come out and take advantage of the amnesties that the Ugandan government was being offered.

But the bottom line is we will not be able to investigate and prosecute, but I think those who receive the commands, knowing that those who are giving me the commands are being investigated and prosecuted, I believe that can send a message to them as well.

BELLINGER: Daniel Bethlehem, who was the legal adviser at the Foreign Commonwealth Office and on the advisory committee that recommended Fatou Bensouda.

QUESTIONER: Thanks, John. I'm not sure that you needed to have—(laughter). But Madam Prosecutor, it's tremendous to have you here and to have you in this role. So, welcome.

You've spoken in the past publicly about the idea of positive complementarity, and you've spoken a little bit about complementarity now. And by positive complementarity, I take—understood you to be saying that in fact you wouldn't—it wouldn't simply be a question of your willingness, as it were, to cede jurisdiction to national authorities, but to actually work positively with them.

So I wonder what your views would be, for example, if one took, simply as a hypothetical, Libya if they came along to you and said, actually we've got very significant prosecutorial lack of capacity, we'd like the trial to take place in Tripoli because it needs to be close to the people and under our law, would you work with us, the OTP, second your people, use your evidence, but have a trial as a matter of Libyan law. Do you understand that to be positive complementarity?

BENSOUDA: I don't know whether that will be going too far in positive complementarity. I think that even though we talk about positive complementarity, we have to also remember that in terms of capacity and resources, there is so much the Office of the Prosecutor can do. I think I just mentioned about even doing our core business becoming a bit difficult for us to do, much more if we were to expand ourselves.

I think when it comes to exchange of information, sharing really core information with the national system, we are in a position to do that. We are also in a position to exchange experiences because we've already done this with regards to Uganda. We had them over, the Prosecuting Office and the investigators, we had them over at the office for about three weeks, in which we exchanged very crucial information with them to assist them in their own domestic investigations and prosecutions.

But you also should realize that we do have this problem of protection of witnesses. How much can you share with them and ensure that the witnesses that you've been protecting all these year will be protected at the national level? So this was a difficulty that we had, and we shared with them as much as we could. Whether we should have gone to Uganda and investigated with them and prosecuted with them, I do not think that this is what is envisaged by the statute on complementarity.

I think the whole idea is, of course, developing the national system so that ICC may not even have to take the case, but at the same time, we need to realize whether our mandate extends to actually going to Libya, in this instance, and investigating and prosecuting with the Libyans. I think they will have to do it themselves and they will have to show that they are in a position of doing it, because after all, they have challenged the admissibility by saying that we are in the position to do—to investigate and prosecute. But as much as we can share information with them, if the court were to decide that they do it, I think we will be in a position to do that.

BELLINGER: I'm going to take two more. The prosecutor has already told me that she has two more events this evening. So I'm going to take the gentleman here.

QUESTIONER: Thank you. John Hirsch from the International Peace Institute. First of all, thank you very much and congratulations.

Could you say a little bit more about why no non-African case has come before the court in this decade, and whether you anticipate that in the next one or two or three years there will be some cases of non-African states?

BENSOUDA: Of non-African. You know, it is very unfortunate that our investigations in Africa is being seen as a negative thing, or at least it's—the perception or the propaganda is that you're targeting Africa, you're going after Africans. I have said it several times and I prefer to look at it as Africans—Africans—taking leadership in international criminal justice. I've said this several times.

And I say this because not only has Africa helped to set up this court, and those who were involved in the—in the negotiating this court—I see Richard over there—will see—will realize the role that Africa that has played in—for this court to come into existence.

But again, the referrals that we have received from Africa, three already—and just in July, two months ago, Mali came again to the court requesting the court to investigate and prosecute. And I keep saying that Africa is actually coming towards the ICC and not the other way around.

But we prefer to (say/see ?) targeting by at the same time making as if we're only thinking about those who perpetrate the crimes. That is why we say or it is said that we are targeting Africa's—those who perpetrate the crimes—how long we should continue to protect those who are committing the crimes? Because here you are talking about hundreds of thousands of victims of rape, of murder, of pillaging, of all sorts of atrocities—hundreds of thousands of them, Africans. They are Africans. Why should the focus be on the few who perpetrate these crimes and not on the millions who suffer from these crimes? I believe we need to start thinking about that.

If the African leaders are coming towards the court and requesting for the court's intervention, I do not think that geographical consideration should be what we think about; that because it's in Africa, therefore we cannot go there.

If I have a referral today and the day after and the day after that coming from Africa, and I see that—how crimes are being committed there, I will still go there. This does not mean that I am not looking elsewhere. Of course I will. But we need to sort of reorient our thinking that ICC is working with, it is working for the victims of Africa. Those who do not want to be targeted should stop committing these crimes. (Laughter, applause.)

BELLINGER: (Now we've got the ?) last question here in the front row.

QUESTIONER: It's an honor to have you here. My name is Bernadette Atuahene. I'm a property professor at Fordham.

My question has to do—all my work has to do with property restitution, and under Article 75 there is a reparations provision. But you know, there's one thing to—there's one type of justice to prosecute somebody, right, and convict them, but then the victims are still, you know, left

with the scars, the economic injustices. So it pains my heart that the issue of reparations is not front and center. In terms of the priorities of the International Criminal Court, the amount of funding, I know there's the special unit to fund it, but in terms of making that a priority, there's an opportunity to deliver a more robust justice by really embracing the capacity of the—of the reparations of Article 75, what that presents for us.

Most of my work has to do with South Africa. We talk about reconciliation. Everyone looks at the Truth and Reconciliation Commission as a huge success.

BENSOUDA: Yeah.

QUESTIONER: But those of us on the inside know that one of the main failings of the Truth and Reconciliation Commission is the lack of delivery of reparations. That in its conception was supposed to go part and parcel with truth, was also reparations. There was a lot of truth and no financial reparations.

The judge I clerked for in the South African Constitutional Court says—and he was one of the justices on the Truth and Reconciliation Commission—openly admits that that was the failure of the South African reconciliation process.

And so I just want to make sure it's not also a failure at the international level. We have to learn from the mistakes of South Africa.

BELLINGER: (Inaudible)—question.

BENSOUDA: Yeah, (interest ?). But you do know that it is at the center of our—of the ICC. I'm not talking about the ad hocs. And I know you mentioned Article 75, reparations and so on. We just—the judges of the—of the Trial Chamber I after the Lubanga verdict issued the first decision on reparation at the International Criminal Court, and I think this is significant.

And also, backing up a little bit, you know that the ICC also is that first international permanent criminal court that victims can be represented, victims can present their views, victims can ask for reparations. And I think within the context of our—of our first case, this has been done.

And I believe that the judges have given important attention—gave attention to this. During the Lubanga case, we were there as prosecutors, but right next to us were the representatives of victims presenting the views of the victims and their concerns, even calling witnesses, even questioning witnesses that were called by either party to—in fact they played a very active part in the trial.

And of course this was not a privilege that was granted to them; it's a right under the statute.

And the judges, doing this for the first time, were very careful, but I think in the end the participation of the victims or by their legal reps became very meaningful.

After the verdict, instead of even talking about reparation within the context of sentence or so, the judges held a separate hearing in which they invited views from everywhere, including, of course, the representatives of victims, about how reparation was to be done. And I think

what has been done—the verdict that has been given or the decision that has been given by the court also again is very significant because it talks about victims, not only direct victims but also indirect victims could ask for reparation. It involves the victims in the process by saying that the trust fund for victims—as you know, which we have—should receive these proposals from the victims themselves and submit it to a newly constituted trial chamber to see.

So I think that significant strides have been taken. The nonparticipation of victims and the non-reparation of victims of course happened in the ad hoc tribunals. And I think this is one of the things that has encouraged those who negotiated the Rome Statute to ensure that there is victim participation and that there is reparation. And I think the way that the court has dealt with it so far is good. It's a good way of implementing the statute.

And also other cases that are coming after Lubanga—you know, hopefully the judges will also decide in a similar manner on reparations. So

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BELLINGER: Yeah. Well, I wish all of our speakers here at the Council on Foreign Relations were always as clear and as precise. You covered an enormous amount of material clearly in one hour. Thank you so much.

I think all of us congratulate you and wish you good luck. (Applause.)

BENSOUDA: Thank you.

