

HE Fatou Bensouda
High Commissioner of The Gambia
to the UK and the Commonwealth
Former Prosecutor of the
International Criminal Court

The General Council of the Bar

International Rule of Law Lecture

26 November 2024

Dear Esteemed Members of the General Council of the Bar,

Dear colleagues,

Ladies and gentlemen,

It is a distinct pleasure and an honour to be here with you today to deliver the 2024 edition of the General Council of the Bar International Rule of Law Lecture, and to share a few reflections on the basis of experience acquired from my first-hand account as former Prosecutor of the International Criminal Court, and more generally, on the state and future of international criminal justice.

I wish to stress at the outset that I am speaking here not in an official but rather personal capacity in sharing these reflections with you.

Ladies and gentlemen,

As I stand before you today, we find ourselves increasingly confronted with gross and unfettered violations of human rights, total disregard for international law in many conflicts around the world, and threats to multilateralism and the post-World War Two rules-based global order, where unchecked realpolitik calculations reign supreme, and the sanctity of sovereignty is misappropriated in the service of exceptionalism and a rejection of the international rule of law.

We are at a defining moment when some of the most important architects of the Post-WW2 multilateral system are either the very same actors undermining their own creation, still-born, or are being tested on whether their true intentions and positions are driven by principle or rather, short-term political calculations often at the cost of international law and a rules-based international system.

This reckoning or moment of truth is taking place in the ‘internet age’ where information is instantly available to millions of people around the world, where the truth can no longer be so easily hidden, and naked hypocrisy lays barren for all to see, irrespective of manufactured spin and so called, ‘alternative facts’.

It bears recalling that the post WW2 global order, however imperfect, was built after the great wars in the hopes of saving future generations from the scourge of destructive power rivalry, perpetual conflicts and mass atrocities.

Dedicated to ensuring mutual respect between nations and the maintenance of international peace and security, organizations were established, such as the United Nations and later regional organizations such as the European Coal and Steel Community, the initial precursor of today’s European Union, which sought to bind together the nations that were the sight of horrendous conflict in WW2.

From a historical macro level evolutionary perspective, the world became a less chaotic and relatively speaking, safer place because of such innovations.

Lest we forget that multilateralism as the preferred modus operandi for inter-state relations, multilateral institutions, including those that advance the peaceful settlement of disputes and the rule of law, are all hard-earned fruits of our costly experience, our common loss, and indeed, our common awakening and collective wisdom – at least, that was our temporary ethos, now increasingly under strain.

In an increasingly inter-dependent world, faced with global challenges from climate change and cross-border terrorism to war and mass atrocities, real success and progress depends on our willingness to acknowledge that it is only through collaboration and a deep conviction in the rule of law, and that no one is above the law, that we can hope to counter the destructive and de-stabilizing force of these ills.

In parallel, an unprecedented effort was made in our not too distant past to ensure a measure of accountability for the atrocities committed during the war, culminating in the Nuremberg and Tokyo Military Tribunals where, for the first time, individuals irrespective of rank or status stood trial and were convicted for their roles in those serious and systematic crimes committed during the war.

The achievements of Nuremberg and Tokyo were unfortunately only short-lived, with the Cold War dynamics paralyzing the international community's efforts to codify such crimes and to create a suitable permanent mechanism. It was not until the hiatus of the 1990s after the collapse of the Cold War order, that the horrors witnessed in the former Yugoslavia and Rwanda prompted renewed efforts to hold individuals accountable for international crimes.

Through these tragedies, the need for a permanent court to try the world's most heinous and destabilizing crimes was given added urgency.

As we know, in Rome, in 1998, the idea behind this aspiration was given effect, with the creation of the world's first permanent international criminal court, complementary to national jurisdictions, with jurisdiction over genocide, crimes against humanity and war crimes.

Since, the International Criminal Court was also given jurisdiction to try the crime of aggression within certain parameters – this was an immensely important development in international law in and of itself.

Ladies and gentlemen,

Dear colleagues

We must not lose sight of the fact that with the establishment of the International Criminal Court itself, an important normative but also structural and systems-based message was sent globally:

- That first, the commission of mass atrocities as merely politics by other means should no longer receive a pass, and that perpetrators irrespective of rank or official status, must answer for their crimes;
- That an international criminal justice system, based on cooperation and complementary action between authorities at the national and international level, is crucial to a rule-based global order, and
- Its institutional manifestation in the form of the ICC is now a reality and an important part and parcel of the international system.

Today, the Court benefits from the membership of 124 States Parties, the latest country to join are the Republic of Armenia. The ICC can possibly have even greater reach due to the Court's jurisdictional competence where nationals of non-states parties commit crimes on the territory of States Parties, or where nationals of State Parties commit atrocities anywhere in the world.

These are seemingly positive developments but the jury is still out if humanity is consistent in its homage to such progressive gains and truly respects international law and the international rule of law.

International justice is only as good as the sum of its parts.

International criminal justice has demonstrated that it can work in practice if it is increasingly accepted and supported by states, as perhaps uncomfortable but necessary mechanisms in the fight against impunity for atrocity crimes and as a possible deterrent against unchecked and savage machinations of war.

Ultimately, international criminal justice, with the ICC at its core, should serve humanity as a whole. Its founding principles are not exclusive to one people, one place, or one time. Its protective embrace is for all to enjoy so long as we have the courage to join it, stand firmly by it and help withstand its challenges and challengers – and as long as we don't allow it to be politicized or instrumentalised for political gain or to shield perpetrators from facing justice.

I would like to recall here the sage words of the late Dag Hammarskjöld., the second Secretary General of the United Nations where he stated that it appears “on the basis of daily experience that the world of order and justice for which we are striving will never be ours unless we are willing to give it the broadest and the firmest possible foundation in law” – end quote. These words should resonate even more today than when they were spoken decades ago.

What is required, today, more than ever, is greater support for international law, and its independent and impartial application.

Acts that may undermine greater accountability for atrocity crimes and a ruled based international order must be avoided and resoundingly rejected.

To me, there is no greater perversion of international law and the cause of human rights than double-standards and selective justice, or law fare masquerading as pseudo calls for accountability.

International justice must be applied equally and consistently if it is to have any meaning, be accepted globally, adequately meet the needs of victims and to effectively deter would be perpetrators.

I believe that we are currently at a pivotal point. The stakes could not be much higher. We are the cusp of a defining moment for the future of international law and international justice.

As I have alluded to, the response from states and other stakeholders is a real test for the future of international criminal justice system.

Time will tell if humanity passes the test. But let's be clear that the cost of failure would be regression and indeed, to our collective detriment.

My own personal record when I served as Prosecutor of the International Criminal speaks for itself. I ensured that we remain committed to the important mandate bestowed upon us by the Rome Statute, as we were clear eyed about the immense responsibility we shouldered, and the importance of the Court to cultivating a culture of accountability for atrocity crimes as a court of last resort.

As Prosecutor, I tried my sincere and honest best, with the courage of my conviction and at great personal cost and sacrifice – not to mention against the background of threats and all forms of pressures and intimidation – to execute my mandate independently, impartially, and objectively, and applied the black letter of the law consistently – without fear or favour.

It is against the standards of unshakable professional integrity, ethical leadership, independence and objectivity that under my term, the Office conducted work in situations across the globe, and opened investigations in Mali, Georgia, Myanmar Bangladesh, Afghanistan and Palestine, among others. We did this work with utmost professionalism and a real devotion to the mandate of the Office of the Prosecutor under the Rome Statute.

Under my leadership, the Office drove significant reforms, and adopted major policy papers, including the Office's first policy paper on sexual and gender-based crimes, crimes against and affecting children; protection of cultural heritage, and situation-closing strategies, while securing major successes in court in a number of pioneering and precedent setting cases, securing convictions.

As the recent developments at the ICC in relation to the Situation in Palestine have elicited a lot of commentary and reactions, and are of the moment so to speak, allow me to make a few short related observations.

When I opened the formal investigation in the Situation in Palestine in March 2021 on the basis of our scrupulous and objective work, I announced that there is a reasonable basis to believe that both Hamas, Palestinian armed groups, and the IDF in the context of the 2014 hostilities in Gaza, have committed war crimes, but also that in the

context of Israel's occupation of the West Bank, including East Jerusalem, that members of the Israeli authorities have committed war crimes of the transfer of Israeli civilians into the West Bank since 13 June 2014.

The warrants that have recently been issued on the basis of Prosecutor Khan's request have focused exclusively on the attacks by Hamas on 7 October 2023 and some of the conduct of Israel in response, and did not include the lines of inquiry that formed the basis of the opening of the investigation, including the illegal settlements – transfer of populations into or out of occupied territory – as a matter of international criminal law.

This latest war in the long tortured history of the Israel-Palestine conflict is still ranging, and the commission of a wide range of alleged crimes is being regularly reported.

It will be important to ensure the full extent of criminality in the context of this devastating longer conflict is fully investigated and accountability is finally had for the benefit of its many victims on all sides of the conflict.

It is also crucially important for States Parties and the international community more broadly to stand by the Court as it carries out its important functions and tries to deliver on the promise of international criminal justice.”

During my term, we undertook our Statute-mandated responsibilities notwithstanding unprecedented pressures, including direct threats to my person and family and some of my closest professional advisors; in some of the toughest situations under the Court's jurisdiction such as the Afghanistan situation or the Israeli-Palestine conflict.

The unacceptable thug-style tactics, threats, intimidation and even sanctions did not result in me or my Office failing to fulfil our obligations under the Rome Statute, or weaken our resolve and sincere devotion to the plight of the victims, and the international rule of law.

The ICC must continue to do its jobs without political interference. It must always apply the law as defined under the Rome Statute and its founding legal instruments. It must not allow political calculations to factor into its decision making. In this, again State Party support is crucial to insulate the Court from pressure and political manipulation of any kind.

Ensuring the election of its high officials, including elected officials such as the Prosecutor and its judges, are transparent and merit-based without fail, and that they are held to the highest standards of professional and ethical conduct is also important to the well-functioning and credibility of the Court.

In short, and while it may seem there is an inherent tension in this proposition, states which are by definition political entities must insulate the ICC from political influence in order to ensure it functions properly as a court of law as intended by its founding treaty, the Rome Statute.

Civil society too has a role. The legal profession at large, including national and regional bar association also have a role to play in assisting the ICC succeed in its important mandate through the provision of support in a myriad of ways, from training and provision of skilled resources and expertise exchange to public advocacy, pursuing cases at the domestic level including through the doctrine of universality where possible, and holding up a mirror up to the Court

and/or states when that is needed to ensure the Rome Statute system stays the course, and is on course.

Together, we can ensure accountability for atrocity crimes wherever needed for victims of the most heinous crimes irrespective of rank, status or how powerful the perpetrators.

The promise of “Never Again” must not become a hollow slogan but rather, lived in practice.

My own experience informs me that am not a forgone conclusion. Far from it.

It requires conviction, dedication, utmost integrity, courage, decency and honesty, tireless work, support from states, NGOs, victims groups, academic institutions, the legal profession, the media – in short, this is a collective project for the betterment of humanity.

We either get it right and stand by human rights and a pledge to a more just world in a principled and consistent fashion, or we settle for the default position of cynical reality of deception, shielding and double-standards where ‘might is right’, and the human rights card is wielded only as a convenient tool of lawfare against one’s political foes.

It is up to us to choose the world that we want to live in, and to secure for future generations.

In this new Century, in an increasingly multipolar world, our collective ethos from the so called Global North and the Global South

must set higher standards than the status quo when it comes to adherence and application of international law.

I close by stating that we must remain firmly principled and vigilant in the service of humanity and the fight against impunity for atrocity crimes.

The future and legitimacy of international rule of law depends on it. It is as simple as that. Do not let anyone deceive themselves or you to think otherwise. As former ICC Prosecutor, I have earnestly tried to do my part to the best of my abilities against all odds and great challenges.

It is my sincere hope and conviction that with unshakable resolve, advocates and agents of peace and stability the world-over in this and future generations – including the legal profession – commit to ensuring that multilateralism, the international rule of law and their instruments of practice take humanity to the next more elevated phase of civilization.

To be sure, the challenges are formidable but the costs of failure are too great to be complacent.

As we sit here today, there are gross human violations taking place in conflict around the world. That should be blight on our collective conscience.

Humanity's quest for a more just world has travelled a long path but it is yet to arrive at its destination. Let's keep those legs moving, ever faster.

Thank you for your time and I look forward to your comments and questions