Professor Ginsburg focuses on comparative and international law from an interdisciplinary perspective. He holds B.A., J.D., and Ph.D. degrees from the University of California at Berkeley. One of his books, Judicial Review in New Democracies (Cambridge University Press 2003) won the C. Herman Pritchett Award from the American Political Science Association for best book on law and courts. He currently co-directs the Comparative Constitutions Project, an effort funded by the National Science Foundation to gather and analyze the constitutions of all independent nation-states since 1789. Before entering law teaching, he served as a legal adviser at the Iran-U.S. Claims Tribunal, The Hague, Netherlands, and consulted with numerous international development agencies and foreign governments on legal and constitutional reform.

Q: As a scholar of comparative constitutional law what is your opinion of the doctrine of complementarity? How does complementarity actually work to accommodate both national sovereignty and the enforcement of fundamental human rights? Under what circumstances can we expect the Chief Prosecutor to accept assertions of national jurisdiction?

From the perspective of comparative constitutional law the doctrine of complementarity is a good thing. It reassures those jurisdiction that are afraid of international overreaching that they will have a degree of autonomy, and also allows those jurisdictions with more capacity for justice to pursue issues of impunity in their own way.

From the perspective of the international system, however, I think complementarity raises some problems and that it is clearly a second best solution. The problems are those that are familiar in debates over universal jurisdiction. The system of universal jurisdiction means that international crimes are adjudicated, potentially, in the courts of a hundred and ninety some separate countries. This could have grave consequences for consistency and development of the law. The complementarity regime is a half-best solution from the point of view of the international system.

It was designed to induce powerful states like the US to join the Rome Statute, but, of course, it ultimately failed to do that. In the negotiations the US was obviously pushing for the doctrine of complementarity, but there were some in the US that would not have
supported the Statute unless it included blanket immunity for the US. So even though the US lobbied for complementarity, fixing or reforming the regime of complementarity is unlikely to induce the US to join the Rome Statute.

Q: What do you think about the ICC’s Pre-Trial Chamber’s refusal to grant genocide charges requested against Bashir? Will this at all be seen as a failure? How will it influence on the indictment process and the political situation?

I heard a radio interview with Bashir’s lawyer in which he claimed that this was a great victory and that it showed the weakness of all the charges. This is obviously not the case, and clearly the court did think that it had the evidence to go forward with charges of crimes against humanity and war crimes. Genocide does require a high evidentiary burden in the sense that it does require specific intent, which can be very difficult to prove. Merely causing massive numbers of deaths is not enough to warrant a genocide charge, one must have specific intent to destroy the group qua group.

I read this as the court showing that it takes its duties seriously to review the prosecutor’s request for indictment and, having weighed the evidence, simply thinking that in was insufficient to warrant that particular charge of genocide. That’s the extent of the issue here. You could view it as a signal to Bashir, insofar as the court might not be going as far as it could have, but I do not actually think that was the court’s motivation.

In general this points to a predicament that the court has been in that I address in a recent article in the Chicago Journal of International Law. It appears that the Europeans would like to use the court as a sort of negotiating stick to induce Bashir to behave better in Darfur. From the point of view of the court, however, this raises serious problems. A court’s indictment and legal process requires that it go forward without regard to politics; this is the nature of legal discourse. The court does not want to develop a reputation as being an attack dog that can be pulled off at the will of particular states or groups of states. In other words the court needs to be a credible institution, which will credibly pursue justice without regard to the political imperatives of the moment. Much of what has gone on in the last eight or nine months since the indictment was issued has been negotiation trying to get Bashir to behave better in exchange for an implicit quid pro quo that the court would not go forward. I think that dynamic itself damages the court.

Q: You’ve written about the Bashir indictment before and highlighted that it brings forward a “clash of commitments” between political considerations of state actors and the ICC’s own agenda as a court pursuing legal justice? Could you explain how this tension plays out in the context of the Bashir case? What do you think will ultimately be the outcome of the indictment and how will it set precedent for the courts future prosecutions? And its perception internationally?

The clash of commitments refers to the tension between several imperatives at play in
international criminal law. States, particularly those with weak capacity, join the ICC to ensure prosecution of major perpetrators; the court needs to follow through on its commitment to prosecute, or it will be seen as a mere political tool. On the other hand, sometimes states need to commit not to prosecute in order to induce perpetrators to step down or end their criminal activities. Something now has to give in the clash of commitments. Either the court will lose its reputation as a body that can bring major international criminals to justice or it will succeed and the implicit promises by the Chinese and others to go easy on Bashir will be dashed. If the latter then we will look back and say that the indictment was a great turning point for the court. All signs, however, indicate that it will not succeed; barring a humanitarian intervention by the Western powers in the Sudan it is difficult to see how Bashir will ever be turned over to the jurisdiction of the ICC.

Remember that notwithstanding all the protests in Sudan about the US interfering about interfering with its internal affairs, the US is not the ICC and the US is not a party to the Rome Statute. The Court is essentially betting that the US will somehow go in and get Bashir or expend precious political capital, and in the short run I don’t think that the US is going to expend that capital.

This is a very interesting development. One of the common criticisms of human rights legislation in the US is that it is plaintiff driven, and that it leads to plaintiffs’ diplomacy; international relations are subject to endogenous shocks that are caused by individual plaintiffs filing law suits, for example against terrorist states in the US or against foreign individuals who have been engaged in torture under the Alien Tort Claims Act. What we have here is not plaintiffs’ diplomacy, but judicial diplomacy, where international relations has been shocked by an autonomous court issuing an arrest warrant for a sitting head of state. I do not think that anyone is that happy about this development: people in Washington are not pleased and certainly regimes like China and others who support Bashir do not want to spend their political capital protecting him. The court has forced all of these issues on to the international agenda. The court is betting that the US and other Western powers are willing to spend the capital necessary to bring Bashir into custody, and I’m skeptical of that given the others things on the agendas of the international community at the moment.

Only time will tell if the US will act on this case. It strikes me that the US will not want to escalate the situation. Bashir will make things worse for himself if he goes on to create a humanitarian crisis in Darfur. It may be that the ends up backing off from the steps he has already taken to expel aid groups. If he simply maintains the status quo, then he gets a lot of what he wants without exacerbating the situation and it is difficult to imagine an immediate threat to him.

An interesting test of this will be whether Bashir can travel to those countries that are signatories to the Rome Statute, such as many members of the African Union., that have
been diplomatically supportive to him. These states have an obligation to arrest him and take him into custody to extradite him to the Hague, but it is unclear if they will actually do so. This again illustrates the risky nature of the arrest warrant: if countries allow him to travel without arresting him then the court is worse off than it was before this whole incident.

Q: Does the ICC have an implicit political role to fulfill? What is this role? Should the court strive to remain politically neutral in conflict situations? Does the court’s participation in political conflicts threaten to undermine its perceived legitimacy?

All courts by their nature do have political impact and are political institutions, but very particular kinds of political institutions. They are dependent on relationships with other political institutions to instantiate their decisions. The court does have to act in a way that is very sensitive to what is possible.

Let me give you an example: in the US we have just had a change in power from a president who presided over a regime of state-sponsored torture. Because some of these incidents involved states that were and are parties to the ICC, some took place in Iraq and some involved renditions and transport through countries that were signatories, arguably the ICC would have jurisdiction to examine whether Bush or Rumsfeld were guilty of war crimes.

It is highly unlikely that the court will take on such a case because it would effectively spell the end of the court. There would be such political pressure from the US to cut off the ICC’s funding and to sign bilateral agreements with countries requiring them to exit the Rome Statute or otherwise not cooperate with the court vis-à-vis the US. In the end such a case would harm the court’s overall mission.

Now the Sudan case might not be quite that kind of case, but it is certainly a risky one from a practical point of view. The prosecutor and the judges have bet the institutions credibility on its ability to try a sitting head of state who is not in their custody. This may be a terrifically successful gamble, but right now I would say the more likely outcome is that it will be a very unsuccessful gamble. This is what I mean by saying that courts have to act within their political contexts. They must be aware of what is possible in the pursuit of justice and particularly pay attention to what is possible in terms of securing those they indict for trial.

Q: What would represent "success" for the court overall? What are the standards by which we can consider a prosecution successful?

I think that first of all the court needs to meet standards of justice and basic due process
and doing all of this in an economical enough fashion that they are not criticized as the ICTY was. With the ICTY some people wonder if the whole effort was actually worth it, given that well over a billion dollar was spent on a few dozen cases.

I do think that it is possible for the court to be successful and I think it is likely, if it chooses cases that it can successfully deal with, to succeed. It could be that we will look back at the this moment, as people do now looking at the Karadzic case of the ICTY, where setting out an arrest warrant that seemed impossible to execute was actually good for the court and for the pursuit of justice in the former Yugoslavia. I, however, remain skeptical that this will be the case with Bashir.

Q: What do you think will be the outcome of the court’s first set of prosecutions? How influential will these prosecutions be for the court’s future activities? If the Lubanga and Bemba trial are prosecuted successfully, but Bashir remains at large will the court still be viewed as successful?

I think that establishing a reputation for conducting high quality prosecution of mid to upper level officials might convince the international community that the court is playing a real and important role.

One reason that it is important to have a lot of cases is so that the court can help develop the standards of international criminal law that are articulated by the ICC and other international legal tribunals. To do this the court will need to take on a sufficiently large number of different cases in different situations.

Moving away from some of the more controversial and ambitious task of international criminal law, such as defining the crime of aggression for example, is probably healthy for the court as well. It should be seeking to play a moderate role in international politics by providing credible transitional justice, but it should not be trying to engage in judges’ diplomacy where it tries to independently affect the political calculus of the most powerful states.

Q: What do you see as the future role of the court in 10 years? Will international criminal law gain increased authority and enforceability? What will its relationship be with key stakeholders? Might the US ratify the Rome Statute in the future? Why or why not?

So far the court has been mockingly referred to as “the international court of African crimes” and there are reasons this has been the case. Many African countries lack the capacity to engage in these prosecutions on their own. There is also a sense in which, consistent with political logic, that the court is avoiding making decisions that are uncomfortable for the most powerful states.
This is not necessarily a bad thing. The court is building up a credible record of pursuing and providing international justice. If the court succeeds at this it may be that, bearing in mind possible changes in the landscape of international power relations, it may be able to expand its jurisdiction to cover other situations outside of Africa.

In any case the court is essentially an instrument of Western policy, in the sense that most dictatorships are not interested in the international criminal law project. In that sense the position of the court will depend upon the overall balance of democracy and dictatorship of the world in ten years. Right now the pendulum seems to be swinging back toward dictatorship. If that reverses and we have a fourth wave of democracy, which is not implausible given the speed of economic change, then one could imagine a heightened role for the court. The ICC can only play the heightened role if it itself is a pragmatic political actor.

Q: Given that the Bashir case is the result of Security Council referral how might this change the political calculus of the prosecutor? What more pragmatic options could the court have pursued short of indicting Bahsir?

Much depends on the factual circumstances of who was responsible for what in the Sudan, which I confess to know less about than I should. It may still, however, have been more pragmatic to go after a set of lower ranking officials. What we are essentially talking about here are horrible actions that really are attributable to a collectivity and the international criminal law paradigm doesn’t fit the situation perfectly, when one considers the role of the Janjaweed militias and such. Given that international criminal law is our only real tool in providing justice in this situation that is what was used.

Ocampo is clearly a gambling man, and it may be that he will win big—if that is so more power to him, but I remain skeptical. I think this indictment does reflect a little bit of the sort of over-ambitious missionary attitude toward justice at all costs. It is better to have a little justice than none at all, and it may be that this risky approach may end up undermining the very enterprise of pursuing transitional justice and the international criminal law projects for those many perpetrators that it is actually possible to prosecute and punish.