David Tolbert most recently served as U.N. assistant secretary-general and special advisor to the U.N. Assistance to the Khmer Rouge Trials (UNAKRT). From 2004 through March 2008, he was the deputy prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). Tolbert has extensive experience in international law. Prior to his position as deputy prosecutor, Tolbert was the deputy registrar of the ICTY. He also served as executive director of the American Bar Association’s Central European and Eurasian Law Initiative (ABA CEELI), which manages rule of law development programs throughout Eastern Europe and the former Soviet Union. Prior to his work at ABA CEELI, Tolbert also served at the ICTY as chef de cabinet to the then president and as the senior legal Adviser to the Registry. He has held the position of chief, General Legal Division of the U.N. Relief and Works Agency (UNRWA) in Vienna, Austria and Gaza. He has also taught international law and human rights at the post-graduate level in the United Kingdom and practiced law for many years in the United States. He has published a number of publications regarding international criminal justice, the ICTY and the International Criminal Court (ICC) and represented the ICTY in the discussions leading up to the creation of the ICC.

Q. You have worked at the ICTY and in Cambodia, cases in which the application of the genocide convention was controversial. What do you make of the Pre-Trial Chamber’s failure to grant Ocampo genocide charges in this case? What is the significance here?

A. I have not had the chance to study seriously the Pre-Trial Chamber’s ruling on the genocide charge. In terms of a general comment, in the course of the history of the ICTY, the only occasions that we were able to obtain genocide convictions arose out of the Srebrenica massacre. Thus, there was a limited application of the Genocide Convention in the ICTY case law, as compared to the ICTR. In Cambodia, the principal crimes do not fall within the ambit of the Genocide Convention because, for the most part, the killings did not target specific religious, national, racial or ethnic groups. There may be genocide charges relating to specific ethnic or national groups such as the Hmong or Vietnamese populations in Cambodia, but the Genocide Convention does not appear to apply to the vast majority of the killings and crimes committed during the Khmer Rouge period.

One of my general concerns with respect to genocide is that while obviously genocide is a very serious crime, there is often a feeling among victims and among the international community as a whole, that if crimes are not found to be genocide then they are somehow less serious than other violations of international humanitarian law, with the perception that crimes against humanity take second place since genocide is perceived to be ‘the crime of crimes’. This disturbs me because genocide is a very particular crime and it is difficult to show the intent that is required to prove genocide. Moreover, there are many
criminals against humanity that are just as serious, but do not qualify as genocide because they are not committed with the specific intent to destroy, in whole or in part, a specific ethnic, religious, national or racial group. Cambodia is a good example of this issue. During the Khmer Rouge period, the worst crimes committed in my lifetime occurred, but most of these acts do not fit within the rubric of genocide.

With the recent Pre-Trial Chamber decision in the Bashir case, there are allegations of extremely serious crimes against humanity: extermination, persecution, etc. My concern, however, is that people can see the failure to have the label of genocide put on these findings and believe they are somehow less serious or should be taken less seriously. I think we need to do a much better job as international lawyers, particularly those of us in the international criminal law field, of explaining genocide in terms of its legal elements. We need to help people understand that this criteria applies in particular situations and does not apply to other situations, but that crimes against humanity and war crimes can be every bit as serious as crimes of genocide.

I was on a panel at a conference some years ago with Geoffrey Robertson, who advocated doing away with the crime of genocide because it is so difficult to prove and controversial. I do not agree with that argument. Genocide is a crime that is on the books and needs to be prosecuted where it applies, but we need to do a better job of explaining how crimes against humanity and war crimes can be just as serious.

Q. How does the Pre-Trial Chamber's ruling in the Bashir case relate to the 2005 UN Commission of Inquiry’s findings? Does the Court’s refusal to grant the genocide charges support the findings of the Commission? Are we reaching a consensus that the violence in Darfur is not appropriately classified as genocide? How will this influence the future development of international criminal law?

A. I want to be very cautious because I understand the prosecutor has said he is going to appeal the decision, so I think we have to wait and see what is the result of that appeal especially, particularly since the Pre-Trial Chamber’s decision was a split decision. The Commission and the majority of the Pre-Trial Chamber did not find the facts sufficient to support a genocide charge. I think we have to wait and see and let the process play itself out. Also the Pre-Trial Chamber said although there is not enough evidence to sustain a genocide charge at this stage, it is open to receiving additional evidence. The prosecutor has not been able to get into Sudan for the last several years. In any event, the Pre-Trial Chamber’s decision is an indication that we may well be dealing with crimes against humanity and not genocide in the Darfur case. However, we should wait until we have a more final judicial determination before we make any predictions.

The Pre-Trial Chamber has found that there is a prima facie case of horrific crimes in Darfur. Thus, I go back to my first answer and say that we need to do a better job of explaining that simply because there is not a genocide charge, it does not mean that these crimes are not as serious as those that fall under the rubric of genocide. These are extremely serious crimes and human suffering is present in these cases regardless of whether the label of genocide, crimes against humanity or something else is used. I hope
the world does not lose focus or somehow downgrade the significance of the charges because of the particular legal label that is attached to them.

Q. You are currently researching the impact of international criminal tribunals on peace and security in the countries where they have jurisdiction. What methodologies are you using in this study to measure the impact of the tribunals? What case studies are you using? What are your preliminary findings?

A. I have narrowed the focus of my research. I have not come up with the right term yet, but I am examining what I call “positive complementarity” or the “other side of complementarity.” I am looking at how international courts can work effectively with domestic courts. On behalf of International Criminal Law Services, an NGO, I spent a month in Bosnia in November and was there again recently, and Aleksandar Kontic and I did an extensive assessment of the Bosnia State Court and Prosecutor’s Office, looking at how these institutions are performing. The State Court is a national court that has hybrid elements: international judges sit with domestic judges, and international prosecutors work with national prosecutors. I was interested in these institutions because I spent considerable time at the ICTY working with actors in the region and with the State Court. When I served as Chef de Cabinet to President McDonald, we set up the first international tribunal outreach program to try and explain the role of the ICTY to people in the former Yugoslavia. I was also involved in establishing the Rules of the Road program, whereby the Office of the Prosecutor reviewed cases from domestic prosecutors to see whether they met international standards, and subsequently we moved on to transferring indicted cases from the ICTY to national courts, subject to monitoring. I chaired the joint ICTY-OHR legal framework task force (which was responsible for establishing the legal infrastructure for the transfer of cases) and then headed the Office of the Prosecutor’s Transition Team, which handed over cases that had been developed but not indicted at the ICTY to national prosecutors (called, in our parlance, Category 2 cases). We also shared information by allowing our databases to be accessed by national prosecutors. I have been very interested in how that process is working and I have been pleased to find that it is working well in Bosnia in most respects.

We are moving past the era of the ad hoc tribunals. We also have the benefit of the experience of the Special Court for Sierra Leone and other experiments with hybrid courts, but what we are missing is a fully developed strategy to assist national courts in prosecuting these crimes. Complementarity at the ICC needs to be about more than the legal standard that the ICC applies in determining which cases or situations it is eligible to take. If the ICC takes the case of the general, who prosecutes the colonel? If war crimes prosecutions are going to be effective, how can we build national systems that are effective as well? This is an issue facing the international justice movement, and I am trying to look at these issues, particularly given my experience in Bosnia and the former Yugoslavia and to see whether those models can be applied more broadly.

Q. What do you think will be the role of regional and hybrid tribunals in the future of international criminal law? Given that the ICC is now up and running and is a permanent court, will the creation of tribunals like the ICTR, ICTY, Sierra Leone
etc., no longer be necessary? Will all major violations of international criminal law be filtered through the ICC? Also, how should the ICC view the case law of the regional and hybrid tribunals?

A. I do not think there are going to be more ad hoc tribunals like the ICTR and ICTY. I do think that there will be additional hybrid tribunals, similar to those in Sierra Leone and Bosnia, and perhaps prosecutions under UN Transitional Authorities like Kosovo and East Timor. I believe we have to develop a better way of doing this, and we have to find ways to build up local capacity and to create partnerships between local courts and the ICC. Thus, we need a wider concept of complementarity. If complementarity is merely the standard used to determine who gets prosecuted at the ICC, and nothing happens in the country of origin, if there are no further efforts to prosecute or investigate the alleged crimes, then the ICC’s impact is going to be relatively limited. Thus, we must have a broader strategy. While it is a great accomplishment to have the ICC in place, it is going to deal with a relative small number of cases and only a handful of leaders, particularly given the number of conflicts in the world.

In terms of the decisions and substantive law that has been generated by the ICTR and the ICTY in particular, I believe the decisions of these courts have to be given a great deal of weight by the ICC, and I think they are being given this weight. Obviously these decisions are not binding on the ICC, but they represent a body of law that been developed by a common appeals chamber and is entitled to respect. As a former prosecutor I have not always agreed with the decisions of the appeals chamber, but on the whole, the ICTR and ICTY and some of the other courts have developed a solid basis of international criminal jurisprudence that has being referred to by the ICC and should be taken very seriously. It is not binding but it must not be disregarded.

Q. What types of outcomes will the ICC need to produce in order to establish its legitimacy on the international stage? In terms of the Bashir case, the Lubanga Trial or the Bemba Trial, but also more generally, what does the Court need to be to be seen as a viable, respected actor?

A. The ICC needs to have solid cases with solid decisions that meet international standards that are widely seen as fair. That is the basic outcome that we will need to see to establish the Court’s legitimacy. When we look back to the early days of the ICTY, I can remember the first (Tadic) trial, with Judge McDonald presiding. It was widely seen as a fair trial, which was important for the legitimacy and credibility of the ICTY as an institution. The trials at the ICTY and ICTR have largely been seen to be fair and to have been conducted in accordance with applicable international and domestic standards of law. This is the same outcome that we need to see at the ICC.

An important issue that always haunts these international courts is that they do not have coercive powers; they do not have police forces or ways to effect arrests and garner evidence. This is a big factor that works against them. We should take the long-view and assess these tribunals over time. I know that there are many comments that Bashir will not be coming to The Hague. On the other hand, if I think back to Milosevic and all the
people we indicted at the ICTY, we heard the same concerns. Now Karadzic is in the dock, Milosevic stood trial, and of the 161 people that were indicted, 159 have come to The Hague, had their cases heard, dismissed or transferred, or they are deceased. On the whole, the record of the ICTY looks quite good. The ICTR’s record does not look bad either. Moreover, I would not judge the ICC or other tribunals on cooperation issues; I would judge the ICC on its ability to conduct fair trials in proceedings that are seen as such by objective, outside observers.

Q. As a follow up question: do you think if Bashir were never brought to trial before the ICC, but that the Court did still manage to have a series of successful prosecutions for lower level officials in different conflicts, that the Court would still be viewed as successful?

A. I think the Court will not be viewed as a success or failure on the basis of one case. I hope it will be judged on its overall record over a longer period of time. I do not think it would be fair to put too much weight on one case. I would not want to judge the ICTY, for example, on the basis of Milosevic dying during the trial. I do not think that it is fair and objective standard. We would not judge the US Supreme Court solely on the basis of the Dred Scott case or Plessy vs. Ferguson. The House of Lords has made some bad decisions over the years, but if you look at the record of these courts as a whole, it is a different story.

Q. Does the ICC have an implicitly political role to fulfill in conflict situations? If so, what should that role be? Should the Court strive to remain politically neutral?

A. In general, of course the prosecutor has to be fully aware of the political situation that he or she is acting in. Prosecutors are elected officials in the sense that the Assembly of State Parties selects them. Most prosecutors need to be cognizant of the political situation in which they are dealing and that affects things like the timing of the issuance of indictments and also has a significant impact on important questions like witness protection, security of staff, and related matters. The political situation is something that the prosecutor always has to be aware of. However, my view is that the prosecutor is first and foremost a judicial actor. Therefore, his or her primary focus is to apply the relevant law to the situation, and the criteria that is set forth in the applicable statute. So yes, there are going to be political considerations or political factors that will have an impact of the Prosecutor’s work and on decisions, but a prosecutor first and foremost must be guided by the law and be a judicial officer. If he or she is seen as a political actor, then, at the end of the day, he or she is going to lose credibility and the Prosecutor’s office is going to lose legitimacy. It is thus important to keep the judicial framework in mind.

Q. There’s been discussion recently that the African Union and the Arab League potentially want to seek a deferral on the basis of Article 16 for the Bashir indictment. Is that a viable option and what should be the criteria for deploying or using article 16? What might be the impact of using it for the future of the Court?
A. Article 16 was essentially a compromise. I remember when it was introduced by Singapore at a New York ICC Preparatory Committee meeting. It was a compromise to placate the permanent five members of the UN Security Council, particularly the United States, which had wanted the Security Council to be in a position to control the situations that the Prosecutor was allowed to investigate. Since this position was not accepted, Article 16 gave the Security Council some power to temporarily halt an investigation when the Prosecutor exercised his or her proprio motu powers or where there had been a state referral. My understanding of Article 16, and I believe that former US War Crimes Ambassador David Scheffer has been pretty clear about this, was never intended to apply to a referral by the Security Council itself. This kind of stop-start approach, whereby the Security Council sanctions an investigation and then pulls it back, was not the intention behind Article 16. Be that as it may, I guess Article 16 can be interpreted in this way. However, my view is that Article 16 is intended for some kind of extraordinary situation. Thus, as a former prosecutor, it causes me concern and nervousness that one could begin a legitimate investigation and then have it halted for reasons that are essentially political and not judicial. My opinion is that the Security Council should exercise Article 16 extremely cautiously. I do not foresee a situation where it would be used, and I certainly do not see the Darfur situation as warranting an application of Article 16. I realize the situation in Darfur is very complex, and there is clearly a considerable political dimension at play, but it seems to me like the prosecutor is acting appropriately under the statute thus far and the process should be left to proceed on its own terms.

Q. How significant is it that the first set of cases that have been referred to the ICC are all for crimes committed in Africa? How might this affect its overall legitimacy? Where, in the future, do you think the Court might find other indictments?

A. What I find a little odd about this ‘only in Africa’ mantra is that my recollection is that in the case of Uganda, the situation was a self-referral made by Government of Uganda. The DRC was self-referred by that government as was the case of Central African Republic. So out of the four situations, three have been referred by the countries themselves. Moreover, the Prosecutor has looked at a number of other situations, such as Iraq, Colombia, Georgia, etc. It does not look to me like the prosecutor has simply focused on Africa. It appears that, except in the case of Sudan, these countries came to him. You can have an argument about whether self-referral is intended in the ICC Statute. There is criticism of the process of self-referral and that is a legitimate subject for discussion and debate, but it is not as if the prosecutor has exclusively focused on Africa. African leaders to the Court referred these cases. However, I do think that this discussion does raise a fundamentally important question regarding international justice and for which we do not have an adequate answer yet. That is that the ICC’s jurisdiction is not universal. While the situation has certainly improved dramatically with the ICC, as with the ICTY, it only had jurisdiction over the former Yugoslavia and the ICTR over Rwanda. Now the ICC has a much broader jurisdiction. Nonetheless, there are many war crimes that are being committed or have been committed that it does not have jurisdiction over. There are only 108 state parties to the ICC out of the 192 members of UN, so there are many countries that are not covered by the ICC’s jurisdiction. The Security Council referrals are obviously subject to the veto of the permanent five, so there are still vast
areas of the world that are not covered by the ICC and this is a problem. I do not think it is an argument against international justice; instead it is an argument for expanding the coverage of the ICC so that it covers the entire world. However, at present the ICC is imperfect in terms of its jurisdictional scope, and we have to push harder for further ratifications. Nonetheless, if we go back to 1993, when no international court or tribunal had any jurisdiction and see that 15 years later the ICC has broad jurisdiction, then we are making progress. It is indeed essential for more states to join the ICC, so we address the lacunae that presently exist.

Q. The mandate of the Rome Statute was originally supposed to govern the crime of aggression as well. There has been much debate about how the crime of aggression will be defined and whether it will actually be incorporated into the list of crimes the Court will prosecute. What do you think is the future of the definition for this crime and its relation to the ICC?

A. It looks to me like it will continue to be debated for some time. We will have to see what the review conference comes up with. There is a lot of controversy around the crime of aggression, and there always has been. The very term is difficult to define. To some extent, the Court has plenty of work to do already, dealing with genocide, crimes against humanity, and war crimes. I doubt the issue of aggression is going to be solved anytime soon, but on the other hand, I have not attended the ICC meetings on aggression. Thus, I am just a distant observer.

Q. Could you speculate on the future of the Court in five or ten years? What are the best and worst case scenarios for its standing in the international system? What can the Court and international actors do to cement the Court’s legitimacy?

A. My first reaction is to say what Chou En-lai said of the impact of French Revolution: it’s a little early to tell…. There are a couple of possible scenarios. Hopefully the Court will become stronger, passing some of these early tests and difficulties, expanding the number of states parties, thus having much broader jurisdiction, and becoming a truly effective court. Of course, one can see an alternative scenario where things go in another direction, and the Darfur situation is deeply worrying in this regard. However, I am heartened by the ad hoc tribunals’ experience. I will never forget in 1997 when I was working in the ICTY, and I was thinking to myself: where is this going? We had only a couple detainees in custody, and we seemed to have no hope for additional indictees arriving. The world’s attention seemed to have shifted away, and the ICTY looked in bad shape. A leading commentator, writing in Foreign Affairs, advocated for winding up the tribunal and closing it down. Over the next ten years, the situation completely turned around. Thus, it is difficult to make predictions, but based on the experience of the ICTY and ICTR and the general course of the international justice movement, I think there are some causes for optimism. I think you have to be an optimist in this business.

*Interview conducted by Zachary Manfredi and Julie Veroff.*