Q. What are some of the potential consequences of the indictment of President Bashir domestically in Sudan with regard to the North-South conflict and the situation in Darfur?

A: We can already see the consequences. There is increased tension. Local partners, civil society organizations, and activists are trying to keep their heads down. They are nervous and unsure. This is a regime that can be very unpredictable, and so the consequences are that the unpredictability is ratcheted up a little more. People are afraid that Bashir might do something to punish the West. So far, [March 10 2009] we’ve seen the expulsion order [of aid agencies] and I am hoping that that is the maximum extent of the response, but we’re still not sure.

In terms of a North-South relationship, the indictment again puts stress and tension on a relationship that is not a great one to begin with. Salva Kiir and Bashir are not the best of friends; they do not seem to consult each other before making decisions. We’ve already had an announcement from the representative of the Government of South Sudan mission in Washington this week that the decision to expel the aid organizations was taken without consultation of the SPLM, which is a significant decision to be taken without consulting your partner in government. This is national unity in name only. The public nature of the decision, and that it was taken unilaterally, puts stress on what should be a functioning political partnership. It still seems that the balance of calculus is in favor of continuing the theater of the peace: acting as if the peace is holding because neither side seems to feel that it is beneficial to actually descend into North-South war again. So that is holding it together.
This [increased tension] is what would be the case if there were any kind of external pressure on Bashir. This response is not particular to the ICC arrest warrant; it is just the result of additional pressure on Bashir.

Q. Given the work that you have done on education in Sudan and universities as sites of social change, what is support like for Bashir among the educated and professional Sudanese elite? Can we expect internal opposition, political support, or demands for accountability to increase or diminish after the indictment? What is the perception of the ICC among these groups?

A: Inside the universities, all of the administrative positions down to the chairs of departments are political appointees. They are selected for loyalty, so the administration of the public universities would pledge public support for Bashir. For some, the public role that they play in universities may be different from their private beliefs, but they are not going to publicly challenge the government. For others, particularly after 2005 when the CPA took hold, a number of people returned from the diaspora, including academics who had gone and taught somewhere else to escape the restrictions of the regime from 1989. Those people have to walk an extremely fine line.

I have to say that the university system has been effectively neutralized as a kind of incubator for transformation or revolution. Transformation possibly, but revolution far less likely. The Government keeps a close eye on political activity; it is very tightly controlled. If students want to demonstrate, or if there is any kind of movement that looks like it is aimed at the government, it will be struck down with serious force. So that just tells you that it will take a very brave collection of students or faculty members indeed to get past what is obviously willingness by the regime to use serious force in the university environment. This has happened since 1989. There have been incidents of demonstration and even violence by the students where they become highly contentious and will fight each other and those situations are put down forcefully; they are not allowed to get out of hand. The Government says it is keeping the peace, but it also has the effect of quelling the kinds of revolution that might spring out of the academy.

Q. Can you speak about the construction of memory around the North-South conflict in terms of educational instruction, textbooks, and so forth, and how this might affect future generations of students, the conflict itself, and transition after the conflict, should that happen?

A: My understanding is that the Northern curriculum is still quite untouched. It hasn’t been modified very much from the height of the war years when it was a heavily militarized curriculum, in which the examples were those of the honor of fighting for your country, being a Muslim fighting against non-Muslims, in which there is a clear reference to the South being the enemy. The Northern curriculum for primary school is still fairly antiquated. It hasn’t really addressed the shift in circumstances: the Government of National Unity, the CPA, and the transition.
The universities are a little more free to try to use external sources for their texts, so they are, but they’ve also been seriously hampered by the general degradation in academic standards. Students don’t read and write any foreign languages very well, English among them, and English in particular is the best language for getting up to date information in most fields. So the university professors of a certain age who were themselves educated in a very robust system that still resembled the English educational system that was left behind when the British left in 1956 are really unhappy because their students aren’t up to snuff. There are scholars in Sudan who are appalled by this and want to see it changed, even in the government. There is a new Minister of Higher Education, from the SPLM. But of course, the ministries given to the SPLM are often weakened by lack of support from the civil service, so it is unclear what kind of power he’ll be able to exert. But, he is clearly interested in being proactive, and in peaceful appreciation of unity and diversity. It will be interesting to see if he’s able to achieve anything in terms of curriculum for universities and in terms of raising the standards. There is still quite a lot of need to update the standards, the textbooks, the materials, and the curriculum. It will take a generation or so to get the academic institutions back to where they were before this regime, before the educational revolution.

In the South, it’s a whole different story. They are really investing heavily in completely rewriting their own curriculum, so it will be significantly different. I don’t know what kind of history they will tell, so I can only speculate whether it will be conducive to living peacefully with a northern neighbor should they secede, or to unity should they stay in the country. It is an incredibly complicated and complex social process that the South is undergoing right now. And of course the South, let alone what kind of history they’re teaching, has a tremendous literacy issue that the Government will have to address very aggressively. This question is still open. It remains to be seen what will happen in terms of curriculum contributing to peaceful relations in the future. There are people who are interested in making peace studies and conflict resolution a very significant part of curriculum from the start, but whether they’ll be able to succeed is another question.

Q. Secretary General Ban Ki Moon has recently said that there might still be potential for some kind of domestic prosecution in Sudan. Do you think there are domestic mechanisms that may seek accountability for crimes in Darfur? Also, what is the perception of the ICC within Sudan? President Bashir has called the ICC a court of Western imposition and linked it to neo-colonialism. Is this a pervasive view? How much traction does it have with the broader population?

A: On the Secretary General’s comment, I don’t see it, unless he’s referring to a hybrid court. There are certainly very skilled attorneys and legal minds in Sudan, but as a whole, the bar and the court system have not demonstrated the necessary independence in any significant way. To put Bashir through the ordinary existing court system while his government still stands would not be justice or meet internationally fair standards. If he’s referring to conversations that he’s had in which the issue of a possible hybrid court has been raised, in which there’s an ability to check and monitor the Sudanese process, then that’s a significant difference.
The question of how the ICC is perceived in Sudan today is a very complex one. Publicly, in statements made by the SPLM and newspaper editors, there’s been a real hesitation and reluctance to come out in favor of the Court and against Bashir. Only Turabi seems to have the stature and the courage to say that Bashir should just submit himself to the process. There were statements like that a few months ago, before it was clear that the warrant was really coming. People wrote editorials saying that the proper response would be to show the evidence in your defense. People were able to say that a few months ago, but not now. You have very intimidating remarks by the head of the intelligence services, such as “We’ve been extremist before, we can do it again.” That’s a very threatening kind of statement. No one doubts that he’s capable of ordering very severe measures. So there’s a real dampening effect on speech.

Of the six or seven Darfurians I have spoken with, in the US and in Darfur, they are fairly positive about the process. They seem to understand that it will not necessarily make their lives better. They are happy that Bashir is indicted, but they are of course a little bit anxious about what the results of that might mean for them. But I haven’t heard them condemn the process as artificial.

The Southerners, the SPLM, have to be careful in public. They may not mind privately if Bashir is prosecuted, but this stance cannot be stated while they are part of the GONU. And they are very concerned about not jeopardizing the CPA. The truth is that it’s hard to get the truth, because you have to get Sudanese where they’re safe in order to really hear it. What they’re able to say publicly on this issue is really limited.

Q. Are you surprised by any of the responses from regional actors to the indictment?

A: I thought they were pretty predictable. The Arab League was predictable. The Africa Union is taking the easy way out. There was a very pertinent and good editorial by Desmond Tutu in the New York Times last week, in which he made the argument that African leaders are dropping the ball, but he’s a lone voice so far from the African continent.

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

A: The Court and the political process are inextricably intertwined. We’ve been focusing a lot on the political nature of the Court but what we haven’t been focusing on very much is the legal nature of the international system. The international system – the UN Security Council and all sovereign states – all rely on a legal structure of nonintervention and sovereignty, which is a legal concept, not a political one. States need institutions like the Court to say that they’re legitimate rulers. We aren’t living in a system of monarchs or empires. We’re living in a system where the political structures of the states actually depend on a perception of legitimacy. Those that are perceived to be illegitimate are
excluded by the rest of the international system. So there is a very legal and very necessarily legal aspect to political interactions in the international system. That said, yes, the Court has a political role to fulfill. It cannot escape it and cannot pretend that it is solely a legal entity because there is no such thing as a solely legal entity. Legal entities are created by a political process; they don’t just spring out of the ground. They have to be somewhat responsive to the conditions of their own creation. The Court is created by a political process— the Rome treaty -- and it is responsive in its very functioning to the behavior of state parties.

That said, when the Court is involved in the process of investigation and indictment, it needs to be as neutral as humanly possibly. I don’t believe that true neutrality exists. You could say I’m a post-structuralist in that sense. Reality is constructed and neutrality is impossible, but the perception that the prosecutor is acting neutrally, the perception that he’s willing to see both sides of the story, that he’s willing to investigate rebel atrocities as well as government atrocities, is very necessary for the Court to have legitimacy. So there is a political aspect to the operation of the Court but neutrality in its process is absolutely necessary.

**Q: Do you think the Court’s participation in ongoing conflicts could undermine its legitimacy?**

**A: I don’t think so. Although I do think there’s the perception that it does. Obviously there are people making that argument right now because of Darfur as an ongoing conflict or at least one of the hottest ones that the Court’s involved in. I think that’s a mistake to see that an investigation in a hot conflict necessarily means the prosecutor is biased. That’s like saying the prosecutor who goes after the mob has to be biased. We do not say this for domestic issues and when we go after organized crime we are very methodical, we spend years taking apart organized criminal syndicates and their activities continue while we do it. We don’t have to wait for them to finish; they are never going to finish. We need to be wary of requiring the Court and prosecutor to somehow wait until the situation is completely calm before they can go in and investigate. If there is enough evidence to trigger an investigation, then the investigation should go on to the best ability of the prosecutor to undertake it. Obviously Bashir’s lack of cooperation in Sudan, given that he didn’t let Ocampo into the country, made it extremely difficult and challenged Ocampo’s ability to gather firsthand evidence. Ocampo is under some criticism for that, but is part of the judicial process and a judicial tribunal will weigh his evidence. It isn’t as if he can get away with fake evidence and the judges will just rubber-stamp it. They have already shown that they are not a rubber stamp committee by not allowing the genocide charge to stand. There is a failure to recognize that this is what justice looks like; it is not clean and neat and perfect, it’s a little messy. We have to do justice the best we can. It is not clean from on high and absolutely pristine with no mud. It has mud; it’s a human process. That is the best we can do and we have to recognize that fact. So far the Court has shown that it is making the best of a flawed human process.

**Q: What kind of outcomes will we need to see from the Court in order to ensure its legitimacy? What about the Lubanga and Bemba trials: do you think the Bashir**
case has taken too much attention away from them? What will be the outcome for the Court if these two cases are tried successfully, but Bashir remains at large? What do we need to see overall from the Court in order to establish it as a legitimate actor on the international stage?

A: Obviously Bashir has taken a lot of the limelight at the moment, but I don’t expect that to last. We are just not a culture that pays attention to one story for more than two weeks in a row. Bashir is already off the front pages and I expect it will go completely out of the news in the next few weeks unless something triggers attention again inside Sudan. I don’t see the Bashir indictment as a problem in the short term. It could be a problem if five years come and go and he is still in power and he is the only sitting head of state the Court ever indict and they never get him. On the other hand, if they are seen to produce fair trials in their other cases and they are able to get custody of other indicted defendants, then I think they stand a chance.

Like any court system, the ICC is not some particularly odd creature, it is just unusual because it’s new. Like any Court system, the international court really depends on buy-in from its constituents and its constituents are states. The US Supreme Court or the House of Lords in the UK or any high court would not be worth a dime if nobody paid attention to it, if people never took cases to it, and if people did not follow requirements that it stipulates. A court is only as powerful as belief in its efficacy, and if the process takes hold enough that more people believe in its efficacy and more states are willing to actually participate in its processes then it might succeed. Of course this will take a long time; it is a new endeavor to get an international criminal court off the ground. It has already gotten remarkably far. The referral by the Security Council to the prosecutor in the Bashir case is remarkable. It shows a remarkable trust, which may now well be regretted by some other actors, in using a legal process as a response to atrocities. Given their willingness to do that, we hopefully will see a response by the Court that it can rise to the occasion and produce a fair process. I think elimination of the genocide charge is part of that process. It shows that the Court considers these issues very carefully and shows that it is not operating in a bubble. I won’t expect to see the Court take off for another ten years or so. This process takes time. It will take a number of cases in a row for the Court to look like it is here to stay. On the other hand it will also take a long time for the Court to fail. Court’s don’t fail overnight; courts fail after 20 years and when no defendants have been brought. Reports of the Court’s demise are greatly exaggerated. It will take time for us to know what the Court’s future will be.

Q: How significant is it that the first (and still all) of the cases currently before the Court are against Africans for crimes committed in Africa? How does this affect the perception of the Court in Africa and in the international community more broadly?

A: I know that in popular discourse they make a great deal about this issue and to some extent I think this is primarily the usual suspects saying the usual thing about post-colonialism. I would be more willing to accept a charge that the Court is a court of the
powerful against the weak rather than a colonialist court directed against Africans. If you look at the African cases, three of them were self-referrals and the other was a Security Council referral. The prosecutor did not decide of his own discretion: “Africa’s a mess so I’ll go there.” This is not really a fair charge. What is fairer, that we all know to be true, is that you won’t see Russian, Chinese, British, French or American defendants in front of the Court any time soon. We won’t see this for all kinds of reasons, but primarily just due to raw political and military power. For example, we are not going to see the Chechen case in front of the Court anytime soon, even though I am quite sure that Chechen atrocities continue. We will probably see Latin American cases. I think that if you give the Court time we will also probably see Eastern European cases. I understand the Court is also looking into the possibility of cases in Georgia, although I am not sure they will be able to initiate an investigation in that case. I do not expect the charge that the Court is unfairly focused on Africa to hold. I understand where this charge is coming from. It is the kind of charge that’s easy to levy because it looks true, but if you peel away the layers it is not a fair charge.

Q. What will be the role of regional tribunals like the ICTY and ICTR in the future? As the ICC develops do you think the ICC will deal with the majority of cases? Or will there still be a place for regional tribunals in the system of international criminal law?

A: I think that there is still a role for particular tribunals like we’ve seen developed for Lebanon in the case of Hariri. It is critically important in many cases, if possible, to have justice take place locally. It is really difficult for the ICC to appear legitimate when it sits in The Hague and The Hague seems like a foreign place to most of the victims of the crimes. There is still room for hybrid tribunals and special tribunals. There is certainly no legal reason why these types of tribunals cannot exist. The ICC does not preclude them in any sense. Regional tribunals are a good tool to keep in mind. If possible, if conditions for justice exist in that country, then the use of a regional tribunal is actually a preferable way to pursue justice. It is critical to have a process that is accessible to the people who most need to see it.

Q: Where do you think the Court will be in five or ten years? What are the best and worst case scenarios for the Court? What can both the Court and other international actors do to improve the Court’s standing in the international community?

A: If the international actors actually do work to improve its standing then its standing will improve. The worst case would be that the prosecutor continues to issue indictments, the judges continue to issue warrants, and no one ever goes before the Court. In that case you would have a number of useless outstanding warrants. The next step is then that countries gradually forget to pay their dues, and the Court just sinks into obscurity. After that, in another 15-20 years, the Court might be defunct simply because no one uses it. That scenario is a possibility, but at the moment it does not seem to be the most likely one.
Most likely, the Court will go in fits and starts. It will have moments of incredible public controversy, moments of failure, moments of great success, and it is likely to sputter along like that for a while. It is possible that American leadership, if there’s a real diplomatic initiative to see the Court as a useful and necessary tool of justice, could significantly enhance the role of the Court. This is going to be tough because the US has a checkered history with the ICC. The US does not necessarily have to sign on to the Rome Statute to say the ICC is a valuable tool and should be encouraged. The US can indefinitely defer the issues of its membership in the ICC, while it watches the Court and its trials and to help the Court in cases where it seems to be important that it have US support. That was the initial thinking behind the Darfur referral and abstention in the Security Council. It still remains to be seen what the Obama administration will do about the Court. We heard some positive remarks during the campaign about the ICC, but it is not clear how much that point of view will be born out, especially now that there is a contentious Congress to deal with. The President cannot just rely on Congress to take part in what might be perceived as an unpopular measure.

It is also an uphill battle to really start using the Court because that will require serious multilateral diplomacy. The ICC cannot just be an American creature; you have to bring in China, Russia, Europe and the other expanded Security Council member contenders, including India, Japan, Germany, and Brazil. These countries need to publicly say that they support the Court in order to encourage its acceptance in the international system. I do not see that happening in the next couple of months. There is room for it to happen and it may still happen. There’s an emerging sense of public responsibility and accountability in the international system at present; there is not a willingness to say simply that justice is unnecessary. Even China won’t say that. This is something that international law continues to thrive on. No one will openly say international law is totally useless. Even states that seem to most rely on sovereignty understand that they need to support some sort of legal process to look legitimate. States have to walk a fine line in supporting an institution like the ICC while trying not to come under its auspices.

*Interview conducted by Zachary Manfredi and Julie Veroff on March 13, 2009.*