Q: You have written about the relationship between the US and ICC, what do you think the current relationship with will be between the ICC and the US under the Obama administration? Will the US show increased support the ICC? Is there a possibility that the US will ratify the Rome Statute? How will the arrest warrant for Bashir affect the dynamic between the US and the ICC?

A. It’s going to be interesting to see how the Obama Administration approaches the ICC question. At this point, prior to the Bashir arrest-warrant, the Obama administration was in many ways hedging its bets on the ICC and possible US support. During the election process there was really only one mention of the ICC by the Obama campaign, and what he said was that this would be a situation that they would look at, he could counsel with his generals and military personnel, and then they would approach the subject a later date. He really danced around the issue of the ICC and possible US support. There have been, however, some positive steps that have occurred recently. One, not necessarily with the Obama administration, but with the Democratic Congress, was the elimination of the Nethercutt Amendment in the Ominbus Bill that just passed. At this point the US is moving away from a belligerent attitude against the ICC. Article 98 agreements are no longer a part of US foreign policy towards the ICC. However, I am not sure we can say that this shift in attitude towards the ICC is just a result of the Obama administration’s policies. We saw this softening towards the ICC occur at the end of the Bush administration. Condoleezza Rice was the first to stipulate that Article 98 agreements were a means by which the US was shooting itself in the foot. With the case in Sudan, the fact that the US did not oppose the Security Council referral of the Darfur cases to the
ICC but merely abstained from the vote was another indication that there was a bit of a softening.

The Bashir arrest warrant changes things a bit. I think that it’s putting more pressure on the Obama administration to actually do something about the ICC. Again though, they are really trying to push the issue of the ICC to the side. When questioned about this, the Obama administration is saying things like “you cannot criticize us for doing nothing, we are having backroom negotiations with the British and the French, and we are trying to come up with a solution.” However, Darfur and the ICC are clearly not their primary concerns at the moment. Domestic interests have consumed the Obama administration’s interest. This has been very disheartening to many of us who want the US to be part of this process and part of the ICC’s attempts to end impunity. This is a particularly unfortunate point, given that Obama called US failure to act in Sudan as a “stain on our souls.”

In terms of ratification, I have no hope at all that the US will ever ratify the Rome Statute. I think the best that we can hope for is a situation where the US is able to cultivate a relationship with the ICC in which the US is supportive of what the ICC is doing to a certain degree, and possibly more important, that the US at least does not actively oppose the ICC and what it is attempting to do. Getting the Rome Statute through two-thirds of the Senate and having ratification is, however, something that is just implausible.

Q: What would you say are the primary goals of the Court? Do you think the goals for the Court differ for international, national, and local actors; for government and non-governmental actors? How will the Court fit into the overall structure of the international system? How so?

A. In terms of the primary goals of the Court, the ICC is trying to be an instrument by which we can end impunity in regard to those specified core crimes. I do not think that the goals are necessarily different from international, national, and other local actors, or even different in terms of actors defined in terms of government or non-government. I think there is a core of the international community that is now working towards this goal, although possibly doing so in different ways. One of the things I find frustrating about the attempt to achieve international justice, is that oftentimes you see these different actors as counterpoised in terms of what they are trying to achieve. We talk about – is it better to have domestic or international prosecutions? Is the ICC simply preventing national justice from occurring to end impunity? The goal here is to see the different actors as behaving in a complementary way. So issues of domestic universal jurisdiction laws vs. international tribunals, the ICC vs. hybrid courts—I think it’s a real problem to see these issues as being in competition with one another, which is often how they are viewed. From an ICC perspective, I do not think the intent of the ICC is to be in competition with other forms of justice. I think the point of complementarity is to work with these other actors and to establish universal justice standards that will be fulfilled for all parties involved in the ICC process. The goal of ending impunity is what we are trying to achieve, and no matter how it is achieved, if we are successful then that will be satisfactory to the members and the supporters of the ICC.
Q: Does (and will) the doctrine of 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? Where might there be sources of conflict between the ICC and national jurisdictions? How should those conflicts be resolved?

A. I think the principle of complementarity, its intent, theoretically, is to work to accommodate national sovereignty, but not to simply accept national sovereignty as the end-all, be-all. So some of the things I have written about sovereignty and its relationship to the ICC address this question. If you look at the notion of sovereignty and the idea of sovereignty as absolute and final authority, when we look at the ICC, it does have that final and absolute authority within this particular arena. Will it always be able to act on that? That is a separate question. Theoretically, however, it does in many ways override national sovereignty while still trying to accommodate it through the principle of complementarity. The ICC does a good job of acknowledging that sovereignty is a principle fundamental to the idea of international law and vital to the stability of the international community, but we cannot simply accept that national sovereignty will trump issues of international justice with regard to war crimes, crimes against humanity and genocide.

In terms of the Chief Prosecutor and times in which he might accept assertions of national jurisdiction, specifically talking about Ocampo, I am not sure that he would ever not proceed with an investigation if a country gave him assurances that they were themselves going to investigate. Just in terms of how he has behaved up to this point, I think he would say “I’m going to conduct my own investigation and we will see what they come up with. If they proceed through this process and have a trial that is acceptable to the Court, then we will allow that to stand, but if not, we need to be prepared to step in and investigate ourselves.” A good example of this would be the Uganda case. The ICC was invited in to investigate, it was a self-referral case, but then there was backpedaling by the Ugandan government. They claimed that they wanted to investigate things themselves and Ocampo simply would not accept that answer – he told the Ugandan government that they invited the Court in and that he was going to continue his investigation. I do not think that Ocampo is necessarily going to cater to the issue of national sovereignty, but I think the Court in general, if it sees a legitimate trial occurring in a national context, then according to the Statute they must accept it, and I hope they will.

Q: What is the significance of the Court prosecuting state vs. non-state actors in the international system? In the case of Sudan for example, the Court has focused on state crimes, whereas in the DRC and Uganda the emphasis has been on rebel groups and non-state actors? Does the choice of who to prosecute in particular situations affect the perceptions of the Court’s legitimacy on the international Stage?
A. In many ways, this is really a political question. This goes back to the question of how Ocampo wants to deal with the political issues that the Court is embroiled in on a daily basis. For the prosecutor, dealing with non-state actors and non-government officials may be politically easier than moving forward against government officials. My sense of Ocampo, however, is that, although he is somewhat aware of the political dynamics of what’s going on, I think in many ways he is also trying to push forward in as objective a fashion as he possibly can. I am not sure that the political calculus is going to influence how he proceeds in investigations and whether he looks at non-state or state actors.

I think the only real problem in terms of legitimacy, in relationship to this question, is whether the perception by the international community is that the Court is proceeding in a purely political manner. If it chooses to prosecute only state or non-state actors on a fairly regular basis, then the perception might become that the selection of cases is simply based on a political calculation by the Court. I think that such a perception will hinder the ICC’s legitimacy more than anything else. However, if they proceed in a juridical, objective fashion, then I don’t see a real problem in terms of legitimacy.

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? Can the ICC be successful if it conceives itself purely as a juridical institution?

A. I’m not sure that the ICC has an implicit political role to fulfill. In some ways I think I’m wary of that line of questioning because it almost makes it seem as if the ICC has to recognize its political role in the system and act upon it in some way. I think I would come at it a little bit different. I think the ICC has to recognize, and what Ocampo has to recognize and I don’t think he really did at first, is whether he likes it or not, the ICC is a political institution. I fully believe that there are no institutions, governmental, legal, etc., that are not political institutions. There is a political component to all aspects of the global community and the ICC is not exempt from that. So do they have a political role to fulfill? No. I think they have to approach the selection of cases and whom they prosecute within those cases in the most objective fashion possible. They do, however, have to be aware of the political implications that every decision that they make have. Ocampo doesn’t always understand the political implications of what’s going to happen. With the Uganda case and the self-referral, standing there with the president of Uganda to announce that the ICC is going to prosecute gives a very political nature to the case, almost immediately. And he is starting to recognize those problems. However, I think the Bashir case is another instance where I’m not entirely sure that he fully recognized the political implications. This may add to the legitimacy of the Court, the fact that he and the Court in some way are going after those they believe are guilty of certain crimes. But this doesn’t alter the political nature of every institution in the global community. I don’t think that their participation in these political crimes will undermine their legitimacy; it will only undermine their legitimacy if the perception is that they’re clearly favoring one side or the other. I fully believe that perception in many ways creates reality and the biggest problem for the ICC is to create a perception of being a purely juridical institution; despite the fact that I don’t think they can be a purely juridical institution. But
the perception among large portions of the international community has to be that this objectivity is the Court’s ultimate goal and that they’re doing a good job. In some ways, they have done well at this, in other ways they’ve failed. The have to be aware that the perception in many ways will determine their legitimacy in the international community. How they are perceived could provide them with a sense of legitimacy, which will allow them to fulfill their goals.

Q: What is the ideal relationship between the ICC and the Security Council as detailed by the Rome Statute? How have the current activities of the Court and the Council failed, exceeded or lived up to this ideal?

A. I think so far the relationship has been pretty good. I am not sure I would call it ideal, but my understanding of how the ICC and the Security Council should interrelate is in line with the principle of complementarity that defines the relationship between the ICC and national jurisdiction. I think that the Security Council in many ways is also supposed to complement the ICC when needed. So in the Sudan case, this is a great example of a situation where the international community was more or less calling for action and the Security Council was able to step up and complement the ICC’s activities by giving them the power to go in and investigate. At that point the Security Council was to step back and allow the ICC to proceed as they see fit. I would hope that that is how the relationship will evolve, and I think this is how the relationship was intended when the international community drafted the Rome Statute. Those in Rome were very wary of the politicization of the Court by the Security Council; however, they also recognized that there had to be some sort of relationship between the Security Council and the ICC and that the relationship should be in many ways a complementary one. Coming back to the political question, the Security Council is also going to have to recognize when the ICC has gotten in over its head in a political situation. That might be the point at which Article 16 is going to be implemented. I think, however, that it is going to be rare that you see Article 16 authorized – it will be rare that the Security Council acts in concert to say that they are going to stop the ICC’s activities for 12 months and possibly renew it after that. So as long as it proceeds in that way and they use Article 16 sparingly and the Security Council is there to give the ICC the authorization to go in to investigate situations like the one in Sudan, then, to me, I think that’s living up to the standards that were set in the Rome Statute.

Q: Does Article 16 of the Rome Statute effectively give the Security Council authority over the prosecutor’s office? On what grounds and in what types of situations should the Council invoke Article 16? What will the implications of adopting an Article 16 Deferral in general but also in the Bashir case in particular?

A. I do think that Article 16 does in many ways give the Security Council authority over the Prosecutor’s office. Article 16 provides the Security Council with the opportunity to suspend the activities of the Prosecutor’s office for 12 months and then renew the investigation more or less at their discretion. So this power of deferral of investigations and prosecutions is clearly a point at which authority resides in the Security Council and not the Prosecutor’s office. However, in terms of when this might be used, I address the
issue from two perspectives—personally, my hope is that it would be used sparingly. I hope that the Security Council would more or less grant the ICC and the prosecutor’s office leave to proceed with investigations as they see fit. Then thinking specifically about what types of situations or criteria exist where they would invoke Article 16, I think, practically speaking, that invocations of Article 16 will be few and far between. There has been talk of doing this for the Bashir case, and I am not sure that I see all members of the Security Council accepting suspending the indictments of the ICC in this case unless there was a very clear indication that a cessation of the crimes was going to occur in the Darfur region. The reality of that happening is minimal at best. I simply do not think that the countries of the Security Council are going to be duped into accepting that, and I personally do not think that Bashir would ever offer that up given how he has reacted to the warrant in the past few weeks.

Are there theoretical debates about when and how Article 16 should be used? Possibly. The peace versus justice question is a very real question; I tend to believe that you cannot disaggregate the two. However, if there was a situation where you had a peace plan on the table and the one stipulation was that all warring parties would sign this if the ICC arrest warrants are suspended against certain individuals, then yes, I think that that is a situation where Article 16 would be appropriate. The key with Article 16—in terms of what types of situations it should be used in—is to remember that it only suspends the prosecution from its activities. If a year later, the peace process breaks down, then the ICC can go back in after the 12 months and renew its investigation and prosecution. Article 16 does not simply make the situation go away; I think this is a key aspect of Article 16 that many critiques of it forget.

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’s legitimacy in the international community?

A. Perception often creates reality and this is a problem that the Court has to work on. The perception at this point is that the Court is focusing on Africa and that it has a Western bias and that this is why it is looking at these particular cases. It is regrettable that this is the perception of what the Court is doing. I do not believe that the fact that all the cases are in African countries is necessarily problematic. We have to remember that all of these cases are either self-referrals, or were initiated by the UN Security Council. The Court has not done a good job making these facts known to the broader public. To those that study the ICC and look at this issue, I think there is a better understanding of why these cases were chosen and why the ICC is acting like this in these particular instances. I think the ICC has to work on its public relations in terms of portraying a more legitimate and beneficial perception of itself to the broader international community. Until it does that, these questions of legitimacy, in relationship to where the Court is investigating, are going to persist. They have looked at other cases and there has been a discussion of opening other cases in other parts of the world. Unless you are looking at particular cases or following the press releases of the ICC, you are not going to be aware of these facts. It is unfortunate that the majority of the public and the international community are not fully aware of everything that the prosecutor’s office is doing.
Q: The Rome Statute was originally supposed to govern the crime of aggression as well? What do you think the future of the crime of aggression will be for the Rome Statute? Will the States Parties to the ICC agree upon a definition of aggression? How might this influence the role of the Court in the future?

A. I’ve become very pessimistic on this question. This question has dogged the establishment of this Court since the WWII era. When you had the activities after WWII, in the late 1940s and early 1950s, to establish this Court, the official justification for not establishing it was that they could not come up with an agreed upon definition of the crime of aggression. That probably was not the sole reason given the emergence of the Cold War and other issues. But as we move forward, we have a definition that emerges in the 1970s that was not palatable to enough actors that they were willing to implement it into a juridical institution like the ICC. So at this point, I am not very optimistic that the crime of aggression will ever be a part of the Rome Statute. Quite honestly, I’m not sure that this is necessarily a bad thing at this point. To me, as I look at the crimes contained in the Rome Statute, I think the crime of aggression may be the most easily politicized of all because it does not have an accepted definition as I think most of the other crimes do. So to have this undefined crime of aggression put into play in the Rome Statute and to allow the prosecutor to act on that, I think would be extremely problematic; I would worry about the politicization of that crime and the overuse of that crime and in many ways, I would think it might hinder the legitimacy of the Court rather than help it. The ICC would be best served to stay with the longstanding definitions of the three core crimes it already governs, and then eventually they can come to a definition of the crime of aggression, but only when and if the Court is a more accepted institution in the international community.

Q: What do you see as the future role of the Court in 10 years? Will international criminal law gain increased authority and enforceability? Why or why not? Can you give an example of a best- and worst-case scenario for the Court?

A. I think the future of the court is extremely dependent on the world’s state actors. As much as I loathe a state-centric, realist perspective of the world, I think the reality is that states still play a fundamental role in how the future international community will be constructed. And so as we look at the Court, I think that the future role of the court will be dependent on the acceptance of the Court and the buy-in by the international community of states. Without that buy-in by the international community of states the ability of the Court to arrest people like Bashir, to act on the warrant, to have any type of enforceability, is extremely limited. The Court simply does not have the independent means to fulfill its mandate. It must rely on states to fulfill its mandate. Simply having a hundred plus ratifications does not mean in a practical sense that these states are going to support the Court in a clear fundamental way in terms of the enforcement of its rulings on the arrest warrants, etc. The best-case scenario is that you do get the buy-in from these states, they do accept the mandate, see it as beneficial to their interests in the international community and they assist in every way possible. The worst-case scenario is that these states don’t buy-in and the Court simply flounders for the next ten years in terms of its
inability to enforce anything. At that point I would rather have seen the Rome Statue fail in 1998 than have the ICC.

The ICC’s fate is solely dependent on the international community of states. If the ICC is not to become a dead letter institutions, then it’s up to the states to prop it up and make it a fully functioning institution, but this will simply be about how states wish to construct the future international community and whether they believe their interests are best served by multilateral means or not.

*Interview conducted by Zachary Manfredi and Julie Veroff.*