

LAURENTI: My name is Jeff Laurenti with the Century Foundation. I'd like to welcome you to this morning's breakfast discussion, and appreciate your readiness to be here at an 8:30 time to enjoy a very modest breakfast, but what should be an intellectually vital feast.

When President-elect Obama announced his National Security team on December 1st, he indicated that the three top priorities that he was setting for his Secretary of State would be, first, non-proliferation, nuclear non-proliferation. The second, achieving an Israeli/Palestinian peace. And third, "strengthening international institutions."

It's been a very long time since an American President has set strengthening international institutions as a priority, and it's one that puzzled many people because the history of the past several decades has been that there's very little profit to be gained by a President investing in that, and perhaps a good deal of political gain to disinvest.

Perhaps things in that area may change, and if so, the subject we'll be discussing this morning, the future of the U.S. relationship with the International Criminal Court, will be a bellwether. The ICC is one of those few new international institutions that have been created many decades after that burst of international institution building of the late '40s, and it is one about which all of the concerns that had animated the American political debate even towards the League of Nations early in the 20th century, bubbled back up to the surface.

It is, as everyone around this table well knows, one of those rare international organizations that one U.S. President signed on to, but so half-heartedly that it wasn't presented or fought for, for ratification. The next disavowed, and the big question mark is where the third President in this succession is going to go on this.

We have a terrific panel, two of – who have written a paper, which I, as soon as we get started around the table, will start passing around to you all. David Scheffer, who was Ambassador for War Crimes Issues in the second term of the Clinton administration, and John Hutson, Dean now of the Franklin Pierce Law Center, and former Judge Advocate General and Admiral of the U.S. Navy. The current Ambassador for War Crimes Issues, Clint Williamson, and the first President of the Assembly of States-Parties of the International Criminal Court, under the Rome statute, Ambassador Zeid Ra'ad Zeid al-Husseini, Ambassador of Jordan to the U.S.

We are particularly privileged to have been able to get Mort Halperin, who had, a decade and a half ago, organized a project for the Century Foundation on the need for an International Criminal Court, to come take the helm and lead off our discussion in a very proactive moderating role. So Mort, will you take that role for us?

HALPERIN: Thank you very much. I am delighted to be here with this distinguished panel, and this distinguished audience that needs no introduction to the Court or to our panelists beyond that you've already been given. So let me just jump in. I'm going to put a question to each one of our panelists. After they respond, give them a chance to comment on each other's answers, and then turn it back to Jeff, who will lead a discussion with the entire group.

So let me start by putting a question to Ambassador Williamson about the evolution of the Bush administration's policy on this issue. There are some of us who like drama who were looking forward to the last act of the Bush administration being, vetoing the Article 16 resolution taking away the jurisdiction of the Prosecutor. It looks like that will not happen. But nevertheless, there clearly has been a substantial evolution in the attitude of the administration towards the Court, and I wonder whether we could ask you to talk about that, and to what extent it's because the Court has behaved differently than people thought, and to what extent because the administration has seen the world.

WILLIAMSON: Thanks, Mort. There clearly has been an evolution. I think as most people here recognize, when this administration came into office in 2001, they were quite hostile to the ICC, and I think suspicious generally of the whole concept of international justice. You had some very outspoken critics in the administration, people like John Bolton, and others who were determined – not only to oppose the ICC, but to do everything they could to destroy it.

And this was exemplified by a number of things. I mean, probably foremost was the unsigned of the Rome treaty, which was this very dramatic act, and sort of sticking a finger in the eye of the international community, and certainly the Court itself.

The administration was very supportive of the passage of the American Service Members' Protection Act – engaged in a policy of pressuring countries to enter into the Article 98 agreements, and tying military assistance to compliance.

Officially, the stated policy was one of respecting rights of countries not to join the Court, but I think in practice, this didn't always come out that way. I think that the message that was delivered too often was one of, don't join, stay away from the ICC if you want to be friends with the U.S. And then also, just the way that the U.S. handled this in the U.N. – abstaining or vetoing any resolutions where there were references to the ICC, seeking exemptions for U.S. troops in peacekeeping missions.

So this is where we were in 2001. There has been an evolution over time, and I think particularly since 2006, the evolution has been most apparent, in part, because some of these vocal opponents left the administration. I think also, because of just pragmatic considerations over time.

But this evolution has occurred in practice, largely at the working levels, but without a clear-cut policy decision. In the initial discussions I had with Secretary Rice when I took this job in 2006, we talked about the need to bridge the divide that it opened up between the United States and our allies, particularly European allies, over the ICC.

So what has happened is, you have had this quiet change. No statement that policy was changing, and certainly no admission that the initial approach to the ICC was in any way wrong.

The change has been incremental. I think had it been teed up for some sort of policy discussion, or policy decision, and asking everybody around the table to agree that we're going to change our policy on the ICC, it would have been impossible to get consensus. And I think even today, four days before this administration ends, it would still be impossible to get that kind of consensus. So what we have done is just implement this policy at the working levels.

I think you also have a recognition by most that the ICC has a prominent and lasting role in the sphere of international justice, and that it's the appropriate forum for certain cases. And finally, that the U.S.' approach of complementarity now tracks closely with the ICC's, with agreement again by most, that for cases that must be handled by a purely international court, the ICC is the appropriate forum.

And just to wrap up, I think the change in policy is evidenced by a number of things that have happened. First of all was the abstention on the Darfur referral by the Security Council in 2005. At that time, it represented a grudging acceptance that the ICC was the only viable option. But there certainly was not a full embrace of the ICC exercising its jurisdiction. That said, I think if that same vote were taken today, that you would actually get a positive U.S. vote for it.

There was support for the Charles Taylor trial on the ICC premises, and the U.S. actually helped to facilitate the arrangements between the Special Court for Sierra Leone and the ICC.

The administration is no longer actively pursuing the Article 98 agreements. Secretary Rice was openly critical of this after she became Secretary of State, and said that these were actually undermining U.S. foreign policy.

You've had statements by administration officials, including myself, that we would share information on the Darfur case with the ICC, in the same fashion as we do with other courts. We have fairly frequent meetings between myself and other officials with the ICC Prosecutor, ICC President, and staff.

But I think probably the most significant single event, which shows how far we've come, was the vote on the UNAMID mandate renewal on July 31st of this year. This is the peacekeeping force in Darfur. The renewal passed 14 to 0, with the U.S. abstaining. In our Explanation of Vote statement, we stated that the sole reason we were abstaining was because the resolution was not strong enough on accountability, and it undermined the ICC's work in the Darfur case. This is a huge change from where we were two years ago, or five years ago, where we would have abstained or vetoed a resolution because it merely made mention of the ICC.

So, there has been this change. But I think it's probably gone about as far as possible with this administration, and as I said, it's in practice. You don't have a stated policy that's supportive of the ICC, and there are some obstacles to going further, such as ASPA and these things, which I'm sure we'll talk about a little further.

HALPERIN: David, let me ask you to follow up on that. Your paper suggests an approach to the new administration dealing with the ICC, which emphasizes difference rather than continuity, which sort of almost calls for championing a new approach to the ICC.

And I wonder whether you'd comment on the alternative view that some have put forward, that the way to make progress on this issue is to build on this change policy, and in effect, for the administration to announce that it is continuing this evolution with steps that are moving toward greater support for the court.

SCHEFFER: Thanks, Mort, and thanks for everyone for coming here. I really appreciate this on an early Tuesday morning.

Mort, you've got a good point, which is, you can sort of reinterpret how this paper is written as a manifesto for constructive continuity, at perhaps an accelerated pace, to further embrace a U.S. relationship with the International Criminal Court, one that would have more cooperative links, one that would continue to chip away at the American Service Members' Protection Act, provision by provision if necessary, depending on how sentiment swings within Congress, and whether or not one can prioritize that amending process to actually achieve real amendments of ASPA.

That being said, as you have probably seen in the rest of the transition process for this new administration, there are significant shifts that are being worked on. And I thought it would be, as John Hutson, extremely useful when we started this project a year ago, to put down on paper by this time a fairly specific mandate for – if you want to call it, I have no problem with accelerated continuity. But I certainly would not want to suggest proceeding at necessarily the same pace of change with respect to our policy on the ICC as the Bush administration has done in the last year or two.

And I have written very supportive articles of the administration's approach, particularly on Darfur. It's remarkable – we were up in New York yesterday, how significant has been the U.S. position on Darfur. And I think, Jeff, my reading of what the French Ambassador said yesterday on this issue signaled to me that while the French were playing around with an Article 16 blockage back in the summer, they clearly have shifted strongly in the direction of no possibility for Security Council action to block the application for an arrest warrant. He just said it flatly, that there's not going to be any such resolution that moves through the Security Council.

That's very encouraging. But I would say that with a new administration coming on board, I think it is useful to try to seize the moment, to jumpstart a more serious approach, not only to cooperation with the ICC, but to change the dynamic of considering full U.S. participation.

There is a break point event in 2010, which is the Review Conference. Now, one can easily rationalize the United States not being a ratified party by the time of that Review Conference, for both pragmatic reasons, as well as, why do you have to go that far so fast? Why not create building blocks toward ultimate ratification many years down the road?

Well, I would just say then, in the Washington culture, sometimes you have to take advantage of these break points, to accelerate interests and build upon that interest within the Washington community, and on Capitol Hill. And I think there are some very, very pragmatic reasons why the United States would gain if it could achieve a State-Party status by the time of the Review Conference.

It's not disastrous if it doesn't. I'm just saying that I think there are great advantages for our own national security interests if we can achieve that in that period of time, fully recognizing that the President-elect already signaled formally in the campaign that he had four other treaties in mind for priority treatment for ratification in the Senate – convention on elimination against – of discrimination against women, the comprehensive nuclear test ban treaty, a nuclear terrorism treaty, and the convention on the law of the sea. He listed those four treaties as high priorities for ratification when he became President.

So I recognize that bringing the Rome statute on board is obviously going to be a serious endeavor, but – and I'll close with this. In order to do what the President-elect said during the campaign, which is, he wants to bring the military and others into the room, to discuss where we are with the ICC, and whether it is worth going toward State-Party status, I felt, as did Admiral Hutson, that you needed a document of this sort, that sort of pushed the edge of the envelope a bit, and dared to say, yes, you can do it. But of course, recognizing that in Washington, the forces of reality will probably – will create obstacles to that objective.

HALPERIN: Thank you. Well, that brings us, Admiral, to your contribution. If you would, I'd like to ask you to focus on the question of the attitude of the military, where it was to start with, how it's evolved, and where you think it's going.

HUTSON: Thank you. Thank you, Mort, and I, too, want to thank all of you for taking time out of what I know are busy days to come here, and the Century Foundation for taking on what I think is an awfully important project, certainly in the long term.

A couple of things. It – just to sort of start at the end for a second, it's very difficult to predict or understand where the military will go, because they haven't really spent an awful lot of time thinking about this over the course of the last eight years, other than the American Serviceman's Protection Act, which they generally opposed, at least, an important part. The military has had their hands pretty full over the course of the last few years, and this is not something that they've spent a lot of time on.

But I think that there are some points that can be made that may be sort of vectors toward the future for the military, and the way that they're going to think about it. And I should preface this by saying that I think that in the end, the military is very likely to have, essentially, a veto on this. I think that if DOD came out foursquare against the ICC, it would be very difficult for Congress, for the Senate, to proceed with it. So that I think having the military at the table is going to be very important. That is going to take a lot of education, both by the military to the civilian leadership, and I think also vice-versa.

Point number one to be made, I think, is to remember that the U.S. military is more forward deployed than all other militaries combined, by any way you measure forward deployments. You know, numbers of deployments, number of troops, duration, whatever. Whatever measure you use, it's the military – the U.S. military, that is at the pointy end of the spear.

In the late '90s, DOD professed to be, and was in fact, very, very concerned about jurisdiction over soldiers – boots on the ground. The corporals and sergeants and enlisted people and junior officers who were the real trigger-pullers, and this vision of them being hauled into court to answer for some alleged mistake or error in judgment was a real scary thing. You didn't want the sergeant to hesitate in taking an action because he was worried about some renegade prosecutor who was going to come after him. And whether that was a legitimate concern or not, it was an honest concern. Whether it was real or not, it was an honest concern.

I think another point to be made is that what we've seen over the course of the last decade or so is that that's not what the ICC has been involved with, and indeed, now suddenly, to the extent DOD is concerned about the personalities involved, that would suggest that it's probably not the junior enlisted people or the junior

officers that are they're so concerned about, as they are the Presidential appointees, who could conceivably find themselves answering at the dock of the ICC.

Another point to be made, I think, to take into consideration in the mix, is that the military – the armed forces are very interested in deterrents. There's nobody that abhors conflict more than the United States armed forces. So that to the extent that it can be demonstrated that the ICC serves as an effective deterrent, that's an important aspect for the military, because that might be one peacekeeping mission that they don't have to engage in, or that it will be smaller than it would otherwise be.

Another great aspect – maybe the greatest – it's certainly one of the great strengths of the United States armed forces, is the concept of accountability. We could debate how accountability has been manifested over the course of the last few years, but it's the backbone of the military – obedience down the chain of command, and accountability up the chain of command. So that to the extent the ICC is shown as enhancing accountability, either on the part of the United States or otherwise, I think that that is an aspect that will make a difference to the United States armed forces.

And then finally, the – it is true that the face of war has changed. It's not true that this is the first time it's ever changed. The face of war changes every time we have a war, practically. It's a little different than the last war. But it has changed, and the United States is going to find itself, in the future, as we are now, but particularly in the future, fighting with coalition partners. We need to build meaningful, real coalitions. We can't do it on our own. We shouldn't be doing it on our own.

And so that to the extent that the United States as a nation as seen as playing well in the sandbox, being reliable and dependable as a coalition partner, that will enhance our opportunity to build meaningful coalitions, so that I think that that is an aspect. We've – we kind of threw the Geneva conventions over the side there for a while, and it made it – those kinds of actions made it difficult for us to build and maintain meaningful coalitions in the efforts that we're engaged in now. I think that the argument could be made that our support of the ICC – it would be a small step in that – not only actually a small step, it would be an important step in that direction.

So, I guess in summary, for a long time, the armed forces were generally opposed to it because of concerns about the prosecution by renegade prosecutors of soldiers, sailors, Marines and airmen who were involved in these things, and we were just being told that that was a great threat to us. And I think that the dialogue back and forth, and coming to understand what the reality of it is now, that we have a period of years now and some experience with the ICC, will cause the military leadership, to the extent that it addresses the issue, to rethink it.

HALPERIN: Thank you. Finally, we want to look at the question of what the international community expects of the new administration, and what it would like to see from the new administration in terms of engaging with the International Criminal Court. Zeid?

ZEID AL-HUSSEIN: Sure. Thank you, Mort, for hosting this, or for coordinating the panel, of course. And we thank the Century Foundation for hosting this event.

I'm assuming that I am – that I may be the only foreign official here, so I should say at the outset that these views do not necessarily represent the views of my government. I'm mindful of the Ambassador who was quoted in the newspaper, or the newspaper article began with, speaking off the record, the Ambassador, the foreign Ambassador proceeded to criticize the United States. (laughter) The last that was heard of this Ambassador was that he was stamping visas in (inaudible) (laughter), so I must be careful here.

The – naturally, the international community would like to see the U.S. ultimately accede to the Rome statute. Without the U.S. in the first ten years of its formulation, the Rome statute would not have come into being, or at the very least, it wouldn't be as fine a document as it is. It's the contribution, intellectual contribution of the many lawyers who took part in the negotiations representing the U.S. under the leadership of David Scheffer and Colonel Lietzau, who is with us today, that we were able to create this statute.

Naturally, it has warts, it has difficulties contained within it. You can't have 186 or 187 member states of the U.N. negotiate a document and have it turn out utterly pristine without these sorts of anomalies. Nevertheless, we believe that it's a very fine statute.

And I think the steps that were enumerated in the paper presented by Ambassador Scheffer and Admiral Hutson is the presumed course that we would judge the U.S. would take in trying to deepen its involvement with the ICC. We would, however, also hope that the approach is judicious. We would like to see a bipartisan approach, of course, because I think we don't want to see mood swings every four to eight years, where the ICC is relevant to the discussion. And also because there are changes that could be anticipated coming from the international community.

And what I mean by this is, if the international community begins to feel that the United States – let's say the States-Parties to the Rome statute begin to sense that the United States is revisiting the whole question in a very serious way, they themselves, including my own country, may feel the urge to revisit the non-surrender agreement, the so-called Article 98(2) agreement, from our side.

Now, naturally, I think you can anticipate that most countries do not have a problem when it comes to containing within SOFA agreements articles or terms whereby

U.S. servicemen or U.S. officials are protected by virtue of the presence of the – or by virtue of their being a SOFA. But where the Article 98(2) agreements, we feel, crossed the line, was that all U.S. nationals were encapsulated with this. And many countries feel very uncomfortable with this point.

And so, if the U.S. begins to revisit, then they may feel compelled to revisit, and you want to control this. And I would suggest that the new administration really sit down and talk to the countries that they've signed Article 98 agreements with, and try and find some sort of middle ground where the major concerns are covered by SOFA agreements, and then perhaps we can see how we can work together on dealing with Article 98(2).

The other point I would like to make is, often I am asked, why is it that the U.S. should join, aside from the pragmatic reasons? We – the States-Parties often like to cite Article 27 of the Rome statute, the – and the principle of the irrelevance of official capacity. It's really quite remarkable to imagine that there are 108 countries, all of whom have forfeited the customary right to immunity, privileges and immunities, where the heads of states and public officials are concerned, in respect of the four court crimes, the atrocity crimes, contained within the Rome statute. It's probably the most enlightened step ever taken by the international community. There is no equivalent parallel, where so many heads of state, crowned heads of Europe, the Emperor of Japan included, have all placed themselves under the jurisdiction of an international court where these crimes are concerned.

And it – you really expect, given the history of this country, the glorious history of this country, and the reasons for the founding of this country, that the United States should be at the forefront, in terms of the countries that take this enlightened approach. And that's what we hope to see.

Finally, there is this political point which I'd like to return to, regarding Darfur. A few weeks ago, I saw – I read an interview with Ahmad Haroun, one of the indicted Sudanese officials, indicted by the International Criminal Court. And he basically lashed out at the U.S. by saying that the U.S. is trying to put pressure on Sudan, trying to put pressure through the International Criminal Court, while itself has ensured that its shielded its own officials from – and its own nationals, from the jurisdiction of the court. And so he's using this to win sympathy for his own plight regarding the court. And for that reason, there is a sort of political approach, which we must also begin to think about, and that's why I imagine, on Article 98(2), we would have to engage in a serious discussion where the U.S. concerns are met, but where we can also move forward from the international community's side.

Finally, just one point in terms of the paper presented. There is – the Series Six (sp?) Declarations were offered by David Scheffer and John Hutson. I think one could quite understand the presence of these declarations. The second declaration, though, sort of rankles me to a certain extent, because it says, essentially, the U.S.

intention – that nothing in the Rome statute requires or authorizes legislation or other action by the United States that is prohibited by the U.S. Constitution, as interpreted by the United States.

And I only say that it rankles me, because when we were effectively bludgeoned into signing Article 98(2) agreements, we told the U.S. this would be in violation of our own Constitutions. And yet, that argument had no – carried no water with our negotiation, with our partners in negotiations.

So I think you can quite understand that declaration being put forward, but then there has to be some give on the Article 98(2) agreements, and I think we can probably find a fix through SOFAs, and take care of that.

Thank you.

HALPERIN: Thank you. Let me ask if any of the members of the panel want to comment on anything that the other panelists said.

WILLIAMSON: If I can, just on one of the points that David made, and I made slight reference to it. And I think people need to understand how much of a constraint ASPA really is. And this is going to be a difficult issue to overcome, not least just because of the political sensitivity of going in and repealing or amending something that's called the American Service Members' Protection Act. And I'm not sure that this is something if the administration is going to want to undertake in its earliest days.

But we have really relied on the final provision of ASPA, which is sort of this get-out-of-jail-free card, which says that nothing in this act shall constrain the U.S. from doing what's necessary to bring people to justice for genocide and other serious crimes.

We have used this final provision to license our interaction with the ICC. But it's – really can be applied on a case by case basis, and this has allowed us, I think, great latitude on Darfur. But ASPA is still the law of the land, and as long as it's in place, it makes it very difficult to go from the sort of ad hoc cooperation arrangements with the ICC to something that's institutionalized, to entering into a cooperation agreement like we have with ICTY, and ICTR, to including Rewards – including ICC in the Rewards for Justice program. For even participating in the Assembly of States-Parties, the discussions at the Review Conference in 2010.

I think there are real constraints there, under ASPA, and so I think the point that David made, that we have to look at this very early on, about amending this or, ideally, repealing it, but this is something that is going to have to be looked at, I think seriously, very early on, if we want to engage further with the court.

HALPERIN: Let me ask you (inaudible) question, which is, do you think we need in some way to unsign the unsigning, in order to make it clear that we're committed to the purposes of the treaty? And can we do even that with ASPA on the books?

WILLIAMSON: I think it's difficult with ASPA on the books. I think we do need to do that. I think some of the points that you made about the very clumsy, kind of heavy-handed way that we dealt with Article 98 agreements – the symbolic importance of the U.S. sort of resigning the treaty. And again, what the actual mechanism is for doing that, I'm not sure, because there's some debate as to whether the unsigning was legal.

But I think there is huge symbolic importance in that. There are obviously some down sides to it, and David knows this better than I do. I mean, misgivings were expressed when the treaty was initially signed. At that point, it had not been ratified by 60 states, and had not gone into force.

So you have now had that happen. So there's a question, do you sign onto a treaty that you recognized earlier as being flawed when it is now in force? Also, there's the question of whether you sign on to a treaty if it's unclear it can ever be ratified?

But I think the arguments that were made at the time, of the symbolic importance, and also of allowing the U.S. to engage from inside the tent rather than outside the tent, outweigh those things. But it's going to be a difficult sort of political balancing act.

LAURENTI: Clint, can I ask you if the reason why the U.S., alone among the big power non-signers, or the U.S.-as-signer-asterisk, or whatever – not to have any representative at the periodic negotiations on the crime of aggression, which, if it affects anyone, would presumably affect a country that occasionally feels these uncontrollable urges to depose other countries' tyrannies or whatever – does it not have a particular stake that they should be there?

WILLIAMSON: I think so, and I've actually argued for that, and that we should participate in this. And I've discussed it with a lot of our allies over time.

There are a lot of things that have argued against us doing it. First of all, I think this is the type of decision that would have required a formal policy consensus within the government for us to engage in this sort of thing. And I think, as I said in my initial remarks, that would have been very difficult to achieve. I think if you put this on the table with the Office of the Vice President there, and DOD there – it would have been very hard to get agreement to do it.

And so we were concerned that it would actually have the opposite effect. If you tee this up for a decision, it's going to put a stop to what we had been doing sort of incrementally, in a very low-key fashion.

Secondly, I think that there was a problem with the U.S. engaging in this process during the Bush administration. I think the hostility toward this government, and toward this administration, would have made it very difficult for us to engage in a positive way in those discussions. In other words, anything that we would suggest would almost certainly engender an opposite reaction from everybody else in the room.

I think with the change of administration, there will be a renewed opportunity to reengage. But realistically, I think there is going to be a limited time window there as well. I think there will be a honeymoon period, where people will very much welcome the United States back, but some of the same disagreements that existed when David was engaged in these negotiations back in 2000 and 1999 are going to resurface. And after a period of time, you are going to have some problems there.

So in talking with allies, they also felt like, a lot of times, it was better for them to carry the water for the U.S. on this, rather than us being directly involved. And we certainly engaged behind the scenes trying to express our concerns, and have them do this.

But I think there is an opportunity now, but again, I think there may be a limited time window within which the U.S. can be particularly effective in these discussions.

HALPERIN: Jeff, let me turn it over to you, and I would ask to be put on the list to ask a question.

LAURENTI: You're the moderator – ask your questions now. This is your shot.
(laughter)

HALPERIN: I want to ask about the agenda of the Prosecutor. This is – as you all know, one of the grave concerns that somehow we would have a runaway Prosecutor, and many people had in mind the special prosecutors in the United States. And we all had a view of one runaway prosecutor – it was a different one for different people, but we all (overlapping conversations; inaudible) (laughter) runaway prosecutor.

And the fear was, the Prosecutor of the Court would go off on his own, and decide what to do. And in fact, as you all know, the agenda of the Court, I think to most people's surprise, has been made up, I think, entirely up until now in terms of actual cases, of either situations where countries ask the Prosecutor to take on the caseload because it, in effect, said we can't do it – complementary means you have to do it. Or, in the case of Darfur, the referral of the Security Council.

My question is, is this an important part of what's led the U.S. to be more comfortable with the Court, and do people think it's likely to continue? Or is this

Prosecutor, or the next one, likely to feel that he or she has to show independence by taking on some of their own cases?

M: Well – I'm sorry, go ahead.

LAURENTI: I think, David?

HUTSON: We were in New York yesterday, as David mentioned, and there was some conversation there about how – this is a new Court, a young Court, an immature Court, and variations on that theme. And in some respects, I think that's true, so that while you're entirely right about what's happened thus far, there still probably is some concern that with – that it's not sufficiently institutionalized, either by personality or by rule or by tradition. And that with a new Prosecutor, and maybe some time on his or her hands someday, they may decide to run amok.

And so, that concern is probably still legitimate, but we've got about ten years now, and the Court is maturing, and is probably – the reality of it is – the unfortunate reality of it is, there is probably going to be enough going on in the world for the foreseeable future, that Prosecutors aren't going to be sitting around doing crossword puzzles, wondering about what they can do next to demonstrate their value.

LAURENTI: David?

SCHEFFER: Well, just that we've had ten years of the Court, since 1998, and really, five years now of experience with the Prosecutor, four to five years. And I think there has been a demonstration of seriousness on his part, particularly with respect to jurisdictional issues.

But I think there's probably also been a little bit of discretion on his part as well, that has been healthy discretion. He knows that, I think, if he were to devote his resources and limited time to some kind of assault on – judicial assault on the United States through some manipulation of jurisdictional issues, particularly, for example, if he were to look very seriously at Afghanistan, try to build a case against the United States on Afghanistan, which is a State-Party, that if he were to go down that path, there would be fire and brimstone sort of confronting him on this. It would make his extremely difficult, and his job even more difficult.

So I think there's a little bit of discretion that's going on there as well, which we should recognize – not that we want to have any policy that would bless an exclusion of the United States from serious issues of accountability, but I have been impressed with how this Prosecutor, despite some flaws that he has, has been extremely focused on upholding the principle of complementarity. And I think that if the United States were to become a more formal player with the Court, ultimately, as a State-Party, that Prosecutor Ocampo has established a precedent in

that office of taking the principle of complementarity extremely seriously. Not perfectly, in some people's minds, but he has done so very, very straightforwardly. And that's a precedent which I think we can build upon in the future, because the United States has full capabilities under the complementarity principle, and we would want to see a Prosecutor who fully recognizes that principle. And Ocampo is establishing a track record that I think would make it hard for any successor Prosecutor to suddenly throw that record aside and say, no, I'm going to look at this from a very different perspective.

WILLIAMSON: Just to – yes, just to sort of follow on this. I think this is another factor which argues for U.S. participation in the ICC. Going back to my time at the ICTY, in 1999, during the Kosovo War, there was a push by certain lawyers and investigators to go after senior U.S. officials, and to indict President Clinton, Secretary Albright, and Secretary Cohen, for crimes committed in the context of the Kosovo campaign.

This was a NATO campaign, but nobody talked about Tony Blair, Robin Cook, or Jean Chretien, or Jacques Chirac. It was very much focused on U.S. officials. It was clearly politically driven. You had a responsible Prosecutor, Louise Arbour at the time, who said, there is absolutely no evidence of crimes. In fact, all of the evidence points to an effort to mitigate civilian casualties. When Carla del Ponte came in later that year, there was another push on the same thing, and she also shut it down.

Like David, I would have absolutely no concerns about Luis Moreno-Ocampo pursuing something like this, but there is always that issue there. And I think Senator Clinton, when – during her campaign, pointed this out. But the United States does have an unique role, and as you said, we're forward deployed more than any other military force.

And so, there is always going to be this danger there, and I think that there's no 100% guarantee that you're not going to have a rogue Prosecutor that's going to do this for political reasons. But I think having a U.S. presence in the Court, as we did at ICTY, ICTR, where you have a lot of lawyers there, you have people who can argue this. And you're not there in a national capacity, but nevertheless, it helps to mitigate this sort of demonization of the U.S. And so, I think that, again, is one of the things that should be persuasive in terms of the U.S. reengaging.

ZEID AL-HUSSEIN: You know, I thought it would be worthwhile just to share with you my own experiences in having more or less picked Luis Moreno-Ocampo. I was President of the Assembly of States-Parties at the time, and I had a role in the search for a Prosecutor for the Court.

And although it was felt, broadly felt, by the States-Parties that the Prosecutor should come from a State-Party, there was by no means any instructions to that

effect, and I had a look at a great many U.S. prosecutors for that role. And I had searched far and wide – I went from the Pacific through various African states. And I heard of – I was in search of a reputation more than anything. And I heard of an Argentine prosecutor who was showing great courage in the late 1980s. I didn't know his name – I knew nothing about him, other than that.

And so, we went digging for his CV, and then we subjected his record to quite intense scrutiny. We looked at all of his trials – some were controversial, whether controversial because he was controversial, or the subject matter was controversial, or the defendant was controversial.

And we subjected this to quite a great deal of scrutiny. I interviewed him at least, I think, on three occasions, and we discussed a whole series of issues. And then his name was one of three that were submitted to my bureau, or the bureau of the Assembly of States-Parties. We had another intense discussion, and then he was chosen and submitted to the Assembly.

And I say this because I want to illustrate the degree to which we are mindful of how much is at stake here – that we can't have a rogue Prosecutor just take decisions on the fly. And while you might have, in the case of this Prosecutor, occasional statements would come out as (inaudible), as Clint said, he is surrounded by a professional staff, and he is a professional prosecutor, after all. And so, the decisions, the flow of decisions, are sort of predictable and reasonable.

I also would like to point out that I believe that we – the Assembly of States-Parties, are more mindful that the Court must maintain a harmonious relationship between its three main divisions. And I say this, because there were experiences within the Yugoslav tribunal where you had terrible – a terrible clash of personalities. For instance, in the Office of the Prosecutor at the time Clint was there, where the casework was being affected by the fact that the Prosecutor and the Deputy Prosecutor hated each other.

And the Security Council did nothing to intervene at the time, to try and lower the temperature, and say, look – you can have professional disagreements, but when it reaches this level, and it's affecting the casework, you've really got to cut this out.

We are more mindful of this, and when I was President, and I know the former President, my successor, and now the current President, will occasionally sort of quietly – we – and again, recognizing the independence of the Court, we're not interfering in the work of the Court. But we will advise them to, if there are differences of opinion, this is entirely natural, but let's keep it within the bounds of reason, and you don't have to air this in public. You can just conduct your discourse and your discussion quietly.

So I'd like to think that we will continue along these lines, believing that this Court will make a great contribution to the maintenance of peace and security in this century and beyond. And so we have a very fine institution which we seek to protect, and I think we will continue to operate in that fashion.

HALPERIN: David, did you want to make one more point, then I'll turn it over to –

SCHEFFER: Right. It's actually just an ancillary point, and I just wanted to throw this on the table.

I've been rather interested in Article 112, subparagraph 4 of the Rome statute, which has never been activated, and it is an opportunity in the future, particularly for states like the United States, perhaps also some of the other non-Party states at this point, who ultimately might be encouraged to join, whether it be Indonesia, Russia, India, otherwise. And that is, that the Assembly of States-Parties, which Ambassador Zeid al-Hussein led for so long, for three years, may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

Now, it may be, as Zeid would probably argue, that the Assembly of States-Parties is doing a fine job at overseeing its own work at this point without having to create a subsidiary body, and I would take the merit of that argument as far as we could take it.

But I think also in terms of U.S. participation in the Court, this is kind of an opportunity, where a subsidiary body of this character, if it were to be created, would satisfy – or would address some very traditional American concerns about institutions of this character over the last 15 to 20 years, and that is, the efficiency by which they are run, their budgeting process. But also, it would slip into the Office of the Prosecutor, in terms of how well is that office being run, to what extent are the resources of the Court being used as efficiently as possible by the Prosecutor, given that they are limited resources.

And that is a little bit of a check on the Prosecutor, to have a subsidiary organ that would keep its eyes on the ball as closely as possible in that respect, but it also goes to the issue of that one often hears about – not only this Court, but the other Courts, that somehow there's a democracy deficit in the operation of these courts, that they're far too independent of the democratic will of the states that are parties to the Court.

We don't want to slice too deeply into the independence of a Court, but I think we do want to consider seriously, are we doing everything that is useful in the auditing and oversight of the operation of the Court? Are there any additional steps we could take that would address that – those particular concerns about a democracy

deficit, as well as, is this Prosecutor turning out to be a rogue Prosecutor, using the limited resources in ways that far outdistance where the Assembly of States-Parties would have assumed they should be utilized.

ZEID AL-HUSSEIN: I am delighted to report to you, David, that I chaired a meeting in the Hague on this very issue back in November. And in February, we should have a program budget indication of how much it's going to cost to set this up, and I'll be chairing that meeting. And hopefully by February 13th, we'll have it set up.

So I anticipated your need –

SCHEFFER: And I thank you. I mean, Clint, I know the U.S. government was totally on top of knowing that.

(laughter)

But again, with an official U.S. representative in the room, I would not have said what I just said.

LAURENTI: I would like to welcome now the contributions, comments, questions, of those of you who patiently listened to the opening exchanges here, so (inaudible), please identify yourself by name and affiliation. And do we have a microphone to carry around? Then shout, please. Yes, sir?

MATHESON: Mike Matheson, and I have a question (inaudible). I'd like to come back to (inaudible) aggression (inaudible), because (inaudible question - microphone inaccessible), because at least in the U.S. political system, that (inaudible) of the prosecution of the highest level of political and military leaders, or of the U.S., or of its key allies, for national decisions to use force as opposed to actual atrocities.

And so, I guess the question is, what do you think can or should be done with respect to that issue of including aggression, and what its effect might be on everything that you've been proposing?

LAURENTI: I thank you, Mike. Others? We're going to just collect all the comments around. Ed, and then (inaudible).

ELMENDORF: I'm Ed Elmendorf from the United Nations Association. We heard from the panel about attitudes in the administration, both current and future, towards the Court, but not very much about attitudes on Capitol Hill. And I wonder if members of the panel could offer comments on how they see attitudes on the Hill evolving.

LAURENTI: OK, then (inaudible), you can wheel around again. Don Kraus?

KRAUS: I'm Don Kraus, with Citizens for Global Solutions. We also convene the Washington Working Group on the International Criminal Court. And the conveners of that group really have had three basic priorities in terms of initial U.S. cooperation. One, which is reversing the unsigned, two is a formalized cooperation with the Court, and three is a constructive U.S. role in the Assembly of State-Parties, looking towards the 2010 Review Conference.

And we see these as the first three things. Notice that we really didn't include overturning ASPA immediately upon that, because we really did an analysis, because we looked at it, and we worked very hard back when it was being written with Senator Leahy and Dodd's office to perforate it as much as possible, and there really does seem to be enough waivers built into it to initially not have to deal with that political fight on the Hill, to be able to accomplish some of those other three pieces, as long as there's an administration in the White House that's willing to go along and use the waiver authority that's built into it.

So it's really, from our perspective, much more a question of sequencing than it is what has to happen when. But we're very, very concerned about going into political fights, both in Congress, before there's a really significant reframing of how the Court is perceived within the U.S. public, and particularly within the military as well, getting away from this Court as a kangaroo court out to get U.S. service members framed. Which frankly, is still predominant, particularly talking to many, many candidates as part of our reviewing and getting the responses to questionnaires this time around, and looking at much more, is the Court out to get the bad guys, and really doing that reframing process.

So from the panel's perspective, what are the steps that really need to happen in order to actually get that reframing and that new perspective on the Court in place, so some of these more constructive steps can happen?

LAURENTI: Other comments or questions at this stage, before we – yes.

VILES: Tom Viles, a partner –

LAURENTI: Hey, can you, Tom, shout for us?

VILES: Yes, I can. Tom Viles, partner at Berliner, Corcoran and Rowe, and ABA representative of the ICP.

I'm sorry that this sounds like a slightly (inaudible) question, but the devil is in the details. With regard to the second declaration, perhaps no new legislation would be required after the ICC is ratified. But wouldn't the ratification of the ICC itself constitute later in time legislation, thereby obviating the need for any subsequent legislation, or even the repudiation of the ASPA? Wouldn't the ratification have nullified the ASPA? (inaudible).

LAURENTI: There's a question for our lawyers here. But, a last one on this cycle? Not seeing one yet, I will pose one, actually, to Zeid, because you had noted the remarkable feature of 108 countries being willing to place their heads of state at some degree of theoretical risk. But what is most striking is that in the region of the world from which you come, save for Jordan, almost nobody has been willing to subject its head of state to that kind of risk.

I wonder if you could explore what (break in audio) in the Middle Eastern region in particular that has led to this caution about the Court, and how the Darfur/Sudan prospective arrest warrant plays into that, or reflects that.

ZEID AL-HUSSEIN: Yes. In the beginning, I think there is –

LAURENTI: This is not – we're going into the whole collection.

ZEID AL-HUSSEIN: Oh, sorry. OK. Want me –

LAURENTI: Why don't you start, and –

ZEID AL-HUSSEIN: OK. In the beginning, I think it was just a lack of understanding about how the statute was put together, and what it purports to be. There was a period of time when we suspected that there were at least two, possibly three Arab countries that were very close to taking the decision to ratify it. But as we understood it, by virtue of the pressure exerted upon these states by the U.S., they then sort of stepped back from ratification. So I think that probably explains it.

On Darfur, of course one notices – and a few days ago, that the Sudanese opposition has called upon the Sudanese President to step down and turn himself in to the ICC. One sort of perhaps expects it.

But I think it will be news that will be front and center, when – or the pretrial chamber announces its decision on the application by the Prosecutor for an arrest warrant, because of the likely reaction by the African states. And so I think this will prompt the new administration to take a position. It cannot, sort of, not take one. I think it will be quite a circus, to be honest, when that decision comes out.

It – you will have, again, complications, because many – from – in terms of the Arab point of view, many from the Arab world don't really understand Article 12 and 13, and so they see – view the various events in the Middle East and wonder, why can't the ICC get involved there, but it gets involved in Darfur, not realizing, of course, that the Security Council has taken action on Darfur.

And so, I think there is an element of misunderstanding there that plays into Arab perceptions, Arab Middle Eastern perceptions.

LAURENTI: And if we could, around the table, perhaps commenting on that question as well, but also Mike Matheson's question about aggression, what can be done on that, Ed Elmendorf's about evolving attitudes on the Hill, if they have evolved at all, Don Kraus' about the steps, the sequencing that politically should happen, and then Tom Viles', why go through all those steps, wouldn't ratification cleanly, effectively, put all of the past legislative enactments to rest? So –

WILLIAMSON: If I can just maybe follow on what Zeid was saying –

LAURENTI: Yes, Clint?

WILLIAMSON: When this issue came up about the Article 16 deferral on Darfur, and I went out very shortly after our vote in the Security Council, our abstention there, and had meetings with the Brits and French, and we had sort of a series of P3 discussions on this, and explaining our point of view, and basically trying to bolster them on where they were on this.

But one of the big concerns that came from both the Brits and the French was what they saw as the threat to the ICC by proceeding against Bashir. And this was because of the movement within the African union and the OIC to – and threats that were coming out that countries were going to withdraw from the ICC if this prosecution went forward.

And the argument that we were making is, well, if you give into it now, you might get some sort of short-term salvation for the Court, but over the long run, you're weakening it.

But I think that this is very much been exploited by people who are protecting their own self interest. I mean, you've got Mugabe, Kaddafi, Kabila, Kagami in Rwanda, all of them criticizing sort of this Western-inspired justice that's being imposed in kind of a neo-colonialist fashion.

And so, they've really tapped into the sensitive points there, and this is going to be a huge issue that the Court has to confront, and I think it's something that they're going to have to deal with. And one of the reasons that there was interest, maybe, in the ICC, of taking on the Georgia/Russia case, just to show that this was not an Africa-centric court.

But I think it's something – the Court is going to have to work on this and deal with it. It's a huge problem.

LAURENTI: John? This collection of questions –

HUTSON: This – yeah, I'll just talk for a minute. (laughter) No particular goal in mind, I guess.

I think the point that was made about not engaging in Congress prematurely is a very, very important point. You know, there is a bit of inertia here. We haven't really done anything with this significantly for some period of time, other than oppose it. And the opposition has evolved a bit, but basically, it's opposition. So the inertia is in the wrong direction for ratification.

And there's a ton of education that has to be done before you can move ahead, and the worst – you know, the American and certainly Congressional attention span is very limited. You're going to get one more shot at this, in the relatively near future, and then it will be the next administration that will be worried about it, so that you've got to make pretty sure that if you address it, you're going to – you're timing it right, and you're going to achieve success.

And so that I think that educating the military – raising the consciousness and educating the military, raising the consciousness and educating Congress, getting people to be thinking about it – and the administration. I see Clinton's confirmation hearing on the TV over there. Unless something pretty remarkable happens in the next couple of hours, she's going to be the next Secretary of State, and will have a significant role in all of this.

So that has to be done in a very deliberate, intentional sort of way, I think, in order for this to ever have any chance of success.

LAURENTI: David?

SCHEFFER: Let me take a couple of the questions that were asked – Mike Matheson's, on the crime of aggression.

We had a good talk about this up in New York yesterday. And I think there is something encouraging to find in the developments on the crime of aggression, Mike, in the sense that the Assembly of States-Parties special working group on the crime of aggression has been laboring away for many years on this. There is still a – shall we say, a divisive set of views about exactly how to proceed.

And yet, I saw it as an encouraging step, even in the last session, where there was a considerable focus on – and a very open discussion, about how to look at Article 121, 4 and 5, which are the amendment provisions in the Rome statute, which would have to be activated in order to bring a definition, as well as a jurisdictional basis for the crime of aggression into the Rome statute in an operational way. You'd have to have an amendment to the statute to achieve this.

That act of amending the statute actually opens considerable opportunities to address concerns as to whether or not particular states will want to be subject to the jurisdiction of the court on the crime of aggression. It permits a, shall we say, an opt-in procedure.

And there was a very transparent discussion about this, that – although I was not in the room, I certainly was deeply involved in the fall and the run up to that meeting, and the readouts from it. And I found it somewhat encouraging, from a U.S. perspective, that we may have the opportunity by the time the 2010 Review Conference comes along of having a rather pragmatic definition of the crime of aggression that we might be able to swallow. We're not there yet, but it's starting to get there.

And as far as jurisdictional nexus, that's still a very fluid discussion. But when you throw in the opportunity for States-Parties and new States-Parties, shall we say, or even non-States-Parties, to exclude themselves from the crime of aggression through an opt-in procedure, or you can reverse it and call it an opt-out procedure – it depends on which way you go on the drafting – it does mean that at the end of the day, I'm beginning to see a little light at the end of the tunnel of the possibility of the crime of aggression existing within the statute as an operational crime, but without necessarily a full application to all States-Parties to the Court, or even to non-States-Parties. This was an issue in 1998 that was so difficult, because we felt there was a drafting flaw in the treaty that somehow subjected non-Parties to the crime of aggression, but not necessarily all States-Parties, which didn't make sense.

So I just want to put that marker down, without going through the endless details of this discussion on the crime of aggression that's taking place very professionally within the Assembly of States-Parties, that I think there is a process underway that is – that may prove to be manageable. I would just want the United States in the room, quite frankly, to address that issue. Russia is there, India is there, Indonesia is there – I mean, they're all there, the non-Parties. They're voicing their opinions. Israel is there. The United States is not.

Now, that takes me to Don's point, about – that John Hutson has already commented on briefly, and getting this new perspective on the Court on Capitol Hill, and how to do it, and John is absolutely right in what he has proposed.

I would say, Clint, that part of that Capitol Hill process, with respect to the American Service Protection Act, I would think that the two provisions of that Act which could more readily be addressed by Congress over the next year or so would be what our colleagues overseas so infamously have called the Hague invasion provision, which authorizes – it's the most sweeping war power I have ever seen legislation for a President. It's potentially an open-ended war power, authorizing the President to invade any country, to release any U.S. citizen who may be in custody, for purposes of transferring that individual to the Court to stand trial.

I think from a relationship with other perspectives of our foreign policy, that would be an enormous jump start for the United States, to just repeal that provision – get it behind us. And frankly, I think from the perspective of Congressional war powers, I have no idea why they delegated that power to begin with, to the President.

And secondly – and this – you know, wiser heads on the Hill would correct me, but I would think the other provision would be to follow Senator Warner's lead over the last two years – he's not there any more, of course – on military support being removed, repealed, as a leverage – that we simply go ahead and remove the economic support funds provision as well, as the leverage that we use on the bilateral surrender agreements.

Oh, did this just happen, too? I am really out of it here. When did this happen?

M: It was not – it's gone, in the sense it was not included in the (inaudible) all, and to (inaudible).

SCHEFFER: So now it's gone. So it's already taken care of.

M: It's only (inaudible),

SCHEFFER: This happened – what, last month, or –

M: (inaudible), in June?

SCHEFFER: In June? Boy, this isn't even recorded.

LAURENTI: Chicago was more focused on other issues.

SCHEFFER: OK, I don't even think the www.amic.org (sp?) site, I don't think, even reports this.

M: Because it – we're waiting for the final law.

SCHEFFER: Oh, I see. OK.

M: (inaudible).

SCHEFFER: Oh, well, the virtues of being on the outside. And so, that's taken care of.

There was one – just one other quick point.

LAURENTI: Ratification –

SCHEFFER: Ratification of the Rome statute, would it nullify ASPA? Very, very interesting legal question.

You know, you might be able to make that argument. I would turn to Mike Matheson for the final opinion on it. But I would suggest that any ratification of the Rome statute inevitably must have an entire package of implementing legislation associated with it. It's just implausible that it would not. And therefore, I think within the context of that implementing legislation, there would have to be – there would be an explicit repeal of ASPA, and I think members would probably insist upon it, that it go to a vote. Even those who want to support continuing ASPA would insist that we go to a vote on ASPA before we ratify the Rome statute.

LAURENTI: Well, thank you very much, panel, moderator. John Hutson, to take a note of inertia, and that reminds us, those of who have been around the New York atmosphere, and Zeid will know this well, the wag who has it that at the United Nations in defiance of all of the laws of physics, inertia acquires momentum.

(laughter)

And it is our hope that inertia in Washington on the ICC, far from acquiring momentum, may now be shaken, and we can begin to get some serious discussion about U.S. interests and global interests, and revisiting this new international institution.

I want to thank all of you for having come out on a Tuesday morning, counting days down now until the crowds arrive in this town next Tuesday. I want to thank our panel, our paper writers, Ambassador Zeid, Ambassador Williamson, and especially, our long time colleague Mort Halperin for having so skillfully led this discussion and put the markers out for our conversation.

Thank you much.

(applause)

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