

# INTERNATIONAL & NATIONAL SECURITY LAW

## THE U.S. RESPONSE TO THE INTERNATIONAL CRIMINAL COURT: WHAT NEXT?

### CAN THE ICC BE EFFECTIVE ON THE WORLD STAGE?\*

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**MR. BAKER:** We're going to do this almost entirely out of questions, as opposed to set-piece presentations. So, let me introduce the panel, which is a really excellent panel. I will start with Tom Malinowski. Tom is head of the Washington office of Human Rights Watch. He previously was chief speech writer for the National Security Council under President Clinton. And, he's worked for the Ford Foundation and for Senator Moynihan.

Next to him is Jeremy Rabkin, who teaches international law and American constitutional history at the Department of Government at Cornell University.

Then, Ron Rychlak is a professor of law at the University of Mississippi, and who has previously practiced law at Jenner & Block, and participated, I believe in the ICC negotiations on behalf of the Vatican.

Then, Elisa Massimino is the Director of the Washington office of the Lawyer's Committee for Human Rights. She has taught at the University of Virginia Law School and George Washington, and previously practiced law at Hogan & Hartson.

Finally, we have Ed Williamson. As many of you know, he was for two and a half years in the first Bush Administration. They actually called it the first Bush Administration, but they had something else in mind. He was the legal advisor to the State Department, and apart from that dalliance with government service, he has spent his career at Sullivan & Cromwell.

What I'd like to do is get to some of the questions about what we can do in the world we're in now, where we've already un-signed the treaty. First, I think it would be useful to explore what the impact of the Treaty and why originally the U.S. was so enthusiastic about it.

I'll ask Elisa to lay out the reasons the U.S. wanted this treaty in the first place.

**MS. MASSIMINO:** I'm anxious to get into this discussion, too. The short answer is that the best arguments for the ICC and the reason why the U.S. was for so long so enthusiastic is the same argument that we hear all the time, and that we all make about domestic crime. It's the practical and moral value of justice and accountability, it's the deterrence factor, and it's the question of victims' rights.

On those issues, the court is an important step forward, but obviously it's not a panacea. It's not going to deter psychopaths. You know, people ask, will it be a deterrent to Saddam Hussein. It's not going to deter people who cannot be deterred anymore than domestic criminal law does. But, the idea is essentially the same as domestic criminal law; once it's shown that it works, the deterrent factor will be strengthened. Right now, the ICC is not much of a deterrent; it's not operating. But, to the extent that the court works responsibly and well in holding people accountable, eventually that will kick in.

**MR. BAKER:** So, Ed or Ron, what happened? Why did the U.S. turn around so dramatically on this issue.

**PROFESSOR RYCHLAK:** Well, I don't know the inside workings of the government. But certainly, I think that if we're going to talk about deterrents, as I look closer, I do not see a deterrent value from this court, primarily because we are talking about people who will be protected by an army. You have to get them out of power before you can prosecute these people.

I spoke to lobbyists at the U.N. about this. I said, "Do you really think there's a deterrent value in this kind of situation?" They said, "Well, we have to do something." Well, take pictures of Mussolini hanging upside-down in Milan and blow them up into posters, if you want to convince people that we will take care of tyrants. I am not sure that a court with no death penalty, with a form of due process, with lawyers for the defense, will deter people. I think that's one of my big concerns.

**PROFESSOR RABKIN:** I want to challenge the premise of the question, that this was something that America was enthusiastic about. This is something that President Clinton was having fun with. That's different from America being

enthusiastic about it.

And if you ask, why was President Clinton drawn to this, the answer is that there were all kinds of atrocities taking place in Yugoslavia. A lot of people were worried about it, and Clinton, after he had that experience in Somalia, said we're not getting involved in that. No troops. Therefore, let's send in lawyers. That's always a good gesture. Then, there were a million people slaughtered in Rwanda, and Clinton said from the very beginning, "We can't get involved in that; we can't get involved in that." What do we do? Let's send in lawyers. That was Madeleine Albright's forceful foreign policy. As she said, "We are the indispensable power because we have more lawyers than any other country in the world."

You should not start from the premise that there's a serious policy objective here; you should start from the premise that this was Clintonism, which is different from serious policy.

**MR. BAKER:** Sending in the lawyers when everybody's getting killed is kind of a two-fer, isn't it?

**PROFESSOR RABKIN:** Unfortunately, we send in the lawyers afterwards.

**MR. WILLIAMSON:** Stewart, I would enter my position that an international criminal tribunal is possibly a useful tool to have in the toolbox. It depends very much on how it's done and so forth. I mean, for example, I think that had we had Saddam Hussein in captivity, we definitely would have preferred that he be tried by an international criminal tribunal. I think what we did with the Lockerbie defendants, while not perfect, was certainly the best solution under the circumstances.

The problem with this particular ICC really goes to the question that was discussed at the last panel. It is the concept of complementarity. Incidentally, I'd like to take a couple of minutes to raise a couple of issues that were raised in the previous panel, and perhaps those panelists can come in during the question period about it.

First, I would just make the observation. Of the 67 countries that have ratified, seven of them each have populations of less than 100,000, and include such mighty powers and contributors to maintaining international peace and security as Nauru and the Marshall Islands. But having said that, I do not deny that there will eventually be substantially more than 60 ratifiers, and that we would be able to find 60 countries with whom we do not basically disagree as to matters of criminal justice.

There was a statement made by David Stoelting, and this is kind of key to my understanding of the ICC. That had to do with the question of the West Bank and the Gaza Strip. My understanding is that after July 1, it is quite possible that, say, on July the 15th, the Israelis take out a school by mistake or something like that. It could be 2010, it could be 2030, it could be 2003. Whereas, a Palestinian state established that covers the territory where those civilian casualties occurred, and that that Palestinian state can certainly consent under Article 12 of the Rome Statute to the court having jurisdiction under those circumstances.

**PANELIST:** It's much more immediate than that.

**MR. WILLIAMSON:** Well, let me just correct a couple of concepts here.

Second is on the role of judges — John Washburn, I would be interested in your precedents for this sort of independent set of judges. The closest precedent that I know of is the International Court of Justice. I do not believe that anyone takes the position that those judges are not there acting in the interest of the governments. In fact, any defendant, any party to the ICJ, is entitled to have a judge of its own nationality sitting in that particular case. And I'm unaware, except in a couple of cases — it was usually involving the U.S. — where a judge voted against his own government.

And, on the issue of complementarity, I think it's a little easier for me to focus on this using a slightly different example than what John Washburn used. Let's take the case where it's not a question of whether or not the U.S. will try to do something about the marine general who's the commander of Guantanamo Bay, for example. But suppose we've decided that he was acting in accordance with the Geneva Conventions, or that the Geneva Conventions were not implicated when he did not give the hearing as to the status of the detainees at Guantanamo Bay. Then, later, somebody brings a complaint to the ICC, and the U.S. comes forward and says, we've already done this. I think it's quite easy to reach the conclusion that the U.S. is unwilling to prosecute this person for this war crime. So, I think you immediately walk right into the exception for complementarity, and it's that second-guessing that I disagree with.

**MR. BAKER:** Why don't we explore that one. Does "unwilling" mean that the prosecutors can say, "Well, you obviously haven't done a very good job of prosecuting this, or you haven't prosecuted it for reasons that seem sufficient to you, but they don't seem sufficient to us?" Tom, Elisa, do you think that is a plausible interpretation of "unwilling"?

**MS. MASSIMINO:** No. I don't think it is. What the Statute says and what the parties intend, and those who were at Rome can attest to this, is that "unwillingness" is not an unwillingness to prosecute. It is an unwillingness to investigate allegations of violations of the laws of war. In fact, what I've seen in having discussions with the Bush Administration about

this very issue is that there has been a lot of thinking and research and reaching of the conclusion — I don't necessarily agree with every element of that conclusion — about the applicability of the Geneva Conventions to Guantanamo. I think that would probably constitute an investigation; certainly, a willingness to investigate allegations of violations of the laws of war.

So, it's really important that it's not unwillingness to prosecute. You don't have to prosecute in order to satisfy complementarity. That would kind of defeat the whole purpose.

**MR. WILLIAMSON:** I'm sorry, but Article 17 — and it's sort of awkward to look at the wording — but it does say, unless a decision resulted from the unwillingness of the state genuinely to prosecute.

**MR. BAKER:** Is there anybody here who knows anything about Ixid arbitration? Probably not. Right? Okay, I get to say whatever I want.

The Ixid arbitration was for arbitration of investment disputes between investors and nations. And it provided an appellate process that was supposed to be very rare. It said, the only time the appellate panel can overrule the original arbitration panel is if there are no reasons given for the lower judgment. The third appeal — that panel said, well, yes, you've got 150 pages of reasons here, but they're not good reasons and that's as bad as no reasons, so we are going to reverse. There really was not much you could do at that point because everybody had signed up to the Treaty, and they used the words of the Treaty.

What is the protection against that kind of interpretation of the words "genuinely prosecute"?

**PROFESSOR RABKIN:** Again, I think the premise of the question is mistaken because you're looking at this as if it's a legal forum. It's not a legal forum. It is utterly, totally, completely political.

To the extent that criminal justice has some kind of integrity in the United States, it's because we have a long tradition of operating a criminal justice system, and we know what it is.

Suppose we said, let's improve our system by getting together with China, and then China and America will together synthesize the best features of their two systems, and it will be sort of broadly accountable to China and America. Everybody would throw up their hands and say that is insane.

Now, if you look at this list of who we're doing this with, it happens not to be China, so don't worry about that. But it is quite a lot of other very nasty countries which have no experience running anything except hate sessions at the U.N. Basically, this list is the European caucus, everyone that they whipped in line in Europe, and then their African colonies, with just a handful of others. It's basically Europe and Europe's clients. And you have to ask with a straight face, France — do we trust them to be impartial and serious and take a legal view of this? To ask the question is to answer. It is ludicrous.

Let me just add one more thing. One more thing. We were told in the earlier panel by Mr. Stoelting, this is not going to be like the Durbin Conference; everyone's so upset about the Durbin Conference. Well, yes, everyone was rather upset about the Durbin Conference. And who hosted it? It was basically done by Europeans, all of whom stayed.

They said, "Well, it's a little embarrassing, all this Nazi literature and all this Nazi rhetoric; we're a little bit embarrassed, but not embarrassed enough to walk out." Okay, those are the people who are setting up this system. It is utterly clear, this system is designed for propagandist show trials, and that's what you're going to get.

**MR. MALINOWSKI:** Look, this whole thing is based on a fear of foreigners. That's sort of the root of all of this. I mean, the critics of this, they see the rules and the rules are airtight, and so they say the rules don't matter; you can't trust the foreigners who are going to be implementing the rules.

Now, even if you accept that, the United States — this Administration — has just made a colossal strategic, tactical blunder in refusing to exert U.S. influence on who gets to implement these rules. EU begged the State Department to play a role in selecting the judges and selecting the prosecutor. This Administration said, no, we're not going to do that. We're not going to exert American power and influence over this. We're just going to let these rogue states, as you called them, run the show.

In fact, it's not going to be rogue states. It's not the EU plus the countries who hijacked Durbin, who hijacked the G8. Freedom House, which is a pretty respected conservative organization, did an analysis of the countries that ratified the treaty on the basis of their characterization of countries as free, partly free and not free. And of the ratifying countries, only one was not free. That's Tajikistan, which is right now a client state of the United States in Central Asia.

I mean, this is just preposterous. You have to imagine a massive conspiracy of America's closest NATO allies to put Donald Rumsfeld on the dock in order to buy into this paranoid theory. Even if the prosecutor is a rogue prosecutor, even if at every single stage they ignore the rules, the notion that America could not get the Security Council to shut down the prosecution is just absolutely preposterous.

Our closest allies on the Security Council in that case would be China and Russia, who would see such a prosecution for exactly what it was — a precedent for putting Putin and Chiang on the dock over Chechnya and Tibet. They wouldn't stand for it, and the French and the British wouldn't stand for it either. It's delusional.

**MR. BAKER:** And can they stop it?

**MR. MALINOWSKI:** Yes. The Security Council can stop any case before the court.

**MR. BAKER:** Subject to veto?

**MR. MALINOWSKI:** Subject to veto. To veto it, you have to imagine that either France or Britain would exercise a veto to put an American in the dock in a politically motivated case, which would basically be to imagine the end of NATO. Or, you would have to imagine that the Chinese or the Russians would be smoking something and allowing this international body to start interfering in the internal affairs of countries where massive human rights violations take place. That would be suicidal from their point of view, politically. So again, I think you would have to be delusional to imagine that.

**MR. BAKER:** Ed.

**MR. WILLIAMSON:** I would definitely recommend to Tom, as soon this panel is over, to give Mr. Kissinger a call and tell him that he really has nothing to worry about as he gets ready to go to Europe, where I guess Baltasar Garzon is lying in wait for him.

**MR. MALINOWSKI:** I wouldn't say Mr. Kissinger has nothing to worry about. But he has nothing to worry about from the ICC. He's got everything to worry about from other courts that you guys ought to be more worried about than the ICC.

**MR. BAKER:** On this question of whether American forces can be prosecuted, I thought it would be at least useful to pick out an example from recent history and ask whether there's a plausible war crimes case to be made. I thought I'd just read a passage from *Blackhawk Down*. This is where the American forces have lost their helicopter support, they're trying to rescue some of the pilots and they're in trouble themselves. Just one paragraph.

"Somalies continued to mass to the north. In the distance, it looked like thousands. One group moved down to just a block and a half a way; maybe 15 people. Nelson tried to direct his machine gun only at those with weapons, but there were so many people and those with guns kept stepping from the crowd to take shots. So, we knew we either had to let the gunmen shoot or lay into the crowd. After a few moments of debate, he chose the latter. That group dispersed, leaving bodies on the street, and another, larger one appeared. They seemed to be coming now in swarms from the north, as though chased from somewhere else. They were closing in — just 40 or 50 feet up the road, some of them shooting. This time, Nelson didn't have time to weigh alternatives. He cut loose, and his rounds tore through the crowd like a scythe. A little bird swooped and then threw a flaming wall of lead at it. Those who didn't fall, fled. One minute, there was a crowd; the next minute, there was just a bleeding heap of dead and injured."

That's the testimony in the investigation. I will, for contrast, read a human rights report on Jenin, which says, it's a war crime to engage in military action that results in disproportionate civilian deaths.

"Human Rights Watch concludes that the Israeli military actions in the Jenin refugee camp included both indiscriminate and disproportionate attacks. Some attacks were indiscriminate because Israeli forces, particularly the IDF helicopters, did not focus their fire power only toward legitimate military targets, but rather fired into the camp at random. This indiscriminate use of fire power added significantly to the civilian casualty toll of the fighting and the destruction of civilian homes in the camp."

That, I take it, is a slightly veiled accusation of potential war crimes by the Israeli IDF, which killed 50 people in Jenin. We probably killed between 500 and 1,000 in Somalia. Is there a plausible war crimes case made out by that passage from *Blackhawk Down*?

**MR. MALINOWSKI:** Let me address both aspects of that on Jenin. What we found after our investigation in Jenin was, first of all, that no massacre took place, contrary to the Palestinian leadership. But there were approximately 22 civilian deaths, of which some appeared to be cases where civilians were unlawfully killed. And we did suggest, in fact, that a war crimes case could potentially be brought in those cases.

But let's assume that we're living in a parallel universe, in which Israel does fall under the jurisdiction of the ICC; for reasons that have been explained, it doesn't and it wouldn't. Events today in Israel would not suddenly fall into the jurisdiction ten years from now, if a Palestinian state is declared. But let's assume that it did fall under the jurisdiction.

Simply stating that a war crime occurred doesn't necessarily suggest that a war crime that meets the higher standard of the ICC occurred. You'd have to show a pattern, a plan, an intent. And, we wouldn't argue based on our findings that even if these things did occur and they were proven, they would constitute war crimes under the ICC statute. In fact, the Israeli government has taken steps in the last couple of weeks to address some of the concerns that we express, particularly with

respect to the use of civilian shields.

Now, let me get to your central question about Somalia. Again, I'm just responding to the passage, as you've read it. I would say no, that you couldn't bring a case in that case. This gets back to the proportionality test that we were debating in the previous panel. I think some of the critics of the court suggested that this weighing test is designed to give prosecutor discretion to go after soldiers in that situation. In fact, it's designed to give the military discretion.

You could easily have a simple rule that says, if the military kills 500 civilians, that's a war crime because civilians are innocent people who shouldn't be killed in war. In fact, the laws of war say something very different. They say that civilians can legitimately be killed in wartime. And in fact, they give the armed forces of any country a great deal of discretion, so long as they meet this test of proportionality.

Again, based on the description that you read — that very chilling description of a soldier who's trapped in this situation, clearly making a decision that there's a military necessity and presumably that civilian shielding was involved, to make a decision that resulted in that kind of tragedy — I don't think anyone could credibly allege that a war crime occurred. Certainly not a war crime on the level of the ICC definitions.

**MR. BAKER:** Of course, the Israelis probably lost more people in Jenin than we lost in Somalia that day. They obviously thought that they were under attack that required that kind of fire power. But Human Rights Watch thought that there was a plausible case for disproportionate use of force there.

**MR. MALINOWSKI:** Well, I mean, in fact the Israelis — they certainly don't agree with all of our findings, but they have actually acknowledged that some of our findings were true on this issue of the use of civilian shields, where they used Palestinian civilians basically as props for their guns in some cases. The IDF has issued an order to all of its troops ceasing, so I don't think there's quite as much of a controversy as you might suggest.

Our report fell, really, right in the middle. The Palestinians hated it. The Israelis didn't like every aspect of it. I think it's generally considered quite credible.

**MS. MASSIMINO:** You know, I think, getting back to the political aspect of this — in one sense I agree with Jeremy, and I think Jeremy and Tom really agreed on this one point. That is that the questions and fears about this court really get down to questions of politics. You know, a lot of what we're talking about this morning are arguments between people who think the court will be used irresponsibly against the United States and people who have faith that it's not going to be, or believe that it won't, or believe that the statute is structured in such a way that it constrains that use of political power.

On these questions of Israel and Palestine and all of the hard cases, the question really is, will the court be a responsible institution that does what we supporters of the court intended for it to do? That is to go after the world's worst human rights criminals — people who commit genocide, massive war crimes and crimes against humanity. And, how does the U.S. best make sure that happens? That's the question now.

I mean, the court is coming into existence. It's an academic exercise to talk about whether it should be stopped. We've moved on from that. We're past that. The court is coming into existence, and the question is, what's in the United States' best interest now? Almost all of the political arguments raised against the court — and while I disagree with most of them — they certainly deserve debate, unlike, I think, many of the legal questions, which do not deserve as much debate as they get. The political questions do deserve debate.

But it seems to me that almost all of the political concerns raised about the ICC would be best addressed from the viewpoint of U.S. national interest by engagement by the U.S. with the court in an ongoing way. The question about who the prosecutor is going to be: the question about whether aggression will become one of the crimes that ICC has jurisdiction over. These are all questions that the United States and American people have a great interest in the outcome. How do we best exert influence in the outcome? And how do we best exert influence over that? I would say it's by engagement. So, that's where we are now. What does the U.S. do now that the court is coming into existence?

**MR. BAKER:** Jeremy.

**PROFESSOR RABKIN:** You cannot participate in a thing like this, and then case by case, say no, we repudiate that political prosecution; no, we repudiate that politicized venture.

You've got to make an assessment at the beginning, whether you think, on balance, enough of these things will be responsible and the politicized wounds will be minor enough that you can live with it. And that's not plausible, given our experience with international institutions, with the U.N., with the U.N. Human Rights Commission. Our experience is that they can't be trusted. And so, it makes sense for us to say from the beginning, "Anything they do, we presumptively question." We may be able to live with some individual prosecutions, but the thing is not set up to do what you are describing.

You're saying that we all agree that we really want to go after genocide. Except, the countries that are likely to do this aren't parties to it. So, what it's really set up to do, I think, is to embarrass other countries, to provide a propaganda forum

against those other countries, that Europeans happen to have a grudge against. And who are those countries, mostly? Israel, Israel, Israel and then the United States. So, I don't want to give that court to the Europeans.

**MS. MASSIMINO:** You know, it's interesting to me that four years ago when we were having this conversation, and the critics of the court were raising the specter that it was going to be controlled by Cuba, Libya, Iraq and Sudan — well, you know, nothing could be further from the truth because countries that ratify the treaty and become part of this court have to subject themselves to the jurisdiction. Countries like that are completely unwilling.

And now, those same critics are raising the specter that the court's going to be controlled by such arch enemies of the United States as Senegal and Mexico. It's absurd — and our NATO allies. I think it's interesting to see the arc of this same argument and see where we're likely to end up.

The point that you make about how we ought to say right now on principle that we're not going to be involved in any prosecution going forward, I think that's very unwise. I think it's quite likely that there will be a prosecution in the next five years, at most, that the U.S. very much wants to see go forward, of a terrorist or a drug kingpin. And, what is the United States going to do? Suppose it has the documentation, the best evidence, to further such a prosecution.

**MR. BAKER:** I think that's important, but I want to stick to this question. Can we really be a little pregnant here? If we go in, can we later say, no, it's not working out and we're leaving? I don't think so.

**MS. MASSIMINO:** I think in a way we can be a little pregnant here because what we arguably should have done is to not squander what influence we had with the court by remaining a signatory.

**MR. BAKER:** Okay, but that's done. So, what can we do now?

**MS. MASSIMINO:** Well, I think the Europeans are still asking the Bush Administration to engage on the issue of who ought to be the prosecutors. There certainly are avenues for the United States, clearly, to exert influence over those important questions that remain unanswered. And it would be foolish, I think, and irresponsible of the United States to back away from those invitations of interest on the part of our allies who want to help make the court more responsible.

Some of my colleagues don't share this view, but I think U.S. participation in this court will help make it stronger.

**MR. BAKER:** Ed.

**MR. WILLIAMSON:** Well, Elisa, I would certainly agree with you that the U.S. ought to be involved and engaged. And the thing that baffles me about this process is that there is already a forum, a platform, for that engagement. It's called the United Nations Security Council. And we have engaged, and we could have done a better job. But we did get engaged, and we established two *ad hoc* tribunals. And so, I have absolutely no problem with going through the exercise and establishing a set of rules and procedures and so forth for *ad hoc* tribunals that would be triggered for the Security Council.

One of the things I really want to focus on here is this question of the quality of the judges and the prosecutor. I still do not see any precedents out there that give me any comfort. Again, I keep going back to the ICJ. Now, the U.S., as a member of the Security Council, has the ability to veto any judge elected by the General Assembly to the ICJ. We have never even dreamed of doing that, even in the midst of the Cold War period, and so forth. In fact, we had a sort of a gentlemen's agreement among the Permanent 5 to support each other's nominees.

I'll take a couple of minutes. The ICJ and the LeGrande case, which was the German citizens who were on death row, in our zone had the opportunity to interpret the provision of the ICJ statute that permits the ICJ to issue provisional measures. Now, people ask me, what's a provisional measure and I say, it's kind of a morally binding preliminary injunction. The statute says that the court shall have the power to indicate if it considers the circumstances so require any provisional measures which ought to be taken to preserve the respective rights of either party. And then, pending the final decision, notice of the measures suggested shall be forthwith given to the parties.

Now, the ICJ, with the U.S. judge voting and a 13 to 2 majority, reached the conclusion that that provisional measures were legally binding; sort of the same as the injunction. None of this "morally binding" stuff.

I quite frankly do not have much confidence in these U.N.-generated bodies. I just don't think the quality's very good. One of the very prominent ICJ judges recently resigned — and I'm not talking about our own, Steve Schwegel, here — and the rumor is because he took a bribe on one of the cases before the court. That just goes back to John McGinnis' point. It's the unaccountability of this court and that it can be hijacked. And if such noted human rights respecters as Cuba and Syria and Iran can be on the U.N. Human Rights Commission, I certainly think some of the judges could find their way onto the ICC when they become partners.

**MR. MALINOWSKI:** Well, once again, those countries are not members of the ICC for a very, very good reason — because

they know that if they —

**MR. WILLIAMSON:** Well, just use the Central African Republic as an example, rather than Syria.

**MR. MALINOWSKI:** Okay. I'm not that scared of the Central African Republic.

I don't know about the ICJ, but there are other international courts out there. There's the ICTY, for example, which the United States has long supported, including this Administration, to its great credit.

**MR. WILLIAMSON:** Well, that was my example.

**MR. MALINOWSKI:** And it's one of these U.N. created courts and I don't think we've ever had any problem with the quality of the judges. And the accountability there is exactly the same.

**MR. WILLIAMSON:** And even in those circumstances, we have had some trouble with both the prosecutor and the judges.

**MS. MASSIMINO:** Well, as we do in the U.S. system. I mean, I don't think you can condemn the system because individual judges are —

**MR. WILLIAMSON:** Exactly. But, at least in the ICTY case and in the U.S. system, there is a process, an ability, to bring errant judges and rogue prosecutors to account.

**MR. MALINOWSKI:** As there is here.

**MR. WILLIAMSON:** There is not, in the ICC.

**MR. MALINOWSKI:** Sure, they can be removed by a simple majority vote. And any case can be stopped by the Security Council, just as it can be with the case of the ICTY. Same system.

**MR. BAKER:** Jeremy.

**PROFESSOR RABKIN:** I think there have been a lot of abuses and a lot of disturbing trends with those special tribunals for Rwanda and Yugoslavia. We shouldn't be looking at them and saying they work great.

Without getting into details, I'd just appeal to people to step back for a minute. We are talking about this as if it's a perfectly normal, ordinary, routine thing to impose a court on a country, which operates at some higher level above that country. And this has never happened for hundreds of years. Why did it never happen for hundreds of years? Why did no one even propose it for hundreds of years? Because it's weird. I mean, it's bizarre. We're talking about accountability at such a high level of abstraction that we forget that it has no meaning. What does it mean to have accountability to 67 different countries? It doesn't mean anything. "Accountability" means, in some sense — and I'm not really emphasizing democracy — that there's a fairly stable community with a fair degree of mutual trust, so we say that the court system has to operate in a way that that community can accept. That has some meaning when you're talking about a real community.

It's just preposterous to talk about a community of 67 countries, half of whom are African tyrannies and the other half of whom are European countries who — well, I'm sorry to keep saying distrust foreigners. But these foreigners aren't very well disposed toward us. These foreigners are protectors of Iraq. These foreigners are protectors of people who burn synagogues — hundreds of them in France. I mean, these foreigners are not particularly our best buddies, and it doesn't matter if they're in NATO, which the French aren't really anyway.

**MR. MALINOWSKI:** I think we've just heard a very principled and consistent argument against any sort of international court at all, and I respect that. That is an argument that is far more radical than any argument that the Bush Administration would make. So, let's state that for the record. And again, it's a respectable argument, but it does leave open the question of what you do with tyrants who commit genocide, who are not going to be brought to heel in their own countries.

**MR. BAKER:** Ron.

**PROFESSOR RYCHLAK:** Rather than talking about fear of foreigners, can we maybe talk about fear of courts? I think part of it is this idea of, we're putting together a standing court to prosecute crimes. There have only been four times in history that we've had these kinds of trials take place. We're now going to have 18 judges with staff, with a standing court. I think they're going to start looking around for something to do. David, this morning, said it's a living, breathing institution. That's

what scares me the most — that it will evolve. We've seen it in our own courts in the United States. I mean, the Federalist Society, one of the sponsors of this event today — I think it's very important — it's one of their issues. It is taking things up to a higher level. And that, I think, is ultimately the scariest part of this.

**MR. BAKER:** Okay. So, there we are. We could become a little bit pregnant and see if we could stay there. The alternative, though, is what? I mean, this is going to happen, so what should the U.S. do about it, if it's going to happen anyway?

**PROFESSOR RYCHLAK:** There is one comment there — we have unsigned, which I think is a wise thing because the fact that we participated in Rome is now used as an argument to say you really shouldn't have un-signed. If you do a little bit, people say you have to keep continuing that. I think it showed respect for international law in un-signing, rather than to try to subvert the court without un-signing.

The United States can be an observer, both at the last remaining prep comm. taking place in July, and then for the Assemblies of States' Parties, first in September, then early next year, which allows you to sit and participate. We won't have a judge and we won't have a vote, but the United States still carries a lot of weight. The United States has not participated in the last two prep comms — not sent their staff. They were at the first seven or eight, but the last two, they have not participated in. They can be there. That gives them a voice. I think that answers at least part of your question.

**MR. BAKER:** And if they accept 75 percent of our recommendations, which would be a good record, do we have some obligation, moral or otherwise, to come back into the fold?

**PROFESSOR RYCHLAK:** I don't think so.

**MS. MASSIMINO:** I want to make clear, too, that there are some questions that are of great interest to the United States that have yet to be resolved. But if the concern of the United States is that it wants an exemption from the ICC to become a party, that concern is not going to be addressed. And if that's the thing that's going to continue to hold the U.S. back, then the U.S. will be held back. But I don't think it's so black and white like that.

I think that the United States ought to be an observer and engage and put forward recommendations. This doesn't have to be a big public display. They ought to do that. What we've been hearing from the Administration now, in the context of the un-signing announcement, is that it intends not to do that. That, I think, is unwise. I think it puts the U.S. in a more difficult situation. I don't think that the U.S. will become pregnant, because it engages with its allies on these very important questions. I think it has a duty to do that, and a responsibility.

**MR. BAKER:** Jeremy.

**PROFESSOR RABKIN:** We need to make clear — forget about the court. We should have nothing to do with the court. We need to make clear to countries that are cooperating with the court that if they arrest an American, we will regard that as a hostile act by that country. And we don't care that they signed the treaty; we don't care that they're participating in this court. They have arrested an American; they have affronted us.

And we should make that absolutely clear to the government of the Netherlands, which we heard was going to spare no expense to celebrate this court. That's totally great. Have a good party. But if an American is being held in one of those expensive prison cells, that is something that we are going to hold the government of the Netherlands responsible for.

We cannot allow the principle that if you sign a treaty, you have contracted out of your obligations to the country that you have injured. If they're holding an American, the Dutch have perpetrated an injury against us, and we should make it absolutely clear that we hold them responsible and we are not going to allow them to hide behind the ICC and say, "Oh, it's really the ICC." That is the principle that we are advancing now in our war on terror. If you harbor terrorists, you are responsible, and you cannot say, "Well, they're just terrorists, they're not us." No. You're harboring them; you're responsible.

If this court gets out of control — maybe it won't; maybe you're right — but if it does, we should be prepared in advance, so we have to prepare ourselves. We have to steel ourselves now. Bush should lay down a marker saying, "You go against an American, you're in big trouble." Yes, up to and including military retaliation. And if they've spent a lot of money building buildings for that ICC, fine. They can be vulnerable to American firepower and Human Rights Watch can write a report afterward saying it was disproportionate. I think we ought to warn the people in those buildings to get out because we're about to demolish them. But we should be prepared to take military action because this is about protecting Americans, and that is our government's job — protecting Americans, not punishing tyrants. That's a nice thing to do, but that's not the primary obligation of the American government. The primary obligation of the American government is to protect American citizens.



**MS. MASSIMINO:** You know, there are easier ways to do it than bombing the Hague, though.

In fact, the statute recognizes that countries can negotiate bilateral agreements that would, in fact, prohibit the transfer of an U.S. citizen. And the U.S., I think, is seeking to negotiate those agreements now. That's not something that's in contravention of the treaty. A lot of people who support the court think that's not a good idea. But it's right there in the statute. And, you know, more power to the U.S. It should negotiate those bilateral agreements with every single country, if it wants to. And then we have even stronger protection that would enable us to become a party to the treaty.

**MR. BAKER:** Ed, is that practical?

**MR. WILLIAMSON:** I don't think so. I mean, if you were talking about — if we're really going to have 120 states' parties, the idea of going around and doing this to each one. I think the place to go is the Security Council. I think the question was sort of, what is it that the Security Council says?

Basically, the problem with the Rome Statute is that there's no way to distinguish between the good guys and the bad guys. Victor's justice may not be perfect justice, but at least you know who the good guys are and the bad guys are, and the good guys are in control.

My preferred Security Council resolution would be the Security Council saying that the ICC shall have no jurisdiction over the member of an armed force, including the civilian chain of command, which was exercised in its right of self-defense under Article 51.

Then, the debate as to the jurisdiction of the court would focus on whether or not there was a legitimate exercise of the right of self-defense, rather than immediately getting into the question of whether war crimes have been committed. The problem with that scenario is that you will always just have a terrible set of facts on your hands. Now, I don't think this is really practical. I think it's a little too broad.

I do not believe that the French or the Brits would exercise their veto under the circumstances. I certainly think the Russians and the Chinese would support us, and that only leaves another six of the remaining 13 — excluding the Brits and the French; I assume that they would abstain. So, that's much easier from a diplomatic standpoint.

Stepping back from that, maybe not quite so broad is that the U.S. did propose to provide immunity to the East Timorese peacekeepers. And according to the *Washington Post* report, the French objected and claimed that it would be a violation of their obligation to the ICC, which is, in my view, not correct.

Just a quick little footnote. The reason the Security Council could do this, and it's the right place to do it, is that Article 25 of the U.N. Charter requires members to follow the directions of the Security Council. It can issue these directions and orders under Chapter 7. And then, Article 103 of the U.N. Charter provides that obligations under the Charter are superior to any obligations under any international agreements. In other words, the Charter trumps the Rome Statute.

**MR. BAKER:** Let's explore that. We've got peacekeeping troops in a variety of places under U.N. mandate. And we asked once for an exemption from ICC jurisdiction and got blown off. But, are we going to ask for Kosovo, for Bosnia? And what happens if we get blown off there?

**MR. WILLIAMSON:** Well, I think — I asked someone in the U.S. U.N. how bad was it. And the response was that this is just really an opening salvo on our part, that there had not been adequate time between the delivery of the de-signing letter and this vote and so forth, to do the necessary diplomatic heavy lifting. And it will be heavy lifting.

The thing that sort of annoys me about it is that we're going to have to use up some diplomatic capital to get us back into the position we should be in. And we could be better using that diplomatic capital for other things. Like, what to do about Saddam Hussein.

**MR. BAKER:** Let me ask Tom and Elisa. Do you think that that's a reasonable thing for us to ask, that our troops in Kosovo, say, shouldn't be subject to prosecution?

**MR. MALINOWSKI:** First of all, they already have essentially immunity from prosecution. There is a standard U.N. Status of Forces Agreement, which gives the country contributing troops to a peacekeeping mission exclusive jurisdiction over its troops. And it may be possible for the United States to work out some sort of blanket Security Council resolution that builds on that, codifies that, and hopefully that will be satisfying. I don't think the United States is going to get much more than that.

**MR. BAKER:** That's a Status of Forces Agreement between the U.N. and the troop-contributing country, and also the U.N. and the host country. In this case, it would be Bosnia, for example, or East Timor.

**MR. BAKER:** I thought it was Serbia that was the host country in Kosovo —

**MR. MALINOWSKI:** Well, that's more complicated.

But to get more than that — I mean, we're in a little bit of denial in this country about the extent of support, particularly within NATO and the EU, for this court. The Administration has handled its relations with those countries and the ICC in the worst possible way. Basically, for every action, there's an equal and opposite reaction from those countries. And you will see consistent exercise of a veto by France and Britain for any resolution that seeks to give blanket for-all-time immunity to U.S. peacekeepers.

**MR. WILLIAMSON:** Tom, when was the last time either of those countries exercised their veto rights?

**MR. MALINOWSKI:** What's that?

**MR. WILLIAMSON:** When was the last time either of those countries exercised their veto rights?

**MR. MALINOWSKI:** Well, in the East Timor resolution, they made clear that they would —

**MR. WILLIAMSON:** They would oppose it.

**MR. MALINOWSKI:** — that's right. And the Administration debated —

**MR. WILLIAMSON:** I do not believe they have used their veto right in recent history.

**MR. MALINOWSKI:** No. Generally, what happens in the Security Council is we don't press the matter if we think Britain's going to veto it.

There was a debate within the Administration on the East Timor resolution as to whether the United States should vote against, essentially declare a policy of shutting down peacekeeping missions, if this concern isn't addressed. And the good guys won and decided, at least for now, that they're not going to do that. So, there really isn't much weight behind the U.S. posture in the Security Council. And I'm not sure where it's going to go unless they can work out some sort of face-saving solution that builds on the existing system.

At the same time, I think you will see Mr. Helms and others in the Congress perhaps deciding that if the Administration isn't willing to shut down peacekeeping missions, they will. And we're going to have this ugly fight again and again and again. And we need to ask ourselves, is that really where we need to go in order to carry out this long twilight struggle against Queen Beatrice.

**MR. BAKER:** Jeremy.

**PROFESSOR RABKIN:** If the Security Council would pass a resolution saying you can never prosecute an American, ever, I might be willing to say, okay, that's good enough.

But clearly, they will not do that. They will not do that. That cannot possibly happen. The most that you could get — and I don't even think you can get that — but the most that you could get is, we won't prosecute you in relation to anything that happens in East Timor, or this little place, or that little place — which means that we have bought into the principle that we need to be given an exemption. We need to be given an indemnity that implies that when we don't get it, we are otherwise vulnerable to this court, and that's something we should never allow.

Yeah, you can make fun of the, ha ha, Queen Beatrice. The question is, why are these other countries so keen on this? I think the reason they're keen on it is that they are very, very uncomfortable with the idea that America has the military, and America decides on its own when and how to use it. And I'm sorry that they are uncomfortable. But we paid for it; it's ours.

That's just the fact. And we should use it responsibly, and we should be open to their criticism and we should take it seriously. But we cannot accept their jurisdiction, and that is really a pretty fundamental principle. We shouldn't compromise that fundamental principle by saying, okay, let's try to get a partial approval from them on this particular and that.

**MR. BAKER:** Well, let me ask you — and if you've got questions, just raise your hands. We'll call on you. But let me ask about whether, in fact, we can sustain a position like that.

Suppose Saddam Hussein is apprehended someplace that recognizes the jurisdiction of the ICC. Are we really not going to participate in his prosecution?

**PROFESSOR RABKIN:** I've never understood the force of that question. What does it matter whether we participate. First of all, who's going to capture him, if not us? And if we catch him, we just try him ourselves. But let's take, hypothetically, that

the French or the Dutch capture him. Those valiant Dutch peacekeeping troops this time strike home and they grab him. Okay, great. We salute you, Queen Beatrice.

Good work. Why do they need us? If they think they can have a trial, let them have a trial. They thought they could have a Pinochet trial. What do they need us for? They were ready to go ahead without some of the evidence we had. We weren't offering Pinochet evidence; we don't need to offer Saddam Hussein evidence. If you could imagine a case in which they have the military means to capture Saddam Hussein, you ought to be willing to imagine a case in which they have the legal talent to prove, gassing 10,000 Kurds was really bad.

**MR. BAKER:** Well, we're much more likely to have intercepts than the French.

**PROFESSOR RABKIN:** The truth is, I think it is much less important whether he is convicted than it is that we say, you can't come after us because we have for 200 years conducted a policy which is, when we are attacked, we have the military means to defend ourselves. This notion that it is absolutely vital, suddenly, now — now — to have a world criminal authority hovering over the world to keep the peace — how did that suddenly become so vital? It is not so vital.

And the last thing is, if you want to be trusting of the Europeans — I absolutely trust them on this. If you could imagine them mounting a trial of Saddam Hussein, which I can't because they'd be afraid of terrorism — but if you could imagine it hypothetically, you could imagine them, if necessary, deviating a little bit from the highest standards of criminal justice to make sure the guy is convicted. They do know how to do that in Europe — to reach the result which they are determined to reach.

I trust the French on that.

**MR. BAKER:** Tom.

**MR. MALINOWSKI:** I think you just asked the first truly relevant, pragmatic question that we've heard this whole morning. There've been a lot of very interesting, wonderful, fun questions to debate, but in terms of what we're actually facing as a country with this court, that's it.

This has been a theoretical debate about a theoretical institution for very long in this country. And the supporters of this court have projected their hopes onto the ICC, and the opponents have projected their fears onto the ICC. Everything that we've said thus far is going to be completely irrelevant about two or three years from now, once this court has a track record, for better or for worse, of prosecuting or not prosecuting the world's worst war criminals.

Now, if I'm right, what are the kinds of cases we're going to be faced with? Colombia's about to ratify the ICC Treaty. Why is it ratifying? Because it wants to use it against the FARC, the left-wing rebels the United States is helping Colombia to defeat. If and when that happens, the United States will be presented with a request for evidence, intelligence, or anything that could help prosecute the leader of the FARC.

I could easily imagine a case against Charles Taylor in Liberia, one of the world's ugliest thugs, where again the United States would be put in that position. I could see a country deciding to put the United States on the spot in the Security Council by referring a case against the leadership of Sudan. Now, all this debate is fine and good, but the United States will not veto that resolution. It will not.

**MR. BAKER:** Ron, Ed, what do you think?

**PROFESSOR RYCHLAK:** Well, number one, it seems to me that if the issue is handing over evidence to a proceeding in some other jurisdiction, that does not necessarily make you part of the court. I mean, we could do that with another nation, right? So, I don't see how this impacts whether we should be part of the court. Tom said, two or three years from now we'll have a track record. It'll be very interesting to me whether we will have any trials.

I think it's going to be a very long time before we have any kind of track record. So, I guess my concern, my things I'm looking for, is all I have.

By the way, we had mentioned Pinochet. I'm not sure he would have left power had the ICC been in place. He was granted immunity. National immunity will mean nothing to the ICC because it will not recognize national immunity. You may still face prosecution, so you stay in power. You can't have a Truth and Reconciliation Commission where people come forward and confess their sins and are forgiven.

Even if you say, well, the judges won't really prosecute someone who's been granted immunity in that circumstance. I'm not going to give up power. I'm not going to face that risk in exchange for a grant of immunity, which I would but for the ICC.

**MR. BAKER:** Back there.

**AUDIENCE PARTICIPANT:** What judicial philosophy will the court have? How will they interpret the Statute?

**MS. MASSIMINO:** I think that's a really good question. But I think that it's very hard to predict that because we don't know the make-up of the panel of judges. Again, if we seek to influence what philosophy the judges of the ICC take vis a vis the statute, then we have to be engaged in that process of choosing the judges, being in there and promoting the philosophy we want. I think, you know, that the statute itself was very carefully drafted; obviously, it's much more specific in a lot of ways than our Constitution. But it is a much more limited document. We're talking about a criminal statute with very specific definitions of crimes. And if you put the Elements of Crimes document with the Statute of the ICC, I think that the range of differences in outcome based on individual judicial philosophy that might sit on the court is much narrower than you might expect to see on our own Supreme Court. But again, there are numerous questions like that, and our best answer to that is to seek to be engaged in that process. We have a perspective, as other countries do, about how the ICC bench ought to be interpreting the Statute in places where interpretation is a question and we have to be in there talking about that. And disengagement and divorce from this process doesn't give us the opportunity.

**MR. WILLIAMSON:** Why can't you do that through an op-ed column in the *Washington Post*?

Seriously, we're not solid. We're not commenting. And then again, I look at the ICJ. We were engaged in the ICJ. We just had the presidency of the ICJ. But the ICJ still does things like the Nicaragua case, where they accept fraudulent evidence, where they're not rigorous enough to examine the quality of the evidence.

Another thing is — Ron saw it coming and there's no question about it — I think one of the proponents of the ICC, Mike Sharth, has written a little article on amnesty. And he basically says that this probably is going to limit the ability to negotiate disputes through the granting of amnesty, but that's the price you pay for this — my wife came to my mind.

But I think that we've had the concept around for these super-national courts and so forth, and it does sort of remind me a little bit of what Mark Twain said about second marriages, that they were a triumph of hope over experience.

**AUDIENCE PARTICIPANT:** President Clinton authorized the U.S. to sign the treaty. He did so with qualification because of significant flaws with the Rome Statute. Can any of the panelists tell the audience whether or not those flaws were corrected. And he also recommended that his successor not sign the treaty unless they were connected.

The second important point one of its provisions does exactly what Jeremy suggested — authorized the U.S. to go in and remove, capture an American from the Hague. It passed overwhelmingly in the House and the Senate. And another version is presently being considered in the House. Could any of the panelists comment on that?

**MS. MASSIMINO:** Tom, do you want to talk about that?

**MR. MALINOWSKI:** Sure, the Hague Invasion. Yes, it passed. I love that provision, frankly, because it helps most people ridicule the bill. I hope it stays in because it's a joke. The United States is not going to invade the Hague.

Technically, you're incorrect about one aspect of it. It's not just a provision that permits the United States to go in and rescue Americans. It permits the United States to go in and invade a country to rescue any political, covered allied personnel, which would apply to a Turkish colonel, an Egyptian intelligence officer or an Argentine postal clerk, anybody who's employed by the government of a NATO ally or major non-NATO ally. I mean, it's something — if you put that before the American people, you would either get a big laugh or you would find some people like Senator Byrd, for example, who actually cares about war powers, saying this is an embarrassment and we shouldn't do it, which is why, despite the fact that it's passed in various versions in both houses, it's never been enacted into law.

**MR. BAKER:** Jeremy.

**PROFESSOR RABKIN:** You make it sound as if this was something done by Senator Helms on his own, who just barely scraped together a majority of yahoos. As a matter of fact, I think it got 92 votes in the Senate. One thing I know for sure is that my two senators, Charles Schumer and — what's her name? — Hillary Clinton, both voted for this thing. And the reason they voted for this thing is not that they're worried about Argentine postal clerks. And the reason they were able to vote for this thing is that everybody in New York says, "Yes, if they interfere with an American, we should be ready to hit back." It doesn't require that we invade the Hague. It leaves all the discretion to the President. But it is putting countries on notice that we are serious about this.

And what it is most clearly saying is that there is not going to be somebody getting an award in the State Department because he did a year of night-duty monitoring what happened to that American over months and months of pointless negotiation. That is past. There is not going to be a Carter Administration saying, "Well, you have an American; let's not be too hostile about this." I mean, we want to put people on notice, and that's a serious thing to do and worth doing. Most Americans support it. Good luck to you.

I mean, I've seen you on TV; you're pretty good. But I think you will have a hard time ridiculing this effectively. I think that most of the American people think, "Well, yes, this is one of the reasons why we have the military, to protect Americans."

**MR. MALINOWSKI:** One reason this bill passes, in addition to the wonderful name, American Service Members Protection Act, which no one can vote again, is that here's what it does. It tells the President, you've got to invade the Hague, unless you don't want to. You've got to impose sanctions on all these countries, unless you don't want to. And so on and so on. It's one of these things that's easy to vote for; it has no impact. It's frankly kind of pathetic.

**PROFESSOR RABKIN:** It has an impact because it makes it easier for the President, if you have a president who feels that he should be protecting Americans instead of cooperating in the global governments of the world. If you have, let's say, a Republican president, he now can say I've got authorization already, and that makes it a little easier for him to act. And I think this President will act.

**MR. BAKER:** So Elisa, if it doesn't, in fact, require that the government, the administration, do any of these things but simply authorizes it, what's wrong with having that arrow in our quiver?

**MS. MASSIMINO:** I think it's a kind of pointless piece of legislation. No administration, this one, and no future administration is going to bomb the Hague to get somebody from the Rwandan motor pool out of custody.

**MR. WILLIAMSON:** But, Elisa, let me just —

**MS. MASSIMINO:** That's not going to happen. And it is a feel-good kind of vote, and it has not been enacted. I don't think it will be enacted. But if it is, I don't think that any administration is going to — what it will do, though, is further alienate the United States from its allies who consider this a slap in the face. They know they're not going to have to gear up their militaries when the U.S. invades the Hague; no one takes it that seriously.

But for the Administration to allow that to happen, if a bill like that gets enacted — in fact, the Administration opposed the original version of that bill quite strongly and said, we're not doing it unless you make it meaningless and give us all the waivers that we want. So, it's quite clear what the Administration's view is toward that, despite some particular Administration officials' statements on that.

**MR. BAKER:** Let me ask about the alienation. Obviously, at the end we made proposals at the end of the negotiation that our allies in NATO and basically the EU bloc and the folks that depend on them, and Africa, just blew off.

**MS. MASSIMINO:** And it was, essentially, a U.S. exemption. Let's just be clear about what the U.S. got and didn't get. What it didn't get is a blanket exemption for all U.S. nationals to the court.

**MR. BAKER:** Right, which we thought was necessary because we are more likely than anybody else to be involved in a lot of international military actions. But it's perfectly understandable why they would see it as bullying and arrogant, and it's perfectly understandable why we would see it as necessary. But if, in fact, there are not consequences to blowing us off in these international negotiations, aren't we going to see that again and again? And if we simply say, well, we don't want to piss anybody off, then people will say, well, then it was fine, what we did in Rome.

**MS. MASSIMINO:** Well, I wouldn't generalize that broadly. In fact, organizations like mine are frequently pushing the United States to do something that's going to piss a lot of people off. You know, we need the United States sometimes to act unilaterally. You know, I'm not a person who thinks that unilateralism is always a bad thing, if it's done for the right ends.

So, I wouldn't over-generalize and say that the principle on which I'm suggesting the U.S. act here is one that means that we don't ever want the United States to stand firm and stand on principle, et cetera. We often do, and we're often the ones pushing the U.S. to do that.

I also would not characterize the negotiations as the U.S. being blown off. Really, I think that's completely not reflective of reality. That's based on conversations with U.S. negotiators who were in Rome, and beyond, and in the prep comms. I mean, there is a key philosophical difference here. And it was not because of feelings that the U.S. was arrogant in wanting this exemption; I'm sure all the other countries would want such an exemption.

Our allies, similarly, would have wanted such an exemption, if such an exemption would not have gutted the capacity of the court to go after countries like Iraq and Libya. But it would have, and that's why they made the judgment that it's better, on balance, to craft the Statute in such a way that it constrains the possibility so much so that it is a virtual impossibility for their nationals to be brought before this court. The U.S. has made a different judgment on that balance. I mean, that's what

this all comes down to.

Despite the fact that some countries who are parties to the Treaty think the United States is unduly unilateralist, think the United States is arrogant, they can think all that they want. That's not the purpose of this court. That's not what's driving the establishment of this court. What's driving the establishment of this court is the repeated failure of the United States and other governments to hold the world's worst criminals accountable, and a desire to have that not be the case again; a desire to stand on the side of the victims of those violations.

**MR. WILLIAMSON:** I'm sorry Elisa — really. Again, I admit that I was not that close to what went on in Rome. But, my impression is that what happened was that the U.S. position that the court should be Security Council-triggered was met with overwhelming opposition by people who were hostile to the role of the permanent members in the Security Council. Then the U.S. took a very stupid position and somehow wanted to carve out from the Statute countries that were not parties to it. That is totally inconsistent with the approach that we take on multi-lateral agreements, whether it's torture or what have you. I mean, that was just so counterproductive to getting that up, I really think it was a colossal error on the part of the Clinton Administration to go off in that direction.

**MR. BAKER:** Jeremy.

**PROFESSOR RABKIN:** I just can't accept this claim that it wasn't hostile to America: "That wasn't it," they say. "It was that they were so concerned about atrocities not being punished." This is just absurd. Hitler, Stalin, Pol Pot, the genocide regime in Rwanda — what do they all have in common? They were all partners with France.

There has hardly ever been a genocidal regime in this century which the French have not embraced, funded, cooperated with. It's preposterous — utterly preposterous — to say that Europeans are just so concerned about this that they have to snub the United States because they really have a moral concern. This is really insane if you view the world this way, if you make it, to your mind, credible. Human Rights Watch and all these other groups, which I think are sincere, have exactly the same agenda as the Europeans, and "therefore the whole world agrees," they say. I think these advocacy groups are being used by governments, and the governments have very different agendas, and the governments' agendas are not very nice.

**MR. BAKER:** One question — last question.

**AUDIENCE PARTICIPANT:** I see some problems with the ICC. If you assume that a defendant is here, let's say, in New York and he's indicted by the court, what do you do? Who decides in the instance when there's a conflict between the United States Constitution and the ICC Statute?

**MS. MASSIMINO:** Well, I think that's a great question to end on because it is very forward-looking. I think one of the benefits that I expect to see coming out of the ICC's existence is that countries, including the United States, will be amending their national criminal laws and jurisdiction so that such a person could be prosecuted inside the United States.

You know, that is true right now in the United States with regard to torture. A non-U.S. national who commits the crime of torture outside the United States can be brought under very pedestrian jurisdiction into federal court and be put to death if found guilty for the crime of torture. That's never been done. Ambassador Crosford\* really kind of laid out the agenda for this in his comments around un-signing in his press conference. That is of the things that I expect we will see, and that we ought to see. Even opponents of the ICC and proponents ought to join together to make sure this happens, because we need to fill the gaps in current U.S. law so that we can properly exercise complementarity.

It was a very interesting phenomenon when Pol Pot was discovered in the jungle and the Clinton Administration asked itself, "Well, what can we do with this guy? Where should we try him? Let's try him here." And it was quickly discovered that we don't have the criminal law jurisdiction to try such a person here. That would be the first thing that my organization will be looking for in a case like that — not to immediately send such a person to the ICC.

The ICC is supposed to operate when national jurisdictions can't. The least that the United States ought to be doing right now is getting its own house in order so that it can exercise jurisdiction over people who it wants to see in the dock. This is not a requirement; there's prosecutorial discretion; some cases won't be brought. But if there's a case where the United States thinks the person has committed crimes against humanity, war crimes, genocide, it ought to be able to have the jurisdiction to prosecute that person in a regular, run-of-the-mill proceedings in federal court.

**MR. BAKER:** Tom.

**MR. MALINOWSKI:** I don't have much to add to that. I totally agree. I think that's an issue where we probably can move forward with the Administration in a pragmatic way.

I want to make maybe a more general comment to respond to my distinguished colleague. The United States is the most powerful country in the history of this planet. We have overwhelming military-economic might; military spending that vastly exceeds everybody else combined. We've got planes at an Air Force base in Missouri that can take off and fly to any point on this planet and destroy any target in any weather and fly home without ever having to land. It's awesome. And one of our major problems is managing the resentment that that sometimes causes around the world.

Here we are expressing not confidence but fear that a bunch of middle-aged jurists sitting in a building in the Netherlands, from Denmark and New Zealand and Canada, are going to come after us. And they're going to limit our ability to exercise this awesome, unprecedented power and might, which would be comical, if it wasn't for the fact that it leads people to start talking about shutting down peacekeeping missions and withdrawing U.S. troops from different places around the world. That would really hurt U.S. national interests, and certainly damage American prestige.

American conservatives, I think, do this country a great service, and they do the world a great service, by reminding us to be skeptical of international agreements and international treaties that promise to fix everything. But there's a real big difference, I think, between skepticism, which is healthy and makes this country stronger, and fear, which makes us weak and petty and insignificant. I think we need at least to have some faith in American power and our own capacity to defend our interests as we move forward with this debate.

Again, three years from now, this is either going to be a successful court or it's going to be a failure. Either we're going to be proved mostly or partially right or you're going to be proved mostly or partially right. And if you're right, you're going to have a very easy time. You know, the United States is going to have a very easy time dealing with this court, if indeed the prosecutor is a rogue prosecutor and he's going around trying to chase Don Rumsfeld around the globe. But if you're wrong and I'm right, then the current posture is going to be completely untenable. Politically, it's going to be untenable in this country, if this court does, in fact, do its job and it goes after the right people. And at that point, I think the whole debate will be transformed one way or another.

**MR. BAKER:** The doubters have their moment to sum up.

**PROFESSOR RABKIN:** Could I just say, I think this is not framed fairly to say, on the one hand hope, and on the other hand, the voice of fear. I don't think I'm expressing fear. I'm expressing contempt, loathing — I mean, I could go down a list. But I view this not —

**MR. MALINOWSKI:** That's what leads to the Dark Side.

**PROFESSOR RABKIN:** If you want to put it in emotional terms, the main feeling driving my criticism here is self-respect. I think we owe it to ourselves to say, "Wait a minute, we won't allow this to be done to us," and not because there are going to be Dutch troops occupying New York. Of course there won't be. Of course. But you have to be able to say, we are not going to be morally intimidated. We are not going to allow ourselves to be used for the gratification of people who want to have an international spectacle at our expense. That is a matter of self-respect.

To be a little more down to earth, we did actually put up with too much of this at the U.N. in earlier times. And one reason why we did it was because no one's paying attention to the U.N. so it doesn't really matter. So, we just sat there and let them beat us up. It was all just talk. You could say, well, in the end, really, it's just talk, if they indict someone, because the ICC can't really follow through. Well, right. They can't "really" follow through.

But, as a matter of self-respect, we want to make it clear that we don't even accept that they can start, that we are our own country and Europe doesn't have any right to govern us. None. Zero. And you can say we are now the world's greatest superpower. But before we were the world's greatest superpower, before we were any kind of superpower, before we were even a power, we founded this country in a revolution against Europeans, and said that by "the Law of Nature and of Nature's God, we're entitled to a separate and equal station among the powers of the earth." And what that meant was: "Back off! We're our own country!" And we're still entitled to say that.

I don't believe in three years everybody will be saying, "Gosh, this court is so great." I think in three years there will be a lot of uncertainty about what it is. And I'm perfectly happy to stay on this side of the Atlantic while Queen Beatrice works out what kind of court this is going to be. If it turns out to be safe and nice and good, fine. But why do we have to be part of it while it's having its experiment? It's the Europeans who like to have experiments: Fascism, Communism — they have all kinds of experiments. Let them experiment. We will stay here with our Constitution. That's a fair deal.

**MR. BAKER:** Ron, two tough acts to follow.

**PROFESSOR RYCHLAK:** You know, I can't say what Jeremy said as well as he said it. But last night in the hotel, I read 200 or 300 columns and letters to the editor — there's a listserve that compiles these things, and I printed them out. Over and over and over again, our European allies — I can't believe we're breaking them. I represent the Holy See when I go to the United

Nations. Mother Theresa said a thousand people may say you're wrong; it doesn't mean you're wrong. You have to evaluate and look at things closely.

It's not fair. I don't think our service men or our leaders are in jeopardy. If Bill Clinton and Kissinger can't travel to certain nations, that's a small cost, if the court were going to be worthwhile. I don't think there is a real up-side to this court. I ultimately do not believe that deterrents will work here. And when you weigh the minimal risk — and I think they're minimal right now, although I do think because it's a living, breathing institution, that might change. When you weigh that against a very limited up-side, then I say it's not worth it.

I don't think three years from now we are going to have any kind of track record that anyone will accept. People will say, "We haven't had time yet; we've just begun the investigation; we've done this." And what it will be for the United States will be another one of those things that Europeans say this, and they're investigating this President, and they're investigating that. It will be another consideration in a *Blackhawk Down* situation should that be a consideration, when the guy's Blackhawk is down and he's got the machinegun, he's looking at the crowd coming at him? Should he think "I'm going to protect my men, get the people, what's going to happen with the ICC?" Do we want to give them another consideration at that point? I just don't see the up-side that justifies that.

**MR. BAKER:** Elisa, you've had one chance at this, but —

**MS. MASSIMINO:** Real short. I think that the question is, do we have any shared goals here? I want to believe that we do. Maybe I'm naïve, but I want to believe that our shared goals are that we do not want to see the world's worst criminals get off. I think we want to see them held accountable. And the question is, how do we best do that?

It used to be, a lot of people argued that the road to stability was accommodation to violation and state-sponsored killing. But that's been proven to be wrong. It's a question of short-term stability versus long-term stability. Justice mechanisms, whether it's the ICC in the outside cases or national jurisdictions or *ad hoc* tribunals, are part of the solution to that.

If the ICC fails, then I think it undermines the goals that we all share. I agree that it's not going to be overwhelmed, despite the fact that the world is not lacking in potential defendants. The ICC is not going to be overwhelmed with defendants in the dock. And that's exactly how it should be. I think if the ICC helps to motivate nations to hold their own accountable, that is the ideal result. That's what we all want.

**MR. WILLIAMSON:** Elisa, I think where I'd say we disagree — there's no question that every member of this panel is in favor of using whatever tools are available to bring bad guys to justice. What I find amusing is that at the Rome meeting, the U.S. delegation showed up without an agreed-upon position within the delegation — I understand the French had the same problem. But out of this meeting comes this thing which is just not a very good idea in the way it got implemented. But all of a sudden, it becomes the only vehicle. And those who are against it, are, as David said, are holding themselves out to provide a haven for war criminals. That's just nonsense. We're all against war criminals. We're all for bringing them to justice.

I think the thing that bothers me about it is that we are probably the best practitioners of respect for the rule of law. Some may be equal to us, but I don't think anybody is superior to us. We have rigorous rules that our service people in the military abide by. We have courts. We have a system. And we are the ones who respond to the alarm. We do not need to put our servicemen in a position where the responsible powers in the U.S. can be second-guessed by people who, at the end of the day, are not accountable to anyone else. And that's the problem with the ICC, the Rome Statute.

**MR. BAKER:** So, unless there's somebody here from the French Embassy, I'd ask all of you to join me in thanking this panel.

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