CRIMINAL LAW & PROCEDURE

THE U.S. RESPONSE TO THE INTERNATIONAL CRIMINAL COURT: WHAT NEXT? WILL THE ICC PROVIDE ADEQUATE PROCEDURAL AND STRUCTURAL SAFEGUARDS?*

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MR. GEDE: Ladies and gentlemen, on behalf of the Federalist Society for Law and Public Policy Studies and the American Bar Association's Standing Committee on National Security Law, welcome to a timely and informative program on the International Criminal Court, posing the question, the U.S. Response to the International Criminal Court: What's next.

I'm Tom Gede, Chair of the Federalist Society's Criminal Law and Procedure Practice Group and will open the program and moderate the first panel. My day job is as Executive Director of the Western State Attorneys General, and I previously served as a deputy and special assistant attorney general in the California Attorney General's Office.

Two practice groups of the Federalist Society are presenting today's program, the Criminal Law and Procedure Practice Group and the International Law Practice Group. The program is in two parts. Panel 1 will explore whether or not the International Criminal Court will provide adequate procedural and structural safeguards, and Panel 2 will be moderated by Stuart Baker and will discuss whether the International Criminal Court can be effective on the world stage.

As you know, the Federalist Society does not take positions on issues, but merely provides an opportunity for debate and discussion on key legal, constitutional and policy issues.

By way of a very general background, you may know that in July 1998, nations attending the Diplomatic Conference in Rome adopted a Statute for the International Criminal Court, which we all call the ICC, independent from the United Nations, which will have its seat in the Hague and will have jurisdiction over individuals who commit genocide, crimes against humanity, war crimes and aggression. The United States voted against the Statute, citing concerns over sovereignty, jurisdiction and due process.

Since the announcement of this program here today, and in April of this year, the Statute of the Court agreed to at the Rome Conference was ratified by the 60 requisite nations, and it will become effective July 1, 2002. Although President Clinton signed the treaty in December 2000, the United States recently announced that it will not in any manner be bound by the terms of the ICC, has communicated that point with the United Nations, and is initiating non-extradition agreements with countries around the world.

Our first panel brings four highly distinguished panelists together to answer the first question, will the ICC provide adequate procedural and structural safeguards. We'll take a break after this panel. This panel will go until 10:30, and then the second panel will begin after a short break and we'll proceed on until noon with the second panel.

This first panel will examine the due process questions, the criminal law questions. Will the well-developed Anglo-American doctrines concerning jury trial, the rights of confrontation, speedy trial and to trial in place of the alleged crime be preserved by the ICC provisions, or will it be interpreted to allow anonymous witnesses, hearsay evidence and undue prosecutorial discretion in procedural matters.

The panel will address the right of the prosecutor to appeal an acquittal. The ICC permits its prosecutor to commence an investigation without a referral from a party state or the U.N., and to involve himself in a primary state's proceedings. Does this constitute unacceptable second-guessing of the primary state in the course of that state's criminal proceedings, or does the ICC represent a needed compromise to achieve a necessary end?

Our very distinguished panelists today include John Washburn, Lee Casey, David Stoelting and Professor John McGinnis. I will give you a brief introduction of all four of them first, and then proceed with the program. In the program, each one of them will present their either background on the ICC or state a case with respect to their perspective on the ICC, and then I'll pass a few softball questions their way, then they can ask each other questions. Then you, as members of the audience, can throw questions at them, as well. We'll hope to have this done by 10:30.

Let me introduce all four of the speakers first. Our first speaker is John Washburn. He's currently the Convener of the American Non-Governmental Organizations Coalition on the International Criminal Court. I think that has an acronym, but I'm not going to try. He's the Co-Chairman of the Washington Working Group on the International Criminal Court, as well.

He has an extensive career in diplomacy, in governmental and non-governmental organizations. He was a member of the Foreign Service of the United States from 1963 to 1987, and a member of the State Department's policy planning staff,

responsible for international organizations and multi-lateral affairs. He was assigned to India, Iran, Indonesia and such places. He left the State Department, and in 1988 became a Director in the Executive Office of the Secretary General of the United Nations from 1988 to 1993. Thereafter, he was a director in the Department of Political Affairs of the United Nations, until March 1994.

He has a very impressive, I think, background that includes — he was the Nightshift Chairman of the Iran Hostage Task Force in 1979 and received a special commendation from the Secretary of State for his services. I asked him whether he kept a cot in his office; obviously, it was a job that involved a night job after a day job and very little sleep.

He is a graduate of the Harvard College and the Harvard Law School. He belongs to the American Society of International Law and the Council on Foreign Relations.

Lee Casey is with us today. Lee is a partner at Baker & Hostetler, and prior to that time was an associate with Hunton & Williams practicing an international, environmental and constitutional law, election, regulatory and other issues, and international humanitarian law, as well. Lee is a graduate of the University of Michigan School of Law and undergraduate at Oakland University.

He served from 1986 to 1993 in various capacities in the federal government, including the Office of Legal Counsel and the Office of Legal Policy at the U.S. Department of Justice. From 1990 to 1992, Mr. Casey served as the Deputy Associate General Counsel at the U.S. Department of Energy. Previously, he had served as law clerk to the Honorable Alex Kozinski, then Chief Judge of the United States Claims Court — currently, of course, on the 9th Circuit. He is a member of the California, Michigan and D.C. Bar Associations. He served in the past as an adjunct professor of law at George Mason University and has written extensively on the International Criminal Court.

We're also pleased today to have Professor John McGinnis, Professor of Law at the Benjamin Cardozo Law School, where he teaches courses in constitutional law, international trade law and economics, and law and biology. He is a graduate of Harvard College, Balliol College, Oxford and Harvard Law School. He was an editor at the Harvard Law Review. He clerked for Judge Kenneth W. Starr of the District of Columbia Circuit Court of Appeals and was a deputy assistant attorney general in the Office of Legal Counsel in the administrations of Presidents Reagan and Bush.

His academic articles, interestingly, cover issues such as "The World Trade Constitution"; "The Rehnquist Court and Jurisprudence of Social Discovery"; and "Our Supermajoritarian Constitution". He is a 1997 recipient of the Federalist Society's Paul M. Batter Award, given annually to outstanding legal scholars under the age of 40. He's the kid on the block here.

Finally, we have Mr. David Stoelting, an associate in the litigation practice group, resident in the New York office. He's Chair of the ABA's Committee on International Criminal Law and Vice-Chair of the ABA's Working Group on Rules and Procedure and Evidence for the International Criminal Court. And so, as co-sponsor of this program today from the ABA, we certainly welcome him.

After graduating from Georgia Southern College in 1982, Mr. Stoelting received a masters degree in international studies from the University of South Carolina in 1984; he was a Fulbright Scholar in West Africa in 1983; and he was a Peace Corps volunteer in Morocco from 1984 to 1986. He received his law degree from the University of Cincinnati, where he was managing editor of the *Human Rights Quarterly*. He also served as a judicial law clerk to Judge Nathaniel Jones of the U.S. Court of Appeals for the 6th Circuit and received an LL.M. in international legal studies from New York University School of Law, where he was a senior fellow at that school's center for international studies, and received their Ford Foundation Fellowship.

As you can see, all four of our speakers and panelists are highly distinguished, have extensive and considerable backgrounds in international law, and we believe are all especially well-equipped to address the difficult and contentious issues involved in the International Criminal Court.

We'll ask first for Mr. John Washburn to give us a little background, from his perspective, on the International Criminal Court. Mr. Washburn.

MR. WASHBURN: Thank you very much, Mr. Gede. I appreciate this chance to talk with all of you. Thanks also to Dean Reuter and the Federalist Society and the ABA for making this highly timely and appropriate occasion possible.

I obviously am a double-plus proponent of the Court, but I'm going to try at this time to throttle back my commitment in that direction, and to start us all off with a quick superficial but, at least, overall statement as to where the Court is now, a little bit more rounding out what Mr. Gede had to say about what the Court is like, and then a first look at the rules for procedure and evidence and the conduct of trials. My coverage on that will only be a start on what the rest of the group will do.

On the status and timing of the Court right now, you've just been told that the Court's jurisdiction comes into effect on July 1st, following the coming into the force of the Rome Statute. This means that crimes committed after July 1, which are otherwise within the jurisdiction of the Court, will be eligible to be tried by it. In September at the U.N., there will be a meeting of the governing body, the Assembly of States Parties, which will elect its officers and start the process for nominating judges and choosing the senior staff of the Court. At that moment, when the President and other officers of the Assembly

of States Parties are elected, the life of the Court will begin. It will at that point separate itself from the processes that have been going on at the U.N. and will begin its own activities as an independent international organization.

In January-February of next year, 2003, the Assembly of States Parties will meet again, will elect the judges, complete the hiring of the senior staff, and those persons will go to work in premises which will have already been previously prepared for them and set up. In March of '03, the Dutch government, no expense spared, will sponsor an enormous international celebration in the Hague presided over by the Queen of the Netherlands. This is going to be as elaborate an historic event as the Dutch and the European Union and other countries can make it. They will bring in heads of state from around the world, and this will be the formal inauguration of the work of the Court.

By June, we expect that the Court will be processing its first cases. This means that almost certainly some lawyer in this room, or a professional connection of some lawyer in this room, will be dealing with a case before the Court. The physical work of setting up the Court is already well underway. Buildings are being refurbished by the Dutch government. A prison has been assigned for the use of the Court, which will be run by the Court when it has its staff in hand. Advance and transitions teams are hard at work.

That's where we stand with the Court. I think that this is enough to show that the Court is about to be up and running soon, and we will need to deal with it as an existing and operational reality.

On the nature and description of the Court, very briefly — Mr. Gede has started us off — the Court was indeed created by the Rome Statute in 1998. It consists of that document plus the Elements of Crimes document and the Rules of Procedure and Evidence document, which were adopted on June 30, 2000 by the U.N. Preparatory Commission for the ICC, and will be forwarded to that first meeting of the Assembly of States Parties for its approval and final adoption.

These are extremely extensive documents, all three of them. They are precise and detailed on the crimes, jurisdiction, oversight, financing, jurisprudence and jurisdiction of the Court. The Rome Statute itself is an extraordinary document, basically setting up everything that a court needs to have to function, from the nature of its organs to highly detailed codification, customized from existing international law, of the crimes that it will try.

Just to give you a sense of this, the Rome Statute runs to 128 articles and 106 pages. The Elements of Crimes is another 48 pages. The Rules of Procedure and Evidence are about 100 pages, with 225 rules. They are a lot more detailed, for example, than the Federal Rules of Criminal Procedure. It's rather interesting to look at those two together. I'd be happy to give any of you who are interested cites to these texts, and also to show you some of the materials I have here, which include the legislative history of these documents.

The Court, as you've been told, will be permanent, independent, will have its own buildings, courtrooms, staff, guards and prison. And as I've mentioned, these are all being set up now.

The personnel of the Court consists of 18 judges divided into three panels of six — a pretrial chamber, a trial chamber and an appellate chamber. I think those labels are enough for an audience of lawyers to give you some sense of what they do. Judges serve for nine years — non-renewable. And there may be only one judge from a given country. Judges are to have either extensive domestic criminal law practice, with heavy emphasis on the practice. It is clear that what they want in the criminal law area is people who have been defense counsel, judges or prosecutors.

The other set of criteria, the "or", is the international humanitarian law expertise. This means that someone has to have a very distinguished background and record in international humanitarian law, again with a heavy bias in evidence in the legislative history for people with practitioner experience. Judges must also have the necessary qualifications to serve on their own highest courts. Judges may come from states parties only, which means that we will not have American judges until the U.S., whenever that should be, chooses to ratify.

The second set of personnel are a prosecutor and his or her assistants, and a registrar, which I think most you know is the name used in international courts to indicate the highest executive or administrative official. Judges provide overall supervision of the court through a group known as the Presidency. A judge is elected to be the President from among his brethren and sisters, and serves to run this executive committee of the judges.

Another and very critical body is the Assembly of States Parties. This is the intergovernmental body composed of those states that have ratified the court, or, rather ratified the Statute. It has the power to fire, hire, discipline, set a budget, put assessments on members to raise the money for the budget, and to exercise oversight and accountability. I would like to emphasize that a reading of the statute and the legislative history makes it very clear that the Assembly of States Parties is expected to maintain continuing oversight and accountability. And the structuring that has gone on in the preparatory process for the Assembly of States Parties makes it extremely evident that the ASP is going to make sure that the countries that give the Court money are getting value for the money, and that the prosecutor, judges and others in the structure of the Court are behaving as States Parties intend that they should.

There will also be within this structure a Victims and Witnesses Unit, which will provide support and care for victims and witnesses that are participating in the Court's processing.

There will be a Defense Counsel Unit. We have had fears that this was not going to happen, but it is now in the first-year budget of the court. This will be a body purely within the office of the Registrar, purely committed to the exclusive work of assisting defense counsel — in the United States, the National Association of Criminal Defense Lawyers and the ABA are

very much involved in the shaping of this defense unit to make sure that it's effective. There will also be a defense bar, which will deal, working with the Office of the Registrar, on issues such as eligibility, discipline and qualifications.

Turning now to the issue of jurisdiction, you've been told that the Court will have jurisdiction over war crimes, crimes against humanity and genocide. This is a narrow band of jurisdiction within those general categories. Only the very worst criminals for the very worst crimes — the statute makes it clear that the crimes in question have to be especially atrocious, have to shock the conscience of humanity, have to be systematic and massive, and in most cases have to be pursuant to some kind of a plan or policy.

Aggression is notionally within the jurisdiction of the Court but suspended by the Statute until it has been defined in further negotiations, and then it must be inserted into the Statute by an amendment process. That will take seven years at a minimum. Judging by the way the negotiations to define aggression are going, I don't expect to see it, frankly, in my lifetime.

These thresholds, therefore, are very high. Although terrorism is not mentioned in the Statute as such, the crimes have been defined in such a way that almost all of the serious criminal acts that terrorists do would be within the Court's jurisdiction. For example, there is unanimity that the 9/11 events would have been within the Court's jurisdiction, had it been in existence at that time.

It's important to emphasize, as Mr. Gede said, that the Court tries only individuals, not governments or organizations. It has no jurisdiction over them whatsoever. Cases come either by reference through Chapter 7 powers or through a ratifying state where a crime has been committed on its territory, or by its national; in similar circumstances, of course, a non-ratifying state may consent to the Court's jurisdiction.

Let me now turn very quickly — I have three minutes left — to safeguards. The safeguards built in — and these are intended as safeguards, and so to call them that is not a matter of interpretation; these are clearly intended to function in this way. There are the thresholds that I mentioned — the very narrow definition of the worst crimes by the worst criminals. There is complementarity, in which a state, with a jurisdictional nexus to an individual, may go to the court and say we want to deal with this person ourselves. The judges must grant that request unless they deem that it's in bad faith or that the country concerned is incapable of carrying out an investigation or trial.

Countries may enter into or have bilateral treaty obligations to deliver persons to each other. In those circumstances, they may honor those obligations, rather than honoring an ICC order or arrest warrant. The United States has many of these agreements and is actively setting up to do more of them.

There is the safeguard by the Assembly of States Parties. There is the oversight provided by the ability of countries to say that information required by the Court is national security and they will not give it up. The Court must accept and defer to that. And there is the power of the Security Council to require the Court not to address an issue that requirement would be by resolution. The Security Council can renew the requirement annually, as long as it wishes.

On trial procedures and process — there's a great deal more to be said here than I can do. Fortunately, these will be covered by others here. I would like to make the observation that the issue that we're examining here, from my point of view — and here my status as a proponent may be coming out— the issue that we need to decide on is that this is a decision of the kind the United States government makes when it is considering an extradition treaty with another country. We do not require of another country that it has a court system that is precisely like ours, or indeed provides all of the rules and regulations that ours does.

We look at the court system of the country with which we are considering having an mutual extradition treaty, and we decide whether, overall, that country provides sufficiently fair trials for us to be willing to deliver an American to them in return for getting somebody back, whether we will have a reciprocal arrangement that does that. I would hope that this would be the perspective in which we would look at this court as a foreign court, which we will look at as we would at a court to which we may be planning to extradite.

The provisions — I'm going to take two more minutes — I'm sorry for this very rapid gallop, but I'm like somebody who has to describe the entire criminal process in the United States in 12 minutes. The trial processes and procedures of the court are hybrids between the civil and common law system. They were negotiated out particularly on that basis. This is a special court for special purposes, which is the result of an act of international legislation, multilateral legislation carried out through parliamentary diplomacy.

The trial processes and procedures contain all of our Bill of Rights due process protections, except for jury trial. These trials are by judges. This was not simply a cave-in to the civil law system. There was a spirited and extended discussion on this. There was a consensus in the end, in which the United States participated, that jury trials for someone like Hitler, Idi Amin or Milosovich were not practical, could result, actually, in discrediting jury trial systems in general, and that judges were better qualified to deal with trials of persons charged with these kinds of very special crimes, of this particular category.

The question of anonymous witnesses is not specifically ruled out in the language of the Statute, but the legislative history makes it quite clear that the cumulative effect of several of the Rome Statute's provisions taken together would result in anonymous witnesses being barred. Hearsay evidence is not *per se* inadmissible, but it is excludible by the judges for lack of probative value.

The defendant may use a lawyer of his or her own choice or be assigned one by the court if he or she wishes. Indigent defendants will have counsel paid for them through the resources of the Court. Most trials will take place in the Hague, but the judges are free to determine that a trial be held elsewhere. In all frankness, for economic and financial reasons it is unlikely, particularly in the first few years of the Court, that it will have trials anywhere else but in the Hague.

The complementarity demand — that is, a demand by a country that the Court defer to a domestic court — may be made at many different stages through the trial procedures. There are numerous preliminary interlocutory appeals available for both sides at all stages; many more than are available in our system. The prosecutor may appeal a conviction, but this is considered to be not a final but an interlocutory appeal because the trial does not close. You have a conviction; the trial is suspended but remains in existence at that point, while an appeal may be made by a prosecutor against a conviction.

The sentencing and convictions — the decisions of the Court are made by a majority of the judges. This is organized in such a way that each panel of judges will have three members, so that there will always be a two-to-one result. However, the statute calls on judges to make every effort to achieve consensus and makes voting a last resort.

Defense counsel will find, on the one hand — and this is an example of the hybrid situation — that judges will participate much more actively in questioning and in structuring the control and flow of the Court's work. But on the other hand, the rights and functions of defense counsel that we are familiar with, such as cross-examination, are fully provided for in the Court.

So, what we have here is a special court designed for a special purpose. You are open to examine, of course, the Rome Statute and the subsidiary documents to make your own determination about whether this is a court that will function. Obviously, as a proponent, I think that this is a carefully crafted court, the result of eight years of work by extremely distinguished international lawyers, not least the extremely expert people who served on our delegation. It's a fascinating subject for a lawyer to examine.

Whether or not you happen to like the Court, I hope that most of you will conclude that, in fact, this is a remarkable product that offers defense counsel and defendants a full and free and fully acceptable trial experience. Thank you very much.

MR. CASEY: With your permission, I will stand.

Somewhere in the novel *Dracula*, Professor Van Helsing warns his colleagues, "My friends, it is no ordinary enemy that we deal with." It seems to me that a similar warning is called for with respect to the International Criminal Court. Like Brams Stoker's fictitious count, the ICC is not what it may at first appear to be. It comes in the shape of justice, but it has the soul of an autocrat. Whether used for good or ill, the ICC's power will be checked only by its own conscience. The limitations some find in the Rome Statute are illusory. The Treaty's separation of powers — nothing but bureaucratic divisions of labor. The Court will be the sole judge of its own power, and complementarity will apply only as the ICC chooses to apply it.

I think it is safe to say that the design of this institution would, from the ribbons in their hair to the silver buckles on their shoes, have shocked the authors of *The Federalist*. As Madison wrote in Number 51, "You must first enable the government to control the governed, and in the next place oblige it to control itself." Like our own courts, the ICC will be an institution of government. It will have power over individuals; not merely states. But it will not required to control itself.

It is not, therefore, surprising that the Rome Statute fails to preserve the fundamental guarantees of the Bill of Rights in any form recognizable in the United States. Those rights — to a public trial by jury, to confront hostile witnesses, to protections against double jeopardy — do not merely ensure a fair trial. They are first and foremost limitations on the abuse of power. As Justice Story wrote regarding trial by jury, "It is the great bulwark of civil and political liberties, part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power."

By contrast, the civil law upon which the ICC is predominantly based, has never served as a check on governmental power. It may well deliver justice in individual cases, but its meteor is the vindication of the state, not its limitation. And if ever an institution needed limits, it is the ICC. War crimes prosecutions and prosecutions for crimes against humanity, particularly when they involve high-level officials, are inevitably political. You cannot avoid it. And the ICC was conceived and constructed quite openly as a political tool, as a tool of foreign policy.

Now, some argue that departures from American practice are permissible because, even today, Americans are not entitled to a trial under the Bill of Rights under all circumstances. They are regularly extradited to courts that offer protections no better than those of the ICC. But Americans are extradited for crimes they have committed abroad, and the ICC could reach people who have never left the United States. Moreover, there is a fundamental difference between washing our hands of a man and actually participating in his destruction.

By acceding to the Rome Statute, the United States would effectively vest the ICC with some of its sovereign power, making it a participant in the Court's prosecutions. The Constitution does not permit such a delegation.

Similarly, it is often claimed that the ICC would be no worse, and perhaps better, than the military commissions that the President has established in our war on terrorism, but those commissions apply only during wartime to individuals who are not and cannot be characterized as civilians. The ICC would operate at all times, in war and in peace, and it would wipe

away the ancient distinction between civilian and military justice — a distinction that has served us well, and that the Supreme Court has jealously maintained.

Now, there are many compelling reasons for not joining the ICC regime, but the Court's failure to preserve the safeguards correctly deemed necessary by the founders of our republic to ensure that the power of criminal prosecution is not abused would alone have fully justified U.S. rejection of this Treaty. Thank you.

MR. GEDE: Mr. Stoelting.

MR. STOELTING: [1] Thank you for the invitation to the Federalist Society and to the ABA for sponsoring this. It's great to be here.

My opening two words in response to comparisons of the ICC to Dracula, *et al.*, are "calm down." It's going to be okay. This is going to be a responsible institution, and one which could be used as tool of American foreign policy, not an opponent of American foreign policy. This is something that could be used to advance American interests.

Just think — in the last few years, how many times have we had instances when we have a war criminal or somebody accused of genocide or crimes against humanity, and there's no place to try the person. Cambodia, Kosovo, Sierra Leone, Congo — time and time again, there are instances when people get caught and there's no courts to try them. We can't keep creating these *ad hoc* tribunals on into the future for special circumstances. It's just not a workable long-term solution. There's no question that the law being applied by the ICC is law recognized by the U.S., indeed written and recognized by the United States military courts and the United States federal courts as law. We're just creating an institution to apply clearly established law. It's just a mechanism to apply law that we, as a country and as a government, recognize is law and is not being applied.

Moreover, the purposes and principles of the ICC are uniquely American. This is something that we should be embracing as Americans with a commitment to the rule of law, not shunning and running away from and declaring it to be an abomination. This is something that actually captures and enforces principles that the United States, among all other countries, has put forward and advanced over the last ten years — indeed, since Nuremberg.

We were the country that conceived and helped put together Nuremberg. We were the country that established the *ad hoc* tribunals for Yugoslavia and Rwanda. We are a country that is enabling the special court for Sierra Leone. Time and time again, you see the United States in the forefront, in the vanguard, of prosecuting war crimes and prosecuting crimes against humanity, except this one instance when there's a permanent court to be created to do what we know needs to be done, yet we're running away from it and declaring it to be an abomination because there's no exclusion for American citizens. And it really is as almost crass as that, to say that because there's no clause declaring that no American will ever be targeted by this court, we will do everything we can to undermine it.

The ICC is going to be a completely unique and new kind of international institution. Indeed, the Rome Statute is a new kind of document. This is not a standard setting body like the Kyoto Treaty or the Comprehensive Test Ban Treaty. It's not a treaty where a bunch of countries get together and say these are goals and aspirations, and everybody that signs on to the treaty is committed to these goals and aspirations.

This treaty creates a living, breathing institution that's going to have staff and powers. And the U.S. should be a part of it. If we were a part of it, we would be exerting our influence on it, we would have American judges on the Court, we would have American prosecutors in the Court. This is not going to be an uncontrolled debating society like the Durban Conference that it's often compared to. This is going to be a very tightly defined, narrowly targeted institution.

What we have now is just a blueprint toward how we'll go ahead. It is premature to be raising these kinds of apocalyptic visions of what the Court's going to do because it hasn't done anything yet. They haven't hired anyone. So it simply is premature to be targeting this court as an enemy of American interests, when all we have is a piece of paper. And when you look at the piece of paper, it should be clear that this is a conservative institution with narrowly defined jurisdiction, with innumerable safeguards.

You can say all you want about the safeguards being illusory. The fact is that the safeguards are there and they have teeth. And I think the greater risk is that the Court will never be able to do anything because it will be mired down in years of preliminary objections and states making objections.

If you look at two aspects of the Court - the triggering mechanism for its jurisdiction and the scope of its subject matter jurisdiction - this should be clear. It's true that there is no explicit carve-out for American servicemembers or peacekeepers. But, given the history of the United States, indeed our own Supreme Court has said that the Commander-in-Chief and President is not exempt from the reach of the law. I think it would be improper for us to demand that this court be created with a carve-out for one of its members or for one of the potential members.

To really understand how the triggering mechanism works, look at the example of Israel. Often, I hear people say, well, this court is going to target Israel and that Israel will be in the dock on day one. That's simply not true. In fact, the greater reality is that there practically is a *de facto* carve-out for Israel. And the reason is that Israel has not ratified the ICC Treaty and is unlikely to do so. The West Bank and Gaza are not states, so there cannot be a referral from one of those states.

So, as to any events that occur in Israel or in the West Bank or Gaza, you would have to have the consent either of Israel, if that was the nationality of the country of the accused, or you would have to have the consent of the country where the alleged crime occurred.

So, unless you had the consent of Israel, there absolutely can be no prosecution by the ICC, absent a Security Council referral. And I doubt very seriously there will be a Security Council referral. so, as long as Israel remains a non-ratifying country, and as long there is no Palestinian state on the West Bank and Gaza, it's inconceivable to me that even the minimum case for jurisdiction could be created, let alone an investigation or anything go forward that would result in an indictment.

As to the threat of the court reaching out and prosecuting Americans for crimes committed in America, that also is impossible under the court's exercise of jurisdiction. Without the consent of the United States, there can be no indictment against an American citizen for a crime committed in the United States, as long as the United States is a non-ratifying country. The reason is that without a Security Council referral, you've got to have the consent of the country of the nationality of the accused or the consent of the country where the alleged crime occurred. And when those two are the same, as it often is, and the country withholds its consent — it's not a ratifying country — the ICC will not have jurisdiction.

As to the scope of the crimes to be prosecuted, it really is here that we see the influence of American policymakers, and indeed, the American military. It is quite consistent with the scope of war crimes and crimes against humanity under American law. There are strong intent and knowledge requirements. The definitions do not pick up one-time events like the bombing of the Sudan chemical factory or the downing of the Iranian airliner a few years ago.

The definition of "genocide" is taken right out of the 1949 Genocide Convention, which the United States has ratified.

The definition of "crimes against humanity" is phrased as "acts committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack," and it requires multiple commission of acts "pursuant to, or in furtherance of, a state or organizational policy to commit such attack."

The definition of "war crimes" includes international armed conflict, which has been the case for a hundred years and is drawn out of the 1949 Geneva Conventions, which the U.S. and every other country in the world has ratified. It includes Common Article III and non-international armed conflicts, but it specifically carves out internal disturbances, riots, and it puts in a definition that says, "This is meant to apply only in protracted armed conflicts between government and armed troops."

So, as you can see, the exercise of jurisdiction is very circumscribed. This is not a court of universal jurisdiction. This is not a court that can reach out and indict anybody, anywhere, without the consent of the country where the crime occurred or the consent of the state of the nationality of the accused.

It's also a court that has a range of protections for defendants and accused persons that does, in fact, comport with our Bill of Rights — presumption of innocence, assistance of counsel, right to remain silent, privilege against self-incrimination, right to written statement of charges, right to examine adverse witnesses, right to have compulsory process to obtain witnesses, prohibitions against *ex post facto* crimes, prohibition against double jeopardy, freedom from warrantless arrest and search, right to be present at the trial, exclusion of illegally obtained evidence, prohibition against *in absentia* trials.

It's true there is no right to a jury trial. However, there are limits to that even in our constitution. There's no right to a jury trial when an American servicemember commits a crime abroad. The right to a jury trial only applies to crimes in the state or district where the offense is committed.

The parties to the court are closest friends and allies. This is a court of democracies. By condemning the court, we find common cause with Libya, Iraq — the tyrannies of the world. By becoming the champion of countries that don't ratify the treaty, by standing up and saying, look, you cannot touch any country that does not ratify the treaty, we champion the cause of countries that do not have American interests in hand. If we're not going to become a part of the Treaty, we should at least stop from becoming a place where war criminals can go and hide and say, well, the Americans will never extradite me to the ICC.

The 67 ratifying countries include Italy, Norway, France, Belgium, Canada, New Zealand, Spain, Germany, Austria, Finland, Portugal, Greece, Ireland, plus a range of countries from Africa, Asia and South America. Now, with the U.S. withdrawing its signature from the ICC, with the U.S. considering legislation that would prevent cooperation under any circumstances with the ICC, perhaps even close the door on Security Council referrals, and even authorize things like invasions of the Hague to free Americans held by the ICC, we risk becoming a haven for war criminals.

I think it's prudent for the U.S. to take a wait-and-see approach. If we believe our position in the world today as the remaining superpower gives us pause, and if we can't join right at this moment, I think we should step back and let the ICC go ahead and see what happens. And I believe that eventually, we will join this court.

Just to close, again, I think we should all just calm down, take a look at the statute, take a look at the reality, take a look at the purposes for which this institution was created, and see what happens. Thank you.

PROFESSOR McGINNIS: Thank you very much. I'm very grateful to be invited.

I'm largely a constitutional lawyer, and I think in general, it's very useful to look at international law concepts through an American constitutional prism because we've developed concepts of accountability that make some of the international law concepts more understandable. What I intend to do today in my brief time is to try to show why I don't think we should join the ICC, by comparing it to an institution that Americans have come to know all too well: the IC, the independent counsel.

My claim is that the ICC suffers from all the structural defects of the IC, and then again some. I'll try to keep this clear; I know that the ICC and the IC are separated only by a letter, and my claim is that they are very, very similar in their defects. Indeed, all the criticism I think that can be levied against the IC — what were those criticisms? That the IC was liable, to politically driven misjudgments; and that ultimately, whatever the intention of its proponents, it undermined the rule of law. These are all fully applicable to the ICC. It seems to me bizarre, in fact, that we would consider plunging in as a member of the ICC of empowering a global independent prosecutor after we have understood the defects of an independent domestic prosecutor.

Well, let me begin with the criticism that the independent counsel was subject to politically driven misjudgments about prosecutors. The problem will be even worse with the ICC because the laws are less clear. In the case of the IC we had the crimes that were as clear as those that are made under U.S. law, that at least had a consensus that the U.S. had signed up to. Not so with the ICC. We have a variety of crimes here, and it's quite interesting that the ICC has not focused on the kinds of crimes which would be very clear, which would have a very clear consensus, for instance, like hijacking.

I'd be more sympathetic to an international criminal court if it just tried to focus on the international statute about hijacking. But no, the International Criminal Court has tried to include within its jurisdiction crimes that have not yet even been defined, like crimes of aggression. The U.N. has been trying for 50 years without much success to define what aggression is. And not surprisingly, that's very difficult because it is inevitably a contextual and political decision about what constitutes aggression, and people have very different concepts of what it is. It is very troubling to me that this kind of concept would be rolled into the ICC. It's a kind of concept that allows a great deal more discretion in enforcing than any kind of decision that we have left to our own independent counsel.

Some of the other kinds of crimes considered in the ICC also allow large elements of political discretion. For instance, I would refer to the ICC statute's definition of war crimes. It includes "intentionally directing attacks against civilian population or intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to the natural environment which would be excessive in relation to the military objective to be obtained."

This kind of provision requires the prosecutors and the judges of the ICC to compare the military objectives to how much incidental collateral damage is caused. That seems to me, again, a very open-ended kind of judgment that allows much more discretion than any kind of discretion that was allowed our own independent counsel. As John Bolton, the Under Secretary, has said, it's very unclear under that statute whether the United States could have been condemned for its bombing in Japan and Germany.

So, the open-ended nature of the crimes within the ICC are extremely troubling. I agree, some of the provisions like the Genocide Convention are a little clearer. But even those conventions leave out some of the U.S. reservations to those conventions that are clearly against our Constitution. So, there are a lot of unclear crimes, and some of the crimes that are clear, are clearly against our Constitution — for instance, parts of the Genocide Convention that allow conviction based merely on incitement.

Well, let's go from the first problem of politically driven misjudgments to the problem of a lack of accountability. The lack of accountability to the ICC comes from its lack — first of all, the separation of powers system. Unlike our own IC, which at least had independent and life-tenured judges appointing and monitoring the IC, the judges are elected by the same body that elects the prosecutor. There really is no separation of powers. And so, it violates a kind of first principle of U.S. constitutional structures that tries to confine the powers of an institution.

Moreover, while it said that the prosecutor is independent, independence, as we've learned from our own IC, is not a safeguard against all ills. Indeed, independent entities can easily be captured by one group or another. It's striking with our own IC that generally prosecutions against Democratic presidents were carried out by a Republican staff, and prosecutions against Republican Presidents and Democratic Staff.

Our experience of independent actors in the international realm suggests that this will be even a worse problem. International institutions are frequently driven by those with an agenda and rarely reflect neutral principles, of course, by the enemies of free speech — even the Secretary General, for instance, in his recent decision to have an exploration, an inquiry against the Jenin Massacres (Palestine), seems to only focus on the Jenin Massacres rather than the Palestine suicide bombings.

So, there is a real danger of a kind of high double-standards that one sees in the international law being brought into this context without the kinds of constraints that we would see against discretion, the kinds of constraints against accountability that we build into our normal prosecutorial system in the United States, and we learned to our great regret, were lost in the IC.

Indeed, in another sense, I think it's worse than the IC because, at least with the IC, or certainly with an ordinary prosecutor in the United States, we have civilians who are very much focused on that prosecutor. People are very much focused on that prosecutor because they fear that they may be prosecuted. They think that domestic prosecution will affect the crime rate in their jurisdiction. That's not going to happen with the IC. These are going to be large, symbolic prosecutions which aren't going to draw the attention of individual citizens, but of various interest groups who are going to be very interested in the symbolism of that prosecution. And that means you need more constraints in this context of the ICC, not fewer constraints with which the ICC is currently circumscribed, not the much fewer constraints that as compared to our normal kinds of prosecutions.

So, in summation, I would say that the ICC has the same risks as our own IC. While it may have been well-intentioned, it is the same kind of Utopian idea of taking politics out of politics and that in end only succeeds in discrediting the rule of law. I don't speak as someone who's necessarily unsympathetic to *ad hoc* tribunals, and I don't see why we can't have some of them when we have a consensus that aggressions or war crimes have been committed and when these crimes are carefully and clearly defined. Then we can have a tribunal to prosecute them. Nor would I object if we had an International Criminal Court that was limited to crimes of hijacking, which didn't have any elements of political discretion, so long as we had a better separation of powers system in the International Criminal Court.

Looking at our own experience with an unaccountable prosecutor with enormous discretion, we have a lot to fear. And I don't think anyone who is aware of our own experience can really be calm at looking at the ICC. Thank you very much.

MR. GEDE: Let me start off the questioning with some jurisdictional, constitutional questions, and then we'll get to some of the due process features.

Mr. CASEY, can you tell us what principles are involved that become the fundamental jurisprudence of the ICC, and describe for us the principle of territoriality versus universal principles of law that the court will have to start from? Where's the starting point here?

MR. CASEY: Well, the court will claim jurisdiction over the territory of all of the states' parties. It will also claim jurisdiction over the nationals of non-states parties, if the act involved took place in the territory of a state party.

That has been described as a form of universal jurisdiction. I mean, the idea is certainly an idea of universality. It's not technically universal jurisdiction, which is actually a very limited doctrine dealing with what you can criminalize on places like the high seas.

I think the most problematic part of the ICC Treaty is indeed the assertion that a treaty-based organization can exercise power over the nationals of countries that have not consented to the treaty. And I think that, frankly, is why it is not enough for the United States merely to repudiate President Clinton's signature on the treaty. Until the ICC says we will not attempt to go after people who have not consented to our jurisdiction, they're a threat and we're going to have to meet it.

MR. GEDE: Let me jump in on a due process question, right off the bat. Maybe Professor McGinnis or Mr. Casey can address it.

It was a fairly compelling point that Mr. Washburn made, that a jury trial of a notorious world criminal, such as Hitler or Milosevic or somebody of this sort, might be deleterious to the long-term health of jury trials. What's your response to that, Professor McGinnis?

PROFESSOR McGINNIS: As you see in my remarks, I'm not necessarily opposed to not having a jury trial, for instance, in the Nuremberg Trials or in an *ad hoc* tribunal. My complaint is not so much with the due process provisions of this Treaty. I think due process can and should sometimes be changed, and I actually don't think the U.S. system is the only system that is consonant with justice. My problem is entirely with the structure of the court and the discretion that is given. And so, perhaps Mr. Casey is in a better position to answer your question.

MR. CASEY: Well, I think the question, frankly, is not merely whether this court should have jury trials for everyone from all around the world. The question is, should Americans be entitled to jury trials. I don't think its necessarily unfair for someone like Slobodon Milosevic not to get a jury trial since he comes from a society that is a civil law country, and would not have been entitled to a jury anyway.

I think, however, that concepts of justice are very culturally based, and we have absolutely nothing to be ashamed of. I sometimes wonder what the State Department's problem is when it goes overseas to defend concepts like the jury trial. You know, call the Justice Department if you need help.

As Justice Story wrote, it's the foundation of the limits that our Founders considered necessary to avoid the abuse of power. So, I think if we are going to be a part of this institution, then we should demand that our traditions be respected.

MR. WASHBURN: If you've got an international court, this has to be a court in which countries come together to create it.

We cannot expect that a court so created is simply going to replicate our own national system. I have to say, with all due respect to Mr. Casey, that it's a rather arrogant assertion that a court, which in its nature has to be of this kind — that we can expect to make it a complete replication of our own system.

Furthermore, we have accepted courts and supported them. The Sierra Leone; the Cambodia effort, which crashed and burned; the East Timor effort; and indeed, the Rwanda and Yugoslavia Tribunals are all courts which did not simply copy U.S. courts.

Many countries took decisions to create a court like this. The court is not something of its own. It has been created by the countries that exercise their sovereign discretion to do it.

MR. GEDE: Can somebody point to precedent for the ICC? Do Nuremberg or Tokyo establish precedent, or was the jurisdiction that was being exercised there against the individuals involved an exercise of jurisdiction within that particular country?

MR. WASHBURN: Well, I think it's very clear. If you look at the way in which the Nuremberg court was created, it was created by an international agreement among the allied forces that set it up. Germany technically gave its consent to this because at the time that it was set up, the theory was that German sovereignty resided in the occupying forces. So, this is clearly established by a limited, be it admitted, but by an international agreement.

Obviously, the successor courts that followed in its train — the Rwanda and Yugoslav tribunals — by being established by the Security Council were established by a collective act of a considerable number of countries; a very large number of countries, if you consider that the Security Council, in theory, acts on behalf of all of the nations of the U.N.

MR. GEDE: Mr. Casey?

MR. CASEY: I think the point is well taken with respect to Nuremberg because — I mean, you call it an international court. In fact, it was a court that was set up by the United States, Britain, and Russia and France was permitted to join in later.

Using the sovereignty of Germany, it was not an international court: it was a German court. That's where the legal power came from— and the international community, let's be very clear, has no inchoate judicial power sort of floating out there in the ether, that it can call on. You need sovereigns to have judicial power. Even the Nuremberg court needed to look at the sovereignty of Germany. In the court's opinion, it makes very clear that that's what it's depending on, so I don't see Nuremberg as a precedent for creating an international court with sovereign power that hasn't been delegated from states.

MR. GEDE: Anybody else?

MR. STOELTING: I would just add that the question of whether a country can consent to have its citizens tried by an international criminal court should be a slam dunk. There simply is no question that a country can consent to have its citizens tried by its own courts or by an international court. And I would cite to the Gerard Wilson decision of the United States Supreme Court, saying that "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction." That's what countries do when they ratify the ICC Treaty.

It's speculated that one of the first cases might be Congo, which is a vast country with all kinds of armed bands, roving, perhaps committing crimes. The Congo may need help in prosecuting those people, and that's where the ICC may come in.

The question of non-state parties confuses the issue of a state party and an individual. Countries that don't ratify the ICC Treaty have absolutely no obligations under the Treaty. They don't have to do anything to support it. The only countries that have obligations under the Treaty are countries that ratify the Treaty, that want to be a part of it.

And as to citizens who commit crimes that may be within the jurisdiction of the Court, we've never taken the position that if you commit a crime abroad, you have a right to be tried by American courts. That's the opposite of what we do. It's always been, if you commit a crime abroad, you're at risk to be prosecuted by the court with jurisdiction over that territory.

MR. GEDE: Mr. McGinnis talked a little bit about military operations and the like. Where is a crime committed, especially in this high-tech world where a military commander can sit in Florida or at the central command and call the shots for military actions abroad, which actually occur abroad? If something is being alleged as a crime, where did it occur?

Mr. Stoelting, any thought on that?

MR. STOELTING: I mean, if you're asking about command responsibility, there are provisions for commanders having responsibility for war crimes and crimes against humanity that they know, or should have known, would occur under their

watch. That wouldn't exclude a commander who was not physically present when the crimes occurred. But the scope of the definition of the crimes — you have to keep in mind, it really picks up only plans or policies to encourage with knowledge and intent that war crimes and crimes against humanity will occur.

MR. GEDE: Professor McGinnis, I cut you off. I'm sorry.

PROFESSOR McGINNIS: Well, let me just go back to the Nuremberg point. I think the real distinction there, is that, there was a political decision taken as a consensus in the world that Germany was guilty of crimes of aggression. We set up a court to deal with the question of which individuals were responsible for that aggression. The Nuremberg tribunal did not make a decision about whether Germany was engaged in unjustified aggression.

My difficulty with the ICC is that it's going to allow a prosecutor and judges to make those better kinds of decisions, to balance, for instance in the context of a war crime, the damage to a civilian population and the military objectives.

I don't think we can give that kind of discretion to essentially non-accountable, non-sovereign actors with few constraints — and that's the reason I oppose it and do not think that these *ad hoc* tribunals represent substantial precedents.

MR. WASHBURN: Let me give you a straight answer to the question that you asked. Military lawyers, including one who participated in the U.S. delegation, to whom I had the opportunity to put precisely your question — he said that the rough and ready answer to it is that the crime occurs where the ordnance impacts. In the case of Osama bin Laden, in which we obviously had an act which must have been prepared and concerted in many different parts of the world, clearly the crime was committed when those planes rammed into the World Trade tower buildings.

MR. GEDE: Both proponents and opponents here have referred to the notion of the court having power over individuals and not states. You mentioned that at the beginning.

But Mr. Casey, you had a different perspective on that. You saw that as a negative and not as a positive. Could you describe what you mean.

MR. CASEY: Well, the ICC Treaty will have power over states to some extent. It will be able to ask them for assistance and even compel that assistance under its authority under the Treaty in some circumstances. But it will have jurisdiction only over individuals.

We talk about this as an international organization. International organizations don't have jurisdiction over individuals. States are international actors. It is an institution of government. It has the power over individuals that our own courts have. In other words, if the ICC wants to indict an American, it doesn't have to ask the State Department's permission. It acts directly on that individual. And if that individual, then, travels overseas, he may be arrested and sent to the ICC without reference to the United States. That's why it's so critical that this court has to meet the ordinary requirements that we consider necessary for an institution of government.

MR. GEDE: Mr. Washburn.

MR. WASHBURN: Well, it's a very existential question as to whether a court is an instrument of government in the sense I think Mr. Casey is trying to get across here.

The United States and most other advanced countries — despite Mr. Casey's adamant versions on the civil law system, courts are not intended to carry out the will of the state in the sense that a cabinet department or an armed force is supposed to carry out the will of the state. We expect courts to be independent and follow rules of law. We expect the judges will, in fact, not communicate with the Executive Branch over matters with which they are dealing.

There may be a larger sense in which you can call a court a part of an overall governance system. I leave that to you. But I do not think that this is an act of government. There is no executive branch. There's no state to which this court is attached. Were it to be attached to some larger structure, that would be world government, of which I assume no on in this room would approve.

The fact of the matter is that this is a court which has been created by individual states and governments in the fulfillment of their sovereignty. This is a court which is a consequence of eight years of very hard work by individual government delegations instructed by their governments through their sovereign processes to put an institution together. There was very vigorous representation of national interests, including by the United States, in the creation of this court. This court is derived from actions in pursuance of sovereignty by individual governments. It is not something that has somehow materialized out of an international ether, and we are suddenly surprised by finding its existence. It's a result of an extremely long process. I'm well aware of it because I participated in that process from the beginning.

You may have problems with the court, but you can't say that it is something that is somehow divorced from nation states and their sovereignty. We may feel that our sovereignty in some way or another is affronted by this court. I don't feel

that way. I think this is an opportunity for leadership and action by the United States, and I think the United States made a dazzling display of its sovereign capabilities by the enormously expert and effective contributions it made to this court.

The court exists because other countries wanted it, fought for it, worked hard to get it, and they did so in the full exercise of their national sovereignties.

MR. GEDE: Professor McGinnis is poised to pounce here.

PROFESSOR McGINNIS: I certainly think this court is exercising governmental power in any core sense of governmental power. It's going to put people in jail without the consent of particular sovereigns. What could be more of an exercise of governmental powers than Utah.

It is true that sovereigns have brought this court into being. But that, of course, was true of the United States Constitution. A lot of states were sovereign and they breathed life into another juridical entity that went and had a life of its own. I think we have to understand that that is what is going on with respect to the court, and we have to hold it up to the same kinds of standards that we do to other kinds of constitutional mechanisms in trying to measure whether its structure is going to lead to accountability, and whether its structure is going to take away politically driven discretion. And it's on those kinds of features that I think the court falls short.

But I think it is a grave mistake to think that this is not governmental power. It is governmental power of the most fundamental kind to put people in jail, sometimes for the rest of their lives, and it is governmental power that is not, and quite understandably because of the theory behind the court, exercised by any sovereign, but is exercised even sometimes against the judgment at least of some sovereigns of the world.

So, it has to be measured and it has to be defined in a way that is going to at least meet the kind of standards for structural accountability that we see in other constitutive mechanisms that exercise governmental power in sovereign states whose political systems we respect, like the United States.

MR. GEDE: Let me ask the final moderator's question, then we'll open it up for questions from the audience. I'll make this between Mr. Washburn and Mr. Casey.

Mr. Washburn, could you describe or explain to us the principle of complementarity in the statute, including its exceptions — in other words, when it does not apply — Mr. Casey, your perspective on that.

MR. WASHBURN: Okay. I hope I can give a technical description of complementarity with which both Mr. Casey and I will be happy, so that we don't have to debate over that and can debate over other aspects of it.

As simply stated as I can make it, complementarity arises when a nation comes to the court and it has many different opportunities to do this— and this nation need not be a state party, incidentally.

Complementarity arises when a nation comes to the court and says you are addressing, investigating, prosecuting, trying, an individual with whom we have some kind of a jurisdictional nexus. And there are many different ways in which a nation could have that jurisdictional nexus. We intend to investigate, prosecute, try, or what have you, this individual ourselves. Therefore, we demand that you stand down, not pursue this further, and let us take over in this case with this individual.

The statute requires the court to do that, unless the judges determine — here are the exceptions you are asking for — that the state in question has no judicial system — if Somalia came in and asked for this, obviously the judges would not give it, or if Afghanistan came in and asked for this, you don't have a court system; you can't carry out what you are asking for — or the judicial system is not worthy of the name, it's a sham, it doesn't meet the international standards for an independent judicial system; or that the request is made in bad faith.

I was present when these exceptions were debated. The basis, obviously, for retaining this final judgment in the court in the case of the judges is that without these exceptions, any country could, under any circumstances, make this demand, if it had any reasonable jurisdictional nexus. The court would have to grant it. And the court would become an empty shell because no cases would come to the court except in those few cases where there was consent. But any country — most countries — if it didn't like the idea that the court was investigating somebody, could pull the case out and frustrate the court's purposes. This is very clearly stated by a wide range of nations.

A final thing to say about complementarity is that although the United States may not feel it is sufficiently complete, it fought very hard to get it and the phrasing of it in the statute was on the basis of the text provided by the United States. Thank you.

MR. CASEY: Well, complementarity is clearly the reason — I would bet a substantial sum that it's the reason — every one of the 67 parties that have joined the Treaty joined it. They all assume that it will protect them. I think they may ultimately be surprised because how complementarity is applied will depend entirely upon how the court chooses to apply it. There's no super-appellate court you can go to, to get its decision reversed.

But I think, from the perspective of the United States, complementarity is peculiarly problematic because under the Rome Statute, under Article 17, the court is freed of its obligations under complementarity, if it concludes that the proceedings in the targeted state were not conducted independently or impartially.

Well, we have a problem with that. Under our Constitution, the President of the United States is the commander and chief of the armed forces, and he is also the chief law enforcement officer. In any case that might come before the ICC, the President is a potential target. And in fact, if you look at the prosecution policies in the Hague, in the ICTY, he's the preferred target. They always want to get as high as possible. You don't make a career prosecuting privates.

The President has a conflict of interest. The men and women who will be investigating will work for him, and he is one of the people that needs to be investigated. I mean, it's one of the conundrums that was always used to justify the Independent Counsel, and I hope that we have learned our lesson, that it is better to depend upon the political structure of the Constitution, rather than to try to set up these extraconstitutional means.

But I think in any case, in our case the ICC has a ready-made excuse to ignore complementarity and to go after us whenever it chooses.

MR. GEDE: Thank you. Let's take 10 minutes for questions from the audience. There is a mic up here and I think it's working. So, unless you have a booming voice, please use the mic. But if you have a booming voice, please stand up and ask your question.

Yes, sir.

AUDIENCE PARTICIPANT: I'd like the panelists to comment on the accuracy of ICC's ability to compel production of witnesses and evidence for both prosecution and defense, particularly protection of the defendants if there is not sufficient cooperation from states in producing evidence for them.

MR. GEDE: Any member? Mr. Washburn.

MR. WASHBURN: All international organizations, unless they are to be part of a world government, have got an enforcement problem, and you're quite right to raise this, and I want to be equally candid in responding to it.

The effective functioning of this court will depend on the cooperation of states. In the case of states parties, those states are bound to provide that cooperation. In the case of a referral by the Security Council to the ICC under Chapter 7 of the U.N. Charter, states will be required by the mandatory powers of the Security Council under Chapter 7 to cooperate with the court. That would presumably include the United States, as well.

We can only look at the track record. The track record of the two *ad hoc* tribunals — and Mr. Casey's had more experience on this than I do, so he may correct me — is mixed. There's been good cooperation in some cases; not such good cooperation in others. You can have countries that play games with the court. You can have witnesses that can't be compelled because the court doesn't have physical enforcement powers. It has no constabulary, it has no police force. As a proponent of the court, I believe it would be undesirable for the court to have those powers because that would indeed turn it into an early element of world government.

The positive aspect of this is that we have found it possible to conduct fair trials in these two bodies, with witnesses present. Witnesses and victims do wish to come forward and to testify. There is a victims/witnesses unit, which is specifically designed to encourage that.

In the case of defense witnesses, this is the purpose of the defense counsel unit, which the registrar is now going to be bound to support and assist.

The registrar, under the Rome Statute, is required to assist defense counsel in bringing witnesses to the court and in making them available and supporting them to testify on behalf of the defense. I don't want to tell you that there are physical enforcement powers; there aren't. There will be problems in this area.

I believe that as the court takes hold and as countries are willing to cooperate with it and with the Chapter 7 powers that the Security Council can confer on the court, with skillful defense counsel and the court doing its best it can produce witnesses. If witnesses are not available, what will in most cases happen is that the prosecutor will not be able to make his case.

There will not be, using the standards of the court, the ability to convict someone simply because he or she has not been able to produce witnesses on their behalf.

AUDIENCE PARTICIPANT: Ken Jones from *The Congressional Quarterly*. Can the proponents address the question of whether there's something other than political judgment and distinguish between good bombing that we might do and bad bombing that Saddam Hussein may do? Good environmental damage that we might cause and bad environmental damage that others might?

MR. STOELTING: The questions before the court will not be, is this good bombing or is this bad bombing? The questions before the court are, were there crimes within the jurisdiction of this court that were committed? And those questions are questions that we have some history of dealing with. We have ten years of jurisprudence from the ICTY and the ICTR, a very extensive body of case law interpreting the very law that's to be applied by this institution. There's a very extensive body of commentary. There's legislative history of the court.

So, the question of how the law, which is clearly established law recognized by the United States and all governments of the world — the question of how the law will be applied to specific acts will be the same judgments that every judge and every prosecutor and defense lawyer deal with every day. What are the facts? What is the law? And, is there sufficient evidence of intent? Here, I think because the intent is at such a high level, that carves out an enormous body of acts.

There also is a provision in the Rome Statute that says that any ambiguities are to be construed in favor of the accused. And if there's any leeway in terms of interpreting the law, that leeway in interpretation is to go in favor of the accused.

MR. WASHBURN: I would simply somewhat generalize what David said. The kinds of issues to which you refer — the guidelines for the judges making them are spelled out in very great detail in both the Rome Statute, and furthermore the Elements of Crimes. The Elements of Crimes is a document that the United States negotiated, and on which it joined the consensus adopting it in the U.N. preparatory commission.

The Rome Statute and the Elements of Crimes are specifically created in extreme detail, in very great detail, to avoid excessive leeway in making those kinds of judgments. As David says, these kinds of judgments have to be made by judges all the time in applying the law to the facts. In the case of the Rome Statute and the Elements of Crimes, the countries creating these have done their very best to reduce the amount of interpretation or discretion on the part of judges on tough questions like this to the absolute minimum.

MR. GEDE: By body language, Professor McGinnis is ready to pounce again.

PROFESSOR McGINNIS: I just can't entirely agree with that. I mean, you can put in however much detail you want, but the facts are, to try to balance environmental damage and collateral damage to civilians against military objectives is an inherently open-ended inquiry that no matter how many words you put down in guidelines isn't going to erase the open-ended nature of that inquiry.

And of course, we haven't even discussed the crimes of aggression, which aren't even defined as we speak today, that are going to become part of this jurisdiction. And again, inevitably you have this political aspect of discretion. What troubles me, again — and I would make an analogy here — is that we have the ICC, prosecuting crimes that are so general and require so much political discretion that they actually resemble more a kind of common law of crimes.

Now, to be sure, there may be precedents the judges will use. But we, from very early on, rejected a kind of common law of crimes because we feared that that would give too much discretion to those who wanted to put people in jail. And I think it's even worse in the context of inevitably political judgments about aggression and balancing civilian and, indeed, environmental casualties with military objectives.

MR. GEDE: I've been given the high sign, and I'm afraid we're going to have to take our break. I apologize that there were two more hands for questions. Do we have five minutes, or — we need our five-minute break.

Before we take a five-minute break, these panel members will be here for a few minutes. Those who didn't get their questions answered, please grab them, but please thank them for their contribution. It was an excellent panel.

[1] Mr. Stoelting's comments are made in his personal capacity.

* This panel was part of a conference sponsored by the Federalist Society's Criminal Law & Procedure and International & National Security Law Practice Groups and the American Bar Associations Standing Committee on National Security Law. It was held on May 23, 2002 at the National Press Club.