

ASIL Task Force: U.S. Should Adopt Policy of Positive Engagement with International Criminal Court

William H. Taft, IV: My name is Will Taft, and I'm one of the members of the task force, which I co-chaired with Judge Wald, who is here. And we are fortunate to have a number of other members of our task force with us this morning. And I'll introduce them in a minute. Let me just say that this is the press conference of the task force for the release of our report, which the American Society of International Law convened the task force to consider what policy the United States should adopt at this time vis-a-vis the International Criminal Court.

The task force was, as I said, convened by the American Society of International Law, but that is not to say that the Society endorses the document that we have produced or its conclusions or recommendations. The society doesn't do that. What it does do is convene groups to study issues of importance in international law, and we think that this question of the relationship with the International Criminal Court is certainly one of those.

In putting together the task force, the Society tried to, and did, I believe, had a broad membership and full spectrum of opinion. And in addition to myself and Judge Wald, we had, and they are not with us today, unfortunately, but Associate Justice Sandra O'Connor. President of the International Criminal Court, Steve Schwebel and Professor Ruth Wedgwood, were part of our group.

And here today, and they will speak later, we also had Congressman Mickey Edwards, David Tolbert, and Mike Newton. The three of them, we're very glad to say, will have more to say as well.

As I said, the task force's assignment was to assess the relationship that the United States has with the International Criminal Court and to make recommendations for our conduct of that relationship in the future.

The reason for doing this at this stage, there were several reasons, I think, that made this an opportune time to do that. First of all, the International Criminal Court has been now in place some seven years. And it's been longer than that authorizing was put in place in Rome.

We also now have, and at this point it was possible to make some assessment of the court's performance. We have now also a new administration in Washington, which we think will be forced to address the issues that are raised. And we thought that our recommendations might be useful to them.

In addition, there is a review conference on the court's performance and on the statute itself which permits the amendment of the statute in various ways, which is scheduled for next year. And the issues that are involved there are important to the United States, and we should determine our relationship with that review conference.

Finally, the Bush Administration had itself been changing its approach to the court in recent years. Originally, the relationship had been one of great unhappiness, let's say. And the administration had not only not joined the court but had great concerns about it and did not cooperate with it, and legislation had been passed which prevented cooperation with the court.

But in recent years the administration has been adjusting its position more as a matter of fact and in practice but no formal change had been announced. And it seemed to us that we should take stock of those adjustments which had been made as a matter of practice and perhaps they suggested further changes that should be made.

The structure of the report is very straightforward. We have an executive summary, of course. But essentially it's in three parts. There is a review of the international criminal courts performance over the past years, which essentially has found that it has been performing responsibly. But not gone very far or had a great deal of experience in cases. No trials have yet been held, and there is more to be seen of the court.

It has had just four formal cases, although a great many cases, possibilities, have been referred to it. Second has been the U.S. We look at the U.S. performance over the last period of time. And as I just mentioned, while originally there was some hostility to the court and statute passed preventing cooperation with it, in more recent years the administration has been cooperating with the court and identifying some opportunities where the interests of the United States are being advanced by the court's activity, and the report notes those.

And finally, in terms of the assembly of state parties, which is the parties that are members of the court and their consideration of the review of the court statute and possible changes to it, that is reviewed as to the status of their debate and consideration and we are looked to what is being proposed for the court in the coming up review conference.

With that, I think I will turn the matter over to my co-chair, Judge Pat Wald, and she will tell you more about what we specifically found and the recommendations that our findings led to.

Patricia M. Wald: Thank you, Will. I will cut to the chase, as it were, and begin discussing our recommendations with some background material of how we got there. They are for your convenience on page 15 of the summary.

I would say that the bottom line, after reviewing the three parts of the report, the U.S. policy toward the court in the past, the seven years of the track record of the ICC and the future schedule of the assembly of state parties and the review conference coming up, that our bottom line -- and it was a unanimous one, which I think when you consult the membership, you might agree, was a feat of some sort, that we should embark upon a definite articulated policy of cooperation with the court.

To gain the experience that will come from that positive cooperation with the court, which will not only help to shape the court into an accountable mechanism we think will further very common interests in cutting down impunity and bringing the perpetrators of atrocities to justice.

But we thought would also that kind of engagement will facilitate the point at which we seriously consider joining the court.

So let me go down through the recommendations, give you a little bit of the background. The first, I think, is very important. And that is that we change our articulated policy toward the court. Now, as Will has been talking about and as several parts of the report explain, there has been kind of a de facto change in the attitude of the prior administration toward the court, beginning around 2005.

Many of the spokespeople of the court, including spokespeople of the U.S. including John Bellinger, who was the counselor to the State Department and other people have made speeches saying we now recognize the existence of the court, we recognize it may have a function. We may not be joining it, but it's there and when we have areas of common interest, we should cooperate with them.

However, our stated policy is still the 2000 letter that was sent by the prior administration over saying we do not intend to join the court parent and we, therefore, do not recognize we have any obligations despite the fact that we sign the treaty, we have no obligations to further its object and purpose.

We believed that a new administration embarked upon a new course of cooperation with the court. It would behoove it to actually articulate that in a stated policy that would then replace the letter as it were.

There are technical questions taken up in our report about some arguments that you have to unsign or sign again, which we do not adopt and which I won't go into here.

But we think definitely that would be a first step for a new administration.

Now, the second concrete step, it would not be enough of course to say we've changed our policy but life goes on as usual. We certainly I think it would be fair to say that we would like to, on careful consideration, accelerate the kind of methods of cooperation that we have with the court short after actually joining it.

So our second recommendation would be to examine for the administration and Congress, which Mickey Edwards will get to its role, to examine the methods of supporting the ICC's investigations and the prosecutions with which we agree. Such as we know that the United States is certainly supportive of the ICC's actions in the referral of the Darfur matter. And not only the referral of the Darfur matter, but past administration was supportive in resisting suspension of that referral.

But there are many other ways in which we could support the ICC's investigations where we think they are in our interests as well as the interests of others.

Those few of those which we discuss in more detail are cooperating with requests for help, requests for information when it's in our interests to do so. Cooperating in the apprehension of suspects, giving diplomatic support, where, again, we think it's in our common interests at the UN.

And in many other ways supporting the prosecutions. It was interesting. The many people who are listed in the back of the report that we talked with, included U.S. officials who have been in the line of duty the last several years. People in Congress. And people who actually, of course, are in the leadership of the ICC.

And what we heard on several occasions was, yes, we have had U.S. officials coming to some of the meetings or coming to -- having some contact with us. But it's always been a kind of quiet behind -- not behind the scenes, exactly, but not a very assertive, aggressive proactive kind of cooperation, because it has never been the articulated policy of the government to take that kind of affirmative cooperation.

That's why we think the statement is important, and then an examination by the administration itself and later by Congress of the methods in which we can do that, consistent with our interests as a national government.

That would require, we thought, a couple of differences or a couple of remedies to current legislation or current practices. And those I'll just allude to briefly.

One, of course, is that in the wake, back in 2002, of the quote unsigned, and I use quotes because we don't believe that's what it was, but in the wake of that Congress did pass the American Serviceman's Protection Act, which is, if you read it, it's quite draconian in its prohibitions of contacts between the U.S. government sort of presidential waiver and the ICC.

It says: No funds can go in any way -- this is short of a presidential waiver -- no funds can go in any way to assist the court. No agency of the government can have contacts with the court or can respond to any kind of plea for assistance. No information can be provided to the court, and no investigations of international crimes can take, no parts of the investigation can take place in the U.S. territory.

Those things can be waived, but the act itself stands as kind of a statement that we don't really want much to do with the court.

That we thought needs a reexamination for possible amendment. It's already been recognized by the administration just finished that in fact some of those things did go too far. We did have a prohibition on military aid to anybody for a while that wouldn't sign an Article 98 agreement saying that if the ICC attempted to arrest anybody in that particular country, the country would not agree and would not hand them over or else if they did they'd get a cutoff of military aid.

That's since been repealed and economic aid, there have been many more waivers. So there's been a kind of, I say, de facto movement away from that. But we think we ought to be straight out if we're going to have a positive program of cooperation that we ought to look at that act again and see whether or not it doesn't need amendment, possibly even repeal.

Now, several of the others, I'll be brief here, recommendations we have is if we are going to have constructive engagement with the court then we have to have a focal point with the government for that because there are many, many different agencies that would be affected. And so we suggest a focal point. We don't actually designate what we think that focal point should be. That might well be up to the executive.

A focal point that would keep monitoring what's happening in the court. So we do have up to date information on the development and also would act as the gatekeeper or the coordinator of the requests for help or cooperation so it becomes a unified policy, not, perhaps, defense getting one request and state getting one request and justice getting one request.

And we also think that without getting into great detail here but really a key part of the ICC is the doctrine of complementarity that says even if ICC takes original jurisdiction over an investigation or a prosecution that affects the nationals of a country, be it a state party or be it not a state party, that if that country will come in and say: Stop, we're going to investigate and prosecute ourselves on this, we're going to take care of it ourselves, then the ICC will retreat unless the ICC can make a positive case to the court, the prosecutor to the court, that country is either unable or unwilling to conduct a fair and efficient prosecution. That's a very important doctrine.

But one key part of it is that the country has to have itself counterparts in its own law so that it can prosecute the same kind of crimes that the international court has jurisdiction over.

And believe it or not, the U.S. code, which I have some familiarity from my 20 years on the bench, does not yet have anywhere near the necessary component. So that would be a kind of recommendation we would want to do in any case, I would think, to bring ourselves up to date, have the capacity to prosecute regardless of whether we even end up down the road in joining the court.

And I think I've covered most of the recommendations. There is a separate couple of recommendations addressed to Congress to look at the American Service Protection Act for Congress itself to do a policy review looking at the performance of the court with a notion to whether or not any new legislation is needed and eventually, eventually if we are happy with the performance of the court and we see what happens with the review conference, whether or not we down the line should consider joining the court.

One thing and I'll point to my colleagues. I did want to point out the importance of the 2010 review conference and the fact that we recommend that the U.S. senate observer to that.

Now, you don't have to join the court to be an observer in the discussions that are going to go on in the 2010 conference report. And especially in the discussions about the crime of aggression, which is going to be defined and the jurisdiction there.

We can participate. Many countries that have not joined the court have sent observers over and have participated in these discussions. We have not. And it does seem to us, especially if we do embark on a positive engagement policy that we definitely will want to have somebody over there keeping track of and perhaps participating. We hope participating in the discussions on the future crime of aggression and several other policies that are going to be debated, which were the subject of initial resistance to the court way back in 1998.

That, I comment, is perhaps one of the most urgent in terms of time. Because some of those discussions are going to take up again on aggression at the end of this year and the conference itself is going to be next year. So we really would have to start going down this track if we did that.

So that is our list of concrete steps that we would suggest a new administration and Congress embark upon to see where it leads down the road. And I'm going to call upon our three other members here. First is Mickey Edwards, who was, himself, a member of the House of Representatives, 18 years, I think.

Mickey Edwards: 16 years. Should have been 18.

Patricia M. Wald: 16 years. Is a prolific author about the positive values of conservatism and Vice President of the Aspen Institute. So Mickey is going to give us his perspective on the report and its contents.

Mickey Edwards: Well, Pat, thank you. As Ambassador Taft and Judge Wald have pointed out, what we've put together here is quite an achievement. It's a unanimous report which was put together after a number of meetings with people who didn't always start out the process with the

same point of view, and we had enough meetings and enough opportunity to question people expert in the operations of the court that we came to a conclusion that we felt very comfortable with as a group.

For at least three decades or more, the United States under both Republican and Democratic administrations, and under the control of both Republican and Democratic majorities in Congress has put a great emphasis in international relations on the rule of law and on human rights, the protection of human rights.

And it has become, over that time, increasingly apparent that in order to achieve those goals we can work effectively with international organizations that expand the reach and the influence of the United States in achieving a world in which human rights are protected and violators of human rights are punished.

The Bush Administration, as ambassador Taft and Judge Wald pointed out, the Bush Administration, over time, came to be increasingly supportive of the International Criminal Court and it became increasingly engaged in the activities of the International Criminal Court, providing the assistance of the United States to help it achieve its aims.

At the same time, and Judge Wald made a point of this, at the same time it became apparent to the Bush Administration that a number of the prohibitions and restrictions that had been put into law that would have impinged on our ability to interact with the International Criminal Court, were in fact counterproductive and harmful to the achievement of our own foreign policy goals.

One of the things that's happened over the years in which the court has been operating is that we have had an opportunity to actually observe the actions of the court, to observe the actions of the prosecutor and to conclude I think pretty clearly that we can be reassured that those people who worried that the court was going to pursue politics rather than justice, politics internationally rather than pursuing violators of human rights, we're just wrong.

As we have watched the court function, that has not proved to be the case. So what we've proposed unanimously is not only continued active engagement with the International Criminal Court, but increased participation, increased activity in giving the court the resources it needs that we can provide to help it achieve its goals.

And finally, just to add to what Judge Wald said, this is a recommendation not only to the Obama Administration, but it's a recommendation to Congress. Many of the restrictions that in fact Secretary Rice found to be counterproductive, came out of the Congress. So it's also a recommendation by us to the Congress, which is ultimately that body that will decide on either membership in the International Criminal Court or the extent to which we support the court. So we hope unanimously that in fact both the administration and the Congress will conclude that it is in the best foreign policy interests of the United States to become more and more involved with the criminal court and help it achieve its goals.

Patricia M. Wald: Thank you, Mickey. Mike Newton, who is a professor at Vanderbilt Law School but a West Point and Judge Advocates School graduate as well was actually at the Rome conference when the Rome statute was adopted. But even after that, in a period which not too many people know about, where President Clinton had signed it but said he wasn't going to send it over to Congress to be ratified at that point, we did continue playing a constructive role.

And Mike, for instance, did a great deal in negotiating the so-called elements of crime, which are the description of the elements of the more broadly defined crimes which are in the Rome statute. So he knows the nitty-gritty and especially the interaction between the necessary discretion we have to leave with our military forces, and yet the need to have some relevance in war crimes, et cetera, to the military.

So Mike's point of view on this report and whether it draws the lines correctly, I think, is very useful. Mike.

Michael A. Newton: Thank you, Judge Wald. Well, let me start with a public thank you to our leadership, both of whom are sitting here. This is, I think, one of the most comprehensive and yet concise documents in existence that captures both the evolution of the history of the court but also proposes some positive constructive mechanisms for the way forward.

If you just focus on the sound bite at the beginning of the report, a strategy of positive engagement, what I think was the common theme among the task force was a very pragmatic balancing of both United States policy interests and military equities and political equities, with the overarching United States objectives, which are not transient objectives, as was pointed out by Congressman Edwards, focusing on accountability and truth-telling and on the pursuit of justice and the protection of fundamental human rights. Those are United States objectives, which in some sense are shared by the court.

Now, this is a maturing institution. We all recognize that. It's an institution that's only now beginning to move into its first case. Other cases on the horizons. But it's also an institution whose policies and whose structure is developing. What we've done is take a snapshot of how the maturing institution matches up against the enduring United States interests. I simply want to make two concrete points. The first is the overarching policy objective that the United States begin to engage the object and purpose of the court.

The object and purpose of the court is, of course, a legally laden phrase. It's a particularly important phrase in the context of treaty interpretation and negotiation.

The fundamental difference with this court as opposed to the other courts that could only have been achieved with U.S. leadership and U.S. funding and U.S. intelligence support and U.S. information, with full regard for the protection of sources and methods and full compliance with our U.S. domestic law, the key difference is that this is a treaty-based court.

And I think one of the fundamental underpinnings of our findings, which are unanimous, is that the object and purpose of the court, which is to seek a political impartial justice, is at a fundamental level consistent with the object and purpose with the policy desires of the United States.

And I think that's an enduring principle that's not a transient principle. That's going to last as the court matures, and that's why we as a pragmatic manner believe we need to engage with the court where it's important and where it does support U.S. interests.

The second point I think is very important, which has already been alluded to, which is the court is designed at the very center of the design of the court, the very structure of the court, to share adjudicative power, to share power between the international institution and domestic courts around the world.

One of the things that we've spent a great deal of time talking about that's implicitly recognized that is addressed in the court is the proper role of the international institution, vis-a-vis the U.S. domestic structure.

And particularly this is important because there's a shared consensus and a very strong belief that the court, the international institution, was not designed to criminalize good faith differences in perhaps rules of engagement or the approach to a particular conflict or the approach to command and control among the various militaries of the world. The domestic structures have first priority. Primacy of jurisdiction. And as a pragmatic manner the international institution has neither the capacity or mandate to take every single case that's committed around the world. There's a balance of power.

The report recognizes that and says that the United States needs to engage in a constructive, positive way, positive engagement, to make sure that that balance of power as a prospective matter is developed in a way that does accord with American interest. We share unanimously the view that that's in fact possible and desirable. And in the long term United States interest, just as our military and political interests are not transient, our long-term interests in developing that proper, appropriate balance of adjudicative power between the domestic institutions and the international court in fact is one that does protect American interests and is very strongly in our interests going forward. I think that's a key part of this report. And I think this leadership, this has been an exceptional effort.

Patricia M. Wald: Thank you, Mike.

Lastly, David Tolbert, a Senior Fellow at the Institute of Peace, I think is well equipped to give us an insider view of these international courts and how they work and what the balances that have to be made inside them.

I first met David when I was a judge at the Yugoslav War Tribunal. He there has been the Deputy Prosecutor, Deputy Registrar, the Chief of Staff. He knows that court inside and outside.

He's also, more recently, been the Assistant Secretary to the Secretary General of the UN in its obligations toward the Cumaruge Court being set up in Cambodia. So David.

David Tolbert: Thanks very much. As Judge Wald has just said, I spent nine cold winters, some with her in the Hague at the Yugoslavia tribunal. I also represented the Yugoslavian tribunal and the community for the ICC and was in Rome during the negotiation and some of the discussion afterwards.

I also welcome the report and thank our leadership. I think what's important here is that the court, the ICC, needs the United States, but I think also the United States needs the court. And let me explain this for just a second, some of these issues have already been raised. But certainly in my experience at the Yugoslav tribunal, the relationship with the government of the United States was very important. It was important in terms of political support. It was important in terms of arrest and particularly I think back to the arrest of Slobodan Milosevic and others, and also it was important in terms of information sharing.

So the relationship with the government of the United States was quite important in terms of the ad hoc tribunals, both in Yugoslav and in Rwanda. And I think this is a missing element for the International Criminal Court.

So moving forward toward a positive relationship where the U.S. will be in a position to give this kind of political informational and other support to be in a position to give this kind of support, I think is important for the court.

On the other side of the coin, Mickey Edwards mentioned the U.S. commitment to the rule of law to human rights and to, I think, also to international justice.

And I think we have to face the fact that the future of international justice and the future accountability mechanisms rest largely with the International Criminal Court. The ad hoc tribunals are reaching the end of their lives.

We probably will see other hybrid courts like, for example, in Cambodia and Sierra Leon, but I think their results will be smaller. So the engine of international justice will be the International Criminal Court. Also working with domestic jurisdictions.

The term "complementarity" has been mentioned and Mike Newton discussed the importance of domestic prosecutions, but the relationship between the International Criminal Court and domestic prosecutions will be key in the arena of international justice.

So the United States' engagement with the court will -- I think it's very important for the court not just for the court, but also for American efforts to see that international -- that justice is done in these circumstances, that the rule of law is supported, and I think the ICC will be a principal engine in that.

So I think this report is a welcome step in the right direction. As one who has worked closely in the international justice field and with the ICC, it was our sister tribunal in the Hague, so I know its work well, I think you can count me as a friend of the court.

There has been, as been mentioned, a broad array of views on the task force, which I think is quite welcomed.

But I would certainly count myself as a friend of the court and a supporter of the court. So I'm very pleased to see that a clear, that the task force that we're able to agree to this conclusion of positive engagement or continued positive engagement. So we moved very far down the road, I think, both in the latter part of the Bush Administration. But also I think this report will give impetus to the Obama Administration to deal with the issues that Pat Wald has highlighted and is a clear change in the policy regardless of the previous letter of 2002, a reexamination and necessary amendments to the American Serviceman's Protection Act and a relook at the Article 98 agreements which I think are three key points towards building a positive relationship with the court, and then engaging also in the meeting of the assembly and state parties and particularly in discussions on aggression.

So I think it's a real tribute to the task force and to our leadership that a group as diverse as we were are able to agree on these as a matter of consensus.

And I think it's a very positive step forward, both for the court and for the United States. And I mean that not just on a theoretical level, but I mean that in a very practical way. And I think if you look at the report's recommendations, they're guided by a pragmatic approach and important steps that will Heparin force international justice on the world stage. Thank you.

Patricia M. Wald: Thank you, David. Now, we hope to get some provocative questions from the audience. The fact that your numbers are few should not in any way discourage your active participation. We do ask that you come to the microphone, because it's being filmed and I guess the filmmakers need you there.

Question: I'm Sheila Ward. And I'm with the Society. I'm wondering if you could tell us a little bit more about the experts that you referred to earlier on that you consulted with as a group, who they were and in addition to the consultations with them, how did your work go with the group? How did the work flow?

Patricia M. Wald: Do you want to take that one, Will?

William H. Taft, IV: There is actually in the report, Sheila, a list, I believe --

Patricia M. Wald: There is, at the end.

William H. Taft, IV: Which page is it on?

Patricia M. Wald: It's at the back. It's Appendix A or B.

William H. Taft, IV: 52. Appendix A, there's a list of the people that we actually either met with or solicited presentations from. And each of the meetings we had -- and I think we had four of the full committee and then some were small groups of the committee of the task force were able to meet just with particular people but not everybody there, was an opportunity first for a presentation by the person who was visiting with us and then many questions were asked by the members of the task force. So as I say they are listed here. They represent both people from the U.S. government, from the Congress, from the military, and people from the court, people who had been involved in the negotiations leading up to the Rome statute.

People who have been very strong supporters of the U.S. becoming a member party to the Rome statute as well as people who have opposed that. And so that was basically the sorts of people that we met with and I should say they include the president of the Assembly Of State Parties and the prosecutor who was -- I guess he's about to be not.

Patricia M. Wald: Couple years.

William H. Taft, IV: I'm sorry, don't mean to rush him out. Oh, it's the president of the ICC.

Patricia M. Wald: Yes, he's left.

William H. Taft, IV: It's the president who has left. I'm sorry, I was confusing Marino O'Campo with Philippe, or at least their schedules. One wouldn't confuse them. So those are the people we met with. The method was not only to do that, but then we had some very vigorous discussions amongst ourselves on drafts of the report or before there were drafts on the substance of what we would agree on and recommend.

We were fortunate in that the society provided us with Laura Olson who did a wonderful job of taking down what were relatively vaguely expressed but perhaps even for that reason very strongly felt views. And she had to pull them together and make them more precise and then people would focus on them again.

And we had I think three sessions which were devoted to that process as well as even after that drafts were circulated for everybody --

Patricia M. Wald: Endless e-mails.

William H. Taft, IV: Endless e-mails, that's right. And it was that kind of a process that we went through. And as has been said here in the end I think we had consensus. I know we had consensus on the document, including all of the recommendations and that is what you see here.

Question: Thanks. And then just as a follow-up, I'd like to know what recommendation each of you thinks is the most individually significant in the report.

Patricia M. Wald: I'm going to refuse to answer that question, Sheila, because I think that actually it's very much of an integrated program, and that if you just took one, if you just made a statement that we're going to have a new policy and then nothing happened, it would be pure Washingtonism but it wouldn't forward our progress. So I think we kept ourselves down purposely to a limited number of recommendations. Probably they're actually something like eight or nine. But they're very discrete and very specific.

So I cede to my fellow colleagues, but I wouldn't say that any one wasn't important. Anybody else want to talk about this?

William H. Taft, IV: I agree they are all important, and I think we all agreed on all of them.

David Tolbert: As an old military man, I completely support my leadership. But I will tell you one of the really important things was, I think as has been pointed out, was not just to make sort of Pablum big picture, these are very concrete specific recommendations that are very carefully worded. So I think it's very important for policymakers, for people who are interested in the court, to focus on the specifics of the recommendations and I agree no single one is completely dominant to the exclusion of others. And I would be hesitant to rank order them. But the package itself is very important and they are carefully worded and they are very concrete and very pragmatic, intentionally. And for that reason I think worthy of study.

Mickey Edwards: I would only add, Sheila, that it's beyond the specific recommendations that do flow all together. The overall recommendation is that we move toward increased cooperation with the court and whether that leads ultimately to joining the court or not, we want to move in that direction. We want more engagement, not less. And we want to move away from those policies that restricted our ability to engage with the court.

Patricia M. Wald: Charles?

David Tolbert: No, I'm with you, I would not want to single anything out. I think what's important to me, I think this report shows another milestone in a movement of rapprochement between the

court and the U.S. And I think it's a step forward if our recommendations are adopted, which we certainly hope so.

If they are adopted, then we take the next step from where we were in 2002 and the letter that was sent, it's referred to sometimes as the unsigned. That's technically wrong. But from 2002 now we're in 2009. There have been a number of steps along the way, and I think this report as a whole is an important step in the process of moving the U.S. and the court together, and I hope much closer together in the near term and maybe we'll see where we go from there.

But that's what I think the significance of the report is. Sorry. Go ahead.

Patricia M. Wald: No, thank you. Charles.

Question: My name is Charles Stephenson. I was with the Agency For International Development in the General Counsel's Office for a long time at the Deputy Assistant General Counsel level. And I wanted to say, first of all, the last question and the discussion reminded me of when David Bell was the administrator of AID. And Otto Passman was questioning him about the numbers of countries that could be assisted under development grants or under development loans, the statute at that time said no more than 20 or whatever it was of a certain category.

And Bell said: Well, are you asking me if we had 19, which one would we throw overboard. And he said it's like asking a parent which child are you going to throw overboard.

Patricia M. Wald: Like Sophie's Choice, yes.

Question: This looks a wonderful addition to the armamentarium, if you will, of the people carrying out United States foreign policy overseas in the sense that whether or not a particular act is covered by the court's jurisdiction, the existence of a court with some jurisdiction over some kinds of acts is going to serve as a deterrent effect to the commission of improper acts by other parties.

I remember when I had one trip out to Vietnam and the Philippines carrying a black passport. I felt that gave me protection from certain things that might have happened and didn't. But this -- so the penumbra of this connection shines a light on possible bad doings which I'm getting mixed up in metaphors here.

But the good that this may do far exceeds its immediately focused spotlight, is what I'm thinking. Wouldn't you agree?

Patricia M. Wald: Definitely.

William H. Taft, IV: Thank you, Charles. Any other -- I think --

Patricia M. Wald: Oh, yes. This young man.

William H. Taft, IV: You've been waiting for a while.

Patricia M. Wald: You were our first entrant today.

Question: I'm Josiah Ryan for CNS News. I cover the Senate for them. I wanted to start off with a clarification. A couple of you talked about moving towards, moving forward, moving towards the international court. Is the end goal for the United States to join the court, as far as this report is concerned?

William H. Taft, IV: I think the report does not reach a conclusion at this time on whether the U.S. should join the court, or I should say the opposite. The conclusion is it should not join the court at this time but it should not exclude joining the court later if certain developments occur. And we would have to see. We want to see, for example, how the court actually performs in carrying out the trials that it has. It hasn't yet had one. And that would take a year or more for that to occur.

We want to see how the Assembly of States Party goes, particularly on the jurisdiction of crime of aggression, which the U.S., one of the fundamental concerns with the court to begin with shared by the Clinton Administration as well as the Bush Administration, was the relationship to the court and the Security Council.

And that comes to a head on this subject of the crime of aggression which is for the Assembly of State Parties to resolve next year or to address next year. We want to see how that's done. We say when we see those things it will be time, and particularly if we have engaged with the court in a pay positive way and helped it and see how well it can do, then it will be time to decide and we'll be able to decide whether to join.

Patricia M. Wald: Let me add a word. I think the report is clear both in the summary and in the text that we are not recommending that we join the ICC at this time. I think those are the exact words.

But in both in the recommendations and in the body of the report, we do, after outlining the program and the steps that we've talked about, we do recommend a reexamination after the conference, after the 2010 conference and after some of these other steps have been taken, we do recommend a reexamination by Congress and by an interagency review within the administration of whether it would be appropriate to join the court.

And I note that the announcement of the Obama Administration about a week ago was that it is forming. I don't know anything other than what was in the newspaper. It is forming an internal group, which according to the newspaper report will look at that question.

Question: Actually, I have another question. Sue Ward again.

Question: I just wanted you all to address some of the biggest concerns, which I'm sure you're very familiar with, but we'll go to the farthest extreme that it's possible, and I'm sure you've encountered Dr. Ron Paul in Congress.

Patricia M. Wald: Not in Congress, but I've encountered him outside Congress.

Question: He says that the United Nation courts are inherently incompatible with national sovereignty. America wants to either remain a constitutional republic or submit to international law because they cannot do both. That's one extreme. Probably the more common opposition is just the argument that joining this court would subject Americans to politically motivated prosecutions. And I'm wondering if a couple of you could address those concerns.

Patricia M. Wald: Do any of the three of you -- Mike, you can start. Anybody else can chime in.

Michael A. Newton: Well, the statement that the design of the court is inherently incompatible with domestic prerogatives is simply demonstrably false based on the negotiating history of the court and the structure of the treaty.

Now, the real question is what does that look like in practice? And I think for many, many years people looked prospectively and painted a scenario that was hypothesis.

Well, the task force recognizes that today we're not in the realm of hypothesis, we're in the realm of observation and implementation. And the real question going forward is, as we all recognize, what does the actual conduct of the court look like in practice, and does that balance between domestic prerogatives and sovereign prerogatives, which is explicit on the face of the statute and express and fundamentally to the design of the court.

If you turn that around, the court cannot function if it runs around the world and simply tramples on state sovereign prerogatives.

Not only would it violate its own charter, own treaty base, it could not function. Philippe Kirsch, president of the court, one of the things he says is the court has essentially two aspects, it has the operational aspect which depends upon state cooperation for a whole range of things. It cannot function without state cooperation of countries around the world and it has the judicial aspect, the judicial role which is the actual in-the-courtroom operational component. Those two things go hand in hand. And one without the other means that the ICC simply ceases to function.

Patricia M. Wald: Mickey.

Mickey Edwards: Yes, I know Ron very well. A couple of things. One, the concern that both President Clinton and President Bush had and members of Congress that the court could in fact turn out to be politically motivated and to oppose U.S. interests or actions could happen, and that's why what has been important is to observe the court. It's been there to observe the way that the prosecutors have worked. We haven't said yet there's a final conclusion as to whether they're ill founded. But to this point there is no indication that they were well-founded. Complementarity was pointed out by Judge Wald that protects American interests that if we have laws that protects certain behavior that trumps the court, the U.S. law dominates.

But I would say as to Congressman Paul's fundamental basic point, he's wrong. Because the United States constitution provides for international treaties to be binding law. It gives us the authority to engage in treaties with other nations and when we do that that becomes the law of the United States.

That's apparently a piece of the constitution that Ron skipped over.

Patricia M. Wald: David.

David Tolbert: I'd like to make a few comments about your second question about the politically motivated court, which I think actually translates into the politically motivated prosecutor. That's where the focus usually is. And this has been around for some time. It's not just focused on the ICC. Questions have been raised at the Yugoslav tribunal the Rwanda context and so forth about politically motivated prosecutions.

I think there are a number of not just experienced but checks and balances within these courts to ensure that you do not have politically motivated prosecutions.

First of all, I think if you look at the record of Judge Goldstone, or Louisa Bore, Dell Ponte, et cetera, et cetera, in terms of these courts, and also in the record of O'Campo, there's no evidence of politically motivated prosecutions.

In fact, these are very careful officials just like the judges. They're selected on a fairly rigorous manner. They're selected by the international community really through the Assembly of State Parties. In the case of the ad hoc tribunals, they were chosen by the Security Council. There are also some safeguards that are built into the system at the International Criminal Court, as you've seen in the Bashir case, for example, a warrant is not issued by the prosecutor. It is issued ultimately by a chamber of the court.

And, for example, in Bashir they did not agree with the genocide charge against Bashir and that did not go forward. They did not find that there was sufficient evidence. So the prosecutor is much more limited in the International Criminal Court, his or her discretion and ability to go forward is much more limited than, say, a national prosecutor or another international prosecutor.

There's a pretrial chamber that he reports to and has to keep informed.

There are a number of jurisdictional hurdles that he has to pass. Not only in terms of issuing the warrant, but simply to open the investigation. First he has to show that there's not -- the national authorities cannot or will not prosecute. So there are a lot of hurdles built into the statute.

There are also, of course, at the end of the day there's article 16 of the statute which has been discussed widely in the Sudan case. As a former prosecutor, something that makes me very nervous, but at the end of the day the Security Council has the power to put on ice or to put on hold a prosecution for a year, which is renewable as well.

So the ICC prosecutor is much more limited than his counterparts in the ad hoc tribunals that the U.S. previously has supported strongly or other national prosecutors.

So while you might criticize the prosecutors in terms of their actual work, I think sort of the canard about politically motivated prosecutor doesn't hold up to scrutiny either in practice, and there are a great number of protections within the statute itself.

Question: I just had one last political question.

Patricia M. Wald: Go ahead.

Question: Obviously I know that you're not recommending that the U.S. join the court right now. But if that time were to come it would face an extremely difficult ratification vote in the Senate. Right now the votes are obviously not there. What would need to change? This is probably for you, Congressman, being from Oklahoma what would need to change in the minds of the American public that this kind of vote could go through the Senate?

Mickey Edwards: I think what has to happen is that the American people are able to see that what the court is doing is bringing to justice people like a Bashir or other kinds of obvious abusers of human rights.

The United States is, to address Republican concerns, the United States is and has been the shining city on the hill. We have been the champion of human rights. We have been the champions of preserving the rights of the individual against a destructive state.

And so as we watch the court and we watch and see what it's doing is working to bring to justice people who violate the rights of their people, I think the American people will get behind that.

That's the best traditions of our constitution and our declaration of independence and all of our basic beliefs.

William H. Taft, IV: Thank you, Congressman Edwards. I think that our time with the program has concluded, and so we have to -- other people have to come into the room.

Question: One last small question.

Patricia M. Wald: Some of us would probably be happy to answer it with you out in the hall.

William H. Taft, IV: We'll be staying here. But we have to wind up our program.

Question: In other words we're being evicted.

Patricia M. Wald: We'll be outside.

William H. Taft, IV: Thank you very much.