

**"U.S. Policy Toward the Upcoming
International Criminal Court Review Conference"**

Presenters:

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12:30 to 2:00 p.m.

Friday, May 14, 2010

The American Society of International Law
2223 Massachusetts Avenue, N.W.
Washington, D.C.

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WALD: On behalf of The American Society of International Law, I want to welcome you to this briefing, special briefing, on the first Review Conference of the Assembly of States Parties to the Rome Statute.

Now, in mid 2008, anticipating a change in administration, the society convened a bipartisan task force to evaluate the International Criminal Court and the U.S. policy toward the Court. I was pleased to serve as co-chair with the task force along with Will Taft, who is over here on the far left.

That's as geographic as -- [laughter].

WALD: After receiving input from many experts, the task force recommended unanimously a new policy of politic engagement with the Court, including resumption of U.S. observer status in the Assembly of States Parties.

Copies of the task force recommendations are on your seat. In brief, in addition to the recommendation for an observer at the conferences, we recommended that there be a statement from the new administration which gave its support to the object and purpose of the Rome Statute where it accorded with U.S. interests. We also wanted legislative and interagency review of the ways in which we could cooperate constructively with the Court, and there were several other recommendations.

We have been pleased to see that many, though not all, of our recommendations have been taken up by the new administration, and we are eager for this opportunity to get an update on this new policy from those who will lead the U.S. delegation to the Kampala Review Conference at the end of the month.

There are, obviously, some questions which remain and which hopefully some of our panelists and discussants will turn to. What is the current stance of the Obama administration toward relationships with the Court? What role will we play at the Review Conference? We know that the conference reportedly will take up the prickly subject of when the crime of aggression, under study for eight years, will be activated as one that can be prosecuted by the Court, and, if so, what will the triggering mechanism be. If we didn't say that, we'd abandon the front row here, so it would surely be brought to our attention.

We know as well that something called "stocktaking" will be discussed at the conference; namely, potential changes in the operation of the Court based on its 10-year experience. But, basically, we are interested in how our relationship with the Court has changed, if it has, and is that an ongoing process or have we, as the heroine in Oklahoma said, gone as far as we intend to go.

This briefing is one of a number of ASIL initiatives to keep the policy community -- that's you -- informed about the Court and the review conference, including a Web-based resource page on the Court on which updates will be posted throughout the Review Conference, and more information about the Web source is also on your seats.

We are pleased to be joined in this briefing by our colleagues of the Council on Foreign Relations and by the American Bar Association's Section of International Law and the Task Force on the ICC.

The format today will be to hear first from for about 7 to 10 minutes from our current U.S. government officials, beginning with Ambassador Stephen Rapp, the Ambassador-at-Large for War Crimes; then the State Department Legal Advisor, Harold Koh; and Rosa Brooks, the Senior Advisor to the Under Secretary of Defense for Policy. Their comments will be followed by reactions, maybe questions, from our discussants who are also former legal advisors who grappled with the ICC issues in some of their earlier incarnations, Will Taft and John Bellinger. Then I will give the panel a brief chance to respond to the discussants' points and will turn to the audience for your questions.

Because of the time limits, because we will break at two o'clock, I will plead with you in the audience to ask brief and truly inquisitive questions to this unique assembly of actors for this briefing. Otherwise, I might be forced to assume my former judicial stance and compel

arbitrarily closure, which I hope I will not have to do.

I am also skipping any elaborate introductions of our speakers who undoubtedly are well known to you all. Their biographies are also on your seats for your reference. I hope it is comfortable sitting because there is a lot on your seat.

So I am going to skip straight to the heart of the matter, and let me turn to Ambassador Steve Rapp to outline the U.S. posture heading into the Review Conference. Steve?

RAPP: I think it probably is easier if I speak from here; otherwise, we'll have difficulty coming up to the microphone and passing each other.

I'd like to thank you very much for convening this session today and thank the Society as well for its very constructive work on this issue and the report, which was issued early last year which I think, as Judge Wald had many of the key elements of it, have now become U.S. government policy and other elements of it to remain under very active consideration. Indeed, as far as the spirit of those proposals, I think they have largely been adopted.

First and foremost, that involved taking up the position to which we were entitled by reasoning of us being in Rome and having signed the final act of the Rome conference in 1998, and that was as an observer in ICC institutions, the Assembly of States Parties, and now in the Review Conference. As we have taken up this role and have begun to participate actively, we have seen how important it is to be present at the table, and some of what's happened on the crime of aggression and some of the way things have been defined, we think probably wouldn't have happened had it been possible for us to be more engaged before 2009.

My own particular interest in my office is in dealing with horrific crimes, with the most serious crimes committed by humankind, genocide, war crimes, and crimes against humanity, and, as I said on the proud day of going into the ICC Assembly of States Parties on November 19th and speaking for the first time as an observer in the Assembly, the United States has been absent from the Assembly of States Parties, but we have not been silent in the face of atrocities. And there has been broad bipartisan support and support across administrations for effective international justice dealing with genocide and crimes against humanity and war crimes in Yugoslavia, in Rwanda, and in Sierra Leone and elsewhere and have been myself actively involved before coming to this administration in those efforts and in that involvement very much appreciated the support that those institutions and the offices of the prosecutor received from the United States government.

The issue that I think confronts all of us now is that we realize that if there are atrocities in the future, if there are atrocities in the period after July 1st, 2002, and there is no possibility of justice being delivered at the national level -- and, obviously, it is always our preference to be done at the national level, even with perhaps international assistance or participation, but, if that's not possible and you need an international institution, given the fact that 111 countries have now ratified the ICC, are paying dues, the organization is up and running with 18 judges and a prosecutor and a whole structure, that is where international justice is going to be delivered.

So, if we want accountability for genocide, if we want accountability for war crimes and crimes against humanity, it's going to have to be delivered at the ICC, and if we want it to be effective and we want those cases to succeed and a message sent and the sort of expectation of victims that was raised so much by these international institutions in which we were so deeply involved not to be betrayed, we want those cases to be successful, and that is fundamental part of our policy. At the same time that we want to protect our own service men and women, we don't want to be involved in a situation where in the world what we might be doing to protect individuals from atrocity or terror might subject us to unfair efforts to prosecute us when we are already willing and able to prosecute our own.

So the engagement that we have been working on with the ICC has now taken the form of a decision across the interagency process, a unanimous position by the American government to work with the ICC in the situations that had been as of March when we arrived in New York for the Resumed Session, have been admitted by the International Criminal Court. So now we are meeting with the prosecutor and with other Court officials to see what sort of support we can provide to the prosecutions in Sudan, in the Central African Republic, in the Democratic Republic of Congo, in Uganda, and we will look at other future situations on a case-by-case basis.

That process is now beginning, and I think it's important that we also recognize that as we were concerned that perhaps the ICC would be involved in situations where it was going after people that are doing protective work around the world, that it would be involved in cases that weren't clear examples of crimes against humanity or genocide or other crimes of atrocity, certainly what we have seen in terms of what the Court has done to date is that it is doing cases that are appropriate and that would otherwise call for the establishment of a separate court or an ad hoc tribunal.

As we go to Kampala, we are interested in working to try to make the ICC as effective as possible, and I think we all have to note that it is now in its seventh year. It hasn't yet completed a trial. The two trials that it has that are ongoing, one involves only child soldiers; the second involves really only a single massacre on a single day in Bunia in Northeast DRC in early 2003. It hasn't yet shown the capacity, and we, Pat and I and others, that worked in the international tribunals were often criticized by how long our cases were and how difficult it was to bring things to conclusion, but the ad hoc tribunals have in the end, I think, adjudged the cases of more than 200 individuals, and the ICC has barely scratched the surface in this area. So we want to make sure that this Court is effective.

We also want to make sure that it fits in within the international system and will be participating actively in the stocktaking, the stocktaking procedure and sessions that will occur during the first week in Kampala, and there are Americans that will be involved in each of those sessions, some from the government, some from outside the government. We want that effort to be successful, a successful stocktaking exercise, recommendations made for countries in terms of cooperation and complementarity and victims and other issues that are really going to come before that exercise as a way in which success will be achieved and can be achieved in Kampala.

I will note that, additionally, we are working on our own side event and, recently, just this morning, obtained the concurrence of the Democratic Republic of Congo to work with us.

We and the Norwegians will sponsor a session a complementarity in the Democratic Republic of Congo, obviously a situation where the ICC has been prosecuting cases, the only case where it has yet had trials, where it has three people in custody, but yet where there is a crying need for accountability, for decisive action to be taken at the national level against the continued massive violations of international humanitarian law, the hundreds of killings that have occurred in the last few months, targeted killings of civilians, the thousands of rapes that continue to occur on a monthly basis, and strengthening the rule of law within the DRC, within the context of complementarity, I think is something upon which the whole world can agree on, and we want to coordinate our response to make it effective. So that will be one area in which I think we will contribute to a great extent.

I will yield to Harold to talk about the crime -- I think he wants to talk about the crime of aggression. My main concern that I will continue to emphasize about the Court moving forward into the definition of a "crime of aggression" and then particularly into any efforts to make it possible for it to be prosecuted is the effect that that will have on the Court's main mission, and we've recently seen statements made by a number of non-governmental organizations and human rights organizations that very much share that concern. That at a time when the Court has indicted 13 individuals or put out arrest warrants for 13 and only successfully arrested 4, when it is accused of being politically motivated, even in cases that clearly involve atrocity crimes, if it were now to cross into the crime of aggression and potentially have countries that may feel that their borders have been compromised or crossed in a way that justifies international action and those cases then are referred to the prosecutor and he has to decide whether to proceed or not to proceed, if he decides not to proceed he can be accused of political bias, if he decides to proceed certainly will be, and the ability of this organization to deal with the crimes that shock the universal conscience, I think will be reduced.

As someone that's been involved in the front lines of actually prosecuting people, it is an enormously difficult thing to do, and obtaining state cooperation to get arrests and to get evidence and to protect witnesses is an enormously complicated thing to do. This Court has not yet scratched the surface of doing that effectively, and to now cross into this other area, I think runs the risk of it becoming less effective, and that is what concerns me to a great extent and what I'll continue to note about efforts to move in that direction.

But, with those preliminary remarks, let me conclude, and thank you all for being here. Thank you.

WALD: Next, we will hear from Harold Koh, who is Legal Adviser to the State Department. Harold?

KOH: Thank you, Judge. The Judge invoked from Oklahoma, have we gone about as far as we can go. I thought you were going to say, "Oh, what a beautiful morning. Oh, what a beautiful day." The question is on June 11th when the Kampala -- and shall we say, we've got a wonderful feeling everything is going our way. I hope so. [Laughter.]

We approach this in a spirit of partnership of many kinds; first, the intra U.S. executive branch partnership. Steve Rapp, my friend and colleague, and I are the co-heads of the delegation, but we work with a group that includes the Department of Defense, all different

elements represented here, by Rosa, the Department of Justice, the National Security Council, and other interested agencies in developing what has been a strong and unified U.S. government position; secondly, a partnership with the Congress -- and I know that both members of the Majority and Minority staff of the Senate Foreign Relations Committee are here -- and then a public-private partnership with those groups who are interested in the work of the Court, including The American Society of International Law, the Council on Foreign Relations, and any number of other groups who have submitted to us extremely helpful and thoughtful reports. We actually read these reports, think about them. They give the kind of historical perspective that is often missing in the crazy daily life of the government.

This is arising in the context. This particular decision is a simple one. It is not a decision whether to change any law. We are not going to be introducing the Rome Treaty, the Rome Statute. We have not proposed that it be submitted for advice and consent. As you know, given the number of votes for the health care bill, we don't have enough votes, even if we wanted to submit for advice and consent. We are not proposing to change any Statute of the United States, the American Servicemembers Protection Act, or any other. We have not proposed to change or modify any agreements.

The only issue is how we participate in a conference of an institution which has been existing now for a number of years, has more than a hundred States Parties, and in which we are an observer nation, an important observer nation but nevertheless one that has to be aware of how we are approaching this, after having been away for 10 years.

And we do this against the background of three policies of this administration. Number one, principled engagement across the board with regard to important international institutions, whether they be climate change talks, the Human Rights Council, or this institution. Our thought is to engage consistently with our values.

The second is support for the exercise of international criminal justice, which we have done consistently in the ad hoc setting in Yugoslavia, Rwanda, Sierra Leone, Cambodia, and to which the U.S. has been deeply committed, and there is a discrepancy between the kinds of distance we've had from this institution and the support that we have given to these other international criminal justice institutions that needs to be worked out.

And the third is a recognition of the need and continuing need for the United States government to engage in lawful uses of force. This was the theme of President Obama's Nobel Prize speech. It was the theme of remarks I gave in March at The American Society of International Law. We believe that force can be used and, indeed, it unfortunately must be used consistently with international norms and consistently with our values, and to the extent to which an institution evolves in a way that we think chills or criminalizes lawful uses of force, it is not playing an appropriate role in this environment.

With that in mind, we have been attending the meetings of the Assembly of States Parties as observers in the Netherlands last November and Resumed Session in New York about a month ago, and a group of us will be in Kampala. The Kampala meeting is a Review Conference. It is not a conference about any particular issue, and there are two prime issues that are on the agenda. One is stocktaking with regard to what we have been calling the "core

agenda" of the Court, war crimes, crimes against humanity, and genocide, and the other is the crime of aggression, which is in the Statute in the sense that there is jurisdiction over the crime, but it has not been defined, and no operational filters for its consideration have been adopted by amendment.

So we are approaching this as a question of the entire exercise, and Steve has talked about, in particular, the element with regard to stocktaking. A Court that has not yet concluded any trials, on the one hand, exists but, on the other hand, is young and untested, and we have used the metaphor of the wobbly bicycle. Is this the time in which we should put on more weight than the bicycle can bear? Part of the stocktaking exercise is to strengthen the Court's capacity to deal with its ongoing cases, including in Sudan, Central African Republic, Uganda, Congo, and a new case it just took on in Kenya, and the question is can it pursue that agenda and take on a whole new set of challenges.

We have questions, and those questions, we have raised in a number of settings in a quest to find a genuine consensus solution and a genuine consensus answer. Some of the questions are, first, about the definition of the "crime of aggression." It is a different kind of crime from the other three that are already being prosecuted. It is a jus ad bellum crime. As most jus ad bellum crimes, there is no customary international law norm yet with regard to what constitutes aggression. It's a crime that's directed against the state, not against a particular individual. It has not been prosecuted, except in the context of a war of aggression, where this speaks in the context of an act of aggression. So this is a new adventure for international criminal law and, therefore, one that needs to be looked at very carefully.

A second question is who decides. In the UN Charter and, indeed, in Article 5 of the Statute of the International Criminal Court, they talk about pursuit of this crime consistently with the terms of the UN Charter, and, as you know, it is the Security Council which is the interpreter of what constitutes aggression for the purposes of current law. And the question is what will happen if there are multiple interpreters of this particular crime. Can we have a situation in which the Security Council has decided that a use of force is lawful and a prosecutor, nevertheless, decides that it is a prosecutable offense? How are we going to manage this tension or this discrepancy?

A third question goes to how will this affect the Court at this moment in its history. Will it strengthen it or weaken it? Will it keep it as a legal institution, or will it politicize it? And will it politicize the office of the prosecutor who will now face a new set of challenges in every case in deciding whether or not to bring about prosecution for the crime of aggression?

Then the final question really goes to the relationship and potential tension between the aggression part of the Kampala exercise and the stocktaking part of the Kampala exercise. The stocktaking part is designed to reaffirm the role of the Court in human rights. If, at the same time, an offense is adopted which discourages interventions of the kind that many urged in Rwanda, of the kind that many supported in Kosovo, then the aggression exercise would have acted contrary to the human rights mission of the International Criminal Court, and the real question, is that something that we want foster?

Steve has mentioned that other elements of the stocktaking exercise are complementarity,

cooperation, and universality. Is this a crime that we want to be prosecuted in every domestic jurisdiction in the world? Will it inhibit or promote cooperation with high leaders for them to know that this crime is in the books and capable of being prosecuted? And universality, this is a court that now has 111 States Parties, but it is not yet a universal institution, and this could be an occasion in which either the process or the progress toward greater membership continues or where it is stillborn at the point where we're at now.

So these, we think, are very significant questions: the definition, who decides, will it strengthen or weaken the Court, will it strengthen or weaken human rights, and how will it affect the core mission of the Court.

From our perspective, the most important element is a matter of procedure. There is no crime in the International Criminal Court that has not been adopted by consensus. War crimes, crimes against humanity, and genocide were all adopted by consensus. We believe that this is also a crime that has the capacity to change the character of the Court. To finalize and operationalize the crime should also be done by consensus, and we should search with others to find that consensus.

We announced in the Resumed Session in New York that we would leave no stone unturned in search of that consensus. We have engaged with many to find an outcome in terms of both stocktaking and aggression in which consensus could be achieved, and if consensus can be achieved, I think we'd say we've got a wonderful feeling.

Thank you.

WALD: Thank you, Harold.

Rosa Brooks is the Senior Advisor to the Under Secretary of Defense for Policy.

BROOKS: Thank you, Pat. It's great to be back at ASIL and see so many friends and colleagues from so many parts of my life.

I am not going to say very much here because I think that my colleagues have really covered the territory quite well. I will just add a couple of points from a Department of Defense perspective.

Obviously, DoD has a unique role and a unique set of concerns when it comes to the issues in front of the International Court and issues relating to the International Court. We have servicemembers deployed all over the world who are involved both in conflicts such as those in Afghanistan and the one that is winding down in Iraq but also in a wide range of other kinds of humanitarian interventions, as we recently saw in Haiti, as we've seen in the past in other places. So, for us, the issues of what the Court will end up doing are very far from academic.

That said, let me just say a few things about what we feel absolutely unambivalent about and what we feel somewhat more concerned and more ambivalent about. One thing I can say we feel absolutely unambivalent about -- this just relates to process -- is we have really had a fabulous interagency team. We had a terrific interagency delegation that went to The Hague a

couple months back. We are sending a great group to Kampala, and we feel really great about the ways in which the various parts of the U.S. government who have concerns about these issues have worked together, Justice, NSC, State, and Defense.

Another thing that I think we are absolutely unambivalent about is that the U.S. military and the Department of Defense has a deep, deep commitment to upholding the highest standards and norms relating to international humanitarian law and a deep commitment both on our own part and in terms of what we would like to see from others in ensuring that the gravest crimes, such as war crimes, crimes against humanity, and genocide, are not responded to with impunity, that there is adequate accountability mechanisms. Those are really core commitments to us.

As Harold said, we also recognize that sometimes precisely because those crimes are so grave that lawful uses of force play a role in responding to them, certainly not a first resort for any of us, far from it, but sometimes the use of force is necessary as part of a response precisely to those kinds of crimes. And for that reason, we also have, as Harold said, real concerns about any institutional or legal developments that might have the unintended consequence of chilling the kinds of uses of force that are intended to respond to those very crimes.

We also, needless to say, have a very grave concern about wanting to ensure that our own service men and women who are committed to those very norms don't end up finding themselves in a highly politicized situation and so forth. I think you are all familiar with those concerns. They still exist, and I think Harold really laid out the reasons that we have some concerns about the approach that the States Parties may be taking on aggression.

That said, another thing that we are very unambivalent about is the benefits of engagement with the Court, and, indeed, I think as we have at DoD tried to reevaluate what our posture should be towards the Court, toward States Parties, one of the things I think that has really been driven home for us has been that when you are not there, you can't do much to influence what happens. I think that we can all feel very proud of the role that the United States played in shaping the Court and shaping crucial aspects of the Rome Treaty, in shaping the elements of crimes and so forth in ways that I do believe made that Court a stronger and better institution and contributed positively to the evolution of international law. We then were away from the table for a long time, and I think that we missed some opportunities, even as an observer, to shape the evolution of the Court in ways that would have been not only to our benefit as the United States but also, I think, to the benefit more broadly of the international community and, indeed, to the Court itself.

I think we have been very pleased that our return to the table, our return to the discussions has been greeted with great enthusiasm by various States Parties as well as by other observers and non-governmental organizations, and we have already, I think, felt very gratified by the willingness of other parties to try to work with us to hear our concerns and to see if there are ways to accommodate it.

Obviously, our role, as Harold said, our role is pretty limited. We are only observers. We have no intention at the moment of attempting to change our laws, of attempting to change our posture in terms of the Rome Statute itself. So the ability, our ability to influence things is somewhat limited, but we, nonetheless, feel very strongly that being there, having those

conversations, being in a position to make suggestions about ways in which some of the specific language that we're uncomfortable with might be changed. We feel very good about the potential benefits of doing that, and I don't see that changing. The Court is, in fact, on the ground at this point, and the Court has the potential to do enormously good things. It also has the potential to go in a different direction, and we really want to make sure, as much as we possibly can, that we are part of that conversation because we think that the Court is likely to be part of the international landscape for many years to come, and we would like it to have a positive role in the international landscape.

I won't say much more. I'd be happy to talk in the question-and-answers about any of these specific issues that we are grappling with right now, and from a DoD perspective in addition to aggression-related issues, we also have some concerns about some of the other proposed amendments; in particular, the so-called "Belgian Amendment." And I am happy to talk about that more later, and I know my colleagues can also address those issues as well.

But I think that for now, I know we are already using up more of our time and we have a lot of people who are likely to want to ask questions, so I will stop there. Thanks.

WALD: Okay. As I advised you earlier, the next part of the program will be our two discussants, both former Counsel to the State Department, first Will Taft and then John Bellinger, who can react to what's already been said and/or ask questions.

I don't think I mentioned, and I should, that today's session is on the record, and it is being recorded for future posting on the Web. So it's not a Chatham House operation. I hope that doesn't deter anybody. [Laughter.]

Okay. Will?

TAFT: Thank you, Pat. I will be very brief.

In our report for the Society, we had urged a constructive engagement with the Court, and a number of the other recommendations that we made were directed towards that. One of them, which I'd like just to focus on specifically, is the suggestion that we review and perhaps amend where appropriate the American Servicemen's Protection Act, recognizing that some of the leading members of the administration voted for that act, and when it was passed, we can understand the little caution on that, but it did seem to us that a number of the concerns that were in place and cited at the time of the passage of the act had not been borne out, and that, certainly, basically the hostile attitude of the act, which prohibited cooperation with the Court in a very broad way, was not well designed to support the call for constructive engagement.

Harold, you said and pointed out that there have been on changes proposed to the ASPA, but I thought that I would just raise here the possibility that it should be reviewed, as we called for in our report, and do the concerns that were cited then, still persist, or if not, can we take a new approach there. This is quite aside from the fact that, of course, the act is a considerable interference with the executive's control of foreign policy and perhaps should be reviewed simply on that basis.

WALD: John?

BELLINGER: And I'm also going to be very brief today because I mostly want to hear from Harold and Steve. I am here in two capacities, both as a former Legal Adviser, but also as the Co-Director of the Program on International Justice at the Council on Foreign Relations, which is co-sponsoring the event today with a grant from the MacArthur Foundation, and also, hopefully, on your chair, which will make quite a pile on your chair, is the report that we have just finished this past week in hard copy, which is a set of recommendations for U.S. negotiators going into Kampala. The drafter of the report is a former member of the Legal Adviser's office, Vijay Padmanabhan, right here. The program is directed by Matt Waxman of the Policy Planning staff and myself, and I hope you'll have a look at the recommendations.

The thrust of the recommendations in our report is recognizing that the United States is not likely to become a party to the Rome Statute anytime soon, and that there will be perhaps a very long period in which the United States stands outside the Rome Statute. Nonetheless, we recommend a continuation of the engagement with the Court that I think did begin in the second term of the Bush administration and that it continues now.

We recommend the use of the term "nonparty partner." Essentially, we are not going to be a party to the Court, but that we be a partner to the Court in helping it in those areas where U.S. interests ally with the Court.

Yes, the Court can pose risk to the United States. Those risks were identified by President Clinton, which is one reason why the Clinton administration did not sign the Rome Statute originally, and President Clinton said he would not forward the treaty to the Senate, but, nonetheless, there are still areas where U.S. interests ally with the Court in bringing accountability for war crimes, genocide, and crimes against humanity around the world.

So we recommend engagement with the Court where that is possible. We expressed concerns, though, about the crime of aggression for the reasons that Harold has said and hope that going into Kampala that we will be able to engage early.

This is one of the key things that we think had been a problem going into the Rome conference was that the United States was not able to engage early with its partners around the world, and I comment Harold and Stephen for the engagement that is going on right now to make sure that U.S. interests are made clear as we go into the Kampala Review Conference.

So I hope you will have a look at the report. I have just two questions. One, one of our recommendations was that we send a high-level representative of the United States to kick off the Review Conference in addition to Harold and Stephen. Legal Advisers are, of course, important in high level, but we are a dime a dozen. We have five of them right here in the room. [Laughter.]

One of the things that all of us looked at was whether the United States should re-sign the Rome Statute. I have gone back and forth on that myself. On balance, I actually think it was a wise decision by the Obama administration not to try to re-sign, which frankly can't really be redone anywhere because we never unsigned, but to have sent some letter making clear that we

were reengaged. I think you probably concluded that that would have bought you more problems at home than it would have value.

But another way to do this to get the same effect would be to send a high-level representative to kick off the Kampala review conference, essentially to emphasize U.S. interests, both our positive interests in the Court but also our negative concerns. So I would like to know whether that is something that is still under consideration.

And then to go really to the heart of the matter on aggression, my sense is that other countries are really looking for compromises. They are beginning to hear the concerns, Harold, that you have articulated, but they are not willing to give up on aggression altogether, even though they recognize that might be the U.S. preference to just kick this off altogether. So people, as they tend to be going into a conference, are in dealmaking mode and are looking at different compromises around the table, and I would be interested in your assessment of the different compromises that we hear being bandied about, and I will offer up the latest one that my sense is where people may be heading going in, which would be an agreement on the definition of "aggression," which almost all lawyers agree is a terrible definition -- a terrible definition but agree on that definition, but not agree to the trigger or the filter. So it would not apply to the United States. The prosecutor himself could not be investigating aggression because he would have only a definition but not a filter. So there would not be real risk to the United States by the ICC, but the Rome Statute, nonetheless, would include this very bad definition that could be picked up by national prosecutors.

So, one, should we send a high-level representative to Kampala to kick things off? What about these compromises, including the definition of "aggression"? And then I just can't resist, given the news of this week, that Judge Garzón has offered himself up to the ICC as an adjunct prosecutor and that seems to have been accepted by Luis Moreno-Ocampo, what is the U.S. government's view on having Judge Garzón as an additional prosecutor attached to the ICC?

KOH: Let me just respond. We would be thrilled to have Merrick Garland on the -- [laughter].

Let me say first, on the high-level point, I think Steve and I would agree, we are sending a very high-level representation. [Laughter.]

On the question of what will happen, let's understand, again, this is not a conference. This is a Review Conference. It's not going to lead to signature or unsignature. It's going to lead to an outcome. It's going to lead to a position.

I am reminded of the fact that when I became Dean of Yale Law School, my predecessor told me that on his first day of work, he was given a pile of papers by his assistant who, of course, ran the law school, and there were these stickies that said "sign here," "sign here," "sign here," and he signed them all. Then the next day, it turned out he had signed one of them in the wrong place, and she gave it back and said "please re-sign." And he read it, and it said "please resign." [Laughter.] He had a moment of existential crisis. He finally decided it was unnecessary, for some of the reasons that John described. And as an observer, we're not actually facing -- that's not one of the questions that we're facing.

With regard to the question that Will asked, let me just rephrase the question. Will asked about a law that's on the books, and if you think it's constraining and ought to be adjusted, the simple fact of the matter is that in the time between now and May 31st, I think the financial reform legislation, the Supreme Court nomination, the energy bill, and immigration bill would probably all have a higher claim to legislative time than this issue. The question for us is simply do we have sufficient discretion under existing law, following it scrupulously, as we will do, to engage and we think achieve what we think is a successful outcome in Kampala, and the answer to that question, I think, is yes. So other issues can be put on the table when we return.

On the various proposals that are kicking around as to how the aggression issue might turn out, we have heard them too. We have heard many of them in different settings. Different people are more interested in those issues than others. Our view on it is a very simple one, which is an organic change in the Court requires consensus. If that consensus can be achieved in Kampala, well enough. If it can't be achieved in Kampala, then there should be consensus on those issues on which genuine consensus is possible. No other crime has been adopted by a divided vote, and neither should this one.

RAPP: Can I just add a couple things there? First of all, in regard to the American Servicemembers Protection Act, the important thing about that act -- and I know a lot of you are familiar with it -- is it does include this amendment, the Dodd Amendment that says that nothing herein shall prevent the United States from cooperating and assisting the Court in a case of a non-citizen, and it lists people like Slobodan Milosevic or others, but then, after the list, it means to include others who are also charged with crimes, like genocide war crimes and crimes against humanity.

There is, as I think many of you also know, some specific language in a reauthorization bill of Congress that did say that we can't spend money directly or obligate funds for the Court, but, as we have reviewed the question with our Justice partners, we have come to the conclusion that the sort of engagement that we have discussed, the possible assistance to the prosecutor in the four situations in Africa could be possible, consistent with American law, and we'll be considering those requests on a case-by-case basis. Now, if we run into a legal obstacle, we may have to review the legislation further, but I think at this point, we think that we've got the flexibility to proceed.

In regard to the issue of the various compromises that are out there, there is, unfortunately, in the "Princeton Process," as it's called, a consensus on the definition on the "crime of aggression," and, as John has eloquently stated, there is no lawyer that likes that language. It's language that reflects kind of a diplomatic compromise. It doesn't easily -- it's very hard to take that language and turn it into a typical criminal Statute of the kind that I prosecuted as U.S. Attorney or as a prosecutor in the ad hoc tribunals of really coming down with the elements, and, as a result, you see that coming out of that process, there's elements that basically restate it and that don't really tell us what "character," "gravity," and "scale" mean, don't really define what a "manifest act" is.

Now that we're participating, I think it is fair to say, though, of course, we don't have a vote, there may be a little less consensus on it, but there is this danger that the Review

Conference could proceed to put this into the Statute, and I think if they do that, I think we are going to want to try to work to assure that there are understandings or provisions in the elements that make it clear that acts taken to protect one's sovereignty or acts taken to protect others, which are specifically to be defensible under Article 31 of the Statute, acts to, for instance, intervene to protect individuals from genocide or war crimes or crimes against humanity, are not manifest violations.

And, additionally, the complementarity point, that we really don't want to see this Statute becoming the basis of prosecutions at the national level simply because it's put into the ICC Statute, there is this expectation that countries that are responsible should then go to work and amend their Statutes, we don't want to see a direction to do that. Of course, countries can do what they want to do, but we also don't want to see the possibility of prosecution of aggression, particularly on a universal basis, prosecuting someone who happens to visit your country because they were involved in aggression elsewhere and preferably not on the basis where the victim states, so called, could prosecute a non-national. Perhaps prosecution of one's own national for aggression would be appropriate, as was outlined, I think, by the International Law Commission back in '96.

So those are subjects that will be discussed there, and we'll be working very hard to get the kind of clarifications, if possible, but I think the better alternative would be to study this thing further and not to walk into this area, so we'll be active on that.

Now, the second issue on definition, on trigger and all of that, there isn't a consensus, and we saw that in New York. There was a straw vote between various options. One option had 12 votes, another had 20, another had 32, and as it's become clear to us in the discussions about whether this is going to be amended under Article 121(4) or 121(5), it's going to be very complicated for this to be done for the reasons of the way that those amendments -- that amendment, statute reads. And the only real way that I think they can be assured that what they do is going to be effective and isn't going to lead to motions to dismiss if a Kim Jong Il or someone is prosecuted in the future is by doing this by consensus.

I don't think they can safely go forward on the 15bis aspects of this case without a consensus, and that's certainly what I think is dawning on a lot of people, but we're going to continue to press that issue because what we really don't want to see is the ability after Kampala for a few countries to ratify this and for this to become part of international law.

KOH: If I can just add two very obvious point, it's a long way from a definition that may be flawed that people are talking about to a prosecutable overbroad crime that has entered into force and can be acted upon. So there is a very broad possible range of outcomes, but keep that in mind.

The second point is part of the discussion that's further along at this point -- and Steve described a Princeton Process -- was a process that went on for eight years in which the United States did not participate, and if there is an aspect of that, that we point out now, it's that the flaws in the definition that we saw could have been pointed out eight years ago, had we been engaging -- had we been engaging, but there are many, many, many more steps before you would get to a point in which a crime of aggression is actually a prosecutable, entered-into-force

crime in the Statute capable of being acted upon by the prosecutor and whatever trigger entities are involved. And, obviously, on those issues, further engagement is also helpful to make sure that the structure of prosecution is done in the most sensible way.

WALD: Rosa, would you like to react to anything that's come before?

BROOKS: I fully agree with Harold and Steve on these issues.

WALD: Okay. Well, actually, that leaves us with plenty of time for the question-and-answer period, but let me just make a couple of administration notes on that.

As I understand it, somebody will circulate with a microphone, and so, if you have a question, it's kind of hard up here sometimes to see all the way back. Maybe you have to stand up or go seek out the microphone, and I have to warn you, I am very myopic. You may be my best friend, but I'm not going to -- [laughter] -- if you're in the end row, then you shouldn't take it personally.

So, just prior to our opening it up, maybe you want to address your question specifically to a particular panel member. I did promise, with the consent of ASIL, that Ben Ferencz, who is perhaps our most seasoned veteran of the whole war crimes process, having been a Nuremberg prosecutor and who has been on the road defending, advocating, et cetera, for the International Criminal Court ever since basically, I promised him two minutes in which to address the question -- I think it's going to be aggression -- and if he has an actual question for the panel members, to do so.

The two-minute rule is, as the Supreme Court said in Bush v. Gore, "for this day only." [Laughter.] It does not necessarily apply to all of the subsequent questions.

Go ahead, Ben.

FERENCZ: I will be very brief. I want only two points.

WALD: Good.

FERENCZ: One, I am disappointed, not too surprised, that Nuremberg has played such an insignificant role in all these discussions. This being The American Society of International Law, I will quickly remind you that in 1920, the man who founded The American Society of International Law, Elihu Root, made a big speech on this subject in which he recognized that it was important to condemn aggression after World War I and II, and he said the important thing is whether states will be willing to give up their sovereignty to the extent necessary. That was 90 years ago. I didn't attend that meeting. I was only six months old at the time.

So Nuremberg was a foundation stone. We are dealing here with a process. It began in Nuremberg when America thrilled the world by saying, in the words of Justice Jackson, "Aggression is the supreme international crime...To hand these defendants a poisoned chalice is to put it to our own lips as well. We must be bound by the same rules which we lay down today." I wish we had the reputation today abroad that we inspired at that time. It's eroded, very

painfully, and it's a dangerous source of encouraging people to assault us and attack us by every possible means, so there is a connection.

We took the additional steps. We've made great progress, definition of "aggression" by consensus, 1974. I sat through 29 years of those meetings. I agree it's a terrible definition. I wrote an article saying it with similar substance. I said it's a sieve, but, nevertheless, it was a consensus, and the same thing is going to happen here. We already have, as Steve has pointed out, on the verge of a consensus on the definition of "aggression." Don't push your luck. It was good enough for the United States, Justice Jackson, the other four powers who drew this up in London, 65 years ago, ratified by the United Nations General Assembly, accepted by 19 other nations, et cetera. Let's go with it. Let's not look for trouble.

The main trouble is the role of the Security Council. Harold has pointed out correctly that the United States is not ready to yield its sovereign power to any strange tribunal, and he wants to do it by consensus. There's only one way to do that by consensus, as it is always done. You reach wording on it which lets each party know that its basic interests are not being violated.

The speeches heard today outline the problem but very few with the solutions. There are solutions to these problems. Ambassador Rapp has pointed out some of them are in process, but there are ways of clarifying the existing documents to achieve the goals which we seek. For example, I don't want to negotiate the details here because --

WALD: Ben, you've only got 30 seconds.

FERENCZ: -- because my time has run out, but if you want to know the solution, see me later. [Laughter.]

WALD: Thank you. You've been very good in adhering to the time.

Harold? Does somebody want to react? Go ahead.

KOH: Well, of course, I love Ben Ferencz, and I revere Justice Jackson. Ben, it's just inaccurate to say Nuremberg doesn't play a role in our thinking about this. Of course, it does. It's the foundation stone of international criminal law.

But you also know -- Heraclitus said it -- you never step in the same river twice. The river moves on, and the participants are different. Let's not put this into a box. Kampala is not Nuremberg. Nuremberg involved the war of aggression, not prosecution for acts of aggression. Nuremberg happened at a time where there was no Security Council. Now there is a Security Council. The Security Council may authorize various lawful uses of force, which might then be effected by a prosecution for an act of aggression, depending on the trigger mechanism.

There is a good reason why a definition, which was flawed in 1974, has not yet been adopted by the Statute of the Rome Conference and why there's still very substantial debate over both the definition and about the mechanisms for its operationalization into a prosecutable crime that will enter into force. So you can revere Nuremberg and think we've got a lot of challenges

in Kampala.

The other thing I'd say is Kampala is not Rome. I know it because we're going to be spending two weeks in Kampala. [Laughter.] And we were looking for that visit to the Spanish steps, and we noticed that there weren't any.

The fact of the matter is, in Rome, it was an organic meeting in which the question of whether an institution should come into being and whether different nations should sign or not sign was on the table. Here, the institution exists. It is 12 years later. The United States has been away and is now reengaged, and the question is what should be the product of a review conference which includes two issues, stocktaking and aggression. And those are the questions that we're facing.

So, please -- this is a very sophisticated audience -- the next time someone says this is about Nuremberg or this is about Rome, just say this is about Kampala. This is about Kampala.

WALD: Steve?

RAPP: Let me just echo that point because I respect so much what happened at Nuremberg, and it's what's drawn me to this particular field. And I think what happened at Nuremberg was, as said, the prosecution of the war of aggression that occurred based upon a broad international consensus that this prosecution needed to take place. The countries that are now in the UN Security Council all favored that approach, and if we were today dealing with a codification of what happened at Nuremberg and a similar kind of procedure, I think we'd have a whole lot more comfort level with that, but what we've got instead is this definition that does not reflect Nuremberg that would allow prosecutions, we fear, of humanitarian interventions of the kind we did in Kosovo. Some can say, well, maybe not, but who can say? These could be manifest acts. Would our ability to deal with what we see today, which is atrocities being committed in non-international armed conflict -- that is not to say aggression doesn't occur and can't occur. There could be aggression in the Korean Peninsula, but what's happening now as opposed to what happened in the 1940s is massive violations of international humanitarian law in the context of either non-international armed conflict or sometimes not even within armed conflict that involve acts of ethnic cleansing or genocide against ethnic groups. People need protection in this kind of situation, and our ability to act collectively to provide that kind of protection may be interfered with by this kind of definition and by giving the ICC the ability to proceed, particularly if it could do it without going to the Security Council.

So we are trying to honor what happened at Nuremberg by making sure that what's done here does not do violence to the commitment that people have there to end atrocities against humankind.

WALD: Rose, do you have something?

BROOKS: Yeah, just one quick additional point. I think that I wanted to emphasize again the analogy Harold drew to the Court as a bicycle that's still wobbly, hasn't yet completed the full cycle of any case.

We very much obviously would like to see the Court become an institution that is able to accomplish those core goals of ensuring accountability for our war crimes, crimes against humanity, and genocide. This is not to say that aggression isn't a serious issue, but I think one of our concerns just relates to overburdening the Court at a time when it's still in its infancy, relatively speaking. And one of the things that's been sort of interesting as we have watched the discourse outside of intergovernmental circles on this issue has been seeing some of the groups in the NGO community come out, in fact, and urge the Assembly of States Parties not to adopt the definition of aggression and not to get into those issues for very similar reasons, out of a concern that it's just, to switch metaphors midstream, biting off more than the Court can chew at this point. It risks adding a very controversial and potentially even more highly politicized crime to those that the Court is going to be looking at, at a time when the Court still really needs to shore up its attention to these core crimes that are already there.

So I don't want to speak on behalf of other organizations. I would be interested if there are others in the audience who want to address those points themselves.

WALD: John, do you want a quick word?

BELLINGER: Yeah, just very briefly. I don't want to have to have all the panel members speak.

But Harold has said a couple of times that the United States was absent over the last eight years, which is certainly true, and I personally would have liked to have seen us be present. I believe that engagement is generally more useful. On the other hand, the implication of the comment is that had we been present, everything would have been fine, and --

BROOKS: To know us is to love us.

BELLINGER: -- that we would have then persuaded the rest of the world and gotten a good definition of "aggression" and a good trigger, and we would not be in the position that we are in now. I think most people know that's just simply not true.

Our allies and people who are not our allies but who shared our interests were there over the last eight years and were fighting vigorously with respect to the definition of aggression and the trigger on aggression, the British, the French, the Chinese, the Russians. All of these are countries that intensely dislike the definition and even more were concerned about diluting the power of the Security Council and fought this vigorously, and there were other countries as well. Just because we were not participating doesn't mean the United States doesn't have ways of getting its views known.

Even when we were present in Rome, we did not get our views across. So the point is simply while I agree, I think I would have preferred to have engaged than not engaged. The world has changed in a way that the United States does not always get what it wants, even when we are present.

WALD: Okay. Will, do you have anything? Then I am going to move into the audience.

TAFT: Somebody ought not to speak. [Laughter.]

WALD: All right. I have Ed Williamson, but I also had Sean Murphy, whoever's got the -- all right. What we'll do, you'll be second, then.

MURPHY: Sean Murphy, George Washington.

WALD: Yeah. It's a good idea, what you are doing, Sean, if you identify yourself just when you get up to speak. Okay.

MURPHY: Still Sean Murphy, George Washington University Law School.
[Laughter.]

My understanding is that the U.S. government to date has not taken an official position that humanitarian intervention is lawful under the UN Charter. When we were confronted with that question with respect to the Iraqi Kurds and Shia in 1991, we did not base our intervention on that idea. When Kosovo arose, we said a lot of things, but we didn't actually say you can do this under Article 2(4) of the Charter.

So my question is this. Given that Steve twice said if the definition is to be adopted, we need to fix it, so that uses of force to protect people in other countries are not regarded as manifest violations of the charter, is it now the U.S. government's position that humanitarian intervention is permissible under Article 2(4) of the Charter, or is it that the issue of criminal responsibility in the context of the Rome Statute is different from what states may or may not be responsible for under the UN Charter? And if it's the latter, do you really think you can contain that, or is it most likely that one will bleed into the other, leading us back into an interpretation of the Charter?

WALD: Are you going to address your question to a particular participant?

MURPHY: I see that the Legal Adviser has seized the microphone.

WALD: It's just that if everybody on the panel answers every question, I'm afraid we are not going to get --

BROOKS: I think this is very clearly a question for the Legal Adviser.

WALD: So be it. Harold.

KOH: One of the great things about being a government official and not an academic for a couple years is you actually have to live in the real world and answer the questions that are put before you.

You know, John Bellinger, read no negative into what I said what should have happened. All I am saying is in the year 2010, we are where we are, and engagement is a strategy that makes sense going forward.

Sean, I say this to you. I have not heard anyone say that all uses of force that are called "humanitarian intervention" are, per se, illegal, and, therefore, it is possible that a crime of aggression, if made prosecutable and actionable, could be drafted in a way that could chill or discourage a lawful use of force, and one of the things that we must do is preserve freedom in which lawful uses of force can be exercised.

Now, does that mean that any particular concept or conception of the use of force is lawful? Well, it arises very much based on the circumstances that present themselves.

We don't have to give the answer to your question, and, as you notice, I am not. [Laughter.] Because it's hard enough to answer those questions as a Legal Adviser when it is actually presented to you but in a situation which state practice has demanded.

But I think the point that I made as a matter of policy remains, which is a crime of aggression has to take into account the many ways in which force can be lawfully exercised and not drafted in a way that chills or restrains potentially lawful uses of force.

WALD: You can both write Law Review articles about it when your current job has expired.

Ed?

WILLIAMSON: Edwin Williamson. I am the Senior Counsel at Sullivan & Cromwell.

Harold, I have a question for you and for Rosa. In the Q&A at the ASIL speech, in response, in fact, to Ben's question about the definition of a "crime of aggression," one of the objections that you voiced to the adoption of the definition would be that it would put -- and use the example of President Kennedy and the Cuban missile crisis -- a U.S. president in the position of having to worry about being second-guessed by a prosecutor on important issues of national security.

And my question to you is whether or not that reflects a change in your thinking, and you have a similar concern with respect to the other crimes or that you somehow make a distinction between the two, between aggression and the other crimes, and I'd be interested in hearing what the DoD position is on that.

KOH: Well, what I was doing was I was referring to an article by Mike Glennon in the Journal of International Law in which in talking about what he called "The Blank-Prose Crime of Aggression," he commented that the list of acts that arguably fit under aggression could encompass acts by every American president going back to JFK.

Now, obviously, what's happened in the past has happened in the past. There is no prosecutable crime and was not at that time. Is that a change in my position? No. All I'm pointing out as an intellectual matter is I don't think anybody says that every American president since John F. Kennedy committed genocide war crimes or crimes against humanity, but they have done things like blockades, which in the Cuban missile crisis was called a "quarantine," and

whether or not they could actually be convicted for those crimes if a crime were to become prosecutable and jurisdiction granted, they could certainly be charged with that, and that the knowledge that they could be charged with that could be the basis for a chilling effect on a lawful use of force.

Imagine if President Kennedy was making the decision about the Cuban missile crisis now and, in addition to having to weigh the factors he actually had to weigh, he had to weigh in the factor as to whether he or the allies in the OAS who were participating in this exercise could be prosecuted for aggression. That might have changed the calculus, and the question is, do we want the calculus with regard to lawful uses of force to be changed that way?

WALD: Rosa, do you want to add to this?

BROOKS: Yeah. I think two responses. One, do we have such a concern with regard to the other crimes? Yeah, sure. And that's, indeed one of the reasons that the U.S. is not a party to the Statute. It's an ongoing set of concerns. I don't think it precludes us from feeling strongly that engagement with the Court and considering request for specific kinds of support on a case-by-case basis makes sense for us going forward, given that we are in the year 2010, we are where we are, but those preexisting concerns certainly remain.

I think, however, they are greater in the case of aggression for the very simple reason -- and this is, more or less, what Harold just said -- I think that we have a pretty good sense in the year 2010 of the contours of what is a war crime, what is a crime against humanity, what is genocide. There's domestic case law in many of these issues. There is case law in foreign courts. There is international case law on these issues. Whereas, when it comes to what constitutes a crime of aggression, from a judicial perspective, it's much, much, much less clear.

So, given what we see as far greater ambiguity, particularly given the existing proposed definition, those concerns about potential politicization, those concerns about potential liability for both political and military officials are all the greater for the aggression crime.

WALD: Thank you. Jane?

STROMSETH: Jane Stromseth from Georgetown Law Center. Thank you all. This is a really great discussion.

I actually have a question for Ambassador Rapp on complementarity. You mentioned at the beginning that the U.S. and the Norwegians would be sponsoring an event on complementarity and the DRC, and I understand that Uganda and perhaps others have proposal on what they call "positive complementarity," the desire to see perhaps a more affirmative role of the ICC in assisting domestic prosecutions or perhaps other States Parties more actively assisting affirmatively domestic prosecutions. And I'm wondering if you could say a little bit more about the U.S. stance toward those proposals, just elaborate a little bit on this positive complementarity issue. Thank you.

RAPP: Well, the positive complementarity is something that is essentially part of our rule-of-law strategy in the world, and it's a place, I think, for a real common ground with the ICC

and with many of the countries that are part of the ICC that do have domestic capacity considerations.

If you follow the history of the ICC the first six or seven years, there was a time that several ICC officials went out and gave speeches about positive complementarity, and then, about three years ago, I noticed they stopped. And part of that was, I think, they ran into the budgetary considerations from the Assembly of States Parties, countries that are paying mandatory assessments, supporting a very expensive establishment in The Hague, 18 judges and lifetime pensions and all of this kind of thing, and the need to have this kind of global reach for their actual prosecutions and did not want to be viewed as a development agency.

Now, that, to some extent, has caused some resentment in some of the situations in Africa where the ICC has come in and is prosecuting one case or two cases or three cases, and there is all these other needs. Of course, the other courts, the ad hoc tribunals, have spent a lot of effort, to some extent because of the desire to transfer cases back to the region, but they have been, to a large extent, become kind of development agencies. Under the ICTR, we spent a lot of time training Rwandan judges and witness protection officers, and the ICTY, in particular, has been active in this area. So there's kind of that expectation, but there isn't the capacity to do it.

On the other hand, you only have to go to Goma in the DRC, and you'll see white trucks going all over the place, four-by-fours and various agencies, and people are almost tripping over each other trying to do something effective about the accountability issue there, but it is uncoordinated, and it doesn't focus, I think, sufficiently on the international humanitarian law piece of it. It may be more broadly focused on the judicial process, which is important, but I think what we really want to begin to look at is what countries, whether they are in the ICC or outside the ICC, can do to coordinate their responses and to coordinate their aid and assistance to make possible a much more effective attack on these crimes at the national level.

Now, of course, there will always be problems with will. There will be problems with independence, et cetera, but, in many places -- look at Guinea, for instance. We have a horrendous crime committed there, 150 people killed in the stadium, women raped in the stadium and then houses outside of it. We are hoping there will be a democratic transition there, hoping that it may be possible rather than not becoming the sixth ICC case in Africa for Guinea to prosecute that itself. And having spent a fair amount of time in that country and knowing still society and the women's rights groups, et cetera, I think there's some hope.

So that's where I think we should be working together to provide that kind of capacity, and that is why I am excited about this session we are going to do on the DRC. There's still a ways to go because there's no place really in the international system where there is any kind of agency that really coordinates this, and it will be up to us and others, I think, to develop the approach to it, but I expect it to be welcome there.

WALD: We have a question in the back there.

SCHAEFER: Thank you. That was a very interesting panel, and I appreciate the discussion. My name is Brett Schaefer. I'm with The Heritage Foundation, and I have three very brief questions.

The first one is that everybody has agreed that there's a very terrible definition of "aggression" on the table, but nobody has really offered their own definition of "aggression," and I was wondering if you could give me an idea of what you think would be a superior definition of "aggression" that the U.S. could have sought over the last 10 years.

And the second question is we've heard a lot about the definition of "aggression," but we haven't heard anything about the other two amendments on the table, and I believe Ms. Brooks mentioned that. DoD had some concerns about the Belgian Amendment. What specifically is the U.S. position on the other two amendments?

And the third question is, what outcome is the U.S. specifically seeking in Kampala in regard to the amendments, and what would you regard as a successful outcome if it's somewhat different or less than your ideal outcome?

Thank you.

WALD: Okay. That's three different questions. The first, let's see. Yeah. Why don't we take the other two amendments since we've been talking so much about aggression.

BROOKS: Maybe I will just say a word about the Belgian Amendment, and I will leave your other questions to my State Department colleagues.

The Belgian Amendment would criminalize the use in non-international armed conflicts of certain kinds of expanding or flattening bullets, and we have a couple of concerns about this, partly some concerns about whether some NATO projectiles might inadvertently be covered in this.

I think we understand the very good intentions behind the proposed amendment but some concerns that it just hadn't been quite thought thorough in terms of what is actually in use and why. Also, some of these -- you know, I think the motivation is obviously to prohibit the use of ammunition that causes unnecessary suffering. That said, some of the kinds of ammunition at issue are ones that are not only often used by law enforcement officials but in counterterrorism operations and often are used precisely in order to avoid unnecessary harm to civilians because they -- or, for instance, imagine a hostage situation where you're trying to make sure that you don't accidentally kill the hostages, and if you shoot at somebody, you only kill the guy you're shooting at or an aircraft situation where you don't want to pierce the shell of the aircraft and have the whole plane come down. So we have some concerns about whether, with the best of intentions, this amendment ends up being very problematic in all kinds of situations.

We also just think that this is not the right forum. The Rome Statute is not the right forum to address those issues. There are existing treaty fora that relate to small arms and ammunition, and, in particular, the Conference on Certain Conventional Weapons, we see as a more appropriate place to take up that kind of question.

We have articulated these concerns. Some of them, I think, quite honestly, the States Parties simply hadn't thought about. We will see what happens, but we're optimistic that there

will be ways that those concerns will be addressed because I think, unlike with aggression where there was just a tremendous amount of time and energy expended on the parts of other states into coming up with a definition, however bad we consider it to be, where states really feel like, "Hey, you're showing up 10 years later. Now you're asking us to change?" this one is one where I think there is more a willingness to go, "Oh, hadn't thought about that," and we want to see if we can do something about it.

WALD: Steve and Harold, you can divide up as you wish any proposed definition.

KOH: Let me go. First, no negotiator or diplomat goes to a conference and in an academic session tells people their bottom line.

So, are there areas in which we're focused? Of course. And what are those areas? One is acceptable solutions with regard to what the Court can prosecute and the likelihood that that will have deleterious effects on those who are engaged in lawful activities; second, the extent to which there are what we call "outside-the-court consequences" from norms that might be created by the exercise; third, chilling effects on lawful uses of force; and, fourth, what you could call "breathing room," time in which the U.S. process of engagement can get stronger and we hope produce more results. So, in those four general areas, we are very much focused.

On what is a superior definition to one that 111 countries are talking about very intently, I think the real question ought to be the one that I was asking, which is how do you get from a proposal to finalize a definition and operationalize a prosecutable crime into something which is a more acceptable outcome with regard to those issues. As I said before, it is a long way from a flawed definition, which is still open for discussion, to a prosecutable entered-into-force crime that can be acted upon by the prosecutor immediately. That gives us a lot of areas in which we can talk about how this crime ought to be addressed in Kampala and beyond.

WALD: Steve?

RAPP: Yeah. Just in terms of the definition, we weren't participating in the Princeton Process. I understand that at one time, it was proposed that there would be a group of "for instance" that would be added to manifest, and it would be "for instance, war of aggression," et cetera, and one non-party state that was participating in that session broke consensus on the issue. So, as a result, that was taken out, and it just sort of reflects the importance of being in the room.

Now, that said, given the desire for consensus, they end up with this ambiguous language. Some people think it allows something like humanitarian intervention, some people don't, and that's, I think, the worst kind of way to write a criminal statute.

We are going to be trying, as Harold had said, to prevent whatever happens there from having a bad effect on us and on the world, and I think that will involve probably dealing with the reality of that consensus that's presented to us and looking at various ways in which matters can be clarified if they go forward with the definition alone and can be further reviewed before they go to the second piece of it, if, as I think there's a strong chance, the second piece of it, the sort of actual implementation or the entering into force of it or the terms for the exercise of

jurisdiction -- if that's deferred, we also want to make sure that the definition itself can be looked at again, as people have more time to reflect. That would be the best solution, so that no permanent danger, no permanent harm is done by this conference, and that's what we're going to be working on with our engagement.

WALD: Over here.

VLASIC: Mark Vlastic from Georgetown, although previously served as a prosecutor at the Yugoslav Tribunal in front of Judge Wald, so it's great to be here.

In fact, every person that I helped indict at the Yugoslav Tribunal was picked up by U.S. Special Forces. So I think the U.S. government in its special position to assist in such tribunals, I am wondering if there's been any discussion -- I'm sure there has been -- or if there's anything you'd like to share with us in terms of whether or not the U.S. government would be willing to support and help apprehend people indicted by the ICC.

RAPP: Well, as I indicated, we had stated in New York that we were prepared to meet with the prosecutor and discuss the areas where we could assist.

I think the question of political support for those kinds, for arrests, the kind of influence that we can bring to bear to assure state cooperation is something that we're already making constructive steps on and engaging with a variety of countries to, we hope, effect the arrests of some of these fugitives.

Going beyond that, that is a matter that's subject to ongoing discussion, but I think you do point to a very important aspect of what happened at the ad hoc tribunals. Of course, the U.S. is a major contributor. We were paying -- I think the assessment rate for tribunals is 24.5 percent of the bills. We had a lot of Americans there, and, indeed, the American prosecutors in The Hague at the ICTY are still the people that are leading the most important cases in the world.

We've had some Americans at the ICC, though they're disfavored in the hiring, intentionally because the state parties want to use their tax money to support their own people, so that's tended to diminish the number of people that are there. We're not going to be contributing a penny -- it's illegal -- to this Court, so other people are going to be paying for these actual cases and judges' salaries and everything else.

But what has been important at the ad hoc tribunals and it was important to me in ICTR and Special Court for Sierra Leone is the sort of assistance the U.S. could provide, the kind of information that could be shared consistent with our law, the kind of assistance for witness protection. Those sorts of issues turned out to be extremely important. Without going into what's possible with the ICC, those are the kind of things that we expect to see on the table and will be responding to in as constructive a way as we can, and, ideally, it won't be called "non-party partner," as clever as that term is in the Council's report, but, certainly, a lot of us would like to see a situation where we could be contributing to effective prosecutions through in-kind assistance, while we're not contributing as a state party or as a dues-paying member.

WALD: Harold?

KOH: Since this is a group of lawyers, one thing I want to clarify for those of you who have been focused on this is in finalizing a prosecutable entered-into-force crime of aggression, there are many elements on the table. There is, of course, a definition. There are understandings of individual words in that definition. There are elements of the crime to be separately negotiated with respect to each crime. There are jurisdictional filters. There are jurisdictional triggers, which are not the same thing. There are possible consent-based approaches. There's discussion about when the entire crime is finalized and operationalized. There are prosecutorial strategy and guidance questions, among others, and that is a non-exhaustive list.

So all of those matters are on the table. Not a single one of them has been finalized, and the question becomes, in getting to a certain outcome, how much of that will or needs to be done in Kampala by consensus.

WALD: Okay. We have the last question coming from Don. Somebody already has the microphone. Yeah, go ahead.

KRAUS: I'm Don Kraus with Citizens for Global Solutions. We are one of the NGOs that are supportive of aggression being amended successfully to the Statute at some point.

We are also very, very -- applaud the U.S. reengaging and being there, and we are very, very supportive of that and very positive.

So, that said, I want to come back to this question that Will brought up a little earlier on reinstatement of signature. Given the U.S. in negotiating position and the cards that it has to play, it's an observer. It's already said that it's not considering ratifying in a short amount of time, and it wasn't at the discussions. It would seem that reinstating the signature prior to Kampala would send a signal that would bump up the credibility that the U.S. has in terms of its negotiating process there. That, as compared to the domestic opposition that it might bring -- that it might boil up here at home, it seems to me it would outweigh what you get out of it in terms of negotiations versus what you get out of it in terms of criticism, which you are going to get anyway just going to Kampala.

So I'm just kind of curious, the calculus that you are thinking through on that. It just seems that it would be very useful for the U.S. position.

WALD: Okay. We'll go right down the line here.

BROOKS: Actually, if you don't mind, Pat, I just wanted to quickly add something in response to the previous comment, and then I'll let my colleagues say anything they'd like in response to this one.

One thing I just wanted to emphasize -- and this is true with regard both to political and diplomatic forms of support for specific cases before the ICC and other forms of support that might be requested at some point in time -- as I think Steve and Harold have both side, that we have already told the prosecutor that we are happy to have those conversations and to consider requests on a case-by-case basis, and what I really want to emphasize there is that we don't look

at these issues in a vacuum. The ICC is not in a vacuum. If and when we get specific requests, some of the factors that we would be looking at on a case-by-case basis would be everything from how compelling is the argument, about the ICC as such, but also how the particular form of assistance requested obviously would have to be in compliance with U.S. law, but impact on partner nations, impact on other U.S. foreign policy objectives, potential unintended consequences, et cetera, et cetera, there might be non-ICC-related reasons to either favor or oppose doing a particular thing.

I think that one of the things that we very much want to do, in fact, is not have the ICC be seen as something where there are absolute yeses or absolute noes. It doesn't exist in a vacuum, and whatever all of the various issues that we are going to face down the road, I think what it means to us to talk about them on a case-by-case basis is exactly that.

So do we talk about contingencies? You can talk about a zillion kinds of contingencies, We think about them, yes, absolutely, but more beyond that, I think we just want to be really clear this is part of a broader set of foreign policy and national security concerns, not something that's by itself.

WALD: Do you sign or do you re-sign or not re-sign?

RAPP: Well, just to supplement that -- and part of the engagement -- I don't want to be so realpolitik about it, but, I mean, one, we want response on the atrocities, but, two, by engaging with a prosecutor, by working with a prosecutor, by responding and developing a relationship, I think that offers us the stronger ability to protect ourselves and to make sure that the prosecutor is not off taking cases that are inappropriate, though the cases that have been taken thus far we think are highly appropriate and confirm that the Statute is being followed.

On the question of signing and re-signing, first of all, as I noted earlier, our ability to participate as an observer doesn't arise from whether we signed or not. It's because we were in Rome, we signed the final act there. The question I think that all of us have to deal with is how do accomplish the most. It has always seemed to me that there is strong bipartisan support for international accountability in the United States. When we put the question should Charles Taylor be surrendered, you know, and arrested and transferred from Nigeria to the Special Court for Sierra Leone, I think there was the sense of a House resolution that passed, 434 to 1. Only Ron Paul, I think, voted no on that resolution, doesn't believe in us doing anything internationally, but everybody else was for it.

So I think in terms of building support for what needs to be done, we're better off talking about concrete things, about doing things in regard to Joseph Kony and the horrendous crimes being committed by the Lord's Resistance Army in Uganda and now in the DRC and Sudan and the CAR, et cetera, and trying to focus on that, rather than to deal with the symbolic issues that don't move us very far. And I think that the approach that we've taken, as you saw and witnessed at the various sessions where we've appeared, it has been very well received by the ICC, and I think that that approach right now in terms of having the kind of domestic support that we need for this policy makes the most sense.

WALD: Harold, the last word or not?

KOH: Yeah. I mean --

WALD: I knew you couldn't resist.

KOH: The only issue on the table for us in Kampala is what is the outcome of the conference, which will have three elements: stocktaking, amendments, and plans for a future Review Conference. So, as you pointed out, President Clinton's signature is on the Statute. It was put there on December 31st, 2000. Nothing that happened subsequently precluded the U.S. from acting in any number of different ways as a matter of policy because there have been a number of different policies pursued under the exact same set of legal instruments and written instruments.

The one issue which I think is very much on the table and which I flagged with the list that I gave of items to be discussed and negotiated is how does one adopt an amendment. One way to do it is by consensus, but, if you are going to have a vote, it could happen under one rule, Article 121(4) or Article 121(5). If you were at the Review Session, the Resumed Session in New York, there was substantial debate over which amendment process ought to be used if there was a vote and it happened not by consensus.

So this is one of the many things to be resolved in Kampala. There are a lot of things to be discussed in Kampala, and I think the major thing, for those of you here who are all skilled international lawyers, is to see exactly what needs to be bit off at this Review Conference. The Statute of the ICC says there shall be "a" Review Conference. It doesn't say the one and only Review Conference or the last Review Conference. This is the first one, and the question is how can we produce outcomes that are successful and satisfactory to our own interests in the conference which is happening in the next few weeks.

WALD: Well, the magic hour of two has come and gone. I want to thank our participants, our high-level participants.

[Applause.]

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