

TRANSCRIPT

"THE FUTURE OF INTERNATIONAL JUSTICE"

A Conversation With David Bosco and Carlos Castresana

Moderator: James Goldston

ANNOUNCER:

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JAMES GOLDSTON:

My name is Jim Goldston with the Open Society Justice Initiative. And on behalf of the Open Society Foundation, I wanna welcome everyone here-- to this discussion of the International Criminal Court and the future of international justice.

We have-- two-- very well-positioned persons to speak on these issues. To my-- immediate right is Carlos Castresana who-- is-- a senior judicial official in Spain, has a-- career as a path-breaker-- in-- in the field of international justice. Starting back in the 1990s-- when he-- initiated some of the first universal jurisdiction litigation that spawned some of the action against Augusto Pinochet that of course in 1998 came before the House of Lords in the United Kingdom, and really-- opened a new chapter-- in the-- in the field of international justice.

And then more recently, when-- when Carlos-- served as the commissioner of the-- the-- the c-- CICIG mixed international-- national-- (NOISE) investigative body in Guatemala to investigate-- serious crimes, that itself is a-- an extraordinary-- if imperfect example of how the international community can assist in the prosecution and the investigation of these crimes.

And then-- to my far right-- David Bosco-- who is-- a-- scholar-- teaching at American University-- a frequent-- commentator and, I guess, an editor at *Foreign Policy*. And-- who is the author of-- this book, *Rough Justice*, which is-- I-- I strongly recommend

as a-- really thorough-- stock taking of the ICC's first-- 12 years or so.

Really timely and deeply, rich and penetrating, and we'll hear a little bit about it-- what it has to say tonight. So-- this is-- it's always (COUGH) topical to talk about the ICC. But it's even more topical (COUGH) this week. We've had-- a number of developments of significance just in the last-- few days.

Of course-- the prosecutor is in town to make her report to the Security Council on the situation-- in Libya. Then we've had a-- public call by 17 leading human rights organizations-- who have urged the government of Palestine to join the International Criminal Court-- raising again the specter of investigations of alleged crimes in that highly sensitive Israeli Palestinian conflict.

Then we've had the French government circulating a-- resolution-- that appears to be getting-- some backing-- (COUGH) from-- some other key-- three member states-- seeking referral of the situation-- in Syria to the ICC. And then today we've seen the announcement of the office of the prosecutor-- reopening a preliminary examination-- into alleged crimes in Iraq-- allegedly committed by forces of the United Kingdom in respect to the treatment of detainees.

So in the last week, I think there's a veritable Arab spring going on at the ICC. (LAUGH) We'll see where that goes. (BACKGROUND VOICE) (COUGH) So we're gonna conduct this in the form of a conversation. And-- we'll talk for a bit, and then we'll open up to the floor for questions-- and comments. I'd like to begin, David, with a-- question-- to you. The ICC, of course, was born-- in 1998 at a time when hopes were very, very high.

Kofi Annan who was then the secretary general of the United Nations said that the adoption of the Rome Statute was a gift of hope to future generations. And a giant step forward in the March toward universal human rights and the rule of law. In the more than-- 15 years since then-- there's been a lot of water under the bridge. The ICC is now an expensive-- complicated and very busy institution.

With investigations and examinations underway in close to 20 countries. And yet, not everyone is pleased with how things have turned out. In a recent edition of your magazine, *Foreign Policy*, a prominent observer had the following to say: "International criminal justice has ground to a halt. Although the ICC has launched a number of investigations and held a few trials, it is increasingly clear that it will never be more than a marginal institution. Only weak African countries seem to have anything to fear from it. And their leaders resent the court's nearly exclusive focus on them. Inevitably, the ICC has come to be seen as a tool of imperialists." So David, I wonder what you think. Is the ICC a giant step forward? Is it a marginal institution? (COUGH) Is it a tool of imperialists? (LAUGH) All of the above?

DAVID BOSCO:

I think maybe I would say it's-- it's a small step forward. N-- and not a-- not a giant one. I think it-- it is so complicated to try to assess the-- the record of the court.

Because as you've indicated, it is a complex record. The court has its hands in a whole range of situations.

I think the first thing we have to do is acknowledge how far the court has come. When this institution started, it started, you know, as I t-- as I talk about in the book, with basically a couple-- handful of employees (COUGH) in the Hague, buying cell phones on their private credit cards, because there was no-- funding for the institution.

This is an institution that had to build itself. And it is now a functioning institution. And a very relevant institution. And-- the other thing that I think we need to acknowledge about the court is we have to remember what the political atmosphere was like, particularly between the United States and the ICC when the court began.

This was a court that-- was-- faced hostility from the United States. One judge that I spoke to who was there at the beginning said, "We didn't know whether we were gonna survive as an institution, because we had John Boldman (PH) in Washington essentially waging war (COUGH) against the ICC." And so I think when we realize how tenuous, how fragile its beginnings were, and we realize then where we are today-- I think you have to acknowledge that its come an awful long way.

And one indication of that, I think, is that here we are in-- 2014. We've already had two UN Security Council Referrals-- in the situations of Sudan and Libya to the court. Many observers, if you had asked them in 2002, 2003, "Will we ever have a Security Council referral to (THROAT CLEARING) the court?" I think they would have been highly dubious because the United States was so hostile to the court.

Because China and Russia had their own grave misgivings about the court. And yet, here we have that having happened twice. So I think an awful lot important and-- positive has had for the court. You've seen some really important jurisprudential issues worked out between-- messily sometimes, between the prosecutor and the judges. This is a-- mixed institution where the judges have much more say over investigations than in a typical-- U.S. court, for example. And those are difficult issues that have been worked through.

And that's caused a lot of delay. But the-- that should pave the way for smoother adjudications in the future. So all of that, I think, goes on the positive side of the ledger. (THROAT CLEARING) What I think-- on the negative side, I think a lot of the investigations and cases have not been particularly well-constructed.

I-- we've seen already several investigations essentially collapse. I think it's likely well probable (SIC) see several more investigations collapse, including my guess would be the-- the-- the case against the Kenyan president-- Uhuru Kenyatta. My-- my guess would be that that will-- that will be dismissed at some point. And that will be an embarrassment. That will be a blow for the court. Not fatal, certainly, but-- but definitely a blow. And then I think, you know, on the negative side or potentially negative side, I think-- and getting to this question about kind of the imperialist quality (COUGH) of the court, I think one has to acknowledge, and I try to argue in the book, that the court has been very cautious in its first decade.

It has, I think, avoided situations, avoid investigations that were going to entangle it with major states. And so if you look at kind of what investigations the court has launched and which ones it hasn't, you find that, you know, the investigations in Africa have been launched. But, for example, Afghanistan, (THROAT CLEARING) there's been no full investigation-- although there's been thousands of civilian casualties.

No investigation in Colombia. Colombia is a d-- a complicated situation. No investigation in Palestine, no investigation in the Russian Georgia conflict. I think there's very good evidence that the court has been careful. The court is not just a judicial actor, it's a political actor. Trying to set itself up as an institution.

And-- so I think many of the criticisms you hear about the court being a-- tool of new imperialism are-- are overblown, over drawn or simply-- opportunistic. But I do think there is an element of truth there that we don't yet have an impartial standard of international justice. We have a court that has to, I think, weigh, to some extent, the geopolitical impl-- implications of its activities. And so I think that leaves us with a complex record that it's gonna satisfy some people. Will-- will-- will anger others. I think the court-- given, though, where it started, I think it's-- it's come an awful long way.

JAMES GOLDSTON:

Thank you, David, that's-- very helpful introduction to the discussion, I think. And I wanna come back to a couple of the issues w-- you raise. But Carlos, if I can turn to you and just pick up on that-- to offer any initial thoughts you may have about how the court has done in its (COUGH) first year. As David says-- (THROAT CLEARING) we don't have an impartial standard of international justice against which to measure it. So how do we assess the court's performance?

CARLOS CASTRESANA:

A very good question. Unfortunately, I would say, the best standard of international justice we have today is still Nuremberg. Nothing has been done better than Nuremberg. And a lot of water has run under the bridge from 1945. So to understand the International Criminal Court, we need to understand the Rome Statue and the situation where the Rome Statue was approved.

It was in the middle of the honeymoon between the Berlin Wall fall and between powers fall. (LAUGHTER) It was a kind of a honeymoon, because it was-- Boris Yeltsin. It was Bill Clinton. It was Tony Blair. And the situation was complete different when the Rome Statute came into force in 2002. So they had-- the honeymoon had clearly ended.

And still, in the Rome Statute, you can see clearly how it was in part-- 'cause it was of a big consensus (THROAT CLEARING) and in part a consequence of a big

compromise. So the first part, the-- the description of the crimes, the question of-- of visibility, (UNINTEL)-- the creation of the court, the organization of the court is-- is-- is almost a miracle of consensus in the international community.

The level of ratifications that they got-- was enormous in a very short term. But then you go to second part, you can see clearly that there was treaty thing. Because for the procedural issues, you have a (UNINTEL) with enormous power-- before which nobody has immunity, even acting heads of state, so a very powerful (UNINTEL). But without teeth. Because in order to implement the Roman Statute, in order to investigate, in order to prosecute, in order to arrest, in order to try, the court needs the states.

And the courts needs the other international bodies, basically the Security Council. So the best that we can do is, in my-- in my view, promising. We have been waiting more than 50 years to have a permanent international community court. (THROAT CLEARING) It was announced in the 1948-- Genocide Convention. But it was not born until 50 years late.

And after one decade of 12 years of the-- court-- working, I fully agree with David that they have made mistakes in electing the (UNINTEL) of the situation. They have been probably too much shy-- dealing with some-- situations that-- the court should have taken or the (UNINTEL) officials have taken. That the-- (COUGH) they have part of the responsibility. (THROAT CLEARING) We should find some failures in the conception of the Roman Statute itself, with a first class (UNINTEL) but a second class-- status. And then we should put part of the responsibility in the lack of cooperation of member states, non member states, and international bodies.

JAMES GOLDSTON:

Uh-huh (AFFIRM). Uh-huh (AFFIRM). Now, y-- so Carlos, y-- I mean, just picking up on your theme about the compromise, the compromises that remain in Rome, and the (THROAT CLEARING) great challenges-- that-- that created for the court to which Rome gave birth. As you said, the ICC is an institution that is deeply dependent on states and/or other institutions to get anything done, to get access to territory, access to witnesses or other evidence-- let alone to-- execute warrants of arrest for everybody whom it-- the court charges.

You have been-- in-- in situations where you've acted as an investigator and/or prosecutor. And you have not had total control of the environment in which you're working. Is there anything from that experience that is of use in, you know, in thinking about how the court should be addressing the challenges structurally that it faces?

CARLOS CASTRESANA:

Well, absolutely. I think that-- one of the mistakes that the court has done in this

ten, 12 years is basically misunderstanding, in my very personal view-- the question, the mok-- the fundamental question of complementarity. Because in most of the countries where the situations are, there is nothing like a willingness, that in-- that is nothing like a ability.

But ability and willingness can be built. I-- my experience in Guatemala was very similar to most of the situations that the office of the prosecutor has decided to follow. You could not find the reliable policemen, reliable prosecutor, reliable judges. (THROAT CLEARING) We needed to build their counterpart, to train them, to create the ability they have not. In many cases, they were involved in corrupt networks.

But in other cases, there were honest professionals that just had not the basic tools to-- to do their jobs. So they could not (UNINTEL). They could not-- and this is what happened to the office of the prosecutor. They have an enormous achievement. They have no wills. The wills are in the domestic authorities.

They can theoretically investigate, but they can't (THROAT CLEARING) (UNINTEL) take witnesses, which is basically what they are doing. (COUGH) Because if they won't (UNINTEL), if they want to intercept (UNINTEL), if they won't want banned records, if they work freezes at, (THROAT CLEARING) if they want to arrest people, if they want confiscations, they need to go to domestic authorities. So the investigations can only be built in the 21st century scientific evidence with forensics (COUGH) and with all these things, if the office of prosecutor is able to create some kind of partnership with domestic authorities.

And there have many countries, maybe not the countries where the situation is. But many other countries including member states and in some cases non member states that can cooperate and build this network that is essential. Because there is a lack of m-- capacity coming from the Roman Statute. Well, you need to be imaginative and build the-- this capacity in a parallel and an automatic way.

JAMES GOLDSTON:

Thank you very much. David, let me come back to you. And-- and you had earlier talked about the-- the challenges of the relationship with the Security Council-- and the court. And you describe-- exceptionally well in the book-- that the ICC is of course both a product of and-- to some extent at least potentially, a restraint upon the prerogative of states.

And nowhere is that duality more present than in this relationship with the Security Council. In yesterday's *Washington Post*-- (COUGH) Mark Kirsten (PH), a prominent-- commentator on the court wrote the following: "Few issues have defined the first ten years of the ICC's existence more than its relationship with the Security Council. The court was created, in part, to transcend the power politics of the council.

"To date, however, it has done quite the opposite. What's your sense of that? I mean, has the Security Council bolstered or hindered the court in its respect of its power to

refer cases or defer cases for a time or in any other way?

DAVID BOSCO:

Yeah. And it's-- and it's-- and in discussing that issue, it's r-- it's important to remember what it was like at Rome with the negotiates. And-- and the-- the issue of the relationship between the-- the Security Council with the five-- arguably the five worl-- most powerful states in the world.

And the court was-- was really central at Rome. And m-- member, the United States' position was that this court needs to be fully under the control of the Security Council. They should not be able to open an investigation, do anything without the Security Council's permission. And that view was not acceptable to the rest of the world.

And so you got out of Rome essentially a compromise, which said, "Well, the Security Council can refer situations to the court, and it can refer them for up to a year. But it-- the c-- the court is gonna be able to work independently from the council." I, in my opening comments, I mentioned that the fact that there have been two Security Council referrals is a very positive thing.

It allows the-- it allows the court to investigate (THROAT CLEARING) Sudan, the situation in Darfur. It allowed the court to investigate in Libya, where it would not, jurisdictionally, have been able to investigate absent the council. So I think that's a-- very positive thing.

I think what gets problematic is the taint of politicization that comes with the council's role. Because it is abundantly clear that it is a political calculation as to when the council decides to refer a situation and when it doesn't. Nobody could say that the gravity threshold hasn't been reached in Syria. Or that the gravity threshold wasn't reached (COUGH) in Sri Lanka. The issue, of course, is the politics (COUGH) between the permanent members of the security (COUGH) council, and whether they want international justice to play a role there. And it's not just a Russia China thing.

I think we should acknowledge, because the United States has its own calculations. And-- the United States until quite recently was very hesitant, I think, about referring Syria, because it wanted, I think, to keep all options on the table, and didn't wanna-- I think they were a little bit burned, the Obama Administration was a little bit burned by how the Libya situation played out.

And they wanted to keep their options open. I think what really gets into the craw of-- of diplomats the UN, and-- and ICC supporters is not so much the politicization of where a referral happens and where it doesn't. But it's the mechanism through which the council has referred situations. And specifically what the Security Council has done at the U.S.'s urging is that every time it's referred (COUGH) a situation, it has said A) that no UN funding may go to the court.

And that is because the U.S.-- U.S. legislation, essentially, provides that there can be no institutional support to the ICC. (COUGH) And second, each Security Council referral has precluded jurisdiction over non-member state nationals, other than the non member state that's being referred.

Which means that, you know, if an American wanders into Sudan and commits a war crime-- that American cannot be prosecuted by the ICC. And so the-- those two-- provisions are deeply problematic for supports of the ICC. And I think that's really accentuated this feeling that the council is kind of instrumentalized the court, uses it when it wants to, but then provide-- you know, imposes all of these restrictions, and moreover, doesn't provide political backing once the court is involved in a situation. So the prosecutor goes routinely to the Security Council and says, "We need your help getting-- Saif al Gaddafi turned over to the ICC."

Or, "We need your help in effectuating arrest warrants against Omar al-Bashir. And-- the Security Council members essentially say, "That's very nice. Thank you. We'll see you in six months." And they don't really do anything to-- to back up the court. So I think that's-- those elements of the relationship are really quite problematic.

JAMES GOLDSTON:

It-- it's-- it-- it-- is it just the fact of the manner in which the referral has happened? Or I think in the book you discuss the fact that some officials in the U.S., perhaps in other countries have actively sought to use referral as a means of controlling the court's docket. And-- and-- and-- and (COUGH) influencing what the court focuses on and what it doesn't focus on. Is that-- is that correct?

DAVID BOSCO:

Well, I think it's-- it's certainly the reality that whenever the Security Council refers a situation, the court has acted on it very quickly. Sudan, Libya, the court opens a full investigation, devotes resources (COUGH) to it. That consumes (THROAT CLEARING) a significant part of the court's limited resources.

Which the court-- which states keep limited, because states are very-- pay very close attention to how much money the ICC is spending and how large the budget gets. And so when you take-- when the Security Council says (COUGH) "Hey, do this investigation, and do this investigation, and use your limited resources on those," in effect, (THROAT CLEARING) what the council is doing is taking away resources from investigations that they may not want the court to do. And so I-- I don't-- I don't-- I hope I don't claim in the book that it's kind of a-- secret cabal kind of in the Security Council. You know, a p-- a plot to-- to-- to control the-- the docket of the ICC. But it's certainly in effect ends up doing that.

JAMES GOLDSTON:

Okay. I-- I-- I sur-- I don't wanna overstate (LAUGH) what you're-- what you're suggesting. But-- but thank you. (LAUGH) What-- can I just push this one-- w-- one point further just to look at the other side of the equation? How successfully the court has dealt with that challenge? Are there things could have done, should be doing, to respond to the incentives that some states have to use the Security Council mechanism in that way so as to preserve the court's institutional strength and ability to function?

DAVID BOSCO:

I would like (SNEEZE) to see-- I would have been-- I-- I think the court should be a little bit more assertive. And-- and so when a referral comes from the Security Council saying, "No funding, and-- you know, no jurisdiction over non-member state nationals," (COUGH) I would like to see court officials push back on that, and say-- not necessarily to say, "We reject the referral."

But (THROAT CLEARING) to say, "We don't necessarily consider ourselves bound by this. And moreover, the UN should be funding us. And by the way, it's not the Security Council, but it's the general assembly that controls UN funding." So I would like the court-- to be a little bit more assertive in that respect. I think the court is very cautious in the public statements that it makes, which is understandable. But I think we're getting now to a point where-- the court can probably afford to be a little bit more assertive.

JAMES GOLDSTON:

Now, Carlos-- so on the one hand-- a criticism is that the court has not been assertive enough. But on the other hand, some have suggested that the prosecutor in particular may have gone (COUGH) too far in charging-- heads of state-- with crimes. And it is suggested perhaps without-- laying a sufficient evidentiary basis or political foundation for doing so. People have talked about this in respect (COUGH) of the situation in Darfur. We've just heard about the-- the problematic Kenya case. Any thoughts about that?

CARLOS CASTRESANA:

Well, yes. Absolutely. I-- I-- I should say something before-- about this political legal-- kind of institution we have before the International Criminal Court is a court of justice. So supposedly, it's an independent and not political international body. (THROAT CLEARING) They should deal with legal cases from the legal point of view. But nobody can ignore the political implications that every case has.

For this, all usually the decisions of the prosecution obvious. But those are the decisions of the petite royal chamber. But the decisions of the court itself need to take into consideration this question of the political implications of every situation of case dictates (COUGH) or they decide not to take.

That-- having said that, the question is that creating the willingness, removing the political obstacles is not the task of the court itself. So they need to take into account being realistic what the situation is and what the political implications are. Because it's not for the court to make the choice between peace and justice.

But (UNINTEL) trying to find the balance between both, because both-- values are enormously important and should be compatible. But coming to the real situations, if they are unable to get arrest, because the lack of cooperation of member states, the court should go loud and clear before the assembly of state parties and say, "We have proof. The petite (PH) royal chamber has proof the warrant for arrest for anyone. And this and this and this member states have not cooperating for the arrest."

Or they are not cooperating for the investigation. Or we are not-- they are not providing the support we have asking them, and they have a legal obligation under the Roman Statute to cooperate. And the same thing with the Security Council. Okay, you have to refer a situation. We do the legal work. We do it professional. When we have a case, we have a warrant. And the pre-trial chamber has a proof, this (UNINTEL) warrant for arrest. It's up to the Security Council to remove the political obstacles for this arrest being effective.

Because the court has not more powers, according to the Roman Statute. Okay, you referred the situation. Now I referred you the arrest. You make this person arrested, that's (UNINTEL). Because this is the political issue. And it is you, the Security Council, who must do the necessary things for the cooperation of member states or not member state.

Because there is a decision of the Security Council and the chapter (UNINTEL) business security internationally. Now coming to your question, but I just (UNINTEL) clear to you should not try to run the (UNINTEL). It makes sense. It's normal. And the expectations about that should have been reasonable.

But maybe they have made mistakes. It's not me who have the information. So I will not have an opinion about this dead-- warrant for the arrest of Omar al-Bashir was-- granted enough or not. So the prosecutor considered that it was. And the (UNINTEL) chamber considered that it was. It's okay. But maybe from the-- prosecutorial point of view, a better idea should be beginning with low-hanging fruits. Learning by doing. And then making some progress. And then having some trials. And then trying yourself and measuring your capacities. This is something that I learned my-- when I was a (UNINTEL) prosecutor.

I went before my chief prosecutor. And I said, "I have grounds for indictment of six ministers." I says, "Son, you should learn. You can shoot a rabbit any time. Nothing will happen. And you hit him or not, nothing will happen. You can do it. But if you are shooting an elephant, you need to think twice. And you do not be shooting

unless you are sure you will hit him between the eyes." (LAUGH)

Okay, this is basic. I think that yes, probably they should have began with low hanging fruit, more easy problems. And after having a number of trial convictions, boy, it's like going to the Empire State Building. Okay, if the elevator is not working, you need to begin with the first floor. (LAUGH) And then the second, and then the third. And maybe one day you will arrive to the roof. (LAUGH)

DAVID BOSCO:

Okay. Can I make one--

JAMES GOLDSTON:

Please. Speak.

DAVID BOSCO:

--comment on that? I think this is-- this is a way in which the ICC-- struggles. And I-- I don't think that it's necessarily the fault of-- of the-- the-- the strategy. I think it's just a kind of institutional constraint, which is that the way a normal prosecutor works in a national system is that you do build cases up.

You build 'em up. And-- and you go (COUGH) after low-hanging fruit. You (THROAT CLEARING) get to mix a metaphor, you get the low-hanging fruit to turn. And then, you know, you go out-- you build up the ladder, (LAUGH) sorry. And-- and-- and you then go after the big (LAUGH) people. The problem is that the ICC has very limited resources. It has the ability to do only probably a few-- a few cases per situation. It doesn't really have the luxury of spending a decade going from the Janjaweed commander up to the political intermediary up to the minister.

It-- its mandate is to go after right away those who are most responsible for the-- for these grave crimes. And so in a sense, I think the court lacks that luxury, if you will that-- that national prosecutors have. And that leads to-- them to really pursue ambitious cases that once they come to trial, can be full of holes.

And I think really the court has had a stroke of (COUGH) bad luck, in a sense in that remember when they indicted Kenyatta and Ruto in Kenya, those people were not the president and deputy president. They were subsequently elected the president and deputy president. And the problem now, of course, is that the apparatus of the Kenyan state is being deployed to undermine, effectively, the ICC's investigations. And that witnesses are being pressured, clearly. And-- and, you know, witnesses are falling away and documentary evidence is not being made available.

And all of that because you have the ICC pitted against the Kenyan state, effectively. And-- and in a sense, you know, that wasn't the-- the court wasn't taking that into

account when it indicted these people because they weren't then in those high positions.

JAMES GOLDSTON:

If I can abuse my position as moderator just to reflect on-- on what you were just suggesting about the distinction between the way cases are built and a national-- or some national systems at the ICC. I mean, I think (COUGH) there's a lot of truth in that. (COUGH) My own sense is-- (COUGH) of course on the one-- the difference are-- are many.

But on the one hand, it-- in the national system, if you call it, (COUGH) I think it's fair to say not every system-- not-- not every case is-- an elephant. Whereas in the ICC, even low-hanging fruit, particularly in its first years, every case is an elephant. Every case is gonna be under the international spotlight.

And that's just n-- you can learn by doing it in a domestic system without doing so under enormous political constraints. But here it's a little bit harder. In addition, just as a tactical matter, the ICC lacks the formal tools that at least some d-- domestic systems, I-- I know those in the United States have to encourage the kind of prosecutorial strategy of building up within a criminal organization from the bottom to the middle to the top by getting people to cooperate as they go.

It lacks both clear carrots and clear sticks that domestic prosecutors and judges have to offer. And that's-- that's a serious issue. The new ICC prosecutorial strategy that came into force-- earlier this year actually suggests that there is an ambition to do what you suggested. And-- and take on organizations and w-- and-- and focus not only on the-- on the most responsible, but people-- b-- below the highest level of perpetrator-- as a means of-- of-- of accomplishing what you suggest.

But we'll see, in fact, if-- if-- if they're able to carry that out. Carlos, can I just pick up on-- on-- your-- your (COUGH) reference to the-- the-- the relationship between law and politics here? W-- y-- w-- y-- we've-- we've often heard when-- when-- when somebody asks-- the office of the prosecutor how, within its broad arena, they choose to pursue cases where you were talkin' about select-- selection criteria.

We often hear a standard mantra being given that-- we apply the law without political considerations. We go where the evidence leads. You've raised questions about whether that's strictly accurate, but I'd be interested in your assessment of that. And also, regardless of its accuracy, is that the right thing to say? Is that what the prosecutor has to say? (LAUGH)

CARLOS CASTRESANA:

Well, I think that yes. You need to be pretty firm in principles, but very pragmatical in (UNINTEL). Being realistic, so measuring your own (UNINTEL), first of all, measuring (THROAT CLEARING) the n-- size of the m-- defendant you can eat and

digest. The one that you can bring successfully to trial, because you cannot afford yourself acquittals. Especially in the first years.

You need to get convictions. And then you need to get cases that you can build with, successfully, in order to send the proper message. Because if you want to have some deterrents, you need to put people in jail. It is the only message that everyone understands. So basically this is, you begin with this, and especially when we are dealing with international crimes that there is always a chain of command.

And there is a commander responsibility. What makes sense is beginning with the lower level. Because if you get the lower level perpetrators in jail, convicted, they will get-- some pre-bargainings. They will plead guilty. They will help you to-- jump-- if the building, and get you arrive to the-- top of the pyramid. But if you begin with the top of the pyramid, what can person can say?

And what the convictions, what the level of evidence needed to convict the most important perpetrator (COUGH) should be? So the question is, make sense that you go step by step according to your own capacity, and according to your own possibilities, and according to the political conditions that can afford a prosecution being successful. So this is what we did with Pinochet. The problem is that Spain was more or less middle size political country with Chile similarly.

We could build with Pinochet. But we could not build with China. This is because the universal jurisdiction in Spain has just been (UNINTEL). Basically because we selected in this same-- last moment a big, bigger than the one we could eat. So basically, for the prosecution, this is the essential thing. You need to measure yourself.

I did it in the Guatemalan situation. I began with a-- chief of police. I didn't say, "Wow, it is a low-hanging fruit." I said, "Yes it is." But they want this guy convicted. And then I will go for bigger pieces, and then for bigger pieces. And finally, we put in the l-- president of the republic, and several ministers, and several (UNINTEL) men, and several businessmen. And we got extradition. And (COUGH) we got the cooperation of foreign states. But you need to de-- to-- to go to do these step (COUGH) by step. It doesn't make sense that the first day you go and-- against the head of a state. Because simply, even if you have a good legal case, the political conditions will not permit you to get the conviction.

JAMES GOLDSTON:

David, let me bring that to you, if I may. Your book is a-- in some ways, a refutation of the very popular myth, if I may, about this division between law and politics, and that law r-- retains this neutrality that is divorced from the messy political world.

We know that's-- we all know that that's not entirely true. But we like to hold that as an ideal. And your book is a-- is a fascinating analysis of how the two intersect. In some ways, to weaken the court, in some ways to strengthen the court. Do we-- I mean, (COUGH) in light of what your book shows-- do we need to rethink the

relationship between law and politics? Is that-- is that something that-- that w-- we've gotta think again? (COUGH)

DAVID BOSCO:

I think the two are obviously intertwined. And they-- they obviously influence each other. Yeah. Going-- I think-- didn't you pose the question in a really interesting way, which is does the prosecutor have to say that his or her decisions are essentially free from politics? And I guess I would say they probably do have to say that.

Even though I think it's fairly manifestly not true. There-- there's this complicated myth-making about justice that I think we kind of engage in-- where we-- we-- we insist on, you know, the ideal that it's free from politics. The reality, of course, is that there's always (THROAT CLEARING) gradations. And I think those gradations make an enormous difference. You know, there's an enormous difference between a situation where politics influences law a little bit, and-- and a situation where politics determines law. And of course that's really the-- the difference between a society that we would consider a kind of law abiding society and one that isn't.

It's not that in-- justice is pure in one case, and-- and totally impure in the other. But-- (COUGH) so I-- I think the prosecutor has to kind of-- maintain that notion that the politics plays no role. I think the public is fairly good at, if you will, kind of myth-making. Because let's talk about, I mean, you cited Nuremberg as the examp-- the-- the-- the kind of, you know, shining example of international justice.

And-- we also talk about the Yugoslav tribunal and the Rwanda tribunal as having been success-- usually successful examples of international justice. Certainly, they were the precedence that encouraged people to move toward the ICC. Where-- were-- any of those examples of impartial, pure international justice? Far from it.

Nuremberg was explicitly designed to only consider the crimes of the Axis powers.

They were often, you know, some of the crimes were ones that Allied powers had committed. There's no doubt that if you look at the state, I think, of the law before WWII broke out that carpet bombing of cities was a crime. (THROAT CLEARING) Firebombing Tokyo? Forget about the atomic bombs. (THROAT CLEARING) There were wide-spread crimes that were committed by Allied forces.

Nuremberg didn't touch those. (THROAT CLEARING) Didn't-- it was prohibited from touching those. The Yugoslav and Rwanda tribunals take-- Rwanda, for an example, there were fairly well documented crimes committed by the Rwanda patriotic front, the RPF, which ousted the genocidal regime. Now, they weren't on a scale, obviously, of those (NOISE) committed by the genocidal regime. The prosecutor of the Rwanda tribunal tried to go after RPF people. And as Carla del Ponte says in her book, "I realized-- you know, b-- basically I'd run up against the boundaries of what was politically possible."

Because the United States didn't want-- and others didn't want the tribunal going after the sitting government of Rwanda or senior people in it. And so I don't think

any of the examples of international justice that we've had are pure at all. And yet, those have been used as-- as steps, as-- as kind of buildings blocks for the ICC.

And so I think somehow, (LAUGH) and it's like all of us who work on this issue, we've-- we somehow understand that politics is gonna be there. But we understand also that nonetheless, it's worth getting some kind of impure justice-- rather than not attempting it at all.

JAMES GOLDSTON:

Wow. Okay. Excellent. Thank you. (LAUGH) Okay. You wanna add briefly to that?

CARLOS CASTRESANA:

Yes please. Because it is-- I think it is very important. This is what we need to understand. And this is if we want to build the International Criminal Court (COUGH) that is really permanent, is really effective, and it is really providing justice, which it is supposedly created for, the question is we need to make this difference between the political choice and of legal routes and the red line between one and the other isn't the-- in-- in the door of the court.

Okay? So the prosecutor, the one thing that positive is in the Roman Statute is that there is not a statute of limitations. So he has a lot of discretion to say maybe the conditions are not given enough to prosecute this guy this year. Okay, maybe next year. No problem. And he dies, you'll-- we'll go to-- with some pickle (?). And he-- (LAUGH) doesn't die, we will have some time the next year. Maybe then this year the-- political conditions have changed. So this is the kind of political discretion that the prosecutor should have and can have according to the Roman Statute.

But building a case and going to the court, they must go only with legal grounds, with evidence, building cases. No politics anymore. Beyond the door of the court, no politics anymore. Because it is the credibility of the court that is at the stake. For this and other very important issue is if we were still considering Nuremberg the most important reference of effectiveness of international justice, we need to say just until today, it is the best example that we have.

But it was victor's justice. Okay? But for the 21st century, we need to build victim's justice. This is the main difference. This is easy to prosecute anyone who has been defeated. (LAUGH) The difficult part is prosecute anyone who is still in power. But the question is that it can be long. And we have also in the Roman Statute instruments to do that. That victims participation have been-- well, let's say not very much.

Okay? Because everything is regarded. (LAUGH) Not very much. (LAUGHTER) They are just considered witnesses or their opinion is taken into consideration for reparations. But they would be like a complementary prosecutor. And they should be helped by the pre-trial chamber to compensate possible political bias of the

prosecutor.

So we need to increase enormously, because there is a provision, Article 68 of the Roman Statute, saying, "Victims have the right of participation." So 21st century should be the century of victims' justice. Not anymore the century of victors' justice.

JAMES GOLDSTON:

And-- and thank you, Carlos. In order to-- make that happen (COUGH) in the next year, are there one or two concrete things you would like to see the prosecutor of the ICC do?

CARLOS CASTRESANA:

Well, absolutely.

DAVID BOSCO:

Can we-- you go first. (LAUGHTER)

CARLOS CASTRESANA:

Can we put an example?

JAMES GOLDSTON:

Please.

CARLOS CASTRESANA:

Okay. The prosecutor has been observing Colombia ten years. I think that for preliminary examination is more than enough. In ten years you should know if the country is willing and able (COUGH) or not. The conclusion you can read in the report of the prosecutor itself that says, "Well, in some cases, they are willing and able. In some cases, they are still able, but they are unwilling."

Okay. You go there, and you see the least of the crimes of the Cabrias (PH), the list of the crimes of the Parbitalia (PH), the list of the crimes of the army, the list of the crimes of the-- narco- traffickers. And there is a clear distinction in the-- enthusiasm with which-- Colombian authorities are prosecuting the Daria (PH), the paramilitarians or the narco-traffickers in a very distinct goal, the way they are prosecuting the branch of the state, the army and the police.

In going to all the cases, there is no prosecution at all of sexual violence. Okay? So again, in a progressive interpretation of complementarity, we could say, "Okay. I take the situation of Colombia." It doesn't mean that they replace (COUGH) the domestic authorities. Because still they have their responsibility to prosecute. But as you are not prosecuting the military, I will do it.

I will take this part of the situation. And as you are not prosecuting at all sexual violence, I will take this part. Because you are not prosecuting, because anyone, the Cabria, paramilitarial army, the police, and the narco-traffickers, I'll (UNINTEL) sexual battles. I will have more than 30,000 cases of rape that have not been prosecute. So this is a case of complementarity. You continue dealing with the Cabria, you are doing very well with this. But you are not doing anything with these other cases. I will take these other cases.

JAMES GOLDSTON:

So Colombia. Thank you. David, you wanna add any thoughts on that--

DAVID BOSCO:

I think Afghanistan-- the-- this is another situation where a preliminary-- preliminary (LAUGH) examination is approaching middle age. And-- I-- I don't see-- I-- I just don't see any reason for not opening a full investigation in Afghanistan other than either kinda feasibility concerns, which aren't really provided for in the statute, or simply (COUGH) the politics of not wanting to be in a place where the NATO states that have been very important there clearly have no interest in having the ICC involved.

And-- so I think Afghanistan should be op-- you know, from the court's perspective, I think it should be opened as a full investigation. I think it would focus largely on crimes by Taliban and-- and other anti-government forces. I think there's some scrutiny-- that will be-- should be paid to-- to other forces in the country as well.

But-- I-- I-- I think that's-- that's the situation where there's no real-- legal rationale for not opening up that investigation. And I think that would help-- both Colombia and Afghanistan would help with this notion that the court can only do Africa. And-- as I've indicated, I think that's in some ways an unfair critique, but it-- but it has an element of-- of truth to it.

JAMES GOLDSTON:

And can I follow up on that? So we've got two really constructive suggestions to offer to The Hague, which is great. (LAUGH) Can I-- can I just follow (THROAT CLEARING) up, David, in asking you, based on the-- your political analysis-- in the book and elsewhere, if it-- I mean, there are many things one wants from states, of

course.

But-- is there something within the realm of political reality, as you see it, that-- (THROAT CLEARING) either the big powers could do or the middle powers who created this court were so instrumental at Rome could do that would really have a significant impact in the coming year or two, three years--

DAVID BOSCO:

Yeah.

JAMES GOLDSTON:

--that's not impossible, but would be helpful?

DAVID BOSCO:

You know, I think one of the key criticisms, of course, as we've discussed, is the Security Council's inability to follow up on-- on its referrals to give the court some political and diplomatic backing. I think (COUGH) a role that the middle powers could play-- would be to kind of come up with a to-do list for the Security Council.

And say, "Look, here's-- here are some concrete steps that the Security Council needs to take if these referrals are gonna have meaning, if the indictments that have been produced by the referrals are gonna have meaning." And-- they should essentially hold those out to the Security Council and say, "Okay, you haven't done any of these ten items that we think would be helpful for giving the court backing in Sudan or Libya. And-- you know, effectively it would be a-- kind of way of shaming the Security Council. It p-- I don't-- I don't have any illusion that it would product dramatic effects. But I think that's the kind of process-- that-- that needs to go on.

And it needs the prosecutor and the court need help from the outside. Because, you know, the prosecutor can go to the-- to the council and say, "I need help." But they're limited in what they can say. And-- and it would really help to have a-- group of other states kind of backing them up, and-- in very concrete terms. Not-- getting away from generalities and platitudes. It's gotta be concrete for it to be meaningful.

JAMES GOLDSTON:

Do you wanna address that? Any-- anything that-- that states can do-- that-- that would s-- within your notion of what is politically realistic? Or you're free to pass.

CARLOS CASTRESANA:

Uh-huh (AFFIRM). Well, I think yes. That there-- there is a group of states that are clearly-- begging for the court being effective-- protecting-- actually humanity, which is supposedly-- because the court was created. So they should promote-- the proper things to be done.

Let me offer you an example, another example. Okay, we have eight situations in the court right now. All of them are in Africa. But everyone knows that all of them are related to the illegal exploitation of natural resources. Okay? It will never change until someone that is not African is persecuted.

And you can understand the anger of African states, say, "Well, you think all is equation of Africa. And you persecute only Africans. What about the traffickers of arms and ammunition? What about the smugglers of natural resources? What about people making big business, (UNINTEL) and abetting and perpetuating the armed conflicts?" Okay? Take the Democratic Republic of Congo? But now and then prosecute an armed trafficker that is not Congolese. Maybe he's European or maybe a diamond trafficker who is buying blood diamonds knowingly.

They are financing the death of, at this point, 5.4 million people. (WHISTLE) So the media, the civil society, should do something. Because the question is basically, well, the court obviously has to win (UNINTEL), moral leadership. But for these, there should be pressure on the court, and that the court will be able to put pressure on the assembly of state parties of-- in the Security Council.

So we need to create this kind of a (UNINTEL). We can do-- we can get democratic countries that have functional judicial systems that can provide scientific evidence and experts and maybe the-- and-- and-- and (UNINTEL) these kind of things that we use daily in our domestic jurisdictions. What that be, my God, it's easy to do. (COUGH) Look at what that-- whenever-- whenever-- and you can find bank records. And you can freeze assets. And maybe someday you should prosecute someone that is not a black African. Sorry. (LAUGH)

JAMES GOLDSTON:

Okay. So thank you both. Let's-- I'd like to open this up for questions or comments from-- colleagues in the audience here. How are we-- doing this? Are folks just speaking from where they are, or do we have a mic or what?

(OFF-MIC CONVERSATION)

JAMES GOLDSTON:

So can I have a show of hands maybe? Yeah. So let me start here.

(OFF-MIC CONVERSATION)

JAMES GOLDSTON:

If you could just-- state your name and-- and your affiliation.

FEMALE VOICE:

Priscilla Hayard (PH) and I'm an independent-- something, consultant, and-- and writer. (LAUGH) Interested in-- in these issues. I was hoping you wouldn't choose me first, Jim, because I have so many questions. I was trying to-- (THROAT CLEARING) to-- to clarify them.

But I wanted to follow this strand of-- question and comment on the-- the political nature of justice, or the political role, or whether there should be a political role for an international prosecutor. And I think Jim, your questions have pushed this conversation forward. So let me pick up from there (THROAT CLEARING) to say that first of all, do you think, in fact, whether the prosecutor will admit to being a political actor, or an actor that has an impact on the-- on national politics or not, do you think that she is and previously he, if they have in fact, done a good job at taking into account these factors.

Or-- I-- if we move away from the word political, and-- and look at sort of the questions of assessing impact, Carlos, some of the things you were suggesting. Assessing the ramifications and implications of your work. I could easily make an argument that the record hasn't been so strong. So I'm curious whether you see it difficulty, even if she's not publically stating it.

And maybe as a just corollary question, it seems as if that's most obvious in this-- in the published policy statement that has been on the website for-- since 2007 from the ICC prosecutor on the interests of justice. So they have the room completely, as I understand it, dependent on how the prosecutor decides that she wants to define what the interests of justice means.

To actually open up to a broader understanding of what the role is of an international court and international prosecutor. But they continue to-- to (UNINTEL) to officially keep a very, very narrow-- understanding of that. So how do you see that? And do you see any means by which that-- definition offered by the prosecutor could be somehow brought to review in an official basis beyond actually the prosecutor's office? Is there any means by which that officially could be reviewed by the-- by the chamber. Sorry. That's a set of questions. I apologize.

JAMES GOLDSTON:

All right. That was great. That was great--
(OFF-MIC CONVERSATION)

DAVID BOSCO:

No, th-- the-- it is a great question. You know, (THROAT CLEARING) I think the prosecutor, I-- I think they've made the right decision, actually, on-- on the interest of-- there is this provision that the interests of justice can be a discretionary factor. So that even if all the other thresholds are met, the prosecutor could decide that the interests of justice aren't served by a prosecution.

And everyone's kind of been abuzz about what does that mean. And-- and the prosecutor h-- the prosecutor's office has essentially said, "Well, whatever it means, it doesn't mean politics. And it doesn't mean kind of the peace and security ramifications of a-- an investigation or prosecution." And I think that's actually correct for them (THROAT CLEARING) to say that.

Their view is, "Look, if you're worried about the peace and security implications of a prosecution, the Rome Statute has a mechanism for that. It has the Article 16 deferral process, so the Security Council can freeze a situation, an investigation, if it thinks it's getting in the way of a peace negotiation or-- or what have you."

And-- so it goes back to this question, though, of whether the prosecutor should acknowledge political factors. And I-- as I indicated previously, I think the prosecutor cannot do that. And I think trying to import that into the interests of justice-- definitionally would-- would be problematic. But I think your broader question is, so let's say that we assume that the p-- the prosecutor is a political actor in some ways.

I think the really interesting aspect of your question is, "Well, are they good political actors? Or are they not very good at what they do in-- in that respect?" And I think-- I think you-- I-- I think they're-- they're probably good in kind of the measuring the big geopolitical impact of should we do an investigation in Palestine.

And they're saying, "Well, that would fracture the relationship with the U.S., probably. And we understand that, and we've been told that by (LAUGH) the Obama Administration. And therefore, we're gonna decide that the geopolitical consequences of opening an investigation in Palestine are negative." (LAUGH) I think at that level, they're-- they're okay at-- at assessing the kind of political ramifications. When it comes down to what impact is it gonna have on the peace negotiations between the Ugandan government and the LRA as to whether we indict people in the LRA, I don't think they're equipped to make that kind of determination.

And-- and-- and, you know, in talking to some court people, and for the book research, (COUGH) one of the interesting, the-- you know, the former prosecutor actually told me this. That one of the interesting things is even if the court wanted to try to get that granular about what its political impact is gonna be, it's receiving all sorts of mixed message-- messages from the diplomats about, you know.

So you've got one diplomat telling the court, "Oh, don't do this. That'll have this effect on-- and another diplomat tells the court something completely opposite." I think the prosecutor said that on one occasion he got two phone calls from the U.S.

Government on one day about Sudan. (LAUGH) One was, "Don't go too high when you indict people." And the other was, "Go high." (LAUGH) And so, you know, there's confusion within governments about what the political impact is gonna be. And I think it's kinda hopeless for the court to try to-- (COUGH) play that out. I think at the very higher level they're-- they're savvy enough to-- to-- to understand.

JAMES GOLDSTON:

Excellent. Let's-- take some more (UNINTEL). Oh you wanna be-- you wanna come in on this? I'm sorry. Please--

CARLOS CASTRESANA:

Yes. I have something because I think it's very important that this moral level that we have (UNINTEL). And I agree also with-- David. You-- you-- you sh-- if you were the prosecutor, you are not the politician. So you sh-- you should not negotiate the cases or the accusation or the evidence.

And when you go to court, you go with legal grounds and with evidence. Okay, but before that, you cannot be naïve and need to understand the political implications. And you can get involvement in a lot of political negotiations. Everyone has enemies. So not to be naïve means that when you go to court, you try to get support from the enemies of the one you are accusing. (LAUGH)

And it works. (LAUGH) And you need to negotiate with the embassies. I did all the time-- in Guatemala. I have \$15. I report it to them. Because I was spending their money that tax payers' money. And I have to deal with the UN. I had-- I have to deal with the president. And I had to deal-- in that sense, I am a politician. I am. Absolutely.

But why? Because even if I build an extremely good case from the legal point of view, I need to remove the political obstacles before bringing this case to court successfully. Because if not, the bad guys have a lot of influence. And you need to counteract this influence.

Pinochet was very influential. We had to make a huge work with the media and the civil society and the public opinion in Spain. And the day he was arrested in London, the president of the government said, "I don't know if I will ask that extradition because maybe it is not important for Spain." And then the next day *La LaGuardia*, (PH) the most important-- newspaper in Barcelona said, "70% of the Spanish people is for the extradition." That Friday, the government ask it for the extradition. That's how it works.

JAMES GOLDSTON:

Sir, over here. Please. (THROAT CLEARING)

MALE VOICE #3:

I have another Palestinian questions. The Palestinian wants to take Israel to (UNINTEL PHRASE)--

JAMES GOLDSTON:

(UNINTEL) say your name please, I'm sorry--

MALE VOICE #3:

John Brushi, (UNINTEL). They're gonna take Israel to the (COUGH) ICC. My question is-- as a-- certain state, under the statute, they-- could they-- actually do that by joining the court as if they are in the court? How do they go about trying to get a prosecutor to open up a case against Israel in maybe a disputed area of the West Bank, where the-- the crimes have been committed?

JAMES GOLDSTON:

Add to that. David, you wanna (UNINTEL PHRASE)--

DAVID BOSCO:

Sure. Yeah. It's a great question. It's something that's been preoccupying a lot of people within the Israeli government. There's no doubt there's very serious concern about this. But the-- the situation is complicated. In 2009-- during the-- shortly after the-- Gaza conflict of t-- of 2008, 2009, the Palestinian authority, their justice minister, traveled to The Hague, and deposited what is known as an Article 12.3 declaration.

That's referencing a provision of the Rome Statue, by which any state can give the court jurisdiction over its territory, even if they are not a member of the court. And so they did that. And the prosecutor said, "Thank you," and he took that. And-- then the-- (LAUGH) the-- the prosecutor proceeded to basically think for several years about is Palestine a state?

Can I accept this? And ultimately, what the prosecutor decided was, "It's not-- it's-- it's-- it's out of my league to decide whether Palestine constitutes a state." And so they said, "We're not gonna open an investigation-- because we-- we can't determine

whether Palestine is a state." But something important happened in the interim, which is the UN voted overwhelmingly to accord Palestine the status of a non-member observer state. So now the UN general assembly has overwhelmingly classified Palestine as a state. And-- the question then becomes, well, now can the court take that previous declaration and say, "All right. We're gonna open an investigation"?

What the prosecutor has done, which is very politically savvy is to say, "Well, the situation has changed. But I'm not gonna activate that previous declaration. What I'm gonna do is say, 'Hey, Palestine, if you would like to submit a new declaration, you may do so.'" Now, Palestine, as you may guess, is under enormous pressure not to do that.

Not to give the ICC a way into the conflict. Because nobody in the west, no b-- certainly nobody in Israel wants that. And-- so pal-- what Palestine is doing is kind of holding it out there and saying, "We may join the court. You know, we may join the court." And every time, they kind of use it as a bargaining chip. But they haven't yet taken the step of submitting a new declaration that the prosecutor has-- requested.

What really worries Israel is, I think, not so much the kinda crimes that-- alleged crimes that may have occurred during, say, the-- the Gaza Offensive, or in air strikes or what have you. I think what really worries Israel is the-- settlements issue. Because if you look under the Rome Statute, k-- constructing settlements could itself be-- conceived of as a war crime.

And-- and-- and if it were conceived of as a w-- as-- if it were ruled to be a war crime by the court, what's really dangerous about that for Israel is that that policy decision goes to the very top of the Israeli government. And so you wouldn't be prosecuting the guy who, you know, at the clerk's office who gave permission for a settlement. You'd be going to the very top of the-- of the Israeli government. And that-- I think that's what makes them really nervous. (THROAT CLEARING)

JAMES GOLDSTON:

Thank. You wanna (UNINTEL) on that? Or?

CARLOS CASTRESANA:

No. I-- is the same thing. You are repeating-- or you're (UNINTEL) there's a legal question. The status of Palestine as a state or not a state is a question that we (UNINTEL) solved sooner or later. Will be a state sooner or later. And that is not a statute of limitation.

And-- yes. The settlement-- and in occupied territories is a war crime, according to the Roman Statute, also according to the addition of protocols of the (UNINTEL) conventions since 1977. And then the question is, maybe the situation cannot be taken today. But can (UNINTEL) taken in the future. Because the-- after 2002, the

court has jurisdiction. And even non member states can refer situations like-- just like Ukraine did a couple of weeks ago. Now they have Russian troops been under the jurisdiction of the International Criminal Court in Ukraine.

So the question could be, "If the-- office of the prosecutor should have been more active investigating the situation in Georgia that have been referred several years ago? Should the situation in Ukraine should have happened in these last months?" So these are the questions. So the question is, the court needs to be more effective in order to have a real deterrent effect.

JAMES GOLDSTON:

In the back please?

FEMALE QUESTION #2:

Thank you. Thank you very much for the interesting discussion. I am Laura (UNINTEL) at the United Nations. And my question is perhaps more speculative. Now we have two very recent new preliminary examinations (COUGH) concerning countries outside of Africa.

Of course, I'm referring to Ukraine and the-- treatment of Iraqi detainees by the British forces. Do you think either of these investigations or examinations, which might lead into investigations might be sufficient to remove the speaker of the ICC as the international colonial court as some have called it? Thank you.

(OFF-MIC CONVERSATION)

JAMES GOLDSTON:

So what do you think? The nucl-- the prosecutor has-- had launched preliminary examinations in Ukraine and in respect of the treatment of detainees by British forces in Iraq. And the question is, "Will-- will that opening of these investigations, or reopening in the case of Iraq, remove the taint, the stain of the-- the-- the claim that the court is focused exclusively on Africa-- and as we heard at the very beginning, some people feel is an imperialist tool?" Is it gonna-- is it gonna help the court politically that it's engaging in these preliminary examinations?

DAVID BOSCO:

I-- I don't really think so. Because there have been preliminary examinations outside of (LAUGH) Africa for years now. And-- you know, r-- really, and that's part of the critique is that, well, they stay preliminary. They-- they never become full ex-- full investigations. And so-- you know, I think it'll be-- I-- I would be s-- shocked if the

Iraq one becomes a full investigation.

The Ukraine referral, or the-- the Ukraine 12.3 declaration is actually very limited (NOISE) temporally. It's only designed to cover basically the period of the crackdown on protestors in Kiev. And it is not-- the court cannot reach current activities by-- after that point. And so-- there's nothing particularly significant about opening a preliminary examination in Ukraine whenever there's a-- 12.3 declaration or a state referral. It's standard practice to open a preliminary examination. So that's just really a routine matter. The Iraq one is a little more interesting.

Because they're reopening something that they had closed before. So that is a little bit more notable. But-- I-- I'd be surprised if either of them leads to full investigations. And therefore, I don't think it's gonna fundamentally address the-- this-- this critique.

JAMES GOLDSTON:

Let's-- take another please. Yeah.

FEMALE QUESTION #3:

Thank you. Hi. I'm Andie Hood (PH), and (UNINTEL PHRASE) response of attack. I think the question should now be preventive or the ICC in cases where atrocities are still unfolding. We saw in 2010 the office of the prosecutor (UNINTEL) in the case of Guinea, we had checked (UNINTEL) number of people seemed to have deterrent impact.

I just came back from Central African Republic. And it was really fascinating (NOISE) to hear a (UNINTEL) government official (MIC) there, were actually saying that they'd like to see the ICC more involved, more engaged, issuing more statements in that kind of preventative (UNINTEL). Is it a realistic goal for the court to play in restraining some resources, political will, I'm just curious what your thoughts are on using the court in that kind of intervention.

JAMES GOLDSTON:

Carlos, you want-- you wanna take the first crack at that?

CARLOS CASTRESANA:

Yes. Basically, this is the question, the dilemma (UNINTEL) justice. And in-- of ongoing violent situations, yes. This kind of pragmatical approach, doing what is important, what is appropriate to put an end to hostilities in a certain situation is the priority, in my view.

Because you can prosecute ten years later. You can always do. Basically yes. The intervention is, in order to help, to solve the problems, not to clear more problems that they already have in these kind of situations. So I think that they-- they-- they-- only case in which they should be very cautious is when there is an ongoing conflict, how to help to put an end to the violence. And then dealing with the justice. It can wait.

JAMES GOLDSTON:

David? What do you think? The court has (COUGH) had its challenges trying to deal with violence after the fact. Can it do much to prevent violence?

DAVID BOSCO:

Yeah. This is-- one of the really difficult questions is kind of what kind of deterrent impact is the court having? How is it affecting ongoing conflicts? And it's something that-- I think one of the kind of-- if I'm-- one of the annoying ticks of the kind of human rights community is that there is tendency to assume that all good things go together.

And therefore, (LAUGH) that, you know, well, justice is a good thing. And deterrents is a good thing. And by God, they must go together. Right? And-- and I don't think-- I think the evidence on deterrents is pretty thin. You know, Central African Republic, in a sense is itself an example of how deterrents may not work.

Because the ICC was already involved there. The ICC was-- there was already the precedent, the specific precedent of the ICC being involved in Central African Republic. Clearly, it didn't deter, you know, the violence that-- that we've seen. But then you get to this question of, "All right. When you have a situation of ongoing violence, should the court be kind of making lots of noise, and getting out there and making sure everyone's aware that what you do might be--" and that gets to a question of tactics. But also I think gets to an important question about who-- I mean, there are real (COUGH) people involved here.

And the court has to think about the safety of its personnel also. And it-- and it j-- there's an interesting echo to a criticism that Louise Arbour made of Luis Moreno Ocampo during the Darfur investigation. Where basically Louise Arbour said, "You can't be conducting this investigation from outside of Darfur," which is what the court was doing.

"You need to be in there. You need to be physically a deterrent. You know, by your presence. You know, that justice is walking around. And-- and the p-- perpetrators need to know that." And that's a little bit easy to say from the outside. It's a little bit harder when you're somebody who's responsible for the safety of court personnel. And if you just kinda have court personnel wandering around some of these conflict zones, you know-- that's a-- that's a hard-- that's a hard thing to ask of people. So I

don't know if that's a-- that's more of a rumination than an answer.

JAMES GOLDSTON:

That's excellent. So I think-- oh, you wanna come in on this? (UNINTEL)--

CARLOS CASTRESANA:

No, let me on this detail. This is one of the cases where the cooperation to the court and the Security Council should be clear examples. Okay? You refer a situation. I need to go there to investigate the situation. And you cannot investigate from The Hague, situation that-- that happened in-- in Darfur. But then the Security Council, whoever referred the situation should provide that protection. Makes sense. So you give me a task, and you help me to fulfill my duties.

DAVID BOSCO:

Yeah.

CARLOS CASTRESANA:

So send in the investigator with their blue helmets. It's (UNINTEL). But if you give me the responsibility to make justice in Darfur, you need to help me to do it. I will do my part, the legal one. But the political one is yours. And if there is security issues, it's yours.

JAMES GOLDSTON:

Excellent. So-- I think we're gonna have to wrap it here. We've got some-- great recommendations for various parties. I hope this has been a-- (THROAT CLEARING) useful-- series of insights that has gone beyond-- myth-making. Though that's always fun. I wanna thank David Bosco. I wanna thank Carlos Castresana-- and again, read-- read the book. And-- look at that website. And keep-- keep-- keep w-- and-- and there's drink and food outside. Thank you very much. (APPLAUSE)

* * *END OF TRANSCRIPT* * *