# Roundtable Discussion

**Approaching the Review Conference in Kampala:**
**The International Criminal Court – Achievements and challenges**
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**Programme Chair: Bettina Ambach**

# Informal summary

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## Relationship between the US and the ICC:

Mr Buchwald described the uneven relationship between the US and ICC over the years as initial support for establishment of the Court gave way to the decision at Rome not to sign, to the decision to sign in 2000, to the decision to "un-sign" in 2002, leading to a period of significant international friction. But there was change in the second half of the Bush Administration, beginning in particular with the decision to allow adoption of UNSC resolution 1593, but also in other events such as the US decision to stand alone opposing the Security Council resolution in summer 2008 that would have signalled possible willingness to consider an Article 16 deferral of the Sudan prosecution.

Beneath the surface one can discern different strands in American political life that make this a very complicated issue. These strands include longstanding efforts of the US to protect its military forces serving overseas from foreign jurisdiction (dating back at least to the 1950's and the negotiation of status of forces that would often present delicate issues in relations with countries in which US military personnel were present), but also include a very significant political strand in the US of emphasizing that those responsible for perpetrating atrocities must be held individually accountable (reflected in the US role in the Nuremberg and Tokyo tribunals and strong US support for the ad hoc tribunals).

In any event, President Obama, Secretary of State Clinton and Ambassador Rice are all committed to the principle that the US should be engaged internationally – this is true not only for the ICC, but also in other areas, such as with the re-engagement with the Human Rights Council – the entire tone reflects this approach. In this connection, the US sent a large

delegation to the Assembly of States Parties in The Hague in November 2009 - the first time the US attended a meeting of the ASP. As Ambassador for War Crimes Stephen Rapp said: “We came here to listen and to learn”.

Although it is true that US policy towards the ICC is under review, there is unlikely to be a big fat policy paper with specific answers to all the issues that will arise over the next months and years; rather what happens will depend on how events will unfold (as is in fact typical for the way government policies evolve).

People often ask whether the US will become a party to the Rome Statute, but for now that does not seem likely. But what the US is doing right now is working to build a more constructive relationship. The US plans to participate again in New York in two weeks and again in Kampala in May/June of this year.

## On the crime of aggression:

Mr Buchwald began by explaining that the US has concerns about the definition itself. The package that the Special Working Group has put forward actually contains two definitions: the state “act of aggression” and the individual “crime of Aggression”. Both definitions raise questions at which the US is continuing to look.

There are significant questions about the definition of the state “act of aggression,” including whether it comes too close to equating any illegal use of force with aggression. The US thinks this would not be consistent with international law and that it does not reflect the definition adopted by the General Assembly in resolution 3314 (1974), upon which the Working Group’s definition is based.

With respect to the definition of the “crime of aggression”, the US has various questions, including about the use of “*manifest* violation of the Charter” as a relevant threshold. In discussing this with people involved in the negotiating process, the US has received different explanations of what that means – a fact which by itself is a source of concern. To their ears “manifest” violation of the Charter means a “*clear”* violation of the Charter; any illegal use of force would be a *clear* violation of the Charter, but a violation could be clear without being significant, and constituting what should be characterized as “aggression”.

There are also questions about how such a provision might have affected events in a situation like Kosovo. Indeed, to this day, many people think the Kosovo campaign was a manifest violation of the Charter. It is worth

noting that, in fact, many of the European countries involved in Kosovo did not at the time put forward an international legal justification for their actions.

It is also important to consider that, unlike how many people anticipated would be the case, most of the activity of the Court takes place during ongoing conflict. What will happen if a crime of aggression is prosecuted during ongoing conflict? Is aggression in fact like war crimes, crimes against humanity and genocide in the unwillingness of the international community's to put such issues behind us in negotiating peace agreements to ongoing conflicts. One has to think about the effect prosecuting aggression during ongoing conflict might have on efforts to promote peace and stability. The prosecution of aggression in the Nuremberg and Tokyo trials took place in a very different environment from what might be envisioned now.

There are questions – including from people very sympathetic to the Court – about the risk of politicizing the Court. Can you in fact prosecute the crime of aggression without being put in a political situation? The whole mode of operation of the International Committee of the Red Cross is to refrain from saying who was right and who was wrong in resorting to force, and focusing instead on the fact that both sides must abide by the basic rules, not committing war crimes etc. But what happens when you put the Court in the position of saying: one side is right, one side is wrong? What happens when you have two sides each one of which is accusing the other side of being the aggressor? The Prosecutor has to make its decision and whichever decision he makes will be seen as political by one side or the other. It will in fact be very difficult for the Prosecutor to stay above politics and be seen as unbiased.

Making a reference to the Bashir case, he said that it may be unavoidable for a court at times to become embroiled in political issues. The point is that in the case of aggression, every case will be like that.

On the issue of complementarity: how would the complementarity principle actually work in connection with the crime of aggression? It is true, as we have heard, that there is in German law a domestic crime of aggression, which comes out of Germany's historical experience in World War II, but in fact it has been very rare for countries to have domestic legislation to prosecute aggression. What would incorporating these amendments into the Rome Statute mean? Would the 110 Rome Statute States now need to incorporate aggression laws into their domestic law, and is this what the international community really wants? It is not obvious to the US that this

is a path that would breed stability, either for international peace and security or for the Rome Statute System itself.