



The European Law Students' Association

ELSA INTERNATIONAL DELEGATION

## REPORT

### **On the Fifth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court**

The Hague, The Netherlands

23 November – 1 December 2006



ELSA INTERNATIONAL  
2007

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## LIST OF ABBREVIATIONS

Assembly - Assembly of States Parties to the Rome Statute of the International Criminal Court  
Coalition - NGO Coalition for the International Criminal Court  
Committee - Committee on Budget and Finance  
Court - International Criminal Court  
Plan - Strategic Plan of the International Criminal Court  
SC - UN Security Council  
SWGCA - Special Working Group on the Crime of Aggression

## INTRODUCTION<sup>1</sup>

The Fifth session of the Assembly took place in The Hague, the Netherlands, on 23 November – 1 December, 2007.

The perception could probably have been that the Assembly at its previous sessions – under close monitoring of ELSA International’s delegations<sup>2</sup> – has already done everything really significant, which it should have done at the initial stage of the Court’s functioning, in particular, it has adopted important legal texts required by the Rome Statute, such as the Rules of Procedure and Evidence and the Elements of Crimes,<sup>3</sup> or the Code of Professional Conduct for counsel<sup>4</sup> and the Regulations of the Trust Fund for Victims,<sup>5</sup> and would now deal with routine issues, such as financial matters and elections; consequently, the focus of attention of the international legal community would switch from the World Forum Congress Centre to another side of The Hague,<sup>6</sup> to *The Arch* building where in the brand new Courtroom I the confirmation of charges hearings in *The Prosecutor v. Thomas Lubanga Dyilo*<sup>7</sup> – first case ever before the Court – were underway.

However, there are still many new issues of enormous importance for the future of the Court to be considered by the Assembly. The Fifth session of the Assembly – which may be entitled as “Battle for Outreach” – will be remembered for detailed discussions of nature and role of this segment of the Court’s activities. The Strategic Plan of the Court was also thoroughly considered. Of course, the Assembly had to draw its attention to the forthcoming Review Conference, in particular, a definition of the crime of aggression which hopefully will be adopted there. Finally, the budgetary process remains one of the most time-consuming issues at the Assembly, in constant strife for the Court to provide “value for money”. All these issues will be analysed in detail below.

The Assembly has also decided, on the issue of the permanent premises,<sup>8</sup> to request the Court to focus on the option of new purpose-built premises on the *Alexanderkazerne* site – the bid proposed by the host State. However, the Assembly reserved its right to make a final deci-

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<sup>1</sup> By Sergey Golubok (ELSA Russia – Head of Delegation); special thanks to Julianna Koppány, Vice President Seminars & Conferences of ELSA International 05/06 and head of ELSA Delegation to the Fourth session of the Assembly, for her very helpful support in editing this report

<sup>2</sup> For the most recent report see:

<https://www.elsa.org/aieh4925y980ppqq2/EI%20Delegations/Reports/ICC/DRAFT%20ASP%20REPORT%202005.pdf> (4th session, 2005) (“ELSA Report from the 4<sup>th</sup> ASP session”)

<sup>3</sup> ICC-ASP/1/3

<sup>4</sup> ICC-ASP/4/Res.1

<sup>5</sup> ICC-ASP/4/Res.3

<sup>6</sup> *Cecilia Nilsson Kleffner*, ASP Overview: While the ICC Remains Busy on One Side of The Hague, States Parties Will Meet on the Other Side, 33 *The Monitor*, Newsletter of the NGO Coalition for the International Criminal Court (2006), at 3

<sup>7</sup> Case ICC-01/04-01/06

<sup>8</sup> ICC-ASP/5/Res.1

sion on this matter at the later juncture. It also approved the Headquarters Agreement with the host State<sup>9</sup> and elected members of the Board of Directors of the Trust Fund for Victims.<sup>10</sup>

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<sup>9</sup> ICC-ASP/5/Res.3, Annex II

<sup>10</sup> ICC-ASP/5/32, para.35

## OUTREACH<sup>11</sup>

The Strategic Plan for Outreach<sup>12</sup> of the Court was developed following a request in the “omnibus resolution”<sup>13</sup> of the Assembly’s Fourth session. In 2005, outreach and communications were for the first time on the agenda of the Assembly. Sierra Leone, Germany and Belgium convened a joint hearing to discuss the importance of outreach for international justice institutions.

The first ever Court’s “Strategic Plan for Outreach”<sup>14</sup> has been prepared by the Court and presented to States and NGOs on 29 September 2006. It outlines the Court’s vision of its outreach programmes in general and in three situation countries in particular – the Democratic Republic of the Congo (DRC), Uganda and Darfur, Sudan. It is designed to be an evolving document to be evaluated and adapted to the Court’s needs.

Due to its importance, outreach has been on the Assembly’s agenda during the budget discussions, the “omnibus resolution” and the strategic plan sessions. In particular, following the suggestion made by the Australian delegation, references to the communications and outreach strategy were integrated in the “omnibus resolution”.

Starting the General Debate and Budget discussions, at the opening plenary of the Assembly’s Fifth session on 23 of November 2006, both the Prosecutor Luis Moreno-Ocampo<sup>15</sup> and the President of the Court, Judge Philippe Kirsch<sup>16</sup>, have been emphasizing the need for resources for outreach.

Bruno Cathala, Registrar of the Court, intervening on the next day, affirmed: “People from the affected communities shall understand what the Court is about, not to be remote from the people whom it is supposed to be serving. We need to explain the international criminal justice system to the population of countries like the DRC, which is alone several times bigger than Germany”<sup>17</sup>.

Outreach has been proven to be a key concern not only for the Court itself, but also for many States Parties, as reflected in their statements at the Assembly. In his statement in the general debate on 23 November 2006, H.E. Allieu Ibrahim Canu, Representative of Sierra Leone

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<sup>11</sup> By Cristina Ganguzza (ELSA Italy)

<sup>12</sup> Outreach is one specific facet of the external communications of the Court. It means to engage communities in situations under investigation in a process of constructive interaction with the Court (two-way communication). Outreach aims at promoting understanding and support for the Court’s mandate, managing expectations and enabling affected communities to follow and understand the international criminal justice process, so that it can contribute to strengthening the rule of law

<sup>13</sup> ICC-ASP/4/Res.4, para.22

<sup>14</sup> ICC-ASP/5/12

<sup>15</sup> Statement by Luis Moreno-Ocampo, Prosecutor of the Court, available at the Court’s website: [http://www.iccnw.org/documents/LMO\\_20061123\\_en.pdf](http://www.iccnw.org/documents/LMO_20061123_en.pdf), at 7

<sup>16</sup> Statement by Philippe Kirsch, President of the Court, available at the Court’s website: [http://www.iccnw.org/documents/PK\\_20061123\\_en.pdf](http://www.iccnw.org/documents/PK_20061123_en.pdf), at 5

<sup>17</sup> Statement by Bruno Cathala, Registrar of the Court, available at the Court’s website: [http://www.icc-cpi.int/library/organs/registry/BC\\_20061124\\_fr.pdf](http://www.icc-cpi.int/library/organs/registry/BC_20061124_fr.pdf), at 4

and the outreach champion, stated: “We need Court outreach staff on the ground... The Court needs a public face and that face must be the Outreach department... This is not a luxury: this is a necessity for the ICC.”<sup>18</sup>

Although outreach could benefit from a widespread support, the Committee suggested in its recommendations<sup>19</sup> to cut the expenses on outreach proposed in the draft budget prepared by the Court’s Registry. The Committee seemed particularly concerned by the lack of a “system for determining the levels and extent of engagement required for the target audience, or any process to evaluate whether that had been achieved”.<sup>20</sup>

These concerns, also shared by some States (such as the United Kingdom), have been expressed and discussed at the Informal hearing on Outreach, organised on 27 November, 2006, by the delegations of Belgium, Canada, Colombia, Finland, Germany, Italy, the Netherlands, Sierra Leone, Spain, Uganda and the United Kingdom. At this meeting the Court was represented by Bruno Cathala, Registrar of the Court. Many NGOs attended the Informal hearing, showing the interest they put in the issue.<sup>21</sup>

Most of the Budget and Finance working group formal discussions on 29 November, 2006, focussed on outreach provisions. The Coordinator of the Budget working group proposed that certain items (translation costs and the Victims and Witnesses Unit) should have been absorbed by the Court through flexibility, while the Assembly would grant the requested resources on outreach. However, some States asked that outreach be also absorbed through flexibility in programme budget III, while other States maintained the importance of reinstating this resource request (especially the African countries, with Sierra Leone and Uganda against any compromise). Finally, at 10pm, the Assembly decided to reinstate the Court’s budgetary request regarding the outreach.

On 1 December 2006 the Assembly adopted the resolution on the strategic planning process of the Court<sup>22</sup> which has references to the Court’s Strategic Plan for Outreach. The Assembly has also indicated in its ‘omnibus resolution’ that it “[r]ecognizes the importance for the Court to engage communities in situations under investigation in a process of constructive interaction with the Court, designed to promote understanding and support for its mandate, to manage expectations and to enable those communities to follow and understand the international criminal justice process and, to that end, *encourages* the Court to intensify such outreach

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<sup>18</sup> Statement of Sierra Leone at the general debate at the fifth session of the Assembly, available at the website of the Court: [http://www.icc-cpi.int/library/asp/ICC-ASP5\\_Statement\\_sierraleone.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP5_Statement_sierraleone.pdf), at 2-3

<sup>19</sup> ICC-ASP/5/23, para.77

<sup>20</sup> Ibid, para.31

<sup>21</sup> Particularly active on this topic was “No Peace Without Justice”. However, all NGOs have put much effort to keep sustained focus on the topic

<sup>22</sup> ICC-ASP/5/Res.2

activities, including through the implementation of the Strategic Plan for Outreach of the Court".<sup>23</sup>

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<sup>23</sup> ICC-ASP/5/Res.3, para.20

## STRATEGIC PLAN<sup>24</sup>

The Plan was developed following a request of the Committee.<sup>25</sup> The Plan is not adopted by States Parties, however, States Parties and other relevant actors are invited to present comments regarding this Plan to the Court which remains its sole owner.

In May 2006 the Court engaged in a consultation process with NGOs and States Parties on this matter and on 4 August 2006 it issued the first *Strategic Plan of the International Criminal Court*.<sup>26</sup> The Plan is intended to be a key management instrument that allows the Court to realise the aims of the Rome Statute, to identify clear divisions of labour between the Court's different units and to ensure consistency between long-term goals and short-term action.<sup>27</sup> It provides a common framework for the Court's activities over the next ten years, although there is a specific indication on the three years objectives.

The Plan contains the Court's mission statements and vision, and it consists of three strategic goals:

1. Quality of justice;
2. A well-recognized and adequately supported institution; and
3. A model of public administration.

In order to reach these goals, the Plan has set 30 strategic objectives.

Even if it is clear that the Assembly should respect the Courts' independence and, therefore, the Court should retain ownership of the Plan,<sup>28</sup> the Assembly is in a position to continue to play a fundamental role in encouraging the Court to carry on this process. While recognising that the Court retains exclusive control over the Plan, States Parties and the Assembly can and should provide the Court with feedback and input on it. Furthermore, the Plan is also an important vehicle through which States Parties and the Assembly can have appropriate and crucial substantive dialogue with the Court about its policy and practice.

At the opening plenary of the Assembly's Fifth session on 23 November 2006, President of the Assembly, H.E. Mr. Bruno Stagno Ugarte (Costa Rica) presented the Report of the Bureau on the strategic planning process of the Court<sup>29</sup> as part of the items critical for the Court. A number of States Parties included references to the Plan into their statements and welcomed the efforts made by the Court so far.

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<sup>24</sup> By Rebeca Cenalmor Rejas (ELSA Spain)

<sup>25</sup> ICC-ASP/3/18, para.46

<sup>26</sup> ICC-ASP/5/6

<sup>27</sup> ICC-ASP/4/2, para.40

<sup>28</sup> ICC-ASP/5/1, para.56

<sup>29</sup> ICC-ASP/5/30

In the general debate carried out at the opening plenary<sup>30</sup> States Parties - Australia, Finland (on behalf of the European Union), Spain, Ireland, Jordan, Germany, Ecuador, Argentina, Colombia, Italy and Mexico - welcomed the development of the Plan and congratulated the Court for developing it. States Parties considered the first edition of the Plan as a vital experience for the Court in realizing its aims. It was also indicated that the Plan was perceived as one of the priorities at the Fifth session of the Assembly.

On 24 November 2006 the general debate which has been initiated on the previous day continued. The Plan was again positively mentioned in the statements made on behalf of other States Parties, including Portugal, South Africa, United Kingdom of Great Britain and Northern Ireland, Norway and Austria, as well as in the speeches of NGOs which were given an opportunity to address the Assembly (the Coalition for the International Criminal Court, the DRC National Coalition for the International Criminal Court, Parliamentarians for Global Action, the Darfur Consortium, Human Rights Watch, International Criminal Bar, International Federation for Human Rights, International Society for Traumatic Stress Studies).

There were informal consultations on the strategic planning process of the Court on 27 November 2006, chaired by Ms. Michèle Dubrocard (France). The coordinator raised five issues for consideration: (1) the venue of the work's activities; (2) the role of victims, including participation and reparations; (3) the importance of outreach; (4) positive complementarity; and (5) how to link the budget to the Plan. The coordinator then went on to consider the draft resolution on this matter, with much discussion on whether the Plan deserves a separate resolution or should be part of the "omnibus resolution". Finally, it was decided that this resolution would remain separate.

At the plenary on 30 November 2006 the Plan was discussed in the framework of the consideration of item 19 of the agenda.<sup>31</sup> Ms. Dubrocard (France), focal point on the Plan, has presented the outcome of the informal consultations on the Plan. The discussion at this meeting was based on the relevant report of the Bureau.<sup>32</sup>

Some delegations suggested that resolution on the Plan should be integrated in the "omnibus resolution" in order to avoid the proliferation of resolutions and not to give the impression that the Plan was of greater importance than the other points of the "omnibus resolution". However, a majority of delegates were in favor of maintaining a separate resolution on the Plan.

Following the suggestion made by the Australian delegation, references to the sectorial strategies were integrated in the resolution: on the one hand with regards to the communica-

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<sup>30</sup> List of speaker and texts of their statement at the general debate on 23-24 November 2006 are available at the official web-site of the Court: [http://www.icc-cpi.int/asp/documentation/5thsession\\_stat.html](http://www.icc-cpi.int/asp/documentation/5thsession_stat.html)

<sup>31</sup> ICC-ASP/5/11/Add.1, at 12-13

<sup>32</sup> See supra note 29

tions and outreach strategy, and on the other hand with regards to the Court's strategy on information and communication technologies, as well as the prosecutorial strategy.

Many delegations have emphasized the importance in the future of the place of the Court's activities as well as the appropriateness of *in situ* proceedings with the view to make justice more visible to the affected communities falling under the jurisdiction of the Court. Consequently, the relevant paragraph of the draft resolution under consideration has been amended.

At the plenary on 1 December 2006 the Assembly adopted resolution on the Strategic Planning process of the Court<sup>33</sup> which cited appreciation of the efforts made by the Court to establish the Plan, as well as the Strategic Plan for Outreach, and the Strategy on Information and Communication Technologies. The Assembly invited the Court to further develop dialogue on these strategies, specifically on the concrete implementation of the Plan, including cross-cutting issues, such as location of the activities of the Court, position of victims, outreach and communication activities of the Court, and the relationship between the Plan and the budget, and to submit an update on this plan to the next session of the Assembly.

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<sup>33</sup> ICC-ASP/5/Res.2

## REVIEW CONFERENCE<sup>34</sup>

According to Article 123(1) of the Rome Statute, a Review Conference shall be convened by the UN Secretary-General seven years after the entry into force of the Statute. To prepare such a Review Conference, some time is needed. Therefore, the Coalition urged the Assembly to intensify their deliberations and preparations for this purpose. In the first provisional agendas of the Fifth session of the Assembly the Review Conference was not an item, but finally 90 minutes for informal consultations on this topic were included. In these consultations the interest of States Parties to speak about the Review Conference has been shown and in the end of the day not even every State Party has had the time to present its consideration. That showed the importance to address this issue already at this (fifth) session of the Assembly.

Nevertheless, the Review Conference is now on the schedule. A preliminary paper, prepared by Mr. Fife (Norway) who was appointed a focal point for the Review Conference at the Third and Fourth sessions of the Assembly, served as a basis for discussions.<sup>35</sup> Mr Fife also led the informal consultations on the Review Conference at the Fifth session of the Assembly. He stressed the necessity for due caution in preparing the Review Conference and the limited basis for amendments to the Rome Statute, because there is not enough practice of the Court's work so far. Two questions should be distinguished: on the one hand, technical matters, such as the rules of procedure of the Review Conference, and financial and administrative issues of its organisation; and, on the other hand, substantive, i.e. the scope of the Review Conference, in particular the subject-matter of its agenda.<sup>36</sup> Above all, this distinction is a practical one and has no strict implications. Therefore, two suggestions may be forwarded to the Assembly and its Bureau. First, to decide on establishing a new working method by a working group for technical issues (rules of procedure, budgetary and administrative planning), and second, to the Secretariat of the Assembly to prepare basic documents on rules of procedure and budgetary and financial implications of holding the Review Conference, especially to illustrate a couple of scenarios on venue (The Hague, New York or elsewhere), duration (one or two weeks) and scope with the organisational capacities and resources expected. Those documents should be available before the Committee at its session in April 2007. Finally, Mr. Fife stressed the high importance of NGO participation in this process and their ability to provide a lot of input for and at the Review Conference.<sup>37</sup>

Another starting point for discussions and first deliberations was the outcome of an International Retreat on "The Future of the International Criminal Court" held by the Austrian

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<sup>34</sup> By Andreas Schüller (ELSA Germany)

<sup>35</sup> ICC-ASP/5/INF.2

<sup>36</sup> See also *ibid.*, para.23

<sup>37</sup> *Ibid.*, para. 26

EU Presidency in cooperation with the Salzburg Law School earlier in 2006.<sup>38</sup> Austria stressed that the Review Conference should be more than proposing amendments to the Rome Statute, in particular an opportunity for stock taking, support showing and celebrating the Court.<sup>39</sup> Through these opportunities, the media attention should be caught and the outreach of the Court should be supported.<sup>40</sup>

Then a number of substantive issues were raised by several States Parties, including:

- Discussions on non-cooperation of States Parties and its consequences;<sup>41</sup>
- Questions of reservations;<sup>42</sup>
- Discussions about the “peace-and-justice dilemma” and possible guidelines for the Court how to proceed in such a situation;<sup>43</sup>
- The compulsory review of Article 124 of the Rome Statute;<sup>44</sup>
- The adoption of a provision on the crime of aggression in accordance with Article 5(2) of the Rome Statute;<sup>45</sup>
- The implementation of other crimes<sup>46</sup> such as the drug crimes,<sup>47</sup> the crimes of terrorism<sup>48</sup> or special provisions on the prohibition of certain weapons;<sup>49</sup>
- The circumventing of the subsidiary principle by a domestic trial with a judgment followed by the amnesty;<sup>50</sup>
- Recommendations to State Parties for the implementation of the provisions of the Rome Statute in national laws to be able to apply the principle of complementarity;<sup>51</sup> and
- Article 98 (2) of the Rome Statute and the pressure of the United States on certain States to sign bilateral immunity agreements.<sup>52</sup>

Decisions on technical issues, in particular those connected with the questions of budget, date, duration and venue of the Review Conference, could already be necessary by the time of the next session of the Assembly.<sup>53</sup> In particular, the SWGCA needs to know the timeline to or-

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<sup>38</sup> <http://www.sbg.ac.at/salzburglawschool/Retreat.pdf>

<sup>39</sup> by Austria and New Zealand; see also ICC-ASP/5/INF.2, para.12

<sup>40</sup> by Austria, Namibia, Greece and Italy

<sup>41</sup> by Austria

<sup>42</sup> by Austria and Italy

<sup>43</sup> by Austria and Italy

<sup>44</sup> by Austria and Belgium; see also ICC-ASP/5/INF.2, para.7

<sup>45</sup> by Austria, Belgium, Spain, Cyprus and Greece; see also resolution F, para.7 of the Final Act of the Rome Diplomatic Conference and ICC-ASP/5/INF.2, para.9

<sup>46</sup> by Austria and Cyprus

<sup>47</sup> by New Zealand, Trinidad and Tobago, Cyprus and Italy; see also resolution E of the Final Act of the Rome Diplomatic Conference and ICC-ASP/5/INF.2, para.8

<sup>48</sup> by New Zealand, Italy and Greece; see also resolution E of the Final Act of the Rome Diplomatic Conference and ICC-ASP/5/INF.2, para.8

<sup>49</sup> by Spain and Greece; see also ICC-ASP/5/INF.2, para.15

<sup>50</sup> by Austria

<sup>51</sup> by Mexico

<sup>52</sup> by Benin and Trinidad and Tobago

<sup>53</sup> by Austria

ganise their schedule, since it is now referring to the “omnibus resolution” adopted at the Fourth session of the Assembly with an envisaged Review Conference in mid-2009.<sup>54</sup> The venue for the Review Conference should be open to every region, not only The Hague and New York, but certainly financial and administrative matters have to be taken into consideration.<sup>55</sup> As regards the date, some States Parties<sup>56</sup> read Article 123 of the Rome Statute in the sense that the Review Conference shall take place in 2009, other States Parties<sup>57</sup> interpret this article more flexible and argue that only an invitation (“convene”) shall be announced in 2009, but the Review Conference itself could also take place in 2010. Moreover, the question was raised, whether the Court itself can propose amendments to the Rome Statute.<sup>58</sup> Finally, the States Parties agreed that only issues that are really needed should be raised at the Review Conference to avoid “Trojan horses” which might undermine the integrity of the Rome Statute.<sup>59</sup>

The Assembly adopted then the following paragraph regarding the Review Conference in its “omnibus resolution”:<sup>60</sup>

*“The Assembly of States Parties,*

...

47. *Takes note* of the preliminary report by the focal point on the issue of the Review Conference, under article 123 of the Rome Statute, and *requests* the Bureau to start preparation of the Review Conference, in particular on the issues of the rules of procedure applicable to the Review Conference and on practical and organizational issues, especially as regards dates and venue of the Review Conference, and to report to the next regular session of the Assembly of States Parties on the status of such preparations; ...”

With this outcome the Assembly avoided to request concretely the establishment of a working group or any other subsidiary body on the Review Conference which could be convened and work in a more focussed manner on this matter. The emphasize on practical and organizational issues may reduce the progressive work on substantial matters that also requires a lot of time as one can see in the work of the SWGCA. Left-over crimes from the Rome Diplomatic Conference, such as drug trafficking and terrorism, which can be better dealt with within an international institutional context, certainly need a lot of preparation time due to their controversial nature.

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<sup>54</sup> by Liechtenstein

<sup>55</sup> by Austria, New Zealand and Sierra Leone

<sup>56</sup> including Mexico and Sierra Leone

<sup>57</sup> including the Netherlands

<sup>58</sup> by South Africa

<sup>59</sup> by Austria and Spain

<sup>60</sup> ICC-ASP/5/Res.3

There was no deadline set for the submission of proposals of amendments, as suggested by the Coalition to clarify the process towards the Review Conference. The question how a provision on the crime of aggression will be included in the Rome Statute is still unclear and waiting for clarification by the SWGCA or the Bureau of the Assembly in preparing the Review Conference.

To sum up, the practical preparations for the Review Conference (to be held in 2009 or 2010) are delegated by the Assembly to its Bureau. However, substantive issues remain for the State Parties to be prepared. Many small but important questions are still open and now up to the Bureau of the Assembly to solve them in an appropriate manner until the sixth session of the Assembly in 2007. Every actor should have in mind the close timeframe to the Review Conference.

## CRIME OF AGGRESSION<sup>61</sup>

The SWGCA held its third informal inter-sessional meeting on 8-11 June 2006 at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States of America. Ambassador Christian Wenaweser (Liechtenstein) chaired the meeting. The report of this meeting<sup>62</sup> was the basis for further discussion of this Working Group during the Fifth session of the Assembly.

In furtherance of the previous inter-sessional meeting in 2005 it was decided to focus the work in Princeton on three main issues: (a) defining the act of the State; (b) conditions for the exercise of jurisdiction under Article 5(2) of the Rome Statute by the Court; and (c) the individual's conduct. Particular attention was devoted to issues identified in the three discussion papers<sup>63</sup> submitted through the virtual working group, however, the Chairman reminded the participants that the work of the SWGCA is based on the "2002 Coordinator's paper".<sup>64</sup>

(a) During the previous inter-sessional meeting there was a preference among the delegates for a generic definition of the (State) act of aggression.<sup>65</sup> However, in the 2006 meeting it was pointed out that the generic and specific approaches could easily be combined by including a general chapeau and a non-exhaustive list of acts. Much of the debate in this context focused on the articles of the UN General Assembly Resolution 3314 (XXIX) ("GA Resolution"). Many of the participants preferred to retain the notion of "act of aggression" in paras.1 and 2 of the 2002 coordinator's paper and the reference therein to GA Resolution. The views of the participants varied as to which combination of articles of the GA Resolution is most feasible to the Court. Some delegates argued that the GA Resolution is a political document and therefore it should not be used to define the State act of aggression, at the most it could serve as a guideline to establish a definition for the purposes of the Court. Furthermore, the view was expressed that a too generic approach will contradict the principle of legality. On the other hand, the problem was recognized that a list of specific acts will give rise to difficulties of determining so-called 'grey zone cases'. Article 1 of the GA Resolution uses the term "use of armed force", however, it was argued that Article 4 lacked the degree of specification which is required in the context of individual criminal responsibility.

(b) Regarding the conditions for exercise of jurisdiction there was a lengthy discussion among the participants in particular on the topic of prior determination of an act of aggression by the SC; participants expressed different views. Some delegates expressed the view that determination of an act of aggression by the SC must be a condition for the Court to exercise its

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<sup>61</sup> By David Mees (ELSA Netherlands)

<sup>62</sup> ICC-ASP/5/SWGCA/INF.1

<sup>63</sup> ICC-ASP/4/32, Annex II(b),(c),(d)

<sup>64</sup> ICC-ASP/4/32, Annex II, Appendix II

<sup>65</sup> ELSA Report from 4<sup>th</sup> ASP session, at 21

jurisdiction, whereas others were of the opinion that the crime of aggression would merit being treated in the same manner as the other crimes under the Rome Statute, in accordance with Article 13. In order to reconcile the divergent views in this respect, it was suggested that different solutions might be found for each of the three scenarios set out in Article 13 of the Rome Statute. It was argued that there is no need for a special provision on prior determination of an act of aggression by the SC, since Articles 13 and 16 of the Rome Statute deal sufficiently with the role of the SC under the Rome Statute. Furthermore, the possibility of a request to the International Court of Justice for an advisory opinion by the General Assembly was kept under consideration. It was noted, however, that prior determination of an act of aggression by another organ must be open for review by the Court in order to safeguard the right of due process of the accused as required by Article 67(1)(i) of the Rome Statute. The point was made that new evidence which might refute the case for the existence of an act of aggression might emerge after a determination by the SC.

(c) The discussion on the individual's conduct exemplified a growing tendency from the monistic view, expressed in the 2002 coordinator's paper, towards a differentiated view. In this respect the discussion focused on individual participation (Article 25(3)(a)-(d)) and responsibility of commanders and other superiors (Article 28). There was a widespread agreement that the use of the word "participates" should be avoided in the definition of the conduct element, in order to avoid the overlap with Article 25(3). The terms "organise and direct", "direct" and "order" were suggested as alternative conduct verbs. It was noted that this language is commonly found in counter-terrorism conventions. Moreover, there was consensus among the participants that aggression should be understood as a leadership crime. Therefore, the leadership clause should refer to the ability of the perpetrator to influence policy. Finally, a discussion took place on whether or not to delete the phrase "planning, preparation, initiation or execution". Some participants argued that they should be deleted because they are already covered in Article 25(3) of the Rome Statute, however, other participants were of the opinion that they should be retained, because it reflects the typical features of aggression as a leadership crime and increases the deterrent effect of the provision.

During the meetings of the SWGCA at the Fifth session of the Assembly, both the Chair and the delegates emphasized the fruitful discussions which took place in Princeton. The delegates who made interventions at the Fifth session of the Assembly noted that the discussions went up to a next level and some of them expressed their wish to move forward as fast as possible, bearing in mind the deadline of finishing the work twelve months prior to the Review Conference. Furthermore, most of the delegates felt that the time was right to ask the Chair to redraft the 2002 Coordinator's paper before the Resumed Fifth session, to be held in New York

on 29 January – 1 February 2007, so that it reflects the progress and all the achievements of the discussions since then. The Chairman will consult as much as possible with delegations of States Parties in order to provide a revised version of the paper in time before the resumed session. Furthermore, he invited the delegates to propose on the timetable for the SWGCA in light of the possibility that the Review Conference could be held in 2010, which could give additional time for the SWGCA.

Belgium was one of the few countries which introduced a new substantial matter during this Assembly's session. The essence of their proposal was to subject prosecutorial action to judicial control of an extended Pre-Trial Chamber in cases where the Prosecutor acts on the basis of a State referral or exercises his *proprio motu* power. Belgium argued that such a type of control would establish an additional filter against politically motivated action. This proposal provides an alternative for a system where there is an exclusive role for the SC to determine an act of aggression, which would in turn provide the Court with a political decision to start its legal consideration on, even though the prior determination of the SC does not have to be binding. A number of delegations expressed their interest in that suggestion. However, a concern was raised that such a form of judicial review would involve the Court in political determinations which should be left to the SC.

Furthermore, Greece made a proposal to tackle the problem with regard to the generic definition and the principle of legality. They made the suggestion to attach a list of specific acts in the definition, which would have to be the list of Article 2 of the GA Resolution, with the possibility to add other acts to the list, similar to the list of weapons in Article 8 of the Rome Statute regarding crimes against humanity. This suggestion will be taken into consideration and further discussed during the resumed session.

Sweden expressed the view that the Court could benefit from prior determination of an act of aggression by the SC, legally required or not, because of the authority of this organ. The Netherlands, however, expressed their concern of the situation, when the SC determines an act as aggression not being one of the listed acts. In this case, it will be very difficult for the accused to defend herself or himself since there is no standard against which the decision of the SC can be measured. In this respect the delegations showed interest in the Greek proposal.

Furthermore, Austria expressed concerns with regard to the mental element of the crime as they questioned how the Court would be able to establish the mental element based on the determination of the SC. Moreover, Austria questioned whether or not the SC would want to take up the role attributed to it by the Assembly. Recognising the value of prior determination by another organ Austria pointed out that the SWGCA should look at the United Nations in a

broader sense. Finally, the report of the Princeton meeting was adopted during the last plenary meeting of the Fifth session of the Assembly.

During the Assembly's session, the informal Coalition's team on the crime of aggression held several meetings, and a number of important issues were discussed. First of all, different ways to adopt the work of the SWGCA were debated, however, not very detailed because it is most likely that it will be the Review Conference who will adopt its report or not. Secondly, concern was expressed in the team that now that the SWGCA is making significant progress, some delegates could enter the discussion in order to delay the work. Thirdly, the different procedural decisions, by which the SC could determine an act of aggression, were elaborated upon. Reference was made to a proposal made by the Netherlands which received the interest of other delegations, namely that the SC should decide, whether or not an act of aggression has occurred, and if it is impossible (i.e. veto was used by one of the permanent members) SC has to decide by majority (no veto, as on procedural matters in accordance with Article 27(2) of the UN Charter), whether to make a request to the International Court of Justice for an advisory opinion on this matter. Furthermore, attention was drawn to the fact that an accused must be able to challenge all the elements of the crime, otherwise the rights of due process will be violated by the Court. Finally, a discussion took place on the GA Resolution. The team, like the States' delegates, was most in favor of including into the provisions on the crime of aggression within the Rome Statute a list of specific acts (Article 2) in combination with a generic article like Articles 1 or 3 of the GA Resolution. Much attention was given to the discussion paper of Benjamin B. Ferencz,<sup>66</sup> which puts the GA Resolution in its historical and political perspective.

As requested by most of the delegates, the Chairman proposed certain amendments to the 2002 Coordinator's paper,<sup>67</sup> to update it and reflect all the work done by the SWGCA so far and to streamline the fifth resumed session of the Assembly.<sup>68</sup> The main features of the revised paper are the distinctions proposed to reflect the differentiated and the monistic approaches. As mentioned above there is a growing tendency towards a differentiated approach at the moment, though most likely during the next round of discussions the alternatives indicated in the Chairman's revised paper will be narrowed down. In the Chairman's draft variant *a* reflects the differentiated approach and variant *b* reflects the monistic view.

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<sup>66</sup> Benjamin B. Ferencz, Enabling the International Criminal Court to Punish Aggression, available at: [www.benferencz.org](http://www.benferencz.org)

<sup>67</sup> ICC-ASP/5/SWGCA/2

<sup>68</sup> See Annex 1 for details

## BUDGET AND FINANCES<sup>69</sup>

The Assembly's Working Group on the Programme Budget of the Court is traditionally one of the most troublesome and time-consuming. Indeed, all activities and innovations proposed, from the Review Conference to victims' protection, will not be implemented if not reflected in the budget. This session was not an exception with one meeting finishing as late as 10p.m.

The draft budget has been presented by the Court's Registry<sup>70</sup> and then reviewed by the Committee at its seventh session,<sup>71</sup> which recommended certain cuts in several areas of the Court's activities, including outreach, protection of victims and witnesses and translation, in Major Programme III ("Registry") of the Court's Programme Budget for 2007.

The budgetary proposals have faced critique from two sides. Number of States' delegations and especially NGOs argued that cuts of proposed posts in Registry responsible for outreach and in the Victims and Witnesses Unit recommended by the Committee<sup>72</sup> should not be endorsed by the Assembly.<sup>73</sup> One of the most important points raised by the opponents of those cuts was that these recommendations affecting the most vulnerable groups of the Court's beneficiaries – affected populations and especially victims and witnesses – were not sufficiently explained by the Committee.<sup>74</sup> One of the most active delegations which led the "battle for outreach" was Sierra Leone. They organised informal hearings on outreach and relied on mistakes done by other international and mixed tribunals in underestimating the role of outreach. H.E. Allieu Ibrahim Kanu, head of delegation of Sierra Leone, at his speech in the general debate on the first date of the Assembly's session reiterated famously, that outreach was "not a luxury",<sup>75</sup> consequently, he proposed: "Let's look at the recommendations of the [Committee]; let's discuss them here".<sup>76</sup> The main idea behind this appeal was the invitation to the Assembly to reconsider its previous approach to adopt Committee's recommendations as a package<sup>77</sup> and reverse the latter's findings regarding cuts on outreach.

Certain States, especially major contributors to the Court's budget, unsurprisingly, argued that constant growth of the Court's budget – of €8mln or 10%, in comparison with 2006

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<sup>69</sup> By Sergey Golubok (ELSA Russia)

<sup>70</sup> ICC-ASP/5/9

<sup>71</sup> ICC-ASP/5/23

<sup>72</sup> ICC-ASP/5/23, paras.75,77

<sup>73</sup> The Budget and Finance Team of the Coalition, Statement on the Report of the Committee, Recommendations to the Fifth Session of the Assembly, available at the website of the Coalition:

[http://www.iccnw.org/documents/Budget\\_and\\_Finance\\_Team\\_Paper\\_5ASP\\_en.pdf](http://www.iccnw.org/documents/Budget_and_Finance_Team_Paper_5ASP_en.pdf)

<sup>74</sup> Human Rights Watch Memorandum for the Fifth Session of the Assembly, available at the website of the Human Rights Watch: <http://www.hrw.org/background/ij/asp1106/asp1106web.pdf>, at 18-19

<sup>75</sup> Statement of Sierra Leone at the general debate at the fifth session of the Assembly, available at the website of the Court: [http://www.icc-cpi.int/library/asp/ICC-ASP5\\_Statement\\_sierraleone.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP5_Statement_sierraleone.pdf), at 3

<sup>76</sup> *Ibid.*, at 4

<sup>77</sup> ELSA Report from 4<sup>th</sup> ASP session, *supra* note 2, at 13

budget<sup>78</sup> even with cuts proposed by the Committee – should not be permitted to continue. Germany, for example, in their statement in general debate indicated that they shared the Committee’s views<sup>79</sup> and underlined that “outreach may also be seen as an objective which requires joint efforts not only by the Court but also by States Parties – and where NGOs may play an important role”.<sup>80</sup>

Finally, at the meeting of the Working Group on the Programme Budget of the Court which lasted almost until 10p.m., States found a consensus and disagreed with the cuts in outreach recommended by the Committee.<sup>81</sup> As for translation costs and the Victims and Witnesses Unit, the Committee’s recommendations were endorsed, but the Working Group on the Court’s Programme Budget was of the view, that those costs “could be absorbed within... the Major Programme” III,<sup>82</sup> what is highly probable, especially if one takes into account the consistent pattern of under-spending (actual expenditures are less than budgeted) characteristic for the Court in recent years.

Finally, the Court’s Programme Budget for 2007 was adopted<sup>83</sup> in total amount of around €88,87mln – less than initially requested by the Court but slightly more than recommended by the Committee (that reflects the decision not to endorse cuts in outreach).

Apart from the budget, proposal by Australia, Canada and New Zealand to introduce maximum assessment rates,<sup>84</sup> or “ceiling” in financial contributions to the Court’s budget was considered. This proposal with reference to the similar UN practice was made to allow Japan to accede to the Rome Statute without accepting a too heavy financial burden.<sup>85</sup> It was subsequently adopted and included into the resolution on budget.<sup>86</sup>

There were certain other matters under discussion of purely technical nature, and the outcome included: National Audit Office of the United Kingdom of Great Britain and Northern Ireland was re-appointed as the Court’s External Auditor for a second quadrennium;<sup>87</sup> conditions of service and compensation of the Court’s Prosecutor and Deputy Prosecutors were fixed at the level of the UN Under-Secretary-General and Assistant Secretary-General, respectively.<sup>88</sup>

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<sup>78</sup> ICC-ASP/4/Res.8

<sup>79</sup> Statement of Germany at the general debate at the fifth session of the Assembly, available at the website of the Court: [http://www.icc-cpi.int/library/asp/ICC-ASP5\\_Statement\\_germany.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP5_Statement_germany.pdf), at 2

<sup>80</sup> Ibid.

<sup>81</sup> ICC-ASP/5/WGPB/1, para.31

<sup>82</sup> Ibid., paras.29,30

<sup>83</sup> ICC-ASP/5/Res.4, Chapter A, para.1

<sup>84</sup> ICC-ASP/5/WP.1

<sup>85</sup> See statement of the delegate of Japan at the meeting of the Working Group on the Programme Budget of the Court on 29 November 2006, Informal and Unofficial Verbatim Notes from the ASP, 29 November 2006, afternoon and evening sessions, Working Group on the Budget, available at the website of the Coalition: [http://www.iccnw.org/documents/VerbatimNotes\\_WGBudget\\_AfternoonSession\\_29Nov06.pdf](http://www.iccnw.org/documents/VerbatimNotes_WGBudget_AfternoonSession_29Nov06.pdf), at 11

<sup>86</sup> ICC-ASP/5/Res.4, Chapter C, second para.

<sup>87</sup> ICC-ASP/5/32, para.31

<sup>88</sup> ICC-ASP/5/Res.3, para.29

## ANNEX 1

### REPORT FROM THE RESUMED FIFTH SESSION OF THE ASSEMBLY<sup>89</sup>

**Summary of proceedings.** The Resumed Fifth session of the Assembly took place in New York on 29 of January – 1 February, 2007.

The main focus was on the issue of the crime of aggression issue<sup>90</sup>, but the delegations of the States also discussed other items, such as the judicial vacancy arising as a result of the resignation of Judge Maureen Harding Clark<sup>91</sup>, and were informed about the States in arrears. At the plenary on 1 February, 2007, the Assembly adopted the draft report of the Resumed Fifth session, approved the report of its Credentials Committee and proceeded to elect Mr. Bulgaa Altangerel (Mongolia) as the fifth member of the Board of Directors of the Trust Fund for Victims.

Last day, a statement by Namibia, supported by Nigeria, Sierra Leone and Uganda, focussed on geographical representation, noting that no African representative is nowadays at the head of the International Criminal Court's five institutions: the Court, the Office of the Prosecutor, the Registry, the Secretariat, the Assembly, as well as the New York Liaison Office.

**Crime of aggression.** Six meetings of the SWGCA were chaired by Ambassador Christian Wenaweser (Liechtenstein).

Elaborations were conducted on the basis of the discussion paper proposed by the Chairman<sup>92</sup>, and included:

- 1) The definition of the crime of aggression (paras.1, 2 and 3):
  - Definition of the Individual's conduct
  - Definition of the State's conduct
- 2) The jurisdictional conditions (paras.4 and 5)

#### Definition of an Individual's conduct

Stressing the leadership nature of the crime of aggression, the States Parties broadly supported the variant (a) of the discussion paper, the so-called "differentiated approach".

Variant (a): "For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack..."

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<sup>89</sup> By Cristina Ganguzza (ELSA Italy)

<sup>90</sup> Final report of the SWGCA: ICC-ASP/5/SWGCA/3

<sup>91</sup> The Assembly adopted resolution ICC-ASP/5/L.4 on this item, which amends the procedure for the nomination and election of judges. Assembly also adopted a resolution (ICC-ASP/5/L.6) amending a previous text on the Pension Scheme Regulations for judges at the Court (ICC-ASP/5/Res.3)

<sup>92</sup> See supra note 67

Para.3: “The provisions of article 25, paragraph 3, (f), and (28) of the Rome Statute do not apply to the crime of aggression”.

It was stressed that the main advantage of this variant would be the possibility to apply the existing provisions of the Rome Statute, and particularly article 25, paragraph 3 (with the exclusion of the “attempt”, in sub-paragraph (f)). Under this interpretation, the discussion paper suggested to add a sub-paragraph to article 25, paragraph 3, clarifying that the forms of participation described into the sub-paragraphs (a) to (d) of article 25, paragraph 3, apply only to persons who are in a position to exercise control over or to direct the political or military action of a State.

Many delegations indicated to be flexible, although expressing a different view and a preference for the “monistic” approach of variant (b).

In reaction to the discussions regarding the choice of the relevant conduct during the SWGCA informal meeting on 31 January, the Chairman presented a new proposal on the definition of the individual’s conduct, reflecting variant (a): “The Court shall have jurisdiction with respect to the crime of aggression when committed by a person being in a position effectively to exercise control over or to direct the political or military action of a State. For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation or execution of an act of aggression/armed attack...”

Following this alternative, the “leadership clause” would be separately addressed in article 25, paragraph 3.

The alternative text gained the general support of the States, even though caution was expressed by some delegations.

Regarding the reference to article 28 in paragraph 3 of the Chairman’s paper, there was a general support for its deletion, as its application to the crime of aggression is mainly theoretical.

#### Definition of a State’s conduct

In the choice between the term “act of aggression” and “armed attack”, the first more specific definition received widespread support. It was stressed that the use of this term would also be necessary to link this part with the reference to the GA Resolution contained in paragraph 2 (“for the purpose of paragraph 1, “act of aggression” means an act referred to [in articles 1 and 3 of]<sup>93</sup> UN General Assembly Resolution 3314 of 14 December 1974”).

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<sup>93</sup> Most delegations agreed with a general reference to the resolution as a whole, while Germany among others insisted to keep the reference to articles 1 and 3

Concerning the nature of a State's act of aggression, support was given to the threshold as reflected in the first set of proposed brackets: "which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter".

#### The jurisdictional conditions

Since the morning of 30 January, 2007, paragraphs 3 and 4 of the Chairman's discussion paper were at the heart of the SWGCA deliberations. Divergent views were expressed on the role and competence of the SC concerning the prior determination of a State's act of aggression and the different solutions in case of the absence of this determination. While some delegations stressed that under Article 39 of the UN Charter the SC is supposed to be the only organ competent for determining an act of aggression, others expressed their concerns regarding the risk of the involvement of a political body regarding the Court's independent functions.

Three proposals, respectively from Belgium, Norway and Sweden, were presented and discussed during informal consultations.

The Belgian proposal<sup>94</sup> aimed at differentiating three triggering mechanisms (State's referral, SC's referral and investigation initiated by the Prosecutor *proprio motu*), reinforcing procedures filters "to avoid politicisation of the prosecutions".

The Norwegian proposal<sup>95</sup> redrafted paragraph 4, in order to consolidate the idea that the Court may exercise jurisdiction when the SC has made a prior determination of an act of aggression. The proposal was seen as more fitting into paragraph 5 than paragraph 4 and as involving the application of option 2 of that paragraph.

The Swedish proposal aimed at reformulating paragraph 4 as well, according to which the SC would have the possibility of giving a "green light" to the Court's actions ("the Court shall first ascertain whether the SC has made a determination of an act of aggression committed by the State concerned or has declared that it does not object to the Court's proceeding with the case"). In case of no determination or declaration, the Court "shall notify the SC of the situation before the Court including any relevant information or evaluation thereof that might assist the SC in its deliberations". Some States felt that these amendments would reinforce the SC's powers, although Sweden rejected this interpretation, stressing the nature of second option for the "no-objection declaration".

Concerning paragraph 5, delegations focused on the deletion or retaining of options 3 and 4. It was suggested by the Netherlands to expand option 2 in order to integrate options 3 and 4 (a declaration of the General Assembly or of the International Court of Justice).

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<sup>94</sup> ICC-ASP/5/SWGCA/WP.1

<sup>95</sup> ICC-ASP/5/SWGCA/WP.2

## ANNEX 2

### ELSA INTERNATIONAL DELEGATION

**Cristina Ganguzza** (ELSA Italy), is member of Italian Bar since 2005, she has degree in law of *La Sapienza* University, Rome (2002), and postgraduate degree in International Law with International Relations from the Brussels School of International Studies of the University of Kent, Brussels, she is also assistant to the professor in criminology, at *La Sapienza* University

**Sergey Golubok** (ELSA Russia), head of delegation, was member of ELSA Delegation to the Fourth Session of the Assembly (2005), he is Russian lawyer, graduate of St. Petersburg State University (2006, with distinction), currently pursuing his LLM in International Human Rights Law at the University of Essex, United Kingdom

**David Mees** (ELSA Netherlands), is law student at the University of Amsterdam, The Netherlands

**Rebeca Cenalmor Rejas** (ELSA Spain), is Spanish lawyer, she has a law degree of the University of A Coruña, Spain (2003) and European Master's Degree on Human Rights and Democratisation from the European Inter-University Centre for Human Rights and Democratisation, Italy

**Andreas Schüller** (ELSA Germany), was member of ELSA Delegation to the Fourth Session of the Assembly (2005), he has graduated from Trier University, Germany, and is currently pursuing his LLM in Public International Law and International Criminal Law at the Leiden University, The Netherlands

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