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Report on the activities of the Oversight Committee**A. Introduction**

1. At its sixth session, held in November/December 2007, the Assembly of States Parties established an Oversight Committee of States Parties (hereinafter “the Committee”) as a subsidiary body of the Assembly to provide strategic oversight for the permanent premises project in accordance with annex II to resolution ICC-ASP/6/Res.1.¹

2. Since its report to the twelfth session of the Committee on Budget and Finance² in April 2009, the Committee held eight meetings under the Chairmanship of Ambassador Lyn Parker (United Kingdom of Great Britain and Northern Ireland) to consider current issues, such as the selection of an architectural design and the financing of the project.

3. The present report is submitted in accordance with resolution ICC-ASP/6/Res.1, annex II, paragraph 15, which provides that the Committee shall provide regular status reports to the Bureau and shall submit any draft resolutions or information to the Assembly through the Bureau. A draft resolution for consideration by the Assembly is contained in an addendum to this report.

4. At its meeting on 12 November 2009, the Committee would receive the final recommendations of the Project Board on the selection of an architect in accordance with resolution ICC-ASP/7/Res.1, annex I, paragraph 5. The result of these deliberations would be reflected in a second addendum to the report.

B. Selection of an architect**1. Assessment of the designs**

5. Following the preliminary evaluation of the three architectural designs by the Project Board, the Board, after consulting an external legal advisory firm (Houthoff Buruma), recommended to the Committee, at its fifth meeting on 24 April 2009, to continue discussions with the first prize-winner of the architectural design competition, Ingenhoven Architects. Although the evaluation of the designs in accordance with the criteria contained in resolution ICC-ASP/7/Res.1, annex I, paragraph 4, had not been fully concluded, the Project Board recommended that, for reasons of efficiency and in order to prevent unnecessary work, to first

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, part III, resolution ICC-ASP/6/Res.1, paragraph 5 and annex II.

² ICC-ASP/8/11.

assess whether Ingenhoven Architects would be in a position to meet the awarding criteria. Only if this would prove not to be the case, discussions with the second and third prize-winners (Schmidt Hammer Lassen Architects and Wiel Arets Architects, respectively), would commence.

6. While endorsing the recommendation, the Committee recalled that, at this stage, it would only decide on the architect with whom further discussions would be conducted.

7. The Project Board further recommended that the architects be informed of the decision to continue discussions with the first prize-winner via a letter and a detailed memo, outlining the procedure and formalities for the further selection process and providing for a complaint procedure. As regards the latter, the external legal advisory firm had recommended that the architects be provided with the opportunity to contest the chosen procedure, so as to reduce the risk of similar claims in the future, which would possibly force the project to come to a halt at a very crucial stage.

8. During this standstill period, the Chairperson of the Committee received complaints from the second and third prize-winners. The second prize-winner argued that, since the cost of the design was considered to be a knock-out criterion, the first prize-winner should have been excluded from further discussions as its design was over budget. The third prize-winner argued that discussions with all three architects should continue on an equal basis and that the eventual contract should be awarded to the architect who best meets the requirements of the project.

9. At its seventh meeting, held on 10 June 2009, the Committee appointed the Chairperson of the Committee to act in his personal capacity as mediator. The aim of the mediation process was to address and resolve the complaints submitted by the second and third prize-winners in a manner fair to all architects and which would allow for the project to continue without significant delay. In this regard, the Oversight Committee and the Project Board had expressed an interest in exploring the possibility of further evaluating the three designs in accordance with resolution ICC-ASP/7/Res.1, annex I, paragraph 4.

10. The more thorough evaluation of the designs was considered even more important as a second cost analysis of the designs, carried out in parallel to the selection process by the project management firm (Brinks Groep), had led to the conclusion that all three designs were significantly over budget. Moreover, the fact that the figures presented by the project management firm were considerably higher than the figures assessed in November/December 2008 by the interim cost consultant (David Meijer), called for further discussions between the architects and the Project Board.

11. Following the discussions with the architects, the Project Board and its legal advisers, the mediator recommended to continue discussions on an equal basis with all three architects in parallel to clarify the cost and other aspects necessary for the Project Board to make its final evaluation of the proposals of all three architects in accordance with paragraph 4 of annex I of resolution ICC-ASP/7/Res.1. The recommendations of the mediator (see annex I) were endorsed by the Committee at its eighth meeting on 8 July 2009 and subsequently communicated to the architects.

2. Further assessment of the designs

12. In accordance with the recommendations of the mediator, the Project Board continued discussions with all three architects. The first phase of discussion with each architect concentrated on clarifying the scope and methodology of the various cost estimates, with a view to reaching agreement as far as possible on the extent of any cost gap to be addressed.

13. In the second phase, each architect was provided with the opportunity to make any adjustments to his existing design which he may consider necessary to bring it within the cost envelope. The second modified designs, together with supporting documents on the issues of costs, fee, contract and security were received by the Project Board on 15 October 2009.

14. At its twelfth meeting, on 23 October 2009, the Project Board briefed the Committee on the ongoing evaluation process. The Project Director indicated that the past discussions with the architects had resulted in greater clarity on key issues, such as functionality of the designs, security and costs. However, since the Project Board had requested further clarifications from the architects on a number of points specific to their designs, the results of the evaluation would not be available until 12 November 2009.

15. On the basis of the information provided, the Committee continued its consideration of the need to enter into the third phase, i.e. consulting the members of the jury of the architectural design competition on the question whether the second revision of the designs had led to entirely modified design concepts. The Committee observed, in this regard, that the Project Board favoured seeking the advice of the jury.

16. The Committee stressed the importance of establishing clear guidelines for the meeting of the jury, which should, inter alia, allow for the architectural members of the jury to take a leading role in answering the question whether the designs had been modified to a substantial extent. Moreover, it should be understood that the final decision would be in the hands of the Oversight Committee and that the members of the jury would merely fulfil an advisory role.

17. Also, the Committee recalled that, already in the first revision phase, the architects had modified their designs. At that time, the chair of the jury advised that these changes had not resulted in entirely modified designs concepts. In this connection, when comparing the second modified designs to the original designs, the fact that the first set of changes had been requested by the jury and/or by the Court should be taken into account.

18. In light of the recommendations of the Project Board, the Committee agreed for a meeting of the jury to be scheduled for 30 October 2009 in order to advise the Project Board on the question whether the second revision of the designs had led to entirely modified design concepts. The Committee underlined the importance of there being an appropriate representation on the jury of independent architects, taking into account also geographical representation. The Committee agreed to consider the matter again on 12 November 2009, taking into account the recommendations of the Project Board and the outcome of the 30 October 2009 jury meeting.

C. Financial issues

1. Timeline and risks

19. At the ninth meeting, held on 25 August 2009, the Project Board indicated that due to the fact that the selection process had not been finalized on 1 July 2009, the cash-flow scheme referred to in resolution ICC-ASP/7/Res.1, annex IV, would have to be adjusted to reflect that the permanent premises were forecasted to be ready for use in 2015.

20. The Project Board further indicated that the delay encountered in the selection of a design could impact the overall cost of the permanent premises project, as an extra inflation cost factor and additional consultancy services may have to be taken into account. On the other hand, the more thorough analysis of the costs of the designs would mitigate the risk of a cost overrun at the time of the completion of the project.

21. The Committee agreed to the necessity of clearly identifying and quantifying the risks of the project. Consequently, the Committee requested the Project Director to develop a risk register, outlining the main risks, including those related to obtaining the necessary permits and the payment of rent for the interim premises, as well as identifying possible mitigating strategies.

22. At its twelfth meeting, on 23 October 2009, the Committee received a first set of documents on the identification and management of risks and agreed to consider these in detail at its meeting on 12 November 2009.

2. Financial reporting

23. At its ninth meeting, held on 25 August 2009, the Committee stressed the importance of establishing a systematic financial reporting mechanism for the project which, while forming an essential tool in the management of the project, would also assist the Committee in carrying out its monitoring role.

24. A first, informal meeting was held on 24 September 2009 between the Project Director's Office, the Court and the project management firm Brinks so as to identify a mechanism that would, on the one hand, facilitate the requirements of the Assembly of States Parties, the Oversight Committee and the Committee on Budget and Finance and, on the other hand, be in compliance with existing reporting mechanisms of the Court. The facilitator of the Committee's sub-group on the financing of the project, Mr. Martin Strub (Switzerland), attended the meeting on behalf of the Oversight Committee. At its meeting on 12 November 2009, the Committee would have before it the results of the meeting.

3. Host State loan

25. The relevant agreements for the implementation of the host State loan were signed by the Court and host State before a notary public on 23 March 2009. The Project Director reported that, as at 26 October 2009, the expenditures amounted to €28,713. It is estimated that, as at 31 December 2009, the expenditures would amount to €1,032,760. A breakdown is contained in annex III.

4. One-time payments

26. In accordance with resolution ICC-ASP/7/Res.1, paragraph 9, the Committee continued its consideration of the financing scheme, in particular with regard to the issue of one-time payments.

27. In accordance with paragraph 7 of the resolution, fourteen States Parties informed the Registrar of their possible intention to select the option of a one-time payment of their assessed share. So as to provide these States with an indication of the estimated amount due under the one-time payment scheme, the Committee, in consultation with the Court and the host State, prepared an explanatory note on the basis of which a preliminary calculation could be made (see annex II) and requested the Court to inform the interested States accordingly.

28. At its twelfth meeting, held on 23 October 2009, the Committee was informed that, as at 15 October 2009, seven States Parties had confirmed their decision to opt for the one-time payment scheme. Their joint contribution would total at approximately €3.5 million. The Committee observed that an additional seven States, whose joint contribution would total at approximately €0.4 million, had not yet confirmed to the Registrar their intention to select the option of one-time payments. In the interest of the project, the Committee requested the Court to contact these States to ascertain whether they would be opting for the one-time payment scheme. The Committee acknowledged, in this regard, that the date of 15 October 2009, referred to in resolution ICC-ASP/7/Res.1, may have prevented certain States from completing their internal processes.

D. Project manual

29. In resolution ICC-ASP/7/Res.1, paragraph 17, the Assembly noted the progress made by the Court in the development of a project manual which takes into account the provisions of resolution ICC-ASP/6/Res.1, annexes II, III and IV, and requested the Project Board to continue to develop the manual and to submit it to the Oversight Committee for approval. At the twelfth meeting, held on 23 October 2009, the Project Director presented two key parts of the manual, relating to the issues of governance and risk management, respectively.

30. As regards the issue of governance, the Project Director stressed the importance of further refining the governance structure so as to reflect that the project is entering into the design phase. The Project Director observed that while the existing responsibilities of the parties involved would remain unchanged, the respective tasks and roles would be redefined so as to be in accordance with the operational requirements of the project. The Project Director further indicated that the risk register, once finalized, would be part of the project manual and as such be kept under constant review.

31. The Committee acknowledged that the manual could not be finalized until after the selection of an architectural design. Similarly, the Committee observed that the manual would undergo certain changes so as to correspond to the various phases in the project. The Committee considered it useful to keep the issue under review and to be informed of any relevant developments.

Annex I

Conclusions of the mediator, Ambassador Lyn Parker (United Kingdom of Great Britain and Northern Ireland)

A. Background

1. In the Project Director's letters of 14 May 2009 to the three prize winning architects, the Project Board set out how it intended to handle the next stage of the procedure for selecting the final design for the new permanent premises of the International Criminal Court. The attachment to those letters ("Memo Negotiation Procedures") also provided for a procedure for considering complaints, including the possibility of appointing a mediator.

2. Following the receipt of letters of complaint from Schmidt Hammer Lassen Architects and Wiel Arets Architects, the Oversight Committee requested me in a personal capacity to act as mediator. In the light of discussions with the three architects, the Project Board and their advisers, this note sets out the conclusions which I decided to recommend to the Oversight Committee. These conclusions have been endorsed by the Oversight Committee and accepted by the Project Board.

B. General considerations

3. It should be noted that:

- a) the possibility of pursuing discussions with only one architect was raised in the meetings with the architects on 18/19 December 2008 and recorded in the minutes of those meetings, to which no objection was made until the establishment of the complaints procedure;
- b) in the light of further work, the Project Board currently has concerns about the compatibility of all three designs with the cost criterion set out in annex I;
- c) these concerns largely arose after the conclusion of the so-called "modification phase" involving all three architects, although no final conclusion on the cost criterion was reached by the Project Board in that stage; and
- d) the discussions in the "modification phase" took place on an equal basis with all three architects.

C. Main recommendations

4. I **recommend** that discussions should continue on an equal basis with all three architects in parallel to clarify the cost and other aspects necessary for the Project Board to make its final evaluation of the proposals of all three architects in accordance with paragraph 4 of annex I of resolution ICC-ASP/7/Res.1.

5. To secure the confidence of the architects in the next steps of the process it will be essential that:

- a) further discussions with each architect are conducted on the basis of transparency and genuine dialogue with the Project Board and negotiating team;
- b) there should be full participation by the two independent national experts; and

- c) the architects should be informed promptly of any concerns on the part of the negotiating team over the compatibility of their responses with the criteria set out in annex I of resolution ICC-ASP/7/Res.1.

D. Detailed recommendations

6. In order to ensure a transparent and orderly process, I **recommend** that:

- a) Each architect should be supplied with those parts of the reports by David Meijer and the Brink Group which relate to their own proposals;
- b) The first phase of discussion with each architect should concentrate on clarifying the scope and methodology of the various cost estimates, with a view to reaching agreement as far as possible on the extent of any cost gap to be addressed;
- c) The basis for these cost estimates should be the requirements discussed with all three architects during the meetings in November/December 2008. Additional requirements arising subsequently should not form part of the comparative cost analysis;
- d) Both Meijer and Brink should be involved in these discussions, so that the differences in their methodology can be properly explored. The independent experts in the negotiating team should have a central role in identifying and helping to resolve any differences of view;
- e) Adequate time should be allowed for thorough discussion during this first phase, also taking account of the availability of the various parties over the July/August period; but the aim should be to bring this phase to a conclusion as soon as possible, and by mid-September at the latest;
- f) Depending on the position reached in the first phase, in the second phase each architect should be given the opportunity to make any adjustments to his existing design which he may consider necessary to bring it within the cost envelope. The Project Board/negotiating team should be available to discuss the potential implications of any such changes for cost, functionality etc before any final proposal is made. Any final proposals would be expected by mid-October;
- g) If any of the designs are modified to a substantial extent, so that questions might arise about their compatibility with the outcome of the original design competition, there will need to be a third phase in which the original jury should be consulted to establish whether in their view the changes would affect the original ranking of the three prize-winners;
- h) In parallel with the second phase, the Project Board should review its draft contract, in particular with a view to how far departures are needed from the indicative contract elements discussed during the so-called modification phase, before circulating a draft to all three architects for discussion of the main points arising from it;
- i) Also in parallel with the second phase, all three architects should be asked to cost a fee offer based on a common basic scope of work such as the scope defined for the so-called reference fee, it being understood that this costing would be provisional and for purposes of comparison only, and that the final scope of work and the associated fee would be a matter for final negotiations in the light of the other aspects of the selected project;
- j) Sympathetic consideration should also be given by the Oversight Committee to the possibility of payment to the architects for extra work undertaken as a result of this process; and

- k) The Project Board's final evaluation of the responses from the three prize-winners regarding the minimum requirements referred to in paragraph 4 of resolution ICC-ASP/7/Res.1 shall remain on the basis that these are minimum requirements to be met by the architects, with no additional scoring or weighting system.

Annex II

Explanatory note on one-time payments

A. Introduction

1. This note refers to the Court's original letter, dated 9 April 2009, requesting States Parties to indicate their interest in making one-time payments by 30 June 2009. In accordance with resolution ICC-ASP/7/Res.1, paragraph 9, this explanatory note provides further clarifications concerning the terms and conditions for one-time payments.

B. One-time payments: modalities

2. Annex III to resolution ICC-ASP/7/Res.1 provides the basic principles for one-time payments of the assessed share (see the appendix to this note). The following points are aimed at operationalizing these provisions:

(i) The amount of a one-time payment for State Party Y (OTPy) can be calculated according to the following formula:

$$\text{OTPy} = (\text{building costs}) \times (\text{share of assessed contributions of State Party Y}) - \text{Discount 1} - \text{Discount 2}$$

Where

$$\text{Discount 1} = (\text{share of assessed contributions of State Party Y}) \times 17.5\% \times (\text{building costs})$$

$$\text{Discount 2}^1 = (\text{share of assessed contributions of State Party Y}) \times (\text{host State subsidy on difference between maximum loan amount and building costs})$$

Explanation: As indicated in resolution ICC-ASP/6/Res.1, the overall construction costs of the project, which include a contingency reserve, fees for the consultants and contractors, pre-tender and post-tender inflation, any fees for permits and dues and a fund for integrated, specialized representational features, are currently estimated to be no more than €190 million at the 2014 price-level. The host State has agreed to compensate for the loss of interest subsidy implicit in the Dutch offer, if the full amount under the loan ceiling of €200 million is not utilized. To that end, 17.5 per cent of the amount not utilized under the ceiling will be deducted from the total amount borrowed. Since one-time payments will lower the need to make use of the host State loan, it is reasonable to deduct this percentage from the beginning. Otherwise, this would have to be done at the time of adjustment, see point (ii).

(ii) One-time payments shall be subject to an adjustment once the final cost of the project² and the amount of the host State subsidy are known.

Adjustment in 2015 of Discounts 1 and 2:

Should the entire loan of €200 million need to be utilised, both Discounts 1 and 2 would be reduced to zero; and

¹ Note that Discount 2 is applicable to all States Parties, whether or not they make a one-time payment. The only difference is that those making a one-time payment would obtain this discount in advance, while others would obtain a reduction in the loan according to their share of assessed contributions.

² The final cost of the project is expected to be available by the end of 2015.

Should the building costs exceed the maximum loan of €200 million, then Discount 1 would be taken only on the part of the one-time payment that actually reduces the loan below €200 million. Discount 2 would be reduced to zero.

Explanation: At the time of the calculation of the one-time payment much is uncertain about the final building costs. A final correction is required to ensure that all States Parties will pay the correct amount. States Parties contemplating a one-time payment should be cautioned that, at the completion of the project, additional funds might be required, although all efforts shall be undertaken to complete the building on time and within budget. For the purpose of the adjustment, the scale of assessments at the time of the adjustment will be utilized to make corrections. Any change in the scale of assessments after that point in time will not be reflected. Also, the amount may be different if a change in the scale of assessments, i.e. a change in the number of States Parties, occurs.

(iii) The one-time payments may be made in one to three instalments between 2010 and 2012.

The one-time payment should be made in accordance with regulation 5.6 of the Financial Regulations and Rules of the Court. In case of a payment in two or three instalments, the second and third instalment should be made accordingly. States Parties are, if applicable, still liable for payment of interest of 2.5 per cent per year for the second and third instalment.

Appendix

Basic principles for one-time payments of the assessed share, as contained in resolution ICC-ASP/7/Res.1¹ (extract)

The Assembly of States Parties,

[...]

7. *Requests* States Parties to inform the Registrar, in accordance with annex III, of their possible intention to select the option of a one-time payment for their assessed share by 30 June 2009 and to inform the Registrar of their final decision to select the option of a one-time payment of their assessed share by 15 October 2009;

[...]

9. *Requests* the Oversight Committee to continue exercising its functions in accordance with resolution ICC-ASP/6/Res.1 and, specifically, to:

- (a) Prepare, in consultation with the Project Board, a detailed financing mechanism that combines the use of the loan referred to in paragraph 2 of this resolution, the possibility for States Parties to make one-time payments, and other possible sources of financing;
- (b) Prepare a mechanism for States Parties to make one-time payments, taking into account the principles contained in annex III; and
- (c) Submit proposals for scheduling one-time payments, so as to start receiving such payments as of 2010 but not later than 2012.

[...]

Annex II

Criteria applicable to the agreement on the loan

The agreement with the host State regarding its offer to provide a loan for the permanent premises project will stipulate that:

- (a) A loan of up to a maximum of €200 million will be provided to the Court by the host State, to be repaid over a period of 30 years at an interest rate of 2.5 per cent;
- (b) The agreement does not create for the Court any legal obligation to borrow the full amount (i.e. €200 million) from the host State or in any way restrict the Court's discretion in deciding on the amount that is to be borrowed;
- (c) The agreement does not in any way restrict the authority and discretion of the Court to seek funds for the same purposes from any other source if the Court chooses to do so;

¹ Adopted by the Assembly of States Parties at its seventh session in November 2008. See: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, part III.

- (d) In the event of the €200 million not being fully utilized at the end of the project, the host State will reduce the amount of the loan to be repaid by an amount that corresponds to 17.5 per cent of the non-utilized part of the loan;
- (e) Interest is to be paid annually, as of the first utilization of the host State loan; and
- (f) Repayment of the loan, through regular annual instalments, will commence after expiration of the existing or future leases of the interim premises.

Annex III

Principles for one-time payments of the assessed share

1. States Parties will inform the Registrar of their possible intention to select the option of a one-time payment of their assessed share by 30 June 2009 and will inform the Registrar of their final decision to select the option of a one-time payment of their assessed share by 15 October 2009, including whether they would prefer paying in one, two or three instalments.
2. States that deposit their instrument of ratification or accession to the Rome Statute before 15 October 2009 will be entitled to opt for the one-time payment, as long as they inform the Registrar of their decision to do so by that date, as provided for in paragraph 7 of this resolution and this annex, notwithstanding the date upon which the Statute enters into force for that State.
3. States Parties not opting for a one-time payment shall be assessed annually for the payment of interest and for the repayment of the host State loan, according to the scale of assessments to the Court's regular budget applicable at the time of the assessment.
4. The Registrar will inform States Parties wishing to make a one-time payment, as soon as possible, of their assessed share, based on the most recent estimates of the final cost envelope referred to in paragraph 13 of the resolution.
5. One-time payments shall be subject to an adjustment once the final cost of the project and the amount of the host State subsidy are known.
6. One-time payments shall be held in a special account and utilized to fulfil payment obligations relating to the construction of the permanent premises.
7. The adjustment referred to in paragraph 6 of this resolution and in this annex will be the difference, in favour or against, between the one-time payment made by each State Party during the project and the definitive one-time payment calculated at the end of the project. For such purposes, definitive one-time payments will:
 - (a) Take into account the scale of assessments to the Court's regular budget applicable at the time the final cost envelope of the project is determined;
 - (b) Apply the reduction on the amount of the loan provided by the host State, as described in paragraph 3 and annex II of this resolution; and
 - (c) Apply any voluntary contribution received, as foreseen in paragraph 18 of this resolution.

Annex III

Host State loan expenditures for the period 2008 - 2009 (in euros)

(EUR)	Total 2008	[1 January - 26 October] ^a 2009	[27 October - 31 December] ^b 2009	Total 2009	TOTAL
Box 1; Construction costs	0	0	0	0	0
Box 3; Other construction costs	0	228,713	804,047	1,032,760	1,032,760
<i>Contingency</i>	0	0	0	0	0
<i>Integrated, specialised representational features</i>	0	0	0	0	0
<i>Fees project management</i>	0	130,110	578,150	708,260	708,260
A. Project management activities prior to arrival Brink Groep	0	130,110	3,150	133,260	133,260
B. Project management by Brink Groep	0	0	575,000 *	575,000	575,000
<i>Fees designers, engineers, consultants etc</i>	0	98,603	225,897	324,500	324,500
A. Legal advice	0	71,736	128,264 **	200,000	200,000
B. Experts advice	0	26,867	47,633	74,500	74,500
C. Other consultants	0	0	50,000	50,000	50,000
<i>Permits and dues</i>	0	0	0	0	0
<i>Consultancy user permits</i>	0	0	0	0	0
Escalation	0	0	0	0	0
Grand Total	0	228,713	804,047	1,032,760	1,032,760

^a: actual

^b: projected

* Project Management services delivered, however not yet invoiced.

** Legal advisory services related to mediation phase yet to be invoiced.

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