

ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE

FOURTEENTH SESSION

Oversight Committee

Oral report of the Chair on the activities of the Committee

Mr. Roberto Bellelli (Italy)

Monsieur le President, Excellencies, Ladies and Gentlemen,

I. Introduction

1. It is an honour to report to the Assembly of States Parties on the activities carried out by the Oversight Committee since the thirteenth session of the Assembly, in December 2014.

2. As you know, the Oversight Committee was established in 2007 as a subsidiary body of the Assembly, tasked with the strategic oversight of the Court's permanent premises project, ensuring that the construction is achieved within budget and timelines.

3. A full report of the Committee's activities has been submitted to the Assembly as document ICC-ASP/14/33, supplemented by two Addenda, including the draft resolution and its annexes, as well as documentation relevant to the decisions to be taken on the future costs of the premises. Due to the complexity of such report, a written briefing has also been circulated on 13 November and is attached to this oral report, to summarize the reasoning of the main decisions submitted to the Assembly for adoption. I will here only briefly highlight the latest developments, and refer to the most important decisions that the Committee is submitting for decisions to be taken by the Assembly at this session.

4. As this will be my last report to the Assembly, the conclusion of a five-year long chairmanship of the Oversight Committee, I am pleased to inform you that the **construction has now been completed, the Court has taken possession of the premises**, and it will actually move there in December 2015. While the formal inauguration of the new premises will only take place in spring next year, delegations will have an opportunity to visit over the current session of the Assembly.

II. Budget and Finance

5. On the budgetary and financial side some matters remain outstanding. While the current **budget** of €206 million was approved in June 2015 - with an expectation that **expenditures** would not exceed €204 million - a total amount of €9.6 million remained to be funded. Since 2013, the Committee has proposed that no new contributions of States Parties be raised to fund the increases in the project budget. Accordingly, also in June 2015 the Assembly has decided that €4.0 million in the newly approved budget envelope would only be funded through the cash reserves of the Court (in the Employee Benefit Liabilities and in the Working Capital Fund). Consistently with this approach, the Committee is now proposing that the remaining €5.6 million of funding needs be ensured through the surplus of the financial years 2014 and following and that, until such moment when the surplus becomes available, the Court be authorized to make advances from its reserves. As to the €204 million expected level of expenditures, the Committee has considered current risks that an overrun of around €1 million might materialize and, in order to mitigate such risk, has implemented a restrictive approach to the use of the remaining project reserve. However, the final costs of the project will only be known in 2016.

6. As to the **contributions of States Parties** (65) who had decided to pledge advance contributions (€94.7 million) to the project costs by the deadline of 31 December 2014, the Committee is proposing that such States be enabled to fulfil their pledges in full, after the final recalculation of contributions is made, upon the availability of the final and audited project costs, in June 2016. This requires a postponement of the deadline for payments until 1 September 2016. However, the Committee has been unable to reach an agreement on whether the current or the next applicable scale of assessment will have to be used in order to liquidate the contributions due by all States Parties, and is submitting to the Assembly both options.

III. Total Cost of Ownership

7. The Oversight Committee is also reporting to the Assembly on some **strategic matters** that demand decisions at this stage. Eight years after its establishment, the Committee has entered into the final phase of its mandate. Consequently, the Committee has addressed the matters that need to be resolved at this juncture, for the Assembly to receive sufficient assurances on the future governance and maintenance of the premises, as well as for their financial sustainability.

8. The Committee has conducted a three-year long evaluation process (2013-2015) on how to address the future costs that States Parties will have to bear as owners of the new premises. Technical advice was received from the project, including the Project Director, the General Contractor and the Court, with the assistance of further expertise. Such the technical approach was focused on the preservation of the asset value over the next period of 50 years. The proposed scheme included estimated costs of around €300 million, which would be financed by a flattened annual €4.3 million assessed contribution – starting in 2017 – as shown in the Table attached to the written briefing. The Court would manage these resources through an ad hoc Fund, so that elements of the premises be replaced at scheduled years, without the need to raise resources through the regular annual budget cycles.

9. At the end of this process – and having also considered the financial advice from the Committee on Budget and Finance and the External Auditor – the Committee has concluded by consensus that the proposed technical approach was not sustainable, because of the assumptions behind the cost estimates, the funding mechanism, and the absence of a proper governance structure.

10. The Committee has identified the elements of the future long-term capital replacement cost strategy that require a positive decision to be taken at this stage by the Assembly, in order for the premises to start to be used under the clear policy and governance guidance necessary to establish the correct management framework, and rely in the future on reasonable financing expectations.

11. On such grounds, and based on the significant lessons learned by the Committee over the past eight years, the following main decisions are submitted for adoption by the Assembly at this session:

(i) A **governance structure** to be established, in the form of a subsidiary body of the Assembly (*Premises Committee*), to which the oversight function conducted until 2016 by the Oversight Committee would be transitioned in 2017, so that States Parties retain control on the policy and strategic aspects of the premises, including on the use of the significant resources that will be required in future,

(ii) A meaningful **cost-review process** to be conducted in the period 2017-2019 (upon further preparation by the Oversight Committee in 2016), based on practices in the international public sector, only, and not in the private sector,

(iii) **Funding** through extra-budgetary resources (surplus and new States Parties contributions). Instead, the analysis of a sustainable use of assessed contributions or other

financial instruments (loans) should be conducted in the period 2017-2019, well in advance of the first capital replacement needs, that are not expected to materialize in the first 10 years of the new premises.

12. The Oversight Committee stresses that **the adoption of these decisions at the current session of the Assembly is of essence to uphold strict governance control and, with it, to protect the financial interests of States Parties.**

IV. Membership of the Oversight Committee

13. The mandate for the current Members of the Committee ends at this session of the Assembly. Out of 10 positions available, to date only 5 States Parties have confirmed or put forward their nomination. In that regard, I draw the attention of States Parties on the importance that the next composition of the Oversight Committee ensures a credible oversight by the Assembly, preserves geographical balance and enables sufficient experience to be retained next year and, hopefully, to be transitioned to the new governance structure as of 2017.

14. All these elements are contained in the draft resolution on permanent premises submitted to the Assembly as an Annex to the Report on the activities of the Oversight Committee.

17. Before I conclude, allow me to thank the Committee Members, the Project Director and his Office, the Court, the host State and the Municipality of The Hague for their dedication and enthusiasm in supporting this challenging project. *Thank you.*

Written presentation by the Chair of the Oversight Committee

I. Status of the project

1. Compliance with the project objectives established by the Assembly is as follows:

(i) Timelines

The Court has occupied the new premises on 2 November, with some 45 days of delay, while its actual move is still planned to take place between 30 November and 11 December 2015,

(ii) Costs

The projected costs remain within the newly approved budget of €206 million, while expenditures in the worst case scenario would be around €205 million, against the €204 million expected by the Assembly. The final figure will only be known upon the audit of the project accounts, in June 2016. The Oversight Committee has been reviewing all pending contracts, in both the construction and transition areas.

(iii) Quality

The premises have been delivered at a level of functionality that meets the current requirements of the Court. However, growth scenarios that include, e.g., the consolidated effects of the Re-Vision and of the OTP's strategic plans after 2015, might put at stress the capacity of the premises to accommodate the Court.

II. Main decisions at ASP/14

3. As the Court will be fully operational in its permanent premises on 1 January 2016, some important issues remain to be addressed in the course of 2015. All the items

clustered below are particularly important, for the impact that they have in the short, medium and long term, and have to be decided no later than at ASP/14. These include:

- A. Funding of the project
- B. One-time payments and host State Loan
- C. Scale of assessment
- D. Ownership interests of the States Parties and, in particular
- E. Total Cost of Ownership
- F. New States Parties contributions
- G. Membership of the Oversight Committee

A. Funding of the project

Funding channels

4. The project has so far been funded through:

- (i) A loan entered with the Host State, up to a maximum of €200 million,
- (ii) One-time payments,¹ which so far have been pledged by 65 States Parties,
- (iii) An authorization to appropriate the 2012-2014 surplus,²
- (iv) The cash reserves of the Court (Employee Benefit liabilities and Working Capital Fund).³

Transition costs

5. In 2013, the ASP decided that the surplus from 2012 to 2014 would have been appropriated to fund the costs of the transition project for the permanent premises, up to €5.7 million.⁴ While the 2012 surplus became available in the amount of €4.4 million, there was no positive surplus in 2013, and, therefore, an outstanding amount of €1.3 million is yet to be funded.

Construction costs

6. In 2014, the ASP decided to endow the Oversight Committee with delegated authority to - if necessary and needed - increase the permanent premises budget up to €4.3 million on the top of the current level of €195.7 million (or €200 million in total).⁵ The developments in the project costs have resulted in the actual budget increase of €4.3 million. However, the 2014 decision did not provide explicitly the funding source of such budget increase.

7. In 2015, the ASP decided to increase the budget envelope up to €206 million, of which €204 million, only, would have been expended if the sharing mechanism in the construction contract performs as expected. This increase is entirely to be funded through the Court's reserves (Employee Benefit Liabilities and Working Capital Fund), whose amount is subject to the review of the External Auditor, expected by March 2016.

Outstanding cash needs

8. Based on the above, the cash flow of the project requires that a currently unfunded amount of budgeted resources of €9.6 million is made available in the next few months.

¹ Advance payments pledged within the deadline of 31 December 2014, amount to €94,768,749, with actual payments for €94,107,108 made by 62 States. The deadline for payments expired on 15 June 2015.

² ICC-ASP/12/Res. 2, paragraphs 16-17, including the resort to "cash advances [from the] reserves of the Court in the period 2014 a to 2016 [...] prior to the availability of the [2012 to 2014] surplus, as a temporary and prudent measure of last resort, for a limited amount, and with an agreed schedule for restitution."

³ ICC-ASP/13/Res.6, paragraph 3.

⁴ ICC-ASP/12/Res. 2, paragraphs 16 and 17.

⁵ *Ibid.*, paragraph 17.

This is the result of budget increases (above the original 2010 level of €190 million)⁶ approved in:

2013 = €195.7 million (unification of the construction and transition project, of which € 1.3 million is still to be funded)

2014 = €200 million (delegated authority to the Committee to increase the budget up to €4.3 million, which was not funded)

2015 = €206 million, with €204 million expected expenditure (to be entirely funded with the reserves of the Court, in EBL and WCF).

9. As a consequence, a total of €5.6 million (€1.3 million from 2013, and €4.3 million from 2014) is at this stage unfunded. The late collection of contributions from States Parties to the annual budget of the Court (arrears) made any 2013 surplus unavailable to fund the 2013 increase. The 2014 surplus is expected to become available in February 2016 in the amount of €[1.8-2.1] million, which would allow to cover the 2013 outstanding funding need (€1.3 million) and part of the 2014 increase.

10. It is proposed that the Assembly authorizes resort to the 2014 and following financial years' surplus⁷ to also fund the remaining part of the 2014 budget increase.

11. The gap between the total €5.6 funding through surplus, and the time when such surplus would actually become available, would be filled in by a explicit authorization for the Court to make cash advances from its reserves, under the same conditions approved to fund the 2013 increase.⁸

B. One-time payments and Host State Loan

12. Upon expiration of the deadlines for opting in (31 December 2014) the system of advance contribution to the project costs, and fulfilling such pledges (15 June 2015), 65 States Parties opted in, and some €94.1 million have been paid. However, an amount of €0.66 million is still outstanding and, should the interested States Parties not be allowed to top up their contributions by extending the payment deadline.

13. The Loan Agreement with the host State included a subsidy of 17.5%. The interpretation endorsed by the Assembly since 2009 enabled to apply advance discounts to States Parties who made one-time payments. In July 2015, the Project Director reported that such interpretation mistakenly lead to a discrepancy of €3.5 million or 3% between the subsidy and the discounts applied, proposing a "new formula" according to which States Parties be additionally assessed for the same amount, in order to fully reimburse the sums drawn down from the loan.

14. The final audited cost of the project, required to enable the final recalculation of States Parties contributions, will only become available by the end of March 2016.

15. The Committee is proposing that the Assembly adopts the following decisions:

- (i) The final recalculation of contributions should be conducted upon expiration of the deadline to establish the amount drawn down from the loan and to be reimbursed to the Host State, as of 30 June 2016;
- (ii) The deadline for payments of pledged one-time payments be extended until 1 September 2016, enabling sufficient time to fulfil pledges on the basis of the final

⁶ ICC-ASP/9/Res. 1, paragraph 3 which, however, excluded the "other costs", later transition costs.

⁷ ICC-ASP/12/Res. 2, Annex II contains the amendment to Regulation 4.6 FRR, which allows the use of surplus "for the funding of costs related to the permanent premises of the Court".

⁸ Temporary and prudent measure of last resort, with an agreed schedule of restitution.

recalculation, while States Parties should be planning to that end sufficiently in advance and according to their internal budgetary and accounting processes;

- (iii) Should States Parties not have topped up their contributions by that final deadline, their outstanding contributions would be treated as arrears, so as to avoid that they automatically join the reimbursement of the loan for the unpaid amounts;
- (iv) Based on the existing legal framework (Loan Agreement, as implemented by the ASP resolutions), the final assessment of contributions should be made on the basis of the formula applied since 2009. Consequently, the amount of subsidy for the purpose of the reimbursement of the loan should include the discounts applied to States Parties which made one-time payments.

C. Scale of assessment

16. At the outset of the project, it was decided that the 2009 scale of assessment provisionally applied, while a final recalculation of contributions would have taken place on the basis of the final cost of the project and the amount of the loan to be reimbursed (which will all happen in 2016). However, in 2013 contributions were provisionally assessed on the basis of the 2013-2015 scale against the newly approved budget for the unified project (€195.7 million). While the External Auditor and the CBF have advised not to further change the scale of assessment, to avoid misunderstandings, the Assembly has so far only taken note of such recommendations. The 2016-2018 scale of assessment would likely bring significant changes for a number of States Parties.

17. The Committee has not been able to reach a consensus position, and is tabling alternative solutions to the Assembly for the scale of assessment applicable to the final recalculation of contributions, either the 2013-2015 scale, or the 2016-2018 one.

D. Ownership interests of States Parties

18. In its current premises the Court is on rent, and the ownership rights and obligations are for a private owner to be borne. However, upon completion of the permanent premises both the Court and the States Parties will need to address in a more structured and clear manner their respective roles and processes as regards the premises.

19. The permanent premises are a project of the Assembly, and its costs are borne entirely by States Parties, who have controlled its implementation through a governance structure whose centrepiece is the Oversight Committee, a subsidiary representative body of the Assembly, composed of ten States Parties.⁹ Meanwhile, the experience of States Parties at the interim premises has improved their awareness and created expectations on their own use of the Court's premises, while they fully appreciate the role of the Court in the management of the premises, which have been built for the Court's primary use.

20. On such bases, in 2014, the Assembly:¹⁰

“request[ed] the Oversight Committee and the Court to ensure that the interests of States Parties are addressed in matters related to the access to the premises”,
and

“also request[ed] the Oversight Committee to submit to the Assembly to its fourteenth session a proposal for States Parties representation of the ownership interests of the Assembly in the permanent premises”.

21. In addressing this mandate, the Committee has taken advantage of the views expressed by States Parties during HWG meetings and in other occasions, where their

⁹ Currently: Kenya, Japan, Korea, Romania, Argentina, Venezuela, Germany, Ireland, United Kingdom, and Italy.

¹⁰ ICC-ASP/13/Res. 2, paragraph 28 and 29.

comments were sought in advance, as it was done on other important matters over the past years (e.g., cost reductions, project unification, representational features, gardens). States Parties have expressed a strong interest, including at the resumed thirteenth session of the Assembly, for a mechanism that can ensure a stronger governance role, including strict control over the resources needed for the new premises and a meaningful role in some aspects of the management of the premises which have an impact on their presence.

22. As indicated at previous briefings,¹¹ the Committee had identified a list of matters where appropriate solutions had to be sought together with the Court.¹² Since these matters are currently being addressed through other initiatives, the Committee is not proposing a specific solution at ASP/14. However, it is proposed that the mandate of a successor body of the Committee be flexible enough to include in the future any need to address such matters.

23. Instead, the future long-term costs of the premises require a number of specific decisions, some of which have to be taken at ASP/14.

C. Total Cost of Ownership¹³

24. This would appear to be the most important strategic matter, for States Parties to retain ownership on the permanent premises they have provided as the seat of the Court. The importance of this item per se calls for States Parties to consider the impact that it will have for them throughout the life span of the premises. **A decision by the Assembly is required at this very stage to enable that the premises start to be used under the clear and unequivocal policy and governance guidance necessary to establish the correct management framework, and rely on reasonable financing expectations.**

25. This matter has been considered by the Committee for three years (2013-2015), and explored in all its facets, with full assistance by the Project Director, the Project Manager (the General Contractor), the Court, and the independent Experts of the Committee itself. The CBF has been constantly informed of the progress achieved, and provided its advice.

26. Final “technical” conclusions were made available on this matter since early in 2015.¹⁴ The future cost for preserving the value of the premises was estimated around €300 million over the next 50 years. A Fund managed by the Court and financed with flattened contributions of States Parties (€4.3 million a year, starting in 2017) would have ensured that repairs are done in the scheduled years without having to raise resources through the regular budget cycle.

27. The Committee, who initially had reserved its position in light of the sensitive policy and financial implications of the proposals received,¹⁵ reached the conclusion that the proposed technical approach was not sustainable, because of:

- (i) The assumptions behind the cost estimates,
- (ii) The funding mechanism, and
- (iii) The absence of proper governance guarantees for States Parties.

¹¹ OC Chair, *briefings to the Hague Working Group*, on 22 May and 28 September 2015.

¹² **Access to the premises**, including: (i) Access routes (staff entrance/main entrance), (ii) Parking lots (visitors/staff), (iii) Security screenings at the access points (Ambassador/delegates), and (iv) Badges (issuance, duration and use); **Use of the facilities**, including: (i) Meeting rooms (e.g., precedence in booking and functionality, including seatings and AV), (ii) Supporting rooms (for use of delegations), and (iii) Courtroom for meetings of the ASP (convertible main courtroom).

¹³ Long term maintenance and capital replacement costs.

¹⁴ The matter has been under consideration in the Committee since 2013. A technical working group was established, chaired by the Project Director and participated by the Project Manager (consultant of the Project Director’s Office), the Court, an Expert appointed by the Committee, and members of the latter as well. The final report of the working group will be considered by the Committee in the coming period, with a final draft recommendation of the Committee to be submitted to the CBF fall session for their advice. The finalized recommendation of the Committee will then be submitted to the Assembly at its fourteenth session.

¹⁵ CBF/24/20, *Interim Report on the activities of the Oversight Committee*, 15 April 2015, Annex VI “Working Group on Total Cost of Ownership – Comprehensive Advice: how to organize and fund Capital Replacements”.

The financial implications proposed in the technical advice are illustrated in the attached cost comparison for the period 2016-2019.

28. As a consequence, the Committee submits for adoption a decision where a governance and a funding model are detailed that would guarantee the sustainability of the long-term costs, while still requiring that in the next few years a follow-up review of such costs and funding mechanism be conducted. In particular, ASP/14 would be called to adopt a mechanism which includes the main aspects of a system to be implemented in the next years:

(i) *Governance.* Based on the significant lessons learned over the 8 years' experience of the Committee, a successor body (*Premises Committee*) would ensure that States Parties will remain in control of the policy and strategic aspects of the premises, including the use of the significant resources required;

(ii) *Organization.* The future maintenance would be outsourced, for an initial period of 10 years, to a Main Contractor;

(iii) *Costs.* A meaningful cost review is conducted in the period 2017-2019, which should:

(a) Only take into account practices at major International Organizations (and not in the private sector),

(b) Not include any costs for the first 10 years of the premises,

(c) Project costs in medium-term plans for planning and funding purposes.

(iv) *Funding.* Extra-budgetary resources (surplus and new States Parties contributions) should be made available for the long-term maintenance, while an analysis of a sustainable use of assessed contributions or other financial instruments (loans) should be conducted in the period 2017-2019.

D. New States Parties contributions

29. Differently from other International Organizations, the ICC is not provided its premises by the Host State, but by all its membership. It would be against the principle of sovereign equality, and unfair, if new States Parties would not take on all their membership responsibilities, being exempted from paying a share of the investment costs in the premises. Consequently, it is proposed that new States Parties, at the time of accession, should pay such contributions, to be used to offset the capital replacement costs.

E. Membership of the Oversight Committee

30. The Oversight Committee is elected for periods of two years. The mandate for the current membership ends with ASP/14. The nomination period for the new membership closed on 30 October 2015. While 7 Members of the Committee will not continue, only 2 new nominations have been received to date, thus resulting in a lack of 5 nominations, in order to re-constitute the membership. This matter should be addressed ahead of the Assembly, taking also into account the minimum regional requirement (1 State Party, only).

31. The renewed membership will elect the next Chair of the Committee.

Annex – *Total costs of ICC premises* (Table - comparison Interim/Permanent Premises)