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**EXTERNAL AUDITOR: FINAL REPORT
ON THE INTERNATIONAL CRIMINAL COURT GOVERNANCE
OVERSIGHT**

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I. CONTEXT

1. The objective of this work, according to the request addressed to the External Auditor by the Assembly of States Parties (ASP), is “to conduct an evaluation of the oversight¹ bodies of the International Criminal Court [referred to as the “Court” or “ICC” in the present report] as part of its work in 2020, replacing the performance audit, and to recommend possible actions on their respective mandates and reporting lines, while fully respecting the independence of the Court as a whole” (Resolution ICC-ASP/18/Res.1 of 7 December 2019).

2. The Assembly Resolution was the outcome of preliminary discussions that took place during the last quarter of 2019 within The Hague Working Group (THWG) on the initiative of the budget management oversight focal point, in conjunction with the External Auditor.

3. Based on these discussions which led to his mandate, the External Auditor understands the “evaluation of the oversight bodies” in a purely institutional way, as the emphasis on “respective mandates” and “reporting lines” makes it clear. So, his core duty is to evaluate the current adequacy and transparency, vis-à-vis the States Parties (SPs), of the mechanism resulting from the mandates and mutual relations between the oversight bodies, and not the current professional merits and outputs of the said bodies.

4. This work is an attempt to assess the efficiency and the effectiveness of the oversight of the Court including the role played by the State Parties. It is not an audit of a process but an analysis of the various relationships existing between the organs of the Court and the different bodies set up by the States Parties to oversee the Organisation’s governance. Such relationships are not only based on rules and documents but also on oral and informal exchanges on which the External Auditor can only exercise his own judgment within the limits of such information.

5. This work is parallel to the Independent Expert Review (IER) process, whose report was published on Sept. 30th, 2020. The Expert Review of the entire organisation and functioning of the Court, requested by the State Parties, aimed at identifying areas of improvement for more efficiency and economy. The External Auditor took good notice of IER’s 384 recommendations. Some of them are in line with the recommendations of this report.

6. An important part of the following analysis is based on a workshop, set out in the terms of reference defined by the External Auditor to fulfil the above-mentioned ASP mandate (see Appendix No. 1). The workshop had to be postponed several times, due to the pandemic, but took finally place in The Hague, at the ICC Headquarters on May 24 and 25th, 2021.

7. The 22 participants to the Workshop (see Appendix No. 2) were all direct stakeholders in the Court’s governance oversight², i.e.:

- the Assembly of States Parties (ASP), represented by the Chair and a member of The Hague Working Group (THWG), and by four “facilitators” and by the Head of the ASP Secretariat;

- the subsidiary bodies of the ASP, represented by the Chair of the Committee on Budget and Finance (CBF), the Chair of the Audit Committee (AC), the Head of the Independent Oversight Mechanism (IOM), and by the Head of the Executive Secretariat of both Committees;

- the Internal audit, represented by the Director of the Office of Internal Audit (OIA);

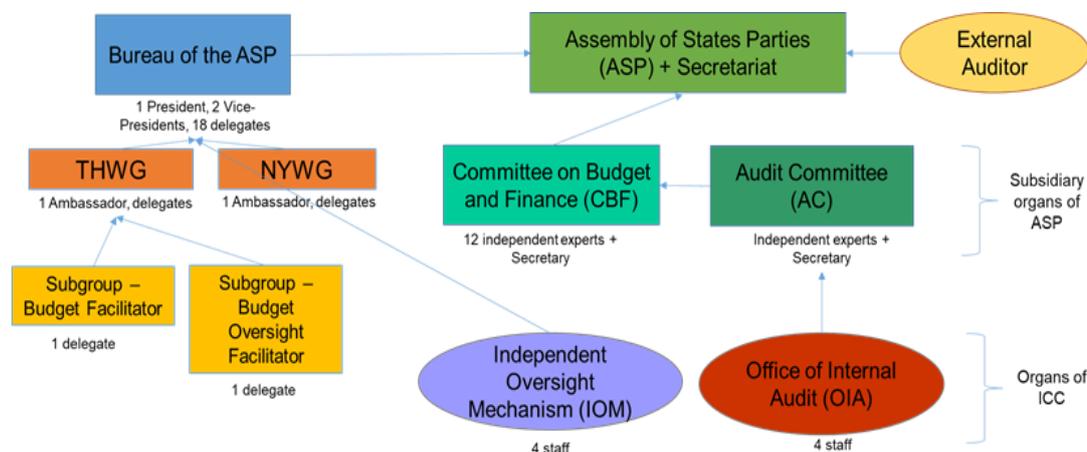
- and the three executive Organs of the Court (Presidency, Office of the Prosecutor, Registry), each represented by two high level executives.

¹ In the French version of this report, the word “surveillance” corresponds to the English term “Oversight”, which can also be translated as “*supervision*”, or “*contrôle*” in certain cases.

² Neither the Trust Fund for Victims (TFV) nor its Secretariat are covered by the ASP’s mandate.

8. The following chart illustrates the inter-relations between the above-mentioned stakeholders of the ICC governance oversight:

Figure 1: ICC Governance Oversight



Source: External Auditor.

9. The purpose of the workshop was to bring together all stakeholders in ICC governance oversight to exchange views on how best to improve access to the oversight mechanism for State parties delegates, and thus for the whole ASP.

10. The External Auditor prepared a working document and an agenda for the workshop, during which he acted as a moderator. Draft minutes of the discussions were dispatched on June 3rd, 2021, to all participants, and gave place to a clearance process, to ensure that they recorded faithfully and accurately each participant's contribution (comments, objections, proposals). All the answers were collected by June 11th, 2021. The minutes amended accordingly are presented in appendix No 3. They show that the workshop came to an initial consensus on the understanding of the External Auditors mandate: the way to improve the access of States parties delegates to the ICC governance oversight system was clearly recognized by the participants as the basic question to be addressed.

11. Based on the amended minutes, a report was drafted and submitted to the participants for a final clearance on July 28th, 2021. As of September 2nd, 2021, the External Auditor received six answers:

- a mail from the Internal Auditor (Tuesday August 3rd, 2021), suggesting bringing some technical clarifications on the future role of the Audit Committee, should the External Auditor's recommendations be adopted;
- a short mail from Ambassador. Päivi Kaukoranta (Monday August 9th, 2021) not proposing any comment;
- a letter from the CBF Chair (August 12th, 2021): in that letter, the CBF Chair indicated *"I would like that this letter be annexed to your final report that will be submitted to the Assembly"*. The letter is reproduced in Appendix 6 to the present report;
- a letter from the AC Chair (August 12th, 2021): the AC Chair indicated *"I would appreciate that this letter be annexed to your final report that will be submitted to the Assembly"*. The letter is reproduced in Appendix 7 of the present report;
- a mail from the Head of the ASP Secretariat (August 27th, 2021), suggesting editorial amendments;
- A note from the Head of the Independent Oversight Mechanism (Sept. 2nd, 2021), which is reproduced in Appendix 8 of the present report.

12. On that basis, the External Auditor finalised the present report.

II. LIST OF RECOMMENDATIONS

13. The recommendations are classified in order of priority:

- **Priority 1**, an essential point requiring the immediate attention from management. This point corresponds to the existence of a high level of risk for the objectives of the Organisation;
- **Priority 2**, a less urgent control issue, requiring attention from management. This point corresponds to a medium level of risk;
- **Priority 3**, an issue brought to the attention of management, pertaining to which controls could be improved. This point corresponds to a moderate level of risk

| Areas and departments concerned | Priority | Recommendations |
|---------------------------------|----------|---|
| ICC | 1 | 1. Given the ICC's persistent liquidity shortage, and the high level of ICC's governance oversight cost ratio compared to other International Organisations, the External Auditor recommends that no reform of the ICC Organisation as a whole, and of the governance oversight organs in particular, should lead to increased expenditure, unless equivalent decrease(s) are found and decided in other domains, and a priority should be given to reforms that can provide measurable economies. |
| Coordination Council, AC, OIA | 1 | 2. The External Auditor recommends to the Coordination Council (CoCo) to formally endorse, under the ex-post control of the AC, the annual internal audit program. The Audit Committee could ask for amendments, which would need in their turn to be approved and endorsed by the CoCo. The Office of Internal Audit (OIA) should report directly to the CoCo, and the CoCo with the advice of the AC, should be fully responsible for the evaluation of the Director of OIA. |
| ASP | 1 | 3. The External Auditor recommends the ASP to give through its Bureau a permanent access to the Audit Committee to a limited number of delegates as non-voting members. The role of these delegates would be to serve as "focal points" to provide information to their colleagues of other delegations on the current activity of the independent Audit Committee. |
| ASP | 1 | 4. The External Auditor recommends: <ul style="list-style-type: none"> - to suppress the CBF composed of independent experts and to transfer its competence in the preparation/negotiation of the detailed budget proposal with ICC's internal Budget Working Group to THWG or one of its sub-groups; - to submit each year, before Summer, the initial budget proposal to THWG, which could immediately start preparing and negotiating, in direct contact with ICC's internal Budget Working Group, the ASP's final consensual decision on budget to be taken in December, - as an option to ask the AC, who would be given an advisory role, to issue a synthetic initial technical opinion on the budget proposal,; - to suppress the Executive Secretariat, in order to restore the principle of subsidiarity of the governance oversight organs towards the Assembly. |

| | | |
|-----------------------------------|---|---|
| ASP, Presidency, OTP, Registry | 1 | 5. The External Auditor recommends merging the Office of Internal Audit and the Independent Oversight Mechanism in one Major Programme. |
|-----------------------------------|---|---|

III. SUMMARY OF THE KEY POINTS OF THE REPORT

14. The evaluation of the adequacy of the access of States parties delegates to the ICC governance oversight system, which is the basic question raised through the mandate given by the ASP to the External Auditor, is controversial among the stakeholders (i.e. the SP delegates on one side, and the independent experts who take part in ICC governance oversight on the other side): the subsidiary bodies of the ASP composed of independent experts (CBF, AC and, to a certain extent, IOM) consider no reform is needed to improve the access of the States Parties delegates to the oversight system. Amongst SP delegates themselves, there is no clear common view on the possible improvements.

15. In the absence of any consensus on any specific measures, the only way for the External Auditor to make objective and effective recommendations to improve the access of States Parties to the ICC governance oversight system is through organisational benchmarking (on a panel of 29 International Organisations), on oversight structures and costs, which show that:

- the ICC has, apart from the ASP and its own subsidiary bodies (Bureau, THWG and NYWG), six oversight structures – CBF, AC, Executive Secretariat, IOM, OIA, and External Audit. This is more than in any other International Organisation. This difference is due to three specific characteristics: a) the CBF is an external body composed of independent experts, whereas in most other Organisations the budget and finance oversight functions are directly exercised by the States Parties delegates; b) There is a separate Executive Secretariat dedicated to CBF/AC, which cannot be found in any other Organisation of similar size; c) lastly, the internal audit and IOM are two separate entities, whereas these two functions are merged in other IOs.

- ICC's overall oversight cost (EUR 1.974 million in 2019), represents 1.23 % of total ICC's overheads. This ratio is far higher than in other International Organisations, where the ratios range between 0.29 % and 0.70 %: as a result, ICC's oversight cost ratio is two to four times higher than that of other IOs, even of similar size. This can be considered as a direct consequence of an excessive complexity of the present ICC's governance oversight system.

16. Based on these elements, the External Auditor recommendations to the ASP (see below) are based on a more economic, straightforward, effective and accountable oversight model, with only one body of independent experts, the Audit Committee, reporting directly to the ASP, with a new relationship with OIA and, optionally, playing an advisory role in budget matters, no separate "executive secretariat" dedicated to independent experts, and one Major Programme merging internal audit and IOM.

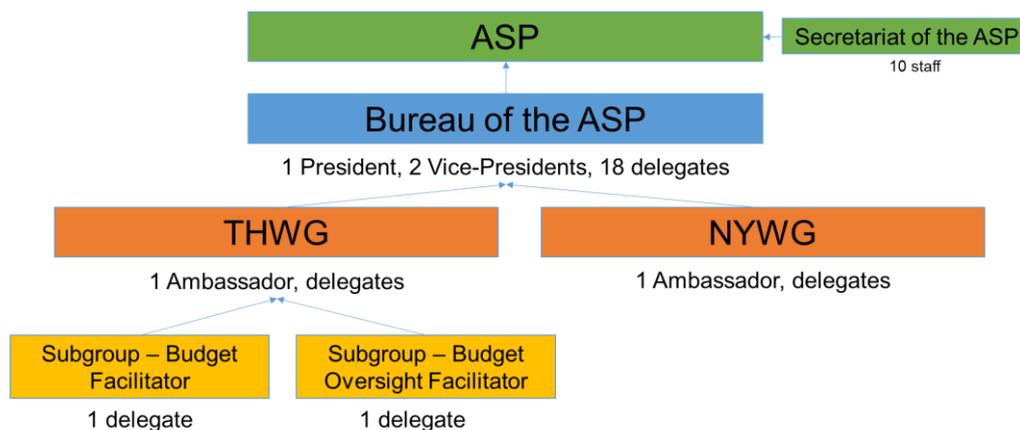
17. If such a model, compliant with best international practices, is implemented at ICC, most of CBF's present functions in budget preparation would be exercised by a direct body of SP delegates (THWG or a specialized group of delegates), which appears to be the most economical way to give to SP's an effective and direct access to ICC's governance oversight.

IV. OBSERVATIONS AND RECOMMENDATIONS

1. Conclusions of the workshop

18. The access of States Parties to the ICC governance oversight system is currently exercised by the ASP and its subsidiary bodies which are shown in Figure 2 below:

Figure 2: Organisational Chart of the ASP and its subsidiary bodies



Source: External Auditor

- *the Bureau of the Assembly*: it consists of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms. The current Bureau assumed its functions at the end of the nineteenth session of the Assembly, on February 12th, 2021. The Bureau has a representative character, considering, in particular, equitable geographical distribution and the adequate representation of the main legal systems of the world. It meets as often as necessary, but at least once a year. It assists the Assembly in the discharge of its responsibilities. Additional information on the Bureau is provided in article 112 of the Rome Statute and rule 29 of the Rules of Procedure of the Assembly of States Parties.

- *the Working Groups of the Bureau*: pursuant to resolution ICC-ASP/3/Res.8, the Bureau established, on December 1st, 2004, two Working Groups of equal standing, one based in The Hague (THWG) and the other in New York (NYWG). The Bureau periodically allocates mandates to these groups, avoiding duplicating work in The Hague and in New York. These groups are open to all States Parties. Each group is coordinated by an ambassador who also serves as Vice-President of the Bureau and is organised in subgroups. On February 14th, 2006, the Bureau recomposed its two Working Groups and adopted their terms of reference, which can be subject to periodical review, and which provide, among others, that THWG is responsible for “*considering the issue of the budget of the Court, while respecting the special role of the Committee on Budget and Finance*”.

- *the Facilitators*: according to the terms of reference adopted in 2006, the Working Groups coordinators may appoint Facilitators on specific issues. In the case of budgetary and financial governance oversight, two THWG subgroups are presently led by a Budget Facilitator and a Budget Management Oversight focal point (previously known as “Budget Oversight Facilitator”).

19. Appendix No. 9 recalls the main characteristics and interrelationships of the various constituent bodies of the governance oversight system at the International Criminal Court, i.e. not only the Bureau, the Working Groups and the Facilitators as described above, but also the other subsidiary bodies of the ASP to which the delegates of States Parties have no access, i.e.: the Committee on Budget and Finance (CBF), the Audit Committee (AC) and their common Executive Secretariat, and the Independent Oversight Mechanism (IOM). Appendix No. 9 also recalls the characteristics of the Office of Internal Audit (OIA), which is not a subsidiary body of the ASP, but which is also part of the ICC governance oversight system as defined in the scope of the present report. It does not mention the External Auditor, which is an intrinsic independent (i.e., non-subsiary) external organ of any International Organisation publishing financial statements.

1.1. Scope of the External Auditor's mandate

20. The Hague Working Group's preliminary approach which led to the mandate given by the ASP to the External Auditor was based on a definition of the governance oversight mechanism of the Court, which excluded the ASP itself, acting as the supreme oversight body of the Organisation, and the independent External Auditor, who reports directly and independently to the ASP.

21. With these two exceptions, the workshop agreed to define the ICC's governance oversight system as the set of mutual relationships between the States Parties and the following entities and structures:

- two "direct" subsidiary bodies of the ASP which are the Committee on Budget and Finance (CBF) and the Audit Committee (AC), each consisting exclusively of independent experts, and their Executive Secretariat;
- one "indirect" subsidiary body (it is indirect, because it is, in terms of staffing and budgeting, a purely "internal" service of the ICC): the Independent Oversight Mechanism (IOM), which should ensure the duties of evaluation, investigation and inspection, and which is reporting directly to the President of the ASP³;
- a non-subsiary internal service of the ICC, which is ensuring the internal audit: the Office of Internal Audit – OIA);
- and the ASP Bureau, The Hague Working Group and the Facilitators, through which the States Parties, taking major decisions during the Assembly sessions (usually one week per year), remain involved in ICC governance issues between sessions. These entities were recognized by the participants to the May 2021 workshop as essential stakeholders in the assessment of the transparency and adequacy of information conveyed to the States Parties delegates by the ICC governance oversight mechanism.

22. In addition to the question of the access of SP delegates to the ICC governance oversight system, for which, as said above, the External Auditor has been mandated by the ASP, the former Budget Management Oversight focal point, participant to the workshop, raised three additional issues that were not mentioned in the working document, but that are addressed further in this report, i.e.:

- **the cost of the system for the States Parties;**
- **the need for "so many auditors" covering ICC activities;**
- **the need for three organs reporting directly or indirectly to the ASP carrying out performance audits, and the specific roles of IOM, OIA and the External Auditor in that area.**

23. The participants came to a consensus on this definition of the ICC governance oversight system, provided that the External Auditor would be included in the scope for his activities as performance auditor⁴.

³ Art. 112-4 of the Rome Statute: "the Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy."

⁴ But of course, not for his core activity as External Auditor of the Financial Statements.

1.2. States Parties' access to the ICC governance oversight

24. The present direct or indirect accesses of the States Parties delegates to the Court's governance oversight mechanism are based:

- on the one hand, on the current reporting lines of the Heads of the four entities in charge of the ICC governance oversight (CBF, AC, OIA, IOM);

- on the other hand, on the direct and indirect flows of mutual information currently provided directly to the ASP, or through the Bureau, The Hague Working Group (THWG) and/or the Facilitators.

25. Reporting to and information of the delegates of the States Parties currently involve three channels: the Secretariat of the ASP; the Budget Facilitator; the Budget Management Oversight focal point. More precisely:

- an Executive Secretariat of CBF/AC is formally under the responsibility of the Director of the Secretariat of the ASP. THWG made recent attempts to clarify the respective roles of the Director of the Secretariat of the ASP and of the Executive Secretary of the CBF and AC. Its conclusion is presented in document ICC-ASP-18-Res1, the wording of which remains ambiguous: "*the Executive Secretary reports to the Chair of the Committee on all issues of substance pertaining to the work of the Committee but remains a member of the ASP Secretariat in line with the management structure of the Court*". Such a wording does not really define a clear-cut and effective reporting line between the ASP and its subsidiary bodies, the Committee on Budget and Finance and the Audit Committee. Such close reporting with the CBF is particularly necessary during the long period of preparation of the ICC budget, during which a flow of reciprocal information would be essential, but it is practically inexistant (see the External Auditor's 2019 final report on the ICC budget process⁵). The underlying core question is to decide whether, in its present role in the budget preparation, which relies on an access to information inaccessible to the States Parties and on the power to make preliminary budgetary arbitrations on this basis, the CBF can be considered at the same time as a genuine "subsidiary" body of the ASP, and as a committee of experts taking decisions fully independently from the States Parties, leaving in theory to the latter the only option to adopt or reject a ready-prepared budget;

- furthermore, through recent discussions on an amendment of the Internal Audit Charter, another ambiguity remains, concerning the respective positions of the CBF and the AC. The most recent description is the following: "*the Assembly of State Parties is the management oversight and legislative body of the Court. It is composed of representatives of the States Parties to the Rome Statute. The ASP has established the Committee on Budget and Finance ("CBF") and the Audit Committee ("AC") that reports to the Assembly through the CBF, to address specific topics that require technical expertise*". Such a wording suggests, without concluding on its practical implications, that the Audit Committee is a sub-committee of the CBF. Obviously, this ambiguity is not likely to clarify contacts between the ASP and its two subsidiary bodies.

⁵ This point was contested during the Workshop by the present Chair of the CBF (see appendix No. 3). But it resulted from an interview of the Budget Facilitator in charge in 2018 (Ambassador. Mrs. Marlene Bonnici), whose statement was confirmed through the clearance process of the External Auditor's report. Reporting always involves at least two partners – if the Facilitator considers that the access to budgetary information through CBF is insufficient, it can be objectively deduced that the reporting from the CBF is inadequate.

26. The Budget Facilitator is appointed by the Bureau on the recommendation of THWG. His/her role is to prepare the negotiation between ICC's internal Budget Working Group, where the administrative officers of the three organs are represented (and which is headed by the Registrar), and the different categories of States Parties⁶ to reach a consensus before the ASP adopts the budget at year's end. That cannot be achieved without re-examining directly the budget proposal in detail, independently from prior adjustments discussed by the CBF with ICC's internal Budget Working Group. The Facilitator entertains only informal contacts with the CBF before and after, but not during the examination of the draft budget by the latter. These contacts are limited to providing to the experts very general indications on the level of funding that the States Parties are willing to allocate to the Court's next budget (basically limited, during the past decade, to "zero real growth"), as was described in the above-mentioned External Auditor's report on the budget process (see "approval process", Chap II-D-2).

27. The Budget Management Oversight focal point, whose function is not clearly defined in any document, is also appointed by the Bureau on the recommendation of THWG and has been the prime instigator of the mandate given to the External Auditor by the ASP to evaluate the Court's governance oversight mechanism.

28. The adequacy of the access of States Parties delegates to the ICC governance oversight system, which is the basic question raised through the mandate given by the ASP to the External Auditor, was controversial among the participants to the workshop. The main following points emerged from the discussion:

- There is clearly, from the participants representing the subsidiary bodies of the ASP (CBF, AC and, theoretically, IOM), no consensus on the need to improve the relationships with the States Parties delegates⁷. On their side, the participating SP delegates did not express a uniform opinion on that question. By re-discussing in detail the budget proposal, THWG duplicates, and finally neglects, through its own negotiations between States Parties, the technical screening of the budget proposal carried out by the CBF. The External Auditor considers that this situation is neither efficient nor cost effective for the States Parties, and therefore questioned that it did not appear deserving a reform by most participants (except by the former Budget Management Oversight focal point and the External Auditor⁸).

- More generally, there was no consensus among the participants representing the subsidiary bodies of the ASP:

- neither on the fact that the governance oversight system was clearly not considered as fully satisfactory from ASP's point of view (which remains the basic objective reason why the ASP requested a report from the External Auditor),

- nor on the fact that the External Auditor should suggest any improvement to a system they consider as adequate from their point of view (although the ASP explicitly asked the External Auditor to make recommendations to improve the system).

- The existence of an "Executive Secretariat" within the ASP Secretariat, whose cost effectiveness and transparency were questioned in the working document provided by the External Auditor, was strongly supported by the CBF and AC chairs (see Appendices No. 4 and 5), while the other participants did not express any particular concern.

⁶ Divergent views have usually to be reconciled between major contributors and "like-minded" States parties. Geographical affinities can also lead to different positions of certain groups, such as WEOG (European Union countries), GRULAC (Latin America), Eastern European Group. Although THWG is open to all States Parties, on average, only about 40 delegations (mainly those who have an embassy in The Hague) participate effectively to THWG-budget discussions.

⁷ The chairs of CBF and AC both sent notes stating that and explaining why they saw no problems of relationships between the SPs and the ICC governance oversight mechanism (see Appendix No. 4 and No. 5).

⁸ The same conclusion on the inefficient duplication of work between CBF and THWG was described by Ambassador. Marlène Bonnici, former Budget Facilitator when the External Auditor audited the ICC budget process in 2019 – see External Auditor's final report on ICC budget process (doc. ICC-ASP/18/12/Add.2).

- Lastly, the Deputy Prosecutor and the Head of IOM expressed the view that the direct reporting line between the IOM and the chair of the ASP, also questioned in the working document for lack of flexibility and visibility compared to the dominant budgetary formula of a unified Major Programme combining IOM and OIA, presented theoretical advantages in case of allegations of misconduct against elected ICC principals.

1.3. The cost of governance oversight

29. Although the working document did not raise this specific question, most participants considered that there is a risk of duplication for performance audits, pointing out the fact that, in that domain, the External Auditor should be included in the scope of the governance oversight system, together with OIA and IOM. Everyone agreed on this point, even though the targets and the relations of the External Auditor with States Parties are clearly different from OIA's and IOM's⁹. Nevertheless, all agreed that there can be overlaps of audit topics between external audit and internal audit. That is why the External Auditor coordinates every year his own audit plan with the Internal Audit's program. But the workshop explicitly raised the question of the cost of the ICC governance oversight system as a whole, including the external audit, as being a major point to be addressed to fulfil the ASP mandate.

30. A general consensus was that the overall cost of the ICC governance oversight system should be recognized as a major concern in the present work. The External Auditor took good notice of this important point.

1.4. The absence of consensus on any reform

31. None of the solutions suggested in the working document to streamline the system, which were based on the External Auditor's experience in other international Organisations, received unanimous support from the participants. In particular:

- the split of responsibilities between the ASP Secretariat and the Executive Secretariat is seen as a core condition of the independence of the CBF – but it is also a clear sign that the CBF, whatever the texts provide, does not accept its legal position of “subsidiary” body towards the States Parties¹⁰. Nevertheless, the suggestion to implement a single straightforward reporting line in the Secretariat of the ASP in order to streamline (and to minimize the cost of) the follow-up of the activities of the Assembly on one hand, and the CBF and the AC on the other hand, met no support from representatives of States Parties;

- a modification of the rules concerning membership of CBF and AC, so that the SP Delegates could be directly represented in these committees through the Facilitators, was either rejected or not supported by the participants (except by the former Budget Management Oversight focal point)¹¹;

- the implementation of a more formal structure for contacts and information flow between the CBF, the AC and the Facilitators, was considered by some participants as imposing a “straitjacket” threatening the experts' independence (although some participants reminded that the CBF and AC should remain basically subsidiary organs of the ASP, which necessarily implies some degree of dependence of these committees towards the States Parties);

- the proposal to merge OIA and IOM was only supported by the former Budget Management Oversight focal point and a member of the AC.

⁹ The core mission of the External Auditor is to issue an independent opinion on the annual financial statements: in that domain, there is clearly no possible duplication. Compared with the Internal Audit, External Auditor's performance audits are based on the INTOSAI approach of the “three E” (Economy, Efficiency and Effectiveness), more than on risk analysis. Compared to IOM, the External Auditor's performance audits are genuine audits specifically oriented on the SPs needs (research of the optimal way to spend SPs contributions), and, in most cases, not evaluations (attempts to assess the outcomes and impacts of a given policy). In addition, the External Auditor is fully independent from the Court and the States Parties for the selection of the audit topics.

¹⁰ As mentioned in Appendix No.9, the CBF/CA Executive Secretariat “does not exist” in ICC's core texts. Only the position of CBF/AC Secretary has been validated.

¹¹ Appendices No. 4 and 5 remind that such a solution (implemented only in the OECD, which does not belong to the UN system), even if recommended by the External Auditor's on the basis of his own experience with that particular Organisation, does not correspond to the major benchmark of 29 International Organisations presented by the External Auditor.

2. External Auditor's approach

32. In the absence of any consensus, the only way for the External Auditor to make objective and effective recommendations to improve the access of States Parties to the ICC governance oversight system is through a benchmarking of both oversight costs and structures.

2.1. Cost benchmarking

33. In the context of the terms of reference for the evaluation of the governance oversight system, as mentioned above, the scope of our survey includes:

- on the one hand, the AC, the CBF and their Executive Secretariat, the IOM, the OIA, and the external audit;
- on the other hand, the various Committees, Commissions, Groups, Facilitators, etc. composed of delegates from the States Parties dealing with oversight – in the case of ICC, this encompasses the Bureau of the ASP, THWG and the Facilitators.

34. For the purpose of cost comparisons, only the first group has to be taken into account – it is generally agreed that oversight activities, when carried out directly by Delegates of the States Parties, are part of a more general role of the delegations, and therefore represent only a marginal cost for the Organisations concerned, which can be neglected (no salaries nor direct overheads, as for IOM and OIA, and no Daily Subsistence Allowance (DSA), no transport costs, nor “Executive Secretariat” costs, as for the Audit Committee and the C Committee on Budget and Finance).

Table 1: Cost of ICC's oversight organs (in thousands of euros)

| 2019 | |
|--|------------|
| AC | 37,38 |
| CBF | 160.42 |
| Secretariat of independent experts bodies (CBF/AC) | 498.31 |
| IOM | 521.60 |
| Internal audit | 686.28 |
| External audit | 70.00 |
| 1. Total cost of governance oversight | 1 974.00 |
| 2. Total Organisation's overheads | 160 736.00 |
| Ratio 1/2 (%) | 1.23% |

Source: External Auditor

35. This table answers a precise question raised by the Head of IOM during the workshop: the external audit cost represents 3.5% of the total governance oversight costs, and 0.04% of the total ICC overheads, i.e., ten times less than OIA (0.43%), ten times less than AC/CBF and their Executive Secretariat (0.43%) and eight times less than IOM (0.32%).

36. More generally, although other Organisations do not publish detailed data on the cost of their oversight organs, the data we have access to concerning some other International Organisations (where the ratios range between 0,29 % and 0,70 %), show that ICC's oversight cost ratio is two to four times higher than that of other IOs.

37. Based on his audit of the ICC financial statements during the past years, the External Auditor is also fully aware of the liquidity shortage that the Organisation has to face at each year's end and which, at some point in time, might question the ICC's going concern¹². That is why the External Auditor concluded that no reform of the ICC organisation in general, and of the governance oversight organs in particular, should lead to an increase of expenditure, unless equivalent decrease(s) can be decided in other domains. As said above, there was a consensus during the workshop that the cost of ICC governance oversight system, was a major concern to be addressed when evaluating that system (see Appendix No. 3).

38. As a general conclusion, as shown in the previous table, the overall cost ratio of the ICC six "non-delegates" oversight structures (CBF, AC, Executive Secretariat, IOM, Internal Audit, External Audit) is far more important than in other International Organisations.

2.2. Structural benchmarking

39. Out of a sample of 29 International Organisations¹³: nine do not have a CBF or equivalent; only five have a CBF of independent experts¹⁴ (including the ICC), and 15 have no independent experts on the CBF, their budget and finance committee being simply an emanation of the delegations acting as a direct commission of the Assembly¹⁵. Delegates' CBFs are therefore clearly the dominant norm in our sample, which is not surprising, considering that budget appropriations are the ultimate (and often the only effective) tool for the Member-States to monitor the governance of an International Organisation. In addition, as it has been outlined during the workshop, in the ICC, most of the effective oversight activities concerning the budget are in fact carried out by the Facilitators and THWG.

40. Regarding the separation of internal audit and IOM, in the same sample, the ICC is the only International Organisation to have two separate bodies.

Finding No.1. With a high number of non-delegates oversight structures, the cost of ICC governance oversight, in comparison with its total expenses, is prohibitive compared to other International Organisations.

Recommendation No. 1. (Priority 1) Given the ICC's persistent liquidity shortage, and the high level of ICC's governance oversight cost ratio compared to other International Organisations, the External Auditor recommends that no reform of the ICC Organisation as a whole, and of the governance oversight organs in particular, should lead to increased expenditure, unless equivalent decrease(s) are found and decided in other domains, and a priority should be given to reforms that can provide measurable economies.

3. Organisational recommendations

41. It must be stressed that the following recommendations aim exclusively at answering the question submitted by the ASP to the External Auditor. The External Auditor is of course aware that some representatives of the three organs and/or independent participants to the oversight system might raise a very different question, i.e.: is a closer involvement of the States Parties in the supervision of the ICC governance desirable?

¹² See External Auditor's opinion on 2017 financial statements (doc. ICC-ASP/17/12, p5): "We draw your attention specifically to the matter set forth in notes 2.4 ("Basis of preparation") and 2.19 ("Liquidity risks") to the Financial Statements, regarding the going concern principle." And page 65, the External Auditor made the following observation: "data provided to the External Auditor during his final mission on the 2017 financial statements lead him to share the concerns expressed by the Committee regarding the risk of a liquidity crisis occurring during the second half of 2018. The External Auditor considers that this is not a temporary crisis, but the manifestation of a problem that has become structural, the resolution of which requires further analysis". Since then, the same problem arises at each year end, including 2021.

¹³ The External Auditor has conducted a benchmark of the governance of the oversight system in 29 International Organisations, related and non-related to the United Nations system: nine United Nations Funds and Programmes, ten specialized United Nations Organizations, five affiliated United Nations Organizations, and five non-United Nations system Organizations

¹⁴ UN, ICC, CoE, OPCW, CTBTO

¹⁵ ICJ, WFP, FAO, ICAO, ILO, WHO, UNIDO, UNWTO, IFAD, IAEA, IBRD, WTO, OECD, NATO and OSCE.

42. The External Auditor, reporting exclusively to the ASP, cannot answer such a political question. The only recommendation he can make in that domain is technical: whatever the degree of direct implication of the States Parties in the ICC governance oversight, this implication must not lead to “micro-management”, i.e., to a situation where the border between governance and oversight responsibilities is blurred. This point must of course be borne in mind when considering the External Auditor’s recommendations.

43. To make effective recommendations to the ASP in order to strengthen the participation of States Parties delegates in the monitoring of the ICC’s governance, the External Auditor followed three main principles:

- simplify the relations between SP delegates and the oversight bodies, by reducing the number of subsidiary bodies and their cost, and by organizing more direct access for SP delegates to these bodies;
- align the ICC, when possible, with the most current International Organisations’ governance oversight structures;
- keep unchanged the respective roles of Presidency, Office of the Prosecutor and Registry, in terms of independence/neutrality, in compliance with the Rome Statute.

44. Based on these principles, and in particular on the fact that the cost of governance oversight should fall within the standards, and that the respective roles of the three main ICC organs should remain compliant with the Rome Statute, the External Auditor’s recommendations often differ from IER’s¹⁶, for which governance oversight was only a minor part of a much larger review.

45. These three principles lead to the following recommendations:

3.1. Improve OIA’s integration in the Court

46. Better integration of the Office of Internal Audit (OIA) in the executive organisation of the ICC is the only point on which a consensus was almost reached between the participants to the workshop (except for the Audit Committee’s representatives, who reject all recommendations).

47. Regarding the OIA, the Court recently went from one extreme to another. After attaching it to the Registry (which the External Auditor considered not to be compliant with good practices), the Court attached it to the Secretariat of the Assembly (which is indeed more in line with good practices¹⁷). But, although the External Auditor’s recommendation did not expect such an outcome, this resulted in this function falling *de facto* under the almost exclusive responsibility of the Audit Committee, thus detaching it from the orbit of the executive authorities of the Court, for the needs and information of which an internal audit is primarily supposed to bring its independent professional contribution.

48. Internal audit is by definition an internal function, which, while independent from the other services, works exclusively for the Organisation’s executive authority: from an operational point of view, the executive/internal auditor reporting line is itself exclusive, with the consequence that:

¹⁶ In particular, a number of IER’s recommendations could entail additional costs

¹⁷ When auditing the financial statements of the Court for the year ending 2013, the External Auditor raised the following recommendations: “*The External Auditor recommends terminating the existing Audit Committee and establishing a new committee in line with best professional practice, assisting the Assembly of State Parties (ASP) in fulfilling its oversight responsibilities for the financial reporting process, the system of internal control, and the internal and external audit process. This committee must therefore be established as a subsidiary body of the ASP. It could be set up as a sub-committee of the Committee on Budget and Finance (CBF). To ensure that the Office of Internal Audit is in line with best professional practice, the External Auditor recommends that OIA be accountable to the heads of organs for administrative matters and to the Audit Committee for the appointment, dismissal and performance appraisal of the OIA Director. The Committee shall approve the Internal Audit Charter and the Internal Audit Office’s annual audit plan and review the effectiveness of the internal audit activities. To reflect this independence, the Office of Internal Audit’s budget should be taken out of Major Programme III (Registry), and established as a separate Major Programme to be executed under the sole responsibility, authority and accountability of the OIA Director*”..

- with regard to the review of the internal Audit programme, the Audit Committee's role should only consist in ensuring that important proposals of the internal auditor have not been improperly discarded by the executive authority. The “amendments” that the Audit Committee may bring to the audit programme must therefore be aimed exclusively at reinforcing or restoring the independence of the Internal Auditor, should it appear that this independence has not been respected. *A contrario*, it is obviously not the role of the Audit Committee to add or suppress in the programme audit topics to those approved by the executive authority based on the Internal Auditor’s proposal;

- as for the “evaluation” of the Internal Auditor, it also relies finally on the responsibility of the executive authorities: the important role of the Audit Committee is to ensure that the executive authority’s evaluation is not a backdoor way of putting pressure on the internal auditor (this is quite the opposite of what is currently happening: the AC has sought to use its alleged power to evaluate the Internal Auditor to put pressure on the latter, when it was supposed to protect him/her), and secondarily, to inform the executive authorities on the technical adequacy of the internal audit methods with regard to good practices.

49. The problem, specific to ICC because of the principles of independence and neutrality of its three major executive organs, is to define who is the “executive authority”. A suggestion put forward three years ago by the External Auditor in this area, consisting in giving to the Director of the OIA a permanent access to the Coordination Council (CoCo)¹⁸ meetings, was in that time not considered relevant by the members of that Committee.

50. The External Auditor suggested in the working document for the workshop that an annual “meeting on internal governance oversight”, with high-level administrative executives of the three Organs of the ICC (Registry, Presidency, OTP) and the Head of the OIA, should be dedicated to the approval of the part of the Internal Audit’s annual program specifically dedicated to ICC crosscutting issues.

51. Most participants to the workshop (except the AC representatives) welcomed this proposal but suggested that the CoCo itself should be the place where the discussion and the approval of the annual internal audit program should take place. Since there was a clear consensus of the representatives of the three ICC organs on that issue, and although it does not solve in any way the core question of the access of the SP delegates to the ICC governance oversight system, the External Auditor makes the following second recommendation:

Recommendation No. 2. (Priority 1) The External Auditor recommends to the Coordination Council (CoCo) to formally endorse, under the ex-post control of the AC, the annual internal audit program. The Audit Committee could ask for amendments, which would need in their turn to be approved and endorsed by the CoCo. The Office of Internal Audit (OIA) should report directly to the CoCo, and the CoCo with the advice of the AC, should be fully responsible for the evaluation of the Director of OIA.

3.2. Give to SP access to the AC

52. As said above, the External Auditor’s proposal to implement “mixed committees”, composed of independent experts and States Parties’ delegates, so that the principle of subsidiarity would be effectively applied to CBF and possibly to AC, was rejected by most participants to the workshop. Nevertheless, the present Budget Management Oversight focal point suggested giving the Facilitators a permanent access to AC and CBF as non-voting members as a substitute: *“we need a formula to ensure participation or at least presence of SP representatives. [...] I thought of a “super-passive” formula, where the Facilitators would be present in a kind of observer role – not asking them to shut up – but maybe somehow facilitating the flow of information for everybody’s benefit. The Facilitator would be in a good position to pass information to the SPs”*.

¹⁸ The Coordination Council is a high-level meeting of the principals of the ICC’s three organs (Registry, Presidency, OTP), where general guidance policies are taken.

53. If applied to the Audit Committee, this proposal is consistent with the other recommendations further presented and is clearly in line with the request made in the mandate given to the External Auditor to improve the access of the States Parties to ICC's governance oversight organs. It is strongly rejected by the AC Chair (see appendix 7). Nevertheless, the External Auditor supports it.

Recommendation No. 3. (Priority 2) The External Auditor recommends the ASP to give through its Bureau a permanent access to the Audit Committee to a limited number of delegates as non-voting members. The role of these delegates would be to serve as “focal points” to provide information to their colleagues of other delegations on the current activity of the independent Audit Committee.

3.3. Redistribute the roles of CBF, AC and THWG

54. The “independent experts CBF model”, although very rarely used by most International Organisations, has an emblematic example: the Advisory Committee on Administrative and Budgetary Questions (ACABQ)¹⁹ of the United Nations, attached to the Fifth Committee of the UN General Assembly. This model relies on a total confidence on the part of the General Assembly, which does not question the conclusions of this independent college of experts.

55. The present ICC CBF relies on similar principles: but to be efficient and effective, this model would require that all States Parties refrain from re-discussing the technical issues settled by the CBF. If a consensus could be reached on that point, such a solution could of course be supported by the External Auditor. But the exchanges that took place in the workshop, as well as the findings of the External Auditor during his previous audit of the budget process, show there is no consensus on that question.

56. That is why, in ICC's case, this model presents three disadvantages:

- the mandate given by the ASP to the External Auditor shows that the CBF is considered by some Delegates as a “screen” between the States Parties and the Court (reversely, it is considered by the services concerned in the ICC, as a “protection” against the delegations);
- for several delegations, who wish to discuss and amend in detail the budget before adopting it, this means a waste of time: THWG can only begin its own analysis at best beginning of Autumn, when the CBF has finished its own review of the initial budget proposal, although this latter is usually already available beginning of Summer;
- the existence of an “Executive secretariat”, separate from the Secretariat of the ASP, not foreseen in ICC's core texts, reinforces the distance between the States Parties and the CBF, which in fact does not act as a subsidiary body but appears finally as a completely autonomous body, not representing the States Parties budgetary positions. When reading appendix 6 and 7, it is clear that CBF and AC do not have the slightest confidence in the States Parties and their direct organs – and that is why they advocated for a separation between the ASP Secretariat and their own Executive Secretariat. What is less clear is the reason why the ASP accepted to meet their demand (with a cost attached to it), putting in place an “executive secretariat” which voids the notion of 'subsidiarity' itself²⁰.

¹⁹ The ACABQ is a subsidiary organ of the General Assembly and consists of 16 members appointed by the Assembly in their individual capacity. Its functions and responsibilities cover in particular the budget submitted by the Secretary-General to the General Assembly, advice to the General Assembly concerning any administrative and budgetary matters referred to it, report to the General Assembly on the External Auditors' reports.

²⁰ The AC Chair's declaration on the workshop paper raises this contradiction in very clear terms (in answer to question 5 of this document: « *do the participants agree that a single straightforward reporting line should be implemented in the ASP Secretariat on the follow-up of the activities of the Assembly, the CBF and the AC ?* »): “*in order to maintain the best outcome of the technical subsidiary bodies, they must be able to maintain their independence from any interference from the political body*”. If “*any interference*” from the States Parties is forbidden, there is no subsidiarity.

57. All this is a drift, which stems from an unfortunate confusion: the CBF and the AC cannot have any autonomy, since they are "subsidiary", and as such, have to respond to the needs expressed by the Assembly and its direct bodies. But on that basis, the experts are expected to express their opinion and advice in complete independence on the demands and wishes expressed by the States Parties – hence the expression "independent" applies to the experts, not of course to the "subsidiary" committees, which should instead of course maintain closest links of exchange with the Assembly and its direct bodies. In other words, while the experts are independent when issuing individual analyses or positions, their committees are subordinate to the governing bodies, which alone have the legitimate right to define the budgetary guidelines at all levels, or even to request the examination of questions relating to specific technical points, on the basis of which the experts give their fully independent opinions and recommendations.

58. The External Auditor notes that opinions, among delegations, are very divided on this issue: but due to the principle of consensus, even if only a limited number of delegations want to exercise their legitimate right of scrutiny directly over the budget proposal and more generally over the financial oversight of the Organisation their States finance, this model leads to a sterile redundancy of the budget discussions, with the delegations having anyway the last word, as was shown in our 2019 report on ICC's budget process.

59. The alternative is therefore as follows:

- either the States Parties reach a clear consensus to accept the conclusions of the present CBF which deprive them of "any interference", without conducting themselves further detailed discussions on the budget proposal, although they have constantly done so in the past;

- or the States Parties recognize that THWG (or one of its sub-groups) is, from the start to the end, the real leading force in the budget discussion and that they do not need the present CBF. If needed, a technical advice on the initial budget proposal could be asked to the Audit Committee²¹, through a formal general review on the initial budget proposal delivered at latest end of July, and the budget proposal itself would be directly discussed/amended by the States Parties delegates (THWG) with ICC's internal Budget Working Group (BWG). In that case, a "technical advice" could be asked to the Audit Committee on the draft budget proposal, which should essentially consist in a purely technical review of the way in which the activity assumptions (the "drivers", i.e. the OTP/Presidency assumptions that have served as a basis for the budget proposal: expected number of preliminary examinations, situation statements, judgments, etc. for the next financial year) have been established, and of the overall financial consistency of the budget proposal with these assumptions. This means that the AC would have to interview the Office of the Prosecutor and the Presidency on the one hand, and the Registrar on the other, and on the basis of these very general and high-level preliminary consultations, draft a short opinion highlighting the strengths and weaknesses of the basic budgetary assumptions and the consistency of their translation into large budgetary masses (without going below the level of each major programme).

60. The External Auditor has three additional reasons to recommend the ASP to consider that second option:

Efficiency

61. The External Auditor's report on the ICC budget process (doc. ICC-ASP/18/12/Add.2) already noted (p.9) that "*the fact that ICC's CBF, elected by the ASP, does not represent the States Parties as such, explains the uncommon fact that THWG continues discussing the budget and making recommendations after the CBF has issued its own recommendations*".

²¹ Such as the CTBTO Advisory Group, which serves as both an audit committee and a financial advisory.

62. In terms of efficiency, replacing the CBF mainly by THWG (or experts of delegations sent by THWG) and partly by the AC (for initial *technical* advice as defined above) means simply drawing the logical consequence of the present situation, where the CBF independent experts' report is not the actual basis for the negotiation and amendment of the budget proposal.

Economy

63. If an independent expertise limited to an initial technical general advice is asked to the AC (which would clearly become a direct subsidiary body of the ASP), it would be, for the reasons set out above, totally inappropriate to maintain a separate Executive Secretariat: but in that case, the Secretariat of the Audit Committee could be provided, as in most other Organisations, by the Office of Internal Audit itself. Referring to the above table comparing the costs of governance systems, this would result in a direct annual saving of EUR 659 thousand (based on 2019 figures)²², bringing the ratio of total oversight costs against total overheads from 1.23 % to 0.82 % - still expensive compared to most other IOs, but more in line with acceptable ratios.

Compliance with most common practices

64. A CBF composed of States Parties delegates is the largely dominant formula among IOs. In the case of the ICC, THWG and/or its sub-groups could play (and already play) this role, which solves the question raised by the ASP of a better access of SP delegates to the governance oversight of the ICC, since the budget is clearly the major, if not the only tool to effectively monitor governance. A new decision of the Bureau would have to determine which sub-group of THWG is the most adequate to fulfil that role (for instance, the Budget Facilitator's working group).

Recommendation No. 4. (Priority 1) The External Auditor recommends:

- to suppress the CBF composed of independent experts and to transfer its competence in the preparation/negotiation of the detailed budget proposal with ICC's internal Budget Working Group to THWG or one of its sub-groups;**
- to submit each year, before Summer, the initial budget proposal to THWG, which could immediately start preparing and negotiating, in direct contact with ICC's internal Budget Working Group, the ASP's final consensual decision on budget to be taken in December;**
- as an option to ask the AC, who would be given an advisory role, to issue a synthetic initial technical opinion on the budget proposal;**
- to suppress the Executive Secretariat, in order to restore the principle of subsidiarity of the governance oversight organs towards the Assembly.**

²² See table 1: EUR 160.42 thousands is the direct cost of CBF, and EUR 498,31 thousand is the indirect cost of the AC/CBF Executive Secretariat...

3.4. Merge OIA and IOM

65. There are three reasons for merging OIA and IOM:

- Increased flexibility

66. The External Auditor’s report on the ICC budget process (doc. ICC-ASP/18/12/Add.2) already noted the lack of flexibility due to the small size of the IOM “Major Programme”, and made the following recommendation (n°3): “*the External Auditor recommends to adapt the Financial Rules, which currently prohibit transfers between Major Programmes, in order to allow such transfers and thus bring an adequate management flexibility to smaller Major Programmes, such as the Independent Oversight Mechanism (IOM) or the Office of Internal Audit*”. This recommendation (which is supported in the IER, recommendation 134), has been rejected, because some delegates consider it would depart from a fundamental principle prohibiting transfers between Major Programmes. The proposed merging of OIA and IOM in one Major Programme (and one structure) solves the problem without breaking any existing principle.

- Alignment on most common IOs’ practices

67. ICC is an exception – in other IOs, audit and IOM (evaluation, inspection and investigation) are usually merged (and nevertheless, *provisions* are in place to enable inspectors to investigate on principals).

68. Art. 112-4 of the Rome Statute states that “*The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.*” It is clear that, based on that article, the Assembly may decide what the best *solution* is, and in particular, whether such a body has to be its direct subsidiary body or not. The minutes of the workshop where this point is mentioned clearly indicate that the present reporting line (IOM to ASP chair) isolates IOM from the rest of the oversight system – that is why most other International Organisations prefer an integrated system, with specific provisions strengthening the independence of inspection and investigation units. Merging IOM and OIA unifies and simplifies the internal governance oversight system under the independent control of the AC.

- Economy

69. More importantly, taking into account the relatively modest size of the Organisation, the merging of IOM and OIA would modify the cost structure of these very small structures: keeping two separate bodies means having two superior officers. In the *present* structures, the cost of the two superior officers represents more than half of the resources of the said bodies²³ – a merger would lead to reduce that cost to about 25%, and allow reorienting, without additional costs, the available resources to operational work.

Recommendation No. 5. (Priority 1) The External Auditor recommends merging the Office of Internal Audit and the Independent Oversight Mechanism in one Major Programme.

²³ The note from the Head of the IOM (see appendix 8) makes comparisons which much larger Organisations, some of which do not include in the merged structure (IOM + internal audit) one or two functions (in several case, evaluation remains separate) – but this appears to be the case in a minority of much larger Organisations.

V. ACKNOWLEDGEMENTS

70. The External Auditor wishes to express deep appreciation to the Representatives of States Parties, AC, CBF, Presidency, Office of the Prosecutor, Registry, and to the Directors and staff members of the ICC for their reception and the accuracy of the information that they provided.

End of observations.

Annexes

[See ICC-ASP/20/6/Addendum 1]
