

QUESTIONNAIRE FOR THE CANDIDATES FOR PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

Note: please feel free to use a separate document to submit your answers. Your answers can be sent to the following email address executivedirector@iccba-abcpi.org

The upcoming election of the next Prosecutor is an important moment for the International Criminal Court. A key aspect of the Prosecutor's work is her capacity to build a relationship of trust and cooperation with the Defence and Victims in order to contribute to the overall quality of the justice rendered at the ICC. It is in this spirit of constructive dialogue that the ICCBA, the representative organisation of Defence and Victims' Counsel at the ICC, proposes the following questionnaire to all candidates for the position of ICC Prosecutor.

A) Equality of Arms between the parties and participants to the proceedings, and within the Rome Statute framework

Question 1: Would you support amendment of Regulation 3 of the [Regulations of the Court](#) to allow for representatives of the Defence and Victims to participate in the Court's Coordination Council?

Answer 1: Regulation 3 creates a coordination council comprising of the Presidency, Prosecutor and the Registry that meets once in a month to discuss and coordinate where necessary, the administrative activities of the organs of the Court, whereas the ICCBA is an independent professional association representing the interests of Counsel and legal Support Staff who represent victims, defendants and other actors (such as witnesses) before the ICC. It is not categorized as an organ of the court. I would need to seek the views of the other organs of the Court on the matter after appreciating the background on which the ICCBA is seeking membership of the Court's coordination Council.

Question 2: Do you support the principle that the salaries, entitlements and fiscal treatment of persons working for ICC Defence and Victims' legal teams should be equivalent to their Prosecution counterparts? If so, would you be willing to collaborate with the ICCBA on these issues? Would you be willing to advocate in favour of such principle within the Court and before the ASP?

Answer 2: . Yes, I would be willing to advocate for equality in salaries, entitlements and fiscal treatment, considering workload and bearing in mind the fact that the prosecution bears the burden of proof in matters heard by the Court.

Question 3: Would you be willing to advocate within the Court and before the ASP in relation to the following issues:

1. i) Revision of the Court's [legal aid policy](#) and adoption of a sufficient legal aid budget to ensure that suspects, accused persons and victims are able to effectively exercise their rights under the Rome Statute and Rules of Procedure and Evidence? These subjects concern matters crucial to ensuring a fair trial, such as allocation of sufficient resources to

conduct proper investigations, consult and meet with victim clients, and compose a legal team (lawyers, analysts, professional investigators and experts) commensurate to the complex and large-scale cases prosecuted before the ICC.

2. ii) Ensuring sufficient funds for [family visits](#) for indigent detainees?
3. iii) Ensuring better respect for the presumption of innocence (Statute, Article 66), by increasing State cooperation in relation to agreements pertaining to provisional release and acquittals?
4. iv) Increasing donations to the Trust Fund for Victims?

Answer 3: Yes, I welcome conversations with all relevant stakeholders on the specified issues.

B) Accountability, Transparency and Integrity measures within the Office of the Prosecutor

Question 4: What are your views on the ICC model of OTP-led Article 70 (offences against the administration of justice) investigations and prosecutions in comparison to the model of other international courts and tribunals, which provide for the possibility of appointing external *amicus* investigators and prosecutors?

Answer 4: Article 70 provides as follows:

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
 - a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
 - b) Presenting evidence that the party knows is false or forged;
 - c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
 - d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - e) Retaliating against an official of the Court on account of duties performed by that or another official;
 - f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
- (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

My understanding of Article 70 of the Statute is that its framers intended that the Court through the OTP retains control over the investigation and prosecution of the stipulated crimes, which have the effect of stifling the Court's ability to fulfill its mandate to prosecute Article 5 crimes. States Parties too are given the mandate under Paragraph 4(a) and (b) to investigate and prosecute such crimes committed in their territories or by their nationals. I have no qualms with that position, because the ICC is a permanent criminal court, which is clothed with the requisite power to ensure that offences which undermine its integrity are adequately investigated and prosecuted. Having said that, the best thing that can happen to the Court regarding those offences is the prevention of or minimization of their commission, given that the OTP is already burdened with many situations to resolve on a limited budget. The most pragmatic thing to do is for the OTP to work with the relevant State Party to investigate and prosecute such offences committed within their jurisdiction and to only take up a matter, where the relevant state is unable or unwilling to take on the requisite responsibility, or where the ends of justice will not be met.

Question 5: Are you open to amending the [Code of Conduct for the Office of the Prosecutor](#) to provide a formal submission mechanism for alleged breaches of the Code, which is accessible to the public as well as parties and participants to the proceedings?

Answer 5: I would first seek to understand what the challenges are with the existing submission mechanism and also seek the views of all relevant stakeholders, before advocating for any amendments. I do support joint processes meant to enhance transparency in dealing with breaches of the Code of Conduct by members of the OTP.

Question 6: Do you believe, and if so to what extent, that the [Code of Professional Conduct for counsel](#) should apply to lawyers in the Office of the Prosecutor? In respect of this issue we note Trial Chamber V(b)'s Decision of 31 May 2013 ¹.

Answer 6: The conduct of the OTP lawyers is as stated in **Prosecutor Vs Kenyatta** supra, subject to the provisions in the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Prosecution Regulations, and the Staff Rules and Regulations relating to the relevant standards of professional conduct and ethics including Articles 42(2), 44, 54(1), 70 and 71, Rule 6 of the Rules, Regulation 29 of the Regulations, Regulation 17 of the Prosecution Regulations, Rules 101.9(a) and 110.1 of the Staff Rules, Articles I and X and Regulations 1.1, 1.2, 1.3 and 1.4

¹ [Prosecutor v. Kenyatta, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers and Concurring separate opinion of Judge Eboe-Osuji, 31 May 2013, ICC-01/09-02/11-747.](#)

of the Staff Regulations. All these provisions are designed to cater for the unique roles and duties of the Prosecution staff in the conduct of their duties. To the extent stated by the concurring Judge Eboe-Osuji, in his separate opinion, I agree that Counsel representing parties and participants on all sides, should be regulated by similar standards of civility and professionalism.

Question 7: Do you believe that any additional accountability, integrity or transparency measures are needed in respect of the Office of the Prosecutor and the conduct of its mandate?

Answer 7: Yes. I welcome ideas on improving accountability, integrity or transparency, without compromising to the independence of the OTP in executing its mandate.

C) Presumption of Innocence, Fair Trial and Expeditious Proceedings

Question 8: To better ensure fair trial guarantees from the outset of the proceedings, what are your views on increasing collaboration and communication between counsel for (potential) suspects during the preliminary examination and investigation phases?

Answer 8: I stand to be corrected but I do believe that collaboration and communication between the parties to a case should happen at any stage after the appointment of Counsel to represent a defendant.

Question 9: To date, the OTP has systematically opposed detained suspects and accused persons' requests for provisional release. Do you envision any changes to this approach to ensure better respect for the presumption of innocence, as well as the principle that detention of defendants should be the exception not the norm?

Answer 9: I whole heartedly believe in the cardinal principles of the presumption of innocence, fair trial and the conduct of expeditious proceedings. To answer this question accurately, I would need to know the reasons why the OTP has taken the stated stand, regarding detention of defendants. From the Strategic Goal 3 of the OTP Strategic Plan 2019-2022, which concerns the development with States, of enhanced strategies and methodologies to increase the arrest rate of persons subject to outstanding ICC arrest warrants, it is evident that suspects are not willingly surrendering to the jurisdiction of the Court. It is stated in the strategic plan that the OTP has requested and obtained public arrest warrants or summonses to appear against 45 suspects and that 15 suspects in six different situations remain at large. It is also stated that the Court's ability to effect arrests is limited, unless States increase the number of arrests and transfers for more judicial proceedings to take place. The Office is inter alia considering employing more ambitious means used in the tracking units of other international criminal tribunals, to track and arrest suspects. From this plan, I perceive the difficulty that the Office is experiencing and its reason for not conceding to the provisional release of defendants. However, as I have stated, I would need to understand the reality in regard to the stance taken by the OTP, before committing myself to announcing another approach to the matter.

Question 10: Past practice has shown that the OTP does not always adequately investigate potentially exonerating evidence and leads, as required by Article 54(1)(a) of the Rome Statute.

How do you propose to amend investigative policies at the OTP to improve this situation, and otherwise fully respect the rights of defendants and victims under the Statute (Article 54(1)(c))?

Answer 10: The provisions of Article 54(1) are mandatory and should be implemented in the course of the conduct of investigations. I would need to establish the reasons why there has sometimes been inadequate investigation of exonerating evidence. That will inform my course of action. Investigative policies may not be the problem, considering the fact that the statute is categorical on the matter.

Question 11: Past practice has shown that the OTP is not always efficient in respecting its disclosure obligations, especially in regards to potentially exculpatory evidence and information (Article 67(2)), or items that are material to the preparation of the Defence (Rule 77). Would you support a more rigorous and transparent Prosecution disclosure policy in order to better guarantee the rights of defendants and victims, the presumption of innocence, and the efficiency of proceedings?

Answer 11: Articles 61(3) and 67(2) as well as Rules 76, 77, 83 and 84 provide for the Prosecutor's disclosure obligations at the pre-trial and trial preparation stage. According to Article 64(3), a Chamber shall provide for disclosure of documents or information, not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial. The Rules (77 and 78) provide for a system of mutual inspection, whereby both parties may inspect material in the opposing party's possession that is intended to be used at trial (and, in the defence case, information in the Prosecution's possession that is material to the preparation of the defence. From where I am at, I have no idea why there is a disconnect between the law and the practice. The cause of such failure or inability to implement the Statute and the Rules will determine my course of action. I will certainly welcome proposals for improving transparency in respect of disclosure.

Question 12: Past practice has shown that the OTP regularly discloses incriminating evidence late in the proceedings, even after the start of trial. How would you propose to improve this situation?

Answer 12: My response to this question is the same as in question 11 above.

Question 13: How do you envisage enhancing the expeditiousness of the proceedings to better respect the interests of victims in achieving a timely outcome to the proceedings, and the right of the Accused to be tried without undue delay (Statute, Article 67(1)(c))?

Answer 13: The expeditious management of proceedings is a system wide issue which can only be meaningfully resolved by all the Court actors working together. I welcome dialogue regarding this issue.

D) OTP engagement with Victims and their Counsel

Question 14: How do you conceive of the Prosecution's role vis-à-vis victims in a proceeding where victims are represented independently of the Prosecutor?

Answer 14: The OTP policy on victim participation recognizes that participation is a statutory right, not a privilege bestowed upon victims on a case by case basis. It offers guidance on the Office's role respecting victims. Legal representation for victims is a key element in protecting and fulfilling their rights and is recognized by the Court's legal regime. The OTP Regulations provide for the Office's collaboration with the legal representatives of victims. Regulation 52 provides for constructive engagement with the legal representatives of victims, in order to promote the efficient conduct of proceedings. I think that the legal and regulatory framework governing the OTP's relationship with Victim's Counsel supports the effective implementation of victim's rights.

Question 15: Would you support the amendment of the [Regulations of the OTP](#) (or the creation of a separate instrument) to include more detailed rules regarding:

1. i) Information to be provided by the OTP to unrepresented victims;
2. ii) The regulation of OTP interactions with victims who are already legally represented before the Court (including at the investigation stage);
3. iii) The provision to victims' counsel of information held by the OTP which specifically relates to their clients;
4. iv) Mechanisms for complaint and enforcement where breaches of the Regulations (or other instruments) are alleged by victims?

Answer 15: Respect for and support of victims' right to participate in proceedings exists within the regulatory framework of the Office, including the Regulations of the OTP. I would support a conversation in regard to improvement of the working relationship between victims representatives and the Office, which could lead to amendment of the rules.

Question 16: The [OTP Policy Paper on Victims' Participation](#) is now 10 years old. Is it time for an updated Policy Paper, and if so what would the key changes in approach be? What is your view on the OTP's current approach of proactively opposing victims' standing (for example standing to initiate appeals, or standing to initiate judicial proceedings during the investigation stage)?

Answer 16: No. I do not think so, but I do welcome the opportunity to engage meaningfully on the matter to appreciate the ICBA's need for review of that policy. As far as the proactive opposition of victim's standing is concerned, the participation of victims in various case stages is governed by the Statute and the Rules, as interpreted by the Chambers. I would thus need more information concerning the specific cases, before giving my view on the impugned conduct of the OTP.

E) Objectives of the Office of the Prosecutor

Question 17: What are your objectives during your mandate in relation to the selection of situations and cases to investigate?

Answer 17: I will carefully consider all the recommendations of the IER in their final report concerning the subject. In a few words, I do agree with their proposal that the criteria of highest importance should be (i) the gravity of the crimes (as already stipulated in the Policy Paper); (ii)

the strength and diversity of the evidence; and (iii) the degree of responsibility of potential suspects.

Question 18: How do you envision increasing OTP presence in situation countries, including through outreach towards affected communities?

Answer 18: It is my esteemed view that establishing a field presence during the conduct of investigations, whenever possible, is the most effective way of increasing the OTP's presence in a situation. If this is not possible, due to resource constraints, then increasing the time spent by investigation teams during missions should increase the OTP's presence and enable it build rapport with victims, witnesses and all other relevant stakeholders. Additionally, improving cooperation, coordination and communications between the office and the relevant stakeholder such as victims and civil society actors in the situation countries will work to improve the presence of the Office in situation countries.

Question 19: Among the many roles that an ICC Prosecutor can play (for example: manager and leader; diplomat and spokesperson; lawyer and in-court advocate) where would you place the greatest priority and how would this be reflected in the way you spend your time?

Answer 19: My understanding of the position of prosecutor is that she/he is expected to perform all those roles without neglecting any of them. To be effective, she/he will have to delegate her/his powers. As leader and manager, I will, initially concentrate on working on the empowerment of the OTP team, to improve performance at all levels. Success will not be achieved without the positive contribution of each staff member. The bottom line is that the Prosecutor however possessed of the competencies to perform the roles outlined in question 19, cannot succeed alone.

Question 20: What benchmarks do you think should be used to measure the 'success' of the Office of the Prosecutor, as a party to the proceedings and as an Organ within an international tribunal?

Answer 20: The OTP Strategic Plan 2019/2021 echoes the yardsticks upon which the success of the office should be measured. The Office expects to achieve among other things: the conduct of speedy and efficient preliminary examinations, investigations and trials; high rates of success in court; increased ability to locate and arrest suspects at large; the prioritization of SGBC, and crimes against or affecting children during; preliminary examinations and investigations, as well as the full implementation of its policies on SGBC and crimes against and affecting children; responsible and accountable management; improved information management; improved communication to stakeholders; improved gender/geo balance; and adequately trained staff. In my considered opinion, if these targets are achieved, the office will have registered great success. I do not think that these measurements of success are final. For instance, yardsticks in respect to the Office's performance on the question of complementarity should be defined.

Question 21: Would you be willing to meet with the ICCBA on a regular basis to discuss ongoing matters of mutual interest and concern?

Answer 21: Yes. Quality justice cannot be achieved without regular communication, coordination and cooperation of all justice actors in the administration of justice.

Question 22: How do you propose to increase OTP independence *vis-à-vis* third party sources (e.g. Article 15(2) information originators (States, UN entities, NGOs)) during all stages of the investigation and proceedings in order to avoid bias?

Answer 22: Article 15 (2) of the statute requires that the Prosecutor analyses the seriousness of the information received before acting on it. The Prosecutor may also seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate. The prosecutor is expected to make a careful assessment of those allegations which meet the expected standard of proof in Article 53(1), which is to established by evidence during the investigation stage. I believe that rigorous internal mechanisms within the hierarchy of office as well as the oversight provided by the Pretrial Chamber, should ensure that only credible information received by the prosecutor is investigated. A thorough investigation of such information, if the matter proceeds to that stage, should determine its evidentiary value.

Question 23: Given that there are currently no formalised investigation protocols before the existence of a case and the intervention of the Defense, would you be willing to collaborate with the ICCBA to draft formal investigation protocols for the preliminary examination and investigation phases?

Answer 23: Although I noted above, that cooperation and collaboration between relevant stakeholders is necessary in the administration of justice, it is noteworthy that the OTP is an independent organ of the Court as stipulated under Article 42 of the Statute. The management and control of its activities is in the hands of the prosecutor. In my humble view, and I stand to be corrected, the OTP should craft its own investigation protocols for the preliminary examination and investigation phases taking into account the law and proposals from the ICCBA among other actors.

NAME: Lady Justice Susan Okalany

DATE: 2st November 2020

[END]