

QUESTIONNAIRE FOR THE CANDIDATES FOR PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

ME RICHARD ROY

As a preliminary matter, I thank you for the opportunity to provide additional information in the context of my application as Prosecutor for the International Criminal Court. I believe in an OTP that delivers on its core mandate: the investigation and prosecution of the most serious crimes of concern to the international community. This begins with timely and high-quality investigations that respect the rights of victims and accused persons and that aim to establish the truth. It ends with prosecutions that deliver justice to victims and affected communities while safeguarding the rights of a defendant to a fair trial. The OTP has fulfilled this vision in many cases. However, in other instances it has not. The OTP can and must do better. If elected, I will consult and work with OTP staff, and other stakeholders, to identify and implement the reforms needed to allow the office to achieve consistency in delivering justice to victims of mass atrocities.

In responding to your question, please note that a number of your questions are similar to those recently posed by a group of civil society organizations, to which I responded on 26 September 2020. You can find those responses at the following: http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/Prosecutor%20Questionnaire_ROY.pdf. Where appropriate I have replicated my responses and direct you to the questionnaire for full context.

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?

The Coordination Council is intended to be the primary forum for coordination between the Court's organs at the highest level to "discuss and coordinate on, where necessary, the administrative activities of the organs of the Court." Given the Council's function to allow coordination between the Court's organs on administrative matters, as provided for under article 34 of the Rome Statute, I am unable to support this amendment.

I am willing to consider, however, regular meetings between the Principle Court organs and the Heads of independent offices within the Court, which would include the Office of Public Counsel for Defence and Office of Public Counsel for Victims, in an extended Coordination Council, as recommended by the Independent Expert Review Report (IERR) (Recommendation 11). The purpose of such meetings being to ensure strategic coordination

at the highest level, and to enable the Court as a whole to work in harmony and with unity of purpose.

Question 2: Do you support the principle that the salaries, entitlements and fiscal treatment of persons working for ICC Defense 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?

I believe that Defense teams ought to be provided with the resources required to ensure a fair trial and that Victims' legal teams should also be adequately resourced to enable them to represent victims in a way that will facilitate their meaningful participation in the proceedings.

I am willing to consider proposals and to collaborate with the Registry and ICCBA to ensure that there are funds and entitlements that are reasonable and necessary to ensure the effective representation of defendants and victims.

I support the recommendation found in the Facilitators Report on Legal Aid, presented at the eighteenth session of the ASP, that these issues be discussed substantively by State Parties and that the ASP adopt resolutions concerning them.

I note that the issue of fiscal treatment of persons working for ICC Defence and Victims' legal teams is being dealt with bilaterally by the ASP Vice President in The Hague and the Government of the Netherlands.

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

- 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.
- ii) Ensuring sufficient funds for [family visits](#) for indigent detainees?
- 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?
- iv) Increasing donations to the Trust Fund for Victims?

Consistent with the above, I am willing to consider proposals that would ensure that there are funds that are reasonable and necessary to ensure the effective representation of defendants and victims and that ensure that defendants and victims are treated humanely and with dignity. This would include proposals that seek to garner greater State support and cooperation for victims, witnesses, and accused persons.

In particular, I would support renewed efforts to finalize the Legal Aid Policy Reform. I agree that it should not only address the issue of remuneration of Defense counsel and Defense teams staff, but also access to resources to conduct investigations and adequate facilities to Defense teams to prepare and conduct an effective defense.

Regarding the Trust Fund for Victims, under the Rome Statute, it is the responsibility of the ASP to determine how it should be managed. I note the Trust Fund's goal for 2021 is to raise €40 million in voluntary contributions and private donations. I believe the more pressing issue is the length, complexity and uncertainty of the Courts procedures for reparations. I would support any effort to allow the Courts processes to deliver fair, adequate effective and prompt reparations to victims of crimes under its jurisdiction.

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?

I believe that offences against the administration of justice undermine the confidence in the ICC and in the enforcement of the Rome Statute. They compromise the integrity of the proceedings, impede the Court's ability to discover the truth and provide justice to victims. They also are prevalent as noted in a recent report by the Open Society Justice Initiative (OSJI). In that report OSJI noted that allegations of witness interference were made in eight out of nine cases that in 2017 had proceeded to the trial stage at the ICC. Investigation of these offences, while remaining secondary to its Article 5 mandate, have occupied significant time and resources of the OTP – the article 70 case against Jean-Pierre Bemba and four others, for instance, was the most expensive trial in ICC history. Nonetheless, I believe that these offences must be investigated fairly and prosecuted firmly.

I believe that the OTP has the mandate, and should, undertake article 70 investigations and prosecutions and only delegate such matters to an external *amicus* investigator and prosecutor when it would be in the interest of justice to do so. I also note that this is consistent with how offences against the administration of justice are investigated and prosecuted domestically and at other international tribunals. For instance, the MICT-OTP currently leads the contempt proceedings in *Prosecutor v. Maximilien Turinabo et al.* (MICT-18-116-T).

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?

Yes. I believe that an effective compliance program, including for the Code of Conduct, requires that there be mechanisms, such as a whistleblower or ethics hotline, through which individuals can anonymously report misconduct to an investigatory body. This is necessary to ensure and preserve a culture of integrity.

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

I believe that the Code of Conduct for the Office of the Prosecutor should align, where appropriate, with the ethical expectations of all counsel practicing before the ICC. To that end, I am open to considering an evaluation and potential amending of the Code of Conduct for the Office of the Prosecutor.

I would also consider the development of a single Court-wide Ethics Charter, laying down the minimum professional standards expected of all individuals working with the Court as recommended in the IERR (Recommendation 106).

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?

One of my first responsibilities if elected Prosecutor will be to audit the OTP's current compliance regime to determine whether such additional measures are needed. To that end, I believe that the report recently issued by the IER identifies a number of compliance gaps that require remediation. In particular, I would review internal processes and procedures of the OTP to ensure effective and efficient cooperation with the Office of Internal Audit and Independent Oversight Mechanism (Recommendation 107).

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?

Article 54 of the Rome Statute places upon the Prosecutor an obligation 'to establish the truth' and to 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute'. The Prosecutor is required to 'investigate incriminating and exonerating circumstances equally'. Further, article 55(2) entitles witnesses legal assistance where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned by the Prosecutor.

As a prosecutor, I have provided advice to investigative agencies regarding accepting evidence, collaboration and communications with suspects, or their counsel, during an investigation. For example, I have negotiated with counsel for potential suspects investigative assistance agreements with the police and the prosecution. It is my experience that such communications must respect the rights of defendant but equally must not compromise the confidentiality of investigations.

I am willing to consider collaboration and communication with counsel for potential suspects in ensuring full compliance with the statutory protections provided to suspects under the Court's legal texts.

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?

Articles 58 and 60 identify the circumstances during which an accused person should be detained pending trial. I am dedicated to observing those requirements in good faith and only requesting a person's detention pending trial when provided for under law.

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))?

As a prosecutor in Canada for the last three decades, I have operated within institutions, and a justice system, where prosecutors are considered "ministers of justice", more part of the Court than proponents of a cause. If elected Prosecutor, one of my first tasks will be to audit our investigative practices and policies to ensure compliance with the Office's obligations under article 54 and with Chapter 3 Section 1 (Objective Truth Seeking) of the OTP's Code of Conduct, and to make amendments to those policies that are necessary to ensure compliance the Office's Statutory obligations, including that provided for under article 54(1)(a).

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?

In all the prosecutions I have led, the full disclosure of evidence and information in the investigative file was ready before laying charges or seeking an arrest warrant of the

accused. No prosecution I have undertaken has ever been stayed for nondisclosure of relevant information to the defence in possession of the police or the prosecution.

If elected Prosecutor, I am committed to ensuring a similar efficient and effective disclosure practice at the OTP and undertaking the necessary reforms required to achieve such aims.

In particular, I would support the review of the system of Pre-Trial disclosure of evidence and all related matters by a Review Team which should be chaired by a Judge and should include a senior prosecutor, a senior member of Chambers staff, the Head of OPCD and the President or nominee of the ICCBA with a view to making recommendations to render the system more predictable and expeditious (Recommendation 190 IERR).

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?

See response to question 11.

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))?

See response to question 11.

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?

Victims and communities affected by violence are the Court's most important stakeholders. I agree with the OTP statement in submissions on victims' participation, that the Rome Statute "empowers victims as an actor in the international criminal justice system, with a right to express their views and concerns independently in proceedings where their personal interests are affected".

As a prosecutor, I have worked with victims. I understand the importance of transparency and engagement. It is important that victims are informed and have a clear understanding of the Office's activities. It is through communication with victims and affected communities that misinformation about the ICC can be prevented.

The processes of the Office must ensure that victims are treated with dignity and respect. They must ensure they are informed and engaged. This includes during the preliminary investigation stage and during investigations. I also agree with the statement of the OTP in

its policy paper that, as a matter of law and policy, the Prosecution must support the participation of victims in proceedings in accordance with the Court's legal framework.

Although the prosecution is independent of victims and affected communities in ICC proceedings, it must not remain merely passive when victims and affected communities intervene in them. The Prosecution has a duty to support victims when they seek to enforce their rights. However, the Prosecutor must continuously safeguard the rights of the defendant to a fair trial.

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:

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

Consistent with the above, I am willing to consider proposals to best ensure transparency and engagement with victims and affected communities, including amendments to the Regulations of the OTP where appropriate, for example Regulation 37 (Information to victims) and Regulation 52 (Relations with legal representative of victims).

I would also amend the Regulations of the OTP should the Registry decide to extend the range of proceedings in which the Court can appoint counsel for victims to include preliminary examinations and requests for authorization to open an investigation (Recommendation 341 IERR).

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)?

I believe the OTP's current policies strike the proper balance when they state that the office will support an application from victims to participate in proceedings under the statute when: the applicant qualifies as a victim under rule 85; legal and factual issues in the proceeding affect the applicant's personal interest; the applicant's participation is appropriate at the particular stage of the proceeding; and the manner of participation is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. This

being said, I believe the OTP should continuously update its policies, like the one on Victims' Participation, as well as ensuring their compliance.

Ultimately, the most important contribution a Prosecutor can make is to ensure the integrity of the judicial process so that victims can best achieve justice and the truth of their victimization be established.

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?

I believe that the OTP's primary goal during preliminary examinations should remain a timely determination of whether the office will seek to exercise the ICC's jurisdiction and open an investigation. I believe that preliminary examinations should last only as long as needed to fulfil their purpose.

Where there are limited prospects of encouraging national prosecutions, I believe the OTP should proceed rigorously to a determination as to whether or not an ICC investigation is merited to maximize the timely collection of reliable evidence. More importantly, this would also provide certainty and transparency to victims and communities as to the outcome of the preliminary examination.

Where the prospects of encouraging national prosecutions are higher, I believe that strict timelines are incompatible with the flexibility this engagement requires. Instead, if elected Prosecutor I would make increased use of benchmarks to stimulate national authorities to take specific steps, and to signal to partners and civil society organizations as to how they may amplify the office's efforts.

In line with IERR recommendations, I believe the Policy Paper of Preliminary Examinations should be updated and I would consider developing a policy on the criteria relevant to the opening of a Preliminary Examinations based on Article 15 communications (Recommendation 226); adopting higher threshold for the gravity of the crimes alleged to have been perpetrated (Recommendation 227) and not take into account feasibility with regard to Preliminary Examinations assessments (Recommendation 228).

I also believe that the Policy Paper on Selection and Prioritization should be updated. I agree with the IERR that there should a comprehensive mapping of all potential cases within each situation investigated and that the development of Case Selection Documents should be completed (Recommendation 240). Among the criteria for case selection, I would consider giving highest importance to the gravity of the crimes; the strength and diversity of the evidence and the degree of responsibility of potential suspects (Recommendation 230).

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

It is of vital importance to the Prosecutor that he or she communicate transparently about the work of the OTP, its investigations and prosecutions, its methods and policies. He or she must do so while protecting confidential information in its possession, ensuring the security of all who cooperate with it, upholding the authority of the ICC, defending the Rome Statute, not compromising its independence and impartiality, supporting the rights of victims and protecting the rights of the accused to a fair trial.

Working with law enforcement can sometimes be daunting for members of the public. That is why the OTP should try, to the extent possible, to demystify what the ICC does and explain the legal process to the broader community. It is essential that the Office have a community outreach program to better inform the public about the OTP's capabilities and activities, with the hope of building relationships and developing trust between the OTP and the broader community. This includes effectively leveraging social media, field offices, partnerships with the Registry and non-governmental organizations, and the public relations office. Many of my proposals for an effective outreach program can be found here:

http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/Prosecutor%20Questionnaire_ROY.pdf.

In line with IERR recommendations, I would consider:

- applying different models available in order to maintain more investigative staff in the field on a longer-term basis; increasing the number of Situation Specific Investigative Assistants and Country Experts;
- recruiting in situation countries of local investigative staff who could be active in the field for the duration of an investigation, and who would support the integrated teams, as well as liaise with local contacts;
- putting in place ways in which some of the investigators and/or analysts on the integrated teams could acquire greater familiarity with the context of the investigation; and
- increasing cooperation with the Registry regarding the use of field offices (Recommendations 293 to 296)

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?

In general, I agree with David Crane, that “an effective prosecutor at the international level must be many things to succeed”. That he or she must be able to practice law at the international level and be “both an experienced diplomat and savvy politician in order to create political and diplomatic support for a court and to seek justice for the victims of an atrocity.”

I have lead teams of prosecutors in all of my cases for the past twenty years. As a leader, I am responsible and accountable; my leadership is an inclusive one. I listen to my team,

consult them and take their point of view in consideration in decision-making. I exercise leadership generously and do not hesitate to let others develop themselves.

I also have a long history of working constructively with law enforcement bodies to collect evidence for the prosecution of international crimes. This includes working with partners throughout the world, including in South America, Europe, and Africa. The relationships I developed over the past three decades as a prosecutor have allowed me to effectively prosecute complex cases of organized crime, economic crimes, terrorist offences, international fraud and corruption, and crimes against humanity and genocide committed across the world.

As Prosecutor, my first priority would be to “right the ship”. I would communicate directly to all staff members that I consider everyone’s role in the Office to be essential regardless of the position. As such, I would welcome to get directly from them, and in the manner they would be most comfortable with, their input as to what they need to feel best able to contribute to their outmost abilities while being happy and proud to be members of the OTP.

I will also evaluate our Operations Manual and other investigative documents to ensure the OTP is employing investigative techniques that are best practices across all investigations in a consistent manner. The OTP should constantly audit its investigative practices, in full transparency, so that it is constantly learning from past mistakes and committed to growth.

Finally, I would undertake steps to implement the recommendations made by the report produced by the Independent Expert Review. The recommendations in the report are timely, necessary, and require implementation.

As the leader and face of the OTP, I would make myself available as a spokesperson for the office for media request and communication with the public when required. I will, however, consider the recruitment of a dedicated spokesperson in order to reduce the amount of media engagements of the Prosecutor, Deputy Prosecutor, as well as other OTP staff (Recommendation 55 IERR).

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?

As mentioned above, I believe in an OTP that delivers on its core mandate: the investigation and prosecution of the most serious crimes of concern to the international community. This begins with timely and high-quality investigations that respect the rights of victims and accused persons and that aim to establish the truth. It ends with prosecutions that deliver justice to victims and affected communities while safeguarding the rights of a defendant to a fair trial

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

Yes.

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?

I would be a fierce defender of the OTP's independence, of the Rome Statute and the authority of the ICC. I would make sure to remind all personnel of the OTP that, as mentioned in its regulations and Chapter 3 Section 2 of the Code of Conduct, the Office and its member must maintain their full independence and not seek to act on instructions from any external source.

I would want to make it clear that any interference or pressure exerted on any member of the office should be promptly reported to me and, in compliance with the Code of Conduct, guidance will be provided on how to proceed. I would want to make it clear to all members in my Office that they have my full support in conducting their activities despite the surrounding noise of political or external pressure.

In communications about such cases, I would make sure that statements, issued by the Office or me, reiterate firmly that pursuant to the Rome Statute, the OTP is an independent organ of the Court that it is responsible to investigate and prosecute crimes within the jurisdiction of the ICC, and that it must not seek or act on instructions from any external sources.

I agree with the current Prosecutor's statements that the OTP must conduct its work without fear or favour. In my conduct and communications, I would want to make sure that I do not say or do anything that would affect confidence in my independence or that of the Office. This means careful screening of: any meetings or events I participate in and any statement of the office. I would want to make sure all members of my offices not engage in activities, conducts or communications that undermine the confidence of the OTP's independence as contemplated in the Code of Conduct. A violation of this could lead to sanctions.

In the end though, I believe strongly that it is through the Offices' action and results that it can best provide an answer to political pressure and external pressure. It must, especially in those circumstances, conduct high quality investigations and prosecutions with a view establishing the truth about crimes of the most serious concern for the international community, provide justice for victims and affected communities and do so while respecting the rights of defendants.

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?

As mentioned, one of my first responsibilities if elected Prosecutor will be to audit the OTP's investigative practices and procedures to ensure they comply with the Court's legal texts and the OTP's responsibilities under article 54. That audit will include consideration of the report recently issued by the Independent Expert Review. I am willing to collaborate with the ICCBA where appropriate based on that review.

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