



## QUESTIONNAIRE FOR THE CANDIDATES FOR PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

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.

Name of Candidate: Fergal Gaynor  
Date: 1 November 2020

### 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 answers provided in this questionnaire, and any observations concerning the recommendations of the Independent Experts, will be subject to modification, depending on how the Assembly of States Parties ("ASP") decides to proceed at its nineteenth session with the report of the Independent Expert Review of 30 September 2020 ("IER").

Furthermore, the answers below are given without the benefit of access to confidential information within the Office of the Prosecutor ("OTP"). If elected as Prosecutor, I will receive confidential information and full briefings on all relevant issues, including issues raised in this questionnaire, and will modify my approach in light of that information and those briefings.

The question of how best to improve inter-organ coordination at the ICC is important. I note the Independent Experts' observation in their report of 30 September 2020 that: "Without exception, all those who commented on inter-Organ coordination and decision-making shared that it was a much too slow and lengthy process."

In order to improve intra-organ decision-making generally, we must strike a fair balance between consultation with stakeholders, and speed in decision-making. Extremely long consultation and discussion periods, resulting in decision-making paralysis, must be avoided.



The IER suggests that representatives of the defence and victims, in the form of the Office of Public Counsel for the Defence (“OPCD”) and the Office of Public Counsel for Victims (“OPCV”), should participate regularly in the work of the CoCo. Recommendation 11 of the IER suggests: “An extended Coordination Council (CoCo+) should regularly bring together the Principals and the Heads of (functionally) independent offices within the Court (OPCD, OPCV, TFV Secretariat, ASP Secretariat) to ensure strategic coordination at the highest level, enabling the Court as a whole to work in harmony and with unity of purpose.”<sup>1</sup>

If this suggestion is adopted, OPCD and OPCV would be in a position to bring defence- and victim-oriented perspectives to meetings of CoCo+. The CoCo+ could also issue invitations, as necessary, to other counsel for the Defence and Victims, or to the ICCBA, to provide written or oral observations on matters of particular relevance to Defence and Victims.

**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?

Defence and Victims’ teams ought to be provided with the resources required to ensure a fair and expeditious trial.

The Assembly of States Parties is currently seized of a reform of all areas of legal aid. On 15 February 2019, the Bureau appointed a Facilitator for Legal Aid, whose report was published on 12 November 2019. In the IER, the Experts noted: “At the time of writing, no [new] facilitator for legal aid had yet been appointed. The Experts understand the issue of taxation is being dealt with bilaterally by the ASP Vice-President in The Hague and the Government of the Netherlands.”<sup>2</sup>

The administration of legal aid is primarily a matter for the Registrar.

As Prosecutor, I would defer to the Assembly of States Parties and the Registrar in their efforts to finalise the reform of legal aid, and to improve its administration. As the Experts note, “[r]enewed

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<sup>1</sup> See also IER, para. 58: “Meeting when needed and in any case regularly, as an extended CoCo (CoCo+), would ensure strategic coordination at the highest level, enabling the Court as a whole to work in harmony and with unity of purpose. A further benefit would be that CoCo+ would offer the possibility to integrate (institutional) defence and victims’ issues in Courtwide approaches – currently, they are meant to be funnelled through the Registry, but the latter is necessarily constrained by its neutrality”.

<sup>2</sup> IER, para. 830.



efforts, taking into account past assessments and consultations already carried out, should take place to finalise the reform of the legal aid policy.”<sup>3</sup> I see merit in the Experts’ suggestion that “[t]he reform should be carried out and finalised with the help of a working group composed of individuals with specific experience working with defence and victims and legal aid policies before international courts, nominated by the Registrar, OPCD, OPCV and ICCBA.”<sup>4</sup>

**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.

As stated earlier, Defence and Victims’ teams ought to be provided with the resources required to ensure a fair and expeditious trial.

As noted, revision of the Court’s legal aid policy and budget is currently under consideration by the ASP. As Prosecutor, I would offer my support to, and defer to, the ASP and the Registrar in their efforts to finalise the reform of legal aid.

- ii) Ensuring sufficient funds for family visits for indigent detainees?

Family visits to detainees are an element of a compassionate criminal justice system. The Registrar, and in particular the Registry’s External Relations and State Cooperation Unit, are currently administering, soliciting donations towards, and raising awareness about the Trust Fund for Family Visits (“TFFV”).<sup>5</sup> As Prosecutor, I would defer to the Registrar concerning this important work.

<sup>3</sup> IER, recommendation 328.

<sup>4</sup> IER, recommendation 328.

<sup>5</sup> See for example the Registrar’s brochure concerning the work of the Trust Fund for Family Visits: <https://www.icc-cpi.int/Publications/20190919-tffvisits-eng.pdf>



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?

The administration of interim release, and release following acquittal, largely falls within the competence of the Registrar. The Registrar has published a model “exchange of letters” on interim release,<sup>6</sup> and a Model Agreement on the Release of Persons.<sup>7</sup> I would defer to the Registrar in respect of increasing State cooperation on these matters.

iv) Increasing donations to the Trust Fund for Victims?

Securing prompt assistance to victims of mass atrocities is extremely important. Fundraising for the TFV is a key issue, and is primarily a matter for the TFV. IER Recommendation 356 merits full consideration: “The TFV should develop as soon as possible a comprehensive and effective fundraising strategy that includes as targets private donors (e.g. large foundations and non-governmental organisations). The strategy should further anticipate engagement with civil society organisations, aiming to benefit from their position as multipliers for the purpose of obtaining additional funds for the TFV”.

## 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?

Investigations and prosecutions under Article 70 might be seen by some as an expensive and time-consuming sideshow to the ICC’s core mandate. But they are a vital element in effectively deterring and thus reducing the general risk of witness interference. As Prosecutor, I would explore in appropriate cases whether the prosecution of such crimes could be outsourced to external counsel, as has occasionally occurred at the ICTY and Special Tribunal for Lebanon, in a

<sup>6</sup> See *Cooperation Agreements*, ICC, [https://www.icc-cpi.int/news/seminarBooks/Cooperation Agreements Eng.pdf](https://www.icc-cpi.int/news/seminarBooks/Cooperation%20Agreements%20Eng.pdf), pages 23-27.

<sup>7</sup> See *Cooperation Agreements*, ICC, pages 28-33.



manner that is financially efficient and in accordance with the Statute and Rules of Procedure and Evidence. Generally, Article 70 proceedings should be undertaken only where the charges are focused, the trial will be relatively short, and there is a high prospect of conviction.

**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?

My model of leadership is directed by respect for ethical values and for the dignity and rights of others. As Prosecutor, I will insist on adherence to high ethical standards.

It is important that staff within the OTP are able to easily access and understand the various ethical standards, and other rules, that govern their everyday work. I agree with the Independent Experts that the Prosecutor should constitute an OTP-wide working group on its regulatory framework, tasked with considering the most efficient way to update, consolidate, and clarify the status of the OTP regulatory documents, including the Code of Conduct for the Office of the Prosecutor.<sup>8</sup> The working group could consider the question of a formal submission mechanism for alleged breaches of that Code, and make a recommendation to the Prosecutor on this matter.

**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.<sup>9</sup>

Whether domestically or internationally, what matters most is adherence to high ethical standards, rather than the existence of multiple overlapping codes of conduct. To this end, as Prosecutor I will place a high priority on the provision of induction training, and ongoing training, to OTP staff in ethics and professional conduct by seasoned counsel experienced in international investigation and prosecution. Training should include working through realistic examples of potentially unethical conduct on matters which might arise when collecting or disclosing evidence, questioning witnesses in the field or in the courtroom, framing charges, or encountering indications of bribery or intimidation of witnesses.

I support the sentiments underlying the IER's recommendation that the Court adopt a single Court-wide Ethics Charter, laying down the minimum professional standards expected of all

<sup>8</sup> IER, recommendations 38-40.

<sup>9</sup> *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.



individuals working with the Court, including staff, elected officials, interns and visiting professionals, external counsel and their support staff, and consultants.<sup>10</sup> This would apply to all within the Office of the Prosecutor, who would also continue to be bound by the Code of Conduct for the Office of the Prosecutor.

**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?

The Prosecutor must be a person with a strong professional reputation for achieving excellence in investigation and prosecution, and for treating all colleagues courteously and with dignity and respect.

I am deeply alarmed at the IER's observations concerning bullying and harassment within the Office of the Prosecutor. I am concerned by the Experts' observation that "the Court suffers within from distrust and a culture of fear. The Experts heard many accounts of bullying behaviour amounting to harassment in all Organs of the Court, though particularly in the OTP."<sup>11</sup> This is a matter of deep concern for all who care about the Court.

As the IER notes, "[t]he Heads of Organs should deliver on their commitment and plans to prioritise zero tolerance of bullying and harassment and the development of a more effective, productive and mutually respectful relationship and atmosphere at the Court."<sup>12</sup>

A 2019 report by the International Bar Association emphasised that cultural change starts from the top. Workplace change is most effective when driven by senior leadership. Bullying and sexual harassment flourish in workplaces where employees perceive that such conduct is not taken seriously by management. OTP staff are more likely to consider that addressing unacceptable behaviour is a high collective priority when the Prosecutor emphasises the need for change. The Prosecutor must be vocal about how bullying and sexual harassment cannot and will not be tolerated.<sup>13</sup>

The ICC's Administrative Instruction on Sexual and Other Forms of Harassment, which dates from July 2005, should be updated to incorporate lessons learned by the United Nations, encapsulated

<sup>10</sup> IER, recommendation 106.

<sup>11</sup> IER, para. 138.

<sup>12</sup> IER, para. 130.

<sup>13</sup> See further International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession*, May 2019, page 103. <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>



in documents such as the UN Secretary General's bulletin addressing discrimination, harassment, including sexual harassment, and abuse of authority, of 10 September 2019.<sup>14</sup>

As Prosecutor, I will ensure that any alleged incidents of bullying or harassment within the OTP are addressed and resolved as quickly as possible. The victim must receive immediate interim protection, depending on the precise circumstances of the alleged abuse. She or he must be able to go into a workplace free of the fear that they will be harassed or bullied. A person accused of harassment who is truly innocent deserves to have their name cleared immediately. There must be decisive action in respect of proven incidents of bullying and intimidation, including termination in appropriate circumstances, in accordance with due process.

If elected as Prosecutor, I will place a very high priority on strengthening internal trust within the OTP, empowering mid-level and lower-level staff, and reducing the distance between the leadership of the OTP and the rest of the staff. As the Experts note, "the Court is widely perceived from within as too bureaucratic, too inflexible, and lacking in leadership and accountability. Several staff shared with the Experts instances of non-inclusive, indecisive and bureaucratic leadership styles. Constructive and meaningful dialogue between managers and the people they supervise does not always seem to be part of the working culture."<sup>15</sup>

As Prosecutor, I will harness the energy and talent that staff bring to the OTP by providing them with the information and tools that they need to do their job. As Prosecutor, I will not only remain regularly updated on the progress of the work of all teams, but will also drop in on teams frequently, to receive informal updates about their work and to provide encouragement. To enable faster, more informed decision-making at all levels, I would encourage senior staff to delegate decision-making authority as much as possible to mid-level and junior staff, and ensure that all staff have access to the information they need to make the right decisions. In my experience, the principal elements of a successful working culture are inclusiveness; empowerment; clear communication; breaking silos and welcoming constructive criticism.

## 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?

<sup>14</sup> <https://undocs.org/ST/SGB/2019/8>

<sup>15</sup> IER, para. 63



The selection of suspects is an extremely sensitive matter. It should be undertaken only after a considerable quantity of evidence has been gathered, and prosecutors and investigators have gained a deep understanding of the structures and activities of the entities that committed, or coordinated the commission of, the alleged crimes. Even after the Prosecutor has selected suspects for prosecution, in accordance with a situation-specific strategy, flight risk remains a significant issue. It is critically important that fugitives be arrested as swiftly as possible, in order that justice for the victims is not delayed. Confidentiality on these matters, including the identify of the suspect, is often of critical importance.

After a person has been arrested and transferred to the custody of the Court, I favour frank discussions with counsel for that person to explore opportunities for resolving the case prior to trial through the use of a guilty plea. If elected, I will instruct OTP lawyers to fully explore the potential for guilty plea negotiations in every case.

**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?

As Prosecutor, I will approach each request for interim release on a case-by-case basis, taking into account all relevant factors, including the risk of interference with any victim, witness or other person; flight risk (where the relevant factors include voluntary surrender; length of expected sentence; previous history of avoiding arrest; pre-transfer statements; agreeing to the interviewed by the OTP); the anticipated period of pre-trial or trial detention; and the medical condition of the person seeking interim release.

As an international prosecutor, I litigated applications for provisional release on numerous occasions at the ICTY, and I have written on this issue.<sup>16</sup>

Interim release will always be an unsatisfactory mechanism: flight risk and the risk of intimidation of vulnerable witnesses can never be fully eliminated. These risks could be reduced if proceedings were sped up, resulting in shorter periods of detention prior to, and during, trial. Use of time-saving initiatives – faster pre-trial disclosure, more use of written evidence-in-chief, more rigorous judicial control over counsel who fail to make good use of courtroom time – could result in defendants being brought to trial, and trials brought to conclusion, more efficiently. More expeditious proceedings are the interests of a defendant in custody in a cell, the victims of the

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<sup>16</sup> See for example Fergal Gaynor, *Provisional Release in the Law of the International Criminal Tribunal for the former Yugoslavia*, The Legal Regime of the International Criminal Court, Brill, 2009 <https://brill.com/view/title/11778>.





alleged crimes who are waiting for justice, and the States Parties who pay a high bill for lengthy proceedings.

**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))?

If elected as Prosecutor, I would familiarise myself with how the Office of the Prosecutor currently investigates exonerating circumstances in accordance with Article 54(1)(a). I would review the so-called 'Investigations 3.0' document referred to in the IER,<sup>17</sup> and consider its overall approach to evidence, including the collection and disclosure of potentially exonerating evidence, and training on what constitutes exonerating evidence in particular cases.

The Prosecutor's duty to investigate exonerating circumstances must be considered in light of the fact that Defence teams also carry out investigations, typically receive legal aid to do so, and are inevitably better placed than the Prosecutor to know what strategies the Defence will adopt at trial.

The question of redaction and disclosure is directly relevant to the speed and efficiency of defence investigations. The IER notes that there have been complaints that, due to heavy redaction and late disclosure by the OTP, "it is very difficult to conduct effective Defence preparation and investigations"<sup>18</sup> at the confirmation stage. There have also been concerns about delay to Defence investigations at other stages of the proceedings. The Experts noted: "Since disclosure, including the related subject of redactions, is probably the most significant factor in causing international criminal trials to last so long and since the problems it causes appear to be endemic, it requires special attention. It should be made the subject of urgent review."<sup>19</sup>

If elected as Prosecutor, the OTP will promote faster disclosure of evidence to responsible defence teams who fully respect witness security. New procedures will be designed in partnership with defence teams and judges who have extensive experience in litigation concerning disclosure and familiar with the disclosure software currently employed by the ICC. I believe that we can better harness the power of modern evidence management technology to enable defence teams to rapidly identify genuinely useful material, so that they can carry out investigations efficiently.

<sup>17</sup> See IER, paras. 744-748.

<sup>18</sup> See IER, para. 480

<sup>19</sup> IER, para. 481.



More efficient disclosure by better-trained OTP staff which leads to faster pre-trial and trial proceedings. As noted, this is in the interest of the accused, the victims, and the States Parties.

**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?

Please see the answer to question 10. As noted, I will promote faster disclosure of evidence to responsible defence teams who fully respect witness security. It is deeply unfortunate that there have been so many instances of interference with witnesses in the short history of the ICC. It is for this reason that the question of how best to protect witnesses must be fully addressed in the discussion regarding how to speed up disclosure to defence teams.

**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?

Please see my answers to question 10 and 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))?

For many years, I have made suggestions as a practitioner aimed at improving expeditiousness in international proceedings. Protecting the fundamental right of an accused person to a fair and expeditious trial is a matter of great importance to me, as is the right of victims to obtain justice without undue delay. For example, in an article that David Tolbert and I published in 2009, we set forth a number of suggestions on the issue.<sup>20</sup>

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<sup>20</sup> David Tolbert and Fergal Gaynor, *International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies* (2009). Law in Context, Vol. 27, p. 33, 2009, available at SSRN: <https://ssrn.com/abstract=1719122>



Many of the arguments we put forth then remain relevant. For example, it remains the case that the breadth of the charges cannot be the principal focus of criticism for lengthy proceedings. There have been lengthy ICC proceedings concerning events which took place on a single day. We argued in 2009 for a more holistic approach, and advocated improvements in the selection process of judges; largely dispensing with oral direct examination; more rigorous training in statement-writing for investigators and lawyers; greater use of investigators from the region where the crimes were committed; judicial mechanisms to restrict unnecessary cross-examination; taking judicial notice; admitting documents in evidence other than through witnesses (the “bar table” procedure); improved training of defence counsel; a requirement to deliver judgement within a defined period after the end of trial; restricting self-representation; and empowering judges to deal summarily with instances of contempt of court. (See also my response to question 16 below).

I will set up a Change Management Unit, which will work in conjunction with the Registry and the Staff Union Council to ensure that the changes we make within the OTP are pragmatic and sustainable, and incorporate suggestions from OTP staff at all levels. I will invite “Change Champions” within the OTP to volunteer to help facilitate adoption and acceptance of change.

#### 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?

The collapse of cases at the ICC exacerbates the suffering of victims, deprives them of knowing the full truth about the crimes committed against them, and prevents applications for reparation. The most important way that the Prosecutor can help victims to obtain truth, justice and reparation is by presenting strong evidence at trial concerning the participation of the accused in the crimes charged, in order to secure a fair conviction. This will facilitate reparations proceedings and will enable the victims to know the full truth about the crimes committed against them.

I believe that ensuring the fair representation of both accused and victims is a key element of a fair trial. As Prosecutor, I am committed to reaching workable, pragmatic arrangements on a case-by-case basis to achieve fair and expeditious proceedings.

**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;

This is a situation-specific matter. The extent to which victims are able to follow proceedings at the ICC depends on a wide range of matters such as the average level of literacy among the victim community; the extent to which they understand legal proceedings generally; the degree to which they are geographically dispersed; whether they speak the same language; the threats that they face; the quantity of ICC-related information that they receive from radio and other media; the quantity of deliberate misinformation about the ICC that is in circulation in the area where the victims live; and the extent to which local civil society are keeping the victims informed.

Rather than impose specific rules on OTP staff, I would encourage OTP staff in every situation to include in their situation-specific strategy document their plans to keep unrepresented victims informed of progress in the proceedings.

ii) The regulation of OTP interactions with victims who are already legally represented before the Court (including at the investigation stage);

As with the previous question, this is dependent on the specifics of the particular situation. Rather than impose specific rules on OTP staff, I would encourage OTP staff in every situation to include in their situation-specific strategy document their plans concerning represented victims. I would also encourage OTP staff to be as accommodating and responsive as possible to requests, whether in formal pleadings or otherwise, to the OTP by legal representatives for victims.

iii) The provision to victims' counsel of information held by the OTP which specifically relates to their clients;

This issue too is situation-specific. It depends on the general security conditions prevailing in the areas where the victims live, whether there is an overall environment of interference with victims or witnesses, the number of victims, the reasons why victims' counsel need the information, and on other factors, including those listed above in the answer to question 15(1). Rather than impose specific rules on OTP staff, I would encourage OTP staff in every case to discuss this matter with victims' counsel in order to assess the reason why the information is sought, the kind of information sought, the volume sought, and the resource impact on the OTP of complying with the request.

iv) Mechanisms for complaint and enforcement where breaches of the Regulations (or other instruments) are alleged by victims?



The answer to this question would depend on the kinds of breaches in question. In every case where victims' representatives consider that the Prosecutor is not complying with its obligations, whether under the OTP's Regulations, or under the Statute, RPE, or Regulations of the Court, I would encourage counsel for the victims to discuss the matter in full with the prosecution team on the case in question, and to identify the specific remedy that they seek.

I would instruct the OTP team to address the issue constructively and pragmatically. Should the response of the OTP fail to satisfy the victims' representatives, the victims' representatives can then seise the relevant Chamber with an application in which they identify the alleged breach of the Prosecutor's duties, and the remedy that they seek.

**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)?

The Policy Paper on Victims' Participation is one of several OTP policy papers that will merit review of the course of the next nine years. I believe that victim representation offers enormous benefits. In particular, it can shrink the distance between the courtroom and the towns or villages where the crimes were committed, or where the victims now live.

Where victims' representatives propose to take steps which are reasonable in view of the duties towards their clients, and are not genuinely prejudicial to the effective investigation and prosecution of Rome Statute crimes, I will not generally oppose those steps.

Representing victims across the ICC's situations differs enormously, depending on the facts on the ground in the situation in question. (See the answer to question 15.1 above). As Prosecutor I will encourage OTP staff in every situation to include in their situation-specific strategy document their plans concerning victim participation. I will encourage them to engage with victims' counsel informally and constructively.

As noted above, the most important way that the Prosecutor can help victims to obtain truth, justice and reparation is by presenting strong evidence at trial concerning the participation of the accused in the crimes charged. As Prosecutor I will focus on delivering excellence on the core mandate, set out in Article 54, of taking whatever measures are necessary to ensure the effective investigation and prosecution of Rome Statute crimes. I will also take all reasonable steps to



ensure that reparations proceedings are concluded as swiftly as possible to facilitate swift delivery of reparations to victims.

Where steps taken by the victims' representatives are genuinely prejudicial to the effective investigation and prosecution of Rome Statute crimes, I will point this out to the victims' representatives on an informal and confidential basis where appropriate, and, where necessary, in formal and public filings before the relevant Chambers.

## 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?

In prioritising the allocation of resources, due account must be taken of gravity; geography (the need to ensure that the OTP's investigations are not primarily concerned with one continent) and opportunity (if a sealed or unsealed arrest warrant is executed and a person is taken into custody, the Prosecutor must divert resources to ensure that the trial of that case is conducted as expeditiously as possible).

In assessing complementarity, the most important criterion is whether there is a good faith intention to investigate or prosecute. Situation countries which are making good faith efforts to establish domestic or hybrid courts focused on international crimes must receive from donors the financial, logistical and other support that they need to arrest and put on trial fugitives whose cases which are currently pending before the ICC. I will pay due regard to traditional processes of accountability and truth-telling as an alternative to conventional criminal trials, and will address ways to determine whether traditional processes enjoy true support from affected victims and communities.

Cases should be brought against persons who were either mid-level or high-level persons, or – in the case of low-level accused – particularly notorious perpetrators of a large number of crimes. Case selection depends to a very large extent on the strength of the evidence.

As Prosecutor, I will work with senior staff to ensure that charges (including modes of liability and crimes) faithfully reflect the evidence to be presented at trial. I will ensure that the temporal and territorial scope of the charges is sufficiently broad to accurately reflect the true extent and gravity of the criminal activity, and the existence (where relevant) of contextual elements, such as a widespread or systematic attack against a civilian population. This must be balanced against the need to ensure that charges are not needlessly broad, requiring trials to run for years. I will ensure that the Office takes full advantage of the tools and procedures in the Statute, Rules of Procedure



and Evidence, and Chambers Practice Manual so that proceedings are as expeditious as possible. As noted earlier, I will instruct OTP staff to explore the potential for resolution by guilty pleas wherever possible.

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

As Prosecutor, I would aim to visit each State in which there is a preliminary examination or investigation once per year, with the consent of that State. In francophone countries, I would aim to conduct meetings with government, civil society and victim communities primarily in French. In Spanish-speaking countries, I would aim to conduct these meetings in Spanish. I have a working knowledge of French and Spanish.

Honesty towards victims is a central responsibility of the Prosecutor. Victims must be kept meaningfully, candidly and regularly informed. In particular, I will ensure that major prosecutorial decisions which negatively affect victims' interests are communicated swiftly and with sensitivity to the affected communities and incorporate opportunities for questions from victims and answers by prosecution staff.

Within the contours of the existing jurisprudence on public statements by the Prosecutor, I would ensure that the Office of the Prosecutor swiftly counters misinformation and corrects misperceptions in a range of languages through effective and prompt use of social media, radio and television interviews, and frequent media briefings.

**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?

As Prosecutor, I would place the greatest priority on the effective investigation and prosecution of cases. The Prosecutor must excel in delivering on this core mandate. In addition, the Prosecutor must excel at communication within the OTP, and externally with other organs of the Court, States (both parties and non-parties to the Rome Statute), the UN Security Council, the media, domestic and international civil society, and victims' communities.

We have seen too few prosecutions at the ICC. Of those that we have seen, too many have collapsed at the confirmation stage, the pre-trial stage, and the trial stage. It is critically important that the next Prosecutor focuses on presenting strong cases. I will ensure that only cases with a



realistic prospect of conviction, on each charge, are brought before the Pre-Trial Chamber. To achieve this, I will focus on the cardinal importance of one issue which affects the effectiveness of the Court as a whole: evidence concerning the participation of the accused in the crimes charged.

The main challenges to ensuring a successful investigation is obtaining access to, and securing, probative evidence prior to its loss, destruction or deterioration.

As part of the change process, I will conduct an overall review of the Prosecution's current evidence-gathering methods in order to identify the key changes which can be put in place.

In no particular order, the changes that I consider to be most likely to result in greater prosecutorial success are: shorter preliminary examinations, enabling investigations to begin soon after commission of the crimes; greater use of financial and cyber investigative techniques; deeper and more successful partnerships with States Parties and digital corporations which hold probative evidence; longer periods on the ground in the situation country by situation-specific investigative teams; integrating more staff from the situation country into situation-specific investigative teams; more effective performance management of staff at all levels within the OTP; better and faster lessons-learned procedures within the OTP; and higher quality investigations in a smaller number of situations.

**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?

The principal benchmark for success in a situation country is the end of impunity for atrocity crimes in that country.

If elected as Prosecutor, the Office will produce a draft policy on completion strategies for situations, to be publicly released for comments and observations. Among the questions to be addressed in the policy will include: how best to determine genuine willingness and ability on the part of the authorities in the situation country to deliver accountability; how best to determine the views of a representative sample of victims concerning closure of a situation; criteria for reopening a closed situation; the transfer of evidence from the OTP to the situation country or other jurisdictions following closure; prohibition on the transfer of evidence for use in cases where the death penalty is available; and witness security after closure.

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





I would welcome opportunities to exchange views with the ICCBA, in particular on practical, implementable ways to improve the expeditiousness of proceedings at every stage from confirmation of charges to reparations; the ethical duties of defence counsel when confronted with credible indications of bribery and intimidation of prosecution witnesses; and settlement of a case prior to trial through guilty plea.

**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?

As Prosecutor, I will at all times fully uphold the article 42(1) requirements to act independently, and not to seek or act on instructions from any external source. I will also take all measures necessary to ensure that the investigations and prosecutions are effective and efficient. This includes forming strong relationships with information providers, including States, UN entities, NGOs, and digital corporations. As the IER recommends, “[t]he OTP should continue to develop strong partnerships and enter into Memoranda of Understanding with States Parties, international and intergovernmental organisations, and private companies.”<sup>21</sup>

Deliberate misinformation about the work of the OTP, including unfounded accusations of bias and deliberate untruths concerning the Prosecutor’s independence or impartiality, are likely to continue in the years ahead. As Prosecutor, I will improve the OTP’s communications strategy in respect of victims, situations generally, States Parties, the Security Council, regional organisations and the press. As noted earlier, I will ensure that the Office of the Prosecutor, within the bounds of existing jurisprudence on public statements by the Prosecutor, counters misinformation and corrects misperceptions concerning the Court as a whole in a range of languages through effective and prompt use of social media, radio and television interviews, and frequent media briefings.

**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?

The Statute recognizes that investigations are presumptively confidential, and that trials are presumptively public. Managing investigations, including the drafting of investigation protocols, are matters which fall within the exclusive competence of the Office of the Prosecutor.

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<sup>21</sup> IER, Recommendation 272.



Nevertheless, the OTP has released several policy papers explaining its position on procedures which take place during investigation, such as case selection and prioritization.

I support the IER recommendation that the OTP should “consider drafting a policy paper on OTP Investigations, combining the best practices and lessons learnt from its 18 years of practice. It should include its vision for the way forward. The policy paper should cover the principles, practices, standards, and strategies that should be applied in OTP investigations.”<sup>22</sup> If elected as Prosecutor, I would direct the preparation of a draft paper on these matters, and would request the drafters to address whether the draft should be released for public comments and suggestions.

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<sup>22</sup> IER, Recommendation 268.