

CARLOS CASTRESANA

Questionnaire for candidates to the 2020 Election of the ICC Prosecutor

Civil society plays an important role in monitoring the election of International Criminal Court (ICC) officials. We promote fair, merit-based, and transparent elections.

Please answer the questions below. These questions are aimed at complementing questions posed during the public hearings held with candidates on 9 - 10 December 2020.

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COMMITMENT AND VISION

1. **What vision will animate the work of the ICC Office of the Prosecutor (OTP), if you are elected Prosecutor?** The OTP must fulfill its mandate according to the Rome Statute: to deliver justice for the most serious violations of human rights worldwide. This essential duty means accountability for the perpetrators and justice and reparations for the victims. The OTP must provide effective deterrence through successful, fair and expedient adjudication of cases of the utmost gravity.
2. **How will you define the Court's legacy in situations where investigations are undertaken? How will you achieve that legacy?** The OTP must contribute to restore the values of life, integrity, freedom and coexistence obliterated by the crimes in the conflicted societies, engaging broad constituencies, victims and civil society to build inclusive narratives of justice, reconciliation, tolerance, and peaceful settlement of disputes.
3. **What is your assessment of the resources available to the Court? If you are elected Prosecutor, how will you achieve the Court's mandate in light of available resources?** The resources are limited, among other reasons, because the results have been limited as well. We cannot ask for more until we are able to provide in exchange the expected results. We need to do better now with the resources available, and improve our effectiveness without additional cost by optimizing our performance, increasing exponentially the operational support of the prosecution offices of the State Parties, and establishing permanent cooperation and partnership in joint and coordinated domestic/international investigations and prosecutions.

PRELIMINARY EXAMINATIONS, INVESTIGATIONS AND PROSECUTIONS

4. **What do you believe are the main challenges facing the OTP in terms of:**
 - a. **Preliminary examinations:** these should be concise assessments on the conditions for the exercise of the ICC jurisdiction: the crimes, subject-matter and ICC jurisdiction, the gravity, the interests and immediate needs for protection of victims, the interest of justice, and the complementarity. The evaluation on the ability and willingness of the concerned States shouldn't be prospective but empirical, after having given them the opportunity for themselves to bring to justice the perpetrators and restore victims' rights. In short, PE must be addressed to gather the information necessary to make a

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sound decision whether to open or not an investigation. Ordinarily, it should not take more than six months.

- b. **Investigations:** The RS only contemplates two possible frameworks for situations: investigations and prosecutions. For this reason, PE must be just the necessary but exceptional and provisional framework for the purposes explained above. During the PE, the OTP has not investigative powers, and the States and the alleged perpetrators have not right of defense. For this, PE should give way as soon as possible to investigations. In this framework, States should be given the opportunity to engage in joint investigations with the OTP, thus demonstrating their capacity and willingness to genuinely prosecute the crimes. To this purpose, the OTP should deploy offices in the field in all the situations under investigation. These investigations must focus on the criminal networks, groups and organizations behind the crimes rather than in individuals, with the aim of dismantling the criminal structures, confiscate their assets, and bring their most responsible individuals before justice. Any investigation requires a strategy: work plan, goals, budget, equipment and team, benchmarks, and outreach and completion strategies.
- c. **Prosecutions:** The OTP should reinforce its staff with forensic experts and specialists in technological scientific 21st century evidence, as well as thematic experts in SGBV, financial investigations and telecommunications. It should establish in cooperation with the Court clearer thresholds of evidence required for the different procedural steps: initiating an investigation, warranting arrests, confirmation of charges, accusations and convictions; clarify some important procedural issues like the “no case to answer” motions, and count with the most experienced trial attorneys. At the same time, it must build its cases with less witnesses and more insider information, establishing clear evidentiary links between the crimes and those accused of holding the highest levels of responsibility.
5. **Please describe your vision for addressing misconceptions related to sexual and gender-based violence that might impede the investigation and prosecution of SGBCs.** A special task force (a Section) should be created in the OTP with specialized staff to address SGBCs taking profit from lessons learned from the previous successful experiences, notably the ICTY, establishing investigative and prosecutorial strategies, dealing with victims, establishing psychological support and procedures for evaluation of victims-witnesses affected by PTSD, implementing best practices and standards of acceptable and forbidden means of evidence both to the prosecutor and defense counsel, and developing transversal investigations in distinct territories against transnational crimes such as human trafficking.
6. **Please describe your experience in addressing crimes against and affecting children and related issues, including dealing with child witnesses.** As Prosecutor in Spain I brought charges in the 90’ for the first time ever in Spain against a high ranking member of the Catholic Church, a priest who had been the Director of a prestigious School in Barcelona, on counts of pedophilia, sexual abuses against a little female child while preparing her to receive the holy sacraments, gaining a landmark conviction by presenting as witnesses adult women who testified having been victims of the same priest and conduct during their childhood. As Prosecutor of the Supreme Court I brought charges against a Member of the Spanish Parliament who was also professor in high school. I accused him of pedophilia, sexual abuse against two male children, thus provoking his resignation as Senator and the

case continuing to be sustained in ordinary courts. As Commissioner in Guatemala, I ordered the investigation and elaboration of a thematic report on illegal networks of clandestine adoptions (5.000 children given in adoption internationally every year, a part of them suspected of having been abducted by illegal networks operating in the country since the times of the internal armed conflict) used until today as a reference, and opened an investigation on these networks, dismantling a religious foster home intended to hold children until their transfer for adoption or sexual exploitation, rescuing 26 children. I signed an MoU of cooperation with Sweden and UNICEF for training officers in the national police and the judiciary, and investigate the criminal networks of clandestine adoptions and children traffic. Attention to children victims/witnesses should be addressed in a similar manner as to victims of SGBCs with respect to their privacy and the support of educators, forensic psychologists and other specialists.

- 7. The 2016 OTP Policy Paper on case selection and prioritization lays down several areas of serious crimes under national law which the OTP will take into consideration when investigating core crimes under the Rome Statute. These include the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment. Could you please provide an example of your experience in any of these areas?** In the Pinochet case, I participated in the financial investigation of the networks of corruption and money laundering behind the international crimes prosecuted, obtaining as a result that Riggs Bank had to pay 8 million USD compensations to the victims of the Chilean dictatorship. There is a clear link between international crimes and transnational crimes such as egregious corruption and organized crime. I agree with the proposals in the 2016 OTP Policy papers. Criminal groups are many times involved simultaneously in several of the mentioned activities, and the investigations must focus in their overall criminal activity, including transnationally, in cooperation with the domestic prosecution offices. According to official records, seven of the ten States most affected by organized crime all around the world have also situations under investigation in the ICC. I have recently proposed (Politorbis, magazine of the Swiss Ministry of Foreign Affairs, n 68, 1/2020, pages 143-149: Carlos Castresana, "Corruption, organized crime and international crimes. Lessons for prevention") to address these situations through joint investigations between the OTP and the national authorities of the concerned States.
- 8. To date, the crime against humanity of enforced disappearance has not been charged. Are there aspects of the Rome Statute, including crimes within its jurisdiction, that you consider have been underutilized and would form part of the Office's prosecutorial strategies, if elected?** There are many provisions of the RS that have not been applied until now. Also, some guidelines in the policy papers of the OTP (in particular, the policy paper on case selection and prioritization) are pending to be implemented. All the policy papers should be reviewed and updated, specially the one related to the interest of justice. Provisions for cooperation, mainly in articles 87, 89 and 93 RS can be implemented in a more efficient manner.
- 9. Under the Rome Statute, the Prosecutor has unilateral authority to investigate offences against the administration of justice (Article 70 cases). As Prosecutor, what policy considerations would guide your implementation of the Article 70 mandate in a clear and consistent manner?** A policy paper should be published in order to address these specific offenses. States parties must regulate in their domestic law these offenses, according to the

provisions established in article 70, 4 a) RS. Once this duty is accomplished and the domestic principle of legality fulfilled, the prosecution of these offenses can follow the guidelines of complementarity, the OTP dealing with these cases only when the concerned State is unwilling or unable to prosecute them.

COMMUNICATION AND OUTREACH

10. The ICC's work is of concern globally and to multiple audiences.

- a. **What experience do you have in prioritizing and successfully conveying key yet complex information to different audiences? Please provide specific examples.** Perpetrators of international crimes are usually powerful individuals with political and economic influence, and capacity to mobilize great resources, lobbying, financing media campaigns and other means to counteract the prosecutions addressed against them. The political pressure they put on national and international authorities and public opinion needs to be prevented and counteracted by proper outreach strategies. In the prosecution before the Audiencia Nacional in Spain against the perpetrators of egregious abuses in the military dictatorships in Argentina and Chile, the witnesses who came to Spain to give testimony to the Court since 1996 were systematically presented before the media, explaining to the Spanish audiences what they had had to go through. When Augusto Pinochet was arrested in London in 1998, the polls indicated that 70% of the Spanish population was in favor of the extradition. The Spanish Government decided accordingly and requested the extradition. During the same period, I gave more than 200 lectures all around Europe, Latin America and the US explaining to very diverse audiences the fundamental grounds for the prosecution under the principle of universal jurisdiction. In Guatemala, only in 2009, CICIG had a permanent presence in local media. It was mentioned in 1306 articles in newspapers, 587 editorials, 1402 radio programs and 1190 television programs, raising awareness of the effort we were making, gaining support of civil society, NGOs and other stakeholders for the prosecutions against very powerful defendants, achieving convictions in all the high profile cases we brought to trial. We were able to join 35 very diverse civil society organizations (indigenous, human rights, feminists, environmentalists, academy, private sector, etc.) in a coalition to support the CICIG.
- b. **What kind of communications strategies and tools will you put in place as Prosecutor?** The effort of CICIG has a lesson to be learned. The excessive identification between the institution and the person in charge has negative consequences, because the propaganda against the institution gives way easily to smear campaigns against the person. The OTP must have a Unit directed by a spokesperson, in charge of this extensive communication effort, the Prosecutor public appearances being limited to those indispensable. The OTP outreach policies must be strong, in the field, and coordinated with the Registrar.

VICTIMS AND AFFECTED COMMUNITIES

11. **Please describe your vision of the prosecution's role in supporting the rights of victims in ICC proceedings as per the Rome Statute.** We have spent the XXth century guaranteeing the rights of the defendants in the criminal processes. The 1966 Covenant of Civil and Political Rights is the best example. The efforts of the human rights movement were more than

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justified because authoritarian States at the time used frequently their *ius puniendi* for the repression of their political opponents. There is still a lot of work to do to guarantee the rights of defense in the criminal proceeding, including in the ICC, but the real challenge ahead, once the Rome Statute has clearly established that the prosecution of egregious abuses of human rights is not anymore a right for the States, but a duty -the *ius puniendi* has become a real *onus puniendi*- and not only for States, but a complementary duty for the international community as well in the case where the States fail to fulfill their duty (RS Preamble). Therefore, our challenge is to transform the XXI century in the century of the rights of victims. Still, this new mandate is work in progress: nobody knows with certainty what is the desirable role to be assigned to victims in the criminal proceedings, or the real meaning of “victim centered strategies”. Many countries still assign the capacity to exert the criminal action and bring charges exclusively to the public prosecution. Some other States recognize to victims some standing and participation, usually subordinated to the public prosecution. Spain, with an ancient but progressive procedural law, is among the few countries allowing the victims –private prosecution- and even the NGOs with a legitimate interest –popular prosecution- active participation in virtual equality of arms to the role assigned to the public prosecutor. This legal provision has proven to be crucial for the success of the prosecutions under the principle of universal jurisdiction in Spain. The RS provides some participation for victims (RS 68,3), protection (68,1) and their right to reparations (RS 75). The OTP must contribute to the widest possible interpretation of these articles and facilitate as much as possible victims’ participation; but in any case, accepting that this participation is recognized with a limited role in the RS, it has to be recognized that for the time being, the recognition and satisfaction of the interests of the victims relies mostly in the OTP, which is at the same time an opportunity and a responsibility.

12. **How will you pursue accountability for those crimes that have a particularly serious impact on future generations of affected communities?** Certain crimes, such as any of the modalities of genocide, apartheid, deportation, persecution, starvation, SGBV with purposes of ethnic cleansing, human trafficking, children recruitment, etc. are about to bring the destruction of entire human groups or destroy their way of life, traditions, religion or identity, thus threatening the survival of the communities targeted. I’ve dealt with these realities while cooperating with the Special Jurisdiction for Peace in Colombia in establishing strategies for prosecution of the most serious cases, affecting to groups of human beings such as women victims of systematic sexual violence and exploitation, indigenous communities, children soldiers; and with the Filipino central and autonomous authorities in the implementation of the Bangsamoro Peace Agreement in Mindanao trying to establish institutional mechanisms to facilitate the dialogue and peaceful coexistence among Muslim and Christian communities establishing an applicable rule of law system compatible with both cultures and beliefs. Accountability must contemplate simultaneously retributive justice proportional to the seriousness of the crimes for the perpetrators responsible of such grave crimes, and establishing the collective reparations for the victims enabling the reintegration of their rights and previous way of life in their homeland.
13. **How do you view the OTP’s relationship with affected communities? How would you seek to maximize the impact of the Office’s work and that of the Court more broadly for affected communities?** The OTP must open field offices in the territories of the situations, engage into a permanent dialogue with the communities and their representatives, usually

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through local NGOs, and when possible, developing joint investigations with local authorities previously selected and vetted. Strategies for investigation and prosecution should contemplate always the interest of victims as the main priority: before the crimes have been committed, through prevention with early interventions prosecuting preparatory conducts punishable according to article 25 RS; in situations of ongoing atrocities, providing deterrence by investigating and prosecuting the peripheral crimes surrounding the conflict by facilitating, financing, aiding and abetting the violent conducts, or simultaneously laundering the illicit profits; in the aftermath of the crimes, providing accountability for the perpetrators, justice and reparations for the victims, and no recurrence for the post-conflict societies.

DEFENCE RIGHTS

14. **Please describe your experiences in ensuring the rights of the accused to a fair and impartial trial.** I've always defended the fair trial and equality of arms for all the parties in the criminal process. Several times in my career I've recused as a prosecutor and as a defense counsel judges or magistrates because of alleged or suspected lack of independence or impartiality, following the criteria established by the ECHR (Piersack case and others). In Barcelona, as prosecutor, I recused the President of the Provincial Court on behalf of the defendant because that Magistrate had adjudicated previous trials against other defendants in the same case predetermining the Court position. After denying the lack of impartiality, the magistrate recused herself. In the Provincial Court in Málaga I recused two of the three magistrates because of lack of independence. They accepted the challenge and recused themselves. In Guatemala, we vetted with CICIG's and civil society information and got removed 5 magistrates of the Supreme Court, 20 magistrates of the Courts of Appeal, and 2 Attorney Generals. As prosecutor I filed innumerable motions on behalf of the defendants to dismiss charges or indictments because of violations of their right to due process.

IMPARTIALITY, INDEPENDENCE, AND COOPERATION

15. **How have you demonstrated your ability to carry out previous mandates with independence and impartiality?** Please provide specific examples. I've always preserved my independence and impartiality as a prosecutor, preserving at the same time the independence and impartiality of judges, understanding that those are not rights or privileges, but duties on behalf of the parties in every process, who have the fundamental right of their case being adjudicated by independent and impartial judges and prosecutors. Independence regards any undue pressure from external actors; impartiality affects to the parties in a certain case. When I've received undue influences from third parties, I've filed written reports to my superiors in the prosecution office. When the pressures came from the parties in a certain case, I've filed a written report to the adjudicating judge or court. When I've received orders from a superior that I've considered not legally grounded or opposed to the law, I've expressed my respectful written discrepancy before the corresponding Junta (assembly of the prosecutors of a certain territory, or the Supreme Court) and then obeyed the order if confirmed. In Guatemala, as CICIG Commissioner, I reported every undue pressure I received to the UN Secretary General or the Undersecretary General for Political Affairs. And once reported, I continued my work as usual. Regarding my subordinates, I always took the undue pressure for myself and let them to do their job without constraints.

16. **How will you act in cases where significant political or other external pressure is exerted upon you and the Office you lead?** As it has been my constant course of conduct during my career. In cases affecting the general aspects of the mandate, i.e. appointments or dismissals of staff, budgetary or organizational issues, no jurisdictional discrepancies with the Court, the State Parties or other stakeholders, I'll report the undue pressure to the President of the ASP. In case of improper pressure regarding jurisdictional issues involving specific cases or situations, I'll report to the President of the concerned Chamber or the Court. And in any case, after having reported, I'll continue business as usual.
17. **How will you secure cooperation in the arrest of individuals wanted by the Court?** Arrest of fugitive individuals requires cooperation of the State Parties, Interpol and other stakeholders, but mostly requires a permanent professional team tracing the escaped individuals, a plan and specific assessment case by case, technological surveillance, interception of communications, tracing of financial operations, and probably public offering of rewards and plea bargaining for co-perpetrators in exchange of relevant information leading to the arrests. In the cases of defendants entitled to any kind of immunity recognized by international law, I'll propose an amendment to the RS authorizing the trial in absentia, because nowadays the State parties face a contradiction between their duty to respect state or diplomatic immunities and their duty to cooperate with the ICC. Once the person entitled to immunity is a convicted criminal, the contradiction will no longer exist.

HIGH MORAL CHARACTER

18. **Are you aware of any formal allegations made against you related to professional misconduct, including allegations of sexual harassment, discrimination, or bullying, or any investigations regarding your alleged professional misconduct related to the same? If so, please explain.** No.
19. **Are you aware of any formal allegations made about you related to financial mismanagement or fraud? If so, please explain.** No.

LEADERSHIP AND MANAGEMENT

20. **How would you describe your leadership style? Please describe a situation where you have demonstrated this in your work.** Leadership is about loyalty. I demand from the staff under my authority to do their best. I give them in exchange my best, take for myself all the responsibility and give them the credit when we succeed. To keep their commitment, the staff must feel safe, treated with fairness and focused. These goals are achieved by establishing legal certainty, clear rules binding equally for everyone, balanced workload, and pre-established strategies and work plans, benchmarks and expected results. One must lead by example: upon our arrival, the security concerns imposed regular tests of reliability, including polygraph tests for our team and our counterparts. The Europeans refused to pass the polygraph, and I ordered the test being regularly applied to myself. There were no more complaints.
21. **How would you describe your management style and experience, including your approach to decision making, delegation of authority, and accountability? Please describe a management challenge, and how you addressed it.** My door in CICIG was always open. Any

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member of the staff could ask for a private meeting with me, only with an assistant present to keep the record. All the decisions were collegial, with the chiefs of cabinet, investigations, analysis, prosecutions, security, administration and staff, and myself. I took the final responsibility for what had been decided. The decisions adopted were subsequently distributed, delegated and executed by the correspondent sections and units. In the course of an investigation affecting to the Government, a detachment of CICIG investigators accompanied a key protected witness to recognize certain places in the countryside. They were ambushed and surrounded by numerous units of National Police who demanded the immediate surrender of the witness, which actually would have put in danger his life. I ordered the Commander to gently refuse, resist and gain time, while talking to the Minister of Interior, the Director of the National Police, the Secretary General in New York, and finally to the President, and told him that we would not surrender the witness whatever the cost could be, and made him responsible of the consequences. Our team was subsequently freed and could come back safely with the witness.

22. **Diversity is critical to the success of the ICC. Please explain how diversity has played a role in your past and present professional activities, community engagement, and your lived experience.** I've been interacting with colleagues, defence counsel, witnesses and victims, all around the world since the 90'. I got in close relationship with all the stakeholders, NGOs, media and civil society, private sector, political and international bodies representatives in Western and Eastern Europe, Latin America, and then in Africa, Middle East, and finally Asia. I've trained young prosecutors from more than 40 post conflict territories. The staff in CICIG was composed of 80% Latin Americans (33% Guatemalans) and 20% Europeans, with gender balance of 53% men and 47% women (except for the security team, mostly composed of men). In the four directive positions, we were 50-50% men and women, and $\frac{3}{4}$ Latin Americans. In CICIG we imposed a policy of 0 tolerance to sexual harassment, discrimination or any other misconduct, and we enforced it. We created a disciplinary committee composed by members of our staff, with an appeal committee; they adjudicated in a double instance all the complaints, without interference from anyone.

OTP OFFICE CULTURE

23. **What is your assessment of the current working culture within the OTP and what measures would you take to improve it?** OTP needs to improve the territorial balance and implement the gender equality. The staff is composed by 61% employees from the WEOG and only 17% Africans. This proportion has to be amended. For the P1 and P2 positions, young professionals from the territories of the situations should be preferred. In directive positions, there are only 20% women. They need to be 50%. I have already explained the strategies for investigations and prosecutions. These must be implemented by cohesive teams directed by the best professional and experienced investigators and litigating lawyers with the advise of experts specialized in the different issues to be dealt with, aspiring to excellence in performance and results. Incriminating and exonerating evidence must be equally gathered, with the absolute confidentiality in the investigative phase and the utmost transparency in the trial phase. Staff must feel they are part of a team entrusted with the most important mandate to protect the rights of the victims all around the world, and the duty to deliver independent, fair and impartial justice for the perpetrators. They must feel,

additionally, that they work in a safe and friendly environment where no misconduct will be tolerated.

24. **How would you address any issues that disproportionately affect women or minorities and people of colour? Please describe a situation where you have demonstrated this in your work to date.** Diversity is an asset, specially in an institution called to serve globally. Equality is a principle that needs to be enforced. Equal opportunities for employment, salary, working conditions and promotion based solely in merit must be guaranteed. Any discrimination based on birth, gender, race, religion, opinion or any other personal or social condition or circumstance must be forbidden, and the prohibition enforced. There were two serious incidents affecting diversity in CICIG. One high ranking international male member of staff insulted gravely a subordinate Guatemalan woman. He later apologized, but still a sanction of one month of suspension of employment and salary was applied. Another high ranking international officer in the security team retained for himself part of the complement of salary assigned to the Guatemalan security guards, in exchange of maintaining them in the service. Those who refused to pay, were sent back to ordinary service. They finally denounced him. His contract was terminated, he was sent back to his country, had to give back the money, and the national authorities were properly informed.

Thank you.