

## **2023 ICC Judicial Elections Questionnaire to candidates**

**Name: ERDENEALSUREN DAMDIN**

**Date:07/29/2023**

### **Motivation**

**1. What motivates you to seek election as a judge of the International Criminal Court (ICC)?**

The justice system is the foundation of maintaining a peaceful society, and the emergence of the International Criminal Court (ICC) signals the necessity of international cooperation between nations for the well-being of the world and humanity. In many ways, it calls for legal professionals of every nationality to have a more proactive outlook toward maintaining the stability of a peaceful world.

Practicing law under two fundamentally antagonistic societies with not only differing, but opposing ideals, and participating in creating and consolidating a new society with aspiration towards universal human rights and social justice, have made me a lawyer with a strong sense to safeguard human rights and liberties, and discern the true entities of global peace and security.

I believe that the unique perspective acquired as an attorney, prosecutor and judge throughout the democratic transition of my country, as well as the skills and experience I gained on this path will allow me to make a meaningful contribution to the core activities of the ICC.

Furthermore, my involvement in the ICC will complementarily improve the justice system of Mongolia, and broaden the ICC's operation in and perspective of the Asia Pacific region, where 2/3 of the world's population resides.

### **Relevant experience as a criminal law practitioner (List A) or international law expert (List B)**

#### **For LIST A candidates**

**2. Please describe your experience as a judge, prosecutor, or criminal lawyer in domestic or international criminal law cases, including information on the number and types of cases as well as challenges you faced.**

Throughout my tenure as a prosecutor, I initiated and conducted supervision over thousands of examinations and investigations of all types of criminal cases, including violent crimes such as murder, bodily harm, rape, child rape, domestic violence, different types of non-violent economic crimes, and also participated in court proceedings related to the above cases.

As a defense advocate, I represented both victims and accused in a large number of criminal cases, including but not limited to sexual and gender-based violence.

In my capacity as Supreme Court Justice, I adjudicated more than 4000 all types of criminal cases, including the most serious and complex domestic crimes and also international and transnational organized crimes such as genocide, crimes against humanity, sexual slavery, enforced prostitution, and human trafficking.

Furthermore, I dedicated my efforts to ensure that the decisions of lower courts were consistent with the requirement for uniformity of implementation and application of norms and principles of international legal instruments including the protection of the rights of children and women, such as CRC, CEDAW, UNTOC, and its Protocols.

In various capacities, such as a Member of the Working Groups of the Legal Standing Committee of the Parliament and the National Committee for Children, I have provided legal advisory opinions on legislation regarding the criminal justice system.

3. During your judicial career, please share any instances when you applied Rome Statute provisions or other international criminal or humanitarian law sources, directly or through national legislation that incorporates Rome Statute offences and procedure. Have you ever referred to or applied jurisprudence of the ICC, *ad hoc*, or special tribunals? If yes, please indicate any relevant judicial decision or opinion that you authored or co-authored.

As Mongolia has ratified almost all core international human rights treaties as well as the Geneva Conventions, they have become an integral part of the national legal system under the Constitution of Mongolia. Also, a new Criminal code of Mongolia has incorporated Rome Statute offenses, including the crime of aggression. Therefore, I have experience, directly and indirectly, applying these principles in handling particular cases.

Nowadays, the most commonly used international human rights treaties in the judicial practice of Mongolia are the Universal Declaration of Human Rights, the International Covenant on Civil Political Rights (ICCPR) and its Second Protocol, the United Nations Convention Against Torture (UNCAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Child (CRC).

One of my examples of applying international human rights law in court proceedings includes cases concerning the crime of torture. Under the old Criminal code, only persons conducting inquiry and investigation were defined as perpetrators of torture. As a result, detectives and other law enforcement officials were excluded from the scope of the offender. This legal gap made it difficult to hold them accountable for torture. While adjudicating related types of cases I directly applied the UNCAT, referring to its meaning on the scope of the offender. Later, based on these decisions and recommendations a new Criminal Code law adopted the definition set out in the UNCAT.

Besides international human rights law, as a judge, I had a chance to explore relevant parts of International Humanitarian Law (IHL). I handled cases tied to the violent riot ever in the recent history of Mongolia. This case is related to a post-parliamentary election riot of 2008. The violent confrontation between thousands of protesters and police force resulted in the declaration of a State of emergency, followed by military deployment. During this violent conflict, 5 civilians were shot to death and many had different levels of physical injury, also causing heavy material damage. I had to decide, as a judge, whether the incident was just an internal disturbance or a non-international armed conflict. In addition to domestic legislation, I had to look at relevant parts of the Geneva Conventions and Additional Protocol II.

Also, I presided over and adjudicated more than 200 cases related to exonerating the victims of genocide and crimes against humanity that took place in Mongolia in the 1930s. These cases focused more on proving the victims' innocence rather than the guilt of those who committed the crimes. In order to adjudicate these cases I had to examine the Genocide Convention, Rome Statute.

I also had experience handling a number of transnational crimes including sexual exploitation of women and minors, which were mainly committed in the neighboring country, China. Such cases required an understanding of definitions of human trafficking and forced prostitution, requiring research into and review of different legal sources of international human rights treaties. These included international law sources such as the CRC and UNCAC and their Protocols.

Overall, dealing with all kinds of cases, I noticed that the Criminal Code of Mongolia did not sufficiently legislate transnational and international crimes as outlined in international treaties. So, as a member of the working group of the Government and the Parliament, I focused more on integrating transnational and international crimes in the new Criminal Code, in a way that aligns with international treaties. This included incorporating international crimes, such as *inter alia*, genocide, crimes against humanity, war crimes, and the crime of aggression.

### Victims' rights

Victims of Rome Statute crimes are the *raison d'être* of the ICC, and they have the right to participate in proceedings and to reparations, as well as to be effectively protected.

4. Please describe your experience and/or expertise relevant to victims' rights to participate in criminal proceedings and to obtain reparations, as well as your understanding of such rights before the ICC.

The criminal justice system of Mongolia, as part of the civil law system, ensures broader procedural rights and guarantees for victims in criminal proceedings. The participation of victims is not limited to only reparations, but they are entitled to participate in every stage of proceedings, including appealing judgments on guilt and sentence.

As a defense advocate, I represented both victims and accused during every stage of criminal proceedings, ensuring a fair trial and due process. This experience gave me valuable insights into how we can improve the support for victims through representation, compensation, and recovery in Mongolia. This experience also helped me to contribute to the drafting of the Law on Victim and Witness Protection.

Most notably, the challenge representing victims was reparations for mental harm. The Criminal Courts refused to order such reparations based on the lack of legal grounds to do so. For that reason, over the years of court practice on reparations were limited only to material or property damages. These litigation experiences helped me to raise the need for improvement of a legal framework to fill this legal gap. After years of continued discussions and efforts, and as part of ongoing criminal law reform, we recently made important amendments to the Criminal Procedure Code and Forensic law.

These modifications particularly concern enabling reparations for mental harm, marking a critical step in ongoing criminal law reform. I am confident that these changes will greatly enhance the protection and rights of victims in criminal law proceedings.

5. How would you ensure victims' statutory rights to participate in proceedings and to reparations are meaningfully achieved?

To further continue the answer provided in Q.5, my experience in adjudicating criminal cases with significant victim participation has helped me to manage victim participation in court proceedings and to identify and ensure specific protection for certain types of victims. Under

our national system, judges are sometimes required to manage the courtroom dynamics to avoid a victim becoming a second prosecutor. My judicial experience has taught me to balance the rights of the accused and victims and preserve fair trial.

If elected, I will advocate for clear and consistent principles and practices regarding victim participation and reparations within the Court's jurisprudence in accordance with Article 75 of the Rome Statute. This will ensure that victims are met with predictable, coherent, and streamlined processes concerning their participation, protection, and reparations.

However, the need for effective victim participation should not undermine the importance of maintaining a balanced approach to justice. It's important that the rights of the accused are not compromised. The Rome Statute provides that the Court may allow victims to present and consider their views and concerns at appropriate stages of proceedings, without causing prejudice to the rights of the accused or compromising a fair and impartial trial.

6. Describe any specialized training and/or experience you have in providing protection and support to victims (and witnesses) participating in judicial proceedings, including expertise in assessing harm, trauma, and the risks of re-traumatization.

As a prosecutor, I initiated, led and supervised thousands of examinations and investigations of all types of criminal cases such as sexual and gender-based violence and violence against vulnerable groups. This experience provided me with first-hand exposure to practical difficulties in examining and investigating such crimes, given the sensitive nature and protection of vulnerable witnesses.

Some part of my experience working as a defence attorney in the criminal justice system is related to representing victims of sexual and gender-based violence, including women and children.

As a Supreme Court Justice, handled a wide variety of cases. This included violent crimes such as murder, robbery, child rape, domestic violence, child abuse, and international crimes like human and sex trafficking. Unfortunately, with the growing rate of sexual crimes including child rape the Supreme Court had to adjudicate these cases with care. I have handled these cases with careful consideration of special protection for victims of such crimes, including their safety, physical and psychological well-being, dignity and privacy.

## Defence rights

7. Please describe any relevant experience implementing the rights of the accused, including specific experience managing fair trial considerations in criminal proceedings.

Besides my judicial experience, my time working as a prosecutor and defence attorney has taught me to balance the rights of the accused and victims. Conducting prosecutorial supervision and representing clients in criminal cases both served as a unique challenge, demanding my utmost dedication to safeguarding the rights of the accused, such as the right against self-incrimination, the right to counsel, the right to a fair trial, and ensuring due process.

Overcoming a deliberate abuse of power and eliminating torture practices by officials in conducting criminal investigations inherited from the previous socialist regime was the most challenging task throughout the years on the way of establishing the justice system with respect to the rule of law, safeguards the rights of the accused and ensure due process.

This extensive experience provided me with a comprehensive understanding of the accused's rights and the factors necessary to guarantee a fair trial. These insights proved invaluable during my tenure as a Supreme Court Justice.

As a Justice, my role required careful consideration of the rights of the accused in addressing the legality of investigative and prosecutorial conducts, reviewing alleged substantive breaches of the procedural rights of accused persons, as well as failures of lower courts to safeguard the rights of the accused in court proceedings. In the capacity of Justice, while providing a judicial review for different criminal cases, I made a considerable number of judgements on the acquittal of accused persons based on above mentioned misconducts or miscarriage of justice.

### High moral character, independence, and impartiality

8. Share your understanding of the "high moral character" Rome Statute requirement (Article 36(3)(a)), and how you embody these characteristics. What qualities or activities would be contrary to a "high moral character"?

My understanding, based on my extensive legal career, of "high moral character" is that the individual must embody traits such as honesty, integrity, ethics, fairness, diligence, equal treatment, respect for the rule of law, and human rights.

The qualities or activities contrary to a "high moral character" would include dishonesty, corruption, bias or prejudice, disregard for human rights, or any kind of misconduct or criminal behavior. The individual should have no record of actions that are inconsistent with the standards or code of conduct expected of a judge, such as bribery, favoritism, or misconduct that will negatively affect the judicial functions or the confidence in their independence.

Throughout my legal career, I have strived to uphold high moral character and professional code of ethics.

9. Have you ever been accused (formally or informally) of bullying, harassment, abuse of power, serious misconduct, including sexual harassment/misconduct, or unacceptable behavior? If so, please explain.

No. I have never been investigated for, or charged with, allegations of bullying, harassment, abuse of power, serious misconduct, including sexual harassment/misconduct, or any other unacceptable behavior.

10. What difficulties, if any, can you envisage in taking a position independent of, and possibly contrary to, the position of your state of nationality? How would you act in cases where significant (direct or indirect) political pressure was exerted upon you and/or your colleagues?

Throughout my thirty-year career in criminal litigation, and particularly during my tenure as a Justice of the Supreme Court handling the most serious crimes in Mongolia, I have become well-versed in working under different types of pressures and attempts of undue influence. These pressures may come from government authorities, private organizations, the media, or the wider public. However, it is essential to note that a judge's decisions must remain independent, free from external influences.

Adhering to this principle, I have remained steadfast and resistant to such pressures, ensuring that my judgments maintained objectivity, transparency, and sound reasoning. Consequently, as a Supreme Court Justice, I frequently authored separate, concurring, and dissenting opinions.

This held true even when it meant taking positions that diverged from those of Parliament or any other governmental body.

Maintaining judicial independence is not always a straightforward path, yet it is crucial for upholding the rule of law and protecting the rights of all parties involved. I am committed to continuing this dedication to independence and impartiality, no matter the external pressures I may face.

Much like the Constitution of Mongolia and the Law on Judiciary of Mongolia, the Rome Statute, particularly Article 40, requires judges to act independently and impartially. Therefore, a judge's actions should remain free from external influences, including their home country's authorities. The relationship between a judge and their country of origin must strictly adhere to principles of impartiality, independence, and integrity to prevent any bias or conflict of interest.

Moreover, Article 11 of the ICC's Code of Judicial Ethics insists that judges shall avoid extra-judicial activities that could potentially compromise their judicial duties or appear to affect their independence or impartiality. While engagement with institutions such as universities, courts, or non-governmental organizations is permissible, a judge's primary commitment must remain with the ICC. Any external involvement should never jeopardize their independence, impartiality, or judicial performance at the ICC.

- 11.** Have you ever worked in the executive or legislative branches of government in your country? If so, please provide details about the capacities in which you served, the duration of these positions, and confidentiality obligations you may have undertaken.

Over several decades, I have been deeply involved in legal reform processes, actively providing legal advisory opinions to enhance Mongolia's criminal justice system. This involved a particular focus on aligning with international human rights treaties, the Genocide Convention, Convention Against Torture and the Rome Statute, integrating international and transnational crimes into the Mongolian Criminal Code. Additionally, my involvement in academia has led to mentoring and training students, lawyers, and judges, offering guidance on their research in criminal litigation and justice.

A prime example of my contributions is my active role in drafting a new Criminal Code and Criminal Procedure Code. Despite Mongolia's civil law system, we acknowledged the hybrid criminal system's importance in safeguarding a fair trial, due process, and the rule of law. Backed by the Mongolian Government's support, we studied common law system best practices, and our working group was successful in incorporating elements of the adversarial system and plea bargaining into the new Criminal Code of Mongolian.

As a Member of the Working Groups of the Legal Standing Committee of the Parliament and National Committee for Children of Government, I have provided legal advisory opinions on legislation for preventing violence against children and women and improving juvenile and women's rights in the Administration of Criminal Justice.

Aside from confidentiality obligations related to conducting judicial review of certain criminal cases, I don't have any confidentiality obligations to any branches of the government of Mongolia.

## Management and workplace culture

- 12.** Please describe your relevant human resources management skills and experience, including: how you managed allegations of discrimination, harassment (including sexual harassment), bullying and/or abuse of authority on the part of staff members; ways you addressed chronic imbalances in geographical representation/race and gender in senior management positions; and how you grappled with issues that disproportionately affect women, minorities, and people of color.

Some of my responsibilities as a Head of the Foreign Affairs and Cooperation Department of the Prosecutor General's Office of Mongolia were related to the administration of human resources of the Prosecutorial Authority. These duties included administering of Prosecutor's Disciplinary Committee activity, where alleged misconduct of prosecutors including allegations of discrimination and harassment were reviewed.

As the Supreme Court of Mongolia has the mandate to review complaints for appeal decisions of the Judicial Disciplinary Committee, I presided over and handled several cases related to allegations of disciplinary and judicial misconduct.

- 13.** If elected, what concrete measures will you take to improve the workplace culture in the ICC's judiciary? Include examples in which you acted to improve the workplace culture.

Promoting a culture of collegiality is indeed crucial to the successful functioning of the International Criminal Court's judiciary. If elected, I intend to advocate several concrete measures, drawing upon my experience in managing teams and fostering a cooperative atmosphere, to cultivate a more cohesive and collegial judicial culture.

Firstly, I would advocate for the inclusion of collegiality as a significant subject during the Induction Programme for new Judges and the Judge's Annual Retreat. Organizing workshops and seminars that concentrate on effective communication, teamwork, and conflict resolution could be a viable starting point.

Secondly, I would propose the addition of a reference to collegiality in the Code of Judicial Ethics. Incorporating the importance of collegiality in the Code would serve as a regular reminder to all judges about the value of cooperation, collaboration, and mutual respect.

Furthermore, I plan to advocate the development of guidelines within the Chamber to foster collegiality. This could entail the creation of a shared digital platform for efficient communication, the encouragement of intra-Chamber and intra-Division dialogues and discussions and consultations. I think that a lack of collegiality can lead to dysfunctionality within Chambers and can have a detrimental impact on the Court's credibility.

As a Justice of the Supreme Court, I have consistently adhered to the principles and spirit of collegiality and professionalism, maintaining an environment of respect, engaging in constructive dialogue, and striving for unanimity. If elected, I will continually work to promote and reinforce these principles and ensure that every voice is valued and heard, both within the Chamber and amongst the staff.

- 14.** Please share examples of when you applied a gender perspective during your professional career.

My career has endowed me with comprehensive expertise in handling litigation, investigations, and inquiries related to gender-based violence, including violence against women and children. In addition to prosecuting and defending victims of gender-based crimes and adjudicating crimes of this nature, I have applied a gender perspective to many prominent issues.

One of the challenging legal issues I encountered in the early years of my judicial career concerned the definition of the crime of rape in the old Criminal Code, which limited the gender of rape victims to females only. Consequently, in practice courts did not recognize the crime of rape when the victim was male. Within my advisory role in drafting a new Criminal Code, I advocated for the adoption of a gender-neutral definition for rape, consistent with the Rome Statute.

I have also experienced handling a number of transnational crimes, including sexual exploitation of women and minors. These crimes were primarily committed in neighboring countries and mainly targeted women and children. To correctly classify the criminal conduct as human trafficking or enforced prostitution, and to identify and apply the correct source of law, I had to research and review various international human rights treaties and legal sources. These included international law instruments like the CRC, CEDAW, UNTOC, and its Protocols.

### Sexual and gender-based crimes (SGBCs) and crimes against children

15. What do you consider are the main advancements in the Rome Statute regarding sexual and gender-based crimes and crimes against children, as well as the relevant jurisprudence and charges brought so far at the Court? Please describe challenges and opportunities for improvement in adjudicating these crimes, and any experience you may have in this area, including addressing misconceptions relating to SGBCs.

Indeed, the Rome Statute's recognition of a broad range of SGBCs and crimes against children stands as a significant advance in international criminal law. The Statute not only defines crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as crimes against humanity and war crimes, but it also provides a framework for recognizing forms of SGBV as methods of perpetrating international crimes, such as genocide. This framework has been instrumental in prosecuting and convicting Mr. Dominic Ongwen, where the accused was convicted on numerous counts of sexual and gender-based violence. It was also the first instance where the Office of the Prosecutor (OTP) brought charges for the crimes against humanity of forced marriage as an inhumane act.

The jurisprudence of the ICC has further reinforced the commitment to prosecuting these grave crimes. The case of Mr. Thomas Lubanga Dyilo marked a milestone, as the Court issued its first conviction for the war crime of conscripting and enlisting children under the age of 15 and using them to actively participate in hostilities. Subsequently, the case of Mr. Bosco Ntaganda represented another significant development, as it resulted in the first conviction confirmed by an appeal for SGBCs. More recently, Mr. Al Hassan and Mr. Ali Muhammad Ali Abd-Al-Rahman have expanded the ICC's jurisprudence on SGBCs and gender persecution.

However, numerous challenges persist. Gathering sufficient evidence and collecting witness testimonies remain formidable tasks, particularly in contexts where stigma, fear, and potential retaliation may deter victims from coming forward. Misconceptions about the nature of SGBCs and crimes against children can further complicate these challenges. As mentioned above, one of these misconceptions is the erroneous belief that only females can be victims of SGBCs.

There are significant opportunities for improvement. The ICC can refine the legal definitions and parameters of SGBCs and crimes against children to develop consistent, coherent jurisprudence. In addition, the Court could potentially foster a more comprehensive understanding of these crimes, including recognizing that men and boys can also be victims of



SGBCs. Such efforts will not only contribute to improving the ICC's ability to prosecute these grave crimes but will also enhance the support and justice provided to victims.

### Judicial training

The ICC is a unique institution and ICC judges face many distinct challenges. Even judges with significant prior experience managing complex criminal trials may not necessarily possess all the requisite skills and knowledge needed to manage these challenges.

- 16.** In this context, is there any area of your expertise, knowledge, or skillset which you think could be enhanced through workplace training? Would you make yourself available to take part in such professional training?

Yes, I firmly believe in the principle of continuous learning and professional development, and there are always opportunities to enhance the knowledge further. Especially, when international law and international criminal law are not stagnant.

While I have significant experience in managing complex criminal trials, the International Criminal Court's distinctive nature implies that there could be specific procedural aspects unique to the ICC that I could benefit from learning more about.

The ICC does indeed face challenges stemming from the inconsistency and unpredictability of chambers, which can affect its efficiency. Therefore, I believe training aimed at aligning judges' understanding of pre-trial, trial, appeal, and other procedural issues could be incredibly beneficial.

I am fully committed to enhancing my expertise and contributing to more efficient and effective Court proceedings. I will make myself available to participate in any professional training that helps accomplish this objective. The international legal landscape is constantly evolving, and so should our understanding and knowledge as legal professionals must be on par as well. Therefore, I view such training not merely as an opportunity but as an integral part of legal professional duties.

### National nomination procedure

- 17.** What is the current national selection and nomination procedure for ICC judicial candidates in your country of nationality? Please provide information on the procedure, including the application process, criteria, rules and legislation, public outcome of the process, bodies or organs involved in the selection process, and any other relevant information.

The candidates of Mongolia are nominated for the judge election under the terms of Article 36, paragraph 4(a)(i), of the Rome Statute by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State of the question.

Accordingly, Mongolia requires candidates for the ICC judge to satisfy the same criteria for becoming a Justice of the Supreme Court of Mongolia, the highest judicial organ, considering that only lawyers of exceptional professional and personal abilities are recommended or nominated for appointment as a Supreme Court Justice.

Therefore, in accordance with Article 25, Article 26 of the Law on Judiciary of Mongolia, Article 3 of Rules of the Session of the Assembly of Justices of the Supreme Court (the

Assembly), the Assembly has a mandate to make decisions for nomination for election of judges of the International Criminal Court.

Following the announcement of the ICC judicial election in December, the information was circulated among all Justices of the Supreme Court. After receiving the Note verbale from the Secretariat of the ASP in December 2022, the Assembly decided to hold the election for the candidacy to the ICC in early January. In the session of the Assembly held on 12<sup>th</sup> January 2023, my candidacy was supported by a majority vote of Justices. Subsequently, the decision of the Assembly was endorsed by the President of Mongolia, who approved the nomination.