

2023 ICC Judicial Elections **Questionnaire to candidates**

Name: Clarence Joseph Nelson

Date: 30 July 2023

Motivation

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

I am motivated by the need to deliver justice for victims of war crimes and similar atrocities through a fair and independent ICC. Representing the often-overlooked Pacific region, I have a longstanding commitment to bringing a voice to the voiceless in the international human rights area. My skills and experience as a Supreme Court judge for over 20 years would bring criminal law and rule of law expertise to the work of the Court.

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.

I have over 20 years' experience as a judge in Samoa's Supreme Court and District Court hearing 100s of serious criminal cases. This has ranged from violent homicides and assaults to all forms of sexual offending, especially in relation to women and children, as well as complex fraud, theft and white collar crime. Before my appointment to the bench, I spent over 20 years as a private lawyer specializing in litigation and 5 years as a criminal prosecutor.

In my working life, I have faced many challenges including the necessity to recognize that the trauma of offending suffered by women, children and persons in positions of special vulnerability e.g. the mentally and physically challenged, requires that their cases be dealt with differently and with sensitivity to their particular needs, both inside and outside of the courtroom; including post-litigation. I have also had to tailor sentences towards balancing deterrence and the need in some cases to provide for the rehabilitative prospects of young offenders as would be the case for example with child offenders.

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.

Throughout my judicial career in Samoa, I have incorporated provisions of the UN Convention on the Rights of the Child directly into numerous national decisions e.g. *Police v Vailopa* [2009] WSSC 69, which incorporated children's rights into the treatment of children as criminal suspects

and *Police v Faiga* [2008] WSSC 96, a sentencing decision incorporating a child's right to protection from sexual abuse.

It has not been necessary to apply the Rome Statute or ICC/UN Special Tribunal jurisprudence in Samoa. But I fear that day is coming, for example if war criminals seek to use the Pacific islands as a refuge.

(or)

For LIST B candidates

2. Please describe your international criminal law experience, particularly regarding legal research, legal opinions, and/or litigation concerning international criminal law matters and themes, as well as cases and situations. Please indicate any legal material, publication, or opinion that you authored or co-authored.
3. During your international law career, have you provided legal opinions or commentaries on Rome Statute provisions or other sources of international criminal or humanitarian law? Have you commented on the jurisprudence of the ICC, *ad hoc*, or special tribunals? If yes, please indicate relevant materials and publications.

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.

I have extensive experience upholding victims rights to participate and receive reparations in criminal proceedings. I pioneered in the Samoan courts the use of video-link technology for the taking of evidence of vulnerable witnesses, including young children and other victims of violence especially sexual violence. I also introduced into the work of the courts reparations by way of payment for victims' medical and other associated costs. Both matters have now been codified by statute (Division 6 'Directions as to giving evidence' of the Evidence Act 2015 and Part 3 Division 1A 'Reparations' of the Sentencing Act 2016). I also introduced into our system the use of Victim Impact Reports and helped establish the Samoa Victim Support Group (SVSG) for whom I am still an advisor and mentor.

I understand that victims have an important role in the ICC and have the right to participate through all judicial proceedings. They may be legally represented through the Office of Public Counsel for the Victims or private counsel. Victims also have the right to reparations for the harm they have suffered, paid for by a convicted perpetrator or the Trust Fund for Victims.

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

Victims must always be represented either in person or via an advocate/duly authorized spokesperson. They must be given an opportunity to express their views and concerns and be

heard on all matters that directly or may indirectly involve them at all stages of proceedings from pre-trial through to reparations.

Although victims' participation is at some stages only when considered appropriate by the judges, requests to participate must always be considered but must be balanced against the rights of the accused to an impartial and fair 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.

I have undertaken extensive work in relation to victims' rights through establishing the non-government organization Samoa Victim Support Group and implementing initiatives to make the courts more user-friendly to victims through, for example, video-link evidence. Also in assisting the Samoa Police Service to establish a specialist Domestic Violence and Childrens Unit for receiving complaints, launching investigations, etc.

Defence rights

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

As a sitting judge for over 20 years, I have extensive experience managing fair trial considerations in judge-alone and assessor (jury) trials across the most serious of criminal offences including rape, murder, manslaughter, multi-party homicides and sexual offending in all its perverse forms. This has included hearing and determining various issues arising from the rights of the accused, including allegations of breaches of a defendant's Constitutional right to a fair trial and various and human rights considerations in trials and sentencing. Prior to joining the Bench, my private law practice included work as a criminal defence attorney for over 20 years, which included advocacy for the rights of the accused. My prior experience as a criminal prosecutor for 5 years also included considerations of the rights of the accused in order to ensure fair trials and a just result.

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"?

The Rome Statute requires judges to be persons of high moral principle, integrity, honesty and reputation, who are able to dispense justice impartially without fear or favour. These are traits required of all judges. My country is no exception.

Biased decision-making, corrupt dealings with any State or person, unprincipled rulings, etc, are contrary to the precept of 'high moral standing' and are incompatible with judicial office.

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.

Never.

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?

Samoa has fully supported the ICC from the Court's inception. This commitment has not diminished nor is there any indication that this position will change.

Should my country or any other seek to exert political pressure on me or my colleagues, I would firmly and fiercely resist and do everything in my power to persuade my colleagues and the Court to do the same.

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.

Yes, I worked in the executive branch of government when I worked for 5 years in the Attorney Generals Office. I undertook all types of work as a legal advisor to Cabinet, Government ministries and other organs of the State including wholly owned private corporations. This covered the field of criminal prosecutions, civil advice and litigation and constitutional advisory work. Such work required strict confidentiality, particularly when advising the Prime Minister and his Cabinet.

However, I specialized in criminal prosecution work and was promoted to Senior Legal Officer (Criminal) then to Principal Legal Officer (Criminal). I left the office while serving as Acting Attorney-General, having declined the then Government's offer to become Attorney General.

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.

Samoaan workplaces are often small, with few staff, and are run in accordance with traditional Samoan norms. This involves a culture of mutual respect, discussion and consensus decision-making that sees workplace problems dealt with respectfully and in accordance with cultural norms. As the Senior Supreme Court Judge, and Acting Chief Justice from time to time, I ensured that allegations of discrimination, harassment, bullying and abuse of authority were dealt with quickly and fairly. In the area of gender balance in appointments, there was always a concerted effort to achieve gender equality where-ever possible without sacrificing considerations of merit.

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.

The key to an improved workplace culture is recognition of any problems and a buy-in into the solution. Annual Retreats in this respect are crucial vehicles for dealing with such issues. My experience is when judges and staff themselves formulate and participate or at least commit to a solution, that is the most effective way to ensure implementation and sustainability.

As Acting Chief Justice in 2019/2020, I ensured the appointment of a woman to the position of Vice-President of the Samoa Land & Titles Court, the largest court in the country. And continuation of the policy of maintaining as far as possible an equal number of men and women judges on both the Supreme Court and District Court benches. Four of our Bench of ten are female with one female appointment currently pending.

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

See answer above.

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.

One of the most critical decisions in the work of the Court came about in 2012 in the Thomas Lubanga Case when it recognized that the use of children as child soldiers was a war crime and a crime against humanity. As for SGBCs, the release of the OTP policy on Gender Persecution which is also applicable to child victims, and cases like that of Prosecutor v Al Hassan represent modern milestones in clarifying certain key aspects of article 7 and the jurisdiction of the Court.

It is also essential that the prosecution of SGBCs be handled sensitively, being mindful of the needs of vulnerable witnesses and victims. The trial process must be carefully managed to ensure that misconceptions such as that SGBCs against women and children are somehow deserved or acceptable, do not proliferate.

The issue of differing viewpoints and interpretation of the Rome Statute needs to be recognized and confronted. Mechanisms to address these need to be developed in order to promote certainty and consistency.

For the future, there remain challenges such as whether the scope of article 7(1)(k) would benefit from greater scrutiny and interpretation, in particular what “inhumane acts” are capable of causing “serious injury.....to mental or physical health”, a concept also referred to in article 8(2)(a)(iii); and whether these should extend to the indirect effects of such acts.

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 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?

I am a great believer in training which is something not all judges like to undergo. First and foremost, there should be an Induction Course of at least 4 weeks duration whereby new judges are introduced to the work of the Court, its mechanisms, etc, including on the jurisprudence and possible upcoming procedural and substantive challenges. This is particularly important for those judges who have qualified for the Court under List A. In respect of List B judges, the focus would be on the skills required and practical aspects of the business of “judging”, evidentiary issues, judgment writing, bias and conflict of interest, judicial conduct, etc.

Secondly, there should be ongoing training and exposure to new developments in international criminal law and associated areas/topics aimed at improving and keeping up to date the knowledge and skillset of all judges of the Court. Such training should be part of an ongoing process to sharpen their skills and knowledge base and better equip judges for the tasks at hand, whether they be procedural or substantive in nature.

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.

There exists no national procedure in Samoa. I was nominated by my Government with my consent.

Thank you.