

Preliminary Observations from the Special Rapporteur on Independence of Judges and Lawyers, visit to Mongolia

At the invitation of the Government, I visited Mongolia from 6 to 15 November.

During my visit, I met with high-ranking State officials as well as judges, prosecutors, lawyers, and a wide range of civil society and non-government representatives.

In addition, I visited the following courts: in Ulaanbaatar, the Chingeltei and Sukhbaatar districts First Instance Civil Courts; in Suhkbaatar City, in the Selenge province: the Court of Criminal and Civil Appeals, the Administrative Court of First Instance, the Intersoum Court of First Instance of Civil Cases and the Intersoum Court of First Instance of Criminal Cases; the Intersoum Court of First Instance of Criminal and Civil Cases in Mandal Soum, and the Courts of First Instance of Civil and Criminal Cases in Baganuur. I also spoke with the Dharkhan Courts of Civil and Criminal Appeals and the Court of First Instance of Administrative Cases. Although I planned to visit Dharkhan, I regret that I was unable to do so, and I hope for the understanding of the Courts and the prosecution office there. Finally, I also visited prosecution offices in Selenge province.

I wish to express my gratitude to the Government of Mongolia, and in particular the Ministry of Foreign Affairs, for its collaboration and support in facilitating these meetings.

These are my preliminary observations and initial recommendations on the independence of the judiciary and the free exercise of the legal profession in Mongolia.

First, I wish to congratulate Mongolia on its standing invitation and openness to the special procedures of the United Nations Human Rights Council, as well as its engagement with the Universal Periodic Review and Treaty Bodies. Since 2004, twelve separate special procedures mandates have visited Mongolia, including this mandate. This speaks to Mongolia's commitment to its human rights obligations. To this end, I welcome Mongolia's serious approach to the recommendations of previous mandates, including on issues of fair trial and arbitrary detention. I am confident my recommendations will be received with the same spirit.

Second, I recognize Mongolia's efforts, and many achievements, in reforming its judiciary since the country's transition to democracy, and the adoption of its Constitution in 1992. I was impressed that recent revisions have sought the views of various key stakeholders and I commend the evidence-based approach to reform, which is embodied in the work of the National Legal Institute and in a number of civil society organizations that produce research using rigorous methods. Important steps to reform the judicial system have been implemented through Constitutional amendments in 2019 and the enactment of a new Law on Courts in 2021. I have had the opportunity to see the early implementation of these reforms, although more time, and increased financial resources, are needed before the full effects will be evident.

Third, I note that further reforms are already underway. The draft Law on the Establishment of Courts, which is currently being considered by Parliament, proposes the establishment of a specialized Family Court, along with the 24-hour availability of a judge. This second innovation

could do much to minimize the risk of arbitrary detention as a result of arrests without a court warrant. I look forward to reading this draft. Efforts are also in progress to review the Criminal Codes. This proposed reform provides an opportunity to reiterate the importance of timely and unhindered access to counsel as a guarantee of fair trial, and to ensure that no detention is arbitrary. This includes allowing advocates to do their work, by ensuring they have appropriate facilities and prompt access to clients and evidence as a matter of right. I look forward to hearing about the composition of this working group.

Each of these reforms represents a crucial step in the right direction. The initial observations and recommendations that follow are designed to preserve and promote Mongolia's momentum towards greater independence of the judiciary, the free exercise of the legal profession, and enhanced human rights protections for all. Please keep in mind that my final report and recommendations will be available in June 2024.

Enhancing the independence of the judiciary

I begin with recommendations to further enhance the independence of the judiciary.

Judges should be appointed through the application of clear, objective, merit-based standards. To that end, robust procedures for judicial selection have been set up in Mongolia and are administered by the Judicial General Council, including a specialized examination for proposed judges that includes an assessment of both the knowledge and the professional capacity of candidates. However, I note that Article 36 of the Law on Courts, in combination with Article 51.2 of the Constitution, provides broad discretion to the President to return proposals for the appointment of a judge to the Judicial General Council. Therefore, I recommend that further steps should be taken to ensure that this discretion does not risk undermining the separation of powers, or the professional pathway to the judiciary that Mongolia has taken such care to establish.

During my visit, I heard of several instances of removal of judges in 2013, 2017 and 2019. Some of these judges have not been reappointed. I was concerned by these reports, and will examine these cases further to understand what took place. In particular, I wish to establish what has happened, since those dates, to judges who were removed or not reappointed to their office, including any impacts on judges' pay, pensions, benefits, and access to healthcare. I note that the removal of judges, even by legal means, must ensure their right to a fair hearing and judicial review are upheld. Judges are entitled to fair resolution of their cases in accordance with international human rights standards.

The UN Basic Principles on the Independence of the Judiciary require that proceedings to discipline, suspend or remove a judge shall be determined in accordance with established standards of judicial conduct. I am concerned that some provisions in Article 50 of the Law on Courts, which are currently under review by the Constitutional Court, appear to characterize issues of judicial competence, including potential grounds of appeal to a higher court, as misconduct. For example, Article 50.1.23 prohibits "action or inaction violating seriously or repeatedly the clear understandable provision of the law." Article 57 provides that the range of disciplinary punishments for violating this provision includes dismissal. I recommend that any ambiguity in the distinction between issues of professional conduct and competence should be

remedied. Judges should not be disciplined for possible errors that are properly remedied by appeal.

One of the most important safeguards of impartiality and the separation of powers is the provision of adequate budgetary independence to the judiciary. I understand that the Judicial General Council submits its proposed budget for the judiciary to Parliament following review by the Legal Standing Committee. However, this provision has not yet been fully implemented. I urge Mongolia to take steps to ensure the full implementation of this law.

Chronic underfunding was by far the most frequently reported problem during my visit. This issue was brought to my attention by actors from every part of the judicial system, as well as by commentators outside the system. I had the opportunity to visit a variety of courtrooms, where I saw the impacts of this underfunding first hand. I was concerned by the number of courtrooms that are reported not to meet national standards. I saw facilities that lack heating or ventilation, with insufficient space to accommodate participants and their representatives, let alone to permit members of the public to observe hearings. I heard that courts from multiple districts were accommodated into one set of leased premises, with judges forced to share courtrooms on a rotating basis to permit proceedings to take place. I was informed that there has been no nationwide capital investment into infrastructure for a decade, and no increase in the judicial salary scale during the same time period.

This underfunding has had a devastating impact on conditions of work for judges, and on people seeking justice through the courts. Low salaries and poor conditions of work contribute to a situation where many courts are unable to fill vacancies for roles as judges or judges' assistants, due to a lack of applications. As a result, many courts operate without a full complement of judges. In some courts, particularly in Ulaanbaatar, this situation has resulted in an unmanageable workload for judges. I also heard that poor court design and a lack of personnel creates security risks for judges, staff and court users. In some courts, judges and staff are required to use the same entrances as case participants to access the court building, exposing them to risk of attack or harassment. The small size of many courtrooms means that judges and participants are required to sit in close proximity to one another. In some cases, this means that witnesses and survivors of serious crimes are placed next to the alleged perpetrator of those crimes, threatening their safety and risking re-victimization.

The solution is, of course, increased funding. However, this is not enough. I consider that more enduring structural change is advisable to secure the long-term financial independence of the judiciary. To that end, I urge Mongolia to consider allocating a benchmark percentage of the State budget to the judiciary, and enshrining this allocation in law. I take positive note that the JGC has already proposed to set this benchmark at 2% of the national budget. With this kind of funding guarantee, the judiciary could not only ensure that infrastructure and salaries meet international standards, but could also embark on much-needed transformation to enhance court performance and efficiency, including through further digitalization of court systems.

I have been informed that the draft Law on the Establishment of Courts includes a proposal for re-zoning Mongolia's courts, in part to achieve a better balance of work for those judges that are currently overloaded. It is important that any amendments to the current court system are accomplished via a participatory process that allows the views of affected parties, including

judges and local court users, to be taken into account. I advise that, if any re-zoning is instituted, judges must be safeguarded from improper transfer, removal or non-reappointment. Decisions about re-zoning must be based on transparent, objective, and impartial criteria set out in law. Moreover, re-zoning plans must ensure that courts remain accessible, and that users—especially those already located far from court centers—will not bear the burden of more travel to seek justice.

Strengthening the independence of prosecutors

I turn now to recommendations to strengthen the independence of prosecutors.

In the same way as the 2021 Law on Courts enhanced the independence of the judiciary, legal changes are now required to protect the prosecution service from undue interference, whether through internal lines of supervision, or through external interference.

It is important that the method of selection maintains public confidence and the respect of the judiciary and the legal profession. This mandate has previously recommended that appointment of a Prosecutor General resulting from cooperation among different governmental bodies is preferable to appointment by a single body. I advise Mongolian officials to consider reviewing the process of appointing the Prosecutor General in light of this guidance.

In relation to ordinary prosecutors, I recall that this mandate has previously recommended a public competitive selection process as an objective way to ensure the appointment of qualified candidates to the prosecution service. Both selection and promotion processes should be transparent in order to avoid undue influence, favouritism or nepotism, or the appearance thereof. Recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria.

I note that there is currently no examination, in addition to the Bar Exam, to determine selection of prosecutors, and that there is no independently-established body to make decisions on appointment or discipline. I call for the creation of a transparent, merit-based prosecutorial career path based on publicly available, objective criteria. To achieve these goals, I recommend that Mongolia consider the creation of an independent body similar to the Judicial General Council for the prosecution service, empowered to oversee appointment, discipline and dismissal.

As for the judiciary as a whole, I note that remuneration for prosecutors should reflect the importance of their task, and is an element of independence and impartiality that should not be overlooked.

Protecting the free exercise of the legal profession

Having outlined the measures required to secure the independence of judges and prosecutors, I now wish to stress the vital part played by defense advocates in guaranteeing the right to a fair trial, and protecting the human rights of all Mongolians.

I consider that there is room for improvement in Mongolia in balancing the rights of the prosecution and the defense in criminal trials, to strengthen debate and achieve an equality of arms. Achieving this goal necessitates providing support to advocates to do their important

work. This includes ensuring that they have timely access to clients and evidence as a matter of right, and that they are able to copy and make appropriate use of evidence.

I recall the importance of lawyers in ensuring access to justice. I note that advocates should not face sanction for taking action that falls within their professional duties.

I heard about threats against defense lawyers and their families. I welcome the discussion in Parliament of potential law reform to provide increased protection for advocates.

Rebuilding public trust in the judiciary

The last matter I wish to address is the relationship between the Mongolian public and the judiciary. The strength of any justice system depends on it being perceived as trustworthy, legitimate, and effective by the public. However, surveys conducted by civil society organizations have demonstrated a widespread lack of trust in the judiciary. The present moment is an occasion for the Government to better explain to the public the crucial role that the judiciary and advocates play in upholding a fair system where everyone can participate equally.

I was concerned to learn that social media has become a focal point for attacks on judges, commentary on investigations and proceedings, and identification of advocates with their clients. I was particularly alarmed to hear that some attacks have come from individuals occupying public office. I will be looking into this issue further.

Transparency is a key ingredient in developing trust. Regrettably, it is inevitable that funding shortfalls will have had a negative impact on the transparency of the justice system. As already discussed, the inadequate size of some courtrooms makes it difficult, if not impossible, for the public, including journalists, to observe many hearings. Furthermore, the overwhelming workload experienced by many judges limits their capacity to provide written explanations of their decisions in a reasonable time. I was informed that some judges are now making use of summaries and simplified language to explain their decisions. I welcome this positive practice, which should become standardized throughout Mongolian courts. I emphasize that all court decisions should result in reasoned judgments that explicitly reference any applicable provisions of human rights law.

Transparency in appointments is also vital to promote public trust. I look forward to the final decision of the Constitutional Court regarding the constitutionality of public Parliamentary hearings for nominees to high-level judicial posts. I encourage Mongolia to continue to find ways to allow for the public to hear from nominees to high judicial office, as a measure to build public trust.

A judiciary that is widely representative of society helps to show that the system is legitimate and open to all. I call on Mongolia to combat discrimination and welcome members of all communities into the legal profession, the judiciary and the prosecution service. To enhance trust, it is also vital that everyone living in Mongolia is confident that they can access the courts and receive a fair outcome. However, I learned that there are several groups that face impediments to the full realization of these rights.

Deficiencies in infrastructure prevent persons with disabilities from participating in investigations and court proceedings. I personally saw that many courtrooms are not accessible to wheelchair users. And I was informed that people with visual and hearing impairments were often not provided with materials in braille or sign language interpretation to facilitate their access to justice. To guarantee full access, additional training is required for all actors in the justice system, including judges, court staff and advocates.

Civil society analysis of court cases concerning intimate partner violence demonstrates a lack of security measures for complainants, including separate entrances and waiting rooms, security checks and security escorts. This analysis also documented re-traumatizing treatment, such as victim-blaming and reliance on gender stereotypes, including by some judges. I heard that discrimination cases concerning Mongolia's LGBT community are not even reaching the courts due to ambiguity in the law and the need for additional education and training for justice personnel. Additionally, members of this community find it difficult to locate legal support. Provisions to protect LGBT people from discrimination should be brought into line with international standards to ensure adequate protection and access to courts.

Mongolia's vast physical landscape can also present a challenge to accessing justice. Particular obstacles exist for rural communities including herders and those impacted by extractive industries. I heard about committed judges traveling to bring justice services to remote rural communities; this practice is commendable. However, I note that the judges reported that they received no additional funding to carry out this work. It is neither appropriate nor sustainable to rely on the good will and private resources of judges to provide services in this way. The Government must ensure that courts are located to facilitate access for rural communities, and Judges working with rural communities should receive systematic funding and support, where necessary, to bring justice services to the people.

In general, resources are required to finance training for the judiciary on non-discrimination and international human rights conventions in force in Mongolia, and to facilitate physical and procedural access to justice for all. I observe that the government is responsible for protecting the rights of all Mongolians and ensuring access to justice without discrimination. However, rights-holders must be involved in designing and delivering training and needed reforms, to ensure that discriminatory attitudes and barriers are adequately addressed. Essential work on this front has already been done by civil society organizations, and I call on all actors to support and complement these activities.

Mongolia has another valuable resource in its fight to improve trust in the judiciary. I was impressed by the innovative work of the National Legal Institute of Mongolia, which is taking a world-class approach to public legal education. The Institute operates an online legal information portal, a legal aid hotline, chatbot and Facebook page, and disseminates expert advice through a weekly podcast. It has also trained a network of 2,500 grassroots legal guides, operating in all 21 aimags and 9 districts of Mongolia. These legal empowerment activities have enormous potential to enhance knowledge and understanding of the law, and ensure that communities can meaningfully engage with the justice system.



In closing

Mongolia has made great strides towards establishing and securing the independence of the judiciary and the free exercise of the legal profession. There is work still to be done, and I encourage all actors to engage in this auspicious moment.

Mongolia must seize this opportunity to consolidate its transformation toward an independent justice system with human rights at its core.