

Judicial Accountability

A Practitioners' Guide



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Judicial Accountability

*International standards on accountability
mechanisms for judicial corruption and
judicial involvement in human rights violations*

Practitioners Guide No. 13

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List of Acronyms and selected Abbreviations

African Fair Trial Principles	Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
Bangalore Principles	Bangalore Principles of Judicial Conduct
Bangalore Implementation Measures	Measures for the Effective Implementation of the Bangalore Principles
Beijing Statement	Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region
Campeche Declaration	Campeche Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America
CCJE	Consultative Council of European Judges
CIJL	ICJ Centre for the Independence of Judges and Lawyers
ECtHR	European Court of Human Rights
GC	General Comment
IAmCtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists

Istanbul Declaration	Istanbul Declaration on Transparency in the Judicial Process
NGO	non-governmental organisation
NHRI	national human rights institution
OHCHR	Office of the UN High Commissioner for Human Rights
UN	United Nations
UNBP Judiciary	United Nations Basic Principles on the Independence of the Judiciary
UNBP Remedy	UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law
UNCAC	UN Convention against Corruption
UNDP	UN Development Programme
UNODC	UN Office on Drugs and Crime
UNSRIJL	UN Special Rapporteur on the Independence of Judges and Lawyers
UN Impunity Principles	Updated Set of principles for the protection and promotion of human rights through action to combat impunity

1. Introduction

The present Guide aims to help practitioners ensure accountability for serious judicial misconduct, such as corruption or complicity in human rights violations, while preserving the independence of the judiciary.¹

The search for measures that secure judicial accountability within the framework of the rule of law is not new. Ancient Roman legal codes already prescribed specific penalties for judges who sought or received personal reward or advantage for deciding cases in particular ways, or who intentionally sentenced someone to death for any improper motive.²

Neither are such efforts obsolete or uncomplicated, in any region of the world. A 2010 resolution of the Parliamentary Assembly of the Council of Europe "deplores the fact that judicial corruption is deeply embedded in many Council of Europe member states" and recommends a series of counter-measures. In 2016, finding key measures to have been "left unaddressed by member states", the Assembly adopted a further resolution stressing the "urgent" need for European States to take action against judicial corruption.³

The International Commission of Jurists' own global consultations in 2015 on institutions and procedures for judicial accountability revealed broad agreement on the need

¹ This Guide is intended to focus on conduct by judges that involves an exercise or failure to exercise their judicial authority - as such, the Guide does not directly address the commission by judges of ordinary crimes or civil wrongs in an entirely private capacity, or other purely private conduct that could be perceived as compromising the dignity of their office.

² Joseph Plescia, "Judicial Accountability and Immunity in Roman Law" (2001), 45 Am. J. Legal Hist. 51. See also Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct* (UN Office on Drugs and Crime, 2007), Annex on "Cultural and Religious Traditions".

³ Parliamentary Assembly of the Council of Europe, Resolution 1703 (2010), "Judicial corruption", and Resolution 2098 (2016), "Judicial corruption: urgent need to implement the Assembly's proposals".

for such mechanisms and on most of their elements, but considerable disagreement on certain details. (See Annex 3 for the lists of participants in the Tunis expert meeting in October and the Geneva Forum of Judges & Lawyers in December).

The Guide updates and expands on previous guidance contained in the 2007 ICJ publication, *Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, as well as the more general 2014/2015 *Practitioners Guide No. 7: International Law and the Fight Against Impunity*. It also builds on earlier work of the ICJ on the theme of judicial corruption (see for example *Strengthening Judicial Independence, Eliminating Judicial Corruption*, CIJL Yearbook 2000).

The Guide also complements guidance produced by other organisations, such as the UN Office on Drugs and Crime (UNODC), *Implementation Guide and Evaluative Framework for Article 11 of the United Nations Convention against Corruption* (2015) and the United Nations Development Programme (UNDP), *A Transparent and Accountable Judiciary to Deliver Justice for All* (2016). While these tend to focus mainly on judicial corruption rather than judicial complicity in human rights violations *per se*, many of the tools and recommendations they contain are potentially applicable more broadly to other forms of judicial misconduct including judicial complicity.

The Guide is also indebted to and complementary to the relatively few scholarly works that specifically address judicial accountability in situations of transition, including particularly: David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, 1998); Hakeem O. Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010); and Hans Petter Graver, *Judges against Justice: On Judges When the Rule of Law is Under Attack* (Springer, 2015). These and other scholarly works also treat in intriguing and illuminating fashion some fundamental questions of a philosophical and legal-theoretical character as to the grounds

for holding judges to account - or for exonerating them - when judges choose to serve within an overall framework of national law that is grossly inconsistent with international human rights norms, as well as what judges can and should choose to do when faced with such circumstances. This Guide does not seek to address these questions directly. It takes as its starting point that international law requires that States and individual judges be accountable for judicial perpetration of or complicity in violations of international human rights and humanitarian law, and for judicial corruption, and focuses primarily on the adoption and characteristics of mechanisms and procedures aimed at meeting this international legal obligation.

This Guide addresses not only the accountability of individual judges, and the accountability of judiciary as an institution, but also State responsibility under international law, particularly in relation to harm caused to victims of violations caused by judges.

The Guide is intended to address judges, magistrates, registrars and most other judicial officers, but does not deal with the specific situation of prosecutors, which in some States are seen as part of the judiciary and in others are seen as totally distinct from it.

The ICJ recognizes that a holistic and preventive approach to corruption, and to impunity for human rights violations, is important. In a context of broader corruption or systematic impunity in a country, measures taken only by or only in relation to the judiciary are unlikely to succeed if they are not matched, sooner or later but preferably at the same time, by similar efforts to address corruption and abuses by other governmental and non-governmental actors. (At the same time, the absence of initiatives addressing other sectors should not be an excuse for the judiciary to fail to adopt measures within its own sector.) Further, accountability measures that respond after corrupt or criminal acts have already occurred contribute to deterring future wrongs but cannot fully substitute for the much broader range of preventive measures that should be in place. Formal mechanisms and rules for prevention and accountability should be joined by changes in

the professional culture within the national judiciary. Again, then, while this Guide specifically focuses on judicial accountability mechanisms, implementation of its particular recommendations should be situated in a much broader framework of anti-corruption and anti-impunity measures.

2. The obligation to ensure an independent, impartial and accountable judiciary under international law

International law sources of the obligation to ensure judicial accountability

International human rights law, international humanitarian law, international criminal law, and other international standards relevant to the rule of law, the administration of justice, and corruption, all include an obligation of States to ensure access to a competent, independent, impartial and accountable judiciary. It is this fundamental obligation that the specific mechanisms and procedures contemplated by this Guide are intended to implement.

The Preamble to the UN Human Rights Council resolution on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, most recently adopted in 2015, includes the following paragraph:

Stressing the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the UN Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards.⁴

Fair trial rights

The right of everyone to a "fair and public hearing" by a "competent, independent and impartial tribunal established by law" in all criminal and civil legal proceedings, is recognized by

⁴ Human Rights Council, resolution 29/6 (2015) on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, Preamble. See also resolution 19/36 (2012) on Human rights, democracy and the rule of law.

article 14 of the *International Covenant on Civil and Political Rights* ("ICCPR") and similar provision is made by article 10 of the *Universal Declaration of Human Rights* ("UDHR") and by other global human rights treaties. Similar provisions are found in the regional human rights treaties and standards,⁵ as well as in the Geneva Conventions and Protocols applicable in situations of armed conflict.⁶ International standards including the *UN Basic Principles on the Independence of the Judiciary* ("UNBP Judiciary") (reproduced in Annex 1a to this Guide) also recognize that independence and impartiality of a tribunal cannot be guaranteed unless there are effective mechanisms in place to respond when judges do not act with independence, impartiality and integrity.⁷

Right to effective remedy and reparation

International law and standards also clearly require that States ensure the availability of effective remedies for human rights violations (as well as certain violations of international

⁵ E.g. African Charter on Human and Peoples' Rights (1986), article 26, and African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Fair Trial Principles") (2005); American Convention on Human Rights (1969), article 8, and American Declaration of the Rights and Duties of Man (OAS General Assembly, 1948), article XXVI; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6; Arab Charter on Human Rights (2004), articles 12 and 13; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region ("Beijing Statement"), article 2.

⁶ Common article 3(1)(d) to the 1949 Geneva Conventions; article 75 of the 1977 Protocol I to the Geneva Conventions; article 6(2) of the 1977 Protocol II to the Geneva Conventions.

⁷ UN Basic Principles on the Independence of the Judiciary ("UNBP Judiciary"), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985), and endorsed by General Assembly resolutions 40/32 and 40/146 (1985), articles 17-20; Bangalore Principles of Judicial Conduct ("Bangalore Principles"), ECOSOC resolution 2006/23 (2006), Annex; UN Special Rapporteur on the independence of judges & lawyers ("UNSRILJ"), Report on Judicial Accountability, UN Doc A/HRC/26/32 (2014).

humanitarian law) and reparation for harm suffered.⁸ The fact that a violation may have been perpetrated by a judicial official rather than other kinds of public officials, or that a judge has been complicit in the violation, does not absolve the State of its responsibility to ensure an effective remedy.⁹

Administration of justice, rule of law, and anti-corruption

Standards for the proper administration of justice, on the rule of law, and for countering corruption, also affirm the need for judges to be held to account when they act unlawfully.¹⁰

Article 11(1) of the *United Nations Convention against Corruption* (UNCAC), for instance, provides:

Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

In 2015, the UN Office on Drugs and Crime (UNODC) published an *Implementation Guide and Evaluative Framework for article 11*, which includes practical tools to assist the judiciary and other government officials, as well as academics, the media,

⁸ E.g. UDHR, article 8; ICCPR, article 2(3); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("UNBP Remedy"), General Assembly resolution 60/147 (2005); and regional instruments.

⁹ See e.g. Human Rights Committee, *Anthony Fernando v. Sri Lanka*, UN Doc CCPR/C/83/D/1189/2003 (2005), para. 9.2; *Dissanayake v. Sri Lanka*, UN Doc CCPR/C/93/D/1373/2005 (2008), para. 8.2.

¹⁰ UNBP Judiciary; Bangalore Principles; UN Office on Drugs and Crime (UNODC), *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011).

and civil society, to evaluate the State's implementation of article 11.¹¹

Judicial conduct for which accountability is required by international law

Judicial violations of human rights and of international humanitarian law

For purposes of international law, the acts of judicial officials constitute an act of the State just as for any other State official. In federal States, this is true whether the court is of a federal or sub-federal character. It true of any conduct by the judicial official that is carried out in the person's judicial capacity, even if the wrongful act exceeded the person's authority.¹²

Judges are therefore as capable as any other kind of public official of perpetrating or being complicit in violations of international human rights. Furthermore, the State is responsible for all judicially perpetrated or judicially complicit human rights violations,¹³ and this is true even if the judge's conduct was "lawful" under the State's domestic law.¹⁴

¹¹ UNODC, *The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11* (2015) ("UNODC Guide").

¹² Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly resolution 56/83 (2001), articles 4 and 7; Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant ("GC 31"), UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 4; UNSRIJL, Report on judicial accountability, *supra* note 7, paras 97-105, 130.

¹³ See e.g. Human Rights Committee, *Dissanayake v. Sri Lanka*, UN Doc CCPR/C/93/D/1373/2005 (2008), para. 8.2.

¹⁴ Articles on Responsibility of States for Internationally Wrongful Acts, articles 1-3; Vienna Convention on the Law of Treaties, 1155 UNTS 331, article 27.

Typical examples include:

- arbitrarily sentencing persons to imprisonment or death, or ordering or authorizing their arbitrary detention, including as a result of their having exercised their protected rights to freedom of thought, conscience and religion, opinion and expression, association and peaceful assembly;
- convicting persons of criminal offences or imposing other penalties or restrictions after trials that have substantially failed to satisfy fundamental guarantees of fairness;
- enforcing domestic laws that discriminate on prohibited grounds or are otherwise inconsistent with international human rights;
- exercising or failing to exercise their authority in ways that seek to conceal violations perpetrated by military, para-military, or law enforcement agents, such as torture, extra-judicial execution, and enforced disappearance, or to protect the perpetrators from punishment, or to deprive victims of an effective remedy;
- authorizing arbitrary or unlawful interference with individuals' privacy, family, home or correspondence.

Many such violations would constitute "gross violations of human rights". "Gross" violations can be understood to include, among other things: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; enforced disappearance; prolonged arbitrary detention; unlawful deportations or forcible transfers of population; and violations of economic, social and cultural rights of a

particularly serious scale or severity of impact.¹⁵ In relation to such violations, international law requires States to ensure that the individuals who perpetrated or were complicit in such violations are held personally responsible for their actions; the rights of victims of such violations to have access to an effective remedy and reparation have also been addressed in particular detail in international standards.¹⁶

Judges are also capable of perpetrating or being complicit in other violations consisting of crimes under international law, including international humanitarian law in situations of armed conflict, or crimes against humanity. Many acts that constitute human rights violations, such as those described above, also constitute violations of international humanitarian law, as well as international criminal law, as described for instance in the jurisdiction provisions of the *Rome Statute of the International Criminal Court* and the statutes of other international criminal tribunals.¹⁷ "Wilfully depriving a protected person of the rights of fair and regular trial", for instance, is expressly listed in the *1949 Geneva Conventions* and *1977 Additional Protocol I* as a "grave breach" giving rise to criminal responsibility, and is included as a war crime within the jurisdiction of the

¹⁵ See e.g. Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr Theo van Boven, Special Rapporteur, UN Doc E/CN.4/Sub.2/1993/8 (2 July 1993), paras 8-13; Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 30; Geneva Academy of International Humanitarian Law and Human Rights, *What amounts to 'a serious violation of international human rights law'?* (August 2014).

¹⁶ See for example UNBP Remedy, article 4 ("In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him..."), and articles 11-23; Human Rights Committee, GC 31, *supra* note 12, para. 18. To be clear, the right of victims of human rights violations to an effective remedy and reparation is not limited to "gross" violations (see for example, ICCPR article 2(3); GC 31 paras 15-16).

¹⁷ See for example Rome Statute of the International Criminal Court, 2187 UNTS 3, articles 5 to 8.

International Criminal Court under the Rome Statute.¹⁸ Other forms of judicial misconduct in armed conflict, even if not rising to the level of a "grave breach", could place the State in violation of its legal obligations.

While the question of the individual judge's motivations or intent, or the lawfulness of their acts or omissions under domestic law, may be relevant to determinations of their individual criminal, civil or disciplinary responsibility, such factors do not relieve the State of its responsibility under international law for the judge's conduct.

Judicial corruption

The UN Special Rapporteur on the independence of judges and lawyers has emphasized that:

Judicial corruption erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system.¹⁹

There is no universally agreed definition of "corruption". The Special Rapporteur has cited the informal definition used by Transparency International, the leading international anti-corruption NGO: "the abuse of entrusted power for private gain".²⁰

¹⁸ See for example 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, article 130; 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, article 147; 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, article 85(4)(e); Rome Statute of the International Criminal Court, article 8(2)(a)(vi).

¹⁹ UNSRIJL, Report on judicial corruption and combatting corruption through the judicial system, UN Doc A/67/305 (13 August 2012), para. 109.

²⁰ *Ibid* para. 16.

The *UN Convention against Corruption* does not directly define "corruption" or "integrity", either in relation to judges under article 11 or more generally. However, the Convention requires States to criminalize a series of specific acts that are implicitly treated as forms of corruption, among which are:

- bribery ("solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties");²¹ and
- embezzlement, misappropriation or other diversion of property by a public official.²²

The Convention also requires States to consider criminalizing additional acts, including abuse of functions or position ("the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity").²³

The ICJ's *Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System* states:

The judicial system is corrupted when any act or omission results or is intended to result in the loss of impartiality of the judiciary.

Specifically, corruption occurs whenever a judge or court officer seeks or receives a benefit of any kind or promise of a benefit of any kind in respect of an exercise of power or other

²¹ UN Convention against Corruption ("UNCAC"), 2349 UNTS 41, article 15(2); see also article 16.

²² UNCAC, article 17.

²³ UNCAC, article 19.

action. Such acts usually constitute criminal offences under national law. Examples of corrupt criminal conduct are:

- bribery;
- fraud;
- utilisation of public resources for private gain;
- deliberate loss of court records; and
- deliberate alteration of court records.

Corruption also occurs when instead of procedures being determined on the basis of evidence and the law, they are decided on the basis of improper influences, inducements, pressures, threats, or interferences, directly or indirectly, from any quarter or for any reason including those arising from:

- a conflict of interest;
- nepotism;
- favouritism to friends;
- consideration of promotional prospects;
- consideration of post retirement placements;
- improper socialisation with members of the legal profession, the executive, or the legislature;
- socialisation with litigants, or prospective litigants;
- predetermination of an issue involved in the litigation;
- prejudice;
- having regard to the power of government or political parties.²⁴

Other forms of judicial misconduct, and ordinary crimes

The main focus of this guide to accountability mechanisms and procedures is on human rights violations and corruption connected to a judge's exercise or refusal to exercise his or her authority. However, the range of conduct for which judges may be held accountable is somewhat broader. For instance, from a rule of law point of view, judges should also be

²⁴ CIJL Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, in CIJL Yearbook vol. IX, *Strengthening judicial independence, eliminating judicial corruption*, 2000. See also International Bar Association Judicial Integrity Initiative, *Judicial systems and corruption* (May 2016).

accountable for ordinary offences entirely unconnected to their judicial authority, as would be any other person in the country.²⁵

Furthermore, international, regional and national standards address a wide range of ethical or professional conduct issues, beyond human rights violations and corruption *per se*. The general term "judicial integrity" is often understood in light of the *Bangalore Principles of Judicial Conduct*. The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity ("Judicial Integrity Group"), a group of Chief Justices and Superior Court Judges from around the world, and have subsequently been repeatedly endorsed by United Nations bodies.²⁶ Clearly, judicial corruption or complicity in human rights violations would breach various principles of the Bangalore Principles, but the Principles also address a wider range of behaviour. The text of the Bangalore Principles is reproduced as Annex 1b to this Guide.

The mechanisms and procedures set out in this Guide, although developed with human rights violations and corruption in mind, may well be useful in addressing other forms of judicial misconduct and ordinary crimes.

Accountable to whom?

In considering different forms of accountability mechanisms and procedures it is useful to consider the persons to whom

²⁵ See e.g. Judicial Integrity Group, Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct ("Bangalore Implementation Measures") (2010) (excerpts reproduced in Annex 1c of this Guide), para. 9.1.

²⁶ ECOSOC resolution 2006/23 (27 July 2006) on Strengthening Basic Principles of Judicial Conduct. See also e.g. resolutions of the Human Rights Council: resolution 29/6 (2015) on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, Preamble; resolution 30/7 (2015) on Human rights in the administration of justice, including juvenile justice, Preamble; resolution 31/2 (2016) on Integrity of the judicial system, Preamble.

the judiciary as a whole, and individual judges, should ultimately be accountable.

At the broadest level, the judiciary as an institution should be accountable to the society it serves.²⁷ However, in a democratic society ruled by law the obligation that the judiciary owes to society is limited to applying the law in an independent and impartial way, with integrity and free of corruption.

The judiciary is emphatically not bound to adopt only those decisions with which a majority of society may agree, nor should individual judges be at any risk of removal simply because a majority of society may disagree with particular judgments. In this sense, the judiciary's accountability to society is made operative first and foremost by ensuring that judges are accountable to the law: that they explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis, and that their decisions can be reviewed and if necessary corrected by the judicial hierarchy through a system of appeals. Societal opinions are relevant to the accountability of the judiciary only to the extent that such opinions are expressed through duly adopted laws that are compliant with the constitution of the State and international legal obligations.

The judiciary as an institution is accountable to society to ensure that all judicial decisions are in fact made independently and impartially, with integrity and free of corruption, and to this end society reasonably expects the judiciary to take action against individual judges who engage in misconduct that compromises these values.

Individuals who are affected by particular judicial misconduct should also be able to expect that the judge will be held

²⁷ Consultative Council of European Judges ("CCJE"), Opinion No. 18, Position of the judiciary and its relation with the other powers of state in a modern democracy (2015), CCJE(2015)4, para. 21.

accountable for the wrongdoing and that the any damage will be remedied. Such persons should have access to complaints procedures capable of resulting in disciplinary proceedings for judicial misconduct.²⁸ However, given the need to ensure judicial independence and impartiality, individuals who have the right to a remedy aimed at achieving accountability may not always have the right to directly pursue certain kinds of remedy or punishment against individual judges: it is common for the right to seek civil compensation, for instance, to be available only against the State as a whole and not the individual judge, and in this case it is the State that is accountable for the acts or omissions of the individual judge; and while individuals should be able to file complaints, usually it is an independent and impartial body that actually decides whether to open disciplinary proceedings against an individual judge.²⁹ While States may adopt different modalities of delivering accountability to individual victims of judicial misconduct in order to respect judicial independence, such victims must in all cases have access to an effective remedy and reparation, if not from the individual judge then from the State as a whole.

Under international law, the judiciary like other organs of the State is not only responsible for applying internal law of the State, but also for upholding internationally protected human rights and international humanitarian law. This is an obligation for which the judiciary is effectively accountable to the population of the State of which it is a part, to individuals and other entities affected by any exercise of jurisdiction beyond the ordinary territory of its State, and through the State's responsibility to other States under international law.

The judiciary is accountable to the other branches of government - legislative or executive - in the same sense as it is accountable to society more generally: as an institution, it

²⁸ See e.g. Bangalore Implementation Measures, para. 15.2.

²⁹ See e.g. Bangalore Implementation Measures, para. 15.3 and footnote 10.

must be able to demonstrate that judicial decisions are based on legal rules and reasoning, and fact-finding based in evidence, in an independent and impartial way free from corruption and other improper influences. The principle of judicial independence precludes, on the other hand, any claim that the judiciary should be accountable to the executive or legislature in the sense of "responsible" or "subordinate" to those branches of government.³⁰

Forms of judicial accountability

Remedy and reparation for victims

International law provides that victims of human rights violations, and serious violations of international humanitarian law, have the right to an effective remedy and reparation for the violations.³¹ The right of victims to remedy and reparation is no less applicable to violations perpetrated by or with complicity of judicial officials, than for other officials of the State.³²

The *UN Convention against Corruption* similarly provides for persons who have suffered damage as a result of corruption to have the right to bring legal proceedings for compensation, for

³⁰ CCJE, Opinion No. 18, *supra* note 27, paras 20-38; Human Rights Committee, Concluding Observations on Democratic Peoples' Republic of Korea, UN Doc CCPR/CO/72/PRK, para. 8.

³¹ Universal Declaration of Human Rights, article 8; ICCPR, article 2(3); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, articles 13 and 14; International Convention on the Elimination of All Forms of Racial Discrimination, article 6; Convention on the Rights of the Child, article 39; American Convention on Human Rights, articles 25 and 63(1); African Charter on Human and Peoples' Rights, article 7(1)(a); Arab Charter on Human Rights, articles 12 and 13; European Convention on Human Rights, articles 5 (5), 13 and 41; Charter of Fundamental Rights of the European Union, article 47; Vienna Declaration and Program of Action, article 27; UNBP Remedy.

³² UNSRIJL, Report on judicial accountability, *supra* note 7, paras 97-105, 130.

the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders, and for measures more generally to address the consequences of corruption through "any other remedial action."³³ The UNODC Guide on implementation of article 11 of the *UN Convention against Corruption* additionally refers to the provision of "effective remedies" in this context.³⁴

International standards on the administration of justice and independence of judiciary also contemplate that victims will have access to an appropriate procedure for making complaints against a judge in his or her judicial and professional capacity, and that any such complaints must be processed expeditiously and fairly.³⁵

Under these standards, States have a duty to ensure: that anyone who alleges to have been a victim of judicial violations has access to an appropriate *procedure* for seeking a remedy; that the procedure *investigates* alleged violations effectively, promptly, thoroughly and impartially; and that the procedure is empowered to, and does in practice, provide victims with "adequate, effective and prompt" *substantive* reparation if the violation is ultimately established. The reparation should be

³³ UNCAC, articles 32(5), 34, 35.

³⁴ UNODC Guide, *supra* note 11, para. 78.

³⁵ UNBP Judiciary, article 17; Bangalore Implementation Measures, article 15.2; African Fair Trial Principles, article A.4(r); Consultative Council of European Judges, Opinion No. 3, on the Principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), para. 67; European Charter for the Statute of Judges, article 5.3; Conference of Chief Justices and Senior Justices of the Asian Region, Istanbul Declaration on Transparency in the Judicial Process ("Istanbul Declaration") (2013), Principle 14; Campeche Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America ("Campeche Declaration"), article 10(c); UNSRIJL, Report on judicial corruption, *supra* note 19, para. 113(t); UNODC Guide, *supra* note 11, para. 70.

appropriate and proportional to the gravity of the violation and the circumstances of each case.³⁶

The elements of adequate and effective reparation under international human rights law and standards, include among others:

- Restitution, restoring the victim to the original situation before the violations in so far as is possible, for instance, restoration of liberty for someone who has been wrongly imprisoned;
- Compensation for economically assessable damage of any kind, including not only financial losses but, for instance, moral damage;
- Rehabilitation, which could include medical and psychological care as well as legal and social services;
- Satisfaction, such as full and public disclosure of the truth; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations;
- Guarantees of non-repetition such as implementing measures to ensure that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; to strengthen the independence of the judiciary; to promoting the observance of codes of conduct and ethical norms, in

³⁶ UNBP Remedy, articles 3, 11, 12, and 18. Human Rights Committee, GC 31, *supra* note 12, paras 15 and 18.

particular international standards, and reviewing and reforming any laws that contribute to such violations.³⁷

Victims of certain kinds of violations also should be able to expect that the State will fulfil its obligation under international law to hold the individuals responsible to account personally. As the *UN Basic Principles on the Right to Remedy and Reparation* put it: "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."³⁸

The responsibility of the State

As was mentioned earlier (see pp. 8-11), it is clear as a matter of international law that the State is responsible for all acts and omissions of judicial officials that are carried out in the judge's judicial capacity, whether the wrongful act exceeded the person's authority or was lawful under the State's domestic law.³⁹

Aspects of the State's responsibility include all the elements of an effective remedy and reparation noted above (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition).

³⁷ UNBP Remedy, articles 18-23; Human Rights Committee, GC 31, *supra* note 12, para. 16.

³⁸ UNBP Remedy, article 4; Human Rights Committee, GC 31, *supra* note 12, para. 18.

³⁹ Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly resolution 56/83 (2001), articles 1-4 and 7; Human Rights Committee, GC 31, *supra* note 12, para. 4; Vienna Convention on the Law of Treaties, article 27.

International standards on the judiciary generally provide that while judges should have "personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions" as a safeguard of judicial independence, this does not lessen the responsibility of the State to provide compensation to victims of judicial misconduct.⁴⁰ Indeed, this is merely a specific manifestation of the more general rule that no form of judicial immunity under national law can affect the State's responsibility under international law to provide a victim of human rights violations with all of the various forms of reparation necessary for the harm the victim has suffered.⁴¹

International standards differ on the issue of whether the State can, having paid compensation to a victim of judicial wrongdoing, in turn claim reimbursement from the individual judge responsible.⁴² Whatever position a State adopts more

⁴⁰ E.g. UNBP Judiciary article 16; Bangalore Implementation Measures, paras 9.2 and 9.4; European Charter on the Statute for Judges, article 5.2; CCJE, Opinion No. 3, *supra* note 35, paras 55-57, 76; Council of Europe (Committee of Ministers), Recommendation CM/Rec(2010)12 on Judges: Independence, efficiency and responsibilities, articles 66-71; African Fair Trial Principles, article A.4(n); Beijing Statement, para. 32; UNODC Guide, *supra* note 11, paras 78 and 80. See also article 11(a) of the Campeche Declaration ("como regla general que los jueces no responderán civilmente de manera personal por sus decisiones, con la única excepción de los casos de dolo.")

⁴¹ Article 27 of the Vienna Convention on the Law of Treaties, in a provision that also reflects customary international law, provides in part that, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 (29 November 1985), article 11: "Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."

⁴² See e.g.: Council of Europe CM/Rec(2010)12, *supra* note 40, para. 67 (State may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation); European Charter for the Statute of Judges, article 5.2 (only with permission of the independent judicial

generally on this question, the ICJ is of the view that it should be possible for individual judges to be required, through fair legal proceedings, to make reimbursement for compensation paid to victims of human rights violations perpetrated by or with complicity of the judge, or victims of judicial corruption.

Where the judicial misconduct is of a character to trigger criminal or disciplinary proceedings against the judge, the State is also responsible for ensuring such proceedings take place, in a manner that fully respects the rights both of the judge and of any victim.⁴³ While this is a responsibility of the State as a whole, even if in a given State it would ordinarily be officials within the *executive* government that would pursue such criminal or disciplinary proceedings against State officials, in the case of proceedings against judges this should normally be discharged by a judicial council or similar body which is independent of the executive and legislature (but still a "State organ" for purposes of international law). The responsibility of the *State* as a whole to ensure appropriate proceedings are taken against individual judges, cannot normally justify interference by the *executive* or *legislative* branches of government in the functioning of judicial accountability mechanisms, in a way that would undermine independence of the judiciary as a whole.

Removal from office, disciplinary sanctions, and other administrative measures

International standards uniformly recognize that individual judges are subject to disciplinary proceedings and penalties,

authority); Bangalore Implementation Measures, para. 9.4 (no recourse by State against the individual judge); CCJE Opinion No. 3, *supra* note 35, para. 57 and Magna Carta of Judges article 22 (no liability to reimburse, except in case of wilful default).

⁴³ UNBP Remedy, article 4; Human Rights Committee, GC 31, *supra* note 12 para. 18.

up to and including removal from office, for sufficiently serious misconduct.⁴⁴

A fundamental element of the independence of the judiciary is that individual judges have security of tenure, i.e. are normally not subject to removal from office during their term of appointment.⁴⁵

The threshold of misconduct capable of justifying removal of a judge from office is accordingly universally set at a very high level, although it is expressed in slightly different terms in different standards:

- "incapacity or behaviour that renders them unfit to discharge their duties";⁴⁶
- "serious grounds of misconduct or incompetence";⁴⁷
- "gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties";⁴⁸

⁴⁴ UNBP Judiciary, articles 17-20; African Fair Trial Principles, articles A.4(p)(q) and (r); Beijing Statement, articles 22-28; Bangalore Implementation Measures, articles 15 and 16.

⁴⁵ UNBP Judiciary, article 12; UNSRIJL, Report on guarantees of judicial independence, UN Doc A/HRC/11/41 (2009), paras 57, 98; Bangalore Implementation Measures, article 13.2; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial ("GC 32"), UN Doc CCPR/C/GC/32 (2007), para. 19; Human Rights Council, resolution 29/6 (2015), para. 3; Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 49; African Fair Trial Principles, article A.4(l); Beijing Statement, article 18; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), article IV(b); Statute of the Ibero-American Judge (Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice, 2001), article 14; Campeche Declaration, articles 2, 7(b)(b.1) and (b.2); Inter-American Court of Human Rights ("IAmCtHR"), *Reverón Trujillo v. Venezuela*, Series C No. 197 (30 June 2009), para. 67; UNODC Guide, *supra* note 11, para. 60.

⁴⁶ UNBP Judiciary, article 18; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), article IV.

⁴⁷ Human Rights Committee, GC 32, *supra* note 45, para. 20.

⁴⁸ African Fair Trial Principles, article A.4(p).

- "inability to perform judicial duties" or "serious misconduct";⁴⁹
- "incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge";⁵⁰
- "incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary".⁵¹

In whatever manner the threshold is formulated, it is clear that at a minimum judicial perpetration or complicity in gross human rights violations, war crimes, crimes against humanity and other crimes under international law, or serious judicial corruption, would meet the threshold for removal from office.⁵²

By contrast, judges should not be subject to removal or punishment for bona fide (good faith) errors or for disagreeing with a particular interpretation of the law.⁵³

The Human Rights Committee has stressed that article 14 of the ICCPR requires, among other things, that States "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence

⁴⁹ Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), article VI(1)(a).

⁵⁰ Beijing Statement, article 22.

⁵¹ Bangalore Implementation Measures, article 16.1.

⁵² Regarding corruption, see UNODC Guide, *supra* note 11, para. 75.

⁵³ UNSRIJL, Report on Judicial Accountability *supra* note 7, paras 84, 87; Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 66; IAmCtHR, *Constitutional Tribunal (Camba Campos et al) v. Ecuador*, Series C No. 268 (28 August 2013), para. 206; Campeche Declaration, article 7(b)(b.3); Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 249 recommendation 22; Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research undertaken by Bingham Centre for the Rule of Law)* ("Commonwealth Study") (Commonwealth Secretariat, 2015), p. 83

in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."⁵⁴ The "clear procedures" for removal or discipline are discussed in Chapter 4 below. In terms of "objective criteria", article 19 of the *UN Basic Principles on the Independence of the Judiciary* provides that, "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."⁵⁵

Although "established standards of judicial conduct" should reflect international standards such as the *Bangalore Principles of Judicial Conduct*, a number of international standards affirm that disciplinary offences should be clearly defined, whether in a written code of professional conduct or other legal instrument, developed by judges and adopted at the national level.⁵⁶ This has also consistently been a key recommendation of the ICJ, based on its longstanding and global experience.

Some international standards affirm that any codification of disciplinary offences, and the machinery for their enforcement, must be strictly separate from codes of judicial ethics and

⁵⁴ Human Rights Committee, GC 32, *supra* note 45, para. 19.

⁵⁵ See similarly, Bangalore Implementation Measures, article 15.5; Beijing Statement, article 27.

⁵⁶ E.g. Bangalore Implementation Measures, paragraphs 1.1-2.2, 15.1-15.8; UNSRIJL, Report on judicial corruption, *supra* note 19, paras 76-82, 113(r); UNSRIJL, Report on judicial accountability, *supra* note 7, paras 72, 78, 120; Human Rights Council, resolution 29/6 (2015), para. 3; CCJE Magna Carta of Judges, paras 18 and 19; Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), article V(1); Campeche Declaration, article 10; IAmCtHR, *López Lone and others v. Honduras*, Series C No. 302 (5 October 2015), paras 257-276; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 249 recommendation 22; UNODC Guide, *supra* note 11, paras 23-27, 69; UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011), pp. 127-131, 134. See also more qualified position in CCJE Opinion No. 3, *supra* note 35, paras 41-50, 60-65, 77.

bodies responsible for the interpretation of ethical standards.⁵⁷ It appears however that in practice many jurisdictions have a single instrument that addresses issues of judicial ethics and professional conduct without drawing clear distinctions between the two, and this approach does not necessarily seem to be uniformly prohibited by international standards.

Depending on national legislation and facts of the particular case, the types of sanctions potentially to be imposed through disciplinary proceedings could range from a simple finding of improper conduct through to removal from office. It is important that the national legal framework requires that sanctions be proportionate to the seriousness, degree of fault and impact of misconduct, and that this requirement be respected in practice.⁵⁸ This applies in both directions: sanctions must not be disproportionately harsh vis-à-vis the gravity of the offence, but neither may they be unduly lenient.

In terms of other administrative measures, the failure of a judge to meet standards for integrity, including by committing or being complicit in human rights violations, or by engaging in judicial corruption, should weigh heavily against any promotion.⁵⁹

On the other hand, the administrative transfer of a judge to a different geographic jurisdiction as a form of punishment for

⁵⁷ E.g. CCJE, Opinion No. 3, *supra* note 35, paras 49, 60-62; CCJE Magna Carta of Judges, para. 18. See also Bangalore Implementation Measures, paragraph 2.2 and footnote 3 and paragraph 15.1 footnote 9.

⁵⁸ UN SRIJL, Report on guarantees of judicial independence, *supra* note 45, paras 58, 98; Bangalore Implementation Measures, article 15.8; Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 69; CCJE Opinion No. 3, *supra* note 35, paras 73-74, 77; Istanbul Declaration, Principle 14; ECtHR, *Kudeshkina v. Russia*, App. No. 29492/05 (26 February 2009), paras 98-100; IAmCtHR, *López Lone and others v. Honduras*, Series C No. 302 (5 October 2015), paras 257-276; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 249 recommendation 24; UNODC Guide, *supra* note 11, para. 73.

⁵⁹ See UNBP Judiciary, article 13; African Fair Trial Principles article A.4(o).

serious misconduct is generally inappropriate. First, the lack of fair and formal procedures leave such measures open to abuse, i.e. punishing judges for the content of their decisions rather than for actual misconduct.⁶⁰ This is why several international standards provide that judges should in principle not be transferred without their consent.⁶¹ Second, if a judge has engaged in misconduct serious enough to warrant sanction, then simply transferring the judge to continue his or her functions in another place without any formal finding of wrongdoing does not fulfil the obligations of the State to ensure transparency, individual responsibility, and effective remedy. (The latter includes measures to prevent re-occurrence of the misconduct, which might otherwise simply be repeated in the new location).

Criminal responsibility

To safeguard judicial independence, judges should in principle be immune from criminal proceedings in relation to the content of their orders and judgments (i.e. the interpretation of the law, assessment of facts, or weighing of evidence),⁶² and the

⁶⁰ The ICJ frequently receives reports or observes transfers highly suggestive of punishment for judgments that have displeased executive authorities. See also, for example, UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on Mission to Uruguay, UN Doc A/HRC/27/56/Add.2 (28 August 2014), para. 24; and Laura-Stella Eposi Enonchong, "Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship" 5 *African Journal of Legal Studies* 313 (2012), p. 322.

⁶¹ Bangalore Implementation Measures, article 13.5; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), referenced by the UN Commission on Human Rights, resolution 1989/32, article 15; Beijing Statement, article 30 (referring to transfers of judges "by the Executive"); Statute of the Ibero-American Judge, article 16; UNSRIJL, Report on Mission to Indonesia, UN Doc E/CN.4/2003/65/Add.2, para. 84; Venice Commission, *Report on the Independence of the Judicial System - Part One The Independence of Judges* (2010), CDL-AD(2010)004, para. 43.

⁶² UNSRIJL, Report on guarantees of judicial independence, *supra* note 45, paras 66, 98; UNSRIJL, Report on judicial accountability, *supra* note 7, paras 52, 84, 87; Human Rights Committee, Concluding Observations on Democratic

due discharge of their judicial duties more generally. On the other hand, international standards contemplate that judges should remain liable for ordinary crimes not related to the content of their orders and judgments,⁶³ although as a safeguard against abuse of such proceedings, the permission of an independent authority such as a judicial council may need to be obtained before any arrest or charge.⁶⁴ (Additionally, of course, the law creating the offence in question, its application to the particular conduct of the judge, and any arrest, detention, search or other measures, must otherwise fully comply with the requirements of international human rights law.)

Peoples' Republic of Korea, UN Doc CCPR/CO/72/PRK (2001), para. 8 (Criminal Code provision subjecting judges to criminal liability for "unjust judgements" seriously endangering the impartiality and independence of the judiciary); Bangalore Implementation Measures, article 9.3 (by implication excluding other remedies for such errors); African Fair Trial Principles, article A.4(n)(1); Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 68 (excepting cases of malice); CCJE, Magna Carta of Judges, article 20; CCJE Opinion No. 3, *supra* note 35, para. 75(ii); CCJE Opinion No. 18, *supra* note 27, para. 37. See also ICJ, *Legal Commentary to the ICJ Geneva Declaration* (Geneva, 2011), p. 213: "Judges should enjoy 'limited functional immunity' which should cover arrest, detention and 'other criminal proceedings that interfere with the workings of the court'. A wider immunity, however, would not be justifiable."

⁶³ See e.g. Bangalore Implementation Measures, article 9.1; Council of Europe, CM/Rec(2010)12, *supra* note 40, paras 68, 71; CCJE Opinion No. 3, *supra* note 35, paras 52-53, 75(i); CCJE, Magna Carta of Judges, article 20. See also Campeche Declaration, articles 11(d) ("Tanto la acción civil dirigida contra un juez, cuando sea admitida, como la acción penal, y en su caso la detención, deberán ser ejercidas en condiciones que no puedan tener como objetivo ninguna influencia sobre su actividad jurisdiccional") and 12 ("No habrá inmunidades judiciales que puedan significar privilegio de los jueces, pero estos tendrán un régimen especial dirigido a resguardar que la tramitación de acciones judiciales en su contra no puedan ser utilizadas para tornarlos funcionalmente dependientes de cualquier otro Poder del Estado o de la sociedad y a impedir las represalias arbitrarias o el bloqueo del ejercicio de sus funciones. De esta manera los jueces dispondrán de un fuero propio y de limitaciones a su detención o prisión anticipada, salvo por flagrante delito, con inmediata presentación ante el Tribunal competente".)

⁶⁴ UNSRIJL, Report on judicial accountability, *supra* note 7, para. 52. See also CCJE Opinion No. 3, *supra* note 35, para. 54, 75(i), and Campeche Declaration, articles 11(d) and 12.

Exceptions to criminal immunity should be made for judicial perpetration of or complicity in gross human rights violations, judicial corruption, war crimes, crimes against humanity and other crimes under international law, subject to appropriate thresholds and procedural protections.

For instance, the Human Rights Committee has said that under the ICCPR, where public officials have committed particularly serious "violations recognized as criminal under either domestic or international law", States "may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities" and that, "no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility."⁶⁵

As regards corruption offences, article 30(2) of the *UN Convention against Corruption* states:

Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

The UN Special Rapporteur has specifically stated that any criminal immunity of judges should be lifted in relation to cases of corruption and similar serious crimes.⁶⁶

⁶⁵ Human Rights Committee, GC 31, *supra* note 12, para. 18. See also paras 22 and 27(c) of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity ("UN Impunity Principles"), UN Doc E/CN.4/2005/102/Add.1 (2005). The Principles are referenced in, for example, Human Rights Council resolution 9/11 (2008) and General Assembly resolution 68/165 (2013), on the right to truth.

⁶⁶ UNSRIJL, Report on judicial corruption, *supra* note 19, para. 91; UNSRIJL, Report on judicial accountability, *supra* note 7, para. 52. See similarly CCJE Opinion no. 3, *supra* note 35, para. 52, and UNODC Guide, *supra* note 11,

Leaving judges vulnerable to criminal proceedings for the content of their judgments, in circumstances other than judicial complicity in human rights violations or corruption, undermines their independence and impartiality by creating the possibility for "inappropriate or unwarranted interference with the judicial process".⁶⁷

There are numerous examples of prosecution of judges for corruption. Although rare, examples of criminal prosecution of judges for perpetration or complicity in human rights violations also exist.⁶⁸

The right to truth

Victims have a right to the truth as part of the "satisfaction" element of reparation. Article 22(b) of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, for instance, states that satisfaction should include, where applicable: "Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations". The right to truth has also been

para. 79. On procedural aspects of the lifting of immunities, see pp. 76-79 below.

⁶⁷ See e.g. UNBP Judiciary, articles 1, 2 and 4; African Fair Trial Principles, article A.4(n).

⁶⁸ See for instance, *United States of America v. Alstötter et al* ("The Nuremberg Justice Case"), 3 T.W.C. 1 (1948) and commentary in Matthew Lippman, "The White Rose: Judges and Justice in the Third Reich" 15 Connecticut Journal of Int'l Law 95 (2000), pp. 165-181, 186-193, 205-206; Erhard Blankenburg, "The Purge of Lawyers after the Breakdown of the East German Communist Regime" 20 Law & Soc. Inquiry 223 (1995), pp. 228-232; Buenos Aires Herald, "Mendoza: 'Trial of the judges' begins today" (17 February 2014), <http://www.buenosairesherald.com/article/152297/mendoza-trial-of-the-judges'-begins-today> .

recognized by international human rights courts and the UN Human Rights Council.⁶⁹

The United Nations *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* ("UN Impunity Principles") and other international and regional standards and jurisprudence recognize the "right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes". The right to truth includes both the rights of particular victims and their families to know the circumstances of the violations that have affected them, and the right of the broader society to know and remember its history, including as a vital safeguard against the recurrence of such violations in the future.⁷⁰

The Impunity Principles affirm that the process of fact-finding by an independent and effective judiciary in the course of legal proceedings to provide victims with remedy and reparation and to hold perpetrators responsible, is an essential part of realization of the right of victims and society to know the truth. At the same time, the role of the judiciary may be complemented (but never replaced) by non-judicial processes. For instance, "Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence."⁷¹

⁶⁹ See for example: ECtHR (Grand Chamber), *El-Masri v. the former Yugoslav Republic of Macedonia*, App. No. 39630/09 (13 December 2012), paras 191-194; IAmCtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219 (24 November 2010), para. 200; Human Rights Council, resolutions on the right to truth, 9/11 (2008), 12/12 (2009), and 21/7 (2012); and the General Assembly, resolution 68/165 (2013) on the right to truth.

⁷⁰ UN Impunity Principles, *supra* note 65, Principles 2-4.

⁷¹ UN Impunity Principles, Principle 5.

All accountability processes described in Chapters 3 and 4 that result in public findings of fact contribute to some extent to realization of the right to the truth. The specific application of truth commissions in situations of transition is addressed separately in Chapter 5.

3. Accountability bodies

Introduction

The *Bangalore Principles of Judicial Conduct*, which mainly set out substantive principles, include a short section on "Implementation" that states: "By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions." This provision was elaborated on in 2010, when the Judicial Integrity Group, the body responsible for the Bangalore Principles, adopted *Measures for the effective implementation of Bangalore Principles of Judicial Conduct* (the "Bangalore Implementation Measures").

The Bangalore Principles, the Bangalore Implementation Measures, and other international and regional standards and jurisprudence stress the need for judicial accountability bodies themselves to be independent and impartial, in order to safeguard the independence of individual judges and the judiciary as a whole.⁷²

The mechanisms discussed in this Chapter include:

- Review of decisions through appeal or judicial review
- Judicial councils
- Civil and criminal trials before the courts
- Parliamentary procedures

⁷² Bangalore Principles, Preamble; Bangalore Implementation Measures; Human Rights Committee, Concluding Observations on Vietnam, UN Doc CCPR/CO/75/VNM (2002), para. 10; UNSRIJL, Report on judicial accountability, *supra* note 7, paras 54-55, 90-93, 123, 125; Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 69; Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), article VI(1); CCJE, Magna Carta of Judges, (2010), article 6; IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), para. 74, *Chocrón Chocrón v. Venezuela*, Series C No. 227 (1 July 2011), para. 99, and *Supreme Court of Justice (Quintana Coello et al) v. Ecuador*, Series C No. 266 (23 August 2013), para. 145; UNODC Guide, *supra* note 11, paras 29-32.

- Ad hoc tribunals
- Anti-corruption bodies
- Civil society monitoring and reporting
- National human rights institutions
- Professional associations
- International accountability mechanisms

International and regional standards recognize that the Executive should not have any role, aside perhaps from at most a purely formal and symbolic function and certainly no substantive role, in regard to judicial removals or other forms of judicial discipline.⁷³

Review of decisions through appeal or judicial review

Where a person has suffered damage as a result of a judicial decision that was wrong but was made in good faith, the primary accountability mechanism is for a higher court to overturn the decision on review, or where the decision is of the highest court, for the court to reverse its earlier decision.⁷⁴ This does not preclude an obligation on the State to deliver additional measures, such as compensation, to fully implement the victim's right to remedy and reparation, in certain cases.⁷⁵

⁷³ Commonwealth Study, *supra* note 53, p. 88; Human Rights Committee, GC 32, *supra* note 45, para. 20; IBA Minimum Standards of Judicial Independence, article 4(a). The UNODC Guide (*supra* note 11) recommends States consider vesting the power to remove a judge from office in an independent body, but notes that if the Head of State or legislature has power to remove judges, "good practice has indicated that such power should be exercised only after a recommendation to that effect of the independent body vested with power to discipline judges" (para. 76).

⁷⁴ Bangalore Implementation Measures, para. 9.3; CCJE Opinion No. 18, *supra* note 27, paras 23 and 37; CCJE, Magna Carta of Judges, article 21.

⁷⁵ For example, in addition to the general provision for effective remedies under article 2 of the ICCPR, article 9(5) specifically provides, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation", and article 14(6) specifically provides for compensation in cases of miscarriage of justice.

Judicial councils

While most international standards do not outright preclude the possibility of other accountability mechanisms, many assert that independent judicial councils or similarly constituted bodies should have the primary if not exclusive role in holding judges accountable.

The Preamble to the Bangalore Principles states that the Principles "presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial".⁷⁶

The UN Special Rapporteur on the independence of judges and lawyers has said that bodies responsible for holding judges to account for judicial corruption and other wrongdoing should be composed either entirely or with a majority of judges, with the possibility of additional minority representation of the legal profession or legal academics, but with the absolute exclusion of any representatives of the political branches of government (executive and legislative).⁷⁷

Numerous other international and regional standards similarly refer to an independent body with (at minimum) a majority of judges (or, in some cases, "substantial representation" of judges), who have been chosen democratically by other judges, with no participation in disciplinary proceedings by any

⁷⁶ See similarly Human Rights Committee, Concluding Observations on Republic of the Congo, UN Doc CCPR/C/79/Add.118 (2000), para. 14; on Tajikistan, CCPR/CO/84/TJK (2005), para. 17; on Armenia, UN Doc CCPR/C/ARM/CO/2 (2012), para. 21; IAmCtHR, *Chocrón Chocrón v. Venezuela*, Series C No. 227 (1 July 2011), para. 163; UNODC Guide, *supra* note 11, para. 71.

⁷⁷ UNSRIJL, Report on judicial corruption, *supra* note 19, paras 88, 113(k); Report on judicial accountability, *supra* note 7, paras 93, 126; Report on Guarantees of Judicial Independence, *supra* note 45, paras 60, 98; Report on Mission to the Democratic Republic of the Congo, UN Doc A/HRC/8/4/Add.2 (2008), para. 75.

political authorities (including the Head of State, Minister of Justice or any other representative of the Executive or Legislative branches of government).⁷⁸ The ICJ has frequently recommended the establishment or maintenance of such mechanisms in countries around the world, based on its longstanding global experience.

The European Court of Human Rights has held in relation to disciplinary proceedings before judicial councils, that "where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will be a strong indicator of impartiality."⁷⁹

Conversely, it has held the following situations not to be compatible with the requirements of independence and impartiality under the European Convention:

⁷⁸ Bangalore Implementation Measures, para. 15.4; CCJE Opinion No. 3, *supra* note 35, paras 71 and 77; CCJE, Opinion No. 10, on the Council for the Judiciary at the service of society (2007), paras 15-24, 63; Council of Europe CM/Rec(2010)12, *supra* note 40, para. 27; European Charter for the Statute of Judges, article 5.1; CCJE, Magna Carta of Judges, (2010), article 13; Campeche Declaration, article 5(b); Venice Commission, *Report on the Independence of the Judicial System - Part One The Independence of Judges*, *supra* note 61, paras 32, 43, 82(4) and (6); OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), paras 7, 9, 26; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), paras 241, 244-246, 249 (recommendation 26); IBA, Minimum Standards of Judicial Independence, article 31 (although the IBA standards also contemplate involvement of the Legislature in disciplinary decisions as an alternative); ICJ, CIJL Policy Framework for Preventing and Eliminating Corruption and Ensuring Impartiality of the Judicial System, *supra* note 24, Annex, p. 133. See also the more qualified positions set out in the International Association of Judges, Universal Charter of the Judge, article 11; in the African Fair Trial Principles, article A.4(u); and in the Beijing Statement, article 25.

⁷⁹ European Court of Human Rights (ECtHR), *Oleksandr Volvov v. Ukraine*, App. No. 21722/11 (9 January 2013), para. 109, citing *Le Compte, Van Leuven and De Meyere v. Belgium*, Series A No. 43 (Plenary judgment, 23 June 1981), para. 58.

- where the vast majority of the body hearing the proceedings is made up of non-judicial staff appointed directly by the executive and legislative authorities;
- where half of the members are required to be judges, but most of the judges (and the non-judge representatives) are still appointed by executive and legislative authorities;
- where the head of the Prosecution service, and Minister of Justice, are included in the body *ex officio*.⁸⁰

Inclusion in the judicial council of persons who are not judges, while perhaps not essential, can add valuable perspectives from other stakeholders, and help reassure the public of the independence and impartiality of the accountability process.⁸¹ It is important that these people not be members or representatives of the executive or legislative branches of government.⁸²

The Consultative Council of European Judges (CCJE) has recommended that non-judge members should be appointed by non-political authorities, and has affirmed that they should never be appointed by the executive; if they are however elected by the Parliament, the CCJE has said that their election should require "a qualified majority necessitating significant opposition support", and the persons selected should ensure

⁸⁰ ECtHR, *Oleksandr Volvov v. Ukraine*, App. No. 21722/11 (9 January 2013), paras 110-117.

⁸¹ CCJE Opinion No. 10, *supra* note 78, para. 19; Istanbul Declaration, Principles 14 and 15; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 244; UNODC Guide, *supra* note 11, para. 29.

⁸² CCJE Opinion No. 10, *supra* note 78, paras 19, 32; UNODC Guide, *supra* note 11, para. 71. On the inappropriateness of involvement of the Minister of Justice, see Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) paras 31, 33, as well as its interim Opinion, CDL-AD(2015)045, paras 62, 71, 80, 82.

that the overall membership is a diverse representation of society.⁸³

The European Commission for Democracy Through Law (Venice Commission) of the Council of Europe, in relation to constitutional amendments on the judiciary in Albania, noted that that international standards did not prescribe a particular threshold for the "qualified majority" (e.g. 3/5, 2/3 or 3/4 support) and this was essentially for each State to decide. The Venice Commission stressed however the importance of the process of nomination of candidate non-judicial members of the council, where Parliament makes the appointment: a "transparent and open nomination process, at the initiative of autonomous nominating bodies (universities, NGOs, bar associations, etc.) and completed by the Judicial Appointments Council, which is composed of the members of the judiciary." The nomination process should seek to ensure, through such means, "that the Parliament has to make a selection amongst the most qualified candidates, and not political appointees."⁸⁴

To further guarantee its independence and impartiality in operation, the body responsible for judicial accountability should manage its own budget and have adequate human and financial resources for its functions.⁸⁵

Certain standards provide that unless a standing disciplinary court has been established by the judicial council, any disciplinary procedures should be dealt with by a disciplinary commission composed of a substantial representation of judges elected by their peers, that are different from the members of the council itself.⁸⁶

⁸³ CCJE Opinion No. 10, *supra* note 78, para. 32.

⁸⁴ Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) paras 12-17. See also its interim Opinion, CDL-AD(2015)045, paras 54-64.

⁸⁵ SRIJL, Report on judicial accountability, *supra* note 7, paras 93 and 126.

⁸⁶ CCJE Opinion No. 10, *supra* note 78, para. 64.

A number of standards suggest that a separate body or person be made responsible for receiving complaints, for obtaining a response from the judge and for considering whether or not there is a sufficient case to refer the complaint onwards to the disciplinary body.⁸⁷ This initial screening is intended to ensure that judges do not face disciplinary proceedings that are of a vexatious or completely unfounded character.

To ensure that the judicial council or similar body is in fact representative and has the expertise and perspectives required, States should implement proactive measures to improve, for instance the proportion of women or persons from minority or marginalized groups (whether judges or laypersons) among its members, if for instance there are reasonable concerns that such persons would otherwise be under-represented, and the selection or election procedures incorporate other criteria for competence and impartiality.⁸⁸

States should also consider a means of ensuring representation of judicial officers from across all levels of the judiciary and at all stages of their career, for instance by reserving some seats for election by and from within particular levels of court or age groups. The inclusion of more junior or younger judges can help promote a sense of engagement with and relevance of the mechanism throughout all levels of the judiciary, and junior and younger members can also bring

⁸⁷ CCJE Opinion No. 3, *supra* note 35, para. 68; Bangalore Implementation Measures, para. 15.3 and footnote 10; Beijing Statement, article 25; UNODC Guide, *supra* note 11, para. 70. In *Oleksandr Volvov v. Ukraine*, App. No. 21722/11 (9 January 2013), para. 115, the ECtHR found that the impartiality of the hearing on the merits was tainted by a reasonable perception of bias when judicial council members who had participated in preliminary inquiries into the case also participated in the decision on the merits.

⁸⁸ See e.g. Human Rights Committee, *Jacobs v. Belgium*, UN Doc CCPR/C/81/D/943/2000 (2004); UNSRIJL, Report on Mission to Mexico, UN Doc A/HRC/17/30/Add.3 (2011), para. 94(i); UN Special Rapporteur on Minority Issues, Report on minorities in the administration of justice, UN Doc A/70/212 (2015), paras 79-93, 109-110. See also ICJ, *Women And the World's Judiciaries: Identifying Key Challenges and Opportunities* (2014), para. 29.

fresh perspectives to the work of the body which complement the experience and acquired wisdom of more senior members. Ensuring inclusion of more junior members can be particularly important in situations of transition, where the more senior ranks of the judiciary may be heavily populated by individuals who closely identify with the prior authoritarian regime.

In some cases, the final decision of a judicial council or other disciplinary bodies takes the form of a recommendation to the Head of State (or similar high official of the executive or legislative branches), who remains charged with formal competence to actually remove the judge. Often it is explained that constitutional conventions or other informal expectations mean that the Head of State will in fact automatically implement the recommendation of the disciplinary body. This might not be problematic in practice where for instance an enforceable Constitutional provision makes clear that the executive or legislative official has no discretion and is involved simply to formally execute the decision. Nevertheless, to any extent that such a system relies on legally unenforceable practices or customs it retains a risk of executive control over the removal of judges, whether in terms of the Head of State ultimately refusing to remove a judge who has been fairly found to have been corrupt or complicit in violations, or ultimately removing a judge when the disciplinary body has recommended against. Indeed, there are examples of such contrary decisions by the head of State - the concern is not simply theoretical.⁸⁹ As such, in the view of the ICJ, the independence and accountability of the judiciary is better ensured by systems that do not rely on a political body to implement the final decision, at least where such a body has any discretion in the matter, whether in theory or in practice.

⁸⁹ Commonwealth Study, *supra* note 53, p. 104.

The ordinary courts

To respect the right to fair trial and equality before the law under international law, any judicial proceedings must be conducted before a competent, independent and impartial ordinary court. In general, victims of judicial human rights violations or judicial corruption should also be able to bring civil proceedings before the ordinary courts seeking compensation and other forms of remedy and reparation, although as noted earlier in some national systems it may be only possible for such proceedings to be brought against the State and not the individual judge.

In order to prevent abuse of the criminal or civil legal processes to unjustifiably interfere with, intimidate, or harass individual judges, national laws may require prior authorization from judicial councils or other similar independent bodies before criminal or civil proceedings may be initiated by the prosecutor or private parties.⁹⁰

In some States, the Supreme Court or other higher courts may also be mandated to conduct disciplinary or dismissal proceedings in respect of lower court judges. While a number of standards refer to courts as possible disciplinary bodies, it must not be conclusively assumed that the fact a court rather than an executive or legislature conducts the proceeding necessarily guarantees its independence, impartiality and fairness. For instance, the Inter-American Court of Human Rights found that the Supreme Court of Honduras had failed to meet the requirements of impartiality in relation to dismissal proceedings it conducted concerning lower-court judges. The grounds for dismissal of the judges relied on their alleged participation in a demonstration opposing a *coup* against the former President, and other lawful anti-*coup* activities, while the Inter-American Court found that the Supreme Court had

⁹⁰ UNSRIJL, Report on judicial accountability, *supra* note 7, para. 52. See also CCJE Opinion No. 3, *supra* note 35, para. 54, 75(i). See also Campeche Declaration, articles 11(d) and 12.

effectively participated in or endorsed the *coup*, and so could not be seen as impartial.⁹¹ As a study for the International Bar Association on judicial independence and accountability in Latin America recently observed, giving a Supreme Court such disciplinary roles can also reproduce any institutional bias that may exist in the judiciary, and may be externally perceived as contributing to "judicial corporatism" whereby the judiciary is seen to be protecting its members.⁹²

Parliamentary procedures

Numerous international standards recognize that, in practice, some States give Parliamentary bodies responsibility for removal of senior judges.

The requirement of Parliamentary approval for removal of judges has a long history in some countries, where it was originally adopted to limit an otherwise unchecked executive discretion to dismiss judges.⁹³ However, many of these same standards also recognize that, today, the political character of Parliamentary bodies itself creates a risk of abuse and that other mechanisms (such as independent judicial councils or disciplinary tribunals) may more effectively secure judicial independence. There is a certain theoretical dissonance to the idea that elected political bodies could be capable of acting as an "independent and impartial tribunal" in judging judges, and the real-world track record of such proceedings bears out the concerns in practice.⁹⁴ Further, even if in a particular country

⁹¹ IAmCtHR, *López Lone and others v. Honduras*, Series C No. 302 (5 October 2015), paras 229-234.

⁹² Jessica Walsh, "A Double-Edged Sword: Judicial Independence and Accountability in Latin America" (International Bar Association's Human Rights Institute Thematic Paper No. 5, April 2016), p. 15.

⁹³ Commonwealth Study, *supra* note 53, p. 105.

⁹⁴ See for example, ICJ, "Sri Lanka: judges around the world condemn impeachment of Chief Justice Dr Shirani Bandaranayake" (23 January 2013); "Ukraine: dismissal and criminal prosecution of judges undermine independence of the judiciary" (20 March 2014); *La Independencia del Poder*

there is no recent history of abuse by Parliament of such powers, the political situation can change rapidly and future parliamentarians may be more willing to exercise the powers for ulterior motives or in an unfair fashion.

The European Court of Human Rights, examining a disciplinary dismissal process that involved an initial hearing and findings by a judicial council, followed by a hearing and findings by a Parliamentary Committee and then a vote of the Parliament in plenary meeting, and finally review by a Higher Administrative Court, commented as follows with respect to the plenary meeting of Parliament:

On the whole, the facts of the present case suggest that the procedure at the plenary meeting was not an appropriate forum for examining issues of fact and law, assessing evidence and making a legal characterisation of the facts. The role of the politicians sitting in Parliament, who were not required to have any legal or judicial experience in determining complex issues of fact and law in an individual disciplinary case, has not been sufficiently clarified by the Government and has not been justified as being compatible with the requirements of independence and impartiality of a tribunal under Article 6 of the Convention.⁹⁵

For these reasons, some international standards oppose any substantive role of Parliamentary procedures in deciding whether to remove judges.⁹⁶ Others provide that

Judicial en Honduras (2004-2013) (May 2014), p. 30; "Maldives: removal of Supreme Court judges an assault on independence of the judiciary" (18 December 2014); and "Bolivia: ICJ condemns removal and forced resignation of Constitutional Court judges by Legislative Assembly" (8 January 2015). See also e.g. UNSRIJL, Report on Mission to Ecuador, UN Doc E/CN.4/2005/60/Add.4 (2005); IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), paras 77-85.

⁹⁵ ECtHR, *Oleksandr Volvov v. Ukraine*, App. No. 21722/11 (9 January 2013), para. 122. The Court separately found breaches of procedural fairness due to Parliamentarians using the electronic voting system to cast votes on behalf of colleagues who were not present (paras 141-147).

⁹⁶ For instance, the UN Human Rights Committee, applying the ICCPR, has expressed concern where the procedure for the removal of judges under the

Parliamentary procedures should only be permitted if an independent judicial council or similar body has already recommended removal after a full investigation and fair hearing.⁹⁷

Recognizing that in many parliamentary systems, the party or other political grouping that controls the executive also controls a majority in the legislative body, some standards further indicate that a qualified majority vote - often two-thirds or three-quarters - be required for judicial removal, and/or if there are two chambers of the parliament, requiring the vote of both.⁹⁸

The *UN Basic Principles on the Independence of the Judiciary* specifically address proceedings in the legislature only to state that the principle of independent review may not apply to such proceedings.⁹⁹ (See, however, pp. 67-69 below: more recent

Constitution and other laws of a State allowed Parliament "to exercise considerable control over the procedure for removal of judges", and it recommended that the State "should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct": Concluding Observations on Sri Lanka, UN Doc CCPR/CO/79/LKA (2003), para. 16. The Inter-American Commission on Human Rights, citing the structural concerns and a history of abuses, recommends the gradual elimination of parliamentary impeachment procedures across the Americas: *Guarantees for the independence of justice operators* (2013), paras 202-205. European regional standards generally provide that disciplinary proceedings, including for removal, should only take place before "an independent authority or a court" (e.g. Council of Europe, CM/Rec(2010)12, *supra* note 40, article 69), implicitly rejecting processes in which the parliament substantively or unilaterally decides on removal. The Beijing Statement does not explicitly reject parliamentary procedures, but notes that in some societies "that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse" (article 23).

⁹⁷ E.g. Bangalore Implementation Measures, article 16.2; Istanbul Declaration, Principle 15; Singhvi Declaration, *supra* note 61, article 26(b); UNODC Guide, *supra* note 11, para. 76. See also Commonwealth Study, *supra* note 53, pp. 105-111.

⁹⁸ See Commonwealth Study, *supra* note 53, pp. 110-111

⁹⁹ UNBP Judiciary, article 20.

standards and jurisprudence now affirm the need for review in such cases.) The other provisions of the Basic Principles are clearly applicable to any suspension or removal proceeding in the legislature, including the requirement of a fair proceeding and hearing, the prohibition of suspension or removal other than for reasons of incapacity or behaviour that renders the judge unfit to discharge their duties, and the requirement that the proceedings be determined in accordance with established standards of judicial conduct.¹⁰⁰

Based on its longstanding experience monitoring and analysing judicial independence and integrity around the world, the ICJ is of the view that while Parliamentary bodies may have some role in legislating the grounds and procedures for removal in consultation with the judiciary and other relevant actors, neither Parliaments nor Parliamentary Committees should play any substantive role in individual removal proceedings.

Ad hoc tribunals

A 2015 study of practices in Commonwealth jurisdictions found that the most popular mechanisms for judicial removals were ad hoc tribunals, formed on an as-needed basis, to inquire into alleged grounds for dismissal and make a recommendation which is either immediately binding on the executive, or subject to further consideration by a court. They are almost always entirely judicial bodies consisting of serving or retired judges, sometimes brought from other Commonwealth jurisdictions. The flexibility in selecting members of ad hoc tribunals can help ensure a certain neutrality in sensitive situations, if the individuals appointed are impartial and have no connection to anyone involved in the case or any particular branch of the government; on the other hand, this same flexibility in composition creates a risk of manipulation and

¹⁰⁰ UNBP Judiciary, article 17-19. See also e.g. IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), paras 77-85.

bias, particularly if the executive is given the power to select the members or otherwise control the process.¹⁰¹

Based on its research, and relevant jurisprudence, the Commonwealth Study recommended that before an ad hoc tribunal is established in any particular case, the judge should have a preliminary opportunity to address a response to the allegations to a person or body with the capacity to make an initial assessment of the facts and law (for instance, a Judicial Service Commission), which should then be entrusted with the decision whether to convene a tribunal.¹⁰² The study underscored the risk of abuse inherent in allowing the executive to initiate and appoint the members of an ad hoc tribunal.¹⁰³ For this reason, and based on its own observations of such processes around the world over many years, the ICJ considers it inappropriate in all circumstances for the executive to play such a role in constituting or controlling ad hoc tribunals.

The Commonwealth Study also noted that in many cases no advance provision is made defining the specific procedures to be followed by the ad hoc tribunal in conducting its work; as a safeguard against abuse or arbitrariness, and guarantee that the requirements of fairness will be fully met (see pp. 62-73 below), it is recommended that generally-applicable standing rules of procedure be adopted in advance for such tribunals, incorporating full fair-trial guarantees and a requirement that the tribunal provide reasons for its decision.¹⁰⁴ Similarly any ad hoc tribunals should, like other accountability mechanisms, be subject to appeal to a court or other forms of independent review, both on questions of fact and questions of law (see pp. 67-69 below).¹⁰⁵

¹⁰¹ Commonwealth Study, *supra* note 53, pp. 91-102.

¹⁰² *Ibid* p. 95.

¹⁰³ *Ibid* pp. 96-97.

¹⁰⁴ *Ibid* pp. 98-100.

¹⁰⁵ *Ibid* pp. 100-102.

Anti-corruption bodies

Article 36 of the *UN Convention against Corruption* provides:

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.¹⁰⁶

In 2000 the UN Special Rapporteur on the independence of judges and lawyers, reporting on a mission to Guatemala, recommended that to address judicial corruption, an independent anti-corruption agency with powers to investigate complaints, including against the judiciary, and to initiate prosecutions, be established. He stressed that the agency "should be a separate entity, independent of all government departments".¹⁰⁷

As with prosecution for other kinds of crimes, any proceedings against judges by specialized anti-corruption units within the police or prosecution or initiated by an anti-corruption commission, must fully meet international fair trial standards and otherwise respect the particular protections to be accorded to judges in order to secure their independence. This could include, for example, a requirement to obtain permission from a judicial council or chief justice before opening an investigation or before filing formal charges or otherwise commencing the legal process (see also pp. 76-79 below).

¹⁰⁶ See also the requirement in article 6 to establish a preventive anti-corruption body, which may, but need not be, the same as the body under article 36.

¹⁰⁷ SRIJL, Report on Mission to Guatemala, UN Doc E/CN.4/2000/61/Add.1 (2000), para. 169(f).

Civil society monitoring and reporting

Civil society, including media, non-governmental organizations, bar associations, and other individual and institutional commentators, have the right publicly to report and comment on the work of individual judges and the judiciary as a whole as an aspect of freedom of expression.¹⁰⁸ In practice, however, journalists and other civil society organisations often face arbitrary restrictions or retaliation for exercising these rights, such as proceedings for contempt of court, restraining orders, or defamation suits. Undue restrictions on civil society monitoring, reporting and comment do not only violate the rights of the individuals involved, they undermine judicial accountability. As the UN Special Rapporteur on the independence of judges and lawyers has pointed out, "public scrutiny of and comment on the work of judges through the media, civil society and other commentators" plays an "invaluable role" as a form of judicial accountability.¹⁰⁹

The *Measures for the Effective Implementation of the Bangalore Principles* similarly affirm that "legitimate public criticism of judicial performance is a means of ensuring accountability" and accordingly, "a judge should generally avoid the use of the criminal law and contempt proceedings to restrict such criticism of the courts".¹¹⁰ Commonwealth

¹⁰⁸ See e.g. UN Working Group on Arbitrary Detention, Opinion, *Thulani Maseko v. Swaziland*, UN Doc A/HRC/WGAD/2015/6 (2015), paras 26-30, 36; UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms ("Declaration on Human Rights Defenders"), articles 6, 9(3)(b), 12; ECtHR (Grand Chamber), *Morice v. France*, App. No. 29369/10 (23 April 2015); ECtHR, *July and SARL Libération v. France*, App. No. 20893/03 (14 February 2008); ECtHR, *Mustafa Erdoğan and Others v. Turkey*, App. Nos 346/04 and 39779/04 (27 May 2014).

¹⁰⁹ UNSRIJL, Report on judicial accountability, *supra* note 7, paras 55, 73, 89. See also, UN Development Programme ("UNDP"), *A Transparent and Accountable Judiciary to Deliver Justice for All* (2016), Chapter 5.

¹¹⁰ Bangalore Implementation Measures, para. 9.5. See similarly UNODC Guide, *supra* note 11, para. 81. And see Geoffrey Robertson, "Judicial

standards also affirm that, "Legitimate public criticism of judicial performance is a means of ensuring accountability" and that, "The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions".¹¹¹

The Human Rights Committee has similarly held that "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties", and that "all public figures" and institutions are "legitimately subject to criticism", and has accordingly expressed concern about laws on "the protection of the honour of public officials".¹¹² While encouraging States to completely decriminalize all defamation, the Committee has emphasized that in any event all defamation laws of any character should include the defences of truth and public interest, and should not be applicable to forms of expression that are not, by their nature, subject to verification, and that "the application of the criminal law should only be countenanced in the most serious of cases" and "imprisonment is never an appropriate penalty."¹¹³ The ICJ is of the view that all States should fully decriminalize all forms of defamation.

Enabling civil society to monitor, assess, and report and comment on judicial integrity also depends in part on certain positive obligations to which States are already more generally subject, such as:

Independence: Some Recent Problems" (International Bar Association's Human Rights Institute Thematic Papers No. 4, June 2014), pp. 23-24.

¹¹¹ Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), article VI(1)(b); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), article VII(b).

¹¹² Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 (2011), para. 38.

¹¹³ Ibid para. 47, where the Committee also states that, "At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice".

- the obligation to ensure that all civil and criminal hearings are, in general, open to the media and the public, and that all judgments be made public, subject only to limited exceptions; this enables media, civil society organizations, academics, and other interested persons to monitor particular trials and to organize systematic monitoring and analysis of the judicial system as a whole;¹¹⁴
- the right of everyone to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or through any other media of his choice; this enables the media, civil society organisations, and academics to obtain information from the authorities and each other about the judiciary and its work, to share and compare information for analysis, and to communicate their findings and recommendations to government authorities and to broader audiences;¹¹⁵
- the right of everyone to freedom of association, which enables civil society to create organizations, whether formal or informal, to increase the scale and effectiveness of monitoring, analysis, and advocacy.¹¹⁶

The burden is on the State to justify any restriction of civil society rights to report and comment on the judiciary and particular judges; to be valid, such restrictions must meet a

¹¹⁴ See e.g. ICCPR, article 14(1).

¹¹⁵ See e.g. ICCPR, article 19(2), and Human Rights Committee, GC 34, *supra* note 112, paras 18-19, on the right of access to information; UN High Commissioner for Human Rights, "Best practices to counter the negative impact of corruption on the enjoyment of all human rights", UN Doc A/HRC/32/22 (15 April 2016) para. 131; Declaration on Human Rights Defenders, *supra* note 108, articles 6, 9(3)(b), 12.

¹¹⁶ See e.g. ICCPR, article 22(1).

series of criteria, including: that the restriction be "provided by law" in precise and publicly accessible form that does not confer unfettered discretion; that the restriction is imposed for a legitimate purpose (i.e. in the case of contempt-of-court type restrictions, the need to maintain orderly proceedings); and that the particular restriction meets strict tests of necessity and proportionality in relation to the specific threat it is meant to respond to, and in relation to the restriction's impact.¹¹⁷ Measures that aim to prevent civil society from legitimate public reporting on and criticism of judicial corruption or judicial complicity in human rights violations, or have a disproportionate or otherwise unjustified effect in that regard, would be incompatible with these requirements.

As an example, while the European Convention on Human Rights explicitly provides that freedom of expression may be subject to restrictions necessary "for maintaining the authority and impartiality of the judiciary", a Grand Chamber of the European Court of Human Rights has held:

Nevertheless – save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner. When acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens.¹¹⁸

¹¹⁷ See ICCPR article 14(1) on exceptions to media and public access to hearings; Human Rights Committee, GC 34, *supra* note 112, paras 22, 31, 33-35 (see also para. 47 regarding "defamation"-type restrictions); Human Rights Committee, *Dissanayake v. Sri Lanka*, UN Doc CCPR/C/93/D/1373/2005 (2008), and *Galina Youbko v. Belarus*, UN Doc CCPR/C/110/D/1903/2009 (2014), paras 9.3 and 9.5.

¹¹⁸ ECtHR (Grand Chamber), *Morice v. France*, App. No. 29369/10 (23 April 2015), para. 131.

The European Court has accordingly found the punishment of (for instance) journalists,¹¹⁹ lawyers,¹²⁰ and law professors (as well as their editors and publishers),¹²¹ for reporting on or criticism of the judicial system or individual judges, to have violated their freedom of expression under the European Convention.

In a case where a person was refused permission by local authorities to display posters "calling for justice during a picket that was aimed at drawing public attention to the need for the judiciary to respect both the Constitution and international treaties ratified by the State party when adjudicating civil and criminal cases", the Human Rights Committee found the refusal of permission to constitute a restriction of "her right to impart her opinions regarding the administration of justice in the State party and to participate in a peaceful assembly, together with others". It noted that the refusal was purportedly "based on the grounds that the purpose of the picket was seen by the authorities as an attempt to question court decisions, and, therefore, to influence court rulings in specific civil and criminal cases". The Committee found that the local authorities had "not explained how, in practice, criticism of a general nature regarding the administration of justice would jeopardize the court rulings at issue, for the purposes of one of the legitimate aims set out in [the ICCPR]", that is, "for respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*), or of public health or morals": the Committee found a violation of the person's freedom of expression under the ICCPR.¹²²

¹¹⁹ ECtHR, *July and SARL Libération v. France*, App. No. 20893/03 (14 February 2008).

¹²⁰ ECtHR (Grand Chamber), *Morice v. France*, App. No. 29369/10 (23 April 2015).

¹²¹ ECtHR, *Mustafa Erdoğan and Others v. Turkey*, App. Nos 346/04 and 39779/04 (27 May 2014).

¹²² Human Rights Committee, *Galina Youbko v. Belarus*, UN Doc CCPR/C/110/D/1903/2009 (2014), paras 9.2-9.7. For an example of a

National human rights institutions

Independent national human rights institutions (NHRIs) typically have a variety of mandates that could be relevant for judicial accountability, including: monitoring the situation of human rights, including in relation to the administration of justice, in the country; reporting to other organs of government, to the public and the press, and to international human rights bodies, its views on the situation for human rights in the country, including as regards laws, policies, and practices, violations; and promoting harmonization of national laws, policies and practices with international human rights standards. Some NHRIs also have a mandate to receive, make findings on, and sometimes order remedies for, individual complaints of violations.

The UN Office of the High Commissioner for Human Rights has observed:

Courts and the judiciary are generally exempt from oversight by NHRIs. Courts, and the judges that serve on them, have an independence that is essential for ensuring full respect of the rule of law. Respect for the rule of law demands that administrative bodies should not sit in appeal or review of the courts. This does not, however, prevent monitoring and reporting on court activities, and making independent recommendations meant to improve the application of human rights principles in the court setting or to remove undue delay in judicial proceedings.

...

It may be that the judiciary is weak and not as independent as one would wish in some countries. Where this is so, efforts should be made to strengthen it and its independence as a separate issue. It is not appropriate to give an NHRI an oversight role over the courts as a means to these ends. Some countries have established mechanisms such as judicial oversight bodies, usually themselves formed of judges, to

contempt-of-court order that the Committee found did *not* violate the Covenant, see *Lovell v. Australia*, UN Doc CCPR/C/80/D/920/2000 (2004).

deal with problems relating to the conduct of judges, including bias. Judicial oversight is not an NHRI function.¹²³

At the same time, the OHCHR suggests that NHRIs can, in addition to monitoring and reporting on court activities, engage in reform and strengthening of judicial institutions through analysis and recommendations on, for instance: institutional monitoring and accountability mechanisms within the judicial system; the overall independence of the judiciary and its capacity to adjudicate cases fairly and competently; analysing national practices in relation to national and international human rights standards; and ensuring that the administration of justice conforms to human rights standards and provides effective remedies particularly to minorities and to the most vulnerable groups in society.¹²⁴

National human rights institutions are encouraged by the UN to contribute to the review by international human rights mechanisms of the situation for human rights in their country (including treaty bodies, the Universal Periodic Review and other proceedings of the Human Rights Council, and special procedures, see pp. 56-59 below);¹²⁵ in such processes, NHRIs can be a particularly important source of objective information concerning the degree to which national law and other national mechanisms do or do not secure judicial integrity and accountability in practice.

¹²³ UN Office of the High Commissioner for Human Rights ("OHCHR"), *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4 (Rev. 1) (2010), pp. 33 and 127.

¹²⁴ Ibid p. 128. See also UN High Commissioner for Human Rights, "Best practices to counter the negative impact of corruption on the enjoyment of all human rights", UN Doc A/HRC/32/22 (15 April 2016), para. 134.

¹²⁵ OHCHR, *National Human Rights Institutions*, *supra* note 123, pp. 132-133.

Professional associations

The right to freedom of association, including for judges, is protected under international law, including under article 22 of the ICCPR. Article 9 of the *UN Basic Principles on the Independence of the Judiciary* expressly recognizes that, "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence." Many such professional associations exist at the national level, complemented by additional organisations at the regional and global level.

Professional associations of judges already contribute to judicial accountability efforts in a variety of ways. Particularly where a system of ethical standards and mechanisms for advice or response to complaints of ethical breaches exists separately from the formal disciplinary system (see pp. 25-26 above), the development of the ethical standards and mechanisms in relation to them may be based in the professional association. Professional associations may also set standards for membership aimed at excluding judges who fail to meet appropriate measures of judicial integrity. International and regional associations may similarly inquire into or regularly review the independence and integrity of national judiciaries and consider taking action to suspend or end the membership of a national association if serious problems are found.¹²⁶ Professional associations also make a major contribution to efforts to develop standards, and guidance on implementation and best practices, at the regional and global levels. They may also make public statements of concern about the situation of judiciaries in other countries,

¹²⁶ See for instance, under the Statute of the International Association of Judges, Constitution articles 4, 5(1), 6, and Regulations under the Constitution, articles 12 and 13, <http://www.iaj-uim.org/statute/>.

when judicial independence or integrity has been particularly gravely undermined.¹²⁷

International accountability mechanisms

Aside from the trial of a few judges at Nuremberg following World War Two,¹²⁸ there do not appear to have been any international criminal trials of judges for involvement in human rights violations. Judges can certainly through exercise of their powers commit or be complicit in war crimes, for instance wilfully depriving a person protected by the Geneva Conventions of their right to a fair trial, or in crimes against humanity.¹²⁹ As such, in appropriate cases there may be a role for the International Criminal Court or other international

¹²⁷ Regarding the freedom of expression of judges and judicial associations, see UNBP Judiciary, article 8: "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary." As with civil society more generally, national, regional or international professional associations of lawyers and prosecutors may also undertake activities to promote the independence and integrity of the judiciary. Article 24 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) and endorsed by General Assembly resolution 45/166 (1990), recognizes the right of lawyers to form professional associations, and article 23 affirms the right of lawyers to "take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights".

¹²⁸ *United States of America v. Alstötter et al* ("The Nuremberg Justice Case"), 3 T.W.C. 1 (1948) and commentary in Matthew Lippman, "The White Rose: Judges and Justice in the Third Reich" 15 Connecticut Journal of Int'l Law 95 (2000), pp. 165-181, 186-193, 205-206.

¹²⁹ See for example Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, article 130; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, article 147; 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, article 85(4)(e); Rome Statute of the International Criminal Court, article 8(2)(a)(vi).

criminal tribunals to hold individual judges directly responsible for such crimes under international law.

There is a range of other mechanisms, of a non-criminal character, operating at the global and regional levels, which have the potential to deliver some measure of accountability for judicial complicity and corruption.¹³⁰

Global UN treaty bodies including the Human Rights Committee (acting under the ICCPR), and the Committee against Torture (acting under the *UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*), have commented on the involvement of judges in violations of their respective treaties, both in decisions on individual complaints (or "communications" as they are called within the UN system), and in their periodic review of the situation in State parties.¹³¹ Other treaty bodies, such as the

¹³⁰ See also Geoffrey Robertson, "Judicial Independence: Some Recent Problems" (International Bar Association's Human Rights Institute Thematic Papers No. 4, June 2014), pp. 19-21. For more detailed information on how to engage UN human rights mechanisms, see OHCHR, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (2008), <http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx>, and other specific OHCHR guides cited in the following footnotes. Those considering use of international mechanisms should also see the detailed information and advice in ICJ, *Practitioners Guide no. 6: Migration and International Human Rights Law* (Updated Edition, 2014), Annex 1 (The Choice of an International Mechanism: a checklist) and Annex 2 (International Legal Remedies and their Use), which are of more general application and not only relevant to migration: <http://www.icj.org/practitioners-guide-on-migration-and-international-human-rights-law-practitioners-guide-no-6/>.

¹³¹ See for example Human Rights Committee, *Anthony Fernando v. Sri Lanka*, UN Doc CCPR/C/83/D/1189/2003 (2005), para. 9.2 (imposition by court of one year of "rigorous imprisonment" for contempt of court, on basis victim had filed repetitious motions and had once "raised his voice" in the presence of the court and refused to apologize"; Committee finds the court's "imposition of a draconian penalty without adequate explanation and without independent procedural safeguards" to have violated the right to liberty of the victim); Committee against Torture, *Imed Abdelli v. Tunisia*, UN Doc CAT/C/31/D/188/2001 (2003), paras 10.5-10.8 (refusal of various State officials, including judges, to respond to the victim's credible allegations of

Committee on Economic, Social and Cultural Rights (acting under the *International Covenant on Economic, Social and Cultural Rights*) and the relatively recently-established Committee on Enforced Disappearances (acting under the *International Convention for the Protection of All Persons from Enforced Disappearance*), have a similar mandate. These bodies can prescribe, although not order, remedies for victims or consequences for governments or perpetrators; their findings contribute to public acknowledgement of judicial wrongdoing, and can lead to impact at the national level.¹³²

A number of independent experts appointed by the Human Rights Council, known as Special Procedures, publicly and officially report on allegations of, and in some cases make findings on, human rights violations, and can highlight any relevant responsibility of judges.¹³³ The Special Rapporteur on the independence of judges and lawyers is one example,¹³⁴ but many other mandates have commented on judicial involvement in violations that fall within their mandates. A striking example is a recent decision by the Working Group on Arbitrary Detention, making findings regarding violations of the right of freedom of expression, fair trial rights, and right to liberty, of a lawyer, which were perpetrated by members of the Swaziland judiciary.¹³⁵

torture and requests for judicial orders and other measures to investigate and protect him against further torture).

¹³² Further information on treaty bodies, see:

<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> .

For information on how to file a complaint, see:

<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> .

¹³³ For further information on Special Procedures, see:

<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> .

For information on how to file a complaint to Special Procedures, see:

<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx> .

¹³⁴ See <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx> .

¹³⁵ UN Working Group on Arbitrary Detention, Opinion, *Thulani Maseko v. Swaziland*, UN Doc A/HRC/WGAD/2015/6 (2015), paras 26-30, 36. The ICJ was involved in bringing the case to the Working Group.

The Universal Periodic Review process of the Human Rights Council, in which the situation of human rights in every country in the world is periodically subject to a form of public peer commentary by other countries, is also an avenue for highlighting judicial wrongdoing, albeit mention of individual cases is somewhat rare and the focus tends to be on more institutional questions. Depending on the country, issue and timing, other activities of the Human Rights Council may also provide opportunities for advocacy.¹³⁶

Certain regions also feature regional human rights courts (European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples' Rights), and/or commissions (African Commission of Human and Peoples' Rights, Inter-American Commission on Human Rights), which can review the overall situation of judicial conduct and accountability in a country, and issue decisions on individual complaints of violations perpetrated by or with complicity of judges.

In respect of criminal violations of international human rights or international humanitarian law, as well as offences established under the *UN Convention against Corruption*, States can (and under the terms of some treaties, must) establish criminal and/or civil jurisdiction for crimes committed outside of their territory. Usually (though not always) this involves some link to the State potentially asserting jurisdiction (for instance, the victims were nationals of the prosecuting country, or the alleged perpetrator enters the territory of the prosecuting country). This is a further potential avenue for international accountability.

¹³⁶ See OHCHR, *Universal Periodic Review - A Practical Guide for Civil Society and United Nations Human Rights Council - A Practical Guide for NGO Participants*, at <http://www.ohchr.org/EN/AboutUs/Pages/CivilSociety.aspx> .

4. Procedural issues

Necessary powers

Depending on the character of the proceeding, the bodies responsible for receiving complaints, investigating allegations, and conducting hearings, require certain powers to collect evidence and to manage the proceedings. These could for instance potentially include authority to compel the production of testimony or documents from various persons or organizations, to intercept communications, or to require the attendance of the judge or other witnesses.

The exercise of these authorities by the accountability body may need to be adjusted to comply with the fundamental principles of the separation of powers, and the special protections accorded to the work of the judiciary to preserve its independence, impartiality, and dignity. For instance, article 15 of the *UN Basic Principles on the Independence of the Judiciary* provides:

The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

To ensure respect for the separation of powers and independence of the judiciary and judicial function, it may be appropriate to require any non-judicial investigating body to obtain prior authorization from a judicial council, a higher court judge, a chief justice, or other such independent offices, before exercising these powers. Or for instance, the principle of professional secrecy means it will generally not be possible for the body to require a judge to provide testimony or other information about discussions between the judges that formed part of the deliberations in a case.

From a practical point of view, sometimes an otherwise independent judicial council or similar body is expected to rely on seconded or shared staff from an executive body, such as staff of the Ministry of Justice or generalist police or

prosecutorial offices, to actually carry out the investigations. Such arrangements raise further questions about compatibility with the separation of powers.

At the same time, as the Inter-American Court of Human Rights has stated, the more general principle should be recalled that:

...in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures. Moreover, when it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a State organ whose members are charged with committing the wrongful acts. In the same sense, the final decision on the existence of the requested documentation cannot be left to its discretion.¹³⁷

For all these reasons, it is generally necessary that investigation personnel be both employed by and report to an investigative unit or entity that is functionally independent of the executive; and it is also strongly preferable that they report to a unit or entity that is functionally independent of the accountability body (such as an independent judicial inspectorate), or at least to a organ of the accountability body other than the organ that will ultimately decide the case.

Procedural rights of the judge

International standards recognize that disciplinary or removal proceedings against a judge must include legal guarantees of

¹³⁷ IAmCtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219 (24 November 24, 2010), para. 202.

procedural fairness and in actual practice be conducted in a manner that ensures that the procedure is fair.¹³⁸

The requirements of procedural fairness have been elaborated in greater detail under, for instance, articles 10 and 11 of the *Universal Declaration of Human Rights*, Article 14 of the ICCPR, and related standards and jurisprudence at the global, regional and national level.¹³⁹ Key elements in all types of judicial accountability proceedings include:

- there must not be any discrimination in the procedural rights afforded to the judge on grounds such as race, colour, sex, language, religion, political or other

¹³⁸ UNBP Judiciary, article 17; UNSRIJL, Report on judicial corruption, *supra* note 19, para. 86; UNSRIJL, Report on judicial accountability, *supra* note 7, paras 79, 123; Human Rights Committee, GC 32, *supra* note 45, para. 20, and *Pastukhov v. Belarus*, UN Doc CCPR/C/78/D/814/1998 (2003), para. 7.3; Human Rights Council, resolution 29/6 (2015), para. 3; Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 69; African Fair Trial Principles, articles A.4(p)(q) and (r); Beijing Statement, articles 22-28; Bangalore Implementation Measures, articles 15, 16; CCJE Opinion No. 3, *supra* note 35, paras 58-74; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), article VII(b); Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), article VI(1); Statute of the Ibero-American Judge, articles 14, 20; Campeche Declaration, article 10; IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), para. 74, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Series C No. 182 (5 August 2008), para. 147, *Chocrón Chocrón v. Venezuela*, Series C No. 227 (1 July 2011), para. 99, *Supreme Court of Justice (Quintana Coello et al) v. Ecuador*, Series C No. 266 (23 August 2013), para. 145, and *López Lone and others v. Honduras*, Series C No. 302 (5 October 2015), para. 196. The forthcoming judgment of the ECtHR (Grand Chamber) in *Baka v. Hungary*, App. No. 20261/12 may also be relevant (judgment announced for 23 June 2016, not available at time of writing); UNODC Guide, *supra* note 11, paras 30, 72.

¹³⁹ E.g. African Fair Trial Principles, article A.2 and section N; Human Rights Committee, GC 32, *supra* note 45; IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), paras 71-85, *Supreme Court of Justice (Quintana Coello et al) v. Ecuador*, Series C No. 266 (23 August 2013), paras 168-169; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 249 recommendations 21, 23; Commonwealth Study, *supra* note 53, p. 90.

opinion, national or social origin, property, birth or other status;¹⁴⁰

- "equality of arms", meaning "the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant" and that "each side be given the opportunity to contest all the arguments and evidence adduced by the other party";¹⁴¹ this also implies that the judge has the right to know in advance the specific allegations of fact and law on which the case against him or her is based, and access to and copies of any evidence;¹⁴²
- The right to legal assistance and representation by a lawyer or possibly another judge, and adequate time to prepare the defence;¹⁴³

¹⁴⁰ See e.g. ICCPR articles 2(1), 14(1), 25(c), 26; Human Rights Committee, GC 32, *supra* note 45, paras 64-65.

¹⁴¹ See e.g. Human Rights Committee, GC 32, *supra* note 45, para. 13; ECtHR, *Olujić v. Croatia*, App. No. 22330/05 (5 February 2009), paras 77-85 (judicial council refused to receive any witness on behalf of the judge, while accepting all witnesses for the Government seeking his dismissal).

¹⁴² See e.g. Human Rights Committee, *Soratha Bandaranayake v. Sri Lanka*, UN Doc CCPR/C/93/D/1376/2005 (2008), paras 7.2 and 7.3; IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), para. 83, *Chocrón Chocrón v. Venezuela*, Series C No. 227 (1 July 2011), paras 120-121, and *Supreme Court of Justice (Quintana Coello et al) v. Ecuador*, Series C No. 266 (23 August 2013), paras 168-169; UNODC Guide, *supra* note 11, para. 69. In criminal proceedings, article 14(3) of the ICCPR specifically guarantees the right to be informed promptly and in detail of the nature and cause of the charges, and the right to examine, or have examined, the witnesses against the judge, and to obtain the attendance and examination of witnesses on the judge's behalf under the same conditions as witnesses against the judge, and similar rights apply in disciplinary and other such proceedings.

¹⁴³ See in particular African Fair Trial Principles, article A.4(q); Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), article VI(1)(a)(i) (addressing proceedings in which there is a risk of removal); European Charter for the Statute of Judges, article

- expeditiousness, i.e. that the proceedings progress without undue delay;¹⁴⁴
- Presumption of innocence and the right not to be compelled to testify against himself or to confess guilt.¹⁴⁵

Members of the disciplinary body hearing the proceedings must not be biased in relation to the case or the parties, and must also ensure they do not make statements or otherwise act in a way that would give rise to a reasonable perception that they are biased (even if there is no evidence that they are in fact biased). If statements, conduct, or relationships would give rise to such perceptions of bias, the person should recuse themselves from hearing the matter.¹⁴⁶ Indeed, the formal

5.1; IAmCtHR, *Constitutional Court v. Peru*, Series C No. 71 (31 January 2001), paras 80-83. In criminal proceedings, article 14(3) of the ICCPR specifically guarantees the right be tried in one's presence, and to defend oneself in person or through counsel of choice, as well as adequate time and facilities for the preparation of the defence and to communicate with counsel of choice, and similar rights apply in disciplinary and other such proceedings.

¹⁴⁴ Expeditiousness is expressly mentioned in UNBP Judiciary article 17. See also Human Rights Committee, GC 32, *supra* note 45, para. 27. In ECtHR, *Olujić v. Croatia*, App. No. 22330/05 (5 February 2009), paras 86-91, after the judicial council decided (on a re-hearing) the judge should be dismissed, the challenge proceedings before the Constitutional Court took six years, a period the European Court found excessive and in violation of the judge's rights to an expeditious procedure.

¹⁴⁵ These rights are specifically provided for in criminal proceedings by ICCPR articles 14(2) and (3), and similar rights apply in disciplinary and other such proceedings.

¹⁴⁶ See for example: Human Rights Committee, *Busyo, Wongodi, Matubuka et al v. Democratic Republic of the Congo*, UN Doc CCPR/C/78/D/933/2000 (2003), para. 5.2 (statements by the President of the Court, before the case was heard, supporting the dismissals); IAmCtHR, *López Lone and others v. Honduras*, Series C No. 302 (5 October 2015), paras 229-234 (Court which had previously endorsed overthrow of previous President could not be seen as impartial in disciplinary proceedings against judges for protesting against the overthrow); ECtHR, *Olujić v. Croatia*, App. No. 22330/05 (5 February 2009), paras 56-68, *Kudeshkina v. Russia*, App. No. 29492/05 (26 February 2009),

provision of a procedure for members to withdraw in such cases may in itself be seen as a necessary guarantee of impartiality.¹⁴⁷

Illustrative examples of perceived or real bias that have been found to render disciplinary proceedings unfair include the following:

- Statements made by members of a judicial council after the council has adopted its initial decision, for instance, but before a court appeal or review has been finally disposed of (thus leaving open the potential for later re-hearing by the judicial council), can give rise to perceptions of bias in violation of the right to a fair hearing;¹⁴⁸
- Participation in the vote on the final decision on the case, by a member of the judicial council who had initially made the complaint against the judge, and then served as de facto prosecutor in the hearing of the complaint by a sub-commission of the judicial council (even though that person was only one of fifteen members of the council);¹⁴⁹
- The presence of the Minister of Justice, as a member of the executive, on the disciplinary body (even as only

para. 97, and *Harabin v. Slovakia*, App. No. 58688/11 (30 November 2012), paras 130-142.

¹⁴⁷ ECtHR, *Oleksandr Volvov v. Ukraine*, App. No. 21722/11 (9 January 2013), para. 120.

¹⁴⁸ ECtHR, *Olujić v. Croatia*, App. No. 22330/05 (5 February 2009), paras 56-68 (members of the judicial council made prejudicial statements to press following initial hearing but prior to re-hearing eventually ordered by Constitutional Court).

¹⁴⁹ ECtHR, *Mitrinovski v. the Former Yugoslav Republic of Macedonia*, App. No. 6899/12 (30 April 2015), paras 34-45. See similarly *Jakšovski and Trifunovski v. the former Yugoslav Republic of Macedonia*, App. Nos 56381/09 and 58738/09 (7 January 2016), paras 36-45, and *Poposki and Duma v. the former Yugoslav Republic of Macedonia*, App. Nos 69916/10 and 36531/11 (7 January 2016), paras 41-29.

one of fifteen members on the body, with eight members being judges elected by judges in secret ballot), and with the decision to dismiss being adopted unanimously.¹⁵⁰

International standards also highlight the need for judges to have access to an appeal or independent review of decisions (whether interim or final) in disciplinary, suspension or removal proceedings. Article 20 of the *UN Basic Principles on the Independence of the Judiciary*, for instance, provide as follows:

Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

The right to appeal to a court or to similar forms of independent review is also affirmed by a range of other international and regional standards.¹⁵¹

Subsequent to adoption of the *UN Basic Principles on the Independence of the Judiciary*, the qualification in relation to "the decisions of the highest court and those of the legislature in impeachment or similar proceedings" has gradually faded in importance. Article 15.6 of the *Measures for Implementation of the Bangalore Principles*, for instance, simply provides:

There should be an appeal from the disciplinary authority to a court.

¹⁵⁰ ECtHR, *Popčevska v. the Former Yugoslav Republic of Macedonia*, App. No. 48783/07 (7 January 2016), paras 53-56.

¹⁵¹ See also Council of Europe, CM/Rec(2010)12, *supra* note 40, para. 69; African Fair Trial Principles, article A.4(q); Venice Commission, *Report on the Independence of the Judicial System - Part One The Independence of Judges*, *supra* note 61, para. 43 (referring specifically to appeal to a court); Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators* (2013), para. 249 recommendation 25.

The Inter-American Court of Human Rights found, in a case where the initial decision to dismiss certain judges was taken by the Supreme Court, and review of that decision was performed by the judicial council, that the judicial council was not itself independent as within the national institutional framework the council was effectively subsidiary to the Supreme Court. Consequently, the failure to have provided for review of the original decision by an independent body constituted a violation of the right to fair hearing.¹⁵²

The UN Special Rapporteur on the independence of judges and lawyers has emphasized that, "In cases of dismissal by political bodies, it is even more important that their decision be subject to judicial review."¹⁵³ The rule of law and separation of powers require that the legislative and executive branches must act in accordance with the law, and that the judiciary is responsible for ensuring they do so, and it would be deeply damaging to both the rule of law and separation of powers if the political branches could remove judges in a flagrantly unlawful manner knowing the judge has no recourse to any judicial body to at least publicly declare, if not remedy, the unlawfulness of the proceedings or the removal.

The European Court of Human Rights held that review by an administrative court of a dismissal decision initially taken by a judicial council and then voted by Parliament was insufficient in so far as it had only the power to declare decisions unlawful, and no power actually to quash or change the decision itself. (This is because the judge would not automatically have been reinstated to his post on the basis of a finding by the reviewing court as it had no power to attach specific legal consequences to a finding that his dismissal was unlawful). The fact that judges of the administrative court were themselves generally subject to the disciplinary jurisdiction of the judicial council

¹⁵² *López Lone and others v. Honduras*, Series C No. 302 (5 October 2015), paras 217-221.

¹⁵³ UNSRIJL, Report on guarantees of judicial independence, *supra* note 45, para. 61.

whose decision the administrative court was reviewing, presented a further obstacle to demonstrating the court's independence and impartiality.¹⁵⁴

Procedural rights of complainants and victims

Under international standards, complainants who allege they have been victims of human rights violations perpetrated by a judge or with a judge's complicity also have procedural rights in relation to proceedings against the judge, as part of their right of access to an effective remedy and access to justice. Articles 3(c) and (d) of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation* refer to the obligation of the State to:

Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation; and

Provide effective remedies to victims, including reparation ...

In this regard, the Principles and Guidelines provide among other things that:

- Victims have the right to "access to relevant information concerning violations and reparation mechanisms" (art. 11);
- States should "take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after

¹⁵⁴ ECtHR, *Oleksandr Volvov v. Ukraine*, App. No. 21722/11 (9 January 2013), paras 124-130.

judicial, administrative, or other proceedings that affect the interests of victims" (art. 12(b));

- Victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations (art. 24).

The earlier *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*¹⁵⁵ also provides, in relation to victims of crime, including criminal abuse of power:

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

¹⁵⁵ UN General Assembly resolution 40/34 (29 November 1985), Annex.

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

Additional detailed standards are set out in the *European Union Directive establishing minimum standards on the rights, support and protection of victims of crime*,¹⁵⁶ including for instance:

- victims must receive written acknowledgement of their complaint, stating its basic elements (art. 5(1));
- victims have the right to receive information about relevant criminal proceedings, including any decision not to proceed further with the case, information about the outcome of the case, and information about the state of the proceedings (except where this may adversely affect the handling of the case) (art. 6);
- victims have the right to be heard and to provide evidence in the criminal proceedings (art. 10);

¹⁵⁶ EU Directive 2012/29/EU of the European Parliament and of the Council (25 October 2012), establishing minimum standards on the rights, support and protection of victims of crime. The Directive creates legal obligations for members of the European Union, and elements of the Directive can be seen as reflecting more global norms, or as best practices for consideration elsewhere. To the extent that some of the articles of the Directive refer specifically to criminal proceedings, these also can be seen as possible best practices for other kinds of proceedings related to the crime (such as disciplinary proceedings).

- victims have the right to review of a decision not to prosecute (art. 11); and
- measures must be available to protect victims from intimidation and retaliation, including, when necessary, the physical protection of victims and their family members (art. 18).

The Inter-American Court of Human Rights has similarly held that as a general rule, "States have the obligation to guarantee the right of the victims or their family to take part in all stages of the respective proceedings, so that they can make proposals, receive information, provide evidence, formulate arguments and, in brief, assert their interests and rights".¹⁵⁷

UNODC has noted, in the specific context of proceedings relating to judicial corruption, the need to ensure protection of complainants and witnesses against intimidation, undue influence and blackmail.¹⁵⁸ The *UN Convention against Corruption* provides, among other things, that:

- States must provide effective protection from potential retaliation or intimidation for witnesses (including

¹⁵⁷ See for instance *González Medina and family v. Dominican Republic*, Series C No. 240 (27 February 2012), para. 251. The Court further stated at para. 253, in the context of the particular case: "Although the Court has considered it admissible that, in certain cases, the measures taken during the preliminary investigation in the criminal proceedings may be kept confidential in order to ensure the effectiveness of the administration of justice, this confidentiality may never be invoked to prevent the victim from having access to the file of a criminal case. The State's powers to avoid the dissemination of the content of the proceedings, if appropriate, must be guaranteed by taking measures that are compatible with the exercise of the victim's procedural rights." See also article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance: "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, *the progress and results of the investigation* and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard." (emphasis added).

¹⁵⁸ UNODC Guide, *supra* note 11, para. 30.

victims) and experts who give testimony, and, as appropriate, for their relatives and other persons close to them (art. 32(1)); and

- States should enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence (art. 32(5)).

The UN High Commissioner for Human Rights, reporting on relevant "best practices" at the request of the Human Rights Council, has highlighted the view that while traditional anti-corruption efforts have tended to focus on the perpetrator, individual criminal responsibility and suppression, this should be complemented by a "human rights-based approach" "focused on the victim, on State responsibility and on prevention and redress".¹⁵⁹

In all cases, the complainant should be informed of the outcome of any accountability processes arising from his or her complaint.¹⁶⁰

Publicity and transparency

A further question arises as to the transparency to the public of judicial accountability procedures.

Article 17 of the *UN Basic Principles on the Independence of the Judiciary* provides in relation to the processing of any "charge or complaint made against a judge in his/her judicial

¹⁵⁹ UN High Commissioner for Human Rights, "Best practices to counter the negative impact of corruption on the enjoyment of all human rights", UN Doc A/HRC/32/22 (15 April 2016), para. 130.

¹⁶⁰ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 155, article 6(a); Istanbul Declaration, Principle 15; UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011), p. 134.

and professional capacity" that "[t]he examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge." The purpose of this provision is to protect the reputation of the individual judge, and that of the judicial system as whole, from unwarranted damage in cases where the charge or complaint is ultimately found to have been without foundation.

This principle of confidentiality (subject to waiver by the judge) necessarily applies to the initial investigation (whether criminal or disciplinary in character), as well as any preliminary procedural step aimed at determining whether the complaint or charge is sufficiently well grounded to warrant a full hearing. However, the principle of confidentiality will not necessarily automatically apply to a disciplinary hearing on the merits, where other important interests in respect of the administration of justice and the rights of the complainant must be taken into consideration. As will be discussed below, there is also a strong presumption of publicity of criminal and civil proceedings before tribunals.

Presumably the principle of confidentiality applies to the bodies responsible for conducting the proceedings but not necessarily to the complainant in so far as he or she may make public statements about the allegations or the fact of having made the complaint. Restricting the right of an alleged victim of human rights violations or corruption to express himself or herself publicly about the violations or the fact of having made the complaint, or punishing the person for having done so, would seem difficult to justify in relation to the person's freedom of expression (see also footnote 157 above).

The UN Special Rapporteur on the independence of judges and lawyers has further noted the potential for corruption proceedings to undermine the credibility and public trust in a judge before the judge has actually been proved to have

committed wrongdoing, and that "investigations preferably should take place confidentiality".¹⁶¹

On the other hand, if the judge facing the proceedings positively requests that the hearing be open to the public, the onus is on the body conducting the hearing not merely to assert the necessity of exclusion of the public (whether to protect the judge's dignity or that of the judiciary as a whole), but to demonstrate that exclusion from each part of the hearing is actually justified in the specific circumstances of that part of the hearing.¹⁶² This onus arises from the recognition in the *Universal Declaration on Human Rights*, the ICCPR, and international and regional human rights treaties and standards, of the right to a "public hearing". Article 14(1) of the ICCPR, for instance, provides in relevant part:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

A number of standards recommend that final decisions in disciplinary proceedings be made public.¹⁶³ Publication, when

¹⁶¹ UNSRIJL, Report on judicial corruption, *supra* note 19, para. 86.

¹⁶² ECtHR, *Olujić v. Croatia*, App. No. 22330/05 (5 February 2009), paras 69-76.

¹⁶³ UNSRIJL, Report on guarantees of judicial independence, *supra* note 45, paras 63, 98; Bangalore Implementation Measures, article 15.7; CCJE Opinion No. 10, *supra* note 78, para. 95; Beijing Statement, article 28; Istanbul Declaration, Principle 15; UNODC Guide, *supra* note 11, para. 72. It is not entirely clear whether the formula used in the Bangalore Implementation Measures, Istanbul Declaration and UNODC Guide ("the final decision in any proceedings instituted against a judge involving a sanction against such

the decision is formal and final, can "inform, not only the whole of the judiciary, but also the general public of the way in which the proceedings have been conducted and to show that the judiciary does not seek to cover up reprehensible actions of its members."¹⁶⁴

Final judgments in all civil or criminal court proceedings relating to judicial violations of human rights or judicial corruption must also be made public as part of the general obligation of States to make all judgments public.¹⁶⁵

Procedures for lifting judicial immunity

As previously explained (see pp. 21-22, 27-30 above), judges should in principle be immune from criminal or civil proceedings relating to their official functions. However, certain exceptions should be made in respect of judicial corruption or judicial complicity in human rights violations.

The possibility of exceptions to immunity raises the question of who should decide whether or not immunity applies in a particular case, and through which procedure.

The UN Special Rapporteur on the independence of judges and lawyers has underscored that "such procedures must be legislated in great detail" and should aim at reinforcing the independence of the judiciary; accordingly, the Rapporteur maintains, the decision to lift immunity must not solely depend

judge") is intended to require publication of all decisions in proceedings in which a sanction *could have* been imposed, or only of decisions actually imposing a sanction (the latter seems more likely); in any event, as the Istanbul Declaration specifies, in all cases the complainant should be informed of the outcome.

¹⁶⁴ CCJE Opinion No. 10, *supra* note 78, para. 95.

¹⁶⁵ E.g. Article 14(1) of the ICCPR states in part that "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

on the discretion of a body of the executive branch, as this "may expose judges to political pressure and jeopardize their independence".¹⁶⁶ Indeed, prosecution of a judge should, the Rapporteur has stated, be permitted "only with the authorization of an appropriate judicial authority".¹⁶⁷

Similarly, the Singhvi Declaration states: "Judges shall be protected from the harassment of personal litigation against them in respect of their judicial functions and shall not be sued or prosecuted except under an authorization of an appropriate judicial authority".¹⁶⁸ The Consultative Council of European Judges has said, "in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge."¹⁶⁹

Opinions published by the Council of Europe Venice Commission have addressed mechanisms for lifting judicial immunity in a variety of countries, though their context-specific character makes it sometimes difficult to extract general principles from the various opinions.

In a 2015 opinion commenting on proposed changes in Ukraine, for instance, the Venice Commission welcomed as "clearly preferable" the shifting of the power to lift judges' immunity from a "political organ" (Parliament) to the judicial council (even while noting that further amendments to the

¹⁶⁶ UNSRIJL, Report on guarantees of judicial independence, *supra* note 45, paras 67, 98.

¹⁶⁷ UNSRIJL, Report on judicial accountability, *supra* note 7, para. 52.

¹⁶⁸ Singhvi Declaration, *supra* note 61, article 20. See also Campeche Declaration, article 12.

¹⁶⁹ CCJE Opinion No. 3, *supra* note 35, para. 54.

composition of the judicial council were needed to secure the full independence of the judicial council).¹⁷⁰

In a March 2013 opinion, the Venice Commission considered amendments to the law of judicial immunities in Moldova, which before the amendments had included a requirement for the independent judicial council's consent before any filing of a criminal proceeding against a judge (or the judge's detention or arrest).¹⁷¹ The amendments removed the requirement for council consent in relation to two specific corruption offences, or when the judge was caught *in flagrante delicto* (in the midst of committing any criminal act), but otherwise left the council's role intact in relation to other crimes. The Venice Commission found, on the one hand, that it was appropriate (though not necessarily mandatory under international standards) to require the consent of the judicial council in relation to ordinary crimes. It affirmed that in countries where individual judges may be in a weak position in relation to prosecutors, such a requirement could be an appropriate means to protect judges against improper interference.¹⁷² Ultimately, however, citing the scale of the problem of judicial corruption in Moldova, the narrow scope of the amendment, and the particular characteristics of corruption offences, the Venice Commission concluded that the removal of the requirement for the judicial council's consent in relation to such offences did "not seem to contradict international standards".¹⁷³

¹⁷⁰ Venice Commission, Opinion on Draft Constitutional Amendments on the Immunity of Members of Parliament and Judges of Ukraine, CDL-AD(2015)013, para. 24.

¹⁷¹ Venice Commission, *Amicus Curiae* brief on the Immunity of Judges, for the Constitutional Court of Moldova, Opinion no. 698/2012, CDL-AD(2013)008 (11 March 2013).

¹⁷² *Ibid* paras 27, 52.

¹⁷³ *Ibid* para. 53. For the ICJ's contemporaneous views on the reform, cited in the Venice Commission opinion, see *Reforming the Judiciary in Moldova: Prospects and Challenges* (2013), pp. 30-32 and 41, concluding, "The removal of the requirement for the SCM's authorisation of any prosecution of a judge, in regard to crimes of judicial corruption, is likely to assist in re-establishing the credibility of the judiciary, and to convince the public of its integrity, by

In an opinion subsequently issued in October 2013 concerning constitutional amendments in Bulgaria, the Venice Commission considered changes to a Constitutional provision that originally provided that the criminal immunity of a judge could be lifted by the Supreme Judicial Council only in the circumstances established by law.¹⁷⁴ The amendments retained the requirement of judicial council approval for criminal accusations, detentions or arrests, but altered the means by which a request for the council's approval could be initiated. The Venice Commission expressed concern that a member of the Council could both request a decision on lifting the immunity, and then participate in the decision itself, concluding: "It would seem preferable that any such move should, as was recommended in relation to the removal of judges, require to be approved by a small expert body composed solely of judges who would give an opinion in relation to whether immunity should be lifted."¹⁷⁵ It further reiterated recommendations it had made to Bulgaria on a previous occasion, to the effect that "an expert body be instituted to investigate cases and to provide its opinion on the lifting of immunity to the Supreme Judicial Council before the latter take a vote on this issue and to ensure that anyone who makes a proposal on the lifting on immunity cannot vote this same proposal."¹⁷⁶

making clear beyond doubt that judges are subject to the Rule of Law in the same way as any other citizen. The consent of the SCM is however, a real safeguard against abuse, which must not be removed without some compensating safeguards or review. Given the concerns with the measure, the first years of its operation, and any prosecutions of judges on corruption charges under the new law, must be carefully monitored and scrutinised".

¹⁷⁴ Venice Commission, Opinion on the Constitutional Amendments Reforming the Judicial System in Bulgaria, Opinion no. 246/2003, 24 October 2003, CDL-AD(2003)16.

¹⁷⁵ Ibid para. 11.

¹⁷⁶ Ibid para. 25.

Temporary suspension during proceedings

The suspension of a judge pending the outcome of investigations and any proceedings may appear warranted, if justified by the facts of a particular case, to prevent the further perpetration of injustice to those involved in cases before the judge. Article 36(a) of the UN Impunity Principles, for instance, states in part that, "Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceeding."

At the same time, any such temporary suspension itself presents a risk to the independence of the judiciary. As such, those proceedings should follow procedures complying with articles 17 to 20 of the *UN Basic Principles on the Independence of Judges and Lawyers* (with the evidentiary thresholds and procedures appropriate to an interim, as opposed to final, measure). A prompt and expeditious right of appeal or other independent review should be available in relation any such temporary suspension.¹⁷⁷

Selective enforcement for improper purposes

The ICJ has observed on numerous occasions, the apparent selective enforcement of judicial accountability for improper purposes. In a context where all or most judges in a country or region are involved in some low-level corruption or misuse of funds, or other forms of potential misconduct whether minor or major, the executive may be aware and tolerate this misconduct unless and until an individual judge exercises his or her independence to issue a judgement unfavourable to the executive. At that point, as a form of reprisal, the executive initiates disciplinary, removal, or criminal proceedings against the individual judge on the basis of conduct that deliberately

¹⁷⁷ UNBP Judiciary, articles 17-20; UNSRIJL, Annual Report 2006, UN Doc E/CN.4/2006/52 (2006), para. 55.

remains unpunished among his or her peers who have not displeased the executive.¹⁷⁸

In such situations, measures which should be strengthening the independence and integrity of the judiciary are instead exploited to further undermine these values.

From the point of view of equal treatment and prevention of misuse of accountability measures in this way, the only available "remedy" for selective enforcement in an individual case may seem to be to allow an individual judge who has in fact engaged in misconduct, to escape responsibility. In relation to human rights violations and corruption that has seriously impacted private individuals, this is obviously a less than satisfactory solution. It is therefore incumbent on those acting within accountability mechanisms to resist all outside influence on their decision about which cases to pursue, and cases must be selected on the basis of objective considerations applied equally to all. Efforts by the executive or other powerful entities to improperly influence should be exposed, condemned and punished. More fundamentally, the problem of selective enforcement only further underscores the crucial need for accountability mechanisms to be independent not only in theory but in practice (and for such mechanisms to be in some way, themselves publicly accountable).

¹⁷⁸ See for instance ICJ, "Bulgaria: ICJ raises concern at dismissal of Judge Todorova" (27 August 2012), <http://www.icj.org/bulgaria-icj-raises-concern-at-dismissal-of-judge-todorova/> (long delays were endemic in the Bulgarian justice system, and the delay in the cases handled by the judge were not unusual for the country; she was suddenly subjected to disciplinary proceedings for her removal on the basis of such delays, after she made public comments highlighting problems in the Bulgarian judicial system and threats to independence of the judiciary. It should be noted that the ICJ has not taken a position on whether the conduct in question could, under other circumstances, justify disciplinary action; the ICJ's concerns in the case have focussed on selectivity, disproportionate sanctions, and possible procedural unfairness).

5. Exceptional circumstances

States have sometimes taken recourse to other accountability mechanisms in highly exceptional circumstances of transition, particularly where an undemocratic or authoritarian regime that has perpetrated widespread and systematic human rights violations through or with complicity of the judiciary, is replaced by a new government which is implementing reforms within a framework aimed at greater respect for human rights and the rule of law. Such mechanisms are often framed by broader constitutional or legal reform with restructuring of a country's justice system and thus changes in jurisdictional arrangements and judicial assignment.

Typical examples of these kinds of mechanisms include truth commissions, vetting, and mass removal with possibility of re-application. The use of such mechanisms in lieu of the normally-applicable mechanisms described in Chapter 3 inherently carries a risk of "abuse and settlement of scores", and the UN Special Rapporteur on the independence of judges and lawyers has emphasized that the State must do everything possible to avoid such manipulation of the processes.¹⁷⁹

The starting point should always be the fundamental presumption that the ordinary mechanisms and procedures of judicial accountability will continue to be respected, even in times of crisis. The *ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*¹⁸⁰ sets out a number of principles that follow from the foundation that, "The role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of

¹⁷⁹ UNSRIJL, Annual Report 2005, section on "Justice in a period of transition", UN Doc E/CN.4/2005/60 (2005), para. 45.

¹⁸⁰ *ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, adopted at the 2008 World Congress of the International Commission of Jurists, in Geneva.

Law in times of crisis, including declared states of emergency" (article 1). Article 5 states:

In times of crisis the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions.

At the same time, the Declaration also affirms the importance of maintaining the integrity of the judicial system in times of crisis (article 12), and that, "Judges in times of crisis are under a special duty to resist actions which would undermine their independence and the Rule of Law" (article 13).¹⁸¹

To justify any exceptional departure from the ordinary mechanisms and procedures for removal or suspension of judges, the State must demonstrate that that the judiciary has been compromised to such an extreme scale and depth that the ordinary mechanisms of judicial accountability cannot possibly secure the independence, impartiality and integrity of judges. Not every situation of transition or emergency can justify such exceptional measures: a particularly high threshold must be applied in order to respect the fundamental principle of the independence of the judiciary, and the specific measures adopted must be strictly necessary and proportionate to the specific factual situation in the country concerned, and appropriately limited in time.¹⁸²

¹⁸¹ See also ICJ, *Legal Commentary to the ICJ Geneva Declaration* (Geneva, 2011), pp. 77-90, 197-227.

¹⁸² See e.g. Human Rights Committee, General Comment No. 29, States of Emergency (article 4 ICCPR), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), paras 4 and 5; GC 32, *supra* note 45, para. 6; *Busyo, Wongodi, Matubuka et al v. Democratic Republic of the Congo*, UN Doc CCPR/C/78/D/933/2000 (2003), para. 5.2; CCJE, Situation report on the judiciary and judges in the Council of Europe member States, CCJE(2015)3, para. 27. It may also be noted that some have argued that in undertaking reform of judicial institutions, including judicial accountability mechanisms, in countries in early stages of transition

Truth commissions

Truth commissions are "official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years."¹⁸³ As was mentioned in the discussion in Chapter 2, their work aims to realize the public interest in and the right of victims to the truth. By establishing a credible official narrative of past violations, truth commissions also seek to prevent the recurrence of similar violations in the future. Such processes must be complementary to, and not a substitute for, other forms of remedy and reparation for victims, including judicial remedies, or for justice by ensuring those responsible for the past violations face criminal proceedings.

A number of final reports of truth commissions have addressed the role of the judiciary in complicity in or perpetration of violations by the former regime.¹⁸⁴ This in itself is relatively uncontroversial: a truth commission would arguably not fully

where there has not yet been a change of judicial culture or composition, imposing or adopting mechanisms that seek immediately to maximize independence and autonomy of the judiciary, sometimes may have the unintended consequence of further entrenching the power of senior judges implicated in the wrongs of the previous regime. For an example of possible measures to guard against such unintended consequences, see pp. 39-40 above regarding ensuring diversity of membership of a judicial council.

¹⁸³ UN Impunity Principles, Definitions (D).

¹⁸⁴ E.g. Report of the El Salvador Commission on Truth, UN Doc S/25500 (1993), pp. 172, 176-179, 181-182; Report of the Chilean National Commission on Truth and Reconciliation (1993), Part Two, Chapter Four "Behaviour of the courts towards the grave human rights violations that occurred between September 11, 1973 and March 11, 1990"; South Africa Truth & Reconciliation Commission, Final Report (1998), Vol 4, Chapter 4 "Institutional Hearing: The Legal Community", Vol 5 Chapter 5, "Findings and Conclusions", pp. 201, 253-254; Sierra Leone Truth & Reconciliation Commission, Witness to Truth: Final Report (2004), Vol. Two, pp. 90-93 "Findings in respect of the judiciary, the rule of law, and the promotion of human rights", pp. 140-143 "Establishing the Rule of Law", recommendations on "Independence of the Judiciary", "Judicial Autonomy", "Judicial Appointments", "Tenure of Office", "Keeping Judges Accountable"; Kenya Truth, Justice and Reconciliation Commission Final Report (2013), Vol. I, p. xiii and Vol. IIA, p. 598, para. 30.

realize its purpose without addressing the extent to which the judiciary was complicit in the violations or independently resisted them, and making recommendations aimed at avoiding recurrence, and so such matters should in principle always be included in the mandates of truth commissions.

More contested is the question whether a truth commission should be able to exercise coercive powers to force judges to provide evidence. Indeed, some question whether judges should be allowed to give evidence even voluntarily, given judicial obligations of confidentiality and the need to preserve institutional independence and impartiality of the judiciary.

These questions were perhaps most sharply posed in relation to the Truth and Reconciliation Commission (TRC) process in South Africa. The TRC had a unit empowered with police powers of search and seizure to facilitate investigations. The TRC also had the power to subpoena unwilling witnesses to appear before it to give testimony.¹⁸⁵

Among its many proceedings, the TRC convened a number of hearings that focussed on particular professions or institutions: one such hearing was the Legal Hearing. The TRC invited all actors within the *apartheid* legal system to make written and oral submissions to the Legal Hearing. A memorandum sent to the TRC by the then-Chief Justice of South Africa not only sought to defend the judicial record under *apartheid*, it also explicitly rejected any suggestion that judges should be held accountable by the TRC for their conduct.¹⁸⁶ A few judges made written submissions, while others were openly disdainful of the invitation. Ultimately, no judge was willing to appear in person before the TRC,¹⁸⁷ and, despite urging from some quarters, the TRC did not issue subpoenas to any judges.¹⁸⁸

¹⁸⁵ David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, 2003), p. 5.

¹⁸⁶ *Ibid* p. 37.

¹⁸⁷ *Ibid* p. 30.

¹⁸⁸ *Ibid* p. 138.

In its final report, the TRC expressed "great regret that judges refused to appear before the Commission on the basis that this would negatively affect their independence and would harm the institution of the judiciary", and disagreed with the judges' assessment in this regard.¹⁸⁹ Their absence did not prevent the TRC from making important findings and recommendations about the role of the judiciary in the violations of the *apartheid* regime, and judicial reforms to prevent recurrence.¹⁹⁰ At the same time, there can be little doubt that the TRC would have had a fuller range of evidence to draw upon, had the judges chosen to take up its invitation to engage fully with its processes. Their absence has been the subject of considerable criticism.

The UN Special Rapporteur on the independence of judges and lawyers, following a mission to South Africa in 2001, however, stated that he regretted the findings of the TRC on the failure of the judges to appear before it when requested to do so, expressing concern for the precedent he felt it would have set to call judges to account before such an institution.¹⁹¹

Hakeem Yusuf, in his work examining judicial accountability and transitional mechanisms in Nigeria, and the possible roles of truth and reconciliation commissions in judicial accountability more globally, condemns the failure of Nigerian truth-seeking processes to engage with the role the judiciary played during the periods of authoritarian military rule in Nigeria. He reviews various potential contributions that a truth commission can make in relation to judicial accountability: credibly documenting the truth of what happened is, of course, a primary aim, but truth commissions can also help to identify particular judicial officials who should be criminally

¹⁸⁹ Vol. 5, Chapter 6, p. 201.

¹⁹⁰ South Africa Truth & Reconciliation Commission, Final Report (1998), Vol 4, Chapter 4 "Institutional Hearing: The Legal Community", Vol. 5 Chapter 5, "Findings and Conclusions", pp. 201, 253-254.

¹⁹¹ SRIJL, Report on Mission to South Africa, UN Doc E/CN.4/2001/65/Add.2 (2001), para. 89.

investigated; can help to ensure that judicial reforms are based on a proper factual basis and analysis and accordingly increase the likelihood of success of such reforms in avoiding continuation or recurrence of abuses; can help to clarify whether vetting processes are warranted and if so what their particular focus should be; and can provide a foundation for other forms of remedy and reparation to victims. Yusuf highlights that undertaking a truth commission process while excluding any deep examination of the role of the judiciary creates a "critical gap" that can undermine the broader project of transition to a democratic, rights-respecting system of government. He concludes that the judiciary, not only in Nigeria but in other such situations of transition, should "be made to give an account of its role in governance in the period of authoritarian rule through a truth-seeking process as part of transitional justice measures." Based on his contextual analysis of Nigeria and other transitional situations, Yusuf argues that the judiciary should not be allowed to avoid engagement with truth commissions in reliance on doctrines of institutional independence or immunity. Indeed, he suggests that a failure to require the judiciary to engage with such processes in transition is ultimately likely to undermine the independence, integrity, and effectiveness of the judiciary over the longer term.¹⁹²

In a 2014 report on a mission to Uruguay, the UN Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, noted the lack of attention that had been given to the apparent implication of judicial officials in serious human rights violations under the military regime of the 1970s and 1980s. He urged "the Government, and the relevant authorities of the State, including the Supreme Court of Justice" to, among other things, "Carry out a process of deep reflection on the responsibility of various State authorities in the commission of human rights violations under the

¹⁹² Hakeem O. Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, 2010), Chapter 2 "Truth, transition, and accountability of the judiciary", pp. 33-40, 45-46, and Conclusion, pp. 183-187.

dictatorship, including the armed forces, the judiciary and medical personnel", and stressed the importance of including civil society organisations in the relevant processes.¹⁹³

Vetting

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has highlighted a number of measures in relation to the judiciary as essential elements of guarantees of non-recurrence in situations of transition where judges have been complicit in abuses by the prior regime, or did not adequately respond to such abuses. In addition to measures to strengthen judicial independence and competencies, such measures should, he says, include screening of judicial personnel through a vetting process (which in particular contexts may also be referred to as part of "lustration").¹⁹⁴ He has defined vetting as follows:

Vetting can, in fact, make an important contribution to transitions, provided that it is meaningfully differentiated from purges. Vetting, as the term has come to be used, far from being the name for massive dismissals on the basis, for example, of mere membership in a party or organization or, even less of ascriptive factors, denotes a formal process to screen the behaviour of individuals and assess their integrity

¹⁹³ UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on Mission to Uruguay, UN Doc A/HRC/27/56/Add.2 (28 August 2014), paras 59 and 75.

¹⁹⁴ Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on Guarantees of Non-Recurrence, UN Doc A/HRC/30/42 (7 September 2015), paras 52-61 and 107-109. Vetting is sometimes referred to as a form of "lustration", particularly in relation to law and processes adopted in the former communist countries of Eastern and Central Europe. "Lustration" seems however to be a broader concept than "vetting", as some of those practices may have been closer to mass removals or purges and it could also be understood to include for instance criminal trials.

on the basis of objective criteria, so as to determine their suitability for continued or prospective public employment.¹⁹⁵

The Special Rapporteur notes that vetting is partly preventive and not punitive in nature, and that it should not be seen as relieving the State of its obligations to bring those responsible to justice through criminal proceedings. Nonetheless, he also points out that where, as a matter of fact, it is unlikely that all those responsible for human rights violations will face criminal punishment, "vetting is a means for addressing part of the 'impunity gap'".¹⁹⁶ At the same time, he warns of the relatively high risk of political manipulation of vetting processes,¹⁹⁷ as well as their possible resource-intensity, recommending that the number of criteria to be applied be limited, and that "vetting should aim primarily at removing those individuals who have committed the most serious violations and at ensuring at least minimum levels of integrity of the personnel concerned."¹⁹⁸

The Special Rapporteur has also emphasized that any vetting procedures must respect the separation of powers, judicial autonomy, due process guarantees and the general principle of the irremovability of judges.¹⁹⁹

¹⁹⁵ Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on Vetting, UN doc A/70/438 (21 October 2015), para. 18.

¹⁹⁶ Ibid paras 19, 23.

¹⁹⁷ Ibid paras 25-27, 58.

¹⁹⁸ Ibid para. 62. See also Federico Andreu-Guzmán, "Due Process and Vetting", Chapter 11 in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, 2007), p. 456: "The conduct targetted by vetting measures should be circumscribed to gross human rights violations and crimes under international law, as well as acts criminalized under domestic criminal legislation."

¹⁹⁹ Report on Guarantees of Non-Recurrence, *supra* note 194, paras 55 and 107. See also, generally, Federico Andreu-Guzmán, *ibid*.

The UN Special Rapporteur on the independence of judges and lawyers has similarly recognized that in certain situations of transition where there has been systematic judicial complicity in violations by a prior undemocratic or authoritarian regime, processes of vetting may represent a valid means for excluding judges who have been the most implicated. The Special Rapporteur stressed the need for individualized case-by-case analysis with procedures in compliance with the *UN Basic Principles on the Independence of the Judiciary*, and always including the possibility to appeal the decision for independent review.²⁰⁰ The Special Rapporteur has also stressed that in all such processes "there exists the possibility of abuse and settlement of scores, and the State must do everything possible to avoid them."²⁰¹

Article 36 of the UN Impunity Principles provides in part as follows:

States must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights. At a minimum, States should undertake the following measures:

- (a) Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination...

²⁰⁰ UNSRIJL, Report on guarantees of judicial independence, *supra* note 45, para. 64, and Annual Report 2006, section on "Justice in a period of transition", UN Doc E/CN.4/2006/52 (2006), paras 54-55.

²⁰¹ UNSRIJL, Annual Report 2005, section on "Justice in a period of transition", UN Doc E/CN.4/2005/60 (2005), para. 45.

The UN Impunity Principles further recognize that the rule of irremovability of judges should not be allowed to be abused to foster or contribute to impunity in situations of transition,²⁰² and Article 30 specifically provides:

The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in conformity with the requirements of the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement.

The Consultative Council of European Judges in a 2015 report referred to "the exercise of lustration which is an extreme measure used historically after a change of the system from a totalitarian regime (e.g. communism) to democracy" and has expressed concern that such practices "have now been applied to other circumstances" in Europe. It added that, "Except in extreme circumstances, these procedures are always in conflict with the principle of permanent tenure of office, which is an important element of the independence of judges."²⁰³

Some authorities, for instance opinions of the Council of Europe Venice Commission, suggest that vetting might also be justified in situations of extremely widespread and deep judicial corruption.²⁰⁴ The Venice Commission has at the same time warned that "such a radical solution would be ill-advised

²⁰² UN Impunity Principles, Principle 22.

²⁰³ CCJE, Situation report on the judiciary and judges in the Council of Europe member States, CCJE(2015)3, para. 27. See note 194 above regarding the term "lustration".

²⁰⁴ See e.g. Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) para. 52, as well as its Interim Opinion, CDL-AD(2015)045, paras 98-100.

in normal conditions, since it creates enormous tensions within the judiciary, destabilises its work, augments public distrust in the judiciary, diverts the judges' attention from their normal tasks, and, as every extraordinary measure, creates a risk of the capture of the judiciary by the political force which controls the process."²⁰⁵

Among the minimum procedural and fairness protections necessary in any process of vetting judges are the following:²⁰⁶

- The right to prior and detailed notice of the allegations or conduct attributed to the person in question;
- The right to respond and defend oneself from the allegations and attribution of conduct, in keeping with the principles of equality of arms and adversarial proceedings, which implies: having the time and facilities needed to prepare one's arguments; access to the documents needed for this purpose; the opportunity to present one's own evidence; and the right to be assisted by counsel;
- The right to the presumption of innocence;
- The right to a public hearing;

²⁰⁵ Venice Commission, Interim Opinion on Albania, CDL-AD(2015)045, para. 98.

²⁰⁶ See Federico Andreu-Guzmán, *supra* note 198, pp. 469-470; UN Secretary-General, *Report on the rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 (2004), paras 52-53; Parliamentary Assembly of the Council of Europe, Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, paras 12 and 13, together with the Council of Europe "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law" (Guidelines included in Doc. 7568, report of the Committee on Legal Affairs and Human Rights), particularly Guideline M. See also Commonwealth Study, *supra* note 53, pp. 61-63. *Ivanovski v. the FYR of Macedonia*, App. No. 29908/11 (21 Jan 2016).

- The right to have the procedure conducted in a sufficiently and reasonably expeditious manner;
- The right to review of a decision to remove or dismiss by a body independent of the organ in charge of the appointment;
- The right to appeal an adverse decision to a court;
- The body in charge of the procedure must satisfy the fullest conditions and guarantees of independence and impartiality, and should in cases of vetting of judges, be judicial, or predominantly judicial, in character, so as to guarantee the principle of separation of powers;
- The judge that is subject to the vetting procedure should have the right to challenge the independence and impartiality of the members or the body in charge of the procedure;
- The stage of investigation and verification of conduct attributed to a public servant should be ensured by a body or officials different from the body that rules on any dismissal;
- The officials in charge of the investigation and the members of the vetting body should be chosen for their impartiality, competence, and personal independence.

It should also in principle be possible for the alleged victims of the acts attributed to the judge, or members of their families, as well as any person who has a legitimate interest, to present their points of view and to produce documents or evidence in the procedure.²⁰⁷

²⁰⁷ Andreu-Guzmán, *supra* note 198, p. 470.

Vetting and other such transitional or exceptional measures should be limited in time. The specific period will depend on a variety of factors including the number of judges to be vetted. As an example, in reviewing proposed Constitutional and legislative amendments to establish an anti-corruption vetting process in Albania, the Council of Europe Venice Commission found an eleven year lifespan for special institutions and processes to vet all judges and prosecutors too long, and recommended the anticipated length of the temporary measures be reduced to three to five years.²⁰⁸ In a case before the Inter-American Court of Human Rights, structural reforms to the Venezuelan judiciary had been on-going for twelve years, with key elements such as disciplinary tribunals remaining unimplemented. In the meantime, the judicial system was staffed through a system of widespread arbitrary appointment and removal of provisional judges. The Court held that the cumulative impact of this situation not only violated the rights of the particular judges affected, it also violated the State's broader obligation to the population as a whole to ensure availability of an independent judiciary. The Court accordingly ordered Venezuela to complete the implementation of a new, rights-compliant regime, within a reasonable time.²⁰⁹

The procedures for appointment of the bodies that will oversee and conduct the vetting are also of key importance, to ensure the credibility, independence and impartiality of the processes and that they are not exploited or compromised by the executive or legislative branches, or other centres of power or corrupting influences.²¹⁰ The principle of separation of powers

²⁰⁸ Regarding time, see, e.g. Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) paras 54-56, see also Interim Opinion, CDL-AD(2015)045, para. 102

²⁰⁹ IAmCtHR, *Chocrón Chocrón v. Venezuela*, Series C No. 227 (1 July 2011), paras 140-142, 162-163.

²¹⁰ UN Independent Expert on Impunity, Diane Orentlicher, Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity, UN

should preclude vetting mechanisms and processes for the judiciary from being conducted or subsumed in a more general vetting body or process: specific procedures and mechanisms must be established for the judiciary.²¹¹ Selection procedures similar to those recommended more generally for selection of members of judicial councils, may be suitable.²¹²

The right of an appeal or independent review by a court should be respected for judges who are dismissed through a vetting process. Even if a specialized court is created to hear appeals generally from judges affected by the vetting procedure, this should not preclude judges from bringing complaints to constitutional courts or Supreme courts about violations of fundamental rights within the vetting or appeal process.²¹³

International observers, including for instance experienced lawyers who are not nationals of the country in question, and are qualified to be judges in their own country, can be given a formal role within the vetting process as a further safeguard against abuses or manipulation of the vetting process for ulterior motives.²¹⁴

The vetting of judges undertaken by Kenya between 2011 and 2016, following a period of crisis and transition and rampant judicial corruption, though it was not free from flaws, included a number of positive elements.

Doc E/CN.4/2004/88 (2004), para. 61 (the Study formed the basis for the Updated UN Impunity Principles).

²¹¹ Andreu-Guzmán, *supra* note 198, pp. 455, 467.

²¹² Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) paras 58-61.

²¹³ Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) paras 62-68, and Interim Opinion, CDL-AD(2015)045, paras 114-117.

²¹⁴ See for example, Venice Commission, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, CDL-AD(2016)009 (2016) paras 69-73, and Interim Opinion, CDL-AD(2015)045, paras 129-135.

Legislation, enacted pursuant to a Constitutional mandate, set out the mechanisms and procedures for vetting of all judges and magistrates in office at the entry into force of the law in 2010, to be overseen by an independent vetting board.²¹⁵

The statute prescribed the criteria for membership. The Board has nine members, six of whom had to be citizens of Kenya (with three of these required to be lawyers), and three of whom had to be non-citizens. Necessary qualifications for Kenyan members included a university degree, fifteen years of distinguished experience in their field of study, and certain integrity requirements. The chairperson and deputy required twenty years experience as a judge, legal academic, judicial officer or other legal practitioner. Members of Parliament, local authorities, executive organs of political parties, or persons who were serving as a judge at the time the statute came into effect, were ineligible. The non-Kenyan members were to be serving or retired judges, having served as a Chief Justice or judge of a superior court in the Commonwealth.

Appointments were made by the President in consultation with the Prime Minister and with the approval of the National Assembly. A public call for applications was issued, and the process managed by the Public Service Commission. A selection committee with a mixture of representatives of the executive, Public Service Commission, Judicial Service Commission and Law Society selected a list of candidates from which the President would choose the appointees. (The overall degree of executive involvement throughout the appointment process may, however, have exceeded what is contemplated by international standards and best practices.) There was a requirement that the membership reflect the regional and ethnic diversity of Kenya and that not more than two-thirds of the members be of the same gender.

²¹⁵ The summary in this and the following paragraphs is based on the Vetting of Judges and Magistrates Act, Laws of Kenya, Chapter 8B; the Kenya Judges and Magistrates Vetting Board, Interim Report September 2011-February 2013; and the published announcements of the Board.

Once the vetting board was established, it made public calls to receive information and complaints from individuals as well as from institutions and NGOs, following which the board made an analysis of the complaints to decide which to dismiss and which to pursue. The Board treated information received as confidential, subject to the necessary degree of disclosure to affected judges.

In its interim report, the Board remarked that despite having statutory powers to compel production of documents and information, it had struggled to obtain key evidence. Many potential witnesses and complainants were reluctant to formally provide information, some explicitly citing fears of retribution. Officials within relevant government offices and court registries, and, for instance, telephone companies (whose phone records were sought), resisted requests for documents and information. The Board struggled to obtain access to personnel files, or in some cases, even court records. Despite their being specifically named in the statute, and proactively invited to provide information, relatively little input was received from professional bodies. The Board noted that its Statute did not provide for any form of witness protection or even limited immunity, which could have encouraged further disclosure on the part of witnesses and complainants.

In cases where the information gave reasons to consider a response was required, the judge was informed accordingly, with a summary of the relevant complaints, and requested to respond and to provide additional background and financial information (usually within ten days from receipt, though extensions were granted by the Board). The file would then be assigned to a panel responsible for interviewing the judge (in private, unless the judge requested a public hearing), and based on all information available it sent findings and recommendations to the vetting board, which was ultimately responsible for taking the decision on the suitability or unsuitability of the judge. The statute set out in detail a wide range of factors for the Board to take into account in reaching its decisions (again, potentially much broader than contemplated by international standards and best practices).

Judges dissatisfied with the Board's determination had the right to request review, and some judges challenged the Board's decisions or jurisdiction before the courts. Decisions of the Board were required by the statute to be made public. The Board published the last of its decisions in March 2016 and, at the time of writing of this Guide, is still drafting its final report.

Mass removal and re-application

While vetting processes are being conducted, judges remain in office and are only subject to removal after an individualized assessment and procedure. An even more severe measure that has occasionally been implemented by States is to simultaneously remove all or a large number of judges, leaving their posts vacant, and require them to re-apply for the former posts (usually alongside new applicants).

Whatever its stated purposes, any process that gives the appearance of imposing collective, rather than individualized, penalties for wrongful conduct requires particularly close scrutiny for its consistency with the rule of law and human rights. Mass removal and re-application is not appropriate for typical situations of transition. If such a technique is acceptable at all, it could only be in the most extreme cases, such as total and deliberate collusion of the judiciary, in its entirety, with a profoundly undemocratic or authoritarian regime, with the judiciary being directly responsible for very grave impacts on the human rights of a significant proportion of the population (or a minority targeted in a discriminatory way).

The Special Rapporteur on the independence of judges and lawyers has suggested that only in the most extreme situations where mass removal and re-application appears to be "the only course of action left" to deal with widespread and systematic involvement of the judiciary in the violations of a previous regime, might this option be a valid alternative to individualized vetting of judges. If mass removal and re-application is used, the Special Rapporteur has said, it should only be undertaken "through an independent mechanism made

up of qualified persons of recognized moral authority and, if possible, with the support of an international institution supervising the proceedings."²¹⁶

In a 2003 decision on a case against the Democratic Republic of the Congo (DRC), the UN Human Rights Committee found mass dismissal of some 315 judges, by Presidential decree, to violate the ICCPR.²¹⁷

The law in the DRC provided that the President could dismiss a judge only upon proposal of the Supreme Council of the Judiciary (CSM), following an individualized and fair process. The CSM was not involved in the process dismissing the 315 judges, who had no prior notice of the President's decree. The only stated basis for dismissal in the decree was that, "reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions", that "the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning", and that the President was acting on the basis of "urgency, necessity and appropriateness". The Government claimed that the President had issued the Decree "in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity" in which "it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of

²¹⁶ UNSRIJL, Annual Report 2006, section on "Justice in a period of transition", UN Doc E/CN.4/2006/52 (2006), para. 54. See also UN Impunity Principles, article 30.

²¹⁷ *Busyo, Wongodi, Matubuka et al v. Democratic Republic of the Congo*, UN Doc CCPR/C/78/D/933/2000 (2003). The DRC chose not to make submissions to the Committee on the case.

the judges concerned." The affected judges were further unable to challenge the Decree before the Supreme Court, as would have been possible for individual dismissals, since the Court ruled the Decree implemented a general political policy and so was beyond control by administrative law.

The Human Rights Committee rejected any contention that the circumstances referred to in the Decree could justify a departure from the ordinary procedures for dismissal, noting that the government had failed to demonstrate that the measures were "strictly required". The failure to follow the ordinary process in the absence of such a detailed demonstrable justification, as well as evidence of bias on the part of the Supreme Court even had the ordinary process theoretically been followed (the President of the Court publicly, before the case had been heard, supported the dismissals), and the denial of any effective appeal or review by the Supreme Court, led the Committee to find that the dismissals violated various provisions of the ICCPR.²¹⁸

Also relevant is article 16.3 of the Bangalore Implementation Measures:

The abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, all existing members of that court should be re-appointed to its replacement or appointed to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned should be provided with full compensation for loss of office.²¹⁹

²¹⁸ Ibid, para. 5.2.

²¹⁹ Beijing Statement, article 30, is virtually identical. See also Human Rights Committee, *Pastukhov v. Belarus* UN Doc CCPR/C/78/D/814/1998 (2003). The forthcoming judgment of the ECtHR (Grand Chamber) in *Baka v. Hungary*, App. No. 20261/12 may also be relevant (judgment announced for 23 June 2016, but not available at the time of writing).

The High Representative for Bosnia and Herzegovina (an international functionary created in 1995 to oversee the Dayton Agreement which had ended the war) in 2002 declared all judicial posts in the country vacant, and all incumbent judges were required to reapply for appointment (in competition with non-incumbent applicants) in processes conducted by newly-formed High Judicial and Prosecutorial Councils. A Supreme Court judge was refused re-appointment and, after unsuccessfully requesting reconsideration by the judicial council, challenged the decision in a complaint to the UN Human Rights Committee.²²⁰ While there had been complaints about several of his judgments, the final decision was taken on the basis of a complex rating system, which took into account a number of factors, including the following appointment criteria which were prescribed by law:

- professional knowledge and performance;
- proven capacity through academic written works and activities within professional associations;
- proven professional ability based on previous career results, including participation in training;
- work capability and capacity for analysing legal problems;
- ability to perform the duties of office impartially, conscientiously, diligently, decisively and responsibly;
- communication abilities;
- relations with colleagues, conduct out of office, integrity and reputation; and
- Managerial experience and qualifications.

²²⁰ See *Raosavljevic v. Bosnia and Herzegovina*, UN Doc CCPR/C/89/D/1219/2003 (2007).

At the Committee, the judge alleged among other things that his non-renewal constituted interference with his independence as a judge, and that the absence of an appeal from its decision violated his right to an effective remedy. The Committee rejected the first argument as inadmissible on the basis that the judge had failed to substantiate that his non-appointment was exclusively based on the controversial judgments, and not on the other objective criteria in the ranking system. As he had failed to establish any violation in the judicial council process, the Committee found his complaint of lack of appeal also inadmissible.²²¹

In a case that came before the Inter-American Court of Human Rights, during a period of political instability in Ecuador the Congress removed all judges of the Supreme Court, the Electoral Tribunal and the Constitutional Tribunal, within a period of 14 days.²²² The judges were not provided with any opportunity to challenge the decision, collectively or individually, whether prior to or after the mass dismissal. The only grounds presented were "accusations of alleged acts of corruption or the alleged politicization of the judges" which were presented "in a broad and generic manner". The Inter-American Court found the Congressional resolution to have been "the result of a political alliance that was intended to create a Supreme Court sympathetic to the political majority existing at that time and to impede criminal proceedings against the acting president and a former president." It emphasized that the dismissal resolution was not based "on an exclusive assessment of specific factual evidence". The Inter-

²²¹ Ibid, paras 7.6-7.8. The question of lack of appeal had apparently been argued by the complainant, and so was treated by the Committee, only in relation to "right to effective remedy" under article 2 of the ICCPR, and not guarantees of judicial independence more generally; as such the Committee's inadmissibility decision cannot necessarily be taken to address the right to appeal under other articles, or other standards, such as the UNBP Judiciary.

²²² See IAmCtHR, *Supreme Court of Justice (Quintana Coello et al) v. Ecuador*, Series C No. 266 (23 August 2013), paras 156-180; and *Constitutional Tribunal (Camba Campos et al) v. Ecuador*, Series C No. 268 (28 August 2013), paras 170-222.

American Court therefore found the "mass and arbitrary" dismissal of the judges to constitute "an attack on judicial independence". For all these reasons, the Court held, the measure violated the American Convention on Human Rights.

6. Particular challenges in relation to developing countries

Introduction

As was mentioned in the Introduction to this Guide, all countries, whatever their circumstances, need to have effective judicial accountability mechanisms, consistent with the requirements of judicial independence. Judicial human rights violations and judicial corruption are present in countries in all regions of the world. At the same time, implementation of judicial accountability mechanisms in any given country, to be effective, should be sensitive to that country's particular circumstances.

This chapter presents some examples of the particular challenges faced in relation to judicial accountability in certain developing countries, and various strategies States have adopted in response.²²³ Perhaps unsurprisingly, these examples also further illustrate some of the challenges in holding the judiciary accountable for human rights violations or corruption already described in earlier sections. They illustrate how widespread judicial corruption is not an isolated phenomenon but rather occurs in the context of broader corruption, usually marked by weak accountability mechanisms across the board.

The examples presented in this Chapter are intended to facilitate the sharing of knowledge between practitioners in

²²³ The research on which this Chapter is based focussed primarily on Afghanistan, Bangladesh, Central African Republic, Chad, Kenya, Myanmar, Nepal, Pakistan and Rwanda. In this Guide, the use of the term "developing country" is not intended to imply value statements about the direction that States may choose to take in terms of economic, social or other policies, nor to suggest that all countries with broadly similar economic conditions are necessarily similar in other ways. In this Guide, the term is used in a limited sense to refer to the countries classified as such in economic terms by, for instance, the United Nations, *World Economic Situation and Prospects 2016*, Statistical Annex, Country Classifications, Table C.

different developing countries. They may also be of interest to practitioners in other countries, who are considering the transnational aspects of corruption (a considerable part of corruption that impacts in developing countries is facilitated, if not initiated, by actors in developed countries) or who are involved in providing development assistance in justice reform processes.²²⁴

The context for judicial accountability

For many developing countries, a more general failure to effectively respond to criminal activity fosters an environment where crime and corruption are widespread; this eventually results in the population coming to view corruption a part of the system, and contributes to a chronic distrust in the judicial system. Judicial staff are frequently not sufficiently qualified and are poorly paid, and staffing levels may not be nearly enough to deal with the number of cases before the courts. Courts may operate in rundown buildings and without basic equipment. These factors create enormous backlogs that reinforce the general belief that the judicial system is not only corrupt but also inefficient.

Judicial corruption tends to have a particularly deep and widespread impact in developing countries. It frequently either constitutes or leads directly to human rights violations, and it undermines the rule of law. Where corruption takes the form of bribes, it effectively discriminates against the poor in that it deprives them of legal services or access to justice because they cannot afford to pay bribes. Moreover, where judicial corruption is widespread in a country it can have effects across and beyond the legal system as a whole. A corrupt judiciary lacks the independence and impartiality required to administer

²²⁴ See also, among others, United Nations Development Programme (UNDP), *A Transparent and Accountable Judiciary to Deliver Justice for All* (2016), and Linn Hamberg, *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transitional Countries* (Routledge, 2014).

justice fairly. This reduces the ability of most individuals to rely on the legal system to enforce their rights and to hold public and private institutions accountable. In the long run, a lack of public trust in the judiciary can lead most of the population to shun State institutions and instead have recourse to alternative means of resolving disputes or seeking justice. This in turn can have negative impacts on stability, on the fair distribution of the benefits (and costs) of development, on democracy, on the protection of the human rights, and on the rule of law.²²⁵

Indeed, many come to see widespread corruption as a 'normal' part of everyday life and part of a country's culture.²²⁶ The public, lawyers, judges and other actors may simply adjust their individual expectations and cost-calculations, rather than investing energy and resources in establishing and implementing effective measures to end the problem.

Pervasive judicial corruption often affects developing countries that suffer more generally from corruption impacting all aspects of governance.²²⁷ In such circumstances, corruption in the justice system is not limited to the judiciary but also affects other actors in the legal system - court clerks, lawyers, prosecutors - with the corruption of one group fostering corruption in the others. Clerks may extort money to provide information to the accused or to process basic steps in a lawsuit; lawyers may in turn elicit bribes from defendants and plaintiffs, a portion of which goes to pay judges to delay or

²²⁵ SRIJL, Report on Judicial Corruption, *supra* note 19, paras 29-39.

²²⁶ Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 4; UNODC, *Corruption in Afghanistan: Bribery as reported by the victims*, January 2010, <http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf>, pp. 4 and 7; ICJ, *Right to Counsel: The Independence of Lawyers in Myanmar* (2013).

²²⁷ Of the examples under consideration in this chapter, for instance, most ranked in the top 30 of the world's most corrupted countries according to the 2014 Transparency International Corruption Perception Index: Afghanistan ranked 12th, Myanmar 21st, Chad 22nd, Central African Republic 24th, Kenya and Bangladesh ranked 25th, Pakistan and Nepal 29th, and Rwanda 49th. See <http://www.transparency.org/cpi2014/results>.

accelerate cases or appeals.²²⁸ The spread of corruption among actors within the system may happen as a kind of ripple effect, or it may involve deliberate collusion.²²⁹ As such, in any particular national context, corruption of judges cannot be fully understood or addressed in isolation. Efforts to combat judicial corruption should take into account the overall situation and be implemented alongside measures targeting corruption among other actors in the legal system, and beyond.

Corruption in the justice sector in developing countries, as in other countries, primarily takes two forms. The first is the bribing of judges by private parties (which may involve cash, or land or goods, or services, including sexual services). The second is political interference, usually involving pressure from executive or the legislative authorities to force judges to take decisions favourable to those powers.²³⁰ In practice, the experiences in the countries examined for this chapter tend to suggest that the two forms frequently, but do not always, co-exist.

Although bribes and political interference may be the most common forms of interference with judicial independence, they

²²⁸ Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, pp. 181 and 236; The New York Times, "Myanmar's Opening Up Hasn't Loosened Graft in Courts", 24 October 2014.

²²⁹ In Bangladesh, for example, there are allegations of collusion between the Government, prosecutors and judges (ICJ, "Bangladesh: execution of Muhammad Kamaruzzaman undermines justice", 11 April 2015; U4 Anti-Corruption Resource Centre, "Overview of corruption and anti-corruption in Bangladesh, Expert Answer 353", 7 November 2012, p. 7); in Central African Republic, there were reports of collusion between lawyers and judges (ICJ, "Attacks on Justice 2005: Central African Republic", <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Central-African-Republic-attacks-on-justice-2005.pdf>); and in Nepal there were reports of collusion between lawyers and court employees (Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 238).

²³⁰ SRIJL, UN Doc E/CN.4/2004/60 (31 December 2003), para. 39; SRIJL, Report on judicial corruption, *supra* note 19, paras 21-25. See also Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. ii.

are by no means the only ones. In some countries other forms of undue influence on judges also occur. Among the most extreme is when the lives and physical integrity of judges and their families are directly threatened. This has been the case in Afghanistan where judges are threatened, intimidated and killed by the Taliban.²³¹ This level of interference with judges' personal safety necessarily affects their judicial decisions and how they perform their tasks. Judges who allow personal relationships or connections to particular economic, political, social, cultural or religious organisations and networks to influence their decision-making without disclosing the influence may also be engaging in a form of corruption of justice.

In Pakistan, interference with judicial independence can be seen in both these forms, particularly in cases related to blasphemy.²³² Often, members of extremist religious groups use threats and intimidation to coerce or pressure judges to decide against the accused, even in the absence of any evidence supporting conviction. On other occasions, judges display bias against the defendants, giving the strong appearance that a judge's personal religious views have determined the outcome of the proceedings.²³³

Heavy caseloads, unethical practices, absent or ineffective accountability mechanisms, insecurity of tenure and lack of capacity building have all been put forward as factors that contribute to judicial corruption. But the most commonly

²³¹ UN Assistance Mission in Afghanistan (UNAMA), "Afghan civilian casualties from ground combat rise in 2015", 12 April 2015, <http://www.un.org/apps/news/story.asp?NewsID=50553> ; "UN in Afghanistan condemns Taliban's deadly attack on judges and prosecutors", 11 May 2015, <http://www.un.org/apps/news/story.asp?NewsID=50816>.

²³² Under section 295-C of the Pakistan Penal Code, 1860, "defaming the Prophet Muhammad" carries a mandatory death penalty.

²³³ ICJ, *On Trial: the implementation of Pakistan's blasphemy laws* (November 2015), Section 5.3.

identified cause in developing countries is low salaries.²³⁴ This factor is a particular challenge for governments and legislatures in developing countries, where increases to judges' salaries may present a significant budgetary and public-perception challenge especially when considered relative to the immediate impact of budget increases or decreases in other sectors.

In the countries particularly studied for this Chapter, low salaries are often cited as a source of discontentment among judges. In Afghanistan, 90 per cent of judges say that they are dissatisfied with their salary²³⁵ and in Bangladesh the salary of a district judge has been considered inadequate to support the lifestyle of a judge.²³⁶ In Myanmar lawyers specifically identified low salaries as one of the causes of judicial corruption.²³⁷ In Nepal, a former Nepalese prime minister said that officials who receive a meagre salary are compelled to look for alternatives to compensate their costs.²³⁸ In the Central African Republic in 2009 there were severe delays in payment of judicial salaries.²³⁹

²³⁴ See for example "When are judges likely to be corrupt?" by Stefan Voigt in Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 296.

²³⁵ UNODC, "Corruption in Afghanistan: Bribery as reported by the victims", January 2010, p. 27, <http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf>.

²³⁶ Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, pp. 180-181.

²³⁷ ICJ, "Myanmar: Financial Independence of the Judiciary", 18 March 2014, <http://www.icj.org/cijl/countryprofiles/myanmar-introduction/judges/financial-independence/>

²³⁸ Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 238.

²³⁹ United States Department of State, "2009 Country Reports on Human Rights Practices - Central African Republic", 11 March 2010. In 2015, Avocats Sans Frontières reported that the budget of the justice sector represented only 0.15% of the overall public budget: "The state of justice in the Central African Republic", 27 August 2015: <http://www.asf.be/blog/2015/08/27/the-state-of-justice-in-the-central-african-republic/>.

On the other hand, judges in developing countries can sometimes be amongst the most economically secure people in their country, especially relative to other public officials and the general public, and may leverage their power not to redress insufficient salaries but rather to further consolidate already considerable relative wealth.²⁴⁰

The nexus of political interference and private corruption can have a mutually reinforcing and amplifying effect. Senior judges and members of the legislative and executive branches may have little incentive to take effective measures against judicial bribery and corruption more generally, if the broader context of bribery and corruption facilitates those same actors' interference with judges' decisions in cases involving the government's interests. A large percentage of judges may be involved in corrupt practices in a country, particularly if it is generally seen as "normal" for judges to supplement their income with other advantages gained through corruption from private parties, but this makes all such judges vulnerable to any unspoken threat that the authorities will expose individual judges who issue decisions contrary to the vested interests of the other branches of government or political leaders. Indeed, the ICJ has often encountered governments that selectively prosecute or impeach on grounds of corruption, only those judges who have fallen out of favour with the political leadership, while taking no action to disrupt widespread similar behaviour by other judges who do not challenge the government's aims or interests (see also pp. 80-81 above).

Interference may begin at the very early stages of the judicial career by ensuring that the persons appointed as judges are

²⁴⁰ In 2010, for instance, UNODC reported that half of all large bribes (\$1000 or more) in Afghanistan are received by enforcement officers, especially judges and prosecutors, and that the amounts paid in bribes differ by the category of public official: on the lower end (less than US\$100 per bribe) are teachers, doctors and nurses, whereas judges, prosecutors, members of the Government and customs officers are at the higher end of the scale (average bribes higher than US\$200). See UNODC, "Corruption in Afghanistan: Bribery as reported by the victims", January 2010, *supra* note 235, pp. 4, 9-10.

individuals who are loyal or sympathetic to the policies of the rulers. Controlling the selection and appointment process of judges allows power holders to choose candidates who favour government's policies and to instil in judges a feeling of debt that needs to be repaid. In return for being appointed, judges are expected to act in line with the objectives of the political authorities. One way to control the appointment process is to set up a legal framework that in itself facilitates political appointments. There is a particular risk of conditions conducive to such corruption if Parliament and Executive have a wide exclusive discretion to make judicial appointments, or if any procedures for independent appointments are compromised or ignored.

Where formal constitutional safeguards exist for judicial independence, such as tenure for life, practical measures such as involuntary transfers may be inappropriately manipulated by the authorities to mete out retribution against judges whose decisions are contrary to the vested interests of those in power.²⁴¹

Impunity as a key cause of judicial corruption

Raising salaries and other measures aimed at lessening incentives to judicial corruption is not in itself enough to guarantee a corruption-free judiciary. Research shows that another major cause of judicial corruption is impunity: judges are more likely to take bribes if they know they will not be punished *due either to the failure of existing accountability mechanisms or lack of political will to hold them accountable.*

²⁴¹ In Bangladesh, prosecutors threatened a judge with transfer if the judge did not grant bail to an accused. The judge sought protection from the Supreme Court, which has powers to punish those who interfere with a judge's function, but instead of protecting the judge the Supreme Court agreed to the transfer (Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 181). See also pp. 26-27 above.

In fact, with the exception of Kenya²⁴² and Rwanda,²⁴³ the countries studied for this chapter have not actually implemented specific measures to combat judicial corruption despite the fact their judiciaries are seen to be among the most corrupted in the world. These include countries that have strong legislation criminalizing corruption by public officials, including judges, and have accountability mechanisms in place, but fail to apply the law in practice.

Afghanistan

Afghanistan's *Anti-Bribery and Corruption Law* criminalizes corruption of public officials, including judges. Afghanistan also has two accountability mechanisms for judges: the Supreme Court, which is responsible for discipline of the judiciary, and the High Office of Oversight and Anti-Corruption, an anti-corruption body responsible for receiving complaints against judges and other officials. Despite this legal and institutional framework, there appears to have been no documented example of any judges in fact being held accountable for corruption in Afghanistan.

The culture of impunity of judges in Afghanistan has been attributed to a lack of political will to combat corruption and the inefficiency of the judicial hierarchy and the Supreme Court. The lack of effective official State measures to fight impunity has led to a pilot project for non-governmental organizations to arrange and conduct trial monitoring. The

²⁴² In 2002/2003, Kenya removed numerous judges under a so-called "radical surgery" reform programme to combat judicial corruption, which adopted controversial methods inconsistent with the standards and best practices set out in this Guide. Following criticisms of the "radical surgery" programme, both in terms of its lack of fairness or objectivity, and its perceived lack of success in addressing the problems with the judiciary, Kenya undertook a vetting process (see pp. 96-99 above) that, while not free of flaws, was designed to be more extensive, structured, systematic, objective, independent and fair than the "radical surgery" had been.

²⁴³ Rwanda dismissed all members of the judiciary in 2004, citing alleged corruption, in an exercise that was clearly inconsistent with the standards and best practices set out in this Guide.

reasoning behind this relatively low-cost attempt to monitor courts throughout the country is that greater scrutiny at the lower level will result in a decrease of corruption.²⁴⁴

Nepal

In Nepal, under the Constitution of 2015 Supreme Court judges (including the Chief Justice) are subject to impeachment by Parliament (with suspension during the proceedings, and removal if impeached) for, among other grounds, "misbehaviour".²⁴⁵ The Judicial Council is responsible for pursuing cases of corruption or abuse of office against judges other than those of the Supreme Court.²⁴⁶ Nepal also has a Commission for the Investigation of Abuse of Authority with responsibility more generally to investigate allegations of corruption by those holding public office, which can bring proceedings against judges only after they have been removed from their office by Parliament or the Judicial Council,²⁴⁷ but it has apparently never attempted to exercise its powers vis-à-vis the judiciary. Judicial corruption is criminalized under the Anti-Corruption Act²⁴⁸, but such acts have not historically been punished as a result of poor enforcement of existing legislation and lack of political will to combat corruption.²⁴⁹ The Nepalese Parliament's power to impeach a Supreme Court justice for corruption, whether under the 2015 Constitution or its predecessors, has not been used in practice, and the Judicial Council has failed to act against many lower courts' judges.

²⁴⁴ UNDP, *A Transparent and Accountable Judiciary to Deliver Justice for All* (2016), pp. 41-46.

²⁴⁵ 2015 Constitution of Nepal, article 101.

²⁴⁶ 2015 Constitution of Nepal, article 153(6).

²⁴⁷ 2015 Constitution of Nepal, article 239(2).

²⁴⁸ Article 2(b) and article 3(1) of the Anti-Corruption Act

²⁴⁹ Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 236.

Bangladesh

In Bangladesh, the Constitution allows Parliament to impeach and remove judges “for proved misbehaviour” and the Penal Code criminalizes corruption by judges.²⁵⁰ In 2004 an Anti-Corruption Commission (ACC) was created to investigate and frame charges against individuals.²⁵¹ By 2007, it was reported that although the ACC had framed charges against hundreds of individuals, it had only achieved a few convictions, either due to interference by the executive or lack of merit of the cases.²⁵² Disciplinary actions taken against judicial misconduct were considered inadequate up to 2011, although the judiciary reportedly remained extremely corrupt; judges not only accepted bribes but were also highly influenced by the executive in terms of appointments, administration and decision-making.²⁵³

Pakistan

In Pakistan, the Constitution authorizes the Supreme Judicial Council (SJC) to carry out inquiries into the capacity and conduct of Supreme Court and High Court judges. The Council consists of the Chief Justice of Pakistan, the two most senior judges of the Supreme Court and the two most senior chief justices of the high courts. Proceedings are initiated before the Council if there is information from “any source”, or if it is the opinion of the President of Pakistan that a judge from the

²⁵⁰ Articles 96(5)(b) and 96(6) of the Constitution, which had allowed removal of judges for gross misconduct following an inquiry by the judicial council, was repealed by the Sixteenth Amendment to the Constitution. The Amendment now provides that judges can only be removed by order of the President passed pursuant to a resolution of the Parliament supported by at least two thirds of the members of Parliament. The Bangladeshi Penal Code criminalizes corruption by public servants, including judges (articles 21(3) and 165).

²⁵¹ Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 182.

²⁵² Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 182.

²⁵³ U4 Anti-Corruption Resource Centre, “Overview of corruption and anti-corruption in Bangladesh, Expert Answer 353”, 7 Nov 2012, p. 7.

superior judiciary is incapable of performing his or her duties due to mental or physical incapacity or that he or she may be guilty of misconduct. An adjudication of guilt by the SJC is the only method by which a Judge of the Supreme Court or of a high court can be removed from office.²⁵⁴

However, the Supreme Judicial Council in Pakistan has been barely functional since its establishment. Furthermore, the proceedings before the SJC are not open to the public, and neither the number of references before the Council, nor the time taken to decide those references, is disclosed. This has contributed to a public perception that the SJC is an ineffective and redundant body. The Chief Justice of Pakistan has also stated that because of the SJC's inactivity, 90 per cent of the complaints before it have become fruitless, as the judges against whom the complaints were made subsequently retired.²⁵⁵

Effectiveness of accountability mechanisms

In the same way that judicial corruption rarely occurs in isolation, impunity of judges often is merely one part of a broader fabric of impunity in a country. Lack of accountability of judges usually takes place in a context of general impunity i.e. in settings in which as a whole there is no accountability for human rights violations, or crimes or misconduct. Developing countries undergoing transition or reform after a period of widespread or systematic violations of human rights are particularly vulnerable to widespread impunity, because the courts tend to be particularly weak, if they are at all operational, when it comes to guaranteeing people's rights. One such case is the Central African Republic, where a severe

²⁵⁴ Article 209, Constitution of Pakistan, 1973.

²⁵⁵ Malik Asad, "90pc of references before SJC 'outdated', says chief justice", Dawn News, 1 November 2015, <http://www.dawn.com/news/1216756> .

lack of funds for the justice system over a number of years has reportedly led to widespread corruption and impunity.²⁵⁶

If in some countries on-going conflict and severe lack of funds can help explain the lack of accountability of judges for corruption, other developing countries are more stable and have accountability mechanisms. No matter how flawed or under-resourced, those mechanisms have sufficient capabilities that should in principle allow them to achieve some degree of accountability. Apart from the judicial system itself, such mechanisms typically include anti-corruption commissions and disciplinary bodies for judges. The question in such situations is therefore not whether accountability mechanisms exist but whether they are operational and are effective.

The countries studied for this chapter all criminalize judicial corruption in their penal codes or in separate anti-corruption laws, so the possibility of the judicial system holding judges accountable exists, at least theoretically, in all of them.²⁵⁷ However, with the exception of Kenya²⁵⁸ and Rwanda²⁵⁹, there

²⁵⁶ *Avocats Sans Frontières*, "The state of justice in the Central African Republic", *supra* note 239.

²⁵⁷ Articles 3(1), 12 and 13 of the Afghanistan Anti-Bribery Law criminalize corruption by government officers, including the judiciary and the Prosecution's office, and articles 254 and 255 of the Penal Code criminalize corruption by "officials of public services"; articles 21(3) and 161 of the Bangladesh Penal Code criminalize corruption by public servants, including judges; article 315 of the Central African Republic Penal Code criminalizes corruption by "all public servants, administrative or judicial"; article 39(1) of the Kenya 2003 Anti-Corruption and Economic Crimes Act criminalizes corruption; article 3(e) of the Myanmar Anti-Corruption Law criminalizes bribery by employees "working in the legislation, executive and judiciary"; article 3 of the Nepal Anti-Corruption Act criminalizes corruption by public officials, while article 639 criminalizes corruption by judges and judicial system actors, and judicial corruption is also criminalized by article 13 of Law No. 23/2003 Related to the Punishment of Corruption and Related Offences.

²⁵⁸ See e.g. pp. 120-121 below, regarding the work of the Kenya Ethics and Anti-Corruption Commission.

²⁵⁹ *The New Times*, "Judiciary sacks 10 over corruption", 12 February 2013: <http://www.newtimes.co.rw/section/article/2013-02-12/62815/>.

are no public reports of judges being prosecuted for corruption in any of these countries at the time of writing.

In addition to the possibility of pursuing criminal proceedings against corrupt judges, these countries each have a specific mechanism for dealing with discipline of judges. This is most commonly a judicial council (though these are not necessarily fully in line with the standards and best practices set out in this Guide)²⁶⁰ but can also be another organ such as the Supreme Court²⁶¹ or an ad hoc tribunal.²⁶² Myanmar and Nepal also provide for parliamentary impeachment of the Chief Justice and judges of the Supreme Court.²⁶³ The authority of these bodies ranges from making recommendations for consideration by other bodies, to effectively having the power directly to decide on appointments, transfers and promotions and discipline of judges.

The degree of specification of grounds for sanctions varies. Some of the judicial councils' constituent legal provisions give them responsibility for cases of "misconduct"²⁶⁴ or

²⁶⁰ Article 22 of the Central African Republic Constitution provides for a judicial council which is headed by the President; article 146 of the Chad Constitution says that the President presides over the Superior Council of Magistrature and that the Minister of Justice is the First Vice-President, and article 149 says that "in disciplinary matters, the presidency of the Superior Council of Magistrature is assured by the President of the Supreme Court"; article 153 of the 2015 Nepal Constitution mandates the judicial council to conduct discipline for all judges other than Supreme Court justices (who are directly impeachable by Parliament); article 209 of the Pakistan Constitution provides for a Supreme Council of the Judiciary; as does article 157 of the Rwanda Constitution.

²⁶¹ In Afghanistan, the organ responsible for discipline of judges is the Supreme Court (article 132 of the Afghan Constitution and article 24(8) of the Afghanistan Anti-Bribery Law).

²⁶² Article 62(4) of the Kenya Constitution requires an ad hoc tribunal to decide on the removal of a High Court judge, and article 69 gives the Judicial Service Commission the power to exercise disciplinary control "over persons holding or acting in those offices".

²⁶³ Articles 302-311 of the Myanmar Constitution; article 101 of the 2015 Nepal Constitution. In 2014, the Sixteenth Amendment to the Bangladesh Constitution removed responsibility for impeachment of judges from the judicial council and gave it to the Parliament.

²⁶⁴ Article 96(5)(b) of the Bangladesh Constitution.

“misbehaviour”²⁶⁵ or even more generally simply for “discipline”.²⁶⁶ In countries where misconduct or misbehaviour results from serious violations of codes of conduct, the consequences can go as far as removal of judges from their position.²⁶⁷ The Afghanistan Constitution gives the disciplinary body, the Supreme Court, not only authority for the accountability of judges in general but also specifically provides that that the Supreme Court is responsible for considering cases of judges accused of crimes and deciding whether they should be dismissed in addition to any other punishment due under the law.²⁶⁸ Despite the powers granted to these disciplinary bodies, there is no public information available showing that these are being used for holding judges accountable for misconduct, be it corruption or other misfeasance, on a consistent and systematic basis.

In some of the countries examined for this Chapter, anti-corruption bodies with a more general mandate have the power to investigate and sometimes even to prosecute individuals for corruption. In 2014 the Bangladesh Anti-Corruption Commission (ACC) reported having almost 3000 cases of corruption of all types under trial, but only 73 convictions.²⁶⁹ In Afghanistan, the High Office of Oversight and Anti-Corruption (HOOAC) can receive complaints against judges²⁷⁰ but there are no reports of the HOOAC having acted

²⁶⁵ Article 105(2) and 105(10) of the Myanmar Constitution.

²⁶⁶ Article 149 of the Chad Constitution. Similarly, article 69(1) of the Kenya Constitution says that the Judicial Service Commission has “the power to exercise disciplinary control”.

²⁶⁷ This is the case in Kenya (Commonwealth Study, *supra* note 53, p. 85) and Nepal (ICJ, *Nepal’s Draft Constitution: procedural and substantive concerns*, (2015), p. 57).

²⁶⁸ Articles 132 and 133 of the Afghanistan Constitution; article 24(8) of the Afghanistan Anti-Bribery and Corruption Law.

²⁶⁹ ACC 2014 Annual report, p. 71 available at http://www.acc.org.bd/assets/acc_annual_report_-_2014.pdf. These numbers refer to overall number of cases of corruption. The ACC report does not provide specific numbers on judicial corruption.

²⁷⁰ <http://anti-corruption.gov.af/en/page/3374>.

on any such complaint.²⁷¹ The President of Chad created a Commission to investigate and prosecute judicial personnel (CEPPAJ) in 2002 in the name of addressing judicial corruption, but it was dissolved in 2005 following criticism from the judiciary. CEPPAJ had jurisdiction over court personnel but not over judges, whose discipline falls under the judicial council.²⁷² Finally, the Nepal Commission for the Investigation of Abuse of Authority is responsible for conducting investigations of improper conduct and corruption by public officials, potentially including judges (but only once they have been removed from office by Parliamentary impeachment or by the Judicial Council).²⁷³ It has the power to investigate and prosecute.²⁷⁴ It is not known to have pursued any cases against former judges for wrongdoing during their time in judicial office.

In other countries, anti-corruption bodies report more activity to combat judicial corruption. The Kenya Ethics and Anti-Corruption Commission, which has the power to investigate corruption committed by public and private persons²⁷⁵ in recent years has reported on investigation of judicial

²⁷¹ Afghanistan's 2013 report under the UNCAC refers to the establishment of an "Office on Monitoring and control of Judicial Affairs", with a mandate including to "prevent and fight against corruption", and that a Special Anti-Corruption Prosecution Office with the authority of investigation and prosecution of cases has been vested to the Attorney General's Office. However, no public information seems to be available on the work of these offices. See Afghanistan 2013 UNCAC self-assessment report (p. 5) https://www.unodc.org/documents/treaties/UNCAC/SA-Report/2013_11_28_Afghanistan_SACL.pdf.

²⁷² ICJ, "Attacks on Justice 2005 - Republic of Chad", <http://www.refworld.org/pdfid/48a928120.pdf>. Among the countries considered for this Chapter, only one has not had an anti-corruption commission, Central African Republic. Myanmar has an Anti-Corruption Commission responsible for "forming and assigning the duties of preliminary scrutinizing team and investigation teams" (Art 16(a) Myanmar Anti-Corruption Law) but no information has been found on the results of the work of the Commission.

²⁷³ Article 239(2) of the 2015 Nepal Constitution.

²⁷⁴ Article 25 of the Nepal Anti-Corruption Act.

²⁷⁵ Articles 7(1), 38(1) and 39(3) of the Kenya 2003 Anti-Corruption and Economic Crimes Act

corruption including alleged cases of bribes,²⁷⁶ irregular purchases of houses for judges,²⁷⁷ payment of rents by the judiciary in excess of the rental agreement,²⁷⁸ and illegal procurement of judges' residences by judicial officers.²⁷⁹

Other measures to combat judicial corruption

In 2002, in the name of responding to corruption and loss of public trust in the judicial system, Kenya carried out a reform programme that became known as "radical surgery". The programme, which was undertaken by ad hoc tribunals, led to the removal of a former Chief Justice and the suspension of 23 other judges on the grounds of corruption. Many of the judges resigned or retired. The manner in which the processes were carried out was criticized by experts and stakeholders on many aspects, including for not respecting the Constitutional guarantee of security of tenure. Other criticisms included alleged failures to inform the judges of the proceedings, and violation of the obligation of keeping proceedings confidential at the initial stage.²⁸⁰ More recently, following the adoption of the 2010 Constitution, Kenya initiated a process to vet all judges, through institutions and procedures that, while not without their own flaws, were designed to be more independent, systematic, transparent and fair, and to apply a

²⁷⁶ A magistrate accused of seeking a bribe, via a court clerk, to rule in favour of an accused was due to go to trial in 2016. See Ethics and Anti-Corruption Commission, "Magistrate nabbed over sh 20,000 bribe", 21 August 2015: <http://www.eacc.go.ke/whatsnew.asp?id=669> , and The Star, "Kericho magistrate denies bribe" (1 March 2016), http://www.the-star.co.ke/news/2016/03/01/kericho-magistrate-denies-bribe_c1304073 .

²⁷⁷ The Kenya Ethics and Anti-corruption commission completed preliminary enquiries in 2013/2014 into an "irregular acquisition of the official residence of the Chief Justice in the amount of 310 million". See Ethics and Anti-Corruption Commission, Annual Report 2013/2014, p. 4.

²⁷⁸ Ethics and Anti-Corruption Commission, Annual Report 2013/2014, p. 5.

²⁷⁹ Ethics and Anti-Corruption Commission, Annual Report 2013/2014, p. 10.

²⁸⁰ Transparency International, "'Radical surgery' in Kenya's judiciary", in *Global Corruption Report 2007, Corruption in Judicial Systems*, pp. 221-225

wider and more objective range of criteria (see pp. 96-99 above).

Rwanda created a specific legal framework to be implemented by the Ombudsman. In 2004, all 503 members of the judiciary were dismissed for corruption and incompetence, giving rise to concern that the removals appeared not to have in fact been individually justified but may have instead been politically motivated.²⁸¹ Similar concerns arose when the country's Chief Justice announced in 2013 that in the previous two years ten judicial staff, including judges and court clerks, had been dismissed for corruption.²⁸²

The experience of several developing countries with truth commission processes was noted in Chapter 5 (see pp. 85-89 above). In Kenya, for example, the Truth, Justice and Reconciliation Commission found that among the factors contributing to the commission of past gross violations of human rights was the use of repressive laws and policies by Presidents Jomo Kenyatta and Daniel Moi, as well as the consolidation of powers in the President coupled with the deliberate erosion of the independence of the judiciary.²⁸³ The Commission found that, rather than upholding the rule of law in the face of these laws and policies, the judiciary had been an accomplice to torture and other violations; it had admitted as evidence information obtained through torture, it had unfairly conducted trials at night, and it had wrongfully refused bail to detainees.²⁸⁴

²⁸¹ U4 "Expert Answer, Overview of Corruption in Rwanda", July 2011: <http://www.u4.no/publications/overview-of-corruption-in-rwanda/> .

²⁸² The New Times (Rwanda), "Judiciary sacks 10 over corruption", *supra* note 259.

²⁸³ Kenya Truth, Justice and Reconciliation Commission Report, Vol. I, p. ix. One of the measures adopted that affected the independence of the judiciary was the removal of security of tenure of judicial officers in 1988 (Commission report Vol. IIA, p. 598, para. 31).

²⁸⁴ Kenya Truth, Justice and Reconciliation Commission Report, Vol I, p. xiii and Vol. IIA, p. 598, para. 30.

In 2015, the Chief Justice of Pakistan, Anwar Zaheer Jamali, declared the new judicial year to have a focus on self-accountability through the reactivation of the Supreme Judicial Council. It remains to be seen whether the Chief Justice's pronouncement yields any practical results.

The Supreme Court of Myanmar, in its Strategic Plan for 2015-2016, has cited "judicial independence and accountability" as one of its key areas for strategic development. As an initial step the Supreme Court is developing a Judicial Code of Conduct that aims to incorporate international standards and best practices to help increase the judiciary's independence and accountability.²⁸⁵

Corruption in rural courts and resort to alternative justice systems

Within countries with widespread judicial corruption, lower-level courts, and by implication rural areas, tend to be most deeply affected.²⁸⁶ The physical distance of these areas from central authorities brings with it an isolation that makes it difficult for victims to report corruption and for relevant centralized authorities to investigate and respond. Afghanistan, for instance, reports its highest levels of judicial corruption in rural areas, with justice institutions barely functional in some parts of the country. The on-going conflict

²⁸⁵ The ICJ is supporting the Supreme Court in its development of the Code of Conduct. See ICJ, "Myanmar's Supreme Court engages in High Level Dialogue with the ICJ on Drafting and Implementing a New Judicial Code of Ethics", 25 November 2015, <http://www.icj.org/myanmars-supreme-court-engages-in-high-level-dialogue-with-the-icj-on-drafting-and-implementing-a-new-judicial-code-of-ethics/> .

²⁸⁶ See for example, UNODC, "Corruption in Afghanistan: Bribery as reported by the victims" *supra* note 235, p. 26; Transparency International, *Global Corruption Report 2007, Corruption in Judicial Systems*, p. 238 on Nepal; The New Times (Rwanda), "Judiciary sacks 10 over corruption", *supra* note 259; ICJ, Myanmar Country Profile, <http://www.icj.org/cijlcountryprofiles/myanmar-introduction/judges/independence-and-impartiality-judicial-integrity-and-accountability/> .

combined with the sheer size of the territory makes it extremely difficult to promote accountability in those areas. The high levels of judicial corruption have been identified as one of the reasons why many in local populations opt for alternative justice systems in the form of tribal councils and village and religious leaders.²⁸⁷

If judicial corruption particularly afflicts rural areas, to speak of judicial corruption in these places does at least imply the presence of some form of State judicial institutions in those areas. This is not however always the case. When the formal justice system is not present at all or too weak to provide basic services, alternative systems will proliferate even more quickly. In the case of the Central African Republic, the aftermath of the 2002/2003 conflict exacerbated the weaknesses of the formal judicial system, including lack of courts in some cities, leading to a tribalization of the judiciary and the establishment of parallel courts.²⁸⁸ Despite some improvements, by 2011 citizens continued to have difficulties accessing the formal justice system, including by having to travel up to 50 kilometres to the nearest courthouse. As a result, people continued to rely on traditional justice at the family and village level.²⁸⁹

In parallel, many factors contribute to a “rule of law vacuum” experienced by certain developing countries in transition, some directly linked to the judiciary and others that are not

²⁸⁷ Institute for War and Peace Reporting (IWPR), "How fair is Traditional Justice in Afghanistan?", <https://iwpr.net/global-voices/how-fair-traditional-justice-afghanistan> ; USIP, *Traditional Dispute Resolution and Stability in Afghanistan*, <http://www.usip.org/publications/traditional-dispute-resolution-and-stability-in-afghanistan> .

²⁸⁸ ICJ, "Attacks on Justice 2005: Central African Republic", *supra* note 229.

²⁸⁹ United States Department of State, "2009 Country Reports on Human Rights Practices - Central African Republic", 11 March 2010; United States Department of State, "2012 Country Reports on Human Rights Practices - Central African Republic", 19 April 2013.

directly linked but that still affect the judicial system.²⁹⁰ In such circumstances, three main obstacles frequently prevent courts from functioning shortly after the conflict: lack of adequate buildings, shortage of qualified staff, and threats and assaults against judicial staff. In such circumstances, people may consider that informal mechanisms are the only realistic option for access to justice.

Public lack of trust in the judiciary due to corruption or perceived partiality, or a lack of practical access to formal justice processes, often lead people to look to informal justice mechanisms (i.e. traditional or customary courts). While informal justice systems tend to be more accessible and less costly to rural populations in practical terms, and may be less subject to popular perception as corrupt (in the narrow sense of involving payment of cash bribes to strangers), there is also considerable potential tension with international standards on judicial integrity and accountability, particularly as concerns human rights and the rule of law. The methods of appointment (often hereditary) or removal (if any) in informal justice systems, and their procedures, often clash with international standards of independence, impartiality, merit and non-discrimination, and fairness, as well as concerns about discrimination against women, children and other further marginalized sub-groups.²⁹¹

²⁹⁰ The term "rule of law vacuum" was used by the UN Secretary-General in his report "The rule of law and transitional justice in conflict and post-conflict societies", UN Doc S/2004/616 (23 August 2004), paras 27-33.

²⁹¹ Deutsche Welle, "Why many Afghans distrust their judicial system" (2 May 2015), <http://www.dw.com/en/why-many-afghans-distrust-their-judicial-system/a-18235687> ; USIP, "The Politics of Dispute Resolution and Continued Instability in Afghanistan" (August 2011), p. 8, <http://www.usip.org/sites/default/files/sr285.pdf> ; IWPR, "How fair is Traditional Justice in Afghanistan?", *supra* note 287. See, more generally, International Development Law Organisation (IDLO), *Customary Justice: from Program Design to Impact Evaluation* (2011) and *Working with Customary Justice Systems: Post-Conflict and Fragile States* (2011); and UN Women, UNICEF and UNDP, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2012).

Annex 1a: UN Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Annex 1b: Bangalore Principles of Judicial Conduct

Adopted by the Judicial Group on Strengthening Judicial Integrity in 2001, as revised at the Round Table Meeting of Chief Justices held at The Hague, November 25-26, 2002, and subsequently endorsed by ECOSOC resolution 2006/23.

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge,

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WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law,

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions,

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice,

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law,

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society,

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system,

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country,

AND WHEREAS the Basic Principles on the Independence of the Judiciary are designed to secure and promote the independence of the judiciary and are addressed primarily to States,

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

Value 1 Independence

Principle

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application

1.1. A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.

1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently.

1.5. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

Value 2 Impartiality

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

2.1. A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3. A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

- (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

- (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or
- (c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3 Integrity

Principle

Integrity is essential to the proper discharge of the judicial office.

Application

3.1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2. The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4 Propriety

Principle

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application

4.1. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's

court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4. A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5. A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7. A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8. A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgement as a judge.

4.9. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10. Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11. Subject to the proper performance of judicial duties, a judge may:

- (a) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;
- (b) Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

- (c) Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or
- (d) Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12. A judge shall not practise law while the holder of judicial office.

4.13. A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14. A judge and members of the judge's family shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16. Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5 Equality

Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application

5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3. A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5. A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6 Competence and diligence

Principle

Competence and diligence are prerequisites to the due performance of judicial office.

Application

6.1. The judicial duties of a judge take precedence over all other activities.

6.2. A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3. A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities that should be made available, under judicial control, to judges.

6.4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6. A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Implementation

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

Definitions

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Court staff" includes the personal staff of the judge, including law clerks;

"Judge" means any person exercising judicial power, however designated;

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household;

"Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

Annex 1c: Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (excerpts)

Adopted by the Judicial Integrity Group at its Meeting held in Lusaka, Zambia, 21 and 22 January 2010

Part One: Responsibilities of the Judiciary

1. Formulation of a Statement of Principles of Judicial Conduct

1.1 The judiciary should adopt a statement of principles of judicial conduct, taking into consideration the Bangalore Principles of Judicial Conduct.

1.2 The judiciary should ensure that such statement of principles of judicial conduct is disseminated among judges and in the community.

1.3 The judiciary should ensure that judicial ethics, based on such statement of principles of judicial conduct, are an integral element in the initial and continuing training of judges.

2. Application and Enforcement of Principles of Judicial Conduct

2.1 The judiciary should consider establishing a judicial ethics advisory committee of sitting and/or retired judges to advise its members on the propriety of their contemplated or proposed future conduct.¹

¹ (Footnote numbered "2" in original). In many jurisdictions in which such committees have been established a judge may request an advisory opinion about the propriety of his or her own conduct. The committee may also issue opinions on its own initiative on matters of interest to the judiciary. Opinions address contemplated or proposed future conduct and not past or current conduct unless such conduct relates to future conduct or is continuing. Formal opinions set forth the facts upon which the opinion is based and provide advice only with regard to those facts. They cite the rules, cases and other authorities that bear upon the advice rendered and quote the applicable principles of judicial conduct. The original formal opinion is sent to the person requesting the opinion, while an edited version that omits the names of persons, courts, places and any other information that might tend to identify the person making the request is sent to the judiciary, bar associations and law school

2.2 The judiciary should consider establishing a credible, independent judicial ethics review committee to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary, where no provision exists for the reference of such complaints to a court. The committee may consist of a majority of judges, but should preferably include sufficient lay representation to attract the confidence of the community. The committee should ensure, in accordance with law, that protection is accorded to complainants and witnesses, and that due process is secured to the judge against whom a complaint is made, with confidentiality in the preliminary stages of an inquiry if that is requested by the judge. To enable the committee to confer such privilege upon witnesses, etc., it may be necessary for the law to afford absolute or qualified privilege to the proceedings of the committee. The committee may refer sufficiently serious complaints to the body responsible for exercising disciplinary control over the judge.²

...

9. Immunity of Judges

9.1 A judge should be criminally liable under the general law for an offence of general application committed by him or her and cannot therefore claim immunity from ordinary criminal process.

libraries. All opinions are advisory only, and are not binding, but compliance with an advisory opinion may be considered to be evidence of good faith.

² (numbered "3" in original). In many jurisdictions in which such committees have been established, complaints into pending cases are not entertained, unless it is a complaint of undue delay. A complaint is required to be in writing and signed, and include the name of the judge, a detailed description of the alleged unethical conduct, the names of any witnesses, and the complainant's address and telephone number. The judge is not notified of a complaint unless the committee determines that an ethics violation may have occurred. The identity of the person making the complaint is not disclosed to the judge unless the complainant consents. It may be necessary, however, for a complainant to testify as a witness in the event of a hearing. All matters before the committee are confidential. If it is determined that there may have been an ethics violation, the committee usually handles the matter informally by some form of counselling with the judge. If the committee issues a formal charge against the judge, it may conduct a hearing and, if it finds the charge to be well-founded, may reprimand the judge privately, or place the judge on a period of supervision subject to terms and conditions. Charges that the committee deems sufficiently serious to require the retirement, public censure or removal of the judge are referred to the body responsible for exercising disciplinary control over the judge.

9.2 A judge should enjoy personal immunity from civil suits for conduct in the exercise of a judicial function.

9.3 The remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals or judicial review.

9.4 The remedy for injury incurred by reason of negligence or misuse of authority by a judge should lie only against the State without recourse by the State against the judge.

9.5 Since judicial independence does not render a judge free from public accountability, and legitimate public criticism of judicial performance is a means of ensuring accountability subject to law, a judge should generally avoid the use of the criminal law and contempt proceedings to restrict such criticism of the courts.

Part Two: Responsibilities of the State

10. Constitutional Guarantee of Judicial Independence

10.1 The principle of judicial independence requires the State to provide guarantees through constitutional or other means:

- (a) that the judiciary shall be independent of the executive and the legislature, and that no power shall be exercised as to interfere with the judicial process;
- (b) that everyone has the right to be tried with due expedition and without undue delay by the ordinary courts or tribunals established by law subject to appeal to, or review by, the courts;
- (c) that no special ad hoc tribunals shall be established to displace the normal jurisdiction otherwise vested in the courts;
- (d) that, in the decision-making process, judges are able to act without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and exercise unfettered freedom to decide cases impartially, in accordance with their conscience and the application of the law to the facts as they find them;

- (e) that the judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, and that no organ other than the court may decide conclusively its own jurisdiction and competence, as defined by law;
- (f) that the executive shall refrain from any act or omission that pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court decision;
- (g) that a person exercising executive or legislative power shall not exercise, or attempt to exercise, any form of pressure on judges, whether overt or covert;
- (h) that legislative or executive powers that may affect judges in their office, their remuneration, conditions of service or their resources, shall not be used with the object or consequence of threatening or bringing pressure upon a particular judge or judges;
- (i) that the State shall ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them; and
- (j) that allegations of misconduct against a judge shall not be discussed in the legislature except on a substantive motion for the removal or censure of a judge of which prior notice has been given.

...

13. Tenure of Judges

...

13.2 A judge should have a constitutionally guaranteed tenure until a mandatory retirement age or the expiry of a fixed term of office. A fixed term of office should not ordinarily be renewable unless procedures exist to ensure that the decision regarding re-appointment is made according to objective criteria and on merit.

...

13.5 Except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an independent body, a judge should not

be transferred from one jurisdiction, function or location to another without his or her consent.³

...

15. Discipline of Judges

15.1 Disciplinary proceedings against a judge may be commenced only for serious misconduct.⁴ The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed.

15.2 A person who alleges that he or she has suffered a wrong by reason of a judge's serious misconduct should have the right to complain to the person or body responsible for initiating disciplinary action.

15.3 A specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person should refer the matter to the disciplinary authority.⁵

15.4 The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and executive, and which is composed of serving or retired judges but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive.

³ (numbered "8" in original) The transfer of judges has been addressed in several international instruments since transfer can be used to punish an independent and courageous judge, and to deter others from following his or her example.

⁴ (numbered "9" in original) Conduct that gives rise to disciplinary sanctions must be distinguished from a failure to observe professional standards. Professional standards represent best practice, which judges should aim to develop and towards which all judges should aspire. They should not be equated with conduct justifying disciplinary proceedings. However, the breach of professional standards may be of considerable relevance, where such breach is alleged to constitute conduct sufficient to justify and require disciplinary sanction.

⁵ (numbered "10" in original) Unless there is such a filter, judges could find themselves facing disciplinary proceedings brought at the instance of disappointed litigants.

15.5 All disciplinary proceedings should be determined by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence.

15.6 There should be an appeal from the disciplinary authority to a court.

15.7 The final decision in any proceedings instituted against a judge involving a sanction against such judge, whether held in camera or in public, should be published.

15.8 Each jurisdiction should identify the sanctions permissible under its own disciplinary system, and ensure that such sanctions are, both in accordance with principle and in application, proportionate.

16. Removal of Judges from Office

16.1 A judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary.

16.2 Where the legislature is vested with the power of removal of a judge, such power should be exercised only after a recommendation to that effect of the independent authority vested with power to discipline judges.

16.3 The abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, all existing members of that court should be re-appointed to its replacement or appointed to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned should be provided with full compensation for loss of office.

...

Definitions

In this statement of implementation measures, the following meanings shall be attributed to the words used:

...

“judge” means any person exercising judicial power, however designated, and includes a magistrate and a member of an independent tribunal.

Annex 2: Selected sources

Treaties

African Charter on Human and Peoples' Rights (adopted 1981, entered into force 1986), 1520 UNTS 217.

American Convention on Human Rights (adopted 1969, entered into force 1978), 1144 UNTS 123.

Arab Charter on Human Rights (adopted 2004, entered into force 2008).

Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (adopted 1984, entered into force 1987), 1465 UNTS 85.

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1950, entry into force 1953), ETS 5.

Geneva Convention (III) relative to the Treatment of Prisoners of War (1949), 75 UNTS 135.

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287.

Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 1977, entered into force 1979), 1125 UNTS 3.

Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 1977, entered into force 1978), 1125 UNTS 609.

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 2006, entered into force 2010), 2716 UNTS 2.

International Covenant on Civil and Political Rights (adopted 1966, entered into force 1976), 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 1966, entered into force 1976), 993 UNTS 3.

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