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## VISITING EXPERTS' PAPERS

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### UNITED NATIONS ACTIVITIES AGAINST CORRUPTION IN THE JUDICIARY, PROSECUTION AND LAW ENFORCEMENT AUTHORITIES

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#### I. INTRODUCTION<sup>1</sup>

Corruption is generally defined as ‘the abuse of entrusted power for private gain’. This means both financial or material gain and non-material gain, such as the furtherance of political or professional ambitions. Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

The fight against corruption depends upon the judicial system. The expanding arsenal of anti-corruption weapons includes new national and international laws against corruption that rely on fair and impartial judicial systems for enforcement. Where judicial corruption occurs, the damage can be pervasive and extremely difficult to reverse. Judicial corruption undermines citizens’ morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance. A government that functions on behalf of all its citizens requires not only the rule of law, but an independent and effective judiciary to enforce it to the satisfaction of all parties.

The professionals that make up the judicial system can use their skills, knowledge and influence to privilege truth and benefit the general public, and the vast majority do. But they can also abuse these qualities, using them to enrich themselves or to improve their careers and influence. For whatever reason and whether petty or gross, corruption in the judiciary ensures that corruption remains beyond the law in every other field of government and economic activity in which it may have taken root. Indeed, without an independent judiciary, graft effectively becomes the new ‘rule of law’.

Careful law-making at the national and international level since then has better defined and proscribed corrupt behaviour in many countries. Nevertheless, an enormous challenge for the anti-corruption movement is to ensure that anti-corruption laws are enforced and that legal redress for injustice can be secured through a functioning judicial system. The failure of judges and the broader judiciary to meet these legitimate expectations provides a fertile breeding ground for corruption. In such environments even the best anti-corruption laws become meaningless.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party or another. In countries where there are no verbatim transcripts, judges may inaccurately summarize court proceedings or distort witness testimony before delivering a verdict that has been purchased by one of the parties in the case. Junior court personnel may ‘lose’ a file – for a price.

Other parts of the justice system may influence judicial corruption. Criminal cases can be corrupted before they reach the courts if police tamper with evidence that supports a criminal indictment, or prosecutors fail to apply uniform criteria to evidence generated by the police. In countries where the prosecution has a monopoly on bringing prosecutions before the courts, a corrupt prosecutor can effectively block off any avenue for legal redress.

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<sup>1</sup> Transparency International, Global Corruption Report 2007, Executive Summary : Key Judicial Corruption Problems, p.xxi , Cambridge University Press.

Judicial corruption includes the misuse of the scarce public funds that most governments are willing to allocate to justice, which is rarely a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption extends from pre-trial activities through the trial proceedings and settlement to the ultimate enforcement of decisions by court bailiffs.

## **II. UNITED NATIONS CONVENTION AGAINST CORRUPTION AND UNITED NATIONS STANDARDS AND NORMS**

### **A. United Nations Convention against Corruption<sup>2</sup>**

#### **1. History**

In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25, annex I) was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the United Nations Office on Drugs and Crime. The text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention against Corruption, held between 21 January 2002 and 1 October 2003.

The Convention approved by the Ad Hoc Committee was adopted by the General Assembly by resolution 58/4 of 31 October 2003. The General Assembly, in its resolution 57/169 of 18 December 2002, accepted the offer of the Government of Mexico to host a high-level political signing conference in Merida for the purpose of signing the United Nations Convention against Corruption.

The Convention needs 30 ratifications to come into force. In accordance with article 68 (1) of resolution 58/4, the United Nations Convention against Corruption entered into force on 14 December 2005. A Conference of the States Parties is established to review implementation and facilitate activities required by the Convention. Until now, 140 countries signed the Convention. 138 countries have become parties to the Convention.

#### **2. Implementation of the Convention**

Corruption is a complex social, political and economic phenomenon that affects all countries. The United Nations Convention against Corruption is the first legally binding international anti-corruption instrument. The Convention provides a unique opportunity for mounting a global response to a global problem.

The UNODC Global Programme against Corruption is a catalyst and a resource to help States effectively implement the provisions of the Convention. It assists States with vulnerable developing or transitional economies by promoting anti-corruption measures in the public and private sector, including in high-level financial and political circles.

The United Nations Convention against Corruption provides an opportunity to develop a global language about corruption and a coherent implementation strategy. Although a multitude of international anti-corruption agreements exist, their implementation has been uneven and only moderately successful. This Convention gives the global community the opportunity to address both of those weaknesses and begin establishing an effective set of benchmarks for effective anti-corruption strategies.

The primary goal of the anti-corruption work done by UNODC is to provide States with practical assistance and build the technical capacity needed to implement the Convention. Efforts will concentrate on supporting Member States in the development of anti-corruption policies and institutions, including preventive anti-corruption frameworks.

#### **3. Convention Highlights**

##### **(i) Prevention**

Corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire

<sup>2</sup> <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants. Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption.

*(ii) Criminalization*

The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption.

*(iii) International Co-operation*

Countries agreed to co-operate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

*(iv) Asset Recovery*

In a major breakthrough, countries agreed on asset-recovery, which is stated explicitly as a fundamental principle of the Convention. This is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.

Several provisions specify how cooperation and assistance will be rendered. In particular, in the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it; in the case of proceeds of any other offence covered by the Convention, the property would be returned providing the proof of ownership or recognition of the damage caused to a requesting state; in all other cases, priority consideration would be given to the return of confiscated property to the requesting state, to the return of such property to the prior legitimate owners or to compensation of the victims.

Effective asset-recovery provisions will support the efforts of countries to redress the worst effects of corruption while sending at the same time, a message to corrupt officials that there will be no place to hide their illicit assets. Accordingly, article 51 provides for the return of assets to countries of origin as a fundamental principle of this Convention. Article 43 obliges state parties to extend the widest possible cooperation to each other in the investigation and prosecution of offences defined in the Convention. With regard to asset recovery in particular, the article provides *inter alia* that "In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the

offence for which assistance is sought is a criminal offence under the laws of both States Parties”.

#### 4. Provisions related to Corruption in Judiciary and Prosecution Authorities

Article 11, paragraph 1 of the Convention states that “[b]earing 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.”

Paragraph 2 states that “[m]easures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.”

Article 11 is based on the universal recognition that the judiciary and prosecutorial authorities should have a crucial role in preventing corruption and their independence and integrity should be secured in order to prevent corruption.

### **B. Basic Principles on the Independence of the Judiciary<sup>3</sup>**

In the Charter of the United Nations in 1945, when the founding nations said they were determined to “establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained”.

The Universal Declaration of Human Rights, adopted three years later, enumerated certain essentials to the achievement of individual dignity and social order. It affirms that everyone is entitled to the equal protection of the law; that the accused must be presumed innocent until proven guilty, in a fair and public hearing, by an “independent and impartial” tribunal; and that no one should suffer arbitrary arrest, detention or exile.

A treaty adopted in 1966, the International Covenant on Civil and Political Rights, enshrines judicial rights as a matter of law, not just principle. These include the right of every human being to a fair trial, immunity from arbitrary arrest and immunity from retroactive sentences. The Covenant and two Optional Protocols -- along with the 1966 Covenant on Economic, Social and Cultural Rights and the Universal Declaration -- together make up the five-part omnibus document known as the International Bill of Human Rights.

In addition to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the United Nations has set forth a set of standards known as the Basic Principles on the Independence of the Judiciary.

Adopted in 1985, the Principles envisage judges with full authority to act, free from pressures and threats, adequately paid and equipped to carry out their duties. Although this set of standards does not carry the force of law, it offers models for lawmakers everywhere, who are encouraged to write them into their national constitutions and to enact them into law.

Many countries have formally adopted the Principles and report regularly to the United Nations on their progress and problems, sometimes seeking help with legal education or the monitoring of procedures.

#### 1. 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.

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<sup>3</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August – 6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.1), chap. I, sect. D.2, annex. and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

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.
2. 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.
3. 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.
4. 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.
5. 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.

6. 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.

**C. Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary<sup>4</sup>**

These describe the process to implement Basic Principles on the Independence of Judiciary, and includes steps to enhance this implementation, and establishes a periodic reporting procedure to ensure compliance with the Principles.

1. Procedure 1

1. All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.

2. Procedure 2

No judge shall be appointed or elected for purposes, or be required to perform services, that are inconsistent with the Basic Principles. No judge shall accept judicial office on the basis of an appointment or election, or perform services, that are inconsistent with the Basic Principles.

3. Procedure 3

The Basic Principles shall apply to all judges, including, as appropriate, lay judges, where they exist.

4. Procedure 4

States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective State. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In particular, States shall make the text of the Basic Principles available to all members of the judiciary.

5. Procedure 5

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to caseloads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

6. Procedure 6

States shall promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence.

7. Procedure 7

In accordance with Economic and Social Council resolution 1986/10, section V, Member States shall inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of

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<sup>4</sup> Economic and Social Council resolution 1989/60 of 24 May 1989, annex.

the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced and difficulties and obstacles encountered in their implementation at the national level and the assistance that might be needed from the international community.

8. Procedure 8

The Secretary-General shall prepare independent quinquennial reports to the Committee on Crime Prevention and Control on progress made with respect to the implementation of the Basic Principles, on the basis of the information received from Governments under procedure 7, as well as other information available within the United Nations system, including information on the technical cooperation and training provided by institutes, experts and regional and interregional advisers. In the preparation of those reports the Secretary-General shall also enlist the cooperation of specialized agencies and the relevant intergovernmental organizations and non-governmental organizations, in particular professional associations of judges and lawyers, in consultative status with the Economic and Social Council, and take into account the information provided by such agencies and organizations.

9. Procedure 9

The Secretary-General shall disseminate the Basic Principles, the present implementing procedures and the periodic reports on their implementation referred to in procedures 7 and 8, in as many languages as possible, and make them available to all States and intergovernmental and non-governmental organizations concerned, in order to ensure the widest circulation of those documents.

10. Procedure 10

The Secretary-General shall ensure the widest possible reference to and use of the text of the Basic Principles and the present implementing procedures by the United Nations in all its relevant programmes and the inclusion of the Basic Principles as soon as possible in the United Nations publication entitled Human Rights: a Compilation of International Instruments, in accordance with Economic and Social Council resolution 1986/10, section V.

11. Procedure 11

As a part of its technical cooperation programme, the United Nations, in particular the Department of Technical Cooperation for Development of the Secretariat and the United Nations Development Programme, shall:

- (a) Assist Governments, at their request, in setting up and strengthening independent and effective judicial systems;
- (b) Make available to Governments requesting them, the service of experts and regional and interregional advisers on judicial matters to assist in implementing the Basic Principles;
- (c) Enhance research concerning effective measures for implementing the Basic Principles, with emphasis on new developments in that area;
- (d) Promote national and regional seminars, as well as other meetings at the professional and non-professional levels, on the role of the judiciary in society, the necessity for its independence, and the importance of implementing the Basic Principles to further those goals;
- (e) Strengthen substantive support for the United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other entities within the United Nations system concerned with implementing the Basic Principles.

12. Procedure 12

The United Nations regional and interregional research and training institutes for crime prevention and criminal justice as well as other concerned entities within the United Nations system shall assist in the implementation process. They shall pay special attention to ways and means of enhancing the application of the Basic Principles in their research and training programmes, and to providing technical assistance upon the request of Member States. For this purpose, the United Nations institutes, in co-operation with national institutions and intergovernmental and non-governmental organizations concerned, shall develop curricula and training materials based on the Basic Principles and the present implementing procedures, which are suitable for use in legal education programmes at all levels as well as in specialized courses on human rights and related subjects.

13. Procedure 13

The regional commissions, the specialized agencies and other entities within the United Nations system as well as other concerned intergovernmental organizations shall become actively involved in the implementation process. They shall inform the Secretary-General of the efforts made to disseminate the Basic Principles, the measures taken to give effect to them and any obstacles and shortcomings encountered. The Secretary-General shall also take steps to ensure that non-governmental organizations in consultative status with the Economic and Social Council become actively involved in the implementation process and the related reporting procedures.

14. Procedure 14

The Committee on Crime Prevention and Control shall assist the General Assembly and the Economic and Social Council in following up the present implementing procedures, including periodic reporting under procedures 7 and 8 above. To this end, the Committee shall identify existing obstacles to, or shortcomings in, the implementation of the Basic Principles and the reasons for them. The Committee shall make specific recommendations, as appropriate, to the Assembly and the Council and any other relevant United Nations human rights bodies on further action required for the effective implementation of the Basic Principles.

15. Procedure 15

The Committee on Crime Prevention and Control shall assist the General Assembly, the Economic and Social Council and any other relevant United Nations human rights bodies, as appropriate, with recommendations relating to reports of ad hoc inquiry commissions or bodies, with respect to matters pertaining to the application and implementation of the Basic Principles.

**D. Bangalore Principles of Judicial Conduct<sup>5</sup>**

1. Drafting History<sup>6</sup>

(i) *Background*

In April 2000, on the invitation of the United Nations Centre for International Crime Prevention, and within the framework of the Global Programme Against Corruption, a preparatory meeting of a group of Chief Justices and senior justices was convened in Vienna, in conjunction with the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The objective of the meeting was to address the problem that was created by evidence that, in many countries, across all the continents, many people were losing confidence in their judicial systems because they were perceived to be corrupt or otherwise partial.

This evidence had emerged through service delivery and public perception surveys, as well as through commissions of inquiry established by governments. Many solutions had been offered, and some reform measures had been tried, but the problem persisted. This was intended to be a new approach.

It was the first occasion under the auspices of the United Nations when judges were invited to put their own house in order; to develop a concept of judicial accountability that would complement the principle of judicial independence, and thereby raise the level of public confidence in the Rule of Law.

At the initial stage, recognizing the existence of different legal traditions in the world, it was decided to limit the exercise to the common law legal system. Accordingly, the initial participants were from nine countries in Asia, Africa and the Pacific, which applied a multitude of different laws but shared a common judicial tradition.

(ii) *The Judicial Integrity Group*

The first meeting of the Judicial Group on Strengthening Judicial Integrity (or the Judicial Integrity Group, as this body has come to be known) was held at the United Nations Office in Vienna on 15 and 16 April 2000.

At this meeting, the Judicial Integrity Group took two decisions. First, it agreed that the principle of

<sup>5</sup> Economic and Social Council resolution 2006/23 of 27 July 2006, annex.

<sup>6</sup> United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.9.



accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systemic reforms as are within the judiciary's competence and capacity. Second, it recognized the urgent need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative branches of government.

The participating judges emphasized that by adopting and enforcing appropriate standards of judicial conduct among its members, the judiciary had the power to take a significant step towards earning and retaining the respect of the community. Accordingly, they requested that codes of judicial conduct which had been adopted in some jurisdictions be analysed, and a report be prepared by the Coordinator of the Judicial Integrity Group, concerning: (a) the core considerations that recur in such codes; and (b) the optional or additional considerations that occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

*(iii) The Bangalore Draft Code of Judicial Conduct*

The second meeting of the Judicial Integrity Group was held in Bangalore, India, from 24 to 26 February 2001. At this meeting the Group, proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct (the Bangalore Draft). The Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

*(iv) Consultation Process*

Over the following twenty months, the Bangalore Draft was disseminated widely among judges of both common law and civil law systems. It was presented to, and discussed at, several judicial conferences and meetings attended by Chief Justices and senior judges from over 75 countries of both common law and civil law systems. On the initiative of the American Bar Association's offices in Central and Eastern Europe, the Bangalore Draft was translated into the national languages of Bosnia and Herzegovina, Bulgaria, Croatia, Romania, Serbia and Slovakia, and then reviewed by judges, judges' associations, and Constitutional and Supreme Courts of the sub-region, including those of Kosovo. Their comments provided a useful perspective.

In June 2002, at a meeting in Strasbourg, France, the Bangalore Draft was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT) which engaged in a full and frank discussion from the perspective of the civil law system.

The published comments of CCJE-GT on the Bangalore Draft, together with other relevant Opinions of the Consultative Council of European Judges (CCJE) – in particular, Opinion No.1 on standards concerning the independence of the judiciary – made a significant contribution to the evolving form of the Bangalore Draft.

The Bangalore Draft was further revised in the light of the draft Opinion of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

*(v) The Bangalore Principles of Judicial Conduct*

A revised version of the Bangalore Draft was next placed before a Round-Table Meeting of Chief Justices (or their representatives) from civil law countries held in the Japanese Room of the Peace Palace in The Hague, Netherlands – the seat of the International Court of Justice - on 25 and 26 November 2002. The meeting was facilitated by the Department for International Development of the United Kingdom, supported by the United Nations Centre for International Crime Prevention, Vienna, and the Office of the High Commissioner for Human Rights, Geneva; and organized with the assistance of the Director-General of the Carnegie Foundation at The Hague.

There was significant agreement among judges of the common law and the civil law systems. The main divergence, however, was in respect of political activity. In one European country, judges were elected on the basis of their party membership. In some other European countries, judges had the right to engage in politics and be elected as members of local councils (even while remaining as judges) or of parliament (their judicial status being in this case suspended).

Civil law judges, therefore, argued that at present there was no general international consensus on whether judges should be free to participate in politics or not. They suggested that each country should strike its own balance between judges' freedom of opinion and expression on matters of social significance, and the requirement of neutrality.

They conceded, however, that even though membership of a political party or participation in public debate on the major social problems might not be prohibited, judges must at least refrain from any political activity liable to compromise their independence or jeopardize the appearance of impartiality.

The Bangalore Principles of Judicial Conduct emerged from that meeting. The core values recognized in that document are independence, impartiality, integrity, propriety, equality, competence and diligence. These values are followed by the relevant principles and more detailed statements on their application.

*(vi) Commission on Human Rights*

The Bangalore Principles of Judicial Conduct were annexed to the report presented to the fifty-ninth session of the United Nations Commission on Human Rights in April 2003 by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy. On 29 April 2003, the Commission unanimously adopted resolution 2003/43 which noted the Bangalore Principles of Judicial Conduct and brought those Principles "to the attention of Member States, the relevant United Nations organs and intergovernmental and nongovernmental organizations for their consideration".

In April 2004, in his report to the sixtieth session of the Commission on Human Rights, the new United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dr Leandro Despouy, noted that:

The Commission has frequently expressed concern over the frequency and the extent of the phenomenon of corruption within the judiciary throughout the world, which goes far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary by Parliament or bribes (a practice that may in fact be encouraged by the low salaries of judges). It may also concern administration within the judiciary (lack of transparency, system of bribes) or take the form of biased participation in trials and judgments as a result of the politicization of the judiciary, the party loyalties of judges or all types of judicial patronage. This is particularly serious in that judges and judicial officials are supposed to be a moral authority and a reliable and impartial institution to whom all of society can turn when its rights are violated.

Looking beyond the acts themselves, the fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetuation of corruption. Here, the rules of judicial ethics take on major importance. As the case law of the European Court of Human Rights stresses, judges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society. Thus one can see why it is so important to disseminate and implement the Bangalore Principles of Judicial Conduct, whose authors have taken care to base themselves on the two main legal traditions (customary law and civil law) and which the Commission noted at its fifty-ninth session.

The Special Rapporteur recommended that the Bangalore Principles be made available, preferably in national languages, in all law faculties and professional associations of judges and lawyers.

*(vii) Commentary on the Bangalore Principles of Judicial Conduct*

At its fourth meeting, held in Vienna in October 2005, the Judicial Integrity Group noted that judges, lawyers and law reformers had, at several meetings, stressed the need for a commentary or an explanatory memorandum in the form of an authoritative guide to the application of the Bangalore Principles. The Group

agreed that such a commentary or guide would enable judges and teachers of judicial ethics to understand not only the drafting and cross-cultural consultation process of the Bangalore Principles and the rationale for the values and principles incorporated in it, but would also facilitate a wider understanding of the applicability of those values and principles to issues, situations and problems that might arise or emerge.

Accordingly, the Group decided that, in the first instance, the Co-ordinator would prepare a draft commentary, which would then be submitted for consideration and approval by the Group.

*(viii) Commission on Crime Prevention and Criminal Justice*

In April 2006, the fifteenth Session of the Commission on Crime Prevention and Criminal Justice met in Vienna and unanimously recommended to the Economic and Social Council the adoption of a draft resolution co-sponsored by the Governments of Egypt, France, Germany, Nigeria and the Philippines entitled "Strengthening basic principles of judicial conduct". The draft resolution requested the UNODC to convene an open-ended intergovernmental expert group, in cooperation with the Judicial Integrity Group and other international and regional judicial forums, to develop a commentary on the Bangalore Principles of Judicial Conduct, taking into account the views expressed and the revisions suggested by Member States.

*(ix) Economic and Social Council*

On 27 July 2006, the United Nations Economic and Social Council adopted resolution 2006/23, entitled "Strengthening basic principles of judicial conduct", without a vote.

*(x) Intergovernmental Expert Group Meeting*

In March 2006, the draft Commentary on the Bangalore Principles of Judicial Conduct prepared by the Co-ordinator of the Judicial Integrity Group, Dr Nihal Jayawickrama, was submitted to a joint meeting of the Judicial Integrity Group and of the Open-ended Intergovernmental Expert Group convened by UNODC.

The Draft was considered in detail, each of the paragraphs being examined separately. Amendments, including certain deletions, were agreed upon. The Commentary that follows is intended to contribute to a better understanding of the Bangalore Principles of Judicial Conduct.

2. Core Values

*(i) 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.<sup>7</sup>

**Some examples of inappropriate connections and influence**

The following are some examples of "inappropriate connections with and influence by" the executive and legislative branches of government, as determined by courts or judicial ethics advisory committees. These are offered as guidelines. In each case the outcome depends on all the circumstances of the case tested according to how those circumstances might be viewed by the reasonable observer:

<sup>7</sup> United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.48.

- (a) If a legislator writes to a judge informing the judge of the legislator's interest, on behalf of a constituent, in an expeditious and just result in the constituent's divorce and custody case, the judge may reply by simply informing the legislator – personally or, preferably, through a representative – that the principles of judicial conduct prohibit him or her from receiving, considering or responding to such a communication. The scope of the prohibition includes responding to a legislator's inquiry about the status of a case or the date when a decision may be forthcoming, because to do so creates the appearance that the legislator is able to influence the judge to expedite a decision and thereby obtain preferential consideration for a litigant.
- (b) It is inconsistent with the principle of judicial independence for a judge to accept, during a period of leave, full-time employment at a high, policy-making level in the executive or legislative branch (for example, as special adviser on matters related to reform of the administration of justice). The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of function-blending that the concept of separation of powers intends to avoid. That blending is likely to affect the judge's perception, and the perception of the officials with whom the judge serves, regarding the judge's independent role. Even if it does not, such service will adversely affect the public perception of the independence of the courts from the executive and legislative branches of government. Such employment is different from a judge serving in the executive or legislative branch before becoming a judge, and serving in those positions after leaving judicial office. In these cases, the appointment and the resignation processes provide a clear line of demarcation for the judge, and for observers of the judicial system, between service in one branch and service in another.
- (c) Where a judge's spouse is an active politician, the judge must remain sufficiently divorced from the conduct of members of his or her family to ensure that there is not a public perception that the judge is endorsing a political candidate. While the spouse may attend political gatherings, the judge may not accompany or her. No such gatherings should be held in the judge's home. If the spouse insists on holding such events in the judge's home, the judge must take all reasonable measures to dissociate himself or herself from the events, including by avoiding being seen by the participants at the events and, if necessary, by leaving the premises for the duration of the events. Any political contributions made by the spouse must be made in the spouse's name from the spouse's own, separately maintained, funds, and not, for example, from a joint account with the judge. It must be noted that such activities do not enhance the public image of the courts or of the administration of justice.<sup>24</sup> On the other hand, in such a case, the attendance of the judge with his or her spouse at a purely ceremonial function, for example, the opening of parliament or a reception to a visiting head of State, may not be improper, depending on the circumstances.
- (d) A minister of justice who awards, or recommends the award of, an honour to a judge for his or her judicial activity, violates the principle of judicial independence. The discretionary recognition of a judge's judicial work by the executive without the substantial participation of the judiciary, at a time when he or she is still functioning as a judge, jeopardizes the independence of the judiciary. On the other hand, the award to a judge of a civil honour by, or on the recommendation of, a body established as independent of the government of the day may not be regarded as inappropriate, depending on the circumstances.
- (e) The payment by the executive of a "premium" (i.e. a particular incentive) to a judge in connection with the administration of justice is incompatible with the principle of judicial independence.<sup>26</sup>
- (f) Where, in proceedings before a court, a question arises in respect of the interpretation of an international treaty, and the court declares that the interpretation of treaties falls outside the scope of its judicial functions and seeks the opinion of the minister of foreign affairs thereon, and then proceeds to give judgment accordingly, the court has in effect referred to a representative of the executive for a solution to a legal problem before it. The fact that the minister has been involved in the outcome of the legal proceedings in a way that is decisive and not open to challenge by the parties means that the case has not been heard by an independent tribunal with full jurisdiction.

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.

*(ii) 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.<sup>8</sup>

**Conduct that should be avoided in court**

The expectations of litigants are high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Therefore, every effort should be made to ensure that reasonable grounds for such a perception are avoided or minimized. A judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and intemperate and impatient behaviour may destroy the appearance of impartiality, and must be avoided.

**Constant interference in the conduct of the trial should be avoided**

A judge is entitled to ask questions to clarify issues, but if the judge constantly interferes and virtually takes over the conduct of a civil case or the role of the prosecution in a criminal case and uses the results of his or her own questioning to arrive at a conclusion in the judgment in the case, the judge becomes advocate, witness and judge at the same time and the litigant does not receive a fair trial.

**Ex parte communications must be avoided**

The principle of impartiality generally prohibits private communications between the judge and any of the parties or their legal representatives, witnesses or jurors. If the court receives such a private communication, it is important that it ensure that the other parties concerned are fully and promptly informed and the court record noted accordingly.

**Conduct that should be avoided out of court**

Out of court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. Everything - from a judge's associations or business interests, to remarks that he or she may consider to be nothing more than harmless banter - may diminish the judge's perceived impartiality. All partisan political activity and association should cease upon the assumption of judicial office. Partisan political activity or out-of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality and lead to public confusion about the nature of the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other hand. By definition, partisan actions and statements involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced if, as is almost inevitable, the judge's activities attract criticism or rebuttal. In short, a judge who uses the privileged platform of judicial office to enter the partisan political arena puts at risk public confidence in the impartiality of the judiciary.

There are some exceptions. These include comments by a judge, on an appropriate occasion, in defence of the judicial institution, or explaining particular issues of law or decisions to the community or to a

<sup>8</sup> United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.61.

specialized audience, or defence of fundamental human rights and the rule of law. However, even on such occasions, a judge must be careful to avoid, as far as possible, entanglements in current controversies that may reasonably be seen as politically partisan. The judge serves all people, regardless of politics or social viewpoints. That is why the judge must endeavour to maintain the trust and confidence of all people, so far as that is reasonably possible.

- 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.

*(iii) 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.<sup>9</sup>

In view of cultural diversity and the constant evolution in moral values, the standards applying to a judge's private life cannot be laid down too precisely. This principle, however, should not be interpreted so broadly as to censure or penalize a judge for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community. Judgments on such matters are closely connected to the society and times in question and few can be applied universally.

This is particularly evident in respect of sexual activity. For example, in the Philippines, a judge who flaunted an extra-marital relationship was found to have failed to embody judicial integrity, warranting dismissal from the judiciary (Complaint against Judge Ferdinand Marcos, Supreme Court of the Philippines, A.M. 97-2-53-RJC, 6 July 2001).

In the United States, in Florida, a judge was reprimanded for engaging in sexual activities with a woman who was not his wife, in a parked motor car (In re Inquiry Concerning a Judge, 336 So. 2d 1175 (Fla. 1976), cited in Amerasinghe, Judicial Conduct, 53).

In Connecticut, a judge was disciplined for having an affair with a married court stenographer (In re Flanagan, 240 Conn.157, 690 A. 2d 865 (1997), cited in Amerasinghe, Judicial Conduct, 53).

<sup>9</sup> United Nations Office on Drugs and Crime, Commentary on The Bangalore Principles of Judicial Conduct, September 2007, p.80.

In Cincinnati, a married judge who was separated from his wife was disciplined for taking a girl friend (whom he since married) on three foreign visits, although they did not ever occupy the same room (Cincinnati Bar Association v Heitzler, 32 Ohio St. 2d 214, 291 N.E. 2d 477 (1972); 411 US 967 (1973), cited in Amerasinghe, Judicial Conduct, 53).

But in Pennsylvania, also in the United States, the Supreme Court declined to discipline a judge who had engaged in an extra marital sexual relationship which included overnight trips and a one-week vacation abroad (In re Dalessandro, 483 Pa. 431, 397 A. 2d 743 (1979), cited in Amerasinghe, Judicial Conduct, 53). Some of the foregoing examples would not be viewed in some societies as impinging on the judge's public duties as a judge but relevant only to the private zone of consensual noncriminal adult behaviour.

- 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.

*(iv) 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 judgment 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.

*(v) 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.

*(vi) 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.

## E. Guidelines on the Role of Prosecutors<sup>10</sup>

### 1. Background

Prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime.

It is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions.

In resolution 7 of the Seventh Congress, the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses.

The Guidelines, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

### 2. Provisions

#### (i) *Qualifications, Selection and Training*

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<sup>10</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No.E.91..2), chap. I, sect. C.26, annex.

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
  - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
  - (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

*(ii) Status and Conditions of Service*

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

*(iii) Freedom of Expression and Association*

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

*(iv) Role in Criminal Proceedings*

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall:
  - (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

143RD INTERNATIONAL TRAINING COURSE  
VISITING EXPERTS' PAPERS

- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
  - (c) Keep matters in the possession confidential, unless the performance of duty or the needs of justice require otherwise;
  - (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
  15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
  16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

*(v) Discretionary Functions*

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

*(vi) Alternatives to Prosecution*

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.
19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

*(vii) Relations with Other Government Agencies or Institutions*

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

*(viii) Disciplinary Proceedings*

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other

established standards and ethics and in the light of the present Guidelines.

(ix) *Observance of the Guidelines*

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

**F. Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors<sup>11</sup>**

The standards are made by the International Association of Prosecutors. The International Association of Prosecutors was established in June 1995 at the United Nations offices in Vienna and was formally inaugurated in September 1996 at its first General Meeting in Budapest. In the following year in Ottawa, the General Meeting approved the Objects of the Association which are now enshrined in Article 2.3 of the Association's Constitution. One of the most important of these Objects is to :

“.. promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences.”

In support of that particular objective a committee of the Association, chaired by Mrs Retha Meintjes of South Africa, set to work to produce a set of standards for prosecutors. A first draft was circulated to the entire membership in July 1998 and the final version was approved by the Executive Committee at its Spring meeting in Amsterdam in April 1999.

The International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors is a statement which will serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. We intend that this should not simply be a bold statement but rather a working document for use by prosecution services to develop and reinforce their own standards. Much of the Association's efforts in the future will be directed to promoting the Standards and their use by working prosecutors throughout the world.

1. Professional Conduct

Prosecutors shall:

- a. at all times maintain the honour and dignity of their profession;
- b. always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- c. at all times exercise the highest standards of integrity and care;
- d. keep themselves well-informed and abreast of relevant legal developments;
- e. strive to be, and to be seen to be, consistent, independent and impartial;
- f. always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- g. always serve and protect the public interest;
- h. respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

- 2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.
- 2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
  - transparent;

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<sup>11</sup> Commission on Crime Prevention and Criminal Justice resolution 17/2 of 18 April 2008, annex.

- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

### 3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- carry out their functions impartially;
- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- act with objectivity;
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

### 4. Role in Criminal Proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- when giving advice, they will take care to remain impartial and objective;
- in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore;

- preserve professional confidentiality;
- in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

- (f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- (g) seek to ensure that appropriate action is taken against those responsible for using such methods;
- (h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Co-operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors:

- (a) shall co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and
- (b) shall render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- (a) to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- (b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- (c) to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;
- (d) to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- (e) to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- (f) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- (g) to objective evaluation and decisions in disciplinary hearings;
- (h) to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and
- (i) to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

**G. Code of Conduct for Law Enforcement Officials<sup>12</sup>**

The functions of law enforcement in the defence of public order and the manner in which those functions are exercised have a direct impact on the quality of life of individuals as well as society as a whole.

The important task which law enforcement officials are performing diligently and with dignity, in compliance with the principles of human rights. But there exist potentials for abuse which the exercise of such duties entails.

The establishment of a code of conduct for law enforcement officials is only one of several important measures for providing the citizenry served by law enforcement officials with protection of all their rights and interests.

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<sup>12</sup> General Assembly resolution 34/169 of 17 December 1979, annex.

1. Article 1

Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

2. Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

3. Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Commentary:

- (a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.
- (b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.
- (c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

4. Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

5. Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Commentary:

The Universal Declaration of Human Rights defines torture as follows:

“... torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”

6. Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

7. Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Commentary:

- (a) Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and within their own agencies.
- (b) While the definition of corruption must be subject to national law, it should be understood to encompass the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.
- (c) The expression "act of corruption" referred to above should be understood to encompass attempted corruption.

## 8. Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

## **H. Guidelines for the effective implementation of the Code of Conduct for Law Enforcement Officials<sup>13</sup>**

These describe the process to implement Code of Conduct for Law Enforcement Officials, and includes steps to enhance this implementation, and establishes a periodic reporting procedure to ensure compliance with the Principles.

### 1. Application of the code

#### (i) *General Principles*

1. The principles embodied in the Code shall be reflected in national legislation and practice.
2. In order to achieve the aims and objectives set out in article 1 of the Code and its Commentary, the definition of "law enforcement officials" shall be given the widest possible interpretation.
3. The Code shall be made applicable to all law enforcement officials, regardless of their jurisdiction.
4. Governments shall adopt the necessary measures to instruct, in basic training and all subsequent training and refresher courses, law enforcement officials in the provisions of national legislation connected with the Code as well as other basic texts on the issue of human rights.

#### (ii) *Specific Issues*

1. Selection, education and training. The selection, education and training of law enforcement officials shall be given prime importance. Governments shall also promote education and training through a fruitful exchange of ideas at the regional and interregional levels.
2. Salary and working conditions. All law enforcement officials shall be adequately remunerated and shall be provided with appropriate working conditions.
3. Discipline and supervision. Effective mechanisms shall be established to ensure the internal discipline and external control as well as the supervision of law enforcement officials.
4. Complaints by members of the public. Particular provisions shall be made, within the mechanisms mentioned under paragraph 3 above, for the receipt and processing of complaints against law enforcement officials made by members of the public, and the existence of these provisions shall be made known to the public.

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<sup>13</sup> Economic and Social Council resolution 1989/61 of 24 May 1989, annex.



## 2. Implementation of the Code

### (i) *At the National Level*

1. The Code shall be made available to all law enforcement officials and competent authorities in their own language.
2. Governments shall disseminate the Code and all domestic laws giving effect to it so as to ensure that the principles and rights contained therein become known to the public in general.
3. In considering measures to promote the application of the Code, Governments shall organize symposiums on the role and functions of law enforcement officials in the protection of human rights and the prevention of crime.

### (ii) *At the International Level*

1. Governments shall inform the Secretary-General at appropriate intervals of at least five years on the extent of the implementation of the Code.
2. The Secretary-General shall prepare periodic reports on progress made with respect to the implementation of the Code, drawing also on observations and on the cooperation of specialized agencies and relevant intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council.
3. As part of the reports mentioned above, Governments shall provide to the Secretary-General copies of abstracts of laws, regulations and administrative measures concerning the application of the Code, any other relevant information on its implementation, as well as information on possible difficulties in its application.
4. The Secretary-General shall submit the above-mentioned reports to the Committee on Crime Prevention and Control for consideration and further action, as appropriate.
5. The Secretary-General shall make available the Code and the present guidelines to all States and intergovernmental and non-governmental organizations concerned, in all official languages of the United Nations.
6. The United Nations, as part of its advisory services and technical cooperation and development programmes, shall:
  - (a) Make available to Governments requesting them the services of experts and regional and interregional advisers to assist in implementing the provisions of the Code;
  - (b) Promote national and regional training seminars and other meetings on the Code and on the role and functions of law enforcement officials in the protection of human rights and the prevention of crime.
7. The United Nations regional institutes shall be encouraged to organize seminars and training courses on the Code and to carry out research on the extent to which the Code is implemented in the countries of the region as well as the difficulties encountered.

## III. INSTANCES OF JUDICIAL CORRUPTION

### A. **Corrupt Judges and Land Rights in Zimbabwe**<sup>14</sup>

The independence of Zimbabwe's judiciary has been the subject of many reports over the past five years and there is a general consensus that it is no longer independent and impartial.

By the end of the 1990s, Zimbabwe's Supreme Court had established an international reputation as an independent court that vigorously upheld human rights, although its human rights jurisprudence was mainly focused on civil and political rights. The high court also previously played a positive role in upholding fundamental rights.

Beginning in 2000, the government began a purge that resulted in most independent judges being replaced

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<sup>14</sup> Transparency International, *Global Corruption Report 2007*, Gugulethu Moyo, *Corrupt judges and land rights in Zimbabwe*, p.35 Cambridge University Press.

by judges known to owe allegiance to the ruling party. This reconstituted judiciary has conspicuously failed to protect fundamental rights in the face of serious violation by legislative provisions and executive action. Corruption has also played a role in compromising judicial independence because the allocation of expropriated farms to several judges has made them more beholden to the executive. Most accounts of the trajectory of judicial independence in Zimbabwe inextricably link its decline to government policies adopted in 2000 aimed at accelerating the protracted land reform process.

The need for more equitable land distribution has been one of Zimbabwe's most intractable problems. At the beginning of black majority rule in 1980 about 6,000 white commercial farmers controlled 40 per cent of the most fertile land while seven million blacks were crowded into largely dry 'communal areas'. In the first decade of majority rule the government was faced with legal constraints, entrenched in the constitution that required it to pay prompt and adequate compensation if it wanted to appropriate land and, if the original owner requested, to do so externally in foreign exchange. This prevented it from carrying out meaningful re-distribution. Even after these constitutional restraints were removed, however, the government failed to adopt policies that addressed the problem effectively or to cooperate with international offers to provide financial assistance to an orderly programme.

Towards the end of the 1990s, the economy was in decline and the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) party was in danger of losing support. A new party, the Movement for Democratic Change (MDC), had attracted a considerable following and posed a threat to the ruling party's hold on power. To counteract this, ZANU PF exploited the hunger for land felt by millions of black peasants to launch a populist, 'fast-track' land reform programme. At the end of February 2000, ZANU PF militias, who identified themselves as veterans of Zimbabwe's liberation struggle, invaded and occupied white-owned farms.

There is a considerable body of evidence that indicates that the occupations were not spontaneous actions by land-hungry peasants, as claimed by the government, but an orchestrated campaign by the ruling party, the security agencies and various government departments. The occupiers perpetrated widespread acts of violence against the commercial farmers and farm workers, who were seen as sympathetic to the MDC. Thousands of workers were driven off farms and left destitute. The occupiers used the farms as bases from which to hunt down and attack opposition supporters in rural areas. After white farmers were expelled, the government, which has been repeatedly criticized for corruption, allocated the best land not to landless peasants, but to high-ranking party and government officials, with some acquiring several farms each.

When the dispossessed farmers sought legal protection and the Supreme Court declared the farm invasions illegal, the executive portrayed the intervention as a racist attempt to protect the interests of the minority white farmers and mounted a vicious campaign against white judges. President Robert Mugabe and several ministers, prominent among them Justice Minister Patrick Chinamasa, took it in turns to condemn these judges as 'relics of the Rhodesian era', alleging they had obstructed implementation of the government's land reform programme. War veterans staged protests that culminated in the invasion of the main courtroom of the Supreme Court just as the court was due to sit. During this incident, the veterans shouted slogans such as 'kill the judges', and both Supreme Court and high court judges subsequently received death threats. In early 2001 Chief Justice Roy Gubbay was forced to resign. Heavy pressure was exerted on the other Supreme Court justices, two of whom also resigned. Relentless pressure against the remaining independent judges in the high court led first to the resignation in 2001 of the remaining white judges, followed later by a number of independent black judges, notably Justices Chatikobo, Chinhengo and Devittie. One high court judge, Judge Godfrey Chidyausiku, joined in the attacks, alleging that the chief justice and Supreme Court had pre-decided in their favour all the cases brought by commercial farmers. This accusation was unfounded since the Supreme Court had decided against the commercial farmers in 1996.

What led the government to declare war on the Supreme Court was a decision in 2000 that interdicted it from continuing with the acquisition and resettlement programme until a proper plan was in place and the rule of law had been restored on the farms. Two other black High Court judges had previously ruled that the land resettlement programme was being conducted in an illegal manner. In this earlier ruling, the government conceded the illegality of the farm invasions and consented to the order relating to them. In the 2000 ruling, despite adjudging the scheme unconstitutional, the Supreme Court gave the government

considerable latitude to remedy the illegality by suspending the interdict for six months. The Court said it fully accepted that a programme of land reform was essential for future peace and prosperity, but could not accept the unplanned, chaotic, politically biased and violent nature of the current policy. Despite this conciliatory approach, the judgment incensed the government. It became determined to purge the bench and replace it with judges who would legitimize its land grab.

Soon after Gubbay was forced out, the government appointed Godfrey Chidyausiku as chief justice, passing over several other Supreme Court judges. Chidyausiku's suitability was publicly questioned. When a fresh land case was brought before the Supreme Court in September 2001, the new chief justice dismissed an application by the Commercial Farmers Union (CFU) that he should recuse himself because of his close association with the ruling party and his previous statements endorsing the government's land policy. He and three newly appointed judges then determined that the government had fully complied with the Supreme Court order to put in place a lawful programme of land reform that was in conformity with the constitution. This was despite detailed evidence from the CFU that the rule of law had not been restored and that farmers were still being prevented unlawfully from conducting their operations.

The only judge from the Gubbay-led bench on this case, Justice Ahmed Ebrahim, dissented, finding that the government had failed to produce a workable programme of land reform or to satisfy the Court that it had restored the rule of law in commercial farming areas. The law that the government had passed was unconstitutional in that it deprived landowners of their rights or interests without compensation; allowed arbitrary entry into property and occupation; and denied landowners the protection of the law and the right to freedom of association. The judge expressed the opinion that the majority decision had been predicated not on issues of law, but issues of political expediency. The reconstituted Supreme Court has made several other questionable rulings upholding the legality of the land reform programme and the limits imposed on compensation for expropriated farms.

Of the seven current justices in the Supreme Court, all but one were appointed in 2001, after the land acquisitions began. Reports have emerged that all the new appointees, including Chief Justice Chidyausiku, were allocated farms after the eviction of their former owners. There is no doubt that the possession of the farms, often violently taken from their owners, has seriously compromised the independence of judges, particularly in legal challenges to land requisition. Two judges, Benjamin Hlatshwayo and Tendai Chinembiri Bhunu, even invaded and took over commercial farms personally. Reports of such cases have deepened the perception that judges have subordinated their obligations to justice to the desire to amass wealth. In 2006, Arnold Tsunga, executive director of the NGO Zimbabwe Lawyers for Human Rights, said: 'A number (of judicial officers) have accepted farms which are contested. These farms have not come as written perks (in their contracts of employment) but as discretionary perks by politicians. When judges and magistrates are given and accept discretion perks because of poverty, surely their personal independence is compromised as well.'

According to several credible independent organizations, judges with the integrity to resist undue influence by the government and ZANU PF have been prevented from independently dispensing justice by intimidation and harassment. Walter Chikwanha, the magistrate for Chipinge, was dragged from his courtroom in August 2002 by a group of veterans and assaulted after he dismissed an application by the state to remand five MDC officials in custody. The attack took place in full view of police who did not try to prevent it. Several court officials were also assaulted and one had to be hospitalized. In December 2003, Judge President Michael Majuru of the administrative court resigned and fled the country after an altercation with Justice Minister Patrick Chinamasa over a controversial case involving a government agency and Associated Newspapers of Zimbabwe (ANZ), publishers of the Daily News, Zimbabwe's only independent newspaper. Majuru later claimed that Chinamasa offered him a farm as an inducement to rule in favour of the government.

When dispossessed farmers continued to bring cases before the administrative court challenging technical aspects of the land acquisition programme, the government amended the constitution in 2005 making 'state land' all land acquired, or to be acquired for resettlement or whatever purpose, and barring any legal challenge to such acquisition, although legal challenges as to the amount of compensation payable for improvements are still allowed.

The failure of the courts to uphold the rule of law in land cases has created the impression that the

security of property rights is no longer guaranteed, precipitating a general breakdown in the rule of law. Land grabs by government and party officials continue to occur with the new black occupiers of the first wave of possession now being forced off their property.

Zimbabwe is said to have the fastest shrinking economy in the world and various economists have attributed this primarily to the loss of property rights. The government has tried to blame Zimbabwe's woes on the sanctions imposed by western states, although these are not economic but instead target government officials through travel restrictions and the freezing of their external accounts.

But it is not only in respect of land that courts have so conspicuously failed to uphold fundamental rights. Despite mounting criticism, the judiciary repeatedly demonstrates a tendency, especially in high-profile and electoral cases, to lend its process to the service of the state. In numerous cases challenging the constitutionality or legitimacy of measures that are palpably in violation of the law, the Supreme Court has departed from established legal principle in order to legitimate executive action. With few exceptions, judges are seen to have collaborated with a government that has violated many of the rights of its citizens, including freedom of expression, freedom of the press, freedom of assembly and the right to free and fair elections.

### **B. Mexico: the Traffickers' Judges<sup>15</sup>**

Mexico's justice system reacts oddly when dealing with criminals involved in organized crime, especially drug trafficking. Since drug trafficking is a federal crime, it must be addressed by judges from the federal jurisdiction; state and municipal-level justice systems cannot be involved (nor local governments and local police). This leaves the fight against drug trafficking in the hands of a very few people who are therefore more vulnerable to corruption, as well as to pressure, threats and physical attacks from criminal elements.

Judges involved in drugs trafficking cases do not receive any special protection and are more susceptible to coercion and corruption. *Plata o plomo* (meaning 'silver or lead', in other words what will make a judge comply with a corrupt demand: money or a bullet?) is the question asked in trafficking circles to assess how amenable a judge might be to corruption when it comes to sentencing. This 'choice' is repeated at every level of investigation throughout the police and judicial systems. This does not mean that there are not police, prosecutors and judges who are honest and carry out their work efficiently. But in such an environment corruption easily penetrates the system.

José Luis Gómez Martínez, a judge in Mexico's highest security prison, has handed down numerous decisions in the past few years absolving a number of people linked to the Sinaloa drug cartel. His sentences sparked complaints by the attorney general's office, which denounced him to the federal judicial council (CFJ), the agency responsible for evaluating judges' sentences and protecting their integrity, and also started an investigation against him. To date, the CFJ has not found any 'irregularities' in the judge's decisions.

But some irregularities are easy to spot. Judge Gómez Martínez presided in the case against Olga Patricia Gastelum Escobar and Felipe de Jesús Mendivil Ibarra, both accused of harbouring and transporting money belonging to the Sinaloa cartel to drug trafficker Arturo Beltrán Leyva, a close associate of El Chapo, the head of the cartel. The couple were detained while attempting to escape from police with close to US \$7 million in cash and US \$500,000 worth of jewellery and watches. They were armed.

In April 2005, Judge Gómez Martínez cleared Olga Patricia Gastelum Escobar of wrongdoing in a sentence that was marred by many irregularities, most notably that the public prosecutor's office (which instigated the case) was notified of the result only 24 hours after the woman was freed from prison. This violated article 102 of the Criminal Procedural Code, which stipulates that decisions cannot be executed without first notifying the public prosecutor. The defendant went free although a separate investigation had been initiated against her. A complaint about the decision was filed with the CFJ, which argued that verdicts of innocence did not need to be notified to the public prosecutor. Although Judge Gómez Martínez was not sanctioned, an appeal against the sentence was brought before the second circuit appeals court, which found that Gastelum Escobar's criminal liability had clearly been demonstrated. Nonetheless, she remains at liberty.

<sup>15</sup> Transparency International, Global Corruption Report 2007, Jorge Fernández Menéndez, Mexico: the traffickers' judges, p.77, Cambridge University Press.

But the scandal does not end there. Despite the appeal court's decision against Gastelum Escobar and the fact that she had already declared that her partner, Mendivil Ibarra, was a drug trafficker, the same judge considered that he, too, was innocent.

There are other cases involving Gómez Martínez. In 2004, a group of 18 hit men loyal to the Sinaloa cartel were detained in Nuevo Laredo by the Mexican army. They were carrying 28 long guns, two short guns, 223 cartridges, 10,000 bullets, 12 grenade launchers, 18 hand grenades, smoke grenades, bullet-proof vests and equipment reserved for military use. Gómez Martínez set them free, arguing they were innocent of charges of involvement with organized crime. The same judge ordered Archivaldo Iván Guzmán Salazar, son of El Chapo, to be set free after he was accused of money laundering and murdering a young Canadian while leaving a bar.

The case of Gómez Martínez is not exceptional. A judge in Guadalajara, Amado López Morales, decided that Héctor Luis 'El Güero' Palma, one of Mexico's best known drug traffickers, was no such thing (he called him an 'agricultural producer') despite the fact that he was detained in charge of an arsenal of weapons. He decided the crime of amassing weapons should merit only five years in prison. A second judge, Fernando López Murillo, reduced the penalty to two years and also decided that the former commander of the federal judicial police, Apolinar Pintor, who had sheltered El Güero, should be exonerated because he only did it out of 'friendship' – and not because he was paid. When Arturo Martínez Herrera, leader of a group of hit men known as Los Texas, was detained with 36 long weapons, and 10 kg of cocaine and marijuana, Judge López Morales dismissed the charges. The only sentence he gave was for criminal association, for which he awarded a sentence of two years, commutable for a fine of US \$10,000. When the sentence was reviewed, the appeals court condemned Martínez Herrera to 40 years in prison.

Another notable judge is Humberto Ortega Zurita from Oaxaca. Two men were detained in a car in 1996 with 6 kg of pure cocaine: the judge absolved them declaring that no one could be sure that the cocaine was theirs. Some time later, a woman was detained in a bus with 3 kg of cocaine taped to her stomach. The judge had no doubt: the woman was set free because he considered that 'she did not carry the drugs consciously'. A short time later, Judge Ortega Zurita 'committed suicide' by stabbing himself several times in the heart.

The Mexican judicial system does not function adequately. But it is also true that there are protections against corruption, and institutions, such as the CFJ, that should bring some order to the chaos.

What is unusual about cases like that of Gómez Martínez is not the quality of his decisions, but the CFJ's refusal to take any action against him when in most cases the appeals court drastically altered the sentences, denouncing the judge's 'ineptitude and lack of knowledge of criminal law'.

The rule of *plomo o plata* continues to taint the justice system. Some traffickers have been detained for years without receiving a firm sentence, exploiting the deficiencies of the justice system with the sole objective of avoiding deportation to the United States where they would face more serious charges.

### **C. Trinidad and Tobago : Tolerance of Corruption<sup>16</sup>**

The belief that corruption has become the norm prepares the ground for social tolerance of it. The level of tolerance is one of the most powerful forces preventing or abetting corruption. Where tolerance is high, even a case where an abuse of office has become public knowledge need not result in communal condemnation and exclusion. Values such as family ties, friendship or the social need to keep in touch are considered more important than the moral impulse to distance oneself from a corrupt person. Only in a climate of extreme social tolerance is it possible to pervert the course of justice as openly as described in 'Mexico: the traffickers' judges'.

It is often the case that holding a particular political view or belonging to a particular ethnic group can be seen as a bigger problem than dishonesty in a corruption-tolerant society. This point was illustrated by the case of Satnarine Sharma, chief justice of Trinidad and Tobago. In July 2006 Sharma was arrested (although

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<sup>16</sup> Transparency International, Global Corruption Report 2007, Marina Kurkchian, Judicial corruption in the context of culture, p.105, Cambridge University Press.

the arrest was later stayed on technical grounds) for attempting to help a former prime minister who had been tried for corruption. He was also charged with interfering with the course of justice by trying to stop the prosecution of his family doctor, who had been accused of murder two years previously. These were not trivial allegations, but in the view of the Trinidad and Tobago public they mattered less than the political and ethnic divisions in the country. Among the Indo-Trinidadian population to which Sharma belongs, he continued to enjoy support.

#### **D. China: The Wuhan Affair<sup>17</sup>**

In response to demands for a more fair and effective judiciary, the Supreme People's Court (SPC) issued a code of ethics in 2003 setting down 13 rules strictly prohibiting certain corrupt behaviour. That same year the National People's Congress joined the anti-corruption fight by embracing open trials, the separation of trials from enforcement and monitoring, evaluation of judges, and amendments to the criminal code that laid down a 10-year prison term for abuse of judicial power. Since then, thousands of judges and other court staff have been arraigned or prosecuted for corruption. For example, in 2004 the procuratorates opened 9,476 investigations into law enforcement personnel and judicial staff, almost 67 times the number in the early 1990s. This number is very small in comparison to the number of judges and judicial personnel in China, however. A review of the World Bank's annual World Business Survey indicates that overall corruption in China appears to be less than in other developing countries with similar per capita income.

From the late 1990s to 2006, senior officials investigated for corruption included the former chief procurator of Shenyang municipal procurator's office, the former vice-procurator of Jiangsu province, the former presidents of the high courts in Liaoning, Guangdong and Hunan provinces, and the former director general of Jiangsu province's anti-corruption bureau. The number of high-level judges charged and convicted of corruption in China can probably be explained, in part, by the fact that it is easier and less costly to bribe one senior judge than all the members of the court's adjudication committee.

The most revealing case in China's anti-corruption campaign is the Wuhan court affair. In Wuhan, Hubei province, 91 judges were charged with corruption, including a vice-president of the high court, two presidents of the intermediate courts and two presidents of the basic courts. The ringleaders, two former Wuhan intermediate court vice-presidents, were ultimately convicted of corruption and sentenced to six and a half and 13 years in prison, respectively. Ten judges under their supervision were also sent to jail and a 13-member group was found to have pocketed almost 4 million yuan (approximately US \$510,000). The investigation implicated more than 100 other judges and court officials, who were disciplined or reassigned to other courts. Finally, 44 lawyers were investigated and 13 were charged with bribery.

The significance of the Wuhan affair is threefold. First, it signalled that senior officials were committed to rooting out judicial corruption. Secondly, it provided the impetus for more, not less, judicial reform. Thirdly, and for the first time, it revealed a ring of corrupt judicial and law enforcement networks running a system of bribery at all levels. By the end of the investigation in 2004, 794 judges in China had been disciplined for irregularities (though only 52 were investigated for serious crimes). China's Chief Justice Xiao Yang has reported that the number of corrupt judges and court officials had fallen steadily from 6.7 per 1,000 in 1998 to 2 per 1,000 in 2002, although this is difficult to verify independently.

In 2006, Chief Justice Xiao and Minister of Justice Zhang Fusen announced a crackdown on the relationship between judges and lawyers following a 2004 ruling by the SPC to regulate control between them. Zhang said that some of China's 100,000 lawyers depended on bribes to win lawsuits and that the income gap between judges and lawyers made this type of corruption more likely. He urged courts to improve judges' working and living conditions so they could better resist the lure of private interests. Rules governing 'justifiable relationships between judges and lawyers' were announced, and lawyers' associations and the public were asked to report any improper behaviour.

#### **E. Croatia: Still In Transition<sup>18</sup>**

In September 2006 the Office for Corruption and Organised Crime (USKOK) filed charges of bribe taking,

<sup>17</sup> Transparency International, Global Corruption Report 2007, Keith Henderson, The rule of law and judicial corruption in China; half-way over the Great Wall, p.155, Cambridge University Press.

<sup>18</sup> Transparency International, Global Corruption Report 2007, TI Croatia, Croatia: still in transition, p.195, Cambridge University Press.

fraud and abuse of office against Zvonimir Josipovic, a former president and judge of the municipal court of Gvozd. He was indicted for exacting bribes worth up to US\$4,000 from litigants to 'speed up' court processes. An investigation into his affairs began in 2005 when his assets were found to amount to HRK1.4 million (US \$240,000).

Judge Juraj Boljkovac was sentenced to three and a half years in prison for taking a € 15,000 bribe to arrange the release of a person in custody. The case against Boljkovac began in June 2002 and lasted more than three years. According to the state judicial council (SJC), the body that appoints and supervises judges, five other members of the judiciary were under investigation for corruption in mid-2006

A number of recent allegations involve bankruptcy proceedings. In February 2006 the state attorney's office accused several judges in the high commercial court in Zagreb of embezzlement, but the indictments were quashed after the SJC rejected a request to lift their immunity. As the scandal unfolded newspapers reported on unusual decisions by the high commercial court, such as a decision to borrow money from companies involved in bankruptcy proceedings. In the case of the Zagreb-based company Derma, the company lent K3.5 million (US \$600,000) to the high commercial court for the renovation of the court house, even as it was fighting bankruptcy proceedings. When the proceedings, which began in 1992, were finally resolved in 2001, the court's debt was mysteriously written off.<sup>8</sup> Other allegations involving bankruptcy include suspected collusion between judges and administrators at the expense of creditors and debtors.

#### **F. Ghana<sup>19</sup>**

A clear illustration of the difficulties of identifying the sources of corruption can be seen in the case of Justice Anthony Abada. He was accused of bribery in February 2004, but not prosecuted. Instead it was found that Jarfro Larkai, a man he knew, had purported to represent the judge when he informed the litigant's lawyer that the judge would be 'soft' on sentencing if he received a bribe of C5 million (US \$560,000), and offered to act as the middleman. Police investigations found that Justice Abada knew nothing of this and did not receive any money, while Larkai was charged with accepting a bribe to influence a public officer.

Other cases are more clear-cut. For example two high court judges, Boateng and Owusu, and a court registrar were arrested for stealing money from an escrow account held on behalf of litigants over a piece of land. The two judges are alleged to have connived with the registrar to withdraw the interest on the money for personal use. A disciplinary committee of the judicial council set up to investigate the matter found that there was a prima facie case of theft and referred the matter to the attorney general for criminal prosecution. The director of public prosecutions duly brought charges against the three men in an Accra high court.

#### **G. Israel<sup>20</sup>**

It is difficult to find evidence of corruption to alter judicial decisions, but critics point to a number of practices that amount to abuse of entrusted power for personal gain. Nepotism is one charge, with critics pointing to the practice by some judges of nominating their colleagues' offspring as assistants; family ties between high court judges and advocates; married couples working in the courts system; and members of government legal councils who have relatives at the bar.

Other allegations relate to misconduct. In August 2005 the disciplinary tribunal of judges convicted magistrate Hila Cohen of falsifying the minutes of court sessions and destroying court documents. Two of the three Supreme Court justices sitting on the case settled for a reprimand, rather than dismissal. Cohen received enormous public criticism after defying a recommendation by Chief Justice Aharon Barak that she resign. In December 2005 the judges' selection committee voted unanimously to dismiss her.

Also in August 2005 the attorney general decided to bring to trial Judge Osnat Alon-Laufer, who confessed to hiring a private investigator to check on her husband's fidelity. Alon-Laufer was subsequently charged with using illegal telephone-record printouts. Alon-Laufer may have broken the law, but there was no evidence that

<sup>19</sup> Transparency International, Global Corruption Report 2007, Dominic Ayine, Mechthild Ruenger and Daniel Badidam, Computerized courts reduce delays in Ghana, p.209, Cambridge University Press.

<sup>20</sup> Transparency International, Global Corruption Report 2007, Doron Navot, Israel's Supreme Court: still making up its own mind, p.219, Cambridge University Press.

she abused entrusted power to acquire the printouts. Nevertheless, the incidents jeopardized trust in the court system, and judges agreed that the judiciary needed more regulation if it were to maintain public confidence.

The Supreme Court responded in late 2004 with an ethical code for judges. As the Chief Justice explained, the rules of behaviour in the past had been conventional wisdom, common sense, tradition and experience, and were neither formal nor written. The time had come, he said, to write down those conventions and create a binding code of ethics.

On 24 November 2005, the Supreme Court announced the introduction of a more robust policy for disqualifying judges from hearing a case, specifically when one of the parties is represented by a law firm with which the judge has had a close relationship. The case that drove the decision was a dispute between Slomo Narkis and Isaiah Waldhorn over a debt of more than US \$500,000 that the district court ordered the latter to pay. The court delayed implementation of its decision, however, and Narkis appealed. In June 2005 Waldhorn requested that the court ruling be thrown out on grounds of partiality. Waldhorn's attorney claimed that Judge Sara Dotan displayed bias when she had said in a previous discussion that the debt was not controversial (suggesting the judge had already accepted Narkis' side of the story). Waldhorn further claimed that there was a substantive kinship relationship between Dotan and Narkis' attorney, Ishai Bet-On; Bet-On had represented Dotan's son in various cases.

The Supreme Court ruled that substantive grounds for a conflict of interests had been sufficient for disqualification. Although Bet-On did not appear in court, his involvement in the case was crucial. He had represented Narkis in the procedures that led to the appeal, and would have to evaluate an appeal written by Bet-On. As senior partner in the law firm representing Narkis, Bet-On also had an interest in professional fees of more than US \$100,000. Under those circumstances the Supreme Court determined there was a substantive apprehension for partiality and disqualified Judge Dotan. The Supreme Court stressed that the decision did not reflect on the judge's partiality, but that the substantive conflict of interest was enough for her to be disqualified.

## **H. Kenya<sup>21</sup>**

The National Rainbow Coalition(NARC) led by President Mwai Kibaki, came to power in 2002 when the judiciary was afflicted by corruption and executive interference. Kenya needed judicial reform as part of a wider process of strengthening democracy and the government won office on the strength of promises made to that end. There were discernible gaps between rhetoric and the implementation of policy, however. Although the public generally views the judiciary as less corrupt than it was, many in the legal fraternity believe that corruption is still a problem.

The NARC initiated a reform programme, known as 'radical surgery', which saw the removal of former chief justice Bernard Chunga, and the suspension of 23 judges and 82 magistrates on grounds of corruption. The move won immediate public approval and was hailed as evidence of a commitment to tackle corruption in the judiciary.

In February 2003, President Kibaki appointed a tribunal to investigate Chief Justice Bernard Chunga on charges of corruption. Chunga resigned and the president appointed Evans Gicheru to replace him. The following month the new Chief Justice launched a committee with a mandate to address administrative problems within the judiciary, at the same time appointing a sub-committee, headed by Justice Aaron Ringera, which was instructed to investigate and report on the magnitude of corruption; consider the causes of corruption in the judiciary; consider strategies to detect and prevent corruption; and propose disciplinary action.

The committee's findings, known as the Ringera report, implicated five of the nine court of appeal justices, 18 of 36 high court judges and 82 of 254 magistrates in corrupt activities. Many of the judges and magistrates resigned or 'retired'. For the rest, President Kibaki appointed two tribunals, one for the high court and the other for court of appeal, to investigate allegations against them.

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<sup>21</sup> Transparency International, Global Corruption Report 2007, TI Kenya, 'Radical surgery' in Kenya's judiciary, p.221, Cambridge University Press.



The government has been criticized for the way the tribunal mechanism was implemented, in particular having single tribunals investigating multiple judges, and allowing for the department of public prosecutions, a key player in the executive, to play a substantial role in the tribunals, considering they were intended to be a 'peer-review exercise'.

## **I. Republic of Korea**

In Republic of Korea, There were three major corruption cases where judges, public prosecutors and law enforcement officials were convicted or disciplined.

### **1. Uijongbu Corruption Scandal**

Mr. Lee, a lawyer had worked as a judge for several years and resigned in 1996 when he worked at the Uijongbu District court. After the resignation, he started new career as a lawyer in the Uijongbu area. He took almost all of criminal cases in that area and numerous complaints was applied to the Uijongbu Public Prosecutors Office that he might grant commissions to the middlemen - such as policemen, and general staffs in public prosecutors office and court - to take the criminal cases.

In 1997, one public prosecutor at the Uijongbu Public Prosecutors Office started to investigate the connection between the lawyer and the middlemen and prove that about 30 policemen, general staffs in public prosecutors office and court got commissions from the lawyer. In 1998, They are all prosecuted and convicted of corruption. The lawyer was prosecuted with granting commission to the middlemen to take the criminal cases and sentenced to eight months' imprisonment.

The prosecutor didn't stop the investigation at that stage. He continued to investigate against the lawyer's bank account and trace the money flow. Finally, he got evidence that the money at the lawyer's account was flowed to 14 present judges.

After it was revealed to the media, the Prosecutor-General announced that the Prosecutors Office would not investigate or prosecute the corrupt judges any more but would inform the Supreme Court for the commencement of the discipline procedures.

After completing the discipline procedures, the Supreme Court has relocated all of the judges at Uijongbu District court, regardless of their involvement or not, to the country side as a form of reprimand and some of the judges had to submit their resignations.

This is the case to show the deep-rooted problems in the judiciary of Korea, so called 'favorable treatment to the former judges'.

### **2. Taejon Corruption Scandal**

There was similar scandal involved in the former public prosecutor. Another lawyer Mr. Lee started his new career in the Taejon area after he retired from the duties of a senior prosecutor at the Taejon District Public Prosecutors' Office.

In 1999, the lawyer's staff revealed to the press a note with records that the lawyer had granted commissions to the over 200 middlemen to take criminal cases. The special investigation team was formed and started the investigation.

The team proved that 25 public prosecutors and five judges got the money from the lawyer. Six of the 25 public prosecutors had to leave their office, seven of the 25 public prosecutors got disciplined and the rest were admonished. The judges were also disciplined.

### **3. Broker Kim Hong-soo Scandal**

This is the most astonishing and shocking corruption scandal in Korea. For the first time in the history of Korea, Mr. Cho, the high-level judge of Seoul High Court, Mr. Kim, the public prosecutor of Seoul Central District Public Prosecutors' Office and Mr. Min, the the present senior Seoul police officer were arrested, prosecuted in detention and convicted of corruption.

Kim Hong-soo was one of the most famous middlemen who insisted to the people involved in criminal cases that he knew well the judge, public prosecutor and police officer in charge of the their cases and could help them to get favourable decisions. Many people believed in him and gave money to him asking for his assistance.

In 2006, After Kim Hong-soo was arrested and in detention, the public prosecutors expanded investigation to the judges, the public prosecutors and the police officers suspicious to get bribes from Kim Hong-soo. At last, they succeeded in proving that the three persons mentioned above got bribes from Kim Hong-soo.

Mr Cho influenced verdicts in up to six cases after receiving over US\$60,000 in cash and US\$70,000 worth of luxury carpets and household furnishings between October 2001 and April 2005. Mr. Kim received US\$10,000 for stopping an internal probe by prosecutors. Mr. Min received US\$30,000 for the launching of an investigation at the broker's request

Other 12 judges, public prosecutors and police official were convicted or disciplined relating to this scandal.

#### **IV. CAUSES AND CONSEQUENCES OF JUDICIAL CORRUPTION**

##### **A. Causes of Judicial Corruption<sup>22</sup>**

The few studies conducted suggest that the causes for judicial corruption vary significantly from state to state. Some of the possible causes are low remuneration, a high concentration of jurisdictional and administrative roles in the hand of judges, combined with far-reaching discretionary powers and weak monitoring of the execution of those powers. This does not only generate extensive possibilities for the abuse of power but it also creates an environment where whistle blowing becomes more unlikely because of the extensive powers of individual holding these powers.

Such a situation is often worsened by a lack of transparency due to defective information collection and information sharing systems, in particular the absence of a comprehensive and regularly updated database jurisprudence. This leads easily to inconsistencies in the application of the law and makes it impossible to track those decisions, which might have been motivated by corruption. Not surprisingly, the lack of computer systems is one of the main causes for inconsistencies, according to Latin American lawyers and judges. It should be noted that inconsistencies in this context might not only arise with regard to the substance of court decisions but also with respect to court delays. The cause in this context is the lack of time standards and their close monitoring.

##### **B. Indicators of Judicial Corruption<sup>23</sup>**

Indicators of corruption, as perceived by the public, include: delay in the execution of court orders; unjustifiable issuance of summons and granting of bails; prisoners not being brought to court; lack of public access to records of court proceedings; disappearance of files; unusual variations in sentencing; delays in delivery of judgments; high acquittal rates; conflict of interest; prejudices for or against a party witness, or lawyer (individually or as member of a particular group); prolonged service in a particular judicial station; high rates of decisions in favour of the executive; appointments perceived as resulting from political patronage; preferential or hostile treatment by the executive or legislature; frequent socializing with particular members of the legal profession, executive or legislature (with litigants or potential litigants); and postretirement placements.

##### **C. Factors that Contribute to the Judicial Corruption<sup>24</sup>**

What follows are seven factors that contribute to judicial corruption and that can be remedied regardless of the type of legal system that exists.

###### **1. Undue Influence by the Executive and Legislative Branches**

Despite constitutional guarantees of equality between the three government branches (the legislature,

<sup>22</sup> Petter Langseth and Edgardo Buscaglia, *Judicial Integrity and its Capacity to Enhance the Public Interest*, p.5, UNODC.

<sup>23</sup> Petter Langseth and Oliver Stolpe, *Strengthening Judicial Integrity Against Corruption*, p.6, UNODC.

<sup>24</sup> Transparency International, *Global Corruption Report 2007*, Mary Noel Pepys, *Corruption within the judiciary: causes and remedies*, p.4, Cambridge University Press.

which makes the laws; the executive agencies, which administer the laws and manage the business of government; and the judiciary, which resolves disputes and applies the law), the executive and legislature have significant control over the judiciary in many countries. Where the rule of law has been historically weak, the judiciary is frequently viewed as an acquiescent branch of government. Judges in weak judiciaries are deferential to politically connected individuals in the executive and legislative branches.

Often the president of the country or a politically motivated body (such as the Ministry of Justice or Parliament) has the power to appoint and promote judges without the restraints of transparent and objective selection procedures, or eligibility requirements may be vague, allowing for arbitrary compliance. Unless compelled by law, officials in the executive and legislative branches are averse to relinquishing their influence over the judiciary. This was true in Thailand where the judiciary was a part of the Ministry of Justice until 1997 when the courts became independent and subject to the control of the Supreme Court.

Once appointed, judges may feel compelled to respond positively to the demands of the powerful in order to maintain their own status. Rather than act as a check on government in protecting civil liberties and human rights, judges in corrupt judiciaries often promote state interests over the rights of the individual. In many countries, the president has the power to reward judges who abide by his wishes with modern office equipment, higher quality housing and newer cars.

## 2. Social Tolerance of Corruption

In many countries social interactions are governed less by law than customary or familial codes of conduct. To regard as corrupt judges who support the interests of their relatives overlooks the notion that it may be more dishonourable for a judge to ignore the wishes of a family member than to abide strictly by the law. Nor is the rule of law as important in such countries as individual relationships. Government decisions may be based more on personal influence than merit. The strength of personal relationships is so great in some countries that all judicial decisions are suspected of being a product of influence.

In some countries, paying a bribe is considered an essential prerequisite for judicial services and, indeed, the only avenue for accomplishing results. In Kenya, the saying 'Why hire a lawyer, if you can buy a judge?' is common. In countries where court processes are laborious, court users prefer to pay bribes as a cheaper means of receiving quicker service. Court staff also demand bribes for services to which citizens are legally entitled. In some countries, the payment of fees for judicial services is so engrained that complaints arise not if a bribe is sought, but if Comparative analysis of judicial corruption the requested bribe is greater than.

## 3. Fear of Retribution

One influence that can lead judges to make decisions based on factors other than the facts and applicable law is fear of retribution by political leaders, appellate judges, powerful individuals, the public and the media.

Rather than risk disciplinary action, demotion or transfer, judges will apply a politically acceptable decision. It is interesting to note that recently in Egypt two senior judges, under the threat of disciplinary action, publicly determined that the 2005 multi-party election results were manipulated.

Death threats and other threats of harm against judges are powerful incentives to sidestepping the law in deciding the outcome of a case. Fear for one's safety, as with Kosovar judges immediately after the Kosovo war, caused many to rule in favour of Kosovar defendants even though the law supported the Serb plaintiffs. While international judges in Kosovo worked under UN protection, Kosovar judges had no such insurance.

In some countries, including Bulgaria, judges who correctly apply the law in controversial criminal cases can be vilified by the press even though the evidence failed to justify a conviction. Fearful of applying the correct, but unpopular, decision, inexperienced or insecure judges will modify their judgment in order to avoid public scorn. A member of a special court appointed to investigate Italian football managers and referees involved in rigging top league matches openly told a newspaper that its decision had taken into account Italy's victory in the 2006 World Cup, a spate of popular demonstrations and the support of some mayors of the cities whose teams were most implicated.

## 4. Low Judicial and Court Staff Salaries

Judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable

judges and court staff to support their families in a secure environment, prompt judges and court staff to supplement their incomes with bribes.

Although judges' salaries are not as attractive as those of legal professionals in the private sector, the security of the judicial position and the respect afforded to the profession should compensate for loss of earnings. In relation to other government employees judges should receive among the highest salaries. While the salary of a federal judge of a district court in the United States is not commensurate with what a judge might have earned in private practice, it is higher than most government employees and the prestige of the post makes it a sought-after position. The salary differential between different branches of government can be galling in some countries. Not so long ago, police in Uzbekistan received higher salaries than judges.

In addition to low salaries, judges often assume their positions with a significant financial burden. Judgeships in some countries are for sale and the cost can be many times the official annual salary of a judge. Judges who purchased their position have to recoup their investment by seeking bribes. Some Azerbaijani judges reportedly tolerate their court staff demanding bribes as they recognize that illicit payments are the only way they can achieve a moderate standard of living.

Countries such as Ecuador, Georgia, Nigeria and Peru have significantly raised judicial salaries in recent years in a bid to reduce the incentives for corruption. It is difficult to prove that an increase in salary is a causal factor in reducing corruption. Even where incidents of illicit payments to judges have clearly been reduced, the public continues to believe that corruption persists at the same level. In Georgia, judges' salaries have increased by as much as 400 percent in the past two years, but perceptions of judicial corruption remain high and the prevailing view is that the nature of corruption has simply changed. Instead of selling decisions for bribes, judges are now perceived as succumbing to executive pressure. At the least, a respectable salary for judges and court staff enhances the public perception of the judiciary as an equal branch of government.

#### 5. Poor Training and Lack of Rewards for Ethical Behaviour

In some countries, judges who make decisions based solely on the facts and applicable law have no assurance they will receive a positive evaluation. Ethical behaviour is punished, rather than rewarded. In corrupt judiciaries, judges who make correct decisions can see their judgments routinely overturned by corrupt appellate judges, thereby giving the impression that the lower court judge is incompetent.

Court presidents, who have the power to assign cases, can punish an ethical judge by assigning a disproportionately heavy caseload, causing a major case delay that can be grounds for reprimand. In Sri Lanka, judges who have the courage to rule against the government's interests are allegedly ignored by the Chief Justice who has broad discretion concerning the composition of Supreme Court panels. Those judges who are resolute in their independence can be the subject of bogus charges or can face early retirement.

#### 6. Collusion among Judges

In countries where judicial corruption is rife, judges conspire to support judicial decisions from which they will personally benefit. In Zimbabwe the government allocated farms expropriated under the fast-track land reform programme to judges at all levels, from lower court magistrates to the Chief Justice, to ensure that court decisions favour political interests. In a criminal case where the stakes are high, judges from the first instance court to the highest appellate court will collude to exonerate the guilty or reduce the defendant's sentence in return for a payoff.

#### 7. Inadequately monitored Administrative Court Procedures

Where procedural codes are ambiguous, perplexing or frequently amended, as in transitional countries, judges and court staff can exploit the confusion. Without modern office systems and computerized case processing, detection of the inappropriate use of case documents and files is difficult. Poorly trained and low paid court staff are enticed to use their discretionary powers to engage in administrative corruption since there is little accountability for their decisions. In Guatemala, for example, the disappearance of case files is a common source of extortion.

#### **D. Consequences of Judicial Corruption<sup>25</sup>**

Judicial corruption undermines citizens' morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance.

It erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities. When the latter occurs, corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.

### **V. UNITED NATIONS ANTI-CORRUPTION ACTIVITIES AND MEASURES**

#### **A. UN Conventions & Standards and Norms**

As reviewed above, the UNODC has developed and distributed UN convention against Corruption and the Standards and Norms.

#### **B. General Activities to curb Corruption<sup>26</sup>**

##### **1. Technical Assistance**

Projects undertaken in the framework of the Global Programme against Corruption have a specific global logic, leading to the identification of good practices and the production of materials that are not only relevant to one specific country or limited geographic context, but are able to inform policymaking and strategic planning worldwide. The Global Programme functions as a focal point for the UNODC field office network in the development and implementation of anti-corruption projects designed to support Member States build local capacities in the long run.

##### **2. Policy Development and Research**

Through the Global Programme against Corruption, UNODC contributes to programmes and projects that identify, disseminate and apply good practices in preventing and controlling corruption. It has also produced several technical and policy guidelines, including the Anti-Corruption ToolKit. The Global Programme has facilitated the production of assessment publications based on information collected during country missions.

Both through the International Group for Anti-Corruption Coordination and bilateral relations, UNODC engages with other agencies in its anti-corruption work. For example, the UNODC Anti-Corruption Unit is working with the United Nations Industrial Development Organization on the development and implementation of measures and tools to assist small and medium-size enterprises in protecting themselves against corruption.

Finally, the Anti-Corruption Unit has partnered with the United Nations Interregional Crime and Justice Research Institute on a project for the development of a guide on best practices and the creation of an electronic library for the implementation of the United Nations Convention against Corruption. The Anti-Corruption Unit continues its efforts to coordinate and facilitate the development of benchmarks, methodologies and approaches for a global assessment of corruption, as well as anti-corruption efforts.

##### **3. Awareness-raising and Outreach**

Public awareness materials are produced that can be used globally in anti-corruption campaigns by UNODC field offices, Governments, non-governmental organizations and other civil society organizations. Special attention is paid to corruption-related issues on 9 December, every year, on the occasion of the International Day against Corruption to raise awareness about the problem of corruption.

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<sup>25</sup> Transparency International, Global Corruption Report 2007, Executive Summary: Key Judicial Corruption Problems, p.xxi, Cambridge University Press.

<sup>26</sup> <http://www.unodc.org/unodc/en/corruption/index.html>

### **C. Strengthening the Integrity of the Judiciary<sup>27</sup>**

To confront widespread corruption in the courts in many parts of the world, the UN is taking a variety of approaches. It is examining judicial corruption in detail and seeking to identify means of addressing it, in higher and lower levels of court systems.

The objectives of strengthening judicial integrity are to: (1) Formulate the concept of judicial integrity and devise the methodology for introducing that concept without compromising the principle of judicial independence; (2) Facilitate a safe and productive learning environment for reform minded chief justices around the world; (3) Raise awareness regarding judicial integrity and to develop, guide, and monitor technical assistance projects aimed at strengthening judicial integrity and capacity.

UNODC has provided support in strengthening judicial integrity and capacity to Nigeria, South Africa, Indonesia, Mozambique and Iran, cooperating with a variety of partners including UNDP, GTZ, DFID, and USAID. Further projects are planned for Montenegro and Kenya.

UNODC especially developed the 'Judicial Ethics Training Manual for the Nigerian Judiciary' and conducted the training for the Nigerian judges.<sup>28</sup> This course is intended not to "teach" judicial ethics but to create a forum for judges to consider a variety of ethical problems and to discuss appropriate responses. It is intended to be participatory: the judges are expected to participate actively, with the course presenter assuming the role principally of a facilitator. The purpose of the course is to provide the judges with a framework for analysing and resolving ethical issues that may arise in the future. The "teaching" element in respect of the content of judicial ethics is intended only to assist a judge to choose the most prudent course of action when faced with an ethical issue.

### **D. Developing of a Computer-Based Training Tools**

A project proposal for the "Development of a Computer-Based Training (CBT) To Promote Judicial Ethics in Arabic-Speaking Countries" is submitted for further action.

The project on promoting judicial integrity takes into account several problems encountered in this field in Arabic-speaking countries. It aims thus at providing a quality training to judges and prosecutors to raise awareness in this field and to increase knowledge on professional ethics. It is being implemented in established training centres and can train a large number of judges and prosecutors at the same time and allows students to become an active part of a multimode training program with live voice commentators which provide feedback on answers.

The CBT aims at fostering the Bangalore Principles through numerous training sessions. Students are confronted with problematic issues of ethical relevance in everyday life situations. The training is supposed to raise awareness and illustrate inappropriate behaviour and test the student's understanding. The CBT is based on the Commentary of the Bangalore Principles and the training manual of these. It is targeted to judges already in office and those starting soon office work, and help them promote integrity within courts, among court staff and giving them the capacity to evaluate their own behaviour.

The project is targeted towards countries in the Middle East and thus is produced primarily in Arabic at the moment. In order to design this CBT a training needs analysis of the judicial situation of these countries has to be carried out. With the help of judicial experts a script needs to be written for the computer program and video-scenes showing inappropriate judicial behaviour designed by a multimedia company.

The content of the CBT will focus basically on three core parts: (1) Awareness rising through Video Clips; (2) Identification of Inappropriate Behaviour; (3) Testing the Participants' Understanding

After the composition and development of this CBT it will be disseminated at selected jurisdictions. After an evaluation of the UNODC and UNDP it is possible to expand this project to other areas, and translate it into other languages.

<sup>27</sup> <http://www.unodc.org/unodc/en/corruption/judiciary.html>

<sup>28</sup> You can find materials, including the Judicial Ethics Training Manual for the Nigerian Judiciary, related to judicial integrity at the following website: <http://www.unodc.org/unodc/en/corruption/publications.html>

## **E. The International Anti-Corruption Academy<sup>29</sup>**

### **1. Proposal**

INTERPOL, the UNODC and the Republic of Austria agreed in 2007 to create a global anti-corruption academy to transfer knowledge and skills to those engaged in the prevention, detection and prosecution of corruption, and to provide technical assistance to enhance transparency and for the implementation of the UN's Convention against Corruption. INTERPOL, as the implementing agency and the coordinator of the project, is leading the transition period until the International Anti-Corruption Academy (IACA) is established as an internationally recognized institution. The Republic of Austria has agreed to provide a state-of-the-art facility for the IACA campus on the outskirts of Vienna in the village of Laxenburg. The Academy will open its doors in fall 2010.

The principal goals of the IACA are (a) to professionalize anti-corruption work and exchange practices and standards in jurisdictions globally; and (b) to improve the efficiency and efficacy of all agencies, entities or individuals throughout the world whose primary function is to prevent, detect or prosecute corruption. In the longer term, the partners will support an expansion of the IACA to include regional academies, and to establish cooperation with existing training centres in Asia and the Pacific, the Americas and Africa, to take into account linguistic, cultural and regional differences, and to reduce costs to students and faculties.

### **2. Curriculum**

The curriculum will be a mixture of longer-term courses on corruption and ethics, shorter "module" courses that address specific needs and skills, and case studies. The courses are targeted at both the public and private sectors.

In addition to traditional course-work, the IACA will offer case-studies in a seminar setting. Students, together with teachers and facilitators, will become authors and editors of an electronic "tool box" that may be of use to those who seek assistance in combating corruption. The Academy will also provide shorter training of varying formats all through the year.

### **3. Faculty**

The IACA intends to have full-time faculty, and to rely upon part-time faculty drawn from police organizations, governments, NGOs, educational institutions and the private sector. The full-time faculty will teach longer-term anti-corruption and ethics courses. The part-time faculty will assist in teaching "module" courses, skills courses and case studies.

### **4. Students**

The students will come from police organizations, governments seeking to implement the UNCAC and other anti-corruption standards, NGOs seeking to enhance transparency and from the private companies needing assistance in the development of compliance programmes. It will also offer programmes to degree-seeking students from academic institutions.

The curriculum will be flexible enough for students to balance their professional obligations with learning. Therefore, students may select modules based on their schedules and the needs of their organizations.

## **VI. CONCLUSION<sup>30</sup>**

I would like to conclude by addressing lessons learnt from supporting judicial reform efforts with a particular focus on strengthening judicial integrity. First and foremost, addressing corruption in isolation is unlikely to yield good results. Corruption is the result of overall weaknesses in the governance system and as such needs to be tackled through a holistic approach.

It is common knowledge that any reform effort will require leadership at the top. This is even more true so for the fight against corruption. However, it has become quite evident that leadership at the top is not

<sup>29</sup> For more information, please see <http://www.interpol.int/Public/Corruption/Academy/default.asp>

<sup>30</sup> UNAFEI, the Office of the Attorney General of Thailand, and the UNODC Regional Centre for East Asia and the Pacific, First Regional Seminar on Good Governance for Southeast Asian Countries, Corruption Control in the Judiciary and Prosecutorial Authorities, Oliver Stolpe, Strengthening Judicial Integrity and Capacity – Successes and Lessons Learned, p.164.

enough. In particular, when the leadership moves on to address new challenges, sustainability becomes problematic when the leadership at the top did not allow by time for leadership at all hierarchical levels to emerge and take ownership of the reform process.

As mentioned earlier, judiciaries are typically small institutions with very little capacities to manage and monitor the implementation of reforms. It is therefore necessary that technical assistance pays particular attention to the identification and strengthening of an organizational unit within the judiciary to carry forward the reform efforts.

Moreover, judiciaries are typically under funded and, unlike institutions of the executive arm, have little or no influence over their resource allocations. Projects and programmes aimed to assist judicial reform need to take this into account, and ensure the active involvement in and support of the legislature and the executive.

In order to ensure that judges of all levels fully embrace measures to enhance accountability, oversight and integrity in the judiciary there is a need to review remuneration and working conditions. If these are not conducive some judicial officers may consider the adherence to standards of professional ethics and conduct impossible and therefore improper.

Another important lesson is that, contrary to the concerns voiced by some judges, it was possible to enhance accountability without jeopardizing judicial independence. As matter of fact it turned out that, if carefully designed, measures aimed to increase accountability of judges, at the same time can strengthen judicial independence.

Overall it can be concluded that low-cost reforms can have a significant impact on the overall performance of and trust in the judiciary, if measures to enhance integrity of the judiciary are carefully balanced with measures aimed to increase the capacity of the judiciary.