

## **MOUNT SCOPUS INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE**

Approved March 19, 2008

Consolidated 2013

### **Preamble**

These revised standards are approved in recognition of the need for the revision of the guidelines of general application to contribute to the independence and impartiality of the judiciary, with a view to ensuring the legitimacy and effectiveness of the judicial process.

In formulating these standards due regard has been given to the New Delhi Minimum Standards on Judicial Independence 1982 and the Montréal Universal Declaration on the Independence of Justice 1983 drafted with the assistance of members of the International Project of Judicial independence of the International Association of Judicial Independence and World Peace and to the UN Basic Principles of Judicial Independence 1985 and the long series of sets of other international rules and standards relating to judicial independence and the right to a fair trial; and The Burgh House Principles of Judicial Independence in International Law (for the international judiciary). Inspiration has also been drawn from the Tokyo Law Asia Principles; Council of Europe Statements on judicial independence, particularly the Recommendation of the Committee of Ministers to Member States on the independence, efficiency and role of judges by the Council of Europe 1998, The Bangalore Principles of Judicial Conduct November 2002, and the American Bar Association's revision of its ethical standards for judges.

The Standards were drafted bearing in mind the special challenges facing the judiciary in view of the challenges and problems in both the national and international spheres.

An updated comprehensive revision of minimum standards for judicial independence is called for in order to give appropriate response to the developments and challenges regarding the position of courts and judges in contemporary society. This revision is important to enable the judiciary to play a role in the adequate protection of human rights and in the operation of an efficient and fair market economy with a human face in the era of globalisation. The standards give due consideration particularly to the fact that each jurisdiction and legal tradition has own characteristics that must be recognised. It is also recognized that in the international judiciary each court or tribunal has its unique features and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges.

## **A. NATIONAL JUDGES**

### **1. THE SIGNIFICANCE OF THE INDEPENDENCE OF THE JUDICIARY**

1.1. An independent and impartial<sup>1</sup> judiciary is an institution of the highest value in every society<sup>2</sup> and an essential pillar of liberty<sup>3</sup> and the rule of law.

1.2. The objectives and functions of the judiciary shall include:

1.2.1.1. To resolve disputes and to administer the law impartially between persons and between persons and public authorities;

1.2.1.2. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

1.2.1.3. To ensure that all people are able to live securely under the rule of law.<sup>4</sup>

1.3 It is vital that supranational and international Tribunals respect the fundamental principles of the legal systems of the Member States and to that end acknowledge the collegiality of the traditions of the courts of both the municipal and extra municipal courts <sup>5</sup>.

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<sup>1</sup> Stating this in the body of the standards themselves in addition to the preamble helps stress the section's importance and ensures that it is more easily referred to.

→ This is preferred to the first version as it describes exactly what elements are required in the Judiciary

→ Tokyo Law Asia Principles. Stating this in the body of the standards themselves rather than in a preamble helps stress the section's importance and ensures that it is more easily referred to.

<sup>3</sup> Preamble, Montréal Declaration.

<sup>4</sup> Montréal Declaration.

→ Recall competing values of judicial independence and judicial accountability: "As phrased by a Canadian judge, Mr. Justice Riddell, commenting on an arrangement of divisions of labour among the judges, 'Judges are the servants, not the masters of the people.' Servants are accountable, so are judges." From Shetreet, *Judicial Independence: The Contemporary Debate*, at 593, referring to *Davis Acetylene Gas Co. v. Morrison*, (1915) 34 O.L.R. 155, 23 D.L.R. 871 (C.A.).

<sup>5</sup> This Article 1.3 was added as an Amendment in the Conference in Venna 2011.

## **BUILDING AND MAINTAINING CULTURE OF JUDICIAL INDEPENDENCE<sup>6</sup>**

1.4 Every society and all international bodies, tribunals and courts shall endeavour to build and maintain a culture of judicial independence that is essential for democracy, liberty, rule of law and human rights in domestic system of government and is a necessary foundation for world peace, orderly world trade, globalised markets and beneficial international investments.

1.4.1 The culture of judicial independence is created on five important and essential aspects: creating institutional structure, establishing constitutional infrastructures, introducing legislative provisions and constitutional safeguards, creating adjudicative arrangements and jurisprudence, and maintaining ethical traditions and code of judicial conduct.

1.4.2 The institutional structures regulate the matters relative to status of the judges and jurisdiction of the courts.

1.4.3 The constitutional infrastructure embodies in the constitution the main provisions of the protection of the judiciary as outlined in this standards.

1.4.4 The legislative provisions offer a detailed regulation of the basic constitutional principles of judicial independence and impartiality

1.4.5 The courts add to the constitutional infrastructure and the legislative provisions complimentary interpretations and jurisprudence on different aspects of the conduct of judges operation and courts.

1.4.6 The ethical traditions and code of judicial conduct cover the judge's official and non-official spheres of activities, and shield the judge's substantive independence from dependencies, associations, and even less intensive involvements which might cast doubts on judicial neutrality.

## **2. THE JUDICIARY<sup>7</sup> AND THE EXECUTIVE**

2.1. The Judiciary as a whole shall be independent.

2.2. Each judge shall enjoy both personal independence and substantive independence:<sup>8</sup>

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<sup>6</sup> This Article 1.4 was added as an Amendment in October 2012 in the conference in Ghent .

<sup>7</sup> The focus is really on the relationship with the judiciary as a whole, rather than with individual judges.

<sup>8</sup> Although substantive independence warrants wide protection, it is not without boundaries. Judges must exercise their powers subject to the general limit of mutual respect between the various branches of the government and accepted lines of demarcation of their respective responsibilities. The mutual respect is expressed in judge-made rules, including the rule that courts will not engage in the adjudication of unjusticiable issues, such as political questions: Shetreet, Judicial Independence :New

- 2.2.1. Personal independence means that the terms and conditions of judicial service are adequately secured by law<sup>9</sup> so as to ensure that individual judges are not subject to executive control; and
- 2.2.2. Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.
- 2.3. The Judiciary as a whole shall<sup>10</sup> enjoy collective independence and autonomy vis-à-vis the Executive.
- 2.4. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence as long as they are in accordance with Principles 4.
- 2.5. No executive decree shall reverse specific court decisions, or change the composition of the court in order to affect its decision-making.<sup>11</sup>
- 2.6. The Executive may only participate in the discipline of judges by referring complaints against judges, or by the initiation of disciplinary proceedings, but not by the adjudication of such matters.
- 2.7. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
- 2.8. The power of removal of a judge shall preferably be vested in a judicial tribunal.
- 2.9. The Executive shall not have control over judicial functions.
- 2.10. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.
- 2.11. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.

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Conceptual Dimensions and Contemporary Challenges , in Shetreet and Descenes *Judicial Independence: The Contemporary Debate* at 635.( 1985 )

<sup>9</sup> To clarify that these important conditions must be legally entrenched.

<sup>10</sup> Adds mandatory language.

<sup>11</sup> Montréal Declaration section 2.08.

- 2.12. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
- 2.13. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.
- 2.14. The principle of democratic accountability should be respected and therefore it is legitimate for the legislature to play a role in judicial appointments and central administration of justice provided that due consideration is given to the principle of judicial independence.
- 2.15. The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects.<sup>12</sup>
- 2.15.1. Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.<sup>13</sup>
- 2.16. Candidates for judicial office shall be individuals of integrity<sup>14</sup> and ability, well-trained in the law. They shall have equality of access to judicial office.<sup>15</sup>
- 2.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.
- 2.18. Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
- 2.18.1. In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

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<sup>12</sup> Montréal Declaration section 2.13. See also Shetreet, *Judicial Independence: The Contemporary Debate*, at 401.

<sup>13</sup> Montréal Declaration

→ "Political opinion" is also taken from PH Lane, *Fragile Bastion: Constitutional Aspects of Judicial Independence* (judicial independence is composed of at least five aspects: (1) non-political appointments to a court; (2) guaranteed tenure and salary; (3) executive and legislative interference with court proceedings or office holders; (4) budgetary autonomy; (5) administrative autonomy).

<sup>14</sup> Montréal Declaration section 2.11.

<sup>15</sup> Exact wording of the Montréal Declaration, section 2.11.

- 2.18.2. Subject to 2.18.1, the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.
- 2.19. The power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
- 2.20. Judicial salaries and pensions shall be adequate at all times, fixed by law, and should be periodically reviewed independently of Executive control
- 2.21. The position of the judges, their independence, their security of tenure, and their adequate remuneration shall be entrenched constitutionally<sup>16</sup> or secured by law.
- 2.22. Judicial salaries, pensions, and benefits<sup>17</sup> cannot be decreased during judges' service except as a coherent part of an overall public economic measure.
- 2.23. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.
- 2.24. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.
- 2.25. The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.
- 2.26. The Executive shall not have the power to close down, or suspend, or delay, the operation of the court system at any level.

### **3. THE JUDICIARY<sup>18</sup> AND THE LEGISLATURE**

- 3.1. The Legislature shall not pass legislation which reverses specific court decisions.

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<sup>16</sup> UN Basic Principles.

→ Change suggested in order to provide additional flexibility, and also to stress how this is an important enough issue to be constitutionally entrenched.

<sup>17</sup> In the interests of completeness

<sup>18</sup> The focus is really on the relationship with the judiciary as a whole, rather than with individual judges.

- 3.2. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service and are generally applied.<sup>19</sup>
- 3.3. In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable<sup>20</sup> status.
- 3.4. Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts.<sup>21</sup>
- 3.5. Part-time judges should be appointed only with proper safeguards secured by law.
- 3.6. The Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation.<sup>22</sup>

#### 4. TERMS AND NATURE OF JUDICIAL APPOINTMENTS

- 4.1. The method of judicial selection shall safeguard against judicial appointments for improper motives<sup>23</sup> and shall not threaten judicial independence.

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<sup>19</sup> In order to prevent "rewarding" specific judges.

- The US Constitution's Compensation Clause guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office." *U.S. Const.*, Art. III, §1.
- See *US v. Hatter* (99-1978) 532 U.S. 557 (2001) 203 F.3d 795: Congress is prohibited from singling out judges for specially unfavourable taxation treatment, although it is permitted to impose a "non-discriminatory tax laid generally" upon judges and other citizens.
- See *United States v. Will*, 449 U.S. 200, 220-21 (1980): though Congress may not rescind a salary increase for judges once it has gone into effect - that would be a diminishment of compensation - Congress is under no constitutional obligation to grant salary increases.
- See *Evans v. Gore*, 253 U.S. 245, 253 (1920): The imposition of a new federal tax that has the effect of reducing the judicial compensation of judges already in office is unconstitutional.
- But see *O'Malley v. Woodrough*, 307 U.S. 277 (1939): an income tax levied against the judicial salary of judges who took office after the levy is in effect is constitutional, when the taxing measure is of general, non-discriminatory application to all earners of income.

<sup>20</sup> To provide for situations such as those that occurred in Ontario when the entire court structure was reorganized.

<sup>21</sup> For a discussion of this issue, see Shetreet, *Judicial Independence: The Contemporary Debate*, at 616.

<sup>22</sup> In order to try to prevent situations such as those that occurred in Ecuador in April 2007 when Congress removed all nine judges of the Constitutional Court in a retaliatory measure, contrary to the Ecuadorian constitution which provides that judges of the Constitutional Court can only be removed by impeachment: Human Rights Watch, *Ecuador: Removal of Judges Undermines Judicial Independence* (May 11, 2007).

<sup>23</sup> Montréal Declaration.

4.2. a) The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.

b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature ,the Executive ,the Judiciary and the legal profession take part ,should be viewed favourably, provided that a proper balance is maintained in the composition of such boards or commissions of each of the branches of government

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

4.3.1. Retirement age shall not be reduced for existing judges.<sup>24</sup>

4.4. Promotion of judges shall<sup>25</sup> be based on objective factors, in particular merit,<sup>26</sup> integrity and experience.<sup>27</sup>

4.5. Judicial appointments and promotions shall be based on transparency of the procedures and standards and shall be based on professional qualifications, integrity, ability and efficiency.

4.6. Judges should not be appointed for probationary periods except in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment, and provided that permanent appointment will be granted on merit.<sup>28</sup>

4.7. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

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<sup>24</sup> See Shetreet, *Judicial Independence :New Conceptual Dimensions and Contemporary Challenges* , in Shetreet and Descenes *Judicial Independence: The Contemporary Debate*, at 607 ( 1985 ) reporting that in Bangladesh, in 1977 an ordinance was passed bringing down the retirement age from 65 to 62 years with immediate effect. This resulted in the retirement of two distinguished judges. This was in fact a legislative removal of these two judges though it was in theory a general statute.

<sup>25</sup> In order to make this mandatory.

<sup>26</sup> "Merit" is broader than "ability".

<sup>27</sup> UN Basic Principles.

→ Montréal Declaration provides: "Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law."

<sup>28</sup> Scottish temporary judges cases *Starrs and Chalmers v .D. F. Linlithgow* 2000 S. L. 2 ; *Clancy v. Caird* 2000 Scottish Law Times ,*The Bailiff Judicial Appointments ( Scotland ) Act 2000*



- 4.8. Part-time judges should be appointed only with proper safeguards secured by law.
- 4.9. The number of the members of the highest court should be fixed, with the exception of courts modeled after the courts of cassation, and in the case of all courts, should not be altered for improper motives.
- 4.10. Legislatures should formulate special procedures for the appointment of Chief

Justices and Presidents of courts.

## 5. JUDICIAL REMOVAL AND DISCIPLINE

- 5.1. The proceedings for discipline and removal of judges<sup>29</sup> shall be processed expeditiously and fairly<sup>30</sup> and shall ensure fairness to the judge including adequate opportunity for hearing.
- 5.2. With the exception of proceedings before the Legislature<sup>31</sup>, the procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public<sup>32</sup> and such request should be respected, subject to expeditious, final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.<sup>33</sup>
- 5.3. All of the grounds for the discipline, suspension and removal of judges shall be entrenched constitutionally or fixed by law and shall be clearly defined.
- 5.4. All disciplinary, suspension and removal<sup>34</sup> actions shall be based upon established standards of judicial conduct.<sup>35</sup>
- 5.5. A judge shall not be subject to removal, unless by reason of a criminal act or through gross or repeated neglect or serious infringements of disciplinary rules or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge. The grounds for removal shall be limited to

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<sup>29</sup> The UN Basic Principles adds "in his/her judicial and professional capacity." This wording was not added here to prevent personal suits being lodged against judges as a back-door method of interfering with their independence.

<sup>30</sup> UN Basic Principles.

<sup>31</sup> Montréal Declaration section 2.36.

<sup>32</sup> Montréal Declaration section 2.36.

<sup>33</sup> Montréal Declaration section 2.36.

<sup>34</sup> Inclusive.

<sup>35</sup> Montréal Declaration section 2.34. Broad.

reasons of medical incapacity or behaviour that renders the judge unfit to discharge their duties.<sup>36</sup>

- 5.6. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.
- 5.7. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

## **6. THE MEDIA AND THE JUDICIARY**

- 6.1. It should be recognized that judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restraint in criticism of judicial decisions.<sup>37</sup>
- 6.2. While recognising the general right of freedom of expression of all citizens, a judge should not interview directly with the general media. If a judge needs to respond to the media in regard to a media report or inquiry, it shall be done via a spokesperson assigned by the court or a judge specifically assigned by the court for this purpose. In exceptional circumstances a judge may respond directly to the media if that judge's direct response will prevent an irreparable damage.
- 6.3. The media should show responsibility and restraint in publications on pending cases where such publication may influence the outcome of the case.
- 6.4. A judge shall not knowingly, while a proceeding is, 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. <sup>38</sup>

## **7. STANDARDS OF CONDUCT<sup>39</sup>**

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<sup>36</sup> UN Basic Principles.

<sup>37</sup> See discussion by Julie Debeljak, *Judicial Conference of Australia, Uluru, April 2001: Judicial Independence: A Collection of Material for the Judicial Conference of Australia* regarding the consequences of inappropriate public criticism (it leaves judges having to choose between being silent leading to a potential decrease in public confidence in the judiciary, or else inappropriately being drawn into public criticism).

<sup>38</sup> Bangalore Principles

<sup>39</sup> Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, Volume 16, No. 3(B) (June 2004) reporting some of allegations of judicial bias in Venezuela. For

- 7.1. Judges may not serve in Executive or Legislative functions, including as:
- 7.1.1. Ministers of the government; or as
  - 7.1.2. Members of the Legislature or of municipal councils.
- 7.2. Judges shall not hold positions in political parties.
- 7.3. A judge, other than a temporary or part-time judge, may not practice law.
- 7.4. A judge should refrain from business activities and should avoid from engaging in other remunerative activity,<sup>40</sup> that can affect the exercise of judicial functions or the image of the judge, except in respect of that judge's personal investments, ownership of property, the business activities or ownership of property of family members<sup>41</sup>, or that judge's teaching at a university or a college.
- 7.5. A judge should always behave in such a manner as to preserve the dignity of the office and the impartiality, integrity and independence of the Judiciary.
- 7.6. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.
- 7.7. Judges may take appropriate action to protect their judicial independence.<sup>42</sup>
- 7.8. 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.
- 7.9. 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;

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instance, Attorney General Isaías Rodríguez in May 2004 allegedly described how the country's top administrative court in the past established set fees for resolving different kinds of cases.

<sup>40</sup> ABA Model Code of Judicial Conduct (February 2007), Canon 4, Article D(2).

<sup>41</sup> ABA Model Code of Judicial Conduct (February 2007), Canon 4, Article D(2) discusses family.

<sup>42</sup> This is how the section appears in the Montréal Declaration, section 2.09.

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 <sup>43</sup>

7.10. A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges.<sup>44</sup>

7.11. Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

7.12. Except in cases of legitimate consultations a Judge shall not approach other judges not sitting with him on the same panel on pending cases.<sup>45</sup>

## 8. SECURING IMPARTIALITY AND INDEPENDENCE<sup>46</sup>

8.1. A judge<sup>47</sup> shall enjoy immunity from legal actions in the exercise of his official functions.<sup>48</sup>

8.2. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.<sup>49</sup>

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<sup>43</sup> Bangalore Principles

<sup>44</sup> Recommendation No.R(94)12). of the committee of Ministers of the Council of Europe to Member States

<sup>45</sup> This Article 7.12 was added as an Amendment in Vienna in 2011.

<sup>46</sup> See Cyrus Das and K. Chandra, Editors, *Judges and Judicial Accountability*, Universal Law Publishing Company Ltd., Delhi.

<sup>47</sup> This does not exclude the possibility that the state may be liable for the gross negligence of a judicial officer.

<sup>48</sup> Consider a 1988 Italian law which was designed to, within certain limit, render judges accountable for damages caused by serious fault in the exercise of their functions: see Giovanni E. Longo, "The Human Right to an Independent Judiciary: International Norms and Denied application before a Domestic Jurisdiction," *St. John's Law Review* (Winter 1996).

<sup>49</sup> "It is most important that the judiciary be independent and be so perceived by the public. The judges must not have cause to fear that they will be prejudiced by their decisions or that the public would reasonably apprehend this to be the case": Howland, CJ, *R. v. Valente* 2 C.C.C. (3d) 417, at 423 (1983).

8.3. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

8.4. The state shall ensure that in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats<sup>50</sup> or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary<sup>51</sup>

## **9. THE INTERNAL INDEPENDENCE OF THE JUDICIARY**

9.1 In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

9.2 Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of judges to pronounce their judgments freely.<sup>52</sup>

### **9A. ADMINISTRATIVE ADJUDICATORS<sup>53</sup>**

#### **Administrative adjudicatory officers**

##### **9A.1— Definitions**

In this section the term administrative adjudicators means — Administrative officers exercising judicial functions in agencies but are not part of the regular court system.

9A.2. Except as provided below, the standards applicable to national judges shall apply to administrative adjudicators

9A.3. Administrative officers exercising judicial functions - hereinafter administrative adjudicators - may be appointed by the executive on merit according to the general principles in section 4.4 and section 4.5.

9A.4. Administrative adjudicators may be appointed for probationary periods provided the decision whether to make a permanent appointment is based on merit.

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<sup>50</sup> Including physical threats to injure or to kill .

<sup>51</sup> Recommendation No.R(94)12 of the committee of Ministers of the Council of Europe to Member States

<sup>52</sup> Montréal Declaration section 2.03.

<sup>53</sup> This Article 9A was added as an Amendment in Vienna in 2011.

9A.5. Compensation of administrative adjudicators shall not be reduced except as part of a general economic measures applied to the country as a whole

9A.6. Administrative adjudicators may be removed only for good cause, to be specified by law, and only after a fair hearing.

9A.7. Administrative adjudicators shall not exercise or be assigned non-adjudicatory functions in the same or a related matter in which they perform adjudicatory functions.

9A.8. Decisions of administrative adjudicators , including factual findings and legal conclusions, shall be subject to review by the agency that administers the program under which the matter arises and also may be subject to judicial review according to law.

9A.9. The executive shall not interfere in the substantive decision-making of administrative adjudicators.

9A.10. Administrative adjudicators shall be subject to evaluation according to objective criteria that are related to promoting uniform decisional standards.

#### **PUBLIC INQUIRIES BY JUDGES<sup>54</sup>**

9B. If a serving member of the judiciary accepts appointment as a Commissioner of Inquiry on behalf of Government, he or she does so not in the capacity of a judge but as a public servant in public administration.

9B.1 While a serving judge conducts a public inquiry, in accordance with terms of reference stated by the Government, he must act impartially and independently of any party interested in the substance of the public inquiry.

9B.2 A serving judge who chairs a public inquiry is entitled to insist that all matters of the procedure in the conduct of the inquiry shall be at his complete discretion; in particular he or she may, according to the applicable law or standards, issue a warning letter to any interested party of any complaint that may appear in the Inquiry's report to Government

9B.3 If an interested party responds to any such warning letter from the public inquiry, the judge will consider such response, and if necessary, indicate that it has been considered in the preparation of the final report to Government.

9B.4 Upon receiving a request to chair a commission of inquiry, a judge shall carefully consider all the ramifications of such appointment before giving consent to said appointment

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<sup>54</sup> This Article 9B was added as an Amendment in Ghent in 2012.

9B.5 Judges who exercise other functions such as in alternative dispute resolution (ADR), in mediation or arbitration, shall act impartially and independently of any party to the relevant procedure.

**Section 9C: Ensuring impartiality of chairpersons and members of commissions and committees of inquiry and other quasi judicial institutions.<sup>55</sup>**

9C.1. All officers exercising judicial and quasi judicial functions and investigative and auditing functions are subject to the duty of fairness and impartiality. This includes commissions of inquiry, mediation, arbitration, state auditing and internal auditing. All such officers and Members or chairpersons of commission or committee of inquiry shall maintain impartiality and demonstrate independence in conducting inquiries and in making fact-finding and recommendations.

9C.2. The general rules applicable to national judges , including sections 1-9B in case of circumstances requiring disqualification of judges, shall also apply to officers enumerated in section 9C.1 and members of commissions of inquiry and to quasi judicial institutions.

9C.3. The general rules applicable to, including sections 1-9B judges in case of circumstances requiring disqualification of judges shall also apply to internal auditors and state auditors.

**Section 9D: Lawyers**

**Definitions**

1 In this section:

- a) "lawyer" means a person qualified and authorized to practice before the courts, or to advise and represent his clients in legal matters;
- b) "Bar association" means the recognized professional association to which lawyers within a given jurisdiction belong.

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<sup>55</sup> This section was added in the Osnabruck Conference, 2014.

## **General Principles**

- 2 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.
- 3 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- 4 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

## **Legal Education and Entry into the Legal Profession**

- 5 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.
- 6 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer, and of human rights and fundamental freedoms recognized by national and international law.
- 7 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to persons of limited means and the promotion and defence of economic, social and cultural rights in the process of development.
- 8 Every person having the necessary integrity, good character and qualifications



in law shall be entitled to become a lawyer, and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

### **Education of the Public Concerning the Law**

9 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant and available remedies.

### **Rights and Duties of Lawyers**

10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and, where required, c) representing him before courts, tribunals or administrative authorities.

The lawyer must also advise the client on both the legal and ethical consequences of proposed actions, while asking questions about future actions that are implicit in what the client has disclosed.

11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

The lawyer shall (1) inform the client when proposed action would violate either legal or ethical standards, and (2) raise questions that are implied by proposed actions.

12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's

cause, however popular or unpopular it may be.

13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

14 No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.

15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

17 Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.

18 The independence of lawyers, in dealing with persons deprived of their liberty, shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

19 Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client relationship; b) the right to travel and to consult with their clients freely, both within their own country and abroad; c) the

right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;  
d) the right to accept or refuse a client or a brief.

20 Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to: a) take part in public discussion of matters concerning the law and the administration of justice. b) join freely local, national and international organizations c) propose and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political, social and cultural life of their country.

21 Rules and regulations governing the fees and remunerations of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

### **Legal Services for persons with limited means**

22 It is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one <sup>may</sup> be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

23 Governments shall be responsible for providing sufficient funding for legal service programmes for persons of limited means .

24 lawyers engaged in legal service programmes and organizations, which are financed wholly or in part, from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;

- recognition that, in serving the cause of justice, the lawyers primary duty is towards his client; whom he must advise and represent in conformity with his professional conscience and judgment.

### **The Bar Association**

25 There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join, in addition, other professional associations of lawyers and jurists.

26 In this section:

- (a) In order to enjoy the right of audience before the courts, all lawyers are encouraged to be members of the appropriate Bar Association.
- (b) Mandatory system of bar membership may be changed to a voluntary one provided it is insuring high professional and ethical standards and maintaining independence of the profession.

### **Function of the Bar Association**

27 The functions of a Bar Association in ensuring the independence of the legal profession shall be inter alia:

- (a) to promote and uphold the cause of justice, without fear or favour;
- (b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession
- (c) to defend the role of lawyers in society and preserve the independence of the profession;
- (d) to protect and defend the dignity and independence of the judiciary;
- (e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;
- (f) to promote the right of everyone to a fair and public hearing before a

competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;

(g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;

(h) to promote a high standard of legal education as a prerequisite for entry into the profession;

(i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;

(j) to promote the welfare of members of the profession and render assistance to a cases; appropriate in family his of member (k) to affiliate with and participate in the activities of international organizations of lawyers.

28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

29 To enable the Bar Association to fulfill its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: t) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to take or calling into question the integrity of a lawyer. In such cases, the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that- professional secrecy is safeguarded.

### **Disciplinary Proceedings**

30 The Bar Association shall freely establish and enforce, in accordance with the law, a code of professional conduct of lawyers.

31 The Bar Association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar Association with a view to its initiating disciplinary proceedings.

32 Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.

33 An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

34 Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

### **Defence of judicial independence**

35. Lawyers have an individual professional responsibility to uphold the independence of the judiciary.

36. Lawyers professional associations shall have a duty to defend the independence of the judiciary.

## **B. INTERNATIONAL JUDGES**

The following text on minimum standards for the independence of the international judiciary is based, with minor amendments, on the Burgh House Principles on the Independence of the International Judiciary which were formulated by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals

### **10. INDEPENDENCE**

- 10.1 The international courts and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity.
- 10.2 This freedom of the judges and courts shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.
- 10.3 The court shall be free to determine the conditions for its international administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.
- 10.4 Deliberations of the court shall remain confidential.
- 10.5 All Judges of international courts and tribunals shall adhere to the principle that a judges who are nationals of a member state of the organisation establishing the court or tribunal when exercising judicial discretion and function shall engage in fair and independent adjudication of the case and by no means in representation of the member state.

## **11 NOMINATION, ELECTION AND APPOINTMENT**

- 11.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned.
- 11.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.
- 11.3 Procedures for the nomination, election, and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.
- 11.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process.

- 11.5 For the promotion of the independence of judges it is preferable that appointment of judges to the international courts and tribunals shall be for one long term and shall not be open for re-election.

## **12 SECURITY OF TENURE**

- 12.1 Judges shall have security of tenure in relations to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance.
- 12.2 The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.

## **13 SERVICE AND REMUNERATION**

- 13.1 Judges' essential conditions of service shall be enumerated in legally binding instruments.
- 13.2 No adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office.
- 13.3 Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.
- 13.4 Conditions of service should include adequate pension arrangements.

## **14 PRIVILEGES AND IMMUNITIES**

- 14.1 Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial functions.
- 14.2 The court alone shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function.
- 14.3 Documents and papers of the courts, judges and registry, in so far as they relate to the business of the court, shall be inviolable.



- 14.4 The state in which an international court has its seat shall take the necessary measures to protect the security of the judges and their families, and to protect them from adverse measures related to the exercise of their judicial function.

## **15 BUDGET**

- 15.1 States, parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

## **16 FREEDOM OF EXPRESSION AND ASSOCIATION**

- 16.1 Judges shall enjoy freedom of expression and association. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.
- 16.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extra-judicially upon pending cases.
- 16.3 Judges shall exercise appropriate restraint in commenting extra-judicially upon judgements and procedures of their own and other courts and may upon any legislation, drafts, proposals or subject-matter likely to come before their court.

## **17 EXTRA-JUDICIAL ACTIVITY**

- 17.1 Judges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.
- 17.2 Judges shall not exercise any political function.
- 17.3 Each court should establish an appropriate mechanism to give guidance to judges in relation to extra-judicial activities, and to ensure that appropriate means exist for parties to proceedings to raise any concerns.

## **18 PAST LINKS TO A CASE**

- 18.1 Judges shall not serve in a case in which they have previously served as agent, counsel, advisor, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute or in a case where they had previously commented or expressed an opinion concerning the subject matter in a manner that is likely to affect or may reasonably appear to affect their independence or impartiality.
- 18.2 Judges shall not serve in a case with the subject matter of which they had other forms of association that may affect or may reasonably appear to affect their independence or impartiality.

## **19 PAST LINKS TO A PARTY**

- 19.1 Judges shall not sit in any case involving a party for whom they have served as agent, counsel, advisor, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

## **20 INTEREST IN THE OUTCOME OF A CASE**

- 20.1 Judges shall not sit in any case in the outcome of which they hold any material personal, professional or financial interest.
- 20.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold a material, personal, professional or financial interest.
- 20.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of a judge's participation in the proceedings.

## **21 CONTACT WITH A PARTY**

- 21.1 Judges shall exercise appropriate caution in their personal contacts with parties, agents, counsel, advocates, advisors, and other persons and entities associated with a pending case. Any such contacts should be conducted in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect the judge's independence and impartiality.

- 21.2 Judges shall discourage *ex parte* communications from parties and except as provided by the rules of the court such communications shall be disclosed to the court and to the other party.

## **22 POST-SERVICE LIMITATIONS**

- 22.1 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.
- 22.2 Judges shall not seek or accept, while they are in office, any future employment, appointment or benefit, from a party to a case on which they sat or from any entity related to such a party that may affect or may reasonably appear to affect their independence or impartiality.
- 22.3 Former judges shall not, except as permitted by rules of the court, act in any capacity in relations to any case on which they sat during their judicial term of office.
- 22.4 Former judges shall not act as agent, counsel, advisor or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.
- 22.5 Former judges should exercise appropriate caution as regards the acceptance of any employment, appointment or benefit, in particular from a party to a case on which they sat or from any entity related to such a party.

## **23 DISCLOSURE**

- 23.1 Judges shall disclose to the court and, as appropriate, to the parties of the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 16 to 22 apply.
- 23.2 Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relations to any particular case.

## **24 WAIVER**

- 24.1 Notwithstanding Principles 16 to 22, judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts

bringing any of those Principles into operation, where the court expresses no objections and the parties give their express and informed consent to the judge acting.

**Section 24A: Ensuring impartiality of chairperson and members of commission of inquiry and other quasi judicial institutions.<sup>56</sup>**

24A.1 All international officers exercising judicial and quasi judicial functions and investigative and auditing functions are subject to the duty of fairness and impartiality. This includes international commissions of inquiry, mediation, arbitration, auditing officers and internal auditing officers of international organizations. Such said officers and Members or chairmen of international commission or committee of inquiry shall maintain impartiality and demonstrate independence in conducting inquiries and in making fact-finding and recommendations.

24A.2. The general rules applicable to international judges, including sections 10-24 in case of circumstances requiring disqualification of judges , shall also apply to said officers and commissions and committees of inquiry and to quasi judicial or investigative or auditing institutions.

24A.3. The general rules applicable to international judges, including sections 10-24 in case of circumstances requiring disqualification of judges shall also apply to auditing officers and internal auditing officers of international organizations.

## **25 WITHDRAWAL OR DISQUALIFICATION**

25.1 Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.

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<sup>56</sup> Amended at Osnabruck Conference, 2014.

## **26 MISCONDUCT**

- 26.1 Each court shall establish rules of procedure to address a specific complaint of misconduct or breach of duty on the part of a judge that may affect independence or impartiality.
- 26.2 Such a complaint may, if clearly unfounded, be resolved on a summary basis. IN any case where the court determines that more detailed investigation is required, the rules shall establish adequate safeguards to protect the judges' rights and interests and to ensure appropriate confidentiality of the proceedings.
- 26.3 The governing instruments of the court shall provide for appropriate measures, including the removal from office of a judge.
- 26.4 The outcome of any complaint shall be communicated to the complainant.

## **27 AD HOC JUDGES**

- 27.1 An *ad hoc* judge in an international court or tribunal must act conscientiously and independently in the adjudication of the case to which that judge was assigned to sit.
- 27.2 The restrictions and provisions applicable to full-time international judges regarding past links, extra-judicial activities, post-service limitations, and security of tenure shall not apply to *ad hoc* judges.

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