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## Session Report Template for Substantive Sessions

### Launch of the Global Judicial Integrity Network

(9-10 April 2018, United Nations Vienna)

This form provides guidance to the organizations that will coordinate sessions to address one of the conference's work streams.

The Conference's main goal is to officially launch the Global Network and to kick start its activities by engaging participants in substantive exchanges and discussions on topics, approaches and emerging good practices related to the strengthening of judicial integrity and preventing corruption in the justice system.

As such, the Conference will work under three streams:

- **Strengthening Judicial Integrity & Accountability**
- **Preventing Corruption in the Justice System**
- **Assessing and Monitoring Integrity**

Each organization coordinating a session is required to prepare a **3-6 pages report** about their sessions (Times New Roman, 12 pt, single space).

The objective of this document is to provide an account of the presentations made and discussions carried out during the session. The report will be shared with all participants of the Conference, as well as disseminated more widely on the Global Judicial Integrity Network website.

The Session Report should cover the following areas:

1. **Introduction of the topic** – providing background information on the issue addressed in the session. The information should include, whenever possible, reference to academic materials, surveys, publications or other reference material, as well as an overall summary of the experiences, practices and challenges to date under the topic. This information may be the same included in the discussion guide of the session;
2. **How the session supports the overall objective of the Global Judicial Integrity Network of strengthening judicial integrity and preventing corruption in the justice system** – this information may be an update/amendment from the initial session proposal submitted;
3. **Outline the issues addressed during the session by the panellists** – information to what aspects of the topic each panellist addressed in his/her presentation;
4. **Outline the issues raised by the audience and discussed with the panel;**



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5. **Proposed outcomes of the session and whether they were achieved** – a summary of what the outcomes of the session were when it was initially proposed and whether they were achieved during the session. The report should also include a summary of the outcomes achieved.
6. **Conclusions and Recommendations** – any recommendations or observations that come out of the discussions and relate to priority areas for action and suggestions of activities or services to be provided by the Global Judicial Integrity Network.

All reports will be incorporated to the library of resources of the Global Judicial Integrity Network and made available through the Network's website, as relevant resources on judicial integrity and the prevention of corruption within the justice system.

### **Background**

With a view to provide sustained support and technical assistance to Member States in implementing the Doha Declaration's goals, UNODC launched in 2016 a **Global Programme for Promoting a Culture of Lawfulness**, with the support of the State of Qatar. The **four-year programme** covers specific areas addressed in the Doha Declaration, including strengthening judicial integrity and the prevention of corruption in the justice system. One of the key objectives of the Global Programme is the establishment of a **Global Judicial Integrity Network**.

### **Deadline for Submissions:**

Discussion guides should be submitted until **30 April 2018**.

### **How to Submit:**

**By email addressed to [oliver.stolpe@unodc.org](mailto:oliver.stolpe@unodc.org) and [roberta.solis@un.org](mailto:roberta.solis@un.org)**

In case of further questions, please contact:

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## Global Judicial Integrity Network Substantive Breakout Session Report

### I. TITLE OF THE SESSION:

Title of the Session:	Implementing best practice guidelines for judicial selection and appointment in southern and east Africa.
Date and time of the Session:	10 April 2018, 10h45 – 12h00.
Topic of the session:	Judicial appointments, specifically how to ensure the effective implementation and monitoring of best practice guidelines for judicial appointments.
Organizer(s):	Democratic Governance and Rights Unit (DGRU), University of Cape Town; International Commission of Jurists.
Contact information of the session coordinator:	Vanja Karth, Director of the DGRU: <a href="mailto:Vanja.karth@uct.ac.za">Vanja.karth@uct.ac.za</a>

### II. RAPPORTEUR<sup>1</sup>

Rapporteur:	Chris Oxtoby
Position:	Senior Researcher
Organization:	Democratic Governance and Rights Unit, University of Cape Town

### III. MODERATOR AND PANELLISTS:

Moderator:	Arnold Tsunga
Position:	Director, ICJ Africa regional programme
Organization:	International Commission of Jurists

#### PANELLISTS

Name:	Chris Oxtoby
Position:	Senior researcher
Organization:	Democratic Governance and Rights Unit
Topic of presentation:	Background to the research project

<sup>1</sup> Responsible for drafting the session report.



Outline of presentation (max. 1000 characters):	The presentation set out the background to the project, and the research findings generated, which are to form the basis for the development of the best practice guidelines. It also highlighted research findings that could be anticipated to present challenges for implementation.
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Name:	Dr Jan van Zyl Smit
Position:	Associate Senior Research Fellow
Organization:	Bingham Centre for the Rule of Law
Topic of presentation:	Background on the history and underlying premise of judicial appointment commissions
Outline of presentation (max. 1000 characters):	The presentation discussed other international best practice instruments relating to the selection and appointment of judges, the link between the appointments process and judicial integrity, the historical development of judicial appointment commissions, and issues of the accountability of judicial appointment bodies.

Name:	Matt Pollard
Position:	Senior Legal Advisor
Organization:	International Commission of Jurists
Topic of presentation:	An overview of international best practice instruments and monitoring practices
Outline of presentation (max. 1000 characters):	The presentation gave a short overview of international instruments relating to the appointment of judges, and identified key institutions and ways in which the implementation of the guidelines could be monitored.

Name:	Justice Sanji Monageng
Position:	Judge
Organization:	International Criminal Court
Topic of presentation:	Implementation and monitoring in the international and regional international context.
Outline of presentation (max. 1000 characters):	The presentation dealt with the impact of domestic appointment processes at the international level, as well as methods of implementation and monitoring in relation to individual states and regional mechanisms on the African continent. Potential challenges were also identified.

**IV. BACKGROUND INFORMATION ON THE TOPIC:**



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The Democratic Governance and Rights Unit (DGRU), in partnership with the Southern African Chief Justices' Forum (SACJF) and the International Commission of Jurists – Africa (ICJ), is involved in an ongoing project to develop best practice guidelines for the selection and appointment of judges. The principles are to be developed based on research undertaken by the DGRU into the practice of judicial selection and appointment in member countries of the SACJF.

There are several existing international instruments which provide guidance on how judges ought ideally to be appointed. These instruments deal with a range of issues, including the ideal composition, structure and operational modalities of judicial appointments commissions; the composition, membership and tenure of appointment commissions; the content of the criteria to be employed in selecting candidates for judicial office; the independence of appointment commissions from other organs of state; and the administration and resourcing of appointment commissions.

It became apparent early on in the research conducted for the DGRU & ICJ project that many of the issues that proved problematic in the member jurisdictions of the SACJF that were surveyed were of an extremely practical and operational nature. For example, issues such as how vacancies are advertised, how candidates are shortlisted, and how candidates are interviewed and assessed, featured regularly during the research.

The SACJF principles thus focus on very practical aspects of the process by which appointment are made. This is not to say that questions such as the composition of appointments commissions and the specific criteria applied in making judicial appointments are unimportant. However, the SACJF principles focus largely on these specific and detailed operational aspects of the appointment process, although there remains some overlap with the international instruments set out above.

It is also necessary to note that the development of SACJF principles based on the practice and experience of African jurisdictions themselves is important and significant. During the phase of stakeholder engagement that ran parallel to the research phase of the project, it was often remarked that there was a need for “African solutions for African problems” – i.e. a need to go beyond the adoption of international instruments, and to engage with the practice and challenges in African jurisdictions themselves. The SACJF guidelines serve to bolster and diversify, rather than deviate from, existing international best practice instruments.

The research phase of the SACJF project is complete. A working group of senior judges from the SACJF are leading a process of finalising best practice principles drawn from the completed research. Once finalised, these principles will be presented to the SACJF's annual general meeting later in 2018 for formal adoption.

However persuasive these principles may appear to be, it is clear that the formal act of adoption alone will not be sufficient to ensure that the principles are implemented in practice. Even with the full support of the senior judiciary, there are many other stakeholders involved in the process of judicial selection and appointment who will need to “buy – in” to the importance of



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the principles, and ensure that they are implemented. The research revealed several examples of issues where people may reasonable differ on the best approach to take, both between different jurisdictions and even within the same jurisdiction. It would also be unrealistic to ignore the unfortunate reality that many governments in Africa do not have a good track record of respecting and accepting the independence of the judiciary. Recent controversy over remarks made by senior Kenyan politicians about the judiciaries handling of litigation relating to the 2017 elections is but one example. This failure to ensure an independent judiciary frequently manifests itself in manipulation or interference by other branches of government, often the executive, in the process of appointing judges.

It is clear that in order to assess whether the principles are being effectively implemented, it will be necessary to undertake some form of monitoring exercise within the SACJF member jurisdictions in order to ascertain what is being done and what changes may be experienced. Therefore, in addition to efforts to ensure that the principles are implemented, the panel discussed what is need for the implementation of the principles to be effectively monitored.

## V. SUMMARY OF THE SESSION:

The moderator, Mr Tsunga, introduced the session with an explanation of the background to the project. He discussed the importance of the project and the contextualised the project in light of issues impacting on judiciaries and the rule of law in the region.

In the first presentation, Mr Oxtoby outlined the research methodology and findings on which the best practice guidelines are being developed. These findings include a need for greater transparency in the appointments process; the need for clear criteria for appointment; the need for a suitable fit and proper standard to ensure the appointment of judges of a high ethical standard; the need for greater regulation of the processes of application and / or nomination and shortlisting; the need for proper vetting of candidates; greater opportunities for stakeholders to comment on candidates' suitability; judicial appointment bodies to be administered by their own independent secretariat; candidates to be interviewed (whether privately or in public being an open question); the need for the decision making process by which final selection decisions are made to be clearly articulated; a need for greater public outreach and public awareness building measures; and concerns about the appointment and security of tenure of temporary or acting judges, and contract judges.

Some specific aspects of the research findings were identified which might poses particular challenges for implementation: namely, transparency, budgetary implications of several of the findings, impact on practices were stakeholders had acquired an indirect or unofficial influence over the process, and whether or not changes would be more effective as legislation or as softer, policy guidelines.

Doctor Van Zyl Smit then set out the background to the development of the preceding Cape Town Principles, and discussed the history of appointment commissions, noting that in many former British colonies in Africa, they had been established immediately on independence, then abolished, and then re-instituted, often following pressure from the legal profession in particular. The re-established commissions often included a role for the legal profession. A third wave followed, including South Africa, inspired by the example of Canada in a determined effort to open up access to judicial office.



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Doctor Van Zyl Smit emphasised the link between the appointment process and judicial integrity, commenting that an appointment system needs to attract the best possible field of candidates, and the appointment body needs to select candidates fairly and well, in order to make appointments that improve public confidence in the judiciary. He also identified the importance of security of tenure for members of appointment commissions, and discussed the accountability of the appointments commission, noting that in some jurisdictions, there is a further independent body to monitor the appointments process. For example, England and Wales and Northern Ireland have an ombud, who monitors the process generally, and can receive individual complaints.

Mr Pollard gave an overview of international instruments concerning judicial appointments, noting that there was a heavy emphasis on the composition of appointment commissions. He noted overlaps between the concerns raised by the research findings and those found in international practice.

Mr Pollard then discussed monitoring, and noted that it tended to come from civil society, including the bar and judges' associations. Reporting to the International Association of Judges on the extent to which commitments to the guidelines were being met by other branches was identified a potential means of monitoring implications, as well as the Commonwealth Magistrates' and Judges' Association raising a situation of concern if other branches acted in contradiction to the guidelines. However, Mr Pollard cautioned that if a government was not interested in their own judiciary, they may not care what other regional judicial organisations might say. In such cases, monitoring could be complemented by mechanisms at a regional level – such as, in the European context, the Council of Europe and the Venice Commission. A role for lawyers' associations, civil society groups, and regional and sub-regional bodies were all things to think about. He also suggested that mechanisms in the United Nations could be interested, such as the Special Rapporteur on the Independence of Judges and Lawyers. The limitation was the resources available to them. The possible involvement of the Human Rights Committee and periodic review by the Human Rights Council, as well as self-monitoring and peer reporting by the SACJF itself, were also considered.

In the final presentation, Justice Monageng emphasised that international courts and tribunals are solely dependent on domestic appointment processes to 'do the right thing' and deliver quality judges. At the level of the International Criminal Court (ICC), judges must possess the qualifications required for appointment to the highest judicial office. Shortcomings in the appointment processes at a domestic level thus also have implications at the international level. This demonstrates the wider impact best practice guidelines and principles may have.

Regarding implementation, Justice Monageng emphasised the importance of states themselves making specific, measurable commitments for the implementation of the guidelines. Regarding monitoring, she noted that states may adopt self – reporting mechanisms, which could utilise mechanisms such as the requirement to submit two yearly reports to the African Commission.

Justice Monageng then discussed the question of ensuring buy-in noting that the guidelines might challenge an existing status quo. As it would then have the potential to change existing power dynamics, sensitive lobbying would be needed. Potential challenges included changing mindsets, potential political interference, and funding. Realistic plans for implementation were essential.

Comments from the audience highlighted the benefit and enrichment provided by an international perspective, and how challenges in the southern and east African region were not unique to those jurisdictions. A question was posed about whether there were any domestic laws that allowed action against corrupted appointments procedures. Appointment experiences in Ghana were shared, where



prospective candidates were interviewed based on their performance in a written examination. However, an increasingly prevalent argument was being made that there should be a move away from exams at a high court level, and a return to the old ‘tap on the shoulder’ system, as it was felt that the exam system was allowing in candidates who lacked sufficient experience. The extent of decision making power between the appointments commission and the ultimate appointing authority (the President, in this instance) was also discussed.

The importance of individual integrity on the part of judges was emphasised both by audience questions and by the panellists. It was noted that the fact that a candidate was qualified did not necessarily mean they conducted themselves well and with integrity.

#### **VI. HOW THE SESSION SUPPORTS THE OVERALL OBJECTIVE OF THE GLOBAL JUDICIAL INTEGRITY NETWORK OF STRENGTHENING JUDICIAL INTEGRITY AND PREVENTING CORRUPTION IN THE JUSTICE SYSTEM:**

A strong system of judicial selection and appointment is vital in ensuring judicial integrity. Judicial integrity can only be strengthened by an appointment system that is robust in identifying and eliminating from possible judicial selection candidates who are shown to have a weak grasp of legal ethics, or who have engaged in professional misconduct or corruption. Public confidence in the judiciary is enhanced by a strong appointments process that allows the best candidates to be appointed, through a fair and transparent process.

#### **VII. PROPOSED OUTCOME(S) OF THE SESSION AND THEIR ACHIEVEMENT:**

- The identification of ways in which the principles can be effectively implemented.

The importance of the role of the legal profession in contributing to changes in appointment processes historically was identified. The importance of states committing to measurable commitments is relevant to questions of both implementation and monitoring. Effective lobbying of relevant entities would be crucial.

- The identification of effective means by which the implementation of the principles can be monitored.

Potential key players include civil society organisations, including the legal profession, regional and international judicial organisations, and international bodies such as the UN Special Rapporteur were suggested.

- The identification of potential difficulties that may be experienced, and how they could be addressed.

Potential challenges were identified, including the need to change mindsets, potential political interference, budgetary challenges, an unwillingness to give up power and change a status quo which may have developed informally but vested stakeholders with considerable power, and





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possible resistance to transparency. Means of addressing these challenges are linked to effective monitoring as discussed, and the need for sensitive lobbying was also identified.

- The identification of possible means of engaging with specific entities (for example the executive, the judiciary) in order to ensure effective and consistent implementation.

This flows to a large extent from the first and second points on implementation and monitoring. Questions of peer reporting, sensitive lobbying and the identification of possible champions, such as the organised legal profession, are all relevant to this outcome.

- The identification of effective methods of implementation in other contexts that may be adapted and applied to best practices on judicial appointment.

This aspect did not end up being addressed in the panel discussion.

#### VIII. CONCLUSIONS OF THE SESSION AND RECOMMENDATIONS TO THE GLOBAL JUDICIAL INTEGRITY NETWORK:

It was felt that there was value in the best practice guidelines. The guidelines demonstrated synergies with universal issues, and there was beneficial enrichment from other regional experiences.

Regarding the issues of monitoring and implementation specifically, the importance of states committing to specific, measurable commitments for implementation was emphasised. The adoption of self-reporting measures by states, at both the judicial and regional international level, was recommended.

The importance of the role of civil society, including the legal profession and judicial organisations, in monitoring implementation, was emphasised.

#### IX. ADDITIONAL OBSERVATIONS, IF APPLICABLE

N/A.